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Containing cases determined by the High 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 1957

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The Hon'ble Justice *Thado Thiri Thudhamma, Agga Maha Thray Sithu* U THEIN MAUNG, M.A., LL.B., *Barrister-at-Law*, Chief Justice of the Union (from 1st January 1957 to 17th July 1957).

The Hon'ble Justice *Thado Maha Thray Sithu* U MYINT THEIN, M.A., LL.B., *Barrister-at-Law*, Chief Justice of the Union (from 17th July 1957).

PUISNE JUDGES

The Hon'ble Justice *Thado Maha Thray Sithu* U MYINT THEIN, M.A., LL.B., *Barrister-at-Law* (from 1st January 1957 to 17th July 1957).

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အမှားပြင်ဆင်ချက်။

၁၉၅၇ ခု၊ မြန်မာနိုင်ငံစီရင်ထုံးအပိုင်း ၁ မှ ၄ တရားလွှတ်တော်ချုပ်ကထွက်စာမျက်နှာ ၁ ဘာဂ၀မ်ဒတ် (စ) ဟန်နုမာန်ဘတ် နှင့် ဘဏ္ဍာတော်မင်းကြီး (ကူးသန်းရောင်း၀ယ်ရေး) အမှု အောက်ဆုံးစာကြောင်း၌ '' တထောင်ထက်မများသော အမှုများကို '' ဟူသောစကားရပ်အစား '' တထောင်ထက်များသော အမှုများကို '' ဟူ၍ ပြင်ဆင်ဘတ်ရှုပါရန်။

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အမှုခေါ်စာချုပ်တော် ပင်လယ်ကြောင်း အကောက်တော် အက်ဥပဒေ ပုဒ်မ ၁၆၇(၀)တွဲဘက်အကောက်တော်မင်းကြီး၏အမိန့်၊ ဘဏ္ဍာတော်မင်းကြီး၏ အယူခံအမိန့်၊ ထိပုဒ်မအရ၊ တပ်ရင်းသော ဒဏ်ငွေသည်သက်ဆိုင်ရာပစ္စည်း တန်ဘိုး၏ သုံးဆဖြစ်နိုင်သော်လည်း၊ ကျော်တထောင်ထက်မိမှု ဥပဒေပြဋ္ဌာန်း

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ချက်များကို အဓိပ္ပါယ်ကောက်ယူခြင်း (Speaking Order)။ ။ဆုံးဖြတ်ချက်။ ။ဘဏ္ဍာတော်မင်းကြီး၏ အယူခံအမိန့်ကိုပယ်ဖျက်ရန် အမှုခေါ်စာခွန်တော်ဖြင့် လျှောက်သောအခါ တွဲဘက်အကောက်တော် မင်းကြီးကိုလည်း လျှောက်ထားခံရသူအဖြစ်နှင့်ထည့်သွင်းပြီး ၎င်း၏အမိန့်ကိုပါ တင်သွင်းပြီးပယ်ဖျက်ရန်တောင်းဆိုကြရချေမည်။ ။ပင်လယ်ကြောင်းအကောက်တော် အက်ဥပဒေပုဒ်မ ၁၆၇(၈)တွင်တပ်ရိုက်နိုင်သော ဒဏ်ငွေများပစ္စည်းတန်ဘိုး၏ သုံးဆထက်မပိုစေရ၊ သို့တည်းမဟုတ် ကျပ်တထောင်ထက် မပိုစေရဟူ၍ပါရှိသည်၊ ထိုပြဋ္ဌာန်းချက်အရ ပစ္စည်းတန်ဘိုး၏ သုံးဆထက်မများသော ဒဏ်ငွေကိုသော်၎င်း၊ ကျပ်တထောင်ထက် မများသော ဒဏ်ငွေကိုသော်၎င်း တပ်ရိုက်နိုင်မည်ဖြစ်ချေသည်၊ ပစ္စည်းတန်ဘိုး သုံးဆထက်မများစေရဟူသောပြဋ္ဌာန်းချက်သည်၊ ထိုသုံးဆသည်ကျပ်တထောင်ထက်များသော အမှုများကို ရည်ညွှန်းသည်ဟု ကောက်ယူရမည်၊ ကျပ်တထောင်ထက် မပိုစေရ ဟူသောပြဋ္ဌာန်းချက်သည်၊ ပစ္စည်းတန်ဘိုးနည်းရှိ၊ ၎င်း၏သုံးဆသည် ကျပ်တထောင်မပြည့်သော မှုခင်းများကို ရည်ညွှန်းသည်ဟု ကောက်ယူရမည်၊ ကျပ်တထောင်ထက်မပိုစေရဟူသော ပြဋ္ဌာန်းချက်သည်၊ ''သို့တည်းမဟုတ်'' ဟူသောစကားခြားရှိနေသောကြောင့် ပစ္စည်းတန်ဘိုး သုံးဆထက်မများစေရဟူသောစကား၏အဓိပ္ပါယ်ကိုကျဉ်းမြောင်းအောင်မချုတ်ချယ်နိုင်။ ။ဥပဒေပြဋ္ဌာန်းချက်များကို အဓိပ္ပါယ် ကောက်ယူရာမှာလည်း ပြဋ္ဌာန်းချက်တွင် ပါရှိသောစကားရပ်များအားလုံး အဓိပ္ပါယ်ရှိအောင်ကောက်ယူရချေမည်။ ။ တွဲဘက်အကောက်တော်မင်းကြီးနှင့် ဘဏ္ဍာတော်မင်းကြီးတို့မှာ၊ ပုဒ်မ ၁၆၃(၈) အရ၊ စီရင်ပိုင်ခွင့် အာဏာရှိသောကြောင့် သူတို့၏စီရင်ချက်များသည် (Speaking Order) ဖြစ်ပြီး အထင်အရှား မှားယွင်းမှုသာလျှင်သူတို့၏အမိန့်များကို ဤရုံးတော်ကအမှုခေါ် စာခွန်တော်ဖြင့် ပယ်ဖျက်နိုင်သည်၊ ။ လျှောက်လွှာ ပယ်လိုက်သည်။

ဘာဂဝဒ်ဒတ်(စ်) ဟန်နမာန်ဘတ်နှင့်ဘဏ္ဍာတော်မင်းကြီး(ကူးသန်းရောင်းဝယ်ရေး) 1

အမှုခေါ်စာခွန်တော်လျှောက်လွှာ၊ ၁၃၁၁ ခုနှစ်၊ ဝိနိစ္ဆယဌာနအက်ဥပဒေပုဒ်မ ၂၅ (၁) နှင့် (၂)၊ပုဒ်မ ၂၂ (၁) (က)။ ။ရန်ကုန်မြို့၊ နိုင်ငံတော်ဝိနိစ္ဆယဌာန၏ ၁၃၁၁ ခုနှစ်၊ စောဒနာဝင်မှုအမှတ် ၄ ကို စစ်ဆေးရန် ဝိနည်းမိုရ်သုံးပါးနှင့် ဆုံးဖြတ်ပေးရန် စုဒ္ဓိတကနှစ်ဦးက ထို သုံးပါးအနက် နှစ်ဦးကို ပါဝင်ဆုံးဖြတ်ခြင်း မပြုပါရန်ကန့်ကွက်ခြင်း၊ ကန့်ကွက်စာကို အကန့်ကွက်ခံရသော ဆရာတော်နှစ်ပါးနှင့် ၎င်းခုံရုံးတွင်ပါဝင်သော ဆရာတော်တပါး ကပါ ပယ်လိုက်ကြောင်း၊ ပယ်ပြီးသည့်နောက် ထိုဆရာတော်သုံးပါးသည် စောဒနာဝင်မှုကိုဆက်လက်ကြားနာပြီး စီရင်ချက်ချတော်မူခြင်း၊စီရင်ဆုံးဖြတ်ချက်သည်လည်း ကန့်ကွက်သူတို့ကို အခွံးပေးသောစီရင်ချက်ဖြစ်ခြင်း၊ ။ဆုံးဖြတ်ချက်၊ ။ကန့်ကွက်ခြင်းခံရသော ဆရာတော်နှစ်ပါးသည် ကန့်ကွက်ချက်များ မမှန်ပါဟုဆိုင်းဆိုလျှင် ထိုဆရာတော်များသည် ကန့်ကွက်ချက်များနှင့်စပ်လျဉ်း၍ ကြွင်းကျန်သော ဝိနည်းမိုရ် ဆရာတော်များရာ ဆုံးဖြတ်ချက်ကို နာခံကြရချေမည်၊ တနည်းအားဖြင့်ဆိုသော် ကန့်ကွက်ချက်များ မှန်မမှန်ကို

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ကြွင်းကျန်သော နိုင်ငံတော်ဝိနည်းဓိုရ်ဆရာတော်ကသာလျှင် ဆုံးဖြတ်ကြရမျှ
မည်၊ ကြွင်းကျန်သော နိုင်ငံတော်ဝိနည်းဓိုရ်ဆရာတော်များထက က နှိုက်ကွက်
ချက်များ မမှန်ကြောင်းဆုံးဖြတ်မှသာလျှင် ကန့်ကွက်ခြင်းခံရသော နိုင်ငံတော်
ဝိနည်းဓိုရ်ဆရာတော်များသည် ထိုစောဒနာဝင်မှုကို ဆက်လက်၍ ကြားနာ
စီရင်ဆုံးဖြတ်တော်မူနိုင်ကြမည်။ ။ကန့်ကွက်ခြင်းခံခဲ့ရသော ဆရာတော်နှစ်
ပါးသည်ကြွင်းကျန်သော နိုင်ငံတော်ဝိနည်းဓိုရ်ဆရာတော်များ၏ အဆုံး
အဖြတ်ကိုမခံယူဘဲ မိမိတို့ကိုယ်တိုင် ဆုံးဖြတ်ဘော်မူခဲ့ကြခြင်းသည် ၁၃၁၁
ခုနှစ်၊ ဝိနိစ္ဆယဋ္ဌာနအက်ဥပဒေပုဒ်မ ၂၅၊ ပုဒ်မငယ် (၂)နှင့် အထင်အရှား
ဆန့်ကျင်၍ စောဒနာဝင်မှုကို ဆက်လက်၍ မကြားနာမဆုံးဖြတ်နိုင်၊ ။ဆ
ရာတော် သုံးပါး၏စီရင်ချက်ကိုယယ်ဖျက်၍ နိုင်ငံတော်ဝိနိစ္ဆယဋ္ဌာနသို့ ထပ်မံ
ကြားနာစစ်ဆေးဆုံးဖြတ်ရန် အမှုကိုပြန်၍ပို့သင့်လိုက်သည်၊

ဦးဇောတိက ပါ ၄ ဦး နှင့် နိုင်ငံတော်ဝိနိစ္ဆယဋ္ဌာန အတွက်တာဝန်ခံ
ဆရာတော် ဦးကောဏ္ဍည ပါ ၉ ဦး 37

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ရန်ကုန်မြို့တော် တရားမရုံးအက်ဥပဒေပုဒ်မ ၃၅ လိုက်နာရန်ရှိသည်တို့ကို မလိုက်
နာဘဲ ပျက်ကွက်ခဲ့သဖြင့် မိမိရထိုက်သည်ကို မရလိုက်ဘဲ နစ်နာဆုံးရှုံးသော
ကြောင့် တာဝန်ရှိသူ စာရေးချုပ်အပေါ်တွင် အရေးယူပါရန် လျှောက်လွှာ
ကို တရားသူကြီးချုပ်က ဆိုင်ရာနှစ်ဦးနှစ်ဘက်တို့အား ကြားနာစစ်ဆေး
မစုံစမ်းဘဲ စာရေးချုပ်၏ အစီရင်ခံစာကို ဘတ်မြဦးပယ်လိုက်ခြင်း၊ အမှုခေါ်
စာချွန်တော်လျှောက်လွှာ။ ။ပြည်ထောင်စု တရားစီရင်ရေးအက်ဥပဒေပုဒ်မ
၄၊ ။ဆုံးဖြတ်ချက်။ ။ဤကဲ့သို့ နစ်နာသည့် ကိစ္စအတွက် တရားရုံးတွင်
တရားစွဲဆိုနိုင်ခွင့်မရှိသည်မှာထင်ရှားသည်။ ။*Rangoon & Co.* v. *Maung Waik*, 6 Ran. 263 လိုက်နာသည်။ ။ဤကိစ္စသည်၊ တရားစီရင်ရေး
လုပ်ငန်းမှ တိုက်ရိုက်ပေါ်ပေါက်ထွက်လာသောကိစ္စဖြစ်၏၊ မည်သို့ပင်ဖြစ်စေ
ပြည်ထောင်စု တရားစီရင်ရေး အက်ဥပဒေပုဒ်မ ၄ အရ၊ ဤရုံးတော်သည်
ပြည်ထောင်စု နိုင်ငံအတွင်းရှိ တရားရုံးအားလုံးကို ကြီးကြပ်ကြည့်ရှုနိုင်ခွင့်
အာဏာရှိသည့် တရားရုံးဖြစ်သည့်အတိုင်း လက်အောက်ခံတရားရုံးတခုက
မိမိသို့အပ်နှင်းထားသည့်အာဏာကို၊ သို့မဟုတ် တာဝန်ဝတ်တရားတခုခုကို
သုံးစွဲဆောင်ရွက်ရန်ပျက်ကွက်လျှင် အမှန်တရားသို့ရောက်အောင် ဝင်ရောက်
စွက်ဖက်ရန် ဤရုံးတော်၌တာဝန်ရှိလေသည်၊ ။လျှောက်ထားသူက စွပ်စွဲ
ထားသည့်အချက်များမှာ မှန်မမှန် စာရေးချုပ်ပေါ်လျှောမှ ပျက်ကွက်မှုရှိမရှိ
ရှိလျှင်မည်မျှလျှောက်ထားသူ၌ နစ်နာဆုံးရှုံးသည် စသောအချက်များကို
နှစ်ဦးနှစ်ဘက်ဆိုင်ရာတို့အား ကြားနာစစ်ဆေးစုံစမ်းရန် တရားသူကြီးချုပ်၏
တာဝန်ဝတ်တရားဖြစ်သည်။ ။ရန်ကုန်မြို့တော် တရားမရုံး အက်ဥပဒေပုဒ်မ
၃၅ အရ၊ စုံစမ်းစစ်ဆေးရန် အမိန့်ချမှတ်လိုက်သည်။

မည်မင်းစံ ပါ ၄ နှင့် ရန်ကုန်မြို့၊ တရားမရုံး တရားသူကြီးချုပ် ပါ ၁၀.... 14

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DIRECTIONS IN THE NATURE OF HABEAS CORPUS—S. 5 (1), *Public Order Preservation Act—Initial arrest by Inspector of Excise—Further arrest by Inspector of Police and detention by the Deputy Commissioner of Police under orders of the Deputy Secretary, Ministry of Home Affairs in anticipation of order of detention under s. 5-A* (1) (d) (e) *and* (h)*—Order XIX, Rule 8, Supreme Court Rules—Return vague—Reference to Home Ministry File—Powers of the President, s. 121 of the Constitution—Delegation of Powers under s. 7, Public Order Preservation Act.* The applicant was arrested by an Inspector of Excise on the 24th March 1956, under s. 5 (*1*), Public Order Preservation Act. On the 3rd April 1956, an Inspector of Police, under orders of the Deputy Secretary, Ministry of Home Affairs arrested and detained the applicant under s. 5 (*1*) of the said Act for 15 days, in anticipation of an issue of an order of detention by the Ministry of Home Affairs. On the 17th April 1956, the Deputy Commissioner of Police ordered the applicant's detention for two months with retrospective effect from 3rd April 1956. On 4th May 1956, an order under s. 5-A (1) (*d*) (*e*) and (*h*) requiring the applicant to reside in Myanaung until 1st May 1957 was passed in the name of the President by the Secretary, Ministry of Home Affairs. The applicant was granted bail and released on 7th May 1956 on which date the Deputy Commissioner of Police also revoked his order of detention. For the applicant it was submitted :—

(*a*) The detention at the instance of the Deputy Secretary, Finance and Revenue, and the actual arrest by an Inspector of Excise who is invested with no powers under the Act, were illegal.

(*b*) The attempt at rectifying this illegality by subsequent orders passed by an Inspector of Police and then by the Deputy Commissioner of Police were also illegal in that they had automatically complied with the order conveyed to them by the Deputy Secretary, Ministry of Home Affairs, instead of deciding for themselves whether there were grounds for suspicion against the applicant that would justify arrest.

(*c*) A detention in anticipation of restricting the applicant's residence to Myanaung was also illegal.

Held : The liberty of the subject is made indefeasible by the Constitution and that such personal liberty is not to be interfered with save in accordance with law and with strict compliance with the procedure prescribed. The sufficiency or otherwise of grounds against a suspect is a matter that has to be solely decided by the officer empowered to act. An order passed by an officer so empowered merely because of a direction made by a superior authority is manifestly illegal. *Ma Thaung Kyi* v. *The Deputy Commissioner, Hanthawaddy*, (1949) B.L.R. (S.C.) 30 ; *Daw Mya Tin* v *Deputy Commissioner, Shwebo*, (1949) B.L.R. (S.C.) 98, referred to. An order meant to be retrospective is also illegal. *Daw Aye Nyunt* v. *Commissioner of Police, Rangoon*, (1949) B.L.R. (S.C.) 5, referred to. *Held further :* The illegality of the initial arrest and detention will not render any effective help to the applicant for the Court is concerned only with the final order passed in the name of the President by the Secretary, Ministry of Home Affairs. All previous orders were vacated when the applicant was released on bail on 7th May, on the revocation of the Deputy Commissioner's order. *Held also :* The various orders of arrest and detention do not form a continuous series and that an illegal arrest at the outset would

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not vitiate a final order, as the orders were issued by different authorities and the final and effective order was made under a different section. *Ah Nywe* v. *Commissioner of Police, Rangoon*, (1948) B.L.R. 737; *Daw Mya Tin* v. *Commissioner of Police, Rangoon*, (1949) B.L.R. (S.C.) 82, referred to. *Held also:* A return made by the Deputy Secretary, which merely said that the President was satisfied as to the necessity of the order is vague, is of no help and not in conformity with Rule 8 of Order XIX of the Supreme Court Rules. *Ah Nywe* v. *Commissioner of Police, Rangoon*, (1948) B.L.R. 737, referred to. *Held further:* The statements contained in the Home Ministry file relating to the applicant may fall short of proof in a criminal trial, but in cases of preventive justice, the statements are there and the competent authority had chosen to believe them. It is not for the Court to say he should not have and thus exercise an appellate jurisdiction. *Maung Hla Gyaw* v. *Commissioner of Police, Rangoon*, (1948) B.L.R. 764, referred to. *Quaere:* In this case, was the Secretary merely following a direction given to him by a superior authority or did he use his own discretion? Desirability of having a properly delegated authority pointed out.

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၁၉၄၇ ခုနှစ်၊ လူဝင်မှု (လက်တလောပြင်ဆင်ချက်များ) အက်ဥပဒေပုဒ်မ ၁၃ (၁) အရ၊ ပြစ်မှုထင်ရှားစီရင်ခြင်းငင်းဉာပဒေပုဒ်မ ၇ (၁) အရ၊ မြန်မာနိုင်ငံတော်မှထွက်သွားစေရန်အမိန့်၊ ပြည်ထောင်စုမြန်မာနိုင်ငံတော်ခွဲစည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေပုဒ်မ ၁၁ (ခ) အရ၊ မြန်မာနိုင်ငံသားဖြစ်နေ၍ ထိုဥပဒေပုဒ်မ ၇(၁)နှင့် လုံးဝသက်ဆိုင်မဆိုင်။ ။လျှောက်ထားသူသည် ၁၉၅၅ ခုနှစ်က ပါကစ္စတန် နိုင်ငံကူးလက်မှတ်ဖြင့် ပြည်ဝင်ဗီဇာရရှိပြီး၊ မြန်မာနိုင်ငံသို့လာရောက်ခါမြန်မာနိုင်ငံတွင် နေခွင့်ပြုထားသည့်ရက်ထက် ကျော်လွန်နေသိုင်းသဖြင့် အထက်ဖေါ်ပြပါ အက်ဥပဒေပုဒ်မ ၁၃(၁)အရ၊ ပြစ်မှုထင်ရှားစီရင်ခြင်းခံခဲ့ရသောကြောင့် ပုဒ်မ ၇(၁)အရ၊ လူဝင်မှုကြီးကြပ်ရေးဝန်ကငင်းအား နိုင်ငံမှထွက်သွားစေရန် ချမှတ်လိုက်သည့်အမိန့်ကို ပယ်ဖျက်ပေးပါရန် အောက်ပါအတိုင်း အကြောင်းပြ လျှောက်ထားလေသည်။ ။မိမိ၏အမိဘက်မှ အဖွါးဖြစ်သူဖေါ်မေသည် မြန်မာတိုင်းရင်းသားဖြစ်သည့်အပြင် မိမိမှာ မြန်မာနိုင်ငံဇွါးဖြစ်၍ ပြည်ထောင်စုမြန်မာနိုင်ငံတော် ခွဲစည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေပုဒ်မ ၁၁(ခ)အရ၊ မြန်မာနိုင်ငံသားဖြစ်နေသဖြင့် ၁၉၄၇ ခုနှစ်၊ ပြည်ဝင်မှုအက်ဥပဒေပုဒ်မ ၇ နှင့် လုံးဝအကျုံးမဝင်ကြောင်းဖြင့် လျှောက်ထားသည်။ ။ဆုံးဖြတ်ချက်။ ။အကြောင်းပြချက် အတိုင်း မှန်စေကာမူ လျှောက်ထားသူသည် ။(၁)ပါကစ္စတန်နိုင်ငံသံားအဖြစ်ကို ၁၉၅၅ ခုနှစ်၊ ဧပြေလ ၁ ရက်နေ့မတိုင်မီ စွန့်လွှတ်ခြင်း မရှိခဲ့သည် တကြောင်း။ ။(၂) ၁၉၅၅ ခုနှစ်၊ ဧပြေလ ၁ ရက်နေ့ရောက်ပြီးသည့်နောက် ပါကစ္စတန်နိုင်ငံအစိုးရထံမှနိုင်ငံသားအနေဖြင့် နိုင်ငံကူးလက်မှတ် ရယူခဲ့သည်တကြောင်း။ ။ထို့ကြောင့် မြန်မာနိုင်ငံသားဖြစ်မှုအက်ဥပဒေပုဒ်မ ၁၄ (က)(၁) အရငင်း၊ ၁၄ (က)(၃) အရငင်း မြန်မာနိုင်ငံသားအဖြစ်မှ ရပ်စဲခဲ့ပြီဟု မှတ်ယူရမည်။

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မိဟာမက်ရာဟူအာမင်နှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံတော်အစိုးရ၊ နိုင်ငံခြားရေးရုံးအမြဲတန်းအတွင်းဝန် ပါ ၁ 25

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၁၉၄၇ ခုနှစ်၊ ပြည်သူ့ငြိမ်ဝပ်စိပြားရေး(ထိန်းသိမ်းစောင့်ရှောက်မှု) အက်ဥပဒေပုဒ်မ ၅ (က)(၁)(ဃ)(ငဂ)(စ) နှင့် ပုဒ်မ ၅ (က၊ (၂) အရ၊ နယ်ပြောင်းအမိန့် ရှေ့တော်သွင်းစာချုပ်တော် ပြည်ထောင်စုမြန်မာနိုင်ငံတော် ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေပုဒ်မ ၁၆နှင့်ပုဒ်မ ၁၇ (ဃ)၊ ။ဆုံးဖြတ်ချက်၊ ။ ၁၉၄၇ ခုနှစ်၊ ပြည်သူ့ငြိမ်ဝပ်စိပြားရေး (ထိန်းသိမ်းစောင့်ရှောက်မှု) အက်ဥပဒေပုဒ်မ ၅(က)(၁)နှင့်(၂)တို့အရ၊ ချမှတ်သောအမိန့်များကို ပယ်ဖျက်ရန် ရှေ့တော်သွင်းစာချုပ်တော်အတွက် လျှောက်ထားသောအခါ၊ ဤရုံးတော်သည် အမိန့်ချမှတ်သော အာဏာပိုင်၏ရှေ့တွင် ထိုအခိန်ကို ချမှတ်ရန် အကြောင်းအထောက်အထားများရှိမရှိကိုသာ ကြည့်မြင်ဖြစ်သည်။ အကြောင်းအထောက်အထားများရှိလျှင် ၎င်းတို့ကို ယုံကြည်အားကိုးရှိ အမိန့်ချမှတ်ထိုက်မထိုက်ကို ဤရုံးတော်က စဉ်းစားရိုးမရှိချေ။ ။ဤအမိန့်သည် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေပုဒ်မ ၁၆-၁၇ (ဃ) အရ၊ ကာကွယ်ရန် ထားသော လွတ်လပ်မှုနှင့် ပြည်ထောင်စု နိုင်ငံအတွင်း မည်သည့်နေရာ၌မဆို နေထိုင်အခြေစိုက်ခွင့် မူလအခွင့်အရေးများကိုထိခိုက်သဖြင့် အဆိုပါအမိန့်ကို ရှေ့တော်သွင်းစာချုပ်တော်ဖြင့် ပယ်ဖျက်နိုင်သည်။

ဦးဝင်းခဇနှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံဘော် ပြည်ထဲရေး ဝန်ကြီးဌာနအတွင်းဝန် 32

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မတရားအသင်းဥပဒေပုဒ်မ ၁၇(၁)။ ။၁၉၅၀ ခုနှစ်၊ အရေးပေါ်စီမံမှုအက်ဥပဒေပုဒ်မ ၃ များအရ၊ လျှောက်ထားသူကိုရာဇဝတ်တရားသူကြီးက တရားသေ လွှတ်လိုက်ခြင်းရုံးအတွင်းမှာပင် ပြန်ဖမ်းခြံခရိုင်ဝန်က ပြည်သူ့ငြိမ်ဝပ်စိပြားရေး (ထိန်းသိမ်းစောင့်ရှောက်မှု) အက်ဥပဒေပုဒ်မ ၅(က)(၁)(ခ)နှင့် ချုပ်

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နှောင်ထားခြင်း။ ။ရှေ့တော်သွင်းစာချုပ်တော်လျှောက်လွှာ။ ။ရာဇဝတ်မှုမျိုးနှင့် ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေးကို ထိန်းသိမ်းစောင့်ရှောက်ရန် ချုပ်နှောင်ခြင်းတို့ကွာခြားခြင်း။ ။ဆုံးဖြတ်ချက်။ ။၁၉၄၇ ခုနှစ်၊ ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေး (ထိန်းသိမ်းစောင့်ရှောက်မှု) အက်ဥပဒေပုဒ်မ ၅(က)(၁)(ခ)၏ ရည်ရွယ်ချက်မှာ ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေးကို ထိန်းသိမ်းစောင့်ရှောက်ကာကွယ်သောအနေဖြင့် ချုပ်နှောင်ထားရန်သာဖြစ်သည်၊ ။မသန်းဆင့် နှင့် ရန်ကုန်မြို့၊ ရဲမင်းကြီး ပါ ၂ ။ (1949). B.L.R. at p. 3 သဘောတူလက်ခံသည်။ ။ထိုသို့ချုပ်နှောင်ထားရန် သင့်မသင့် စုံစမ်းပုံနှင့် ပြစ်မှုတခုခုအတွက် အပြစ်ရှိမရှိ ဆုံးဖြတ်နိုင်ရန် ထည့်သွင်းစဉ်းစားရမည့် အကြောင်းအချက်များသည် အလွန်ကွာခြားသည်၊ ။လူတဦး တယောက်ကို သာမန်ရာဇဝတ်ကြောင်းဥပဒေအရ တရားစွဲ၍ အပြစ်ကျစေလောက်အောင်သက်သေခံမလုံလောက်၍ မအောင်မြင်လျှင် ထိုသူကို ပြည်သူ့ငြိမ်ဝပ်ပိ ပြားရေးအတွက် ချုပ်ထားရန်လိုသေးသည်ဟု အကြောင်းသင့်စွာ ကျေနပ်လျှင် အစိုးရသည် ထိုသူကို ချုပ်၍ထားနိုင်စေကြောင်း။ *Gajanan Krishna Yalyi and others* v. *Emperor*, A.I.R. (1945), Bom. 533 at p. 536 သဘောတူသည်။ ။သာမန်ရာဇဝတ်ကြောင်းဥပဒေများနှင့် ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေးအတွက် ချုပ်နှောင်ထားရေးဆိုင်ရာ အက်ဥပဒေများသည် တဦးကိုတဦး ဖြည့်စွက်ခြင်းသာဖြစ်ကြောင်း၊ သို့ဖြစ်၍ သာမန်ရာဇဝတ်မှုတွင် တရားသေလွတ်ခဲ့သည့်အတွက် ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေးကို ကာကွယ်ထိန်းသိမ်းရန် ချုပ်နှောင်ထားနိုင်ကြောင်း၊ *Raman Lal Rathi* v. *Commissioner of Police, Calcutta, and others*, A.I.R. (1952) Cal. 26 ; *Dayaram* v. *The State*, A.I.R, (1955) M.B. 65 သဘောတူသည်။ ။ရာဇဝတ်မှုတခုခုတွင် တရားသေလွတ်ခဲ့ရုံမျှနှင့် ထိုလွတ်သူ၏အပေါ်တွင်ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေးအတွက် ချုပ်နှောင်မထားနိုင်ဟုမဆိုနိုင်ကြောင်း၊

မောင်တင်အေးနှင့် ခရိုင်ဝန်၊ ပခုက္ကူမြို့ ပါ ၁ 17

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ရွှေတော်သွင်းစာချုပ်တော်၊ နိုင်ငံခြားသားအက်ဥပဒေ ပုဒ်မ ၃ (ခ) အခြေခံဥပဒေ ပုဒ်မ ၁၁ (ဂ) ဆိုးဖြတ်ချက်။ ။ဆိုးဖြတ်ချက် စာချုပ်တော် အမှုမျိုးများတွင် ရာဇဝတ်တရားမရုံးတော်များ၌စစ်ဆေးဘိသကဲ့သို့ သက်သေများဆင့်ခေါ်ပြီး ရှိသမျှပြဿနာများကို အပြီးအပြတ်စစ်ဆေးပေးနိုင်ရန် ခဲယဉ်းသည်။ တင်သွင်းသည့် ကျန်းကျိန်စာများကိုသာ ကြည့်ရှုရုံ မျက်မြင်အားဖြင့် ချမှတ်သောအမိန့်မှာ ဥပဒေနှင့်ဆန့်ကျင်သည် မဆန့်ကျင်သည်ကိုသာ ကြည့်ရှုရပေမည်. တိန်ယုံးဂန်နှင့် နိုင်ငံတော်သမတ ပါ ၂။ ၁၉၅၂ ခုနှစ်၊ ရာဇဝတ်အသေးအဖွဲလျှောက်လွှာ အမှတ် ၂၅၂ ခွဲခြားသည်။

ချန်ယူတန့်ှင့် အမြတန်းအတွင်းဝန်၊ နိုင်ငံခြားရေးရုံး၊ ရန်ကုန်မြို့ ပါ ၁ 46

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၁၉၅၀ ခုနှစ်၊ ကင်းလွတ်ချမ်းသာခွင့်နှင့် တည်မြဲရေးအက်ဥပဒေပုဒ်မ ၄ (၂) တရားစွဲဆိုခွင့်ပြုသည့်အမိန့်။ ၎င်းအမိန့်တွင်မည်သည့်အကြောင်းချင်းရာများအတွက် တရားစွဲဆိုခွင့်ပေးသည်ဟု လုံးဝမပါ။ သို့သော် အခွင့်အမိန့်တုတ်

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ပေးရန် လျှောက်ထားသည့် တောင်းခံစာတွင် ဖြစ်ပျက်သည့်အကြောင်း ချင်းရာအစုံအလင်းဖေါ်ပြထားကြောင်း အခွင့်အမိန့်တခုခုသည် မည်သည့် အခကြောင်းအချက်များနှင့် ပြည့်စုံမှသာလျှင် တရားဝင်သော အခွင့်အမိန့် ဟု ယူဆရမည်နည်း။ ဆုံးဖြတ်ချက်။ ။၁၉၅၀ ခုနှစ်၊ ကင်းလွတ်ချမ်းသာ ခွင့်နှင့် တည်ငြိုရေးအက်ဥပဒေပုဒ်မ ၄ (၂) အရ၊ တရားစွဲဆိုခွင့်ပြုသည့် အမိန့်စာတွင် တရားစွဲရန်အခွင့်အမိန့်ပေးရသည့် အကြောင်းချင်းရာများ ဖေါ်ပြထားခြင်း လုံးဝမရှိသော်လည်း အခွင့်အမိန့်ပေးပါရန် တောင်းခံ သည့်စာတွင် သက်ဆိုင်ရာအကြောင်းချင်းရာများ အစုံအလင်ဖေါ်ပြထား ပြီးဖြစ်၍ ထိုအခွင့်အမိန့်စာသည် တရားသော အခွင့်အမိန့် ဖြစ်သည်။ ပြည်ထောင်စုမြန်မာနိုင်ငံတော်နှင့် ဦးကျော်နု၊ ၁၉၅၆ ခုနှစ်၊ ရာဇဝတ် အသေးအဖွဲလျှောက်လွှာ အမှတ် ၁၀၈ လိုက်နာသည်။

မောင်ခန်းပန်းနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော် 53

ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေးထိန်းသိမ်းစောင့်ရှောက်ရေး အက်ဥပဒေပုဒ်မ ၅ (က)။ ဆုံးဖြတ်ချက်။ ။ဤငြင်းပြည်ခွင့်အေးချမ်းသာယာခြင်းမရှိ၍ ပြည်သူ့ငြိမ်ဝပ်ပိ ပြားရေး(ထိန်းသိမ်းစောင့်ရှောက်မှု)အက်ဥပဒေကို၊၁၉၄၇ ခုနှစ် ကထုတ် ပြန်ခဲ့ရသည်။ ထိုအက်ဥပဒေပုဒ်မ ၅ (က) အရ၊ လူတဦးကယောက်သည် ပြည်သူ့လုံခြုံမှုနှင့် ပြည်သူ့ငြိမ်ဝပ်ပိပြားမှုကို ထိခိုက်အောင် တနည်းနည်း နှင့်ပြုမူခြင်းမှ ဝိတ်ပင်တားဆီးမှုလိုအပ်သည်ဟု ခရိုင်ဝန်မင်းကယူဆလျှင် ထိုသူကိုချုပ်နှောင်ထားရန် အမိန့်ပေးနိုင်သည်၊ ဤကဲ့သို့ယူဆရာ၌ ခရိုင် ဝန်မင်းသည် အကြောင်းကြောင်းကိုဝေဘန်ရမည်၊ သက်သေအထောက် အထားကို စစ်ဆေးရမည်၊ မိမိခရိုင်အတွင်း အခြေအနေကိုလည်း သတိမူ ရမည်။ ထိုအကြောင်းကြောင်းကိုထောက်ထား၍ သင့်တော်သည်ဟုထင် မြင်သောအမိန့်ကိုချမှတ်ရန် အာဏာရှိသည်။ မိမိကသက်သေအထောက် အထားများကို ယုံကြည်လက်ခံပြီး အမိန့်ချမှတ်ခဲ့ပါလျှင် ဤရုံးတော်က စာချုန်တော်အမှုအနေဖြင့် ထိုသက်သေအထောက်အထားကို မယုံကြည် ထိုက် လက်မခံထိုက်ဟု ပြောဝိုင်ခွင့်မရှိ၊ သို့သော် သက်သေအထောက် အထားလုံးဝမရှိဘဲနှင့် ပုဒ်မ ၅ (က) အရ၊ အရေးယူပါက ဤရုံးတော်က စွက်ဘက်ရန်ဖြစ်နိုင်သည်။

မောင်ကျော်အေး ပါ ၇ နှင့် တောင်ငူခရိုင်ဝန်မင်း ပါ ၂ ... 49

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meaning of s. 6 of the Union Judiciary Act, but it is a Tribunal discharging quasi-judicial functions. *D. D. Grover* v. *K. C. Kounda*, C.M.A. No. 86 of 1955; *Cooper* v. *Wilson and others*, (1937) 2 K. D. 309 at 340; *Bharat Bank* v. *Employees of Bharat*, A.I.R. (37) (1950) (S.C.) 188 at 209 (Para 61); *J. K. Iron and Steel Co. Ltd.* v. *The Iron and Steel Mazdoor Union*, (1956) A.I.R. (S.C). 231; *The Waterside Workers Federation of Australia* v. *J. W. Alexander Ltd.* (1918) 23 C.L.R. 434; *Attorney-General for Australia* v. *The Queen*, (1957) W.L.R. 607 at 614.

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UNION JUDICIARY ACT, 1948, s. 5—*Monthly Leases (Termination) Act, 1946—Suit for Declaration—Proviso, s. 42 Specific Relief Act, failure to comply with Court has no jurisdiction to dismiss the suit—Amendment of plaint to conform with the Proviso—Reliefs though not specifically prayed for should be granted if the proved facts in the plaint warrant it—The object of Court Fees Act.* The appellant instituted a suit under s. 42 Specific Relief Act against the Respondent who was appellant's monthly tenant for a bare declaration that the appellant is the owner of a Cinema Hall and its site and for damages, etc. without a prayer for possession. In fact, the Respondent was found to be a mere trespasser in possession by virtue of the Monthly Leases (Termination) Act, 1946. The suit was decreed, but on appeal, the High Court dismissed the suit holding that under the Proviso to s. 42 of the Specific Relief Act, the suit was not maintainable. On appeal to the Supreme Court, by special leave held: Proviso to s. 42 Specific Relief Act does not warrant the assertion that the suit is not maintainable; for the Proviso merely enacts that the Court shall not make a declaration where the plaintiff being able to seek further relief failed to do so. The Court has no jurisdiction to dismiss the suit, it can only refuse to make a declaration unless the plaint is so amended as to satisfy the requirements to s. 42 of the Specific Relief Act. *S. T. K. Chetty Firm* v. *Balasundram*, 10. L.B.R. 199; *B. S. Mohamed Eusoof* v. *Bakridi and another*, (1952) B.L.R. 248, followed. *Held also*: That if a plaintiff is entitled to certain reliefs upon proof of necessary fact alleged in the plaint, it is for the Court to grant such reliefs although the reliefs specifically asked for may be inartistically framed. *Babu Lal Ray* v. *Bindhyachal Rai*. I.L.R. 22 Pat. 187, referred to. *Held further*: The Court Fees Act was passed not to arm a litigant with a weapon of technicality against his opponent but to secure revenue for the benefit of the State *R. Subrao* v. *Venkatro*, A.I.R. (1918) (P.C.) 188, referred to.

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ဘဉ်ဘဉ် ခွန်ဖ၊ ထိန်ဆွယ်ဘွဲ့(ပြင်ဆင်ချက်)အက်ဥပဒေပုဒ်မ ၃ ချုပ်ဖျက်ရုံ၊ ၄၄၇၊
ဘဉ်ဘဉ် ခွန်ဖ၊ ထိန်ဆွယ်ဘွဲ့ အက်ဥပဒေပုဒ်မ ၁၅၊ ၁၀၊ ၁၉၊ ၃၅၊
မြန်ယဉ်ထိန်ဆွယ်ဘွဲ့နှင့် အထိန်ကိုမကျေနပ်သဖြင့် ခရိုင်ထိန်ဆွယ်သို့ စောဒ
နာဝင်ရောင်း စောဒနာဝင်မှုမပြီးပြတ်သေးခင် နယ်ဝိုင်တရား၊ တရား
သူကြီးထံမှောက်သို့ ထိန်ဆွယ်ခဲ့ခဲ့ခြင်းပေးရန်လျှောက်ထားရာ တရားသူကြီး
က ဘဉ်ဘဉ် ခွန်ဖ၊ ထိန်ဆွယ်ဘွဲ့ (ပြင်ဆင်ချက်) အက်ဥပဒေပုဒ်မ ၃ ၀ အရ၊

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ဝိနိစ္ဆယခုံဖွဲ့စေခြင်း မြွေနယ်ဝိနိစ္ဆယဌာန၏ အမိန့်ကိုပယ်ဖျက်လိုက်လေသည်၊ ဆုံးဖြတ်ချက်။ ။မြွေနယ်ဝိနိစ္ဆယဌာနကအမိန့်ချမှတ်ပြီးနောက် ခရိုင်ဝိနိစ္ဆယဌာနသို့ စောဒကဝင်ရောက်ရာတွင် နယ်ပိုင်တရားမရုံးတော်က ဝင်ရောက်စွက်ဖက်၍ ဝိနိစ္ဆယခုံဖွဲ့စည်းပေးခြင်းမပြုနိုင်သည့်အာဏာမရှိကြောင်း။

ဦးဘိုးမြှင့် ဦးဝိလာသ ပါ ဂ 71

၁၃၁၆ ခုနှစ်၊ ဝိနိစ္ဆယဌာန (ပြင်ဆင်ချက်) အက်ဥပဒေပုဒ်မ ၃၈၊ ဝိနိစ္ဆယခုံဖွဲ့စည်းခြင်း၊ မြွေနယ်ဝိနိစ္ဆယဌာန၏ အမိန့်ကိုမကျေနပ်သဖြင့် ခရိုင်ဝိနိစ္ဆယဌာနသို့ စောဒကဝင်ရာဝယ် စောဒေကနှင့် စုဒ်ဘာကတို့သည် နှစ်ဦးသဘောတူပဋိညာဉ်စာချုပ် ချုပ်ဆို၍ ဆရာတော်တို့အား ဆုံးဖြတ်ချက်ပေးပါရန်လွှဲအပ်သဖြင့် ၎င်းတို့ကဆုံးဖြတ်ချက်ပေးလေသည်၊ ထိုဆုံးဖြတ်ချက်ကို ဂရုမမူဘဲနယ်ပိုင်တရားမရုံးတော်သို့ဝိနိစ္ဆယခုံဖွဲ့စည်းပေးရန်လျှောက်ထားရာခုံဖွဲ့စည်းပေးရန် ထိုခုံကပင်ဆုံးဖြတ်ချက်ချမှတ်လေသည်။ ဆုံးဖြတ်ချက်။ ။နယ်ပိုင်တရားမရုံးတော်၌ ၁၃၁၆ ခုနှစ်၊ ဝိနိစ္ဆယဌာန (ပြင်ဆင်ချက်) အက်ဥပဒေပုဒ်မ ၃၈ အရ၊ ဝိနိစ္ဆယ ခုံဖွဲ့စည်းပေးနိုင်သည့် အာဏာမရှိချေ၊ ဦးဘိုးမြှင့် ဦးဝိလာသ ပါ ဂ၊ ၁၉၅၆ ခုနှစ်၊ တရားလွှတ်တော်ချုပ် တရားမအယေးအဖွဲ့လျှောက်လွှာအမှတ် ၄၄ ကိုလိုက်နာသည်။

ဦးအောင်ဘနှင့် နယ်ပိုင်တရားမတရားသူကြီး ပါ ၆ ... 68

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PENAL CODE—*S. 193 and s. 196—Criminal Procedure Code—S. 190 and s. 476. Held :* The question of delay is quite irrelevant where the Magistrate is to take cognizance of an offence under s. 190 of the Criminal Procedure Code. No Magistrate can refuse to take cognizance of an offence on ground of any delay. This is, however, a matter for consideration in proceedings under s. 476 of the Criminal Procedure Code, where a Court is to determine whether it would be expedient in the interest of justice to make an enquiry and thereafter lay a complaint for offence under s. 195 (1) (*b*) or (*c*) of the Penal Code. The question of delay is relevant only in considering whether "it is expedient in the interest of justice". While acting under s. 190 of the Criminal Procedure Code, the Magistrate has no choice but to take cognizance of any offence brought before him, except where it is specifically provided requiring complaint by or on the order of a particular person or authority, such as is provided in ss. 195, 196, 196-A, 197, 198 and 199. Therefore, the ruling in *Hwe Eve Hain* v. *The King*, (1948) B.L.R. p. 40 is applicable only to proceedings under s. 476 of the Criminal Procedure Code.

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အက်ဥပဒေများ။

ပါလီမန်ရွေးကောက်ပွဲ အက်ဥပဒေ (၁၉၄၀ ခုနှစ်)။

ခွဲစည်းအုပ်ချုပ်ပုံအခြေခံ အက်ဥပဒေ။

မြို့မဆိုင်ရာဒါးရမ်းခ ကြိုးကြပ်ရေး အက်ဥပဒေ။

သီးခြားသက်သာခွင့် အက်ဥပဒေ။

ပါလီမန်ရွေးကောက်ပွဲအက်ဥပဒေ(၁၉၄၀ ခုနှစ်) ပုဒ်မ ၅၄၊ ၅၅ ... 84

ပါလီမန်ရွေးကောက်ပွဲ နည်းဥပဒေ ၀၇ (၁) နှင့် (၃) ... 84

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မြို့မဆိုင်ရာ ဌါးရမ်းခကြိုးကြပ်ရေး အက်ဥပဒေပုဒ်မ ၁၄ (က)၊ ပုဒ်မ ၁၁ (၁) (ဃ) နှင့် (င)။ ဆုံးဖြတ်ချက်။ ။မြို့ပြဆိုင်ရာ ဌါးရမ်းခ ကြိုးကြပ်ရေး အက်ဥပဒေပုဒ်မ ၁၄(က)ကိုစီစစ်လျှင်၊ ၎င်းပုဒ်မအရ တရားစွဲဆိုနိုင်ခွင့်လျော်ကာထားရာတွင်၊ ထိုအက်ဥပဒေပုဒ်မ ၁၁ (၁)၏ အပိုဒ်ငယ်များတွင် ပါရှိသော အချက်များကို ဖေါ်ပြရမည်ဟုမဆိုချေ။ တဖန် ကြိုးကြပ်ရေး ဝန်ကလည်း၊ လျောက်ထား သူသည် တရား စွဲဆိုရန် အတွက်၊ ပုဒ်မ ၁၄ (က) (၃) တွင်ဖေါ်ပြထားသည့် အတိုင်း၊ လုံလောက်သော အကြောင်းရှိ မရှိကိုသာစုံစမ်းပြီးနောက်၊ ကျေနပ်လျှင် တရားစွဲခွင့် ပေးရမည်ဖြစ်သည်။ ထိုကြိုးကြပ်ရေး ဝန်၏ ဆုံးဖြတ်ချက်သည်၊ တရားစွဲဆိုသည့် ရုံးတော်အား မည်သည့်နည်းနှင့်မျှ ချုတ်ချယ်နိုင်ခွင့်မရှိချေ။ အကယ်၍၊ ရရှိသော အခွင့်ကို အထောက်အထား ပြုပြီး၊ ယခုလျောက်သူက သက်ဆိုင်ရာ ရုံးတော်၌ တရားစွဲဆိုလျှင်၊ မိမိသည် မြို့ပြဆိုင်ရာ ဌါးရမ်းခကြိုးကြပ်ရေး အက်ဥပဒေပုဒ်မ ၁၁ (၁) တွင်ပါရှိသော မည်သည့် အပိုဒ်ပါ အချက် အလက်များအရ၊ စွဲဆိုသည့်အဆိုလွှာ၌ ဖေါ်ပြရပေမည်၊ ယင်းသို့ဖေါ်ပြလျှင်၊ တရားရုံးတော်ကမည်သည့် အပိုဒ်တွင်အကျုံးဝင်ကြောင်း စီစစ်ဆုံးဖြတ်ရမည်ဖြစ်သည်။

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ဦးစန်စိုးဘ နှင့် ဌါးရမ်းခကြိုးကြပ်ရေးဝန် ပါ ၃ ... 90

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အမှုခေါ်စာရွက်စာစွန်တော်—ပါလီမန်ရွေးကောက်ပွဲနည်းဥပဒေ ၈၇ ၁)(၃)၊ ၁၉၄၈ နှစ်၊ ပါလီမန်ရွေးကောက်ပွဲ အက်ဥပဒေပုဒ်မ ၅၄၊ ပုဒ်မ ၅၅၊ ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေပုဒ်မ ၇၄ (၁) (ဆ)၊ ပုဒ်မ ၂၅၊ အခန်း ၂၊ ပုဒ်မ ၅၅၊ ပုဒ်မ ၁၇ (၄)၊ ပုဒ်မ ၇၆၊ ပုဒ်မ ၁၅၀၊ ပုဒ်မ ၀၇၊ သီးခြားသက်သာခွင့် အက်ဥပဒေ ပုဒ်မ ၄၂၊ လျောက်ထားသူသည်၊ ငွေ ၂၄၀ နှင့်တံဆိပ်တော်ခေါင်းကိုးငွေ ၆ တို့ကို၊ ရွေးကောက်ပွဲ ကုန်ကျစရိတ် ငွေစာရင်းတွင် ထည့်သွင်းဖေါ်ပြခြင်း မပြုမီသည့်အတွက်၊ ၁၉၄၈ ခုနှစ်၊ ပါလီမန်ရွေးကောက်ပွဲအက်ဥပဒေပုဒ်မ ၅၄ နှင့် ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံ

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ဥပဒေ ပုဒ်မ ၇၄ (၁) (ဆ) အရ၊ ငါးနှစ်ကာလအတွင်း ပါလီမန်အမတ်ရွေးချယ်ခံခြင်း၊ မဲဆန္ဒပေးနိုင်ခြင်းမပြုခွင့်မရှိရ၍ ပါလီမန်ရွေးကောက်ပွဲ နည်းဥပဒေ ၈၇၊ အရည်အချင်းပျက်ကွက်သူဖြစ်သည်ဟု နိုင်ငံတော် သမတက ကျေညာရာ၊ ထိုကျေညာချက်ကို မကျေနပ်၍ ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေပုဒ်မ ၂၅ အရ၊ အမှုခေါ်စာချွန်တော် လျှောက်ထားလေသည်။ ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေ အခန်း ၂ ၌ပါရှိသော မူလအခွင့်အရေးများကို မထိခိုက်သဖြင့်၊ ၎င်းအခြေခံဥပဒေပုဒ်မ ၂၅ အရ၊ လျှောက်ထားနိုင်ခွင့်မရှိဟု ပထာမကန့်ကွက်ချက်ဖြင့် နိုင်ငံတော်ရှေနေချုပ်က အောက်ပါစီရင်ထုံးကို အကိုးအကားပြုခဲ့တင်သည်၊ နိုင်ငံတော်အတွင်းဝန်နှင့်မတ်စ်(ခ) အင်ကိုး၊ အေ၊အိုင်၊အာ(ရှ်)၊ ၁၉၄၀၊ပရီဗီကောင်စီ ၁၀၅၊ ဆုံးဖြတ်ချက် ။ ။ပါလီမန်ရွေးကောက်ပွဲ အက်ဥပဒေ ပုဒ်မ ၅၅ ၌ ဖော်ပြထားသော အခွင့်အရေးနှင့် အခြားနှစ်နာဆုံးရှုံးမှုများ ထိခိုက်သဖြင့်၊ နိုင်ငံတော်သမတ၏ ဆုံးဖြတ်ချက်သည် ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေပုဒ်မ ၁၇ (၄) အရပေးထားသော မူလအခွင့်အရေးများကို ထိခိုက်လေသည်၊ နိုင်ငံတော်သမတသည် ယခုကဲ့သို့၊ အုပ်ချုပ်ပုံအခြေခံဥပဒေ ပုဒ်မ ၁၀၅ အရ၊ တရားစီရင်ရေးနှင့် အာဏာများကိုသုံးစွဲပါမူ၊ ၎င်းပုဒ်မ ၇၆ အရ၊ ပါလီမန်အမတ်အဖြစ်အရွေးခံခွင့်၊ မဲဆန္ဒပေးနိုင်ခွင့်တို့ကို ထိခိုက်နေသဖြင့် ဤရုံးတော်က ထိုအမိန့်ကို အမှုခေါ်စာချွန်တော်ဖြင့် ပယ်ဖျက်နိုင်စေလေသည်၊ ဒီ၊ ဒီ၊ ဂရိုးဖါးနှင့်အေ၊ စီ၊ ကွန်ဒါး ပါ ၃၊ တရားလွှတ်တော်ချုပ်၊ တရားမသေးမှုအမှတ် ၃၆/၅၅ ကြည့်သည်။ မည်သူမဆို တိုင်းသူပြည်သားများ၏ အခွင့်အရေးနှင့်စပ်လျဉ်း၍၊ ဆုံးဖြတ်နိုင်ခွင့်ကို ဥပဒေအရအပ်နှင်းခြင်းခံရပြီး၊ ယင်းသို့ဆုံးဖြတ်ရာ၌လည်း၊ ဥပဒေအတိုင်းဆောင်ရွက်ရန် တာဝန်ရှိလျှင်၊ ထိုသူ၏ဆောင်ရွက်ချက်သည် အုပ်ချုပ်ရေးသက်သက်အတွက် ဆောင်ရွက်မမည်၊ တရားစီရင်ရေးဆိုင်ရာ အလုပ်ဝတ္တရားများနှင့် အာဏာများကို သုံးစွဲဆောင်ရွက်ရာရောက်သည်၊ ဦးထွေး (ခေါ်) အေ၊ အီး၊ မဒါးရီနှင့် ဦးထွန်းအုံ၊ ၁၉၄၈ ခုနှစ်၊ မြန်မာပြည်စီရင်ထုံး ၅၄၁၊ ဗိုလ်သိန်းဆွေနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံ၊ ၁၉၄၉ ခုနှစ်၊ မြန်မာပြည်စီရင်ထုံး ၁၀၀ ကြည့်သည်၊ တရားစီရင်ရေးဆိုင်ရာ အလုပ်ဝတ္တရားနှင့် အာဏာများကို သုံးစွဲဆောင်ရွက်ရာ ၌အမှုသည်တဦးဦးအား ချေပခွင့်မပေးဘဲ နစ်နာစေသော အမိန့်ကိုချမှတ်လျှင်၊ ထိုချမှတ်သောအမိန့်သည် သဘာဝတရားနည်းလမ်းနှင့်မကိုက်ညီသဖြင့် မတည်မြဲနိုင်။ ဦးပစ်နှင့်သဲကုန်းကျေးရွာ မြေယာဆထားရေးကော်မိတီ၊ ၁၉၄၈ ခုနှစ်၊ မြန်မာပြည် စီရင်ထုံး ၅၅၉၊ အမှုဖွင့်ဝါဒနှင့်ဦးကျော်ညွန့်၊ ၁၉၅၀ ခုနှစ်၊ မြန်မာပြည်စီရင်ထုံး ၂၁၀ ကြည့်သည်။ အခြားသော သက်သာခွင့်ရရှိနိုင်ရုံမျှဖြင့်၊ အမှုခေါ်စာချွန်တော်အမိန့်ကို လုံးဝပန်ကြားနိုင်ခွင့်မရှိဟု ဝိတ်ပင်တားမြစ်ထားခြင်းမရှိချေ၊ အတူလိယံကုမာနှင့်ဝယ်ယူဖြန့်ချီရေး ညွှန်ကြားရေးဝန်၊ အေ၊ အိုင်၊ အာ(ရှ်)၊ ၁၉၅၃ ခုနှစ်၊ ကာလကတ္တား ၅၄၈ ကြည့်သည်။ ထိုကြောင့်၊ လျှောက်ထားသူသည် မိမိနှစ်သက်ရာ အမှုခေါ် စာချွန်တော် အမိန့်ကို လျှောက်ထားနိုင်သည်၊ သာမန်ရုံးများ၌လည်း တရားစွဲဆိုနိုင်သည်၊

တရားလွှတ်တော်ချုပ်

ဘာဂဝမ်ဒတ် (စ) ဟန်နုမာန်ဘတ် (လျှောက်ထားသူ)
နှင့်
ဘဏ္ဍာတော်မင်းကြီး (ကူးသန်းရောင်းဝယ်ရေး)
(လျှောက်ထားခံရသူ) *

†၁၉၅၆
နိဝတ်လ
၁၉ ရက်။

အမှုခေါ်စာချွန်တော် ပယ်လယ်ကြောင်း အကောက်တော် အက်ဥပဒေပုဒ်မ ၁၆၇ (ဂ) တွဘက် အကောက်တော်မင်းကြီး၏ အမိန့်၊ ဘဏ္ဍာတော် မင်းကြီး၏ အယူခံအမိန့်၊ ထိုပုဒ်မ အရ တပ်ရိုက်သော ဒဏ်ငွေသည် သက်ဆိုင်ရာ ပစ္စည်းတန်ဘိုး၏ သုံးဆ ဖြစ်နိုင်သော်လည်း ကျပ်တထောင်ထက် ပိုနိုင်မပိုနိုင် ဥပဒေ ပြဋ္ဌာန်းချက်များကို အဓိပ္ပါယ်ကောက်ယူခြင်း (Speaking Order)။

ဆုံးဖြတ်ချက်၊ ။ဘဏ္ဍာတော်မင်းကြီး၏အယူခံအမိန့်ကိုပယ်ဖျက်ရန် အမှုခေါ် စာချွန်တော်ဖြင့် လျှောက်သောအခါ၊ တွဘက် အကောက်တော် မင်းကြီးကိုလည်း လျှောက်ထားခံရသူအဖြစ်နှင့် ထည့်သွင်းပြီး ၎င်း၏ အမိန့်ကိုပါ တင်သွင်းပြီး ပယ်ဖျက်ရန် တောင်းဆိုရမည်။

ပင်လယ်ကြောင်းအကောက်တော် အက်ဥပဒေပုဒ်မ ၁၆၇ (ဂ)တွင် တပ်ရိုက်နိုင်သော ဒဏ်ငွေများ ပစ္စည်းတန်ဘိုး၏ သုံးဆထက် မပိုစေရ၊ သို့တည်းမဟုတ် ကျပ် တထောင်ထက် မပိုစေရဟူ၍ ပါရှိသည်။ ထိုပြဋ္ဌာန်းချက်အရ ပစ္စည်းတန်ဘိုး၏ သုံးဆထက် မများသော ဒဏ်ငွေကိုသော်၎င်း၊ ကျပ်တထောင်ထက် မများသောဒဏ်ငွေကိုသော်၎င်း တပ်ရိုက်နိုင်မည် ဖြစ်ရေသည်၊

ပစ္စည်းတန်ဘိုး သုံးဆထက်မများစေရဟူသော ပြဋ္ဌာန်းချက်သည်၊ ထိုသုံးဆသည် ကျပ် တထောင်ထက်မများသော အမှုများကို ရည်ညွှန်းသည်ဟု ကောက်ယူရမည်။

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* ၁၉၅၆ ခုနှစ်၊ တရားမအယေးအမဲ့လျှောက်လွှာအမှတ် ၇၀။

† နိုင်ငံတော် တရားဝန်ကြီးချုပ် ဦးသိန်းမောင်၊ တရားဝန်ကြီး ဦးဘိုကြီးနှင့် တရားဝန်ကြီး ဦးအောင်သာကျော်ရွှေမြောက်တွင် နိုင်ငံတော် တရားဝန်ကြီးချုပ်အမိန့်ချမှတ်သည်။

၁၉၅၆

ဘာဂဝဓ ဒတ်(စ်) ဟန်နမာန်ဘာတော် နှင့် ဘဏ္ဍာတော်မင်းကြီး (ကူးသန်းရောင်းဝယ်ရေး)။

ကျပ်တထောင်ထက်မပိုစေရဟူသော ပြဋ္ဌာန်းချက်သည်၊ ပစ္စည်းတန်ဘိုးနည်းရုံ၌ ၎င်း၏ သုံးဆသည် ကျပ်တထောင်မပြည့်သော မူခင်းများကို ရည်ညွှန်းသည်ဟု ကောက်ယူရမည်။

ကျပ်တထောင်ထက်မပိုစေရဟူသော ပြဋ္ဌာန်းချက်သည် " သို့တည်းမဟုတ် " ဟူသော စကားခြားရှိ နေသောကြောင့် ပစ္စည်းတန်ဘိုးသုံးဆထက် မများစေရဟူသော စကား၏ အဓိပ္ပါယ်ကိုကျဉ်းမြောင်းအောင် မချုတ်ချယ်နိုင်။

ဥပဒေပြဋ္ဌာန်းချက်များကို အဓိပ္ပါယ်ကောက်ယူရာမှာလည်း ပြဋ္ဌာန်းချက်တွင် ပါရှိသော စကားရပ်များအားလုံးအဓိပ္ပါယ်ရှိအောင် ကောက်ယူရချေမည်၊

တွဲဘက်အကောက်တော်မင်းကြီးနှင့် ဘဏ္ဍာတော်မင်းကြီးတို့မှာ ပုဒ်မ ၁၆၃ (၈)အရ၊ စီရင်ပိုင်ခွင့် အာဏာရှိသောကြောင့် သူတို့၏ စီရင်ချက်များသည် (Speaking Order) ဖြစ်ပြီး အထင်အရှား မှားယွင်းမှသာလျှင် သူတို့၏ အဓိန့်များကို ဤရုံးတော်က အမှုခေါ် စာချွန်တော်ဖြင့် ပယ်ဖျက်နိုင်သည်၊ ။လျှောက်လွှာပယ်လိုက်သည်။

လျှောက်ထားသူအတွက်၊ ဝတ်လုံတော်ရ ဦးကျော်မင်းလိုက်ပါဆောင်ရွက်သည်။

ဦးဆိန်းမောင်။ ။ရန်ကုန်မြို့၊ တွဲဘက် အကောက်တော် မင်းကြီးက၊ လျှောက်သူတို့၏အပေါ် လိုင်စင်မရှိဘဲတန်ဘိုးငွေ ၁၀,၈၅၂ ကျပ်ရှိသော ရှုပ်ဖျင် များကိုကူပန်ပြည်မှတင်သွင်းမှုဖြင့်ပယ်လယ်ကြောင်းအကောက်တော် အက်ဥပဒေ ပုဒ်မ ၁၆၇ (၈)အရ၊ တန်ဘိုး၏ နှစ်ဆခန့်ဖြစ်သော ဒဏ်ငွေ ၃၇,၇၀၀ ကျပ် ကိုတပ်ရိုက်လိုက်လေသည်။ လျှောက်သူတို့က ဘဏ္ဍာတော်မင်းကြီး (ကူးသန်း ရောင်းဝယ်ရေး)ထံ အယူခံဝင်သော အခါမှာလည်း ဘဏ္ဍာတော် မင်းကြီးက သူတို့၏ အယူခံလွှာကို ပယ်လိုက်လေသည်။ သို့ဖြစ်၍ လျှောက်သူတို့က ဘဏ္ဍာ တော်မင်းကြီး၏ အဓိန့်ကို ပယ်ဖျက်ရန်၊ အမှုခေါ် စာချွန်တော် အတွက် ဤရုံး တော်မှာ လျှောက်ထားကြသည်။ စင်စစ်အားဖြင့် ဆိုသော် လျှောက်သူတို့သည်၊ ရန်ကုန်မြို့၊ တွဲဘက်အကောက်တော်မင်းကြီး၏ အဓိန့်ကိုပါ ပယ်ဖျက်ရန် တောင်း ဆိုကြရချေမည်။ ယခုမှာထိုအဓိန့်ကိုပယ်ဖျက်ရန်တောင်းဆိုဘို့ဝေးစွ၊ ထိုအဓိန့်၏ မိတ္တူကိုမျှပင် ဤရုံးတော်တွင် တင်သွင်းခြင်းမရှိခဲ့။ ထိုတွဲဘက် အကောက်တော် မင်းကြီးကိုလည်း လျှောက်ထားခံရသူအဖြစ် မထည့်သွင်းခဲ့။

သို့ရာတွင် အောက်တွင် ဖေါ်ပြလတ္တံ့သော အကြောင်းအချက်များကြောင့် ဤလျှောက်လွှာကို ပယ်ရမည်သာဖြစ်သောကြောင့် အထက်ပါ ချို့ယွင်းချက်များ ပပျောက်အောင် ပြင်ဆင်ရန်မလိုပြီ။

လျှောက်သူတို့၏ ပညာရှိ လွှတ်တော် ရှေ့နေကြီးက ပင်လယ်ကြောင်း အကောက်တော်အက်ဥပဒေ ပုဒ်မ ၁၆၇ (၈) အရ၊ တပ်ရိုက်သော ဒဏ်ငွေသည်

၁၉၅၇

ဘာဂဝမ် ဒတ်(စ်) ဟန်နမာန်ဘတ် နှင့် ဘဏ္ဍာတော်မင်းကြီး (ကူးသန်းရောင်းဝယ်ရေး)။

သက်ဆိုင်ရာပစ္စည်းတန်ဘိုး၏ သုံးဆဖြစ်နိုင်သော်လည်း ကျပ်တထောင်ထက်မပို နိုင်ကြောင်း၊ သို့ဖြစ်၍ ကျပ် ၃၇,၇၀၀ ဒဏ်ရိုက်ခြင်းသည်၊ တရားဥပဒေနှင့် မညီ ကြောင်း လျှောက်ထားသည်။

သို့ရာတွင် ပုဒ်မ ၁၆၇ (၀) တွင် တပ်ရိုက်နိုင်သော ဒဏ်ငွေမှာ ပစ္စည်း တန်ဘိုး၏ သုံးဆထက်မပိုစေရ၊ သို့တည်းမဟုတ် ကျပ်တထောင်ထက် မပိုစေရ ဟူ၍ ပါရှိသည်။ ထိုပြဋ္ဌာန်းချက်အရ ပစ္စည်းတန်ဘိုး၏ သုံးဆထက်မများသော ဒဏ်ငွေကိုသော်၎င်း၊ ကျပ်တထောင်ထက် မများသော ဒဏ်ငွေကိုသော်၎င်း တပ်ရိုက်နိုင်မည်ဖြစ်ချေသည်။ ပစ္စည်းတန်ဘိုး သုံးဆထက် မများစေရ ဟူသော ပြဋ္ဌာန်းချက်သည်၊ ထိုသုံးဆသည် ကျပ်တထောင်ထက် များသော အမှုများကို ရည်ညွှန်းသည်ဟု ကောက်ယူရမည်။ ကျပ်တထောင်ထက် မပိုစေရဟူသော ပြဋ္ဌာန်းချက်သည်၊ ပစ္စည်းတန်ဘိုး နည်း၍၊ ၎င်း၏ သုံးဆသည်၊ ကျပ် တထောင် မပြည့်သော မှုခင်းများကို ရည်ညွှန်းသည်ဟု ကောက်ယူရမည်။ ကျပ်တထောင် ထက်မပိုစေရ ဟူသော ပြဋ္ဌာန်းချက်သည်၊ "သို့တည်းမဟုတ်" ဟူသော စကားခြား၍ နေသောကြောင့် ပစ္စည်းတန်ဘိုးသုံးဆထက် မများစေရ ဟူသော စကား၏ အဓိပ္ပါယ်ကို ကျဉ်းမြောင်းအောင် မချုတ်ချယ်နိုင်။

လျှောက်သူတို့၏ ပညာရှိလွှတ်တော်ရှေ့နေကြီး လျှောက်ထားသည့်အတိုင်း မည်သည့်အမှုတွင်မျှ (ပစ္စည်းတန်ဘိုး မည်မျှပင်ဖြစ်စေ) ကျပ်တထောင်ထက်ပို၍ ဒဏ်မတပ်နိုင်ဟု အဓိပ္ပါယ်ကောက်ယူလျှင် (ပစ္စည်း တန်ဘိုး သုံးဆထက် မများစေရ၊ သို့တည်းမဟုတ်) ဟူသော စကားရပ်မှာ အဓိပ္ပါယ်မရှိဘဲ၊ သက်သက် အပိုမျှသာ ဖြစ်လိမ့်မည်။ ဥပဒေပြဋ္ဌာန်းချက်များကို အဓိပ္ပါယ်ကောက်ယူရာမှာ လည်း ပြဋ္ဌာန်းချက်တွင် ပါရှိသော စကားရပ်အားလုံး အဓိပ္ပါယ်ရှိအောင် ကောက်ယူရချေမည်။ သို့ဖြစ်၍၊ ကျပ် ၃၇,၇၀၀ ဒဏ်ရိုက်လိုက်ခြင်းသည်၊ တရား ဥပဒေနှင့်မညီဟု ဤရုံးတော်က မယူဆနိုင်ချေ။

ထိုမှတပါး ရန်ကုန်မြို့၊ တွဲဘက် အကောက်တော် မင်းကြီးနှင့် ဘဏ္ဍာတော် မင်းကြီးတို့မှာ ပုဒ်မ ၁၆၇ (၀) အရ၊ စီရင်ပိုင်ခွင့် အာဏာရှိ သောကြောင့် သူတို့၏စီရင်ချက်များသည်၊ (Speaking Order) ဖြစ်ပြီး အထင်အရှား မှားယွင်းမှုသာလျှင်၊ သူတို့၏အမိန့်များကို ဤရုံးတော်က အမှုခေါ် စာချွန်တော်ဖြင့် ပယ်ဖျက်နိုင်သည်။ ယခုမှာ သူတို့၏ စီရင်ချက်များသည်၊ မှားယွင်းသည်ဟူ၍ပင် မဆိုနိုင် အထင်အရှားမှားယွင်းသော (Speaking Order) များဖြစ်သည်ဟု ဆိုနိုင်ဘို့ရာမှာ ဝေးလေစွ။

၁၉၅၆

ဘာဂဝမ်

ဒတ်(စ်) ဟန်နု မာန်ဘတ် နှင့် ဘဏ္ဍာတော် မင်းကြီး (ကူး သန်းရောင်း ဝယ်ရေး)။

သည်မျှသာမကသေး၊ ဘဏ္ဍာတော် မင်းကြီး၏ အမိန့်တွင် အောက်ပါ အတိုင်းပါရှိသေးသည်။

"ဤအကြောင်းနှင့် ပတ်သက်၍လည်း၊ မြန်မာပြည်နှင့် အိန္ဒိယပြည်နှစ်ပြည့်တပြည် အုပ်ချုပ်ခဲ့စဉ်က အိန္ဒိယပြည် အစိုးရ ကူးသန်းရောင်းဝယ်ရေးဌာန၊ ၁၉၂၁ ခု၊ ဇွန်လ ၂၅ ရက်နေ့စွဲ ပါ စာအမှတ် ၄၂၃၂ တွင် အတိအလင်း ကျပ် တထောင် ထက်ပိုသော အပြစ်ကို ပေးခွင့်ရှိကြောင်း ဖေါ်ပြခဲ့ပြီး ဖြစ်လေ သည်။ ထိုးဆုံးဖြတ်ချက်ကို၊ ၁၉၄၇ ခုနှစ်အထိ တစုံတဦးကမှ ငြင်းဆိုခြင်းမပြုခဲ့ရာ ထိုးနှစ်တွင်၊ ဘဏ္ဍာတော်မင်းကြီးက အခွန် တော်အယူခံမှုအမှတ် ၄-စီ-၆၉ ယခင် ဘဏ္ဍာတော်မင်းကြီးက ထပ်လောင်းအတည်ပြုဆုံးဖြတ်ခဲ့လေသည်။"

အထက်တွင် ဖေါ်ပြထားသော ဘဏ္ဍာတော်မင်းကြီး၏ အမိန့်မှ ကောက် နုတ်ချက်များ အရ ဤပြဿနာသည်၊ ၁၉၂၁ ခုနှစ်ကပင် ဖြေရှင်းပြီးသော ပြဿနာဖြစ်၍ နေသည်။ နှစ်ပေါင်း ၃၅ နှစ်ကျော်က ဖြေရှင်းပြီး ဖြစ်သော ပြဿနာကိုပြန်၍ ဖွင့်ရန်အကြောင်း တစုံတရာမျှကိုလည်း ဤရုံးတော်ကမမြင်။

သို့ဖြစ်၍၊ ဤလျှောက်လွှာကို ပယ်လိုက်သည်။

SUPREME COURT.

LEE KYIN SU *(alias)* U SU (APPLICANT)

v.

THE COMMISSIONER OF EXCISE AND THREE OTHERS (RESPONDENTS).*

† S.C. 1957

Jan. 14.

Directions in the nature of Habeas Corpus—S. 5 (1), Public Order Preservation Act—Initial arrest by Inspector of Excise—Further arrest by Inspector of Police and detention by the Deputy Commissioner of Police sunder orders of the Deputy Secretary, Ministry of Home Affairs in anticipation of order of detention under s. 5-A (1) (d), (e) and (h)—Order XIX, Rule 8, Supreme Court Rules—Return vague—Reference to Home Ministry File—Powers of the President, s. 121 of the Constitution—Delegation of Powers under s. 7, Public Order Preservation Act.

The applicant was arrested by an Inspector of Excise on the 24th March 1956, under s. 5 (*1*), Public Order Preservation Act.

On the 3rd April 1956, an Inspector of Police, under orders of the Deputy Secretary, Ministry of Home Affairs arrested and detained the applicant under s. 5 (*1*) of the said Act for 15 days, in anticipation of an issue of an order of detention by the Ministry of Home Affairs.

On the 17th April 1956, the Deputy Commissioner of Police ordered the applicant's detention for two months with retrospective effect from 3rd April 1956.

On 4th May 1956, an order under s. 5-A (1) (*d*), (*e*) and (*h*) requiring the applicant to reside in Myanaung until 1st May 1957 was passed in the name of the President by the Secretary, Ministry of Home Affairs.

The applicant was granted bail and released on 7th May 1956 on which date the Deputy Commissioner of Police also revoked his order of detention.

For the applicant it was submitted:—

(*a*) The detention at the instance of the Deputy Secretary, Finance and Revenue, and the actual arrest by an Inspector of Excise who is invested with no powers under the Act, were illegal.

(*b*) The attempt at rectifying this illegality by subsequent orders passed by an Inspector of Police and then by the Deputy Commissionsr of Police were also illegal in that they had automatically complied with the order conveyed to them by the Deputy Secretary, Ministry of Home Affairs, instead of deciding for themselves whether there were grounds for suspicion against the applicant that would justify arrest.

(*c*) A detention in anticipation of restricting the applicant's residence to Myanaung was also illegal.

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* Criminal Misc. Application No. 129 of 1956.

† *Present:* U MYINT THEIN, Acting Chief Justice, MR. JUSTICE BO GYI and MR. JUSTICE CHAN HTOON.

S.C. 1957

LEE KYIN SU (*alias*) U SU, *v.* THE COMMISSIONER OF EXCISE AND THREE OTHERS.

Held: The liberty of the subject is made indefeasible by the Constitution and that such personal liberty is not to be interfered with save in accordance with law and with strict compliance with the procedure prescribed. The sufficiency or otherwise of grounds against a suspect is a matter that has to be solely decided by the officer empowered to act. An order passed by an officer so empowered merely because of a direction made by a superior authority is manifestly illegal.

Ma Thaung Kyi v. *The Deputy Commissioner, Hanthawaddy*, (1949) B.L.R. (S.C.) 30; *Daw Mya Tin* v. *Deputy Commissioner, Shwebo*, (1949) B.L.R. (S.C.) 98, referred to.

An order meant to be retrospective is also illegal.

Daw Aye Nyunt v. *Commissioner of Police, Rangoon*, (1949) B.L.R. (S.C.) 5, referred to.

Held further: The illegality of the initial arrest and detention will not render any effective help to the applicant for the Court is concerned only with the final order passed in the name of the President by the Secretary, Ministry of Home Affairs. All previous orders were vacated when the applicant was released on bail on 7th May, on the revocation of the Deputy Commissioner's order.

Held also: The various orders of arrest and detention do not form a continuous series and that an illegal arrest at the outset would not vitiate a final order, as the orders were issued by different authorities and the final and effective order was made under a different section.

Ah Nywe v. *Commissioner of Police, Rangoon*, (1948) B.L.R. 737; *Daw Mya Tin* v. *Commissioner of Police, Rangoon*, (1949) B.L.R. (S.C.) 82, referred to.

Held also: A return made by the Deputy Secretary, which merely said that the President was satisfied as to the necessity of the order is vague, is of no help and not in conformity with Rule 8 of Order XIX of the Supreme Court Rules.

Ah Nywe v. *Commissioner of Police, Rangoon*, (1948) B.L.R. 737, referred to.

Held further: The statements contained in the Home Ministry file relating to the applicant may fall short of proof in a criminal trial, but in cases of preventive justice, the statements are there and the competent authority had chosen to believe them. It is not for the Court to say he should not have and thus exercise an appellate jurisdiction.

Maung Hla Gyaw v. *Commissioner of Police, Rangoon*, (1948) B.L.R. 764, referred to.

Quaere: In this case, was the Secretary merely following a direction given to him by a superior authority or did he use his own discretion?

Desirability of having a properly delegated authority pointed out.

Tun Maung, Advocate, for the applicant.

Ba Pe (Government Advocate), for the respondents.

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LEE KYIN SU (*alias*) U SU *v.* THE COMMISSIONER OF EXCISE AND THREE OTHERS.

The judgment of the Court was delivered by

U MYINT THEIN, ACTING CHIEF JUSTICE OF THE UNION.—On the 24th January 1956 the Commissioner of Excise sent in to the Ministry of Finance and Revenue, under which the Excise Department functions, a recommendation to take action against the applicant who was reputed to be an opium smuggler on a large scale. On 22nd March someone purporting to act for the Deputy Secretary of the Ministry, directed the Commissioner to secure the arrest of the applicant under section 5 (*1*) of the Public Order (Preservation) Act in anticipation of an order requiring him to reside at a place later to be specified. On the authority of this letter an Inspector of Excise arrested the applicant and had him confined in the Rangoon Town Lock-up on the 24th March. On 30th March the Deputy Secretary, Finance and Revenue wrote two letters to the Ministry of Home Affairs, the first of which was a request to issue formal orders for the detention of the applicant under section 5 (*1*). The second letter was a request for an order directing the applicant to reside in Tamu in the Lower Chindwin District for a period of one year.

By a letter dated the 2nd April, the Deputy Secretary in the Ministry of Home Affairs directed the Commissioner of Police, Rangoon, to take action under section 5 (*1*) and the next day, 3rd April, an Inspector of Police wrote out a formal order of arrest and detention for 15 days. On 17th April the Deputy Commissioner of Police issued another order directing the detention of the accused for a period of two months with retrospective effect from 3rd April.

In the meantime the Home Ministry had taken action and on 3rd April the proceedings were

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submitted to the Deputy Secretary by the office. On the 6th April he recorded a note recommending action as asked for by the Ministry of Finance and Revenue. The papers were submitted to the Secretary. The Secretary in turn agreed and submitted the proceedings to the Chief Secretary who noted that Tamu might not be a place where the applicant would have the means of earning a livelihood.

On 10th April the Home Ministry consulted the Finance Ministry on the point raised by the Chief Secretary. A reply dated 30th April was received annexed to which was a letter from the Commissioner of Excise suggesting Myanaung in the Henzada district instead of Tamu. The office recommended acceptance and the proceedings were resubmitted to the Deputy Secretary whose final note dated the 4th May was: "Secretary and Chief Secretary have agreed. Issue orders." On the same day an order under section 5-A (*1*) (*d*) (*e*) and (*h*) requiring the applicant to reside in Myanaung until lst May 1957 was passed in the name of the President by the Secretary, Ministry of Home Affairs.

The applicant was granted bail and released on the 7th May 1956 on which date the Deputy Commissioner of Police revoked his order of detention.

We have set out the events in some detail, for learned Counsel for the applicant has submitted that—

(*a*) The detention at the instance of the Deputy Secretary, Finance and Revenue, and the actual arrest by an Inspector of Excise who is invested with no powers under the Act, were illegal.

(*b*) The attempt at rectifying this illegality by subsequent orders passed by an Inspector of Police

and then by the Deputy Commissioner of Police were also illegal in that they had automatically complied with the order conveyed to them by the Deputy Secretary, Ministry of Home Affairs, instead of deciding for themselves whether there were grounds for suspicion against the applicant that would justify arrest.

(*c*) A detention in anticipation of restricting the applicant's residence to Myanaung was also illegal.

There is ample authority in support of these submissions, but the matter before us cannot be disposed of on the question of unauthorised arrest alone.

Since the point has been raised we would observe, this Court has repeatedly pointed out that the liberty of the subject is made indefeasible by the Constitution and that such personal liberty is not to be interfered with save in accordance with law and with strict compliance with the procedure prescribed. The sufficiency or otherwise of grounds against a suspect is a matter that has to be solely decided by the officer empowered to act. An order passed by an officer so empowered merely because of a direction made by a superior authority is manifestly illegal. See *Ma Thaung Kyi* v. *The Deputy Commissioner, Hanthawaddy* (1) and *Daw Mya Tin* v. *The Deputy Commissioner, Shwebo* (2). So also is an order meant to be retrospective. See *Daw Aye Nyunt* v. *The Commissioner of Police, Rangoon* (3).

But the illegality of the initial arrest and detention will not render any effective help to the applicant for we are concerned only with the final order passed in

(1) (1949) B.L.R. (S.C.) 30. (2) (1949) B.L.R. (S.C.) 98.
(3) (1949) B.L.R. (S.C.) 5.

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the name of the President by the Secretary, Ministry of Home Affairs. The original direction of the Deputy Secretary, Ministry of Finance and Revenue, executed by an Inspector of Excise, culminating in the arrest of the applicant on the 24th March was substituted by the directions of the Deputy Secretary, Ministry of Home Affairs, under which the applicant was detained as from 3rd April, first on the responsibility of an Inspector of Police and later on that of the Deputy Commissioner of Police. These orders were in turn vacated when the applicant was released on bail on the 7th May and the Deputy Commissioner took the precaution of revoking his own order. The applicant is thus left with the order which has kept him at the present moment in Myanaung.

It has been urged that the various orders of arrest and detention formed a continuous series and that an illegal arrest at the outset must vitiate the final order. Some credence is lent to this view by the decision in *Ah Nywe* v. *Commissioner of Police, Rangoon* (1) where it was held that an arrest made by a subordinate officer upon receipt of verbal orders over the telephone from the Commissioner of Police was illegal from its inception and that a subsequent written order confirming his verbal message could not cure the illegality. While it is true that the various orders in this case relate to the same person's continued detention, it must be borne in mind that the orders were issued by different authorities and that the final and effective order which is now being challenged was made under a different section by which the applicant was released from custody but was restricted to the limits of Myanaung. A decision which is against the view advanced is *Daw Mya Tin* v. *Commissioner of Police, Rangoon* (2), where

(1) (1948) B.L.R. 737. (2) (1949) B.L.R. (S.C.) 82

it was held that a person released under the order of this Court owing to a technical flaw in the orders of detention may by rearrested or, if still under detention, such detention may be continued under a fresh and lawful order.

Turning to the merits, notice was issued to the respondents named in the application, they being the Commissioner of Excise, the Officer-in-charge of the Rangoon Town Lock-up, the Commissioner of Police and the Secretary, Ministry of Home Affairs. No returns were filed by the first three while a Deputy Secretary of the Ministry filed an affidavit in which he merely said that the President was satisfied as to the necessity of the order. A vague return of this nature is of no help [see *Ah Nywe* v. *Commissioner of Police* (1)] and not in conformity with Rule 8 of Order XIX of the Rules of this Court, which reads:

> "The return of the writ shall contain a copy of all the causes of the prisoner's detention endorsed or annexed to the writ, and the return may be amended or any other return substituted."

The learned Government Advocate however has placed before us the Home Ministry file relating to the applicant and we have looked into it. It appears that subsequent to a seizure of a large consignment of opium near Rangoon in 1948 the applicant was kept under surveillance. It is said that he was ruined over the seizure and remained inactive for some time but the Excise Department had reasons to suspect that another big consignment seized in Meiktila in 1952 was his. A strict watch had been placed upon him since then. At the end of 1955 there were two large seizures on board ships about to sail from Rangoon. Enquiries were made and there are

(1) (1948) B.L.R. 737.

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statements on record that these attempts to smuggle opium were done at the instance of the applicant.

These statements may fall short of proof in a criminal trial but, as pointed out in *Maung Hla Gyaw* v. *Commissioner of Police, Rangoon* (1), preventive justice which comprises restraining a man from committing a crime which he may commit but has not yet committed, is common in all systems of jurisprudence, and in applying it, it must proceed upon the principle that a person should be restrained from doing something which, unfettered and free, it is reasonably probable that he would do.

In the past this Court has explained its functions in dealing with writs. We do not exercise appellate jurisdiction in dealing with them. What we have to consider is whether an authority exercising powers under the Public Order (Preservation) Act had materials before him to justify the conclusion he had arrived at. The discretion to exercise the powers is solely his, and even if we wish to, we cannot substitute our discretion instead. It is for him without question to decide whether he has reasonable grounds to act.

In this case, there were before the competent authority the statements that we have mentioned and since he had chosen to believe them, it is not for us to say that he should not have. The materials were there; on these materials it was within his discretion to pass the order he had passed; and it would not be proper for us to interfere.

The application is dismissed.

We desire to make our observations on one point which was not raised. This relates to the powers of the President. The Public Order (Preservation) Act invests the President with certain powers but the

1) (1948) B.L.R. 764.

word is governed by section 121 of the Constitution which provides that all executive action by the Union Government shall be expressed to be taken in the name of the President. Thus in actual fact the powers under section 5 are exercised by the Ministry of Home Affairs and not by the President in person. We have examined the proceedings before us and we are unable to discover who actually took the decision which led to the order restricting applicant's residence to Myanaung. As has been pointed out, it was the office that made the recommendation to the Deputy Secretary who submitted the proceedings to the Secretary, who ultimately sent it to the Chief Secretary with his recommendation. If the Chief Secretary was the authority, he should have issued the orders but in this case his orders were verbal and the person who actually signed the order in the name of the President was the Secretary. In doing so, was he merely following a direction given to him by a superior authority or did he use his own discretion ?

The delegation of powers under section 7 by the President to an individual officer in the Home Ministry would ensure the exercise of individual discretion which is urged by this Court in a series of pronouncements. The nature of the proceedings under the Act puts the burden of coming to a decision upon one person who should issue the order himself, and who should make the return in the appropriate form in the event of a writ being issued.

တရားလွှတ်တော်ချုပ်

† ၁၉၅၇
မတ်လ
၁၀ ရက်။

မည်မြင်းစံ ပါ ၄ (လျှောက်ထားသူများ)
နှင့်
ရန်ကုန်မြို့၊ တရားမရုံး တရားသူကြီးချုပ် ပါ ၁၀ (လျှောက်ထားခံရသူများ)*

ရန်ကုန်မြို့တော်တရားမရုံး အက်ဥပဒေပုဒ်မ ၃၅ လိုက်နာရန် ရှိသည်တို့ကို မလိုက်နာဘဲ ပျက်ကွက်ခဲ့သဖြင့် မိမိရထိုက်သည်ကို မရလိုက်ဘဲနစ်နာဆုံးရှုံးသောကြောင့် တာဝန်ရှိသူစာရေးချုပ်အပေါ်တွင် အရေးယူပါရန် လျှောက်လွှာကို တရားသူကြီးချုပ်က ဆိုင်ရာနှစ်ဦးနှစ်ဘက်တို့အား ကြားနာစစ်ဆေးစုံစမ်းခြင်းမပြုဘဲ စာရေးချုပ်၏ အစီရင်ခံစာကို ဘတ်ရှုပြီးပယ်လိုက်ခြင်း၊ အမှုခေါ်စာရွက်တော်လျှောက်လွှာ ပြည်ထောင်စု တရားစီရင်ရေးအက်ဥပဒေပုဒ်မ ၄။

ဆုံးဖြတ်ချက်၊ ဤကဲ့သို့ နစ်နာသည့် ကိစ္စအတွက် တရားရုံးတွင် တရားစွဲဆိုနိုင်ခွင့် မရှိသည်မှာထင်ရှားသည်၊ *Rangoon & Co.* v. *Maung Waik*, 6 Ran. 263 လိုက်နာသည်။

ဤကိစ္စသည် တရားစီရင်ရေးလုပ်ငန်းမှ တိုက်ရိုက်ပေါ်ထွက်လာသောကိစ္စဖြစ်၏၊ မည်သို့ပင်ဖြစ်စေ ပြည်ထောင်စုတရားစီရင်ရေးအက်ဥပဒေပုဒ်မ ၄ အရ၊ ဤရုံးတော်သည်ပြည်ထောင်စုနိုင်ငံအတွင်းရှိ တရားရုံးအားလုံးကို ကြီးကြပ်ကြည့်ရှုနိုင်ခွင့် အာဏာရှိသည့် တရားရုံးဖြစ်သည့်အတိုင်း လက်အောက်ခံတရားရုံးတခုခုက မိမိသို့အပ်နှင်းထားသည့် အာဏာကို၊ သို့မဟုတ် တာဝန်ဝတ်တရားတခုခုကို သုံးစွဲဆောင်ရွက်ရန်ပျက်ကွက်လျှင် အမှန်တရားသို့ရောက်အောင်ဝင်ရောက်စွက်ဖက်ရန် ဤရုံးတော်၌ တာဝန်ရှိလေသည်။

လျှောက်ထားသူက စွပ်စွဲထားသည့် အချက်များမှာ မှန်မမှန်စာရေးချုပ်ပေါ်လျှောမူ ပျက်ကွက်မှုရှိမရှိ၊ ရှိလျှင်မည်မျှလျှောက်ထားသူ၌ နစ်နာဆုံးရှုံးသည်စသော အချက်များကို နှစ်ဦးနှစ်ဘက်ဆိုင်ရာတို့အား ကြားနာစစ်ဆေးစုံစမ်းရန် တရားသူကြီးချုပ်၏ တာဝန်ဝတ်တရားဖြစ်သည်။

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* ၁၉၅၃ ခုနှစ်၊ တရားမအသေးအဖွဲ့ လျှောက်လွှာ အမှတ် ၉၆၂

† တရားဝန်ကြီး ဦးမြင့်သိန်း၊ တရားဝန်ကြီး ဦးဘိုကြီး၊ တရားဝန်ကြီး ဦးချန်ထွန်းတို့ ရွေ့မျောက်တွင် တရားဝန်ကြီး ဦးချန်ထွန်းအမိန့်ချမှတ်သည်။

ရန်ကုန်မြို့တော် တရားမရုံးအက်ဥပဒေပုဒ်မ ၃၅ အရ၊ စုံစမ်းစစ်ဆေးရန် အမိန့်ချမှတ် လိုက်သည်။

၁၉၅၇

မညီမျှမှုစီ ပါ ၄ နှင့် ရန်ကုန်မြို့ တရားမရုံး တရားသူကြီး ချုပ် ပါ ၁၀၊

လျောက်ထားသူအတွက်၊ လွတ်တော်ရှေ့နေကြီး ဦးအောင်မင်း (၁) လိုက်ပါ ဆောင်ရွက်သည်။

လျောက်ထားခံရသူများအတွက်၊ အစိုးရရှေ့နေဦးဘဘော လိုက်ပါ ဆောင်ရွက် သည်။

ဦးချန်ထွန်း။ ။ဤလျောက်လွှာသည် ရန်ကုန်မြို့တော်တရားမရုံးအက်ဥပ ဒေပုဒ်မ ၃၅ အရ၊ ၎င်းရုံး၏စာရေးချုပ်အပေါ်တွင် အရေးယူပါရန် လျောက်ထား သည့်လျောက်လွှာကို တရားသူကြီးချုပ်က ပယ်လိုက်သဖြင့်၊ ဒေါ်နှင်းနွယ်က ဤရုံးတော်တွင် လျောက်ထားသော လျောက်လွှာဖြစ်သည်။

လျောက်ထားသူ ဒေါ်နှင်းနွယ်က ၁၉၄၉ ခုနှစ်၊တရားမကြီးမှုအမှတ် ၁၁၃ တွင် မသန်းနှင့်အခြားတရားခံတဦးအပေါ်တွင် တရားစွဲဆိုရာ၌ တရားခံများတွင်၊ ရန်ကုန်မြို့၊ ၁၁ လမ်း၊ အမှတ် ၈၄ နေအိမ်မှတပါး အခြားပစ္စည်း လုံးဝမရှိသဖြင့်၊ ၎င်းနေအိမ်ကို ကြိုတင်ရှင်းရမ်းကပ်ထားရန်လျောက်ထားသည့်အတိုင်း၊ ရန်ကုန် မြို့တော်တရားမရုံးက ကြိုတင်ဝါးရမ်းထုတ်ရန် အမိန့်ချမှတ်ခဲ့လေသည်။ ၎င်းအမှု တွင် လျောက်ထားသူက အနိုင်ဒီဂရီရရှိသောအခါ၊ အဆိုပါအိမ်ကို ဇာရိပြုလုပ် ရောင်းချရန်အမိန့်တောင်းခံလေသည်။ ထိုအခါအဆိုပါအိမ်ကို မိမိတို့ဝယ်ယူခြင်း ဖြစ်ကြောင်း၊ မိုင်းမျိုးအောင်နှင့်မချိုချိုတို့က လျောက်ထားကန့်ကွက်ရာ ထိုအိမ်ကို ခွဲးတော်၏အမိန့်အရ ဝါးရမ်းကပ်စဉ်အခါက ဥပဒေအရ လိုက်နာဆောင်ရွက်ရန် ရှိသည်တို့ကို မလိုက်နာဘဲပျက်ကွက်ခဲ့သဖြင့်၊ ဝါးရမ်းမှာ အတည်မဖြစ်သော ကြောင့် ဝယ်ယူသူများက အကြောင်းမဲ့ပိုင်ဆိုင်လာခဲ့သည်ဟု ၁၉၅၃ ခုနှစ်၊ တရားမ အသေးအဖွဲလျောက်လွှာ အမှတ် ၁၃ တွင်၊ ရန်ကုန်မြို့တော် တရားမရုံးက စီရင် ချက်ချမှတ်ခဲ့သည်။ ဤကဲ့သို့လိုက်နာရန်ရှိသည်တို့ကို မလိုက်နာဘဲ ပျက်ကွက်ခဲ့ သဖြင့် မိမိရထိုက်သည်ကို မရလိုက်ဘဲ နစ်နာဆုံးရှုံးသောကြောင့်၊ တာဝန်ရှိသူ စာရေးချုပ်အပေါ်တွင်၊ ရန်ကုန်မြို့တော်တရားမရုံး အက်ဥပဒေပုဒ်မ ၃၅ အရ၊ အရေးယူပါရန် လျောက်ထားသူက ထိုရုံးတွင် လျောက်ထား လေသည်။ အဆိုပါအက်ဥပဒေပုဒ်မ ၃၅ အရမှာ စာရေး၊ဘီလစ်နှင့် အခြားလက်အောက်ခံ အုပ်ချုပ်ရေးဆိုင်ရာ ပုဂ္ဂိုလ်တဦးဦး၏ ပေါ့လျော့မှု၊ပျက်ကွက်မှု စသည်တို့ကြောင့် တဦးဦးသောသူမှာ နစ်နာဆုံးရှုံးခဲ့လျှင် ထိုသို့အပြစ်ရှိသူက ထိုနစ်နာဆုံးရှုံးခြင်း အတွက် လျော်စေရမည်ဟု တရားသူကြီးချုပ်က အမိန့်ချမှတ်ရမည်ဖြစ်သည်။

၁၉၅၇

မည်မ်းစံ ပါ ၄ နှင့် ရန်ကုန်မြို့၊ တရားမရုံး တရားသူကြီး ချုပ် ပါ ၁၀၊

ယခုအမှုတွင် တရားသူကြီးချုပ်သည်၊ လျောက်ထားသူ၏ လျောက်လွှာနှင့် စာရေးချုပ်၏ အစီရင် ခံစာကို ဘတ်ရှ ပြီးလျှင် ၁၉၅၃ ခု၊ ဇူလိုင်လ ၂၇ ရက် နေ့က လျောက်လွှာကို ပယ်လိုက်လေသည်။ ဤသို့ပယ်လိုက်သည့် အမိန့်အတွက် ဤရုံးတော်သို့လျောက်ထားရန်မှတပါး၊ အခြားသောသက်သာခွင့် ရနိုင်ရန် နည်းလမ်းလုံးဝ မရှိကြောင်း။ တရားရုံးတွင်လည်း တရားစွဲဆိုနိုင်ခွင့် မရှိကြောင်းဖြင့် လျောက်ထားသူ၏ ပညာရှိရွှေနေကြီးက လျောက်လဲလေသည်။ ဤကဲ့သို့ နစ်နာသည့် ကိစ္စအတွက် တရားရုံးတွင် တရားစွဲဆိုနိုင်ခွင့်မရှိသည်မှာ ထင်ရှားသည်။ (***Rangoon & Co.* v. *Maung Waik*, 6 Ran. 263**) ကိုကြည့်ပါ။

ဤကိစ္စမှာ တရားစီရင်ရေးကိစ္စမဟုတ်သဖြင့် ဤရုံးတော်က အမှုခေါ်စာချုပ် တော်အမိန့်ထုတ်ပြန်၍၊ တရားသူကြီးချုပ်၏ အမိန့်ကိုပယ်ဖျက်ရန်သင့်မည်မဟုတ် ပါဟု အစိုးရရွှေနေကြီးက လျောက်လဲသည်။ အမှန်မှာ ဤကိစ္စသည် တရားစီရင် ရေးလုပ်ငန်းမှတိုက်ရိုက်ပေါ်ထွက်လာသော ကိစ္စဖြစ်၏။ မည်သို့ပင်ဖြစ်စေ၊ ပြည် ထောင်စုတရားစီရင်ရေးအက်ဥပဒေပုဒ်မ ၄ အရ၊ ဤရုံးတော်သည် ပြည်ထောင် စုနိုင်ငံအတွင်းရှိ တရားရုံးအားလုံးကို ကြီးကြပ်ကြည့်ရှုနိုင်ခွင့် အာဏာရှိသည့် တရားရုံးဖြစ်သည့်အတိုင်း လက်အောက်ခံတရားရုံးတခုခုက မိမိတို့အပ်နှင်းထား သည့်အာဏာကို၊ သို့မဟုတ် တာဝန်ဝတ်တရားတခုခုကို သုံးစွဲဆောင်ရွက်ရန် ပျက်ကွက်လျှင် အမှန်တရားသို့ရောက်အောင် ဝင်ရောက်စွက်ဖက်ရန် ဤရုံးတော် ၌ တာဝန်နှင့်အာဏာရှိလေသည်။ ဤကိစ္စတွင် လျောက်ထားသူက စွပ်စွဲထား သည့်အချက်များမှာ မှန်သည် မမှန်သည် စာရေးချုပ်အပေါ်တွင် ပေါ်လျော့မှု၊ ပျက်ကွက်မှုစသည်တို့ ရှိသည်မရှိသည် အကယ်၍ရှိခဲ့သျှင် လျောက်ထားသူ၌ မည်ရွေမည်မျှ နစ်နာဆုံးရှုံးသည်စသော အချက်များကို နှစ်ဦးနှစ်ဘက်ဆိုင်ရာတို့ အား ကြားနာစစ်ဆေးစုံစမ်းရန် တရားသူကြီးချုပ်၌ တာဝန် ဝတ်တရားအထင် အရှားရှိလေသည်။

ထို့ကြောင့်၊ ရန်ကုန်မြို့တော်တရားမရုံး တရားသူကြီးချုပ်၏ ၁၉၅၃ ခု၊ ဇူလိုင်လ ၂၇ ရက် နေ့စွဲနှင့်ချမှတ်သော အမိန့်ကို ပယ်ဖျက်လိုက်သည်။ တရား သူကြီးချုပ်က ရန်ကုန်မြို့တော်တရားမရုံးအက်ဥပဒေပုဒ်မ ၃၅ အရ၊စုံစမ်းစစ်ဆေး ရန် အမိန့်ချမှတ်လိုက်သည်။

ဤရုံးတော်တွင် ကုန်ကျသည့်စရိတ်နှင့်ပတ်သက်၍ မည်သို့မျှ အမိန့်ချမှတ် ခြင်းမရှိပါ။

တရားလွှတ်တော်ချုပ်

မောင်တင်အေး (လျှောက်ထားသူ)

နှင့်

ခရိုင်ဝန်၊ ပခုက္ကူမြို့ပါ ၁ (လျှောက်ထားခံရသူများ)*

† ၁၉၅၆
ဇူလိုင်လ ၃၀၊

မတရားအသင်းဥပဒေပုဒ်မ ၁၇ (၁) နှင့် ၁၉၅၀ ခုနှစ်၊ အရေးပေါ်စီမံမှု အက်ဥပဒေပုဒ်မ ၃ များအရ၊ လျှောက်ထားသူကို ရာဇဝတ်တရားသူကြီးက တရားသေလွှတ်လိုက်ခြင်း၊ ရုံးအတွင်းမှာပင် ပြန်ဖမ်းခံရ၍ ခရိုင်ဝန်က ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေး (ထိန်းသိမ်းစောင့်ရှောက်မှု) အက်ဥပဒေပုဒ်မ ၅ (က) (၁) (ခ) နှင့် ချုပ်နှောင်ထားခြင်း၊ ။ရှေတော်သွင်း စာချွန်တော် လျှောက်လွှာ၊ ။ရာဇဝတ်မှု များနှင့် ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေးကို ထိန်းသိမ်းစောင့်ရှောက်ရန် ချုပ်နှောင်ခြင်းတို့ ကွာခြားခြင်း၊

ဆုံးဖြတ်ချက်၊ ။၁၉၄၇ ခုနှစ်၊ ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေး(ထိန်းသိမ်းစောင့်ရှောက်မှု) အက်ဥပဒေပုဒ်မ ၅ (က) (၁) (ခ) ၏ရည်ရွယ်ချက်မှာ ပြည်သူ့ ငြိမ်ဝပ်ပိပြားရေးကို ထိန်းသိမ်း စောင့်ရှောက် ကာကွယ်သော အနေဖြင့် ချုပ်နှောင်ထားရန်သာ ဖြစ်သည်။ မသန်းဆင့်နှင့် ရန်ကုန်မြို့၊ ရဲမင်းကြီး ပါ ၂ ၊ (1949), B.L.R. at p. 3 သဘောတူလက်ခံသည်။

ထိုသို့ ချုပ်နှောင် ထားရန် သင့်မသင့် ဆုံးဖြတ်ရာ၌ ထည့်သွင်း စဉ်းစားနိုင်သော အကြောင်း အချက်များနှင့် ပြစ်မှုတခုခုအတွက် အပြစ်ရှိမရှိ ဆုံးဖြတ်နိုင်ရန် ထည့်သွင်း စဉ်းစားရမည့်အကြောင်းအချက်များသည် အလွန်ကွာခြားသည်၊

လူတဦးတယောက်ကို သာမန်ရာဇဝတ်ကြောင်း ဥပဒေအရ၊ တရားစွဲရာ အပြစ်ကျစေလောက်အောင် သက်သေခံမလုံလောက်၍ မအောင်မြင်သော်လည်း ထိုသူကို ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေးအတွက် ချုပ်ထားရန် လိုသေးသည်ဟု အကြောင်းသင့်စွာ ကျေနပ်လျှင် အစိုးရသည် ထိုသူကိုချုပ်၍ထားနိုင်သေးကြောင်း။ ***Gajanan Krishna Yalyi and others v. Emperor***, A.I.R. (1945) Bom. 533 at p. 536 သဘောတူသည်၊

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* ၁၉၅၆ ခုနှစ်၊ ရာဇဝတ်အသေးအဖွဲလျှောက်လွှာအမှတ် ၇၂၊

† နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးသိမ်းမောင်၊ နိုင်ငံတော်တရားဝန်ကြီး ဦးမြင့်သိမ်း၊ နိုင်ငံတော် တရားဝန်ကြီး ဦးချန်ထွန်း ရှေ့မှောက်တွင် နိုင်ငံတော် တရားဝန်ကြီးချုပ် ဦးသိမ်းမောင် အမိန့်ချမှတ်သည်၊

၁၉၅၆

မောင်တင်အေး
နှင့်
ခရိုင်ဝန်၊
ပခုက္ကူမြို့ပါ၁၊

သာမန်ရာဇဝတ်ကြောင်း ဥပဒေများနှင့် ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေးအတွက် ချုပ်နှောင်ထားရေးဆိုင်ရာ အက်ဥပဒေများသည် တဦးကိုတဦး ပြည့်စွက်ခြင်းသာဖြစ်ကြောင်း၊ သို့ဖြစ်၍ သာမန်ရာဇဝတ်မှုတွင် တရားသေလွတ်ခဲ့သော်လည်း ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေးကို ကာကွယ်ထိန်းသိမ်းရန် ချုပ်နှောင်ထားနိုင်ဦးမည်သာဖြစ်ကြောင်း၊ *Raman Lal Rathi* v. *Commissioner of Police, Calcutta and others*, A.I.R. (1952) Cal. 26 ; *Dayaram* v. *The State*, A.I.R. (1955) M.B. 65 သဘောတူသည်၊

ရာဇဝတ်မှုတခုခုတွင် တရားသေလွတ်ခဲ့ရုံမျှနှင့် ထိုလွတ်သူ၏ အပေါ်တွင် ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေးအတွက် ချုပ်နှောင်မထားနိုင်ဟုမဆိုနိုင်ကြောင်း၊

လျှောက်ထားသူအတွက်၊ လျှောက်ထားသူ ကိုယ်တိုင် ထောင်တွင်းမှလျှောက်ထားသည်။

လျှောက်ထားခံသူ အမှတ် ၁ နှင့် ၂ အတွက်၊ အစိုးရရှေ့နေကြီးဦးဘစိန်လိုက်ပါဆောင်ရွက်သည်။

ဦးသိန်းမောင်။ ။အမှတ် ၃၊ ချင်းသေနတ်ကိုင် တပ်ရင်းမှ ကက် (ပ) တိန် သိုင်းထီးရိုးခေါင်းဆောင်သော စစ်သား ၃၀ ခန့်နှင့် ရဲကြပ်ကြီးဦးသိန်းဖေ၊ ရဲအမှုထမ်းဦးဘအုံးအစရှိသော ရဲသားအချို့တို့ ပူးပေါင်းပြီး တိုက်ကင်းလှည့်ကြရာ၊ ဘိစပ်ရွာအနီးတွင် မြေဖြူကျင်းရွာသားလျှောက်သူ မောင်တင်အေးကိုတွေ့ရှိစစ်မေးဆီးခဲ့ကြလေသည်။ ထို့နောက် ထိုတပ်၏တပ်ရင်းမှူးက မောင်တင်အေးကို သောင်းကျန်းသူ အလံနီခေါင်းဆောင်ဆိုပြီး လိုအပ်သလို အရေးယူဆောင်ရွက်ရန် ရဲဌာနာအုပ်ထံသို့ လွှဲအပ် လိုက်လေသည်။ ထိုအခါ ရဲဌာနအုပ်က မောင်တင်အေး၏အပေါ်တွင် အလံနီခေါင်းဆောင်အဖြစ်နှင့်၎င်း၊ ပြည်ထောင်စုမြန်မာနိုင်ငံတော် ငြိမ်ဝပ်ပိပြားရေးကို ထိန်းသိမ်းစောင့်ရှောက်နေသည့် နိုင်ငံတော်အစိုးရ လက်နက်ကိုင်များ၏ ဆောင်ရွက်မှုအောင်မြင်ရေးကို နှောင့်နှေးနှောက်ပြားစေသောအားဖြင့်၎င်း၊ မတရားအသင်း ဥပဒေပုဒ်မ ၁၇ (၁) အရ၎င်း၊ ၁၉၅၀ ခုနှစ်၊ အရေးပေါ်စီမံမှု အက်ဥပဒေပုဒ်မ ၃ အရ၎င်း ကာရောစွဲဆိုခဲ့လေသည်။ ပခုက္ကူမြို့၊ ၃ ရာဘက်ရာဇဝတ် တရားသူကြီးကလည်း မောင်တင်အေးကို ၁၉၅၅ ခုနှစ်၊ ရာဇဝတ်ကြီးမှုအမှတ် ၄၀ ထွင် စစ်ဆေးပြီး အလံနီမတရားအသင်းကို ကူညီသည့်အတွက် မတရားအသင်းဥပဒေပုဒ်မ ၁၇ (၁) အရ၊ ပဋမဖွဲ့ချက်တင်ခဲ့သည်။ ထို့နောက်ထိုပညာရှိရာဘက်ရာဇဝတ်တရားသူကြီးသည် မောင်တင်အေး၏ သက်သေများကို စစ်ဆေးပြီးနောက် မောင်တင်အေးကို တရားသေလွှတ်လိုက်လေသည်။

၁၉၅၇
မောင်တင်အေး
နှင့်
ခရိုင်ဝန်၊
ပခုက္ကူမြို့ပါ ၁၊

သို့လျှင်လိုက်သောအခါ ရဲဘက်က မောင်တင်အေးကို ထိုရုံးအတွင်းမှာပင် ပြန်၍ဖမ်းဆီးခဲ့လေသည်။ ထို့နောက် ၁၀ ရက်ခန့်အကြာတွင် သက်သေအသစ် ၆ ယောက်တို့၏ ထွက်ချက်များကို လျှောက်ထားခံရသူအမှတ် ၁ ခရိုင်ဝန်မင်းထံတင်ပြ၍ မောင်တင်အေးအား ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေး (ထိန်းသိမ်းစောင့်ရှောက်မှု) အက်ဥပဒေပုဒ်မ ၅ (က) (၁) (ခ) အရ၊ ချုပ်ထားရန် အစီရင်ခံခဲ့လေသည်။

ထိုအခါ ခရိုင်ဝန်မင်းက ပဌမမောင်တင်အေးအား၊ ထိုဥပဒေပုဒ်မ ၅ (၂) အရ ချုပ်နှောင်ထားရန် အမိန့်ချမှတ်ပြီး၊ နောက်ဆုံးတွင် မောင်တင်အေးအား ထိုဥပဒေပုဒ်မ ၅ (က) (၁) (ခ) အရ၊ နောက်ထပ်အမိန့်ချမှတ်ခြင်းမပြုမီအတွင်း ချုပ်နှောင်ထားရန် အမိန့်ချမှတ်လိုက်လေသည်။

ထိုအမိန့်တွင် ခရိုင်ဝန်မင်းက အောက်ပါအတိုင်း အကြောင်းပြချက်ထားသည်။

"မောင်တင်အေးသည်၊ နိုင်ငံတော်အစိုးရကို ပုန်ကန်တိုက်ခိုက်လျက်ရှိသောအလံနီအဖွဲ့ဝင်ခေါင်းဆောင်တဦးဖြစ်၍၊ အလံနီအဖွဲ့မှ ၎င်းမောင်တင်အေးအား၊ ရေစကြိုမြို့နယ်အရှေ့ဘိုင်း အုပ်ချုပ်ရေးကာဝန်ခံအဖြစ်နှင့် ရေစကြိုမြို့နယ် ကျန်းပိုင်းဒေသ တလျောက်သို့ ပြည်ထောင်စုအစိုးရ လက်နက်ကိုင်တပ်များလာရောက်က တိုက်ခိုက်ရန် တာဝန်ပေးထားသူလည်းဖြစ်သည်၊ ထို့ပြင် မောင်တင်အေးသည် အလံနီအဖွဲ့ ရံပုံငွေရရှိရေးအတွက် ကျေးရွာအသီးသီးမှ ဝေပုံကျဆက်ကျေးငွေများ ကောက်ခံရံမှုမက နယ်ရှိ ရွာသူရွာသားများနှင့် အစိုးရလက်နက်ကိုင်တပ်များအား အနှောင့်အရှက်ပေးနေသူလည်း ဖြစ်သည်ဟု ရဲဌာနမှ စစ်ဆေးသောသက်သေများက ထွက်ဆိုကြသည်၊ သို့ဖြစ်၍ မောင်တင်အေးသည်၊ ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေးကို ထိခိုက်စေအောင် လုပ်ကိုင်ဆောင်ရွက် နေသည်ဟု ကျွန်ုပ်ယုံကြည်ကျေနပ်သည်၊

မောင်တင်အေးအား တရားရုံးတော်သို့ တရားစွဲတင်ပို့ပါက၊ ရုံးတော်ရှေ့တွင် ပေါ်လွင်စွာ သက်သေထွက်ဆိုပါက ၎င်းနှင့်တကွ ၎င်း၏အဖေါ်များ၏ ရန်တုံ့ပြန်မှုကို ကြောက်ရွံ့ရခြင်း၊ ၎င်း၏လုပ်ရှားမှုကို အခြားနည်းလမ်းဖြင့် ဟန့်တားနိုင်ခြင်းမရှိပါသဖြင့် ၎င်းအား ချုပ်နှောင်ထားမှ သင့်လျော်မည်ဟု ယူဆပါ၏"

သို့ဖြစ်၍ မောင်တင်အေးက ခရိုင်ဝန်မင်း နောက်ဆုံးချမှတ်သော အမိန့်ကို ပယ်ဖျက်ရန် ဤရုံးတော်တွင် ရှေ့တော်သွင်း စာချွန်တော်အတွက် လျှောက်ထားသည်။

မသန်းဆင့်နှင့်ရန်ကုန်မြို့၊ ရဲမင်းကြီးပါ ၂ တို့၏အမှုစီရင်ထုံး (၁) တွင်—

ဤရုံးတော်က ဇော်ပြခဲ့ပြီး ဖြစ်သည့်အတိုင်း ၁၉၄၇ ခုနှစ်၊

(1) (1949) B.L.R. at p. 3.

၁၉၅၆

မောင်တင်အေး
နှင့်
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ပခုက္ကူမြို့ပါဝ၊

ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေး (ထိန်းသိမ်းစောင့်ရှောက်မှု) အက်ဥပဒေပုဒ်မ ၅ (၊က) (ဘ) (ခ) ၏ ရည်ရွယ်ချက်မှာ ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေးကို ထိန်းသိမ်းစောင့်ရှောက် ကာကွယ်သော အနေဖြင့် ချုပ်နှောင်ထားရန်သာဖြစ်သည်။

မတရားအသင်း အက်ဥပဒေပုဒ်မ ၁၇ (၁)နှင့် အရေးပေါ်စီမံမှုအက်ဥပဒေပုဒ်မ ၃ တို့အရ၊ စွဲဆိုသောရာဇဝတ်မှုမှာ သက်ဆိုင်ရာပြစ်မှုကို ကျူးလွန်ခဲ့သည့်အတွက် အပြစ်ဒဏ် ပေးရန်မျှသာဖြစ်သည်။

ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေးကို ထိန်းသိမ်းစောင့်ရှောက် ကာကွယ်ရန် ချုပ်နှောင်ခြင်းနှင့်ကျူးလွန်ခဲ့သောပြစ်မှုအတွက် အပြစ်ပေးခြင်းတို့သည် အလွန်ကွာခြားသည်။ သို့ကွာခြားသည့်အတွက် ချုပ်နှောင်ထားရန် သင့်မသင့်ဆုံးဖြတ်ရာ၌ ထည့်သွင်းစဉ်းစားနိုင်သော အကြောင်းအချက်များနှင့် ကျူးလွန်ခဲ့သည်ဆိုသော ပြစ်မှုအတွက် အပြစ်ရှိမရှိ စီရင်ဆုံးဖြတ်ရာ၌ ထည့်သွင်းစဉ်းစားရမည့် အကြောင်းအချက်များသည် အလွန်ကွာခြားသည်။

ချုပ်နှောင်ထားရန်သင့်မသင့် စုံစမ်းပုံနှင့် ပြစ်မှုတခုခုအတွက် အပြစ်ရှိမရှိ ဆုံးဖြတ်နိုင်ရန် စစ်ဆေးရပုံများသည်လည်း အလွန်ကွာခြားသည်။

Gajanan Krishna Yalyi and others v. *Emperor* အမှုစီရင်ထုံး (၁) တွင် တရားဝန်ကြီး လိုကူး (Lokur) က အောက်ပါအတိုင်းဖော်ပြခဲ့ပါသည်။

လူတဦးတယောက်ကို သာမန်ရာဇဝတ်ကြောင်း ဥပဒေအရတရားစွဲဆိုနိုင်ခွင့်နှင့် အိန္ဒိယပြည်ကို ကာကွယ်ရေး နည်းဥပဒေများအရ ချုပ်နှောင်ထားနိုင်ခွင့်တို့မှာ တခုကိုအသုံးပြုပြီးလျှင် ကျန်တခုကို မသုံးနိုင်ပြဟုဆိုခြင်းသည် မှားယွင်းကြောင်း။

ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေးကို စင်စစ်အန္တရာယ် ဖြစ်စေမည့်သူ တဦးတယောက်သည်၊ ရာဇဝတ်ပြစ်မှု တခုခုကို ကျူးလွန်လျှင် အစိုးရသည်သူ၏အပေါ်တွင် ပဌမ သာမန်ရာဇဝတ်မှုစွဲဆိုနိုင်

(1) A.I.R. (1945) Bom. 533 at p. 536.

ကြောင်း။ ထို့နောက် အကယ်၍ ထိုအမှုသည် သက်သေခံ မလုံလောက်၍ မအောင်မြင်လျှင် ထိုသူ့ကို ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေးအတွက် ချုပ်နှောင်၍ ထားရန် လိုဦးမည်သာဖြစ်ကြောင်း။

* * * *

ရာဇဝတ်ပြစ်မှုတခုခုအတွက် အပြစ်ပေးနိုင်ရန် လိုအပ်သော သက်သေချက်အဆင့်အတန်းနှင့် ပြည်သူ့ ငြိမ်ဝပ်ပိပြားရေး လုံခြုံမှုအတွက် ချုပ်နှောင်ထားလိုသည်ဟု အကြောင်းသင့်စွာ စိတ်ကျေနပ်နိုင်အောင် လိုအပ်သောသက်သေခံ အဆင့်အတန်းမှာ ကွာခြားကြောင်း။ ရာဇဝတ်မှုတခုခုအတွက် အပြစ်ပေးနိုင်ရန် ရုံးတော်သည် တရားခံမှာ အပြစ်ရှိကြောင်း စွဲစွဲမြဲမြဲယုံကြည်ရမည်ဖြစ်ကြောင်း။ အကယ်၍ အကြောင်းသင့်သော သံသယ ရှိလျှင် ထိုသံသယအတွက် အကျိုး ခံစားခွင့်ကို တရားခံအား ပေးရကြောင်း။

သို့ရာတွင် ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေးအတွက် ချုပ်နှောင်ထားဘို့ရန်မှာ၊ သို့ချုပ်နှောင်ထားရန် အမိန့်ချမှတ်သူက ချုပ်နှောင်ထားရန် လိုသည်ဟု အကြောင်းသင့်စွာ ကျေနပ်လျှင် လုံလောက်ကြောင်း။ အရေးပေါ် ခေတ်ကာလ အတွင်းမှာ ပြည်သူ့ ငြိမ်ဝပ်ပိပြားရေးသည် အစိုးရ၏ အဓိကတာဝန်ဖြစ်ကြောင်း။ သံသယအတွက် အကျိုးခံစားခွင့်ပေးရန်လည်း မရှိကြောင်း။

သို့ဖြစ်၍ ရာဇဝတ်ပြစ်မှုတွင် အပြစ်ကျစေလောက်အောင် သက်သေခံ မလုံလောက်စေကာမူ ထိုသူကို ပြည်သူ့ ငြိမ်ဝပ်ပိပြားရေးအတွက် ချုပ်ထားရန် လိုသေးသည်ဟု အကြောင်းသင့်စွာကျေနပ်လျှင် အစိုးရသည် ထိုသူကို ချုပ်နှောင်၍ထားနိုင်သေးသည်သာဖြစ်ကြောင်း။

Raman Lal Rathi v. *Commissioner of Police, Calcutta and others* အမှုစီရင်ထုံး (၁)မှာလည်း—

တရားဝန်ကြီးများသည်၊ အလားတူ အကြောင်းများကိုပြပြီး၊ သာမန် ရာဇဝတ်ကြောင်း ဥပဒေများနှင့် ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေး အတွက် ချုပ်နှောင်ထားရေးဆိုင်ရာ အက်ဥပဒေများသည်

(1) A.I.R. (1952) Cal. 26.

၁၉၅၇

မောင်တင်အေး
နှင့်
ခရိုင်ဝန်၊
မရမ်းကုန်းမြို့ပါဒ။

တဦးကိုတဦး ဖြည့်စွက်ခြင်းသာဖြစ်ကြောင်း။ သို့ဖြစ်၍ သာမန်ရာဇဝတ်မှုတွင် တရားသေ လွှတ်ခဲ့သည့် အတွက် ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေးကို ကာကွယ်ထိန်းသိမ်းရန် ချုပ်နှောင်၍ မထားနိုင်ပြီဟု မဆိုနိုင်ကြောင်း စီရင်ဆုံးဖြတ်ခဲ့ကြလေသည်။ အထက်တွင်ဖော်ပြခဲ့သော ဘုံဘောစီရင်ထုံးနှင့် ကာလကတ္တားစီရင်ထုံးကို မဒ္ဒယားဘရတ် တရားလွှတ်တော်က *Dayaram* v. *The State* အမှုစီရင်ထုံး (၁) တွင် သဘောတူလက်ခံပြီး အလားတူစီရင်ချက်ကို ချမှတ်ခဲ့လေသည်။

ဤရုံးတော်ကလည်း ရာဇဝတ်မှုတခုခုတွင် တရားသေလွှတ်ခဲ့ရုံမျှနှင့် ထိုလွှတ်သူ၏အပေါ်တွင် ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေးအတွက် ချုပ်နှောင်ထားရန် အမိန့်မချမှတ်နိုင်ပြီဟု မဆိုနိုင်ကြောင်း သဘောတူသည်။

သို့သဘောတူသည့်အတိုင်း၊ ခရိုင်ဝန်မင်း၏ရှေ့တွင် မောင်တင်အေးအား ချုပ်နှောင်ထားရန် အမိန့်ချမှတ်ဘို့ စိတ်ကျေနပ်စေလောက်သော အကြောင်းအထောက်အထားများ ရှိမရှိစစ်ဆေးကြည့်ရှုရာ အောက်ပါအတိုင်း တွေ့မြင်ရသည်။

မောင်တင်အေးအား တရားသေလွှတ်လိုက်သော မရမ်းကုန်းမြို့၊ ရာဘက်ရာဇဝတ်တရားသူကြီး၏ စီရင်ချက်မှာပင်လျှင် အောက်ပါအတိုင်းပါရှိသည်။

" ငါးပြင် မောင်သိန်းဖေ (လိုပြ ၁) က၊ တရားခံအား မူလကပင် သိကြောင်း၊ ငါးမှာ အလံနီအသင်းဝင်တယောက်ဖြစ်ကြောင်း ထွက်ဆိုလေသည်၊ ငါး၏ ထွက်ချက်ကို မောင်ဘအုန်း (လိုပြ ၃) က လူဆိုးစာရင်းတွင် တရားခံသည် အလံနီထဲဝင်ပြီး တောခိုသွားကြောင်း ထွက်ဆိုထောက်ခံသွားလေသည်။

သက်သေ မောင်လှမောင် (လိုပြ ၄) မှာ ညောင်တောသူကြီးဖြစ်၍ တရားခံအား သောင်းကျန်းသူတယောက်ဟုတ်မဟုတ် မသိကြောင်း ထွက်ဆိုလေသည်၊

သောင်းကျန်းသူတယောက်အား ရုံးတင်၍ တရားခံအဖြစ်ဖြင့် ရုံးတွင်စစ်ဆေးသည့်အခါ၊ အစိုးရအမှုထမ်းမဟုတ်သော အုပ်ချုပ်ရေးလက်လွှမ်းမမှီရာတွင် နေကြရသော တရားလိုပြသက်သေတို့မှာ သက်သေခံရန် ရှောင်နေခြင်းဖြင့်၎င်း၊ မတတ်သာ၍ သက်သေခံရပါမူ အမှန်ကိုမထွက်ဝံ့ခြင်းဖြင့်၎င်း၊ သောင်းကျန်းသူတို့၏နောက်ရန်ကို ရှောင်၍ထွက်ကြရသဖြင့် ထိုသူကြီးဘူးကွယ်သည်မှာ ထူးဆန်းသည်ဟုမဆိုသာပြီ၊

သို့သော် အထက်ကရှင်းပြခဲ့သော သက်သေ ထွက်ချက်တို့အရ၊ တရားခံမှာ မတရားအသင်းအဖြစ် နိုင်ငံတော် အစိုးရက ကျေညာပြီးဖြစ်သော အလံနီကို ကူညီလောလူ

(1) A.I.R. (1955) M.B. 65.

တယောက်ဟုယူဆ၍၊ ၎င်းအား မတရားအသင်း (ပြင်ဆင်ချက်) ဥပဒေပုဒ်မ ၁၇ (၁) (၁၉၅၄ ခုနှစ်၊ အက်အမှတ် ၂ ၁) အရ စွဲချက်တင်လေသည်။

၁၉၅၆

မောင်တင်အေး နှင့် ခရိုင်ဝန်၊ ပခုက္ကူမြို့ပါ ၁၊

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ကျွန်ုပ်၏ ထင်မြင်ချက်မှာ တရားခံသည် ရှေးက သောင်းကျန်းသူ အသင်းဝင် တယောက်ဖြစ်ကောင်းဖြစ်ပါလိမ့်မည်၊ သို့သော် ယခုကား၎င်းတို့နှင့် အဆက်အသွယ် မရှိတဲ့ ကောင်းရောင်းကောင်းဝယ်ဖြင့် အသက်မွေးမြူနေလိမ့်မည်ဟု ယူဆပါသည်၊ အဘယ် ကြောင့်ဆိုသော် ကုန်သည်ကိုကျော်သောင်း (ခံပြ ၂)၏ ထွက်ချက်အရ၊ တရားခံမှာမနှစ်က အတွင်းတွင် နှစ်ခေါက်ခန့် ရေစကြိုသို့ အရောင်းအဝယ်နှင့် လာတူးပါလျက် ရဲဘက်က မဖမ်းမဆီးဘဲထားသည်မှာ၊ ၎င်းတို့လည်း တရားခံအား အရေးမယူသင့်သောသူတယောက် ဟု မှတ်ထားဟန်တူလေသည်၊"

မောင်တင်အေးသည် မနှစ်ကရေစကြိုသို့ အရောင်းအဝယ်နှင့် နှစ်ခေါက် လာဘူးပါလျက် ရဲဘက်က မဖမ်းမဆီးဘဲထားခဲ့သည်ဆိုရာမှာ မောင်တင်အေး သည် တိုင်ရှိသို့လာရောက်ခဲ့ကြောင်း ရဲဘက်ကသိလျက်နှင့် မဖမ်းမဆီးခဲ့သယောင် ယောင်ဖြစ်ရှိနေသည်။ စင်စစ်သော်ကား ရဲဘက်ကသိကြောင်း သက်သေခံ အထောက်အထားမရှိခဲ့၊ ကိုကျော်သောင်း ကိုယ်တိုင်ကလည်း (ကျွန်တော်မှာ တရားခံသူပုန်ထဲ ဝင်သည်မဝင်သည်ကို မသိပါ) ဟုအတိအလင်း ထွက်ဆိုခဲ့ သည်။

ကိုမှတပါး ရဲဘက်က သက်သေအသစ် ၆ ယောက်တို့ကို စစ်ဆေးပြီး၊ သူတို့၏အစစ်ခံချက်များကို ခရိုင်ဝန်မင်းထံ တင်သွင်းခဲ့လေသည်။ ထိုသက်သေ များသည် မောင်တင်အေး၏ ဇာတိဖြစ်သော မြေပြုကျင်းရွာနှင့် မောင်တင်အေး ကိုဖမ်းမိသော ဘိစပ်ကုန်းရွာမှဖြစ်ကြသည်။ သူတို့အားလုံးက မောင်တင်အေး သည်၊ အလံနီခေါင်းဆောင်ဖြစ်ကြောင်း၊ ရေစကြိုမြို့နယ်အရှေ့ပိုင်း အုပ်ချုပ်ရေး တာဝန်ခံဖြစ်ကြောင်း၊ အမှုများကိုစစ်ဆေးပြီး အပြစ်ပေးနေသူ ဖြစ်ကြောင်း၊ အလံနီပါတီအတွက်ဆက်ကြေးများကို သူ့အားပေးအပ်ကြရကြောင်း၊ သူ့အား လွှတ်လပ်စွာထားပါက ပြည်သူလူထု၏ ငြိမ်ဝပ်ပိပြားရေးကို ထိခိုက်ပျက်ပြား မည်အမှန်ဖြစ်ကြောင်း၊ သူ၏နောက်လိုက်များကို ကြောက်ရသောကြောင့် တရား ရုံးတော်များတွင် သက်သေမခံဝံ့ကြောင်း တသံတည်းထွက်ဆိုခဲ့ကြသည်။

ချင်းတပ်မတော်နှင့် ရဲအဖွဲ့ပူးပေါင်း၍ တိုက်ကင်း လှည့်ရာတွင် မောင် တင်အေး အား မိခဲ့ပုံ၊ ထိုတပ်မတော်မိုလ်မှူးက မောင်တင်အေးအား ရဲဌာနသို့ လွှဲအပ်ခဲ့ပုံ၊ ရဲဌာနက မောင်တင်အေး၏ အပေါ်တွင် တရားစွဲဆိုခဲ့ပုံ၊ ထိုစွဲဆိုခဲ့ သောအမှုတွင် သက်သေဦးသိန်းဖေနှင့် ဦးဘအုံးတို့၏ ထွက်ခဲ့ပုံများနှင့် နှောက်

၁၉၅၆

မောင်တင်အေး
နှင့်
ခရိုင်ဝန်၊
ပခုက္ကူမြို့ပါ ၁၊

ထပ်စစ်ဆေးသောသက်သေ ၆ ယောက်တို့၏ ထွက်ခဲ့ပုံများကိုထောက်ဆသော်၊ ခရိုင်ဝန်မင်းမှာ မောင်တင်အေးကို ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေးအတွက် ချုပ်နှောင်ထားမှဖြစ်မည်ဟု စိတ်ကျေနပ်လောက်အောင် သက်သေအထောက်အထားများရှိသည်ဟုဆိုရချေမည်။

သက်သေအသစ် ၆ ယောက်တို့က မည်သည့်အတွက် မိမိတို့သည်ငင်း၊ အခြားသူများသည်ငင်း တရားရုံးများတွင် မောင်တင်အေး အပေါ်၌ အပြစ်ကျူးအောင် သက်သေမခံဝံ့ကြောင်း အကြောင်းပြချက်ကို ပခုက္ကူမြို့၊ ရာဘာက်ရာဇဝတ်တရားသူကြီး၏ စီရင်ချက်မှ အထက်တွင် ကုတ်နုတ်ဖေါ်ပြခဲ့သော စာပိုဒ်က ထောက်ခံလျက်ရှိသည်။

သို့ဖြစ်၍ ခရိုင်ဝန်မင်းသည် အမှန်ပင် ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေး ထိန်းသိမ်းစောင့်ရှောက်ရန် မောင်တင်အေးကို ချုပ်နှောင်ထားဘို့လိုသည်ဟု အကြောင်းသင့်စွာ ကျေနပ်၍သာလျှင် အဆိုပါအမိန့်ကို ချမှတ်ခဲ့သည်ဟု ဤရုံးတော်က သဘောရသည်။ သို့သဘောရသည့်အတိုင်း မောင်တင်အေး၏ လျှောက်လွှာကို ပယ်လိုက်သည်။

တရားလွှတ်တော်ချုပ်

မိုဟာမက်ရာဟူအာမင် (လျှောက်ထားသူ)

နှင့်

ပြည်ထောင်စုမြန်မာနိုင်ငံတော်အစိုးရ၊နိုင်ငံခြားရေးရုံးအမြဲတန်း အတွင်းဝန် ပါ ၁ (လျှောက်ထားခံရသူများ)*

† ၁၉၅၆ ခြဂုတ်လ ၂၀၊

၁၉၄၇ ခုနှစ်၊ လူဝင်မှု (လတ်တလောပြင်ဆင်ချက်များ) အက်ဥပဒေပုဒ်မ ၁၃ (၁) အရ၊ ပြစ်မှုထင်ရှားစီရင်ခြင်း၊ ၎င်းဥပဒေပုဒ်မ ၇ (၁) အရ၊ မြန်မာနိုင်ငံတော်မှ ထွက်သွားစေရန်အမိန့် ပြည်ထောင်စု မြန်မာနိုင်ငံတော် ဒုစည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေပုဒ်မ ၁၁ (ခ) အရ၊ မြန်မာနိုင်ငံသားဖြစ်နေခြင်း ထိုဥပဒေပုဒ်မ ၇ (၁) နှင့် လုံးဝ သက်ဆိုင်မဆိုင်၊

လျှောက်ထားသူသည် ၁၉၅၅ ခုနှစ်က ပါကစ္စတန်နိုင်ငံကူးလက်မှတ်ဖြင့် ပြည်ဝင်ဗီဇာရရှိပြီး မြန်မာနိုင်ငံသို့ လာရောက်ခါ မြန်မာနိုင်ငံတွင် နေခွင့်ပြုထားသည့် ရက်ထက် ကျော်လွန်နေထိုင်သဖြင့် အထက်ဝေါပါပါ အက်ဥပဒေပုဒ်မ ၁၃ (၁) အရ၊ ပြစ်မှုထင်ရှားစီရင်ခြင်းခံခဲ့ရသောကြောင့် ပုဒ်မ ၇ (၁) အရ၊ လူဝင်မှုကြီးကြပ်ရေးဝန်က ၎င်းအားနိုင်ငံမှ ထွက်သွားစေရန် ချမှတ်လိုက်သည့်အမိန့်ကို ပယ်ဖျက်ပေးပါရန် အောက်ပါအတိုင်း အကြောင်းပြလျှောက်ထားလေသည်။

မိမိ၏အမိဘက်မှ အဖွါးဖြစ်သူ ဒေါ်မေသည် မြန်မာတိုင်းသားဖြစ်သည့်အပြင် မိမိမှာ မြန်မာနိုင်ငံ၌ဖြစ်၍ ပြည်ထောင်စုမြန်မာနိုင်ငံတော် ဒုစည်းအုပ်ချုပ်ပုံအခြေခံ ဥပဒေပုဒ်မ ၁၁ (ခ) အရ၊ မြန်မာနိုင်ငံသားဖြစ်နေသဖြင့် ၁၉၄၇ ခုနှစ်၊ ပြည်ဝင်မှု အက်ဥပဒေပုဒ်မ ၇ နှင့် လုံးဝအကျုံးမဝင်ကြောင်းဖြင့် လျှောက်ထားသည်။

ဆုံးဖြတ်ချက်၊ ။အကြောင်းပြချက်အတိုင်း မှန်စေကာမူ လျှောက်ထားသူသည်။ ။ (၁) ပါကစ္စတန်နိုင်ငံသားအဖြစ်ကို ၁၉၄၇ ခုနှစ်၊ ဩဂုတ် ၁ ရက်နေ့မတိုင်မီ စွန့်လွှတ်ခြင်း မရှိခဲ့သည်တကြောင်း၊

(၂) ၁၉၄၇ ခုနှစ်၊ ဩဂုတ် ၁ ရက်နေ့ရောက်ပြီးသည့်နောက် ပါကစ္စတန်နိုင်ငံအစိုးရထံမှ နိုင်ငံသားအနေဖြင့် နိုင်ငံကူးလက်မှတ်ရယူခဲ့သည်တကြောင်း။

ထို့ကြောင့် မြန်မာနိုင်ငံသားဖြစ်မှုအက်ဥပဒေပုဒ်မ ၁၄ (က) (၁) အရငင်း၊ ၁၄(က) (၃) အရငင်း မြန်မာနိုင်ငံသားအဖြစ်မှ ရပ်စဲခဲ့ပြီဟုမှတ်ယူရမည်၊

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* ၁၉၅၆ ခုနှစ်၊ တရားမအသေးအခဲ့လျှောက်လွှာအမှတ် ၂၅။

† နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးသိန်းမောင်၊ နိုင်ငံတော်တရားဝန် ဦးမြင့်သိန်း၊ နိုင်ငံတော်တရားဝန်ကြီး ဦးချန်ထွန်းတို့၏ရှေ့မှောက်တွင် တရားဝန်ကြီး ဦးချန်ထွန်းအမိန့် ချမှတ်သည်။

၁၉၅၆

မိုဟာမက်ရာဟူ အာမင် နှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံ တော်အစိုးရ၊ နိုင်ငံခြားရေးရုံး အမြဲတန်း အတွင်းဝန်ပါ ၁။

လျှောက်ထားသူအတွက်၊ လွှတ်တော်ရှေ့နေကြီး မစ္စတာ ဗြီ၊ စံစီပိုး လိုက်ပါဆောင်ရွက်၍။

လျှောက်ထားခံရသူများအတွက်၊ အစိုးရ ရှေ့နေကြီး ဦးဘစိန် လိုက်ပါဆောင်ရွက်သည်။

ဦးချန်ထွန်း။ ။ဤလျှောက်လွှာမှာ ၁၉၄၇ ခုနှစ်၊ လူဝင်မှု (လတ်တလော ပြင်ဆင်ချက်များ) အက်ဥပဒေပုဒ်မ ၇ အရ၊ လူဝင်မှုကြီးကြပ်ရေးဝန်ကပိမိအား မြန်မာနိုင်ငံမှ ထွက်သွားစေရန် ချမှတ်သည့်အမိန့်ကို ပယ်ဖျက်ပေးပါရန် လျှောက်ထားသူက တောင်းဆိုသော လျှောက်လွှာဖြစ်သည်။

လျှောက်ထားသူသည် ၁၉၅၅ ခုနှစ်က ပါကစ္စတန် နိုင်ငံကူးလက်မှတ်ဖြင့် မြန်မာနိုင်ငံတွင် သုံးလနေခွင့်ရှိသည့် ပြည်ဝင်ဗီဇာရရှိပြီး မြန်မာနိုင်ငံသို့ လာရောက်ခဲ့ပေသည်။ ၁၉၅၆ ခုနှစ်က ရာဇဝတ်မှုကြီးအမှတ် ၁၂၀ တွင် တတိယ ရာဇာက်တရားသူကြီးရုံးတော်၌ အထက်ဇေါ်ပြပါ အက်ဥပဒေပုဒ်မ ၁၃ (၁) အရ၊ လျှောက်ထားသူအား မြန်မာနိုင်ငံတွင် နေခွင့်ပြုထားသည့် ၁၉၅၅ ခုနှစ်၊ ဒီဇင်ဘာလ ၃၁ ရက်နေ့ထက် ကျော်လွန်နေထိုင်သဖြင့်တရားစွဲဆိုရာတွင် လျှောက်ထားသူကတရားခံအဖြစ်ဖြင့် မိမိတွင်အပြစ်ရှိကြောင်းဝန်ခံသည့်အတိုင်း ၁၉၅၆ ခုနှစ်၊ ဇန်နဝါရီလ ၂၄ ရက်နေ့က ပြစ်မှုထင်ရှားစီရင်ခြင်းခံခဲ့ရလေသည်။ ထို့နောက်အထက်ဇေါ်ပြပါ အက်ဥပဒေပုဒ်မ ၇ (၁) အရ၊ လူဝင်မှုကြီးကြပ်ရေးဝန်က ၎င်းအား မြန်မာနိုင်ငံမှ ထွက်သွားစေရန် အမိန့်ကို ချမှတ်ခဲ့လေသည်။

လျှောက်ထားသူက မိမိ၏အမိဘက်မှ အဖွါးဖြစ်သူ ဒေါ်မေသည် မြန်မာတိုင်းရင်းသားဖြစ်သည့်အပြင် မိမိမှာမြန်မာနိုင်ငံတွင် ဖွါးမြင်သူဖြစ်သဖြင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်လွှတ်တော်စည်းအုပ်ချုပ်ပုံအခြေခံ ဥပဒေပုဒ်မ ၁၁ (ခ) အရ၊ မိမိသည် မြန်မာနိုင်ငံသားဖြစ်သောကြောင့်၊ အထက်ဇေါ်ပြပါ ၁၉၄၇ ခုနှစ်၊ ပြည်ဝင်မှုအက်ဥပဒေပုဒ်မ ၇ ပါ ပြဋ္ဌာန်းချက်များသည် မိမိနှင့်လုံးဝမသက်ဆိုင်ပါ။ ထို့ကြောင့်မိမိအား မြန်မာနိုင်ငံမှ ထွက်သွားစေရန်ထုတ်ပြန်သည့်အမိန့်သည် တရားဥပဒေနှင့်ဆန့်ကျင်သော အမိန့်ဖြစ်သည်ဟု လျှောက်ထားလေသည်။

အကယ်၍ ၎င်း၏ထုတ်ဆိုသည့်အတိုင်း သူ၏အဖွါးဒေါ်မေသည် တိုင်းရင်းသားဖြစ်သောကြောင့် ၎င်းသည်လည်း နိုင်ငံသားဖြစ်ခဲ့သည် မှန်စေဦးတော့ မြန်မာနိုင်ငံသားဖြစ်မှုအက်ဥပဒေပုဒ်မ ၁၄ (က) (၁) အရငင်း၊ ၁၄ (က) (၃) အရငင်း မြန်မာနိုင်ငံသားအဖြစ်မှ ရပ်စဲခဲ့ပြီးဟုမှတ်ယူရမည်ဖြစ်သည်။ လျှောက်ထားသူသည် ပါကစ္စတန်နိုင်ငံသားအဖြစ်ကို ၁၉၅၅ ခုနှစ်၊ ဧပြီလ ၁ ရက်နေ့

မတိုင်မီ စွန့်လွှတ်ခြင်းမရှိခဲ့သည်တကြောင်း၊ ၁၉၅၅ ခုနှစ်၊ ဧပြီလ ၁ ရက်နေ့ ရောက်ပြီးသည့်နောက် ပါကစ္စတန်နိုင်ငံအစိုးရထံမှ ထိုနိုင်ငံသားအနေဖြင့် နိုင်ငံကူးလက်မှတ်ရယူခဲ့သည်တကြောင်းတို့ကြောင့် အဆိုပါပုဒ်မ ၁၄ (က) (၁)နှင့် (၃)တို့ပါ ပြဋ္ဌာန်းချက်များအရ လျှောက်ထားသူသည် ပြည်ထောင်စုမြန်မာနိုင်ငံသားအဖြစ်မှ ရပ်စဲခဲ့ပြီးဟု မှတ်ယူရမည်သာဖြစ်သည်။

ထို့ကြောင့် လျှောက်ထားသူ၏လျှောက်လွှာကို ပယ်လိုက်သည်။

SUPREME COURT.

†S.C. 1956

Mar. 29.

U HLA KYI AND ONE (APPLICANTS)

v.

COMMISSIONER, IRRAWADDY DIVISION AND FOUR OTHERS (RESPONDENTS).*

Certiorari—Writ of—Rule 8 (b) *and Rule 29* (2) *and Rules 55 and 57, Municipal Electoral Rules—Candidate's eligibility and qualifications to Municipal Committees—Qualification at the time of nomination—Ss. 10 and 72 Co-operative Societies Act (Act XV of 1956).*

The two applicants are the Secretary and the Treasurer of a Co-operative Society, which runs a ferry service under contract with the Municipal Committee.

They stood for election to the Municipal Committee, and they were declared ineligible because of Rule 8 of the Municipal Electoral Rules.

On an application for directions in the nature of Certiorari, it was contended, that a Society created under the Co-operative Societies Act (XV of 1956) does not come within the terms, "person, firm, or incorporated or registered Company" of Rule 8 of the Municipal Electoral Rules.

Held: While a Co-operative Society may not fall within the terms "firm" and "incorporated Company" it would be a "registered Company" as one registered under s. 10 of the Co-operative Societies Act.

Held further: The word "person" is defined in the General Clauses Act to include "any Company or association or body of individuals whether incorporated or not" and it is comprehensive enough to include a Co-operative Society.

San Myint for the applicants.

Hla Maung (Government Advocate) and *N. C. Sen* for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—The applicant U Hla Kyi in Civil Miscellaneous No. 84 and the applicant U Ah Shwe in No. 85 were declared

* Civil Misc. Applications Nos. 84 and 85 of 1956.

† *Present:* MR. JUSTICE MYINT THEIN, MR. JUSTICE BO GYI and MR. JUSTICE CHAN HTOON.

ineligible for election to the Bassein Municipal Committee by the Commissioner, Irrawaddy Division, in view of Rule 8 of the Municipal Electoral Rules, the relevant portion of which reads :

"8. No person shall be qualified as a candidate for election—

(*b*) except with the written permission of the Commissioner, if he takes an active part in the business of any person, firm or incorporated or registered company who or which is either directly or indirectly interested in any contract made with the Committee."

The applicants are the Secretary and Treasurer respectively of a Co-operative Society which operates a ferry service in Bassein under a contract with the Committee. They had in fact obtained permission from the Commissioner to seek election but such permission was obtained subsequent to their nomination. Under Rule 29 (2) a candidate's eligibility is to be adjudged on his qualifications as they stood at the time of the nomination.

U Hla Kyi's candidature was objected to at the time of scrutiny of nominations and the Electoral Authority sustained the objections. An appeal to the Commissioner was unsuccessful. In regard to U Ah Shwe, objection was taken only before the Commissioner who set aside the order of the Electoral Authority accepting U Ah Shwe as an eligible candidate. The Commissioner is empowered so to do under Rules 55 and 57.

The Commissioner's orders are sought to be quashed by way of directions in the nature of certiorari. It cannot be denied that the applicants are office bearers and as such they take an active part in the business of the Co-operative Society which

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U HLA KYI AND ONE v. COMMISSIONER, IRRAWADDY DIVISION AND FOUR OTHERS.

runs a ferry service under contract with the Bassein Municipal Committee. Learned Counsel has concentrated on the words in Rule 8—"person, firm, or incorporated or registered company" and has urged that a Society created under the Co-operative Societies Act (XV of 1956 which supersedes Act VI of 1927) does not come within these terms. He contends that the words "incorporated and registered company" refer to those contemplated under the Companies Act, which is inapplicable to a co-operative society in view of section 72 of the Co-operative Societies Act. He goes on to say that the society is not a "firm" not being a partnership, and that the word "person" under the Rules must refer to an individual and not to a group of persons.

It is an accepted rule of interpretation that words in statutes must be given their ordinary meaning, and reading Rule 8 as a whole, it is clear that any individual interested in a contract with a Municipal Committee, or if he is an active member of a group similarly interested, would have to seek permission from the Commissioner, who presumably would have to consider whether such an applicant's inclusion in a Municipal Committee would be against public interest. While a co-operative society may not fall within the terms "firm" and "incorporated company" in our judgment, it would be a "registered company" as one registered under section 10 of the Co-operative Societies Act itself. Further, the word "person" is defined in the General Clauses Act to include "any company or association or body of individuals whether incorporated or not", and thus it is comprehensive as to include a co-operative society.

For these reasons both the applications must be dismissed with costs, Advocates fees in each case to be K 51. The orders dated the 3rd December 1956

staying further action in the election proceedings are withdrawn. We note that in Civil Miscellaneous No. 85, the 4th respondent U Mya Bu, had already been declared elected as the sole eligible candidate prior to the filing of the application before us. We accept learned Counsel's statement that this fact was not known to the applicant at the time the application was filed.

တရားလွှတ်တော်ချုပ်

ဦးဝင်းဖေ (လျှောက်ထားသူ)

နှင့်

† ၁၉၅၆ နိုဝင်ဘာလ ၁၉။

ပြည်ထောင်စု မြန်မာနိုင်ငံတော် ပြည်ထဲရေး ဝန်ကြီးဌာန အတွင်းဝန် (လျှောက်ထားခံရသူ) *

၁၉၄၇ ခုနှစ်၊ ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေး (ထိန်းသိမ်းစောင့်ရှောက်မှု) အက်ဥပဒေပုဒ်မ ၅ (က)(၁)(ဃ)(ငဲ)(စ) နှင့် ပုဒ်မ ၅ (က) (၂)အရ၊ နယ်မြေငြင်းအမိန့်၊ ရှေတော်သွင်း စာချွန်တော်။ ။ပြည်ထောင်စုမြန်မာနိုင်ငံတော် ဇွဲစည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေပုဒ်မ ၁၆ နှင့် ပုဒ်မ ၁၇ (ဃ)။

ဆုံးဖြတ်ချက်။ ။၁၉၄၇ ခုနှစ်၊ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေး(ထိန်းသိမ်းစောင့်ရှောက်မှု) အက်ဥပဒေပုဒ်မ ၅-က (၁)နှင့်(၂) တို့အရ၊ ချမှတ်သောအမိန့်များကိုပယ်ဖျက်ရန် ရှေတော်သွင်း စာချွန်တော်အတွက် လျှောက်ထားသောအခါ ဤရုံးတော်သည် အမိန့်ချမှတ်သော အာဏာပိုင်၏ရှေ့တွင် ထိုအမိန့်ကိုချမှတ်ရန်အကြောင်း အထောက်အထားများ ရှိ မရှိကိုသာ ကြည့်ရှုမြဲဖြစ်သည်။ အကြောင်းအထောက်အထားများရှိလျှင် ၎င်းတို့ကိုယုံကြည်အားကိုးရှိ အမိန့်ချမှတ်ရန် ထိုက် မထိုက်ကို ဤရုံးတော်ကစဉ်းစားရိုးမရှိသေး။

ဤအမိန့်သည် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေပုဒ်မ ၁၆-၁၇ (ဃ) အရ၊ ကာကွယ်ထားသော လွတ်လပ်မှုနှင့် ပြည်ထောင်စုနိုင်ငံအတွင်း မည်သည့် နေရာ၌မဆို နေထိုင်အခြေစိုက်ခွင့်မှလွဲ အခွင့်အရေးများကို ထိခိုက်သဖြင့် အဆိုပါအမိန့်ကို ရှေတော်သွင်း စာချွန်တော်ဖြင့် ပယ်ဖျက်နိုင်သည်။

လျှောက်ထားသူအတွက်၊ လွှတ်တော်ရှေနေကြီး ဦးကျော်မြင့် လိုက်ပါ ဆောင်ရွက်၍။

လျှောက်ထားခံရသူအတွက်၊ အစိုးရရှေနေကြီး ဦးဘဖေ လိုက်ပါ ဆောင်ရွက်သည်။

ဦးသိန်းမောင်။ ။ပြည်ထောင်စုမြန်မာနိုင်ငံတော်သမတက၊ ၁၉၄၇ ခုနှစ်၊ ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေး (ထိန်းသိမ်းစောင့်ရှောက်မှု) အက်ဥပဒေပုဒ်မ

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* ၁၉၅၆ ခုနှစ်၊ ရာဇဝတ်အသေးအဖဲ့လျှောက်လွှာအမှတ် ၆၇။

† နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးသိမ်းမောင်၊ တရားဝန်ကြီး ဦးဘိုကြီးနှင့် တရားဝန်ကြီး ဦးအောင်သာကျော်တို့၏ ရှေ့မှောက်တွင် နိုင်ငံတော်တရားဝန်ကြီးချုပ်ဦးသိမ်းမောင် စီရင်ချက်ချမှတ်သည်။

၅ (က) (၁) (ဃ) (ငဲ) (စ) နှင့် ပုဒ်မ ၅ (က) (၂) တို့အရ၊ဦးဝင်းဖေ၏ အပေါ်တွင် ရန်ကုန်မြို့မှ ရေနံချောင်းမြို့သို့ပြောင်းရွှေ့နေထိုင်ရမည်။ သို့နေထိုင်ရာတွင် စပါးနှင့်သစ်များခိုးထုတ် ခိုးသွင်းခြင်းမှုးနှင့် တိုက်ရိုက်သော်၎င်း၊ သွယ်ဝိုက်၍သော်၎င်း မည်သို့မျှပတ်သက်ခြင်းမရှိစေဘဲ၊ အကျင့်စာရိတ္တကောင်းမွန်စွာနှင့်နေထိုင်ရမည်။ ထို့ပြင် သောင်းကျန်းသူများနှင့် မည်သည့်နည်းနှင့်မျှ ဆက်သွယ်ခြင်းမပြုရ အစရှိသော အချက်အလက်များ ပါဝင်သည့်အမိန့်ကိုချမှတ်လိုက်လေသည်။

၁၉၅၆
ဦးဝင်းဖေ
နှင့်
ပြည်ထောင်စု
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ရေးဝန်ကြီးဌာန
အတွင်းဝန်။

ထိုအမိန့်ကိုချမှတ်စဉ်အခါက၊ ဦးဝင်းဖေသည်၊ တောင်ငူခရိုင်၊ အုတ်တွင်းမြို့တွင် နေထိုင်သူဖြစ်သော်လည်း၊ ရန်ကုန်ထောင်ကြီးတွင် အချုပ်ခံခြံနေရသောကြောင့် ထိုအမိန့်တွင်သူ့ကို ရန်ကုန်မှရေနံချောင်းမြို့သို့ပြောင်းရွှေ့နေထိုင်ရမည်ဟု အမိန့်ချမှတ်လိုက်ခြင်းဖြစ်သည်။ ထိုအမိန့်ကိုချမှတ်ပြီးသည့်နောက် နောက်တနေ့မှာမှ ဦးဝင်းဖေသည်၊ ရန်ကုန်ထောင်ကြီးမှလွတ်ရှိလာခဲ့သည်။ သို့လွတ်ရှိလာခဲ့ပြီးသည့်နောက် ငါးရက်မြောက်သောနေ့တွင် ဦးဝင်းဖေက ထိုအမိန့်ကိုပယ်ဖျက်ရန် ရှေ့တော်သွင်းစာရွက်တော်အတွက် လျှောက်ထားခဲ့သည်။

ဦးဝင်းဖေ၏ လျှောက်လွှာကိုကျမ်းကျိန်ချေပရာ၌၊ ပြည်ထဲရေးဝန်ကြီးဌာန ဒုတိယအတွင်းဝန်က အောက်ပါအတိုင်းအဓိကြောင်းပြသည်။

> လျှောက်ထားသူအား နယ်ပြောင်း၍ နေထိုင်ရန်အမိန့်ချမှတ်ခြင်းမှာ၊ ၎င်းအားစပါးနှင့်သစ်များကို မတရားသဖြင့်ဝယ်ယူရောင်းချခြင်းနှင့် ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေးကိုထိခိုက်မည်ဖြစ်သောအပြုအမူများကို တိုက်ရိုက်သော်၎င်း၊ သွယ်ဝိုက်သောနည်းလမ်းဖြင့်သော်၎င်း ပြစ်မှုကျူးလွန်ခြင်းမှ ပိတ်ပင်တားဆီးရန် လိုအပ်သည်ဟု နိုင်ငံတော်သမတက ကျေနပ်ယုံကြည်သောကြောင့် ဖြစ်ပါသည်။

ထိုအကြောင်းပြချက်ကို ထောက်ခံရန်လည်း ပြည်ထဲရေးဝန်ကြီးဌာန၊ ဟစဌာနခွဲအမှတ် ၂၃၆-ဟစ-၅၆ အမှုတွဲကို ဤရုံးတော်တွင်တင်သွင်းခဲ့လေသည်။

သို့ဖြစ်၍၊ ဤရုံးတော်က နိုင်ငံတော်သမတမှာ ဦးဝင်းဖေကို (၁) စပါးများကိုမတရားသဖြင့် ဝယ်ယူရောင်းချခြင်း၊ (၂) သစ်များကိုမတရားသဖြင့် ဝယ်ယူရောင်းချခြင်းနှင့် (၃) ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေးကို ထိခိုက်မည်ဖြစ်သော အပြုအမူများကို တိုက်ရိုက်သော်၎င်း၊ သွယ်ဝိုက်သောနည်းဖြင့်သော်၎င်း ပြစ်မှုကျူးလွန်ခြင်းမှ ပိတ်ပင်တားဆီးရန်လိုအပ်သည်ဟု ကျေနပ်ယုံကြည်စေနိုင်သော အကြောင်း အထောက်အထားများရှိ မရှိစိစစ်ရသည်။

၁၉၅၆

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အတွင်းဝန်။

သို့စီစစ်သောအခါ၊ အဆိုပါပြည်ထဲရေးဝန်ကြီးဌာန အမှုတွဲတွင်ပါရှိသော သက်သေချက်များအရ၊ နိုင်ငံတော်သမတမှာ ထိုကဲ့သို့သောအထောက်အထားများ မရှိကြောင်းကိုတွေ့မြင်ရသည်။

စပါးများကို မတရားသဖြင့် ဝယ်ယူရောင်းချခြင်းဆိုသော အချက်နှင့် စပ်လျဉ်း၍ သက်သေများ၏ထွက်ချက်မှာ ဦးဝင်းဖေသည် သူပုန်များရှိသော နယ်မှ စပါးများကိုလျှော့ဈေးနှင့်ဝယ်ယူပြီး ရောင်းကြောင်းသာပါရှိသည်။ သူပုန်များရှိသောနယ်မှ စပါးများကိုလျှော့ဈေးနှင့်ဝယ်၍ ရောင်းခြင်းသည်၊ မတရားသဖြင့် ဝယ်ယူရောင်းချခြင်းမဟုတ်ချေ။ ထိုသို့ဝယ်ယူရောင်းချခြင်း မပြုမလုပ်ရဟုတားမြစ်သော ဥပဒေတစုံတရာမရှိချေ။ ဦးဝင်းဖေသည် ဆန်စက်နှစ်လုံးနှင့်ပိုင်ရှင်ဖြစ်ရာ၊ ထိုဆန်စက်များအနီးရှိနယ်များမှာလည်း သောင်းကျန်းသူများ သွားလာဝင်ထွက်နေသော အရပ်များဖြစ်ရာ၊ ၎င်းတို့ရှိရာအရပ်မှ စပါးများကို ဦးဝင်းဖေ ဝယ်ယူခြင်းမှာ မသင့်မလျော်သော ဝယ်ယူခြင်းဖြစ်သည်ဟူ၍ပင် ဆိုနိုင်ဘို့ခဲယဉ်းချေသည်။

သစ်များကိုမတရားသဖြင့် ဝယ်ယူရောင်းချခြင်းဆိုသော အချက်နှင့်စပ်လျဉ်း၍လည်း ဦးဝင်းဖေ၏အပေါ်တွင် သက်သေထွက်ဆိုချက်များမှာ သောင်းကျန်းသူများနယ်အတွင်းဖြစ်သော ဆင်ကုန်ထိုင်ရွာအရပ်မှသစ်များကို ဦးဝင်းဖေစက်သို့ သယ်ယူပို့ပေးနေသည်ဟု ကြားရကြောင်းသာဖြစ်သည်။ သို့ရာတွင် အစိုးရသက်သေတဦး၏ ထွက်ချက်အရပင်လျှင် ဦးဝင်းဖေသည် အုတ်တွင်းမြို့အနောက်ဘက်ဆုံးကြိုးဧိုင်းတွင် သစ်လုပ်ငန်းကိုပါ လုပ်ကိုင်သူတဦးဖြစ်သည်။ သို့ဖြစ်၍ သူပုန်များရှိသောနယ်မှ သစ်များကို ဦးဝင်းဖေ၏သစ်စက်သို့ သယ်ယူပို့ပေးခြင်းသည် မတရားသဖြင့် သယ်ယူပို့ပေးခြင်းသည်ဟူ၍ပင်း၊ ထိုသစ်များကို ဦးဝင်းဖေသည် မတရားသဖြင့်ဝယ်ယူရောင်းချသည်ဟူ၍ပင်း ယူဆရန်အကြောင်းအထောက်အထားတစုံတရာမျှမရှိချေ။

ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေးကို ထိခိုက်မည်ဖြစ်သော အပြုအမူနှင့်စပ်လျဉ်း၍ ဒုတိယအတွင်းဝန်၏ ကျမ်းကျိန်ချေပချက်တွင် ရှင်းလင်းဖေါ်ပြချက် မပါရှိသော်လည်း၊ထိုကျမ်းကျိန်ချေပချက်လို အဆိုပါအမိန့်နှင့်ဆက်စပ်၍ ဘတ်ရှသော အခါ သောင်းကျန်းသူများနှင့်ဆက်သွယ်ခြင်းကို ဆိုလိုကြောင်းထင်ရှားသည်။ သောင်းကျန်းသူများနှင့် ဆက်သွယ်ခြင်းနှင့်စပ်လျဉ်း၍ သက်သေတဦးက အောက်ပါအတိုင်းထွက်ဆိုသည်။

"ကျွန်တော်ကြားသိရသမျှ ဤနယ်တဝိုက်ရှိစက်ပိုင်များမှာ သောင်းကျန်းသူများကို ထောက်ပံ့ကြေးပေးရသည်ဟုသိရပါသည်။ ၎င်းတို့ထဲတွင်

ဦးဝင်းဖေလည်းအမြဲ ထောက်ပံ့ကြေးပေးသည်ဟုကြားသည်။ ထောက်ပံ့ကြေးမပေးသောစက်များကို သောင်းကျန်းသူများက အမြဲဒုက္ခပေးပါသည်။''

၁၉၅၆ ခု ဦးဝင်းဖေနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော် ပြည်ထဲရေးဇနီးမွာန အတွင်းဝန်။

အခြားသက်သေတဦးက အောက်ပါအတိုင်းထွက်ဆိုသည်။

''အုတ်တွင်းမြို့ ဆန်စက်ပိုင်သူမှာဦးဝင်းဖေဖြစ်ပါသည်။ ၎င်းမှာ အနောက်ဘက်ရှိ သောင်းကျန်းသူများနှင့် ဆက်သွယ်သည်ဟုသိရပါသည်။ ၎င်းမှာအနောက်ဘက်ဆုံးကြိုးဝိုင်းတွင်သစ်လုပ်ငန်းကိုပါ လုပ်ကိုင်သူတဦးဖြစ်ပါသည်။ ထိုသစ်လုပ်ငန်းလုပ်ရာတွင် သစ်များထုတ်ရန် အတွက် အနှောင့်အရှက် မပေးရန်အလို့ငှါ ဆက်ကြေးများပေးနေရသည်ဟု ကြားသိရပါသည်။''

သို့ရာတွင်၊ မိမိ၏ဆန်စက်လုပ်ငန်းနှင့် သစ်စက်လုပ်ငန်းများကို အနှောင့်အရှက်မပေးရန် သူပုန်များအားဆက်ကြေးပေးရုံမျှဖြင့် ဦးဝင်းဖေသည် သူပုန်များနှင့်အဆက်အသွယ်ရှိသည်။ သူတို့နယ်ပြောင်းရွှေထားမှ ဖြစ်မည်ဟု မယူဆနိုင်ချေ။

ထိုမှတပါး ပဌမသက်သေကပင် အောက်ပါအတိုင်း ထွက်ဆိုသေးသည်။

''ကရင်မဝင်မိအချိန်က အုတ်တွင်းမှရဲနှင့် စစ်တပ်များအနီးအနားနယ်သို့ တိုက်ကင်းလှည့်ရန်ထွက်သည့်အခါတိုင်း ဦးဝင်းဖေစက်မှ ဥဩဆွဲပေးပါသည်။ လူအများက ဤသို့ဥဩဆွဲပေးခြင်းမှာ သောင်းကျန်းသူများသို့ ကြိုတင်သတိပေးသည်ဟု မသင်္ကာကြပါ။''

အခြားသက်သေတဦးကလည်း အချိန်မသတ်မှတ်ဘဲ ဤကဲ့သို့ဥဩသံရှည်ရှည်ဆွဲကြောင်းထွက်ဆိုသေးသည်။ သို့ရာတွင်ပဌမသက်သေ၏ ထွက်ချက်အရပင်လျှင် ဦးဝင်းဖေသည် တောင်ငူတွင်အခြေနေပြီး အုတ်တွင်းစက်သို့ မကြာခဏသာလာသူဖြစ်သည်။ အုတ်တွင်းစက်မှ စွပ်စွဲသည့်အတိုင်း ဥဩဆွဲသည့်အခါမှာ ဦးဝင်းဖေရှိသည်ဟူ၍ပင်း၊ သို့ဥဩဆွဲကြောင်းကို ဦးဝင်းဖေသိသည်ဟူ၍ပင်း မည်သူကမှုမထွက်ဆိုခဲ့၊ ဥဩဆွဲသူမည်သူဖြစ်သည်ဟူ၍ပင် ထွက်ဆိုခြင်းမရှိခဲ့။

ဦးဝင်းဖေ၏ဆန်စက်မလည်သောညများတွင် စိုးရိမ်ရကြောင်း ကောလဟာလသတင်းဖြစ်သည်ဟု အဆိုရှိသော်လည်းအစိုးရသက်သေတဦးကပင်လျှင် အောက်ပါအကိုင်း ထွက်ဆိုထားသေးသည်။

''ဦးဝင်းဖေစက်သည် အလုပ်များသည့်အခါ နေ့ရောညပါ ကြိတ်ပါသည်။ သောင်းကျန်းသူများလာရောက်ပစ်ခတ်သော်လည်း စက်ကြိတ်သည့် အချိန်စက်မရပ်ဘဲ ဆက်လက်လုပ်ကိုင်ပါသည်။''

၁၉၅၆

ဦးဝင်းဖေ နှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံ တော် ပြည်ထဲ ရေးဝန်ကြီးဌာန အတွင်းဝန်။

သို့ဖြစ်၍ သူပုန်များမှိုသို့လာရောက်ပစ်ခတ်ခြင်းနှင့် ဦးဝင်းဖေ၏ ဆန့်စက်များပိတ်ထားခြင်း နှစ်ကြိမ်ခန့်တိုက်ဆိုင်ရုံမျှနှင့် ဦးဝင်းဖေသည် သူပုန်များလာရောက်ပစ်ခတ်လိမ့်မည်ဟု ကြိုတင်သိနှင့်သည်ဟူ၍ငင်း၊ သို့သိနှင့်ခြင်းသည် သူပုန်များနှင့်အဆက်အသွယ်ရှိ၍သာ ဖြစ်သည်ဟူ၍ငင်း ယူဆရန် အကြောင်းအထောက်အထားမရှိချေ။

၁၉၄၇ ခုနှစ်၊ ပြည်သူ့ဦးမဝင်ပိပြားရေး (ထိန်းသိမ်းစောင့်ရှောက်မှု) အက်ဥပဒေပုဒ်မ ၅ (က) (၁) နှင့် (၂) တို့အရ၊ ချမှတ်သောအမိန့်များကို ပယ်ဖျက်ရန် ရှေတော်သွင်းစာချွန်တော်အတွက် လျှောက်ထားသောအခါ ဤရုံးတော်သည် အမိန့်ချမှတ်သောအာဏာပိုင်၏ရှေ့တွင် ထိုအမိန့်ကိုချမှတ်ရန်အကြောင်းအထောက်အထားများရှိ မရှိကိုသာ ကြည့်မြဖြစ်သည်။ အကြောင်းအထောက်အထားများရှိလျှင် ၎င်းတို့ကိုယုံကြည်အားကိုး၍ အမိန့်ချမှတ် ထိုက် မထိုက်ကို ဤရုံးတော်က စဉ်းစားရုံးမရှိချေ။ ယခုဒေါ်မှမှာလည်း အဆိုပါအမိန့်ကိုချမှတ်ရန် အကြောင်းအထောက်အထားများ ရှိ မရှိကိုသာလျှင် ဤရုံးတော်ကစီစစ်ခဲ့သည်။ သို့စီစစ်ရာမှာ ထိုအမိန့်အတွက်အကြောင်း အထောက်အထား မရှိကြောင်း အထက်တွင် ဖေါ်ပြခဲ့သည့်အတိုင်း တွေ့မြင်ရသည်။

ထိုအမိန့်သည်လည်း ပြည်ထောင်စုမြန်မာနိုင်ငံ၏ ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေပုဒ်မ ၁၆ နှင့် ပုဒ်မ ၁၇ (ဃ) အရ၊ ကာကွယ်၍ထားသော လွတ်လပ်မှုနှင့် ပြည်ထောင်စုနိုင်ငံအတွင်း၊ မည်သည့်နေရာ၌မဆို နေထိုင်အခြေစိုက်နိုင်ခွင့် မူလအခွင့်အရေးများကို ထိခိုက်လျက်ရှိသည်။

သို့ဖြစ်၍ အဆိုပါအမိန့်ကို ရှေတော်သွင်းစာချွန်တော်ဖြင့် ပယ်ဖျက်လိုက်သည်။

တရားလွှတ်တော်ချုပ်

ဦးဇောတိက ပါ ၄ ဦး (စောဒကများ)
နှင့်
နိုင်ငံတော် ဝိနိစ္ဆယဌာန အတွက်တာဝန်ခံ ဆရာတော် ဦးကောဏ္ဍည ပါ ၉ ဦး (စွဒိတကများ)*

† ၁၉၅၆ ဇန်နဝါရီလ ၂၆၊

အမှုခေါ်စာခွန်တော်လျောက်လွှာ၊ ၁၉၁၁ ခုနှစ်၊ ဝိနိစ္ဆယဌာန အက်ဥပဒေပုဒ်မ ၂၅ (၁) နှင့် (၂) ပုဒ်မ ၂၂ (၁) (က)၊

ရန်ကုန်မြို့၊ နိုင်ငံတော် ဝိနိစ္ဆယဌာန၏ ၁၉၁၁ ခုနှစ်၊ စောဒနာဝင်မှုအမှတ် ၄ ကို စစ်ဆေးရန် ဝိနည်းခိုရိ ၃ ပါးနှင့် ဆုံးဖြတ်ပေးရန် စွဒိတက ၂ ဦးက ထို ၃ ပါး အနက် ၂ ဦးကိုပါဝင်ဆုံးဖြတ်ခြင်းမပြုပါရန် ကန့်ကွက်ခြင်း။ ကန့်ကွက်စာကို အကန့်အကွက် ခံရသော ဆရာတော် ၂ ပါးနှင့်ထင်းခုံရုံးတွင်ပါဝင်သောဆရာတော်တပါးကပါ ပယ်လိုက်ကြခြင်း၊ ပယ်ဖြီးသည့်နောက် ထိုဆရာတော် ၃ ပါးသည် စောဒနာဝင်မှုကို ဆက်လက်ကြားနာပြီး စီရင်ချက်ချမှတ်ကြခြင်း၊ စီရင်ဆုံးဖြတ်ချက်သည်လည်း ကန့်ကွက်သူတို့ကို အခွံးပေးသော စီရင်ချက်ဖြစ်ခြင်း၊

ဆုံးဖြတ်ချက်၊ ။ကန့်ကွက်ခြင်းခံရသော ဆရာတော် ၂ ပါးသည်၊ ကန့်ကွက်ချက်များမှန်ပါဟု ငြင်းဆိုလျှင် ထိုဆရာတော်များသည် ကန့်ကွက်ချက်များနှင့် စပ်လျဉ်း၍ ကြွင်းကျန်သော ဝိနည်းခိုရိဆရာတော်များရာ၏ ဆုံးဖြတ်ချက်ကို နာခံကြရမည်၊

တနည်းအားဖြင့်ဆိုသော် ကန့်ကွက်ချက်များမှန်မမှန်ကို ကြွင်းကျန်သော နိုင်ငံတော် ဝိနည်းခိုရိဆရာတော်ကသာလျှင် ဆုံးဖြတ်ကြရမည်၊

ကြွင်းကျန်သော နိုင်ငံတော်ဝိနည်းခိုရိ ဆရာတော်များရာက ကန့်ကွက်ချက်များ မမှန်ကြောင်း ဆုံးဖြတ်မှသာလျှင် ကန့်ကွက်ခြင်းခံရသော နိုင်ငံတော် ဝိနည်းခိုရိ ဆရာတော်များသည် ထိုစောဒနာဝင်မှုကို ဆက်လက်၍ ကြားနာစီရင်ဆုံးဖြတ်တော်မူနိုင်ကြမည်၊

ကန့်ကွက်ခြင်းခံခဲ့ရသော ဆရာတော် ၂ ပါးသည် ကြွင်းကျန်သော နိုင်ငံတော်ဝိနည်းခိုရိဆရာတော်များ၏ အဆုံးအဖြတ်ကိုမခံယူဘဲ မိမိတို့ကိုယ်တိုင် ဆုံးဖြတ်တော်မူခဲ့ကြခြင်းသည်၊ ၁၉၁၁ ခုနှစ်၊ ဝိနိစ္ဆယဌာန အက်ဥပဒေပုဒ်မ ၂၅၊ ပုဒ်မငယ် (၂) နှင့် အထင်အရှားဆန့်ကျင်၍ စောဒနာဝင်မှုကို ဆက်လက်၍ မကြားနာ မဆုံးဖြတ်နိုင်၊

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* ၁၉၅၅ ခုနှစ်၊ တရားမအယေးအဲ့ဒဲ့ လျှောက်လွှာအမှတ် ၂၆။

† နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးသိန်းမောင်၊ နိုင်ငံတော်တရားဝန်ကြီး ဦးမြင့်သိန်း၊ နိုင်ငံတော်တရားဝန်ကြီး ဦးချန်ထွန်းတို့ ရွှေမြောက်တွင် နိုင်ငံတော်တရားဝန်ကြီးချုပ် အမိန့်မှတ်သည်၊

၁၉၅၆

ဦးဇောတိက ပါ ၄ ဦး နှင့် နိုင်ငံတော် ဝိနိစ္ဆယဌာန အတွက်တာဝန်ခံ ဆရာတော် ဦးကောဏ္ဍည ပါ ၉ ဦး။

ဆရာတော် ၃ ပါး၏ စီရင်ချက်ကိုပယ်ဖျက်၍ နိုင်ငံတော်ဝိနိစ္ဆယဌာနသို့ ထပ်မံကြားနာစစ်ဆေးဆုံးဖြတ်ရန် အမှုကိုပြန်၍ပို့သလိုက်သည်၊ စောဒကများကိုယ်တိုင် ကြွရောက်သည်။

အစိုးရရှေ့နေကြီး ဦးချစ်က စုဒို့တက အမှတ် ၁ အတွက် လိုက်ပါဆောင်ရွက်သည်။ စုဒို့တကအမှတ် ၂ မှ ၉ အထိကိုယ်တိုင်ကြွရောက်ကြသည်။

ဦးသိန်းမောင်။ ။ဤမေတ္တာရပ်ခံစာသည်၊ ရန်ကုန်မြို့၊ ဝိနိစ္ဆယဌာန၏ ၁၃၁၃ ခုနှစ်၊ စောဒနာဝင်မှုအမှတ် ၄ တွင် စီရင်ချက်ကို ပယ်ဖျက်ရန် အမှုခေါ်စာချုပ်တော်အတွက် မေတ္တာရပ်ခံစာဖြစ်သည်။

ဤမေတ္တာရပ်ခံစာနှင့် စပ်လျဉ်း၍ အရေးအကြီးဆုံးဖြစ်သော ပြဿနာမှာ အဆိုပါစောဒနာဝင်မှုကို ဆုံးဖြတ်ရာတွင် နိုင်ငံတော် ဝိနည်းဓိုရ်ဆရာတော်များဖြစ်တော်မူကြသော ရတနာသိရိစံကျောင်းဆရာတော် ဦးမေဓိယနှင့် စကံဘူဆရာတော် ဦးဝိသာရဒတို့ ပါဝင်တော်မူခဲ့ကြသည့်အတွက် ထိုစီရင်ချက်ပျက်ပြယ်ရန် သင့်သည်မသင့်သည်ဟူသော ပြဿနာဖြစ်သည်။

ထိုပြဿနာနှင့်စပ်ဆိုင်သော အဖြစ်အပျက် အချက်အလက်များကို ရှေးဦးစွာ နိုင်ငံတော်ဝိနိစ္ဆယဌာန၊ တာဝန်ခံဆရာတော်၏ ထိုစောဒနာဝင်မှုဆိုင်ရာ နေ့စဉ်မှတ်တမ်းမှ ထုတ်နုတ်၍ ဖေါ်ပြရသော် ၎င်းတို့မှာ အောက်ပါအတိုင်းဖြစ်သည်။

"၈-၁-၅၅။ ။အမှုအတွက်စစ်ဆေးရာ၌ဆုံးဖြတ်ရာတွင်အခက်အခဲရှိ၍ ဝိနည်းဓိုရ် ၃ ပါးနှင့်ပင် ဆုံးဖြတ်ပေးရန်ဩဝါဒါစရိယဆရာတော်တို့က အမိန့်ချမှတ်တော်မူကြသည်။

(ပုံ) ဦးကောဏ္ဍည။

၂-၂-၅၅။ ။တောင်ငူ၊ ရေတာရွာသည်၊ အောင်သမြေ၊ နိုင်ငံတော်ဝိနည်းဓိုရ်ဆရာတော်အား၊ အမှုစီစစ်ရန် ပင့်စာကို သာသနညွှန်ကြားရေးဝန်ရုံးမှတဆင့် ပို့စေသည်။

(ပုံ) ဦကောဏ္ဍည။

၂-၂-၅၅။ ။နှစ်ဘက်အမှုသည်တို့အား၊ အမှုဆိုင်ရှိုင် စစ်ဆေးခံကြစေရန်အတွက်၊ ၁၉-၂-၅၅ နေ့ချိန်းဆိုသည်။

(ပုံ) ဦးကောဏ္ဍည

၁၉၅၆

ဦးဇောတိက ပါ ၄ ဦး နှင့် နိုင်ငံတော် ဝိန်ဆယ်ဌာန အတွက်တာဝန် ခံဆရာတော် ဦးကောဏ္ဍည ပါ ၉ ဦး။

၈-၂-၅၅။ ။အမှုအတွက် ဆုံးဖြတ်ရန်- (၁) အောင်သပြေ၊ (၂) ရတနာသိဒ္ဓိစံကျောင်း၊ (၃) စက်ဘူ ဆရာတော်တို့အား ဝိနည်းဝိုရိ တင်မြှောက်ကော်မူလျက် ၁၉-၂-၅၅ နေ့ အမှု စစ်ရန်ပင့်သည်။

(ပုံ) ဦးကောဏ္ဍည၊"

ထိုနေ့စဉ်မှတ်တမ်းများအရ၊ ၁၉၅၅ ခုနှစ်၊ ဇန်နဝါရီလ ၈ ရက်နေ့တွင် အဆိုပါ စောဒနာဝင်မှုကို ဝိနည်းဝိုရိ ၃ ပါးနှင့် ဆုံးဖြတ်ရန် ညွှတ်ခြင်းရှိစရိယ ဆရာတော်များ အမိန့်ချမှတ်တော်မူကြ၍၊ ထိုနှစ် ဖေဖော်ဝါရီလ ၂ ရက်နေ့တွင် တာဝန်ခံဆရာတော်က ရေတာရှည်၊ အောင်သပြေ ဆရာတော်ကိုပင်ပြီး၊ ထိုလ ၈ ရက်နေ့တွင် ထိုစောဒနာဝင်မှုကို ဆုံးဖြတ်ရန် အောင်သပြေ ဆရာတော်၊ ရတနာသိဒ္ဓိစံကျောင်း ဆရာတော်နှင့် စက်ဘူဆရာတော်တို့အား ဝိနည်းဝိုရိတင်မြှောက်တော်မူလျက် ထိုလ ၁၉ ရက်နေ့အမှုစစ်ရန် တာဝန်ခံ ဆရာတော်က ပင့်သည်။

နှစ်ဘက်အမှုသည်တို့မှာကား၊ ၁၉၅၅ ခုနှစ်၊ ဖေဖော်ဝါရီလ ၁၉ ရက်နေ့တွင် (အမှုဆိုင်ပြိုင် စစ်ဆေးခံကြစေရန်အတွက်၊ ထိုလ ၂ ရက်နေ့ကပင် တာဝန်ခံဆရာတော်ကနေ့) ချိန်းဆိုခဲ့ပြီးဖြစ်သည်။

အမှုကိုစစ်ဆေးကြားနာရန် ချိန်းသောနေ့၊ ၁၉၅၅ ခုနှစ်၊ ဖေဖော်ဝါရီလ ၁၉ ရက်နေ့နှင့် စပ်လျဉ်း၍မူကား၊ တာဝန်ခံဆရာတော်၏ နေ့စဉ်မှတ်တမ်းတွင် အောက်ပါအတိုင်းသာ ပါရှိသည်။

၁၉-၂-၅၅။ ။စောဒကဘက်မှ၊ စောဒကများနှင့် စုဒိတကဘက်မှ ဦးဥာဏိန္ဒနှင့် ဦးအာဒိစ္စ ၂ ပါးရောက်ရှိကြပြီး အမှုအတွက် အစစ်ခံကြသည်။ ၎င်းနောက် နှစ်ဘက် အမှုသည်တို့အား နောက်ဆုံး စိစစ်ချက်ခံယူရန် ၂၄-၂-၅၅ နေ့သို့ နှစ်ဘက် အမှုသည်တို့အား ဝိနည်းဝိုရိများက ရက်ချိန်းပေးလိုက်သည်။

(ပုံ) ဦးကောဏ္ဍည။

သို့ရာတွင်၊ ထိုနေ့တွင် အမှုကို မစစ်ဆေးမကြားနာမီ စုဒိတက ၂ ဦးက ဖက်မင်အိုင်း အရွှေပိန်းနဲကုန်း ဆရာတော်နှင့် စက်ဘူ ဆရာတော်များပါ ဝင်ဆုံးဖြတ်ခြင်းမပြုပါရန် ကန့်ကွက်စာတင်သွင်းခဲ့လေသည်။ ထိုကန့်ကွက်စာပါ စာသားမှာ အောက်ပါအတိုင်းဖြစ်သည်။

၁၉၅၆

ဦးဇော်တိုက
ပါ ၄ ဦး
နှင့်
နိုင်ငံတော်
ပိုင်နှယ်ရှောန
အတွက်တာဝန်
ခံဆရာတော်
ဦးကောဏ္ဍည
ပါ ၉ ဦး။

"၁။ ။အထက်ဖေါ်ပြပါ စောဒနာဝင်မှုတွင် အမှုကိုစစ်ဆေးကြားနာ ဆုံးဖြတ်ရန်ကိစ္စအတွက် ခန့်ထားသော နိုင်ငံတော် ဝိနည်းမိုရ် ဆရာတော်ကြီးများ (၁) ဖက်မင်းဆိုင်း အရှေပိန်းနဲကုန်း ဆရာတော်နှင့် စက်ဘူဆရာတော်ပါဝင်ကြသည်ဟု စုဒီတက များ သိရှိရပါသည်။

၂။ ။ထိုဝိနည်းမိုရ်ဆရာတော်ကြီး ၂ ပါးသည်၊ စောဒကဦးဥာဏိက ကိုယ်တော်၊ မြိတ်ကျောင်း ဦးအာလောကတို့သည် တနယ်သားချင်း ဖြစ်၍ရင်း၊ ပုဂ္ဂိုလ်အားဖြင့်ဂုဏ်း၊ တပါးနှင့်တပါး ထောက်ညှာရန် အဆက်အသွယ်များ ထင်ရှား ရှိသောကြောင့်ဂုဏ်း ဝိနိစ္ဆယအက်ဥပဒေအရ တရားသူကြီးအနေဖြင့် ဤစောဒနာမှုကို ချိန်ခွင်ညှာကဲ့သို့ မတိမ်းမစောင်း စေဘဲ စစ်ဆေးကြားနာဆုံးဖြတ်ရန် မဖြစ်နိုင်ပါ။

၃။ ။ဤစောဒနာဝင်မှုကို ထိုဝိနည်းမိုရ်ဆရာတော်ကြီး ၂ ပါး ပါဝင် ဆောင်ရွက်သော ခုံက စစ်ဆေးကြားနာ ဆုံးဖြတ်ခဲ့သော် စုဒီတကများဘက်မှ များစွာနှစ်နာဆုံးရှုံးမည်ဟု ယုံကြည်ပါသည်။

၄။ ။အဆိုပါ ဝိနည်းမိုရ် ဆရာတော်ကြီးများ၏ မူလလက်ရှိ ဂုဏ်သိက္ခာသမာဓိတို့ကို ရိုးရိုးဆရာတော်များအနေဖြင့် စုဒီတကများ သံသယမရှိပါ။ သို့သော် စောဒက ဦးဥာဏိကကိုယ်တော်၊ ဦးအာလောက ကိုယ်တော်တို့နှင့် ပတ်သက်သော ကိစ္စတို့ကို တရားသူကြီးများအနေဖြင့် မကြားနာ မဆုံးဖြတ်ထိုက်ကြောင်းကိုမူ ဤရုံးတော်ရှေ့တွင် ပြေရှင်းလျှောက်ထားခွင့်ရပါက သက်သေစုံညီ ဆင့်ခေါ်စစ်မေးဖြေရှင်းရန် တာဝန်ကို စုဒီတကများအဘို့ ဆောင်ရွက်ရန်အသင့်ရှိပါသည်။

သို့ဖြစ်ပါသောကြောင့် ဤစောဒနာဝင်မှု ကြားနာစစ်ဆေးဆုံးဖြတ်တော်မူရန်၊ ခုံရုံးတော်တွင်ဖေါ်ပြပါ နိုင်ငံတော် ဝိနည်းမိုရ် ဆရာတော်ကြီး ၂ ပါး ပါဝင်ဆောင်ရွက်ခြင်းမပြုပါရန် ရှိသေစွာ လျှောက်ထားရသည်။"

(ဖင်မင်းဆိုင်းအရှေ့ ပိန်းနဲကုန်း ဆရာတော်မှာ ရတနာသိဂီစံကျောင်း ဆရာတော် ဦးမေဓိယပင်ဖြစ်သည်)။

ထိုကန့်ကွက်စာကို အကန့်အကွက်ခံရသော ဆရာတော် ၂ ပါးနှင့် အောင်သပြေဆရာတော်သာပါဝင်သော ထိုစာဒနာဝင်မှုအတွက် ခွဲစည်းထားသော နိုင်ငံတော်ဝိနိစ္ဆယဌာနက ထိုနွေမှာပင်လျှင် အောက်ပါ အမိန့်စာပိုဒ် ၂ ခြင်း ပယ်လိုက်လေသည်။

၁၉၅၆

ဦးဇောတိက ပါ ၄ ဦး နှင့် နိုင်ငံတော် ဝိနိစ္ဆယဌာန အတွက်တာဝန် ခံ ဆရာတော် ဦးကောဏ္ဍည ပါ ၉ ဦး။

"(၁) ၁၃၁၆ ခုနှစ်၊ တပို့တွဲလဆုတ် ၁၂ ရက်နေ့ နိုင်ငံတော် ဝိနိစ္ဆယဌာန သရက်တောကျောင်းတိုက်၊ စကင်းဘိုင်လောမှ ဆိုင်သောဓနတွင် စုဒိတက ဦးဥာဏိန္ဒပါ ၇ ပါးတွင် တပါးအပါအဝင်ဖြစ်သူ ဦးဇောတိက က မန္တလေး ရဟန်းပျို အဖွဲ့ချုပ် စည်းဝေးရာသို့ သွားနေရသောကြောင့် ဤအမှုကို တလရွှေဆိုင်းပေးရန် လျှောက်သည်ကို အကြောင်းမပြည့်စုံသောကြောင့် ပယ်ချလိုက်သည်။

(၂) ၎င်းအချိန်တွင်ပင် တဆက်ဘည်း အရွှေပိန်းနဲကုန်း ဆရာတော်နှင့် စက်ဘူဆရာတော် ၂ ပါးကို တနယ်တည်းသားဖြစ်သောကြောင့် စသောအကြောင်းပြ၍ ဤအမှုဌ် တရားမစီရင်မှုကန့်ကွက်သည်ကို ဝိနိစ္ဆယဌာန အက်ဥပဒေပုဒ်မ ၂၅ နှင့် မကိုက်ညီသောကြောင့် ပယ်ချလိုက်သည်။

* * * *

၁။ တောင်ငူမြို့၊ အောင်သပြေဆရာတော် ဦးအရိယဝံသ။
၂။ အရွှေပိန်းနဲကုန်း ရာဇာနာသိရီစံကျောင်း ဦးမေဓိယ။
၃။ စက်ဘူဆရာတော် ဦးဝိသာရဒ။"

ထိုကန့်ကွက်စာကို အထက်ပါအမိန့်ဖြင့် ပယ်ပြီးသည့်နောက် ထိုဆရာတော် ၃ ပါးသည် စာဒနာဝင်မှုကို ဆက်လက်၍ ကြားနာပြီးလျှင် နောက် ၅ ရက်အကြာ၊ ၁၉၅၅ ခုနှစ်၊ ဖေဖော်ဝါရီလ ၂၄ ရက်နေ့တွင်မှ စီရင်ချက် ချတော်မူခဲ့ကြလေသည်။

သို့အတွက်၊ ဤခုံးတော်တွင် မေတ္တာရပ်ခံသူတို့က အဆိုပါ ဆရာတော် ၂ ပါး ပါဝင်၍ စီရင်ဆုံးဖြတ်ခဲ့ခြင်းသည်၊ ၁၃၁၁ ခုနှစ်၊ ဝိနိစ္ဆယဌာန အက်ဥပဒေပုဒ်မ ၂၅ နှင့်ဆန့်ကျင်ကြောင်း။ သို့ဆန့်ကျင်သည့်အတွက် နိုင်ငံတော် ဝိနိစ္ဆယဌာန၏ စီရင်ဆုံးဖြတ်ချက်ကို ပယ်ဖျက်သင့်ပါကြောင်း အဆိုရှိသည်။ ထိုအက်ဥပဒေပုဒ်မ ၂၅ (၁) နှင့် (၂) မှာ အောက်ပါအတိုင်း ဖြစ်သည်။

၁၉၅၆

ဦးဇောတိက ပါ ၄ ဦး နှင့် နိုင်ငံတော် ဝိနိစ္ဆယဌာန အတွက်တာဝန် ခံ ဆရာတော် ဦးကောဏ္ဍည ပါ ၉ ဦး။

ဝိနည်းခိုရ်၊ သို့မဟုတ် ဩဝါဒါဒိယ ဆရာတော် ကြားနာစစ်ဆေး စီရင်ဆုံးဖြတ်ခြင်း၊ သို့မဟုတ်ဩဝါဒါပေးခြင်း မပြုအပ်သည့် အချက်။

''၂၅။ ။(၁) မည်သည့်ဝိနည်းဓိုရ်ဆရာတော်၊ သို့မဟုတ် ဩဝါဒါစရိယဆရာတော်မျှ ကိုယ်တိုင် အမှုသည် ဖြစ်နေသည့် အမှု၊ သို့မဟုတ် ကိုယ်တိုင် အကျိုး သက်ဆိုင်နေသည့်အမှု၊ သို့မဟုတ် အချင်းဖြစ်ပွါးကြသည့် စောဒက၊ စုဒိတကတို့နှင့် ရင်းရင်းနှီးနှီး အကျွမ်းတဝင် ဖြစ်နေသည့်အမှု၊ သို့ဟုတ် ကိုယ်တိုင်သက်သေ ပါဝင်နေသည့် အမှုကိုကြားနာ စစ်ဆေးခြင်း၊ သို့မဟုတ် ဩဝါဒပေးခြင်းမပြုရ။

(၂) မည်သည့်အမှုသည်မဆို၊ ဝိနိစ္ဆယဌာနတွင် ပါဝင်သည့် ဆရာတော်တပါးပါးမှာ ကိုယ်တိုင် အကျိုးသက်ဆိုင်မကြောင်း၊ သို့ဟုတ် အချင်းဖြစ်ပွါးသည့်စောဒက၊စုဒိတကတို့နှင့်ရင်းရင်းနှီးနှီးအကျွမ်းတဝင်ဖြစ်ကြောင်းနှင့်ပုဒ်မခွဲ (၁) အရ၊ ကန့်ကွက်နိုင်သည်။ ယင်းသည့်ကန့်ကွက်ချက်ကို ကန့်ကွက်ခြင်းခံရသည့် ဆရာတော်က ငြင်းဆိုခြင်းမပြုလျှင် ၎င်းဆရာတော်၏အစား အခြားဆိုင်ရာ ဝိနည်းဓိုရ်ဆရာတော်တပါးကို ရွေးကောက်ထည့်သွင်းရမည်။ ကန့်ကွက်ခြင်း ခံရသည့် ဆရာတော်က ငြင်းဆိုလျှင် ထိုဆရာတော်သည် ထိုကန့်ကွက်ချက်နှင့် စပ်လျဉ်း၍ ကြွင်းကျန်သော ဝိနည်းဓိုရ်ဆရာတော် များ၏ ဆုံးဖြတ်ချက်ကို နာခံရမည်။''

သို့ဖြစ်၍ ကန့်ကွက်ခြင်းခံရသော ဆရာတော် ၂ ပါးသည်၊ ကန့်ကွက်ချက်များမှန်ပါဟု ငြင်းဆိုလျှင် ထိုဆရာတော်များသည် ကန့်ကွက်ချက်များနှင့် စပ်လျဉ်း၍ ကြွင်းကျန်သော ဝိနည်းဓိုရ်ဆရာတော်များ၏ ဆုံးဖြတ်ချက်ကိုနာခံကြရချေမည်။ တနည်းအားဖြင့်ဆိုသော် ကန့်ကွက်ချက်များမှန်မမှန်ကို ကြွင်းကျန်သော နိုင်ငံတော် ဝိနည်းဓိုရ်ဆရာတော်များကသာလျှင် ဆုံးဖြတ်ကြရချေမည်။ ကြွင်းကျန်သော နိုင်ငံတော် ဝိနည်းဓိုရ်ဆရာတော်များရောက ကန့်ကွက်ချက်များ မမှန်ကြောင်း ဆုံးဖြတ်မှသာလျှင် ကန့်ကွက်ခြင်းခံရသော နိုင်ငံတော် ဝိနည်းဓိုရ်ဆရာတော်များသည် ထိုစောဒနာဝင်မှုကို ဆက်လက်၍ ကြားနာစီရင် ဆုံးဖြတ်တော်မူနိုင်ကြမည်။

ယခုအမှုမှာမူ ကန့်ကွက်ခြင်းခံခဲ့ရသော နိုင်ငံတော် ဝိနည်းဓိုရ် ဆရာတော် ၂ ပါးသည် ကန့်ကွက်ချက်များကို ငြင်းဆိုပြီး ထိုကန့်ကွက်ချက်များနှင့် စပ်လျဉ်း၍ ကြွင်းကျန်သော နိုင်ငံတော် ဝိနည်းဓိုရ်ဆရာတော်များ၏ အဆုံးအဖြတ်ကို မခံ

ယူဘဲ မိမိတို့ကိုယ်တိုင်ပင်လျှင် ဆုံးဖြတ်ဘော်မူခဲ့ကြလေသည်။ သို့ဆုံးဖြတ်တော် မူခဲ့ကြခြင်းသည် အဆိုပါပုဒ်မ၊ ပုဒ်မငယ် (၂) နှင့် အထင်အရှားဆန့်ကျင်၍ မှားယွင်းသည့် ကန့်ကွက်ချက်များကို ကျွန်နိုင်ငံတော် ဝိနည်းမိုရ် ဆရာတော်များ ရှေ့ဘော်သို့ တင်မပြခဲ့သည့်အတွက် ၎င်းတို့နှင့်စပ်လျဉ်း၍ ဆရာတော်များက အဆုံးအဖြတ်ပေးခွင့်မရခဲ့ကြ။ ထိုဆရာတော်များ၏ အဆုံးအဖြတ်ကို မရသေးဘဲ လျက်နှင့်လည်း အကန့်အကွက်ခံရသော ဆရာတော်များသည်၊ စောဒနာဝင်မှုကို ဆက်လက်၍ မကြားနာမဆုံးဖြတ်နိုင်။ ကန့်ကွက်စာတွင်လည်း ကန့်ကွက်ခြင်းခံရသော ဆရာတော်များသည် (တရားသူကြီးများအနေဖြင့် မကြားနာမဆုံးဖြတ်ထိုက်ကြောင်းကိုမူ၊ ဤရုံးတော်ရှေ့တွင် ငြင်းခုံရန်အသင့်ရှိပါသည်) ဟူ၍လည်း အတိအလင်းပါရှိနေသေးသည်။

၁၉၅၆

ဦးဇောတိက ပါ ၄ ဦး နှင့် နိုင်ငံတော် ဝိနိစ္ဆယဌာန အတွက်တာဝန်ခံ ဆရာတော် ဦးဓမ္မာဘိ ပါ ၉ ဦး၊

အထက်တွင်ဖော်ပြခဲ့သော စုဒိတကများ၏ ကန့်ကွက်လွှာပေါ်တွင် ဆရာတော် ၃ ပါးချမှတ်ခဲ့သောအမိန့်မှာ ထိုကန့်ကွက်လွှာသည် ဝိနိစ္ဆယဌာန အက်ဥပဒေပုဒ်မ ၂၅ နှင့်မကိုက်ညီသောကြောင့် ပယ်ချလိုက်သည်ဟု ဆိုသော်လည်း မည်သည့်အတွက်ကြောင့် ထိုပုဒ်မနှင့်မကိုက်ညီကြောင်း ဖော်ပြခဲ့ခြင်း မရှိချေ။

သို့ရာတွင် နိုင်ငံတော် ဝိနိစ္ဆယဌာနအတွက် လိုက်ပါဆောင်ရွက်သူ ပညာရှိ အစိုးရရွှေနေကြီး ဦးချစ်က စုဒိတကများ၏ ရာနာသိဂိစ်ကျောင်း ဆရာတော် ဦးမေဃိယနှင့် စက်ပူဆရာတော် ဦးဝိသာရဒသည် စောဒနာဝင်မှုကို စစ်ဆေးစီရင်ဆုံးဖြတ်ရာတွင် မပါဝင်ထိုက်ပါဟူသော ကန့်ကွက်ချက်သည် အလွန်နောက်ကျသော ကန့်ကွက်ချက်ဖြစ်၍ ထိုကန့်ကွက်ချက်ကို အရေးမယူထိုက်ပါ။ ထိုဆရာတော်များပါဝင်၍ စစ်ဆေးစီရင်ဆုံးဖြတ်ခဲ့သည့်အတွက် နိုင်ငံတော် ဝိနိစ္ဆယဌာန၏ စီရင်ချက်သည် မပျက်ပြယ်ထိုက်ပါဟု လျှောက်လဲခဲ့သည်။

ထိုလျှောက်လဲချက်နှင့်စပ်လျဉ်း၍ ထိုကန့်ကွက်ချက်သည် နောက်ကျလွန်းသည်ဟုတ်မဟုတ်ဟူသော ပြဿနာကို ကျွန်နိုင်ငံတော် ဝိနည်းမိုရ်ဆရာတော်များကသာဆုံးဖြတ်ခဲ့ရတို့သင့်ပေသည်။ အကယ်၍သာကန့်ကွက်ခြင်းခံကြရသော ဆရာတော် ၂ ပါးက ကန့်ကွက်ချက်များနှင့်စပ်လျဉ်း၍ ကျွန်နိုင်ငံတော်ဝိနည်းမိုရ် ဆရာတော်များရာ၏အဆုံးအဖြတ်ကို ခံယူရန်တင်ပြလျှင် ထိုဆရာတော်များသည် ကန့်ကွက်ချက်နောက်ကျလွန်းသည် မကျလွန်းသည်ဟူသော အချက်အလက်ကိုလည်း ထည့်သွင်း၍ စဉ်းစားနိုင်ကြပေလိမ့်မည်။ ယခုမူမူ ကန့်ကွက်ချက်များကို ကျွန်နိုင်ငံတော် ဝိနည်းမိုရ်ဆရာတော်များထံတင်ပြခြင်း အသုံးမရှိခဲ့ချေ။ အောင်သပြေဆရာတော် ဦးအရိယဝံသတပါးသာလျှင်ကန့်ကွက်ခြင်းခံရသောဆရာတော် ၂ ပါးနှင့်အတူ ထိုစောဒနာဝင်မှုအတွက် နိုင်ငံတော်ဝိနိစ္ဆယဌာနတွင် ပါဝင်နေ၍

၁၉၅၆
ဦးဇောတိက
ပါ ၄ ဦး
နှင့်
နိုင်ငံတော်
ဝိန္ဓယဒ္ဓာန
အတွက်တာဝန်
ခံ ဆရာတော်
ဦးကောဏ္ဍည
ပါ ၉ ဦး။

ကန့်ကွက်ချက်များအပေါ်တွင် ဆုံးဖြတ်ချက်ပေးခဲ့ရလေသည်၊ ထိုဆရာတော်ပေးသော ဆုံးဖြတ်ချက်မှာလည်း ကန့်ကွက်ခြင်းခံရသော ဆရာတော် ၂ ပါး ပါဝင်၍ ဆုံးဖြတ်ခဲ့သော ဆုံးဖြတ်ချက်ဖြစ်လေသည်။

ထိုမှတပါး၊ ထိုကန့်ကွက်ချက်များသည်၊ နောက်ကျလွန်းပါသည် ဟူသော လျှောက်လဲချက်ကို ဤရုံးတော်က လက်မခံနိုင်ချေ။ ၁၉၅၄ ခုနှစ်၊ စက်တင်ဘာလ ၇ ရက်နေ့တွင် စောဒနာဝင်မှုကို ကြားနာစစ်ဆေး စီရင်ဆုံးဖြတ်ရန် (ကန့်ကွက်ခြင်းခံနေရသော ရတနာသိရိစံကျောင်း ဆရာတော်ဦးမေဃိယနှင့် စက်ာပူဆရာတော် ဦးဝိသာရဒအပြင် (၁) စလင်းဆရာတော် ဦးဇောတရ၊ (၂) ဘုရားဖြူ ဆရာတော် ဦးပညာစံသနှင့် (၃) မါးကရာတောရ ဆရာတော် ဦးနာဂဝံသ ပေါင်း ဆရာတော် ၅ ပါးအား စောဒနာဝင်မှုကို ကြားနာစစ်ဆေး စီရင်ဆုံးဖြတ်ရန် ဝိနည်းဝိုရိမ္မားအဖြစ် တင်မြှောက်ခဲ့သည် မှန်သော်လည်း ထိုဆရာတော်များကို တင်မြှောက်ပြီးသည့်နောက် ၁၉၅၄ ခုနှစ်၊ အောက်တိုဘာလ ၂ ရက်နေ့တွင် အမှုသည်များအား အစစ်ခံရန် ချိန်းဆိုခဲ့သည်မှန်သော်လည်း မါးကရာတောရဆရာတော် ဦးနာဂဝံသသည် ၁၉၅၄ ခုနှစ်၊ စက်တင်ဘာလ ၁၇ ရက်နေ့တွင် နုတ်ထွက်ခဲ့သည်။ ဘုရားဖြူဆရာတော် ဦးပညာစံသသည် ထိုလ ၂၄ ရက်နေ့တွင် အခွင့်တောင်းခဲ့သည်။ စလင်းဆရာတော် ဦးဇောတရသည်လည်း ထိုချိန်းဆိုသောနေ့၊ ၁၉၅၄ ခုနှစ်၊ အောက်တိုဘာလ ၂ ရက်နေ့မှာပင်လျှင် နေမကောင်း၍ မတက်ရောက်နိုင်ခဲ့။ သို့ဖြစ်၍ ထိုနေ့မှာ နိုင်ငံတော် ဝိန္ဓယဒ္ဓာနရုံးသည် စောဒနာဝင်မှုကို မကြားနာ မစစ်ဆေးနိုင်ခဲ့ချေ။

အထက်တွင်ဖော်ပြခဲ့သည့်အတိုင်း စောဒနာဝင်မှုကို အဆိုပါ ဆရာတော် ၅ ပါး မကြားနာမစစ်ဆေးနိုင်ပြီဖြစ်သည့်အတွက်ပင် ၁၉၅၅ ခုနှစ်၊ ဇန္နဝါရီလ ၈ ရက်နေ့တွင် ဩဝါဒါစရိယ ဆရာတော်များက ဝိနည်းဝိုရိဆရာတော် ၃ ပါးနှင့်ပင် ဆုံးဖြတ်စေရန် အမိန့်ချမှတ်တော် မူခဲ့ကြရလေသည်။ သို့အမိန့်ချမှတ်ပြီးသည့်နောက် တာဝန်ခံဆရာတော်က ၁၉၅၅ ခုနှစ်၊ ဖေဖော်ဝါရီလ ၂ ရက်နေ့တွင် အောင်သပြေဆရာတော်ကိုပင်ပြီး ထိုလ ၈ ရက်နေ့တွင် အောင်သပြေဆရာတော်၊ ရတနာသိရိစံကျောင်း ဆရာတော်နှင့် စက်ာပူဆရာတော်တို့ ပါဝင်သော နိုင်ငံတော် ဝိန္ဓယဒ္ဓာနရုံးအသစ်တခုကို ဖွဲ့စည်းခဲ့ရလေသည်။

အဆိုပါကန့်ကွက်လွှာကိုလည်း စုဒိတကများသည် ထိုဆရာတော် ၃ ပါး ပဌမရုံးထိုင်သောနေ့မှာပင်လျှင် ရက်ချိန်းရွှေ့ရန်လျှောက်လွှာနှင့်အတူ တင်သွင်းခဲ့ခြင်းဖြစ်လေသည်။

ရတနာသိဂီစံကျောင်း ဆရာတော်နှင့် စက်ဘူ ဆရာတော်တို့သည် ပဌမခွဲစည်းသော ဆရာတော် ၅ ပါးပါဝင်သည့် အဖွဲ့တွင် ပါဝင်ခဲ့သည်မှန်သော်လည်း ထိုအဖွဲ့သည် စောဒနာဝင်မှုကို တကြိမ်တခါမျှ ကြားနာစစ်ဆေး စီရင်ဆုံးဖြတ်ခဲ့ရသေးသည်မဟုတ်ချေ။ စင်စစ်သော်ကား၊ အမှုသည်များသည် တာဝန်ခံဆရာတော်၏ထံတွင် စွဲလွှာ၊ ချေလွှာ၊ ကန့်ကွက်လွှာစသည်တို့ကို အပြန်အလှန် တင်နေကြခိုက်၊ စောဒနာဝင်မှုကို ထိုဆရာတော် ၅ ပါး ကြားနာစစ်ဆေးစီရင်ဆုံးဖြတ်နိုင်လောက်အောင် ပြည့်စုံသော အခြေသို့မရောက်မီ ထိုဆရာတော် ၅ ပါး ပါဝင်သော ဝိနိစ္ဆယရုံးကို ဖျက်သိမ်းပြီး ဆရာတော် ၃ ပါးသာ ပါဝင်သော ဝိနိစ္ဆယရုံးအသစ်ကို ဖွဲ့စည်းခဲ့ခြင်းဖြစ်သည်။

၁၉၅၆
ဦးဇောတိက ပါ ၄ ဦး နှင့် နိုင်ငံတော် ဝိနိစ္ဆယဌာန အတွက်တာဝန်ခံ ဆရာတော် ဦးကောဏ္ဍည ပါ ၉ ဦး။

ထိုအသစ်ဖွဲ့စည်းသော ဝိနိစ္ဆယရုံးကသာလျှင် စောဒနာဝင်မှုကို ကြားနာစစ်ဆေးပြီး နှစ်ဘက်အမှုသည်များ တင်သွင်း၍ထားသော စွဲလွှာ၊ ချေလွှာ၊ ကန့်ကွက်လွှာ စသည်တို့၏အပေါ်တွင် စီရင်ဆုံးဖြတ်ခဲ့ရလေသည်။

သည်မျှသာမကသေး၊ ၁၃၁၁ ခုနှစ်၊ ဝိနိစ္ဆယဌာန အက်ဥပဒေပုဒ်မ ၂၂ (၁) (က) အရ၊ နိုင်ငံတော်ဝိနိစ္ဆယဌာနသည် သက်ဆိုင်သည့် ဝိနည်းဓိရိဆရာတော်များရာ၏ သဘောအရ စီရင်ချက်တခုတည်းသာ ချမှတ်ရမည်ဖြစ်ရာ ဆရာတော် ၅ ပါးပါဝင်သော ဝိနိစ္ဆယရုံးအဖွဲ့တွင် ၂ ပါးသည် နည်း၍ မစိုးရိမ်ခဲ့စေကာမူ၊ ဆရာတော် ၃ ပါးပါသော ဝိနိစ္ဆယရုံးအဖွဲ့တွင် ၂ ပါးသည် များရာဖြစ်၍ စိုးရိမ်စရာဖြစ်လာနိုင်သည်ကိုလည်း သတိပြုရချေမည်။

သို့အတွက် အချုပ်အားဖြင့်ဆိုသော် စောဒနာဝင်မှုကို နိုင်ငံတော်ဝိနည်းဓိရိဆရာတော် ၃ ပါးက စီရင်ဆုံးဖြတ်လိုက်ရာ ထိုဆရာတော် ၃ ပါးထဲတွင် ထိုအက်ဥပဒေပုဒ်မ ၂၅ အရ၊ မပါဝင်ထိုက် မဆုံးဖြတ်ထိုက်ပါဟု ကန့်ကွက်၍ ထားသော ဆရာတော် ၂ ပါး ပါ၍နေခဲ့လေသည်။ ထိုဆရာတော် ၂ ပါးသည်လည်း ကန့်ကွက်ချက်များနှင့် စပ်လျဉ်း၍ ကျန်နိုင်ငံတော် ဝိနည်းဓိရိဆရာတော်များရာက အဆုံးအဖြတ်မပေးမီ ထိုစောဒနာဝင်မှုတွင် ပါဝင်ဆုံးဖြတ်နိုင်ခွင့်မရှိခဲ့သေးချေ။ စီရင်ဆုံးဖြတ်ချက်သည်လည်း ကန့်ကွက်သူတို့ကို အရှုံးပေးသော စီရင်ဆုံးဖြတ်ချက် ဖြစ်နေသည်။

သို့ဖြစ်၍ ဤရုံးတော်က အဆိုပါ ဆရာတော် ၃ ပါး၏ စီရင်ချက်ကို ပယ်ဖျက်ပြီးလျှင် စောဒနာဝင်မှုကို ရန်ကုန်မြို့၊ နိုင်ငံတော် ဝိနိစ္ဆယဌာနသို့ပင် ကြားနာစစ်ဆေးစီရင်ဆုံးဖြတ်ရန် ပြန်၍ပို့သလိုက်သည်။

ဤရုံးတော်တွင် နှစ်ဘက်အမှုသည်များသည် မိမိတို့၏တရားစရိတ်ကို မိမိတို့ ကျခံကြရမည်။

တရားလွှတ်တော်ချုပ်

† ၁၉၅၇

ဩဂုတ်လ ၁၂ ရက်။

ချန်ယူတ (လျှောက်ထားသူ)
နှင့်
အမြဲတန်းအတွင်းဝန်၊ နိုင်ငံခြားရေးရုံး၊ ရန်ကုန်မြို့ ပါ ၁ (လျှောက်ထားခံရသူများ)*

ရှေ့တော်သွင်း စာချုပ်တော်၊ နိုင်ငံခြားသားအက်ဥပဒေပုဒ်မ ၃ (ခ)၊ အခြေခံဥပဒေပုဒ်မ ၁၁ (ဂ)၊ ဆုံးဖြတ်ချက်။ ။ဆုံးဖြတ်ချက် စာချုပ်တော် အမှုမျိုးများတွင် ရာဇဝတ် တရားမရုံးတော်များ၌ စစ်ဆေးဘိသကဲ့သို့ သက်သေများဆင့်ခေါ်ပြီး ရှိသမျှပြဿနာများကို အပြီးအပြတ်စစ်ဆေးပေးနိုင်ရန် ခံယူဉီးသည်။ တင်သွင်းသည့် ကျမ်းကိုန်စာများကိုသာကြည့်ရှုခြင်း၊ မျက်မြင်အားဖြင့် ချမှတ်သောအမိန့်မှာ ဥပဒေနှင့်ဆန့်ကျင်သည်မဆန့်ကျင်သည်ကိုသာကြည့်ရှုရပေမည်၊

တိန်ယုံဟန်နှင့်နိုင်ငံတော်သမတ ပါ ၂။ ၁၉၅၂ ခုနှစ်၊ ရာဇဝတ်အသေးအဖွဲလျှောက်လွှာအမှတ် ၂၅၂ ခွဲခြားသည်။

လျှောက်ထားသူအတွက် လွှတ်တော်ရှေ့နေကြီး ဦးဘရွှန်း လိုက်ပါဆောင်ရွက်၍။

လျှောက်ထားခံရသူများအတွက် အစိုးရရှေ့နေကြီး ဦးလှမောင် လိုက်ပါဆောင်ရွက်သည်။

ဦးမြင့်သိန်း။ ။လျှောက်သူ ချန်ယူတ သည်၊ မြန်မာပြည်တွင်ဆက်လက်၍ နေခွင့်မပေးထိုက်သော နိုင်ငံခြားသားတဦးဖြစ်သည်ဟု နိုင်ငံတော် သမတ က ယူဆ၍၊ နိုင်ငံခြားသား အက်ဥပဒေပုဒ်မ ၃ (ခ) အရ၊ မြန်မာပြည်မှ ထွက်ခွါသွားရန် အမိန့်ချမှတ်သည်ကို မနာခံသဖြင့်၊ တရုပ်ပြည်သို့ ပြန်ပို့ရန် ဖမ်းဆီးချုပ်နှောင်ထားခြင်း ခံရသောကြောင့်၊ ဤဒုံးတော်တွင် ရှေ့တော်သွင်း စာချုပ်တော်ကို လျှောက်ထားသည်။

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* ၁၉၅၇ ခုနှစ်၊ ရာဇဝတ်အသေးအဖွဲလျှောက်လွှာအမှတ် ၃။

† ဧရာ နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးမြင့်သိန်း၊ တရားဝန်ကြီး ဦးချုန်ထွန်း နှင့် တရားဝန်ကြီး ဦးဘိုကြီး တို့၏ရှေ့မှာက်တွင်။

၁၉၅၇

ချန်ယူတန့် အ
မြိတန်း အ
တွင်းဝန်၊ နိုင်ငံ
ခြားရေးရုံး၊ ရန်
ကုန်မြို့ ပါ ၁။

လျှောက်လွှာနှင့်ပူးတွဲပါကျမ်းကျိန်စာများတွင် ကွယ်လွန်သူ မိမိ၏အဖွါး၊ (အဘ၏ မိခင်) မှာ၊ မြန်မာနိုင်ငံ တိုင်းရင်းသူ ရှမ်းအမျိုးသမီးဖြစ်ကြောင်း။ သို့အတွက် အခြေခံဥပဒေပုဒ်မ ၁၁ (ဂ) အရ၊ လျှောက်သူသည်၊ ပြည်ထောင်စု သားဖြစ်၍၊ ၎င်းအားပြည်နှင်ဒဏ်မပေးလိုက်ကြောင်းဖေါ်ပြသည်။

သို့ရာတွင် နိုင်ငံခြားရေးဌာန ဒုတိယ အတွင်းဝန်၏ ကျမ်းကျိန်စာတွင်၊ လျှောက်သူသည်၊ ပြည်ထောင်စုသားမဟုတ်၊ နိုင်ငံခြားသား တရုပ်လူမျိုးဖြစ် သည်ဟုဆိုသည်။

သို့ဖြစ်၍ လျှောက်သူသည်၊ အကယ်ပင် ပြည်ထောင်စုသား ဖြစ်သည် မဖြစ်သည်ဟူသော ပြဿနာပေါ်ပေါက်ရာ၌၊ နိုင်ငံခြားရေးဌာန ဒုတိယအတွင်း ဝန်၏ကျမ်းကျိန်စာမှာ လျှောက်သူ၏အဖွါးသည်၊ ရှမ်းအမျိုးသမီးတဦးမဟုတ်ဟု အသေအခြာ အပြန်အလှန် ချေပခြင်း မရှိသောကြောင့်၊ လျှောက်သူအား ပြည်ထောင်စုသားဖြစ်သည်ဟု၊ ဤရုံးတော်ကယူဆရန် လျှောက်သူအတွက်လိုက် ပါဆောင်ရွက်သော လွှတ်တော်ရှေ့နေကြီး ဦးဘရွှန်း ကလျှောက်ထားလေသည်။ ဤကဲ့သို့ မယူဆနိုင်ပါက တိန်ယုံဟန်နှင့် နိုင်ငံတော်သမတပါ၊ ၂ အမှုတွင် သက်သေများကို ခေါ်စစ်ခဲ့သလို၊ ဤအမှုတွင်လည်း သက်သေများ ဆင့်ခေါ် စစ်ဆေးပါရန် လျှောက်ထားပြန်သည်။ [1]

ဒုတိယအတွင်းဝန်၏ ကျမ်းကျိန်စာမှာ လျှောက်သူ၏ ကျမ်းကျိန်လွှာတွင် ဖေါ်ပြထားသည့်အချက်အလက်များကို တခုစီပြန်၍မချေပသော်လည်း၊ ''အစိုရင် ခံစာများနှင့်သက်သေထွက်ချက်များအရ၊ လျှောက်ထားသူသည်၊ ပြည်ထောင်စု နိုင်ငံသားမဟုတ်'' ဟုပါရှိသည်။ ဤကဲ့သို့ ဖေါ်ပြထားသည့်အတိုင်း သက်ဆိုင်ရာ အမှုတွဲကို စစ်ဆေးကြည့်ရှုရာ၊ဒုတိယအတွင်းဝန်မင်း၏ယူဆချက်မှာ အထောက် အထားများ ရှိကြောင်းကိုတွေ့မြင်ရသည်။

စာချွန်တော်အမှုမျိုးများတွင် ရာဇဝတ်တရားမရုံးတော်များ၌ စစ်ဆေးဘိ သကဲ့သို့ သက်သေများဆင့်ခေါ်ပြီး၊ ရှိသမျှပြဿနာများကို အပြီးအပြတ်စစ်ဆေး ပေးနိုင်ရန် ခဲယဉ်းသည်။ တင်သွင်းသည့် ကျမ်းကျိန်စာများကိုသာ ကြည့်ရှုရ၍၊ မှန်မြင်အားဖြင့် ချမှတ်သော အဓိန့်မှာ ဥပဒေနှင့် ဆန့်ကျင်သည် မဆန့်ကျင်သည်ကိုသာ ကြည့်ရှုရပေမည်။

တိန်ယုံဟန်၏ အမှုတွင် သက်သေများကို ဆင့်ခေါ်စစ်ဆေးခဲ့ရခြင်းမှာ၊ နိုင်ငံတော်အဓိုးရက တိန်ယုံဟန်သည်၊ မြန်မာအဓိမ္မ မြန်မာပြည်တွင် မွေးဖွါး သည်ကို မစုံစမ်းဘဲ၊ နိုင်ငံခြားသားအဖြစ် မှတ်ပုံတင်ခြင်းကိုသာ အားကိုး၍၊

[1] ၁၉၅၂ ခုနှစ်၊ ရာဇဝတ်အယေးအဒဲ့လျှောက်လွှာအမှတ် ၂၅၂။

၁၉၅၇

ချုန်ယူတနှင့် အ
ခြံတန်း အ
တွင်းဝန်၊ နိုင်ငံ
ခြားရေးရုံး၊ ရန်
ကုန်မြို့ ပါ ၁။

ပြည်နှင်ဒဏ်အမိန့်ချမှတ်ခဲ့ကြောင်း။ မြန်မာအဓိပ္ပ မြန်မာပြည်တွင်မွေးဖွါးခဲ့သည် မှန်သည် မမှန်သည် မပြောနိုင်ကြောင်းကို ဝန်ခံချိုဖြစ်သည်။

ယခုလျှောက်လွှာမှာ တိန်ယုံဟန်၏ လျှောက်လွှာနှင့် ကွာခြားသည်။ ပြည်ထောင်စုသား ဖြစ်ပါသည် ဟူသော စွပ်စွဲချက်ကို နိုင်ငံတော် သမတက လက်မခံ၊ နိုင်ငံခြားသားသာ ဖြစ်သည်ဟု ပြန်လှန်ခြေပမ်း၊ လျှောက်သူက အကယ်စင်စစ်ပင် ပြည်ထောင်စုသားဖြစ်ပါလျှင်၊ ဥပဒေအခွင့်အရေးအရ ပြဋ္ဌာန်း ချက်ရရန်၊ အခြားနည်းနှင့် ဆက်လက်ဆောင်ရွက်ရန်လိုက ဆောင်ရွက်ရန်သာ ရှိတော့သည်။

မျက်မြင်အားဖြင့် ပြည်နှင်ဒဏ်အမိန့်ကို မနာခံ၍၊ နိုင်ငံခြားသားတဦးကို မိမိတိုင်းပြည်သို့ ပြန်ပို့ရန် ဖမ်းဆီးချုပ်နှောင်ထားခြင်းမှာ ဥပဒေနှင့် ဆန့်ကျင်သည်ဟုမဆိုနိုင်၊ သို့အတွက် လျှောက်လွှာကို ပယ်လိုက်သည်။ ၁၉၅၇ ခုနှစ်၊ ဇန်နဝါရီလ ၁၁ ရက်နေ့စွဲပါ ဆိုင်းငံ့ထားသည့်အမိန့်ကိုရုပ်သိမ်းလိုက်သည်။

တရားလွှတ်တော်ချုပ်

မောင်ကျော်အေး ပါ ၇ (လျှောက်ထားသူများ)
နှင့်
တောင်ငူခရိုင်ဝန်မင်းပါ ၂ (လျှောက်ထားခံရသူများ)*

† ၁၉၅၇ စက်တင်ဘာလ ၉ ရက်။

ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေး ထိန်းသိမ်းစောင့်ရှောက်ရေး အက်ဥပဒေပုဒ်မ ၅ (က)။ ။ ဆုံးဖြတ်ချက်။ ။တိုင်းပြည်၌ အေးချမ်းသာယာခြင်းမရှိ၍၊ ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေး (ထိန်းသိမ်းစောင့်ရှောက်မှု) အက်ဥပဒေကို၊ ၁၉၄၇ ခုနှစ်က ထုတ်ပြန်ခဲ့ရသည်။ ထိုအက်ဥပဒေပုဒ်မ ၅ (က) အရ၊ လူတဦးတယောက်သည်၊ ပြည်သူ့လုံခြုံမှုနှင့် ပြည်သူ့ငြိမ်ဝပ်ပိပြားမှုကို ထိခိုက်အောင် တနည်းနည်းနှင့် ပြုမူခြင်းမှ ဖိတ်ပင်တားဆီးမှု လိုအပ်သည်ဟု ခရိုင်ဝန်မင်းက ယူဆလျှင် ထိုသူကို ချုပ်နှောင်ထားရန် အမိန့်ပေးနိုင်သည်။ ဤကဲ့သို့ယူဆရာ၌ ခရိုင်ဝန်မင်းသည် အကြောင်းကြောင်းကို ဝေဘန်ရမည်။ သက်သေ အထောက်အထားကို စစ်ဆေးရမည်။ မိမိခရိုင်အတွင်း အခြေအနေကိုလည်း သတိမူရမည်။ ထိုအကြောင်းကြောင်းကို ထောက်ထား၍ သင့်တော်သည်ဟုထင်မြင်သောအမိန့်ကိုချမှတ်ရန်အာဏာရှိသည်။ မိမိက သက်သေအထောက်အထားများကို ယုံကြည်လက်ခံပြီး အမိန့်ချမှတ်ခဲ့ပါလျှင် ဤရုံးတော်က စာချွန်တော်အမှုအနေဖြင့် ထိုသက်သေ အထောက်အထားကို မယုံကြည်ထိုက်၊ လက်မခံထိုက်ဟု ပြောဆိုခွင့်မရှိ။ သို့သော် သက်သေ အထောက်အထားလုံးဝမရှိတဲ့နှင့် ပုဒ်မ ၅ (က) အရ၊ အရေးယူပါက ဤရုံးတော်က စွက်ဖက်ရန် ဖြစ်နိုင်သည်။

လျှောက်ထားသူများအတွက် လွှတ်တော်ရှေ့နေကြီး ဒေါက်တာဦးမောင်လိုက်ပါဆောင်ရွက်သည်။

လျှောက်ထား ခံရသူများအတွက် အစိုးရလွှတ်တော် ရှေ့နေကြီးဦးလှမောင်လိုက်ပါဆောင်ရွက်သည်။

ဦးမြင့်သိန်း။ ။လျှောက်ထားသူ တောင်ငူမြို့နေ ကျောင်းသားများ မောင်ကျော်အေး၊ မောင်တင်ဦး၊ မောင်မြင့်သိန်း၊ မောင်မင်းအောင်၊ မောင်သောင်းရွှေ၊ မောင်ကျူအေး၊ မောင်တင်မြင့်ဘို ၇ ဦးနှင့် အချုပ်မှလွှတ်လိုက်ပြီး

* ၁၉၅၇ ခုနှစ်၊ ရာဇဝတ်အသေးအဖွဲလျှောက်လွှာအမှတ် ၂၄၊ ၃၀။

† နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးမြင့်သိန်း၊ တရားဝန်ကြီး ဦးချန်ထွန်းနှင့် တရားဝန်ကြီး ဦးဘိုကြီး တို့ရွေးမှောက်တွင်။

၁၉၅၇
မောင်ကျော်အေး ပါ ၇ နှင့် ဘောင်ဦးခရိုင်စုန်မင်း ပါ ၂ ။

ဖြစ်သော မောင်စိုးသိန်းနှင့် မောင်အောင်မြင့်တို့မှာ ကျောင်းသားသမဂ္ဂဖျက်သိမ်းခြင်းကို မကျေနပ်သူများ ဖြစ်ကြသည့်အလျောက်၊ ကျောင်းသား ခေါင်းဆောင်များအနေနှင့် အထူးပင် တာဝန်ယူခဲ့ကြသူများ ဖြစ်ကြသည်။ ပြည်သူ့လူငယ်အဖွဲဝင်များလည်း ဖြစ်ကြသည့် အလျောက် ၁၉၅၆ ခု၊ ဒီဇင်ဘာလ ၉ ရက်နေ့တွင် ကျင်းပမည်ဖြစ်သော အထိမ်းအမှတ်ပွဲအတွက် ကျေညာစာများ ကပ်မည်ဟု ခရိုင်ဝန်မင်းကို အကြောင်း ကြားကြ၍ ကပ်ခွင့် ရခဲ့ကြသည်။ သို့သော် ၁၉၅၆ ခု၊ ဒီဇင်ဘာလ ဂ ရက်နေ့တွင် ကပ်သော ကျေညာစာများမှာ အစိုးရကိုပင် ထိခိုက်လောက်သော ကျေညာစာများဖြစ်၍ ရဲအမှုထမ်းများက ထိုကျေညာစာများကို ဆွဲယူဆုတ်ပစ်ကြသည်။

ဤကဲ့သို့ပြုလုပ်ပုံကို မကျေနပ်ကြ၍ မောင်စိုးသိန်းနှင့် မောင်ဝင်းဦးတို့က ရဲဌာနသို့ လာရောက်တိုင်တန်းကြရာ ကတောက်ကဆ ဖြစ်ပုံရသည်။ ထိုသူငယ်နှစ်ယောက်ကို ရဲဌာနက ဖမ်းချုပ်ခဲ့သည်။ ထိုနှစ်ယောက် ပြန်မလာ၍ လိုက်သွားသူ မောင်မင်းအောဝ်နှင့် မောင်သောင်းလွှတို့ကိုလည်း အလားတူ ဖမ်းဆီး ချုပ်နှောင်လိုက်သည်။ ၁၉၅၆ ခု၊ ဒီဇင်ဘာလ ၁၁ ရက်နေ့၌ မောင်မြင့်သိန်း၊ မောင်ကျော်အေး၊ မောင်အောင်မြင့်တို့ကို ဖမ်းဆီး ချုပ်နှောင်ပြန်သည်။ ၁၉၅၆ ခု၊ ဒီဇင်ဘာလ ၂၆ ရက်နေ့၌ မောင်ကျော်အေးကို ဖမ်းပြီး ၁၉၅၇ ခု၊ ဖေဖော်ဝါရီလ ၂ ရက်နေ့၌ မောင်တင်မြင့်ကိုလည်း ဖမ်းဆီးချုပ်နှောင်၏။

ဤကဲ့သို့ အသိုးသိုးကိုဖမ်းဆီးပြီးနောက် ၎င်းတို့၏အကြောင်းစုံကို ရဲအဖွဲက စုံစမ်းရာ သက်သေထွက်ချက်များအရ၊ ခရိုင်ရဲဝန်မင်းက ထိုသူငယ်များသည်၊ သောင်းကျန်းသူများနှင့် လျှို့ဝှက်စွာ ဆက်သွယ်သည်ဟု စွပ်စွဲကာ ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေး ထိန်းသိမ်းစောင့်ရှောက်ရေး အက်ဥပဒေအရ၊ ချုပ်နှောင်ထားပါရန် အစီရင်ခံသည်ကို ခရိုင်ဝန်မင်းက လက်ခံပြီး ပုဒ်မ ၅ (က) အရ၊ ချုပ်နှောင်ထားရန် အမိန့်ချမှတ်သည်။

သူငယ်များ၏ မိဘများမှာ ပူပင်ဒုက္ခရောက်ကြသည့် အလျောက် မိမိတို့၏သားများကို လွှတ်ပါရန် စုပေါင်းပြီး လျှောက်ထားကြရာ မောင်စိုးသိန်းနှင့် မောင်အောင်မြင့်တို့ကိုသာ ခံဝန်ချုပ်နှင့် ခရိုင်ဝန်မင်းက လွှတ်ခွင့်ချမှတ်ခဲ့လေသည်။

ယခုထက်တိုင် အချုပ်ခံနေရသော သူငယ် ၇ ဦးမှု၊ ဤကဲ့သို့ ခံဝန်ချက်များကို လက်မှတ်မထိုး၍ မလွှတ်ဘဲထားပါသည်ဟု ၎င်းတို့၏အတွက် လိုက်ပါဆောင်ရွက်သူ လွှတ်တော်ရွေးနေကြီး ဒေါက်တာဦးမောင်က လျှောက်ထား

သည်။ ထိုးရမည့်ခံဝန်ချက်မှာလည်း မည်သည့်အတိုက်အခံ နိုင်ငံရေးအဖွဲ့အစည်း ကိုမျှ ဝင်ရောက် ဆောင်ရွက်မည် မဟုတ်ကြောင်း ဝန်ခံကတိပေးရမည်ဖြစ်၍ ထိုကဲ့သို့ ကဘိမှာ အခြေခံဥပဒေကဲ့ပင် အပ်နှင်းထားသော လွတ်လပ်ခွင့်များကို ပိတ်ပင်ရာရောက်၍ လူငယ်များက လက်မှတ် မထိုးနိုင်ကြောင်း။ ၎င်းတို့၏ ကျောင်းအုပ် ဆရာကြီးနှင့် အတန်းပြ ဆရာကြီးများက ထိုသူငယ်များသည် လူကောင်းကလေးများ ဖြစ်ကြကြောင်း ထောက်ခံချက်ကိုလည်း အမှုတွဲတွင် ပါကြောင်း နှစ်ဦးကိုလွှတ်လွှင့် ကိစ္စတခုတည်းအတွက် အတူအဖမ်းခံရသော လူငယ်များကိုလည်း လွှတ်ထိုက်ကြောင်း ကျောင်းသား ခေါင်းဆောင်တို့ကို ဖမ်းပြီး ဆက်လက်ချုပ်နှောင်ထားနိုင်ရန်သာ သောင်းကျန်းသူများနှင့် အဆက် အသွယ်ပြုသည်ဟု အာဏာပိုင်များက ပြောဆိုကြောင်း စသည်ကို လျှောက် ထားသည်။

၁၉၅၇
မောင်ကျော် အေး ပါ ၇ နှင့် တောင်ငူခရိုင် ဝန်မင်း ပါ ၂။

အတူဖမ်းဆီး ချုပ်နှောင် ထားသူများ အနက် နှစ်ဦးကို လွှတ်ပစ်၍ အခြားသူများကိုလည်း လွှတ်သင့်သည်ဆိုသည်မှာ သာမန်အားဖြင့် ပြောထိုက် သောစကားပင် ဖြစ်ငြားသော်လည်း ခရိုင်ဝန်မင်းသည် လူတဦးတယောက်ကို ဖမ်းဆီးချုပ်နှောင်ခြင်းမှ လွှတ်လိုပါက ငြိစဝ်ပိုပြားရေးကို ထိခိုက်မည် မထိ ခိုက်မည်ကို ဝေဘန်ပြီးမှ လွှတ်သင့်သည်ထင်လျှင် လွှတ်နိုင်ရန် အာဏာရှိသည်။ ဤသူငယ်များအနက် ဘယ်သူက စိတ်ချရသည်၊ ဘယ်သူက စိတ်မချရသည်ကို လည်း စဉ်းစားရပေမည်။ ခရိုင်ဝန်မင်းက ကုန် ၇ ယောက်ကို လွှတ်လပ်စွာ မထားနိုင်သေးဟု ယူဆ၍သာ ဆက်လက် ချုပ်နှောင်ထားခြင်း ဖြစ်ပေမည်။ ခံဝန်ချုပ်လက်မှတ် ထိုးသည်ဆိုသည်မှာလည်း ခရိုင်ဝန်မင်းက ဘယ်ကဲ့သို့ ရေးမှတ်ရမည်ကို ပြောရသည်မဟုတ်။ လူကြီးမိဘများက မိမိတို့ ဝန်ခံချက်နှင့် မောင်စိုးသိန်းနှင့် မောင်အောင်မြင့်တို့၏ အလိုအလျောက် ရေးသားသော ဝန်ခံ ချုပ်များကို တင်သွင်းခြင်းဖြစ်သည်ကို အမှုတွဲတွင် တွေ့မြင်ရသည်။

ခရိုင်ဝန်မင်းက နိုင်ငံတော် ရှေ့နေချုပ်ရုံးသို့ပို့သော ၁၉၅၇ ခု၊ ဩဂုတ်လ ၁၆ ရက်နေ့စွဲပါစာတွင် ဤသူငယ်များသည် မတရားသောနည်းဖြင့် အတိုက် အခံပြုနေသော ကွန်မြူနစ်ဖြူတို့နှင့် လှုံ့ဝှက်စွာ ဆက်သွယ်ကြောင်းကို ထင်မဲ့ဖော် ပြသည်။ ထို့ပြင်လည်း ထောင်တွင်းရှိ အခြား နိုင်ငံရေးသမားများနှင့်လည်း ပူးပေါင်းပြီး ဆူပူထကြွရန် လှုံ့ဆော်နေကြ၍ မောင်ဝင်းဦးနှင့် မောင်တင်မြတို့ကို အင်းစိန်ထောင်ကြီးသို့ ပို့ထားရန် အခြေရောက်နေကြောင်း ဖေါ်ပြသည်။

ထောင်တွင်းတွင် ဖြစ်ပျက်သည်မှာ ဤအမှုနှင့်မဆိုင်။ အထူးဖမ်းသူသဲက ရွေး၍ နှစ်ဦးကိုလွှတ်သည့်အတွက် စိတ်ထက်သော သူငယ်များဒီဒီ ဌစ်တ်ရွတ်

၁၉၅၇
မောင်ကျော်
အေး ပါ ၇
နှင့်
တောင်ငူခရိုင်
ဝန်မင်း ပါ ၂။

လုပ်ခြင်းလည်း ဖြစ်နိုင်သည်။ သို့ရာတွင် ဖမ်းဆီးချုပ်နှောင်ထားခြင်းမှာ ဥပဒေအကျုံးဝင်သော အဓိန်နှင့် ချုပ်နှောင်ထားသည် မဆိုသည်ကိုသာ ဝေဘန်ရန် ဤရုံးတော်၏ တာဝန်ဖြစ်သည်။

တိုင်းပြည်၌ အေးချမ်း သာယာခြင်းမရှိ၍ ပြည်သူ့ ငြိမ်ဝပ်ပိပြားရေး (ထိန်းသိမ်းစောင့်ရှောက်မှု) အက်ဥပဒေကို၊ ၁၉၄၇ ခုနှစ်က ထုတ်ပြန်ခဲ့ရသည်။ ထိုအက်ဥပဒေပုဒ်မ ၅ (က) အရ၊ လူတဦးတယောက်သည် ပြည်သူ့လုံခြုံမှုနှင့် ပြည်သူ့ငြိမ်ဝပ်ပိပြားမှုကို ထိခိုက်အောင် တနည်းနည်းနှင့် ပြုမူခြင်းမှ ပိတ်ပင်တားဆီးမှု လိုအပ်သည်ဟု ခရိုင်ဝန်မင်းက ယူဆလျှင် ထိုသူကို ချုပ်နှောင်ထားရန် အဓိန်ပေးနိုင်သည်။ ဤကဲ့သို့ယူဆရာ၌ ခရိုင်ဝန်မင်းသည် အကြောင်းကြောင်းကို ဝေဘန်ရမည်။ သက်သေအထောက်အထားကို စစ်ဆေးရမည်။ မိမိခရိုင်အတွင်း အခြေအနေကိုလည်း သတိမူရမည်။ ထိုအကြောင်းကြောင်းကို ထောက်ထား၍ သင့်တော်သည်ဟု ထင်မြင်သော အဓိန်ကိုချမှတ်ရန် အာဏာရှိသည်။ မိမိက သက်သေ အထောက် အထားများကို ယုံကြည် လက်ခံပြီး အဓိန်ချမှတ်ခဲ့ပါလျှင် ဤရုံးတော်က စာချွန်တော်အမှုအနေဖြင့် ထိုသက်သေအထောက်အထားကို မယုံကြည်ထိုက်၊ လက်မခံထိုက်ဟု ပြောပိုင်ခွင့် မရှိ။ သို့သော် သက်သေအထောက်အထား လုံးဝမရှိဘဲနှင့် ပုဒ်မ ၅ (က) အရ၊ အရေးယူပါက ဤရုံးတော်က စွက်ဘက်ရန်ဖြစ်နိုင်သည်။

ယခုအမှုများတွင် ထိုသူငယ်များမှာ သောင်းကျန်းသူများနှင့် ဆက်သွယ်သည်ဟူသော သက်သေခံ အထောက်အထားများကို ခရိုင်ဝန်မင်းက လက်ခံ၍ ချုပ်နှောင်ထားစေဟူသော အဓိန်ကို ချမှတ်ခြင်းသည် မိမိအား အပ်နှင်းထားသည့် အာဏာအတွင်းတွင် ကျရောက်သည်။ ချမှတ်ခဲ့သော အဓိန်မှာ မှားသည်ဟုမဆိုနိုင်၊ သို့ဖြစ်၍ ဤလျှောက်လွှာများကို ပယ်လိုက်သည်။

ပယ်ပင်ပယ်ငြားသော်လည်း လျှောက်သူများသည် ငယ်ရွယ်သူ ကျောင်းသားများ ဖြစ်ကြသည့်အလျောက် ၎င်းတို့၏ကိစ္စကို အာဏာပိုင်များက သက်ညှာစွာစဉ်းစား၍ တရားဝင် ခံဝန်ချုပ်နှင့်သော်၎င်း၊ အခြားနည်းနှင့်သော်၎င်း သက်သာခွင့်ကို ပေးနိုင်က ပေးလိမ့်မည်ဟု ဤရုံးတော်က ယူဆကြောင်းဖေါ်ပြလိုက်သည်။

တရားလွှတ်တော်ချုပ်

မောင်ခန်းပန်း (လျှောက်ထားသူ)

† ၁၉၅၇
ဇွန်လ ၃ ရက်။

နှင့်

ပြည်ထောင်စုမြန်မာနိုင်ငံတော် (လျှောက်ထားခံရသူ) *

၁၉၅၀ ခုနှစ်၊ ကင်းလွတ်ချမ်းသာခွင့်နှင့် တည်မြဲရေးအက်ဥပဒေပုဒ်မ ၄(၂) တရားစွဲဆိုခွင့်ပြုသည့်အမိန့်၊ ၎င်းအမိန့်တွင် မည်သည့်အကြောင်းချင်းရာများအတွက်တရားစွဲဆိုခွင့်ပေးသည်ဟု လုံးဝမပါ၊ သို့သော် အခွင့်အမိန့် ထုတ်ပေးရန် လျှောက်ထားသည့် တောင်းခံစာတွင် ဖြစ်ပျက်သည့်အကြောင်းချင်းရာ အစုံအလင်ဖော်ပြထားကြောင်း၊ အခွင့်အမိန့်တခုခုသည် မည်သည့်အကြောင်းအချက်များနှင့်ပြည့်စုံမှသာလျှင် တရားဝင်သော အခွင့်အမိန့်ဟု ယူဆရမည်နည်း။ ။ဆုံးဖြတ်ချက်။ ။၁၉၅၀ ခုနှစ်၊ ကင်းလွတ်ချမ်းသာခွင့်နှင့် တည်မြဲရေးအက်ဥပဒေပုဒ်မ ၄ (၂) အရ၊ တရားစွဲဆိုခွင့်ပြုသည့်အမိန့်စာတွင် တရားစွဲရန်အခွင့်အမိန့်ပေးရသည့်အကြောင်းချင်းရာများဖော်ပြထားခြင်းလုံးဝမရှိသော်လည်း အခွင့်အမိန့်ပေးပါရန် တောင်းခံသည့်စာတွင် သက်ဆိုင်ရာအကြောင်းချင်းရာများအစုံအလင်ဖော်ပြထားပြီးဖြစ်၍ ထိုအခွင့်အမိန့်စာသည် တရားဝင်သောအခွင့်အမိန့်ဖြစ်သည်။

ပြည်ထောင်စုမြန်မာနိုင်ငံတော်နှင့် ဦးကျော်န၊ ၁၉၅၆ ခုနှစ်၊ ရာဇဝတ်အသေးအဖဲ့ လျှောက်လွှာအမှတ် ၁၁၀ လိုက်နာသည်။

လျှောက်ထားခံရသူအတွက် အစိုးရရှေ့နေကြီး ဦးလှမောင် လိုက်ပါဆောင်ရွက်သည်။

ဦးချန်ထွန်း။ ။ဤလျှောက်လွှာ အမှတ် ၁၉ နှင့် လျှောက်လွှာအမှတ် ၂၀၊ ၂၂ တို့တွင်၊ လျှောက်ထားသူမောင်ခန်းပန်းက ၎င်းအပေါ်၌၊ ရာဇသတ်ကြီးပုဒ်မ ၃၀၂ အရ၊ ချမှတ်ထားသော ပြစ်ချက်နှင့် သေဒဏ်အမိန့်များကို ၁၉၅၆ ခုနှစ်၊ ရာဇဝတ်အယူခံမှုအမှတ် ၅၀၄၊ ၅၀၂၊ ၅၀၃ တို့တွင်၊ တရားလွှတ်တော်ကအတည်ပြုထားသည့် စီရင်ချက်များကိုပယ်ဖျက်ပေးပါရန် လျှောက်

* ၁၉၅၇ ခုနှစ်၊ ရာဇဝတ်အသေးအဖဲ့လျှောက်လွှာအမှတ် ၁၉၊ ၂၀၊ ၂၂။

† နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးမြင့်သိန်း၊ လွှတ်တော်ချုပ်တရားဝန်ကြီး ဦးချန်ထွန်းနှင့် လွှတ်တော်ချုပ်တရားဝန်ကြီး ဦးဘိုကြီး တို့၏ရှေ့တော်တွင် ကြားနာ၍ လွှတ်တော်ချုပ်တရားဝန်ကြီး ဦးချန်ထွန်းအမိန့်ချမှတ်သည်။

၁၉၅၇
မောင်ခန်းပန်း
နှင့်
ပြည်ထောင်စု
မြန်မာနိုင်ငံ
တော်။

ထားခြင်းဖြစ်သည်။ ကိုးကားထားသည့်အချက်မှာ၊ အဆိုပါအမှုများတွင် ၎င်း အပေါ်၌ တရားစွဲဆိုနိုင်ရန်အလို့ငှါ၊ ၁၉၅၀ ပြည့်နှစ်၊ ကင်းလွတ်ချမ်းသာခွင့်နှင့် တည်မြဲရေးအက်ဥပဒေပုဒ်မ ၄ (၂) အရ၊ နိုင်ငံတော်သမတ ကထုတ်ပေးသော တရားစွဲဆိုခွင့်ပြုသည့်အမိန့်သည်၊ တရားဝင်သော အခွင့်အမိန့်မဟုတ်ပါဟူသော အချက်ဖြစ်သည်။ အဆိုပါ တရားစွဲဆိုခွင့်ပြုသည့် အခွင့်အမိန့်တွင်၊ မည်သည့် အကြောင်းချင်းရာများအတွက် တရားစွဲဆိုရန် အခွင့်အမိန့် ပေးသည်ဟူသော အချက်များကိုလုံးဝဖော်ပြခြင်းမရှိခဲ့ချေ။ သို့ရာတွင် ပခုက္ကူခရိုင်ရဲဝန်က နိုင်ငံတော်သမတ (ပြည်ထဲရေးဝန်ကြီးဌာန) သို့ အခွင့်အမိန့်ထုတ်ပေးပါရန် ၁၉၅၅ ခုနှစ်၊ နိုဝင်ဘာလ ၁၈ ရက်နေ့စွဲဖြင့် ပေးပို့လျှောက်ထားသည့် တောင်းခံလွှာကို ဤရုံးတော်သို့ အစိုးရရှေ့နေကြီးက တင်ပြသည်။ ထိုလျှောက်လွှာတွင် လျှောက်ထားသူ မောင်ခန်းပန်းက၊ (၁) ကိုထွားကျော်၊ ကိုဖေလေး၊ ကိုဖိုးသီးနှင့် ကိုသိန်းထိုက် တို့လေးယောက်အား ထားနှင့်ခုတ်သတ်သော (ဆောရဲဌာန၊ ပဌမတိုင်ချက် အမှတ် ၂၃/၄၉) အမှု၊ (၂) ကိုအောင်ဖေနှင့်ကိုစောချန် တို့နှစ်ယောက်အား သတ်သော (ဆောရဲဌာန၊ ပဌမတိုင်ချက်အမှတ် ၂၅/၄၉) အမှုနှင့် (၃) ကိုမြတင်အားသတ်သော (ဆောရဲဌာန၊ ပဌမတိုင်ချက်အမှတ် ၂၄/၄၉) အမှု တို့အတွက်၊ ရာဇသတ်ကြီးပုဒ်မ ၃၀၂ အရ၊ တရားစွဲဆိုရန် အခွင့်အမိန့်ထုတ်ပေး ပါမည့်အကြောင်း ဖြစ်ပျက်သည့်အကြောင်းချင်းရာ အစုံအလင်ကို ဖော်ပြထားကြောင်း တွေ့ရှိရသည်။ ထို့ကြောင့် နိုင်ငံတော်သမတ ကထုတ်ပေးသည့် အခွင့်အမိန့်စာနှင့် အဆိုပါအခွင့်အမိန့်ထုတ်ပေးရန် လျှောက်ထားသည့် တောင်းခံစာတို့ကို ပူးတွဲဘတ်ရှုသောအခါ၊ တရားဝင်အခွင့်အမိန့်ဖြစ်ကြောင်း တွေ့ရှိရသည်။ အခွင့်အမိန့် တခုခုသည် မည်သည့်အကြောင်းအချက်များနှင့်ပြည့်စုံလျှင် တရားဝင်သော အခွင့်အမိန့်ဟု ယူဆနိုင်ကြောင်းဟူသော ပြဿနာနှင့် စပ်လျဉ်း၍ ဤရုံးတော်က ပြည်ထောင်စု မြန်မာနိုင်ငံတော်နှင့် ဦးကျော်နု (၁၉၅၆ ခုနှစ်၊ ရာဇဝတ် အယေးအဖွဲ့ လျှောက်လွှာအမှတ် ၁၀၈) တွင် ချမှတ်ထားထော စီရင်ချက်၌ အောက်ပါအတိုင်း ဖော်ပြထားလေသည်။

> "အဂတိလိုက်စားမှုတားမြစ်ရေး အက်ဥပဒေပုဒ်မ ၆ အရဖြစ်စေ၊ အခြားအလားတူ တရားဥပဒေ တခုခုအရဖြစ်စေ ကြိုတင်ရယူရမည့် ဖြစ်သည့် အခွင့်အမိန့်သည် ရုံးတော်သို့ တင်ပို့စွဲဆိုခြင်းခံရသော ပြစ်မှု အတွက် အခြေခံဖြစ်သည့် အကြောင်းချင်းရာများအတွက် တရားစွဲဆိုရန် ထုတ်ပေးသော အခွင့်အမိန့် ဖြစ်သည်ဟူသောအချက်ကို တရားစွဲဆိုသူ တရားလိုက၊ သက်ဆိုင်ရာရုံးတော် ကျွန်ုပ်လောက်အောင် ပြဆိုရမည်

၁၉၅၇

မောင်ခန်းပန်း နှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံ တော်။

ဖြစ်သည်။ ဤသို့ပြဆိုရန်အတွက်မှာနည်းအမျိုးမျိုးရှိနိုင်သည်။ အခွင့်အမိန့် ပေးသည့်စာတွင် တရားစွဲဆိုရန် အခွင့်အမိန့်ပေးရသည့် အကြောင်း ချင်းရာများကို ဖေါ်ပြထားလျှင်၊ ထိုအခွင့်အမိန့်ပေးသည့်စာကို ရုံးတော် သို့တင်ပြခြင်းဖြင့် ကိစ္စပြီးမြောက်နိုင်သည်။ ထိုကဲ့သို့မဟုတ်လျှင်၊ အခွင့် အမိန့်ပေးပါရန် တောင်းခံသည့် စာကိုဖြစ်စေ၊ ထိုစာတွင် ပါရှိသည့် သက်ဆိုင်ရာအကြောင်းချင်းရာများနှင့်စပ်လျဉ်းသော ထုတ်နုတ်ချက်များ ကိုဖြစ်စေ တင်ပြခြင်းဖြင့်ငင်း၊ ယခုရုံးတော်တွင်စွဲဆိုထားသည့် ပြစ်မှု၏ အခြေခံဖြစ်သော အကြောင်းချင်းရာများအတွက် အဆိုပါအမိန့်သည်၊ စွဲဆိုရန် ထုတ်ပေးလိုက်သော အမိန့်ဖြစ်သည် ဟူသော အချက်ကို တနည်းနည်းအားဖြင့် ပေါ်လွင်ထင်ရှားအောင် သက်သေခံတင်ပြခြင်း ဖြင့်ငင်း တရားစွဲဆိုသူတရားလိုက ဆောင်ရွက်နိုင်သည်။''

ထို့ကြောင့်၊ အခွင့်အမိန့်ထုတ်ပေးပါရန် တောင်းခံသည့်စာတွင် သက်ဆိုင် ရာအကြောင်းချင်းရာများအစုံအလင်ဖေါ်ပြထားပြီဖြစ်၍၊ သက်ဆိုင်ရာအခွင့်အမိန့် သည် တရားဝင်သောအခွင့်အမိန့်ဖြစ်သည်ဟု ဤရုံးတော်က ယူဆသည်။

ထို့ကြောင့်၊ ဤရုံးတော်က မည်သို့မျှဝင်ရောက်စွက်ဖက်ရန်အကြောင်း တစုံ တရာမမြင်သဖြင့်၊ ဤလျှောက်လွှာနှင့်တကွ၊ လျှောက်လွှာအမှတ် ၂၀၊၂၂ တို့ကို ပယ်လိုက်သည်။

ထို့ပြင်၊ ဤရုံးတော်မှထုတ်သားသော ဇာနီပြုခြင်းကို ဆိုင်းငံ့ရန်အမိန့်များ ကိုလည်း ရုပ်သိမ်းလိုက်သည်။

SUPREME COURT.

† S.C. 1956

Dec. 3.

THE BANK OF CHETTINAD LTD. (APPELLANT)

v.

U TAW (RESPONDENT). *

Union Judiciary Act, 1948, s. 5—Monthly Leases (Termination) Act, 1946—Suit for Declaration—Proviso, s. 42 Specific Relief Act, failure to comply with—Court has no jurisdiction to dismiss the suit—Amendment of plaint to conform with the Proviso—Reliefs though not specifically prayed for should be granted if the proved facts in the plaint warrant it—The object of Court Fees Act.

The appellant instituted a suit under s. 42 Specific Relief Act against the Respondent who was appellant's monthly tenant for a bare declaration that the appellant is the owner of a Cinema Hall and its site and for damages, etc., without a prayer for possession.

In fact, the Respondent was found to be a mere trespasser in possession by virtue of the Monthly Leases (Termination) Act, 1946.

The suit was decreed, but on appeal, the High Court dismissed the suit holding that under the Proviso to s. 42 of the Specific Relief Act, the suit was not maintainable.

On appeal to the Supreme Court, by special leave held :

Proviso to s. 42 Specific Relief Act does not warrant the assertion that the suit is not maintainable ; for the Proviso merely enacts that the Court shall not make a declaration where the plaintiff being able to seek further relief failed to do so. The Court has no jurisdiction to dismiss the suit, it can only refuse to make a declaration unless the plaint is so amended as to satisfy the requirements of s. 42 of the Specific Relief Act.

S. T. K. Chetty Firm v. *Balasundram*, 10. L.B.R. 199; *B. S. Mohamed Eusoof* v. *Bakridi and another*, (1952) B.L.R. 248, followed.

Held also : That if a plaintiff is entitled to certain reliefs upon proof of necessary fact alleged in the plaint, it is for the Court to grant such reliefs although the reliefs specifically asked for may be inartistically framed.

Babu Lal Ray v. *Bindhyachal Rai*, I.L.R. 22 Pat. 187, referred to.

Held further : The Court Fees Act was passed not to arm a litigant wit a weapon of technicality against his opponent but to secure revenue for the benefit of the State.

R. Subrao v. *Venkatro*, A I.R (1918 (P.C.) 188, referred to.

K. R. Venkatram for the appellant.

Ba Shun for the respondent.

* Civil Appeal No. 1 of 1956 against the decree of the High Court Rangoon in Civil 1st Appeal No. 56 of 1952.

† *Present :* U MYINT THEIN, Acting Chief Justice, U BO GYI, J. an U AUNG THA GYAW, J.

S.C. 1956

THE BANK OF CHETTINAD LTD. v. U TAW.

The judgment of the Court was delivered by

MR. JUSTICE BO GYI.—This appeal is by special leave granted under section 5 of the Union Judiciary Act, 1948 and arises in the following circumstances. Prior to the events which have led to the present litigation, the respondent U Taw was in occupation of a parcel of land in Mandalay town together with a residential building and a godown standing thereon as a monthly tenant of the appellants, the Bank of Chettinad Ltd. In the month of April 1942 during the Japanese invasion, the respondent ceased to occupy the premises but some time later entered upon the land again and put up a cinema hall in place of the house and godown without the Bank's consent. Under the Monthly Leases (Termination) Act, 1946, the tenancy was determined with effect from the end of April 1946 and the respondent in entering upon the property again did so as a trespasser. If in drafting the plaint the Bank's learned advocate had kept these legal consequences steadily in mind, much confusion of thought would have been avoided.

The Bank claimed that the respondent dismantled the house and godown on their land and with part of the materials thus obtained put up the cinema hall in suit, removing the rest to another place where he constructed a house. They therefore prayed to be declared owners of the cinema hall standing on the site in question and to be awarded the sum of K 10,000 as damages in respect of building materials removed to another place or, in the alternative, for the sum of K 25,000 as damages for dismantling the house and godown and conversion of the materials. They also prayed that, in case the Court did not find them to be owners of the cinema hall, the

S.C. 1956 — THE BANK OF CHETTINAD LTD. v. U TAW.

respondent be ejected by demolition of the hall. They further prayed for mesne profits and rents, but the claim for rents was later abandoned. The respondent while admitting the tenancy disputed the Bank's ownership of the land. He denied having dismantled the house and godown and averred that the buildings were dismantled by hooligans during the enemy occupation of Mandalay.

The learned trial Judge held that the land and the buildings originally standing thereon belonged to the Bank and that the respondent dismantled the buildings and used some of the materials in the construction of the cinema hall and the remainder in building a house on another site. He directed an inquiry as to the mesne profits claimed and the value of the building materials removed.

The learned Judges of the High Court were of the opinion that the original buildings standing on the land were dismantled by the respondent who constructed the cinema hall with some of the materials, removing the remainder for the construction of another building. The learned Judges held, however, that in view of the proviso to section 42 of the Specific Relief Act the suit was not maintainable and accordingly dismissed the suit without going into the claim as to damages and mesne profits. The language of the proviso to section 42 of the Specific Relief Act does not warrant the assertion that the suit is not maintainable; for the proviso merely enacts that the Court shall not make a declaration where the plaintiff being able to seek further relief fails to do so. The Court has no jurisdiction to dismiss the suit; it can only refuse to make a declaration unless the plaint is so amended as to satisfy the requirements of the proviso to section 42 of the Specific Relief Act. The view was held in *S. T. K*

Chetty Firm v. *Balasundram* (1) which has been approved by this Court in *B. S. Mohamed Eusoof* v. *Bakridi and another* (2).

Normally, where necessary facts are stated in the plaint which, if proved, would entitle the plaintiff to obtain certain reliefs it is for the Court to grant such reliefs although the reliefs specifically asked for may be inartistically framed. See *Babu Lal Ray* v. *Bindhyachal Rai* (3). This however is subject to the proviso to section 42 of the Specific Relief Act. We hold therefore that the Bank should have been given an opportunity by the High Court to amend their plaint adding the necessary reliefs and paying the deficit court fees, if any.

We are not impressed with the argument that the respondent raised this issue before the trial Court. Reading the written statement as a whole we find that he did not raise the plea that the suit was not maintainable for want of a prayer for possession of the cinema hall and its site. As a matter of fact, no issue was asked for on the point and none was framed.

The learned advocate for the respondent has contended that no court fee has been paid on the relief for possession of the premises. The Bank have paid Court fees on K 31,080 and it is clear that they did not try to evade payment of court fees by a mere declaratory suit. Furthermore, it has been held by the Privy Council in *R. Subrao* v. *Venkatro* (4) that the Court Fees Act was passed not to arm a litigant with a weapon of technicality against his opponent but to secure revenue for the benefit of the State.

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(1) 10 L.B.R. 199.
(2) (1952) B.L.R. 248
(3) I.L.R. 22 Pat. 187.
(4) A.I.R. (1918) (P.C.) 188.

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THE BANK OF CHETTINAD LTD. v. U TAW.

We accordingly set aside the judgment and decree under appeal and remand the case to the High Court to re-admit it under its original number in the register of Civil Appeals and to determine it in accordance with law, after giving the Bank an opportunity to amend the plaint by adding the necessary reliefs in conformity with the proviso to section 42 of the Specific Relief Act and paying the deficit court fees, if any.

The respondent shall bear the costs of the present appeal. Advocate's fee in this Court Kyats one hundred and seventy. A certificate will issue under section 13 of the Court Fees Act for refund of the Court fees paid on the memorandum of appeal in this Court.

SUPREME COURT.

THE BURMA OIL COMPANY LABOURERS UNION (APPELLANTS)

v.

THE BURMA OIL COMPANY (REFINERIES) LTD. (RESPONDENTS).*

† S.C. 1957

Aug, 26.

Trade Disputes Act, s. 9—The Court of Industrial Arbitration, whether a "Court" within the meaning of s. 6 of the Union Judiciary Act.

Held: That the Court of Industrial Arbitration formed under the Trade Disputes Act is not a Court within the meaning of s. 6 of the Union Judiciary Act, but it is a Tribunal discharging quasi-judicial functions.

D. D. Grover v. *K. C. Kounda*, C.M.A. No. 36 of 1955; *Cooper* v. *Wilson and others*, (1937) 2 K. B. 309 at 340; *Bharat Bank* v. *Employees of Bharat*, A.I.R (37) (1950) (S.C.) 188 at 209 (para. 61); *J. K. Iron and Steel Co. Ltd.* v. *The Iron and Steel Mazdoor Union*, (1956) A.I.R. (S.C.) 231; *The Waterside Workers Federation of Australia* v. *J. W. Alexander Ltd.*, (1918) 25 C.L.R. 434; *Attorney-General for Australia* v. *The Queen*, (1957) W L.R. 607 at 614.

Yan Aung for the applicants.

Horrocks for the respondents.

Judgment of the Court was delivered by

MR. JUSTICE CHAN HTOON.—The President referred to the Court of Industrial Arbitration, under section 9 of the Trade Disputes Act, for its determination a dispute between the Burma Oil Company (Refineries) Ltd. (hereinafter to be referred to as "the Company") and its former employees represented by their Labour Union known as the Burma Oil Company Labourers Union (hereinafter to be referred to as "the Union"). After hearing the parties and their witnesses the Court of Industrial

* Civil Misc. Application No. 73 of 1956. Application for Special Leave to Appeal against the Award of the Court of Industrial Arbitration.

† *Present:* U MYINT THEIN, Chief Justice, U CHAN HTOON, J. and U BO GYI, J.

S.C. 1957

THE BURMA OIL COMPANY LABOURERS UNION v. THE BURMA OIL COMPANY (REFINERIES) LTD.

Arbitration made an award under section 10 of the Act. The Union applied to this Court for special leave to appeal against the award under section 6 of the Union Judiciary Act, and the Company also applied for special leave to appeal against the said award in Civil Miscellaneous Application No. 82 of 1956.

The Court heard the counsel for the Union and the Company on a preliminary question as to whether the Court of Industrial Arbitration is a "Court" within the meaning of section 6 of the Union Judiciary Act. The Attorney-General, represented by the learned Government Advocate, was also heard as *amicus curiae*.

In *D. D. Grover* v. *K. C. Kounda and two others* (1) this Court has observed:

> "It may at once be said that the words 'Court' occurring in section 6 of the Union Judiciary Act denotes only courts in the strict sense of the term, as the section relates only to appeals to this Court by special leave."

It is therefore necessary to see whether the Court of Industrial Arbitration is a "Court" in the strict sense of the term, in other words whether its functions are purely of judicial nature or merely quasi-judicial. In the above-mentioned case this Court adopted as the basis of its determination of the meaning of the terms "judicial" and "quasi-judicial" the following passage reproduced from the report of the Committee on Minister's Powers by Scott, L.J. in *Cooper* v. *Wilson and others* (2).

> "A true judicial decision presupposes an existing dispute between two or more parties and then involves four requisites—
>
> (1) the presentation (not necessarily orally) of their case by the parties to the dispute;

(1) C.M.A. No. 36 of 1955. (2) (1937) 2 K.B. 309, 340.

(2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence ;

(3) if the dispute between them is a question of law, the submission of legal argument by the parties ; and

(4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law.

A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3), and never involves (4). The place of (4) is in fact taken by administrative action, the character of which is determined by the Minister's free choice."

We must therefore consider whether the Court of Industrial Arbitration has all the attributes of a truly judicial body as indicated above. It is common ground, nor is there any doubt whatsoever, that the Court of Industrial Arbitration fulfills first three requisites. It has indeed all the trappings of law. Under the Act and the Rules made thereunder, each party to an industrial dispute "when referred to the Court for its determination by the President of the Union" is required to present his own case in writing and to adduce evidence if he wishes to do so, as in the case of proceedings in an ordinary Court of law. At the end of the hearing of the parties and their witnesses, legal arguments are made by the parties or their lawyers. Then the Court makes its award based upon a finding of the facts as brought out by the evidence on record. Is the Court bound to decide by "an application of the law of the land to the facts so found" or is it at liberty to come to

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its decision on considerations other than what is strictly legal? This seems to be the question which will determine the character and nature of the Court of Industrial Arbitration. For this purpose we may refer to the Trade Disputes Act to see if there are any provisions which lay down any substantive law or which require it to apply the ordinary law of the land. There is no such provision to be found in the Act. The Act contains no provisions relating to the rights and obligations between employers and employees, as in the case of the law of master and servant. It only seeks to regulate the conduct and relations between the Court and the parties in respect of the dispute. It does not purport to lay down what facts and circumstances will give rise to what kinds of rights or obligations between the parties. It merely provides procedure for settling the disputes. Section 10 of the Act, empowers the Court "to make such award as it thinks fit and proper after due enquiry and consideration". It is quite apparent that the Court of Industrial Arbitration is not bound to apply the law of Contract or the law of Master and Servant or any other substantive law. On the contrary, it is to decide on principles of industrial policy and for peaceful relations between capital and labour or what appears to be just and proper in the circumstances of the particular case. In *Bharat Bank* v. *Employees of Bharat Bank* (1), Mukherjea, J. observed with reference to the question as to whether the Industrial Tribunal constituted under the Industrial Disputes Act of India is a Court in the strict sense of the term or a Tribunal of quasi-judicial nature:

"We would now examine the process by which an Industrial Tribunal comes to its decisions and I have no

(1) A.I.R. (37) (1950) (S.C.) 188 at 209 (para. 61).

hesitation in holding that the process employed is not judicial process at all. In settling the disputes between the employers and the workmen, the function of the Tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace. An industrial dispute as has been said on many occasions is nothing but a trial of strength between the employers on the onehand and the workmen's organization on the other and the Industrial Tribunal has got to arrive at some equitable arrangement for averting strikes and lock outs which impede production of goods and the industrial development of the country. The Tribunal is not bound by the rigid rules of law. The process it employs is rather an extended form of the process of collective bargaining and *is* more akin to administrative than to judicial function. In describing the true position of an Industrial Tribunal in dealing with labour disputes, this Court in *Western India Automobile Association* v. *Industrial Tribunal, Bombay*, (1949) F.C.R. 321 at p. 345: [A.I.R. (36) (1949) F.C. 111] quoted with approval, a passage from Ludwig Teller's well known work on the subject, where the learned author observes that "industrial arbitration may involve the extension of an existing agreement or the making of new one or in general the creation of new obligation or modification of old ones, while commercial arbitration generally concerns itself with interpretation of existing obligations and disputes relating to existing agreements.' The views expressed in these observations were adopted in its entirety by this Court. Our conclusion therefore is that an Industrial Tribunal formed under the Industrial Disputes Act is not a judicial tribunal and its determination is not a judicial determination in the proper sense of these expressions."

The learned Judge further remarks (para. 67, p. 211):

". . . the (Industrial) tribunal is not bound to decide the disputes by application of the ordinary law of the

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land. A good deal depends upon questions of policy and public convenience."

In our opinion these observations correctly set out the functions of a Court of Industrial Arbitration formed under the Trade Disputes Act of Burma. In the above mentioned case the Supreme Court of India held by a majority that the Industrial Tribunals are not courts in the strict sense of the term but are merely tribunals discharging quasi-judicial functions. In *J. K. Iron and Steel Co. Ltd.* v. *The Iron and Steel Mazdoor Union* (1) it was held that "these tribunals are not Courts in the strict sense of the term" but "they have to discharge quasi-judicial functions".

The observations of Issacs and Rich, JJ. in *The Waterside Workers Federation of Australia* v. *J. W. Alexander Limited* (2) bring out clearly the distinction between the functions of an Industrial Tribunal and a Court of law—

> "But the essential difference is that the judicial power is concerned with the ascertainment, declaration and enforcement or the rights and liabilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted; whereas the function of the arbitral power in relation to industrial disputes is to ascertain and declare, but not enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other."

It is contended by the learned counsel for the Union that the name of the court as "The Court of Industrial Arbitration" as provided in the Act, together with its judicial trappings should be the determining factor in considering this question. We must at once say that neither the name nor mere trappings will turn what is merely a quasi-judicial body into a court in the strict sense of the term.

(1) (1956) A.I.R (S.C.) 231. (2) (1918) 25 C.L.R. 434.

The following remarks of Barton, J. in *The Waterside Workers Federation of Australia* v. *J. W. Alexander Ltd.* (1) are quite apposite in this respect:

"Whether persons were Judges, whether tribunals were courts and whether they exercised what is now called judicial power, depends on substance and not on mere names."

In *Attorney-General for Australia* v. *The Queen* (2), Viscount Simonds in delivering the judgment of the Privy Council observes—

". . . . that in the matter under consideration the primary and essential object of the Act was the settlement of industrial disputes, that this object can be fulfilled only by the intermediacy of a body of persons established for that purpose, that the functions of a body so established are not judicial, that to call it a court or a superior court of record does not convert its non-judicial functions into judicial functions, and that to add judicial functions or powers to them means only that a body created to exercise non-judicial functions has now vested in it judicial functions also."

For all the reasons set out above, we are of the opinion that the Court of Industrial Arbitration formed under the Trade Disputes Act is not a Court within the meaning of section 6 of the Union Judiciary Act, but it is a tribunal discharging quasi-judicial functions.

Special leave to appeal is therefore refused and the application is dismissed; each party to bear its own costs. Advocate's fees are fixed at Kyats three hundred and forty.

(1) (1918) 25 C.L.R. 434. (2) (1957) W.L.R. 607 at 614.

တရားလွှတ်တော်ချုပ်

† ၁၉၅၇
ဇူလိုင်လ ၂၉
ရက်။

ဦးအောင်ဘ (လျှောက်ထားသူ)
နှင့်
နယ်ပိုင်တရားမတရားသူကြီးပါ ၆ (လျှောက်ထား ခံရသူများ)*

၁၉၁၆ ခုနှစ်၊ ဝိနိစ္ဆယဌာန (ပြင်ဆင်ချက်) အက်ဥပဒေပုဒ်မ ၃၀။ ဝိနိစ္ဆယခုံပွဲစည်းခြင်း မြို့နယ်ဝိနိစ္ဆယဌာန၏အဓိန်ကိုမကျေနပ်သဖြင့် ခရိုင်ဝိနိစ္ဆယဌာနသို့ စာဒဏဝင်ရာဝယ် စာဒဏနှင့် စုဒိတကတို့သည် နှစ်ဦးသဘောထူ ပဋိညာဉ်စာချုပ်ချုပ်ဆို၍ ဆရာတော်တို့အား ဆုံးဖြတ်ချက်ပေးပါရန်လွှဲအပ်သဖြင့် ၎င်းတို့က ဆုံးဖြတ်ချက်ပေးလေသည်။ ထိုဆုံးဖြတ်ချက်ကို ဂရုမမူဘဲ နယ်ပိုင်တရားမရုံးတော်သို့ ဝိနိစ္ဆယခုံပွဲစည်းပေးရန်လျှောက်ထားရာ ခုံပွဲစည်းပေးရန် ထိုခုံကပင် ဆုံးဖြတ်ချက်ချမှတ်လေသည်၊ ဆုံးဖြတ်ချက်။ ။နယ်ပိုင်တရားမရုံးတော်၌၊ ၁၉၁၆ ခုနှစ်၊ ဝိနိစ္ဆယဌာန(ပြင်ဆင်ချက်) အက်ဥပဒေပုဒ်မ ၃၀ အရ၊ ဝိနိစ္ဆယခုံပွဲစည်းနိုင်သည့် အာဏာမရှိချေ။

ဦးဘိုးမြနှင့် ဦးဝိလာသ ပါ ၀ ၁၉၅၆ ခုနှစ်၊ တရားလွှတ်တော်ချုပ် တရားမအယေးအမဲ့လျှောက်လွှာအမှတ် ၄၄ ကိုလိုက်နာသည်၊

လျှောက်ထားသူအတွက် လွှတ်တော်ရှေ့နေကြီး ဦးဘသန်း (၁) လိုက်ပါဆောင်ရွက်သည်။

လျှောက်ထားခံရသူအမှတ် (၆) အတွက်လွှတ်တော်ရှေ့နေကြီး ဦးဘကျင် လိုက်ပါဆောင်ရွက်သည်။

ဦးဘိုကြီး။ ။ဤအမှုတွင် လျှောက်ထားခံရသူ အမှတ် (၆) ဦးနာယကသည်၊ လျှောက်ထားသူ ဦးအောင်ဘအား၊ မော်လမြိုင်ကျန်းမြို့နယ်၊ ဝိနိစ္ဆယဌာန၌ မြောင်းမြမြို့နယ် ဘိုးတီလွှတ်ကျောင်း ဝိဝါဒါဒါအဓိကရဏ်းမှုနှင့် ပတ်သက်၍ တရားစွဲဆိုရာ၊ ထိုရုံးတော်က ဘိုးတီးလွှတ်ကျောင်းကို ဦးနာယကအား၊ ဂရုဘက်၊ လဟုဘက်၊ အာရာဓ်မြေနှင့်တကွ ပုဂ္ဂလိကပိုင်ဖြစ်စေ ဟုဆုံးဖြတ်ကြသည်တွင်၊

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* ၁၉၅၆ ခုနှစ်၊ တရားမအယေးအမဲ့လျှောက်လွှာ အမှတ် ၀၁။

† နိုင်ငံတော်တရားဝန်ကြီး ဦးမြင့်သိန်း၊ တရားဝန်ကြီး ဦးချန်ထွန်းနှင့် တရားဝန်ကြီး ဦးဘိုကြီးတို့ရှေ့မှောက်တွင်။

ဦးအောင်ဘက မကျေနပ်သဖြင့်၊ မြောင်းမြခရိုင် ဝိနိစ္ဆယဌာနသို့ စာဒဏဝင်ရောဝယ်၊ ထိုခရိုင်ဝိနိစ္ဆယဌာနဆရာတော်များ၏ ဆုံးမညွှန်ကြားပေးချက်အရ၊ စာဒဏကန့် စုဗိတကတို့သည် နှစ်ဦးသဘောတူ ပဋိညာဉ်စာချုပ်ချုပ်ဆို၍၊ ယင်းဆရာတော်များအား အခင်းဖြစ် ပစ္စည်းများကို ဆက်ကပ်လှူဒါန်းခဲ့လေသည်။ ဆရာတော်များကလည်း အဆိုပါပစ္စည်းအရပ်ရပ်တို့ကို၊ ဦးနာယကအပါအဝင် ရဟန်း ၄ ပါးပိုင်၊ စတုသန္တကအဖြစ်ဖြင့် ပြုလုပ်ပြီးလျှင်၊ မိမိတို့သတ်မှတ်သော စည်းကမ်းချက်များအရ၊ ယင်းစတုသန္တကအဖြစ်ဖြင့်ပိုင်ဆိုင်သူရဟန်းများနေထိုင်သုံးစွဲလိုက်နာဆောင်ရွက်ရမည်ဟု ဆုံးဖြတ်ချက်ချမှတ်လိုက်လေသည်။

၁၉၅၇

ဦးအောင်ဘ နှင့် နယ်ပိုင်တရားမတရားသူကြီးပါ ၆၊

ဤရုံးတော်ရှေ့တွင်၊ နှစ်ဦးနှစ်ဘက်သော ပညာရှိရှေ့နေကြီးများ၏ လျှောက်လဲချက်အရ သိရှိရသည်မှာ၊ ဦးနာယကသည် အထက်ဖေါ်ပြပါကျောင်းတွင်ယခုနေထိုင်လျက်ရှိကြောင်း။ သို့သော်အခြားသောရဟန်း ၃ ပါးတို့မှာ ထိုကျောင်းသို့လာရောက်နေထိုင်ခြင်းမပြုကြောင်း သိရှိရသည်။ ဦးနာယက၏ပညာရှိ ရှေ့နေကြီးက ထပ်မံလျှောက်ထားသည်မှာ ယခုလျှောက်ထားသူ ဦးအောင်ဘသည်၊ အထက်ဖေါ်ပြပါကျောင်း၌ သီတင်းသုံးနေသူ ဦးနာယကအား ခြိမ်းခြောက်ခြင်း၊ ရန်မူခြင်းစသည်ဖြင့် အမျိုးမျိုးအနှောင့်အရှက် ပေးပြီးလျှင်၊ ခရိုင်ဝိနိစ္ဆယဌာနဆရာတော်များချမှတ်သည့်အတိုင်း ပစ္စည်းများကို ဦးနာယကအား ပေးအပ်ခြင်းမပြုပါဟုလျှောက်ထားလေသည်။

ဤအမှုတွင်ထူးခြားသောအချက်များမှာ၊ဦးနာယကသည်မိမိနှင့်ဦးအောင်ဘတို့နှစ်ဦးသဘောတူညီစွာ ခရိုင်ဝိနိစ္ဆယဌာနဆရာတော်တို့အား၊ ဆုံးဖြတ်ချက်ပေးပါရန်လွှဲအပ်သဖြင့်၊ ဆရာတော်များက ဆုံးဖြတ်ချက်ပေးပြီးသည်ကို အလေးမပြုဂရုမမူဘဲ၊ မြောင်းမြနယ်ပိုင်တရားမရုံးတော်သို့ ဝိနိစ္ဆယ ခုံဖွဲ့စည်းပေးပါရန် လျှောက်ထားသည်တကြောင်း။ နယ်ပိုင် တရားမရုံးတော်ကလည်း ယင်းသို့လျှောက်ထားသည့်အတိုင်း ခုံဖွဲ့စည်းပေး၍ တိုခုံကဆုံးဖြတ်ချက် ချမှတ်သည်တကြောင်းတို့ဖြစ်လေသည်။

စင်စစ်အားဖြင့်ဆိုသော်၊ ယခုကဲ့သို့သော ကိစ္စမျိုးတွင်၊ မြို့နယ်ဝိနိစ္ဆယဌာနကအမိန့်ချမှတ်ပြီးနောက်၊ ခရိုင်ဝိနိစ္ဆယဌာနသို့ စာဒဏဝင်ရောက်သောအမှုမျိုးတွင်၊ နယ်ပိုင်တရားမရုံးတော်က ဝင်ရောက်စွက်ဖက်၍၊ ဝိနိစ္ဆယခုံဖွဲ့စည်းပေးခြင်း၊ ပြန်၍သည့်အာဏာမရှိကြောင်း၊ ဤရုံးတော် ဦးဘိုးမြနှင့် ဦးဝိလာသ ပါ ဂ [°] တွင်ဆုံးဖြတ်ခဲ့ပြီးလေပြီ။

° ၁၉၅၆ ခုနှစ်၊ တရားလွှတ်တော်ချုပ် တရားမအယေးအဖွဲ့လျှောက်လွှာအမှတ် ၄၄၊

၁၉၅၇

ဦးအောင်ဘ နှင့် နယ်ပိုင်တရားမ တရားသူကြီး ပါ ၆၊

ထိုမျှသာမကသေး၊ ဤအမှုတွင် ခရိုင်ဝိနိစ္ဆယဌာနက စောဒကနှင့်စုတဒိက တို့ နှစ်ဦးနှစ်ဘက်သဘောတူညီစွာ၊ ယင်းဌာနဆရာတော်များအား အခင်းဖြစ် ပစ္စည်းများကို ပေးအပ်လျှင်ငါးပြီးနောက်၊ ဆရာတော်များက၊ ထိုပစ္စည်းများကို စတုသန္တကပစ္စည်းအဖြစ်ဖြင့် ဆုံးဖြတ်ချက် ချမှတ်လိုက်လေသည်။ ယင်းသို့ဖြစ်၍ နယ်ပိုင်တရားမရုံးတော်၌ ၁၃၁၆ ခုနှစ်၊ ဝိနိစ္ဆယဌာန (ပြင်ဆင်ချက်) အက် ဥပဒေပုဒ်မ ၃၈ အရ၊ ဝိနိစ္ဆယခုံဖွဲ့စည်းနိုင်သည့်အာဏာမရှိချေ။

အထက်ဖေါ်ပြပါ အခြေခံများကြောင့် ၁၉၅၆ ခုနှစ်၊ ဇူလိုင်လ ၁၈ ရက်နေ့၌ပါ နယ်ပိုင်တရားမရုံးတော်၏ ဝိနိစ္ဆယခုံဖွဲ့စည်းသည့်အမိန့်ကိုငင်း၊ ယင်းအမိန့်အရဖွဲ့စည်းသော ဝိနိစ္ဆယခုံ၏ချမှတ်သော ၁၉၅၆ ခုနှစ်၊ စက် တင်ာလ ၉ ရက်နေ့၌ပါ အမိန့်ကိုငင်း ပယ်ဖျက်လိုက်သည်။

ဤအမှုတွင်၊ လျောက်ထားခံရသူ ဦးနာယကသည်၊ ဘိုးတိလွတ်ကျောင်း၌ သီတင်းသုံးနေသည်ဖြစ်သဖြင့် ဦးနာယကနှင့်လျောက်ထားသူ ဦးအောင်ဘတို့မှာ ကျန်ရှိသောပစ္စည်းရပ်များနှင့် ပတ်သက်၍ နှစ်ဦးသဘောတူ ခရိုင်ဝိနိစ္ဆယဌာန ဆရာတော်များ ဆုံးဖြတ်ချမှတ်သည့်အတိုင်း ဆောင်ရွက်သွားမည်ဆိုလျှင်၊ ယခုအဓိကရုဏ်းမှာ ရာဇဝတ်မှုစသည့် မှုခင်းများမပေါ်ပေါက်ဘဲ အေးငြိမ်းစွာ ပြီးပြတ်နိုင်လိမ့်မည်ဟု ဤရုံးတော်ကထင်မြင်သည်။ ယင်းသို့ထင်မြင်သည့်အတိုင်းလည်း နှစ်ဦးနှစ်ဘက်သဘောထားကြီးစွာဖြင့် ခရိုင်ဝိနိစ္ဆယဌာနဆရာတော်များ၏ အမိန့်ကိုလိုက်နာဆောင်ရွက်လိမ့်မည်ဟုဤရုံးတော်ကမျှော်လင့်သည်။ ယင်းသို့ မျှော်လင့်သည့်အတိုင်းလည်း ဤအမှုမှာ အမှုသည်များသည် မိမိတို့စရိတ်ကို မိမိတို့ကျခံကြစေဟုအမိန့်ချမှတ်လိုက်သည်။

တရားလွှတ်တော်ချုပ်

ဦးဘိုးမြ (လျှောက်ထားသူ)

နှင့်

ဦးဝိလာသ ပါဂ (လျှောက်ထားခံရသူများ)*

† ၁၉၅၇ ဇူလိုင်လ ဂ ရက်။

၁၃၁၆ ခုနှစ်၊ ဝိနိစ္ဆယဋ္ဌာန (ပြင်ဆင်ချက်) အက်ဥပဒေပုဒ်မ ၃၅၊ ၃၆၊ ၃၇၊ ၃၈၊ ၄၇၊ ၁၃၁၁ ခုနှစ်၊ ဝိနိစ္ဆယဋ္ဌာနအက်ဥပဒေ ပုဒ်မ ၁၅၊ ၁၆၊ ၁၈၊ ၁၉၊ ၃၅၊ မြို့နယ် ဝိနိစ္ဆယဋ္ဌာန၏အဓိန္ဓိကို မကျေနပ်သဖြင့် ခရိုင်ဝိနိစ္ဆယဋ္ဌာနသို့ စာဒနာဝင်ကြောင်း စာဒနာဝင်မှုမပြီးပြတ်သေးမီပင် နယ်ပိုင်တရားမ တရားသူကြီးထံမှောက်သို့ ဝိနိစ္ဆယခုံဒွစည်းပေးရန် လျှောက်ထားရာ တရားသူကြီးက ၁၃၁၆ ခုနှစ်၊ ဝိနိစ္ဆယဋ္ဌာန (ပြင်ဆင်ချက်) အက်ဥပဒေပုဒ်မ ၃၈ အရ၊ ဝိနိစ္ဆယခုံဒွစည်းပြီး၊ မြို့နယ်ဝိနိစ္ဆယဋ္ဌာန၏ အဓိန္ဓိကို ပယ်ဖျက်လိုက်လေသည်။ ။ဆုံးဖြတ်ချက်။ ။မြို့နယ်ဝိနိစ္ဆယဋ္ဌာနက အဓိန္ဓိချမှတ်ပြီးနောက် ခရိုင်ဝိနိစ္ဆယဋ္ဌာနသို့ စာဒနာဝင်ရောက်ရာတွင် နယ်ပိုင်တရားမ ရုံးတော်ကဝင်ရောက်စွက်ဖက်၍ ဝိနိစ္ဆယခုံ ဒွစည်းပေးခြင်းပြုနိုင်သည့် အာဏာမရှိကြောင်း။

လျှောက်ထားသူအတွက် လွှတ်တော်ရှေ့နေကြီး ဦးဘသန်း (၁) လိုက်ပါဆောင်ရွက်သည်။

လျှောက်ထားခံရသူ အမှတ် (၆) မှ (၈) အထိအတွက် လွှတ်တော်ရှေ့နေကြီး ဦးဘကျင် လိုက်ပါဆောင်ရွက်သည်။

ဦးဘိုကြီး။ ။ဤအမှုတွင် လျှောက်ထားသူ ဦးဘိုးမြက လျှောက်ထားခံရသူအမှတ် (၆) ဦးတေဇဝံသ၊ အမှတ် (၇) ဦးဇုန္ဓာဘိဝံသနှင့် အမှတ် (၈) မောင်တင်ညွန့်တို့အား၊ ဝါးခယ်မမြို့၊ ကသစ်ပင်ကျောင်းမှ ဗဟုရွာထွက်ခွါသွားစေရန်အတွက်၊ ဝါးခယ်မမြို့နယ် ဝိနိစ္ဆယဋ္ဌာန၌တရားစွဲဆိုရာတွင် အနိုင်ရရှိခဲ့သည်ကို ဦးတေဇဝံသ ပါ စုဒိတက ၃ ဦးတို့က မကျေနပ်သဖြင့်၊ မြောင်းမြခရိုင် ဝိနိစ္ဆယဋ္ဌာန်သို့ စာဒနာဝင်ကြပြီးလျှင် ထိုစာဒနာဝင်မှု မပြီးပြတ်သေးမီပင် ခရိုင်ဝိနိစ္ဆယဋ္ဌာန ဝိနည်းခိုရိုဆရာတော်များအား မယုံကြည်ဟုဆိုကာ လျှောက်

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* ၁၉၅၆ ခုနှစ်၊ တရားမအသေးအဖဲ့လျှောက်လွှာ အမှတ် ၄၄-၈၊

* နိုင်ငံတော် တရားဝန်ကြီးချုပ် ဦးမြင့်သိန်း၊ လွှတ်တော်ချုပ်တရားဝန်ကြီး ဦးဘိုကြီး နှင့်လွှတ်တော်တရားဝန်ကြီး ဦးအောင်ခိုင်တို့ရှေ့မှောက်တွင်။

၁၉၅၇

ဦးဘိုးမြ နှင့် ဦးဝိလာသ ပါ ဂ။

ထားခံရသူ အမှတ် (၄) မြောင်းမြို့၊ နယ်ပိုင်တရားမ တရားသူကြီးထံမှောက်သို့ ပိန္နဒယုခံ ဖွဲ့စည်းပေးပါရန် စွဲဆိုလျှောက်ထားကြလေသည်။ နယ်ပိုင်တရားမ တရားသူကြီးက ယင်းသို့လျှောက်ထားသူများနှင့် ဦးဘိုးမြတို့အား ဆင့်ခေါ်ပြီး လျှင်၊ ဦးဘိုးမြတို့က ကန့်ကွက်ငြားသော်လည်း ၁၃၁၆ ခုနှစ်၊ ပိန္နဒယဌာန (ပြင်ဆင်ချက်) အက်ဥပဒေပုဒ်မ ၃ဂ အရ၊ ပိန္နဒယုခံ ဖွဲ့စည်းစေပြီး၊ အမှုကို လွှဲအပ်ခဲ့လေသည်။ ယင်းပိန္နဒယုံသည် ထိုအမှုကို ယခုလျှောက်ထားသူ ဦးဘိုးမြမလာရောက်ဘဲနေသဖြင့် ၎င်း၏မျက်ကွယ်တွင် သုံးသပ်ဝေဘန်ပြီးလျှင်၊ ဝါးခယ်မမြို့နယ် ပိန္နဒယဌာန၏ဆုံးဖြတ်ချက်ကို ပယ်ဖျက်လိုက်လေသည်။

လျှောက်ထားသူ ဦးဘိုးမြ၏ ပညာရှိရွှေနေကြီးက အဓိကလျှောက်ထားသည်မှာ ယခုအမှုသည် ဝါးခယ်မမြို့နယ် ပိန္နဒယဌာနက ဆုံးဖြတ်ပြီးဖြစ်သဖြင့် နယ်ပိုင်တရားမတရားသူကြီးကိုးကားသော ၁၃၁၆ ခုနှစ်၊ ပိန္နဒယဌာန (ပြင်ဆင်ချက်) အက်ဥပဒေပုဒ်မ ၃ဂ တွင် မည်သည့်နည်းနှင့်မျှ အကျုံးမဝင်နိုင်ကြောင်း လေးနက်စွာလျှောက်ထားလေသည်။ ယင်းအက်ဥပဒေပုဒ်မ ၃ဂ နှင့် သက်ဆိုင်ရာပုဒ်မ ၃၅၊ ၃၆၊ ၃၇ တို့ကို ပေါင်းစပ်ပြီး သုံးသပ်ဝေဘန်ရာဝယ် မြို့နယ်ပိန္နဒယဌာနက ဆုံးဖြတ်ပြီးဖြစ်၍ ခရိုင်ပိန္နဒယဌာနသို့ ရောက်ရှိနေသော စာဒနာဝင်မှုများနှင့်စပ်လျဉ်း၍ နယ်ပိုင်တရားမ တရားသူကြီးသည်၊ ပုဒ်မ ၃ဂ အရ၊ အပ်နှင်းထားသော အာဏာများကို အသုံးမပြုနိုင်ကြောင်း တွေ့ရှိရသည်။ စင်စစ်အားဖြင့်ဆိုသော် ၁၃၁၁ ခုနှစ်၊ ပိန္နဒယဌာနအက်ဥပဒေပုဒ်မ ၁၅ တွင် အကျုံးဝင်သည့် ဖိနည်းဓမ္မက်အဓိကရုဏ်းမှုကို ကြားနာစစ်ဆေးဆုံးဖြတ်ရန်အလို့ငှါ စာဒနာနှင့်စုဒီတကာတို့သည် မိမိတို့သဘောတူဖွဲ့စည်းသော ပိန္နဒယုံသို့ လွှဲအပ်နိုင်သည့် အခွင့်အရေးကို ၁၃၁၆ ခုနှစ်၊ ပိန္နဒယဌာန (ပြင်ဆင်ချက်) အက်ဥပဒေပုဒ် ၃၅ အရ၊ ပေးအပ်ရာတွင် ၁၃၁၁ ခုနှစ်၊ ပိန္နဒယဌာနအက်ဥပဒေပုဒ်မ ၁၆ ကိုသာညွှန်း၍အခွင့်အရေးများပေးထားလေသည်။ ၎င်းပုဒ်မ ၁၆ မှာ ထိုကဲ့သို့သောအမှုမျိုးကို မြို့နယ်ပိန္နဒယဌာနမှာ ကြားနာစစ်ဆေး၍ စီရင်ဆုံးဖြတ်ရန် မူလစီရင်ပိုင်ခွင့် အာဏာများရှိကြောင်း ပြဋ္ဌာန်းထားလေသည်။ မြို့နယ်ပိန္နဒယဌာန၏ ဆုံးဖြတ်ချက်ကို ခရိုင်ရာခရိုင်ပိန္နဒယဌာနတွင် စာဒနာဝင်ခွင့်ပေးအပ်ထားသည့် ပုဒ်မ ၁၈ ကိုသော်၎င်း၊ ခရိုင်ပိန္နဒယဌာန၏ ဆုံးဖြတ်ချက်ကို နိုင်ငံတော် ပိန္နဒယဌာနတွင် နောက်ဆုံးစာဒနာ ဝင်ခွင့်ပေးအပ်ထားသည့် ပုဒ်မ ၁၉ ကိုသော်၎င်း ယင်းပုဒ်မ ၃၅ ၌ ရည်ညွှန်းချက်မရှိချေ။

အကယ်၍၊ နှစ်ဦးနှစ်ဘက်သဘောတူညီလျှင်၊ မည်သည့်ပိန္နဒယဌာနတွင် မဆို မပြီးပြတ်ရှိနေသော အဓိကရုဏ်းမှုတခုခုကို စာဒနာနှင့်စုဒီတကတို့သဘော

တူဖွဲ့စည်းမည့် ဝိနိစ္ဆယခုံသို့ ထိုအမှုကိုဆုံးဖြတ်ချက်မချမီ လွှဲအပ်နိုင်ကြောင်း ၁၃၁၆ ခုနှစ်၊ ဝိနိစ္ဆယဌာန (ပြင်ဆင်ချက်) ပုဒ်မ ၄၇ က ပြဋ္ဌာန်းထားလေသည်။

၁၉၅၇

ဦးဘိုးမြနှင့် ဦးဝိလာသပါ ဝ။

ယင်းကဲ့သို့စောဒကနှင့်စုဒိတကဘို့အား အခွင့်အရေးအမျိုးမျိုးပေးအပ်ခဲ့ရာတွင် ပါလီမန် လွှတ်တော်၏အာဘော်မှာ မြို့နယ်ဝိနိစ္ဆယဌာန ဆရာတော်များဆုံးဖြတ်ပြီး ဖြစ်သောအမှုကို နယ်ပိုင်တရားမ တရားသူကြီးက ဝင်ရောက်စွက်ဖက်၍ ဝိနိစ္ဆယခုံဆွဲစေပြီး ထပ်မံစစ်ဆေးရန်အတွက် လွှဲအပ်နိုင်သည့်အာဏာအပ်နှင်းရန် မလိုလားကြောင်း ထင်ရှားလေသည်။

အထက်ဖေါ်ပြပါ အကြောင်းများတို့ကြောင့် လျှောက်ထားခံရသူအမှတ် (၁)၊ (၂)၊ (၃)၊ (၄) တို့၏အမိန့်များကို စရိတ်နှင့်တကွ ပယ်ဖျက်ပြီးလျှင်၊ ဤဝါးခယ်မမြို့၊ ကသစ်ပင်ကျောင်းနှင့် စပ်လျဉ်းသည့် ဝိနည်းဓမ္မကံ အဓိကရဏ်းမှုကို မြောင်းမြခရိုင်ဝိနိစ္ဆယဌာနက ဆက်လက်စစ်ဆေးဆုံးဖြတ်ရန် မေတ္တာရပ်ခံပြီး အမိန့်ချမှတ်လိုက်သည်။

SUPREME COURT.

†S.C. 1957

Sept. 9.

ULU SHEIN (APPELLANT)

v.

RENT CONTROLLER, RANGOON AND FIVE OTHERS (RESPONDENTS).*

Directions in the nature of Certiorari—Rent Controller, whether competent to set aside ex-parte *order—Rent Controller, an administration officer and not a Court—Freedom of action in procedural matters.*

Held: The Controller under the Urban Rent Control Act is an administrative Officer and not a Court. Subject to statutory directions or principles of natural justice, he has freedom of action in matters of procedure. He can set aside his own *ex-parte* order.

San Myint for the applicant.

Cassim for *Aung Min* (2) for the Respondent No. 2.

Tha Tun Khine for the Respondents Nos. 3 to 6.

The judgment of the Court was delivered by

MR. JUSTICE CHAN HTOON.— This is an application to quash the order of the Urban Rent Controller of Rangoon dated 10th January 1957 setting aside the *ex-parte* order dated 27th May 1956 passed by him under section 16-AA of the Urban Rent Control Act.

The learned counsel for the applicant has contended that in the absence of any provision in the Urban Rent Control Act empowering the Controller to set aside an *ex-parte* order passed by himself, he has acted without jurisdiction. He further pointed out that the only provision in the Act which enables

* Criminal Misc. Application No. 11 of 1957.

† *Present:* U MYINT THEIN, Chief Justice of the Union, U CHAN HTOON, J. and U BO GYI, J.

the Rent Controller to deal with an order previously passed by him is section 21-A which allows a review of any order made by him under the Act.

It is quite clear that the Controller under the Urban Rent Control Act is an administrative officer discharging functions of a quasi-judicial nature and is not a Court in the strict sense of the term. Except where he is governed by statutory directions he has freedom of action to pursue any course he thinks necessary to meet the ends of justice or the exigencies of the case, subject only to the requirements of the rules of natural justice. In matters of procedure, therefore, he may adopt any measures he deems proper, provided they do not offend any statutory directions or the principles of natural justice. There is nothing in the Urban Rent Control Act to prevent the Controller from setting aside the *ex-parte* order passed by him in order to give the respondent-tenants opportunity to be heard where he thought that sufficient cause had been shown for their failure to appear on the date of hearing. It may even be argued that to act otherwise may amount to condemning a party unheard.

We therefore see no reason to interfere with the order of the Rent Controller. The application is dismissed. Advocate's fees are fixed at Kyats fifty-one.

SUPREME COURT.

†S.C. 1957

Dec. 11.

E. M. SEYED MOHAMED (APPELLANT)

v.

M. E. ARIFF AND ONE (RESPONDENTS).*

Penal Code —S. 193 and s. 196— Criminal Procedure Code—S. 190 and s. 476.

Held: The question of delay is quite irrelevant where the Magistrate is to take cognizance of an offence under s. 190 of the Criminal Procedure Code. No Magistrate can refuse to take cognizance of an offence on ground of any delay. This is however, a matter for consideration in proceedings under s. 476 of the Criminal Procedure Code, where a Court is to determine whether it would be expedient in the interest of justice to make an enquiry and thereafter lay a complaint for offence under s. 195 (1) (*b*) or (*c*) of the Penal Code. The question of delay is relevant only in considering whether "it is expedient in the interest of justice". While acting under s. 190 of the Criminal Procedure Code, the Magistrate has no choice but to take cognizance of any offence brought before him, except where it is specifically provided requiring complaint by or on the order of a particular person or authority, such as is provided in ss. 195, 196, 196-A, 197, 198 and 199. Therefore, the ruling in *Hwe Eve Hain* v. *The King*, (1948) B.L.R. p. 40 is applicable only to proceedings under s. 476 of the Criminal Procedure Code.

J. R. Chowdhury for the appellant.

J. K. Munshi and *Kyaw Myint* for the respondent 1 and

Hla Maung (Government Advocate) for the respondent 2.

Judgment delivered by

U CHAN HTOON, J.—In this appeal by special leave, correctness of an order of the High Court which quashed a pending criminal prosecution is questioned. Some time in 1947 the appellant E. M. Seyed Mohamed filed an application under section 12 of the Urban Rent Control Act for

* Criminal Appeal No. 4 of 1956.

† *Present:* U MYINT THEIN, Chief Justice, U CHAN HTOON, J. and U BO GYI, J.

permission to continue in occupation as a statutory tenant of room No. 4 which is on the first floor of a building known as No. 234/236, Mogul Street, Rangoon, belonging to one Khatiza Bibi. An agreement was soon reached between him and the 1st respondent M. E. Ariff and his brother who represented their mother Khatiza Bibi, and the appellant was accepted as a tenant at a monthly rent of K 50. In March 1948 Khatiza Bibi through her son M. E. Ariff (1st respondent) filed an application under section 11 (1) (*f*) of the Urban Rent Control Act against the appellant for permission to file an ejectment suit on the ground that the said room No. 4 was required for her own occupation; this application was, however dismissed. On 3rd May 1949 the 1st respondent and his brother filed an application under section 13 (*c*) of the Urban Rent Control Act against the appellant, claiming in paragraph 2 of their application "that the Respondent entered the room under section 12 (*2*) of the Urban Rent Control Act, 1948, at a standard rent of Rs. 50 per month". On the appeliant's objection that he was not a statutory tenant but a contractual tenant, the respondent and his brother filed an amended application wherein paragraph 2 was amended as follows:

> "That the respondent entered the room under section 12 (*2*) of the Urban Rent Control Act, 1948, and later in the Rent Controller's Office he was taken as a tenant at a standard rent of Rs. 50 per month."

This application was dismissed on 12th July, 1949. A reference was made to the Chief Judge of the City Civil Court. No final order was however passed confirming the order of the Rent Controller till 26th August 1952. On 25th September 1952 the appellant applied to the Rent Controller under section 476 of

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E. M. SEYED MOHAMED v. M. E. ARIFF AND ONE.

the Criminal Procedure Code to lay a complaint against the 1st respondent for an offence of perjury in respect of his statement in paragraph 2 of the application to the Rent Controller in the previous Rent Control proceedings. On the contention by the counsel for the 1st respondent that the Rent Controller was not a Court within the meaning of section 476, Criminal Procedure Code, the application was withdrawn on 11th April 1953. The appellant then filed a direct complaint against the 1st respondent for an offence under section 193 of the Penal Code. After examining the complainant/appellant, the Court of the 7th Additional Magistrate, Rangoon, issued summons to the 1st respondent. The 1st respondent then applied to the High Court under section 439 of the Criminal Procedure Code to quash the proceedings pending in the Court of the 7th Additional Magistrate. An order was passed by the High Court quashing the proceedings; hence this appeal.

The learned counsel for the appellant contends that the High Court was wrong in extending the ruling in *Hwe Eve Hain* v. *The King* (1) to private complaints under section 190 of the Criminal Procedure Code. In the said case it was held that where there has been an inordinate delay in making application for action under section 476 of the Criminal Procedure Code, the Court should not entertain such an application; complaint should not be filed unless there is a reasonable probability of conviction. The learned Judge of the High Court who dealt with the case held that there was an inordinate delay on the part of the appellant in filing the direct complaint and purporting to follow the above-mentioned ruling remarked: "I am of opinion that whether it is a case

(1) (1948) B.L.R. p. 40.

where the Magistrate took cognizance of the offence under section 190 of the Criminal Procedure Code or whether it is a case where an application was made under section 476 of the Code, the principle laid down in the ruling in *Hwe Eve Hain*'s case would be just the same and equally applicable to both the cases."

We do not, however, agree with this view. We are clearly of the opinion that the question of delay is quite irrelevant where the Magistrate is to take cognizance of an offence under section 190 of the Criminal Procedure Code. No Magistrate can refuse to take cognizance of an offence on ground of any delay. This is, however, a matter for consideration in proceedings under section 476 of the Criminal Procedure Code, where a Court is to determine whether it would be expedient in the interest of justice to make an enquiry and thereafter lay a complaint for offences under section 195 (1) (*b*) or (*c*) of the Penal Code. The question of delay is relevant only in considering whether "it is expedient in the interest of justice". While acting under section 190 of the Criminal Procedure Code, the Magistrate has no choice but to take cognizance of any offence brought before him, except where it is specifically provided requiring complaint by or on the order of a particular person or authority, such as is provided in sections 195, 196, 196-A, 197, 198 and 199. Therefore, we hold that the ruling in *Hwe Eve Hain* v. *The King*, (1948. B. L. R. p. 40) is applicable only to proceedings under section 476 of the Criminal Procedure Code.

We do not, however, propose to set aside the order of the High Court, having regard to the facts and circumstances of the case and the relationship between the parties. No doubt, the 1st respondent acted foolishly and rashly, perhaps, in his anxiety

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for the comfort and happiness of his aged mother, who appeared to have set her heart on regaining possession of the premises from the appellant for her own residence, as it would be much more convenient for her than the 3rd or 4th floors which she was occupying at the time. If the prosecution were to continue, the lst respondent may, in all probability, be found to be technically guilty of an offence of perjury. But in view of his action in correcting the alleged false statement by filing an amended application, no Court would take a very serious view of the offence if proved. We do not, therefore, consider it worthwhile to continue with the prosecution which would only worsen the relations between the parties, who are, after all, members of the same community and living in the same building. For all these reasons we do not wish to disturb the order of the High Court. The appeal is dismissed.

တရားလွှတ်တော်ချုပ်

ဒေါ်မမကြိုး (ငယ်ရွယ်သူ ရင်ရင်မေအတွက်) (လျှောက်ထားသူ)
နှင့်
မိရိဒင်ပါ ၂ (လျှောက်ထားခံရသူများ)*

† ၁၉၅၇ နိုဝင်ဘာလ ၂၅ ရက်။

မြို့မဆိုင်ရာ ဌါးရမ်းခကြိုးကြေငြာရေး အက်ဥပဒေပုဒ်မ ၁၄ (က)၊ ပုဒ်မ ၁၁ (၁)(ဃ)နှင့် (၈)။ ဆုံးဖြတ်ချက်။ ။မြို့ပြဆိုင်ရာ ဌါးရမ်းခကြိုးကြေငြာရေး အက်ဥပဒေ ပုဒ်မ ၁၄(က)ကို စီစစ်လျှင်၊ ၎င်းပုဒ်မအရ တရားစွဲဆိုနိုင်ခွင့် လျှောက်ထားရာတွင်၊ ထိုအက်ဥပဒေ ပုဒ်မ ၁၁ (၁)၏ အဝိုဒ်ငယ်များတွင်ပါရှိသော အချက်များကို ဖော်ပြရမည်ဟု မဆိုချေ၊ တဖန် ကြိုးကြေငြာရေးဝန်ကလည်း၊ လျှောက်ထားသူသည် တရားစွဲဆိုရန် အတွက်၊ ပုဒ်မ ၁၄ (က) (၃)တွင် ဖော်ပြထားသည့်အတိုင်း၊ လုံလောက်သော အကြောင်း ရှိ မရှိကိုသာ စုံစမ်းပြီးနောက်၊ ကျေနပ်လျှင် တရားစွဲခွင့်ပေးရမည် ဖြစ်သည်။ ထိုကြိုးကြေငြာရေးဝန်၏ ဆုံးဖြတ်ချက်သည်၊ တရားစွဲဆိုသည့် ရုံးတော်အား မည်သည့်နည်းနှင့်မျှ ချုတ်ချယ်နိုင်ခွင့်မရှိချေ။

အကယ်၍၊ ရှိသောအခွင့်ကို အထောက်အထားပြပြီး၊ ယခု လျှောက်သူက သက်ဆိုင်ရာ ရုံးတော်၌ တရားစွဲဆိုလျှင်၊ မိမိသည် မြို့ပြဆိုင်ရာ ဌါးရမ်းခကြိုးကြေငြာရေး အက်ဥပဒေ ပုဒ်မ ၁၁(၁)တွင် ပါရှိသော မည်သည့်အဝိုဒ်ပါ အချက်အလက်များအရ၊ စွဲဆိုသည့်အဆိုလွှာ၌ ဖော်ပြရပေမည်။ ယင်းသို့ဖော်ပြလျှင်၊ တရားရုံးတော်က မည်သည့်အဝိုဒ်တွင် အကျုံးဝင်ကြောင်း စီစစ်ဆုံးဖြတ်ရမည်ဖြစ်သည်။

လျှောက်ထားသူအတွက်၊ မစွဘာချော်ဘီ (ဦးမောင်မောင်သက်အတွက်)။

လျှောက်ထားခံရသူ အမှတ် (၁) အတွက်၊ ဒေါက်တာ မောင်မောင်။

ဦး ဘိုကြီး။ ။ယခု လျှောက်ထားသူ ရင်ရင်မေသည်၊ အရွယ်မရောက်သူ ဖြစ်သဖြင့် ၎င်း၏ကိစ္စအတွက် ဒေါ်မမကြိုးက နီးစပ်ရာ မိတ်ဆွေအဖြစ်ဖြင့် ဆောင်ရွက်ပြီးလျှင်၊အလျှောက်ခံရသူ အမှတ် (၁) မိရိဒင်အား၊ မန္တလေးမြို့၊ ချမ်းသာဇံရပ်၊ အကွက်နံပါတ် ၅၉၆၊ ဦးပိုင်နံပါတ် ၅၀-က-ခ/၁ ရှိ မြေနှင့်မြေပေါ်ရှိ

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* ၁၉၅၇ ခုနှစ်၊ တရားမအသေးအဖွဲမှုအမှတ် ၅၃။

† နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးမြင့်သိန်း၊ တရားဝန်ကြီး ဦးဘိုကြီးနှင့် တရားဝန်ကြီး ဦးအောင်သာကျော်တို့ ကြားနာ၍၊ တရားဝန်ကြီး ဦးဘိုကြီး အမိန့်ချမှတ်သည်၊

၁၉၅၇
ဒေါ်မမကြီး (ယော်ရွယ်သူ ရင်ရင်မေ အတွက်) နှင့် မိရင်ဒင် ပါ ၂ ။

အိမ်မှ ထွက်ခွါသွားစေမှုကို တရားစွဲဆိုရန်အတွက်၊ မန္တလေးမြို့၊ မြို့ပြဆိုင်ရာ ၄ါးရမ်းခကြီးကြွေးရေး ဝန်ထမ်တွင်၊ မြို့ပြဆိုင်ရာ ၄ါးရမ်းခကြီးကြွေးရေး အက်ဥပဒေ ပုဒ်မ ၁၄ (က) အရ၊ လျှောက်ထားလေသည်။ ကြီးကြွေးရေးဝန်က စုံစမ်းပြီးလျှင် လျှောက်ထားသူသည် သဘောရိုးနှင့်လျှောက်ထားသည်ဟု ယူဆပြီးလျှင်၊ ယင်းအက်ဥပဒေပုဒ်မ ၁၄ (က) အရ၊ တရားစွဲဆိုခွင့်ပေးလိုက်လေသည်။ ထို တရားစွဲဆိုခွင့်ပေးသည့် လက်မှတ်တွင်၊ ယင်းအက်ဥပဒေ ပုဒ်မ ၁၁(၁) (ဃ) နှင့် (၉) တို့ကို ဖေါ်ပြလိုက်လေသည်။

ထိုသို့တရားစွဲဆိုခွင့်လက်မှတ် ထုတ်ပေးသည်ကို မကျေနပ်သဖြင့်၊ မိရင်ဒင်က၊ မန္တလေး နယ်ပိုင်တရားမ တရားသူကြီးထံသို့ စောဒကဝင်ရာတွင်၊ ယခု လျှောက်ထားသူသည်၊ မိမိ၏၄ါးရမ်းခ ကြီးကြွေးရေးဝန်သို့ လျှောက်ထားသော လျှောက်လွှာ၌၊ မြို့ပြဆိုင်ရာ ၄ါးရမ်းခကြီးကြွေးရေး အက်ဥပဒေပုဒ်မ ၁၁ (၁) (ဃ) (၉) အရ၊ တိကျစွာဖေါ်ပြခြင်းမရှိသဖြင့်၊ ကြီးကြွေးရေးဝန်သည်၊ တရားစွဲနိုင်ခွင့် လက်မှတ်ထုတ်ပေးသည်မှာ၊ မှားယွင်းကြောင်းဖြင့် ကန့်ကွက်လေသည်။ နယ်ပိုင် တရားမတရားသူကြီးက၊ ယခု လျှောက်ထားသူ၏လျှောက်လွှာသည်၊ လျှောက်ထားခံရသူ မိရင်ဒင်ကန့်ကွက်သည့်အတိုင်း၊ ချို့ယွင်းသည်တကြောင်း၊ ကြီးကြွေးရေးဝန်ကလည်း၊ ယင်းသို့ချို့ယွင်းလျက်နှင့် မိမိထုတ်ပေးသော တရားစွဲဆိုနိုင်ခွင့် လက်မှတ်တွင်၊ မြို့ပြဆိုင်ရာ ၄ါးရမ်းခကြီးကြွေးရေး အက်ဥပဒေ ပုဒ်မ ၁၁ (၁) (ဃ) (၉) တို့ကို ဖေါ်ပြ၍၊ တရားစွဲခွင့်ပေးခြင်းမှာလည်း၊ မှားယွင်းသည် တကြောင်းတို့ကြောင့်၊ မခိုင်လုံဖြစ်သည်ဟု ယူဆပြီးလျှင်၊ ကြီးကြွေးရေးဝန်၏ အမိန့်ကို ပယ်ဖျက်လိုက်လေသည်။

မြို့ပြဆိုင်ရာ ၄ါးရမ်းခကြီးကြွေးရေးအက်ဥပဒေ ပုဒ်မ ၁၄ (က) ကို စိစစ်လျှင်၊ ၎င်းပုဒ်မအရ တရားစွဲဆိုနိုင်ခွင့်လျှောက်ထားရာတွင်၊ ထိုအက်ဥပဒေ ပုဒ်မ ၁၁ (၁) ၏ အဝိဒ်ဝေယျများဘွင်ပါ၌သော အချက်အလက်များကို ဖေါ်ပြရမည်ဟု မဆိုချေ။ တဖန် ကြီးကြွေးရေးဝန်ကလည်း၊ လျှောက်ထားသူသည် တရားစွဲဆိုရန် အတွက်၊ ပုဒ်မ ၁၄ (က) (၃) တွင် ဖေါ်ပြထားသည့်အတိုင်း၊ လုံလောက်သော အကြောင်း ရှိ မရှိကိုသာ စုံစမ်းပြီးနောက်၊ ကျေနပ်လျှင် တရားစွဲခွင့်ပေးရမည်ဖြစ်သည်။ ထိုကြီးကြွေးရေးဝန်၏ ဆုံးဖြတ်ချက်သည်၊ တရားစွဲဆိုသည့်ရုံးတော်အား မည်သည့်နည်းနှင့်မျှ ချုတ်ချယ်နိုင်ခွင့်မရှိချေ။

အကယ်၍၊ ရရှိသောအခွင့်ကို အထောက်အထားပြုပြီး၊ ယခု လျှောက်သူက သက်ဆိုင်ရာရုံးတော်၌ တရားစွဲဆိုလျှင်၊ မိမိသည် မြို့ပြဆိုင်ရာ ၄ါးရမ်းခကြီးကြွေးရေးအက်ဥပဒေ ပုဒ်မ ၁၁ (၁) တွင် ပါရှိသော မည်သည့်အဝိဒ်ပါ

အချက်အလက်များအရ၊ စွဲဆိုသည်ကို အဆိုလွှာ၌ ဖော်ပြရပေမည်။ ယင်းသို့ ဖော်ပြလျှင်၊ တရားရုံးတော်က မည်သည့်အပိုဒ်တွင်အကျုံးဝင်ကြောင်း စီစစ်ဆုံးဖြတ်ရမည်ဖြစ်သည်။

၁၉၅၇

ဒေါ်မမကြီး (ငယ်ရွယ်သူ ရင်ရင်မေ အတွက်) နှင့် မိရိုးဖ ပါ ၂ ။

အထက်ဖော်ပြပါ အကြောင်းများကြောင့်၊လျှောက်ထားခံရသူအမှတ် (၂) မန္တလေးနယ်ပိုင် တရားမတရားသူကြီး၏အမိန့်ကို ပယ်ဖျက်လိုက်သည်။ လျှောက်ထားခံရသူ အမှတ် (၁) သည်၊ ဤရုံးတော်၌ လျှောက်ထားသူ၏ကုန်ကျစရိတ်ကို ကျခံစေရမည်။ ရွှေနေခမှာ၊ ဂ၌ ဖြစ်စေရမည်။

တရားလွှတ်တော်ချုပ်

† ၁၉၅၇
နိုဝင်ဘာလ
၂၅ ရက်။

ဦးစံဝင်း (လျှောက်ထားသူ)
နှင့်
အတွင်းဝန်၊တရားရေးဝန်ကြီးဌာန (လျှောက်ထားခံရသူ) *

အမှုခေါ် စာရွက်စာခွန်တော်။ ။ပါလီမန်ရွေးကောက်ပွဲနည်းဥပဒေ ၀၇(၁) (၃)။၁၉၄၀ ခုနှစ်၊ ပါလီမန်ရွေးကောက်ပွဲအက်ဥပဒေ ပုဒ်မ ၅၄၊ ပုဒ်မ ၅၅။ ဒွဲစည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေ ပုဒ်မ ၇၄(၁)(ဆ)၊ ပုဒ်မ ၂၅၊ အခန်း ၂၊ ပုဒ်မ ၅၅၊ ပုဒ်မ ၁၇ (၄)၊ ပုဒ်မ ၇၆၊ ပုဒ်မ ၁၅၀၊ ပုဒ်မ ၈၇ သီးခြားသက်သာခွင့်အက်ဥပဒေ ပုဒ်မ ၄၂။ လျှောက်ထားသူသည်၊ ၎င် ၂၀၀ နှင့် တံဆိပ်တော်ခေါင်းဘိုးငွေ ၆ တို့ကို ရွေးကောက်ပွဲကုန်ကျ စရိတ်ငွေစာရင်းတွင် ထည့်သွင်းဖော်ပြခြင်းမပြုမိသည့်အတွက်၊ ၁၉၄၀ ခုနှစ်၊ ပါလီမန်ရွေးကောက်ပွဲအက်ဥပဒေ ပုဒ်မ ၅၄ နှင့် ဒွဲစည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေ ပုဒ်မ ၇၄ (၁)(ဆ)အရ၊ ငါးနှစ်ကာလအတွင်း ပါလီမန်အမတ် ရွေးချယ်ခံခြင်း၊ မဲဆန္ဒပေးနိုင်ခြင်း ပြုခွင့်မရှိ၍ ပါလီမန်ရွေးကောက်ပွဲနည်းဥပဒေ ၀၇ အညီ အရည်အချင်းပျက်ယွင်းသူဖြစ်သည်ဟု နိုင်ငံတော်သမတက ကျေညာရာ၊ ထိုကျေညာကိုမကျေနပ်၍ ဒွဲစည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေ ပုဒ်မ ၂၅ အရ၊ အမှုခေါ် စာရွက်စာခွန်တော်လျှောက်ထားလေသည်။ ဒွဲစည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေ အခန်း ၂ ၌ ပါရှိသော မူလအခွင့်အရေးများကို မထိခိုက်သဖြင့်၊ ၎င်းအခြေခံဥပဒေပုဒ်မ ၂၅ အရ၊ လျှောက်ထားနိုင်ခွင့်မရှိဟု ပဏာမကန့်ကွက်ချက်ဖြင့် နိုင်ငံတော်ရှေ့နေချုပ်က အော်ပါစီရင်ထုံးကို၊ အကိုးအကားပြု၍တင်သည်။ နိုင်ငံတော် အတွင်းဝန်နှင့် မတ်စ် (ခ) အင်ကိုး၊ အေ၊အိုင်၊အာ(၆)၊ ၁၉၄၀၊ ပရီမီကောင်စီ ၁၀၅၊ ဆုံးဖြတ်ချက်။ ။ပါလီမန်ရွေးကောက်ပွဲအက်ဥပဒေ ပုဒ်မ ၅၅ ၌ ဖော်ပြထားသော အခွင့်အရေးနှင့် အခြားနစ်နာဆုံးရှုံးမှုများ ထိခိုက်သဖြင့်၊ နိုင်ငံတော်သမတ၏ ဆုံးဖြတ်ချက်သည် ဒွဲစည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေ ပုဒ်မ ၇၄(၄)အရ၊ ပေးထားသော မူလအခွင့်အရေးများကို ထိခိုက်လေသည်။

နိုင်ငံတော်သမတသည် ယခုကဲ့သို့ အုပ်ချုပ်ပုံအခြေခံဥပဒေ ပုဒ်မ ၁၀၅ အရ၊ တရားစီရင်ရေးနှင့် အာဏာများကိုသုံးစွဲပါမူ၊ ၎င်းပုဒ်မ ၇၆ အရ၊ ပါလီမန်အမတ်အဖြစ် အရွေးခံခွင့်၊ မဲဆန္ဒပေးနိုင်ခွင့်တို့ကို ထိခိုက်နေသဖြင့်၊ ဤရုံးတော်က ထိုအမိန့်ကို အမှုခေါ်

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* ၁၉၅၇ ခုနှစ်၊ တရားမအသေးအဖွဲ့ လျှောက်လွှာအမှတ် ၂။

† နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးမြင့်သိန်း၊ တရားဝန်ကြီး ဦးဘိုကြီးနှင့် တရားဝန်ကြီး ဦးအောင်သာကျော်တို့ ကြားနာခဲ့၊ တရားဝန်ကြီး ဦးဘိုကြီးအမိန့်ချမှတ်သည်။

စာချုန်တော်ဖြင့် ပယ်ဖျက်နိုင်စေလေသည်။ ဒီ၊ ဒီ၊ ဂရိုးဖါးနှင့် အေ၊ စီ၊ ကွန်ဒါးပါ ၃၊ တရားလွှတ်တော်ချုပ် တရားမသေးမှု အမှတ် ၃၆/၅၅ ကြည့်သည်။

မည်သူမဆို တိုင်းသူပြည်သားများ၏ အခွင့်အရေးနှင့်စပ်လျဉ်း၍၊ ဆုံးဖြတ်နိုင်ခွင့်ကို ဥပဒေအရ အပ်နှင်းခြင်းခံရပြီး၊ ယင်းသို့ ဆုံးဖြတ်ရာ၌လည်း၊ ဥပဒေအတိုင်း ဆောင်ရွက်ရန် တာဝန်ရှိလျှင်၊ ထိုသူ၏ဆောင်ရွက်ချက်သည် အုပ်ချုပ်ရေးသက်သက်အတွက် ဆောင်ရွက်မည်။ တရားစီရင်ရေးဆိုင်ရာ အလုပ်ဝတ်တရားများနှင့် အာဏာများကို သုံးစွဲဆောင်ရွက်ရာ ရောက်သည်၊ ဦးထွေး (ခေါ်) အေ၊ အီး၊ မဒါးရီနှင့် ဦးထွန်းခိုး၊ ၁၉၄၈ ခုနှစ်၊ မြန်မာပြည် စီရင်ထုံး ၅၄၁၊ မိုလ်သိန်းဆွေနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံ၊ ၁၉၄၉ ခုနှစ်၊ မြန်မာပြည် စီရင်ထုံး ၁၀၀ ကြည့်သည်။

တရားစီရင်ရေးဆိုင်ရာ အလုပ်ဝတ်တရားနှင့် အာဏာများကို သုံးစွဲဆောင်ရွက်ရာ၌အမှုသည်တဦးဦးအား ချေပခွင့်မပေးဘဲ နစ်နာစေသောအမိန့်ကို ချမှတ်လျှင်၊ ထိုချမှတ်သော အမိန့်သည် သဘာဝတရားနည်းလမ်းနှင့်မကိုက်ညီသဖြင့် မတည်မြဲနိုင်။ ဦးပစ်နှင့် သဲကုန်းကျေးရွာ မြေယာချထားရေးကော်မတီ၊ ၁၉၄၈ ခုနှစ်၊ မြန်မာပြည်စီရင်ထုံး ၇၅၉၊ အမှုဒုဂိမ်းနှင့် ဦးကျော်ညွန့်၊ ၁၉၅၀ ခုနှစ်၊ မြန်မာပြည်စီရင်ထုံး ၂၁၀ ကြည့်သည်။

အခြားသော သက်သာခွင့်ရရှိနိုင်ရုံမျှဖြင့်၊ အမှုခေါ်စာချုန်တော်အမိန့်ကို လုံးဝပန်ကြားနိုင်ခွင့်မရှိဟု ပိတ်ပင်တားမြစ်ထားခြင်းမရှိချေ။ အတူလီယံကုမာနှင့် ဝယ်ယူဖြန့်ချိရေး ညွှန်ကြားရေးဝန်၊ အေ၊ အိုင်၊ အာ(ရှ်)၊၁၉၅၃ ခုနှစ်၊ ကာလကတ္တား ၅၄၈ ကြည့်သည်။

ထို့ကြောင့်၊ လျှောက်ထားသူသည်၊ မိမိနှစ်သက်ရာ အမှုခေါ်စာချုန်တော်အမိန့်ကို လျှောက်ထားနိုင်သည်၊ သာမန်ရုံးများ၌လည်း တရားစွဲဆိုနိုင်သည်။

လျှောက်ထားသူအတွက်၊ လွှတ်တော်ရှေ့နေကြီး ဒေါက်တာဦးအေးမောင် လိုက်ပါဆောင်ရွက်သည်။

လျှောက်ထားခံရသူအတွက်၊ နိုင်ငံတော်ရှေ့နေချုပ် ဒေါက်တာဦးဘဟန် လိုက်ပါဆောင်ရွက်သည်။

ဦးဘိုကြီး။ ။ယခုလျှောက်ထားသူ ဦးစံဝင်း သည်၊ ၁၉၅၆ ခုနှစ်တွင် ကျင်းပသော အထွေထွေရွေးကောက်ပွဲ၌၊ ထားဝယ်မြောက်ပိုင်း မဲဆန္ဒနယ်မှ ပြည်သူ့လွှတ်တော်ပါလီမန်အတွက် ယှဉ်ပြိုင်အရွေးခံခဲ့ပြီးနောက်၊ ၁၉၄၈ ခုနှစ်၊ ပါလီမန်ရွေးကောက်ပွဲအက်ဥပဒေ၌၎င်း၊ နည်းဥပဒေများ၌၎င်း ပြဋ္ဌာန်းထားသည့်အတိုင်း၊ ရွေးကောက်ပွဲကုန်ကျစရိတ်ငွေစာရင်းကို လိုအပ်သည့် ကျမ်းကျိန်လွှာနှစ်စောင်နှင့်တကွ၊ သက်ဆိုင်ရာ ခရိုင်ရွေးကောက်ပွဲအရာရှိထံသို့ တင်သွင်းလေသည်။ ယင်းသို့တင်သွင်းရာတွင်၊ ရွေးကောက်ပွဲအရာရှိက လျှောက်ထားသူ ဦးစံဝင်းသည်၊ ထိုငွေစာရင်းကို ရက်လွန်မှတင်သွင်းခဲ့သည်ဟုကြောင်း၊ အမည်တင်သွင်းလွှာနှင့်အတူ အာမခံအဖြစ်တင်သည့် ငွေနှစ်ရာကိုဌင်း၊ ကုန်ကျစရိတ်

၁၉၅၇
ဦးစံဝင်း
နှင့်
အတွင်းဝန်၊
တရားရေး
ဝန်ကြီးဌာန။

ငွေစာရင်းနှင့်အတူ ပူးတွဲတင်သွင်းသည့် ကျမ်းကျိန်လွှာနှစ်စောင်အတွက် ထမ်း ဆောင်သော အခွန်တော် တံဆိပ်ခေါင်းဘိုးငွေ စုစုပေါင်း ၆ ကိုဂုဏ်း ဖေါ်ပြခြင်းမပြုသည်တကြောင်းတို့ကြောင့်၊ ချို့ယွင်းချက်များရှိကြောင်းနှင့် ပါလီမန် ရွေးကောက်ပွဲနည်းဥပဒေ ဂ၇ (၁) အရ၊ နိုင်ငံတော်သမတက ခန့်ထား သော ပြည်ထောင်စုမြန်မာနိုင်ငံတော်အစိုးရ အတွင်းဝန်ထံသို့၊ အစီရင်ခံစာ တင်သွင်းခဲ့လေသည်။ နိုင်ငံတော်သမတသည်၊ ထိုနည်းဥပဒေ ဂ၇ (၃) အရ၊ ရွေးကောက်ပွဲ တာဝန်ခံအရာရှိ၏ အစီရင်ခံစာကို စဉ်းစားပြီးနောက်၊ ယခု လျှောက်ထားသူသည်၊ ရွေးကောက်ပွဲကုန်ကျစရိတ်ငွေစာရင်းကို အချိန်မှီ တင် သွင်းခဲ့သော်လည်း၊ အထက်၌ဖေါ်ပြခဲ့သော ငွေနှစ်ရင်းကို၊ ထိုစာရင်းတွင် ဖေါ်ပြ ခြင်း မပြုခဲ့သည့်အတွက်၊ ၁၉၄၈ ခုနှစ်၊ ပါလီမန်ရွေးကောက်ပွဲအက်ဥပဒေပုဒ်မ ၅၄ နှင့် ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေ ပုဒ်မ ၇၄ (၁) (ဆ) အရ၊ ၁၉၅၆ ခုနှစ်၊ ဇွန်လ ၁၄ ရက်နေ့မှစ၍ ငါးနှစ်ကာလအတွင်း၊ ပါလီမန်လွှတ်တော် တရပ်ရပ်၏အမတ်အဖြစ်ဖြင့် ရွေးချယ်ခြင်းခံရန်ငင်း၊ ရွေးကောက်ပွဲတွင် မဲပေးရန် ငင်း အရည်အချင်းပျက်ယွင်းသူဖြစ်သည်ဟု ကျေညာခဲ့လေသည်။

ယင်းသို့ကျေညာသည်ကို မကျေနပ်သဖြင့်၊ လျှောက်ထားသူသည်၊ ဖွဲ့စည်း အုပ်ချုပ်ပုံ အခြေခံဥပဒေပုဒ်မ ၂၅ ကို သတ်ပြု၍၊ နိုင်ငံတော်သမတ၏ အထက် ဖေါ်ပြပါ ဆုံးဖြတ်ချက်နှင့် ကျေညာချက်တို့ကို၊ အမှုခေါ်စာဆန်တော်ဖြင့် ပယ် ဖျက်ပါရန်၊ ဤရုံးတော်သို့ လျှောက်ထားလေသည်။ နိုင်ငံတော်ရှေနေချုပ်က၊ ပဏာမအားဖြင့် ကန့်ကွက်သည်မှာ၊ ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေ အခန်း ၂ ၌ ပါရှိသော မူလအခွင့်အရေးများကို မထိခိုက်သဖြင့်၊ ယခု လျှောက်ထားသူ သည်၊ ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေပုဒ်မ ၂၅ အရ၊ လျှောက်ထားနိုင်ခွင့်မရှိ ဟု ကန့်ကွက်လေသည်။ သို့ရာတွင် ပါလီမန်ရွေးကောက်ပွဲ အက်ဥပဒေပုဒ်မ ၅၅ ၌ ရွေးကောက်ပွဲနှင့်သက်ဆိုင်သော တရားမဲ့ပြုကျင့်မှုကြောင့်၊ ငါးနှစ်အောက် မလျော့သောကာလအတွင်း၊ ရွေးကောက်မှုအခွင့်အရေးကို အသုံးပြုရန် အရည် အချင်း ပျက်ယွင်းသောသူသည် ယင်းသို့ ပျက်ယွင်းသောနေ့မှစ၍ ငါးနှစ်ကာလ အတွင်း၊ တရားဌာနရာထူးတွင် အခန့်ခံနိုင်ခွင့်၊ သို့တည်းမဟုတ် ဆောင်ရွက် နေခွင့်မရှိသည့်အပြင်၊ ထိုပုဒ်မ ၅၅ ၌၊ ဖေါ်ပြထားသော အခြားနှစ်နာဆုံးရှုံး မှုများကိုလည်း ခံရပေမည်။ ယင်းသို့ဖြစ်၍၊ နိုင်ငံတော်သမတ၏ ဆုံးဖြတ်ချက် သည်၊ ယခု လျှောက်ထားသူအား ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေ ပုဒ်မ ၁၇ (၄) အရ၊ ပေးအပ်ထားသော မူလအခွင့်အရေးများကို ထိခိုက်သည်ဟု ယူဆရ ပေမည်။

၁၉၅၇
ဦးစံဝင်း
နှင့်
အတွင်းဝန်၊
တရားရေး
ဝန်ကြီးဌာန။

မည်သို့ပင်ဆိုစေ၊ လျှောက်ထားသူ၏ မူလအခွင့်အရေးကို မထိခိုက်ပါဟု စောဒကတက်နိုင်လျှင်လည်း၊ ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံ ဥပဒေ ပုဒ်မ ၇၆ အရ၊ လျှောက်ထားသူအား ပေးအပ်ထားသည့် ပါလီမန်အမတ်အဖြစ်ဖြင့် အရွေးခံနိုင်ခွင့်၊ ပါလီမန်အတွက် ရွေးကောက်ပွဲတွင် မဲဆန္ဒပေးပိုင်ခွင့်တည်းဟူသော အခွင့်အရေးများကို ထိခိုက်သည်ဖြစ်သဖြင့်၊ နိုင်ငံတော်သမတသည်၊ ယခုကဲ့သို့ ဆုံးဖြတ်ရာ၌ ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေ ပုဒ်မ ၁၅၀ အရ၊ တရားစီရင်ရေးဆိုင်ရာ အလုပ်ဝတ်တရားများနှင့် အာဏာများကို သုံးစွဲဆောင်ရွက်သည်ဟု ယူဆနိုင်လျှင်၊ ဤရုံးတော်က ထိုအမိန့်ကို အမှုခေါ်စာချွန်တော်အမိန့်ဖြင့် ပယ်ဖျက်နိုင်လေသည်။ ဒီ၊ ဒီ၊ ဂရိုးဖါးနှင့် အေ၊စီ၊ ကွန်ဒါးပါ ၃ [၁] ကို ကြည့်ပါ။

အဘယ်ကဲ့သို့သောအလုပ်ဝတ်တရားနှင့် အာဏာများကို သုံးစွဲဆောင်ရွက်သနည်းဟူသည့် ပြဿနာကို သုံးသပ်ရာ၌၊ မည်သူမဆို တိုင်းသူပြည်သားများ၏ အခွင့်အရေးနှင့်စပ်လျဉ်း၍၊ ဆုံးဖြတ်နိုင်ခွင့်ကို ဥပဒေအရ အပ်နှင်းခြင်းခံရပြီး ယင်းသို့ ဆုံးဖြတ်ရာ၌လည်း၊ ဥပဒေအတိုင်းဆောင်ရွက်ရန် တာဝန်ရှိလျှင်၊ ထိုသူ၏ ဆောင်ရွက်ချက်သည် အုပ်ချုပ်ရေးသက်သက်အတွက် ဆောင်ရွက်သည်မမည်။ တရားစီရင်ရေးဆိုင်ရာ အလုပ်ဝတ်တရားများနှင့် အာဏာများကို သုံးစွဲဆောင်ရွက်ရာရောက်သည်ဟု၊ ဤရုံးတော်က ဆုံးဖြတ်ထားလေသည်။ ဦးထွေး (ခေါ်) အေ၊ အီး၊ မဒါးရီနှင့် ဦးထွန်းအုံ [၂]၊ မိုလ်သိန်းဆွေနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံ [၃] တို့ကိုကြည့်ပါ။

ဤအမှုတွင် ပါလီမန်ရွေးကောက်ပွဲနည်းဥပဒေ ၈၇ (၃) အရ၊ ရွေးကောက်ပွဲ တာဝန်ခံအရာရှိ၏အစီရင်ခံစာကို စဉ်းစားပြီးနောက်၊ လျှောက်ထားခံရသူ တင်သွင်းသော ရွေးကောက်ပွဲ ကုန်ကျစရိတ်ငွေစာရင်းသည်၊ ချို့ယွင်းသည်ဟု ဆုံးဖြတ်ရာတွင်၊ နိုင်ငံတော်သမတသည် ပါလီမန်ရွေးကောက်ပွဲ အက်ဥပဒေနှင့် နည်းဥပဒေများ၌ သတ်မှတ်ပြဋ္ဌာန်းချက်များနှင့် ကိုက်ညီသည် မညီသည်ကို စီစစ်ဆုံးဖြတ်ရမည်ဖြစ်သည်။ ထိုသို့ဖြစ်၍၊ တရားစီရင်ရေးဆိုင်ရာ အလုပ်ဝတ်တရားနှင့် အာဏာများကို သုံးစွဲဆောင်ရွက်ရမည်ဖြစ်သည်။

ယင်းသို့ တရားစီရင်ရေးဆိုင်ရာ အလုပ်ဝတ်တရားနှင့် အာဏာများကို သုံးစွဲဆောင်ရွက်ရာ၌ အမှုသည်တဦးဦးအား ချေပခွင့်မပေးဘဲ နစ်နာစေသောအမိန့်ကို ချမှတ်လျှင်၊ ထိုချမှတ်သောအမိန့်သည် သဘာဝတရားနည်းလမ်းနှင့် မကိုက်ညီ

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[၁] တရားလွှတ်တော်ချုပ်၊ တရားမသေးမှုအမှတ် ၃၆/၅၅၊

[၂] ၁၉၄၈ ခုနှစ်၊ မြန်မာပြည်စီရင်ထုံး ၅၄၁၊

[၃] ၁၉၄၉ ခုနှစ်၊ မြန်မာပြည်စီရင်ထုံး ၁၀၀။

၁၉၅၇
ဦးစံဝင်း
နှင့်
အတွင်းဝန်၊
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ဝန်ကြီးဌာန။

သဖြင့်၊ မတည်မြဲနိုင်ဟု ဦးပစ်နှင့် သဲကုန်းကျေးရွာ မြေယာချထားရေးကော်မိတီ [၁]၊ အမှုဒုဂဝ်ဖါးနှင့် ဦးကျော်ညွန့် [၂] ထုံးတို့၌၊ ဤရုံးတော်က ဆုံးဖြတ်ချက် ချမှတ်ခဲ့လေသည်။

နိဂုံးချုပ်အားဖြင့်၊ နိုင်ငံတော်ရှေ့နေချုပ်က နိုင်ငံတော် အတွင်းဝန်နှင့် မတ်စ်(ခ)အင်ကိုး [၃] ကို ရည်ညွှန်းပြီး၊ ထိုစီရင်ထုံးခေါင်းစဉ်ဘွင် ပါရှိသော အောက်ပါ ဥပဒေအချက်အလက်များကို အကိုးအကားပြုသည်။

> "The exclusion of the jurisdiction of the Civil Courts is not to be readily inferred but such exclusion must either be explicity expressed or clearly implied. Even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

ထိုစီရင်ထုံးအတိုင်းသာ လိုက်နာရမည်ဆိုလျှင်၊ အမှုခေါ်စာချွန်တော်ရရှိရန် အတွက် ပန်ကြားသည့်လျှောက်လွှာမှန်သမျှကို၊ ဤရုံးတော်ကပလပ်ပြီး၊ လျှောက်ထားသူများအား သာမန်တရားရုံးတော်များသို့ တက်ရောက်တရားစွဲဆိုရန် ညွှန်ကြားရန်သာရှိတော့သည်။ အဘယ်ကြောင့်ဆိုသော်၊ အမှုခေါ်စာချွန်တော် အမိန့် လျှောက်ထားရာ၌လည်း၊ ထိုပရိဗီကောင်စီ စီရင်ထုံးတွင် ဖော်ပြသည့် နည်းနှင်နှင်ပင်၊ အောက်ရုံးများသည်၊ မိမိတို့အား ဥပဒေအရပေးအပ်ထားသည့် အာဏာနှင့်အညီ ဆုံးဖြတ်သည်၊ မဆုံးဖြတ်သည်၊ သို့တည်းမဟုတ် ယင်းသို့သော ဆုံးဖြတ်ချက်များသည်၊ ထိုရုံးတော်များ၏ အာဏာစက်တွင်းသို့ ကျရောက်သော်လည်း၊ ၎င်းတို့၏ဆောင်ရွက်ချက်များသည်၊ တရားစီရင်ရေးရာ အဓိကစည်းကမ်းများနှင့် ကိုက်ညီသည်၊ မညီသည်ကို ဝေဘန်ဆုံးဖြတ်ရမည်ဖြစ်သည်။

ထို့ပြင်လည်း၊ အခြားသောသက်သာခွင့်ရရှိနိုင်ရုံမျှဖြင့်၊ အမှုခေါ်စာချွန်တော် အမိန့်ကို လုံးဝပန်ကြားနိုင်ခွင့်မရှိဟု ပိတ်ပင်တားမြစ်ထားခြင်း မရှိချေ။ အတူလီယံကုမာနှင့် ဝယ်ယူဖြန့်ချီရေးညွှန်ကြားရေးဝန် [၄] ကိုကြည့်ပါ။

ယင်းသို့ဖြစ်၍၊ အထက်၌ ဖော်ပြခဲ့သော ပရိဗီကောင်စီ စီရင်ထုံးပါ အကြောင်းများကို၊ အထောက်အထား အကိုးအကားပြုပြီးလျှင်၊ အမှုခေါ်စာချွန်

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[၁] ၁၉၄၈ ခုနှစ်၊ မြန်မာပြည်စီရင်ထုံး ၇၅၉။
[၂] ၁၉၅၀ ခုနှစ်၊ မြန်မာပြည်စီရင်ထုံး ၂၁၈။
[၃] အေ၊ အိုင်၊ အာ(ရဲ)၊ ၁၉၄၀၊ ပရီဗီကောင်စီ ၁၀၅။
[၄] အေ၊ အိုင်၊ အာ(ရဲ)၊ ၁၉၅၃ ခုနှစ်၊ ကာလကတ္တား ၅၄၀။

တော် အမိန့်ကိုလည်း လျှောက်ထားနိုင်သည်။ သာမန်ရုံးများ၌လည်း တရားဆိုစွဲနိုင်သည်ဖြစ်သဖြင့်၊ နစ်နာသူတဦးတယောက်သည်၊ မိမိနှစ်သက်ရာရာ သက်သာခွင့်ကို တောင်းဆိုနိုင်သည်ဟု ယူဆရပေမည်။

သာမန်အားဖြင့် လျှောက်ထားသူသည်၊ သီးခြားသက်သာခွင့် အက်ဥပဒေ ပုဒ်မ ၄၂ အရ၊ တရားစွဲဆိုနိုင်ခွင့်ရှိမည်မဟုတ်ချေ။ အဘယ်ကြောင့်ဆိုသော်၊ ပါလီမန်ရွေးကောက်ပွဲ အက်ဥပဒေ ပုဒ်မ ၇၅ အရ၊ တရားစွဲဆိုခွင့်ကို ပိတ်ပင်ထားသည့်အပြင်၊ ထိုသူ နစ်နာဆုံးရှုံးသော အခွင့်အရေးများသည်၊ သူတဦးတယောက် ပိုင်ဆိုင်အဆုံးပြုနိုင်သောပစ္စည်မျိုးမဟုတ်ချေ။ တဖန် လျှောက်ထားသူ၏ မဲဆန္ဒပေးနိုင်ခွင့်နှင့် ပါလီမန်အမတ်အဖြစ် ယှဉ်ပြိုင်အရွေးခံနိုင်ခွင့်တို့ကို ထိခိုက်ပြားသော်လည်း၊ ယင်းသို့ မဲဆန္ဒပေးနိုင်ခွင့်၊ ပါလီမန် အမတ်အဖြစ် ယှဉ်ပြိုင် အရွေးခံနိုင်ခွင့်တို့ကို နိုင်ငံတော်သမတက ဖြစ်စေ၊ အခြားသူ တဦးတယောက်ကဖြစ်စေ ငြင်းဆိုခြင်းမပြုခဲ့ချေ။

အထက်၌ဖော်ပြခဲ့သော အာမခံအဖြစ်တင်သွင်းခဲ့သည်ဆိုသော ငွေ ၂၀၀ နှင့် တံဆိပ်တော်ခေါင်းဘိုးငွေ ၆ တို့ကို၊ ရွေးကောက်ပွဲကုန်ကျ စရိတ်ငွေစာရင်းတွင် ထည့်သွင်းဖော်ပြခြင်းမပြုမိသည့်အတွက်၊ လျှောက်ထားသူအပေါ်၌၊ ပါလီမန်ရွေးကောက်ပွဲ နည်းဥပဒေ ၀၇ အရ၊ အရည်အချင်းပျက်ယွင်းသည်ဟု ဆုံးဖြတ်သင့်၊ မသင့်ဟူသည့် ပြဿနာတရပ်ကျန်ရှိလေသည်။ ထိုငွေနှစ်ရပ်မှာ၊ ပါလီမန်ရွေးကောက်ပွဲ အက်ဥပဒေနှင့် နည်းဥပဒေတို့၏အာဘော်အရ၊ ရွေးကောက်ပွဲကုန်ကျစရိတ်များဖြစ်သည်ဟု ဆိုနိုင်ဘိဘိုး၊ ထိုငွေများမှာ ဥပဒေ ညွှန်ကြားသည့်အတိုင်း၊ လူသိနက်ကြား အသုံးပြုသည့်ငွေများဖြစ်သဖြင့်၊ ရွေးကောက်ပွဲ ကုန်ကျစရိတ်ငွေစာရင်းတွင် ထည့်သွင်းဖော်ပြခြင်းမပြုမိသည့်အတွက်၊ ယခု လျှောက်ထားသူသည်၊ မရိုးသားသောသဘောဖြင့် ထိန်ချန်ခဲ့သည်ဟု မယူဆနိုင်ပေ။ ယင်းသို့ မဖော်ပြသည့်အတွက် ကုန်ကျစရိတ်ငွေစာရင်းသည်၊ အရေးကြီးသောအချက်တွင် မဟုတ် မမှန်ဖြစ်နေသည်ဟု ယူဆရန် အကြောင်းမရှိငြင်ချေ။ သို့ဖြစ်၍၊ လျှောက်ထားသူသည်၊ ပါလီမန်ရွေးကောက်ပွဲ အက်ဥပဒေ ပဌမဇယား၊အပိုဒ် ၁၀ အရ၊ တရားမဲ့ပြုကျင့်မှုများ ကျူးလွန်သည်ဟု မဆိုနိုင်ပေ။

အထက်ဖော်ပြပါအကြောင်းများကြောင့်၊ ၁၉၁၈ ခု၊ နတ်တော်လဆန်း ၂ ရက် (၁၉၅၆ ခု၊ ဒီဇင်ဘာလ ၄ ရက်) နေ့စွဲပါ တရားရေး ဝန်ကြီးဌာန (ဥပဒေပြုဌာနခွဲ) အမိန့်ကြော်ငြာစာ အမှတ် ၆၁၅ ကို ပယ်ဖျက်လိုက်သည်။

တရားလွှတ်တော်ချုပ်

†၁၉၅၇
ဒီဇင်ဘာလ
၂ ရက်။

ဦးစန်နား (လျှောက်ထားသူ)
နှင့်
ငွေးရမ်းခကြီးကြပ်ရေးဝန် ပါ ၃ (လျှောက်ထားခံရသူများ) *

ငွေးရမ်းခကြီးကြပ်ရေး အက်ဥပဒေပုဒ်မ ၁၆(ဃ)အရ၊ ၁၉၅၅ ခု၊ နိုဝင်ဘာလ ၂၂ ရက်နေ့ လျှောက်လွှာတင်သည်၊ ၁၉၅၇ ခု၊ ဇန်နဝါရီလ ၃၀ ရက်နေ့အထိ အမှုစစ်ရာ ၎င်းအက်ဥပဒေပုဒ်မ ၂၉ အရ၊ အမှုပိတ်ခြင်း၊ အမှုကြန့်ကြာခဲ့ရခြင်းမှာ လျှောက်ထားသူအပြစ်လုံးဝမပါ။ ဤအမှုတွင်လျှောက်ထားသူက အလျှောက်ခံရသူ အမှတ် ၂ သည်၊ အခန်းကို အမှတ် ၃ အားတဆင့်ငွေးရမ်းသည်ဟု ကြီးကြပ်ရေးအက်ဥပဒေ ပုဒ်မ ၁၆(ဃ)အရ၊ တရားစွဲဆိုခွင့်ကို၊ ၁၉၅၅ ခု၊ နိုဝင်ဘာလ ၂၂ ရက်နေ့က လျှောက်ထားရာ၊ ၁၉၅၇ ခု၊ ဇန်နဝါရီလ ၃၀ ရက်နေ့အထိ စစ်ဆေးလာ၍ ၎င်းနေ့တွင် ပုဒ်မ ၂၉ အရ၊ အမှုပိတ်လိုက်သည်။ ဆုံးဖြတ်ချက်။ ။ပုဒ်မ ၂၉ အရ၊ အိမ်ခန်းကို အမိန့်တစုံတရာမရ ဘဲနှင့် တဆင့်ငွေးရမ်းသည့်နေ့မှစ၍ ၉ လ အတွင်း တရားစွဲဆိုမှသာ တရားရုံးတော်က အမှုကို လက်ခံနိုင်ခွင့် ရှိသည်၊ လျှောက်လွှာပယ်လိုက်သည်။

လျှောက်ထားသူအတွက် ဦးဘကျော်။

ပဌမလျှောက်ထားခံရသူအတွက် အစိုးရရှေ့နေကြီး ဦးလှမောင်။

ဒုတိယလျှောက်ထားခံရသူအတွက် ဦးတင့်။

တတိယလျှောက်ထားခံရသူအတွက် ဦးမြတင်။

ဦးမြင့်သိန်း။ ။အိမ်ပိုင်ရှင် ဦးစန်နားက၊ မိမိပိုင်အိမ် ဂေါဒဝင်လမ်း၊ အမှတ် ၃၂၊ အခန်းနံပါတ် ၂ ၌ ငွေးရမ်းနေထိုင်သူ လျှောက်ထားခံရသူ အမှတ် ၂၊ ကိုထော်ဝါးသည်၊ ငွေးရမ်းခကြီးကြပ်ရေးဝန်၏ အမိန့်တစုံတရာမရ

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* ၁၉၅၇ ခုနှစ်၊ တရားမ အသေးအဖွဲ လျှောက်လွှာအမှတ် ၄၂။

† နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးမြင့်သိန်း၊ တရားဝန်ကြီး ဦးချန်ထွန်းနှင့် တရားဝန်ကြီး ဦးဘိုကြီးတို့ကြားနာ၍၊ နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးမြင့်သိန်း အမိန့်ချမှတ်သည်။

ရှိဘဲနှင့် လျှောက်ထားခံရသူ အမှတ် ၃၊ လိတိန်ချင်းအား တဆင့်ငှါးရမ်းရှင်
ငှါးရမ်းခကြိုးကြပ်ရေးအက်ဥပဒေပုဒ်မ ၁၆ (ဃ) အရ၊ တရားစွဲဆိုခွင့်ပေးပါရန်
ကြိုးကြပ်ရေးဝန်မင်းထံ၌၊ ၁၉၅၅ ခု၊ နိုဝင်ဘာလ ၂၂ ရက်နေ့က လျှောက်ထား
ခဲ့သည်။ ကြိုးကြပ်ရေးဝန်မင်းက၊ ၁၉၅၇ ခု၊ ဇန်နဝါရီလ ၃၀ ရက်နေ့အထိ
အမှုကိုပြီးပြတ်အောင် မစစ်ဆေးနိုင်ဘဲ၊ ထိုနေ့ကမှ ကြိုးကြပ်ရေးအက်ဥပဒေပုဒ်မ
၂၉ ကိုညွှန်ပြလျက်ဆက်လက်၍အရေးယူပါက အကျိုးရှိမည်မဟုတ်ဟု ဖေါ်ပြပြီး
အမှုကိုပိတ်လိုက်လေသည်။

၁၉၅၇
ဦးစန်နား
နှင့်
ငှါးရမ်းခကြိုး
ကြပ်ရေးဝန်
ပါ ၃။

စာချုန်တော်အတွက် လျှောက်သူက၊ ဤကဲ့သို့ အမှုကြန့်ကြာခဲ့ရခြင်းမှာ၊
မိမိ၏အပြစ်လုံးဝမပါဘဲ၊ ကြိုးကြပ်ရေးဝန်၏အပြစ်သာဖြစ်ကြောင်း။ ရုံး၏အပြစ်
ကြောင့် မည်သူမျှမနစ်နာစေရဟု ဥပဒေဆိုရိုးစကားရှိသည့်အလျောက် မိမိအား
သက်သာခွင့်ပေးပြီး အမှုကိုပြန်လည်စစ်ဆေး၍၊ တရားစွဲဆိုခွင့်ပေးစေရန်လျှောက်
ထားသည်။

လျှောက်သူ၏အပြစ်မဟုတ်ဘဲ အနစ်နာခံရသည်ဖြစ်၍၊ ကြိုးကြပ်ရေးဝန်က
ဆက်လက်ပြီး ဆောင်ရွက်ပေးပါရန်၊ ဤရုံးတော်က ညွှန်ကြားထိုက်သည်ဟု
ပြောအားရှိသော်လည်း၊ ဤကဲ့သို့ညွှန်ကြား၍ ကြိုးကြပ်ရေးဝန်က ပုဒ်မ ၁၆ (၁)
အရ၊ တရားစွဲဆိုခွင့်ပင်ပေးစေကာမူ၊ ပုဒ်မ ၂၉ အရ၊ အိမ်ခန်းကို အမိန့်တစုံ
တဲ့ရာမရဘဲနှင့် တဆင့်ငှါးရမ်းသည့်နေ့မှစ၍၊ ၉ လအတွင်း တရားစွဲဆိုမှသာ၊
တရားရုံးတော်က အမှုကိုလက်ခံနိုင်ခွင့်ရှိသည့်အလျောက်၊ တရားရုံးတော်က
အမှုလက်ခံနိုင်တော့မည်မဟုတ်။

ကြိုးကြပ်ရေးဝန်မင်း၏ အမိန့်တွင် ''အမှုကို အချိန်ကာလအတွင်း အပြီး
အပြတ်မစစ်ဆေးနိုင်ခဲ့သည်မှာ၊ မလွဲမရှောင်သာသောအမှုများကိုသာ စစ်ဆေး
ခဲ့ရ၍၊ လျှောက်သူ၏အပြစ် လုံးဝပါသည်ဟု မဆိုနိုင်ပါ'' ဟု ပါရှိသည်။

ဤကဲ့သို့ဖြစ်ရခြင်းမှာ ဝန်းနည်းစရာပင်ဖြစ်ပေသည်။ နောက်နောင်ဤကဲ့သို့
မဖြစ်စေရန် သတိမူသင့်ကြောင်း ဖေါ်ပြလိုက်သည်။

လျှောက်လွှာကို စရိတ်မရိုပယ်လိုက်သည်။

BURMA LAW REPORTS

HIGH COURT

1957

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

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CORRIGENDA

အမှားပြင်ဆင်ချက်။

၁၉၅၃ ခု၊ မြန်မာနိုင်ငံစီရင်ထုံး အပိုင်း ၁ မှ ၄၊ တရားလွှတ်တော်ကဏ္ဍ၊ စာမျက်နှာ ၁ မှတ်စု နှင့် စာမျက်နှာ ၃ နောက်ဆုံးအပိုဒ်တွင်ပါရှိသည့်—

"အရွယ်ရောက်သူ သက်သေ ပသီဘာသာဝင် ယောကျ်ားတဦး၊ သို့မဟုတ် နှစ်ဦး နှင့် မိန်းမသက်သေ နှစ်ဦးတို့ရှေ့တွင်"

ဟူသောစကားရပ်အစား—

"အရွယ်ရောက်သူ သက်သေ ပသီဘာသာဝင် ယောကျ်ား နှစ်ဦး၊ သို့မဟုတ် ယောကျ်ား တဦးနှင့် မိန်းမ သက်သေ နှစ်ဦးတို့ရှေ့တွင်"

ဟူသော စကား ရပ်ဖြင့် အစားထိုး ဘတ်ရှုပါရန် မေတ္တာရပ်ခံပါသည်။

The following words appearing in the first line of the second paragraph of the head-notes between the word "agent" and the word "it" at page 322 of the Burma Law Reports, 1953, should be *deleted*:—

"at the time of the loan"

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မြန်မာဗုဒ္ဓဘာသာဥပဒေ။ ဗုဒ္ဓဘာသာဝင် လင်မယား တဦးဦး ကွယ်လွန်သွား ပါက ကျန်ရစ်ခဲ့သူယောကျ်ားဖြစ်စေ၊ မယားဖြစ်စေ ၎င်းတို့ပိုင်ဆိုင်ခဲ့သော ပစ္စည်းအားလုံးပိုင်ဆိုင်ခြင်း။ ဤကဲ့သို့ အတိအလင်း စီရင်ထုံးရှိပါလျက်နှင့် ကျန်ရစ်ခဲ့သူမယားသည် မရထိုက်ဟု ရုံးတော်က အမှားဆုံးဖြတ်ထားခြင်း၊ ထိုဆုံးဖြတ်ချက်ကို အယူခံသော်လည်းကောင်း၊ ပြင်ဆင်မှု သော်လည်း ကောင်း၊ စောဒကတက်ခြင်းသော်လည်းကောင်း ပယ်ဖျက်ခြင်းမပြုခဲ့၊ နောက် မယားဖြစ်သူက၊ မိမိထက်ဝက်ရလိုကြောင်းတရားတထုံးထပ်မံစွဲခြင်း၊ တရားမ

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ကျင့်ထုံးကိုဧဉပဒေပုဒ်မ ၁၁၊ရှင်းလင်းချက်အပိုဒ် ၄၊ နောက်ထပ်မံစွဲဆိုင်ခွင့်
မရှိ။ ဤအမှုအတိုချုပ်မှာ ဦးဘိုးရင်နှင့် ဦးမြင့်တို့မှာညီအစ်ကိုအရင်းဖြစ်ကြ
သည်။ အစ်ကိုကြီးဦးဘိုးရင်၏မယားမှာအယူခံတရားခံမအေးမိဖြစ်၍၊ဦးဘိုး
ရင် အနိစ္စရောက်ပြီးနောက်အချင်းဖြစ်မြေသည်၊မအေးမိလက်ရှိဖြစ်နေသည်၊
အချင်းဖြစ်မြေသည်၊မူလကမိမိတို့၏အမေကြီးဒေါ်သေးဝိုင်ဖြစ်၍၊ဝင်းညီအစ်
ကိုနှစ်ယောက်တယောက်တဝက်စီသာ ပိုင်ထိုက်ငြားသော်လည်း၊ ဦးမြင့်က
မိတ္ထိလာမြို့၊ တရားမ ဝန်ထောက်ရုံး၊ ၁၉၅၁ ခုနှစ်၊ တရားမကြီးမှု အမှတ်
၈ တွင်၊ မအေးမိနှင့် အခြားတရားခံများအပေါ်တွင်၊ ဝင်းမြေများကို ပြန်
လည်ရရှိရန်တရားစွဲ၍၊ဒီကရီရရှိထား၍၊ ဒီကရီဇာရီပြုလုပ်၍ အမှုတွင်ပါဝင်
သော မြေများတို့မှာ ဦးမြင့်လက်တွင်းသို့ ရောက်သွားကြောင်း၊ အဆိုပါ
အမိန့် ဒီကရီကိုတရားခံဖြစ်သူများက အယူမခံကြ၊ ထို့နောက်၊ မိတ္ထိလာ
မြို့၊နယ်ပိုင်တရားမရုံး၊ ၁၉၅၂ ခုနှစ်၊ တရားမကြီးမှုအမှတ် ၃ တွင်မအေးမိ
က ကွယ်လွန်သူဦးဘိုးရင်၏အမွေအတွက် ဝင်းမြေထဲမှ ထက်ဝက် ရလိုပါ
သည်ဟု တရားစွဲဆိုသည်၊ စွဲဆိုသည့်အတိုင်းအောက်ရုံးတော်နှစ်ရုံးစလုံးက
၁၉၅၃ ခုနှစ်၊ တရားမကြီးမှုအမှတ် ၈ တွင် မည်ကဲ့သို့ ဆုံးဖြတ် ထားစေ
ကာမူမအေးမိသည်ကွယ်လွန်သူဦးဘိုးရင်၏မိန်းမဖြစ်သည့်အလျောက်ထက်
ဝက်ရစေဟု ဒီကရီပေးမှတ်ပေးခဲ့သည်။ ဤအမိန့်ဒီကရီကိုဦးမြင့်ကတရားလွှတ်
တော်သို့အယူခံရာလွှတ်တော်၏ ဆုံးဖြတ်ချက်၊ ပဒ္ဓဘာသာဝင်လင်
မယားတဦးဦးကွယ်လွန်သွားပါကကျန်ရစ်ခဲ့သူယောကျ်ားဖြစ်စေ၊မယားဖြစ်
စေ ၎င်းတို့ပိုင်ဆိုင်ခဲ့သော ပစ္စည်းများအားလုံးပိုင်ဆိုင်သည်၊ မောင်ဝိတ်နှင့်
ဂူ ဦးနှင့် မောင်ညိမ်း၊ ယူ၊ဘီ၊အာ(ရ)၊ ၁၀၉၇၊ ၁၉၀၁၊ စာမျက်နှာ
၁၄၆။ ဤစီရင်ထုံးကို အောက်ရုံးနှစ်ရုံးစလုံးက သိရှိပါလျက်နှင့် ၁၉၅၁
ခုနှစ်၊ တရားမကြီးမှုအမှတ် ၈ တွင် မအေးမိလက်ဝယ်ရှိ အချင်း ဖြစ်မြေ
အားလုံးကို ထိုစဉ်အခါက ဦးမြင့်မှာ ထက်ဝက်သာ ရထိုက်သည်မှာ
ထင်ရှားပါလျက်နှင့် မြေအားလုံးကို ဦးမြင့်လက်သို့ အပ်ပေးစေဟု ချမှတ်
လိုက်သောအမိန့်သည် ထင်ထင်ရှားရှားကြီး မှားခဲ့သည်၊ တရုံးတရုံးမှ
ချမှတ်ထားသော ဒီကရီကို အယူခံသော်ငင်း၊ ပြင်ဆင်မှုခွင့်ရှိသော်ငင်း၊
စောဒကတက်ခွင့်သော်ငင်း တနည်းနည်းနှင့် ဥပဒေအတိုင်း ပယ်ဖျက်ခြင်း
မပြုခဲ့လျှင်၊ ထင်းဒီကရီသည် အမှုထဲတွင်ပါသော ဟရားလို တရားခံများ
အပေါ်တွင် တည်ရှိလျက်ပင်ရှိသည်၊ သို့ဖြစ်၍ ၁၉၅၁ ခုနှစ်၊ တရားမကြီးမှု
အမှတ် ၈ တွင် ချထားသော ဒီကရီသည် မှားပင်မှားငြားသော်လည်း
ဤဆုံးဖြတ်ထားသည့် စီရင်ချက်ကို ပယ်ဖျက်ရန် အယူခံမဝင်ခဲ့ခြင်းကြောင့်
ထင်းအမှုတွင် ချထားသောဒီကရီသည် တည်ဆဲပင်ဖြစ်သည်၊ တရားမ
ကျင့်ထုံး ကိုဧဉပဒေပုဒ်မ ၁၁ အရ၊ မအေးမိမှာ ဦးမြင့်ထံမှ အမွေထက်
ဝက်ရလိုမှု ထပ်မံတရားတထုံးအသစ် စွဲဆိုပိုင်ခွင့်မရှိ။ မလိကာဂျန်ဘင်ရှိ
ဒရာမပါပါဆရိန်နှင့် နာရ်ဟရီဘင်ရှိမက်ဝါနှင့် တဦး၊ အိုင်းအေ၊ ၂၇၊ စာ
မျက်နှာ ၂၁၆။ အက်(စ်)၊အေးနသန်နှင့် အက်(စ်)၊အာ(ရ)၊ဆမ်ဆင်၊ ဧ၊
ရန်ကုန်၊စာမျက်နှာ ၄၀၀ တို့ကိုလိုက်နာသည်။ မဂ္ဂါရှင်နှင့်ဘိုးဆင် ပါ ၂၊
အေးအိုင်၊အာ(ရ)၊ ၁၉၃၇ ခု၊ ရန်ကုန်၊ စာမျက်နှာ ၃၂၄ ခွဲခြားသည်။

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CONTRACT ACT, ss. 230, 233—*Burmese Agencies Ltd. is the purchasing Agent of the S.A.M.B. A special term of the contract between them was that all procurements must be paid for by the Agent out of his own money at first and subsequently claim for reinbursement from the S.A.M.B.* Burmese Agencies contracted with the plaintiff for the purchase of rice in their personal capacity, no mention whatsoever being made that they were buying or acting on behalf of the S.A.M.B. except at the beginning of the contract form that they were the agents of the S.A.M.B. The Plaintiffs sued both the S.A.M.B. and the Burmese Agencies for payment of rice, contending that both the principal and the agent are liable on the contracts. The S.A.M.B. replied that the Burmese Agencies were primarily liable to the plaintiff and they *i.e.* the Burmese Agencies are liable to be reimbursed by them subsequently for such payment. The Burmese Agencies contended that they were clearly acting as Agents and that the plaintiff should look for payment to the S.A.M.B. the principal. The question is which of the two defendants are liable? *Held:* The Burmese Agencies by executing these contracts in their own name made themselves liable and the S.A.M.B. being the principals entitled to the benefit of the contracts are also liable. *The Indian Company Act*, (1882) 18 Cal. p. 31; *Firm of Khushi Ram Behari Lal* v. *Mathra Das and another*, A.I.R. (1917) Lah. p. 404; *Hambro* v. *Burnand and others*, (1904) K.B.D. p. 10; *Higgins and others* v. *John Senior*, 58 Revised Reports (1841-43) p. 884; *Parker* v. *Winlow*, 119 English Report, K.B. 1497; *Universal Steam Navigation Company Ltd.* v. *James Makelvie and Company*, (1923 A.C. p. 492; *Ariadne Steamship Co., Ltd.* v *James Mckelvie & Co.*, (1922) K.B.D. p. 518; *T. Muhammad Shamsuddin Rowthan & Bros. and others* v *Messrs. Shaw Wallace and Company*, I.L.R. (1939) Mad. 282; *Babulal* v. *Jafal Narain*, A.I.R. (1952) Vindhya Pradesh 51, referred to.

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CONTRACT ACT, s. 73 106

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CONTRACT OF SALE—*Time the essence of Contract—Execution of Compromise decree—S. 74, Contract Act, application of equitable principles—Issue depending on creditility of witnesses—An Appellate Court and the findings of fact by the trial Court—Stipulation that if Seller could not give possession to the buyer on or before a specified date, the purchase price would be reduced from K 34,000 to K 20,000 whether a penalty.* The Appellant sued the Respondent for specific performance of contract of sale and the suit was compromised on the following amongst other terms :—

(i) That the plaintiff would purchase the suit property for a sum of K 34,000 if the defendant was in a position to give vacant possession on or before the 11th March 1952.

(ii) That if the defendant was unable to give vacant possession of the property on or before the 11th March 1952 the price payable by the plaintiff to the defendant should be K 20,000.

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On defendant's failure to give possession on 11th March 1952 the appellant applied for the execution of the compromise decree. The trial Court held—

(1) That time was of the essence of the contract.

(2) That default was due to a third party and not to any act of negligence or lack of good faith on the part of the Respondent.

(3) That the judgment-debtor was entitled to indulgence and equitable principles laid down in s. 74, Contract Act and therefore the appellant would be entitled to a conveyance upon payment of K 34,000 in terms of the first clause of the consent Decree, relying on *Audh Behari Lal and others* v. *Faquir Rai and another*, A.I.R. (1951) All. 236 ; *Shyam Sundar Padhi and others* v. *Indramoni Das and another*, A.I.R. (1951) Orissa 46.

On appeal by the appellant. *Held*, where there is a conflict of oral evidence, and the issue in the case depends upon the credibility of the witnesses a Court of appeal ought to bear in mind that it does not see or rehear the witnesses and should not interfere with a decision arrived at by the trial Judge unless it comes to the conclusion that the trial Court was plainly wrong. *Chinnaya* v. *U Kha*, 14 Ran. 11 approved. *Held also* : Under the circumstances of the case, time was of the essence of contract, though in contracts for the sale of land Equity looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really intended no more than that it should take place within a reasonable time. *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai*, 40 Bom. 289 (P.C) approved. *Held also* : In the circumstances of the case, the stipulation that if vacant possession could not be given on or before 11th March 1952, the price should be reduced from K 34,000 to K 20,000 was a stipulation in the nature of penalty. *Ramalinga Ad.viar and others* v. *Meenak Shisundaram Pillai and others*, A.I.R. (1925) Mad. 177 ; *Hiralal Hariram Bhatad* v. *Mt. Durga Bai Murlidhor Marwadi*, A.I.R. (1937) Nag. 413, referred to. *Held further* : A compromise decree merely embodies the agreement arrived at between the parties and is therefore no more than any other contract between them. *Shyam Sundar Padhi and others* v *Indramoni Das and another*, A.I.R. (1951) Orissa 46, referred to. Ordered a reduction of K 5,000 from the stipulated price of K 34,000.

U HTAN HMAT *v.* DAW GON 7

ရာဇဝတ်ကျင့်ထုံး ၄၀၈။ ပဒေသာသာဝင် လူမျိုးများ ထိမ်းမြားလက်ထပ် အထူ
မြောက်ခြင်း။ ။ဆုံးဖြတ်ချက်။ ။ပဒေသာသာဝင် လူမျိုးများ မင်္ဂလာ
ဆောင်ရာ၌ အရေးကြီးသောအချက်မှာ တဘက်နှင့်တဘက် အပြန်အလှန်
အကြောင်းဆိုကြ၍ သဘောတူညီချက်လက်ခံချက်များကို အပြည်ပြော်သူ
သက်သေပဒေသာသာဝင် ယောကျ်ားတဦး၊ သို့မဟုတ် ၂ ဦးနှင့် မိန်းမ
သက်သေ ၂ ဦးတို့ရှေ့တွင် ကတိပြုကြရသည်၊ ထိုးတို့ရှေ့မှောက်၌အကြောင်း
ဆိုခြင်း၊ လက်ခံခြင်းတို့ကို တကြိမ်တည်း ပြည့်စုံအောင်လုပ်ရသည်။ သို့မဟုတ်
လျှင် လက်ထပ်ခြင်း အထမြောက်သည်မဟုတ်စေဟု ဆိုရာ၌ ယောကျ်ား
ဖြစ်သူက မိန်းမအား ပဒေသာသာဝင်ထုံးတမ်းအရ လက်ထပ်မယူဟုပြော

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ဆိုခဲ့ပါလျှင် မိန်းမလုပ်သူက ၎င်းပြောဆိုချက်ကိုမှားသည်တကယ်ပင်ထုံးတမ်း အရ လက်ထပ်ယူကြောင်းကို အတိအကျသက်သေပြရမည်၊ ဦးဘဝေ နှင့် မစောရင်၊ (1951) B.L.R. p. 113 သဘောတူသည်။

အပ္ပဒူမာလစ် နှင့် မဒေး ၁

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EXECUTION OF DECREE—*Order staying or refusing to stay execution of a decree, whether appealable*—S. 2 (2) *and* s 47, *Civil Procedure Code. Held :* No hard and fast rule can be laid down as to when an order staying an execution will be appealable as a decree under s. 2 (2) read with s. 47 of the Civil Procedure Code. Each case must be decided on the facts and circumstances arising therein. *U San Wa and others* v. *U Chit San and others*, 9 Ran. p. 354 ; *Kyauksema* v. *Aparna Charan*, 10 L.B.R. p. 326 ; *Janardan Triumbak Gadre* v. *Martand Triumbak Gadre*, 45 Bom. p. 241 ; *Hussain Bhai and another* v. *Bellie Shah Gilani*, 45 All. p. 733 ; *Mussammat Durga Devi* v. *Hans Raj and others*, 11 Lah. p. 402 ; *Audh Behari Singh* v *Sailaendra Nath Bhattacherjee*, A.I.R. (1954) Cal. p. 339, referred to.

MAUNG THA SAING *v.* MA AIN THA 16

Ex-parte DECREE—*Setting aside*—S. *18, Articles 164, 166 and 181, Limitation Act—Auction Sale by Court, setting aside on ground of fraud—Order 21, Rule 90, Civil Procedure Code and Article 166 and s. 18, Limitation Act—Actual positive fraud must be proved—Certificate of Sale, necessity of proof. Held :* Unless a person aggrieved by an *ex-parte* decree apply within the time presented either under Article 164 or s. 18 of the Limitation Act to set it aside he is bound by it. *Markanda* v. *V.K.R. Naidu*, 26 Pat. p. 717 ; *Patal Baldevdas Kursandas* v. *Mohanlal Bapalal Bahia*, I.L.R. (1948) Bom. p. 145, referred to. *Held also :* Unless a person file an application to set aside the sale under Order 21, Rule 90, Civil Procedure Code within the time prescribed by Article 166 and s. 18 of the Limitation Act, the sale is binding upon him. If fraud is alleged, it must be actual positive fraud, a meditated, and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case. *Janki Kuar* v. *Lachmi Narain*, 37 All. p. 535 ; *Ram Ratin Lal* v. *Bhuri Begam*, 38 All. p. 7 ; *Kunja Behari Chakrabarti* v. *Krishna Dhan Majundar*, (1940) Cal. p 477 ; *Mohamed Galab* v. *Mohamed Sulliman*, 21 Cal. p. 613 ; *Mohendro Narain Chaturaj* v. *Gopal Mondul*, 17 Cal. p. 769, referred to. *Held further :* A certificate of sale is not conclusive as to the property which had been purchased at the sale as the property offered for sale and bid for was in fact the property ordered to be sold and proclaimed for sale. *Balvant Babaji Dhondge* v. *Hirachand Gulachand Gujar*, 27 Bom. p. 334, referred to. *Held also :* Mere production of the sale certificate alone would not entitle the plaintiff to decree. It is the duty of the plaintiff to prove (1) the existence of a suit, (2) the existence of a mortgage decree and (3) the sale of the mortgaged properties in pursuant thereto. A sale certificate, if properly proved to be genuine, is a document of title and is the best evidence to prove what was actually sold. *Traders and Mincrs Ltd.* v. *Dhiredra Nath Banerjee*, 23 Pat. p. 115.

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LANDLORD AND TENANT—*Suit for ejectment—Notice under s. 11 (a) Urban Rent Control Act and s. 106 Transfer of Property Act—Interpretation of ambiguous notice.* Notice, dated the 10th October, 1952 set out *inter alia* as follows :—

"This notice is hereby given to you to pay the said arrears of K 133 to my client Zarnami Ranjan Chowdhury or to leave the premises within 21 days from the receipt of this notice failing which legal action will be taken in Court for recovery of the arrears and for ejectment from the premises".

The notice was received on the 11th October, 1952. Contended by the Appellants that—

(1) 21 days after the receipt of notice falls on the 1st of November 1952, and hence a fresh period has begun from the 1st November, and

(2) Therefore, a fresh notice to appellants giving fifteen days ending with that month would be required relying on ***Matrumal Satnarain and others*** v. ***Mt. Rami***, A.I.R. (32) 1945, Pat. 463, was relied on.

(3) In a suit for ejectment, the provision of both s. 106, Transfer of Property and the Urban Rent Control Act must be complied with relying on *T. H. Khan* v. *Dawood Yusoof Abowath and others*, (1947) R.L.R p. 354.

Held : The wordings in the notice are ambiguous as to whether the appellants are to stay on till the 1st of November or quit by the end of October. In interpreting ambiguous words in notices, the test is to see what the words would mean to tenants well conversant with all the facts and circumstances of the tenancy. *Dr. U Chit and one* v. *Daw Ohn Yin*, (1952) B.L.R. p. 176, followed. *Held further* : The 21 days' time given in the notice is only for the purpose of paying up the arrears of rent and since more than 15 days ending with the month of October has been given to quit, it must mean that they are to quit by the end of October.

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ရာဇသတ် ပုဒ်မ ၂၁၁ လျှပ်စစ်ဓါတ်အားပေးရေးအဖွဲ့ အက်ဥပဒေ အရ ခန့်ထားသော အရာရှိများမှာ ပြည်သူ့ဝန်ထမ်း အရာရှိများဖြစ်ပြီး ပြည်ထောင်စုမြန်မာနိုင်ငံတော် ခွဲထွက်အုပ်ချုပ်ပုံ အခြေခံဥပဒေ ပုဒ်မ ၄၁၁ ... 1

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ဆုံးဖြတ်ချက်။ ။လျှော်စစ်ခါတ်အားပေးရေးအဖွဲ့ဝင် အရာရှိ အရာထမ်းတို့သည် ရာဇသတ်ဟု ၂၁ ၏ အဓိပ္ပါယ်တွင်အကျုံးဝင်သည်ဟုသည်သို့ဝန်ထမ်းများဖြစ်ကြသည်။

ဦးဘစိန် ပါ ၂ နှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော် ... ၆၇

PENAL CODE, ss. 21, 120 49

PENAL CODE, s. 497—*Marriage ingredient in the offence—Necessity of strict proof. Held:* In criminal cases where marriage is an ingredient in the offence, the fact of the marriage must be strictly proved in the regular way, *i.e.* as an event which took place and not merely as a state in which the parties were living. *Aziz Khan* v *Ekram Hussain*, 38 C.L.J. 213, referred to. The parties might have lived as husband and wife but their conduct alone is not sufficient to prove marriage under s. 50 of the Evidence Act. *Bhagu Dhondi* v. *Emperor*, 16 C.L.J. (1915) p. 213; *The Empress* v. *Pitambur Singh*, I.L.R. 5 Cal. 566; *Gopal* v. *King-Emperor*, (1925) A.I.R. Rau. 328.

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SALE OF GOODS ACT, ss. 55 to 61 (*1*)—*Contract Act, s. 73—Contract of Sale—Deposit by buyer as part payment or earnest money—Breach of contract by Buyer—Deposit whether recoverable by him—Whether Seller entitled to set off the deposit against damages on re-sale or retain the deposit in addition to damage. Held:* The Buyer is entitled to recover the deposit he had made subject to the right of the Seller to set off his damages on re-sale against the claim. The Seller is entitled only to the deficiency and expenses incurred on re-sale and cannot retain the deposit in addition. *Soper* v. *Arnold*, (1889), 14 A.C. p. 429; *Ockenden* v. *Henly*, 120 English Reports (Vol. CXX) K.B. p. 590. *The Vellore Taluk Board by its President* v. *Gopalasami Naidu*, I.L.R. (1915) 38 Mad. p. 801; *Piari Lal and others* v. *Mina Mal Balkishan Das*, (1928) I.L.R. 50 All. p. 82; *Dies and another* v. *British and International Mining and Finance Corporation Ltd.*, I.K.B. (1939) p. 724; *Manepalli Satyanarayanamurthi* v. *Thommandra Erikalappa*. A.I.R. (1926) Mad p. 410, referred to.

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SUPPRESSION OF BRIBERY AND CORRUPTION ACT, s. 4 (*1*) (*d*) / 4 (2)—*Gross negligence amounted to misconduct—Whether the element of* mens rea *is necessary ingredient in an offence under s. 4* (1) (d)/*4* (2), *Suppression of Corruption Act. Held*: Gross negligence amounted to misconduct under s. 4 (*1*) (*d*) /4 (2) Suppression of Corruption Act. The question of *mens rea* is irrelevant for the purposes of determining the criminal liability of the

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accused sent up under this Section. *Dr. Gordon Seagrave* v. *The Union of Burma*,(1952)B.L.R. 44 (S.C.) ; Criminal Reference No. 16 of 1956 ; *U Sein Ban* v. *The Union of Burma*, Criminal Appeal No. 107 of 1956 of the High Court, Rangoon, referred to.

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အဂတိလိုက်စားမှုတားမြစ်ရေး အက်ဥပဒေ ပုဒ်မ ၄(၁)(ဂ) (၂) နှင့်ရာဇသတ် ပုဒ်မ ၁၂၀(ခ) အရစွဲချက်။ရာဇသတ် ပုဒ်မ ၂၁၊ ပြည်ထောင်စု မြန်မာနိုင်ငံတော် ပြည်တွင်းရေကြောင်းသယ်ယူပို့ဆောင်ရေးအဖွဲ့၏ အရာထမ်းအမှုထမ်း တို့သည်ပြည်သူ့ဝန်ထမ်းများဖြစ်မဖြစ်။ ပြည်ထောင်စုမြန်မာနိုင်ငံတော် ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံ ဥပဒေပုဒ်မ ၄၁၊ ။ဆုံးဖြတ်ချက်။ ။ပြည်ထောင်စုမြန်မာနိုင်ငံတော် ပြည်တွင်းရေကြောင်းသယ်ယူပို့ဆောင်ရေးအဖွဲ့၏ အရာထမ်းအမှုထမ်းများအားလုံးတို့သည် ရာဇသတ် ပုဒ်မ ၂၁ ၏ အဓိပ္ပါယ်အတွင်း သက်ရောက်သောပြည်သူ့ဝန်ထမ်းများဖြစ်ကြောင်း၊ ခန့်မဟာဗျူဟာဂျီဂိုလန် ရှာရာဇိနှင့် ဘုရင်မင်းမြတ်။ ၁၉၄၁ ခုနှစ်၊အာ(ရှ)၊အယ်(လ)၊အာ(ရှ)၊ စာမျက်နှာ ၅၉၉ လိုက်နာသည်၊

အက်(စ်)၊ စီ၊ လျူး ပါ ၄ နှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော် ၄၉

အဂတိလိုက်စားမှုတားမြစ်ရေး အက်ဥပဒေ ပုဒ်မ ၄(၁)(ဃ)၊၄ (၂) အရစွဲချက်။ ရာဇသတ် ပုဒ်မ ၂၁။နိုင်ငံတော် ကောက်ပဲသီးနှံရောင်းဝယ်ရေးအဖွဲ့၏အရာထမ်းအမှုထမ်းများတို့သည် ပြည်သူ့ဝန်ထမ်းများဖြစ်မဖြစ်။ ။ဆုံးဖြတ်ချက် ၂ ။နိုင်ငံတော်ကောက်ပဲသီးနှံရောင်းဝယ်ရေးအဖွဲ့မှ ခန့်ထားသောပုဂ္ဂိုလ်တဦး တယောက်သည် ရာဇသတ်ပုဒ်မ ၂၁ ၏ အဓိပ္ပါယ်အရ ပြည်သူ့ဝန်ထမ်းတဦးဖြစ်သည်၊

ဦးပု နှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံတော် ၁၀၂

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ADMINISTRATION SUIT—*Order for payment of maintenance allowance for the Respondent and her four children during the pendency of the administration suit—Such order, whether a "Judgment" within the meaning of s. 20 of the Union Judiciary Act or an appealable order under Order 43, Rule 1 of the Civil Procedure Code?* The Respondent filed an administration suit against the appellant and obtained an order for payment of maintenance allowance during the pendency of the suit. The appellant appealed against this order. *Held:* The appeal is not maintainable, because the order is neither a judgment within the meaning of s. 20 of the Union Judiciary Act, nor an appealable order under Order 43, Rule 1, Civil Procedure Code. *Maganlal Pranjivan Mehta* v. *Mrs. Champakunvar Ratilal Mehta and others*, (1952) B.L.R. (H.C.) 192; *Dayabhai Jiwandas and others* v. *A.M.M. Muruggapa Chettiar*, (1935) 12 Ran. p. 457; *T. C. Leong and one* v. *U Po Thein*, (1953) B.L.R. (H.C.) p. 1, referred to.

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APPEALS TO ASSISTANT COMMISSIONER OF INCOME-TAX AGAINST ORDERS OF ASSESSMENT BY INCOME-TAX OFFICER—*Rejection of application made during pendency of the appeals for permission for registration of the firm under Rule 2 (c) of the Burma Income-Tax Rules*, (vide *Notification No. 37 of the Office of the Financial Commissioner, dated the 21st April 1939*)—*Further appeals to the Income-Tax Appellate Tribunal under s. 33-A, Burma Income-Tax Act, against the confirmation of the Income-Tax Officer's assessment and also against the rejection of the application for permission by the Assistant Commissioner, dismissal of—Application to Income-Tax Appellate Tribunal under s. 66 (1), Burma Income-Tax Act to state a case to High Court, refusal thereof—Application under sub-s. (2) of s. 66, Burma Income-Tax Act to the High Court requiring the Income-Tax Appellate Tribunal to state a case on question of Law. Held:* The rule that the assessee requiring the Income-Tax Appellate Tribunal to refer questions of Law to High Court should formulate the questions he wants to refer is a rule of practice based on consideration of convenience to protect the Court from unnecessary application under sub-s. (2) of s. 66 of the Income-Tax Act. The Appellate Tribunal is not bound to refer only the questions so formulated. In cases where the Appellate Tribunal refused to state the case under sub-s. (2) on the ground that no point of law arises, the High Court, under sub-s. (2) if not satisfied with the correctness of the Appellate Tribunal's view, can require the Appellate Tribunal to state the case, *i.e.* the case which the Appellate Tribunal ought to have stated under sub-s. (2) and to refer the case to the High Court. However, the actual framing of the questions rests with the Appellate Tribunal. *Held also:* An application under Rule (2) (*c*) of the Income-Tax Rules is not by itself an application for registration. All that the appellate Assistant Commissioner of Income-Tax is in effect empowered to do under that Rule is either to condone the delay, or to refuse to condone the delay in preferring an application for registration of a firm under s. 26-A of the Income-Tax Act. The Appellate Assistant Commissioner of Income-Tax has no authority under that Rule either to allow or disallow registration. *Held further:* A decision affecting the very quantum of assessment according to whether a particular assessee firm is registered or not registered, or whether permission for registration should or should not be granted, or whether there are sufficient materials to justify the rejection or acceptance of such an application, even though such a decision can be said to have been left to the direction of the Income-Tax authorities, yet the question as to whether such discretion has been exercised perversely, illegally or arbitrarily is a question of Law. *Rai Sahib Chranji Lal and Sons* v. *Commissioner of Income-Tax, Punjab*, (1937) 5 I.T.R. 44; *Mote Shah and Co. Karad* v. *Commissioner of Income-Tax, Bombay South, Bombay*, (1952) 22 I.T.R. 39.

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APPLICATION TO SUE *in forma pauperis*—*Rejection under Order 33, Rule 4 (4) Code of Civil Procedure—Appeal under Rule 7, Original Side Rules (Civil)—S. 204 (1) City of Rangoon Municipal Act. Held:* If the Rangoon Corporation or its Officers are sued for acts done in their official capacity it must be deemed that they were doing them in pursuance or execution or intended execution under the provisions of the Rangoon Municipal Act. Civil First

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Appeal No. 61 of 1955, referred to. *Held further:* There is nothing in Rule 4 or in any other rule in Order 33 which expressly prohibits the consideration and determination by the Court of those circumstances under clauses (*a*) or (*b*) or (*c*) after issue of notice and hearing of the case under Order 33, Rule 4. *Dr. A. Karim and another* v. *Pandit Laiq Ran and others*, (1939) R.L.R. p. 263, followed. *H. Pascal* v. *The Secretary of State in India in Council*, 12 Ran. p. 124, referred to.

U THA HLA *v.* THE MUNICIPAL CORPORATION OF RANGOON 224

APPLICATION UNDER s. 491 OF THE CRIMINAL PROCEDURE CODE FOR DIRECTION IN THE NATURE OF *habeas corpus—Foreigners Act, s. 3* (b) *and 4* (2)*—Burma Extradition Act s. 3* (2)*—Preamble of an Act, when to be consulted.* The applicant was arrested under s. 3 (*2*) of the Burma Extradition Act. He applied under s. 491 of the Criminal Procedure Code for a direction in the nature of *habeas corpus* and the High Court ordered his release. But a few days before the order of release was passed, he was served with an order under s. 3 (*b*) of the Foreigners Act to remove himself from the Union of Burma. The applicant then applied for a writ of *habeas corpus* in the Supreme Court and while the application was pending, the order was cancelled and his release was ordered by the Supreme Court. Upon his release, a fresh order was issued by the President of the Union of Burma under s. 3 (*b*) of the Foreigners Act in Foreign Office Memorandum No. 431 Nga Kha 55, dated 8th September 1956. Thereupon, the applicant filed an application under s. 491 Criminal Procedure Code. *Held:* That the fact that action had been taken against the applicant unsuccessfully under the Burma Extradition Act cannot preclude an order being passed against him under s. 3 (*b*) of the Foreigners Act. *Hans Muller of Nurenburg* v. *Superintendent, Presidency Jail, Calcutta and others*, A.I.R. (1952.) (S.C.) p. 367, referred to. *Held also:* S. 3 (*b*) of the Foreigners Act is couched in a language which is not open to doubt and therefore the preamble of the Act need not be consulted for the purposes of interpreting the Section. Maxwell on Interpretation of Statutes, Ninth Edition pp. 46 and 48, referred to. *Held further:* So long as the person concerned is a foreigner it is not the Courts of law to question the desirability or otherwise of his deportation under s. 3 (*b*) of the Foreigners Act. This matter is entirely within the province of the executive authorities. *Kyi Chung York* v. *The Controller of Immigration, Burma*, (1951) B.L.R. p. 197 (S.C.); *The King* v. *Secretary of State for Home Affairs*, (1917) K.B.D. p. 922, relied on.

SITARAM *v.* THE SUPERINTENDENT, RANGOON CENTRAL JAIL AND ANOTHER 190

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CIVIL PROCEDURE CODE, s. 107, ORDER 43, RULE 1 (*w*) AND ORDER 47, RULE 7*—Appellate Court, whether precluded from questioning the propriety of a review granted by the Lower Court on the ground of insufficiency of evidence—Interpretation of the word "Strict proof" in Order 47, Rule 4. Held:* Order 43, Rule 1 (*w*) must be read together with Order 47, Rule 7 of the Code of Civil Procedure. The phrase "Strict proof" in Order 47, Rule

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4 refers to the formal correctness of the evidence offered and not to its effect or result and so far as the sufficiency of evidence is concerned it is purely a matter to be taken care of by the original court, and the appellate Court is precluded from going into the sufficiency of the quantum of the evidence adduced. *Ahid Khondkar* v. *Mahendra Lal De*, I.L.R. 42 Cal. 830, approved and followed; *Nandalal Mullick* v *Panchanan Mukerjee*, 45 Cal. p. 60; *Bai Nematbu* v. *Bai Nematullabu*, 42 Bom. 195; *Ali Akbar and others* v. *Khurshed Ali and another*, I.L.R. 27 All p. 695; *Rajah of Bobbili* v. *Marandana Venku Naidu*, A.I.R. (1948) Mad. 340; *Narain Das and others* v. *Chiranji Lal*, I.L.R. 47 All. p. 361, referred to; *Pattan Ahmad Khan* v. *Pyda Venkatachclamayya and another*, A.I.R. (1942) Mad. 511, dissented from; *Sonaji* v. *Motiram*, I.L.R. (1949) Nag. p. 502, referred to.

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CRIMINAL PROCEDURE CODE, S. 145—*Proceedings cannot be renewed after termination—A new proceeding should be opened, if there is a fresh dispute—S. 556, Criminal Procedure Code applicable to s. 145, Criminal Procedure Code. Held*: A settlement between the parties in a proceeding under s. 145 Criminal Procedure Code puts an end to the proceedings. It cannot be renewed. If there is a fresh dispute likely to cause a breach of the peace, a new proceeding under s. 145 Criminal Procedure Code must be opened. *Tarini Charan Chowdhry* v. *Amulya Ratan Roy*, I.L.R. 20 Cal. 867; *Ghulam Mahammad and others* v. *The Crown, through Musammat Allah Wasai*, (1933) I.C. 512, referred to. *Held further.*: The principle underlying s. 556 Criminal Procedure Code is applicable to a proceeding under s. 145 Criminal Procedure Code.

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CRIMINAL PROCEDURE CODE, SS. 263, 264 (1) 118

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ရာဇဝတ်ကျင့်ထုံး ကိုဝဉ်ပဒေ ပုဒ်မ ၄၀၀၊ ကလေးဝရိတ်ရလိုကြောင်း ဘခင်က၊ ကလေးသည် ဖြိုသားဟုတ် မဟုတ်ကိုသွေးစစ်ကြည့်ရန် လျောက်လွှာ၊ ဆုံးဖြတ်ချက်၊ ဥပဒေအရ၊ ကလေး၏ သွေးကိုစေါက်ထုတ်စစ်ဆေးနိုင်သည့်အာဏာများကို၊ ရာဇဝတ်ကျင့်ထုံး ကို၉ ဥပဒေထဲတွင်မည်သည့်တရားသူကြီးကိုမျှပေးခွင့်မထား၊ လျောက်လွှာကိုပယ်လိုက်သည်၊

ဗါတီမာတီတီ (ခေါ်) ဒေသန်းခဲ့ နှင့် ဒေ၊ အခ် ရွာဆုဇီ ... 155

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"ENTRUSTMENT" UNDER, S. 4 (*1*) (*d*) OF THE SUPPRESSION OF CORRUPTION ACT—. MEANING OF 196

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IMMIGRATION (EMERGENCY PROVISIONS) ACT, S. 13 (7) (*b*)—*Act No. 26 of 1956, no retrospective effect—Ss. 263 and 264 (1) Code of Criminal Procedure. Held:* Burma Act No. 26 of 1956. The Burma Immigration Emergency Provisions (Amendment) Act, 1956 has no retrospective effect. *Held further :* Under s. 264 (1) of the Code of Criminal Procedure, it is imperative on the Magistrate trying such a case summarily to record a judgment embodying the substance of the evidence and also the particulars mentioned in s. 263.

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LICENCE IN EXCISE—INTERRUPTION BY INSURRECTION—COMPLETED CONTRACT *in personam*—NO QUESTION OF FRUSTRATION ... 122

LIMITATION ACT, ARTICLE 149.—*Transfer of Immoveable Property (Restriction) (Amendment) Act, 1946.* Article 149 Limitation Act has no application to suits brought by assignees and oth r persons deriving or claiming through or under Government. I.L.R., (1946) Nag. 246, referred to. In enacting the Transfer of Immoveable Property (Restriction) (Amendment) Act, the legislature could not have intended to deprive foreigners of immoveable property which had been acquired other than by transfer.

U SAW AND ONE *v.* LOKE MANI (*alias*) LO MANI ... 221

MAINTENANCE ORDER PASSED IN ADMINISTRATION SUIT—WHETHER "JUDGMENT" WITHIN THE MEANING OF S. 20, UNION JUDICIARY ACT—OR APPEALABLE ORDER UNDER ORDER 43, R. 1 CIVIL PROCEDURE CODE 152

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PENAL CODE, S. 302 (*a*) (*b*) AND 404, 201 (2) AND 404—*Ss. 256 and 342 Criminal Procedure Code as amended by Burma Act 13 of 1945, applicability to Naga Hills District—The Chin Hills Regulations of 1896—Code of Criminal Procedure 1882—Burma Act 33 of 1947—Premeditation—Irregularity in recording confession, how cured. Held :* The Chin Hills Regulations of 1896 are still in

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force within the Naga Hills District, as existing Law. *Held also:* In the case of Chins residing in the Naga Hills District, amendments to ss. 256 and 342 of the Criminal Procedure Code, 1898 by Burma Act of 1945 cannot apply unless Burma Act 13 of 1945 is extended to the Chins in the Naga Hills District under s. 3 of the Chin Hills Regulation of 1896. *Held further:* Neither of the amended ss. 256 and 342 of the Criminal Procedure Code, apply to the non Chins in the Naga Hills District without amendment of s. 9 (2) of the Chin Hills Regulations, 1896. The procedure to be followed in the trial must be according to the procedure prescribed by the Code, of Criminal Procedure, 1882 for the trial of warrant cases by Magistrates. *Held also:* To constitute a premeditated killing it is necessary that the accused should have had time to reflect, with a view to determine whether, he would kill or not, and that he should have determined to kill as a result of that reflection. *Than Myint* v. *The Union of Burma*, (1953) B.L.R. 342, referred to. *Held also:* Where there is any irregularity in the recording of a confession by a Magistrate empowered to record such confessions the Magistrate himself can be called and examined as a witness with a view to consider whether the confession should or should not be admitted in spite of the irregularity.

AI HTWE AND TWO OTHERS *v.* THE UNION OF BURMA ... 134

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QUASHING OF CRIMINAL PROCEEDINGS—*S. 406, Penal Code—Precise criminal responsibility of a partner in relation to partnership property—Whether a partner could be prosecuted for Criminal breach of trust during the existence of the partnership. Held:* If it could be established that a partner having been entrusted with partnership assets or with dominion over it converts to his own use in breach of specific terms of trust imposed upon him or does anything with the properties or assets of the partnership, there can be no doubt that he can under certain circumstances be prosecuted for criminal breach of trust as laid down in s. 405 of the Penal Code. In the absence of such special agreement, a partner cannot be said to have received the property in a fiduciary capacity, and be prosecuted for criminal breach of trust. A partner cannot be liable for criminal breach of trust in respect of the partnership property received or held by him on behalf of the partnership in the ordinary course of partnership. *Bhuban Mohan Rana* v. *Surendia Mohan Das*, (1952) I.L.R. Cal. Series, Vol. (11) p. 23; *Nancy de Silva* v. *Union of Burma*, followed; Criminal Appeal No. 99 of 1957; *Queen* v. *Okhoy Coomar Shaw*, (1874) 13 B.L.R. 307-(1874), 21 Weekly Reporter. Cr. 59; *V. V. Reddy* v. *L. C. Reddy*, (1941) R.L.R. p. 547, referred to. *Held further:* That in order to constitute an offence of criminal breach of trust the element of trust must be definitely proved. The very conception of partnership precludes the possibility of entrustment of partnership property by one partner as against the other, unless the provisions of the partnership are subject to any Special contract. *Held also:* The High Court does not deal lightly with applications to quash pending criminal proceedings. It is only in cases where there is some manifest and patent injustice apparent on the face of the proceedings, or where the evidence on

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record for the prosecution clearly does not justify a charge of any offence or where the trial is on the face of it an abuse of the process of the Court, rare remedy of quashing pending proceedings are given. *Khan Bahadur Hajee Gulam Sherazee* v. *The King*, (1941) R.L.R. 599; *U Wa Gyi* v. *The Union of Burma*, (1948) B.L.R. 652, referred to.

SAW THA OO *v.* MA AYE THI 179

REFERENCE TO HIGH COURT OF QUESTION OF LAW BY INCOME-TAX APPELLATE TRIBUNAL—PROCEDURE AND POWER OF HIGH COURT 143

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SALE OF EXCISE LICENSES FOR ONE YEAR—*Interruption by Communist Insurgents—Resumption of business by licensee on cessation of interruption till the expiry of the year—Application for remission of revenue due for the period of interruption—Rejection by Government—Suit by license against Government for a declaration and an injunction—The nature of excise license in Burma, a right* in personam—*Completed contract*—Obiter dictum *by the Supreme Court—S. 18 Burma Excise Act—S. 56 Contract Act, the doctrine of frustration.* Two Excise Licenses were sold by public auction at Bogale to the highest bidder, the appellant for K 90,000 for the year 1949. The appellant carried on his business from 1st January, 1949, to 6th February, 1949. On 6th February, Bogale was overrun by Communist insurgents. He had by then paid K 27,000 towards his license fees for the year. Bogale was reoccupied by Government in August, 1949 and appellant resumed his business till the end of the year. He had paid a further sum of K 18,000 leaving a balance of the K 45,000. As appellant had been prevented entirely from carrying on his trade during the insurgent occupation of Bogale, he submitted an application for remission, which was rejected. The appellant therefore filed a suit against the Government for—

(*a*) a declaration that he was not liable to pay the sum of K 45,000 and

(*b*) an injunction restraining the revenue authorities from enforcing full payment against him, basing his claim on two main grounds, *viz:*

(i) That the auction sale carried an implied condition that law and order would be maintained in Bogale Town, and

(ii) That the prohibition of his trade by the insurgents in occupation of the Town for nearly seven months rendered the contract impossible of performance and consequently void.

The defence raised by the Government was that the excise sales were completed contracts. The Trial Court dismissed the suit, relying on *Sri P. Guruviah* v. *The Union of Burma* (Civil Regular Suit No. 163 of 1947). On an appeal by plaintiff. *Held:* That an excise license under s. 18, Burma Excise Act gives nothing more than a right *ex-contractu* which is a right *in personam*. There is no room under the Excise Act for a license coupled with an interest. *Hup For* v. *The Deputy Commissioner, Insein and two others*, (1950) B.L.R. 86 (S.C.); *Hurst* v. *Pictures Theatres Ltd.*, I.K.B. 1 (1915), referred to. The above conclusion is not a mere *obiter dictum* but even assuming them to be so, such observation by the Supreme Court

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should be received with the greatest respect. *N. A. Annamalai Chettyar* v. *Mohamed Yava and two others*, (1954) B.L.R. 86 (H.C.), referred to. *Held also :* That unless the license is coupled with a grant, it is purely a contractual right *in personam*. *Thomas* v. *Sorrell*, Eng. Reports, 124, Common Pleas, 1098 – Vaughan (330); *Muskett* v. *Hill and Tozer*, 5 Bing (N.C.) 694 – Eng. Reports, 132, Common Pleas, p. 1267 ; *Heap* v. *Hartley*, (1889) L.R. 42 Ch. Div. 461 at 468, referred to. *Held further :* The license granted under s. 18 of the Burma Excise Act is a completed contract and the doctrine of frustration as embodied in s. 56 of the Contract Act applies only to contracts which are merely executory and not to executed contracts. Therefore, the license had not become void owing to the Licensee's impossibility to perform his part of the contract nor was there any implied guarantee by the Government that the appellant would for the whole period of one year be not disrupted by insurgents, there was no breach of contract. *The King* v. *David Allen and Sons, Billposting Ltd.* L.R. (1916) A.C. vol. 2 p. 54 ; *Walton Harvey Limited* v. *Walker and Homfrays*, (1931) L.R. 1 Ch. Div. 274, distinguished. Appeal dismissed.

AH HTAUNG *v.* THE UNION OF BURMA AND ANOTHER ... 122

"STRICT PROOF" IN ORDER 47, *r.* 4 CIVIL PROCEDURE CODE—MEANING OF 164

SUPPRESSION OF CORRUPTION ACT, 1948, S. 4 *(1) (c)*/4 *(2)*—*"Obtains for himself or for any other person"—The Chief ingredient of* s. *4* (1) (c). The appellant was convicted and sentenced to four months' rigorous imprisonment under s. 4 *(1) (c)*/4 *(2)* Suppression of Corruption Act, 1948 for obtaining for his wife and his father-in-law two shares in the Win Win Cinema Hall business. *Held :* The facts in the cases are just the reverse. The obtaining is by the wife of the appellant, who is a public servant. The case is one of a non-public servant, namely, a public servant's wife, accepting or obtaining either for herself or for her husband a valuable thing or pecuniary advantage. It does not come within the purview of the above Section. What s. 4 *(1) (c)* of the Suppression of Corruption Act penalises is the obtaining by a public servant for himself or for another person any valuable thing or pecuniary advantage in the discharge of his duties. Appeal allowed.

U KHIN MAUNG GYI *v.* THE UNION OF BURMA ... 213

SUPPRESSION OF CORRUPTION ACT, S. 4 *(1) (d)*/4 *(2)—Meaning of the expression, "in respect of public property entrusted to him"—S. 405 Penal Code—The words "entrusted", and "entrustment" their meaning—S. 5* (1) (c) *Prevention of Corruption Act, (India Act 11 of 1947). Held :* The expression "in respect of public property entrusted to him" in s. 4 *(1) (d)*, Suppression of Corruption Act, 1948 means public property which is in the possession or under the control of the public servant in question. It has the same connotation but much more restricted wordings than those appearing in s. 405 Penal Code. It is an essential ingredient of the offence that the Public property either immoveable or moveable or cash which is the subject matter of the offence must have been entrusted to the public servant. The word "entrusted" with reference to cash or money means that such cash or money has been transferred to the accused and remains in the possession or control of the accused *as a bailee in trust* for the complainant who holds the position of bailor.

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N. N. Burjorjee v. *Emperor*, A.I.R. (1935) Ran. p. 453 ; *Lake* v. *Simmons*, (1927) A. C. p. 487 at p. 499 ; *Thakarsi* v. *King-Emperor*, I.L.R. Nag. (1949) p. 620, referred to. To make an accused person liable within the purview of s. 4 (*1*) (*d*) Suppression of Corruption Act, 1948, the accused person concerned must have possession or control of the property, be it cash or be it other moveable property.

U BA CHIT TIN *v.* THE UNION OF BURMA 196

SUPPRESSION OF CORRUPTION ACT, s. 4 (*1*)/4 (*2*)—*"Acquittal" on ground of defective sanction—Appellant re-arrested and again sent up under requisite sanction—Application to quash the second proceeding—S. 403 (1) Criminal Procedure Code—S. 26, General Clauses Act—Sentence served under an abortive trial cannot be treated as served under a lawful conviction.* The applicant was convicted and sentenced to one year's rigorous imprisonment under s. 4 (*1*)/4 (2) of the Suppression of Corruption Act, 1948. On appeal, the High Court set aside the conviction and "acquitted him" because of defective sanction. By this time, the applicant had already served his sentence. He was re-arrested and again sent up for trial after obtaining proper sanction. The applicant filed an application to quash the trial proceedings. *Held :* If the trial of the applicant is based upon an invalid sanction, then the trial is void and that the "acquittal" or "conviction" thereunder is also void. The first trial of the Applicant under a defective sanction was a nullity and that the ultimate order acquitting the applicant by the appellate Court cannot operate as a bar under s. 403, sub-s. (1) Criminal Procedure Code to the institution of a fresh prosecution against the applicant. *Yusofalli Mulla Noorbhoy* v. *The King*, 76 I.A. (1948-49) p. 158 ; *Maung Chit Po and one* v. *The Union of Burma*, (1948) B.L.R. p. 175, followed. *Held also :* The former trial being no trial *ab initio*, because of a defective sanction, the order quashing the case could only operate as an order of discharge and no acquittal. *In Re C. Devanugraham*, A.I.R. (1952) Mad. p. 725, referred to. *Held further :* The principle underlying s. 26 of the General Clauses Act is the same as that in s. 403 of the Criminal Procedure Code. One is complementary to the other in reiterating the fundamental principle of criminal law that no person shall be put in jeopardy of his life and liberty more than once ; and s. 403 of the Criminal Procedure Code is no more than an elaboration of this principle in detail. Moreover, the General Clauses Act is essentially, an Act to be invoked only for purposes of interpretation of legislative enactments and statutes. *Held also :* A sentence served following a conviction under an abortive trial cannot, in law, be treated as sentence served under lawful conviction. *Ahsanul Haq and another* v. *King-Emperor*, A.I.R. (1949) Nag. p. 327, referred to.

MAUNG SO SAN *v.* THE UNION OF BURMA 157

TRANSFER OF IMMOVEABLE PROPERTY (RESTRICTION) (AMENDMENT) ACT—NOT INTENDED TO DEPRIVE FOREIGNERS OF PROPERTY ACQUIRED OTHERTHAN BY TRANSFER ... 221

——————————— (RESTRICTION) ACT, s. 3 ... 172

UNION JUDICIARY ACT, s. 20— *S. 3 Transfer of Immoveable Property (Restriction) Act, 1947—Act 17 of 1952—"Foreigner," whether*

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entitled to a simple money decree when his suit is essentially a simple mortgage suit but the claim was for repayment of the loan on personal covenant only and not against the security—*Ss. 24, 57 and 58 Contract Act.* A mortgage deed contained (1) a personal covenant to repay the loan and (2) an offer of immoveable property as security for the loan. The respondent, a foreigner waived the security given and claimed the repayment of the loan by enforcement of appellant's personal covenant. The appellant contended that the mortgage deed contained two indivisible covenants and the transaction was void from its inception under s. 3 of the Transfer of Immoveable Property (Restriction) Act, 1947. *Held*: The first part to repay the loan on personal covenant is legal. The second part is illegal under s. 3 of the Transfer of Immoveable Property (Restriction) Act, 1947. To consider whether a contract is void in its entirety or not under s. 24 of the Contract Act, one must also look into the severability or otherwise of the illegal part from legal part in the light of the provisions of ss. 57 and 58 of the Contract Act, the three sections being supplementary. The rule as regards enforceability of contracts appears to be that where a contract is indivisible and when you cannot sever the illegal part from the legal part of a covenant the contract is altogether void. If a contract contains distinct covenants, some of which are legal and others illegal, the Court can enforce the legal ones. If several distinct promises are made for one and the same lawful consideration and one or more of such promises are found to be illegal, the Court will enforce the legal ones. Even where a person promises firstly to do certain things which are legal, and secondly, under certain circumstances to do other things which are illegal, the first part of his promise is a good contract and binding on him ; but the second part of his promise to perform under certain circumstances, which is illegal, is void. Similarly, in the case of alternative promise, if one part which is found to be legal and the other illegal, the legal part can be enforced. Appeal dismissed. *A. P. Joseph* v. *E. H. Joseph*, A.I.R. (1926) Ran. p. 186, distinguished ; *Ma Kyin Hone and others* v. *Ong Boon Hock and others*, A I.R. (1937) Ran. 47 ; *V.R.M. Ramaswamy Chettyar and another* v. *C.T.M.N. Nachiappa Chettyar*, R.L.R. (1939), p 711, referred to.

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URBAN RENT CONTROL ACT, S. 11, SUB-S. (*1*) (*d*)— *Certificate under s. 14-A—Whether a Civil Court has jurisdiction to decide the question of* bona fide *requirement, which had already been decided by the Rent Controller—Order 23, Rule 1, sub-rule (2) Civil Procedure Code, permission to withdraw suit with liberty to institute a fresh one—Fresh suit filed*—Res Judicata—*Order 41, Rule 23, Civil Procedure Code.* The Respondent filed a suit for ejectment against the appellant under s. 11, sub-s. (1), Clause (*d*) of the Urban Rent Control Act, 1948, after obtaining the requisite Certificate under s. 14-A that the land was required *bona fide* for erection of a building. The defence, *inter alia*, was that the land was not required *bona fide*, by the Respondent. The Respondent replied that the Controller of Rents had already decided the question of *bona fides* and that the Court has no jurisdiction to go into the same matter. This contention was accepted by the Court on a preliminary issue. The Respondent however withdrew the suit under Order 23, Rule 1, sub rule (2) of the Civil Procedure Code with liberty to file a fresh one, because a notice to quit under the Transfer of Property Act had

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not been given. Subsequently, after giving a fresh and valid notice, she filed a second suit. The appellant again raised the same plea that the land was not required *bona fide*. The Respondent contended that the matter was *res judicata* in view of the decision on the preliminary issue in the first suit. The Trial Court held that (i) the matter was *res judicata* and that (ii) he had no jurisdiction to go into the question of *bona fides* and decreed the Respondent's suit. The District Court, on appeal, held that the Trial Court was wrong in holding that Civil Court had no jurisdiction to decide the question of *bona fides*, but held that the matter was *res judicata* in view of the decision in the first suit. The High Court, on Second Appeal, held that : (i) Civil Courts have jurisdiction to go into the question whether or not the land was *bona fide* required for erection of a building thereon, though the landlord had been granted a certificate to file a suit under s. 11 (*i*) (*d*) of the Urban Rent Control Act, 1948. *S. M. Ahmed and one* v. *Bakridi*, (1951) B.L.R. 156 (H.C.) relied on; (ii) The question was not *res judicata* by reason of the decision in the first suit, which could not have been upon the same cause of action as in the second suit, inasmuch as in the first suit the cause of action did not exist at all a notice to quit under the Transfer of Property Act not having been given by the landlord to the tenant. *Ramasami Reddi* v. *Thalawasal Marudai Reddi*, I.L.R. 47 Mad. 453 ; *Ramireddi* v. *Subbareddi*, I.L.R. Mad. 500 ; *Shazadee Begam* (a) *Khin Khin Nyunt and one* v. *P. C. Dutt*, (1954) B.L.R. 34 (S.C.), referred to.

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CIVIL PROCEDURE CODE—*Order 41, Rule 20 read with Rule 33, Order 1, Rule 10 read with s. 107.* The firm of Chandmal Nathmal claimed a sum of Rs 5,006-14-9 and not knowing exactly from which of the four defendants, namely :—

(i) British India Steam Navigation Company,
(ii) The Arakan Carriers Syndicate,
(iii) The Port Officer, Akyab and
(iv) The Union of Burma,

filed a suit against all of them, leaving to the Court to determine which defendant is liable. The trial Court decreed the suit against the Arakan Carriers Syndicate alone, dismissing the suit against the rest. The Arakan Carriers Syndicate filed an appeal against the firm alone, without impleading the co-defendants as co-Respondents. The Firm also did not appeal against the judgment and decree dismissing the suit against the other co-defendants. The High Court, on appeal directed under Order 41, Rule 20 read with Rule 33, Civil Procedure Code to implead the 3rd defendant, the Port Officer, Akyab, as a co-Respondent in the appeal. It was contended that the Port Officer should not be impleaded since no appeal was filed against him and that the period of limitation had expired. *Held:* An appeal is but a continuation of the suit and the powers of the appellate Court cannot be limited by Order 41, Rule 20; the appellate Court still has the power to act under Order 1, Rule 10 read with s. 107 of the Code of Civil Procedure. *Held also:* The powers conferred upon the appellate Court by Order 41, Rule 33, Civil Procedure Code are very wide and the question of limitation cannot be urged as a ground against the exercise of the Court's discretion under this Rule. *V.P.R.V. Chokalingam Chetty* v. *Seethai Acha and others*, I.L.R. 6 Ran. 29 (P.C.), distinguished. *Girish Chander Lahiri* v. *Sasi Sekhareswar Roy*, I.L.R. 33 Cal. 329, referred to *Baluswami Aiyar* v. *Lakshmana Aiyar and three others*, I.L.R. 44 Mad. 605 at 608, relied on. *Subramanian Chettiar* v. *Sinnammal*, 59 Mad. L.J. 634 at p. 640, approved.

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FRUSTRATION—*The doctrine of—S. 56, Contract Act—S. 4 and s. 108, clause* (e) *Transfer of Property Act—Applicability of doctrine to leases. Held :* The doctrine of frustration comes into play when a contract becomes impossible of performance after it is made, on account of circumstances beyond the control of the parties. When such an event or change of circumstances occurs which is so fundamental as to be regarded as striking at the root of the contract as a whole, a Court should pronounce the contract to be frustrated and at an end. The doctrine of frustration applies to leases under special circumstances. *Cricklewood Property and Investment Trust* v. *Leighton's Investment Trust*, (1945) A.C. 221; *Sakhisona Dasi* v. *Gour Hari*, A.I.R. (1952) Cal. 567; *Tarahai Jivanlal Parekh* v. *Lala Padamchand*, A.I.R (1950) Bom. 89; *Inder Pershad Singh* v. *Campbell*, 7 Cal. 474 referred to. *K. M. Modi* v. *Mohamed Siddique*, (1947), R L.R. 423, followed. Appeal dismissed,

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INCOME-TAX ACT, S. 66 (1)—*Reference to High Court—The Company disbursed £ 38,258 to its employees in compliance with the award of the Court of Industrial Arbitration in 1952—Whether such disbursement permissible expenditure under s. 10 (2) (ix) of the Burma Income Tax, Act, or allowable commercial loss and is therefore deductible from the taxable profits for the assessment year 1953-54—Distinction between "Expenditure" and "Loss incidental to the business"—English Income-Tax Act, 1918—Vital consideration for deciding whether a certain item is deductible or not—S. 20 (1) Trade Disputes Act—Payment whether correlated to the accounting year or any year prior to that. Held :* That for purposes of deductions of certain items as loss or expenditure, the vital consideration that should be given is, whether such loss or expenditure is laid out, expended or incurred wholly and exclusively for purposes of the said business, or one connected with or arising out of the trade or profession, or one which it is necessry to incur for the purpose of carrying on the assessee's trade, profession or business. *Allen* v. *Farquharson Bros. & Co.*, (1932), 17 Tax Cas. 59 at 64, referred to. *In The Commissioner of Income-Tax, Burma* v. *Hajee Abdul Ganny Ayoob*, (1941) R.L.R. 529; *Commissioner of Income Tax, Central Provinces and Berar* v. *Sir S. Chitnavis*, 59 I.A. 290, approved. *Held further :* That the payment can only be correlated to the accounting year in which the liability to pay was incurred by the company, that is, the year 1952. *In re Chouthmal Golapchand*, (1938) I.T.R. (VI) 733 (1939) A.I.R. Cal. 559, referred to *C.I.R.* v. *Falkirk Iron Co.*, 17, T.C. 625, approved. *Rhodesia Railways Ltd.* v. *Income Tax Collector, Bechuanaland Protectorate*, (1933) I.T.R. 227 (P.C), referred to.

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Mad. 331, referred to. *Held : Per* U SAN MAUNG, J.—That a buyer's remedy when goods of the right quality and quantity had not been shipped is as against the seller for damages,

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REVIEW—*Application for—S. 114, Order 47, Rule 1, Civil Procedure Code—The phrase "any other sufficient reason"—Decisions of two Benches of equal standing—Duty of Lower Court. Held :* It is settled law that the words "any other sufficient reason" are *ejusdem generis* having reference to grounds analogous to those other two mentioned in the rule. *K.K.S.A.R. Firm* v. *Maung Kya Nyun and one*, I.L.R. 5 Ran. 675 ; *Bisheshwar Pratap Sahi and another* v. *Parath Nath and another*, 61 I.C. 378, referred to. *Held further :* It is settled law that a wrong or incorrect exposition of law is no ground for review. *Luxman Anandroa and others* v. *Ramchandra Wasudeo Ajasty*, A.I.R. (1938) Nag. 145, referred to. *Held further :* When there are two rulings by two Benches of equal standing, it is not for the lower Court to say which rule is right and which rule is wrong. He should follow the rule which appeals to his reason. *Manoo Ali* v. *Hawabi*, A.I.R (1936) Ran. 63 ; *Maung Zaw* v. *Maung Hla Din*, I.L.R. 12 Ran. 163 ; *King-Emperor* v. *Nga Lun Maung*, I.L.R. 13 Ran. 570 ; *The Union of Burma* v. *Maung Maung and two*, B.L.R. (1949) (H.C.) 1 at 12, referred to.

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SUCCESSION AND INHERITANCE—BURMESE BUDDHIST LAW—CAN THE CHILDREN OF A STEP-FATHER BY A SUBSEQUENT MARRIAGE SUCCEED TO THE ESTATE OF THE DECEASED STEP-CHILD OF A FORMER MARRIAGE 242

TENANCY OR LICENCE—*Distinction between a bare licence and a licence with contractual right—Enforceability of licencee's rights against third parties.* The Respondent was a tenant of a Room of a house belonging to one Mr. Jarvis, who subsequently sold the house to the appellant. There were two doors leading to the main hall for the purpose of entry and exit into the room occupied by the Respondent. The appellant claimed that the Respondent had no exclusive use of the two doors, and that the

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right, if any, was a mere licence revocable at will. The Respondent replied that his was a tenant's right under the tenancy with the previous owner. The question was whether the Respondent had acquired any tenancy right of free access through the two doorways or whether his tenancy right was limited to the room only. The appellant further contended that a licensee's right, if any, only binds the licensor and not a third party. *Held:* On the evidence, that the entire room was rented out without any reservation whatsoever. The use of the two doorways was not given as a distinct permission, but as a necessary incident of the tenant's right accompanying the tenancy of the room in question. The Respondent has already acquired a tenancy right of using the two doorways from the very inception of his attornment of tenancy with the previous owner. *Held further:* That the licence though revocable at will at Common Law, notwithstanding a Contract to the Contractor, cannot now be revoked in Equity. Equitable rights now prevail. When there is a licence with a contractul right, Equity would always intervene to protect by injunction, the licensee's right of ~~any~~ revocation or threatening interference in breach of such contract. The appellant who has full knowledge of the Respondent's right of use of these two doorways, even as a licensee, and there being an implied contractual obligation of the former owner to allow the Respondent free and uninterrupted use of the two doorways must be held to be bound by such obligation. Therefore, firstly, the Respondent's right is a tenant's right, and secondly it is a contractual licensee's right created under an implied contract to last as long as the tenancy lasts. *King* v. *David Allen & Sons, Billposting Ltd.* (1916) 2 A C. 54; *Clore* v. *Theatrical Properties Ltd.*, (1936) 3 All E.R. 483, facts distinguished. *Errington* v. *Errington and Woods*, I.K.B. 290, followed. *Wood* v. *Leadbitter*, 13 M & W 838, referred to. *Booker* v. *Palmer*, (1942) 2 All E.R. 674; *Thompson* v. *Park*, (1944) K.B 408; *Winter Garden Theatre (London), Ltd.* v. *Millennium Productions, Ltd.* (1946) 1 All E.R. at p. 685; *Per Viscount Simon*, (1948) A.C. at pp 189-91; *Foster* v. *Robinson*, (1951) I.K.B. 149. "Licences and Third Parties" Professor Wade 68 Law Quarterly Review pp. 337-345; *Gurbachan Singh Bindra* v. *Jos. E. Fernando*, B.L.R. (1951) (S.C.) 255; *S. R. Raja* v. *The Assistant Controller of Rents, Rangoon and two others*, B.L.R. (1950) (S.C.) 10; *The Indian Starch Products Limited and another* v. *The Controller of Rents, Rangoon and another*, B.L.R. (1950) (S.C.) 64, referred to. *Fairman* v. *Perpetual Investment Building Society*, (1923) A.C. 74 at 85, approved. Appeal dismissed.

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ရာဇဝတ်အယူခံ

တရားလွှတ်တော်ဝန်ကြီး ဦးအောင်ဥငြွှေ့

အပ္ပဒူမာလစ် (အယူခံတရားလို)
နှင့်
မအေး (အယူခံတရားခံ) *

တရားလွှတ်တော်
၁၉၅၁
ဩဂုတ်လ ၂

ရာဇဝတ်ကျင့်ထုံး ၄၀၀၊ ပသီဘာသာဝင် လူမျိုးများ ထိမ်းမြန်းလက်ထပ်ရေး အထမြောက်ခြင်း။

ဆုံးဖြတ်ချက်။ ။ပသီဘာသာဝင် လူမျိုးနှား မင်္ဂလာဆောင်ရာ၌ အရေးကြီးသော အချက်မှာ တဘက်နှင့်တဘက် အပြန်အလှန် အကြောင်းဆိုကြ၍သဘောတူညီချက် လက်ခံချက်များကို အရွယ်ရောက်သူသက်သေပသီဘာသာဝင်ယောကျ်ားတဦး၊ သို့မဟုတ် ၂ ဦးနှင့် မိန်းမသက်သေ ၂ ဦးတို့ရှေ့တွင် ကတိပြုကြရသည်။ ၎င်းတို့ရှေ့မှောက်၌ အကြောင်းဆိုခြင်း၊ လက်ခံခြင်းတို့ကိုတကြိမ်တည်းပြည့်စုံအောင် လုပ်ရသည်၊ သို့မှသာလျှင် လက်ထပ်ခြင်းထမြောက်သည်။

မယားစားစရိတ်စွဲဆိုရာ၌ ယောကျ်ားဖြစ်သူက မိန်းမအား ပသီဘာသာဝင်ထုံးတမ်းအရ လက်ထပ်မယူဟုပြောဆိုခဲ့ပါလျှင် မိန်းမလုပ်သူက ၎င်းပြောဆိုချက်ကို မှားသည် တကယ်ပင် ထုံးတမ်းအရ လက်ထပ်ယူကြောင်းကို အတိအကျ သက်သေပြရမည်။ ဦးဘအေနှင့်မစောရင်၊ **1951, Burma Law Reports, Page 113** သဘောတူသည်။

အယူခံတရားလိုအတွက်—ဦးအောင်မင်း (၁)။

အယူခံတရားခံအတွက်—မစ္စတာ ဂျီ၊ အင်၊ ဘနာဂျီ။

ဦးအောင်နိုင်။ ။ရန်ကုန်မြို့၊ ပဋ္ဌမဈာဘက် ရာဇဝတ် တရားသူကြီးရုံး ၁၉၅၄ ခုနှစ်၊ ရာဇဝတ် အသေးအဖဲ့မှု အမှတ် ၃၅ တွင် တရားလိုဖြစ်သူ

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* ၁၉၅၁ ခုနှစ်၊ ရာဇဝတ်အယူခံမှု အမှတ် ၂၀၄။

† ၁၉၅၄ ခုနှစ်၊ရာဇဝတ်အသေးအဖဲ့မှုအမှတ် ၃၅ တွင် ချမှတ်သော ၁၉၅၅ ခုနှစ်၊ ဧပြီလ ၂၃ ရက်နေ့စွဲပါ ရန်ကုန်မြို့၊ ၅ ရာဘက် ရာဇဝတ်တရားသူကြီး၏အမိန့်ကိုအယူခံမှု။

တရားလွှတ်တော်
၁၉၅၅
အပ္ပဒူမာလစ်နှင့် မအေး၊ ဦးအောင်ခိုင်၊

မအေးအား၊ မယားစရိတ် တလလျှင် ၁၀၀ ဝိ စီ တရားခံဖြစ်သူ အပ္ပဒူမာလစ်က ပေးဆောင်ရမည်ဟု အမိန့်ချမှတ်ခြင်းကို၊ အပ္ပဒူမာလစ်က မကျေနပ်၍၊ ယခု အယူခံဝင်ခြင်းဖြစ်သည်။

အယူခံ တရားခံ မအေး၏ အစစ်ခံချက်အရ၊ ထိုးသည် ကျပန်ခေတ်က၊ အပ္ပဒူမာလစ်နှင့် ပသီဘာသာဝင်ထုံးစံအရ၊ ကမာရွတ်တွင် လက်ထပ်ကြသည်။ ထိုးတို့ကမာရွတ်တွင်နေပြီးနောက်၊ဖရေဇာလမ်း၊ အိမ်နံပါတ် ၁၄ သို့ပြောင်းရွှေ့ နေကြသည်ဟုဆိုသည်။ ၁၉၅၃ ခုနှစ်၊ ဒီဇင်ဘာလ ၇ ရက်နေ့၌၊အပ္ပဒူမာလစ်က ထိုးအားအိမ်မှနှင်ထုတ်သဖြင့် ထွက်သွားပြီးနောက်၊ ထိုးအား စရိတ်မထောက်ပံ့သဖြင့်၊ တရားစွဲဆိုရခြင်းဖြစ်သည်ဟုဆိုသည်။ အယူခံတရားလို အပ္ပဒူမာလစ်က၊ မအေးဆိုသူအား ဘယ်စဉ်အခါကမှ လက်ထပ်ခြင်းမပြုခဲ့။ သူ၏မိန်းမ မဘီ၏ မိတ်ဆွေအဖြစ်ဖြင့် အိမ်တွင်လက်ခံထားသည်ဟုဆိုသည်။

ဤအမှုမျိုး၌၊ တရားလို၊ တရားခံဖြစ်သူများသည်၊ ပသီဘာသာဝင်လူမျိုးများဖြစ်ခဲ့ပါလျှင် မယားစားစရိတ်ရနိုင်ရန်အတွက် ထိုးတို့ပသီဘာသာဝင်ထုံးစံအတိုင်း၊ လက်ထပ်ယူခြင်း၊ မယူခြင်းတို့မှာ အလွန်အရေးပါအရာရောက်သော အချက်ပင်ဖြစ်သည်။ မအေး၏အဆိုမှာ အပ္ပဒူမာလစ်နှင့်မရခင်၊ ထိုးသည် အခြား ပသီဘာသာဝင်လူမျိုးတဦးနှင့် အိမ်ထောင်ကျခဲ့ဘူးသည်ဖြစ်ကြောင်း။ ထိုးမှာလည်း ထိုစဉ်အခါက ပသီဘာသာဝင်တဦးဖြစ်နေသည်ဟုဆိုသည်။ ထိုး၏အစစ်ခံချက်အရ၊ အပ္ပဒူမာလစ်နှင့်ထိုး၊ ကမာရွတ်ပလီတွင် လက်ထပ်ကြသည်၊ အပ္ပဒူရဟင်အပါအဝင် ည့ီသည် ၄၊ ၅ ယောက်လာရောက်သည်ဟုဆိုသည်။ မင်္ဂလာဆောင်စဉ်၊ ကဘီနာမာ (ခေါ်) စာချုပ်တခု ရေးဆွဲကြသည်။ ထိုးစာချုပ်တွင် အပ္ပဒူရဟင်နှင့် အခြားသူတယောက် လက်မှတ်ထိုးသည်။ ထိုး၏အတွက် ချောင်ဒရီဘာဘူဆိုသူက မြန်မာလို (ခေါင်းကိုင်အဘော)၊ ကုလားလို (ဗကီးလ်) ခေါ် ကိုယ်စားလှယ်အဖြစ်နှင့် မင်္ဂလာဆောင်တွင် ပါဝင်ဆောင်ရွက်ခဲ့သည်ဟုဆိုသည်။ လက်ထပ်စဉ်က (မော်လဘီ)မှာ မည်သူမည်ဝါဖြစ်ကြောင်း မပြောနိုင်။ (မော်လဘီ)က ယခင်ယောကျ်ားရှိသလားဟု မေးသည်မှအပ၊ အခြားအကြောင်း ဘာမျှမပြောဟုဆိုသည်။ လက်ထပ်စဉ်ချုပ်သော ကဘီနာမာ စာချုပ်ကို၊ မအေးကရုံးတွင် တင်မပြနိုင်။ ထိုးအိမ်ပေါ်မှ ဆင်းလာစဉ်က အိမ်တွင်ကျန်ရစ်ခဲ့သည်ဟု အစစ်ခံသည်။ ထိုး၏သက်သေ ဦးဘကြိုင် (လိုပြ-၁) က၊ မအေးနှင့် အပ္ပဒူမာလစ်တို့လင်မယားဖြစ်ကြောင်းသိသည်။ သို့ရာတွင် မည်သည့်နေ့မှာ၊ မည်သည့်ထုံးစံအတိုင်း လက်ထပ်သည်ကိုမပြောနိုင်ဟုဆိုသည်။ ကိုထွန်းလိုင် (လိုပြ-၃) ကလည်း မအေးနှင့် အပ္ပဒူမာလစ်တို့ လင်မယားဖြစ်

ကြောင်း သိသည်ဟုအစစ်ခံသည်။ သို့ရာတွင် လက်ထပ်စဉ်အခါက၊ မည်သို့မည်ပုံ လက်ထပ်ကြောင်း ထင်းသိဟန်မတူ။ ဒေါ်စိန် (လိုပြ-၄) က မအေးတို့ မင်္ဂလာဆောင်ရာတွင်၊ ငင်းရောက်သည်။ ကုလားထုံးစံအတိုင်း လက်ထပ်သည်။ အိမ်ရှေ့ပိုင်းမှာ ယောကျ်ား ၄၊၅ ယောက်၊ နောက်ဖေးပိုင်းမှာ မိန်းမ ၄၊၅ ယောက်လောက်သာ တွေ့သဲ့သည်ဟုဆိုသည်။ သို့ရာတွင် ငင်းအားပြန်လှန်မေးခွန်းထုတ်ရာ၌၊ မင်္ဂလာဆောင်စဉ် ရောက်သေးသူများအနက်၊ မည်သူမည်ဝါကိုမျှ နာမည်နာမတပ်၍မပြောနိုင်။ ပလီဆရာမှာလည်း မည်သူမည်ဝါဖြစ်ကြောင်းမသိဟုဆိုသည်။

စူလတန် (လိုပြ-၅) က၊ မအေးနှင့်အပ္ပဒူမာလစ်တို့ လက်ထပ်စဉ်ငင်းရောက်သည်။ သူတို့ပသီဘာသာအရ လက်ထပ်သည်ဟုဆိုသည်။ ငင်းဝန်ခံချက်အရ၊ ငင်းမှာ အခြေအနေပစ္စည်းဘာမျှမရှိသူ တဦးဖြစ်ကြောင်း သိရသည်။ လက်ထပ်စဉ်ရှိသည်ဆိုသော်လည်း မည်သူမည်ဝါရှိကြောင်းမပြောနိုင်။ လဘက်ဆိုသူက (ခေါင်းကိုင်အဘော) (ဗကီးလ်) လုပ်သည်ဟု အစစ်ခံသည်။

အူစမန် (လိုပြ-၆) က၊ မအေးနှင့် အပ္ပဒူမာလစ်တို့သည်၊ လင်မယားဟုဆိုသော်လည်း၊ မအေးကို၊ အပ္ပဒူမာလစ်က လက်ထပ်ယူသည်၊ မယူသည်ကို မသိဟုဆိုသည်။

မအေးသည်၊ ပသီဘာသာဝင်အရ၊ အပ္ပဒူမာလစ်၏ တရားဝင်မိန်းမဖြစ်ကြောင်း သက်သေခံအခိုင်အလုံမရှိ။ မအေး၏အစစ်ခံချက်အရ၊ လက်ထပ်စဉ်အခါက ချောင်ဒရိဘာဘူဆိုသူက (ခေါင်းကိုင်အဘော) (ဗကီးလ်) လုပ်သည်ဟုဆိုသည်။ ငင်းချောင်ဒရိမှာ၊ ဟိန္ဒူဘာသာဝင်လူမျိုးဖြစ်သည်။ သို့ဖြစ်၍ ငင်း၏အစစ်ခံချက်မှာ ယုတ္တိမရှိ။ ပသီဘာသာဝင်လူမျိုးအချင်းချင်း လက်ထပ်ရာဝယ်၊ ဟိန္ဒူဘာသာဝင်လူမျိုးတဦးက၊ ဝင်ရောက်ကာ မင်္ဂလာဆောင်အခမ်းအနားခွင့်၊ အရေးပါအရာရောက်သည့်နေရာက ဝင်ရောက်ကာ ဆောင်ရွက်သည်ဆိုခြင်းမှာ မဖြစ်နိုင်။ ဤထူးဆောင်ထားသည့် သက်သေစူလတန်က (ခေါင်းကိုင်အဘော) လုပ်သူမှာ၊ ချောင်ဒရီမဟုတ်၊ လဘက်ဖြစ်သည်ဟု တမျိုးအစစ်ခံသည်။

ပသီဘာသာဝင်လူမျိုးများ မင်္ဂလာဆောင်ရာ၌၊ အရေးကြီးသောအချက်မှာ၊ တဘက်နှင့်တဘက် အပြန်အလှန် အကြောင်းဆိုကြ၍၊ သဘောတူညီချက်လက်ခံချက်များကို အရွယ်ရောက်သူသက်သေ ပသီဘာသာဝင်ယောကျ်ားတဦး၊ သို့မဟုတ် ၂ ဦးနှင့် မိန်းမသက်သေ ၂ ဦးတို့ရှေ့တွင် ကတိပြုကြရသည်။ ထိုးတို့၏ရှေ့မှောက်၌၊ အကြောင်းဆိုခြင်း၊ လက်ခံခြင်းတို့ကို၊ တကြိမ်တည်း ပြည့်စုံအောင်လုပ်ရသည်၊ သို့မှသာလျှင် လက်ထပ်ခြင်းအထမြောက်သည်။ သို့ဖြစ်၍

တရားလွှတ်တော်
၁၉၅၇
အပ္ပဒူမာလစ်နှင့် မအေး၊ ဦးအောင်ခိုင်။

မအေး၏အစစ်ခံချက်အရ၊ ၎င်းအား မင်္ဂလာဆောင်ရာတွင်၊ အပ္ပဒူမာလစ်ဘက်မှ ၎င်းအားမင်္ဂလာဆောင်ရန် တောင်းခြင်းလည်းမရှိ၊ ၎င်းကလည်း အပ္ပဒူမာလစ်အား လင်အဖြစ် ပေါင်းသင်းမည် ဆိုသည့်အကြောင်း လက်ခံခြင်းမရှိကြောင်း ထင်ရှားသည်။ လက်ထပ်ပေးသည့် (မော်လဘီ) နာမည်ကိုပင် မည်သူမည်ဝါဟု အတိအကျမပြောနိုင်။ လက်ထပ်စဉ်အခါကလည်း၊ စာချုပ်စာတမ်းရေးထားသည်ဟုဆိုသည်။ ၎င်းစာချုပ်စာတမ်းမှာ ၎င်းအိမ်ပေါ်ကဆင်းလာစဉ်က၊ ၎င်းနှင့်အတူပါမလာဟု ထွက်ဆိုသည်။ ဤစကားမှာ ယုတ္တိရှိသောစကားမဟုတ်။ အသေးအဖဲ့ဖြစ်သော ဓါတ်မီးခလက်မှတ်၊ အိမ်ခန်းခလက်မှတ်များကို ယူလာနိုင်လျှင်၊ အရေးအကြီးဆုံးသော မင်္ဂလာဆောင်စဉ်က ချုပ်ဆိုသဲ့သည့် စာချုပ်ကို ယူလာနိုင်ရပေမည်။

အပ္ပဒူမာလစ်က၊ မအေးကို ၎င်း၏မိန်းမဖြစ်သည်ဟု နိုင်ငံခြားသားမှတ်ပုံတင်လက်မှတ်၌ ဖေါ်ပြထားခြင်းအကြောင်းကိုကြည့်ရုံမျှနှင့်၊ မအေးသည်၊ ၎င်း၏မိန်းမအဖြစ်မရောက်ရှိနိုင်။ ၎င်းလက်မှတ်တွင် မိန်းမဟု ဖေါ်ပြထားခြင်းသည်၊ သမန်ကာရှန်ကာ ဖေါ်ပြထားခြင်းပင်ဖြစ်ဟန်တူသည်။

သို့ဖြစ်၍ ဤအမှုတွင်၊ မအေးသည် အပ္ပဒူမာလစ်၏ တရားဝင်မယားဖြစ်ကြောင်း မပေါ်လွင်ခဲ့။ မအေးနှင့် အပ္ပဒူမာလစ်တို့နှစ်ပေါင်းများစွာ အတူတကွနေလာသည်မှာ မှန်သည်။ လင်မယားဖြစ်သည်ဟု အများသူဘို့ကယူဆကောင်းယူဆပေလိမ့်မည်။ သို့ရာတွင် ဤကဲ့သို့အတူပေါင်းသင်းလာရုံမျှနှင့် ပသီဘာသာဝင်လူမျိုးတို့၏တရားဝင်အကြောင်လင်မယားမဖြစ်နိုင်။ လက်ထပ်စဉ်က၊ ပသီဘာသာဝင်တို့ထုံးတမ်းအရ၊လက်မထပ်ခဲ့လျှင်၊တရားဝင်လင်မယားအဖြစ်သို့မရောက်။ ဤအမှုတွင်၊ မအေးက အပ္ပဒူမာလစ်နှင့်လက်ထပ်စဉ်ကထုံးတမ်းအရ၊ လက်ထပ်သည်ကို အတိအလင်းအကြောင်းမပြနိုင်၍ ၎င်းသည် အပ္ပဒူမာလစ်ထံမှ၊ မယားစိုက်မရနိုင်ဟု ကျွန်ုပ်ဆုံးဖြတ်သည်။ **ဦးဘဒေနှင့် မစောရင်** (1) တို့၏ အမှုတွင်၊ မယားစားစရိတ်စွဲဆိုရာ၌၊ ယောကျ်ားဖြစ်သူကမိန်းမအား၊ ပသီဘာသာဝင် ထုံးတမ်းအရ လက်ထပ်မယူဟုပြောဆိုခဲ့ပါလျှင်၊ မိန်းမလုပ်သူက ၎င်းပြောဆိုချက်ကို မှားသည်၊ တကယ်၌ထုံးတမ်းအရ လက်ထပ်ယူခြင်းကို အတိအကျ သက်သေပြရမည်ဟုဆိုသည်။

သို့ဖြစ်၍၊ ဤအမှုတွင် အောက်ရုံးမှ ချမှတ်လိုက်သော အမိန့်ကို ပယ်ဖျက်ကာ၊ အယူခံ တရားခံ မအေး၏လျှောက်လွှာကို ပလပ်လိုက်သည်။

(1) 1951, Burma Law Reports, p. 113.

APPELLATE CIVIL.

Before U San Maung, J.

DAW DAW SHIN AND TWO OTHERS (APPELLANTS)

v.

U AUNG PE AND TWO OTHERS (RESPONDENTS).*

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Aug. 23.

Burmese Buddhist Law—Suit for partition—Maintainability.

Held: A suit for partition and possession among Burmese Buddhist heirs is not maintainable in Law.

The only way in which one heir can obtain his share of inheritance from the other heirs is by an administration suit.

Maung Ba Tu v. *Ma Thet Su*, 5 Ran. p. 785; *Ma Pwa Shin* v. *U Po Sin and another*, A.I.R. (1937) Ran. 324, approved.

Tin Hla for the appellants.

Yan Aung for the respondents.

U SAN MAUNG, J.—In Civil Regular Suit No. 2 of 1952 of the Subdivisional Court of Pakôkku, the plaintiffs U Aung Pe and Daw Sein Po who are the first and second respondents in the present appeal sued the defendant-appellants U Soe Maung, Ma Kyin Myaing and Daw Daw Shin for possession of a piece of land measuring 2·693 acres situated in Pakôkku town. Their case was that the suit land was purchased by them from Daw Hnin Nwe, widow of U Po Hlaing who became the sole owner thereof

* Civil 2nd Appeal No. 4 of 1954, against the decree of the District Judge's Court of Pakôkku, in Civil Appeal No. 2 of 1952, dated 17th October 1953, arising out of the Subdivisional Court of Pakôkku in Civil Regular No. 2 of 1952, dated the 10th July 1952.

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on U Po Hlaing's death that the defendants U Soe Maung and Ma Kyin Myaing had trespassed upon the land erected a house and put up bamboo fencing thereon and that when they were told to vacate they said that they were there with the permission of the 3rd defendant Daw Daw Shin. On a notice being issued to Daw Daw Shin the latter claimed that the suit land belonged to her and that the 1st and 2nd defendants were occupying the land with her permission.

The defendants by their written statement claimed that the suit land belonged exclusively to Daw Daw Shin as the only wife of the deceased U Po Hlaing. Daw Hnin Nwe who was subsequently joined as a *pro formâ* defendant under the orders of the Court did not file any written statement and the case proceeded *ex-parte* against her, the issues framed being—

(*a*) whether Daw Hnin Nwe or Daw Shin or both were the legal wives of the deceased U Po Hlaing ?

(*b*) whether the registered deed of sale Exhibit B executed between Daw Hnin Nwe's agent U Thu and the plaintiff U Aung Pe is valid and enforceable, and

(*c*) to what relief, if any are the plaintiffs entitled ?

The Subdivisional Judge by his judgment dated the 10th of July 1952 held that both Daw Hnin Nwe and Daw Daw Shin were the legal wives of the deceased U Po Hlaing, that the suit land originally belonged to U Po Hlaing so that on his death both the wives will have certain rights and interest in the properties left behind by him and that until and unless the rights and interest of each wife in respect

of the suit land has been ascertained in a suit between them it must remain indeterminate. He accordingly dismissed the plaintiffs' suit for possession with costs.

On appeal by the plaintiffs to the District Court of Pakôkku, the learned District Judge by his order dated the 4th of April 1953 in his Civil Appeal No. 2 of 1952 remanded the case to the trial Court under Order XLI, Rule 25 of the Civil Procedure Code for the trial of the following additional issues :—

> If Daw Shin and Daw Hnin Nwe are the legal wives of U Po Hlaing, what is the status of each, and what would be her respective share in the house.

The Subdivisional Judge accordingly submitted a finding to the effect that the respective share of each wife would be half of the suit land or house site as the wives were of equal status. When the case came up again before the successor of the learned District Judge who had previously remanded it under Order XLI, Rule 25, the learned Judge passed an order declaring that the plaintiffs were entitled to half the disputed land. He however, refused to give a direction for the removal from the land of the house built by the defendants U Soe Maung and Ma Kyin Myaing.

In the present appeal by Daw Daw Shin, U Soe Maung and Ma Kyin Myaing, it was urged that the learned Judges of the lower Courts had erred in law in not holding that the suit as framed was not maintainable in law. On the authority of the ruling in the case of *Maung Ba Tu* v. *Ma Thet Su* (1) it was pointed out that until and unless a suit for administration had been decided, Daw Hnin Nwe's

(1) 5 Ran. p. 785.

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share in the particular piece of property now in dispute remains indeterminate and that therefore no suit for possession such as that filed by the plaintiffs can be maintained. In my opinion, there is ample force in the argument put forward by the learned Advocate for the defendant-appellants. In the case of *Ma Pwa Shin* v. *U Po Sin and another* (1) it was observed by Dunkley, J., that strictly speaking there is no such thing as a suit for partition among Burmese Buddhist heirs because they are tenants-in-common and not joint tenants of the inheritance that the only way in which one heir can obtain his share of inheritance from another heir or heirs in possession thereof is by an administration suit in which the whole of the property belonging to the estate must be brought to account and that consequently if an heir is to get a share of inheritance a suit for a share of one property out of the inheritance will not lie.

Although no doubt the plaintiffs U Aung Pe and Daw Sein Po had purchased the right title and interest of Daw Hnin Nwe one of the widows of the deceased U Po Hlaing, what interest they have acquired in this particular piece of land must remain indeterminate until the whole of the property belonging to the estate of the deceased U Po Hlaing has been brought to account. If for instance, it is proved that Daw Hnin Nwe had taken more out of the estate than what she was entitled to obtain her share in the remaining property including the suit land will be nil. If, on the other hand, Daw Daw Shin has taken more out of the estate than what she is entitled to her share in the remaining property including the suit land will be nil and Daw Hnin Nwe will be entitled to receive the whole of the suit land.

(1) A.I.R. (1937) Ran. p. 324.

For these reasons I consider that the suit for possession of the land in dispute is not maintainable in law. In the result the appeal succeeds, the judgment and decree of the District Court of Pakôkku appealed against are set aside and the plaintiffs' suit dismissed with costs throughout. Advocate's fee in this Court, 3 gold mohurs.

APPELLATE CIVIL.

Before U Ba Thoung, J.

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Aug. 15.

KAMINI KUMAR MALICK AND ONE (APPELLANTS)

v.

ZERMAINI RANJAN CHOWDHURY (RESPONDENT).*

Landlord and Tenant—Suit for ejectment—Notice under s. 11 (a), *Urban Rent Control Act and s. 106, Transfer of Property Act—Interpretation of ambiguous notice.*

Notice, dated the 10th October, 1952 set out *inter alia* as follows :

" This notice is hereby given to you to pay the said arrears of K 133 to my client Zarnami Ranjan Chowdhury or to leave the premises within 21 days from the receipt of this notice failing which legal action will be taken in Court for recovery of the arrears and for ejectment from the premises. "

The notice was received on the 11th October, 1952.

Contended by the Appellants that :

(1) 21 days after the receipt of notice falls on the 1st of November 1952 and hence a fresh period has begun from the 1st November, and

(2) Therefore, a fresh notice to appellants giving fifteen days ending with that month would be required relying on ***Matrumall Salnarain and others*** v. ***Mt. Rami***, A.I.R. (32) (1945) p. 463, was relied on.

(3) In a suit for ejectment, the provision of both s. 106, Transfer of Property and the Urban Rent Control Act must be complied with relying on *T. H. Khan* v. *Dawood Yusoof Abowath and others*, (1947) R.L.R. p. 354.

Held : The wordings in the notice are ambiguous as to whether the appellants are to stay on till the 1st of November or quit by the end of October.

In interpreting ambiguous words in notices, the test is to see what the words would mean to tenants well conversant with all the facts and circumstances of the tenancy.

Dr. U Chit and one v. *Daw Ohn Yin*, (1952) B.L.R. p. 176, followed.

Held further : The 21 days time given in the notice is only for the purpose of paying up the arrears of rent and since more than 15 days ending with the month of October has been given to quit, it means that they are to quit by the end of October.

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* Civil 2nd Appeal No. 125 of 1953, against the decree of the Additional District Court of Akyab (U BA GYAN) in Civil Appeal No. 3 of 1953, dated the 4th September 1953, arising out of the Township Court of Akyab in Civil Regular Suit No. 59 of 1952, dated the 19th May 1953.

Dutt and *Tun Sein*, Advocates, for the appellants.

Sein Tun (2), Advocate, for the respondent.

U BA THOUNG, J.—The plaintiff-respondent sued the defendants-appellants in the Township Court of Akyab for recovery of K 140 as rent and for ejectment and for delivery of the suit premises. His case is that he took the lease of a room in the suit building belonging to one Shaik Busher Ali and two others through their agent Nazir Ahmed at a rental of K 35 per month, and after partitioning the room into two portions, he sublet one portion of it to the defendants-appellants as his sub-tenant at a rent of K 7 per month. The defendants-appellants did not pay the rents due to him from March 1951 to October 1952, and refused to deliver possession of the suit room, and hence he filed the suit after giving due notice Exhibit E. The defendants-appellants contended that they are not the sub-tenants of the plaintiff-respondent, but that they are the tenants of Nazir Ahmed himself to whom they have paid all the rents due.

The trial Court held that the plaintiff-respondent is not the tenant of Nazir Ahmed; that the defendants-appellants are the tenants of Nazir Ahmed and not the sub-tenants of the plaintiff-respondent and hence the question of ejectment by the plaintiff-respondent against the defendants-appellants does not arise, and with these findings the plaintiff-respondents' suit was dismissed. On appeal to the District Court, the learned District Judge reversed the findings of the trial Court and held that the plaintiff-respondent is the sole tenant of Nazir Ahmed and that the defendants-appellants are the sub-tenants of the plaintiff-respondent; and a decree in favour of the

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U BA THOUNG, J.

plaintiff-respondent was given with costs. Hence this appeal.

The question whether the defendants-appellants are the sub-tenants of the plaintiff-respondent or whether they are the tenants of Nazir Ahmed is a question of fact, and the lower Appellate Court after carefully considering the evidence of both sides came to a finding that they are the sub-tenants of the plaintiff-respondent, and as I do not think that this finding of fact arrived at by the lower Appellate Court is either perverse or not according to law, I am not prepared to interfere with it in this second appeal.

The only question to be considered in this appeal is whether the notice Exhibit E given by the plaintiff-respondent to the defendants-appellants is valid in law. It is contended by the learned counsel for the appellants that this notice is not valid in law as it has not complied with the provisions of section 106 of the Transfer of Property Act.

In the last paragraph of the notice Exhibit E which is dated the 10th October 1952, it sets out as follows :

* * * *

This notice is hereby given to you to pay the said arrears of Rs. 133 to my client Zarmani Ranjan Chowdhury or to leave the premises within 21 days from receipt of this notice ; failing which legal action will be taken in Court for recovery of the arrears and for ejectment from the premises.

* * * *

The notice is dated the 10th October 1952 and it is not disputed that it was received on the 11th October. It is contended by the learned counsel for the appellants that since the defendants-appellants were given 21 days from the date of receipt of the

notice to leave the premises, and as 21 days after the receipt of notice fall on the 1st of November, a fresh period has begun from the 1st November, and hence a fresh notice to the defendants-appellants giving fifteen days ending with that month would be required under section 106 of the Transfer of Property Act. It is also contended that if a landlord wants to eject a tenant, he must comply with the provisions of section 106 of the Transfer of Property Act as well as with section 11 (*a*) of the Urban Rent Control Act. In support of his contention that the notice Exhibit E is not in compliance with section 106 of the Transfer of Property Act, the learned counsel has cited the case of *Matrumall Satnarain and others* v. *Mt. Rami* (1) where it has held that:

"When the tenancy is a periodic tenancy, the landlord cannot permit a tenant to remain on in possession after a fresh period has begun and then call on him to vacate the premises. If he permits him to remain on after a fresh term has commenced, he must permit him to remain on till that term expires."

And in support of his contention that both the provisions of section 106 of the Transfer of Property Act and section 11 (*a*) of the Urban Rent Control Act must be complied with if a landlord wants to eject a tenant, he has cited the case of *T. H. Khan* v. *Dawood Yusoof Abowath and others* (2) where it has held that:

"Urban Rent Control Act does not make any provision for the creation and determination of the relationship of landlord and tenant and if a landlord wants to eject a tenant he must comply with the provisions of section 106 of the Transfer of Property Act and also comply with section 11 (*a*) of the Urban Rent Control Act, and section 11 (*a*) of the

(1) A.I.R. (32) (1945) Pat. p. 463. (2) (1947) R.L.R. p. 354.

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latter Act does not repeal section 106 of the Transfer of Property Act."

It is, however, to be considered first, in this case, whether by his notice Exhibit E, the plaintiff-respondent meant to allow the defendants-appellants to stay on till the 1st of November or whether they are to quit by the end of October. The wordings in it are not clear. The 21 days time given in the notice to the defendants-appellants may be only for the purpose of paying up the arrears of rent and not for the purpose of quitting the premises. I think what the plaintiff-respondent meant was that the defendants-appellants are to quit the premises by the end of October as he has given them more than fifteen days ending with the month of October to do so. I do not think the plaintiff-respondent has meant to allow the defendants-appellants to stay one day more till the 1st November. In any case, the wordings in the notice Exhibit E are ambiguous as to when the defendants-appellants should quit and give up possession of the suit premises. In such cases the principle laid down in the case of *Dr. U Chit and one* v. *Daw Ohn Yin* (1) should be followed. It is held in that case that:

> "In interpreting ambiguous words in notices to quit the principle which should guide the Court is to test what the words would mean to tenants conversant with all the facts and circumstances of the tenancy."

In the present case the defendants-appellants must be presumed to know what was the real intention of the plaintiff-respondent. The plaintiff-respondent has given them more than 15 days to quit, for the notice was given on the 10th October and received by them on the 11th October. Surely it must mean to them

(1) (1952) B.L.R. p. 176.

that they are to quit by the end of the month of October. In these circumstances, I hold that the notice Exhibit E is a valid notice both under section 106 of the Transfer of Property Act and under section 11 (*a*) of the Urban Rent Control Act. In the result the appeal fails and it is accordingly dismissed with costs.

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U BA THOUNG, J.

APPELLATE CIVIL.

Before U San Maung, J.

H.C. 1956

July 26.

MAUNG THA SAING (APPELLANT)

v.

MA AIN THA (RESPONDENT).*

Execution of Decree—Order staying or refusing to stay execution of a decree, whether appealable—S. 2(2) and s. 47, Civil Procedure Code.

Held: No hard and fast rule can be laid down as to when an order staying an execution will be appealable as a decree under s. 2 (2) read with s. 47 of the Civil Procedure Code.

Each case must be decided on the facts and circumstances arising therein.

U San Wa and others v. *U Chit San and another*, 9 Ran. p. 354; *Kyauksema* v. *Aparna Charan*, 10 L. B. R., p. 326; *Janardan Triumbak Gadre* v. *Martand Triumbak Gadre*, 45 Bom., p. 241; *Husain Bhai and another* v. *Bellu Shah Gilani*, 46 All., p. 733; *Mussammat Durga Devi* v. *Hans Raj and others*, 11 Lah., p. 402; *Audh Behari Singh* v. *Sailendra Nath Bhattacharjee*, A I R. (1954) Cal., p. 339, referred to.

R. Basu for the appellant.

Kyaw Khin for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 16 of 1952 of the Township Court of Sandoway, the plaintiff Maung Tha Saing who is the appellant in the present appeal sued the defendant Ma Ain Tha for her ejectment from the land in suit on the ground that the land belonged to him and that she was in unauthorised occupation thereof. Maung Tha Saing's case was that the land which originally belonged to

* Civil 2nd Appeal No. 112 of 1953, against the order of the Additional District Court of Sandoway in Civil Appeal No. 5 of 1953, dated 29th August 1953, arising out of the order, dated the 7th July 1953, passed in Civil Execution Case No. 1 of 1953 by the Township Judge, Sandoway.

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his parents was acquired by Government many years ago and was re-transferred to him by Government in March 1951 on his refunding to Government the compensation awarded to his parents and that one of the conditions of the re-transfer of the land to him was that it should be surrendered to Government if and when required. The defendant's case was that she had been in occupation of the land since the pre-independence period and that she had the permission of the then Minister for Welfare and Rehabilitation to continue to occupy the same. The learned Township Judge, after a full hearing into the merits of the case, rejected the defendant's story as untrue. He accordingly decreed the suit with costs. The plaintiff Maung Tha Saing then sought to execute the decree against Ma Ain Tha and his application for execution was dealt with in Civil Execution Case No. 1 of 1953. While the execution case, namely, Civil Execution Case No. 1 of 1953, was proceeding the Deputy Commissioner, Sandoway, by his letter dated the 6th of July 1953 requested the Township Judge to stay proceedings on the ground that he was taking necessary steps to re-acquire the land for the Government. The Township Judge by his order dated the 7th of July 1953 held in these circumstances that execution should not proceed against the defendant Ma Ain Tha. He accordingly closed the execution proceedings with no order as to costs. The plaintiff U Tha Saing appealed to the Additional District Court of Sandoway and the Additional District Judge by his order dated the 29th of August 1953 in Civil Appeal No. 5 of 1953 dismissed the appeal upon two grounds—(1) that the Township Judge had in the circumstances acted very properly in exercise of his inherent power by staying the execution and (2) that

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the order of the Township Judge was not an appealable order.

In coming to the conclusion that the order relating to the stay of execution of the decree was not appealable, the learned Additional District Judge relied upon the ruling in the case of *U San Wa and others* v. *U Chit San and another* (1). In this second appeal before this Court it is contended that the observation in *U San Wa and others* v. *U Chit San and another* (1) goes too far and that the same should be reconsidered. In *Kyauksema* v. *Aparna Charan* (2) where an application for execution of a decree for possession was stayed on the ground that the judgment-debtor's husband had filed a suit in respect of the same land as against the decree-holder, Maung Kin, J. after a review of the authorities available to him held that orders staying or refusing to stay execution of a decree are orders determining questions relating to the execution of the decree within the meaning of section 47 of the Code of Civil Procedure and are therefore appealable.

The opposite view was, however, taken by a Bench of the Bombay High Court in *Janardan Triumbak Gadre* v. *Martand Triumbak Gadre* (3) where it was held that such an order is not a decree as defined in section 2 of the Civil Procedure Code read with section 47. Fawcett, J. who was a member of the Bench while admitting that the words "questions relating to the execution of a decree" are very wide and *primâ facie* cover a question regarding stay of execution of a decree held that in construing the words of section 47, Civil Procedure Code, the Court is entitled to have regard to the fact that the

(1) 9 Ran. p. 354. (2) 10 L.B.R. p. 326.
(3) 45 Bom. p. 241.

corresponding section of the old Code contains an express reference to a stay of execution, which has been omitted in the present section. In *Husain Bhai and another* v. *Beltie Shah Gilani* (1) it was held that an order staying execution of a decree from the 23rd of July 1923 to the 6th of September 1923 on payment of Rs. 5,000 by the judgment-debtor was not a decree within the meaning of sections 2 and 47 of the Code of Civil Procedure.

U San Wa and others v. *U Chit San and another* (2) relied upon by the learned Additional District Judge followed the decision in *Janardan Triumbak Gadre* v. *Martand Triumbak Gadre* (3). Practically all the authorities bearing upon the question were however exhaustively reviewed by a Bench of the Lahore High Court in *Mussammat Durga Devi* v. *Hans Raj and others* (4) where it was held that the order for the stay of execution of a decree pending disposal of the appeal to the High Court falls under section 2 read with section 47 of the Civil Procedure Code and is appealable as a decree.

Between the two extreme views, namely that held by the Bombay High Court in Janardan Triumbak Gadre's case and that held by the Lahore High Court in Mussammat Durga Devi's case is that taken by Mookerjee, J. in *Audh Behari Singh* v. *Sailendra Nath Bhattacherjee* (5) that an order staying execution if it conclusively determines the rights and liabilities of the parties with reference to the relief granted by the decree will be " the determination of a question under section 47" within the meaning of section 2 (2) and will thus be a decree

(1) 46 All. p. 733.
(2) 9 Ran. p. 354.
(3) 45 Bom. p. 241.
(4) 11 Lah. p. 402
(5) A.I.R. (1954) Cal. p. 339.

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under the Code and appealable as such under section 96.

In my opinion no hard and fast rule can be laid down as to when an order staying an execution will be appealable as a decree under section 2 (2) read with section 47 of the Civil Procedure Code. Each case must be decided on the facts and circumstances arising therein.

In the case now under consideration it would appear that the learned Township Judge considered that so long as the executive authorities are taking steps to acquire a piece of land on behalf of the Government execution proceedings relating to the decree for possession of that land should be stayed. He had accordingly not only stayed the execution *sine die* but also closed the proceedings. His order in the circumstances must be regarded as a denial of the right on the part of the decree-holder to execute his decree for possession and is therefore a determination of the question under section 47 within the meaning of section 2 (2) of the Civil Procedure Code.

It is now more than three years since the Deputy Commissioner, Sandoway, had written to the Township Judge that he was taking steps to acquire the land in question and the learned Advocate appearing for the respondent cannot say that the proposed acquisition is even now effective.

The decree for possession was passed on the 7th of October 1952 and the order of the Township Judge staying the execution *sine die* has resulted in the decree-holder not being able to execute his decree even though more than three years had elapsed since the date of the decree.

In the result the appeal is allowed. The order of the Township Judge dated the 7th of July 1953

staying the execution *sine die* is set aside and the learned Judge is directed to proceed with the execution proceedings in accordance with law in the light of the remarks made above. There will be no order as to costs of this appeal.

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APPELLATE CIVIL.

Before U Chan Tun Aung, Chief Justice and U San Maung, J.

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Oct. 22.

P. S. K. ASEEZAL BEEVI (APPELLANT)

v.

V. S. SYED AMMAL AND OTHERS (RESPONDENTS).*

Appointment of Receiver, Order XL, Rule 1, Civil Procedure Code—Order rejecting, whether appealable—Order XLIII, Rule 1, Civil Procedure Code—S. 20, Union Judiciary Act, 1948.

Held : An Order made by a Judge on the Original Side of the High Court coming under Order XLIII, Rule 1, Civil Procedure Code is appealable.

P. Abdul Gaffor v. *The Official Assignee*, 3 Ran. p. 605 ; *U Ohn Khin* v. *Daw Sein Yin*, (1949) B.L.R. p. 201 ; *Re Devabhai Jiwandas and others* v. *A. M. Murugappa Chettiar*, 13 Ran. p. 457, followed ; *T. C. Leong and one* v. *U Po Thein*, (1953) B.L.R. p. 1, explained and distinguished.

P. N. Ghosh for the appellant.

N. Bose for the respondents 1 and 2.

M. Ahmed for the respondent No. 4.

Aung Min (1) for the respondent No. 5.

Jaganathan for the respondent No. 6.

Judgment delivered by

U SAN MAUNG, J.—In Civil Regular Suit No. 59 of 1951 on the Original Side of this Court, the plaintiff P. S. K. Aseezal Beevi filed a suit for declaration and recovery of Rs. 20,000 being the tentative value of plaintiff's share of inheritance and for accounts. The plaintiff's case was that she was the

* Civil Misc. Appeal No. 29 of 1955, against the Order of the Judge on the Original Side of this Court in Civil Regular No. 59 of 1951, dated the 6th June 1955.

daughter of the late P. S. Kader Sultan Rowther while the defendants were the three surviving widows and the sons and daughters of the deceased.

On the 14th June 1938 the deceased who had hitherto been carrying on big business as publishers, printers and booksellers under the name and style of K.O.M.Z. Kader Sultan and Company executed a deed of partnership between himself and his three sons by the first wife, namely, P. S. K. Abdul Rahman, P. S. K. Mohamed Dastaghir and P. S. K. Mohamed Rashid Khan, the 4th, 5th and 6th defendants in the case. The business was then run under the name and style of P. S. Kader Sultan and Sons. In accordance with the provisions of this partnership deed, the 4th, 5th and 6th defendants carried on the partnership business up till the time of the general evacuation of Rangoon in February 1942, consequent on the war with Japan.

On the 17th of December 1943, the 4th, 5th and 6th defendants in collusion with one another executed a document purporting to be an agreement for the dissolution of the partnership. This document, the plaintiff alleged, was not genuine because on that date the state of mind of her father P. S. Kader Sultan Rowther was such as would make him incompetent to enter into any agreement or contract. After the British reoccupation of Burma, the 5th defendant P. S. Mohamed Dastaghir came to Burma in May 1946 without the knowledge of the other heirs and legal representatives of P. S. Kader Sultan and took charge of the stock-in-trade and the account books of the firm which had been left in charge of the employees of the firm. Thereafter, without consulting the other heirs and legal representatives of P. S. Kader Sultan the 5th defendant dealt with the assets of the firm as he pleased and subsequently entered into a

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collusive sale with the 6th defendant transferring the entire assets to the latter for a sum of Rs. 32,000 when such assets were worth well over Rs. 400,000. Those of the other heirs and legal representatives who were majors at that time, made a protest through the 4th defendant against the 5th defendant's conduct in making the unauthorised sale and a long correspondence followed as a result.

Subsequently, on the 27th of March 1947 the 4th defendant, for himself and purporting to act as the agent of defendants 1 to 3, 7 to 12 and of the plaintiff, executed a deed of release in favour of the 6th defendant all their claims to the properties, assets, copyrights, trade-marks, goodwill to the business of their father for a further sum of Rs. 85,000. In spite of these sales neither the first sum of Rs. 32,000 nor the second sum of Rs. 85,000 had yet been distributed to the heirs and legal representatives of P. S. Kader Sultan. The plaintiff claimed that as she was a minor at the time of the execution of the sale deed and the release deed in question, the defendant No. 4 had no authority to act as her agent nor had her own mother, defendant No. 2, authority to appoint the 4th defendant as her agent. Consequently, she asked for a declaration that the transactions aforesaid were not binding upon her and that she was entitled to one-sixteenth share in the sum of Rs. 45,000 being the capital contribution of P. S. Kader Sultan Rowther in the firm of P. S. Kader Sultan and Sons, one-sixteenth share of trade profits accrued to P. S. Kader Sultan Rowther up to the 17th of December 1943, one-sixteenth share in the profits due to P. S. Kader Sultan subsequent to the 17th of December 1943 and one-sixteenth share in the profits earned by the defendant Nos. 5 and 6 by making use of the assets of P. S. Kader Sultan Rowther.

The suit was mainly contested by the 5th and 6th defendants. They emphatically denied that the sale of the assets of the firm to the 5th defendant by the 6th defendant was collusive or that the assets were worth anything like Rs. 400,000. They contended that the deed of release executed by the 4th defendant as agent of the other heirs of P. S. Kader Sultan was binding upon the plaintiff. Accordingly they contended that the plaintiff had no claim either for a declaration that the sale deed and the release deed were not binding upon her or for a declaration that she was entitled to one-sixteenth share of the assets and profits of the business up to the date of the suit.

The suit was filed on the 10th of July 1951. On the 18th of January 1955 the plaintiff filed an application under Order XL, Rule 1 of the Code of Civil Procedure for the appointment of the Official Receiver as Receiver of the properties in suit. In the affidavit of Zakkariya, agent of the plaintiff, which was annexed to the application it is alleged firstly that the 5th and 6th defendants carried on business in the name of P. S. K. Mohamed Rashid Khan at stalls Nos. 74, 75, 90 and 91 in Sooratee "D" Bazaar, Rangoon, originally forming part of the assets of P. S. Kader Sultan and Sons and that they had recently transferred stall No. 75 with its stock worth K 25,000 to their servant P. S. N. Syed Ebrahim and stall No. 91 with its stock worth K 25,000 to their servant P. S. N. Kamaradin. It is also alleged that the 5th and 6th defendants were selling goods without issuing vouchers and that they had been prosecuted from time to time in respect of such sales under the Sales Tax Act.

Both these allegations have been denied by the 5th and 6th defendants in their counter-affidavits. These defendants alleged that these scandalous allegations

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had been made with a view to damaging their reputation and the good name of their business at the instigation of the 4th defendant who was running a rival concern under the name of "Three Stars Stationery Supply Co." in which the plaintiff's agent was also a partner.

The learned trial Judge by a brief order dismissed the application for the appointment of a receiver mainly on the ground that the plaintiff had not given sufficient reasons for the appointment of a receiver at the present stage of the proceeding and that the plaintiff's interest would be amply protected by directing the 5th and 6th defendants to deposit a sum of K 10,000 undertaking not to do anything to the detriment of the plaintiff's interest during the pendency of the case. Security was accordingly ordered and a deposit of K 10,000 was duly made in Court.

The plaintiff being dissatisfied with the order rejecting her application for the appointment of a receiver has preferred the present appeal.

A preliminary objection was raised on behalf of the 5th and 6th defendants that no appeal lies against the order of the Judge on the Original Side refusing to appoint a receiver under Order XL, Rule 1 of the Civil Procedure Code. In support of this, certain observations of a Bench of this Court in *T. C. Leong and one* v. *U Po Thein* (1) have been relied upon for the proposition that an order refusing the application for the appointment of a receiver is not a judgment within the meaning of section 20 of the Union Judiciary Act, 1948 and section 13 of the Letters Patent of the late High Court of Judicature at Rangoon and hence not subject to appeal to a Bench of this Court. However, the learned Advocate for the appellant has apparently overlooked the decision

(1) (1953) B.L.R. p. 1.

of a Bench of the late High Court of Judicature in *P. Abdul Gaffor* v. *The Official Assignee* (1). There it was held that for an order made in exercise of the Ordinary Original Civil Jurisdiction to be appealable, it must come either under Order XLIII, Rule 1 of the Civil Procedure Code, or be a judgment within the meaning of clause 13 of the Rangoon High Court Letters Patent. It is thus clear that if an order made by the Judge on the Original Side of this Court comes under Order XLIII, Rule 1 of the Civil Procedure Code it is appealable.

The above decision of the late High Court in *P. Abdul Gaffor* v. *The Official Assignee* (1) was referred to with approval by a Bench of this Court in *U Ohn Khin* v. *Daw Sein Yin* (2). In *Re Devabhai Jiwandas and others* v. *A. M. M. Murugappa Chettiar* (3) when a Full Bench of seven Judges of the late High Court of Judicature had to consider the meaning of the word "judgment" in clause 13 of the Letters Patent, Page, C.J. with whom all the Judges concurred observed at page 479 :

> "But if only 'decrees' are appealable under clause 13 of the Letters Patent what 'orders' are appealable, and in what circumstances does an appeal from an 'order' lie ?
>
> Now, an appeal is the creature of statute, for
>
> 'an appeal does not exist in the nature of things. A right of appeal from any decision of any tribunal must be given by express enactment.'
>
> In many statutes in India, of course, a right of appeal from an order passed pursuant to the statute is expressly provided, and in such cases an appeal will lie on the terms and conditions therein prescribed. I will not pause to enumerate or discuss these enactments, although many such statutes were cited at the Bar. But, except where otherwise a right of

(1) 3 Ran. p. 605. (2) (1949) B.L.R. p. 201.
(3) 13 Ran. p. 457

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appeal *ad hoc* is given under some statute or enactment having the force of a statute, the right of appeal from orders that do not amount to 'judgment' is regulated by the provisions of the Code of Civil Procedure ; (see section 104 and Order 43, Rule 1)."

This is clear authority for the proposition that besides judgments coming within the ambit of clause 13 of the Letters Patent, orders falling under Order XLIII, Rule 1 of the Civil Procedure Code made by a Judge on the Original Side of the late High Court of Judicature were appealable to a Bench. There is nothing in the language of section 20 of the Union Judiciary Act to support the view, that only judgments falling within the ambit of that section and not orders falling under Order XLIII, Rule 1 of the Civil Procedure Code are subject to appeal to a Bench of this Court.

In the case of *T. C. Leong and one* v. *U Po Thein* (1) which has been strongly relied upon by the learned Advocate for the appellant what the Court had to consider was whether the order of U Aung Khine, J. in second appeal remanding the case to the trial Court for disposal on merits was a judgment within the ambit of section 20 of the Union Judiciary Act as that particular order would only be appealable if it could be a judgment within the ambit of that section. Only then could the Judge who had passed that order declare that the case was fit for further appeal. The Bench did not, at that time, have occasion to consider whether or not orders falling under Order XLIII, Rule 1 made by a Judge on the Orginal Side of this Court were subject to appeal.

The next point for consideration is whether on the facts as disclosed in the pleadings and in the affidavits and counter-affidavits of the plaintiff's agent

(1) (1953) B.L.R. p. 1.

and the 5th and 6th defendants, the learned trial Judge was right in having dismissed the plaintiff's application for the appointment of a receiver. Firstly there has been an inordinate delay in the making of the application inasmuch as the plaintiff had filed the suit as early as the 10th of July 1951. If she had been so minded she could, on the allegations contained in her plaint, have asked for the appointment of a receiver. The allegations contained in the affidavit of her agent, all of which have been denied by the 5th and 6th defendants, are not such as would materially add to what the plaintiff had said in her plaint. Besides, the plaintiff has a difficult hurdle to jump before she can be successful in her suit, that is, she must prove that the deed of release executed by the 4th defendant was not binding upon her. Furthermore, in our opinion also the plaintiff's right would be fully safeguarded if the 5th and 6th defendants are placed on terms as to security, though the sum of K 10,000 fixed by the learned Judge on the Original Side may be perhaps somewhat inadequate. We would therefore, while dismissing the appeal in so far as it relates to the appointment of a receiver, direct that the security required of the 5th and 6th defendants be increased to a sum of K 20,000. We would direct that each party should bear its own costs of this appeal.

U CHAN TUN AUNG, C.J.—I agree.

ORIGINAL CIVIL.

Before U Shu Maung, J.

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Dec. 19.

RANCHHODDAS JETHABHAI & COMPANY (PLAINTIFF)

v.

THE STATE AGRICULTURAL MARKETING BOARD AND ANOTHER (RESPONDENTS).*

Ss. 230, 233, Contract Act.

Burmese Agencies Ltd., is the purchasing Agent of the S.A.M.B. for purchase of rice, delivery ex-hopper. A special term of the contract between them was that all procurements must be paid for by the Agent out of his own money at first and subsequently claim for reimbursement from the S.A.M.B.

Burmese Agencies contracted with the plaintiff for the purchase of rice in their personal capacity, no mention whatsoever being made that they were buying or acting on behalf of the S.A.M.B. except at the beginning of the contract form that they were the agents of the S.A.M.B.

The plaintiffs sued both the S.A.M.B. and the Burmese Agencies for payment of rice, contending that both the principal and the agent are liable on the contracts.

The S.A.M B. replied that the Burmese Agencies were primarily liable to the plaintiff and they *i.e.* the Burmese Agencies are liable to be reimbursed by them subsequently for such payment.

The Burmes Agencies contended that they were clearly acting as Agents and that the plaintiff should look for payment to the S.A.M.B. the principal.

The question is which of the two defendants are liable ?

Held : That both the agent and the principal are jointly liable. The Burmese Agencies by executing these contracts in their own name made themselves liable and the S.A.M.B. being the principals entitled to the benefit of the contracts are also liable.

The Indian Companies Act, 1882, 18 Cal. p. 31; *Firm of Khushi Ram Behari Lal* v. *Malhra Das and another*, A.I.R. (1917) Lah. p. 404 ; *Hambro* v. *Burnand and others*, (1904) K.B.D. p. 10 ; *Higgins and others* v. *John Senior*, 58 Revised Reports, (1841-43) p. 884 ; *Parker* v. *Winlow*, 119 English Report, K.B. 1497 ; *Universal Steam Navigation Company Ltd.* v. *James Makelvie and Company*, (1923) A.C. p 492 ; *Ariadne Steamship Co. Ltd.* v. *James Mckelvie & Co.*, (1922) K.B.D. p. 518 ; *T. Muhammad Shamsuddin Ravuthan & Bros.* v. *Messrs. Shaw Wallace and Company*, I.L.R. (1939) Mad. 282; *Babulal* v. *Jagat Narain*, A.I.R. (1952) Vindhya Pradesh 51, referred to.

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* Civil Regular Suit No. 29 of 1952, High Court.

P. K. Basu for the plaintiff.

Sein Tun for the defendant No. 1.

Than Sein for the defendant No. 2.

U SHU MAUNG, J.—The plaintiffs in the present suit are a Firm of Gyobingauk dealing in rice and the defendants are No. 1, The State Agricultural Marketing Board and No. 2, The Burmese Agencies Ltd.

According to the plaint, the plaintiffs entered into contracts with the 2nd defendants for the supply of rice from their two mills situated at Gyobingauk, Tharrawaddy district and the names of the mills are the New Rice Mill and Yadanabala Rice Mill and the numbers are Nos. 10 and 11 respectively of 1949, in that particular zone known as Zone No. 15. Altogether it was alleged that 28 contracts were entered into between the plaintiffs and the 2nd defendants who were said to be agents of the 1st defendants and out of those 28 contracts in respect of Mill No. 10, 11 contracts had been completed and they had received payment leaving a balance of 3 contracts to be still accounted for by the 2nd defendants and in respect of Mill No. 11, 10 contracts were completed and also paid leaving 4 contracts still to be paid out of which only 3 contracts are now the subject matter of the present suit.

The contracts were for the supply of rice from their mills and the delivery was to be ex-hopper. According to the plaintiffs, these contracts were duly completed by them and the rice was ready for delivery and the details are given in paragraph 7 of their plaint. After that the 2nd defendants issued pay orders in respect of the rice milled and delivered

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by the plaintiffs and the details of the pay orders are mentioned in paragraph 8 of the plaint and the amount to be recovered from the 2nd defendants amounted to Rs. 1,63,400-1-0.

After the rice had been milled and delivered to the 2nd defendants who accepted these rice on behalf of the 1st defendants in their capacity as agents of the 1st defendants, insurgents occupied Gyobingauk about the beginning of April 1949 and the rice which was kept in the godown of the plaintiffs were looted by the insurgents and that therefore the plaintiffs now claimed this sum of money from the 2nd defendants as well as the 1st defendants on the ground that both of them were liable for the goods sold and delivered. Out of this sum of Rs. 1,63,400-1-0, the only amount they had received as part payment was Rs. 5,336-0 leaving a balance of Rs. 1,58,064-1-0. They have also claimed from 6th November 1951 up to 14th March 1952 interest at the Court rate 9 per cent per annum which comes up to Rs. 5,137-15-0 and they therefore now claimed a total of Rs. 1,63,202-0 against both the defendants.

The 1st defendants admitted that the 2nd defendants were employed as their agent in accordance with the terms of the agency contract entered into between the 1st defendants and the 2nd defendants but contended that the 2nd defendants who purchased this rice from the plaintiffs were bound to make the payment out of their own funds in accordance with the terms of the agreement of the agency and that therefore they denied the liability to pay the amount claimed. They further denied the allegations whether this rice was looted by the insurgents or not and they put the plaintiffs to strict proof of this. Other pleas were also raised such as the jurisdiction of this Court to try the case and also

as to the maintainability of the suit regarding misjoinder of parties. However, when the suit came up for trial the point of jurisdiction and the maintainability of the suit was not pressed for and therefore their main defence merely came up to this, that as the agents had entered into the contracts with the plaintiffs on their own responsibility the agent, namely the 2nd defendants were liable in the first instance and that therefore they were not liable to be sued in the present suit. The 2nd defendants admitted the existence of the contracts and their due delivery, and that they received the reports from the plaintiffs that the rice were looted. They, however, pleaded that as agents they were not liable for the claim, as they were only purchasing the rice on behalf of their principal the 1st defendants. On the above pleadings the following issues were framed by consent of the parties. The issues are as follows:

1. Did the plaintiffs and 2nd defendants execute the six contracts as alleged in paragraph 4 of the plaint?
2. Did the plaintiffs deliver the rice and broken rice as alleged in paragraphs 6 and 7 of the plaint?
3. Was the rice and broken rice in suit and other stock looted by the insurgents?
4. Are the plaintiffs entitled to Rs. 1,58,064-1-0 as the price of rice or broken rice from the defendants or either of them?
5. Are the plaintiffs entitled to interest Rs. 5,137-15-0 as claimed in the suit?
6. To what relief, if any, are the plaintiffs entitled?

In respect of issue No. 1, we have the evidence of Motichan Vardhman Sanghavi (PW2) that the

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plaintiffs' Firm entered into six contracts with the 2nd defendants for the supply of rice and broken rice. He was the Mill Manager of the plaintiffs' Firm at the material time of this dispute. The contracts were signed on behalf of the plaintiffs' Firm by their representatives and on the other part they were signed on behalf of the 2nd defendants. These contracts are Exhibits N, N-1, N-2, N-3, N-4, N-5. This witness is supported by another witness Maung Tin Aye (PW6). He was the Manager at the Paungde Rice Mill belonging to the 2nd defendants and he also stated that these contracts Exhibits N to N-5 were those contracts entered into by the 2nd defendants with the plaintiffs in which they purchased rice and rice products and a perusal of these exhibits will show that it is headed " Agreement For Sale & Purchase of Rice " and the name of the sellers is that of the plaintiffs and the buyers, The Burmese Agencies Ltd. signed by the Assistant Branch Manager. There is no rebutting evidence as far as this piece of evidence is concerned and in view of this, the answer to this issue must be in the affirmative.

As to the next issue No. 2 there is evidence of Shuji Gangjee (PW1) who was the agent of the plaintiffs' Firm in the year under dispute and according to him the rice was milled at these two mills of the plaintiffs, Nos. 10 and 11 at Gyobingauk and they were duly delivered in accordance with the terms of the contracts entered into between the plaintiffs and the 2nd defendants. He has prepared an abstract of the amount of paddy milled giving the details when the milling started and the date of deliveries, etc. in respect of Rice Mill No. 10 and that statement is filed as Exhibit A. Similarly he has prepared another statement for Mill No. 11 and

that is Exhibit B. And then we have the evidence of Motichan Vardhman Sanghavi (PW2) the Mill Manager of the plaintiffs' Firm and he also deposed that after the contracts had been entered into between the plaintiffs and the 2nd defendants the paddy was milled and the rice supplied and bagged in accordance with the terms of the contract and these were duly delivered and he has produced the relevant books regarding the paddy which landed and the book known as the paddy landing book filed as Exhibit O. And he has also produced the daily milling book and that is produced as Exhibit Q and he stated that the practice was that for every hundred tons of paddy milled he gave a heading "A" and for the next hundred tons "B" and for the next "C" as the case may be. And according to him the milling of the paddy started on the 19th of March and they were completed for all the contracts on the 27th of March 1949. And after that, these rice were bagged and stored up and delivered to the 2nd defendants on behalf of the 1st defendants. Then we have Maung Tin Aye (PW 6) who was the Manager at the Paungde Mill of the 2nd defendants in the year 1949 and according to him the rice which was purchased by them on behalf of the 1st defendants was duly milled and delivered as stated by the plaintiffs' two witnesses. And he stated that while the rice was being milled the milling was supervised by the Inspector of the S.A.M.B. and by one person on behalf of the 2nd defendants and after they had been milled and delivered bills were submitted by the plaintiffs to the 2nd defendants and after these bills were scrutinized and checked up with registers maintained for the office they passed the bills and pay orders were duly issued. And he also identified the pay orders issued by them namely Exhibit 1-C

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altogether 4 of them. The first is dated Paungde the 23rd of March 1949 to Messrs. Burmese Agencies Ltd., Rangoon, Pay Order No. 440 for a sum of Rs. 47,774. The next is dated the 25th of March 1949, Pay Order No. 454 for a sum of Rs. 46,281 and the third dated the 29th March 1949, Pay Order No. 468 for Rs. 46,281 and the 4th dated the the 4th August 1949 for a sum of Rs. 23,063-1-0. This witness also stated that on the first bill dated the 23rd of March 1949 a sum of Rs. 5,336 was paid by the 2nd defendants and there is an endorsement to that effect on that Pay Order.

We have also the evidence of U Ba Maw (PW 3) former Executive Officer of the S.A.M.B. and according to him, he was deputed to hold an enquiry into these alleged lootings of rice by the rebels, and in the course of the enquiries he examined witnesses and documents produced by the parties, the plaintiffs and the 2nd defendants, and amongst others, he admitted the millers registers, Exhibits Q and R, milling daily reports Exhibits U and V, milling registers Exhibits O and P and log Books Exhibit X and Exhibit W, duly signed by the Sircar, Inspector and agent of the rice mill. From these facts, he was satisfied that the contracted rice had been duly milled and delivered before the lootings took place. This witness is entirely an impartial witness, and there is no eason to doubt this evidence.

In view of the above evidence which was in no way rebutted by the defendants, this issue must also be answered in the affirmative.

Coming to issue No. 3 whether the rice and broken rice in suit and other stock were looted by the insurgents, we have the evidence of Shuji Gangjee (PW 1) who has stated that the rice in dispute were looted and he has filed a statement giving the abstract

of the rice looted from these two mills and those abstracts are Exhibit C in respect of New Rice Mill No. 10 and Exhibit D in respect of Mill No. 11. And over and above that he has also produced statements sent by the 2nd defendants to the 1st defendants in respect of rice and broken rice looted by the insurgents and the abstract of those statements showed the letter No., date, number of bags taken away, insurgent's receipt, etc. and Exhibit E relates to rice Mill No. 10 and Exhibit F relates to Mill No. 11. The next witness Motichan Vardhman Sanghavi (PW 2) also stated that after the rice had been milled in that the insurgents came to Gyobingauk about the 4th of April 1949 and then they asked for particulars regarding the stock of S.A.M.B. paddy and rice and after that commencing from the 9th of May the insurgents began to remove the stocks, every time they took away the stocks of rice they give receipts and the receipts are produced as Exhibit Y in respect of Mill No. 10 and Exhibit Z in respect of Mill No. 11. These series of receipts were produced from the possession of the 2nd defendants. It was stated that they also had in their possession counterparts of these receipts and these receipts were seized by the Police department known as P.4 and he has produced the receipts granted to them by the police authorities when those receipts were seized from them and the receipts given by the police P.4 the Inspector of Police concerned are produced, Exhibits 1-A and 1-B. The next witness is Mr. N. P. Thakore (PW 4) who was an engineer in the mill of the plaintiffs and he also stated about this looting during this material period. We have another witness Mr. N. P. Thakur (PW 5) who is a rice miller of Gyobingauk. He has a rice mill known as the Ganesh rice mill the number of which is known as No. 9 Mill and according to

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him his mill was opposite to the New Rice Mill of the plaintiffs and he also stated that the rice from his mill as well as from the other mills were all looted by the insurgents during that period. The next witness Maung Tin Aye (PW 6) who was the Manager of the 2nd defendants Rice Mill at Paungde corroborated the fact that all these paddy which had been milled and kept in the plaintiffs' possession which were the property of the 1st defendants were looted by the insurgents and he was personally aware of this looting. The next witness U Aye (PW 7) was a milling clerk at Mill No. 7 and he also supported this fact of insurgents' looting the rice from the various mills. In view of this evidence which has not been in any way rebutted by the defendants' side this issue must also be answered in the affirmative.

The real difficulty in this case is in respect of this 4th issue as to what amount are the plaintiffs entitled to as the price of rice or broken rice sold by them and from which of the defendants are they liable to get this amount if any.

According to the 1st defendants it was admitted that the 2nd defendants were the purchasing agent on their behalf. But exception was taken to this fact that when the 2nd defendants were appointed their agent, a special contract was entered into between the 1st defendants and the 2nd defendants relating to the terms of the agency and a copy of that is the agreement dated the 9th September 1949, Exhibit 1, entered into between the State Agricultural Marketing Board and the Burmese Agencies Ltd. and the attention of this Court was invited to clause (11) of this contract where it was stated " the company shall in the first place bear the whole costs of procuring and delivering products in accordance with the terms of

this Agreement." Then clause (12) stated payment shall be made by the Board to the Company for all products purchased by the Company in the following manner :

"(*a*) In the case of rice and rice products upon presentation to the Board of any invoice accompanied by a Certificate to the effect that the Company holds the seller's invoice and a delivery order relating to the quantity invoiced, a sum equal to 95 per cent of the ex-hopper price of the rice or rice products *plus* customary charges for bagging, sewing, weighing and shipping."

In view of these provisions, it was contended by the learned Advocate for the 1st defendants that the terms of this contract appointing the 2nd defendants as their agent were quite clear that the liability for payment of the rice and rice products purchased by the 2nd defendants was to be made by the 2nd defendants out of their own funds and that therefore the liability for payment rested with the 2nd defendants and not with the 1st defendants. The learned Advocate has also invited the attention of the Court to the form of contract entered into by the 2nd defendants with the plaintiffs, namely the agreement for sale and purchase of rice, Exhibit N series. There it was pointed out, the buyers in that contract were the 2nd defendants and it was signed by them in their personal capacity and there was no mention whatsoever that they were buying or acting on behalf of the 1st defendants. And the only place where they mentioned the 1st defendants was in the beginning of the contract, where they have mentioned the fact that they were agents of the 1st defendants. And it was therefore argued that the liability on the contract rested upon the 2nd defendants and not on the 1st defendants in the first instance. And their liability would only accrue if and when the 2nd

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defendants had paid up the respective dues to the sellers of the rice and in that event they can recover the amount under the terms of their contract entered into with the 1st defendants to be reimbursed for the payment made by them.

On the other hand, the learned Advocate for the 2nd defendants submitted, that it was quite apparent that when the contracts were entered into between the plaintiffs and the 2nd defendants it was to the knowledge of all the parties concerned that the 2nd defendants were merely acting as the agent of the 1st defendants and that it was in evidence that these contracts were ex-hopper contracts and when the paddy had been milled and converted into rice there was evidence to show that when the rice was bagged they were bagged with gunnies supplied by the 1st defendants and the gunnies were clearly marked S.A.M.B. that is the short form of the 1st defendants Board. And it was therefore argued that as the 2nd defendants were only acting as the agent of the 1st defendants and it was the 1st defendants who had actually received these rice, the moment they were bagged they became the property of the 1st defendants and that therefore the agent namely the 2nd defendants were not in any way liable to make good the amount and it was immaterial whether this rice had been looted in this instance and the 1st defendants did not get any benefit out of this transaction and as he was merely an agent he had done all that was necessary under the circumstances and he should no more be held responsible.

In answer to these two contentions raised by the defendants, the learned Advocate for the plaintiffs submitted that no doubt normally an agent would not be liable to make any payment in respect of the contracts entered into by the agent on behalf of the

principal. That was the normal course of the law of agency. But the distinction which he sought to draw in this particular case was from the peculiar terms of the contract of agency entered into between the 1st defendants and the 2nd defendants, and it was urged that in this particular case the very terms of the contracts entered into between the plaintiffs and the 2nd defendants which admittedly were signed by the 2nd defendants in their own name, there was nothing to indicate that they were signing for or on behalf of the 1st defendants and that therefore in this particular case the agent himself was personally liable to make good in respect of the rice delivered and where the agent is personally liable as in this instance, from the peculiar circumstances of the contracts, he submitted that the provisions of section 233 of the Contract Act applied and that therefore it was within the purview of this section that he could sue both the principal and the agent and make both of them liable and he therefore contended that the defence put forward by the two defendants was not sustainable in law and that his claim, if proved, the Court should give a decree in his favour against both defendants.

The learned Advocate for the 2nd defendants in support of his arguments has invited my attention to section 230 of the Contract Act where it was stated that in a contract entered into by an agent, the principals would be liable and he also drew my attention to the fact that all along in the pleadings, it was the plaintiffs' case, that the 2nd defendants were acting as the agent of the 1st defendants. And that therefore he submitted that the provisions of this section should apply and his client should not be made personally liable. He has invited my attention to these decisions. The first case is in the matter of

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The Indian Companies Act, 1882 (1) where it was held that a person contracting with an agent may look directly to the principal unless by the terms of the contract he has agreed not to do so, whether he was or was not aware when he made the contract that the person with whom he was dealing was an agent only. The next case is in the case of ~~Firm of~~ *Khushi Ram Behari Lal* v. *Mathra Das and another* (2). That was a decision under section 230 of the Contract Act where it was held that the agent was not personally liable and the letter written by him did not convey an unconditional undertaking to pay. That was a case ~~in which~~ the plaintiffs sued the agent in respect of certain sums of money relying on a letter which the agent wrote to the plaintiffs stating that they would pay for the goods. However, when we look at the decision as a whole it was quite clear that from the correspondence that passed between the parties that this particular letter in which the agent purported to make terms of payment though not specifically mentioned that he was acting as an agent, the other correspondence clearly showed that the plaintiffs were looking to the principals for payment and therefore their Lordships hold that the agent was not responsible in respect of this particular matter in dispute.

The next case quoted is that of *Hambro* v. *Burnand and others* (3) where it was held that where an agent, in contracting on behalf of his principal, has acted within the terms of a written authority given to him by the principal, the principal cannot repudiate liability on the contract by stating that the agent had acted in his own interests, and not in those of his principal.

(1) 18 Cal. p. 31. (2) A.I.R. (1917) Lah. p. 404.
(3) (1904) K.B.D. p. 10.

No doubt the decisions quoted by the learned Advocate for the 2nd defendants lays down the principles that are generally accepted in regard to the contracts entered into by an agent for and on behalf of the principal. The difficulty in the present case is as I have mentioned above in the series of contracts referred to in which the Burmese Agencies, the 2nd defendants no doubt at the top of the contract form have mentioned the fact that they were agents of the 1st defendants. After that when the contract was actually signed they did not sign acting for or on behalf of the 1st defendants but merely signed their own names as the buyers of the rice. And this fact alone would show that they purported to enter into these contracts with the plaintiffs admitting their personal liability by virtue of their contract form. Again if we look at Exhibit 1 the contract entered into by them with the 1st defendants there also it was quite clear under the clause (11) that in regard to these contracts the 2nd defendants were to pay out from their own fund and only later on they were to be reimbursed by the 1st defendants. Furthermore, it is not in dispute that all the pay orders which have been mentioned in the earlier part of my judgment (namely those four pay orders Exhibit 1-C), in all those pay orders these were addressed to the Rangoon Office of the 2nd defendants and not to the 1st defendants and Maung Tin Aye (PW 6) himself stated that in regard to all previous bills it was the 2nd defendants who actually paid out the money and in respect of these four bills which are now in dispute they did make out the payment orders to be paid by the Rangoon Office but unfortunately they did not get the necessary payment from the 1st defendants in respect of payments made by them for other contracts and with the result they were short

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of funds and they could not honour those pay orders which normally they would have paid out to the plaintiffs. That admission on the part of U Tin Aye coupled with the Exhibit 1 agency agreement between the 2nd defendants and the 1st defendants to my mind supports the contention that the 2nd defendants though an agent had by their own conduct admitted this personal liability on these contracts with the plaintiffs and that therefore it is not open to the 2nd defendants now to say that their liabilities ceased and the plaintiffs should look for payment to the 1st defendants their principal. Several decisions were cited by the learned Advocate for the plaintiffs in support of his contention that both the principal and the agent should be liable on these contracts. He has also drawn the attention of this Court that the law on this point is slightly different between the English law and the Indian law and that the law governing this case is the Indian law of Contract and I need not cite all the decisions but it would be useful to cite some of the English Reports to see what are the principles that govern such cases. In the case of *Higgins and others* v. *John Senior* (1) where it was held, that in an action on a written agreement purporting on the face of it to be made by the defendant and subscribed by him for the sale and delivery by him of goods above the value of £ 10, it is not competent for the defendant to discharge himself on an issue by proving that the agreement was really made by him by the authority of, and as agent of the 3rd person. The relevant portion of the judgment at page 889 gives the indication as to what is the extent of the liability of an agent if he signs an agreement without purporting to be acting on behalf of another person. This is the relevant quotation.

(1) 58 Revised Reports (1841-43) p. 884.

"That if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility."

The next case is that of *Parker* v. *Winlow* (1). In that case a memorandum of charter-party was expressed to be made between P. of the good ship "C" and W. agent for E.W. & Sons to whom the ship to be addressed. It was signed by W. without any restriction. Held that W. was personally liable as charterer. At page 1499 there is this remark:

"I can have no doubt myself that the defendant is personally liable. He makes the contract, using apt words to show that he contracts; and the only ground suggested for rebutting his personal liability is that he says he is agent for another; but he may well contract and pledge his personal liability, though he is agent for another. If he had signed the contract as by procuration for E. Winlow & Son, he might have exempted himself from liability; but on principle, and on the authorities cited, an agent is liable personally if he is the contracting party; and he may be so though he names his principal."

The next case is *Universal Steam Navigation Company Ltd.* v. *James Makelvie & Company* (2). There in that case, the agent had signed acting on behalf of the principals. It was held that the defendants having signed as agents were not liable as principals to pay demurrage notwithstanding that they were described as charterers in the body of the charter-party.

Another case arising out of a charter contract is that of *Ariadne Steamship Company Ltd.* v. *James Mckelvie and Company* (3) where this issue whether the agent is personally liable was considered. It was held that the agent had signed as charterer in the

(1) 119 English Report, K.B. 1497. (2) (1923) A.C. p. 492.
(3) (1922) K.B.D. p. 518.

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body of the charter-party. But it was held that the defendants having signed as agents were not liable as principals to pay demurrage, notwithstanding that they were described as charterers in the body of the charter-party.

I think the law has been very clearly enunciated by his Lordship Bankers, L.J., at page 525 and this paragraph is most illuminating. It is as follows :

"In some of the decided cases no special attention appears to have been paid to the question whether the words of qualification were annexed to the signature or appear in the body of the document. My own view is that it is a sound rule of construction, applicable to cases like the present, that where the signature is unqualified the presumption is that the agent is personally liable, but that where sufficient words of qualification are annexed to the signature to indicate that the person signing signs as agent the presumption is the other way * * * * This view is, I think, quite in accordance with the decided cases some of which are decisions in reference to charter-parties and some in reference to contracts in writing other than charter-parties."

The view expressed by his Lordship clarifies the liability of the agent and I cannot do better therefore than to quote the passage. The above principle coupled with the Indian law need further consideration. First is in the case of *T. Muhammad Shamsuddin Ravuthan & Brothers* v. *Messrs. Shaw Wallace & Company* (1). That was a case in which section 233 of the Indian Contract Act was in issue and their Lordships decided that the consideration of this section meant that the plaintiff must sue both the principal and agent and get judgment against both the principal and the agent in a case where the agent is personally liable. The relevant portion of this judgment is at page 287. This is a portion of the judgment of his Lordship Leach, C.J.

(1) I.L.R. (1939) Mad. 282.

"We are here governed by the provisions of the Indian Contract Act, and section 233 of that enactment states that, in cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable. An illustration is given to the section and it is in these words.

> 'A enters into contract with B to sell him 100 bales of cotton and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton. Therefore, there is in India a statutory provision allowing a plaintiff to sue both the principal and the agent in a case where the agent is personally liable. * * * * * * * * '

There is no ambiguity in the language used in the section and I am unable to see anything unreasonable in the rule which it embodies."

There is a recent decision in the case of *Babulal* v. *Jagat Narain* (1). There also this section 233 of the Contract Act was in issue and it was held that the words "hold them both liable" mean that the party dealing with agent can join both the agent and the principal in one suit. There is no suggestion that if he does so, he is only entitled to a decree against one or the other and not against both. Whatever the legislature may have intended the words "may hold both of them liable" mean that both may be sued to judgment and this Madras decision which is quoted above was also cited with approval. Taking all these decisions into consideration and as we are governed by the statutory law of contract it must be clearly held, that as far as this claim is concerned, the answer to this issue would be that both the defendants are held to be liable in view of the fact that the 2nd defendants by executing these

(1) A.I.R. (1952) Vindhya Pradesh 51.

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contracts in their own name made themselves liable and it is not disputed that the plaintiffs in the first instance look to them for payment as evidenced by the documents before the Court, but the 1st defendants also being the principals who were entitled to the benefit of this contract and as the contracts were ex-hopper contracts and as delivery of rice had also been made to the 1st defendants they are also liable in this instance. I would therefore answer this issue that both the defendants are liable to pay the sum of Rs. 1,58,064-1-0 as the price of rice due from both the defendants.

No. 5 issue, as far as this issue is concerned, I do not think it would be fair to give any interest as the delay in payment by the defendants were not solely due to their own default but to circumstances beyond their control, namely because of the insurrection in the year 1949. This issue is therefore answered in the negative. Lastly there is this question as to who should bear the costs. As I have mentioned above under the terms of the contracts between the 1st and 2nd defendants, it was the 2nd defendants who were liable in the first instance to make these payments and as far as the contracts between them and the plaintiffs were concerned, there was no question of their withholding payment as they now try to get out, because they did not get the necessary payment from the 1st defendants and that therefore in regard to costs I would hold that the 2nd defendants would be liable for the costs of the suit. Consequently there will be a decree for Rs. 1,58,064-1-0 against both the defendants, with costs to be paid by the 2nd defendants and without costs against the 1st defendants the State Agricultural Marketing Board. The rest of the claim is dismissed without costs.

ရာဇဝတ်အယူခံ

တရားလွှတ်တော်ဝန်ကြီး ဦးအောင်ခိုင် ရှေ့၌

အက်(စ်)၊စီ၊လျူး ပါ၄ (ပြင်ဆင်ရန်လျှောက်ထားသူများ) တရားလွှတ်တော် †၁၉၅၆ ဖေဖော်ဝါရီလ ၇။
နှင့်
ပြည်ထောင်စုမြန်မာနိုင်ငံတော် (ပြင်ဆင်ရန် လျှောက်ထား ခံရသူ)

အဝတိလိုက်စားမှုတားမြစ်ရေး အက်ဥပဒေပုဒ်မ ၄(၁)(ဝ)(၂)နှင့် ရာဇသတ်ပုဒ်မ ၁၂၀ (ခ) အရဖွဲ့ချက်။ ။ရာဇသတ်ပုဒ်မ ၂၁၊ ပြည်ထောင်စုမြန်မာနိုင်ငံတော် ပြည်တွင်းရေးကြောင်း သယ်ယူပို့ဆောင်ရေးအဖွဲ့၏ အရာထမ်းအမှုထမ်းတို့သည် ပြည်သူ့ဝန်ထမ်းများဖြစ်မဖြစ်။ ။ပြည်ထောင်စု မြန်မာနိုင်ငံတော် ဒဏ္ဍစည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေပုဒ်မ ၄၁၊

ဆုံးဖြတ်ချက်၊ ။ပြည်ထောင်စု မြန်မာနိုင်ငံတော် ပြည်တွင်းရေကြောင်း သယ်ယူပို့ဆောင်ရေးအဖွဲ့၏ အရာထမ်းအမှုထမ်းအားလုံးတို့သည် ရာဇသတ်ပုဒ်မ ၂၁ ၏ အဓိပ္ပါယ်အတွင်းသက်ရောက်သော ပြည်သူ့ဝန်ထမ်းများဖြစ်ကြောင်း။

ခန်မဟာဒူးဟာဂိုလန်ရှာရာဇီနှင့် ဘုရင်မင်းမြတ် ၁၉၄၁ ခုနှစ်၊အာ(ရ)၊အယ်(လ်)၊ အာ(ရ)၊ စာမျက်နှာ ၅၉၉ လိုက်နာသည်၊

ပြင်ဆင်ရန်လျှောက်ထားသူများအတွက်၊ (၁) အတွက် ဦးကျော်မြင့်။
(၂)* အတွက် မစွတာဖစ်ရှား။
(၃) အတွက် } ဦးချောင်ဖို။
(၄) အတွက် }

ပြင်ဆင်ရန်လျှောက်ခံရသူအတွက်၊ ဦးတင်မောင် အစိုးရရှေ့နေ။

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* ၁၉၅၅ ခုနှစ်၊ ရာဇဝတ်ပြင်ဆင်မှုအမှတ် ၁၇၀ (ခ) မှ ၁၈၀ (ခ) နှင့် ၁၉၁ (ခ)၊

† ရန်ကုန်မြို့ (အထူးစုံစမ်းစစ်ဆေးရေးဌာန အက်ဥပဒေ)အထူးတရားသူကြီး (၂)ရုံးမှ ၁၉၅၃ ခုနှစ်၊ ရာဇဝတ်ကြီးမှုအမှတ် ၃၄ တွင်စွဲချက်တင်ထားခြင်းကို ပယ်ဖျက်ပေးရန် တင်သွင်းသောလျှောက်လွှာ။

တရားလွှတ်တော် ၁၉၅၆

အက်(စ်)၊ စီ၊ လျူး ပါ ၄ နှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံတော်၊

ဦးအောင်ခိုင်။

ဦးအောင်ခိုင်။ ။ရန်ကုန်မြို့ (အထူး စုံစမ်းစစ်ဆေးရေး ဌာန အက် ဥပဒေ) အထူးတရားသူကြီး (၂) ရုံး၊ ၁၉၅၃ ခုနှစ်၊ ရာဇဝတ်ကြီးမှု အမှတ် ၃၄ တွင် တရားခံငါးဦးဖြစ်သူ (၁) မစ္စတာ အီး၊ ဘားနှစ်၊ (၂) မစ္စတာ အက်(စ်)၊ စီ၊ လျူး၊ (၃) မစ္စတာ အက်(ဖ်)၊ အေ၊ ဝီလျံ၊ (၄) မစ္စတာ အယ်(လ်)၊ အိပ်(ချ်)၊ လဂေးနှင့် (၅) အရှိန်ဆိုသူငါးဦးတို့အား အဂတိလိုက်စားမှုတားမြစ်ရေး အက်ဥပဒေပုဒ်မ ၄ (၁)(ဂ)(၂)/ရာဇသတ်ပုဒ်မ ၁၂၀ (ခ) အရ၊ ပြစ်မှုကျူးလွန်သည်ဟုဆိုကာ တရားစွဲဆိုခြင်းခံရသည်။

ပဌမတရားခံ မစ္စတာ အီး၊ ဘားနှစ်မှာ မြန်မာနိုင်ငံတော် ပြည်တွင်းရေကြောင်း သယ်ယူပို့ဆောင်ရေးအဖွဲ့တွင် ဥက္ကဋ္ဌအဖြစ် ဆောင်ရွက်ခဲ့သူ တဦးဖြစ်သည်။ ဒုတိယတရားခံ မစ္စတာ အက်(စ်)၊ စီ၊ လျူးမှာ ၎င်းအဖွဲ့တွင် အထွေထွေမန်နေဂျာအဖြစ် ဆောင်ရွက်ခဲ့သူဖြစ်သည်။ တတိယတရားခံ မစ္စတာ အက်(ဖ်)၊ အေ၊ ဝီလျံမှာ အလုပ်ဘက်ဆိုင်ရာမန်နေဂျာအဖြစ် ၎င်းအဖွဲ့တွင်ဆောင်ရွက်ခဲ့သည်။ စတုတ္ထတရားခံ မစ္စတာ အယ်(လ်)၊ အိပ်(ချ်)၊ လဂေးမှာ ၎င်းအဖွဲ့ပိုင် သဘော်ဘက်ဆိုင်ရာ ဗိမာန်လူကြီးဖြစ်၍၊ ပဌမတရားခံအရှိန်ဆိုသူမှာ သာမန်ကုန်သည်တဦးသာဖြစ်သည်။

ဤအမှုတွင်ဇေါ်ပြပါ တရားခံငါးဦးတို့သည်၊ အတူပူးပေါင်း ကြံစည်ကာ မြန်မာနိုင်ငံတော် ပြည်တွင်းရေကြောင်း သယ်ယူပို့ဆောင်ရေး အဖွဲ့ပိုင်တုံကင်းအမှတ် ၁၁၀ မှာပျက်စီးယိုယွင်းနေသဖြင့်၊ ပြင်ဆင်ရှိအသုံးပြုရန် မသင့်တော်ကြောင်းဖြင့် ပဌမအစီရင်ခံပြီးနောက် ၎င်းတုံကင်း၏တန်ဘိုးကိုလျော့ချကာ ငွေ ၃၅၀၀ နှင့် ပဌမတရားခံ အရှိန်အား ရောင်းလိုက်သည့်အတွက် ၎င်းတို့အား တရားစွဲဆိုခြင်းဖြစ်သည်။

တရားလိုဘက်မှသက်သေ ၄၆ ယောက်ကို စစ်ဆေးပြီးနောက်မှ တရားခံငါးဦးစလုံးကို အထက်ဇေါ်ပြပါပုဒ်မများအရ စွဲချက်တင်ခဲ့သည်။ ဤကဲ့သို့စွဲချက်တင်ပြီးနောက်မှ အောက်ရုံးတရားခံများအနက် မစ္စတာ အယ်(လ်)၊ အိပ်(ချ်)၊ လဂေးမှအပ ကျန်တရားခံလေးဦးတို့က ၎င်းတို့အပေါ်တွင် စွဲချက်တင်ထားခြင်းများကို ပယ်ဖျက်ပေးပါရန် လျှောက်လွှာအသီးသီးတင်ကြသည်။ ၎င်းတို့၏ လျှောက်လွှာ လေးခုစလုံးကို ပူးပေါင်းကာ စီရင်ချက်တခုတည်းသာရေးသား၍ ယခုအဓိန့်ချမှတ်မည်။

လျှောက်ထားသူလေးဦးတို့က ၎င်းတို့အပေါ်တွင် စွဲချက်တင်နိုင်ရန် ပဌမဦးစွာ ၎င်းသည် ပြည်သူ့ဝန်ထမ်းတဦးဖြစ်ရမည်။ ဒုတိယမှာ အမှုတွင်ပါဝင်သော ပစ္စည်းသည် ပြည်သူပိုင်ပစ္စည်းဖြစ်ရမည်။ တတိယ ၎င်းပြည်သူပိုင်ပစ္စည်းမှာ

ငင်းတို့ထံတွင် ယုံမှတ်အပ်နှင်းထားသောပစ္စည်းဖြစ်ရမည်ဟု အသိုးသိမ်းပြောဆိုကြသည်။ ထို့ပြင် ငင်းတို့သည် ပြည်သူ့ဝန်ထမ်းလည်းမဟုတ် ရောင်းလိုက်သော တုံကင်းမှာလည်း ပြည်သူပိုင်ပစ္စည်းမဟုတ်၊ ငင်းပစ္စည်းမှာလည်း ငင်းတို့ထံတွင် ယုံမှတ်အပ်နှင်းခြင်းပြုထားသည် မဟုတ်ဟုဆိုကြသည်။

တရားလွှတ်တော် ၁၉၅၆ အက်(စ်)၊ စီ၊ လျှူး ပါ ၄ နှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်။ ဦးအောင်ခိုင်၊

တရားခံများအတွက် လျှောက်လဲချက်များ ပေးရာတွင် ငင်းပြည်တွင်းရေကြောင်း သယ်ယူပို့ဆောင်ရေးအဖွဲ့ကို ၁၉၄၆ ခုနှစ်၊ ပြည်တွင်းရေကြောင်း သယ်ယူပို့ဆောင်ရေးအဖွဲ့ အမိန့်အရ မူလဖွဲ့စည်းခဲ့သည်။ ဤသို့ ဤအဖွဲ့ကိုတည် ထောင်ရာတွင် မူလရောဝတီ ဗလိုတီလာကုမ္ပဏီ လိမိတက်ပိုင်သော သင်္ဘော ဟောင်းများကို မြုပ်နှံရာမှပြန်ဖေါ်ယူကာပြင်ဆင်၍ အစိုးရကငွေစိုက်ထုတ်ကာ ပြည်သူလူထုအသွားအလာ သက်သာချောင်ချိရေးအတွက် ပြုလုပ်သောအဖွဲ့ဖြစ်သည်။ ရောဝတီဗလိုတီလာကုမ္ပဏီလိမိတက်ပိုင် ပစ္စည်းများကို ပြည်သူပိုင်ပြုလုပ်ရန် အက်ဥပဒေထုတ်ပြီး ကော်မရှင်တခုဖွဲ့စည်းခဲ့သည်။ ငင်းကော်မရှင်ဖွဲ့စည်းပြီးနောက် ငင်းကုမ္ပဏီပိုင်ပစ္စည်းများ တန်ဘိုးကိုယူရသည်။ ငင်းနောက်ငင်းကုမ္ပဏီပိုင်ပစ္စည်းများအနက် မည်သည့်ပစ္စည်းကိုသော သိမ်းဆည်းမည်ဟု ၇-၁-၅၀ ခုနှစ်မတိုင်မီက ဆုံးဖြတ်ခြင်းမရှိသေး၊ သို့ဖြစ်၍ ငင်းပစ္စည်းများမှာ ပြည်သူပိုင်ပစ္စည်းများဖြစ်သည်ဟု မဆိုနိုင်ကြောင်းဖြင့် လျှောက်လဲသည်။ ဤကိစ္စနှင့်ပတ်သက်၍၊ မူလရုံးတော်တွင်သော်၎င်း၊ ဤရုံးတွင်တင်သွင်းသော လျှောက်လွှာများထဲတွင်သော်၎င်း ဤအကြောင်းချင်းရာများကို မူလကအလျဉ်းမဖေါ်ပြခဲ့။ ယခု လျှောက်လဲသည့်အချိန်ကျမှသာလျှင် ဤအကြောင်းအချက်များကို ဖေါ်ပြခြင်းဖြစ်သည်။ သို့ရာတွင် ဤလျှောက်လဲချက်မှာ အခြေအမြစ်မရှိသော လျှောက်လဲချက်တခုဖြစ်ကြောင်းကို ပြည်သူပိုင်ပစ္စည်းကာကွယ်ရေး အက်ဥပဒေအရထင်ရှားသည်။ ငင်းတုံကင်းမှာ မူလက ရောဝတီ ဗလိုတီလာကုမ္ပဏီလိမိတက်ပိုင် ပစ္စည်းဖြစ်သော်လည်း၊ ပြည်တွင်းရေကြောင်း သယ်ယူပို့ဆောင်ရေး အဖွဲ့အတွက် သိမ်းဆည်းသောပစ္စည်းတခုဖြစ်ခဲ့၍၊ ငင်းပစ္စည်းမှာ ပြည်သူပိုင်ပစ္စည်းဖြစ်ကြောင်းထင်ရှားသည်။

ဤတုံကင်း၏တန်ဘိုးကို ငွေ ၃၅၀ သာတန်သည်ဟု မစ္စတာ အက်(စ်)၊ အေဝိလ်ကု ဆုံးဖြတ်သည်ဟုဆိုသည်။ ဤဆုံးဖြတ်နိုင်ခွင့်အာဏာငင်းတွင်ရှိသည် မရှိသည်ကို သေချာစွာလျှောက်လဲချက်များမပေးခဲ့၊ ၁၉၂၀ ခုနှစ်က ငင်းတုံကင်း၏တန်ဘိုးငွေမှာ ၁,၉၆၄ ပေါင်တန်သည်ဟု ဆိုသည်။ ရောဝတီဗလိုတီလာကုမ္ပဏီလိမိတက်မှ ငင်းတုံကင်းအတွက်တောင်းသော လျော်ကြေးငွေမှာ ၁,၃၅၉ ပေါင်ဖြစ်သည်။ သို့ရာတွင် မြန်မာနိုင်ငံတော် ပြည်တွင်းရေကြောင်း သယ်ယူ

တရားလွှတ်တော်
၁၉၅၆

အက်(စ်)၊ စီ၊ လျူး ပါ ၄ နှင့် မြန်မာနိုင်ငံ ပြည်ထောင်စု မြန်မာနိုင်ငံတော်၊

ဦးအောင်ခိုင်။

ပို့ဆောင်ရေးအဖွဲ့ကို ပြည်သူပိုင်ပြုလုပ်ရန်အတွက် ဖွဲ့စည်းထားသော ကော်မရှင်အဖွဲ့ဝင်များက ၎င်းတို့ကင်းကို ၉၀ ပေါင်တန်သည်ဟုသာ ဆုံးဖြတ်သည်။ ၎င်း ၉၀ ပေါင်မှာ မြန်မာနိုင်ငံသုံးကျပ်ငွေ ၁,၃၀၀ မျှလောက်ရှိသည်။ ၎င်းအဖွဲ့က ၉၀ ပေါင်တန်သည်ဆိုသော ပစ္စည်းတခုကို မစ္စတာ အက်(ဖ်)၊ အေ၊ ဝီလျံ က ငွေ ၃၅၀ သာတန်သည်ဟု ဆုံးဖြတ်နိုင်ခွင့်ရှိသည်ဟုမဆိုသား။

၎င်းတို့ကင်းကို မစ္စတာ ရောက်လီ၊ မစ္စတာ အက်(ဖ်)၊ အေ၊ ဝီလျံနှင့် မစ္စတာ အယ်(လ)၊ အိပ်(ချ်)၊ လဂေးတို့က စမ်းသပ်ကြည့်ရှုပြီးနောက် ၎င်းတို့ကင်းမှာ ပြင်ဆင်သုံးစွဲသော်လည်း အကျိုးကျေးဇူးမရှိဟုဆိုကာ အဖွဲ့ပိုင်ပစ္စည်းအနေမှ ပယ်ဖျက်ရန် ထောက်ခံချက်ပေးခဲ့သည်။ ဤကဲ့သို့ထောက်ခံချက် ပေးပြီးနောက်မှ ၎င်းတို့ကင်းမှာဖျက်ဆီးရှိမရ ရေတွင်လည်းမြုပ်၍ မရသည့်အတွက် ရောင်းပစ်သင့်သည်ဟု အစီရင်ခံခဲ့သည်။ ဤကဲ့သို့ အစီရင်ခံပြီးသည့်နောက်မှ ၁၆-၁၀-၄၉ ခုနှစ်တွင် ပဋ္ဌမ တရားခံအရှိန်အား ငွေ ၃၅၀ နှင့်ရောင်းခဲ့သည်။ ယခု ၎င်းတို့ကင်းကို အရှိန်ကပြန်ပြင်ဆင်၍၊ ငွေ ၄၀,၀၀၀ နှင့် ပြန်ရောင်းစားသည်ဟု သိရှိရသည်။ အကယ်၍ ဤပစ္စည်းမှာ အသုံးမချနိုင်လောက်အောင် ပျက်စီးနေသော ပစ္စည်းဖြစ်နေ၍၊ ရောင်းချလျှင် လေလံတင်ရှိသာရောင်းချသင့်သည်။ ဤကဲ့သို့လည်း လေလံတင်ကာမရောင်းချခဲ့။

ဤလျှောက်လွှာလေးခုတို့မှာ အောက်ရုံးတရားသူကြီးက စွဲချက်တင်ထားခြင်းကိုပယ်ဖျက်ပေးရန် လျှောက်ထားသည့်လျှောက်လွှာများဖြစ်သည်။ ဤကဲ့သို့ အောက်ရုံးတရားသူကြီးက ကြားဖြတ်အမိန့်များချမှတ်ရာတွင် တရားလွှတ်တော်က ဝင်ရောက်စွက်ဖက်သင့်သည် မစွက်ဖက်သင့်ဆိုသည့် အကြောင်းနှင့်ပတ်သက်၍၊ ခန်ဗဟာဒူးဟာဂျီဂိုလန်ရှာရာဇီ နှင့် ဘုရင်မင်းမြတ် (၁) တို့၏ အမှုဖြတ်ထုံးတွင် ရှင်းလင်းစွာဖော်ပြခဲ့ထားသည်။ ဤကဲ့သို့သော လျှောက်လွှာမျိုးကို တရားလွှတ်တော်က သာမန်အားဖြင့် အောက်ရုံး၏အမိန့်ကို ပယ်ဖျက်လေ့မရှိ။ အထူးအကြောင်းများ ပေါ်ပေါက်လာသော အခါကျမှသာလျှင် ပယ်ဖျက်လေ့ရှိသည်။ အထူးအကြောင်းဆိုသည်မှာလည်း တရားခံများသည် မတရားသဖြင့်ညှဉ်းဆဲကာ တရားစွဲခံနေရခြင်း၊ သို့တည်းမဟုတ် အမှုတွဲကိုကြည့်ရုံမျှနှင့် အမှုမှာ မတရားပြုမှုဖြစ်ကြောင်း ပေါ်လွင်နေသဖြင့်၊ ရုတ်တရက်ရှောင်တခင် တရားခံများအား သက်သာခွင့်ပေးသင့်သည်ဆိုသော အမှုများ၌သာလျှင် တရားလွှတ်တော်က ဝင်ရောက်စွက်ဖက်လေ့ရှိသည်။ အထူးအကြောင်းအချက်များရှိသည် မရှိသည်ကို စူးစမ်းဆင်ခြင်ရာဝယ်၊ အမှုအကြောင်းချင်းရာများကို ဖော်ပြရုံနှင့်ပင် အမှုမှာ

(၁) ၁၉၄၁ ခုနှစ်၊ အာ(ရှ်)၊ အယ်(လ်)၊ အာ(ရှ်)၊ စာမျက်နှာ ၅၉၉။

မတရားရာကျရောက်နေကြောင်း ပေါ်လွင်မှသာလျှင် တရားလွှတ်တော်က ဝင်ရောက်စွက်ဖက်ခြင်းပြုပေမည်။ ယခုအမှုမှာ သက်သေပေါင်း ၄၆ ယောက်မျှပင် စစ်ဆေးပြီးနောက် ၎င်းသက်သေအစစ်ခံချက်များအရ၊ စွဲချက်တင်နိုင်လောက်သော အကြောင်းချင်းရာများရှိနိုင်သာလျှင်၊ အောက်ရုံးကစွဲချက်တင်ကြောင်းမှာ ထင်ရှားသည်။

တရားလွှတ်တော် ၁၉၅၆ အက်(စ်)၊ စီ၊ လျူး ပါ ၄ နှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်၊ ဦးအောင်ခိုင်။

ပဋ္ဌမတရားခံအရှိန်မှအပ၊ ကျန်လျှောက်ထားသူများတို့သည် ပြည်သူ့ဝန်ထမ်းအရာရှိများ ဖြစ်သည်မဖြစ်သည်ဆိုသည့် အကြောင်းနှင့်ပတ်သက်၍ စဉ်းစားရာဝယ် ပြည်ထောင်စုမြန်မာနိုင်ငံတော် ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေပုဒ်မ ၄၁ အရ၊ မြန်မာနိုင်ငံတော် ပြည်တွင်းရေးကြောင်း သယ်ယူပို့ဆောင်ရေးအဖွဲ့ကို ဖွဲ့စည်းခဲ့သည့် အဓိပ္ပါယ်ပေါ်ဒပါက်လာပေမည်။ ဤအဖွဲ့ကို ပြည်ထောင်စုမြန်မာနိုင်ငံတော်၏ စီးပွါးရေးဆိုင်ရာ စီမံကိန်းများအရ ဖွဲ့စည်းခဲ့သည်။ ၁၉၅၂ ခုနှစ်၊ မြန်မာနိုင်ငံတော် ပြည်တွင်းရေကြောင်း သယ်ယူပို့ဆောင်ရေးအဖွဲ့ အက်ဥပဒေပုဒ်မ ၃၂ အရ၊ ၎င်းအဖွဲ့၏ အမှုထမ်းအရာထမ်းအားလုံးတို့သည်၊ ရာဇသတ်ပုဒ်မ ၂၁ ၏ အဓိပ္ပါယ်အတွင်း သက်ဆောက်သော ပြည်သူ့ဝန်ထမ်းများဖြစ်ကြောင်း မှတ်ယူရမည်ဟုဖေါ်ပြထားသည်။ ဤအက်ဥပဒေမှာ ၁၉၅၂ ခုနှစ်ကျမှထုတ်သောအက်ဥပဒေဖြစ်၍၊ ၎င်းပုဒ်မ ၃၂ တွင် ဖေါ်ပြထားချက်များသည်၊ ယခုအမှုနှင့်မဆိုင်ဟု ဆောဒကတက်မည်ဆိုက တက်နိုင်စရာအကြောင်းရှိသည်။ သို့ရာတွင် ယခင်က အတိုအလင်းဖေါ်ပြမြွက်ဆိုကာ မထားသော်လည်း၊ ၎င်းအဖွဲ့ဖွဲ့စည်းရခြင်းသည် ပြည်ထောင်စု မြန်မာနိုင်ငံတော် ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံ ဥပဒေအရဖွဲ့စည်းခြင်း ဖြစ်သည်ဘကြောင်း၊ အဖွဲ့ဖွဲ့စည်းပုံအရ အက်ဥပဒေကိုယ်တိုင်ကပင် "ပြည်ထောင်စု မြန်မာနိုင်ငံတော် ပြည်တွင်းရေကြောင်း သယ်ယူပို့ဆောင်ရေးအဖွဲ့" ဟုခေါ်ဝေါ်ထားသည်လည်း တကြောင်း ၁၉၄၆ ခုနှစ်၊ ပြည်တွင်းရေကြောင်း သယ်ယူပို့ဆောင်ရေးအဖွဲ့၏ အမိန့်အရ၊ အစိုးရဦးစီးကာ ငွေအမြောက်အမြား စိုက်ထုတ်၍ တည်ထောင်ခဲ့သည်လည်း တကြောင်း၊ အစိုးရက ၁၉၄၈ ခုနှစ်၊ ဇွန်လ ၁ ရက်နေ့မှစ၍၊ ယခင် ရောဝတီဖလိုတီလာကုမ္ပဏီလိမိတက်ပိုင် ပစ္စည်းများနှင့် လုပ်ငန်းဆောင်တာများကို သိမ်းပိုက်လိုက်ပြီးနောက်၊ ထိုနေ့မှစ၍ အစိုးရကဦးစီးကာ ဆောင်ရွက်နေသဖြင့် ၎င်းအဖွဲ့တွင် လုပ်ကိုင်ဆောင်ရွက် နေကြသူများတို့သည်၊ အစိုးရဝန်ထမ်းများ အလုပ်လုပ်နေကြသူများ ဖြစ်သည်လည်းတကြောင်း၊ ဤအကြောင်းများကြောင့် ၎င်းအဖွဲ့တွင် လုပ်ကိုင်ဆောင်ရွက်နေကြသော အရာထမ်းအမှုထမ်းများတို့သည်၊ ပြည်သူ့ဝန်ထမ်းများ ဖြစ်ကြသည်ဟုယူဆရပေမည်။

တရားလွှတ်တော်
၁၉၅၆

အက်(စ်)၊ စီး၊ လျှူး ပါ၄ နှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်။

ဦးအောင်မိုင်၊

အထက်ဖေါ်ပြပါ အကြောင်းအရာများနှင့်တကွ၊ အမှုတွင်ပေါ်လွင်သော သက်သေခံချက်များအရ၊ အောက်ရုံးတရားသူကြီးတို့က လျှောက်ထားသူများအပေါ် စွဲချက်တင်ထားခြင်းသည် မှားယွင်းသည်ဟုမဆိုသာ၊ ထို့ပြင် အမှုအကြောင်းချင်းရာများကို အဘက်ဘက်မှကြည့်ရှုပြီး ဥပဒေနှင့်ယှဉ်တွဲကာ ဆင်ခြင်သုံးသပ်ပြီးနောက် အောက်ရုံးတွင် လျှောက်ထားသူများအပေါ် စွဲချက်တင်ထားခြင်းမှန်ကန်သည်ဟု ကျွန်ုပ်ယူဆသည်။ သို့ဖြစ်၍ ဤလျှောက်လွှာများကိုပလပ် လိုက်သည်။

APPELLATE CRIMINAL.

Before U Aung Tha Gyaw, J.

S. SHAM (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

H.C. 1956

Dec. 13

Penal Code—S. 497, Marriage ingredient in the offence—Necessity of strict proof.

Held: In criminal cases where marriage is an ingredient in the offence, the fact of the marriage must be strictly proved in the regular way, *i.e.* as an event which took place and not merely as a state in which the parties were living. *Aziz Khan* v. *Ekram Hussain*, 38 C.L.J. 213, referred to.

The parties might have lived as husband and wife but their conduct alone is not sufficient to prove marriage under s. 50 of the Evidence Act.

Bhagu Dhondi v. *Emperor*, 16 C.L.J. (1915) p. 213 ; *The Empress* v. *Pitambur Singh*, I.L.R. 5 Cal. 566 ; *Gopal* v. *King-Emperor*, (1925) A.I.R. Ran. 328.

P. N. Ghosh, Advocate, for the appellant.

Nil for the respondent.

U AUNG THA GYAW, J.—The appellant in this case was convicted of the offence of adultery punishable under section 497 of the Penal Code and sentenced to undergo six months' rigorous imprisonment.

The parties involved in the prosecution are said to be low Caste Telegu Hindus. Chitty, the complainant, claims that Sattapa *(a)* Latchmi, the woman concerned, has been his wife since 1951. On 6th March 1956, the appellant is alleged to have removed her from the complainant's protection and had gone and lived in Kyaikto with her as man and

* Criminal Appeal No. 438 of 1956, appeal from the Order of the 3rd Additional Special Power Magistrate of Rangoon, dated the 26th day of October 1955 passed in his Criminal Regular Trial No. 785 of 1956.

H.C. 1956

S. SHAM v. THE UNION OF BURMA.

U AUNG THA GYAW, J.

wife. Regarding his own marriage with Sattapa, the complainant Maung Chitty states that although his first association with her was the result of an elopement, they had subsequently legalized the relationship by calling a *Panchayat* and paying a compensation of K 75, half for the use of the members of the *Panchayat* and half for the satisfaction of the girl's mother.

The learned trying Magistrate accepted this fact and the subsequent co-habitation of Chitty and Sattapa as proof of a valid marriage between them.

It is now contended in this appeal that the assumption made by the learned trying Magistrate is unwarranted. The marriage of the complainant and his alleged wife Sattapa, according to settled authority, must be a matter of strict proof in a prosecution for adultery. Although the payment of K 75 for the use of the assembled leaders and the girl's mother is proved, there is nothing in the evidence of the witnesses to show that a marriage among low Caste Telegu Hindus is, by custom, effected in this manner. In criminal cases such adultery where marriage is in an ingredient in the offence, the fact of the marriage must be strictly proved in the regular way, *i.e.* as an event which took place and not merely as a state in which the parties were living. [See *Aziz Khan* v. *Ekram Hussain* (1)].

The complainant Chitty and Sattapa might have lived as husband and wife but their conduct alone is not sufficient to prove marriage under section 50 of the Evidence Act. [See *Bhagu Dhondi* v. *Emperor* (2)]. A Full Bench of the Calcutta High Court in *The Empress* v. *Pitambur Singh* (3) also adopted the view that where marriage is an ingredient in an

(1) 38 C.L.J. 213. (2) 16 C.L.J. (1915) p. 213.
(3) I.L.R. 5 Cal. 566

offence, as in bigamy, adultery and the enticing of married women, the fact of the marriage must be strictly proved in the regular way. [See also *Gopal* v. *King-Emperor* (1)].

The evidence adduced for the prosecution in this case does not satisfy this requirement of law. Accordingly, the conviction and sentence passed upon the appellant S. Sham are set aside and he shall be acquitted so far as this case is concerned. The bail bond executed by him will be cancelled.

(1) (1925) A.I R Ran. 328.

APPELLATE CRIMINAL.

Before U Aung Khine, J.

H.C. 1956

Nov. 30.

THE UNION OF BURMA (APPELLANT)

v.

U NYO (RESPONDENT).*

Suppression of Corruption Act, s. 4 (1) (d)/4 (2)—Gross negligence amounted to misconduct—Whether the element of mens rea *is a necessary ingredient in an offence under s. 4 (1) (d)/4 (2), Suppression of Corruption Act.*

Held: Gross negligence amounted to misconduct under s. 4 *(1) (d)*/4 (2) Suppression of Corruption Act.

The question of *mens rea* is irrelevant for the purposes of determining the criminal liability of the accused sent up under this section. *Dr. Gordon Seagrave* v. *The Union of Burma*, (1952) B.L.R. 44 (S.C.) ; Criminal Reference No. 16 of 1956 ; *U Sein Ban* v. *The Union of Burma*, Criminal Appeal No. 107 of 1955 of the High Court, Rangoon, referred to.

Tin Maung (Government Advocate) for the appellant.

Mon San Hlaing for the respondent.

U AUNG KHINE, J.—In Criminal Regular Trial No. 10 of 1955 of the Court of the 2nd Additional Magistrate, Toungoo, the accused U Nyo was found guilty under section 4 *(1) (d)*/4 *(2)* of the Suppression of Corruption Act and he was sentenced to suffer four months' rigorous imprisonment.

U Nyo is the Senior Inspector of the State Agricultural Marketing Board, Pyu, and he was responsible for the paying out of the price of all paddy purchased in the locality. There was a Paddy Buying Centre at a place called Laikpaw and on 3rd February 1954 one Ko Tun Kyaing came to that

* Criminal Appeal No. 12 of 1956, appeal from the order of the Sessions Judge of Toungoo, dated the 12th day of September 1955 passed in Criminal Appeal No. 31 of 1955.

buying centre in three carts and sold 75 baskets of paddy. After weighing the paddy it was found that Ko Tun Kyaing was to get the price of 74 baskets. The Weighing Clerk Maung Ba Saw (PW 4) made out a voucher in quadruplicate and the original was issued to the seller Ko Tun Kyaing. By mistake Ba Saw mentioned in the voucher that the purchase price came up to K 495·90, whereas the actual price was really K 210·90. What actually happened was that he had credited to Tun Kyaing's account the price of 100 baskets more than he had sold to the SAMB. According to Head Inspector U Tin Lay (PW 3) and Maung Ba Saw (PW 4), the mistake was detected in time and when Ba Saw prepared the daily paddy purchase statement a correction was made. However, it is doubtful whether the corrected statement reached the office of the accused U Nyo. On 12th February 1954, *i.e.*, 9 days after the sale of the paddy, Ko Tun Kyaing presented his voucher to U Nyo for payment. The voucher in question is Exhibit ၀-၁. The amount of money to be paid, both in words and figures, still remained unaltered and without doubt U Nyo must have paid out the sum without scrutinising the voucher carefully. Had he inspected the voucher carefully he would have seen that there was an overwriting of the figure " 3 " by figure " 7 " in ink in the column shown as " Carts " and also an addition of figure " 1 " in ink in front of the original figure " 75 " in the column shown as " Baskets " and thirdly, also an addition of figure " 1 " in front of the figure " 74 " in the column shown as " Nett Baskets. " In the column shown as " Bags " is an entry in pencil showing the figure " 26. " Then in the same line in another column there had been an overwriting to make it appear that the number of bags was 56. The figure "2" had been overwritten with the figure " 5 "

H.C. 1956 — THE UNION OF BURMA v. U NYO. — U AUNG KHINE, J.

in ink. Had he scrutinised this voucher carefully he would have seen these suspicious overwritings and additions in figures, and it is doubtful whether he would have paid out the amount shown in the voucher before verifying or cross-checking. The mistake was discovered when the audit of the accounts took place and on the report made by U Maung Maung, Senior Investigation Officer, Bureau of Special Investigation, U Nyo was sent up to stand his trial under the sections mentioned above. At the time it was probably thought that he had by corrupt or illegal means appropriated the whole or part of the money which he had overpaid to Ko Tun Kyaing. It is clear that the trial Court did not attribute to him the offence of misappropriating the money by corrupt practices. This view was also upheld by the Sessions Judge before whom the appeal of U Nyo was heard subsequently. The trial Magistrate thought that the accused had been grossly negligent, so much so that his action amounted to misconduct as defined in Act No. XVI of 1951. When U Nyo appealed against his conviction and sentence the learned Sessions Judge gave a considerable thought over the question as to whether an offence under section 4 (*1*) (*d*) read with section 4 (*2*) of the Suppression of Corruption Act can be deemed to have been committed in law in the absence of the element of *mens rea*. Finally, relying on the decision in the case of *Dr. Gordon Seagrave* v. *The Union of Burma* (1) he held that U Nyo did not commit the offence with which he had been charged, in the absence of *mens rea* and he directed that U Nyo be acquitted. It is as against this order of acquittal that the Government has come up on appeal. I understand from the learned Government Advocate

(1) (1952) B.L.R. 44 (S.C.).

that the very idea of filing this appeal was to have a binding decision as to whether the element of *mens rea* is a necessary ingredient in an offence under section 4 (*1*) (*d*)/4 (*2*) of the Suppression of Corruption Act. This very question was referred by U Po On, J. to a Bench of this Court and in Criminal Reference No. 16 of 1956 it was held that " so far as statutory offences are concerned, words of statutes are given effect to as they stand without bringing in the extraneous *mens rea* doctrine for purposes of determining the guilt of the offender and that if the definition does not include the requirement of a particular mental condition, we must give effect to it as it stands holding the omission to be deliberate." In other words, the question of *mens rea* is irrelevant for purposes of determining the criminal liability of the man sent up under section 4 (*1*) (*d*)/4 (*2*) of the Suppression of Corruption Act. Exactly the same view was taken by me in the case of *U Sein Ban* v. *The Union of Burma* (1).

Now, reverting back to the facts of the case I would say that U Nyo had been negligent to the extent that he did not scrutinise properly the voucher, Exhibit ၈-ာ presented by Tun Kyaing before he paid out the sum. It is true that he paid out the very amount written, both in words and figures, on the voucher, but he had overlooked the fact that there had been overwritings or material alterations in respect of the quantity of paddy sold. In any such case a prudent man would have carefully scrutinised the voucher in question and if there be any grounds for suspicion that material alterations had been made in the entries, a cross-check would have been made before paying out the amount. Therefore I would hold that U Nyo was guilty and that the trial Court

(1) Criminal Appeal No. 107 of 1955 of the High Court, Rangoon.

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U AUNG KHINE, J.

was correct in entering a conviction under section 4 (*1*) (*d*)/4 (*2*) of the Suppression of Corruption Act against him. The order of acquittal of U Nyo in Criminal Appeal No. 31 of 1955 in the Court of the Sessions Judge, Toungoo, is hereby set aside and the original conviction is now directed to be restored.

Regarding the sentence, it would be improper at this stage to re-commit the respondent U Nyo to prison. He was sentenced to suffer four months' rigorous imprisonment on 15th July 1955 and he was released by the order of the Sessions Judge on 12th September 1955. Thus he had served nearly two months' imprisonment before he was released. Prior to his conviction he was in custody for quite a few months. Taking all these facts into consideration and also the fact that no sharp or corrupt practices were attributed to him by the lower Courts I would reduce the sentence to the term of imprisonment he had already undergone.

APPELLATE CIVIL

Before U Thaung Scin and U Po On, JJ.

H.C. 1956 — Aug. 6.

THE OFFICIAL RECEIVER, HIGH COURT (APPELLANT)

v.

TAN GWAN LYE AND ANOTHER (RESPONDENTS).*

Urban Rent Control Act, s. 2 (d) and s. 16—Definition of the word "Premises"—Electric generating plant.

Held: An electric generating plant means and includes machines, buildings, outhouses, etc., as well as the lands on which they stand and hence must come within the definition of "Premises" in s. 2 (*d*) of the Urban Rent Control Act.

L. Hoke Sein v. *The Controller of Rents for the City of Rangoon and one*, (1949) B.L.R. (S.C.) 160, followed.

Held also: In a suit for arrears of rent due on a lease of an electric generating plant, a certificate by the Controller certifying the standard rent of the premises under s. 16 of the Urban Rent Control Act is necessary.

Aung Min (2), Advocate, for the appellant.

Daw Khin Kyi, Advocate, for the respondent No. 2.

Judgment delivered by

U THAUNG SEIN, J.—The estate of one Tan Shu Yon a wealthy Chinaman of Pyapôn who died some years ago is the subject matter of Civil Regular Suit No. 192 of 1947 of the High Court, Rangoon. By an order dated the 1st April 1948 and recorded in that suit the Official Receiver was appointed to take charge of the estate and among the numerous assets comprised in that estate is an electric generating

* Civil 1st Appeal No. 62 of 1953, against the decree of the Additional District Court of Pyapôn in Civil Regular Suit No. 13 of 1952, dated the 26th December 1952.

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THE OFFICIAL RECEIVER, HIGH COURT v. TAN GWAN LYE AND ANOTHER.

U THAUNG SEIN, J.

plant which supplied the town of Pyapôn with electrical energy. On the 1st May 1948 the Official Receiver (appellant) leased out to the first respondent Tan Gwan Lye the electric generating plant in question at a rental of Rs. 900 per month while the second respondent Tan Shu Swan stood as surety for the payment of the rents as they fell due. The rents soon fell into arrears however and the first respondent approached the Official Receiver to either reduce the rent or else to terminate the lease as he was suffering losses. The lease was then terminated and on the failure of the two respondents to pay up the arrears of rent a suit was filed in the Additional District Court of Pyapôn for recovery of the same. Unfortunately for the Official Receiver that suit was dismissed and he has come up on appeal to the High Court to have the decision of the lower Court set aside. The main reason advanced by the lower Court for the dismissal of the suit was that an electric generating plant falls within the definition of "premises" in section 2 (*d*) of the Urban Rent Control Act and that the Official Receiver had failed to comply with the provisions of section 16 of that Act.

The learned counsel for the Official Receiver has urged that the lower Court is wrong in that it failed to realise that the property leased to the first respondent was not the electric generating plant alone but also the right to collect the dues from consumers of eletrical energy in Pyapôn town. It appears that the deceased Tan Shu Yon held a licence under the Electricity Act for the supply of electrical energy to Pyapôn and the Official Receiver asserts that the first respondent was able to supply electricity in accordance with that licence. Now, it is indisputable that an electric generating plant means and includes, machines, buildings, outhouses, etc., as well as

the land on which they stand and hence must come within the definition of "premises" in section 2 (*d*) of the Urban Rent Control Act. In this connection it may be noted that the Supreme Court has in *L. Hoke Sein* v. *The Controller of Rents for the City of Rangoon and one* (1) held "that the definition of the word 'premises' in section 2 (*d*) of the Act includes industrial concern like Rice Mill." An electric generating plant is also an industrial concern like a rice mill and hence the same consideration will apply.

With regard to the argument that the first respondent took over the lease of the electric generating plant as well as the right to collect dues from consumers of electrical energy in Pyapôn town, it should be noted that under the proviso to section 9 of the Electricity Act the Official Receiver was not competent to transfer the licence for the supply of electrical energy without the sanction of the President. There is no hint or suggestion that the sanction of the President was ever sought for or obtained for the transfer of the licence to the first respondent. Be that as it may, the first respondent did in fact collect certain dues from the consumers of electrical energy in Pyapôn town in respect of energy supplied by him. We need not look very far however to discover the exact nature of the property which was leased to the first respondent. The cause title of the plaint reads "Suit for recovery of Rs. 8,400 due as rent" and in paragraph 3 of the plaint it is alleged that "the 2nd defendant agreed, in consideration of the letting on hire of the said Electric Plant to the first defendant, to guarantee the punctual payment of the said rent jointly and severally with the 1st defendant". It is significant that there is no mention

(1) (1949) B.L.R. (S.C.) 160.

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whatsoever in the plaint as regards the licence under the Electricity Act.

On the whole, it is clear that the suit under consideration was for arrears of rent in respect of an electric generating plant which was leased out to the first respondent. We have pointed out already that the plant in question comes within the definition of "premises" in section 2 (*d*) of the Urban Rent Control Act. That being so we fail to see how the plaint could have been accepted in the lower Court without "a certificate by the Controller certifying the standard rent of the premises" in view of the clear provisions of section 16 of the Urban Rent Control Act. There was in fact no such certificate attached to the plaint filed by the Official Receiver.

Accordingly this appeal fails and is dismissed with costs.

ရာဇဝတ် အယူခံ

တရားလွှတ်တော်ဝန်ကြီးဦးအောင်ခိုင် ရှေ့၌

ဦးဘစိန် ပါ ၂ (ပြင်ဆင်ရန်လျှောက်ထားသူများ)
နှင့်
ပြည်ထောင်စုမြန်မာနိုင်ငံတော် (ပြင်ဆင်ရန်လျှောက်ထားခံရသူ)*

တရားလွှတ်တော် †၁၉၅၆ ဖေဖော်ဝါရီ လ ၇၊

ရာဇသတ်ပုဒ်မ ၂၁၊ လျှပ်စစ်ဓါတ်အားပေးရေးအဲ့ဒဲ အက်ဥပဒေအရ ခန့်ထားသောအရာရှိများမှာ ပြည်သူ့ဝန်ထမ်းအရာရှိများဖြစ် မဖြစ်၊ ပြည်ထောင်စု မြန်မာနိုင်ငံတော်ဖဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေပုဒ်မ ၄၁။

ဆုံးဖြတ်ချက်။ ။လျှပ်စစ်ဓါတ်အားပေးရေးအဲ့ဒဲ့ဝင်အရာရှိ အရာထမ်းတို့သည် ရာဇသတ် ပုဒ်မ ၂၁ ၏ အဓိပ္ပါယ်တွင် အကျုံးဝင်သည့် ပြည်သူ့ဝန်ထမ်းများဖြစ်ကြသည်။

ပြင်ဆင်ရန်လျှောက်ထားသူများအတွက်၊ ဒေါက်တာဦးဒေးမောင်။

ပြင်ဆင်ရန်လျှောက်ထားခံရသူအတွက်၊ ဦးတင်မောင် (အစိုးရရှေ့နေ)။

ဦးအောင်ခိုင်။ ။ဤပြင်ဆင်မှုလျှောက်လွှာ ၂ စောင်နှင့်ပတ်သက်၍၊ စီရင်ချက် တခုတည်းကိုသာ ရေးသားချမှတ်မည်။

ရန်ကုန်မြို့ (အထူးစုံစမ်းစစ်ဆေးရေးဌာနအက်ဥပဒေ) အထူးတရားသူကြီး (၁) ရုံး ၁၉၅၅ ခုနှစ်၊ရာဇဝတ်ကြီးမှုအမှတ် ၂၃ နှင့် ၂၄ တို့တွင်၊ လျှောက်ထား သူများဖြစ်သောဦးဘစိန်နှင့် ဦးထွန်းအုံတို့ အသီးသီးအပေါ်တွင်၊ ၁၉၄၈ ခုနှစ်၊ အဂတိလိုက်စားမှုတားမြစ်ရေး အက်ဥပဒေပုဒ်မ ၄ (၁) (ဂ) (ဃ) / ၄ (၂) အရ တရားစွဲဆိုထားသည်။

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* ၁၉၅၅ ခုနှစ်၊ ရာဇဝတ်ပြင်ဆင်မှုအမှတ် ၁၅၉ (ခ) နှင့် ၁၆၀ (ခ)။

† ရန်ကုန်မြို့ (အထူးစုံစမ်းစစ်ဆေးရေးဌာနအက်ဥပဒေ) အထူးတရားသူကြီး (၁) ရုံးတော်မှ ၁၉၅၅ ခုနှစ်၊ရာဇဝတ်ကြီးမှုအမှတ် ၂၃ နှင့် ၂၄ ကို ဖျက်သိမ်းပေးရန်တင်သွင်းသော လျှောက်လွှာ။

တရားလွှတ်တော်
၁၉၅၆
—
ဦးဘစိန် ပါ ၂ နှင့်
ပြည်ထောင်စု
မြန်မာနိုင်ငံတော်။
—
ဦးအောင်ခိုင်၊

လျှောက်ထားသူဦးဘစိန်မှာ၊ လျှပ်စစ်ဓါတ်အားပေးရေးအဖွဲ့တွင် ဥက္ကဋ္ဌဖြစ်၍၊ လျှောက်ထားသူ ဦးထွန်းဆုံမှာ ၎င်းအဖွဲ့တွင်၊ အင်ဂျင်နီယာချုပ် အဖြစ်ဖြင့်၎င်း၊ အမှုဆောင်အရာရှိချုပ် အဖြစ်ဖြင့်၎င်း အမှုထမ်းရွက်နေကြသူများဖြစ်သည်။ ၎င်းအရာရှိကြီးနှစ်ဦးအပေါ်တွင်၊ ပြည်သူ့ဝန်ထမ်းများ၏ အခွင့်အရေးကို အလွဲသုံးစားပြု၍၊ သူတပါးအတွက်ငွေကြေး အကျိုးအမြတ်များကို မရိုးမဖြောင့်သောနည်းဖြင့်ရရှိစေသည်။ ထို့ပြင်၎င်းတို့အား ယုံမှတ်အပ်နှင်း ထားသည့် ပြည်သူပိုင်ငွေကြေးများကို ဖေါက်လွဲဖေါက်ပြန်ပြုလုပ်သည်ဟုစွပ်စွဲခဲ့သည်။

ဤရုံးတော်တွင် ၎င်းအရာရှိကြီးနှစ်ဦးက၊ ၎င်းတို့သည်ရာဇသတ်ပုဒ်မ ၂၁၈ အမိပွါယ်အတွင်း သက်ရောက်သော ပြည်သူ့ဝန်ထမ်းအရာရှိများဟုတ်။ ထို့ပြင် ၎င်းတို့ဖေါက်လွဲဖေါက်ပြန်ပြုသည်ဆိုသော ပစ္စည်းမှာလည်း၊ ပြည်သူပိုင်ပစ္စည်းများမဟုတ်ဟုဆိုကာ၊ ဤလျှောက်လွှာ ၂ စောင်ကိုတင်သွင်းသည်။

ဤလျှောက်လွှာများတွင် ၎င်းတို့အပေါ်အောက်ရုံး၌ ၁၉၄၀ ခုနှစ်၊ အဂတိလိုက်စားမှုတားမြစ်ရေး အက်ဥပဒေပုဒ်မ ၄(၁)(ဂ)(ဃ)/၄(၂) နှင့် ပုဒ်မ ၄(၁)(ဂ)/၄(၂) အရ တရားစွဲဆိုထားခြင်းသည်၊ ဥပဒေအရများယွင်းချက်ချော်နေသဖြင့်၊ အထက်ဖေါ်ပြပါ အောက်ရုံးကအမှုများကို ပယ်ဖျက်ပေးပါရန် လျှောက်ထားကြသည်။

လျှောက်ထားသူတို့ဘက်မှပြောဆိုသည်မှာ၊ လျှပ်စစ်ဓါတ်အားပေးရေး အဖွဲ့တွင် လုပ်ကိုင်ဆောင်ရွက်နေကြသောအရာရှိများတို့သည်၊ ပြည်သူ့ဝန်ထမ်း အရာရှိများမဟုတ်ကြောင်းကို၊ လျှပ်စစ်ဓါတ်အားပေးရေး အက်ဥပဒေကို သုံးသပ်ကြည့်ပါက၊ အတိအလင်းတွေ့မြင်ရပေမည်ဟုဆိုသည်။ ဥပမာ ပုဒ်မ ၁၅ တွင်၊ ဤအက်ဥပဒေအတည်ဖြစ်သည့်နေ့တွင် လျှပ်စစ်ဓါတ်အားပေးရေးဌာန၌၊ အမှုထမ်းလျက်ရှိကြသောအရာရှိများနှင့် အမှုထမ်းများတို့သည်၊ အဖွဲ့ဆိုင်ရာ အရာထမ်း အမှုထမ်းများအဖြစ်သို့ လွှဲပြောင်းသည်ဟု မှတ်ယူရမည်ဟုဆိုသည်။ သို့ဖြစ်၍ လျှပ်စစ်ဓါတ်အားပေးရေးဌာနမှာ ယခုမရှိတော့သဖြင့်၊ ၎င်းအရာရှိအရာထမ်းတို့သည် အစိုးရအရာရှိများမဟုတ်တော့ဟုဆိုသည်။ နောက်တဖန် ပုဒ်မ ၁၇(ဆ) အရ၊ ပင်စင်လစာရံပုံငွေကို တည်ထောင်ထားရှိရန်အတွက် သတ်မှတ်ထားသော အပိုဒ် ၁ တွင် '' အစိုးရအရာရှိမဟုတ်သော '' ဆိုခဲ့သည့် အရာရှိအားလုံးဟုပါသည်။ သို့ဖြစ်၍လျှောက်ထားသူများသည်၊ အစိုးရအရာရှိမဟုတ်ကြောင်းထင်ရှားသည်ဟုဆိုသည်။ တဖန် ပုဒ်မ ၂၀(၁)၌ အစိုးရ၏ လျှပ်စစ်ဓါတ်အားပေးရေးဌာနမှ အလုပ်များကို အဖွဲ့က လွှဲပြောင်းယူရမည်ဟု

ဆိုပြန်သည်။ သို့ဖြစ်၍ အဖွဲ့နှင့်အစိုးရတို့သည် မည်သို့မျှသက်ဆိုင်ခြင်းမရှိကြောင်း ထင်ရှားသည်။ အဖွဲ့ကငှင်းတို့၏လုပ်ငန်းအတွက်မြေကိုအလိုရှိ၍ လျောက်တောင်းသောအခါ၊ မြေသိမ်းအက်ဥပဒေပြဋ္ဌာန်းချက်များအရ၊ နိုင်ငံတော်သမတကမြေကို သိမ်းယူရန် ဆောင်ရွက်နိုင်သည်ဟုဆိုသည်။ သို့ဖြစ်၍ဤတွင်လည်း၊ အဖွဲ့နှင့် အစိုးရမဆိုင်ကြောင်းမှာ ထင်ရှားသည်ဟုဆိုသည်။ လျှပ်စစ်မဂါတ်အားပေးအဖွဲ့ကိုလည်း၊ ပုဒ်မ ၃၆ အရ ငွေချေးယူနိုင်ခွင့်အာဏာများပေးထားသည်။ မည်သို့ငွေချေးယူရမည်ဆိုသည်ကိုလည်း ပုဒ်မ ၃၇ တွင်သတ်မှတ်ထားသည်။ သို့ဖြစ်၍ လျှပ်စစ်မဂါတ်အားပေးရေးအဖွဲ့ အက်ဥပဒေအရဆိုလျှင်၊ လျောက်ထားသူနှစ်ဦးတို့သည် အစိုးရနှင့်မည်သို့မျှသက်ဆိုင်ခြင်းမရှိတော့သဖြင့်၊ ထိုးတို့သည် ပြည်သူ့ဝန်ထမ်းအရာရှိများမဟုတ်ကြောင်းမှာ ထင်ရှားသည်ဟုဆိုသည်။ ဤရုံးတော် ၁၉၅၂ ခုနှစ်၊ ရာဇဝတ်စောဒကမူအမှတ် ၁၄ တွင်၊ မြန်မာနိုင်ငံတော် လေကြောင်းသယ်ယူပို့ဆောင်ရေးအဖွဲ့မှ ခန့်ထားသောအရာရှိတဦးသည်၊ ရာဇဝတ်ပုဒ်မ ၂၁၏အဓိပ္ပါယ်အရ ပြည်သူ့ဝန်ထမ်းတဦးဖြစ်သည်ဟုဆိုထားသော်လည်း၊ လုပ်ငန်းချုပ်းလည်းမတူ၊ အဖွဲ့ဖွဲ့စည်းပုံခြင်းလည်းမတူဟုဆိုကာ ခွဲခြားရှင်းပြောဆိုသွားသည်။ ဥပမာ မြန်မာနိုင်ငံတော်လေကြောင်းသယ်ယူပို့ဆောင်ရေးအဖွဲ့သည် နိုင်ငံတော်အစိုးရဝန်ကြီးတဦး၏ ညြှာအာဏာကိုခံယူရသဖြင့်၊ ထိုးအဖွဲ့မှာ တိုက်ရိုက်အစိုးရနှင့် ဆက်သွယ်သည်ဖြစ်၍၊ ထိုးအဖွဲ့၌ လုပ်ကိုင်ဆောင်ရွက်ကြသော အရာရှိများသည် ပြည်သူ့ဝန်ထမ်းများဟု ဆိုကောင်းဆိုနိုင်ပေမည်။ သို့ရာတွင် လျှပ်စစ်မဂါတ်အားပေးရေးအဖွဲ့ အက်ဥပဒေအရခန့်ထားသောအရာရှိများမှာ၊ ဤကဲ့သို့အာဏာအထိန်းအချုပ်အချယ်မရှိသဖြင့်၊ ထိုးတို့ကိုပြည်သူ့ဝန်ထမ်းအရာရှိများဖြင့်သည်ဟု မဆိုသာ။ ဒုံးပြင် အက်ဥပဒေ၏နာမည်ကို ခေါ်တွင်စေရာ၌ ''မြန်မာနိုင်ငံတော်လျှပ်စစ်မဂါတ်အားပေးရေးအဖွဲ့အက်ဥပဒေ'' ဟုမဆို။ '' လျှပ်စစ်မဂါတ်အားပေးရေးအဖွဲ့အက်ဥပဒေ '' ဟုသာခေါ်ကြောင်းဖြင့် ပြောဆိုသည်။

သို့ရာတွင်၊ ဤကိစ္စနှင့်ပတ်သက်၍ လျှပ်စစ်မဂါတ်အားပေးရေးအဖွဲ့ အက်ဥပဒေကိုသတ်မှတ်ရာ၌၊ ပုဒ်မတခုစီတခုစီရွေးထုတ်ကာ ကိုယ်ကြိုက်ရာအဓိပ္ပါယ်ကိုယူကာဘတ်ရှုလျှင် ချွတ်ချော်မှားယွင်းနိုင်သည်။ စီးပွါးရေးစီမံကိန်းများနှင့် ပတ်သက်သည့်ရည်ရွယ်ချက်များကို၊ မူတည်ကာစဉ်းစားရမည်။ ပြည်ထောင်စုမြန်မာနိုင်ငံတော် ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေပုဒ်မ ၎၁ အရ၊ နိုင်ငံတော်၏ ဓနအင်အားတိုးတက်စေရန်၊ ပြည်သူလူထု၏ပစ္စည်းဥစ္စာဒေါင်အား ကောင်းသည်ထက် ကောင်းစေရန် ရည်ရွယ်၍၊ ပြည်ထောင်စုမြန်မာနိုင်ငံတော်၏ စီးပွါးရေးဆိုင်ရာ

တရားလွှတ်တော် ၁၉၅၆

ဦးဘစိန် ပါ ၂ နှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်။

ဦးအောင်ခိုင်၊

တရားလွှတ်တော် ၁၉၅၆

ဦးဘစိန် ပါ ၂ နှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်။

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ဦးအောင်ခိုင်၊

စီမံကိန်းများကို ပြုစုပျိုးထောင်ရမည်ဟု ဖေါ်ပြထားသည်။ ဤကဲ့သို့ဖေါ်ပြထားသည့်အတိုင်း၊ ပြည်သူလူထုစီးပွါးရေး၊ ပြည်ထောင်စုမြန်မာနိုင်ငံတော်၏ စီးပွါးရေးဖွံ့ဖြိုးစေရန်၊ စီးပွါးရေးနှင့်သက်ဆိုင်ရာအဖွဲ့အသီးသီးကို ဖွဲ့စည်းကြသည်။ ဤကဲ့သို့အဖွဲ့အသီးသီးဖွဲ့စည်းရာ၌လည်း နိုင်ငံခြားသားပိုင်ပစ္စည်းများကို ပြည်သူပိုင်ပစ္စည်းများဖြစ်စေရန် ကော်မရှင်များဖွဲ့စည်းကာ သိမ်းဆည်းခဲ့သည်။ သိမ်းဆည်းပြီးနောက်မှ ဤအဖွဲ့များကိုဖွဲ့စည်းခဲ့သည်။ ဥပမာ၊ မြန်မာနိုင်ငံတော်ပြည်တွင်းရေကြောင်းသယ်ယူပို့ဆောင်ရေးအဖွဲ့ တည်ထောင်ခဲ့သည်။ မြန်မာနိုင်ငံတော်လေကြောင်းသယ်ယူပို့ဆောင်ရေးအဖွဲ့တည်ထောင်ခဲ့သည်။ ယခင်က အာ(ရ)၊ အီး၊ တီ၊ ကုမ္ပဏီ ကိုသိမ်းဆည်း၍၊ ရန်ကုန်မြို့၊ လျှပ်စစ်ဓါတ်အားပေးရေးအဖွဲ့ကို တည်ထောင်ခဲ့သည်။ သို့ဖြစ်၍၊ လျှပ်စစ်ဓါတ်အားပေးရေးအဖွဲ့ကို ဖွဲ့စည်းပြီးသည့်နောက်၊ အဖွဲ့၏အရာရှိများသည် ပြည်ထောင်စု မြန်မာနိုင်ငံတော်၏ စီးပွါးရေးအတွက် လုပ်ကိုင်ဆောင်ရွက်နေကြသူများဖြစ်သည်ဟု ယူဆရပေမည်။ ဤကဲ့သို့ယူဆလျှင်၊ ၎င်းအဖွဲ့တွင် လုပ်ကိုင်ဆောင်ရွက်နေကြသော အရာထမ်းအမှုထမ်းများတို့သည်၊ ပြည်သူ့ဝန်ထမ်းများဖြစ်ကြောင်းမှာ ထင်ရှားနေသည်။

လျှပ်စစ်ဓါတ်အားပေးရေးအဖွဲ့ဥက္ကဋ္ဌမှာ နိုင်ငံတော်သမတကခန့်ထားသော ဥက္ကဋ္ဌပင်ဖြစ်သည်။ ၎င်းအဖွဲ့တွင် ဘဏ္ဍာရေးဝန်ကြီးဌာနမှ ကိုယ်စားလှယ်တဦးအပြင်၊ နိုင်ငံတော်သမတကခန့်အပ်သည့် ပုဂ္ဂိုလ်ငါးဦးတို့လည်း ဝါဝင်သည်။ ၎င်းအဖွဲ့ဝင်များအား၊ နှုတ်ပယ်ခြင်းပြုလိုလျှင်၊ နိုင်ငံတော်သမတက အမိန့်ကြော်ငြာစာထုတ်ပြန်ကျေညာချိန်နှုတ်ပယ်ရမည်။ ၎င်းအဖွဲ့ကစည်းကမ်းဥပဒေများပြုလုပ်မည်ဆိုပါက၊ နိုင်ငံတော်သမတ၏ ကြိုးကြပ်အုပ်ချုပ်ခြင်းကို လိုက်နာရသည်။ ဤသို့လိုက်နာပြီးမှသာလျှင်၊ စည်းကမ်းဥပဒေများကို ပြုလုပ်နိုင်သည်။ လျှပ်စစ်ဓါတ်အားပေးရေးအဖွဲ့တွင် အက်ဥပဒေပါကိစ္စရပ်များကို ဆောင်ရွက်ရန်အာဏာ၊ လိုအပ်သည့်ငွေကြေးများကိုရရှိရန်၊ အဖွဲ့ကငွေများချေးယူနိုင်သည်။ သို့ဆာတွင် နိုင်ငံတော်သမတ၏ အခွင့်အမိန့်ကို ကြိုတင်ရယူထားရှိပြီးဖြစ်ရမည်။ ဤကဲ့သို့အမိန့်မရရှိပါက၊ ငွေများကိုချေးယူခြင်းငှါမတတ်စွမ်းနိုင်။ အစိုးရထံတွင်လည်း ငွေကြေးများချေးယူနိုင်ခွင့်ရှိသည်။ သို့ဆာတွင်ငွေများအတွက် စည်းကမ်းချက်များသားရှိရမည်။ ၎င်းစည်းကမ်းချက်များမှာလည်း၊ နိုင်ငံတော်သမတက သဘောတူညီသော စည်းကမ်းချက်များဖြစ်ရမည်။ ဤကဲ့သို့ချေးယူသော ငွေများကို ပြန်လည်ပေးဆပ်နိုင်ရန်၊ ရံပုံငွေသီးသန့်ရှိထားရမည်။ ဤသို့သီးသန့်ထားသောရံပုံငွေများကို၊ မြန်မာနိုင်ငံတော်ငွေစာရင်းစစ်ချုပ်က နှစ်စဉ်စစ်ဆေးရသည်။

သို့ဖြစ်၍၊ ဤလျှောက်လွှာတင်အားပေးရေးအမှုအတွက်၊ အရေးအကြီးဆုံးသော အချက် ၃ ချက်မှာ—

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(၁) ၎င်းအမှုကိုအုပ်ချုပ်ရန်ခန့်ထားသော အမှုဝင်လူကြီးများသည်၊ နိုင်ငံတော်သမတ၏ သဘောတူညီချက်အရ ခန့်ထားသော ပုဂ္ဂိုလ်များသာဖြစ်ရသည်။

ဦးဘစိန် ပါ ၂ နှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်။

(၂) အုပ်ချုပ်မှုနှင့်ပတ်သက်သော နည်းဥပဒေ၊စည်းကမ်းဥပဒေများ ပြုလုပ်ရာ၌၊ နိုင်ငံတော်သမတ၏ ကြီးကြပ်အုပ်ချုပ်ခြင်းကို လိုက်နာပြီးမှသာလျှင်၊ ၎င်းဥပဒေများကို ပြဋ္ဌာန်းနိုင်သည်။

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(၃) ငွေရေးကြေးရေးနှင့် ပတ်သက်သောကိစ္စများတွင်၊ နိုင်ငံတော်သမတ၏ ကြီးကြပ်အုပ်ချုပ်ခြင်းကိုခံရသည်။ ၎င်းအမှုကို ထူထောင်ရန် လိုအပ်သည့် ငွေကြေးများကို၊ နိုင်ငံတော်အစိုးရက ထုတ်ချေပေးရသည်။

ယင်းသို့ဖြစ်ရကား၊ နိုင်ငံတော်အစိုးရနှင့်ကင်းလွတ်၍၊အရေးပါအရာရောက်သည့် ကိစ္စရပ်များကို၊ ၎င်းအမှုကမည်သို့မျှမဆောင်ရွက်နိုင်။ ထိုမျှသာမက၊ နိုင်ငံတော်သမတက ဥပဒေအရအမှုဝင်ပုဂ္ဂိုလ်များကိုခန့်အပ်ပြီးနောက်၊ အမှုက ပြီးမြောက်အောင် ဆောင်ရွက်ရန်ရည်ရွယ်ထားသော ကိစ္စရပ်များကိုမဆောင်ရွက်နိုင်ခဲ့လျှင်၊ နိုင်ငံတော်သမတကပင် သုံးလအချိန်ပေး၍၊အမှုသို့အပ်နှင်းထားသော အာဏာများကို ရုပ်သိမ်းမည်ဆိုပါက ရုပ်သိမ်းနိုင်သေးသည်။ ဤကဲ့သို့ရုပ်သိမ်းလိုက်ပါက၊ အမှု၏အာဏာအားလုံး၊ အခွင့်အရေးအားလုံးတို့နှင့် အရပ်ရပ်ပစ္စည်းတို့သည် နိုင်ငံတော်သမတ၌ တည်ရှိရမည်ဟု အတိအလင်းဖော်ပြ၍ ထားသည်။

သို့ဖြစ်၍၊ လျှောက်လွှာတင်အားပေးရေးအမှုကို၊ စီးပွါးရေးလုပ်ငန်း သဘောမျိုးဖြင့် တည်ထောင်ထားသည်မှာ မှန်ကန်သော်လည်း အများပြည်သူလူထုအကျိုးအတွက်၊ နိုင်ငံတော်အစိုးရကတည်ထောင်ထားသော အမှုဖြစ်ကြောင်းမှာ ထင်ရှားသည်။

၅၅ခုနှစ်၊ ဆုဇဝင်အယူခံအမှုအမှတ် ၃၂၂ နှင့် ၁၉၅၂ ခုနှစ်၊ ဆုဇဝင်စောဒကာမှုအမှတ် ၁၄ တို့တွင်၊ ဤလျှောက်လွှာတင်အားပေးရေးအမှုကဲ့သို့ပင် တည်ထောင်ထားသော နိုင်ငံတော်ကောက်ပဲသီးနှံ ရောင်းဝယ်ရေးအမှုနှင့် မြန်မာနိုင်ငံတော် လေကြောင်းသယ်ယူဆောင်ရေးအမှုက

တရားလွှတ်တော်
၁၉၅၆

ဦးဘစိန်ပါ ၂
ပြည်ထောင်စု
မြန်မာနိုင်ငံ
တော်၊

ဦးအောင်ခိုင်၊

အရာရှိအရာထမ်းတို့သည်၊ ရာဇသတ်ပုဒ်မ ၂၁ ၏ အဓိပ္ပါယ်တွင်အကျုံးဝင်သည့် ပြည်သူ့ဝန်ထမ်းများဖြစ်ကြသည်ဟု ဆုံးဖြတ်ချက်များရှိလေသည်။

အဆက်ဖေါ်ပြပါ အကြောင်းချင်းရာများကို၊ ၎င်းအမှုဆုံးဖြတ်ချက်များက ထောက်ခံထားပြီး ဖြစ်သည့်အလျောက်၊ လျှောက်ထားသူများဖြစ်ကြသော ဦးဘစိန်နှင့် ဦးထွန်းအုံတို့၏ လျှောက်ထားတောင်းဆိုချက်များကို၊ လိုက်လျောနိုင်ရန်အကြောင်းမမြင်။ သို့ဖြစ်၍၊ ၎င်းတို့၏လျှောက်လွှာနှစ်စောင်ကို ကျွန်ုပ် ပလပ်လိုက်သည်။

APPELLATE CIVIL.

Before U Chan Tun Aung, Chief Justice and U San Maung, J.

U HTAN HMAT (APPELLANT)

v.

DAW GON (RESPONDENT).*

H.C. 1956

Aug. 9.

Contract of Sale—Time the essence of Contract—Execution of Compromise decree—S. 74, Contract Act, application of equitable principles—Issue depending on credibility of witnesses—Appellate Court and the findings of facts by the trial Court—Stipulation that if Seller could not give possession to the buyer on or before a specified date, the purchase price would be reduced from K 34,000 to K 20,000 whether a penalty.

The Appellant sued the Respondent for specific performance of contract of sale and the suit was compromised on the following amongst other terms :—

(4) That the plaintiff would purchase the suit property for a sum of K 34,000 if the defendant was in a position to give vacant possession on or before the 11th March 1952.

(5) That if the defendant was unable to give vacant possession of the property on or before the 11th March 1952 the price payable by the plaintiff to the defendant should be K 20,000.

On defendant's failure to give possession on 11th March 1952 the appellant applied for the execution of the compromise decree.

The trial Court held—

(1) That time was of the essence of the contract.

(2) That default was due to a third party and not to any act of negligence or lack of good faith on the part of the Respondent.

(3) That the judgment-debtor was entitled to indulgence and equitable principles laid down in s. 74, Contract Act and therefore the appellant would be entitled to a conveyance upon payment of K 34,000 in terms of the first clause of the consent Decree, relying on *Audh Behari Lal and others* v. *Faquir Rai and another*, A.I.R. (1951) All. 236; *Shyam Sundar Padhi and others* v. *Indramoni Das and another*, A.I.R. (1951) Orissa 46.

On appeal by the appellant,

Held : Where there is a conflict of oral evidence, and the issue in the case depends upon the credibility of the witnesses a Court of appeal ought to bear in mind that it does not see or rehear the witnesses and should not interfere with a decision arrived at by the trial Judge unless it comes to the conclusion that the trial Court was plainly wrong.

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* Civil Misc. Appeal No. 78 of 1954, against the decree of the Original Side of this Court in Civil Execution Case No. 19 of 1952, arising out of Civil Regular Suit No. 74 of 1951, dated the 9th November 1954.

H.C. 1956

U HTAN HMAT v. DAW GON.

Chinnaya v. *U Kha*, 14 Ran. 11, approved.

Held also: Under the circumstances of the case, time was of the essence of contract, though in contracts for the sale of land Equity looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really intended no more than that it should take place within a reasonable time.

Jamshed Khodaram Irani v. *Burjorji Dhunjibhai*, 40 Bom. 289 (P.C.), approved.

Held also: In the circumstances of the case, the stipulation that if vacant possession could not be given on or before the 11th March 1952, the price should be reduced from K 34,000 to K 20,000 was a stipulation in the nature of penalty.

Ramalinga Adaviar and others v. *Meenak Shisundaram Pillai and others*, A.I.R. (1925) Mad. 177; *Hiralal Hariram Bhatad* v. *Mt. Durga Bai Murlidhar Marwadi*, A.I.R. (1937) Nag. 413, referred to.

Held further: A compromise decree merely embodies the agreement arrived at between the parties and is therefore no more than any other contract between them.

Shyan Sundar Padhi and others v. *Indramani Das and another*, A.I.R. (1951) Orissa 46, referred to.

Ordered a reduction of K 5,000 from the stipulated price of K 34,000.

Kyaw Din for the appellant.

Ba Thaw for the respondent.

Judgment delivered by

U SAN MAUNG, J.—In Civil Regular Suit No. 74 of 1951 of the Original Side of this Court the plaintiff U Htan Hmat who is the appellant in the present appeal, sued the defendant-respondent Daw Gon for specific performance of a contract of sale of a house and site known as No. 793, Dalhousie Street, Rangoon, for a sum of Rs. 20,000. His case was that at the time the agreement for sale was entered into between him and Daw Gon, the house and site in suit were under an equitable mortgage by deposit of title deeds, with one U Ba Hla for a sum of Rs. 5,400 and that at the request of the defendant he had to give her an advance of Rs. 200 on the 21st September 1950 and also paid to U Ba Hla a sum of

Rs. 5,400 in full settlement of his claim but that when called upon to do so she failed to complete the sale by accepting the balance of Rs. 14,400. The defendant's case was that she had agreed to sell U Htan Hmat the house and site in suit for a sum of Rs. 35,000 but that she was responsible for the eviction of the tenants therefrom, and for the demolition of the house which had already been condemned by the Rangoon Corporation. The suit did not go to trial but was compromised upon the following terms :—

(1) That the plaintiff would purchase the suit property for a sum of Rs. 34,000 if the defendant was in a position to give vacant possession on or before the 11th March 1952, in which event the defendant must execute the necessary deeds and hand over the same to the plaintiff on or before that date.

(2) That the plaintiff should, except for the money advanced by him to the defendant, pay to her the balance money on or before that date.

(3) That the defendant must pay interest on the money advanced to her at the rate of 1½ per cent per mensem till the date of the execution of the sale deed, which was to be not later than the stipulated date and further the defendant must pay the plaintiff the ground rents and house rents which were due and recoverable from the tenants who were residing on the premises in suit from the date of order recording the compromise till the date of the execution of the sale deed.

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(4) That the plaintiff undertook not to obstruct or interfere at all while the defendant was taking steps to eject the tenants from the suit property.

(5) That if the defendant was unable to give vacant possession of the property on or before the 11th March 1952, the price payable by the plaintiff to the defendant should be Rs. 20,000 and the defendant must execute the necessary deed of conveyance, on the plaintiff depositing the balance due after deducting the advance paid by him to the defendant.

The defendant was unable to give vacant possession on the stipulated date, namely, the 11th March 1952, as the Rangoon Corporation did not eject the tenants till two days later. Accordingly, the plaintiff U Htan Hmat applied on the 17th March 1952 for the execution of the compromise decree by directing Daw Gon to execute the necessary deed of conveyance, on U Htan Hmat depositing the sum of Rs. 9,998-5-6 which he claimed was the amount due to Daw Gon after making the deductions stipulated in clause 5 of the compromise terms. To this Daw Gon filed a written objection stating, *inter alia*, that the application for execution was not maintainable because the plaintiff had contrary to his undertaking recorded in the compromise decree, that he would not raise or cause to be raised any objection to the ejectment of tenants from the premises in suit, caused delay in her obtaining vacant possession of the premises which could only be secured on the 13th of March 1952. Daw Gon also filed an application in Civil Regular Suit No. 74 of 1951 asking the Court to direct U Htan Hmat to

deposit a sum of Rs. 34,000 less Rs. 5,400 with interest due thereon. In that application she set out the reason why vacant possession of the premises could not be given on the 11th March 1952 as stipulated in the first portion of the compromise decree. She said that this was entirely due to the tactics adopted by U Htan Hmat in obstructing or interfering with her attempts to obtain vacant possession of the premises in suit. The learned trial Judge, however, without making any enquiry into the question whether or not the failure on the part of the defendant Daw Gon to give vacant possession on the 11th March 1952 was really occasioned by the conduct of U Htan Hmat in obstructing or interfering with her attempts to obtain vacant possession of the premises in suit in contravention of his undertaking, held that time was clearly of the essence of contract between the parties and that there was no justification in the claim made by Daw Gon that the plaintiff should be made to deposit Rs. 34,000 less the money already paid by him on the basis that vacant possession was offered on the date agreed upon in the compromise decree. Daw Gon appealed and the learned trial Judge's order, dated the 23rd June 1952, was set aside on the ground that Daw Gon should have been given an opportunity of establishing her case that failure on her part to obtain vacant possession of the premises in suit was really due to the obstructive tactics taken by U Htan Hmat in contravention of his undertaking in the terms set out in the compromise decree. The trial Judge then held an enquiry and subsequently passed an order, dated the 9th November 1954, which is the subject-matter of the present appeal. After a careful appraisal of the evidence adduced by both the parties the learned trial Judge

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held that the evidence adduced on behalf of the judgment-debtor Daw Gon, both direct and circumstantial, lent no support to the objection raised by her that the decree-holder U Htan Hmat had been responsible for the two days' delay in the eviction of the tenants who occupied the premises in suit. He, however, held that she had been very diligent in taking all steps possible, in the circumstances, to give effect to the terms of the compromise decree for giving vacant possession on the 11th March 1952 and that if she was unsuccessful in this respect it was due not to any act of negligence or lack of good faith on her part but upon the failure of a third party, the Buildings Department of the Corporation of Rangoon, to carry out the eviction of the tenants from the condemned building before the 11th March 1952. Therefore relying on the observations of the learned Judge of the Allahabad High Court in *Audh Behari Lal and others* v. *Faquir Rai and another* (1), the learned trial Judge held that this was a case for treating the judgment-debtor's default with indulgence. The concluding portion of his judgment reads:

"A compromise decree merely embodies the agreement arrived at between the parties and is no more than any other contract between them. It cannot therefore claim the sanctity of a judgment followed by a decree of the Court and an executing Court has therefore power to apply the equitable principle embodied in section 74 of the Contract Act and relieve one of the parties to the contract against any term which operates as a penalty although the contract may have been embodied in a decree of the Court. See *Shyam Sundar Padhi and others* v. *Indramoni Das and another* (2). In the present case payment of quite a large sum of money is made dependent upon the judgment-debtor agreeing to do a certain

(1) A.I.R. (1951) All. 236. (2) A.I.R. (1951) Orissa 46.

act, namely, giving vacant possession of the premises which she had contracted to sell to the decree-holder. Having regard to the time at her disposal and the nature of the action which the parties contemplated that the judgment-debtor should take in order to comply with her undertaking and to the difficulties inherent in the situation in which she was placed, it would clearly seem to be inequitable that the decree-holder should refuse to excuse the delay of two days in the delivery of the property contracted to be sold to him."

He accordingly directed that the decree-holder U Htan Hmat would be entitled to the conveyance of the property in terms of the first clause of the consent decree only, that is to say, for a price of Rs. 34,000 but that he would be entitled to the reliefs set out in clauses 2 and 3.

In this appeal the learned Advocate for the appellant U Htan Hmat has argued that the learned trial Judge having held in his first order, dated the 23rd June 1952, that time was of the essence of the contract and has in the order under appeal come to a finding that U Htan Hmat had not committed any breach of the covenant not to obstruct or interfere while Daw Gon was taking steps to eject the tenants from the premises in suit, was logically bound to execute the compromise decree on the footing that the premises in suit were to be sold for a sum of Rs. 20,000 only. The learned Advocate for the respondent Daw Gon, on the other hand, contended that the learned trial Judge was wrong in coming to a finding that the evidence on record, both direct and circumstantial, did not lend support to the objection raised by Daw Gon that the decree-holder U Htan Hmat was responsible for the two days' delay in the eviction of the tenants from the condemned building, that on a true construction of the compromise decree time was not of the essence

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of the contract, and that in any event, even assuming that time was of the essence of the contract the equitable principles embodied in section 74 of the Contract Act were applicable.

Now, regarding the contention that the learned trial Judge was wrong in the view which he took of the evidence that it lent no support to the objection raised by the judgment-debtor Daw Gon, we have carefully perused the evidence in the case and we are unable to agree that the learned trial Judge's finding on the facts should be reversed. Daw Gon in her evidence has stated that when she went to the Municipal Office to urge the authorities concerned to take early steps for the eviction of her tenants she was told that U Htan Hmat and his friend U Ba Tun, a Municipal Councillor, had been there to raise objection. Her informant was no other than the Buildings Engineer U Khin Maung (*a*) McIntosh himself. She had also been informed by her tenants that U Htan Hmat had told them that they need not vacate since he had purchased the house and had come to some sort of understanding with the Tenants' Association. However, McIntosh (*a*) U Khin Maung (DW 6) cited by her, failed to corroborate her story that U Htan Hmat and U Ba Tun came to raise objection against the eviction of the tenants. Two witnesses Cassey Jayaran and Ah Shaung cited by her in support of her story that U Htan Hmat had been round to the tenants telling them not to vacate, have been disbelieved by the learned trial Judge for reasons which appear to us to be cogent. The learned trial Judge observed that considering that these witnesses had been brought and examined in Court on the last day of the hearing, their vagueness in regard to the date on which the

decree-holder came and spoke to them on this vital matter did not appear to impress their evidence with the stamp of truth.

Daw Gon and U Htan Hmat had been in negotiation regarding the sale of the premises in suit since 1950, and Daw Gon had been given one year's time in which to eject her tenants. The reasons she gave for considering that U Htan Hmat was obstructing her in her attempts to obtain vacant possession of these premises, appear in the penultimate paragraph of her statement. She said that she had once seen U Ba Tun and U Htan Hmat in McIntosh's room some time before the compromise decree was passed and she therefore presumed that subsequent to the decree also U Ba Tun who was very friendly with U Htan Hmat had been helping him to delay the eviction of the tenants till after the 11th March 1952. She may have reasons for her suspicion but this is not tantamount to proof of the fact that U Htan Hmat was either instigating the tenants or otherwise actively opposing her in her attempts to obtain vacant possession of the premises in suit before the crucial date.

Her husband U Ba Thein (DW 2) was himself a pleader. On the 25th January 1952 he wrote the letter Exhibit "o" which was delivered to the Buildings Engineer by George Tha Khin (DW 4) who being a friend of that engineer, had promised to render some assistance in this matter. The Buildings Engineer referred U Ba Thein to the Chairman of the Buildings Committee, U Tun Win (DW 7), and when this was done U Tun Win promised to help. Subsequently a promise was obtained from the Buildings Engineer that steps would be taken for the demolition of the premises in suit after the municipal elections were over. On the 25th February 1952 U

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Ba Thein again wrote the letter Exhibit "ဃ" addressed to the Buildings Engineer wherein he alleged that U Ba Tun was acting on behalf of the decree-holder U Htan Hmat and was opposing the demolition of the building. Two days before this letter the Buildings Engineer had directed that notices be issued again to the tenants for their eviction from the premises. U Ba Thein then met the Buildings Engineer and from him obtained the explanation that the 13th March was the earliest date on which the demolition of this particular building could be carried out by the department in view of the fact that he had other matters of similar nature fixed for the 11th of March 1952. U Ba Thein alleged that whenever he saw the Buildings Engineer he was made to understand that the opposite party, namely, U Htan Hmat, had objected to the eviction of the tenants and that in these circumstances the responsibility for the delay in the ejectment of the tenants lay with U Htan Hmat. His witness George Tha Khin (DW 4) stated that when he and U Ba Thein went to see the Buildings Engineer they saw U Ba Tun, Municipal Councillor, in the Engineer's room. The Buildings Engineer pointed out to U Ba Tun and told them that he was objecting to the demolition of the building on behalf of the opposite party, meaning the purchaser.

However, as already mentioned above, the story sought to be established by Daw Gon and her witnesses, namely, U Ba Thein and George Tha Khin, that Mr. McIntosh had himself told them that U Ba Tun had been objecting to the ejectment of the tenants and the demolition of the building at the instigation of U Htan Hmat, had been strongly negatived by the evidence of McIntosh whom Daw Gon had herself cited as her own witness. In these

circumstances, it cannot be said to have been proved that U Htan Hmat had either instigated the tenants from vacating the premises in suit or had himself actively opposed Daw Gon's application with the help of his friend U Ba Tun.

As held by a Bench of the late High Court in *Chinnaya* v. *U Kha* (1), where there is a conflict of oral evidence, and the issue in the case depends upon the credibility of the witnesses a Court of Appeal ought to bear in mind that it does not see or rehear the witnesses and should not interfere with a decision arrived at by the trial Judge unless it comes to the conclusion that the trial Court was plainly wrong. This observation applies with full force to the finding of facts of a Judge on the Original Side of this Court.

In support of his contention that time was not of the essence of the contract, the learned Advocate for the respondent Daw Gon has cited the case of *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (2). There, a stipulation as to time in the agreement to the effect that the purchase price of a piece of land must be paid on the execution of the deed of sale which was to be prepared and received within two months from the date of that agreement, was held to be not of the essence of the contract. In this connection the Privy Council observed that section 55 of the Contract Act did not lay down any principle which differed from those that obtained as regards contracts for the sale of land by which equity in such a case looks, not at the letter, but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really intended no more than that it

(1) 14 Ran. 11. (2) 40 Bom. 289 (P.C.).

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should take place within a reasonable time. Although we agree that the law has been correctly laid down in the case cited above, we consider that it is idle for the judgment-debtor now to contend that time was not of the essence of the contract between her and the decree-holder. When the matter regarding the execution of the compromise decree came before the trial Judge the parties joined issue only on the question as to who was at fault for the failure on the part of the judgment-debtor Daw Gon to give vacant possession of the premises in suit on the 11th March 1952. Even when the matter came up before a Bench of this Court in Civil Miscellaneous Appeal No. 52 of 1952, it was never contended that time was not of the essence of the contract and this matter was therefore not decided as it would otherwise have been, in the judgment dated the 9th November 1953. Therefore, in the circumstances obtaining in the case now under appeal we must hold that time was of the essence of the contract as embodied in the compromise decree.

The question which now remains for consideration is whether the stipulation to the effect that if the defendant was not in a position to give vacant possession of the property on or before the 11th March 1952 the purchase price would be reduced from Rs. 34,000 to Rs. 20,000, was in the nature of a penalty so as to attract the equitable principles embodied in section 74 of the Contract Act. In this connection, the observation of Srinivasa Aiyangar, J. in *Ramalinga Adaviar and others* v. *Meenak Shisundaram Pillai and others* (1) may be usefully quoted. The learned Judge said:

> " The whole principle of the law of penalty is this as I understand it. The parties who enter into a contract no

(5) A I.R. (1925) Mad. 177.

doubt expect that the contract would be carried out; but they also contemplate the possibility of the contract not being carried out and provided for such a case. If in making provision for breach of contract the promisee stipulates from the promissor on the breach only for such compensation as the Court would deem reasonable in the circumstances, then there is no penalty and the stipulation is not penal. But if, on the other hand, the Court would on a proper consideration come to the conclusion that the stipulation was put in not by way of reasonable compensation to the promisee but in order that by reason of its burdensome or oppressive character it may operate *in terrorum* over the promissor so as to drive him to fulfil the contract, then the stipulation is one by way of penalty."

In *Hiralal Hariram Bhatad* v. *Mt. Durga Bai Murlidhar Marwadi* (1) Niyogyi, J. held that where a contract contains a term which, not being an integral part of the contract, is introduced only for the purpose of securing the performance of the contract, that term is penal and equity interferes to relieve a party to the contract against it and that a penalty is a term which is extraneous and collateral to the actual contract. As to what provisions are penal have also been made clear in Illustrations (*a*), (*d*) and (*e*) to section 74 of the Contract Act. These Illustrations bear out the truth of the observation of Srinivasa Aiyangar, J. in *Ramalinga Adaviar's* case cited above.

Bearing these observations in mind, we are of the opinion that in the circumstances obtaining in this case the stipulation to the effect that if vacant possession could not be given on or before the 11th March 1952 the price of the house and its site should be reduced from Rs. 34,000 to Rs. 20,000, was a stipulation in the nature of penalty. The decree-holder who had entered into an agreement to

(1) A.I.R. (1937) Nag. 413.

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purchase the house as early as 1950 with the judgment-debtor, had waited for a long time before he filed the suit on the 24th of August 1951. The compromise decree was passed on the 24th of January 1952 and the time limit seems to have been placed in order to compel the judgment-debtor to do her utmost to give vacant possession of the house and site. The judgment-debtor also probably thought that since the house had been condemned by the municipal authorities since 1950 she would be able to fulfil her part of the contract by giving delivery of possession on the 11th March 1952 and accordingly agreed to accept a much lower price in default.

That a compromise decree merely embodies the agreement arrived at between the parties and is therefore no more than any other contract between them is clearly laid down in many of the cases cited by a Bench of the Orissa High Court in *Shyam Sundar Padhi and others* v. *Indramani Das and another* (1) wherein the same conclusion was arrived at by the Judges of the Orissa High Court.

The question now for consideration is how much of the penalty stipulated in the contract should be enforced. The penalty of Rs. 14,000 mentioned therein is certainly excessive considering that the house and site in suit would not deteriorate in value with the passage of time. However, considering the fact that the original contract for the sale of the house whereby the decree-holder U Htan Hmat had made an advance of Rs. 5,600 which took place in the year 1950 and because of the default on the part of the judgment-debtor to give possession on the 11th March 1952 as stipulated in the compromise decree litigation between the parties and consequent

(1) A.I.R. (1951) Orissa 46.

delay had resulted, we consider that the decree-holder should get a reduction in the price of the property to the extent of Rs. 5,000 only. Accordingly, we would direct that a sum of Rs. 5,000 be reduced from the stipulated price of Rs. 34,000 mentioned in clause (1) of the compromise decree and that the judgment-debtor do convey to the decree-holder the premises in suit, on the decree-holder paying into Court the money due to be paid by him having regard to clauses 2 and 3 of the compromise decree which reads:

"2. That the plaintiff shall, except for the money advanced by him to the defendant, pay to the defendant the balance money on or before the said date.

3. That the defendant shall pay the interest on the advanced money received by her at the rate of Rs. 1½ per cent per mensem from the date of receipt of the said advance till the date of execution of the deed on or before the said date, and further the defendant shall pay to the plaintiff the ground rents and house rents which are due and recoverable from the tenants who are residing on the said property from the date of this order till the date of execution of the deeds."

However, in the circumstances, the words "on or before the said date" occurring in these clauses should read "on the date of the execution of the sale deed."

The payment by the decree-holder of the necessary amount must be made within one month of the date of this order or within such further time as may be granted by the trial Judge.

Each party must bear its own costs of appeal in this Court.

U CHAN TUN AUNG, C.J.—I agree.

APPELLATE CIVIL.

Before U Chan Tun Aung, Chief Justice and U San Maung, J.

H.C. 1956

Oct. 12.

U KYWE (*alias*) U AUNG MYINT (APPELLANT)

v.

DAW MYA MYA AND ONE (RESPONDENTS).*

Ex-parte *Decree—Setting aside—S. 18, Articles 164, 166 and 181, Limitation Act—Auction Sale by Court, setting aside on ground of fraud—Order 21, Rule 90, Civil Procedure Code and Article 166 and s. 18, Limitation Act—Actual positive fraud must be proved—Certificate of Sale necessity of proof.*

Held: Unless a person aggrieved by an *ex-parte* decree apply within the time presented either under Article 164 or s. 18 of the Limitation Act to set it aside he is bound by it.

Markanda v. *V. K. R. Naidu*, 26 Pat. p. 717; *Patel Baldevdas Karsunda* v. *Mohanlal Bapalal Bahia*, I.L.R. (1948) Bom. p. 145, referred to.

Held also: Unless a person file an application to set aside the sale under Order 21, Rule 90, Civil Procedure Code within the time prescribed by Article 166 and s. 18 of the Limitation Act, the sale is binding upon him.

If fraud is alleged, it must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case.

Janki Kuar v. *Lachmi Narain*, 37 All. p. 535; *Ram Ratin Lal* v. *Bhuris Begam*, 38 All. p. 7; *Kunja Behari Chakrabarti* v. *Krishna Dhan Majumdar*, (1940) 2 Cal. p. 477; *Mohamed Golab* v. *Mohamed Sulliman*, 21 Cal. p. 613; *Mohendro Narain Chaturaj* v. *Gopal Mondul*, 17 Cal. p. 769, referred to.

Held further: A certificate of sale is not conclusive as to the property which had been purchased at the sale as the property offered for sale and bid for was in fact the property ordered to be sold and proclaimed for sale.

Balvant Babaji Dhondge v. *Hirachand Gulachand Gujar*, 27 Bom. p. 334, referred to.

Held also: Mere production of the sale certificate alone would not entitle the plaintiff to decree. It is the duty of the plaintiff to prove (1) the existence of a suit (2) the existence of a mortgage decree and (3) the sale of the mortgaged properties in pursuant thereto.

A sale certificate, if properly proved to be genuine, is a document of title and is the best evidence to prove what was actually sold.

Traders and Miners Ltd. v. *Dhiredra Nath Banerjee*, 23 Pat. p. 155.

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* Civil 1st Appeal No. 5 of 1955, against the decree of the Original Side High Court of Rangoon in Civil Regular No. 30 of 1955.

San Myint for the appellant.

Kyaw Htoon for the respondents.

Judgment delivered by

U SAN MAUNG, J.—In Civil Regular Suit No. 30 of 1955 of the Original Side of this Court the plaintiffs Daw Mya Mya and Daw Hla Hla who are the respondents in the present appeal sued the defendant-appellant U Kywe (*a*) U Aung Myint for a declaration that they were the owners of the house and site in suit. Their case was that in Civil Regular Suit No. 331 of 1937 of the late High Court of Judicature at Rangoon, in which the Receiver of the estate of the deceased Mr. Robertson was the plaintiff and the defendant U Kywe as one of the heirs and legal representative of Daw Kha was one of the defendants, a mortgage decree was passed for the sale of the mortgaged properties namely, the house and site in dispute. Thereafter in Civil Execution Case No. 58 of 1941 the mortgaged properties were sold by the Court in execution of the said mortgage decree and the same were purchased by Daw Hla Nyein, grandmother of the plaintiffs for a sum of Rs. 10,550. The sale was confirmed on the 20th of August 1941 and Daw Hla Nyein was granted a sale certificate. (The original had been filed with the plaint). The proclamation of the sale of the properties was advertised in the *Rangoon Commercial Advertiser* a copy of which was also produced and the sale proceeds of Rs. 10,550 was paid in three instalments *vide* the original receipts also produced with the plaint. On the death of Daw Hla Nyein in February 1954, the properties devolved upon the two plaintiffs as her only surviving heirs

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and since then the plaintiffs had been in actual possession of the same. On the 29th of December 1954 the defendant U Kywe gave a notice to the plaintiffs' father U Ba Tun, claiming that the said suit properties still belonged to the estate of their mother Daw Kha and hence the plaintiff had to file the present suit to dispel the cloud which had been cast upon their title to the suit properties.

The defendant U Aung Myint by his written statement said that he did not admit the existence of a mortgage suit as alleged by the plaintiffs or the mortgage decree arising therefrom and the sale of the suit properties in pursuant to that decree. He alleged that neither he nor the other heirs of Daw Khá namely Ma Ohn Yin, Ma E Nyun, Maung Tin U and Ma Khin Nyein were aware of the mortgage suit or the sale thereunder. He also contended that Daw Kha was so ill for many years prior to her death that she could not possibly have executed the mortgage deed in question, and that since Daw Kha died in December 1935 she could not possibly have figured as the second defendant in the mortgage suit brought in 1937. He alleged that he and the other co-heirs had been purposely kept out of the knowledge of the existence of the mortgage suit in question and the sale relating thereto with a view that the properties might be purchased *benami* in the name of U Ba Tun's mother-in-law Daw Hla Nyein so that U Ba Tun's own children might benefit thereunder.

The plaintiffs in reply to the written statement contended that the defendant was barred from questioning either the validity of the mortgage decree on any ground whatsoever after the lapse of so many years or the validity of the auction sale as well. They also submitted that so long as the auction sale

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was not set aside within the limitation allowed by Article 166 and Article 181 of the Limitation Act the plaintiffs were estopped from questioning the validity of the auction sale. Accordingly two preliminary issues were fixed by consent—

(1) Is the defendant estopped from questioning the validity of the auction sale by reason of Articles 166 and 181 of the Limitation Act ?

(2) Did the auction purchaser Daw Hla Nyein fail to secure a valid title to the property in suit by reason of the facts set out in paragraphs 2 to 8 of the plaint ? (apparently a mistake for written statement).

On the first preliminary issue, the learned Judge on the Original Side held that the defendant U Kha if he wishes to have the execution sale set aside must make an application within the period allowed by Article 166 of the Limitation Act. Also if he could prove that he had, by means of fraud, been kept from the knowledge of his right to make such an application he could claim the benefit of section 18 of the Limitation Act. A mere allegation made by him 14 years after the sale took place, that he was unaware of the institution of the proceedings resulting in the sale was held not to amount to a plea of fraud on the part of the decree-holder. Consequently the defendant was held to be estopped by the provisions of Article 166 of the Limitation Act from questioning the validity of the auction sale. In the result the first preliminary issue was answered in the affirmative and the second in the negative and a decree was passed declaring that the

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plaintiffs were owners of the house and site in suit. Hence this appeal by the defendant U Kywe.

Now, from the allegations contained in the written statement, it would appear to us that, what the defendant sought to contend in the case under appeal was, that he and the other co-heirs of Daw Kha, with the exception of the plaintiffs' father U Ba Tun, were unaware of the institution of the mortgage suit by the Receiver of the estate of Mr. Robertson, deceased because summonses have not been duly served upon them. Secondly they were also kept in the dark regarding the sale of the suit properties in execution of the mortgage decree, thus enabling the mother-in-law of U Ba Tun to purchase the said properties. The question which therefore arises for consideration is can the defendant by way of defence to the present suit for declaration contend that the mortgage decree is not binding upon him, because he had not been duly served with summons. In our opinion, this defence is untenable. Assuming that the mortgage decree was passed *ex-parte* against the defendant, the proper course for him to have adopted was to have applied for the setting aside of the decree on the ground that he had not been duly served with summons. His application must be brought within the period allowed by Article 164 of the Limitation Act although of course if he can prove that he had, by means of fraud, been kept from the knowledge of the existence of such a decree he could also invoke the provisions of section 18 of the Limitation Act against the person guilty of the fraud or accessory thereto, or against any person claiming through that person otherwise than in good faith and for valuable consideration. No such application has yet been filed by the defendant and so he is bound by the mortgage decree even

assuming it to be *ex-parte*. See *Markanda* v. *V. K. R. Naidu* (1) and *Patel Baldevdas Karsandas* v. *Mohanlal Bapalal Bahia* (2). Then again if the defendant wants to say that although the mortgage decree may be binding upon him the sale is vitiated on account of fraud committed by his own brother U Ba Tun, he must file an application for the setting aside of the sale under Order XXI, Rule 90 of the Civil Procedure Code within the period of limitation allowed by Article 166 of the Limitation Act read with section 18 of the Act the period of limitation being 30 days from the date on which the fraudulent sale first became known to the defendant. However, where fraud is alleged it must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the court in ignorance of the real facts of the case. See *Janki Kuar* v. *Lachmi Narain* (3), *Ram Ratin Lal* v. *Bhuri Begam* (4), *Kunja Behari Chakrabarti* v. *Krishna Dhan Majumdar* (5), and *Mohamed Golab* v. *Mohamed Sulliman* (6). However, since the defendant had not yet made an application for the setting aside of the sale it must be held to be binding upon him for the purpose of this case. In this connection the ruling of a Full Bench of the Caclutta High Court in *Mohendro Narain Chaturaj* v. *Gopal Mondul* (7) is apposite. There it was held that when circumstances affecting the validity of a sale in execution had been brought about by the fraud of one of the parties to the suit and give rise to a question between these parties such as, apart from fraud, would be within the provisions of section 244

(1) 26 Pat. p. 717.
(2) I.L.R. (1948) Bom p. 145.
(3) 37 All. p. 535.
(4) 38 All. p. 7.
(5) (1910) 2 Cal. p. 477.
(6) 21 Cal. p. 613
(7) 17 Cal. p. 769.

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U KYWE (*alias*) U AUNG MYINT v. DAW MYA MYA AND ONE.

U SAN MAUNG, J.

of the Civil Procedure Code, 1882 a suit would not lie to impeach the validity of the sale on the ground of such fraud. For these reasons we consider that the defendant has no real defence to the present suit.

However, it does not mean that the plaintiffs are entitled to a decree merely on the pleadings and the production of the sale certificate which has been filed in the proceedings. As the existence of the mortgage suit in which the defendant U Kywe has been made a party defendant along with the other co-heirs of Daw Kha has not been admitted, it is the duty of the plaintiff to prove not only the existence of such a suit but also of the existence of a mortgage decree against the defendant as an heir and legal representative of Daw Kha and the sale of their mortgaged properties in pursuant thereto. In this connection the sale certificate, if proved to be genuine, will be no doubt a valuable piece of evidence. As held in *Traders and Miners Ltd.* v. *Dhiredra Nath Banerjee* (1) a sale certificate if properly proved is a document of title and is the best evidence to prove what was actually sold. However, as pointed out in *Balvant Babaji Dhondge* v. *Hirachand Gulachand Gujar* (2) a certificate of sale is not conclusive as to the property which had been purchased at the sale as the property offered for sale and bid for was in fact the property ordered to be sold and proclaimed for sale. Consequently, what was sold was the interest mentioned in the Court's order and proclamation and if there is a discrepancy between the sale certificate and the Court's order the sale certificate itself may have to be rectified.

For these reasons it is necessary to remand the

(1) 23 Pat. p. 115. (2) 27 Bom. p. 334.

suit under the provisions of Order XLI, Rule 25 for the trial of the following issues :—

(1) Was there such a mortgage suit as alleged in paragraph 1 of the plaint ?

(2) Were the properties in suit sold in execution of the decree in the said mortgage suit to Daw Hla Nyein for a sum of Rs. 10,550 ?

(3) Was the sale duly confirmed by the late High Court of Judicature and was the sale certificate Exhibit A issued to Daw Hla Nyein in respect of the house and site in suit ?

The learned Judge on the Original Side will take such evidence as may be produced by the parties in proof or disproof of the facts mentioned in these issues and return the evidence to this Court together with his findings and reasons.

U CHAN TUN AUNG, C.J.—I agree.

တရားမအယူခံ

တရားလွှတ်တော်ဝန်ကြီး ဦးအောင်ခိုင် ရှေ့တော်၌၊

† တရားလွှတ်တော် ၁၉၅၅ ခုနှစ် ဇူလိုင်လ ၁။

ဦးမြင့် (အယူခံတရားလို)
နှင့်
မအေးမိ (အယူခံတရားခံ)*

မြန်မာဗုဒ္ဓဘာသာဝင် လင်မယားတဦးဦး ကွယ်လွန်သွားပါက ကျန်ရစ်ခဲ့သူယောကျ်ားဖြစ်စေ၊ မယားဖြစ်စေ ၎င်းတို့ပိုင်ဆိုင်ခဲ့သော ပစ္စည်းအားလုံး ပိုင်ဆိုင်ခြင်း၊ ဤကဲ့သို့ အတိုအလင်း စီရင်ထုံးဖွဲ့ပါလျက်နှင့် ကျန်ရစ်ခဲ့သူမယားသည် မရထိုက်ဟု ရုံးတော်က အမှားဆုံးဖြတ်ထားခြင်း။ ထိုဆုံးဖြတ်ချက်ကို အယူခံသော်လည်းကောင်း၊ ပြင်ဆင်မှုသော်လည်းကောင်း၊ စောဒကတက်ခွင့်သော်လည်းကောင်း ပယ်ဖျက်ခြင်းမပြုခဲ့၊ နောက်မယားဖြစ်သူက မိမိထက်ဝက်ရလိုကြောင်း တရားတထုံးထပ်မံစွဲခြင်း၊ တရားမကျင့်ထုံး ကိုဇ္ဇပဒေပုဒ်မ ၁၁၊ ရှင်းလင်းချက်အဝိုဒ် ၄၊ နောက်ထပ်မံစွဲပိုင်ခွင့်မရှိ၊

ဤအမှုအတိုချုပ်မှာ ဦးဘိုးရင်နှင့်ဦးမြင့်တို့မှာညီအစ်ကိုအရင်းဖြစ်ကြသည်။ အစ်ကိုကြီး ဦးဘိုးရင်၏မယားမှာ အယူခံတရားခံ မအေးမိဖြစ်၍၊ ဦးဘိုးရင်အနီစွမောက်ပြီးနောက် အချင်းဖြစ်မြေသည် မအေးမိလက်ရှိဖြစ်နေသည်။

အချင်းဖြစ်မြေသည် မူလက မိမိတို့၏အမေကြီး ဒေါ်သေးပိုင်ဖြစ်၍၊ ၎င်းတို့ညီအစ်ကို နှစ်ယောက် တယောက်တဝက်စီသာ ပိုင်ထိုက်ငြားသော်လည်း ဦးမြင့်က မိတ္တိလာမြို့၊ တရားမဝန်ထောက်ရုံး၊ ၁၉၅၁ ခုနှစ်၊ တရားမကြီးမှုအမှတ် ဂ တွင် မအေးမိနှင့် အခြားတရားခံများပေါ်တွင် ၎င်းမြေများကို ပြန်လည်ရရှိရန်တရားစွဲ၍ ဒီကရီရရှိထား၍ ဒီကရီဇာရီပြုလုပ်၍ အမှုတွင်ပါဝင်သော မြေများတို့မှာ ဦးမြင့်လက်တွင်းသို့ ရောက်သွားကြောင်း။

အဆိုပါအမိန့် ဒီကရီကို တရားခံဖြစ်သူများက အယူမခံကြ။

ထို့နောက် မိတ္တိလာမြို့၊ နယ်ပိုင်တရားမရုံး၊ ၁၉၅၂ ခုနှစ်၊ တရားမကြီးမှုအမှတ် ၃ တွင် မအေးမိက ကွယ်လွန်သူ ဦးဘိုးရင်၏အမွေအတွက် ၎င်းမြေထဲမှ ထက်ဝက်ရလိုပါသည်ဟု တရားစွဲဆိုသည်။

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* ၁၉၅၃ ခုနှစ်၊ တရားမဒုတိယအယူခံမှု အမှတ် ၂။

† ၁၉၅၃ ခုနှစ်၊ တရားမကြီးမှုအမှတ် ၃ တွင် မိတ္တိလာမြို့၊ နယ်ပိုင်တရားမတရားသူကြီးရုံးတော်၏ ချမှတ်သော ဒီကရီကိုအယူခံဝင်မှု၊

ဟရားလွတ်တော် ၁၉၅၅ — ဦးမြင့်နှင့် မအေးမိ၊ — ဦးအောင်ခိုင်၊

စွဲဆိုသည့်အတိုင်း အောက်ရုံးတော်နှစ်ရုံးစလုံးက ၁၉၅၃ ခုနှစ်၊ တရားမကြီးမှု အမှတ် ၈ တွင် မည်ကဲ့သို့ ဆုံးဖြတ်ထားစေကာမူ မအေးမိသည် ကွယ်လွန်သူ ဦးဘိုးရင်၏ မိန်းမဖြစ်သည့်အလျောက် ထက်ဝက်ရစေဟု ဒီကရီချမှတ်ပေးခဲ့သည်၊

ဤအမိန့်ဒီကရီကို ဦးမြင့်က တရားလွှတ်တော်သို့ အယူခံရာ လွှတ်တော်၏ ဆုံးဖြတ်ချက်၊ ။။ဗုဒ္ဓဘာသာဝင်လင်မယား တဦးဦးကွယ်လွန်သွားပါက ကျန်ရစ်ခဲ့သူ ယောကျ်ားဖြစ်စေ၊ မယားဖြစ်စေ ၎င်းတို့ပိုင်ဆိုင်ခဲ့သော ပစ္စည်းများအားလုံးပိုင်ဆိုင်သည်၊

မောင်ဝိတ်နှင့် ၇ ဦးနှင့် မောင်ညိမ်း။ ယူ၊ဘီ၊အာ(ရ)၊ ၁၈၉၇၊ ၁၉၀၁၊ စာမျက်နှာ ၁၄၆။

ဤစီရင်ထုံးကို အောက်ရုံးနှစ်ရုံးစလုံးက သိရှိပါလျက်နှင့် ၁၉၅၁ ခုနှစ်၊ တရားမကြီးမှု အမှတ် ၈ တွင် မအေးမိလက်ဝယ်ရှိ အချင်းဖြစ်မြေအားလုံးကို ထိုစဉ်အခါက ဦးမြင့်မှာ ထက်ဝက်သာရထိုက်သည်မှာ ထင်ရှားပါလျက်နှင့် မြေအားလုံးကို ဦးမြင့်လက်သို့ အပ်ပေးစေဟု ချမှတ်လိုက်သောအမိန့်သည် ထင်ထင်ရှားရှားကြီးမှားခဲ့သည်။

တရုံးတရုံးမှ ချမှတ်ထားသော ဒီကရီကိုအယူခံသော်၎င်း၊ ပြင်ဆင်မှုဖွင့်ရှုသော်၎င်း၊ စောဒကတက်ခွင့်သော်၎င်း တနည်းနည်းနှင့်ဥပဒေအတိုင်း ပယ်ဖျက်ခြင်းမပြုခဲ့လျှင် ၎င်းဒီကရီသည် အမှုထဲတွင်ပါသော တရားလိုတရားခံများအပေါ်တွင် တည်ရှိလျက်ပင်ရှိသည်၊

သို့ဖြစ်၍ ၁၉၅၁ ခုနှစ်၊ တရားမကြီးမှုအမှတ် ၈ တွင် ချထားသော ဒီကရီသည် မှားပင်မှားငြားသော်လည်း ဤဆုံးဖြတ်ထားသည့် စီရင်ချက်ကို ပယ်ဖျက်ရန် အယူခံမဝင်ခဲ့ခြင်းကြောင့် ၎င်းအမှုတွင်ချထားသော ဒီကရီသည် တည်ဆဲပင်ဖြစ်သည်။ တရားမကျင့်ထုံးကိုဝဥပဒေပုဒ်မ ၁၁ အရ၊ မအေးမိမှာ ဦးမြင့်ထံမှ အမွေထက်ဝက်ရလိုမှု ထပ်မံတရားတထုံး အသစ်စွဲဆိုပိုင်ခွင့်မရှိ။

မလ်ကာဂျန်ဘင်ရှိဒရာမပါပါဆရီနှင့် နာရ်ဟရီဘင်ရှိမက်ဝပ်ုနှင့်တဦး၊ အိုင်၊အေ၊ ၂၇၊ စာမျက်နှာ ၂၁၆။ အက်(စ်)၊အေ၊နသန်နှင့် အက်(စ်)၊အာ(ရ)၊ ဆမ်ဆင်၊ ၉၊ ရန်ကုန်၊ စာမျက်နှာ ၄၈၀ တို့ကို လိုက်နာသည်။ မဓွါးရှင် နှင့် ဘိုးဆင် ပါ ၂၊ အေ၊အိုင်၊အာ(ရ)၊ ၁၉၃၇ ခု၊ ရန်ကုန်၊ စာမျက်နှာ ၃၂၄ ခွဲခြားသည်။

အယူခံ တရားလိုအတွက်၊ ဦးဘရွှန်း။

အယူခံ တရားခံအတွက်၊ ဦးကျော်ထွန်း။

ဦးအောင်ခိုင်။ ။ဤအမှုပေါ်ပေါက်လာရခြင်း နောက်ကြောင်းရာဇဝင်မှာ အောက်ပါအတိုင်းဖြစ်သည်။

အမှုတွင်ပါသောမြေများမှာ မူလဒေါ်သေးဆိုသူပိုင်သည်။ ဒေါ်သေးတွင် သားသမီး ၃ ယောက်ရှိသည်။ ၎င်းတို့မှာ ဘုန်းကြီး ဦးကဝိန္ဒ၊ ဦးသိုက်နှင့် မငါး တို့ဖြစ်ကြသည်။ ဒေါ်သေး ကွယ်လွန်အနိစ္စရောက်ပြီးနောက် ဘုန်းကြီး ဦးကဝိန္ဒ

တရားလွှတ်တော်
၁၉၅၅
—
ဦးမြင့်နှင့်
မအေးမိ၊
—
ဦးအောင်ခိုင်၊

မှာ ဘုန်းကြီးဖြစ်၍ အမွေများမဆက်ခံ၊ ဦးသိုက်မှာ သမီးတယောက် မသိန်းရင်ဟု ထွန်းကားခဲ့သည်။ ၎င်းမသိန်းရင်ဆိုသူမှာလည်း ယခုမရှိတော့ပြီ၊ ဦးသိုက်၏ အဆက်အနွယ်များ ဤမြေမှုနှင့်ပြောဆိုသူမရှိ။ မင်းမှာ သားသမီး ၃ ယောက်ရှိခဲ့သည်။ ၎င်းတို့မှာ ဦးဘိုးရင်၊ ဦးမြင့်နှင့်မအေးမြတို့ဖြစ်ကြသည်။

ဒေါ်သေးပိုင်မြေများသည်၊ နောက်ဆုံးပိတ်၌ ဦးကဝိန္ဒလင်္ကာထံ၌ ကျန်ခဲ့သည်။ ဦးကဝိန္ဒကွယ်လွန်ပြီးနောက်၊ ဤမြေနှင့်ပတ်သက်၍ ပိုင်ဆိုင်သူများမှာ၊ ဦးဘိုးရင်၊ ဦးမြင့်နှင့်မအေးမြတို့ဖြစ်ကြသည်။ ဦးဘိုးရင်၏ပဌမ မိန်းမ မမယ်ဖြစ်သည်။ မမယ်အနိစ္စရောက်ပြီးနောက်၊ မအေးမိနှင့် အကြောင်းပါသည်။ မအေးမြတွင် သားသမီးနှစ်ဦးထွန်းကားသည်။ ၎င်းတို့မှာ မောင်ဘိုးလှနှင့်မဖြူတို့ဖြစ်ကြသည်။ မောင်ဘိုးလှသည် ဘုန်းကြီးဖြစ်သွားပြီး၊ လွန်ခဲ့သော ၂၀ နှစ်လောက်က၊ ရဟန်းဝတ်နှင့်ပင်ပျံလွန်တော်မူသည်။ မဖြူမှာ ကိုဘိုးလုံး ဆိုသူနှင့် အကြောင်းပါသည်။ ၎င်းတို့တွင် သမီး မတင်လေးဆိုသူတဦး ထွန်းကားသည်။ မဖြူနှင့်မတင်လေးမှာ ယခုမရှိတော့ပြီ။ ဦးကဝိန္ဒ ပျံလွန်တော်မူပြီးနောက်၊ ၎င်း၏ ဒါယကာ ဒါယိကာမများပြောဆိုချက်အရ၊ ဦးဘိုးရင်က ၎င်း ၇၀၀ ဘုန်းကြီးပျံအတွက် ထည့်ခဲ့သည်။ ၎င်းငွေ ၇၀၀ အနက်၊ ဦးမြင့်တဝက်ခံရန် ကတိရှိသည်ဟုနားလည်မှုရှိထားကြသည်။ ဤအမှုတွင်ပါသော မြေအားလုံးတို့မှာ ဦးကဝိန္ဒပျံလွန်ပြီးနောက်၊ ဦးဘိုးရင်၏လက်ဝယ်ရောက်သွားခဲ့သည်။ ဦးဘိုးရင်ကွယ်လွန်သွားပြီးသည့်နောက်၊ ၎င်း၏ဒုတိယမယား မအေးမိလက်တွင်းသို့ အဆိုပါမြေများ ကျရောက်သွားသည်။

ဦးမြင့်က မိတ္ထိလာမြို့၊ တရားမဝန်ထောက်ရုံး၊ ၁၉၅၁ ခုနှစ်၊ တရားမကြီးမှုအမှတ် ၈ တွင်၊ မအေးမိ၊ မောင်ဘိုးလုံးနှင့်အခြား ၉ ဦးတို့အား၊ ၎င်းမြေများကို ပြန်လည်ရရှိရန် တရားစွဲဆိုခဲ့သည်။ ၎င်းက တရားစွဲဆိုခဲ့သည့်အတိုင်း၊ မိတ္ထိလာမြို့၊ တရားမဝန်ထောက်ရုံးက မြေများကို ဦးမြင့်၏လက်သို့အပ်စေဟု အမိန့်ဒီကရီချမှတ်ပေးခဲ့သည်။ ဒီကရီကိုဇာရိပြုလုပ်၍အမှုတွင်ပါဝင်သော မြေများတို့မှာ ဦးမြင့်၏လက်တွင်းသို့ ရောက်လာသည်။ အဆိုပါအမိန့်ဒီကရီကို တရားခံလုပ်သူများက အယူမခံကြ။ ဦးမြင့်၏လက်တွင်းသို့ မြေများရောက်ရှိပြီးနောက်မှ မိတ္ထိလာမြို့၊ နယ်ပိုင်တရားမရုံး၊ ၁၉၅၂ ခုနှစ်၊ တရားမကြီးမှုအမှတ် ၃ တွင်၊ မအေးမိက ကွယ်လွန်သူ ဦးဘိုးရင်၏အမွေအတွက်၊ ၎င်းမြေထဲမှ ထက်ဝက်ရလိုပါသည်ဟု တရားစွဲဆိုသည်။ တရားစွဲဆိုချက်၌ အယူခံတရားလိုက ၁၉၅၁ ခုနှစ်၊ တရားမကြီးမှုအမှတ် ၈ တွင်၊ အမွေကိစ္စနှင့်ပတ်သက်ပြီး အပြီးအပိုင်ဆုံးဖြတ်ပြီးဖြစ်၍ ယခုမှတဖန်ပြန်ပြီး ဤအမှုမျိုးကို မစွဲထိုက်သင့်ပါဟုချေပသည်။

ဤပြဿနာနှင့်ပတ်သက်ပြီး၊ အောက်ရုံးတော်နှစ်ရုံးစလုံးက ၁၉၅၁ ခုနှစ်၊ တရားမကြီးမှုအမှတ် ၈ တွင် မည်ကဲ့သို့ ဆုံးဖြတ်ထားစေကာမူ မအေးမိမှာ တရားစွဲဆိုပိုင်ခွင့်ရှိသေးသည်ဟုဆိုသည်။ မအေးမိသည် ကွယ်လွန်သူ ဦးတိုးရင်၏မိန်းမဖြစ်သည့်အလျောက်၊ အခင်းဖြစ်မြေများအနက် ထက်ဝက်ကိုရထိုက်ပါသည်ဟုဆိုကာ ဒီကရီချမှတ်ပေးခဲ့သည်။

တရားလွှတ်တော် ၁၉၅၅ ဦးမြင့်နှင့် မအေးမိ။ ဦးအောင်ခိုင်၊

ဤရုံးတွင် အယူခံတရားလိုဦးမြင့်၏ လွှတ်တော်ရှေ့နေကြီးက လျှောက်လဲသည်မှာ၊ ၁၉၅၁ ခုနှစ်၊ တရားမကြီးမှုအမှတ် ၈ တွင် ဒီကရီချပြီးသည့်နောက်၊ ၎င်းဒီကရီကို ပယ်ဖျက်ရန်အယူမခံခဲ့သဖြင့် ၎င်းဒီကရီသည် မှားသည်ဖြစ်စေ၊ မှန်သည်ဖြစ်စေ မပယ်ဖျက်သမျှကာလပတ်လုံး အတည်ဖြစ်နေရမည်ဟုဆိုသည်။ ပရိမီကောင်စီမှ၊ မင်းကာကျန်ဘင်ရှိဒရာမပါပါဆရီနှင့် နာရံဟရီဘင်ရှိဗက်ဝါနှင့်တဦး (၁) တို့၏ဖြတ်ထုံးနှင့် ရန်ကုန်မြို့၊ တရားလွှတ်တော်မှ၊ အက် (စ)၊ အေ၊ နသန်နှင့် အက် (စ)၊ အာ (ရ)၊ ဆမ်ဆင် (၂) တို့၏ ဖြတ်ထုံးတို့ကိုတင်ပြသည်။ ၎င်းစီရင်ထုံးများက ရုံးတရုံးမှချမှတ်ထားသော ဒီကရီကိုအယူခံရှိသော်၎င်း၊ ပြင်ဆင်မှုဖွင့်ရှိသော်၎င်း၊ စောဒကတက်ရှိသော်၎င်း တနည်းနည်းနှင့် ဥပဒေအတိုင်းပယ်ဖျက်ခြင်းမပြုခဲ့လျှင်၊ ၎င်းဒီကရီသည် အမှုထဲတွင်ပါသော တရားလို၊ တရားခံများအပေါ်တွင် တည်ရှိလျက်ပင်ရှိသည်ဟုဆိုသည်။ သို့ဖြစ်၍ ၁၉၅၁ ခုနှစ်၊ တရားမကြီးမှုအမှတ် ၈ တွင်ချမှတ်သော ဒီကရီသည် အမှုတွင်ပါဝင်သောသူများအတွက် အတည်ရှိလျက်ပင်နေသည်ဟု ယူဆရပေမည်။ ၎င်းအမှုတွင် အယူခံတရားခံမအေးမိ၏ထုချေလွှာ တတိယအပိုဒ်၌ဖေါ်ပြထားသည်မှာ၊ (၁ တရားခံ) မအေးမိက အခင်းဖြစ်မြေကို ဆက်ခံပိုင်ဆိုင်ခွင့်ရှိ၍ မြေကိုလက်ရှိဆက်ခံထိုက်သည်ဟုဆိုထား၍ အမှုတွင် မအေးမိသည် အခင်းဖြစ်မြေကို အမွေခံထိုက်သလောဟု ကောက်ချက်တခုထုတ်ထားသည်။ ၎င်းကောက်ချက်နှင့်ပတ်သက်၍ မအေးမိမှာ ၎င်း၏ယောကျ်ား ဦးတိုးရင်အတွက် မြေစုကိုမခံစားထိုက်သေး၊ မြေများကိုလည်း လက်ရှိယူငင်ထားပိုင်ခွင့်မရှိဟု ဆုံးဖြတ်ချက်ရှိသည်။ ဤကဲ့သို့ ဆုံးဖြတ်ထားခြင်းသည် ကျွန်ုပ်သဘောအရ မှားသည်ဟုဆိုရပေမည်။ မှားပင်မှားငြားသော်လည်း၊ ဤဆုံးဖြတ်ထားသည့် စီရင်ချက်ကိုပယ်ဖျက်ရန် အယူခံမဝင်ခဲ့ခြင်းကြောင့် ၎င်းအမှုတွင်ချထားသော ဒီကရီသည် တည်ဆဲပင်ဖြစ်သည်။

ယခုမှတဖန် မအေးမိက လာရောက်ပြီး၊ ၎င်းယောကျ်ား ဦးတိုးရင်၏အမွေစားဖြစ်သည့်အတွက် အခင်းဖြစ်မြေများမှ တဝက်ပိုင်ဆိုင်ခွင့်ရှိပါသည်ဟု

(၁) အိုင်၊အေ၊ ၂၇၊ စာမျက်နှာ ၂၁၆။ (၂) ၉၊ ရန်ကုန်၊ စာမျက်နှာ ၄၀၀။

ဟရားလွတ်
တော်
၁၉၅၅
ဦးမြင့်
နှင့်
မအေးမိ၊
ဦးအောင်ခိုင်၊

တရားစွဲဆိုခဲ့သည်။ ဤဒုတိယအမှုဌ် တရားသူကြီး၏ စီရင်ချက်တွင်၊ မောင်ဝိတ် နှင့် ၇ ဦးနှင့်မောင်ညိမ်း (၁) တို့၏စီရင်ထုံးကို ကိုးကားဖော်ပြထားသည်။ ၎င်း ဖြတ်ထုံးတွင် ဖော်ပြထားသည်မှာ ဗုဒ္ဓဘာသာဝင် လင်မယား တဦးဦးကွယ်လွန် သွားပါက ကလေးများမရှိခဲ့လျှင်၊ ကျန်ရစ်ခဲ့သူယောကျ်ားဖြစ်စေ၊ ယောကျ်ားဖြစ်စေ ၎င်းတို့ပိုင်ဆိုင်ခဲ့သော ပစ္စည်းများအားလုံး ပိုင်ဆိုင်သည်ဟုဆိုသည်။ ဤဆုံးဖြတ်ချက်ထဲတွင် အမွေမခွဲရသေးသော ပစ္စည်းများကို ရယူနေ့အခွင့်အရေးကိုပါ ပိုင်ဆိုင်သည်ဟုဆိုသည်။ ဤစီရင်ထုံးကို သိရှိပါလျက်နှင့် ၁၉၅၁ ခုနှစ်၊ တရားမကြီးမှုအမှတ် ၈ တွင် မအေးမိလက်ဝယ်ရှိ အခင်းဖြစ်မြေအားလုံးကို ဦးမြင့်လက်သို့ အပ်ပေးစေဟု ချမှတ်လိုက်သောအမိန့်သည် လွန်စွာအံ့ဩစရာပင်။ ထိုစဉ်အခါက ဦးမြင့်မှာ အခင်းဖြစ်မြေများ၏ ထက်ဝက်သာရထိုက်သည်မှာ ထင်ရှားပါလျက်နှင့် အခင်းဖြစ်မြေအားလုံးကို ၎င်းတို့အားအပ်ပေးစေဟု ရုံးတော်က ချမှတ်ခြင်းသည် ထင်ထင်ရှားရှားကြီးမှားခဲ့သည်။ တရားမကျင့်ထုံးဥပဒေပုဒ်မ ၁၁၊ ရှင်းလင်းချက်အပိုဒ် ၄ အရ၊ ယခုမအေးမိရွဲ့ဆိုထားသော အမှုတွင် ၎င်းအားထားသော အချက်အလက်တို့သည် ၁၉၅၁ ခုနှစ်၊ တရားမကြီးမှုအမှတ် ၈ တွင် ထုတ်ဖော်ပြခဲ့သော (သို့မဟုတ်) ခုခံခဲ့သော (သို့မဟုတ်) ခုခံနိုင်သောအကြောင်းများပင်ဖြစ်သည်။ အကြောင်းများကိုပြခဲ့ပြီး ခုခံလာသည်ဆိုခြင်းမှာလည်း၊ အမှန်ပင်ဖြစ်သည့် ကောက်ချက်တခုလည်းထုတ်ခဲ့သည်။ သို့ဖြစ်၍ဤကိစ္စနှင့်ပတ်သက်၍ အဆိုပါအမှုတွင် အပြီးအပြတ်ဆုံးဖြတ်ခဲ့ပြီးပြီဟုယူဆရပေမည်။ သို့ဖြစ်၍ တရားမကျင့်ထုံးကို ဥပဒေပုဒ်မ ၁၁ အရ၊ မအေးမိက ၁၉၅၂ ခုနှစ်၊ တရားမမှုအမှတ် ၃ တွင် တရားတထုံးထပ်မံအသစ်မဆွဲဆိုနိုင်။

မအေးမိမှာ ကောင်းသော ဥပဒေအကြံဉာဏ်ပေးမည့်သူ မရှိ၍သာလျှင်၊ ၁၉၅၁ ခုနှစ်၊ တရားမကြီးမှုအမှတ် ၈ တွင် ချမှတ်ပေးထားသော အမိန့်ကိုအယူမခံဘဲ၊ ၁၉၅၂ ခုနှစ်၊ တရားမမှုအမှတ် ၃ ကို တရားစွဲဆိုဟန်တူသည်။ အကြံဉာဏ်ကောင်းပေးမည့်သူမရှိသဖြင့် မိမိရခွင့်ရထိုက်သော မြေများကို ဆုံးရှုံးရတော့မည်။ ၎င်းသည် အလွန်တရာမှပင် သနားစရာကောင်းသော အခြေအနေသို့ ဆိုက်ရောက်နေချေပြီ။ ဤအယူခံမှုကို ယခုဖော်ပြသော အကြောင်းအချက်များကြောင့် အယူခံတရားလို ဦးမြင့်အား အနိုင်ပေးရှု အယူခံတရားခံ မအေးမိအား အရှုံးပေးရပေမည်။

ဤအမှုတွင် အယူခံတရားလို ဦးမြင့်၏ ရှေ့နေကြီးက ထပ်မံပြောဆိုသေးသည်မှာ၊ မအေးမိ၏ တရားစွဲပုံစွဲနည်းမှာမမှန်၊ ဤအမှုမျိုးဌ် အမွေအတွက်

(၁) ယူ၊ဘီ၊အာ(ရ်)၊ ၁၈၉၇၊၁၉၀၁၊ စာမျက်နှာ ၁၄၆။

ပစ္စည်းများကို ခွဲခြားပေးပါဟူ၍ အမွေဆက်ခံလိုသူက တရားမစွဲနိုင်၊ ရုံးတော်တွင် မည်သည့်အမွေဆိုင်ပစ္စည်းများရှိသည်ဟု ပစ္စည်းအားလုံးကို ထုတ်ဖော်ပြောဆိုပြီး၊ ရုံးတော်က စီရင်ထုခွဲပေးရမည့်အကြောင်းလျှောက်ထား၍ တရားစွဲဆိုသင့်ပါသည်ဟုဆိုသည်။ ဤကိစ္စနှင့်ပတ်သက်၍၊ မဖွါးရှင်နှင့် ဘိုးဆင် ပါ ၂ (၁) တို့၏ဖြတ်ထုံးကိုတင်ပြသည်။ ဤဖြတ်ထုံးတွင်ပါရှိသော အကြောင်းအရာများနှင့် ယခုအမှုတွင်ပါသောအကြောင်းအရာများမှာမတူ။ ဖြတ်ထုံးတွင် ပါသောအမှုဌ အမွေဆိုင်ပစ္စည်းအားလုံးတို့ကို ထုတ်ဖော်ခဲ့မပြဘဲ၊ ပစ္စည်းတချို့တဝက်အတွက်သာ တရားစွဲဆိုဟန်တူသည်။ ဤအမှုတွင်ကား ဦးဘိုးရင်နှင့်ဦးမြင့်တို့၏အမွေဆိုင်သည့် ပစ္စည်းအားလုံးသည် ရုံးတော်သို့တင်ပြ ဖော်ပြထားပြီးဖြစ်သည်။ သို့ပါသော်လည်း ဤအကြောင်းအချက်များနှင့်ပတ်သက်၍ ယခုဆုံးဖြတ်ချက်ပေးရန် မလိုတော့ပေ။

တရားလွှတ်တော် ၁၉၅၅ — ဦးမြင့်နှင့် မအေးမိ၊ — ဦးအောင်ခိုင်။

အထက်တွင်ဖော်ပြထားသည့်အတိုင်း၊ တရားမကျင့်ထုံး ကိုဓဥပဒေ ပုဒ်မ ၁၁ အရ၊ မအေးမိမှာ ဦးမြင့်ထံမှ အမွေဆက်ဝက်ရလိုမှု ထပ်မံ တရားဘထုံးအသစ်စွဲဆိုပိုင်ခွင့်မရှိ။ သို့ဖြစ်၍ အောက်ရုံးနှစ်ရုံးစလုံး၏ အမိန့်များကိုပယ်ဖျက်လိုက်ပြီး၊မအေးမိ၏အမှုကို ပလပ်လိုက်သည်။ မအေးမိမှာအထက်ကဖော်ပြထားသည့်အတိုင်း၊ မိမိရွှေ့ရာထိုက်ရှိသော ပစ္စည်းများကို ၎င်းအားအကြိဉာဏ်ပေးသူညံ့ဖျင်း၍ ၎င်းရထိုက်သည့်ပစ္စည်းများ ဆုံးရှုံးရခြင်းဖြစ်သည်။ ဤအကြောင်းကြောင့် အယူခံတရားလို ဦးမြင့်၏ တရားစရိတ်ကို ထပ်မံ၍ပေးရမည်ဆိုပါကသင့်ဟော်မည်မဟုတ်။ တရားရုံးသုံးရုံးစလုံးတွင်း အမှုသည်များတို့သည် မိမိတို့၏စရိတ်ကို မိမိတို့သာလျှင် ကျခံစေရန်အမိန့်ချမှတ်လိုက်သည်။

(၁) အေးဇင်၊အာ(ရ)၊ ၁၉၃၇၊ ရန်ကုန်၊ စာမျက်နှာ ၃၂၄။

ရာဇဝတ်အပူခံ

တရားလွှတ်တော်ဝန်ကြီး ဦးအောင်ခိုင်ရှေ့၌

† ၁၉၅၆
ဇေဖေါဝါရီလ
၇၊

ဦးပု (ပြင်ဆင်ရန်လျှောက်ထားသူ)
နှင့်
ပြည်ထောင်စုမြန်မာနိုင်ငံတော် (ပြင်ဆင်ရန်လျှောက်ထားခံရသူ)*

အဂတိလိုက်စားမှုတားမြစ်ရေး အက်ဥပဒေပုဒ်မ ၄ (၁) (ဃ) / ၄ (၂) အရ စွဲချက်။ ။ ရာဇသတ်ပုဒ်မ ၂၁ နိုင်ငံတော်ကောက်ပဲသီးနှံရောင်းဝယ်ရေးအဖွဲ့၏ အရာထမ်း အမှုထမ်းများတို့သည် ပြည်သူ့ဝန်ထမ်းများ ဖြစ်မဖြစ်။

ဆုံးဖြတ်ချက်။ ။နိုင်ငံတော် ကောက်ပဲသီးနှံရောင်းဝယ်ရေးအဖွဲ့မှ ခန့်ထားသောပုဂ္ဂိုလ် တဦးဟယောက်သည် ရာဇသတ်ပုဒ်မ ၂၁ ၏အဓိပ္ပါယ်အရ ပြည်သူ့ဝန်ထမ်းတဦးဖြစ်သည်၊

ပြင်ဆင်လျှောက်ထားသူအတွက်—ဒေါက်တာဦးစေအးမောင်နှင့် ဦးဒေး။

ပြင်ဆင်ရန်လျှောက်ထားခံရသူအတွက်—ဦးတင်မောင် (အစိုးရရှေ့နေ)။

ဦးအောင်ခိုင်။ ။ရန်ကုန်မြို့ (အထူး စုံစမ်းစစ်ဆေးရေးဌာန အက်ဥပဒေ) အထူးတရားသူကြီး (၂) ရုံး၊ ၁၉၅၅ ခုနှစ်၊ ရာဇဝတ်ကြီးမှု အမှတ် ၁၇ တွင်၊ နိုင်ငံတော်ကောက်ပဲသီးနှံရောင်းဝယ်ရေးအဖွဲ့မှ အမှုဆောင်အရာရှိ ဦးပုအား၊ အဂတိလိုက်စားမှုတားမြစ်ရေးအက်ဥပဒေပုဒ်မ ၄ (၁) (ဃ) / ၄ (၂) အရ တရားစွဲဆိုခဲ့သည်။

အမှုအကျဉ်းချုပ်မှာ၊ ဦးပုသည်၊ နိုင်ငံတော်ကောက်ပဲသီးနှံ ရောင်းဝယ်ရေးအဖွဲ့တွင်၊ အမှုဆောင်အရာရှိတဦးအနေဖြင့် ဆောင်ရွက်နေခိုက်၊ ပြည်သူလူထုအကျိုးကိုထိခိုက်အောင် ယုံမှတ်အပ်နှင်းခြင်းခံရသည့် ပြည်သူပိုင်ပစ္စည်းကို အလွဲသုံးစား၊ သို့မဟုတ် ဇေါက်လွဲဇေါက်ပြန် ပြုလုပ်သည်ဟု တရားလိုဘက်မှစွပ်စွဲထားသည်။

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* ၁၉၅၅ ခုနှစ်၊ ရာဇဝတ်ပြင်ဆင်မှုအမှတ် ၁၅၈ (ခ)။

† ရန်ကုန်မြို့ (အထူးစုံစမ်းစစ်ဆေးရေးဌာန အက်ဥပဒေ) အထူးတရားသူကြီး (၂) ရုံးတော်မှ ၁၉၅၅ ခုနှစ်၊ ရာဇဝတ်ကြီးမှုအမှတ် ၁၇ ကိုဖျက်သိမ်းရန်တင်သွင်းသောလျှောက်လွှာ။

အောက်ရုံးတွင် တရားလိုပြသက်သေ သုံးဦးသာ စစ်ဆေးရသေးသည်။ အမှုစစ်ဆေးနေခိုက်၊ လျှောက်ထားသူဦးပုက ဤရုံးတော်သို့ လာရောက်ကာ၊ ၎င်း၏ လျှောက်လွှာထဲတွင် အကြောင်းအချက် အမျိုးမျိုး ဖေါ်ပြထားသည့် အတိုင်း၊ ၎င်းအား တရားစွဲဆိုထားခြင်းသည် ဥပဒေအရ မှားယွင်းချွတ်ချော် နေသည့်အတွက်၊ အထက်အဆိုပါတရားသူကြီးရုံး၊ ၁၉၅၅ ခုနှစ်၊ ရာဇဝတ်ကြီးမှု အမှတ် ၁၇ ကို ပယ်ဖျက်ပေးပါရန် တောင်းဆိုလျှောက်ထားသည်။

၁၉၅၆ — ဦးပု နှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံ တော်၊ — ဦးအောင်ခိုင်။

၎င်း၏လျှောက်လွှာထဲတွင် အရေးအကြီးဆုံးသောအပိုဒ်မှာ အပိုဒ် (၃) ပင် ဖြစ်သည်။ ၎င်းအပိုဒ် (၃) တွင် လျှောက်ထားသူက ဖေါ်ပြထားသည်မှာ ''မိမိ သည် ပြည်သူ့ဝန်ထမ်းတဦးတယောက်မဟုတ်သည့်အပြင်၊ ၎င်းလိမ်လည်သည်၊ သို့တည်းမဟုတ် အလွဲသုံးစားလုပ်သည်၊ သို့တည်းမဟုတ် ဖေါက်လွဲဖေါက်ပြန် ပြုလုပ်သည်ဆိုသောပစ္စည်းမှာ ပြည်သူပိုင်ပစ္စည်းမဟုတ်'' ဟု ဆိုထားသည်။

လျှောက်ထားသူ၏ လွှတ်တော်ရှေ့နေကြီး ဒေါက်တာဦးအေးမောင် က၊ ''လျှောက်ထားသူသည်ရာဇသတ်ပုဒ်မ ၂၁ အရ၊ပြည်သူ့ဝန်ထမ်းတဦးဖြစ်သည် ဟု မဆိုနိုင်။ နိုင်ငံတော်ကောက်ပဲသီးနှံရောင်းဝယ်ရေးအဖွဲ့၏ ပစ္စည်းများသည် ပြည်သူပိုင်ပစ္စည်းမဟုတ်ကြောင်း ထင်ရှားသည်မှာ၊ ၎င်းဘုတ်အဖွဲ့ဝင်လူကြီးများ အထဲတွင် အစိုးရအရာရှိသက်သက်မဟုတ်သောသူများပါရှိသည်၊ ၎င်းဘုတ်အဖွဲ့ ဝင်လူကြီးများသည် လစာငွေများကို အစိုးရအရာရှိများကဲ့သို့ မရရှိကြ။ ၁၉၄၇ ခုနှစ်က ဤဘုတ်အဖွဲ့ စတင်တည်ထောင်သည့်ပြန်တမ်းအပိုဒ် ၉ တွင်၊ မြေများကို ဘုတ်အဖွဲ့အတွက် သိမ်းဆည်းရာ၌၊ အများပြည်သူလူထု အကျိုးအတွက်သိမ်း ဆည်းဘိသကဲ့သို့ သိမ်းဆည်းရမည်ဟု ဖေါ်ပြထားသည်။ ဤကဲ့သို့ဖေါ်ပြထား ခြင်းကြောင့်၊ ၎င်းဘုတ်အဖွဲ့သည် ပြည်သူပိုင်၊ သို့တည်းမဟုတ် ပြည်သူလူထုနှင့် သက်ဆိုင်သည့် ဘုတ်အဖွဲ့မဟုတ်ကြောင်းမှာထင်ရှားသည်။ ဘုတ်အဖွဲ့မှာ အစိုးရ နှင့် မည်သို့မျှမသက်ဆိုင်သဖြင့်၊ ၎င်းဘုတ်အဖွဲ့သည် အစိုးရ၏အလုပ်ဝတ္တရားများ ပြုလုပ်သည်ဟုမဆိုသာ။ နိုင်ငံတော်ကောက်ပဲသီးနှံရောင်းဝယ်ရေးအဖွဲ့မှ အမြတ် အစွန်းရသောငွေများသည်၊ နိုင်ငံတော်အစိုးရ၏ အထွေထွေအခွန်တော်ငွေများ နှင့်မည်သို့မျှသက်ဆိုင်ခြင်းမရှိ။ ပြုနိုစိုပါယ်အက်ဥပဒေ၊ သို့မဟုတ် ရန်ကုန်ပြုနိုစို ပါယ် အက်ဥပဒေနှင့် အခြား အလားတူ အက် ဥပဒေများတွင်၊ ၎င်းအဖွဲ့များ က ခန့်ထားသော အရာရှိများကို၊ ရာဇသတ်ကြီး ပုဒ်မ ၂၁ အရ ဖေါ်ပြထား သော ပြည်သူ့ဝန်ထမ်း အရာရှိများဖြစ်ကြောင်း ယူဆရမည်ဟု ဖေါ်ပြထား သည်။ သို့ရာတွင် နိုင်ငံတော် ကောက်ပဲသီးနှံ ရောင်းဝယ်ရေးအဖွဲ့ အက်ဥပဒေ ထဲတွင်၊ ဤကဲ့သို့ သီးခြားဖေါ်ပြထားခြင်းမရှိ။ ၁၉၅၀ ပြည့်နှစ်တွင်၊ နိုင်ငံ

၁၉၅၆

ဦးပု နှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံ တော်။

ဦးအောင်ခိုင်။

တော် ကောက်ပဲသီးနှံ ရောင်းဝယ်ရေးအဖွဲ့မှ အက်ဥပဒေ အမှတ် ၅၇ ဟု သတ်မှတ်ကာ ထုတ်ပြန်ခဲ့သည်။ ၎င်းအက်ဥပဒေပုဒ်မ ၃၁ အရ၊ ၎င်းအဖွဲ့တွင်လုပ်ကိုင်ဆောင်ရွက်ကြသော အရာထမ်းအမှုထမ်းများသည်၊ ရာဇသတ် ပုဒ်မ ၂၁ ၏အဓိပ္ပါယ်အရ၊ ပြည်သူ့ဝန်ထမ်းများဖြစ်ကြောင်း မှတ်ယူရမည်ဟု ဖော်ပြထားသည်။ သို့ရာတွင် ၎င်းအက်ဥပဒေကို နိုင်ငံတော်သမတက အမိန့်ကြေငြာစာ ထုတ်ပြန် ကျေညာ၍ သတ်မှတ်ခြင်း မပြုသည့်အတွက်၊ ၎င်းအက်ဥပဒေမှာ ယခုတိုင်အာဏာမရှိ။ အာဏာလည်းမတည်။ အဆက်ဖော်ပြပါအကြောင်းများကြောင့်၊ လျှောက်ထားသူဦးပုသည်လည်း ပြည်သူ့ဝန်ထမ်းတဦးမဖြစ်နိုင်။ ၎င်းအလွဲသုံးစားလုပ်သည်၊ သို့တည်းမဟုတ် ဖေါက်လွဲဖေါက်ပြန် ပြုလုပ်သည်ဆိုသောပစ္စည်းမှာလည်း ပြည်သူပိုင်ပစ္စည်းမဟုတ်ကြောင်း'' ဖြင့်လျှောက်လဲချက်များပေးလေသည်။

နိုင်ငံတော်ကောက်ပဲသီးနှံ ရောင်းဝယ်ရေးအဖွဲ့၏ပစ္စည်းများသည်၊ ပြည်သူပိုင်ပစ္စည်းဖြစ်သည် မဖြစ်သည်ဆိုသည့် အကြောင်းနှင့် ပတ်သက်၍၊ ယခင်က တကြိမ် ဤရုံးတော်တွင် ကျွန်ုပ်ကိုယ်တိုင် ၁၉၅၂ ခုနှစ်၊ ရာဇဝတ်အယူခံမှုအမှတ် ၃၂၂ တွင် စီရင်ဆုံးဖြတ်ခဲ့သေးသည်။ ၎င်းအမှုမှာ နိုင်ငံတော်ကောက်ပဲသီးနှံ ရောင်းဝယ်ရေးအဖွဲ့ပိုင် ဂုံနီအိတ်ပေါင်း ၂,၅၀၀ ကို သယ်မှတ်လိမ်ဖြင့်ထုတ်ယူသောအမှုဖြစ်သည်။ ဤအမှုကိစ္စနှင့်ပတ်သက်၍ သေချာကုန်စွာ စဉ်းစားဆင်ခြင်ပြီးနောက်၊ နိုင်ငံတော်ကောက်ပဲသီးနှံရောင်းဝယ်ရေးအဖွဲ့သည်၊ ၁၉၄၇ ခုနှစ်က ဘုရင်ခံ၏အမိန့်အရ တည်ထောင်ခဲ့သော အဖွဲ့ဖြစ်သည်။ ၎င်းအဖွဲ့သည်၊ နိုင်ငံတော်မှကောက်ပဲသီးနှံများထုတ်လုပ်ရာ၌ ကြီးကြပ်အုပ်ချုပ်ကာ ရောင်းဝယ်ခြင်း ပြုလုပ်ရန်ဖြစ်သည်။ ဤကဲ့သို့ရောင်းဝယ်၍ရသော အမြတ်အစွန်း အပေါ်တွင်၊ နိုင်ငံဘော်အစိုးရက အမြတ်တော်ကြေး၊ သို့တည်းမဟုတ် အမြတ်တော်ကြေး ပေါ်တွင် တဆင့်စည်းကြပ်သောအခွန်တို့ကို စည်းကြပ်ခြင်းမရှိ။ အဖွဲ့သားများကို ဘုရင်ခံကိုယ်တိုင်က ခန့်အပ်ခြင်း၊ ထုတ်ပယ်နိုင်ခြင်း၊ နိုင်ငံတော်ကောက်ပဲသီးနှံရောင်းဝယ်ရေးအဖွဲ့ တည်ထောင်နိုင်ရန် ဘုရင်ခံက ငွေထုတ်ပေးခြင်း။ အကယ်၍ ၎င်းဘုတ်အဖွဲ့ပျက်စီးခဲ့ပါက၊ ၎င်းဘုတ်အဖွဲ့တွင်ရှိသောပစ္စည်းများသည် ပြည်သူပိုင်ပစ္စည်း ပြန်လည်ရှင်ဖြစ်ခြင်းတို့ကိုထောက်ချင့်၍၊ ဤနိုင်ငံတော် ကောက်ပဲသီးနှံရောင်းဝယ်ရေးအဖွဲ့သည် အစိုးရက ပြည်သူလူထု အကျိုးအတွက်၊ စီးပွါးရေးလုပ်ငန်းသဘောဖြင့် တည်ထောင်ပေးသော အဖွဲ့ဖြစ်သည်ဟု ယူမှတ်ရမည်။ သို့ဖြစ်၍ ၎င်းအဖွဲ့၏ပစ္စည်းများသည် အစိုးရပိုင်သည်၊ သို့တည်းမဟုတ် အများပြည်သူလူထုအကျိုးအတွက် လုပ်ကိုင်သည့်ပစ္စည်းဟူ၍ယူဆနိုင်သည့်အလျောက်၊

၁၉၅၆

ဦးပု
နှင့်
ပြည်ထောင်စု
မြန်မာနိုင်ငံ
တော်။
ဦးအောင်ဒွင်။

ဂင်းနိုင်ငံတော်ကောက်ပဲသီးနှံရောင်းဝယ်ရေးအဖွဲ့ပိုင် ပစ္စည်းများသည်၊ ပြည်သူပိုင် ပစ္စည်းဖြစ်သည်ဟုကျွန်ုပ်သတ်မှတ်ခဲ့သည်။

ဤသို့သတ်မှတ်ခဲ့သောအချိန်မှ ယခုအချိန်အထိ၊ နိုင်ငံတော်ကောက်ပဲသီးနှံ ရောင်းဝယ်ရေးအဖွဲ့ကို တည်ထောင်ခဲ့သော ပြဋ္ဌာန်းချက်များ ပြောင်းလဲပြင်ဆင် သေးသည်ဟု ကျွန်ုပ်မသိရ။ ယခင်က ကျွန်ုပ်မှန်ကန်သည်ဟု ယူဆထားသော အချက်အလက်များကိုယခုအချိန်တွင် တမျိုးတဖုံပြောင်းလဲယူဆနိုင်ရန်အကြောင်း များလည်း မပေါ်ပေါက်ပေ။

ဤရုံးတော်၏ ၁၉၅၁ ခုနှစ်၊ ရာဇဝတ်စောဒကမှု အမှတ် ၁၄ တွင်၊ မြန်မာနိုင်ငံတော် လေကြောင်းသယ်ယူပို့ဆောင်ရေးအဖွဲ့မှ ခန့်ထားသောအရာရှိ တဦးသည်၊ ရာဇသတ်ပုဒ်မ ၂၁ ၏အဓိပ္ပါယ်အရ၊ ပြည်သူ့ဝန်ထမ်းတဦးဖြစ် သည်မဖြစ်သည်ဆိုသောပြဿနာကို စဉ်းစားခဲ့သည်။ ဤသို့စဉ်းစားရာ၌၊ မြန်မာ နိုင်ငံတော် လေကြောင်းသယ်ယူပို့ဆောင်ရေးအဖွဲ့သည် စီးပွါးရေးလုပ်ငန်းတရပ် ဖြစ်သော်လည်း၊ နိုင်ငံတော်အစိုးရက တည်ထောင်ပေးခဲ့သည့်အပြင်၊ ဂင်း၏ လုပ်ငန်းကိစ္စအဝဝတို့ကို နိုင်ငံတော်အစိုးရကပင် ကြီးကြပ်အုပ်ချုပ်ခဲ့သဖြင့်၊ ဂင်း အဖွဲ့မှာ နိုင်ငံတော်အစိုးရက တာဝန်ခံဆောင်ရွက်ရသော အဖွဲ့ဘခုဟုဆိုနိုင် သောကြောင့် ဂင်းအဖွဲ့မှခန့်ထားသောပုဂ္ဂိုလ်တဦးတယောက်သည်၊ ရာဇသတ် ပုဒ်မ ၂၁ ၏အဓိပ္ပါယ်အရ၊ ပြည်သူ့ဝန်ထမ်းတဦးဖြစ်သည်ဟု ဆုံးဖြတ်ခဲ့လေ သည်။ ဂင်းအမှုနှင့် ယခုလက်ရှိအမှုသည် ခြားနားခြင်းမရှိလှ။ သို့ဖြစ်၍ ဤအမှု တွင် လျှောက်ထားသူ၏တောင်းဆိုချက်ကို မလိုက်လျောနိုင်သည့်အလျောက်၊ ဂင်း၏လျှောက်လွှာကိုပလပ်လိုက်သည်။

APPELLATE CIVIL.

Before U Chan Tun Aung, Chief Justice and U San Maung, J.

H.C. 1956

July 30.

U SHWE LONE (APPELLANT)

v.

MR. KHA CHOUNG (RESPONDENT). *

Sale of Goods Act, ss. 55 to 61 (1) —Contract Act, s. 73—Contract of Sale—Deposit by buyer as part payment or earnest money—Breach of contract by Buyer—Deposit whether recoverable by him—Whether Seller entitled to set-off the deposit against damages on re-sale or retain the deposit in addition to damage.

Held : The Buyer is entitled to recover the deposit he had made subject to the right of the Seller to set-off his damages on re-sale against the claim.

The Seller is entitled only to the deficiency and expenses incurred on re-sale and cannot retain the deposit in addition.

Soper v. *Arnold*, (1889) 14 A.C. p. 429; *Ockenden* v. *Henly*, 120 English Reports, (Vol. CXX) K. B. p. 590; *The Vellore Taluk Board* v. *Gopalasami Naidu*, I.L.R. (1915) 38 Mad. p. 801; *Piari Lal and others* v. *Mina Mal, Balkishan Das*, (1928) I.L.R. 50 All. p. 82; *Dies and another* v. *British and International Mining and Finance Corporation Ltd.*, K.B (1939) p. 724; *Manepalli Satyanarayanamurthi* v. *Thommandra Erikalappa*, A.I.R. (1926) Mad. p 410, referred to.

Ba Than, Advocate, for the appellant.

Tun Aung (1), Advocate, for the respondent.

Judgment delivered by

U CHAN TUN AUNG, C.J.—This appeal raises quite interesting points of law under the Sale of Goods Act, as to whether a purchaser of goods who has made a deposit with the seller either as part payment towards the purchase price or as earnest towards the contract, can recover that sum

* Civil 1st Appeal No. 112 of 1953, against the decree of the 2nd Judge, City Civil Court of Rangoon (U SHWE BIN) in Civil Regular No. 308 o 1952, dated the 26th August 1953.

when the contract falls through by reason of his default; and whether on breach of the contract by the buyer, the seller who re-sells the goods and sues for the recovery of the loss arising on such re-sale, should take into account the deposit made by the buyer towards the diminishing of his loss.

It may be noted that under the Sale of Goods Act as it now stands, apart from section 61 (*1*), which expressly saves the right of both buyer and seller to recover special damages, sections 56, 57, 59 and 60 lay down the right of the buyer and seller respectively to sue for recovery of damages on other party's breach of contract. The general rule as to the measure of damage is governed by what is laid down in section 73 of the Contract Act. When the breach is on the part of the buyer, the seller's right is to sue the buyer for the price of goods as declared in section 55, either in case property in the goods has passed to the buyer or when the price is payable at a certain date even when the property in goods has not passed to the buyer. The seller can also under section 56 sue the buyer for damages for non-acceptance; and the measure of damage is to be calculated on the basis laid down in section 73 of the Contract Act, *i.e.* he is entitled to sue the buyer for the difference between the contract price and the market price prevailing at the time when the goods ought to have been accepted by the buyer. The buyer's remedy is to be found in section 57 of the Sale of Goods Act. He can sue the seller for damages for non-delivery of the contract goods, in case the seller refuses to deliver or neglects to deliver them and the measure of damage which he can claim is as envisaged in section 73 of the Contract Act *i.e.*, he is entitled to claim

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U CHAN TUN AUNG, C.J.

the difference between the contract price and the market or current price prevailing at the time when the goods ought to have been delivered; and if no time is fixed at the time of refusal to deliver by the seller. In certain exceptional cases, the buyer is entitled to sue for specific performance under section 58.

Now, the facts giving rise to this appeal and the counter-appeal are very simple. The present appellant U Shwe Lone filed a suit as against the respondent for recovery of Rs. 10,000 which he claimed to have paid under a verbal contract, as part-payment towards the purchase price of tobacco leaves commonly known in the market as "Kyangin-Shwe-Letwa-Yolone Tobacco", on the ground that the respondent had failed to supply him the contract quality, or in other words caused the breach of contract. The respondent, on the other hand, maintained that the breach was not on his part; that the tobacco leaves of contract quality were duly sorted out from respondent's godown by the appellant himself, after the appellant's examination and satisfaction of the samples shown, and that thereafter the tobacco leaves were duly set apart in bundles ready for delivery to the appellant. On the date of delivery, the appellant refused to accept the tobacco saying that they were not of the contract quality. The respondent has made a counter-claim on the ground that it was the appellant who by his failure to accept the goods has occasioned the breach of contract he averred that he had to resell the tobacco at a loss; the loss claimed was Rs. 5,733 inclusive of godown charges for storage of tobacco in question.

Four material issues were framed and the learned trial Judge, (the Second Judge of the

Rangoon City Civil Court) in a somewhat rambling judgment found that the breach was occasioned by the appellant and dismissed the appellant's claim *in toto*, with the following observation :—

". . . . since the basis of the claim of the plaintiff is on the breach committed by the defendant while it is found that the breach was not committed by the defendant but by the plaintiff himself. The plaintiff however, could have sued for recovery of the prices of the goods obtained by the defendant in re-sale in excess of the amount of the portion of the price he had not paid as the property in the goods had passed to him. Since he has not done so, the same relief cannot be given to him in this suit as the relief is founded on a cause of action different from the one on which he is basing this suit. The relief he is claiming is based on the breach of contract by the defendant, while the relief he could have claimed is based on the resale of the goods by the defendant as his bailee."

Dealing with the respondent's counter-claim, which in fact, represents the difference between the contract price and the price the respondent had obtained in the resale of the tobacco in question, the learned trial Judge, after making certain reference to section 56 (*2*) of the Sale of Goods Act which, we may note, is absolutely irrelevant to the present case, observed :

" But where the buyer has paid part of the price, as in this case, it appears that the seller cannot claim the difference in the prices when the portion of the price remaining unpaid by the buyer is equal to or smaller than the price fetched at re-sale, for then it cannot be said that loss is occasioned by the breach of the contract."

As regards the deposit of Rs. 10,000 which is being retained by the respondent, the learned trial Judge finds himself in deep waters how it should be dealt with. It is common ground that the suit contract was based on a verbal contract with no

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stipulation whatsoever as regards forfeiture or otherwise of this deposit of Rs. 10,000 which has been differently described by the parties—the appellant claims it to be a part payment towards the purchase price, while the respondent maintains that it was earnest money "စံ့" and the learned trial Judge's remarks concerning that deposit are as follows :

"If, of course, it is held that the plaintiff forfeits the whole amount of Rs. 10,000 he has paid as advance, the case would be different, and the defendant would then be entitled to claim, as he is doing now, the difference in the contract price and the price at resale.

But, there is no specific provision of law that an advance paid must be forfeited when the seller commits breach of the contract . . . . There is no such penal or forfeiture clause in the agreement between the parties in this case."

The learned trial Judge then sought to invoke section 73 of the Contract Act, and finding it to be inapplicable, brought in equitable principles; and in the concluding portion of the judgment he observes :

"Is there any equity to allow the defendant to retain the whole sum of Rs. 10,000 paid in advance as forfeited and to appropriate the whole price of goods fetched at resale as his own ? There cannot, in my opinion, be anything more equitable than allowing the defendant to do such a thing, *i.e.* to swallow up the substantial sum of the advance paid and also make use of the goods, purchased from him and not taken from him, as his own. What is reasonable is to allow him to only recoup himself the unpaid portion of the price and the godown charges from the proceeds at resale."

But, surprisingly enough and quite contrary to the above findings, the learned trial Judge dismissed the appellant's suit and also the respondent's counter-claim without making any decision whatsoever as to the fate of the deposit of Rs. 10,000. Now, from the facts it appears that the appellant agreed to buy from the respondent 6,000 viss of tobacco in question

at the rate of Rs. 280 per hundred viss. Owing to appellant's failure to take delivery of the said tobacco, the respondent had to resell them at a loss, *i.e.* at the rate of Rs. 185 per hundred viss, total net loss being Rs. 5,700. This in fact, is the difference between the contract price and the price which he fetched on re-sale of the said goods, while Rs. 33-5 being the godown charges. It also appears that in the counter-claim by the respondent he has not given the appellant the credit of Rs. 10,000. In our view, there being no specific terms regarding the deposit of Rs. 10,000 inasmuch as the contract in question was verbal, there is no material difference whether we characterise that deposit as earnest (ဝဲ့), or part-payment. In any event, it is a deposit, and as observed by Lord Macnaghten in *Soper* v. *Arnold* (1) " the deposit serves two purposes—if the purchase is carried out it goes against the purchase-money—but its primary purpose is this, it is a guarantee that the purchaser means business." On a careful survey of all the relevant facts, we find that the following points are not seriously in dispute between the parties :—

(1) The contract was a verbal contract ;

(2) The appellant had made a deposit of Rs. 10,000 either as earnest or as part payment towards the purchase price ;

(3) The rate at which the appellant agrees to buy from the respondent is Rs. 280 per hundred viss for a total quantity of 6,000 viss ;

(4) The appellant refuses to take delivery of the said bundles of tobacco on the date fixed for delivery ;

(1) (1889) 14 A.C. p. 429.

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(5) The respondent sold the said tobacco at the rate of Rs. 185 per hundred viss and fetched Rs. 11,100;

(6) The respondent has retained the sum of Rs. 10,000, claiming it to be a forfeit.

As regards the question who has committed the breach, we agree with the trial Judge that the appellant was the defaulter; but we cannot subscribe to the view that because the appellant has committed the breach, he is is not entitled to recover the deposit of Rs. 10,000 merely on the ground that his frame of suit is one based upon the breach of contract on the part of the respondent, and not based upon the recovery of the price of the goods obtained in resale by the respondent as bailee. We really do not see the justification of such a finding in the circumstances obtaining in the case. Here, the learned trial Judge should not have lost sight of the counter-claim by the respondent, which is in fact a claim for damages quite in conformity with what has been laid down in the Sale of Goods Act. If it is found that the breach was not occasioned by the default of the respondent, but by that of the appellant, then the remedy available to the respondent is a claim for damages as laid down in the Sale of Goods Act, the relevant provisions of which have been quoted above. This is clearly what the respondent has done in his counter-claim. He claims damages on the basis of difference in price between the contract price and the price he realised in the resale of the commodity in question, but he failed to account the appellant's deposit of Rs. 10,000, obviously because there were no terms regarding it, whether to treat it as earnest and suffer forfeiture or as part-payment towards the price. In these circumstances,

we really do not see how the respondent's claim should have been dismissed in its entirety without also taking into consideration the appellant's claim as against him. In our view, the appellant's claim and the respondent's counter-claim must be considered together so as to result in a fair adjustment as between them, having regard to the provisions of law laying down the principles concerning the claim for damages in cases of breach. No doubt, the Contract Act or the Sale of Goods Act make no specific provision relating to the refund of money paid as earnest or as part payment by the buyer on a default either by him or by the seller. But, there are numerous judicial decisions where it has been held that on a breach of contract owing to buyer's fault, and the seller resells and sues to recover the loss arising from such resale, the seller must take into account the deposit made by the buyer in diminishing his loss. There are also decisions in which it has been held that where part payment of price has been made by the buyer and owing to his default, the contract falls through, the buyer is entitled to recover the part purchase price he has paid subject to the right of the seller to set off the damage against that claim. In *Ockenden* v. *Henly* (1), the plaintiff sold property upon condition that the purchaser should forthwith pay into the hands of the auctioneer a certain deposit, and the remainder some time after, that on purchaser's failure to comply with this condition, the deposit to be forfeited and the vendor shall resell the property and any deficiency that may arise upon such resale together with the expenses, to be made good by the purchaser, and on non-payment the entire sum recoverable from the purchaser as liquidated damages. Owing to his non-compliance with the

(1) 120 English Reports (Vol. CXX) K.B p. 590.

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aforesaid terms, and the plaintiff having resold at a price below which the defendant had agreed to purchase, the plaintiff preferred a claim in terms of the condition. It was held that the plaintiff was entitled to recover from the defendant-purchaser the amount of the deficiency and the expenses only, and not, in addition to those sums the amount of the deposit. In *The Vellore Taluk Board, By its President* v. *Gopalasami Naidu* (1) it was held that where a person deposits a certain amount as earnest money for the due performance by him of his part of the contract, under which he agrees to pay the other party a certain sum and breaks the contract thereafter, the other party who becomes entitled to retain the deposit as forfeited under the terms of the contract, must, in a suit by him for damages for the breach of contract, give credit for the amount retained as forfeited and that he can only recover the difference between the actual loss sustained and the amount of the forfeited deposit. In *Piari Lal and others* v. *Mina Mal, Balkishan Das* (2), the defendants sold a quantity of grain to the plaintiff, who paid substantial sum as earnest money, the delivery date being not fixed. The plaintiff assigned his right under the contract to a third person and he filed a suit for breach of contract. Apart from the question whether he should implead as plaintiff the assignee of his contract, the question that arose was whether the plaintiff was entitled to sue the defendant for the return of what is called the earnest money which in fact was a part payment towards the price of the goods to be delivered subsequently. It was held that that although there was no specific provision in the Indian Contract Act relating

(1) I.L.R. (1915) 38 Mad p.801. (2) (1928) I.L.R. 50 All. p. 82.

to the refund of money paid as earnest money or part payment by the buyer and the seller failed to make delivery, the buyer was entitled to recover the money so paid. *Dies and another* v. *British and International Mining and Finance Corporation, Limited* (1) is a case in which the purchaser had paid one hundred thousand pounds towards the contract for purchase of certain rifles and ammunition from the vendor. He committed a breach which he himself admitted, and failed to take delivery of the goods under the terms of the written contract. The vendors having elected to treat the contract as at an end, the plaintiff-purchaser filed a suit for recovery of one hundred thousand pounds less thirteen thousand five hundred pounds which he admitted the vendors were entitled to retain under a clause of the written contract, it was held *inter alia* that the payment of one hundred thousand pounds was not in the nature of an earnest but was a part payment of the price and that the plaintiff-purchaser was accordingly entitled to recover the sum of one hundred thousand pounds subject to the defendant's claim for damages for the plaintiff-purchaser's breach of contract. In *Manepalli Satyanarayanamurthi* v. *Thommandra Erikalappa* (2), both the buyer and seller of goods appealed against the order of the trial Court in a case where the buyer failed to take delivery of the goods on the stipulated terms and the seller filed a suit for damages for non-acceptance. The seller was only allowed damage he actually suffered, but not the deposit made by the buyer. It was held that it was never the practice in mercantile contract to hold that whatever be the damage suffered or not suffered, the

(1) 1 K.B. (1939) p. 724. (2) A.I.R. (1926) Mad r. 410.

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seller was entitled to keep the deposit. Therefore, from a catena of authorities cited above, we are convinced that even if it were found that the buyer is in default, the buyer is entitled to recover the part payment he has made, subject to the right of the seller to set off his damages against that claim. In our view, therefore the trial Judge was wrong in rejecting the claim of the appellant as well as the counter-claim of the respondent. Since both the parties have preferred an appeal and counter-appeal to this Court, we must hold that, on the facts and circumstances obtaining in the case, and also in view of the judicial decisions cited above, both have partially succeeded in this appeal. Accordingly, the order of the trial Court will be set aside and there will be a judgment and decree in favour of the appellant in the sum of K 4,267 being the surplus of the deposit of K 10,000 paid by the appellant after setting off the sum of K 5,733 being the difference between the contract price and the sum realized on the resale of the tobacco in question *plus* the godown charges payable by the appellant to the respondent. Since both the parties have partially succeeded in this appeal, there will be no order as to costs in this appeal.

CIVIL FIRST APPEAL NO. 112 OF 1953.

U SAN MAUNG, J.—On the facts disclosed in evidence I do not consider that the transaction now under consideration ever proceeded beyond the stage of a contract for the sale of the tobacco. Section 22 of the Sale of Goods Act provides that where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the

goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done. In this connection the plaintiff's contention that the tobacco was to be packed in his presence after weighing is much more probable than the defence story that the plaintiff had instructed him to do the weighing and the packing of the goods in his absence. Therefore the property in the tobacco had not yet passed from the defendant to the plaintiff.

If the contrary had been true, and if the whole of the purchase price had been unpaid, sub-section (2) of section 54 of the Sale of Goods Act would be applicable. However, this section does not specifically deal with the position which may arise when the buyer has pre-paid part of the price and I would reserve judgment as to what should be done when part of the price is pre-paid in a case where the property in the goods had passed from the seller to the buyer.

On the facts and circumstances arising in the case under appeal I agree that the authorities cited by the learned Chief Justice are apposite and that the defendant must, in equity, refund to the plaintiff the difference between K 10,000 and K 5,733. The learned trial Judge was wrong in thinking that he could not give a decree for this sum in the suit under appeal because the plaintiff had claimed for the recovery of the whole of the amount of K 10,000 paid by him as a deposit. There is nothing in law to prevent a suit being decreed for less than the amount claimed by the plaintiff.

I agree in the order proposed by the learned Chief Justice.

APPELLATE CRIMINAL.

Before U Shu Maung, J.

H.C. 1957

April 5.

ABDUL HAI (APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Immigration (Emergency Provisions) Act, s. 13 (7) (b)—Act No. 26 of 1956, no retrospective effect—Ss. 263 and 264 (1) Code of Criminal Procedure.

Held : Burma Act No. 26 of 1956. The Burma Immigration Emergency Provisions (Amendment) Act, 1956 has no retrospective effect.

Held further: Under s. 264 (1) of the Code of Criminal Procedure, it is imperative on the Magistrate trying such a case summarily to record a Judgment embodying the substance of the evidence and also the particulars mentioned in s. 263.

Ba Saing, A.T.M., for the applicant.

Ba Kyine (Government Advocate) for the respondent.

U SHU MAUNG, J.—This is an application in revision against the conviction and sentence passed by the learned 3rd Additional Magistrate, Rangoon, in his Criminal Summary Trial No. 862 of 1955 in which the applicant was convicted by the learned Magistrate under section 13 (7) (*b*) of the Burma Immigration (Emergency Provisions) Act, 1947. This trial, as it appears from the record, is full of unsatisfactory features both in regard to procedure and in the way it has been conducted by the learned Magistrate.

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*Criminal Revision No. 29 (B) of 1957.

Review of the order of the 3rd Additional Magistrate of Rangoon, dated the 5th day of October 1956 passed in his Criminal Summary Trial No. 862 of 1955.

First of all, there is a complaint filed in this proceeding at page 2 and the complainant who filed this complaint is the Immigration Officer and according to him—as related in this complaint—the accused committed the offence alleged on or about the 11th December 1953 when he filed an application for issue of re-entry visa stating that he resided in Burma continuously during the period lst January 1932 to lst January 1942 without absence. However, it was alleged that the statement of the accused was false as he came to Burma for the first time in 1947. However, when we look at the record of the order of the learned Magistrate, the form used is Criminal Form No. 75 and the first entry relating to the date of commission of the offence alleged appears as 5th July 1955 which is clearly not the date of the alleged offence. Although this particular entry does not, to my mind, vitiate the whole trial there are other aspects which have to be considered.

The learned Advocate appearing for the applicant submitted in the first instance that the trial of this offence by way of a summary trial was not in accordance with law in view of the fact that the Burma Immigration (Emergency Provisions) Act was subsequently amended by Act No. 26 of 1956 which came into force on the 28th September 1956 and by virtue of this amendment, the punishment that could be awarded for an offence under section 13 (7) (*b*) was a term of imprisonment not exceeding two years or with fine or with both ; and it is therefore urged that a summary trial was not permissible and that the trial was vitiated. However, the learned Government Advocate contended that when the accused was sent up the original punishment that could be awarded was only one year and therefore, at the time the case was sent up this amendment had not been done and

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as the substantive law in respect of the offence committed was amended it could have no retrospective effect and the trial therefore was not bad in law. As far as that argument is concerned, I am in entire agreement with the learned Government Advocate and I am prepared to hold that the trial was not vitiated on that ground. However, there is this other aspect to be considered, namely, even assuming that the punishment was imprisonment for a term of one year only, this was an appealable case and that therefore under section 264 (1) of the Code of Criminal Procedure, it is imperative on the Magistrate trying such a case summarily to record a judgment embodying the substance of the evidence and also the particulars mentioned in section 263. That aspect of the case seems to have been entirely ignored by the learned Magistrate and all that he has recorded in the order is that the accused pleaded "guilty" and that therefore he was convicted and sentenced to pay a fine of K 75 or in default to suffer two months' rigorous imprisonment. That to my mind—is most unsatisfactory especially as the offence alleged is a serious offence under the immigration law and if an accused is convicted he might even be deported from this country. As the consequences which might follow from such a conviction are of a very serious nature even if the trial had been a summary one, the learned Magistrate should have called upon the accused to explain to him explicitly the particulars in regard to the offence with which he has been charged and if the accused comes to understand these particulars then, he might be called upon to plead whether he is guilty or not. As these were not done in the first instance, I am unable to accept this conviction as one being properly awarded under the provisions of the law. The conviction and

sentence imposed upon the applicant are therefore set aside and the proceedings are remanded to the Court below to proceed with the trial—not in a summary manner but by way of a regular trial and to come to a finding on the merits after he has heard the evidence. The fine, if realized, should be refunded to the applicant.

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APPELLATE CIVIL.

Before U San Maung and U Ba Thoung, JJ.

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Mar. 8.

AH HTAUNG (APPELLANT)

v.

THE UNION OF BURMA AND ANOTHER (RESPONDENTS).*

Sale of excise licenses for one year—Interruption by Communist Insurgents—Resumption of business by licensee on cessation of interruption till the expiry of the year—Application for remission of revenue due for the peroid of interruption—Rejection by Government—Suit by licensee against Government for a declaration and an injunction—The nature of excise license in Burma, a right in personam—*Completed contract*—Obiter dictum *by the Supreme Court—S. 18 Burma Excise Act—S. 56 Contract Act, the doctrine of frustration.*

Two Excise Licenses were sold by public auction at Bogale to the highest bidder, the appellant for K 90,000 for the year 1949.

The appellant carried on his business from 1st January, 1949, to 6th February, 1949.

On 6th February, Bogale was overrun by Communist insurgents. He had by then paid K 27,000 towards his license fees for the year.

Bogale was reoccupied by Government in August, 1949 and appellant resumed his business till the end of the year.

He had paid a further sum of K 18,000 leaving a balance of the K 45,000. As appellant had been prevented entirely from carrying on his trade during the insurgent occupation of Bogale, he submitted an application for remission, which was rejected.

The appellant therefore filed a suit against the Government for—

(*a*) a declaration that he was not liable to pay the sum of K 45,000 and

(*b*) an injunction restraining the revenue authorities from enforcing full payment against him, basing his claim on two main grounds, *viz:*

(i) That the auction sale carried an implied condition that law and order would be maintained in Bogale Town, and

(ii) That the prohibition of his trade by the insurgents in occupation of the Town for nearly seven months rendered the contract impossible of performance and consequently void.

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* Civil 1st Appeal No. 11 of 1955, against the order of the Original Side, High Court of Rangoon in Civil Regular Suit No. 95 of 1952, dated the 6th January 1955.

The defence raised by the Government was that the excise sales were completed contracts.

The Trial Court dismissed the suit, relying on *Sri P. Guruviah* v. *The Union of Burma*, (Civil Regular Suit No. 163 of 1947).

On an appeal by plaintiff.

Held: That an excise license under s. 18 Burma Excise Act gives nothing more than a right *ex-contractu* which is a right *in personam*. There is no room under the Excise Act for a license coupled with an interest.

Hup For v. *The Deputy Commissioner, Insein and two others*, (1950) B.L.R. 86 (S.C.); *Hurst* v. *Pictures Theatres Ltd.*, I. K. B. 1 (1915), referred to.

The above conclusion is not a mere *obiter dictum* but even assuming them to be so, such observation by the Supreme Court should be received with the greatest respect.

N. A. Annamalai Chettyar v. *Mohamed Yava and two others*, (1954) B.L.R. 86 (H.C.), referred to.

Held also: That unless the license is coupled with a grant, it is purely a contractual right *in personam*.

Thomas v. *Sorrell*, Eng. Reports, 124, Common Pleas, 1098 = Vaughan (330); *Muskett* v. *Hill and Tozer*, 5 Bing. (N.C.) 694 = Eng. Reports, 132, Common Pleas, p. 1257; *Heap* v. *Hartley*, (1889) L.R. 42 Ch. Div. 461 at 468, referred to.

Held further: The license granted under s. 18 of the Burma Excise Act is a completed contract and the doctrine of frustration as embodied in s. 56 of the Contract Act applies only to contracts which are merely executory and not to executed contracts.

Therefore, the license had not become void owing to the Licensee's impossibility to perform his part of the contract nor was there any implied guarantee by the Government that the appellant would for the whole period of one year be not disrupted by insurgents, there was no breach of contract.

The King v. *David Allen and Sons, Billposting Ltd.*, L.R., (1916), A.C. Vol. 2 p. 54; *Walton Harvey Limited* v. *Walker and Homfrays*, (1931) L.R. 1 Ch. Div. 274, distinguished.

Appeal dismissed.

Dr. E Maung for the appellant.

Kyaw Thaung (Government Advocate) for the respondents.

U SAN MAUNG, J.—In Civil Regular Suit No. 95 of 1952 of the Original Side of this Court, the plaintiff, Ah Htaung who is the appellant in the present appeal sued the Union of Burma as represented by the Hon'ble Minister for Finance and Revenue

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and the Deputy Commissioner, Pyapon, for a declaration that he was not liable to pay a sum of K 45,000 claimed from him by the revenue authorities as balance of excise license fees due on two excise licenses for the manufacture and sale of Hlaw-za-ye and country spirit in Pyapon district. He also sought an injunction restraining the revenue authorities from enforcing full payment against him in respect of these dues.

The facts which have been fully set out in the judgment of the learned Judge on the Original Side now under appeal, are briefly these. On the 5th November, 1948, two excise licenses for the manufacture and sale of Hlaw-za-ye and country spirit for the year 1949 were sold by public auction at Bogale. The plaintiff having made the highest bid of K 90,000 for these licenses became their purchaser and the usual earnest money was deposited by him. He then carried on his trade from the lst January 1949 to the 6th February 1949, at Bogale. On the 6th February 1949, however, Bogale was overrun by Communist insurgents so that the plaintiff had to suspend his activities. By then, he had paid altogether K 27,000 towards his license fees for the year. On Bogale town being reoccupied by the Government in August 1949, plaintiff resumed his business till the end of the year. He paid a further sum of K 18,000 leaving a balance of K 45,000 for which he applied to the revenue authorities for remission on the ground that during the insurgent occupation of Bogale he had been prevented entirely from carrying on his trade. His application for remission being unsuccessful, plaintiff applied to the Supreme Court for a writ of prohibition prohibiting the Ministry of Finance and Revenue from demanding from him the balance of license fees and a writ of *certiorari* to quash the proceedings of the President who had refused to

interfere with the order passed by the revenue authorities for the recovery of the amount of K 63,000 from him. The Supreme Court dismissed his application observing that the only contention raised by Ah Htaung was that he was prevented by the insurgents from carrying on his business in accordance with the terms of the licenses and that he should therefore not be made liable to pay up the whole of the license fee, that this plea was tantamount to one for the frustration of the contract and accordingly his proper remedy was by way of a suit.

The plaintiff, therefore, filed the present suit on the ground that the auction sale of the excise licenses carried an implied condition that law and order would be maintained in Bogale town to enable him to carry on his trade for the period covered by the licenses and that by reason of the prohibition of his trade by the insurgents who occupied the town for nearly seven months, the contract entered into by him with the revenue authorities had been rendered impossible of performance and consequently void.

The defence raised by the Government was that the excise sales were completed contracts in so far as the Government was concerned and that the interruption of the plaintiff's trade by the insurgents would not absolve him from his liability to pay the license fees as stipulated at the time of their sale. The following issues were therefore framed :—

1. Did the sale of the liquor license in suit—constitute a completed contract as between the plaintiff and the Government, or was the transaction in the nature of an executory contract, subject to the

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condition set out in paragraph 12 of the plaintiff's reply ?

2. Is the plaintiff entitled to the declaration and the injunction asked for ?

On the 1st issue the learned trial Judge came to the conclusion that the transaction constituted a completed contract as between the plaintiff and the Government inasmuch as the Government had by the issue of licenses already granted the plaintiff permission to manufacture and sell Hlaw-za-ye and country spirit. The fact that the plaintiff was allowed to pay the sum of K 90,000 for the two licenses in 10 equal instalments instead of in one lump sum did not make any difference as the instalments were allowed by way of concessions to him. Accordingly, the plaintiff was held not to be entitled to the declaration and injunction asked for by him and his suit was dismissed with costs. Hence this appeal.

Now, the learned trial Judge in coming to the conclusion he did, relied upon a decision of another Judge on the Original Side (U Bo Gyi, J.) in Civil Regular Suit No. 163 of 1947. There, the plaintiff Sri. P. Guruviah Raju sued the Government of the Union of Burma for the refund of part of the license fees paid by him in respect of Toddy-shop licenses for the sale of toddy at Rangoon on the ground that the contract was frustrated by the bombing of Rangoon on the 23rd and 25th December 1941 by the Japanese invaders. The learned Judge observed therein that the point for consideration was whether the sales of the licenses were mere contracts or completed sales and that having regard to the rules regarding the auction of excise licenses, the transactions were in the nature of completed sales inasmuch as the Government had nothing more to do after

licenses to sell toddy had been knocked down to the plaintiff. It was held that the fact that Government allowed the plaintiff to deposit 1/10th of the sale price forthwith and to pay the balance by instalments did not alter the position.

Regarding the nature of licenses for the sale of liquor the observations of the Supreme Court in *Hup For* v. *The Deputy Commissioner, Insein and two others* (1) are apposite. In that case the Collector of Insein under the orders of the Excise Commissioner, acting under the instructions of the Government of the Union of Burma held an inquiry against the applicant Hup For and cancelled the licenses granted to him for the sale of alcoholic liquor in Kamayut, Kanbe and Thingangyun areas of Insein district. These licenses were then granted to a third party and Hup For applied to the Supreme Court for directions in the nature of *certiorari* to have the proceedings of the Collector quashed and direction in the nature of prohibition prohibiting the Commissioner from granting the license to his rival. The Supreme Court held that the Collector in deciding to cancel the unexpired license under section 29 (*1*) of the Burma Excise Act was performing a purely administrative function and therefore his proceedings could not be quashed by the Court. After coming to that conclusion, the Supreme Court further observed:

"It has been contended also before us by the learned Counsel for the applicants that the license being one which had been granted for a consideration is not revocable. We are aware that there is a conflict of judicial opinion in England on this point, but even the case of *Hurst* v. *Pictures Theatres Ltd.* (2) cannot be read as clear authority for the view that the licensee for consideration thereby obtains an 'interest'. Section 18 of the Burma Excise Act seems to us

(1) (1956) B.L.R. 86 (S.C.). (2) 1 K.B. 1 (1915).

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to be sufficient authority for the view that an excise license gives nothing more than a right *ex-contractu* which is a right *in personam*. There is no room under the Excise Act for a license coupled with an interest. It is therfore very difficult for the applicants successfully to claim that any fundamental rights assured to them by the Constitution have been encroached upon by the Collector when he decided to revoke the licenses in their favour."

In our opinion, the above observation of the Supreme Court is not a mere *obiter dictum* inasmuch as the Supreme Court has given reasons why the revocation of the excise license could not be regarded as an encroachment by the Collector upon any fundamental rights assured to the applicant by the Constitution and therefore no interference by the Supreme Court was called for. However, even assuming that the above observation was a mere *obiter dictum*, there is clear authority in the case of *N. A. Annamalai Chettyar* v. *Mohamed Yava and two others* (1) that observations in the nature of an *obiter dicta* by the Supreme Court should be received with great respect as they come from the highest Court in this country.

Besides, the above conclusion of the Supreme Court regarding the nature of excise licenses in Burma is clearly supported by authority. In the famous case of *Thomas* v. *Sorrell* (2), it was observed :

" A dispensation or licence properly passeth no interest nor alters or transfer property in any thing, but only makes an action lawful, which without it had been unlawful. As a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions, which without license, had been unlawful.

But a license to hunt in a man's park, and carry away the deer killed to his own use ; to cut down a tree in a man's ground, and to carry it away the next day after to his own

(1) (1954) B.L.R. 86 (H.C.).

(2) Eng. Reports. 124, Common Pleas. 1098 = Vaughan (330).

use, are licences as to the acts of hunting and cutting down the trees; but as to the carrying away of the deer kill'd, and tree cut down, they are grants."

These observations were quoted with approval by Tindal, C.J., in *Muskett* v. *Hill and Tozer* (1), where it was held that a license to search for and raise metals, and also to carry them away and convert them to the licencee's own use, passed an interest which was capable of being assigned. In *Heap* v. *Hartley* (2), Cotton, L.J., said :

"That is pointedly put in the judgment of Lord Hatherley, then Vice-Chancellor, in this way: 'With regard to the word 'license', there is some little ambiguity. It is, however, well defined in the case of *Muskett* v. *Hill* (1) and I prefer stating it in the language there cited by Chief Justice Tindal to giving my own. It is thus stated: 'A dispensation or license properly passes no interest, but only makes an action lawful which without it had been unlawful; as a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful; but a license to hunt in a man's park and carry away the deer killed to his own use, to cut down a tree in a man's ground and to carry it away the next day after to his own use, are licenses as to the acts of hunting and cutting down; but as to carrying away the deer killed and the tree cut down, they are grants.' So here, a license to enter upon a canal and take the ice is a mere license; and the right of carrying it away is a grant of the ice so to be carried away."

From these authorities it is clear that unless the license is coupled with a grant as, for instance, the right to take game has been killed or timber which has been felled, it is purely a contractual right *in personam.*

Now, section 18 of the Burma Excise Act enacts that no alcoholic liquor shall be bottled for sale and no excise article shall be sold except under

(1) 5 Bing. (N.C.) 694=Eng. Rep. 132, Common Pleas, p. 1267.
(2) (1889) L.R. 42 Ch. Div. 461 at 468.

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the authority and subject to the conditions of a license granted under the act. Therefore, an excise license makes the manufacture and sale of liquor by the licensee legal; otherwise it would be entirely against the law. Turning to the excise license now under consideration it clearly shows that the Government had completely carried out its part of the contract, having already granted to Ah Htaung —permission to manufacture and sell Hlaw-za-ye and country spirit. The opening paragraph of the license, Exhibit A reads:

"Be it known that Ah Htaung, resident of Bogale having paid to Government the sum of Rs. 5,400, being one-tenth of the license fee payable by him for this license, is hereby authorized by the undersigned, Collector of Pyapon, to open a shop for the manufacture and retail vend of Hlaw-za-ye at Bogale from the 1st January 1949 until the 31st December 1949, after which this license will cease to have effect."

Then, follow the terms regarding the payment of the balance of the license fee by instalments and the conditions under which Hlaw-za-ye must be manufactured and sold. How can such a contract between the Government and Ah Htaung be frustrated by the occupation of Bogale by the insurgents? The doctrine of frustration is embodied in section 56 of the Contract Act, the relevant portion of which reads:

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

From the language of this section it is clear that it applies only to contract which are merely executory and not to executed contracts. Government having given to Ah Htaung the permission to manufacture and sell Hlaw-za-ye and country spirit

for the year 1949, had nothing left to perform its part of the contract. If it could be contended that by the terms of the excise license granted to him, Ah Htaung was bound to keep the liquor shop open at Bogale throughout the year 1949, it might be said that his part of the contract had become impossible of performance owing to the occupation of Bogale by the insurgents and the prohibition by the insurgents of the opening of such a shop. But, Dr. E Maung for the appellant has frankly conceded that a licensee is not bound by the terms of the license given to him to open a liquor shop in the locality mentioned in the license. Therefore, it cannot be said that the license had become void owing to the impossibility on the part of the licensee to perform his part of the contract.

In our opinion, the excise licenses granted to Ah Htaung by the Government did not imply a guarantee that he would throughout the year 1949 be guaranteed interruption of his trade by the lawless elements in the country. To hold otherwise would lead to the conclusion that even if Ah Htaung had been prevented—even for one day—from selling his liquor by a large band of dacoits attacking his house the license would be void and he would be committing an offence punishable under the Excise Act if he carried on his trade the day after the dacoity.

Two cases which have been brought to our notice on the question of revocation of licenses are distinguishable from the present on facts. In *The King* v. *David Allen and Sons, Billposting Ltd.*, (1), the defendants gave the plaintiffs permission to affix posters and advertisements to the flank walls of a picture house proposed to be erected on his

(1) L.R. (1916) A.C., Vol. 2 p. 54.

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property by a company about to be formed for a period of four years and the defendant agreed that he would not, while the license remained in force, permit any other person to affix any advertisement to the said walls. By an agreement for a lease of the site made between the defendant and a trustee for the picture house company, the defendant agreed to assign to the trustee all his interest in the aforesaid agreement and the trustee agreed to obtain the ratification by the company when formed of that agreement. Later, the company having refused the permission granted to the plaintiffs by that agreement, the plaintiffs brought an action for damages for breach of the agreement against the defendant, their licensor. It was held that the agreement merely created a personal obligation on the part of the defendant to allow the plaintiffs to use the wall for advertisements and that as he had put it out of his power to fulfil his obligation under the agreement, he was liable in damages for breach of contract.

In *Walton Harvey, Limited* v. *Walker and Homfrays, Limited* (1), the lessees of a hotel entered into two contracts with a firm of advertising agents, under the terms of which the latter were entitled to erect and exhibit, for a term of years, electrically illuminated advertisements on the roof of the hotel. Before the expiration of the term, the local authority in exercise of its statutory powers, served the lessees with a notice to treat for the purchase of their estate and interest in the hotel and ultimately having acquired the reversion of the lessees' term took possession of the hotel and began to demolish it. The electric sign was removed by an arrangement with the advertising agents who subsequently commenced an action against the lessees of the hotel

(1) (1931) L.R. 1 Ch. Div. 274.

to recover damages for breach of contract. It was held that as it could not be said that both parties to the contracts had made their bargain upon the footing that if the local authority exercised their powers and took the hotel, the contracts were to be discharged, there must be a declaration that the defendants were liable to the plaintiffs for damages for breach of those contracts.

As already held above, there being no implied guarantee on the part of the Government that the plaintiff-appellant Ah Htaung would not be interrupted in his trade for the whole period of one year, there was no breach of contract on the part of the defendant-respondents in this case.

If the plaintiff in this case had thought fit to do so he should have surrendered his license under Rule 14 on finding that Bogale had been overrun by insurgents. As it is he elected to treat the license as subsisting and had, on occupation of Bogale by the Government forces, carried on his trade from the 1st of September 1949 till the end of the year.

In these circumstances we consider that this suit had been rightly dismissed by the learned Judge on the Original Side. This appeal fails and must be dismissed with costs. Advocates fee, 10 gold mohurs.

U BA THOUNG, J.—I concur.

APPELLATE CRIMINAL.

Before U San Maung, J. and U Shu Maung, J.

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May 14.

AI HTWE AND TWO OTHERS (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

Penal Code—Ss. 302 (a) (b) and 404, 201 (2) and 404—Ss. 256 and 342 Criminal Procedure Code as amended by Burma Act 13 of 1945, applicability to Naga Hills District—The Chin Hills Regulations of 1896—Code of Criminal Procedure 1882—Burma Act 33 of 1947—Premeditation—Irregularity in recording confession, how cured.

Held: The Chin Hills Regulations of 1896 are still in force within the Naga Hills District, as existing Law.

Held also: In the case of Chins residing in the Naga Hills District, amendments to ss. 256 and 342 of the Criminal Procedure Code, 1898 by Burma Act of 1945 cannot apply unless Burma Act 13 of 1945 is extended to the Chins in the Naga Hills District under s. 3 of the Chin Hills Regulation of 1896.

Held further: Neither of the amended ss. 256 and 342 of the Criminal Procedure Code apply to the non-Chins in the Naga Hills District without amendment of s. 9 (2) of the Chin Hills Regulations 1896.

The procedure to be followed in the trial must be according to the procedure prescribed by the Code of Criminal Procedure 1882 for the trial of warrant cases by Magistrates.

Held also: To constitute a premeditated killing it is necessary that the accused should have had time to reflect, with a view to determine whether, he would kill or not, and that he should have determined to kill as a result of that reflection.

Than Myint v. *The Union of Burma*, (1953) B.L.R. 342, referred to.

Held also: Where there is any irregularity in the recording of a confession by a Magistrate empowered to record such confessions the Magistrate himself can be called and examined as a witness with a view to consider whether the confession should or should not be admitted in spite of the irregularity.

Daw Mya Than Nu for the appellants.

Ba Kyaing (Government Advocate) for the respondent.

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* Criminal Appeals No. 56, 61 and 62 of 1957.

Appeal from the order of Mr. R. W. Mundt, Sessions Judge of Naga Hills District, dated the 15th day of January, 1957 passed in Criminal Regular Trial No. 1 of 1956.

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The judgment of the Court was delivered by

U SAN MAUNG, J.—In Criminal Regular Trial No. 1 of 1956 of the Sessions Judge, Naga Hills District, the appellants Ba Pe, Ai Htwe and Ai Yoe were sent up for trial under sections 302 and 392 of the Penal Code for the offence of robbery with murder of one Maung Htwe (*a*) Maung Hla Shein. At the conclusion of the trial the appellant Ai Htwe was convicted of the offence punishable under section 302(*1*) (*b*) for the murder of the deceased Ko Htwe and under section 404 of the Penal Code for criminal misappropriation of the cash and jewellery belonging to the deceased. The appellant Ba Pe and Ai Yoe were convicted of the offence punishable under section 201 of the Penal Code, for causing disappearance of the evidence of murder by assisting in the disposal of the dead body. They were also convicted of the offence punishable under section 404 of the Penal Code for criminal misappropriation of the cash and jewellery belonging to the deceased. The sentence on the appellant Ai Htwe was death for the offence of murder and 2 years' rigorous imprisonment for the offence under section 404 of the Penal Code. The sentences on each of the appellants Ba Pe and Ai Yoe were 7 years' rigorous imprisonment for the offence under section 201 of the Penal Code and 2 years' rigorous imprisonment for the offence under section 404 of the Penal Code, the sentences to run concurrently.

The facts of the case which have been fully set out in the judgment of the learned Sessions Judge are briefly these:

On the 5th *lazan* of *Tabodwe* 1317 B.E. corresponding to the 16th of February 1956, a dead body was found on a sand bank in the Chindwin

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river near Khaungkhan village. There were eight injuries on the body, which was partially decomposed, and in the opinion of the doctor who performed the post-mortem examination, they were incised wounds caused by sharp and heavy weapons. The dead body was subsequently identified to be that of a precious stones seller by the name of Maung Htwe and police investigation pointed to the three appellants being concerned with the murder. The appellants Ba Pe and Ai Yoe were arrested and precious stones, cash and clothings belonging to the deceased were recovered from their possession. Ai Htwe was subsequently arrested and cash and precious stones were also found with him. All the three appellants later gave confessions, implicating themselves of the murder and the robbery of the deceased Maung Htwe. These confessions were, however, rejected by the learned trial Judge on the ground that they were not voluntary, his main reason for coming to this conclusion being that they were in a narrative form when they should have been in the form of questions and answers and that one of the persons who gave the confession, namely, the appellant Ai Htwe, was not sufficiently conversant with the Burmese language to be able to give a statement without the help of an interpreter. However, the learned trial Judge, examined all the appellants on oath on behalf of their own defence as provided for in section 342 of the Criminal Procedure Code as substituted by Burma Act No. 13 of 1945. In his statement on oath the appellant Ba Pe retracted the statement made by him in his confession that the murder was the result of the conspiracy between him and the other two appellants. Instead, the appellant Ba Pe stated that what really happened was that Ai Htwe had cut the deceased Maung Hla Shein in

the course of a quarrel in which the deceased tried to catch hold of Ba Pe's *dah* to cut Ai Htwe. Ba Pe admitted in his statement on oath that he helped in the disposal of the dead body and in receiving some of the cash and precious stones belonging to the deceased as his share of the spoils.

The appellant Ai Htwe in his statement on oath denied that the deceased who was known to him as Bo Khin Maung was murdered in pursuance of a conspiracy between him and the two other appellants. Instead, he said the deceased insulted him by saying " you Shans are fools ". In the course of the quarrel which ensued, the deceased tried to snatch the *dah* which Ba Pe had, slung on his shoulders. At that moment he (Ai Htwe) cut the deceased on the neck. Subsequently Ba Pe and Ai Yoe helped him to throw the dead body which was weighted with stones, into the river. The cash and precious stones found in the possession of the deceased were divided between the three of them.

The appellant Ai Yoe in giving evidence on oath said that he was not present at the time the deceased was cut by Ai Htwe. He heard the sound of quarrel and saw Ai Htwe cutting the deceased at a distance of about 40 or 50 fathoms away from him. Later, he assisted Ba Pe and Ai Htwe in throwing the dead body weighted with stones, into the river. He received some cash and precious stone and clothings as his share of the spoils.

The learned trial Judge relied mainly upon the evidence of the three appellants in coming to the conclusion that the murder was committed by the appellant Ai Htwe and that the two other appellants Ba Pe and Ai Yoe had merely assisted Ai Htwe in causing the disappearance of the dead body. Therefore, the learned Advocate for the appellants has

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argued as a preliminary point in this appeal that the whole trial is bad because the provision of section 342 of the Criminal Procedure Code as amended by Burma Act No. 13 of 1945 is inapplicable to the trial of accused persons in the Naga Hills District. In our opinion this contention must be allowed to prevail.

The present Naga Hills District forms part of the Sagaing Division as one of the administrative units within Burma proper. It is not within the Special division of Chins as Acts Nos. 48 and 49 of 1948, namely Chin Special Division Act of 1948 and Chin Special Division (extension of laws) Act 1948 have no application to this area. (See Ministry of Home Affairs Notification No. 423, dated the 1st of April 1948.) Accordingly, the Chin Hills Regulations of 1896 are still in force within the Naga Hills District, as existing law. This was the decision arrived at by a Bench of this Court in Criminal Appeal No. 388 of 1954 relating to Sessions Trial No. 1 of 1954 of the Sessions Judge. Naga Hills District. The appellant in that case was a non-Chin and it was accordingly held that Burma Act 33 of 1947 which amended section 302 of the Penal Code applied to him as the law for the time being in force in Upper Burma *vide* section 4(1) of the Chin Hills Regulations 1896.

However, it was not considered in that case whether or not the Code of Criminal Procedure (Amendment Act) 1945 [Burma Act 13 of 1945] in so far as it amended sections 256 and 342 of the Criminal Procedure Code was applicable to the Naga Hills District.

Now sub-section (4) of section 4 of the Chin Hills Regulations 1896 provides *inter alia* that section 4 and section 9 shall apply to all persons within the Chin Hills and sub-section (2) of section 9

thereof enacts that the Sessions Judge when taking cognizance of an offence as a Court of Original Judisdiction shall follow the procedure prescribed by the Code of Criminal Procedure 1882, for the trial of warrant cases by Magistrates. Subsequently, by Political Department Notification No. 11, dated 27th of March 1922 it was declared that on and with effect from the 9th of March 1922 the Criminal Procedure Code 1898 with the modifications set forth in the schedule appended to the notification shall be applicable to Chins in the Chin Hills. Among the modifications, the one most worthy of note is that all offences against private persons and property, with the exception of robbery or dacoity committed or attempted to be committed by organized gangs or members of such gangs, may be compounded with the permission of the Court by the individual who has been injured.

There can be no doubt whatsoever that in the case of Chins residing in the Naga Hills District, amendments to section 256 and 342 of the Criminal Procedure Code of 1898 by Burma Act 13 of 1945 cannot possibly apply unless Burma Act 13 of 1945 is extended to the Chins in the Naga Hills District under section 3 of the Chin Hills Regulations of 1896. The question which therefore arises for our consideration is:

Are the amendments to sections 256 and 342 of the Criminal Procedure Code by Burma Act 13 of 1945 applicable to the non-Chins in the Naga Hills District as the law for the time being in force in Upper Burma *vide* section 4(1) of the Chin Hills Regulations 1896?

The answer to our mind is in the negative. Section 9(2) of the Regulation is specific in that the procedure to be followed in the trial of cases is the

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procedure prescribed by the Code of Criminal Procedure 1882 for the trial of warrant cases by Magistrates.

Section 256 of the Criminal Procedure Code as substituted by item 55 of Act 13 of 1945 reads as follows:

"256. (*1*) If the accused refuses to plead, or does plead or claims to be tried, he shall be required to state forthwith whether he wishes to cross-examine any, and, if so, which of the witnesses for the prosecution whose evidence has been taken. If he says that he does so wish, the witnesses named by him shall be recalled and, after cross-examination and re-examination (if any), they shall be discharged. The evidence of any remaining witnesses for the prosecution shall next be taken, and after cross-examination and re-examination (if any) they also shall be discharged. The accused shall then be called upon to enter upon his defence, and if he puts in any written statement it shall be filed with the record.

(2) On entering upon his defence the accused shall be asked whether he desires to give evidence on his own behalf, and the Magistrate shall warn him in the manner required by sub-section (*1*) of section 342. If the accused decides to give evidence, his evidence shall next be taken, and after his cross-examination and re-examination (if any) the evidence of witnesses for the defence (if any) shall be taken. If the accused declines to give evidence, he shall, before the evidence of the witnesses for the defence is taken, be examined in the manner provided by sub-section (*2*) of section 342."

The amended section introduces a radical change in the procedure, which, cannot in our opinion, be effective in the Naga Hills District without amendment of section 9(2) of the Chin Hills Regulations 1896. Accordingly, neither of the amended section 256 or 342 of the Criminal Procedure Code can apply to the non-Chins in the Naga Hills District.

It must be noted in passing that one of the appellants, Ba Pe who is a Burman domiciled in the Chin Hills is a Chin as defined in sub-section (3) of

section 2 of the Chin Hills Regulations 1896. The other two appellants, Ai Yoe and Ai Htwe being Shans who have not adopted the customs and language of the Chins, they cannot be Chins as defined therein.

The position therefore is as follows: So far as the Penal Code is concerned Ai Htwe and Ai Yoe being non-Chins will be governed by Burma Act 33 of 1947 which amends section 302 of the Penal Code, this being the law prevailing in Upper Burma. As regards Ba Pe who is technically a Chin the law applicable to him will be section 302 of the Penal Code as it stood before it was amended by Burma Act 33 of 1947.

As regards procedure, the trial of all the three accused must be according to the procedure prescribed by the Code of of Criminal Procedure 1882 for the trial of warrant cases by Magistrates.

As all the appellants have been convicted mainly on the strength of their own evidence on oath, their convictions and sentences must be considered as bad in law and accordingly set aside.

We would therefore allow the appeals of the three appellants, set aside the convictions and sentences against them as set out above and direct that they be retried by the learned Sessions Judge, Naga Hills District in the light of the remarks made above. For the guidance of the learned Sessions Judge we would cite the case of *Than Myint* v. *The Union of Burma* (1) where it was held that to constitute a premeditated killing it is necessary that the accused should have had time to reflect, with a view to determine whether, he would kill or not, and that he should have determined to kill as a result of that reflection. In other words the

(1) (1953) B.L.R. 342.

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killing should be a predetermined killing upon consideration, and not a sudden killing under the momentary excitement and impulse of passion upon provocation given at the time or so recently before as not to allow time for reflection.

We would also observe that where there is any irregularity in the recording of a confession by a Magistrate empowered to record such confessions the Magistrate himself can be called and examined as a witness with a view to consider whether the confession should or should not be admitted in spite of the irregularity.

APPELLATE CIVIL.

Before U Chan Tun Aung, Chief Justice, U San Maung, J. and U Ba Thoung, J.

DAW HLA OHN AND CO. (APPLICANT)

v.

THE INCOME-TAX APPELLATE TRIBUNAL (RESPONDENT).*

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Mar. 11.

Appeals to Assistant Commissioner of Income-Tax against orders of assessment by Income-Tax Officer—Rejection of application made during pendency of the appeals for permission for registration of the firm under Rule 2 (c) of the Burma Income-Tax Rules, (vide Notification No. 37 of the Office of the Financial Commissioner, dated the 21st April 1939)—Further appeals to the Income-Tax Appellate Tribunal under s. 33-A, Burma Income-Tax Act, against the confirmation of the Income-Tax Officer's assessment and also against the rejection of the application for permission by the Assistant Commissioner, dismissal of—Application to Income-Tax Appellate Tribunal under s. 66 (1) Burma Income-Tax Act to state a case to High Court, refusal thereof—Application under sub-section (2) of s. 66, Burma Income-Tax Act to the High Court requiring the Income-Tax Appellate Tribunal to state a case on question of Law.

Held: The rule that the assessee requiring the Income-Tax Appellate Tribunal to refer questions of Law to High Court should formulate the questions he wants to refer is a rule of practice based on consideration of convenience to protect the Court from unnecessary application under sub-s. (2) of s. 66 of the Income-Tax Act.

The Appellate Tribunal is not bound to refer only the questions so formulated. In cases where the Appellate Tribunal refused to state the case under sub-s. (2) on the ground that no point of law arises, the High Court, under sub-s. (2) if not satisfied with the correctness of the Appellate Tribunal's view, can require the Appellate Tribunal to state the case, *i.e.* the case which the Appellate Tribunal ought to have stated under sub-s. (2) and to refer the case to the High Court. However, the actual framing of the questions rests with the Appellate Tribunal.

Held also: An application under Rule (2) (*c*) of the Income-Tax Rules is not by itself an application for registration. All that the Appellate Assistant Commissioner of Income-tax is in effect empowered to do under that Rule is either to condone the delay, or to refuse to condone the delay in preferring an application for registration of a firm under s. 26-A of the Income-Tax Act. The Appellate Assistant Commissioner of Income-Tax has no authority under that Rule either to allow or disallow registration.

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*Civil Reference Nos. 9 and 10 of 1955. Under s. 66 (2) of the Burma Income-Tax Act.

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Held further: A decision affecting the very quantum of assessment according to whether a particular assessee firm is registered or not registered, or whether permission for registration should or should not be granted, or whether there are sufficient materials to justify the rejection or acceptance of such an application, even though such a decision can be said to have been left to the direction of the Income-Tax authorities, yet the question as to whether such discretion has been exercised perversely, illegally or arbitrarily is a question of Law.

Rai Sahib Chranji Lal and Sons v *Commissioner of Income-Tax, Punjab*, (1937) 5 I.T.R. 44; *Mole Shah and Co. Karad* v. *Commissioner of Income-Tax, Bombay South, Bombay*, (1952) 22 I.T.R. 39.

Horrocks for the applicant.

Kyaw Thoung (Government Advocate) for the respondent.

U CHAN TUN AUNG, C.J.—These two matters should not have been treated as civil references. They arise out of an application by Daw Hla Ohn and Company, a partnership firm carrying on business at No. 62, 29th Street, Rangoon, to this Court under sub-section (2) of section 66 of the Burma Income-Tax Act requiring the Appellate Tribunal to state a case on the ground that a question of law has arisen. The applicant firm consisting of three partners, namely, Daw Hla Ohn, U Ba Lat and Mrs. C. M. Devi, was assessed to income-tax for the years 1951-52 and 1952-53 in two separate proceedings by the Income-tax Officer, Central Circle, section I. Against the orders of assessment in the said two proceedings the assessee firm preferred an appeal to the Assistant Commissioner of Income-tax who dealt with the said appeal in two separate proceedings, namely, Appeals Nos. CEN 76/53-54 and CEN 77/53-54.

Pending the hearing of the two appeals before the Assistant Commissioner of Income-tax, it appears that the assessee firm, taking advantage of the provisions of Rule 2 (*c*) of the Burma Income-tax Rules,

(*vide* Notification No. 37 of the Office of the Financial Commissioner dated the 21st April 1939), sought for permission of the Assistant Commissioner of Income-tax to make an application for registration of the firm. Here, we may observe incidentally, that the said Rules published in Notification No. 37, dated 21st April 1939 of the Office of the Financial Commissioner have been amended by Notification No. 38, dated the 11th September 1956 and Notification No. 49, dated the 13th December, 1956. In view of these subsequent amendments, which substantially alter the previous Rules, a point has arisen before us as to whether in determination of the question involved in the two assessement proceedings, we should be guided by the old Rules or by the new Rules published in Financial Commissioner's Notification No. 49, dated the 13th December 1956. Both the learned Government Advocate and the applicant's Counsel Mr. Horrocks agree—and in our opinion rightly too—that the new Rules are not applicable to the present proceedings, inasmuch as the new Rules do not operate retrospectively. We fully agree in this submission there being no expressed or implied retrospectivity of the new Rules published in Notification No. 49, dated the 13th December 1956. Therefore, we will be guided in the consideration of this present application, so far as they are relevant, by the old Rules published in Notification No. 37, dated the 21st April 1939. Now, both the applications seeking permission to make an application for registration of the firm were rejected by the Assistant Commissioner of Income-tax. We may, here, point out that if the permission sought for in both the proceedings were granted by the Assistant Commissioner of Income-tax acting under Rule 2 (*c*) of the Burma Income-tax

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Rules, the applications would have to be sent to the Income-tax Officer concerned who is the only competent authority to deal with such applications in accordance with the provisions of section 26-A of the Income-tax Act and the relevant rules made in that regard. However, in rejecting the applications seeking permission for registration of the firm, the Assistant Commissioner of Income-tax remarked in Appeal No. CEN 76/53-54 as follows:

"Before me the appellants filed a fresh Instrument of Partnership dated the 31st October 1953 and prayed for leave to submit their application for registration of their firm under Rule 2 (*c*). According to this new Instrument there had been a change in the constitution of their firm owing to the death of Daw Hla on the 3rd September 1953 and her shares had been also taken over by Daw Hla Ohn.

From the facts stated above it is quite apparent that the appellants had no operative Instrument of Partnership during the period from the 19th October 1952 to the 31st October 1953 or up to the time when the Assessment Order was passed by the Income-tax Officer, *i.e.*, on the 9th October 1953, to enable them to file their application under Rule 3 or Rule 6 of the Burma Income-tax Rules.

Therefore, in view of the fact that their firm must be deemed to have come to an end on the expiry of three years as specified in the Instrument and that there was no operative Instrument of Partnership I hold that the appellants were not entitled in law to apply for registration for the assessment year 1951/52. Permission prayed for is therefore rejected";

and in Appeal No. CEN 77/53-54 as follows:

"At the time of making the assessment, *i.e.*, on the 9th October 1953, the appellants had no operative Instrument of Partnership to enable them to apply for registration under Rule 3 or Rule 6 of the Burma Income-tax Rules nor had they any inherent right to enjoy the benefits of registration as their assessment had to be made by the Income-tax Officer under Section 23 (*4*) of the Act.

On the above observations I see no warrant to interfere with the assessment. It is therefore confirmed and the appeal accordingly dismissed."

The above two orders were passed by the Assistant Commissioner in one and the same relevant appellate proceedings. In both the appeals the Assistant Commissioner held that the assessments made by the Income-tax Officer for the relevant two periods were fully justified, being not arbitrary or excessive in any way; and at the same time, as could be seen from his remarks quoted above, he dismissed the application seeking permission for registration holding that the assessee-firm "is not entitled in law to apply for registration."

As against the said order of the Assistant Commissioner the assessee-firm preferred two appeals, namely, Nos. 29 of 1954 and 30 of 1954, to the Income-tax Appellate Tribunal under section 33-A of the Burma Income-tax Act not only as against the confirmation of the Income-tax Officer's assessment, but also as against the order of the Assistant Commissioner refusing to grant the permission under Rule 2 (*c*) of the Burma Income-tax Rules for registration of the assessee's firm. The Income-tax Appellate Tribunal, however, after admitting the two appeals passed orders confining itself solely to the question as to whether the rejection by the Assistant Commissioner of the application to grant permission for registration of the firm was perverse or not. Holding that it was not perverse, the Appellate Tribunal dismissed both the appeals. It appears that, although it was contended on behalf of the assessee-firm, that the decision of the Assistant Commissioner of Income-tax should not only be considered from the aspect of perversity, but in view of the patent illegality in that the Assistant Commissioner of Income-tax had exercised a jurisdiction not vested in him by law, or in other words, had exceeded his jurisdiction in giving a decision not authorized

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by law, there had also been an arbitrary decision, thereby involving questions of law; yet the Income-tax Appellate Tribunal refused to accept this submission and refused to interfere with the decision of the Assistant Commissioner of Income-tax. Thereupon, the assessee-firm applied to the Appellate Tribunal under section 66 (*1*) of the Burma Income-tax Act to refer to this Court the following three questions as Questions of law arising out of the aforesaid appeals :—

(1) Whether the Income-tax Appellate Tribunal, while passing orders in the Second Appeal, was not bound to examine the correctness or otherwise of the reasons given by the Assistant Commissioner of Income-tax, in his Appellate Order, for having exercised his discretion in refusing permission to the assessee to apply to the Income-tax Officer for registration of the Firm under Rule 2 (*c*) of the Burma Income-tax Rules.

(2) Whether the Income-tax Appellate Tribunal was not entitled, in its capacity as the higher judicial Authority, to correct the Assistant Commissioner of Income-tax in having exercised his discretion on unsustainable grounds or incorrect finding of facts.

(3) Whether the Income-tax Appellate Tribunal was not bound to correct the order of the Assistant Commissioner of Income-tax after examining whether the Assistant Commissioner erred in law in withholding his permission to enable the Petitioner to apply for Registration under Rule 2 (*c*).

By its order, dated 11th February 1955, the Appellate Tribunal, however, refused to state the case holding that they were not really questions of law. In refusing to entertain the application to state the case the learned Appellate Tribunal observed, *inter alia*, that it was not concerned with the correctness, incorrectness, legality or illegality of the order of the Assistant Commissioner of Income-tax, but that it was only concerned, in the light of the two rulings— *Rai Sahib Chranji Lal and Sons* v. *Commissioner of*

Income-tax, Punjab (1) and *Mote Shah and Co. Karad* v. *Commissioner of Income-tax, Bombay South, Bombay* (2)—with the question whether or not the Assistant Commissioner of Income-tax was acting perversely in refusing the permission to register the firm. It also appears that the Appellate Tribunal refused to state a case by holding that there was no question of law involved, but that the issue raised concerned only as to the exercise of discretion available to the Assistant Commissioner of Income-tax under Rule 2 (*c*) of the Burma Income-tax Rules. It further holds that there being no perversity in the decision of the Assistant Commissioner of Income-tax, it did not see how the questions formulated arise from its order dismissing the appeals in exercise of its power available under section 33-A of the Burma Income-tax Act. Hence the application by the assessee under sub-section (*2*) of section 66 asking us to require the Appellate Tribunal to state the case.

The assessee-firm has, however, in its application before us recast the three questions of law raised by it into one, as follows :

> " In an appeal against the assessment to the Appellate Tribunal under section 33-A of the Burma Income-tax Act in which the only grounds put forward are those relating to the propriety of the decision of the Assistant Commissioner of Income-tax declining permission to the assessee-firm to submit an application for registration of the firm to the Income-tax Officer under Rule 2 (*c*) of the Burma Income-tax Rules, is the jurisdiction of the Appellate Tribunal with reference to such decision of the Assistant Commissioner confined to an enquiry whether or not the said decision was perverse or does it extend to examining and determining the correctness, legally and/or factually of the said decision ? "

There are some Indian decisions which lay down that the assessee requiring the Appellate Tribunal to

(1) (1937) 5 I.T.R. 44. (2) (1952) 22 I.T.R. 39.

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refer questions of law to High Court should formulate the questions he wants to refer. However, those are rules of practice based on consideration of convenience, to protect the Court from unnecessary applications under sub-section (*2*) or section 66 of the Income-tax Act; but in our view the Appellate Tribunal is not bound to refer only the questions so formulated. In cases where the Appellate Tribunal refused to state the case under sub-section (*2*) on the ground that no point of law arises, the High Court, under sub-section (*2*) if not satisfied with the correctness of the Appellate Tribunal's view, can require the Appellate Tribunal to state the case, *i.e.*, the case which the Appellate Tribunal ought to have stated under sub-section (*2*) and to refer the case to the High Court. However, the actual framing of the questions rests with the Appellate Tribunal. Now, in view of the special circumstances presented in these two cases, we are of the view that a *prima facie* question of law arises for consideration. It should be noted that an application under Rule 2 (*c*) of the Income-tax Rules is not by itself an Application for registration. All that the Appellate Assistant Commissioner of Income-tax is in effect empowered to do under that Rule is either to condone the delay, or to refuse to condone the delay in preferring an application for registration of a firm under section 26-A of the Income-tax Act. The Appellate Assistant Commissioner of Income-tax has no authority under that Rule either to allow or disallow registration. But here in the instant cases, the order of the learned Assistant Commissioner of Income-tax clearly shows that he has taken upon himself the task of deciding whether he should allow or disallow registration of the assessee-firm, instead of merely considering whether he should

grant the permission sought for or not. In our view there is considerable force in the submission made by the assessee's Counsel that registration or non-registration of the firm being a matter that goes to the very root of any assessment of income-tax, a question which directly arises out of such matter, whether the Income-tax Appellate Tribunal had jurisdiction only to enquire whether the decision of the Assistant Commissioner in that regard was perverse or whether it extended to examining correctness, legality or otherwise of the Assistant Commissioner's order, involves question of law. In our view the decision in such an important question as affecting the very quantum of assessment according to whether a particular assessee-firm is registered or not registered, or whether permission for registration should or should not be granted, or whether there are sufficient materials to justify the rejection or acceptance of such an application, even though such a decision can be said to have been left to the discretion of the Income-tax authorities, yet the question as to whether such discretion has been exercised perversely, illegally or arbitrarily seems to us to involve a question of law.

Having regard to the above circumstances, we do not, however, wish to suggest in what form the question of law involved should be stated to us by the Appellate Tribunal, but we feel that there is sufficient indication in the application of the assessee-firm as to the point of law it has raised to enable the Appellate Tribunal to formulate one, and we hereby require the Appellate Tribunal to state the case and refer it to this Court. The costs of these applications shall follow the result of reference that will follow hereafter.

APPELLATE CIVIL.

Before U Chan Tun Aung, Chief Justice and U San Maung, J.

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Mar. 29.

DAW SAW MYINT (APPELLANT)

v.

DAW MYA THIN (RESPONDENT).*

Administration Suit—Order for payment of maintenance allowance for the Respondent and her four children during the pendency of the administration suit—Such order, whether a "Judgment" within the meaning of s. 20 of the Union Judiciary Act or an appealable order under Order 43, Rule 1 of the Civil Procedure Code.

The Respondent filed an administration suit against the appellant and obtained an order for payment of maintenance allowance during the pendency of the suit.

The appellant appealed against this order.

Held: The appeal is not maintainable, because the order is neither a judgment within the meaning of s. 20 of the Union Judiciary Act, nor an appealable order under Order 43, Rule 1, Civil Procedure Code.

Maganlal Pranjivan Mehta v. *Mrs. Champakunvar Ratilal Mehta and others*, (1952) B.L.R. (H.C.) 192; *Dayabhai Jiwandas and others* v. *A. M. M. Muruggapa Chettiar*, (1935) 12 Ran. p. 457; *T. C. Leong and one* v. *U Po Thein*, (1953) B.L.R. (H.C.) p. 1, referred to.

Kyaw Myint for the appellant.

Ba Tin for the respondent.

Judgment of the Court was delivered by

U CHAN TUN AUNG, C.J.—A preliminary question has arisen as to whether the present appeal against the order of the learned Judge on the Original Side is maintainable in view of section 20 of the Union Judiciary Act.

The respondent Daw Mya Thin filed a suit against the appellant Daw Saw Myint for administration of the estate of U Ba Win, B.Sc., B.L., Advocate

* Civil Misc. Appeal No. 26 of 1956, against the order of the Judge, Original Side, High Court in Civil Regular Suit No. 19 of 1956.

of the High Court, who died in Rangoon on the 21st March, 1955. The respondent claimed that she was the wife of the late U Ba Win, with whom four children were born, namely :—

(1) Dora Win (*a*) Tin Tin Win ;
(2) Michael Win (*a*) Mg. Myo Set ;
(3) Tommy Win (*a*) Mg. Htay Myint ; and
(4) Cissie Win (*a*) Su Su Aye.

The respondent also alleged *inter alia* that Daw Saw Myint is a widow of the late U Ba Win.

During the pendency of the suit the respondent asked for the appointment of a Receiver to take charge of the estate of the late U Ba Win and also claimed maintenance allowance for herself and the four children. The learned Judge on the Original Side after considering the affidavits filed by the parties and also the documentary evidence produced before him, directed the payment of K 300 per month as maintenance allowance for the respondent and her four children during the pendency of the administration suit, but he, however, rejected the application for the appointment of a Receiver of the suit estate. The appeal now before us is as against the order of the learned Judge on the Original Side directing payment of maintenance allowance out of the estate.

The question therefore is whether the order against which the appeal is now being preferred is a "judgment" within the meaning of section 20 of the Union Judiciary Act or, if it is not a judgment, whether it is an appealable order under Order 43, rule 1 of the Civil Procedure Code.

There have been numerous decisions on this question and after reference to them, we have not the slightest doubt that the present appeal is not

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U CHAN TUN AUNG, C.J.

maintainable, because it is neither a judgment within the meaning of section 20 of the Union Judiciary Act, nor an appealable order under the provisions of the Civil Procedure Code. What is a judgment within the meaning of section 20 of the Union Judiciary Act has been carefully considered in *Maganlal Pranjivan Mehta* v. *Mrs. Champakunvar Ratilal Mehta and others* (1), following the decision in *Dayabhai Jiwandas and others* v. *A. M. M. Murugappa Chettiar* (2). A judgment has been defined as a decree made in the suit whereby the rights of the parties are determined. It was also held that the word "judgment" in section 20 of the Union Judiciary Act should not be accorded a wider meaning than it possesses under the corresponding clause 13 of the Rangoon Letters Patent. See also *T. C. Leong and one* v. *U Po Thein* (3).

In the light of these judicial decisions we must hold that this appeal is not maintainable and it is therefore dismissed with costs. Advocate's fee three gold mohurs.

U SAN MAUNG, J.—I agree.

(1) (1952) B.L.R. (H.C.) p. 192. (2) (1935) 13 Ran. p. 45.
(3) (1953) B.L.R. (H.C.) p. 1.

ရာဇဝတ်အယူခံ

တရားလွှတ်တော်ဝန်ကြီး ဦးအောင်ခိုင်ရွှေတွင်

ဖါတိမာဘိဘိ (ခေါ်) မေသန်းနှဲ့ (ပြင်ဆင်လျှောက်ထားသူ) ၁၉၅၇ မေလ ၃၁။

နှင့်

အေ၊ အမ်၊ ရှာရာဖီ (ပြင်ဆင်ရန်လျှောက်ထားခံရသူ)*

ရာဇဝတ်ကျင့်ထုံး ကိုခဉ်ပဒေပုဒ်မ ၄၀၈။ ကလေးစရိတ်ရလိုကြောင်း၊ ဘင်က ကလေးသည် မိမိသားဟုတ် မဟုတ်ကိုသွေးစစ်ကြည့်ရန်လျှောက်လွှာ။ ဆုံးဖြတ်ချက်၊ ၁၉၅၆ခုနှစ် ကလေးအရေးကိုဖေါက်ထုတ်စစ်ဆေးနိုင်သည့် အာဏာများကို ရာဇဝတ်ကျင့်ထုံးကိုခဉ်ပဒေထဲတွင် မည်သည့်တရားသူကြီးကိုမျှ ပေးခြင်းမထား၊ လျှောက်လွှာပယ်လိုက်သည်။

ပြင်ဆင်ရန်လျှောက်ထားသူအတွက် ဦးကျော်ခင်။

ပြင်ဆင်ရန်လျှောက်ထားခံရသူအတွက် မစ္စတာ အာ (ရဲ) ၊ အီး၊ ဟင်ဒါဆင်။

ဦးအောင်ခိုင်။ ။ရန်ကုန်မြို့၊ တတိယရာဘက်ရာဇဝတ် တရားသူကြီးရုံး၊ ၁၉၅၅ ခုနှစ်၊ ရာဇဝတ်အသေးအဖွဲမှုအမှတ် ၄၅ တွင်၊ လျှောက်ထားသူ ဖါတိမာဘိဘိ (ခေါ်) မေသန်းနှဲ့က၊ အေ၊ အမ်၊ ရှာရာဖီအပေါ်တွင် ကလေးစားစရိတ်ငွေ ၁၀၀ ရလိုကြောင်းဖြင့် လျှောက်ထားသည်။ လျှောက်ထားသူက ၎င်းမှာ အေ၊ အမ်၊ ရှာရာဖီ၏ မဟာမေဒင် ဘာသာထုံးစံအရလက်ထပ်မယား ဖြစ်သည်ဟုဆိုသည်။

အေ၊ အမ်၊ ရှာရာဖီက၊ လျှောက်ထားသူနှင့် ထိုးတို့အကြောင်လင်မယားဖြစ်ခဲ့သော်လည်း မေသန်းနှဲ့ရသည့်ကလေးမှာ ၎င်းနှင့်ရသော ကလေးမဖြစ်နိုင်၊ သို့ဖြစ်၍ ကလေးစားစရိတ်မပေးနိုင်ဟုချေပသည်။

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* ၁၉၅၇ ခုနှစ်၊ ရာဇဝတ်ဒြိုင်ဆင်မှုအမှတ် ၄၃ (ခ)၊

† ၁၉၅၆ ခုနှစ်၊ ရာဇဝတ်ပြင်ဆင်မှုအမှတ် ၆၄ တွင် ချမှတ်သော ၁၉၅၇ ခုနှစ်၊ မတ်လ ၂၀ ရက်နေ့စွဲပါ ရန်ကုန်နှင့်တံသာဝတီခရိုင် (စက်ရွှင်) တရားသူကြီး၏ အမိန့်ကို ပြန်၍ဆင်ခြင်မှု။

၁၉၅၇

ဖေါ်တိမာ ဘိဘိ (ခေါ်) မေသန်းခဲ့ နှင့် အေးအမ်း ရွာ ဇီး။

ဦးအောင်ဒိုင်း။

ဤအမှုကိုစစ်ဆေးနေစဉ်လျှောက်ထားခံရသူ အေးအမ်း ရွာရာဇီးက၊ ကလေးသည် မိမိ၏သားဟုတ်သည်မဟုတ်သည်ကို သွေးစစ်ကြည့်ပါရန် လျှောက်ထားသည်။ ဤလိုအမှုမျိုးဌ သိရသလောက် ယခင်ကဤကဲ့သို့တခါမျှလျှောက်ထားခြင်းမရှိခဲ့ဘူးပါ။ သို့ပါသော်လည်း တတိယရာဘာက်ရာဇဝတ်တရားသူကြီးက၊ အမှုကိုတရားမျှတစွာ ဆုံးဖြတ်နိုင်စေခြင်းအလို့ငှါ၊ ကလေး၏သွေးကို စစ်ဆေးကြည့်ရန်၊ လျှောက်ထားသူက ကလေးကိုထုတ်ပေးရမည်ဟု အမိန့်ချမှတ်ခဲ့သည်။ ဤအမိန့်ကို မကျေနပ်၍ မေးသန်းနွဲက ဟံသာဝတီနှင့်ရန်ကုန်ခရိုင် စက်ရှင်ရုံးသို့ လျှောက်ထားရာ၊ စက်ရှင်တရားသူကြီးက တတိယရာဘာက်ရာဇဝတ်တရားသူကြီး၏အမိန့်မှာ၊ တရားဝင်သောအမိန့်မဟုတ်သဖြင့် ၎င်း၏ အမိန့်ကိုရုပ်သိမ်းပေးရန် ၎င်း၏ထောက်ခံချက်နှင့်တကွ ဤရုံးတော်သို့ ၎င်း၏အမှုဘွဲ့ ၁၉၅၆ ခုနှစ်၊ ရာဇဝတ်ပြင်ဆင်မှုအမှတ် ၆၄ ကိုပါတင်ပို့လိုက်သည်။

ဥပဒေအရ၊ ကလေး၏သွေးကို ဖေါက်ထုတ်စစ်ဆေးနိုင်သည့် အာဏာများကို ရာဇဝတ်ကျင့်ထုံး ကိုဥပဒေထဲတွင် မည်သည့် တရားသူကြီးကိုမျှပေးရှိမထား၊ လျှောက်ထားခံရသူဘက်မှ၊ ဤကဲ့သို့ ကလေး၏ သွေးကိုစစ်ဆေးပါမှ အမှုကို ဆုံးဖြတ်ချက်ပေးရာ၌ ပို၍လွယ်ကူလိမ့်မည်ဟု လျှောက်သားရုံးမှအပ အခြားချေပချက်များထုတ်ဖေါ်မပြောနိုင်။

အထက်ပါအကြောင်းများကြောင့် ရန်ကုန်နှင့် ဟံသာဝတီ ခရိုင်စက်ရှင်တရားသူကြီး၏ ထောက်ခံချက်ကိုလက်ခံ၍၊ တတိယရာဘာက် ရာဇဝတ်တရားသူကြီးကငင်း၏ရုံး ၁၉၅၅ ခုနှစ်၊ ရာဇဝတ်အသေးအဖွဲ့ အမှုအမှတ် ၄၅ တွင် ၁၉၅၆ ခုနှစ်၊ အောက်တိုဘာလ ၂၃ ရက်နေ့က ချမှတ်လိုက်သောအမိန့်ကို ပယ်ဖျက်လိုက်သည်။

APPELLATE CRIMINAL.

Before U Chan Tun Aung, Chief Justice.

MAUNG SO SAN (APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT).*

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Oct. 4.

Suppression of Corruption Act, s. 4 (1)/4 (2)—"Acquittal" on ground of defective sanction—Appellant re-arrested and again sent up under requisite sanction—Application to Quash the second proceeding—S. 403 (1), Criminal Procedure Code—S. 26, General Clauses Act—Sentence served under an abortive trial cannot be treated as served under a lawful conviction.

The applicant was convicted and sentenced to one year's rigorous imprisonment under s. 4 (*1*)/4 (*2*) of the Suppression of Corruption Act, 1948.

On appeal, the High Court set aside the conviction and "acquitted him" because of defective sanction. By this time, the applicant had already served his sentence.

He was re-arrested and again sent up for trial after obtaining proper sanction.

The applicant filed an application to quash the trial proceedings.

Held : If the trial of the applicant is based upon an invalid sanction, then the trial is void and that the "acquittal" or "conviction" thereunder is also void.

The first trial of the Applicant under a defective sanction was a nullity and that the ultimate order acquitting the applicant by the appellate Court cannot operate as a bar under s. 403, sub-s. (*1*) Criminal Procedure Code to the institution of a fresh prosecution against the applicant.

Yusofalli Mulla Noorbhoy v. *The King*, 76 I.A. (1948-49) p. 158 ; *Maung Chit Pe and one* v. *The Union of Burma*, (1948) B.L.R. p. 175, followed.

Held also : The former trial being no trial *ab initio*, because of a defective sanction, the order quashing the case could only operate as an order of discharge and not as acquittal.

In Re. C. Devanugraham, A.I.R. (1952) Mad. p. 725, referred to.

Held further : The principle underlying s. 26 of the General Clauses Act is the same as that in s. 403 of the Criminal Procedure Code. One is complementary to the other in reiterating the fundamental principal of

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* Criminal Revision No. 91-B of 1957.

Application to quash the proceeding in Criminal Regular Trial No. 19 of 1957 of the Court of the Special Judge (3) (S.I.A.B. & B.S.I.A. Act), Rangoon.

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criminal law that no person shall be put in jeopardy of his life and liberty more than once ; and s. 403 of the Criminal Procedure Code is no more than an elaboration of this principle in detail. Moreover, the General Clauses Act is essentially, an Act to be invoked only for purposes of interpretation of legislative enactments and statutes.

Held also: A sentence served following a conviction under an abortive trial cannot, in law, be treated as sentence served under lawful conviction.

Ahsanul Haq and another v. *King-Emperor*, A.I.R. (1949) Nag. p. 327, referred to.

Aung Min (*1*), Advocate, for the applicant.

Tin Maung (Government Advocate) for the respondent.

U CHAN TUN AUNG, C.J.—The applicant Maung So San who was, at the relevant time, an auction clerk at No. 4 Godown, Port Commissioners, Rangoon was prosecuted under section 4 (*1*) (*c*) read with section 4 (*2*) of the Suppression of Corruption Act, 1948 in Criminal Regular Trial No. 13 of 1955 of the Court of Special Judge (1), (S.I.A.B & B.S.I. Act) Rangoon, and was convicted and sentenced to undergo one year's imprisonment on the 25th February, 1956. On appeal to the High Court, as against the said conviction and sentence, in Criminal Appeal No. 102 of 1956, U Aung Khine J., after remanding the case twice to the Trial Court on the ground of, what appeared to be, absence of satisfactory evidence showing that a proper sanction to prosecute the applicant, in conformity with the provisions of section 6 of the Suppression of Corruption Act, 1948 had been granted or not ultimately set aside the conviction of the applicant and "acquitted" him.

From a perusal of the judgment dated the 13th March, 1957, passed by the learned Appellate Judge, it is undoubtedly clear that the setting aside of the conviction of the applicant was mainly because of

the defect in the sanction for his prosecution. The concluding portion of the judgment read :

"အထက်ဖေါ်ပြပါအကြောင်းများကြောင့်၊ အောက်ရုံးတရားသူကြီးက အယူခံတရားလိုမောင်စိုးအပေါ်တွင်၊ ၁၉၄၈ ခုနှစ်၊ အဂတိလိုက်စားမှု တားမြစ်ရေး အက်ဥပဒေပုဒ်မ ၄ (၁) (ဂ)/၄ (၂) အရ၊ အလုပ်ကြမ်းနှင့် ထောင်ဒဏ် ၁ နှစ်ကျခံစေရန် အမိန့်ချမှတ်ထားခြင်းကို ပယ်ဖျက်၍၊ ၎င်းအား ဤအမှုနှင့်ပတ်သက်၍ တရားသေလွတ်ရန်အမိန့်ချမှတ်လိုက်သည်။"

However, by the time the appellate order setting aside his conviction was passed, the applicant had already served his sentence awarded by the Trial Court with the remissions given by the jail executive authorities. Now, the applicant has been re-arrested, and in Criminal Regular Trial No. 19 of 1957 of the Special Judge, (S.I.A.B. & B.S.I. Act), Rangoon, he is being sent up for trial after obtaining the requisite sanction. The present revision application is to quash the trial proceedings now pending before the Special Judge (S.I.A.B. & B.S.I. Act), Rangoon.

Two grounds have been urged in support of the application. Firstly, it is urged that the fresh trial of the applicant is barred under the provisions of section 403 of the Criminal Procedure Code inasmuch as, the appellate Court (the High Court) has " acquitted " him after setting aside the conviction and sentence of the trial Court. It is further contended that the words " ဤအမှုနှင့်ပတ်သက်၍ တရားသေလွတ်ရန် အမိန့်ချမှတ်လိုက်သည်။" are not without significance, and that they should be regarded as " complete acquittal " entered by the learned appellate Judge after a full consideration of the entire merits of the case, and not confined to validity or otherwise of the sanction accorded for the prosecution of the applicant. However, the applicant's Counsel has to concede that if the trial of the applicant is based upon an invalid sanction, then the trial is void, and that the

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" acquittal " or " conviction " thereunder is also void. That proposition of law seems to be quite settled and has been accepted by many Courts, although there were at one time conflicting views ; but these conflicts have been set at rest by the decision of the Privy Council in *Yusofalli Mulla Noorbhoy* v. *The King* (1). See also *Maung Chit Po and one* v. *The Union of Burma* (2). There is no doubt therefore, that the first trial of the applicant under a defective sanction was a nullity and that the ultimate order, acquitting the applicant by the Appellate Court cannot operate as a bar under section 403, sub-section (*1*) of the Code of Criminal Procedure to the institution of a fresh prosecution against the applicant. However, the learned Counsel for the applicant laid special emphasis on the expression : " ဤအမှုနှင့်ပတ်သက်၍ တရားသေ လွှတ်ရန် အဓိန့်ချမှတ်လိုက်သည်။" " acquitted so far as this case is concerned " used by the appellate Judge, and he submits that the principle of acquittal enunciated in section 403 of the Criminal Procedure Code should apply. I see no substance in this submission. The use of the word " acquitted " instead of the word " discharged " in the judgment of the learned Judge in appeal is, with due respect, somewhat unhappy. The former trial before the Special Judge (S.I.A.B. & B.S.I. Act) Rangoon, being no trial *ab initio*, or in other words being void, because of a defective sanction, the proper order of the appellate Judge should have been an order of discharge and not acquittal. From the reading of the entire judgment of the learned Judge, it is abundantly clear that the so-called acquittal order was made, because of the defect in the sanction for the prosecution of the applicant, and on no other grounds whatsoever. In my view, the objection taken by the learned Counsel

(1) 76 I. A. (1948-49) p. 158. (2) (1948) B.L.R. p. 175.

for the applicant has no merits whatsoever beyond taking advantage of learned appellate Judge's wrong use of the word " acquitted " instead of the word " discharged." In *re. C. Devanugraham* (1), is a case on all fours with the present case. The petitioner was convicted and sentenced to a certain term of imprisonment for an offence under section 161 of the Penal Code. He preferred an appeal to the High Court, and a single Judge of the High Court set aside his conviction and sentence on the ground that the sanction granted for his prosecution was illegal and defective, and in the concluding portion of the judgment, the learned Judge wrote, " In the result, the conviction and sentence are set aside and the appellant is acquitted." In the re-trial of the petitioner after rectifying the defective sanction, the petitioner sought for quashing of the second trial on the ground that having been " acquitted " by the High Court, his second trial was barred under section 403 of the Criminal Procedure Code. It was however held that the fresh trial was no bar under section 403 of the Criminal Procedure Code, following the decision of the Privy Council in *Yusofalli Mulla Noorbhoy* v. *The King* (2). It was also held that where there was no valid sanction, for the prosecution of an accused person, the prosecution was invalid and the order quashing the case could only operate as an order of discharge and not of acquittal. There is, thus no real merit in the submission made by the applicant's Counsel.

In the connection with the second ground urged, my attention was drawn to the provisions of section 26 of the General Clauses Act which reads:— " Where an act or omission constitutes an offence under two or more enactments, then the offender

(1) A.I.R. (1952) Mad. p. 725. (2) 75 I.A. (1948-49) p. 158.

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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;" and it was contended that the applicant, having served the sentence awarded to him under the first trial, it would amount to a second punishment if he were to be tried and convicted again for the same offence, and that the above provisions of the General Clauses Act, especially by the use of the expressions " shall not be liable to be punished twice for the same offence " it was intended to prevent a case of punishment, such as the present applicant had undergone. I am afraid I cannot persuade myself to fall in line with this submission. In my view, the principle underlying in section 26 of the General Clauses Act is the same as that in section 403 of the Criminal Procedure Code. One is complementary to the other in reiterating the fundamental principle of criminal law that no person shall be put in jeopardy of his life and liberty more than once; and section 403 of the Criminal Procedure Code is no more than an elaboration of this principle in detail. Moreover, the General Clauses Act is essentially, an Act to be invoked only for purposes of interpretation of legislative enactments and statutes.

It is, however, unfortunate that the applicant had during the pendency of the appeal against the conviction and sentence in his first trial served the term of sentence awarded him. But, I must hold that the sentence he had served cannot be treated as having served the sentence awarded him by the Court, inasmuch as his whole trial was later found to be invalid. In my view, a sentence served following a conviction under an abortive trial cannot, in law, be treated as sentence served under a lawful conviction. In *Ahsanul Haq and another* v.

King-Emperor (1), it was held that the fact that the accused had served a part of the sentence inflicted under the original void trial for want of proper sanction for prosecution was not itself a good ground to debar a fresh trial after obtaining the proper sanction. Therefore, under the circumstances of the case, there is no substance in the contention that the applicant having served the sentence awarded him in his first trial, he should not be put to a fresh trial for the same offence. This revision application is therefore dismissed.

A few more words, and I am done with it. The applicant will no doubt, on conviction lose his employment. His first trial and the subsequent appeal against the conviction had taken quite a long time and he had, as a result of the first abortive trial served some months of imprisonment. Though these facts and circumstances cannot however stand in the way of the fresh trial, I do hope they will be taken into consideration in assessing the sentence awardable to him in the event of a conviction following the fresh trial.

(1) A.I.R. (1949) Nag. p. 327.

APPELLATE CIVIL.

Before U Aung Khine, J. and U Choon Foung, J.

H.C. 1957

July 3.

Q. S. MARIANO (APPELLANT)

v.

C. J. GRANT (RESPONDENT).*

Civil Procedure Code, s. 107, Order 43, Rule 1 (w) *and Order 47, Rule 7—Appellate Court, whether precluded from questioning the propriety of a review granted by the Lower Court on the ground of insufficiency of evidence—Interpretation of the word "Strict proof" in Order 47, Rule 4.*

Held : Order 43, Rule 1 (*w*) must be read together with Order 47, Rule 7 of the Code of Civil Procedure.

The phrase "Strict proof" in Order 47, Rule 4 refers to the formal correctness of the evidence offered and not to its effect or result and so far as the sufficiency of evidence is concerned it is purely a matter to be taken care of by the original court, and the appellate Court is precluded from going into the sufficiency of the quantum of the evidence adduced.

Ahid Khondkar v. *Mahendra Lal De*, I.L.R. 42 Cal. 830, approved and followed.

Nandalal Mullick v. *Panchanan Mukerjee*, 45 Cal. p. 60 ; *Bai Nematbu* v. *Bai Nematullabu*, 42 Bom. 295 ; *Ali Akbar and others* v. *Khurshed Ali and another*, I.L.R. 27 All. p. 695 ; *Rajah of Bobbili* v. *Marandana Venku Naidu*, A.I.R. (1948) Mad. 340 ; *Narain Das and others* v. *Chiranji Lal*, I.L.R. 47 All. p. 361, referred to.

Pattan Ahmad Khan v. *Pyda Venkatachelamayya and another*, A.I.R. (1942) Mad. 511, dissented from.

Sonaji v. *Motiram*, I.L.R. (1949) Nag. p. 502, referred to.

P. N. Ghosh, Advocate, for the appellant.

R. Basu, Advocate, for the respondent.

U AUNG KHINE, J.—This appeal under Order 43 Rule 1 *(w)* of the Code of Civil Procedure is agains the order dated 8th November 1954 passed by the 3rd Judge, Rangoon City Civil Court in Civil Miscellaneous Case No. 104 of 1953.

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* Civil Misc. Appeal No. 80 of 1954.

Against the order of the 3rd Judge, City Civil Court of Rangoon in Civil Misc. Case No. 104 of 1953, dated the 8th November 1954.

The sole question that calls for decision in this appeal is as to whether an appellate Court can question the propriety of a review granted by the lower Court on the ground of insufficiency of evidence. This question has now assumed a general importance, in that there has been no authoritative decision of this Court on the point. The facts relating to this case briefly are as follows :

In Civil Regular Suit No. 1613 of 1947, the plaintiff Mrs. D. Grant obtained an *ex parte* decree for Rs. 1,287 with costs against the defendant Q. S. Mariano. Mrs. Grant died and her son C.J. Grant was brought on record as her legal representative. On 24th April 1952 Grant applied for the execution of the decree but his application was held to be time barred and it was accordingly dismissed. *Prima facie* the application was filed out of time but it was contended *inter alia* on behalf of Grant that limitation was saved by the two deposits made towards the decree by the judgment-debtor. Grant filed an application for the review of the order dismissing his application on the ground of discovery of new and important evidence, which, after the exercise of due diligence, was not within his knowledge when the previous order rejecting his application was passed. The evidence adduced at the hearing of the review application was to the effect that the two deposits towards the decree were made by Pleader U Ba Win at the instance of either the judgment-debtor or his pleader, Mr. Pillay. On this further evidence the review application was allowed, the previous order set aside, and the case re-opened.

When in this appeal in support of the grounds canvassed, the evidence in the hearing of review application was touched upon for consideration on merits, the learned Advocate for the respondent

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U AUNG KHINE, J.

pointed out that the appellate Court is precluded from going into the sufficiency of the reason given on the basis of the evidence tendered.

On behalf of the appellant it is submitted that we are dealing with an appeal and not with a revision and further that section 107, Code of Civil Procedure provides that an appellate Court shall have power to determine a case finally and therefore even though the appeal here is under Order 43, Rule 1 *(w)* its scope is not restricted in any way. In other words, it is claimed that the appellate Court has jurisdiction to go into the merits of evidence tendered by the appellant in the lower Court.

It seems clear, however, that Order 43, Rule 1 *(w)* must be read together with Order 47, Rule 7 of the Code. Order 47, Rule 7 says that an order granting an application may be objected to on the ground that the application was *(a)* in contravention of the provisions of Rule 2, *(b)* in contravention of the provisions of Rule 4, or *(c)* after the expiration of the period of limitation prescribed therefor and without sufficient cause ; and such objection may be taken at once by an appeal from the order granting the application. The portion of Order 47, Rule 4 as relevant to this case reads :

> "(2) Where the Court is of opinion that the application for review should be granted, it shall grant the same provided that . . . . . *(b)* no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation."

As to what "strict proof" means has been a subject of a good deal of judicial interpretation, not, however in all cases harmonious. In the case of

Ahid Khondkar v. *Mahendra Lal De* (1), Jenkins, C. J. observed.

" The word ' proof ' ordinarily has one of two meanings : either the conviction of the judicial mind on a certain fact, or the means which may help towards arriving at that conviction. The use of the word ' strict ' seems to me to point to the second of these two meanings, and ' strict proof ', in my opinion, means anything which may serve directly or indirectly to convince a Court and has been brought before the Court in legal form and in compliance with the requirements of the law of evidence. It is formality which is prescribed and not the result that is described."

In a separate judgment Woodroffe, J. agreed with Jenkins, C. J. and said that—

" The term ' strict ' refers in this section, in my opinion, to formalities."

and he finally held that the question as to whether the proof is according to law or not is within the jurisdiction of the appellate Court to determine and the question of sufficiency of evidence is for the Court admitting the review.

In *Nandalal Mullick* v. *Panchanan Mukerjee* (2) the dictum laid down in 42 Calcutta page 830 that " strict proof " means proof according to formalities of law and has no reference to the sufficiency of the quantum of the evidence adduced was followed. Sanderson, C.J. in one portion of his judgment remarked—

" . . . . . , and if I had been the learned Judge who had to exercise his discretion as to whether he would grant a review or not, I would have refused . . . . . "

In spite of this adverse opinion held, he refused to interfere with the order granting the review as it could not be said that the provisions of Rule 4 of Order 47 had been contravened.

(1) I.L.R. 42 Cal. 830. (2) 45 Cal. p. 60.

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In the case of *Bai Nematbu* v. *Bai Nematullabu* (1) Batchelor, acting C.J. entirely concurred in the construction which had been placed for these provisions by the Calcutta High Court in 42 Calcutta page 830.

That the words " strict proof " refers to formal correctness of the evidence offered and not to its effect or result as held by the Calcutta High Court is also followed by other High Courts. [See *Ali Akbar and others* v. *Khurshed Ali and another* (2), *Rajah of Bobbili* v. *Marandana Venku Naidu* (3) and *Narain Das and others* v. *Chiranji Lal* (4)].

A contrary view, however, was taken in the case of *Pattan Ahmad Khan* v. *Pyda Venkatachelamayya and another* (5). In that case Burn, J. observed—

"Learned counsel for the petitioner has drawn my attention to the case in 42 Cal. 830 in which it has been held that on appeal under O. 47, R. 7, Civil Procedure Code, the appellate Court is powerless to interfere with a decision on a point of fact falling under R. 4, Order 47, R. 7 says that an order granting an application for review may be objected to on the ground that the application was (*a*) in contravention of the provisions of R. 2, (*b*) in contravention of the provisions of R. 4 or (*c*) after the expiration of the period of limitation prescribed therefor and without sufficient cause. Such objection, may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit. In 42 Calcutta 830 in dealing with the phrase 'strict proof' in O. 47, R. 4 (2) proviso (*b*) it was held that this merely meant formal proof, or evidence admissible in accordance with the strict provisions of law. This case was followed by the Calcutta High Court in two later cases reported in 45 Cal. 60 and 47 Cal. 568 and also by the Bombay High Court in 42 Bom. 295. With due respect to these learned Judges who have pronounced these judgments, it appears to me that they have not given

(1) 42 Bom. 295.
(2) I.L.R. 27 All. p. 695.
(3) A.I.R. (1948) Mad. 340.
(4) I.L.R. 47 All. p. 361.
(5) A.I.R. (1942) Mad. 511.

sufficient weight to the word 'proof' in Rule 4 (2) proviso (*b*). There is a difference between 'proof' and 'evidence'. 'Proof' is the effect produced upon the mind of the Judge by the evidence or evidence sufficient to satisfy the Judge to whom it is presented. A fact is said to be proved when the Court after considering all the matters before it comes to the conclusion that it exists or that a reasonable man ought to act upon the assumption that it does exist."

With respect we must point out that it is not quite true as stated by Burn, J. that the Judges who dealt with the cases in 42 Calcutta page 830 and 45 Calcutta page 60 had not given sufficient weight to the word "proof" in Rule 4 (2) proviso (*b*). The passage appearing in the judgment of Jenkins, C.J. and quoted by us earlier clearly shows that he had exercised his mind in the interpretation of the word "proof". Jenkins, C.J. began by saying that the word "proof" ordinarily has one of two meanings: either the conviction of the judicial mind on a certain fact or the means which may help towards arriving at that conviction. He was of the opinion that the use of the word "strict" should apply to the second of the two meanings.

The view entertained by Burn, J. was dissented from in a later Madras decision. [See *Rajah of Bobbili* v. *Marandana Venku Naidu* (1)]. However, Nagpur High Court, in the case of *Sonaji* v. *Motiram* (2), accepted the view taken by Burn, J.

The learned counsel for the appellant has not been able to bring to our notice any other rulings in support of the contention made by him. Thus there is plainly a preponderance of the view in the Indian High Courts that the phrase "strict proof" refers to the formal correctness of the evidence offered, and not to its effect or result and so far as the sufficiency

(1) A I.R. (1948) Mad. 340. (2) I.L.R. (1949) Nag. p. 502.

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of evidence is concerned it is purely a matter to be taken care of by the original Court. After carefully wading through the mass of case law presented to us, we find ourselves respectfully agreeing with the principles laid down in 42 Calcutta page 830 for the following reasons.

If the appellate Court is allowed to set aside the original Court's order on the ground of insufficiency of evidence, it would create an unjustifiable situation in that the party in whose favour the review application was granted would be deprived of his precious right of appeal against the original order.

Again, Order 47 appears to be a discretionary order and as such the legislature must have intended to invest the original Court with wide discretionary powers.

This view appears to be in consonance with the construction placed on the words "strict proof" in 42 Calcutta case. We find ourselves in entire agreement with the following observation made by Jenkins, C.J. in that case—

"And section 626, so far as it relates to this topic, requires that there should be strict proof of the allegation. That appears to me to mean that there must be proof adduced before the Court that has to deal originally with the question of granting a review. Where there has been placed before that Court such evidence or other mode of proof as the law requires and permits, I cannot think that it was intended that on appeal under section 629 it was to be opened to the Appeal Court to say though there has been legal evidence, and in that sense strict proof, that proof did not convince it though it convinced the Judge who heard the witnesses, and therefore the application and the order granting the review were *ultra vires* and beyond the competence of the Court. That would bring into litigation fresh elements of chances and speculation. I think that the whole scheme of the Act recognises that with proper safeguards the Court of first instance is the proper Court to determine whether or not there should be a review,

but that before a review is granted those safeguards must be observed "

In these circumstances we must therefore confine ourselves to the consideration of the question whether there was strict proof, in the sense that proof according to the formalities of law, of the allegation that new evidence was not within the knowledge of the respondent and could not have been adduced by him at the first enquiry. The formalities having been fully observed, that is, all procedural rules having been strictly followed in the conduct of the second enquiry, we must confirm the lower Court's order. Accordingly the appeal is dismissed with costs.

APPELLATE CIVIL.

Before U Chan Tun Aung, Chief Justice and U San Maung, J.

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Oct. 3.

S. SABIR HUSSAIN (APPELLANT)

v.

R.M.L. RAMANATHA CHETTIAR (RESPONDENT).*

Union Judiciary Act, s. 20—S. 3 Transfer of Immoveable Property (Restriction) Act, 1947—Act 17 of 1952—"Foreigner," whether entitled to a simple money decree when his suit is essentially a simple mortgage suit but the claim was for repayment of the loan on personal covenant only and not against the security—Ss. 24, 57 and 58, Contract Act.

A mortgage deed contained—

(i) a personal covenant to repay the loan, and

(ii) an offer of immoveable property as security for the loan.

The Respondent, a foreigner waived the security given and claimed the repayment of the loan by enforcement of appellant's personal covenant.

The appellant contended that the mortgage deed contained two indivisible covenants and the transaction was void from its inception under s. 3 of the Transfer of Immoveable Property (Restriction) Act, 1947.

Held: The first part to repay the loan on personal covenant is legal.

The second part is illegal under s. 3 of the Transfer of Immoveable Property (Restriction) Act, 1947.

To consider whether a contract is void in its entirety or not under s. 24 of the Contract Act, one must also look into the severability or otherwise of the illegal part from legal part in the light of the provisions of ss. 57 and 58 of the Contract Act, the three sections being supplementary.

The rule as regards enforceability of contract is that where a contract is indivisible, *i.e.*, when illegal part cannot be severed from the legal part of the covenant the contract is altogether void. If a contract contains distinct covenants, some of which are legal and others illegal, the Court can enforce the legal ones. If several distinct promises are made for one and the same lawful consideration and one or more of such promises are found to be illegal, the Court will enforce the legal ones. Even where a person promises firstly to do certain things which are legal, and secondly, under certain circumstances to do other things which are illegal, the first part of his promise is a good contract and binding on him; but the second part of his promise to perform under certain circumstances, which is illegal, is void. Similarly, in the case of alternative promise, if one part which is found to be legal and the other illegal, the legal part can be enforced.

Appeal dismissed.

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* Special Civil Appeal No. 3 of 1955, against the decree of the High Court of Rangoon (U AUNG KHINE, J.) in Civil 2nd Appeal No. 14 of 1955, dated the 1st March, 1955.

A.P. Joseph v. *E. H. Joseph*, A.I.R. (1926) Ran., p. 186, distinguished.

Ma Kyin Hone and others v. *Ong Boon Hock and others*, A.I.R. (1937) Ran. 47; *V.R.M. Ramaswamy Chettyar and another* v. *C.T.M.N. Nachiappa Chettyar*, R.L.R. (1939), p. 711, referred to.

Leong and *Thein*, Advocates, for the appellant.

Basu and *Venkatram*, Advocates, for the respondent.

The judgment of the Court was delivered by

U CHAN TUN AUNG, C.J.—This special appeal under section 20 of the Union Judiciary Act is against the judgment of the learned Judge of this Court passed in second appeal, and it raises quite an interesting question, whether the respondent Chettyar (a foreigner) is entitled to a simple money decree on personal covenant when his claim as against the appellant is essentially based upon a simple mortgage bond under which certain immoveable property belonging to the appellant has been offered as security, in contravention of section 3 of Transfer of Immoveable Property (Restriction) Act, 1947 (Act No. LXXXVI of 1947) before its amendment by Act 17 of 1952.

It appears that at the time of filing his suit the respondent was fully aware of the prohibition of transfer of immoveable property either by way of sale, gift, mortgage or otherwise in favour of foreigners laid down in section 3 of the Act No. LXXXVI of 1947; and that is made plain by his plaint filed before the trial Court namely the Court of Assistant Superintendent for Civil Justice, Taunggyi, wherein he specifically asked judgment and decree for a specified sum of Rs. 5,000 with interest thereon against the appellant, based upon personal covenant of the appellant, and not upon the mortgage bond although a reference was made

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to it in paragraph 2 of his plaint. The mortgage bond (Exhibit A) has been filed in the original suit and we reproduce the *testatum* which reads :—

"Witnesseth that in consideration of a sum of Rs. 5,000 (Rupees five thousand only) loaned by the mortgagee to the mortgagor the receipt of which the mortgagor hereby acknowledges the said mortgagor does by these presents agree to and undertake to repay the said sum of Rs. 5,000 (Rupees five thousand only) with interest thereon at the rate of Rs. 1-8-0 (Rupees one and annas eight only) per cent per mensem and as security therefor the mortgagor does hereby mortgage his house lease for Lot Nos. 186 and 186A situated in Kyaung Road, Alebaing Quarter, Taunggyi Town with all buildings standing thereon."

It seems therefore clear that although the appellant had effected a simple mortgage of his leasehold property as security for the loan of Rs. 5,000 obtained from the respondent Chettyar, he had also given a personal covenant to repay the loan and that the respondent's claim as against the appellant was for repayment of the loan on personal covenant and not for realization of the loan as against the security offered. In other words, the respondent had waived the security given altogether, and had claimed the repayment of the loan by enforcement of appellant's personal covenant in his favour. The appellant in resisting the claim contended that the transaction was void from its inception having contravened section 3 of the Transfer of Immoveable Property (Restriction) Act, 1947, and that the money advanced was not recoverable from him. Both the trial Court and the first appellate Court on reasonings which are not quite intelligible to us rejected appellant's contention. The learned appellate Judge in Second Appeal has rightly pointed out the curious reasoning given in the judgments of both the trial Court and the first

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appellate Court and we entirely agree with his observations therein. The appellant took up the same ground before the Second Appellate Court and also before us. He contended that the transaction as evidenced by Exhibit A was void being in direct contravention of the provisions of the Transfer of Immoveable Property (Restriction) Act, and that the respondent could not enforce the personal covenant clause, inasmuch as the same could not be separated from the other covenant with respect to the property offered as security. In other words the appellant contended that the mortgage deed Exhibit A contained two indivisible covenants, namely the personal covenant to repay the loan, and the covenant entitling the mortgagee to proceed against the property offered as security and the latter covenant being illegal, the whole transaction was void. In support of his contention the appellant relied upon certain Indian decisions as well as a decision of single Judge of the late High Court of Judicature at Rangoon in *A. P. Joseph* v. *E. H. Joseph* (1) where in it was held that a money decree cannot be passed against a mortgagor who has mortgaged his life-interest as a beneficiary under a certain gift made by his father in which there was a restriction against alienation. With due respect, on careful perusal of the judgment in the said case, we find that the decision was made solely based upon the interpretation of section 24 of the Contract Act, holding that the mortgagor's promise in offering his life-interest for the loan taken is a single consideration, and it being inalienable in view of section 6 (*d*) of the Transfer of Property Act the entire transaction was illegal and void. It appears that the learned Judge's attention was never drawn to the provisions

(1) A.I.R. (1926) Rin. p. 186.

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of sections 57 and 58 of the Contract Act which are supplementary to section 24 in prescribing the enforceability of certain contract when illegal part and the legal part of it are severable. It also appears that, on behalf of the respondent, certain decisions of the Indian High Court were cited before the learned Judge in Second Appeal, but we do not propose to discuss the applicability or otherwise of those cases to the case now under appeal inasmuch as the facts obtaining in those cases were not similar to those obtaining in the present case. The Indian cases referred to are mostly cases involving actual transfer of property under possessory or usufructuary mortgages, the mortgagee being in possession of the mortgaged property enjoying the usufruct, thus passing from domain of contract into one of actual conveyance. It is curious that in none of those decisions the effect or applicability of sections 57 and 58 of the Contract Act to the transaction in question was ever considered. Section 57 reads as follows :

"Where persons reciprocally promise, firstly, to do certain things which are legal, and secondly, under specified circumstances, to do certain other things which are illegal, the first set of promise is a contract, but the second is a void agreement."

Section 58 :

"In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced."

It appears therefore that when we have to consider whether a contract is void in its entirety or not under section 24 of the Contract Act we must also look into the severability or otherwise of the illegal part from legal part of the Contract in the light of the provisions of sections 57 and 58 of the Contract Act, the three sections being supplementary.

See *Ma Kyin Hone and others* v. *Ong Boon Hock and others* (1). See also *V.R.M. Ramaswamy Chettyar and another* v. *C.T.M.N. Nachiappa Chettyar* (2). When we read those sections together the rule as regards enforceability of contracts appears to be that where a contract is indivisible and when you cannot sever the illegal part from the legal part of a covenant the contract is altogether void. If a contract contains distinct covenants, some of which are legal and others illegal, the Court can enforce the legal ones. If several distinct promises are made for one and the same lawful consideration and one or more of such promises are found to be illegal, the Court will enforce the legal ones. Even where a person promises firstly to do certain things which are legal, and secondly, under certain circumstances to do other things which are illegal, the first part of his promise is a good contract and binding on him; but the second part of his promise to perform under certain circumstances, which is illegal, is void. Similarly, in the case of alternative promise, if one part which is found to be legal and the other illegal, the legal part can be enforced.

Now, if we examine the contract of mortgage upon which the respondent has based his claim against the appellant, we find that the appellant has made two promises, namely, (1) the promise to repay the sum of K 5,000 with interest thereon at the rate of Rs. 1-8-0 per cent per mensem, and (2) the promise by which his leasehold property in Taunggyi Town with a building thereon has been mortgaged in favour of the respondent for the loan he has taken from the respondent. The second part of the mortgage is definitely an agreement to do certain things under specified circumstances within the meaning of second

(1) A I.R. (1937) Ran. p. 47. (2) R.L.R. (1939) p. 711.

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part of section 57 of the Contract Act. It is only on failure to repay the loan on personal covenant can the mortgagee-respondent proceed against the mortgaged property. The first part to repay the loan on personal covenant is certainly a legal part. The second part enabling the mortgagee (the respondent) to proceed against the property only under specified circumstances, *i.e.*, on mortgagor's (appellant's) failure to repay the loan on personal covenant, is illegal, being contrary to section 3 of the Transfer of Immoveable Property (Restriction) Act, 1947. This is exactly what the respondent has done in preferring the claim for recovery of K 5,000 with interest thereon as against the appellant. Therefore, in view of the specific provisions containing in the Contract Act, namely, section 57, we do not see any substance in this appeal, and it is dismissed with costs.

U SAN MAUNG, J.—I agree.

APPELLATE CRIMINAL.

Before U Chan Tun Aung, Chief Justice.

SAW THA OO (APPLICANT)

v.

MA AYE THI (RESPONDENT). *

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Oct. 17.

Quashing of criminal proceedings—S. 405, Penal Code—Precise criminal responsibility of a partner in relation to partnership property—Whether a partner could be prosecuted for Criminal breach of trust during the existence of the partnership.

Held: If it be established that a partner having been entrusted with partnership properties or assets and having dominion over them converts to his own use in breach of specific terms of trust imposed upon him, he can be prosecuted for criminal breach of trust as laid down in s. 405 of the Penal Code.

In the absence of such special agreement, a partner cannot be said to have received the property in a fiduciary capacity, and be prosecuted for criminal breach of trust. A partner cannot be liable for Criminal breach of trust in respect of the partnership property received or held by him on behalf of the partnership in the ordinary course of partnership.

Bhuban Mohan Rana v. *Surendra Mohan Das*, (1952) I.L.R. Cal. Series, Vol. (II) p. 23; *Nancy de Silva* v. *Union of Burma*, followed, Criminal Appeal No. 99 of 1957.

Queen v. *Okhoy Coomar Shaw*, (1874) 13 B.L.R. 307=1874, 21 Weekly Reporter, Cr. 59; *V. V. Reddy* v. *K. C. Reddy*, (1941) R.L.R. p. 547, referred to.

Held further: That in order to constitute an offence of criminal breach of trust the element of trust must be definitely proved.

The very conception of partnership precludes the possibility of entrustment of partnership property by one partner as against the other, unless the provisions of the partnership are subject to any Special contract.

Held also: The High Court does not deal lightly with applications to quash pending criminal proceedings.

It is only in cases where there is some manifest and patent injustice apparent on the face of the proceedings, or where the evidence on record for the prosecution clearly does not justify a charge of any offence, or where the trial is on the face of it an abuse of the process of the Court, rare remedy of quashing pending proceedings are given.

Khan Bahadur Hajee Gulam Sherazee v. *The King*, (1941) R.L.R. 599; *U Wa Gyi* v. *The Union of Burma*, (1948) B.L.R. 652, referred to.

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* Criminal Revision No. 112-B of 1957.

Application to quash the proceedings in the Court of the 8th Additional Magistrate (S.P.), Rangoon, namely, Criminal Regular Trial No. 245 of 1957.

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SAW THA OO v. MA AYE THI.

V. S. Venkatram, Advocate, for the applicant.

G. D. Williams, Advocate, for the respondent.

U CHAN TUN AUNG, C.J.—This is an application to quash the proceedings, namely, Criminal Regular Trial No. 245 of 1957 now pending in the Court of the 8th Additional Magistrate, Rangoon, wherein the petitioner has been prosecuted on a complaint made by the respondent Ma Aye Thi for an alleged offence of criminal breach of trust. The applicant and the respondent are said to be partners, carrying on a partnership business under the name and style of "Nay Set Kya Company" at No. 230, Fraser Street, Rangoon. Besides the petitioner and the respondent, there is a third partner, U San Nyunt, a brother of the petitioner. According to the partnership-deed, dated the 27th September, 1955 which has been filed in Civil Miscellaneous Case No. 69 of 1957 on the Original Side of this Court, and the existence of which in terms as set out therein having been admitted by the respondent, it appears that the original shares of each partner in the partnership are as follows:

	K
(1) U Saw Tha Oo (Petitioner)	50,000
(2) U San Nyunt	15,000
(3) Ma Aye Thi (Respondent)	15,000

It also appears that by a supplementary deed, bearing the date 6th June, 1956, the shares of the partners were re-allotted as follows :—

	K
(1) U Saw Tha Oo (Petitioner)	52,000
(2) U San Nyunt	30,000
(3) Ma Aye Thi (Respondent)	3,000

The petitioner is said to be the Managing Partner of the firm. The respondent alleged in her complaint

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before the Court below that the partners had agreed to dissolve the partnership; that in pursuance thereto, a statement of account had been furnished by the auditors, and that according to such statement (a certified copy of which had been filed with her complaint), it appeared that the applicant had without the knowledge of other partners refunded to himself a sum of K 26,010·45 pyas. This act, on the part of the applicant, she asserted, constituted an offence of criminal breach of trust under section 409 of the Penal Code. She made a similar report to the Pabedan Police Station, but the Police, after examining the partnership-deed and also the relevant account-books refused to take action, holding that the matter was within the purview of the Partnership Act. The complaint before the 8th Additional Magistrate was made on the 27th April, 1957 against both U Saw Tha Oo, the present petitioner, and co-partner U San Nyunt. The learned Magistrate, after examining the complainant in a rather perfunctory manner, took cognizance of the case and issued a bailable warrant in the sum of K 30,000 for the arrest of the petitioner for the offence under section 406 of the Penal Code. As against U San Nyunt, however, the learned Magistrate says there was no case, and he should be discharged. To use his exact words:—"(၂) တရားခံအပေါ် စွတ်စွဲချက်တစုံတရာမရှိ၍ တရားမှုငှင်လွှတ်" "Ma Aye Thi's statements on oath before the learned 8th Additional Magistrate do not cover anything more than what she has stated in her complaint. Thus, from the foregoing statement of facts, the following points are found to be established:—

(1) That there is a partnership between the applicant and the respondent and that the terms of the partnership are as

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incorporated in the deed of partnership filed in Civil Miscellaneous Case No. 69 of 1957 now pending before the Original Side of this Court;

(2) That they have agreed to dissolve the partnership;

(3) That there has been no final settlement of accounts as yet;

(4) That the alleged unauthorised withdrawal of capital by the petitioner in the sum of K 26,010·25 is also found in the statement of accounts furnished by the auditors of the Firm as per the balance-sheet of the partnership business as at 13th March 1957;

(5) That in the said balance-sheet, the capital account of each partner is shown as follows:—

		K	K
Capital accounts of U Saw Tha Oo	...	34,250·00	
Less refund of capital	...	26,010·25	
		Total	8,239·75
Maung San Nyunt's capital	... ...	29,105·00	
Add undrawn profits on K 29,105 at K 250·59 pyas on K 1,000	...	7,293·45	
		Total	36,398·45
Ma Aye Thi's capital	...	3,000·00	
Add undrawn profits at K 250·59 pyas on K 1,000	... ...	751·87	
		Total	3,751·87

(6) That as against capital account, there is on the asset side of the balance-sheet,

besides the cash in Bank and cash in hand, stock in trade (as at 13th March 1957) valued at K 61,498·71.

It has been urged on behalf of the applicant, relying upon many authorities including the Full Bench case of *Bhuban Mohan Rana* v. *Surendra Mohan Das* (1) that on the face of the complaint, even if it is conceded that the applicant has drawn out of the capital account of the partnership, a sum of twenty-six thousand and odd rupees, he being a partner of the Firm, such withdrawal, if any, is well within his capital contribution and that as such, he has not committed an offence of criminal breach of trust within the purview of section 406 of the Penal Code. It is asserted that the applicant did not hold or draw that money in a fiduciary capacity, and that there is no case as against the applicant to warrant cognizance being taken by the learned 8th Additional Magistrate. There is considerable force in this submission. Recently in Criminal Appeal No. 99 of 1957 of this Court (*Miss Nancy de Silva* v. *Union of Burma*), a conviction as against a co-partner for alleged misappropriation of certain partnership funds belonging to the partnership, recorded by the Western Subdivisional Magistrate, Rangoon was set aside and the accused acquitted by a single Judge of this Court (U Ba Nyunt, J.) and the acquittal order so recorded was mainly based on the aforesaid authority of the Calcutta High Court in *Bhuban Mohan Rana* v. *Surendra Mohan Das* (1). The special leave to appeal to the Supreme Court as against the said acquittal entered by the High Court has also since been dismissed by the Supreme Court in Criminal Miscellaneous No. 66 of 1957.

1) (1952) I.L.R. Cal. Series, Vol. II, p. 23.

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SAW THA OO v. MA AYE THI

U CHAN TUN AUNG, C.J.

The Full Bench decision of the Calcutta High Court in *Bhuban Mohan Rana* v. *Surendra Mohan Das* (1) quoted above may be regarded as the latest contribution to judicial thoughts; and also as having great persuasive value, so far as our Courts are concerned; in determining precise criminal responsibility of a partner in relation to partnership properties, which come under his charge or authority during the subsistence of the partnership. In view of wide provisions of section 406 of the Indian Penal Code, which is the same as ours, and on the basis of several old authorities, specially an earlier Full Bench case of the Calcutta High Court in *Queen* v. *Okhoy Coomar Shaw* (2), Courts in India were assailed by doubts for a number of years whether a partner, during the existence of the partnership could at all be prosecuted for an offence of criminal breach of trust. Now, such doubt has, it seems, been set at rest by the decision of the Full Bench in the aforesaid case. Exhaustive review was made of previous cases, especially the Full Bench case of *Queen* v. *Okhoy Coomar Shaw* (2), wherein the possibility of a partner being prosecuted for breach of trust of partnership funds was voiced. Several aspects under which a partner can criminally be responsible were considered. But I do not propose to enter into those detailed discussions. Suffice it to say that the following observations of Harries, C.J., at page 29 are most apposite, and I feel persuaded to quote with approval and also respectfully adopt as my own in considering the present application before me. After quoting certain passages of Lord Lindley on Partnership, the learned Chief Justice observed:

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1) (1952) I.L.R. Cal. Series, Vol. II. p 23.

(2) (1874) 13 B.L.R. 307 = (1874) 21 Weekly Reporter, Cr. 59.

"From these observations it is clear that the share of a partner in the partnership assets cannot be predicated until an account has been taken and all the debts have been discharged. Until that has been done it cannot be said that a partnership asset belongs to any particular partner or that any particular share of it belongs to any particular partner. That being so, if one partner retains a partnership asset, can it be said that property belonging to somebody else has been entrusted to him, or at least the share of his co-partners has been entrusted to him? It may be that two persons each owns a half share in a partnership and at first sight it might appear as if each would own a half of every asset of the partnership. However, that by no means follows, because if at any given moment the partnership account was taken and the debts discharged it might be that the assets belonged wholly to one of the partner or indeed after payment of debts there might be no assets at all for any of them. It is, therefore, impossible to say, at any given moment, before accounts have been taken, what share, if any, a partner has in the property. Until dissolution and accounts each partner must be regarded as having a right to the property and he does not hold it in a fiduciary capacity.

It seems to me that, if a partner is to be charged under s. 406 of the Indian Penal Code, it must be held that property belonging to somebody else was entrusted to him. A partnership firm has no existence apart from the partners and is not an entity like a limited company which can own property. If a partner holds partnership property, it cannot be said that he has been entrusted with his own share in the property, if he had any share in it. But can it be said that the partner has been entrusted with the other partner's share? The question immediately arises what is the other partner's share, and, as pointed out by Lord Lindley, he has no definite share until the accounts have been taken and the debts discharged and the assets divided according to the partnership agreement. That being so, it appears to me that it cannot be said that a partner, who receives partnership property, is entrusted with his co-partner's share of that property to bring the case within s. 406 of the Indian Penal Code".

However, on behalf of the respondent, it has been urged that the present application for quashing the

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trial is too premature; that *prima facie*, the applicant's withdrawal of the sum of twenty-six thousand and odd Kyats out of his capital account constitutes breach of trust of the partnership funds, and that on the authority of *V.V. Reddy* v. *K.C. Reddy* (1) he is, in any event, liable to be tried for criminal breach of trust of the partnership property. I am afraid I cannot assent to these submissions. *V. V. Reddy*'s *case* (1) decided by a single Judge of the late High Court, (Mosley, J.), makes a reference to *Okhoy Coomar Shaw*'s *case* (2) which lays down that section 405 of the Penal Code is wide enough to include the case of a partner, if it be proved that he was in fact entrusted with the partnership property or with dominion over it, and had dishonestly misappropriated or converted to his own use the property so entrusted. That single Judge decision, with due respect, merely reiterated what was laid down by Sir Richard Couch, C.J., in the case of *Okhoy Coomar Shaw* (2). What was observed by Sir Richard Couch, C.J., delivering judgment was as follows:

"We think the words of section 405 of the Penal Code are large enough to include the case of a partner, if it be proved that he was in fact entrusted with the partnership property, or with a dominion over it, and has dishonestly misappropriated it, or converted it to his own use. There is no reason that the case of a partner should be excepted from the operation of the section. Indeed there is every reason that it should be included in it. . . If it be made out by the evidence that one partner was entrusted by his co-partners with property, or with a dominion over it, and that he had dishonestly misappropriated it, or dishonestly used it in violation of the mode in which his trust was to be discharged, or

(1) (1941) R.L.R. p. 547.
(2) (1874) 13 B.L.R. 307 = (1874) 21 Weekly Reporter, Cr. 59.

of the agreement between the parties as to the use he was to make of the property, he ought to be tried for that offence."

I respectfully agree with the above statements. If it could be established that a partner having been entrusted with partnership assets or with dominion over them converts to his own use in breach of specific terms of trust imposed upon him or does anything with the properties or assets of the partnership, there can be no doubt that he can under certain circumstances be prosecuted for criminal breach of trust as laid down in section 405 of the Penal Code; but the question to be considered in such a case is whether or not the partner receives the partnership property under special agreement concerning as to how he should dispose of or deal with the said property. If there is no special agreement in that regard, a partner cannot be said to have received the property in a fiduciary capacity, and be prosecuted for criminal breach of trust. There is thus no merit in the submission made by the respondent's Counsel. *V. V. Reddy's case* (1) is certainly not an authority which lays down that a partner can, under any circumstance be liable to be tried for criminal breach of trust in respect of the partnership property received or held by him on behalf of the partnership in the ordinary course of partnership.

On the very face of the statement made by the complainant in her complaint as well as on oath, what the applicant is alleged to have drawn out of the partnership funds was a portion of his capital; and that the value of the stock of the partnership on 13th March 1957 is well over K. 60,000, and how can it therefore be held that the applicant has misappropriated the partnership funds? The amount

(1) (1941) R.L.R. p. 547.

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he has refunded to himself does not exceed the capital share he has contributed, namely, K 34,250. Furthermore, U San Nyunt, whose capital account shows on 13th March 1957 K 36,398·45 has not even made the slightest objection against such refund. It is therefore highly questionable as to the *bona fides* of the respondent's complaint as against the petitioner; and also the justification of the learned 8th Additional Magistrate's readiness in taking cognizance of the case and issuing the process of the Court of the arrest of the applicant under a bailable warrant fixed at K 30,000. It is elementary that in order to constitute an offence of criminal breach of trust, the element of trust must be definitely proved. Here, under the Partnership Act, partners are regarded in law as joint owners or co-owners of partnership property. The very conception of partnership precludes the possibility of entrustment of partnership property by one partner as against the other, though it might be conceded that the provisions of the Partnership Act are subject to any special contract between the partners, and that by such special contract, there may be entrustment of any specific property by one particular partner, in which case, in appropriate circumstances, an offence of criminal breach of trust can be said to have been committed by one of the partners. But, in the instant case before me, the existence of special agreement or contract regarding specific entrustment has not been alleged by the complainant in her complaint, nor such a term finds its place in the deed of partnership filed in Civil Miscellaneous Case No. 69 of 1957 of the Original Side of this Court.

The application to quash pending criminal proceedings are not lightly dealt with by this Court; and I am not unmindful of the principle laid down in

Khan Bahadur Hajee Gulam Sherazee v. *The King* (1) and in *U Wa Gyi* v. *The Union of Burma*(2).

It is only in cases where there is some manifest and patent injustice apparent on the face of the proceedings, or where the evidence on record for the prosecution clearly does not justify a charge of any offence, or where the trial is on the face of it an abuse of the process of the Court, rare remedy of quashing pending proceedings are given. Here, in the present case, I am fully convinced that from the facts appearing on the complaint, and from the circumstances under which the present prosecution is launched, and also having regard to the latest judicial authorities available on the question in issue, it would clearly amount to abuse of the process of the Court to prosecute the applicant under section 406 of the Penal Code.

In the result therefore, the petition is allowed and the proceedings now pending in the Court of the learned 8th Additional Magistrate, Rangoon, namely, Criminal Regular Trial No. 245 of 1957 are hereby quashed. Bail bond given by the applicant shall be cancelled.

(1) (1911) R.L.R. p. 599. (2) (1948) B.L.R. p. 652.

APPELLATE CRIMINAL.

Before U San Maung and U Ba Thoung, JJ.

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Feb. 15.

SITARAM (APPLICANT)

v.

THE SUPERINTENDENT, RANGOON CENTRAL JAIL AND ANOTHER (RESPONDENTS).*

Application under s. 491 of the Criminal Procedure Code for direction in the nature of habeas corpus—*Foreigners Act, s. 3* (b) *and 4* (2)—*Burma Extradition Act, s. 3* (2)—*Preamble of an Act, when to be consulted.*

The applicant was arrested under s. 3 (2) of the Burma Extradition Act.

He applied under s. 491 of the Criminal Procedure Code for a direction in the nature of *habeas corpus* and the High Court ordered his release.

But a few days before the order of release was passed, he was served with an order under s. 3 (*b*) of the Foreigners Act to remove himself from the Union of Burma.

The applicant then applied for a writ of *habeas corpus* in the Supreme Court and while the application was pending, the order was cancelled and his release was ordered by the Supreme Court.

Upon his release, a fresh order was issued by the President of the Union of Burma under s. 3 (*b*) of the Foreigners Act in Foreign Office Memorandum No. 431 Nga Kha 55, dated 8th September 1956.

Thereupon, the applicant filed an application under s. 491, Criminal Procedure Code.

Held: That the fact that action had been taken against the applicant unsuccessfully under the Burma Extradition Act cannot preclude an order being passed against him under s. 3 (*b*) of the Foreigners Act.

Hans Muller of Nurenburg v. *Superintendent, Presidency Jail, Calcutta and others*, A.I.R. (1952) (S.C.), p. 367, referred to.

Held also: S. 3 (*b*) of the Foreigners Act is couched in a language which is not been open to doubt and therefore the preamble of the Act need not be consulted for the purposes of interpreting the Section.

Maxwell on Interpretation of Statutes, Ninth Edition, pp. 46 and 48, referred to.

Held further: So long as the person concerned is a foreigner it is not for the Courts of law to question the desirability or otherwise of his deportation under s. 3 (*b*) of the Foreigners Act. This matter is entirely within the province of the executive authorities.

Kyi Chung York v. *The Controller of Immigration, Burma*, (1951) B.L.R., p. 197 (S.C.); *The King* v. *Secretary of State for Home Affairs*, (1917) K.B.D., p. 922, relied on.

* Criminal Misc. Application No. 69. of 1956.

Dr. Ba Maw for the applicant.

Kyaw Thaung (Government Advocate) for the respondent.

Judgment of the Court was delivered by

U SAN MAUNG, J.—By this application for a direction in the nature of *habeas corpus* under section 491 of the Criminal Procedure Code, the applicant Sitaram, who is at present a detenue in the Rangoon Central Jail, seeks to question the validity of his detention under section 4 (*2*) of the Foreigners Act, in pursuance of an order under section 3 (*b*) of the Act that he be deported forthwith from the Union of Burma. The facts which have been fully set out in the affidavit of the applicant Sitaram are briefly these :

In July 1955 Sitaram was arrested by the Thingangyun police and thereafter proceedings were opened against him under the Burma Extradition Act, on the ground that he was a fugitive criminal from India. Thereafter, while he was being held in custody in Rangoon Central Jail, Sitaram applied to this Court under section 491 of the Criminal Procedure Code for a direction in the nature of *habeas corpus* on the ground that his arrest and detention were illegal. This Court by an order dated the 25th of March 1956 in Criminal Miscellaneous Case No. 40 of 1955 directed that he be set at liberty on the ground that the warrant for his arrest issued by the District Magistrate under section 3 (*2*) of the Burma Extradition Act was invalid in law. On the 29th of February 1956 a few days before the order for his release was passed by this Court, the applicant while still in custody in pursuance of a warrant under section 3 (*2*) of the Burma Extradition Act, was served with an order under section 3 (*b*) of the Foreigners Act to

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remove himself from the Union of Burma. The applicant Sitaram then filed an application for a writ in the form of *habeas corpus* for his release. While that application was pending before the Supreme Court, the learned Attorney-General informed the Court that the order sought to be impugned had been cancelled. Accordingly the Supreme Court issued an order for his release. However, immediately upon his release on the 8th of September 1956, a fresh order which is now sought to be impugned was issued by the President of the Union of Burma under section 3 (*b*) of the Foreigners Act. This order is contained in Foreign Office Memorandum No. 431 Nga Kha 55, dated 8th September 1956 which has been filed in these proceedings. The applicant contends that the aforesaid order under section 3 (*b*) of the Foreigners Act is illegal, *ultra vires* and not in accordance with the law or the Constitution of the Union of Burma, and that it was an attempt to utilize the Foreigners Act, to cure a defect in the operation of the Burma Extradition Act, in so far as it concerned India which was not a "foreign state" within the purview of the Burma Extradition Act. The applicant further says that he cannot be an undesirable alien, as throughout his long residence in this country he had been completely law-abiding and there was no allegation or charge against him of a criminal nature. Nor had he ever been accused or suspected of doing anything detrimental to the Union of Burma or its Government and interests.

In the counter-affidavit filed on behalf of the Government, all the facts stated above are either admitted or not specifically denied. It is however contended on behalf of the Government that the order issued by the President under section 3 (*b*) of the Foreigners Act against the applicant Sitaram is

perfectly valid and that the fact alleged in the applicant's affidavit that he had throughout his long residence in this country been law-abiding, etc., is not of any relevance in so far as the proceedings are concerned.

Now, the fact that action had been taken against the applicant Sitaram unsuccessfully under the Burma Extradition Act on the ground that he was a fugitive criminal from India, cannot, in our opinion, preclude an order being passed against him under section 3 (*b*) of the Foreigners Act. This section reads:

"The President of the Union may by writing order that any foreigner be deported forthwith from the Union of Burma."

Section 4 (*2*) which provides the machinery for the deportation of a foreigner, enacts that any foreigner who has been ordered to be deported under section 3 (*b*) may be apprehended without warrant by any police officer not below the rank of Sub-Inspector and brought before the District Magistrate who shall, by an order in writing, cause the said foreigner to be detained in safe custody pending the completion of arrangement for his removal out of the Union of Burma.

In regard to the provisions of section 3 of the Foreigners Act, Dr. Ba Maw for the applicant contends that from the preamble of the Act it is evident that the Act is designed to enable the President to prevent the subjects of foreign states from residing or sojourning in Burma, and that therefore it is not within the spirit of the law so to use section 3 of the Act as to arbitrarily remove from Burma a foreigner who has been residing peacefully therein for many years and not in any way an undesirable resident of the country. However,

"The preamble cannot either restrict or extend the enacting part, when the language and the object and scope of

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the Act are not open to doubt." (Page 48 of ninth edition Maxwell on Interpretation of Statutes).

But

"It may legitimately be consulted to solve any ambiguity, or to fix the meaning of words which may have more than one, or to keep the effect of the Act within its real scope, *whenever the enacting part is in any of these respects open to doubt.*" (Page 46 *ibid*).

Section 3 (*b*) of the Foreigners Act is, in our opinion, couched in a language which is not open to doubt and therefore the preamble of the Act need not be consulted for the purpose of interpreting the section. However, even assuming that the preamble of the Foreigners Act is relevant for the purpose in hand, the words "to prevent the subjects of foreign states residing or sojourning in Burma" appearing therein are wide enough to cover the action of the President in directing a foreigner, many years resident in Burma, to be deported from the country.

In our opinion, so long as the person concerned is a foreigner it is not for the Courts of law to question the desirability or otherwise of his deportation under section 3 (*b*) of the Foreigners Act. This matter is entirely within the province of the executive authorities. We are fortified in the view which we take in this matter by the observation of the Supreme Court in *Kyi Chung York* v. *The Controller of Immigration, Burma* (1). There it was held that—

"Every country which extends its hospitality to an alien can withdraw it and send him back to his own country and that every power has the right to refuse to permit an alien to enter the State and if it permits an alien to enter, to annex what conditions it pleases to such permission and expel or deport him from the State at pleasure, and that this principle is to be found embodied in section 3 of the Foreigners Act whereby the President may order any foreigner to remove himself from the Union of Burma."

(1) (1951) B.L.R. p. 197 (S.C.).

In *The King* v. *Secretary of State for Home Affairs. Ex-parte Duke of Chateau Thierry* (1), Swinfen Eady, L.J. observed at page 930—

> "A Secretary of State is not required to justify in a Court of law his reasons for making a deportation order in the case of an alien."

This observation applies with full force to the President of the Union of Burma acting under the powers conferred upon him by section 3 of the Foreigners Act.

In *Hans Muller of Nurenburg* v. *Superintendent, Presidency Jail, Calcutta and others* (2) it was pointed out by the Supreme Court of India that the Foreigners Act is not governed by the provisions of the Extradition Act, and the fact that a request has been made to the Government under the Extradition Act does not fetter the discretion of Government to choose a less cumbrous procedure of the Foreigners Act when a foreigner is concerned, provided always, that in that event the person concerned leaves the country, a free man.

For these reasons we hold that the detention of the applicant Sitaram under section 4 (*2*) of the Foreigners Act in pursuance of the order for his deportation under section 3 (*b*) of the Act is legal and proper, and that his application for a direction in the nature of *habeas corpus* must fail. His application is dismissed.

U BA THOUNG, J.—I agree.

(1) (1917) K.B.D., p. 922. (2) A.I.R. (1953) (S.C.), p. 367.

APPELLATE CRIMINAL.

Before U Chan Tun Aung, Chief Justice.

H.C. 1957

Jan. 8.

U BA CHIT TIN (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Suppression of Corruption Act—S. 4 (1) (d)/4 (2)—Meaning of the expression, "in respect of public property entrusted to him"—S. 405 Penal Code—The words "entrusted", and "entrustment" their meaning—S. 5 (1) (c), Prevention of Corruption Act, (India Act 11 of 1947).

Held: The expression "in respect of public property entrusted to him" in s. 4 (*1*) (*d*), Suppression of Corruption Act, 1948 means public property which is in the possession or under the control of the public servant in question.

It has the same connotation but much more restricted wordings than those appearing in s. 405 Penal Code. It is an essential ingredient of the offence that the public property either immoveable or moveable or cash which is the subject matter of the offence must have been entrusted to the public servant.

The word "entrusted" with reference to cash or money means that such cash or money has been transferred to the accused and remains in the possession or control of the accused *as a bailee in trust* for the complainant who holds the position of bailor.

N. N. Burjorjee v. *Emperor*, A.I.R. (1935) Ran. p. 453; *Lake* v. *Simmons*, (1927) A.C.p. 487 at p. 499; *Thakarsi* v. *King-Emperor*, I.L.R. Nag. (1949), p. 620, referred to.

To make an accused person liable within the purview of s. 4 (*1*) (*d*) Suppression of Corruption Act, 1948, the accused person concerned must have possession or control of the property, be it cash or be it other moveable property.

Ba Swe, Advocate, for the appellant.

Tin Maung (Government Advocate) for the respondent.

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* Criminal Appeal No. 387 of 1956, appeal from the order of the Special Judge (2) (SIAB & BSIA) Act of Rangoon, dated the 7th day of September 1956 passed in Criminal Regular Trial No. 26 of 1955.

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U BA CHIT TIN v. THE UNION OF BURMA.

U CHAN TUN AUNG, C.J.—The appellant U Ba Chit Tin was at the material time the Superintendent, Botataung Traffic Office (Inland Water Transport Board). He has been found guilty of the offence under section 4 (*1*) (*d*) of the Suppression of Corruption Act by the Special Judge (2), (SIAB & BSI Act), Rangoon, and has been sentenced to undergo concurrently four months' rigorous imprisonment on three heads of charge which read:

(1) That you as a public servant, to wit, as Superintendent of Botataung (I.W.T.) were enjoined by Circular Order Ex. 8 to receive the cash collected by the Inward Freight Clerk (Cashier) and that you failed to do so regarding Trip No. 304 of the Steamer "Maha" which arrived at Botataung on 19th June 1954 and thereby there was a delay of 14 to 15 days in depositing the freight charges, K 6,534·95, as shown in Ex. 2-00 which is an act of misconduct in respect of the said public property which is deemed to be entrusted to you as defined in S. 4 (*1*) (*d*) and proviso thereto of the Suppression of Corruption Act.

(2) That you as a public servant, to wit, as Superintendent, Botataung (I.W.T.) were enjoined by Circular Order Ex. 8 to receive the cash collected by the Inward Freight Clerk (Cashier) and that you failed to do so regarding Trip No. 306 of the Steamer "Mingyi" which arrived on 26th June 1954 at Botataung and thereby there was a delay of 10 to 14 days in depositing the freight charges K 6,73·220, as shown in Ex. 2-0 which

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is an act of misconduct in respect of the said public property which is deemed to be entrusted to you as defined in S. 4 (*l*) (*d*) and the proviso thereto of the Suppression of Corruption Act.

(3) That you as a public servant, to wit, as Superintendent, Botataung (I.W.T.) were enjoined by the Circular Order Ex. 8 to receive the cash collected by the Inward Freight Clerk (Cashier) and that you failed to do so regarding Trip No. 329 of the Steamer "Mindone" which arrived at Botataung on 14th September 1954 and thereby there was a delay of 7 to 8 days in depositing the freight charges K 4,157·15 as shown in Ex. 2 which is an act of misconduct in respect of the said public property which is deemed to be entrusted to you as defined in S. 4 (*l*) (*d*) and the proviso thereto of the Suppression of Corruption Act.

The facts and circumstances leading to the appellant's prosecution are briefly, as follows:

The appellant was the Superintendent of Botataung Traffic Office from 29th December 1949 to 13th March 1955, and in his charge there was the "Inward Section" dealing with freight receipts from big steamers that ply between Rangoon and Mandalay. Under him, there were a cashier and two freight clerks. The cashier's post was held by one U Maung Maung Tin who died on or about the 10th of May 1955 after a short illness. For some time the Botataung Traffic Office was entirely in charge of the appellant. It was not until the 1st February 1951 that a cashier's post was sanctioned by the

Head Office, and one U Ba Tu was appointed to hold the said post on a salary of K 330—25—450. The cashier has to deposit K 5,000 cash security and also furnish immoveable property security to the value of K 10,000. U Ba Tu held the post of cashier up to the year 1952 when he was succeeded by U Maung Maung Tin. From the Botataung Traffic Office, the appellant was next transferred to the Labour Supervision Department at the Main I.W.T. Office on or about the 14th of March 1955. The fact there was no post of cashier in the Botataung Traffic Office prior to 1st February 1951 was conceded by the General Manager U Hmyin (PW 2) of the Main I.W.T. Office, who states that it was only on his recommendation that the post of cashier on a salary of K 330—15—450 was created in Botataung Traffic Office and that the first cashier was U Ba Tu who had to furnish K 5,000 cash deposit and a security to the value of K 10,000 in immoveable property. On appellant's transfer to the Main Office, he was succeeded by U Nyun (PW 6).

On the death of U Maung Maung Tin, the account books maintained by him were checked up as against freight collections relating to the three steamers, "Mintha", "Mingyi" and "Mingale", and it was found that there was a shortage of K 39,149·70. The matter was reported to the Traffic Manager U Hla Baw (PW 3) who directed his assistant U Ba Yin (PW 11) to inquire into the matter and also to go into the accounts thoroughly. U Hmyin (PW 2) General Manager, was also informed about the shortage, and he directed the Chief Accountant U Ba Thu (PW 5) to investigate into the matter. After examining all the relevant accounts and entries relating to the freight receipts, U Ba Thu, the Chief Accountant, found a shortage

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of K 39,149·70. The shortages in freight collections were as shown hereunder in relation to trip number of each steamer :

(1) "Mingale"...Trip No. 392...1,407·45
(2) "Mintha"...Trip No. 393...19,328·70
(3) "Mingyi"...Trip No. 394...18,413 55

Besides these shortages, the check also revealed that freight collections were not promptly remitted to the authorities concerned. There were delays for several days. In particular, it was found that though in trip No. 388 "Mingyi" was shown to have arrived on 12th April 1955, her earnings of cargo freights were found to have been remitted to the Main Office 4 to 7 days later. Mr. Manickham (PW 7), Superintendent of the Freight Section in the Main I.W.T. Office, who at the instance of the Chief Accountant, checked the accounts found that the account books for the year 1953 showed invariable delays in the remittance of the freight collections, and the delays were in some cases up to 7 days. During 1954 the delays extended to about two weeks. Such delays were also detected for the year 1955. But in the year 1953, one Mr. Gastin (PW 4) took upon the duties of Traffic Manager and he issued instructions for the guidance of the Superintendent of Botataung Depot and these instructions were embodied in Exhibit 8.

Captioned "Botataung Depot, Inland Water Transport Board (Irrawaddy Section)", Exhibit 8 contains some six pages of closely typewritten matters divided into four sections. The first section "A" deals with the scope and responsibility of the staff concerned. Section "B" lays down detailed procedure for checking books and cargo discharged, and also collection and disposal of discharged cargo receipts. Section "C" sets out maintenance of

registers, records and returns concerning freight, cash receipts and cargo weight, etc. Section " D " prescribes the duties of the staff, whereby the Superintendent of Botataung Traffic Office is entrusted with overall responsibility of running the office. He is also enjoined to receive cash in the following terms:—

" He will receive the cash collected by the Inward Freight Clerk (Cashier) and check it in the manner laid down in para, 6, Section A. He is prohibited from delegating this particular duty to anyone without authority from the Management."

This instruction Exhibit 8 is said to be an approved one, that is, approved by the Accounts Department, duly signed by the Traffic Manager Mr. Gastin. But curiously enough, in section " D " the following passage appears :—

" You will therefore endeavour to achieve that when possible. It is considered that at present, with small upward cargo offering at least one Flat can be turned round."

This passage strikes one as if the instructions in question are addressed to a particular person. Though it is suggested that the instructions are meant for all those concerned in the Botataung Depot, yet the wordings of this clause militate against such suggestion. Be that as it may, the significant point to be noted is that, although the instructions require the Superintendent of the office to receive the cash collection of the Inward Freight Clerk (Cashier), yet nothing is mentioned about the disposal of the cash collected. In that connection I would set down here the very words deposed to by U Hmyin (PW 2), General Manager and U Ba Thu (PW 5), Chief Accountant of the I.W.T. Office.

ဝင္ထိန္းခန္ထားခြင့္မရွိဒီက ဦးဘခူစတင်က ဝင္ပုဂ္ဂိုးတင်က ဝင္ပုဂ္ဂိုး ကိုစစ်ဆေးပြီး ရုံးကြီးသိမ်းပါသည်။ ဝင္ထိန္းခန့်ပြီးနောက် ဦးဘခူစတင်က

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ရုံးကြီးသို့မပို့တော့ပါ။ ငွေကိုရုံးကြီးမှနေ၍ ငွေထိန်းထံမှ တိုက်ရိုက်သိမ်းယူပါသည်။ (*Vide* U Hmyin's evidence).

ငွေများကို ကျွန်တော် သွားသိမ်းသောအခါ၊ ငွေထိန်းထံမှ တိုက်ရိုက်သိမ်းလာပါသည်။ ဆိပ်ကမ်းမှူးမှတဆင့် တခါမှမသိမ်းဘူးပါ။ * * * ဤအမှုဖြစ်သည့်နေ့ထိ ငွေများကိုငွေထိန်းမှ တိုက်ရိုက်သိမ်းယူပါသည်။ * * * ဤအမှုမဖြစ်ခင်ကငွေများကိုကက် (၅) ယာထံမှ တိုက်ရိုက်ပေးနေပါသည်။ ဦးဘချစ်တင်မှတဆင့် ကျွန်တော် တခါမှငွေများ မရဘူးပါ။ ဤကဲ့သို့ ငွေသွင်းနေကြောင်းကို ပရဂသ၀၊ ရုံးကြီးတရုံးလုံး သိကြပါသည်။ (*Vide* U Ba Thu's evidence).

It will therefore appear that since the appointment of a cashier, that is, with ~~effect from the 1st of~~ February 1953, despite the instruction dated 18th May 1953 *vide* Exhibit 8 issued by the Traffic Manager, the Superintendent of Botataung Traffic Office had not received any cash collected by the Inward Freight Clerk—that is to say either from U Ba Tu or his successor U Maung Maung Tin. The (I.W.T.) Head Office was, apparently, quite satisfied with this procedure of collecting the cash direct from the cashier. In other words, for nearly two years either the Chief Accountant or the Traffic Manager or persons reponsible for checking the daily freight receipts from the main office never questioned the procedure adopted by the Botataung Traffic Office, nor did anybody inquire into whether the Traffic Manager's instructions, if they were at all in force, had been complied with or not. It appears that the instructions were not followed, and the appellant as a Superintendent of the Botataung Traffic Office never received cash collected by the Inward Freight Clerk. It may also be noted that although responsible persons, namely the General Manager, U Hmyin, and the Chief Accountant U Ba Thu, were aware of the infringement of the so-called

instructions issued by the Traffic Manager, yet it is an admitted fact that they never took any action whatsoever either as against the appellant, or as against the cashier U Maung Maung Tin at any time prior to the actual institution of the present case. Only on the death of U Maung Maung Tin, as observed above, did the authority wake up and try to enforce the instructions (Exhibit 8) drafted by the Traffic Manager. Even after the appellant's transfer and later when he was succeeded by U Nyun (PW 6) on the 21st March 1955, U Nyun never received cash freight receipts from the cashier. In that connection U Nyun deposes :

တန်ဆာခငွေများနှင့်ပတ်သက်၍ ကျွန်တော်ဘာမှမလုပ်ရပါ။ ကျွန်တော်စာရင်းစစ်ခြင်း၊ ငွေကိုလက်ခံခြင်း၊ ငွေကိုအပ်ပေးခြင်း တစုံတရာမျှ လုပ်ရပါ။

Thus, during the relevant period, cash collections by the cashier were kept in cashier's hand who dealt directly with the Head Office by remitting them straight to the Head Office, and that the Head Office was satisfied collecting cash from the hands of the cashier alone.

It is also observed that although according to the First Information Report the appellant was responsible for the shortage of K 39,149·70 pyas, yet the three heads of charge under which he was tried and convicted set out that the appellant was responsible for cashier's delay in the surrendering of freights collected by him in respect of specific earnings from trips made by respective steamers and that the total sum so collected with consequential delay was said to amount to K 17,424·30 pyas although it is conceded that the same has been remitted to the Head Office.

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The facts set out above are not seriously disputed by the appellant, except that he maintained that the instructions (Exhibit 8) said to have been issued by the Traffic Manager were not in force at the relevant time and that they were merely tentative. He further asserted that even if they were in force the Traffic Department in Botataung had never followed them since the appointment of a cashier and that therefore there was no entrustment of cash with him.

The trial Judge, however, did not accept these contentions. The trial Judge's view was to the effect that owing to appellant's non-observance of the instructions (Exhibit 8) cashier's daily collections had not been paid in regularly since 1953 thereby enabling the latter to temporarily misappropriate the said collections. For these laches on the part of the appellant, the trial Judge holds that the appellant was "vicariously" responsible. Here, I propose to quote the very words appearing in the lower Court's judgment:

> "As things stand the accused cannot be held directly responsible for the loss of K 39,149·70, for it is not proved that the losses occurred actually while he was Superintendent of Botataung. From all showing the losses seem to have occurred after he had demitted the office and during the time of his successor. But he may be vicariously held responsible for the losses in as much as it might be said that he did not collect the cash from the cashier or that he did not check the register as laid down in the Circular Instruction Ex. 8. In these circumstances, it appears to me that the accused is more concerned with that part of the complaint where it is alleged that on account of laches on the part of the accused, there had been no regularity in making over the daily collections since July 1953."

From these observations it seems clear that offence of "misconduct" with which the appellant stands convicted is one for laches in not collecting the cash

from the cashier in contravention of the so-called circular instructions containing in Exhibit 8. Having found so, the trial Judge next proceeded to consider at a later state of his judgment:

"Whether the failure on the part of the accused to observe the instructions falls within the definition of misconduct as given in the proviso to section 4 (*1*) (*d*) of the Suppression of Corruption Act."

To this question, notwithstanding clear admissions of U Hmyin (General Manager) and U Ba Thu (Chief Accountant) that cash freight receipts were not collected from the appellant but from the cashier, the trial Judge readily answered that appellant's failure to follow the instructions (Exhibit 8) constitutes connivance with the cashier in the commission of "misconduct" within the meaning of section 4 (*1*) (*d*) of the Suppression of Corruption Act read with the explanation. As regards the question whether there was entrustment of money with the appellant the trial Judge found in these terms:

"It has been urged for the accused by his learned counsel that there was no entrustment of money with the accused. But by virtue of the duties cast on the accused in the circular instruction, it must be held that the accused had been entrusted with the money by the departmental instructions and consequently in law."

Therefore, so far as I can comprehend the judgment of the learned trial Judge, the appellant has been convicted of the offence of misconduct under section 4 (*1*) (*d*) of the Suppression of Corruption Act in respect of cash (public property) which he never collected by which was "deemed to have been entrusted to him" (*vide* three heads of charge) because he failed to collect them from the cashier as enjoined by the departmental instructions containing in

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Exhibit 8. In fact, the trial Judge himself, probably assailed by some doubts, conceded at the conclusion of his judgment that the offence committed by the appellant "seems to be a technical one."

In appeal, it is contended, firstly, that there was no proper sanction accorded in the prosecution of the appellant. Secondly, it is urged that an offence of misconduct has been made out against the appellant within the purview of section 4 (*1*) (*d*) of the Suppression of Corruption Act. A sustained argument has been advanced in this connection that no public property had been entrusted to the appellant with respect to which he could be held in law to have committed the offence of misconduct within the purview of that sub-section read with the explanation thereto. Thirdly, it is urged that the circular instructions Exhibit 8 were merely tentative and had not been brought into force. Now, the relevant portion of section 4 (*1*) (*d*) of the Suppression of Corruption Act reads—

> "4 (*1*) A public servant is said to commit the offence of criminal misconduct in the discharge of his duties :—
>
> (*d*) If he commits any fraud to the detriment of public interest or commits in respect of public property entrusted to him, either an act of misappropriation or misconduct."

Added to this sub-section is an explanation which is in Burmese. I have had occasion to point out as a member of the Bench in Criminal Reference No. 16 of 1956 that there are three classes of cases where an act or omission of a public servant can be said to come within the purview of sub-section 4 (*1*) (*d*) of the Suppression of Corruption Act, namely :

(*a*) If he commits fraud to the detriment of public interest;

(*b*) If he commits in respect of public property entrusted to him an act of misappropriation; and

(*c*) If he commits in respect of public property entrusted to him, an act of misconduct, *i.e.* mismanagement, wrongful act or omission or for doing something which ought not to be done or not doing something which ought to be done in the given circumstances (*vide* Amendment Act No. XVI of 1951).

With regard to sanction it is contended that the sanction does not specifically set out the facts of the offence alleged against the appellant and that as such it was defective. Reliance was placed upon the Supreme Court in Miscellaneous Application No. 108 of 1956. (*Union of Burma* v. *U Kyaw Nu*). It was urged that inasmuch as the sanction Exhibit-c being defective in that there being no evidence as to whether the sanctioning authority was fully apprised of the entire aspect of the case, the prosecution of the case, the prosecution of the appellant on that ground alone is illegal. I am not disposed to accept this contention. I have carefully examined the sanction Exhibit-c and I am fully satisfied that the sanctioning authority was fully aware of the facts and the nature of the offence with which the appellant has been charged. The sanction itself contains all the necessary particulars. I must hold that there is no substance in this submission, and I cannot allow it to prevail.

Now, I propose to deal with the third contention rather than the second contention. The third contention relates to the enforcement of instructions contained in Exhibit 8. There is, I am afraid, very unsatisfactory evidence in that regard. Mr. Gastin

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maintains the instructions are already in force, whereas the Chief Accountant conceded that he was not aware of the existence of these instructions or their enforcement prior to the case. He was made aware of it only after the case and he did not know from which date it came into force. No wonder therefore, he deposed to the fact that all cash collections from Botataung Traffic Office were not received from the appellant U Ba Chit Tin, but from the cashier all along. I have set out above the salient parts of the instructions and it is most surprising that although the Traffic Manager and the responsible heads of the Department in the Head Office are aware of the fact that freight collections from Botataung are received or otherwise collected by the Head Office directly from the cashier and not from U Ba Chit Tin (the appellant) no step of any kind was taken against anybody at all for enforcement of the instructions. Under these circumstances it is very difficult to conclude that these rules have become effective from a certain date. Moreover, the peculiar wordings in some parts of the rules indicate that they are being addressed to a particular person tentatively, and to me they do not give the impression that they have been finally approved and made effective from a certain date. Even assuming that they are effective, the most important question for determination is whether in the circumstances set out above, the appellant can be said to have been entrusted with the cash collections, namely, the cash freight. This brings me to the sheet-anchor of the appellant's contention. The relevant portion of the instruction merely says that Superintendent of Botataung Traffic Office has overall responsibility for running Inward Section of the Depot; that he will receive the cash collected by the Inward Freight Clerk and check in the manner laid down in

paragraph 6. But the instructions are completely silent as to what the Superintendent should do after the receipt of the cash from the cashier. Neither do they contain what the cashier should do with the cash he has collected. The Head Office (I.W.T.), for nearly two years, collected the cash not from the appellant but from the cashier direct, and can it therefore be said that the appellant has been entrusted at all material times with the cash in question ?

I am of the view that under the circumstances the appellant cannot be said to have been entrusted with the cash collected by the cashier. In my view, the expression " in respect of public property entrusted to him " appearing in section 4 (*1*) (*d*), Suppression of Corruption Act means public property which is in the possession or under the control of the public servant in question. It has the same connotation as is to be found in section 405 of the Penal Code without the qualifying words " in any manner. " Thus to bring home an offence under this sub-section, it is an essential condition that the public property either immoveable or moveable property or cash which is the subject matter of the offence must have been entrusted to the public servant. The word " entrusted " with reference to cash or money means that such cash or money has been transferred to the accused and remains in the possession or control of the accused *as a bailee in trust* for the complainant too holds the position of bailor. In *N. N. Burjorjee* v. *Emperor* (1), it was pointed out (Mya Bu and Baguley, JJ.) that the term " entrustment " with reference to section 405 of the Penal Code is not necessarily a term of law. It may have different implications in different contexts. In its most general signification, all it imports is the handling over of the possession for

(1) A.I.R. (1935) Ran. p. 453.

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some purpose which may not imply the conferring of any proprietary right at all. This decision makes a reference to the House of Lords' case in *Lake* v. *Simmons* (1), wherein Viscount Haldane in considering the import of the word "entrusted" with reference to a Lloyds' insurance policy containing a clause exempting the insurer from liability in the case of "loss by theft or dishonesty committed by any customer or broker's customer in *respect of goods entrusted to them* by the assured" observed:

> "It may have different implications and different contexts. In its most general significance all it imports is a handing over the possession of some purpose which may not imply the conferring of any proprietary right at all. I hand my umbrella to a servant to enable me to be free of it while I am taking off my coat. In a very general sense I entrust him with the umbrella. * * Entrusting may, of course, introduce a bailment, conferring some definite but restricted proprietary right. It is a question, then, of the contract entered into. And whether there is such a contract depends on more than a bare parting with possession."

In *Thakarsi* v. *King-Emperor* (2) the connotation of the word "entrusted" in section 405, Penal Code, was considered and it was pointed out that—

> "In order that money is 'entrusted' to the accused person within the meaning of section 405, Indian Penal Code, it should be transferred to him in circumstances which show that, notwithstanding its delivery, the property in it continues to vest in the prosecutor and the money remains in the possession and control of *the accused as a bailee*, and in trust for the prosecutor as a bailor, to be restored to him or applied in accordance with his instructions."

Having regard to the meaning of the word "entrusted" as given in the aforesaid decisions, I am of the view that in order to make an accused person liable within the purview of section 4 (*1*) (*d*), Suppression of Corruption Act, the wordings of which are much

(1) (1927) A.C. 487 at 499. (2) I.L.R. Nag. (1949) p. 620.

more restricted than those appearing in section 405 of the Penal Code of those appearing in section 5 (*1*) (*c*) of the Prevention of Corruption Act (India Act II) of 1957, there must be actual entrustment of the public property with the accused person, or in other words, the accused person concerned must have possession or control of the property, be it cash or be it other moveable property.

Now, from the facts and circumstances obtaining in the present case, it is abundantly clear that the appellant has never, at all material times, since the appointment of a cashier, received the cash, nor did he at all handle the same, though such failure on his part might be contrary to the instructions contained in Exhibit 8. How can he therefore be said to have committed the offence of misconduct with respect to the property which never came into his possession or control or which he had never received them ? There was thus, to my mind, no entrustment of cash as far as the appellant was concerned. Apparently, the trial Judge himself realized this difficult aspect and no wonder therefore, he has strained the relevant law by charging the appellant, not with offence of misconduct in respect of property entrusted with the appellant, but with the offence of " misconduct " in respect of property *deemed to have been entrusted to him.* This is clearly not within the contemplation of section 4 (*1*) (*d*) of the Suppression of Corruption Act. There is thus considerable force in submission made by the appellant's counsel in that regard, and it must be allowed to prevail. Moreover, if a comparison is made with the relevant provision of the India Suppression of Corruption Act, 1947, above referred to, it would be seen that the scope and meaning of the word " entrusted " appearing in section 5 (*1*) (*c*) of the said Indian Act in its proper context is much wider than

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that appearing in section 4 (*l*) (*d*) of our Suppression of Corruption Act. We cannot widen the scope of a penal statute; and it is elementary rule of construction that a penal statute must always be construed strictly. Therefore, I must hold that under the facts and circumstances obtaining in the case no offence under section 4 (*l*) (*d*) of the Suppression of Corruption Act has been made out against the appellant, and I must set aside the lower Court's conviction and sentence and acquit appellant so far as this case is concerned.

APPELLATE CRIMINAL.

Before U Chan Tun Aung, Chief Justice.

U KHIN MAUNG GYI (APPELLANT)

v.

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Suppression of Corruption Act, 1948, s. 4 (1) (c)/4 (2)—"Obtains for himself or for any other person"—The Chief ingredient of s. 4 (1) (c).

The appellant was convicted and sentenced to four months rigorous imprisonment under s. 4 (*1*)(2)/ 4 (*2*), Suppression of Corruption Act, 1948 for obtaining for his wife and his father-in-law two shares in the Win Win Cinema Hall business.

Held : The facts in the cases are just the reverse.

The obtaining is by the wife of the appellant, who is a public servant. The case is one of a non-public servant, namely, a public servant's wife, accepting or obtaining either for herself or for her husband a valuable thing or pecuniary advantage. Such accepting or obtaining do not come within the purview of the above Section.

What s. 4 (*1*) (*c*) of the Suppression of Corruption Act as it stands penalises is the obtaining by a public servant for himself or for another person any valuable thing or pecuniary advantage in the discharge of his duties.

Appeal allowed.

Kyaw Myint and *Ba Swe* for the appellant.

Tin Maung (Government Advocate) for the respondent.

U CHAN TUN AUNG, C.J.—The appellant U Khin Maung Gyi was a Senior Investigator of the Bureau of Special Investigation and he was sent up for trial under section 4 (*1*) (*c*) read with section 4 (*2*) of the Suppression of Corruption Act, 1948, on the allegation, that here I propose to use the very words of Mr. Jardine, the Assistant Director of the Bureau of

* Criminal Appeal No. 432 of 1956. Appeal from the order of U Po Thun, Special Judge (2) (SIAB and BSIA) of Rangoon, dated the 16th day of October 1956 passed in Criminal Regular Trial No. 11 of 1956.

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Special Investigation, contained in his first information report, Exhibit ည, which he lodged at the Kyauktada Police Station—"နိုင်ငံခြားသို့ ဘိန်းများမတရားသဖြင့် ဝိုးထုတ်၍၊ ရွှေချောင်းများမတရားခိုးသွင်းနေသည်ဟူသောသတင်းကို ရရှိသဖြင့် စုံစမ်းခဲ့ရာတွင် ဤဌာနဝင်တဦးဖြစ်သူ၊ အထက်တန်း စုံစမ်းစစ်ဆေးရေးအရာရှိ ဦးခင်မောင်ကြီးသည် အဆိုပါနိုင်ငံခြားသို့ မတရားဘိန်းခိုးထုတ်ပြီး နိုင်ငံတွင်းသို့ မတရားရွှေချောင်းများ ခိုးသွင်းသည့် နာမည်ကြီးပုဂ္ဂိုလ်များနှင့် ဆက်သွယ်ပူးပေါင်းပြီး မိမိရာထူးဂုဏ်ကို အသုံးပြု၍ မိမိဘနီးဖြစ်သူ ဒေါ်မြအုံးနှင့်ယောက်ခမဖြစ်သူ ဦးစောတို့အဘွက် သုံးသိန်းတန် ဝင်းဝင်းရုပ်ရှင်ရုံဝယ်ယူသည့် ကိစ္စတွင် တန်ဘိုးတပြားတချပ်မျှ မပေးရဘဲ၊ အစုနှစ်စုရရှိသည်ဟုသိရှိရပါသည်။ ဦးခင်မောင်ကြီးသည် မိမိ၏ဇနီးနှင့်ယောက်ခမ ဦးစောတို့အတွက် ထိုသို့ အတိုးတန်ပစ္စည်း၊ သို့မဟုတ် ငွေကြေးအကျိုးအမြတ်တစုံတရာကို မရိုးသားအဂတိလိုက်စားသောနည်းဖြင့်ဖြစ်စေ၊ သို့မဟုတ် တရားဥပဒေနှင့်ဆန့်ကျင်သော နည်းဖြင့်ဖြစ်စေ ပြည်သူ့ဝန်ထမ်းအဖြစ်ဖြင့် မိမိအခြေအနေကို အလွဲသုံးစားပြု၍ မိမိအတွက်သော်၎င်း၊ သူတပါး အဘွက်သော်၎င်း ရယူခဲ့သဖြင့် ၎င်းဦးခင်မောင်ကြီးအပေါ် ၁၉၄၈ ခုနှစ်၊ အဂတိလိုက်စားမှုတားမြစ်ရေးအက်ဥပဒေပုဒ်မ ၄ (၁) (ဂ) / ၄ (၂) အရတိုင်တန်းပါသည်။

From the above information laid against the appellant, it is clear that the offence alleged against him was for obtaining for his wife Daw Mya On and his father-in-law U Saw two shares in the Win Win Cinema Hall business without making any payment within the purview of section 4 *(1) (c)* of the Suppression of Corruption Act. The trial Court has found the appellant guilty under the said section and directed him to suffer four months' rigorous imprisonment. The appellant has already served the sentence during the pendency of the appeal and he is now out from the jail.

As a background of the appellant's connection with smugglers of gold and opium, Mr. Jardine, the Assistant Director, relied upon the information received by the Special Investigation Administration

Board to the effect that persons by the names of Nawkhum, Zaw Saing and Khunnaw from Kachin State would be smuggling 90 bars of gold from Siam *via* Taunggyi to Mandalay in a truck belonging to Nawkhum between 28th and 30th October 1955 and that this information should not be divulged to U Khin Maung Gyi, the appellant, as the appellant was said to be a friend of these people. Mr. Jardine took up the investigation into this matter, and he proceeded to Mandalay ; but it resulted in nothing except in the seizure of certain documents from a shop in "B" Road, Mandalay, in front of which Mr. Jardine, by chance, found Nawkhum's truck referred to in the information. Mr. Jardine then returned to Rangoon after seizing some documents from the said shop and he later learnt that one of the men referred to in the information, namely, Nawkhum was in the appellant's house in Rangoon where on 14th November 1955 a search was made and certain properties, cash, documents, etc., said to belong to Nawkhum were seized. Among the documents seized from U Khin Maung Gyi's house, Mr. Jardine found a document relating to an agreement for the hire of Win Win Cinema Hall and also a partnership deed for running the cinema Hall.

Further investigation by the Bureau of Special Investigation resulted in obtaining a copy of the sale deed of the Win Win Cinema Hall filed as Exhibit ๑ in the trial Court's proceedings. The so-called sale deed is described as assignment of business and its goodwill with the leased premises. So far as I can comprehend, it is the sale of an unexpired lease or assignment of the unexpired terms of a lease by lessees to 10 persons, including the goodwill of the leased premises, at a price of Kyats three lakhs. The deed is in the form of a conveyance, dated 3rd

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November 1955. The assignors of the lease (described as sellers) were (1) U Kyaw Win (2) Daw Kway (3) U Aye Khine (4) Daw Khin Phon (5) U Par Sein (6) Daw Myint Myint (7) Daw Khin Sein (8) Ma Yi Yi (9) Ma Thein Yi (10) U Mya Thein (11) Daw Khin Khin Gyi and (12) U Too Too Rahman. The buyers or the assignees are found to be (1) U Naw Kam (2) Zau Saing (3) U Yee Yaung (4) U Saw (5) U Kyi Thein (6) U Khin Maung Swe (7) Daw Tin (8) U Shwe Sein (9) Ma Zau Aung and (10) Daw Mya On. One of the buyers, namely, Daw Mya On, is no other than the appellant's wife. From the several documents seized from the shop in "B" Road, Mandalay, and also from U Khin Maung Gyi's house in 48th Street, Rangoon, exhibited in the trial proceedings as Exhibit ဝ series, most of which are from the personal effects of U Nawkhum—the prosecution tried to build up its case that the appellant and the alleged smugglers of gold and opium had some sort of link or connection. The trial Court, however, found that the link could not be definitely established. However, as regards the purchase of the lease of the Win Win Cinema Hall, particularly Daw Mya On's participation as a purchaser thereof, as evidenced in the sale deed, Exhibit ဝ, and also in view of the circumstances referred to hereafter, the lower Court found that a case under section 4 (*1*) (*c*) of the Suppression of Corruption Act, 1948 has been made out against the appellant. Documentary evidence *vide* Exhibit ဂ was produced by the prosecution to show that the appellant had somehow or other taken an undue interest in the matter of purchase of the particular cinema hall by U Nawkhum. In that connection several parts played by the appellant either before or after the purchase of the Win Win Cinema Hall by Nawkhum along with his (appellant's) wife and

father-in-law and others were adduced in evidence. Emphasis was laid upon the appellant's presence in Daw Khin Phon's and U Kyaw Win's house before the actual purchase of the cinema hall by Nawkhum and others, and also on the appellant having placed an order with one S. A. Raman (PW 20) of the Oriental Furniture Mart to polish up the chairs in the Win Win Cinema Hall.

The agreement for the hire of the cinema hall to stage a *Pyazat* sponsored by the Rangoon Town Police for raising welfare funds for the Rangoon Police Force was also relied upon by the prosecution to prove that the agreement for the hire of the said cinema hall had to be made between the appellant representing the Win Win Cinema Hall on the one part and Superintendent of Police U Ba Han on the other part. The agreement has been filed in the trial Court as Exhibit c-ɔ and it was signed by U Zau Saing as the owner of the hall.

In November 1955 the Special Investigation Administration Board questioned the appellant specifically dwelling upon what he had to say about his wife Daw Mya On being found to be one of the purchasers of the Win Win Cinema Hall and also as a shareholder in the said business along with Nawkhum and others. The appellant was said to have told before the Board that as U Nawkhum was a friend who was putting up at that time at his house and that as he was a very close friend to him and his wife, she had been included in the sale deed as one of the buyers. U On Pe (PW 15), one of the Directors of the Special Investigation Administration Board, was directed to take down the appellant's statement in writing which he duly did and the statement, Exhibit ɕ, is duly signed by the appellant. There, the appellant stated specfically that Daw Mya

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On's name had been inserted without his consent. He said he went to the lawyer, U Choung Po at once, and asked him to delete his wife's name. U Choung Po was said to have told him that since the sale deed had reached the Registration Office, the appellant's wife's name could not be deleted, but that he would not include her name in the partnership deed. U Choung Po himself followed to the appellant's house that evening and enquired whether the appellant's wife did not approve the inclusion of her name in the purchase deed as a purchaser of the cinema hall. There is U Choung Po's testimony that the appellant told him that he dared not take the risk and that he would stay aloof from such affair and that his wife's name should also be deleted and not included in the partnership deed. To satisfy the appellant's wish U Choung Po drew up an amended partnership deed excluding the appellant's wife's name.

On these evidence the appellant had been charged and convicted under section 4 (*1*) (*c*) of the Suppression of Corruption Act.

Section 4 (*1*) (*c*) of the Suppression of Corruption Act, 1948 reads:

"4. (*1*) A public servant is said to commit the offence of criminal misconduct in the discharge of his duties—

(*a*) * * * * *

(*b*) * * * * *

(*c*) if he, by corrupt or illegal means or otherwise by abuse of his office as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage."

(The under-lines are mine.)

On behalf of the appellant it is strenuously contended that even if all the facts and circumstances adduced by the prosecution are found to have been

established, the appellant, though a public servant, has not committed the offence under section 4 (*1*) (*c*) of the Suppression of Corruption Act, inasmuch as he has not, as a public servant, obtained by corrupt or illegal means, any valuable thing or pecuniary advantage *for himself* or *for any other person*. There is considerable force in this submission. From the mass of evidence adduced by the prosecution, even accepting that they are true, they only disclose that the appellant's wife has, by her participation as a purchaser of the shares in the Win Win Cinema Hall business along with Nawkhum and others who are said to be concerned in smuggling of gold and opium, obtained a valuable thing or a pecuniary advantage. What section 4 (*1*) (*c*) of the Suppression of Corruption Act penalises is the obtaining by a public servant for himself or for another person any valuable thing or pecuniary advantage in the discharge of his duties. Here, the position is just the reverse. The obtaining is by the wife of the appellant, a public servant. Even, if the valuable thing or pecuniary advantage has been obtained by the appellant's wife for her husband, it does not come within the purview of the above section. In other words, the alleged obtaining or taking by a public servant of a valuable thing or pecuniary advantage so as to be within the scope of section 4 (*1*) (*c*) of the Suppression of Corruption Act, must be for himself or for another person. The learned Government Advocate U Tin Maung appearing for the respondent has very properly conceded that the appellant could not have been convicted under the aforesaid section on the facts and circumstances adduced at the trial by the prosecution. The facts that have been established by the prosecution are just the reverse of what is contemplated in section 4 (*1*) (*c*) of the Act. The case is

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one of a non-public servant, namely, a public servant's wife, accepting or obtaining either for herself or for her husband a valuable thing or pecuniary advantage. Therefore, the conviction of the appellant under the aforesaid section was clearly based upon misconception of the provisions of section 4 (*1*) (*c*) of the Act and I must hold that it is not sustainable.

The appeal is allowed. The conviction and sentence passed upon the appellant under section 4 (*1*) (*c*) read with section 4 (*2*) of the Suppression of Corruption Act which directed the appellant to suffer four months rigorous imprisonment must be set aside and the appellant will be acquitted so far as this case is concerned.

However, before I finish with this I would like to point out that it is for careful consideration by the authority concerned whether, from the facts obtaining in the present case, namely, the putting in of the appellant's wife (Daw Mya On's) name in spite of protestation said to have been made by the appellant, and having regard to the peculiar relationship that was said to have been existing between the appellant and Nawkhum, Nawkhum has not committed an offence of abetment of bribery punishable under section 161 read with section 116 of the Penal Code; or whether the appellant's wife herself, subject, of course, to whatever defence she may be able to put forward in that regard, has not committed an offence of taking gratification as a motive or reward for inducing, by exercise of her personal influence over her husband, a public servant, to forbear to do any official act, etc., within the mischief of section 163 of the Penal Code; or whether the appellant and his wife have not jointly committed offences under sections 163 and 164 of the Penal Code.

APPELLATE CIVIL.

Before U Aung Khine, J.

U SAW AND ONE (APPELLANT)

v.

LOKE MANI (*alias*) LO MANI (RESPONDENT).*

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Jan. 3.

Limitation Act, Article 149—Transfer of Immoveable Property (Restriction) (Amendment) Act, 1949.

Article 149 Limitation Act has no application to suits brought by assignees and other persons deriving or claiming through or under Government.

Governor-General-in-Council v. *Pandit Awadhoot*, I.L.R. (1946) Nag. 246, referred to.

In enacting the Transfer of Immoveable Property (Restriction) (Amendment) Act, the legislature could not have intended to deprive foreigners of immoveable property which had been acquired other than by transfer.

San C. Po for the appellant.

H. Subramanyan for the respondent.

U AUNG KHINE, J.—The facts of this appeal are very similar to the facts of the case I have dealt with in Civil Second Appeal No. 88 of 1954. The appellants in that case, U Saw and Daw Gun Nu are also the appellants here in this appeal.

On the 12th day of June 1950, the appellants purchased from Messrs. Ellerman's Arracan Rice and Trading Co., Ltd., certain piece of land which included the occupancy right in Holding No. 27 of 1952-53, obtained under lease from the Government and a free-hold land known as Holding No. 24 of 1948-49 measuring 7·266 acres in Kalagon Block No. 53, Thinbawgyin Oksu. After the purchase of these pieces of land the appellants found that the respondent Loke-Mani (*a*) Lo-Mani was in possession of a

* Civil 2nd Appeal No. 22 of 1955, against the decree of the Additional District Court of Bassein in Civil Appeal No. 8 of 1954, dated the 27th December 1954.

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U AUNG KHINE, J.

portion each of both the lease-hold and the free-hold lands. He had turned that area into a plantain grove. He had also been living on that area. The appellants requested him to vacate but he refused to do so and hence Civil Regular Suit No. 74 of 1953 of the Township Court of Bassein West. In his defence the respondent pleaded that he had been staying on that land for over 24 years and set up the plea that the suit was barred by limitation. The fact that the respondent had been in continuous possession of the land for over 24 years has been accepted by both the lower Courts. The plea of adverse possession was also accepted by the trial Court and the appellants' suit was dismissed.

The appellants failed to get the judgment and decree of the trial Court set aside in their appeal to the District Court also and hence this appeal. One of the grounds taken up here is that both the lower Courts erred in law in accepting and upholding the plea of adverse possession in respect of a lease-hold land. I have pointed out in Civil Second Appeal No. 88 of 1954 that as the Government was not a party in the suit and as the dispute is between private parties, the provisions of Article 149 of the Limitation Act cannot be applied. In *Governor-General-in-Council* v. *Pandit Awadhoot* (1), it was held that Article 149 has no application to suits brought by assignees and other persons deriving or claiming through or under Government.

As stated above, the respondent was in possession of a small fraction of the free-hold land and in respect of it the appellants claimed that the respondent being a foreigner, he was incapable of possessing any land and to allow him to do so would be contravening the provisions of the Transfer of

(1) I.L.R. (1946) Nag. 246.

Immoveable Property (Restriction) (Amendment) Act, 1949. To this contention, an effective answer has been given by the Advocate for the respondent to the effect that no transfer of the land was ever made to the respondent but that he had simply been in continuous possession of the land for over 24 years. He was not a permissive occupant nor a lessee of Messrs. Ellerman's Arracan Rice and Trading Co. Ltd. and it was submitted that by his long occupation of the land he had become an owner thereof by reason of adverse possession. In enacting the Transfer of Immoveable Property (Restriction) (Amendment) Act, the legislature could not have intended to deprive foreigners of immoveable property which had been acquired other than by transfer. Therefore, I am of the opinion that the contention put forward on this ground cannot also be sustained.

For all these reasons this appeal also fails and is dismissed with costs.

ORIGINAL CIVIL.

Before U Shu Maung, J.

H.C. 1957

Aug. 31.

U THA HLA (PETITIONER)

v.

THE MUNICIPAL CORPORATION OF RANGOON (RESPONDENTS).*

Application to sue in forma pauperis—*Rejection under Order 33, Rule 4 (4), Code of Civil Procedure—Appeal under Rule 7, Original Side Rules (Civil)—S. 204 (1) City of Rangoon Municipal Act.*

Held: If the Rangoon Corporation or its Officers are sued for acts done in their official capacity it must be deemed that they were doing them in pursuance or execution or intended execution under the provisions of the Rangoon Municipal Act. Consequently under s. 204 (1) (*b*) of the Rangoon Municipal Act a suit against the Corporation or its officers should be commenced within six months after the accrual of the cause of action. A suit filed after that date is therefore barred by limitation.

Civil First Appeal No. 61 of 1955, referred to.

Held further: There is nothing in Rule 4 or in any other rule in Order 33 which expressly prohibits the consideration and determination by the Court of those circumstances under clauses (*a*) or (*b*) or (*c*) after issue of notice and hearing of the case under Order 33, Rule 4.

Dr. A. Karim and another v. *Pandit Laiq Ram and others*, (1939) R.L.R. p. 263, followed.

H. Pascal v. *The Secretary of State in India in Council*, 12 Ran. p. 124, referred to.

Dr. U E Maung for the petitioner.

C. C. Khoo for the respondents.

U SHU MAUNG, J.—This is an appeal under Rule 7, Original Side Rules (Civil) from the order of the learned Deputy Registrar dated the 31st January 1957 in which he rejected the application of the petitioner who had filed an application to sue *in forma pauperis* and after an enquiry as to the question of pauperism the application was rejected under Order

* Civil Misc. No. 35 of 1956.

33, Rule 4 (4) of the Code of Civil Procedure on the ground that there was no subsisting cause of action against the respondents.

The application was one to obtain the leave of the Court to sue as a pauper and the subject-matter of the suit was one for compensation or damages for wrongful and malicious dismantling of the restaurant building known as " Mahabandoola Restaurant " and for wrongful seizure of the property and the amount claimed was for a sum of K 50,000. In this application the proposed plaint is also attacLed and the cause of action according to paragraph 26 of the attached plaint will show that the plaintiff had served the notice of intention to sue the defendant Corporation *vide* copy of notice dated 18th April 1955 and the defendants' reply dated 10th May 1955. The gist of that notice is to the effect that he was addressing the Commissioner of the Rangoon Corporation applying for compensation in respect of his restaurant which he claimed was wrongfully dismantled and the amount mentioned is K 50,000 and the reply dated 10th May 1955 on behalf of the Rangoon Corporation is to the effect that the Corporation was unable to accede to his request and this is in fact a denial of the claim. Therefore the case of action according to this claim filed by the petitioner arose on the 18th of April 1955 and under section 204 (*1*) of the City of Rangoon Municipal Act there is this provision which is as follows :

" 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 execution or intended execution of this Act, or in respect of any alleged neglect or default in the execution of this Act—

(*a*) until the expiration of one month next after notice in writing has been, in the case of the Corporation, left at the chief municipal office

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and, in the case of the Commissioner or of a municipal officer or servant, delivered to him or left at his office or place of abode, stating with reasonable particularity the cause of action and the name and place of abode of the intending plaintiff and of his advocate, pleader or agent, if any, for the purpose of such suit ; nor

(*b*) unless it is commenced within six months next after the accrual of the cause of action."

In view of this provision of law, the learned Deputy Registrar held that when the petition was filed on the 15th March 1956 by the petitioner, it was more than six months from the date of accrual of the cause of action and that therefore it was barred and he rejected the application.

Two points have been raised by the learned Advocate for the petitioner in challenging the correctness of this order. One was to the effect that this petition to sue the Rangoon Corporation represented by the Municipal Commissioner and the Building Engineer was against the action of these people for wrongfully ousting the petitioner out of possession in respect of his restaurant and that they had wrongly exercised their powers and that therefore this suit against them could not be said to be a suit against the Rangoon Municipal Corporation and its officers for acts done in pursuance of execution or intended execution of the Act as defined in section 204 of the Rangoon Municipal Act.

The next point urged was that the learned Deputy Registrar in dismissing this application under Order 33, Rule 4 (4) erred in law in view of the fact that he had already issued notice to the respondent when he passed this order and according to the learned Advocate, if the learned Deputy

Registrar deemed that there was no cause of action the proper step which he should have taken was one under Order 33, Rule 3 (*b*) and (*c*) of the Code of Civil Procedure and that therefore this action on his part in dismissing this application under Order 33, Rule 4 was bad in law. As against that the learned Advocate appearing for the respondents has invited my attention to a decision in Civil First Appeal No. 61 of 1955 (a certified copy is herewith filed) by a Bench of this Court. There in the course of the judgment their Lordships had discussed this question whether the actions of the Rangoon Corporation or its officers or employees acting under section 204 of the Rangoon Municipal Act were acts done in pursuance or execution or intended execution of the Act and their Lordships had also quoted decisions from the Indian High Courts in respect of this point and they came to the conclusion that if the Rangoon Corporation or its officers are sued for acts done in their official capacity, it must be deemed that they were doing it in pursuance or execution or intended execution of the Act. In view of this decision it was submitted that there cannot be any doubt on the allegations in the proposed plaint filed by the petitioner that his plaint against the two respondents was in respect of action done by them in the official capacity and that therefore the provisions of section 204 of the Rangoon Municipal Act would come into play. I think there is a great deal of force in this contention and I am of the view that the action of the respondents must be deemed to be done in their official capacity under the provisions of the Rangoon Municipal Act.

Then in respect of the other contention of the learned Advocate for the petitioner that the action of the learned Deputy Registrar was not in

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accordance with law as he had rejected the application under Order 33, Rule 4, the learned Advocate for the respondents has invited my attention to the case of *Dr. A. Karim and another* v. *Pandit Laiq Ran and others* (1). The very same point which is now being raised by the learned Advocate for the petitioner was discussed in that decision and their Lordships held that such an action in an application to sue *in forma pauperis* could be dealt with under Order 33, Rule 4 of the Code of Civil Procedure as amended by the High Court and if the Court comes to the conclusion that if the petition does not disclose a cause of action or whether the suit is barred by limitation under Rule 3 (*b*) and (*c*), then without considering any other extraneous evidence, the Court comes to the conclusion that no cause of action is disclosed, the petition could be dismissed. The observations of their Lordships at page 264 are apposite for the purpose in hand and it would be relevant for me just to quote that portion which is as follows:

> "But there is nothing to warrant the reading of these rules in such a way as to show that the Court not having rejected the petition on any of the grounds mentioned in rule 3, before the issue of notices and the holding of enquiry under rule 4, has no further jurisdiction to consider and determine whether it is liable to be rejected under clause (*a*) or (*b*) or (*c*) of that rule. There is nothing in rule 4 or in any other rule in Order 33 which expressly prohibits the consideration and determination by the Court of these circumstances after issue of notice and hearing of the case under rule 4."

The next point urged by the learned Advocate for the respondents is in respect of the question of what is a good and subsisting cause of action and he has invited my attention to the case of *H. Pascal* v. *The Secretary of State for India in Council* (2).

(1) (1939) R.L.R. p.263. (2) 12 Ran. p. 124.

That was also a petition for leave to sue *in forma pauperis* and when the cause of action was found to be barred by limitation the application was dismissed on the ground that there was no good and subsisting cause of action and the order of the Deputy Registrar dismissing the application was confirmed by the learned Judge when the matter came up on appeal to him.

In view of these circumstances there cannot be any doubt that in the present case as I have stated in the earlier part of my order, the cause of action according to the proposed plaint filed by the petitioner was 18th April, 1955 and the petition came to be filed only on the 15th of March 1956 and under section 204 (*1*) (*b*) of the City of Rangoon Municipal Act there is this clause that the suit should be commenced within six months next after the accrual of the cause of action and as this application was filed very much after this period of six months, I am of the opinion that the learned Deputy Registrar was correct in dismissing this application. For the above reasons, the order of the learned Deputy Registrar is hereby confirmed and this appeal against that order must stand dismissed.

APPELLATE CIVIL.

Before U San Maung, J.

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June 21.

U U NYUNT (APPELLANT)

v.

DAW KYIN SIN (RESPONDENT).*

Urban Rent Control Act, s. 11, sub-s. (1) Clause (d)—*Certificate under s. 14-A —Whether a Civil Court has jurisdiction to decide the question of* bona fide *requirement, which had already been decided by the Rent Controller— Order 23, Rule 1, sub-rule (2) Civil Procedure Code, permission to withdraw suit with liberty to institute a fresh one—Fresh suit filed—* Res judicata—*Order 41, Rule 23, Civil Procedure Code.*

The Respondent filed a suit for ejectment against the appellant under s. 11, sub-s. (*1*), Clause (*d*) of the Urban Rent Control Act, 1948, after obtaining the requisite Certificate under s. 14-A that the land was required *bona fide* for erection of a building.

The defence, *inter alia*, was that the land was not required *bona fide* by the Respondent.

The Respondent replied that the Controller of Rents had already decided the question of *bona fides*, and that the Court has no jurisdiction to go into the same matter. This contention was accepted by the Court on a preliminary issue.

The Respondent however withdrew the suit under Order 23, Rule 1, sub-rule (2) of the Civil Procedure Code with liberty to file a fresh one, because a notice to quit under the Transfer of Property Act had not been given.

Subsequently, after giving a fresh and valid notice, she filed a second suit.

The appellant again raised the same plea that the land was not required *bona fide*. The Respondent contended that the matter was *res judicata* in view of the decision on the preliminary issue in the first suit.

The Trial Judge held that (i) the matter was *res judicata* and that (ii) he had no jurisdiction to go into the question of *bona fides* and decreed the Respondent's suit.

The District Court, on appeal, held that the Trial Court was wrong in holding that Civil Court had no jurisdiction to decide the question of *bona fides*, but held that the matter was *res judicata* in view of the decision in the first suit.

The High Court, on Second Appeal, held that :

(i) Civil Courts have jurisdiction to go into the question whether or not the land was *bona fide* required for erection of a building thereon, though the

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* Civil 2nd Appeal No. 57 of 1955, against the decree of the District Court of Tavoy in Civil Appeal No. 1 of 1955.

landlord had been granted a certificate to file a suit under s. 11 (*1*) (*d*) of the Urban Rent Control Act, 1948.

S. M. Ahmed and one v. *Bakridi*, (1951) B.L.R. 156 (H.C.), relied on.

(ii) The question was not *res judicata* by reason of the decision in the first suit, which could not have been upon the same cause of action as in the second suit, inasmuch as in the first suit the cause of action did not exist at all, a notice to quit under the Transfer of Property Act not having been given by the landlord to the tenant.

Ramasami Reddi v. *Thalawasal Marudai Reddi*, I.L.R. 47 Mad. 453; *Ramireddi* v. *Subbareddi*, I.L.R. Mad. 500; *Shazadee Begam* (a) *Khin Khin Nyunt and one* v. *P. C. Dutt*, (1954) B.L.R. 34 (S.C.), referred to.

Ba Than for the appellant.

C. C. Khoo for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 23 of 1954 of the Township Court of Tavoy the plaintiff Daw Kyin Sin who is the respondent in the present appeal sued the defendant-appellant U U Nyunt for his ejectment from the piece of land in suit. The suit was one under clause (*d*) of sub-section (*1*) of section 11 of the Urban Rent Control Act, on the ground that the land was required *bona fide* by the landlord for the erection of a building thereon, the necessary certificate therefor under section 14-A of the Urban Rent Control Act having been obtained from the Controller. The defendant by his written statement pleaded, *inter alia*, that the suit land was not required *bona fide* by the plaintiff for the purpose of erecting a building thereon. To this contention the plaintiff replied that the Controller of Rents, having already decided that the land was *bona fide* required for the aforesaid purpose civil courts had no jurisdiction to go into the same matter. This contention was accepted by the learned trial Judge in his answer to a preliminary issue regarding the jurisdiction of a civil court to decide a matter which had already been decided by the Rent Controller.

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However, it was subsequently discovered by the plaintiff that her suit was bad because a notice under the provisions of the Transfer of Property Act terminating the lease of the land had not been served upon the defendant. She therefore filed an application purporting to be under Order 23, Rule 1, sub-rule 2 of the Civil Procedure Code, for permission to withdraw the suit with liberty to institute a fresh one on the same cause of action and this application was granted by the learned Township Judge with costs in favour of the defendant. Subsequently, the plaintiff Daw Kvin Sin filed a fresh suit, being Civil Regular Suit No. 41 of 1954 under the provisions of clause *(d)* of sub-section *(1)* of section 11 of the Urban Rent Control Act, the notice terminating the lease of the land having been duly given. The defendant by his written statement again raised the plea that the land was not required by his landlord *bona fide* for the purpose of erecting a building thereon. To this plea the plaintiff replied that the matter was *res judicata* in view of the answer given by the learned Township Judge to the preliminary issue raised in Civil Regular Suit No. 23 of 1954. The learned Township Judge accepted this plea of *res judicata* and again holding that he had no jurisdiction to go into the question whether or not the land was required *bona fide* as stated by the plaintiff, decreed the respondent's suit with costs.

On appeal by the defendant appellant to the District Court of Tavoy, the learned District Judge by his judgment in Civil Appeal No. 1 of 1955 held relying upon a decision of this Court in *S. M. Ahmed and one* v. *Bakridi* (1) that the learned Township Judge was wrong in holding that the civil Court had no jurisdiction to go into the question relating to the

(1) (1951) B.L.R. 156 (H.C.)

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bona fide nature of a landlord's requirements once a permit to sue had been issued to him under section 14-A of the Urban Rent Control Act by the Controller. The learned District Judge, however, concurred with the Township Judge that the matter was *res judicata* in view of the decision of the Township Judge in the former suit, namely, Civil Regular Suit No. 23 of 1954. He accordingly dismissed the appeal with costs. Hence this second appeal by the defendant U U Nyunt.

At the very outset I must say that the learned Township Judge was in error when he held that merely because a landlord had been granted a certificate under section 14-A of the Urban Rent Control Act to file a suit under section 11 (*1*) (*d*), civil Courts have no jurisdiction to go into the question whether or not the land was *bona fide* required for the erection of a building thereon.

As regards the question whether the defendant-appellant's defence was barred as *res judicata* in view of the answer given by the learned Township Judge to a preliminary issue in a former suit which had subsequently been allowed to be withdrawn under Order 23, Rule 1, sub-rule 2 of the Civil Procedure Code, there is ample authority to the contrary.

In *Ramasami Reddi* v. *Thalawasal Marudai Reddi* (1) in answer to a suit for ejectment the defendants pleaded that they were entitled to occupancy rights in the land and that in any event the suit for ejectment was not maintainable as they were tenants from year to year, and no notice to quit had been given to them as required by law. The District *Munsif* held that the defendants had no occupancy rights but that the suit was not maintainable as the defendants were tenants from year to year

(1) I.L.R. 47 Mad. 453.

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and no notice to quit had been given to them. He accordingly dismissed the suit. On appeal the lower appellate Court affirmed the decree of the trial Court on the ground of want of notice to quit. On second appeal the High Court affirmed the decree on the same ground. The plaintiff having subsequently given a proper notice to quit, instituted a fresh suit for ejectment wherein the defendants again set up occupancy rights. On the plaintiff pleading that the question of occupancy rights was *res judicata* it was held by a Bench of the Madras High Court that this question was not *res judicata* by reason of the decision in the previous suit.

In the case quoted above the previous suit was dismissed on the ground that it was not maintainable in law for want of a notice to quit. In the suit under appeal the previous suit was withdrawn because the plaintiff knew that it was bound to be dismissed for want of a notice to quit. However, the same principle would apply as in both cases the matter in issue was not finally decided within the meaning of that phrase in section 11 of the Civil Procedure Code.

Ramireddi v. *Subbareddi* (1) is another case in point. There, a suit by the assignee of a mortgage bond against a mortgagor was dismissed on the ground that the plaintiff was not entitled to sue for want of notice to the defendant under section 132 of the Transfer of Property Act. The plaintiff then gave express notice of the assignment to the mortgagor and sued on the bond again. It was held by a Bench of the Madras High Court that the claim was not *res judicata* and the second suit was accordingly not precluded by section 13 of the Code of Civil Procedure, 1882, (corresponding to section 11

(1) I.L.R. 12 Mad. 500.

of the present Code). In this connection the following observation of the Bench is apposite :—

" In our judgment the decree of the Courts below is right. To conclude a plaintiff on the ground of *res judicata* it is necessary to show not only that there was a former suit between the same parties, for the same matter, and upon the same cause of action, but also that the matter directly and substantially in issue has been heard and finally decided by the Court which tried the former suit. In original suit No. 1102 of 1885, the Court of First Instance decided, no doubt erroneously, that the plaintiff had no cause of action. The merits of the case were not gone into, the suit being dismissed because the plaintiff's assignor had not given the notice which, in the opinion of the Court, he was bound to give before his assignee could seek to make the defendant liable. The matter directly and substantially in issue, *viz.*, the liability of the defendant, was not heard and decided in the former suit. "

In this connection, a decision of our own Supreme Court in *Shazadee Begam* (a) *Khin Khin Nyunt and one* v. *P. C. Dutt* (1) will be of interest although not directly in point. There, a suit for ejectment under section 11 (*1*) (*f*) of the Urban Rent Control Act was instituted with a permit issued by the Rent Controller was subsequently withdrawn because of an invalid notice to quit. A subsequent suit was filed based upon a fresh and valid notice and one of the points raised was that the new suit was barred because of Order 23, Rule 1 (3) of the Civil Procedure Code. It was held that Rule 1, sub-rule (3) was no bar to a fresh ejectment suit where an initial suit had failed because the subject-matter in the two suits were not the same. The Supreme Court observed as follows :

" 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

(1) (1954) B.L.R. 34 (S.C.).

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No. 694 (of 1951) 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*."

In the light of these remarks it is clear that Civil Regular Suit No. 41 of 1954 could not have been upon the same cause of action as Civil Regular Suit No. 23 of 1954 inasmuch as in the former suit the cause of action did not exist at all, a notice to quit under the Transfer of Property Act not having been given by the landlord to the tenant.

For these reasons I would allow the appeal and set aside the decree for ejectment passed against the defendant-appellant U U Nyunt in Civil Regular Suit No. 41 of 1954 and under Order 41, Rule 23 of the Civil Procedure Code, remand the suit to the Township Court to be retried according to law in the light of the remarks made above. The Township Court will re-admit the suit under its original number in the Register of Civil Suits and proceed to determine it. Costs so far incurred will abide the final result of the suit on its merits, Advocate's fees in this Court being assessed at three gold mohurs.

APPELLATE CRIMINAL.

Before U San Maung, J.

U ZA TILA (APPLICANT)

v.

UNION OF BURMA (RESPONDENT).*

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Apl. 10.

Criminal Procedure Code, s.145—Proceedings cannot be renewed after termination—A new proceeding should be opened, if there is a fresh dispute—S. 556 Criminal Procedure Code applicable to s. 145 Criminal Procedure Code

Held: A settlement between the parties in a proceeding under s. 145 Criminal Procedure Code puts an end to the proceedings. It cannot be renewed. If there is a fresh dispute likely to cause a breach of the peace, a new proceeding under s. 145 Criminal Procedure Code must be opened.

Tarini Charan Chowdhry v. *Amulya Ratan Roy*, I.L.R. 20 Cal. 867; *Ghulam Muhammad and others* v. *The Crown, through Musammat Allah Wasai*, (1933) I.C. 512, referred to.

Held further: The principle underlying s. 556 Criminal Procedure Code is applicable to a proceeding under s. 145 Criminal Procedure Code.

Hla Sein, Advocate, for the applicant.

Ba Gyaw (Government Advocate) for the respondent.

U SAN MAUNG, J.—This is a recommendation by the Sessions Judge of Henzada that the orders, dated the 15th of June 1956, 18th of June 1956 and 20th of June 1956, recorded by the Subdivisional Magistrate, Myanaung, in his Criminal Miscellaneous Case No. 36 of 1955 be set aside on the ground that the learned Subdivisional Magistrate had no jurisdiction to pass them. The facts of the case which have

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* Criminal Revision No. 31 (B) of 1957.

Review of the orders of the Subdivisional Magistrate of Myanaung, dated the 15th, 18th and 20th days of June 1956, passed in his Criminal Misc. No. 36 of 1955 as recommended by the Sessions Judge, Henzada.

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been fully set out by the learned Sessions Judge in his order dated the 28th January 1957 are briefly these:

At Myanaung there is a pagoda named Shwebontha which was managed by a Board of Trustees, including U Myint the applicant in Criminal Miscellaneous Case No. 36 of 1955. On the 21st October 1955 U Myint filed an application before the Subdivisional Magistrate, Myanaung, that a dispute likely to cause a breach of the peace existed because U Za Tila, the respondent in the case, was about to dispose of an electric lighting plant, which had been purchased with the money received by public subscription for the purpose of lighting the aforesaid pagoda. When examined on oath, U Myint stated that the respondent U Za Tila, who was responsible for collecting the money, had after the purchase of the electric lighting plant kept it within the precinct of his *kyaung* and was managing it as if it was his own personal property. On notice being issued to U Za Tila, the latter by a written statement contended that the electric lighting plant was in fact being used for the purpose of lighting the pagoda and that he had no intention whatsoever of misappropriating the same to his own use. U Za Tila, however, admitted that because of a dispute between him and the members of the Board of Trusteees some stones were thrown at his monastery, thus compelling him to seek asylum elsewhere. Subsequently, on the 10th of January 1956 both the parties to the dispute, namely, U Myint and U Za Tila filed a joint written statement to the effect that the dispute had been compromised on the basis that the electric plant should be handed over to the custody of U Tezawunta, Sayadaw of Zeyaaungmye monastery. Accordingly, the attachment order which had been issued on the

22nd of October 1955 was withdrawn and the case was kept pending merely for the purpose of receiving a report to the effect that this subsequent order, withdrawing the attachment had been carried out. Subsequently, on the 16th of March 1956 both U Tezawunta and U Za Tila appeared before the Subdivisional Magistrate and from them the Magistrate learnt that there were still difference of opinion regarding the management of the electric lighting plant. The Magistrate, therefore, made an attempt to mediate between them and upon failure of his mediation, the Subdivisional Magistrate took upon himself the task of formulating a scheme, after consulting such of the persons whom he considered to be interested in the management of the electric lighting plant. By his order, dated 15th of June 1956, he proposed that U Kaweinda, President of the Yahanpyo Association, should be the chairman of a board of management, consisting of the Subdivisional Officer, the Subdivisional Judge and the Subdivisional Police Officer. This scheme was communicated to U Za Tila who appeared on the 18th of June 1956 to express his dissent. On the 19th of June 1956 U Za Tila assented to the scheme by which the Subdivisional Officer would be the sole manager of the electric lighting plant and on the next day a letter was received from the Board of Trustees of Shwebontha Pagoda also agreeing to this. Subsequently, however, U Za Tila filed an application before the Sessions Judge of Henzada questioning the validity of the orders, dated the 15th of June 1956, 18th of June 1956 and 20th of June 1956, on the ground that the Subdivisional Magistrate had no jurisdiction to pass these orders assuming that in doing so he was acting in his capacity as a Magistrate. The learned Sessions Judge agreed with the contention

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of U Za Tila and has accordingly submitted to this Court a recommendation as mentioned above.

Now, it is clear that on a compromise being effected between the parties as recorded in the Diary Order, dated 10th January 1956, and an order being passed for the withdrawal of the attachment under section 145 of the Criminal Procedure Code the proceedings in Criminal Miscellaneous Case No. 36 of 1955 came to an end.

In *Tarini Charan Chowdhry* v. *Amulya Ratan Roy* (1) it was held by a Bench of the Calcutta High Court that proceedings under section 145 of the Code of Criminal Procedure cannot be renewed after the dispute has been settled and an order has been made that the case be struck off. The same view was held by Sir Shadi Lal, C.J. in *Ghulam Muhammad and others* v. *The Crown, through Musammat Allah Wasai* (2).

The proceedings subsequent to the 10th January 1956 in Criminal Miscellaneous Case No. 36 of 1955 were irregular assuming that the Subdivisional Magistrate was acting *qua* Magistrate. What the Subdivisional Magistrate should have done, if a fresh dispute likely to cause a breach of the peace had arisen, was to have opened a new proceeding under section 145 of the Criminal Procedure Code. Instead, he had in the same proceedings acted as a self-appointed arbitrator to the dispute and subsequently identified himself with it, firstly, by proposing a scheme in which he as a Subdivisional Officer should be one of the members of a management committee and, secondly, by appointing himself as Subdivisional Officer the sole manager of the electric lighting plant. Accordingly, he had deprived himself from adjudicating the matter in his capacity as a Magistrate.

(1) I.L.R. 20 Cal. 867. (2) (1933) I.C. 512.

Section 556 of the Criminal Procedure Code enacts that no Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try to permit for trial any case to or in which he is a party,or personally interested. The principle underlying this section is applicable to a proceeding under section 145 of the Criminal Procedure Code as the law in laying down the rule had regard not so much to the motives which might supposed to bias the Judge as to the susceptibilities of litigating parties; the important object being to promote the feeling of confidence on the administration of justice.

For these reasons, I would, on the assumption that the orders dated the 15th June 1956, 18th June 1956 and 20th June 1956, were made by the Subdivisional Magistrate in his capacity as a Magistrate, direct that these orders be set aside.

APPELLATE CIVIL.

Before U Chan Tun Aung, Chief Justice and U San Maung, J.

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Sept. 25.

DAW HLA SHIN AND SEVEN OTHERS (APPELLANTS)

v.

DAW AYE KHIN (RESPONDENT).*

Burmese Buddhist Law—Claim by children of a step-father by a subsequent marriage to the estate of the deceased step-child of a former marriage—Attendance in illness and performance of funeral obsequies—"Intermeddling" within the purview of s. 2 (11) of the Civil Procedure Code.

U Me + Daw Toke—

Maung Ba Han (*Keittima* son)—Daw Aye Khin natural sister of Ba Han (Respondent).
(d. 1952)

Daw Toke + Tun Yin—

No issue.

Tun Yin + Daw Hla Shin—

Seven children (Appellants).

1. U Me and Daw Toke adopted Ba Han as their *Keittima* son. His natural sister was Daw Aye Khin.
2. U Me died in (d. 1911) Daw Toke remarried Tun Yin in (1929). There was no issue.
3. Daw Toke died in (d. 1933) Tun Yin remarried Daw Hla Shin and had seven children.

On Ba Han's death who are his heirs and legal representatives, Daw Aye Khin or Daw Hla Shin and her seven children ? Or, in other words, can the children of a step-father by a subsequent marriage succeed to the estate of the deceased step-child of a former marriage ?

Held : A step-child of a step-father's former marriage, once he severs his connection with the step-father on the latter's re-marriage, is no more a member of the step-father's new family and as such he is a stranger so far as that new family is concerned in matters of succession and inheritance, and therefore the wife and the children of U Tun Yin's subsequent marriage are complete strangers for purposes of succession to Maung Ba Han's estate. *Ma Gun Bon* v. *Maung Po Kywe and another*, (1897-1901) U.B.R. (Buddhist Law, Inheritance), p. 66, distinguished.

Ma Thein v. *Ma Mya and one*, 7 Ran. p. 193 at p. 199, referred to.

Held further : That persons naturally entitled to inherit can be excluded from inheritance by the person who supports the deceased and performs the funeral ceremonies.

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* Civil Misc. Appeal No. 14 of 1956, against the order of the Original Side High Court of Rangoon, (U AUNG THA ^YAW, J) in Civil Execution Case No. 20 of 1952, dated the 19th March, 1956.

Ma Mya v. *Maung Kywel*, B.L.R. Agabeg, Vol. II, 1905, p. 228 ; *Daw Toke* v. *Ma Tin Ohn*, 12 Ran. p. 703 ; U Gaung's "A Digest of the Burmese Buddhist Law" (Vol. I, Inheritance, p. 388), s. 816 at p. 387 ; Dhammathatkyaw, referred to.

Held also : That the very word "Intermeddling" connotes interference by a person either acting by himself or through some one with the properties of a deceased person which do not really concern him.

To justify acceptance of a person as legal representative in the sense of an intermeddler with reference to certain property, it must clearly be shown that he has taken possession of such property as an intermeddler.

That unless one has in fact taken possession of the deceased person's estate one cannot be held to be an intermeddler and be accepted as his legal representative within the purview of s. 2 (11) of the Civil Procedure Code.

Mussammat Darofdi v. *Mussammat Sada Kaur*, 115 Punj. Record, (1913) p. 436=22 I.C. 242 ; *Woomesh Chandra Datta Chowdhury v. Jabed Ali and others*, A.I.R. (1944) Cal. 42=211 I.C. 388, approved.

Appeal dismissed.

J. R. Chowdhury, Advocate, for the appellants.

S. T. Leong, Advocate, for the respondent.

U CHAN TUN AUNG, C.J.—This appeal is from an order in an execution proceeding arising out of Civil Regular Suit No. 20 of 1950 of the Original Side of this Court whereby the respondent was allowed to proceed with the execution as legal representative of one Maung Ba Han (deceased), the decree-holder in the said suit. The execution sought for was for ejectment of U Tun Yin (since deceased) and his wife Daw Hla Shin, the present first-appellant from the premises known as No. 15, Lloyds Road, Rangoon and for possession of the same by the decree-holder Maung Ba Han. During the pendency of the said execution proceedings, U Tun Yin died leaving behind Daw Hla Shin and her children who are now being impleaded as appellants. It appears that when Civil Regular Suit No. 20 of 1950 was filed, Maung Ba Han was insane and he was then represented by his next-friend U Tun U, husband of Daw Aye Khin, the, present respondent. However, on 6th December

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1952 Maung Ba Han died, while the execution proceedings were in progress ; and Daw Aye Khin who is the natural sister of Maung Ba Han, asserting that, although Maung Ba Han was an adopted child of Daw Toke, thereby severing relationship with his natural family, yet in view of her (Daw Aye Khin) having maintained and looked after him during his long illness for about 12 years, and also of having performed the funeral obsequies on his death, bearing all expenses, Maung Ba Han's estate should devolve upon her, there being no other person entitled to inherit his estate, claimed that she should be brought on the execution proceedings as Maung Ba Han's legal representative. It is common ground that Maung Ba Han was taken in *Keittima* adoption by Daw Toke and U Me in May, 1911 ; that U Me died in the same year ; that in September, 1929, Daw Toke remarried U Tun Yin with whom she had no issues ; that Daw Toke died in 1933 and that thereafter, U Tun Yin remarried the present first-appellant with whom he had seven children, who have been impleaded in this present appeal as co-appellants. It is also common ground that by virtue of a gift made in favour of Maung Ba Han during the lifetime of Daw Toke and U Tun Yin, the premises and the site from which the appellants are being sought to be evicted was Maung Ba Han's exclusive property—a fact which became established after some lengthy litigations between the parties.

The appellants objected to the right of respondent's representation, and they claimed that they should be made the legal representatives of deceased Maung Ba Han, as Maung Ba Han's adoptive step-mother and as his half-brothers. An enquiry was made in that regard by the Deputy Registrar (1) Original Side, full opportunity being accorded to the

parties to adduce necessary evidence. But the appellants did not choose to give any evidence except making a bare assertion that they were entitled to represent the deceased Maung Ba Han. We may here observe that the present appellants are in occupation of, either by themselves or through their tenants, the premises in question from which they are being sought to be evicted. After quite a careful enquiry, in which the respondent Daw Aye Khin cited some witnesses, the learned Deputy Registrar allowed Daw Aye Khin's application. The appellants then moved the learned Judge on the Original Side under Rule 7 of the Original Side Rules to set aside the Deputy Registrar's order ; but the learned Judge refused to do so. Hence, this appeal.

A perusal of the order of the learned Deputy Registrar and that of the learned Judge, confirming the order of the Deputy Registrar shows that Daw Aye Khin's application has been allowed mainly on the strength of Daw Aye Khin having established the fact that after the death of his adoptive parents, (U Me and Daw Toke) Maung Ba Han came and lived with Daw Aye Khin till his death in 1952. Apparently, this circumstance was found to be quite sufficient entitling Daw Aye Khin, though a stranger in law so far as Maung Ba Han's estate is concerned, to act as Maung Ba Han's legal representative in the execution proceedings. Another circumstance that was also found to have been established was that when Maung Ba Han became insane in or about the year 1945 and onwards, Daw Aye Khin's husband U Tun U became the guardian of the person and property of Maung Ba Han and managed the same until Maung Ba Han's death. However, besides the above stated facts and circumstances, the learned Judge on the Original Side gave an added reason

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why Daw Aye Khin was entitled to be brought on the record as legal representative. He held that Daw Aye Khin was an "intermeddler" of Maung Ba Han's estate, and that as such, she was qualified to be his legal representative within the meaning of section 2, clause 11 of the Civil Procedure Code.

It is now contended that acceptance of Daw Aye Khin's right of representation on the ground that she is an intermeddler is wrong in view of the fact that Daw Aye Khin never came into possession of any of Maung Ba Han's properties,—especially the subject-matter of the execution proceedings. There is considerable force in this contention. There are authorities which lay down that to justify acceptance of a person as legal representative in the sense of an intermeddler with reference to certain property, it must clearly be shown that he has taken possession of such property as an intermeddler. We are inclined to find favour with these decisions. In our view, the very word "intermeddling" connotes interference by a person either acting by himself or through someone with the properties of a deceased person which do not really concern him. Thus, in *Mussammat Daropdi* v. *Mussammat Sada Kaur* (1) and *Woomesh Chandra Datta Chowdhury* v. *Jabed Ali and others* (2), it was held that one who intermeddles with the estate of a deceased person even though it may be with part thereof, he is a legal representative within the meaning of section 2, clause 11 of the Civil Procedure Code, and is liable as such to the extent of the property taken possession of by him. It seems therefore clear that unless one has in fact taken possession of the deceased person's estate, one cannot be held to be an intermeddler and be

(1) 115 Punj. Record (1913), p. 436=22 I.C. 242.
(2) A.I.R. (1944) Cal. 42=211 I.C. 388.

accepted as his legal representative within the purview of section 2 (11) of the Civil Procedure Code. Here, it is an admitted fact that Daw Aye Khin had at no time been in possession of the deceased's estate including the subject-matter of the present execution proceedings, and we find it difficult to appreciate the added reason given by the learned Judge on the Original Side that Daw Aye Khin being an intermeddler of Maung Ba Han's estate, she is qualified to be a legal representative of Maung Ba Han (deceased).

The second ground urged relates to the rule under the Burmese Buddhist Law which entitles a stranger who supports and gives all necessary aids during the illness of a person to succeed to his estate on his death. It is contended that the aforesaid principle applies only when there are no heirs to succeed, but that in the present case the appellants 2 to 7 being the children of Maung Ba Han's step-father U Tun Yin by a subsequent marriage with the first-appellant Daw Hla Shin, they are entitled to succeed to Maung Ba Han's estate in preference to Daw Aye Khin who must be treated as a stranger. In other words, it is urged that the children of a step-father by a subsequent marriage should succeed to the estate of an *atet* step-child of step-father's former marriage. As observed above, it is common ground that deceased Maung Ba Han was adopted by Daw Toke before her marriage with U Tun Yin. But, on Daw Toke's remarriage with U Tun Yin, it is very doubtful whether Maung Ba Han to all intents and purposes an adopted *atet* child of Daw Toke also became an adopted son of U Tun Yin. There is clear evidence to show that when Daw Toke died, and when U Tun Yin remarried Daw Hla Shin, Maung Ba Han severed all connection with U Tun Yin and

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that thereafter remained with Daw Aye Khin until his death. The learned Counsel appearing for the appellants could not cite any authority whatsoever in support of his submission that the children of a step-father by a subsequent marriage can succeed to the estate of the deceased step-child of a former marriage. *Ma Gun Bon* v. *Maung Po Kywe and another* (1) was cited to show that the step-children are treated as entitling to the share of inheritance like descendants by blood, and that in the absence of natural descendants, the step-children are classed as heirs. However, in looking through the facts of the said case, we find that they are entirely different from those obtaining in the present case. There, the suit is for recovery of certain property by the plaintiff who claims to be an heir in her right as adopted daughter of one Ma Mi Gyi, the property being in the hands of Ma Mi Gyi's step grand-children (the defendants). It appears that the defendants were the grand-children of Ma Mi Gyi's 4th husband Maung On Gaing begotten of his first wife Ma Thaw Ka. Therefore, the defendants in the said suit were the issues of *atet* children of Maung On Gaing with his previous wife Ma Thaw Ka before his marriage with Ma Mi Gyi. Thus, the facts presented in the said case do not at all support the appellants' Counsel's contention that on that authority the appellants are entitled to succeed to Maung Ba Han's estate. We have given sufficient time to enable the learned Counsel to find any other authority in support of his submission, but he was unable to do so. We are not at all surprised that there is no authority to support his submission. In our view, a step-child of a step-father's former marriage, once he severs his connection with the step-father on the latter's

(1) (1897-1901) U.B.R. (Buddhist Law, Inheritance), p. 66.

remarriage, is no more a member of the step-father's new family, and as such he is a stranger so far as that new family is concerned in matters of succession and inheritance. In *Ma Thein* v. *Ma Mya and one* (1), while considering the question whether *Keittima* children are entitled to partition on re-marriage of surviving parents, Sir Guy Rutledge, C.J. and Brown. J. observed :

> "But, if a natural born child can claim his rights and the *keittima* child cannot, it does not seem to us that the rights of partition are equal. The ordinary children are given the right of severing themselves from the family of their natural parent on his or her remarriage and claiming their share in the family property. They are not bound to make that claim, and, if they do not do so, they can then claim a different share on the death of the surviving parent."

Therefore, there being clear evidence that Maung Ba Han had never, since his litigation with U Tun Yin on the death of his adoptive mother Daw Toke, chosen to live with his step-father U Tun Yin on U TunYin's marriage with Daw Hla Shin, it must be held that Maung Ba Han had severed his family tie with U Tun Yin and that the present appellants, the wife and the children of U Tun Yin's subsequent marriage are complete strangers for purposes of succession to Maung Ba Han's estate. Now, the next question is whether, under the Burmese Buddhist Law in the absence of any other person, Daw Aye Khin, who admittedly looked after Maung Ba Han in every way not only before he was insane, but also after he became insane, until his death for a period of 12 years, is entitled to succeed to Maung Ba Han's estate. The answer to this must be definitely in the affirmative. We must hold that the Lower Court's finding in that regard is fully justified both on facts and on

(1) 7 Ran. p. 193 at p. 199.

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authorities available on the question. In U Gaung's "A Digest of the Burmese Buddhist Law" (Volume I, Inheritance, page 388), section 316, at page 387 lays down that anyone who supports and looks after another both in health and sickness and also performs the burial rites on the latter's death is entitled to inherit the estate of the deceased. *Dhammathat-kyaw* in particular, provides that in the absence of children, natural or adopted, those who live together and support the deceased shall succeed to his estate and also liquidate his debts, if any and that there shall be no escheat in such a case. Similarly, in *Ma Mya* v. *Maung Kywet* (1) it was held by having reference to many previous cases that persons naturally entitled to inherit can be excluded from inheritance by the person who supports the deceased and performs the funeral ceremonies. *Daw Toke* v. *Ma Tin Ohn* (2) is also an authority wherein the rule among the Burman Buddhists that a relative who tends a deceased person during his lifetime and supports him is entitled to succeed to his property is recognized.

In view of the reasons set out above, both on facts and on legal principles involved, we see no good reason to interfere with the order of the learned Judge on the Original Side and this appeal is therefore dismissed with costs. Advocate fee five gold mohurs.

U SAN MAUNG, J.—I agree.

(1) B.L.R. Agabeg, Vol. 11, 1905, p. 228. (2) 12 Ran. p. 703.

APPELLATE CIVIL.

Before U Ba Thoung, J.

MA THAN SEIN AND THREE (APPLICANTS)

v.

DAW YI (RESPONDENT).*

H.C. 1957

Nov. 15.

Counsel's authority to compromise suits on behalf of his client—Lawyers' power of attorney.

Held: Counsel has no power to compromise a suit on behalf of his client, without the knowledge, consent or instruction of his client.

Though his lawyer's power of attorney empowered him to do so, he should not exercise that power without first obtaining the consent of his client and without his knowledge to a settlement.

Mohamed Idris Haider v. *Mohamed Habibur Rahman*, A.I.R. (35) (1948), Pat. 97, referred to.

Shepherd v. *Robinson*, L.R. (1919) I.K.B.D. 474, approved.

Dawsons Bank, Ltd. v. *C. Ein Shaung*, (1951) B.L.R. 308 at 311, distinguished.

Application allowed.

Dr. E Maung and *Wan Hock* for the applicants.

S. T. Leong for the respondent.

U BA THOUNG, J.—In Civil Regular Suit No. 1 of 1952 of the Subdivisional Court of Zigôn, the plaintiff-respondent Daw Yi sued the first three defendants-applicants Ma Than Sein, Maung Tu and Ma Tun for enforcement of a right to pre-emption in respect of the suit house and site, Daw Yi and Ma Than Sein's father U Kyu Wa, since deceased, had jointly bought the suit house and site for K 2,300 about 15 years ago, each contributing equally towards the purchase money; and Daw Yi has been in occupation of half of the building since her

* Civil Revision No. 50 of 1955, against the orders of the District Court of Tharrawaddy in Civil Misc. Appeal No. 1 of 1955, dated the 6th April 1955.

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purchase. It is alleged that at the time of their purchase, Daw Yi and Ma Than Sein's father U Kyu Wa, had mutually agreed with each other to give a preferential right to the other in case if any one of them desires to sell his or her share in the house and site; that after the death of U Kyu Wa and when Ma Than Sein inherited the former's share in the suit house and site, Ma Than Sein sold that portion of the property to the 2nd and 3rd defendants-applicants Maung Tu and his wife Ma Tun for K 4,000 under registered deed of sale without the knowledge and consent of Daw Yi and without giving her the preferential right of buying. Daw Yi therefore filed this suit for enforcement of her right to pre-emption in respect of the portion of the property, sold by Ma Than Sein to Maung Tu and Ma Tun. Then after the suit was filed and before written statements were filed in the case, it appears that Maung Tu and Ma Tun reconveyed to Ma Than Sein, the property which they had bought from her. When the written statements were filed, Ma Than Sein, in her written statement, denied that there was any mutual agreement between her father U Kyu Wa and Daw Yi to give one of them a preferential right to purchase his or her share in the house and site if one of them wishes to sell the same. She had also stated that Maung Tu and Ma Tun had reconveyed the property sold to them as it was found that Maung Tu, being a foreigner and had not yet registered as a citizen of the Union of Burma, could not legally buy an immoveable property in Burma. The 2nd and 3rd defendants-applicants Maung Tu and Ma Tun also filed a joint written statement stating that inasmuch as they had reconveyed the property to the 1st defendant-applicant Ma Than Sein, they had no more interest in the suit and

therefore there was no cause of action against them. The 4th defendant-applicant Maung Htike San, as a husband of the 1st defendant-applicant Ma Than Sein, was brought on record as one of the defendants and he had also filed a written statement on the same line as his wife. Now, after the framing of the issues in the case and before the witnesses were examined, the parties asked for several adjournments on the ground that they were negotiating for settlement of the case out of Court. The suit was finally adjourned from 15th August 1953 to 19th August 1953 at the request of the Counsel for both parties for a settlement. On the 19th August 1953, Counsel for the parties appeared in Court along with the 4th defendant-applicant Maung Htike San and mentioned to the Court that the suit had been settled out of Court. The Subdivisional Judge asked the Counsels appearing in the case to file an application in writing for the passing of a compromise decree in terms of the settlement arrived at; and on the same day, *viz.*, 19th August 1953. U Po Shin, Counsel for plaintiff-respondent Daw Yi filed the application for compromise signed by himself, and by U Tha Ngai, Counsel for the 1st and 4th defendants-applicants Ma Than Sein and Maung Htike San, and by U Ba Thin, Counsel for the 2nd and 3rd defendants-applicants Maung Tu and Ma Tun. The learned Subdivisional Judge then recorded the compromise and a preliminary decree in terms set out in the compromise application followed, directing the defendants-applicants Ma Than Sein and her husband Maung Htike San to sell their share in the suit house and site to the plaintiff-respondent Daw Yi for K 5,200 and directing the latter to deposit the said amount in Court within one month and on doing so, the defendants-applicants Ma Than Sein and

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Maung Htike San to execute a sale deed in favour of the plaintiff-respondent Daw Yi, and that if the amount of K 5,200 was not deposited in Court within the stipulated period of one month the suit would stand dismissed with costs.

Then on the 5th September 1953 the defendants-applicants Ma Than Sein, Maung Tu and Ma Tun filed applications, supported by affidavits, to set aside the compromise decree on the ground that they had never agreed to the suit being compromised, and that they had not given an authority to their Counsels to compromise the suit without their knowledge and consent. Their applications were opposed by the plaintiff-respondent. The learned Subdivisional Judge, after hearing counsel on both sides, on the applications to set aside the compromise decree, dismissed the applications. On appeal to the District Court of Tharrawaddy the order of the Subdivisional Court was set aside and an enquiry was directed to be held into the validity or otherwise of the compromise. After holding an enquiry, the learned Subdivisional Judge dismissed the defendants-applicants' applications to set aside the compromise decree. The first three applicants Ma Than Sein, Maung Tu and Ma Tun then filed an appeal against that order to the District Court of Tharrawaddy, and the learned District Judge also confirmed the order of the lower Court and dismissed the appeal. The applicants have therefore filed this revision application against the order of the Subdivisional Judge, dated the 7th December 1954, refusing to set aside the compromise decree and against the order of the District Judge, dated the 6th April 1955, dismissing the appeal.

The learned Counsel for the plaintiff-respondent contends that under section 96 (3) of the Civil Procedure Code on appeal lies against a consent

decree; and in support of his contention he has cited the case of *Mohamed Idris Haider* v. *Mohamed Habibur Rahman* (1) where it has held that:

> " Section 96 (3) clearly bars any appeal from a decree passed on consent. There is a difference between an appeal against an order recording a compromise and an appeal against the decree passed thereon. The right of appeal provided by Order 43, Rule 1 (*m*) is not lost by reason of a decree having been prepared."

That case can, however, be distinguished from the present case in that in the present case the appeal filed by Ma Than Sein, Maung Tu and Ma Tun in the lower appellate Court was not an appeal against the decree, but an appeal under Order 43, Rule 1 (*m*) against the order dated the 7th December 1954 of the Subdivisional Court rejecting the application of the applicants for setting aside the compromise; and the present application in Revision is to revise the order dated the 6th April 1955 of the District Court dismissing that appeal; whereas in the other case it was an appeal against the decree and not an appeal against the order recording the compromise. I would therefore held that the contention made by the learned Counsel for the respondent has no application to the present case. The question to be considered in this case is whether the two lower Courts had acted illegally in confirming the order recording the compromise on the 19th August 1953 without considering the validity or otherwise of the compromise. Dr. E Maung, who appears for the applicants, had nothing to say against the findings of fact by the lower Courts that the consent given by U Tha Ngai on behalf of his clients Ma Than Sein and Maung Htike San, to the passing of the compromise decree, was not due to mis-representation of facts by

(1) A.I.R. (35) (1948) Pat. p. 97.

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U Po Shin. But Dr. E Maung contends that if Counsels consented on behalf of their clients to a compromise without obtaining the consent of their clients and without their clients' knowledge, as in this case, the compromise effected under such circumstances could not be set aside. He contends that in this case, U Ba Thin, for the 2nd and 3rd defendants Maung Tu and Ma Tun, had consented to the compromise without the consent of his clients and without first verifying from them whether they have agreed to the compromise; it is contended that he should have verified about it before he puts his signature on the application for compromise, since there have been several instances of disagreement between Maung Tu and Ma Tun on one side and Daw Yi on the other side; and that under these circumstances the compromise could be set aside. In support of his contention he has relied on the case of *Shepherd* v. *Robinson* (1) where in an action for a debt being called upon for hearing, Counsel for the defendant compromised the suit without knowledge of the fact that the defendant had given instructions that the case was not to be settled, and the compromise was accordingly set aside by the Court. The case of *Shepherd* v. *Robinson* (1) was referred to in the case of *Dawsons Bank Ltd.* v. *C. Ein Shaung and three others* (2) and the decision in *Shepherd* v. *Robinson* was not dissented in the case of *Dawsons Bank Ltd.* v. *C. Ein Shaung*. The former case was only distinguished from the latter case in that in the former case it was a compromise by Counsel without knowledge or instructions of the client and that it stands on a different footing from the latter case where an admission of fact by Counsel was held to be binding on the client. In the present case it is quite

(1) L.R. (1919) 1 K.B.D. 474. (2) (1951) B.L.R. 300 at 311.

apparent from the explanation of U Ba Thin, who appeared for the 2nd and 3rd defendants in the trial Court, that his clients had not instructed him to compromise the suit and that they had no knowledge that the suit was to be compromised, but that he signed on the application on seeing in it the signature of U Tha Ngai who had occasionally appeared on his behalf in Court, and who had watched his clients' interest. He had stated that his clients came to know about the compromise only about two or three days later. The 2nd and 3rd defendants Maung Tu and Ma Tun had also filed affidavits that they had never instructed their lawyer U Ba Thin to effect a compromise and that they never agreed to the compromise application filed by the lawyers. Under these circumstances and in view of the decision in the case of *Shepherd* v. *Robinson* (1) with which I respectfully agree, I am of the opinion that the compromise recorded on 19th August 1953 could not be valid. The learned Counsel for the defendant-respondent contends that in the case of *Shepherd* v. *Robinson* the compromise was set aside before the decree was drawn, whereas in the present case the compromise decree had already been passed when the application to set aside the compromise was made; but the main reason why the compromise was set aside in Shepherd's case is because the Counsel had compromised the case without the knowledge or instructions of the client and not because the compromise was made before the decree was drawn; and I think the same principle should apply to the present case where the Counsel had compromised the case without the knowledge or instruction of the clients and without the latter's consent. The learned Counsel for the respondent contends also that the

(1) L.R. (1919) 1 K.B.D. 474.

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power of attorney given to U Ba Thin, by his clients the 2nd and 3rd defendants, gives him power to compromise the suit, and that his act is binding on his clients. It is true that he has the lawyers' power of attorney to compromise the suit on behalf of his clients; but I do not think he should exercise that power without first obtaining the consent of his clients and without their knowledge to a settlement. In this case both the Counsel for the 1st and 4th defendants and the Counsel for the 2nd and 3rd defendants knew that the 2nd and 3rd defendants were adverse to a settlement; and that is all the more reason why they should act with the knowledge and consent of their clients.

For the reasons stated I consider that the compromise effected on 19th August 1953 between the plaintiff-respondent and the defendants-applicants is not a valid compromise, and that the lower Court had acted illegally in the exercise of their jurisidiction in confirming the order recording the compromise. I therefore allow this application in Revision, and I accordingly set aside the orders of the two lower Courts and direct that the proceedings be sent back to the Subdivisional Court of Zigôn to proceed with the case on its merits. Advocates fees fixed at K 51.

APPELLATE CIVIL.

Before U Aung Khine and U Choon Foung, JJ.

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Aug. 29.

MA THAUNG (APPELLANT)

v.

MAUNG PE TIN (RESPONDENT).*

Review—Application for—S. 114, Order 47, Rule 1, Civil Procedure Code—The phrase "any other sufficient reason"—Decisions of two Benches of equal standing - Duty of Lower Court.

Held: It is settled law that the words "any other sufficient reason" are *ejusdem generis* having reference to grounds analogous to those other two mentioned in the rule.

K. K. S. A. R. Firm v. *Maung Kya Nyun and one*, I.L.R. 5 Ran. 675; *Bisheshwar Pratap Sahi and another* v. *Parath Nath and another*, 61 I.C. 378, referred to.

Held further: It is settled law that a wrong or incorrect exposition of law is no ground for review. *Luxman Anandroa and others* v. *Ramchandra Wasudeo Ajasty*, A.I.R. (1938) Nag. 145, referred to.

Held further: When there are two rulings by two Benches of equal standing, it is not for the lower Court to say which rule is right and which rule is wrong. He should follow the rule which appeals to his reason.

Manoo Ali v. *Hawabi*, A.I.R. (1936) Ran. 63; *Maung Zaw* v. *Maung Hla Din*, I.L.R. 12 Ran. 163; *King-Emperor* v. *Nga Lun Maung*, I.L.R. 13 Ran. 570; *The Union of Burma* v. *Maung Maung and two*, B.L.R. (1949), (H.C.) 1 at 12, referred to.

Ba Shun, Advocate, for the appellant.

Tun Aung (1), Advocate, for the respondent.

U CHOON FOUNG, J.—This is an appeal against the order dated the 19th February 1954 of the District Court of Shwebo in its Civil Miscellaneous case No. 2 of 1953.

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* Civil Misc. Appeal No. 22 of 1954, against the order of the District Court of Shwebo (Mr. J. D. GHOSH) in Civil Misc. Case No. 2 of 1953, dated the 19th February 1954.

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U CHOON FOUNG, J.

The appellant and the respondent are husband and wife, having been married according to the Burmese Buddhist custom on or about the 4th May 1944. After the birth of the infant son Maung Myint Swe, the parties fell out; and in July 1947, after a quarrel they lived separately, the custody of the minor child remaining with the appellant. Subsequently, there was a divorce by mutual consent, and the minor child continued to live with the appellant. The respondent having neglected to maintain her, the appellant filed an application against him under section 488 of the Code of Criminal Procedure and, in Criminal Miscellaneous No. 7 of 1952 of the Court of the Township Magistrate of Shwebo, obtained an order directing the respondent to pay Kyats 18 per month for the maintenance of the said minor child. It would appear from the connected proceeding that the respondent failed to pay the monthly maintenance allowance regularly and was in arrears for a considerable period. After the passing of the said order for maintenance, the respondent filed a suit (*i.e.*, Civil Regular Suit No. 1 of 1952 of the Subdivisional Court of Kanbalu) for the custody of the minor child Maung Myint Swe, but the suit was dismissed. Thereupon, in Civil Miscellaneous Case No. 2 of 1953 of the District Court of Shwebo the respondent filed an application against the appellant—apparently under section 25 of the Guardians and Wards Act—for restoration of custody of the said minor child. The application was dismissed with costs on 30th November 1953; and on 18th February 1954 the respondents filed an application for review under Order 47, Rule 1 read with section 114 of the Code of Civil Procedure. On 19th February 1954, the District Judge granted the respondent's application

for review and passed an order directing that the "minor Maung Myint Swe be returned to his natural father and guardian, Maung Pe Tin."

The points raised by the learned Advocate for the appellant in this Court are:

(1) That the review application should not have been entertained in view of the plain provisions of Order 47, Rule 1 of the Code of Civil Procedure.

(2) That the order passed on review was wrong and was not in accordance with law.

The main point for consideration is whether the District Judge, Shwebo, was competent to entertain the application for review of his order dated the 30th November 1953.

The learned District Judge's main reason for entertaining the review application and passing his order now under appeal is that the case of *Manoo Ali* v. *Hawabi* (1) on which he relied when he passed his previous order was, at the time of entertaining the review application, found by him to be "not good law" and that another ruling of a Bench of the High Court, *i.e., Maung Zaw* v. *Maung Hla Din* (2) to which his attention was drawn by the learned Advocate for the applicant-respondent was apposite and ought to have been applied and followed.

Under Order 47, Rule 1 of the Code of Civil Procedure, review is permissible in any of the following cases:—

(1) On the ground of the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the party or could not be produced by him at the

(1) A.I.R. (1936) Ran. 63. (2) I.L.R. 12 Ran. 163.

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time when the decree was passed or order made.

(2) On account of some mistake or error apparent on the face of the record.

(3) For any other sufficient reason.

None of these three conditions would seem to exist in the present case to justify a review of the learned Judge's order passed on the 30th November 1953. There was in fact no discovery of new and important matter or evidence which was not within the knowledge of the respondent or could not be produced by him at the time when the previous order was made. Neither was there any mistake or error apparent on the face of the record. And the grounds for review put forth by the respondent did not fall within the category of " any other sufficient reason ", for it is settled law that these words are *ejusdem generis* having reference to grounds analogous to those other two mentioned in the rule. See *K. K. S. A. R. Firm* v. *Maung Kya Nyun and one* (1) and *Bisheshwar Pratap Sahi and another* v. *Parath Nath and another* (2).

A perusal of the learned District Judge's order dated the 30th November 1953 shows that he was aware of both the Bench rulings referred to above and had in fact followed the rule laid down in *Manoo Ali* v. *Hawabi* (4) after considering both the cases. This is what he stated in his order dated the 30th November 1953:

" The Rangoon High Court in *Maung Zaw* v. *Maung Hla Din* (3) at first adhered to the view expressed by the Calcutta and Madras High Courts but in a later case of *Manoo Ali* v. *Hawabi* (4) dissented from the Madras and Calcutta High Courts' views and followed the view of the Bombay High Court. In that case our High Court has observed that it is

(1) I.L.R. 5 Ran. 675.
(2) 61 I.C. 378.
(3) I.L.R. 12 Ran. 163.
(4) A.I.R. (1936) Ran. 63.

very dangerous for Courts to try and find out the intention of the Legislature and then strain the language used in the statute to carry out the intention. If the Legislature has failed to express its intention in the statute, that will have to be remedied by legislative action. So if a father has not had the custody of his infant child this section cannot apply although he desires to act as a natural guardian when the custody of the child had all along been with its mother.

In view of the express words used in section 25, I am inclined to think that the decision in *Manoo Ali* v. *Hawabi* is the correct interpretation of the law. The application must therefore be rejected."

And yet in his order now under appeal, the learned District Judge states, "I think that *Manoo Ali* v. *Hawabi* (1) cannot be taken to be good law."

We are not here concerned with the reason or the motive that led to the learned District Judge changing his mind within so short a period and reversing his previous order on such a flimsy and unacceptable ground as stated above. Even assuming for the sake of argument that he did not know of the existence of the rule laid down in *Maung Zaw* v. *Maung Hla Din* (2) at the time he passed his previous order and that the said rule was the proper one to have been followed but that he had followed another ruling through ignorance or by mistake, the learned District Judge would not be justified in reviewing his previous order; for his mistake would just be a case of incorrect exposition of law. It is settled law that a wrong or incorrect exposition of law is no ground for review. In this respect, the observation made by a Bench of the Nagpur High Court in *Luxman Anandroa and others* v. *Ramchandra Wasudeo Ajasty* (3) is apposite and is reproduced herein below:

(1) A.I.R. (1936) Ran. 61. (2) I.L.R. Ran. 163.
(3) A.I.R. (1938) Nag. 145.

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" In our opinion the view that review lies if the Judge overlooks the apposite law is wrong. A Judge is supposed to know the law. There is only one correct view of the law though there may be many opinions as to what that view is. A Judge is assisted in arriving at the correct opinion by the argument of counsel. Whether counsel is helpful or not, whether the Judge has in mind or not a particular point, the Judge is supposed to have it in mind. If he makes a mistake, his judgment proceeds on 'an incorrect exposition of the law.' It makes no difference whether that mistake is due to inadvertence, forgetfulness, ignorance . . . . . "

We are constrained to observe that the Bench of the High Court which laid down the rule in *Maung Zaw* v. *Maung Hla Din* (1) and that which laid down the rule in *Manoo Ali* v. *Hawabi* (2) are competent Benches of equal standing. It is not for the learned District Judge to say which rule is right and which rule is wrong. So far as he is concerned, all that he needs do is to follow the rule which appeals to his reason. Even in the High Court, if a Bench finds itself unable to accept a decision made by another Bench of equal standing, the proper and only available course open to the later Bench is to refer the question upon which there is a difference of opinion for determination by a Full Bench of the High Court [See *King-Emperor* v. *Nga Lun Maung* (3) and *The Union of Burma* v. *Maung Maung and two* (4)].

In the circumstances, the most charitable view that we can take of the learned District Judge's action is, that he had proceeded on an incorrect exposition of the law and it is settled law that the mere fact that the Judge has gone wrong in law is no ground for a review.

We therefore hold that the learned District Judge was not competent to entertain the application

(1) I.L.R. 12 Ran. 163.
(2) A.I.R. (1936) Ran. 63.
(3) I.L.R. 13 Ran. 570.
(4) B.L.R. (1949) (H.C.) 1 at 12.

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for review of his previous order dated the 30th November 1953.

Accordingly, this appeal will be accepted and the order of the learned District Judge, Shwebo, dated the 19th February 1954 will be set aside with costs.

U AUNG KHINE, J.—I agree.

APPELLATE CIVIL.

Before U Po On, J.

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Oct. 16

MAUNG KYAW NYEIN AND TWO OTHERS (APPELLANTS)

v.

MAUNG KYAW KYAW AND ONE (RESPONDENTS).*

Frustration—The doctrine of—S. 56, Contract Act—S. 4 and s. 108, clause (e) *Transfer of Property Act—Applicability of doctrine to leases.*

Held: The doctrine of frustration comes into play when a contract becomes impossible of performance after it is made, on account of circumstances beyond the control of the parties. When such an event or change of circumstances occurs which is so fundamental as to be regarded as striking at the root of the contract as a whole, a Court should pronounce the contract to be frustrated and at an end.

The doctrine of frustration applies to leases under special circumstances.

Cricklewood Property and Investment Trust v. Leighton's Investment Trust, (1945) A. C. 221; *Sakhisona Dasi* v. *Gour Hari*, A.I.R. (1952) Cal. 567; *Tarabai Jivanlal Parekh* v. *Lala Padamchand*, A.I.R. (1950) Bom. 89; *Inder Pershad Singh* v. *Campbell*, 7 Cal. 474, referred to.

K. M. Modi v. *Mohamed Siddique*, (1947) R.L.R. 423, followed.

Appeal dismissed.

Ba Thaw for the appellants.

Ba Swe for the respondents.

U PO ON, J.—The plaintiffs, Maung Kyaw Kyaw and his sister, Ma Hla Hla were the owners of a house known as No. 269, U Ba Aye Road, Henzada. They let out the ground floor of it to the defendant and the upper floor to another person as monthly

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*Civil 2nd Appeal No. 73 of 1956, against the decree of the District Court of Henzada in Civil Appeal No. 7 of 1955, dated 28th May 1955 arising out of the Subdivisional Court of Henzada in Civil Regular Suit No. 6 of 1954, dated 8th January 1955.

tenants. On the 28th January 1954 the house was completely destroyed by fire which broke out at Henzada. It is, therefore, alleged by the plaintiffs that the doctrine of frustration has come into play and that the lease had come to an end by destruction by fire.

When the fire was over, the defendants left the place without telling the plaintiffs anything. So, it is contended by the plaintiffs that there was an implied surrender of the lease by the defendants.

However, a few weeks later, the defendants re-entered upon the land and built a house thereon in spite of the plaintiffs' protest.

So, the plaintiffs brought a suit in the Sub-divisional Court of Henzada, for a declaration that they were the owners of the land in suit, (2) that the defendants have no right to build the house on the land without their consent, (3) for recovery of vacant possession of land after removing the house built by the defendants thereon and (4) for mesne profit or damages for use and occcupation of the land.

The defendants contend that the suit for declaration is not maintainable, as they never denied the plaintiffs' title to the house site. They further aver that there was no implied surrender of the lease by them, that the doctrine of frustration could not be applied to the present case, that as they have built a house on the land, the plaintiffs could not be entitled to get possession of the house site and that the suit for eviction and for mesne profit is not maintainable without a certificate from the Assistant Controller of Rents at Henzada.

Both the Courts below decreed the suit in favour of the plaintiffs.

I will go straight into the question of frustration, as it is the vital matter in the whole case. Clause

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(*e*) of section 108 of the Transfer of Property Act reads:

"In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:—

* * * *

(*e*) if by fire, tempest or flood, or violence of an army or of a mob or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void."

It is now argued by the learned Counsel for the defendants (appellants) that as the defendants-tenants still elect to continue the tenancy, the plaintiffs-lessors are not entitled to compel the tenants to walk out in view of clause (*e*) of section 108 of the Transfer of Property Act.

Another ground advanced by the defendants' counsel is that the doctrine of frustration cannot come into play, as the lease of immoveable property can be determined only on any of the ground specified in section 111 of the Transfer of Property Act.

The plaintiffs-lessors, on the other hand, have placed reliance on section 56 of the Contract Act which is in the following terms:—

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

It is clear from section 4 of the Transfer of Property Act that the Contract Act is the complementary to the Transfer of Property Act. Section 56 of the Contract Act does not conflict with section

108 of the Transfer of Property Act on the facts of the case. Besides, the doctrine of frustration comes into play when a contract becomes impossible of performance after it is made, on account of circumstances beyond the control of the parties. When such an event or change of circumstances occurs which is so fundamental as to be regarded as striking at the root of the contract as a whole, a Court should pronounce the contract to be frustrated and at an end. So, I have to see whether section 56 of the Contract Act is attracted at all.

In the case of *Cricklewood Property and Investment Trust* v. *Leighton's Investment Trust* (1) Lord Russel and Lord Goddend expressed the view that the doctrine of frustration could never apply to put an end to a lease, while Viscount Simon, L.C., and Lord Wright thought it might in certain circumstances apply to a lease and Lord Porter did not think it necessary to express any opinion on the point in the circumstances of that case. It will thus be seen that in England the question whether the doctrine of frustration applies to a lease has been left in some doubt.

In India too it is a moot point whether the doctrine of frustration can be applied to a lease. *Sakhisona Dasi* v. *Gour Hari* (2), *Tarahai Jivanlal Parekh* v. *Lala Padamchand* (3) and *Satyabrata* v. *Mugreeram* (4) have arisen in India in which demised premises have been requisitioned by Government for long periods of time. It was held in the circumstances of those cases that the contract of lease had not been frustrated at all. However, in those cases no reference was made to clause (*e*) of section 108 of the Transfer of Property Act.

(1) (1945) A.C. 221.
(2) A.I.R. (1952) Cal. 567.
(3) A.I.R. (1950) Bom. 89.
(4) A.I.R. (1954) (S. C.) 44.

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On the other hand, it was held in *Inder Pershad Singh* v. *Campbell* (1) that the doctrine of frustration may be applied to leases.

The facts in *Kshitish Chandra Mondal* v. *Shiba Rani Debi and others* (2) are somewhat parallel to the facts of the present case. They are shortly these.

A erected a thatched shed on a plot and let the shed to B as a monthly tenant. During the tenancy the shed was burnt by fire. Thereafter B raised another structure on the land in spite of A's protest.

It was held therein that—

(1) that section 108 (*d*) did not in terms apply as B neither elected to walk out even after total destruction nor was willing to suspend payment of rent and give up possession;

(2) that the doctrine of frustration applied to leases. The contract between A and B became impossible of performance through no negligence on the part of A and he was entitled to claim that the lease had come to an end by destruction by fire;

(3) that under the tenancy B had no right to raise structures of his own, treating the lease as the lease of the land only.

There is also the case of *K. M. Modi* v. *Mohamed Siddique* (3), a Burma case, in which U Thein Maung, J., (till lately the Chief Justice of the Union of Burma) held that the doctrine of frustration applies to leases under special circumstances.

As I respectfully agree with the view of U Thein Maung, J., I will now examine whether special circumstances exist in this case to attract section 56 of the Contract Act.

(1) 7 Cal. 474. (2) A.I.R. (1950) Cal. 441.
(3) (1947) R.L.R. 423.

There is no dispute that the defendants occupied only the ground floor and another person (who is not a party to this case) the upper floor of the house of the plaintiffs as monthly tenants. The defendants paid K 75 per month for the ground floor and the other tenant paid K 40 per month for the upper floor. These two families were living separately and paying rents separately. In the circumstances it cannot be taken that the plaintiffs let out one and same house site to the ground floor and upper floor tenants. What had been let out must therefore be only the ground floor and the upper floor of the house. As the house was completely destroyed by fire, the subject matter of the lease is now non-existent. The contract which had been entered into between the plaintiffs and the defendants has now become impossible of performance through no negligence on the part of the plaintiffs. The plaintiffs are, therefore, entitled to claim that the lease of the ground floor of the house had come to an end by its destruction by fire.

Under the lease the defendants were entitled to occupy only the ground floor of the house as monthly tenants. As this house was destroyed by fire, it will lead to various complications in future, if the defendants were allowed to stay on the house site with their own building and not with the plaintiffs' building. It will further lead to an anomalous position that the defendants who were paying rent for the ground floor of the house on the land would pay such rent for the building which belonged to them.

So, the defendants must be held as trespassers and consequently no certificate from the Assistant Controller of Rents is necessary to institute the present suit.

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U PO ON, J.

Another ground raised in the memorandum of appeal is that the plaintiffs' suit for declaration is not maintainable, as the defendants never denied the plaintiffs' title to the land. But the plaintiffs' suit is not a bare declaration suit. It is one with consequential reliefs. It is further obvious that when a declaration is to be refused, it should be refused at a preliminary stage of litigation and not by a Court of appeal especially after the issues or facts and laws have been decided.

The last ground of appeal is regarding the award of mesne profits or damages for use and occupation of the land in question by the defendants. As the defendants are held to be trespassers and as they built a house of their own on the land in spite of plaintiffs' protest, they should obviously pay damages. The lower Appellate Court gave sound reasons why the damages awarded by it were fair and reasonable. It is true that though the plaintiffs claimed damages up to the date of suit (*i.e.* up to end of July 1954) and further damages till the defendants gave up possession of the land, the lower Appellate Court gave the damages up to 30th November 1954. But as I agree with the lower Appellate Court that the damages should be K 115 per month and as the plaintiffs have paid Court fees for damages up to the end of November 1954, I should not interfere in this small matter.

The appeal stands dismissed with costs.

APPELLATE CIVIL.

Before U Aung Khine, J. and U Ba Thoung, J.

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Dec. 12.

MESSRS. ARAKAN CARRIERS SYNDICATE (APPELLANT)

v.

CHANDMAL BIRLA AND TWO OTHERS (RESPONDENTS).*

Civil Procedure Code—Order 41, Rule 20 read with Rule 33—Order 1, Rule 10 read with s. 107, Civil Procedure Code.

The firm of Chandmal Nathmal claimed a sum of Rs. 5,006-14-9 and not knowing exactly from which of the four defendants, namely:—

(i) British India Steam Navigation Company,

(ii) The Arakan Carriers Syndicate,

(iii) The Port Officer, Akyab and

(iv) The Union of Burma,

filed a suit against all of them, leaving to the Court to determine which defendant is liable.

The trial Court decreed the suit against the Arakan Carriers Syndicate alone, dismissing the suit against the rest.

The Arakan Carriers Syndicate filed an appeal against the firm alone, without impleading the co-defendants as co-Respondents.

The Firm also did not appeal against the judgment and decree dismissing the suit against the other co-defendants.

The High Court, on appeal directed under Order 41, Rule 20 read with Rule 33, Civil Procedure Code to implead the 3rd defendant, the Port Officer, Akyab, as a co-Respondent in the appeal.

It was contended that the Port Officer should not be impleaded since no appeal was filed against him and that the period of limitation had expired.

Held: An appeal is but a continuation of the suit and the powers of the appellate Court cannot be limited by Order 41, Rule 20; the appellate Court still has the power to act under Order 1, Rule 10 read with s. 107 of the Code of Civil Proceudre.

Held also: The powers conferred upon the appellate Court by Order 41, Rule 33, Civil Procedure Code are very wide and the question of limitation cannot be urged as a ground against the exercise of the Court's discretion under this Rule.

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*Civil 1st Appeal No. 116 of 1952, against the decree of the Additional District Court of Akyab in Civil Regular Suit No. 5 of 1951, dated 11th June 1955.

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V.P.R.V. Chokalingam Chetty v. *Seethai Acha and others*, I.L.R. 6 Ran. 29 (P.C.), distinguished.

Girish Chander Lahiri v. *Sasi Sekhareswar Roy*, I.L.R. 33 Cal. 329, referred to.

Baluswami Aiyar v. *Lakshmana Aiyar and three others*, I.L.R 44 Mad. 605 at 608, relied on.

Subramanian Chettiar v. *Sinnammal*, 59 Mad. L.J. 634 at p. 640, approved.

Kyaw Min for the appellant.

Aung Min (2) for respondents Nos. 1 and 2.

Hla Tun Pru for respondent No. 3.

U AUNG KHINE, J.—Chandmal Birla and Nathmal Kabra, plaintiff-respondents are partners of a firm known as Chandmal Nathmal carrying on business as cloth merchants in Akyab. During March 1951 three cases containing various assortment of goods, mostly textiles, consigned to them from Rangoon as per S.S. "Bandra" of the British India Steam Navigation Company reached Akyab on 24th March 1951. This three cases marked "CMB" were unloaded from the ship, taken ashore and delivered at the Port Warehouse Jetty by lighterage brokers, Arakan Carriers Syndicate. On 29th March 1951 when delivery was taken one box was found broken with some of the contents removed. The plaintiffs fixed the value of the missing goods at Rs. 5,006-14-9 and not knowing exactly from which of the four defendants, namely, (i) British India Steam Navigation Company, (ii) The Arakan Carriers Syndicate, (iii) The Port Officer, Akyab and (iv) the Union of Burma, they were to receive compensation, filed a suit against all of them and left it to the Court to determine the liability of each of the defendants. The suit proceeded to trial and ultimately the plaintiff was given a decree for the amount claimed

Rs. 5,194-10-9 together with costs as against the Arakan Carriers Syndicate only.

The Arakan Carriers Syndicate filed an appeal against the judgment and decree of the trial Court and in doing so impleaded the plaintiffs as the sole respondents. The co-defendants in the trial Court were not made party-respondents. The plaintiffs also did not file any appeal against the judgment and decree dismissing the suit against the other defendants.

When the appeal was heard, with the reading of the evidence recorded in the lower Court it became doubtful whether the finding entered by the lower Court on facts was correct and before forming a definite opinion in the matter, we gave a direction, acting under Order 41, Rule 20 read with Rule 33 of the Code of Civil Procedure that the Port Officer, Akyab, be added as a party-respondent.

It is now contended on behalf of the Port Officer that he should not be made a party in appeal at this late stage especially after he had acquired a very valuable right under the law of limitation, in that no appeal was filed against him in time. The case of *V.P.R.V. Chokalingam Chetty* v. *Seethai Acha and others* (1) was cited in support of this contention.

After a careful reading of this ruling we find the facts as obtained in that case are not at all similar to the facts of this case. Here, the appellant was a defendant and not a plaintiff, as in the other case and he filed his appeal against the plaintiff who had obtained a decree against him. It is true, however, that he did not add the Port Officer, Akyab, as a party-respondent.

The learned Advocate for the appellant, on the other hand, submitted that a person who was a party

(1) I.L.R. 6 Ran. 29 (P.C.).

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in the proceedings in the trial Court can be added as a respondent at a later stage even though the time to prefer an appeal against him had long expired. The decision in the case of *Girish Chander Lahiri* v. *Sasi Sekhareswar Roy* (1) was quoted in support of this counter-claim.

It is further submitted on behalf of the Port Officer that a party who is no longer interested in the result of an appeal should not be added as a respondent under Order 41, Rule 20, Civil Procedure Code. As the time for filing an appeal against him has long since expired, he is no longer interested in the result of the appeal and as such he should no be impleaded.

It must, however, be remembered that an appeal is but a continuation of the suit and the powers of the appellate Court cannot be limited by Order 41, Rule 20; the appellate Court still has the power to act under Order 1, Rule 10 read with section 107 of the Code of Civil Procedure. We are fortified in this view by the decision in the Full Bench case of *Baluswami Aiyar* v. *Lakshmana Aiyar and three others* (2). The relevant portion of the judgment on page 608 of the Report is as follows:

> " It was contended that we had no power to add him as a party to the appeal, as he was not interested in the result of the appeal and that Order XLI, Rule 20, did not apply to this case. The words of that rule are, however, wide enough to cover the present case ; but, even if they were not, our powers to add parties in appeal are not exhausted by that rule, as Order I, Rule 10, also applies to appeals by force of section 107 of the Code of Civil Procedure. In the present case, it is manifestly desirable to have the second defendant before us to enable us properly and effectually to settle the question whether the plaint agreement is binding on him or not, a question which we have to decide in any case for the disposal of the

(1) I.L.R. 33 Cal. 329. (2) I.L.R. 44 Mad. 605 at 608.

first defendant's appeal. We must now consider that question."

Moreover, in our considered opinion the powers conferred upon the appellate Court by Order 41, Rule 33, Civil Procedure Code are very wide and the question of limitation cannot be urged as a ground against the exercise of the Court's discretion under this rule. Even in the Privy Council case of *Chokalingam Chetty* v. *Seethai Acha and others* (1) cited earlier there appears to be a suggestion that in a fitting case a party against whom time has run out for appeal may be added as a respondent under this rule.

In this connection we would quote with respect and approval the words of Madhavan Nair, J. in the Full Bench case of *Subramanian Chettiar* v. *Sinnammal* (2)—

Order 41, Rule 33, reads as follows:

> "The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.
>
> *Illustration.*
>
> A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X appeals and A and Y are respondents. The Appellate Court decides in favour of X. It has power to pass a decree against Y.
>
> The rule has been newly introduced in the Code of 1908. Its object is clearly to enable the Court to do complete justice between the parties. Its terms are very wide and in a proper case it gives the Appellate

(1) I.L.R. 6 Ran. 29 (P.C.). (2) 59 Mad. L.J. 634 at p. 640.

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Court ample discretion to pass any decree or make any order to prevent ends of justice from being defeated. By the very terms of the order, involving as it does an exercise of judicial discretion, the question whether the Appellate Court should exercise the powers conferred by them in a particular case would no doubt depend upon the special facts and circumstances of that case. The illustration to the rule is a type of one class of cases, which calls for the exercise of the powers conferred by Rule 33; but it does not by any means exhaust the class of cases in which the powers of the Appellate Court under this rule may be invoked. Having regard to the wide language of the rule it is inexpedient to lay down any hard and fast rule regarding the true scope of this provision. In a *proper case* the Courts should not hesitate to use the powers conferred upon it by this rule."

Now, what are the set of facts and circumstances obtaining in this case so as to warrant our adding the Port Officer, Akyab, as a party-respondent? The correctness of the trial Court's finding is in doubt and if as a result of the appeal the suit as against the appellant were to be dismissed, the plaintiff-respondents stand to lose everything as they had not filed an appeal against the Port Officer. On facts as made out by the evidence on record, they are certainly entitled to a decree against either the defendant-appellants, the Arakan Carriers Syndicate or the Port Officer, Akyab. Therefore, in the interest of justice, equity and good conscience, the Court cannot stay its hand to help out the plaintiff-respondents. In this appeal we are to determine as to who is the party liable to compensate the plaintiff-respondents and therefore it is highly desirable to have the Port Officer, Akyab, before the Court to enable us effectually to decide the issue in question.

In the light of these circumstances we hold that the Port Officer, Akyab must be added as a

party-respondent and therefore we reject all the objections raised against this order by the learned Advocate appearing in his behalf.

Early in the proceedings before the Port Officer, Akyab, was brought on the record, quoting the case of *Ma Than May* v. *Mohamed Eusoof* (1) as an authority, the plaintiff-respondents submitted that the appeal of the Arakan Carriers Syndicate was incompetent inasmuch as the most necessary party in appeal, that is, the Port Officer, Akyab, was not impleaded. The reason furnished is that in the event of the appeal being accepted there would be an undesirable existence of two contradictory judgments, one of the trial Court, and the other, of the High Court in respect of the same case. Here again, we say that the facts obtainable in the two cases are not the same. In this case there are no shares to be determined or adjusted inter-parties as in the case cited; the liability has to be fixed one way or the other. Furthermore, we doubt whether the appellate Court in that case was moved to exercise its discretion to implead the third party as a party-respondent under Order 41, Rule 20 read with Rule 33 of the Code of Civil Procedure. The plaintiff-respondents have now submitted to us that they do not wish to press this point raised by them earlier, if the Port Officer is added as a party-respondent and since we have decided to make the Port Officer a party-respondent, we need not dwell any longer on this point.

Proceeding now to the facts of the case, there is no dispute that three cases marked "CMB" were consigned to the firm of the plaintiff-respondents from Rangoon. The Arakan Carriers Syndicate has admitted that they received these three cases in good

(1) I.L.R. 9 Ran. 624.

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condition from S.S. "Bandra." It is their case that they in turn delivered these three cases to the Port authorities in good condition and that the coolies employed by the Port authorities removed them from the T head of the jetty into their godown. It is a standing custom that the damaged goods are never accepted to be kept in the Port warehouse and on landing, these goods invariably are directed to be carried straight into the damaged goods room provided by the Port authorities in the warehouse itself. The key of the damaged goods room is always held by the Arakan Carriers Syndicate and that their employees who were present at the jetty at the time when the goods were unloaded from S.S. "Bandra" were never told to remove any of the "CMB" marked cases into the damaged goods room. In other words, they say that one "CMB" marked case subsequently found damaged was landed in good condition and it was while in the custody of the Port authorities that the pilferage of goods from that case took place.

On the other hand, the Port Officer claimed that one of the "CMB" marked cases was delivered at their jetty in a damaged condition and this fact was shown in the remarks column of the tally sheet prepared by a clerk of the Port Office. In the copy of the Cargo Receipt furnished to the Arakan Carriers Syndicate, the same remark was entered so that the Arakan Carriers Syndicate knew from the very outset that one of the "CMB" marked cases was delivered damaged at their jetty.

Thus the primary question to be decided is whether the case in question was delivered intact or in a damaged condition.

Somma Maizee (DW 2) for defendant No. 2, a head cooly, stated that he was the person who carried these "CMB" marked cases into the Port godown.

They were in good condition when delivered to the Port authorities and he kept them at a place about 40 cubits away from the damaged goods room. There cannot be any doubt that this witness is a cooly who works in the Port Yard. It is not disputed that he was the man who brought out the disputed case from the damaged goods room on the 29th March 1951. Sarkar (PW 1) and Shwe Maung (DW 1) for defendant No. 2 also knew him as a cooly who works in the Port Yard. Mr. Chapman (DW 1) for defendant No. 1, Port Superintendent, stated that his (Somma Maizee's) face was familiar to him.

The unloading of the goods started from the evening of 24th March 1951 and the work was carried on throughout the night to be fully completed by about 10·30 a.m. on 25th March 1951 which happened to be a Sunday. On 26th March 1951 Sarkar (PW 1), a clerk employed by the plaintiffs, went to the Port godown to make enquiries about the goods consigned to his principal. He saw the three cases inside the godown apparently in good condition. He also noticed that the damaged goods room was not full although there were some packages inside it. He is corroborated by P. C. Das (P W 2), P. C. Das would have it that he saw only about 10 packages in the damaged goods room. Shwe Maung (DW 1) for defendant No. 2 deposed that he delivered the three "CMB" marked cases in good condition to the Port authorities and they were kept in the godown. According to him, S.S. "Bandra" on that trip brought 10 damaged cases and he put them all in the damaged goods room.

Sarkar (PW 1) who has been working as shipping clerk for quite a number of years stated that the Port authorities would never accept any damaged cases to

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be kept in their godown. He is supported in this version by P. C. Das (PW 2) who has been working for the British India Steam Navigation Company for the last 30 years or so. There is no reason to doubt their statements. Mr. Spencer, defendant No. 3, himself stated that according to the Port Manual, the moment a case is landed on the Port jetty the Port takes charge of it. He further stated that the Port accepts damaged cases but they are to be in the damaged goods room in the Port godown itself. Mr. Chapman (DW 1) also deposed in a similar strain. This is what he stated in his cross-examination—

> "Our Tally Clerk would accept the broken cases of packages under protest from Carriers Syndicate and these cases would be entered in the tally sheet broken. If a case is declared as broken every party must know about it. Then the goods will be taken into the godown by wharf's coolies at Port responsibility. The broken packages will then be delivered to the Carriers Syndicate clerk at the door of the damaged goods room."

According to Shwe Maung about two or three days after he had delivered the "CMB" cases to the Port authorities, Port Clerk U Tha Tun asked him to put one damaged "CMB" case in the damaged goods room. He noticed then that this case was broken on one side. He refused to do so and this resulted in the dispute between him and U Tha Tun. However, in the end he agreed to put the case inside the damaged goods room and in fact he did so. Apparently he made a report about this to U Tha Aung Pru, Managing Partner of the Arakan Carriers Syndicate and U Tha Aung Pru wrote Exhibit E letter in protest against the keeping of the same in the damaged goods room. This letter was dated 28th March 1951 and according to the contents of the

letter it would appear that the damaged case was taken to the damaged goods room only at 3 p.m. on that day.

A different version is given by U Tha Tun (DW 3) for defendant No. 3 as to what took place between him and Shwe Maung. According to him one day before the plaintiffs came to take delivery of the cases, he saw one of them in a broken condition. Shwe Maung came and informed him on that day that he wanted to remove it to the damaged goods room and he informed him that he could do what he liked and that he had no concern in the matter. If U Tha Tun is to be believed, the Port authorities have nothing to do whatsoever with the damaged goods even if they are found inside the godown. This version of U Tha Tun cannot be accepted in view of what Tun Aung Gyaw (DW 5) for defendant No. 3 has stated in his cross-examination. This is what he said—

> "Chapman was present whole night when the goods were unloaded. He inspected the damaged goods. He gave general instructions to move the damaged case. . . . . U Tha Tun's duty was to arrange the storage of the cases. He also had to separate the damaged cases from undamaged cases."

Versions may differ as to under what circumstances the disputed case got into the damaged goods room, but it has been established that this case was put into the damaged goods room only on 28th March 1951, that is three days after it had been kept lying in the open godown.

On the day the unloading of the cargo was done, U Tha Tun and Tun Aung Gyaw were the two clerks present at the T head of the jetty and it is inconceivable that they would accept a damaged case to be kept in the open godown, as it would mean

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acceptance by the Port authorities of having received the same in good condition. Taking a cue from what Mr. Chapman has stated in his evidence, the learned Advocate for the Port Officer seems to suggest that (1) the damaged goods were received by the Port authorities under protest and (2) these goods could not be put into the damaged goods room as the same was full. U Tha Tun himself was unaware of the fact that one of the "CMB" marked cases was damaged and according to Tun Aung Gyaw it was U Tha Tun's duty to sort out the damaged cases from amongst other cases delivered in good condition. If he did not know that any of the "CMB" marked cases was in a damaged condition, he could not have received the same under protest. The Port Clerks themselves did not draw the attention of Shwe Maung who was looking after the interest of the Arakan Carriers Syndicate that they had found one "CMB" marked case in a broken condition. Mr. Chapman had already stated that if a case is declared as broken all the parties concerned would be made known about it and that the case would be taken into the godown at the responsibility of the Port authorities and the broken package would then be delivered to the Carriers Syndicate clerk at the door of the damaged goods room. Since no case marked "CMB" was delivered at the door of the damaged goods room to the Carriers Syndicate clerk on the night in question, it must be assumed that all "CMB" marked cases were delivered intact.

It was clear that on the night in question this disputed case was not handed over to Shwe Maung at the door of the damaged goods room nor was he informed that as the damaged goods room was full the case would be accepted under protest and kept outside the damaged goods room.

The Port Officer seems to rely much on the fact that in the tally sheet prepared by them (Exhibit 9), in the remarks column, the word "broken" was shown as against a "CMB" marked case. We have examined this exhibit and as stated, in the remarks column as against the item in question there is the word "broken". It is however not denied that this word "broken" is written with a different pencil after some other entry underneath had been erased out. Tun Aung Gyaw (DW 5) who prepared this tally sheet stated that he had at first misspelt the word "broken" using the word "a" instead of "e" between "k" and "n". He erased out the entire word and re-wrote the word "broken". He admitted that he did not tell any of the Arakan Carriers Syndicate clerks about the correction he had made. We notice that the word "broken" had been correctly written two lines above this item and therefore we have grave doubts about the truth of the explanation given by this witness. The original entry has undoubtedly been tampered with.

Another piece of evidence relied upon by the Port Officer is Exhibit 8, the original Cargo Receipt prepared in their office. It is submitted that the word "broken" appears against the 14th item shown as "CMB" from the bottom of this exhibit. With regard to this item, Maung Maung Tin (DW 4) for defendant No. 3, who prepared this receipt, admitted that the word "broken" in the last column in Exhibit 8 is in same line with the initials NKS in the first column. The initials NKS are the initials appearing directly below the initials "CMB" in that exhibit. Maung Maung Tin explained that this word "broken" is really meant to be shown against the initials "CMB" but as the typewriter roller was at fault it inadvertently was shown as against the initials NKS. We have

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grave doubts here also as to the truth of the statement of Maung Maung Tin, especially when we see in Exhibit 9 tally sheet that one case marked NKS is also shown as "broken" It could be that Maung Maung Tin really was showing in Cargo Receipt (Exhibit 8) that one of the NKS cases was broken.

The Port Officer relied on these two documentary Exhibits 8 and 9 and in both the cases there are unsatisfactory features to throw a doubt as to the genuineness of the entries. The lower Court was quite alive to the possibility that the entries in these exhibits were tampered with by the Port clerks but he was not sure whether they were so done with a view to protect themselves. The learned Judge of the lower Court, however, refused to see that these suspicious circumstances attached to these two documents are enough to cast a doubt on the truth of the version they presented in Court. As a matter of fact, the learned Judge appears to have been making a special pleading for the Port authorities throughout. He said in his judgment that it was quite possible that the case in question was tampered with by the Arakan Carriers Syndicate coolies and that as all the cases were landed at the Port Jetty about the time when most people were feeling sleepy, the fact that this particular case was damaged could have escaped the attention of the clerks concerned. These are mere conjectures and we are surprised that they should be made grounds to support the case of the Port authorities.

The promptness in which U Tha Aung Pru, Managing Partner of the Arakan Carriers Syndicate, sent in Exhibit E letter to protest against the storage of the disputed case in the damaged goods room on the 28th March 1951 shows that prior to that date neither the Arakan Carriers Syndicate nor the Port

authorities knew that this case had been tampered with. On these facts, we must take the view that the same was delivered intact and that the pilferage of the contents of this case must have occurred while it was in the custody of the Port authorities. It is claimed that the Port godown was well guarded and that it was well-nigh impossible that the goods could have been stolen while in the custody of the Port authorities. There is evidence, however to show that on the day S.S. "Islamia" arrived in Port on the 27th March 1951, the Port godown was kept open throughout that day. It is suggested that the goods from the disputed case could have been stolen on that day. When all the circumstances obtainable in the case are studied carefully, we are of the opinion that the Port authorities by their action did accept these "CMB" marked cases, and as the contents were pilfered from the damaged case whilst in their custody, we hold that the Port Officer is liable to compensate the plaintiffs and not the Arakan Carriers Syndicate. There is not much dispute as to the value of the goods lost to the plaintiffs and we are of the opinion that the lower Court was right in assessing the value of the goods according to the value mentioned in the invoice maintained by the plaintiffs in the ordinary course of their business.

In the result the appeal is allowed and the plaintiff-respondents suit against the appellant Arakan Carriers Syndicate is dismissed with costs throughout and instead there will be a decree for the plaintiff-respondents for Rs. 5,194-10-9 with costs throughout against the 3rd respondent, the Port Officer, Akyab.

U BA THOUNG, J.—I agree.

APPELLATE CIVIL.

Before U Chan Tun Aung, Chief Justice, and U San Maung, J.

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July 24.

MESSRS. THE ASIATIC CORPORATION (APPELLANT)

v.

MESSRS. MERCANTILE BANK OF INDIA LIMITED (RESPONDENT).*

Letters of Credit—Irrevocable letters of credit or "documentary or conditional letters of credit"—Basis of Plaintiff's claim on confirmed irrevocable letters of credit alone—Banker's duty in respect of letters of credit—Construction of "documentary letter of credit"—Examination of witnesses on commission.

The appellant purchased from the Asiatic General Trading Company of Hongkong Cigarettes and Toilet requisites and opened two irrevocable letters of credit with the Respondent in favour of the Hongkong Firm, who however shipped useless odds and ends.

The Respondent Bank claimed reimbursement from the appellant who resisted the claim alleging negligence on the part of the Respondent in not ascertaining whether the packages contained genuine goods in conformity with the Bills of lading, invoices, etc.

Held: That as between the buyer and the banker, it is only on bank's departure from the exact terms of letters of credit can the bank be held responsible, and the buyer cannot resist any claim for reimbursement by the bank, on the strength of the letter of credit opened at his (buyer's) instance.

Brazilian and Portugese Bank v. *British and American Banking Corporation*, (1868), 18 L.T. 823; *Union Bank of Canada* v. *Cole*, (1877) 47 L.J.C.P. 100; *Donald H. Scott & Co. Ltd.* v. *Barclays Bank, Ltd.*, (1923), 2 K.B. 1; *Bortlwick* v. *Bank of New Zealand*, (1900) 6 Com. Cas. 1; *Hart's Law of Banking* (4th Edition, Vol. 11), pp. 650, 651, 652 and 654, referred to.

Held also: That if the terms of the letter of credit are fully complied with any payment made or bills negotiated by the Bank in accordance therewith cannot give rise to a complaint either by the seller or the buyer.

That the relationship between the Banker and the buyer at whose instance a letter of credit is opened, is determined by the precise terms of the letter of credit. The Banker must rigidly comply with these terms. In such a deal, the Banker only makes the credit available for the benefit of his client. The banker is neither an agent of the buyer, nor of the seller; and "on the credit being issued, the transaction is purely a trust between the seller and the buyer".

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*Civil 1st Appeal No. 35 of 1956 against the decree of the High Court of Rangoon, (Original Side) in Civil Regular Suit No. 73 of 1953, dated the 27th February, 1956.

The banker's duty is to pay against documents and not against goods, and that if the documents are in order, it is not open to the banker, or has he any right to enquire into the question of quality or quantity.

The deal being based upon documents, the question of "actual conformity of the goods to the description on the documents was immaterial".

Frey v. *Sherburne and the National City Bank of New York*, (1920) 193 App. Div. 849 ; 184=N.Y. Supp. 661 ; *O'Meara Co.* v. *National Park Bank of New York*, (1925) 239 N.Y. 386 ; 146 N.E. 636 ; *Continental National Bank* v. *National City Bank of New York*, (1934), 69 F. (2d) 312 "The Law relating to Commercial letters of Credit" by Professor A. G. Davis, referred to.

Held further : That in the matter of issue of commission to examine certain witnesses in a distant country, especially where his examination would cause delay, the Court must be fully convinced that the evidence of such a witness is really relevant and necessary for the proper decision of the case.

Ram Sewak Koeri Mosadi Koeri v. *Rai Bahadur Harihar Prasad Singh and one*, A.I.R. (1927) Ran. 175=5 B.L.J. 242 ; *M. Palaniappa Chettiar* v. *Narayanan Chettyar*, 226 I.C. 111=A.I.R. (1946) Mad. 331, referred to.

Held : Per U SAN MAUNG, J.—That a buyer's remedy when goods of the right quality and quantity had not been shipped is as against the seller for damages.

N. R. Burjorjee, Advocate, for the appellant.

C. A. Soorma, Advocate, for the respondent.

U CHAN TUN AUNG, C.J.—This is the defendants' appeal against the judgment and decree of the Original Side of this Court, arising out of a suit in which the respondents-bank (The Mercantile Bank of India) sought for the recovery of K 33,033·72 pyas, being the total equivalent sum of Hongkong dollars 12,240 and 36,000 paid for and on behalf of the appellants by having negotiated two drafts, at Hongkong on two irrevocable letters of credit in favour of one Asiatic General Trading Company of Hongkong. The claim being founded upon documents, which in banking circle, are called "documentary or conditional letters of credit" raises a question of some importance not only to the bankers and their clients, but also to the commercial community at large. It appears that at the written

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request of the appellants, the respondents opened two irrevocable letters of credit at their branch in Hongkong. The two letters of request (Exhibits A and J) are both dated 20th February, 1953. The Bank accordingly cabled instructions to their branch at Hongkong and the credits were made available to the Asiatic General Trading Company of Hongkong. Now, the respondents' case at the trial being that they have in strict compliance with the very terms of the relevant letters of credit completely discharged their obligation, we deem it to be very essential that some salient terms incorporated in one of them should be set out hereunder. They are duly signed by the appellants' proprietor addressed to the respondents-bank. Both are in identical terms:—

"*Irrevocable without recourse credit.*

THE MANAGER,

The Mercantile Bank of India, Ltd.

DEAR SIR,

Please instruct your Hongkong Office by wire to negotiate the draft or drafts of M/S. Asiatic General Trading Co., No. 22, Connought Road, 1st Floor, Hongkong on us to the extent of Hongkong dollars twelve thousand two hundred and forty only, for full or invoice cost of merchandise, *viz.*, Toilet Requisites of Hongkong origin on C.I.F. terms from Hongkong to be shipped to Rangoon port, not later than 30th March, 1953. . . . . Drafts to be drawn at sight accompanied by documents purporting to be :—

1. Invoice, Certificate of Origin ;
2. Full set Clean on board Bills of Lading ; evidencing despatch to the Mercantile Bank of India, Ltd. Rangoon A/c. Openers The Asiatic Corporation ;
3. Insurance Policy/ies or Certificate (s) of a First Class British and/or dominion Insurance Co., covering

War, Marine (combined Marine surcharge conditions) : W.P.A., theft, pilferage, non-delivery, riots, strikes, civil commotion, malicious damage, damage by fresh water mud, hooks oil and/or other cargo from warehouse to warehouse irrespective of percentage for at least - % over invoice value.

Claims payable in Rangoon but for the regularity or genuiness of which documents you are not to be responsible if apparently in order. . . . . .

And further we agree that the negotiation of such draft or drafts above referred to shall be optional on the part of your Bank. . . . . .

We further agree that we open this credit entirely at our own risk and will honour all drafts presented even should the goods not arrive or be refused landing through any act of War or restrictions imposed by Government Ordinance. Should this credit be extended or amended in any way we agree to pay all charges in connection thereof. . . . . .

Yours faithfully,

THE ASIATIC CORPORATION.

(Sd.) I. M. MADHA.

RANGOON, *20th February, 1953.* *Proprietor.*

The respondents obviously accepted these terms for opening the credit and in pursuant thereto, they issued necessary instructions to their branch at Hongkong for the negotiation of draft or drafts to be drawn on them. In due course the respondents received all the necessary documents, through their branch office in Hongkong who had negotiated the bills in the sums of Hongkong dollars 12,200 and 35,700 against specified documents set out in the letters of credit. However, in the meantime, the packages of so-called goods consigned by the Asiatic General Trading Company of Hongkong to the appellants, and also

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said to be covered by the documents set out in the letters of credit had arrived at Rangoon Port for delivery. But it was eventually found out that the contents of the packages were useless odds and ends of no value whatsoever. The respondents-bank thereafter presented their bills Exhibits B and H to the appellants for payment; but payments were refused. The appellants resisted the claim, asserting that the respondents-bank had committed the breach of contract in not having strictly complied with the terms embodied in the irrevocable letters of credit, Exhibits A and J. In other words, the appellants denied their liability to reimburse the Banking Company the sums aforesaid on the ground that the Banking Company had failed to observe the terms of the contract. When the pleadings were filed before the Trial Court the appellants were called upon by the respondents to furnish particulars as to which terms of the credit the Bank had committed the breach. Here, we may observe that the appellants took several months to furnish the particulars asked for. After several evasive replies and objections, spreading over for nearly eight months, the appellants furnished the particulars, and even then, it was on a move by the Bank to strike out their (appellants') defence for failure to comply with Court's order. The particulars furnished read:

(*a*) That the country of origin of the goods shown in the application for a Letter of Credit and the Letters of Credit is different to the country of origin of the goods sent to the defendants.

(*b*) That the goods in respect of which the application for a Letter of Credit was made and the Letter of Credit issued are entirely different in description

and kind to the goods sent to the defendants.

(*c*) That the value of the goods shipped was very much less than the value of goods shown in the application for Letter of Credit and the Letter of Credit itself.

(*d*) That the plaintiffs failed in their obligation to ensure that goods shipped were the same as those in the application for a Letter of Credit and in the Letter of Credit itself.

(*e*) That the plaintiff failed in their implied obligation in respect of the application for Letter of Credit and the Letter of Credit itself to safeguard the interest of the defendants.

(*f*) That although the defendant had requested the plaintiffs to enquire and report on the financial stability of and commercial reputation of the shippers from Hongkong they neglected and omitted to inform the defendant of the reply to such.

(*g*) That although the defendant requested the plaintiffs to amend the Letter of Credit in an important particular they omitted and neglected to do so.

(*h*) That both the Letters of Credit were opened for a larger amount than that for which the defendants had applied for.

Thus, the only important issue that fell for determination at the trial was whether the appellants or the respondents-bank had committed the breach of the terms of Contract set out in the exhibit letters of credit.

The learned Trial Judge held that the appellants having ordered certain goods from the sellers, the

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Asiatic General Trading Company of Hongkong, and having arranged payment to the said sellers by taking advantage of the banking facilities made available by the respondents by means of irrevocable letters of credit Exhibits A and J, but that in consequence of fraud or deceit practised by the sellers on the buyers (appellants) the goods consigned were of no value whatsoever, and that in such a transaction in which both the paying Bank and the issuing Bank having had to deal mostly as against documents—the very basis of the letter of credit made available under the circumstances of the case being on documents alone, the respondents-bank are not liable to share the loss, nor can they be said to have committed breach of any of the terms of the letters of credit made available at the request of the appellants.

It also appears at the trial that the respondents by their application, dated the 21st August, 1954 obtained permission to examine on commission, the Chief Accountant of their bank at Hongkong, and that the appellants had also taken the fullest opportunity to administer cross interrogatory on the said witness. However, on the 27th July, 1954 the appellants also applied for issue of a commission to examine the following persons in Hongkong :—

(*a*) Collector of Customs, Hongkong;

(*b*) Officer (Custom) in Hongkong, who passed the goods in suit;

(*c*) The President of the Chinese Chamber of Commerce, Hongkong;

(*d*) The Secretary of Chinese Chamber of Commerce, Hongkong;

(*e*) The Manager of the Shipping Agents, (S.S. "Sangola") at Hongkong;

(*f*) The proprietor or partner of Messrs. Asiatic General Trading Company;

(*g*) The Manager of Messrs. Asiatic General Trading Company, Hongkong.

This application was resisted by the respondents on the ground that their claim as against the appellants being based upon two confirmed irrevocable letters of credit which entitled them to negotiate drafts against documents or titles to goods, invoices, bills of lading, etc., the evidence of these witnesses were not at all material for the determination of the issue or issues involved, namely whether the respondents-bank had committed the breach of the specified terms of the letters of credit made in favour of the said Asiatic General Trading Company, consignors (sellers). This objection was upheld by the Trial Judge, and the appellants' application for issue of commission to examine the aforesaid witnesses was rejected on the 31st January, 1955.

In the appeal before us, the appellants' Counsel has assailed the judgment of the Trial Court basing mainly upon the following three grounds :

(*a*) Accepting that the contractual relationship between the appellants and respondents is based upon the terms set out in the two applications for opening irrevocable letters of credit pursuant to which the respondents had paid out the specified sums after due confirmation both by airmail and by cablegram to their bank in Hongkong—the paying sector—yet, the respondents should be held to have committed the breach of the terms under which the letters of credit were opened, in that they had through their paying bank acted negligently in not ascertaining whether the packages consigned contained genuine goods as described in the bills

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of lading, invoices, insurance policies and the certificates of the Chamber of Commerce, Hongkong, *vide* Exhibits D, E, F and G.

(*b*) Even if the above contention were unacceptable, then due consideration should be given to the existence of appellants' letter, dated 2nd March 1953 (Exhibit 8) the address of the respondents wherein the following amended clause of terms of credit was inserted :—

> "Goods to be surveyed on the wharf by General Superintendence Company Hongkong for the entire consignment of Cigarettes and Toilet goods in respect of quality, quantity and value according to the terms of Letters of Credit."

The respondents-bank had obviously failed to comply with this amended term and thus, should be held to have committed the breach.

(*c*) Rejection of the appellants' application for examination of certain listed witnesses on commission at Hongkong was wholly unjustified.

I shall now deal with the first ground. It may be observed at the very outset that the appellants are not in a position to challenge seriously that the respondents in fulfilling their obligation under the exhibit letters of credit, in terms some of which we have already set out above, cannot be held to have committed breach of the terms thereof, if they negotiated the draft or drafts presented to them on the strength of documents "*purporting to be invoices, clean bills of lading, insurance policies, etc.*, for the regularity or genuineness of which they are not to be held responsible if they are *apparently in order.*" Submissions were however made by the appellants' Counsel by stressing that the respondents were not justified in negotiating the draft drawn upon them on the mere presentation of the documents alone. It is

contended that the bankers' duty in respect of the aforesaid letters of credit does not end by merely looking at the documents presented, but that they should, before the negotiation of the bills, examine whether the goods specified in the documents were really the goods which the appellants had purchased *viz.* toilet requisites and cigarettes. In other words, the appellants sought to put the respondents-bank in the role of their agent and place responsibility on them for having negligently paid out or otherwise negotiated the draft to the appellants' detriment by not properly ascertaining beyond the documents which were presented to them. I see no merit in these submissions and I cannot allow them to prevail. It seems the learned Counsel for the appellants is under a misconception as to the precise scope and the specific purpose of the two letters of credit (Exhibits A and J) when read in terms of the last clause whereby the appellant had agreed with the (respondents) that in opening the credit it was done entirely at their own risk and that they agreed to reimburse the bank even if the goods do not arrive or be refused landing through any act of war, or restrictions imposed by government ordinance.

By referring to Hart's Law of Banking (4th Edition, Volume II), the appellants' Counsel cited the following cases appearing at pages 650, 651, 652 and 654 :—

Brazilian and Portugese Bank v. *British and American Exchange Banking Corporation* (1) ; *Union Bank of Canada* v. *Cole* (2) ; *Donald H. Scott & Co. Ltd.* v. *Barclays Bank, Ltd.* (3) ; *Borthwick* v. *Bank of New Zealand* (4). It is urged on those authorities that the respondents should be held responsible for

(1) (1868) 18 L.T. 823.
(2) (1877) 47 L.J.C.P. 100.
(3) (1923) 2 K.B. 1.
(4) (1900 6 Com. Cas. 1.

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the loss sustained by the appellants. I have carefully gone through the facts presented in each of the aforesaid cases and I find that none of them really helps the appellants' case. In *Brazilian and Portugese Bank* v. *British and American Exchange Banking Corporation* (1), the bank was sued upon by a third party who had produced or cashed a bill purporting to be drawn under a letter of credit, for non-performance by the issuing Bank of specified terms of the letter of credit. Similarly, in the *Union Bank of Canada* case (2), a specified condition in the letter of credit remained unperformed. In that case, letters of credit were addressed by the defendant-bank to certain corn merchants authorising them to draw bills on them against shipment of grain. There were certain conditions appended to the letters of credit. The corn merchants drew bills upon the defendant-bank under the credit so opened without performing the conditions specified. It was held that the appended condition formed part of the contract. *Donald H. Scott & Co. Ltd.* v. *Barclays Bank Ltd.* (3) was a case in which the bank was sued upon by the seller of the goods for alleged non-performance of one of the specified terms of the letters of credit. The said term related to a payment clause, which enjoined the bank to honour the draft only on presentation of among other documents, draft and insurance policy, covering the shipment of goods. The sellers presented their draft accompanied by a certificate of insurance which did not contain or did not offer any means of ascertaining the terms of the contract. It was held that the bankers were justified in refusing to honour the draft. *Borthwick* v. *Bank of New Zealand* case (4) is also of no help to the

(1) (1868) 18 L.T. 823.
(2) (1877) 47 L.J.C.P. 100.
(3) (1923) 2 K.B. 1.
(4) (1900) 6 Com. Cas. 1.

appellants. There, the buyer sued the bank (defendants) for having negotiated a draft attaching to an insurance policy, containing a term which was quite contrary to the one usually adopted in the frozen meat trade, and the bank was held liable for having not complied with the terms of the letter of credit. Thus, from the very decision, relied upon by the appellants' Counsel it appears that as between the buyer and the banker, it is only upon the bank's departure from the exact terms of letters of credit can the bank be held responsible, and the buyer resist any claim for reimbursement by the bank, on the strength of the letter of credit opened at his (buyer's) instance. In my view Exhibits A and J letters of credit as they stand authorise the respondents to negotiate the draft drawn upon them on the strength of documents set out therein. Nowhere do I find any term whereby the respondents-bank were obliged to satisfy themselves as regards the quality, quantity and the genuineness of the goods shipped or agreed to be shipped. In other words the respondents are authorised to negotiate or accept only as against documents and not against goods. If, the documents are in order, it is not open to the respondents, nor have they any authority or right whatsoever to enquire into the question of quality or quantity in the absence of any specified term in that behalf.

On the other hand, the learned Counsel for the respondents has drawn our attention to certain observations appearing in the Treatise on "The Law relating to Commercial Letters of Credit" by A. G. Davis and submits that the issuing bank or any of its branch, the paying bank, on the basis of documentary letters of credit is not a buyer's agent and that the respondents had not committed breach of any of the terms of letters of credit (Exhibits A

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and J). He relies upon the following American cases cited in the said treaties:—

Frey v. *Sherburne and the National City Bank of New York* (1); *O'Meara Co.* v. *National Park Bank of New York* (2); and *Continental National Bank* v. *National City Bank of New York* (3). In all these cases, we find that for failure to embody a specific term in the letter of credit, an action brought either as against the bank or any third party, failed for anything alleged to have been done contrary to what is not specifically set out in the letter of credit. If the terms of the letter of credit are fully complied, any payment made or bills negotiated by the Bank in accordance therewith cannot give rise to a complaint either by the seller or the buyer. In *Frey* v. *Sherburne and the National City Bank of New York* (1), the contract provided that the plaintiff should furnish irrevocable letters of credit for the full amount of the seller's invoice, contract being for the purchase of certain quantity of Java sugar. There was a further term added which stipulated that if by reason of the unforeseen circumstances, the sugar could not be shipped within the specified time, and the seller being unable to supply a steamer of equal character and capacity, the buyer had the option of cancelling such portion of the contract as had not been cleared within the time specified. This new clause was not embodied in the letter of credit. In exercise of that right, the buyer cancelled a portion of the contract and brought action against the bank restraining it from paying out the draft covering the shipment of sugar. It was held that the plaintiff's remedy lay against the seller for damages and that he

(1) (1920) 193 App. Div. 849; 184 N.Y. Supp. 661.
(2) (1925) 239 N.Y. 386; 146 N.E. 636.
(3) (1934) 69 F. (2d) 312.

had no right to restrain the banker from paying the draft drawn by the seller strictly in accordance with the original terms of the letter of credit. Here, we observe that the banker's duty is to pay against documents and not against goods, and that if the documents are in order, it is not open to the banker, nor has he any right to enquire into the question of quality or quantity. *O'Meara & Co.'s case* (1) was also decided having for its basis the strict interpretation of the terms of the letter of credit. There, the defendant issued an irrevocable letter of credit in which it was agreed to pay sight drafts covering shipment of certain tons of newsprint on presentation of specified documents. The letters of credit definitely specified the tensile strength of the newsprint. When the drafts were presented with the documents required by the letters of credit, the bank refused to pay on the ground that neither the beneficiary under the letter of credit, nor the plaintiff (his assignee) had presented evidence "*reasonably satisfactory*" that the newsprint referred to in the documents accompanying the drafts was of the tensile strength specified in the letters of credit. It was held that the Bank was liable to pay on the drafts. The documents presented described the paper shipped as of a certain size, weight and tensile strength and the Bank was not justified in insisting "evidence" of tensile strength of the paper. In *the Continental National Bank case* (2), the Bank issued a letter of credit covering a cargo of cement and they were obliged to call for shipping and consular documents in addition to a provision which reads: "Cement to be of sound merchantable quality and standard of

(1) (1925) 239 N.Y. 386 ; 146 N.E. 636.
(2) (1934) 69 F. (2d) 312.

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same shall meet with the requirements of the American Society for testing materials". Documents presented corresponded to those specified in the letter of credit and included in addition a document, entitled "Certificate of Quality". The Bank refused to honour the draft accompanying these documents and when sued upon, it was contended that there was lack of conformity of the goods specified in the letter of credit. The plaintiffs, on the other hand, contended that the Bank was bound to accept drafts drawn under the letter of credit in question when *the documents presented conform to its terms*, the deal being based upon documents. The plaintiff's contention was allowed to prevail. It was also held that where the terms of the letter of credit are to accept drafts on presentation of certain documents, the question of "actual conformity of the goods to the description on the documents was immaterial".

The decisions referred to above are indeed useful guides to us in the determination of the question involved in the present case, especially the question on construction of "documentary letter of credit". Thus, from the foregoing decisions we may lay down that the relationship between the Banker and the buyer at whose instance a letter of credit is opened, is determined by the precise terms of the letter of credit. The Banker must rigidly comply with these terms. In such a deal, the Banker only makes the credit available for the benefit of his client. The banker is neither an agent of the buyer, nor of the seller, and in the words of Professor Davis "on the credit being issued, the transaction is purely a trust between the seller and the buyer".

It may perhaps, from what I have stated above, imply that the buyer in transacting the business on documents which complied with the terms of letter

of credit, but which do not in fact describe the quality and quantity of actual goods shipped puts himself entirely at the mercy of the unscrupulous seller. In that connection, the observations of Professor Davis at page 76 of his Treatise are most apposite and we desire to adopt as our own. They read:

"In some cases this may be so, but the remedy lies in the buyer's hands. If he is unwilling to trust the seller, then it is an easy matter for him to stipulate in the sales contract that payment under the letter of credit will be made only against (*inter alia*) certificates of quality provided by his (the buyer's) agent at the port of embarkation; or, again, if the goods are to be carried by sea, he can require the tender of clean bills of lading, describing the goods as of the contract description, and so throw on the carrier the liability to produce such goods".

In the present case, it cannot be seriously urged that the respondents-bank had failed to carry out the obligations expressly provided in Exhibits A and J letters of credit. They have negotiated a draft drawn upon them on presentation of documents set out therein, the genuineness of which, if such documents are found to be *apparently in order*, is not to be questioned by them. How can the Bank, therefore, be held to have committed breach of the terms thereof? There is thus no substance whatsoever in the submission made by the appellants' counsel in that regard.

Dealing with the second point urged, I must at once say that the appellants had not specifically raised this point at the trial. They never contended that the terms of the credit Exhibits A and J were amended by their letter to the respondents dated 2nd March, 1953 (Exhibit 8). I cannot give any credence to letter Exhibit 8. Both from internal evidence,

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and on the face of letter (Exhibit 8) itself, the appellants' assertion of amendment of the letters of credit in terms set out therein is clearly an afterthought, just to bolster up their case, when they found that they had no grounds whatsoever to resist the respondents' claim on Exhibits A and J. It is most surprising that the presence of this important letter which can completely alter the appellants' case was never disclosed, nor mentioned by them when they filed their written statements on the 7th day of September, 1953. They merely contented themselves by saying in paragraph 6 of their written statement, " the plaintiffs (respondents) themselves have committed breach of the contract and have failed to carry out the terms of the contract as stipulated ". Strenuous efforts were made by the respondents-bank to get particulars from the appellants, how they had failed to carry out the terms of the contract; but as already stated above, the appellants gave several evasive replies and sought to gain time by cleverly adopting the delaying tactics spreading well over nearly eight months. In none of these particulars furnished, did the appellants disclose specifically the despatch of Exhibit 8, except in vague terms set out in clause (g) of the particulars belatedly furnished on the 25th May, 1954. It is alleged that the letter Exhibit 8 was personally handed over to the respondents-bank Manager, one Mr. Guthrie. If that is so, we do not see why the Bank should not promptly communicate the important term to their paying Bank at once. What benefit would there be to the Bank to suppress this letter if it had really been communicated to them ? Appellants' case is not founded upon conspiracy between the respondents-bank and the Asiatic General Trading Company of Hongkong. Furthermore, when the respondents' lawyer sent their

letter, dated 2nd May 1953 (Exhibit P) calling upon the appellants for reimbursement, the appellants replied through their lawyer by letter (Exhibit Q), dated the 5th May, 1953 in which they naively denied their liability to pay. Nothing was mentioned about the amendment of the terms of the letter of credit by letter Exhibit 8 in what they, at a late stage, said " an important particular ". This, to my mind, greatly militates against the appellants' case. I have very closely examined the letter Exhibit 8 itself, and I find that it is not a carbon copy; but an original with no signature or initials of any responsible person; whereas in exhibit letters 3 and 4, admittedly sent by the appellants to the Manager of the Mercantile Bank of India, which initiated the opening of the letters of credit in question, the appellants have produced purple colour carbon copies maintained in their office. Had the term as set out in Exhibit 8 really constituted the basis of the opening of the two letters of credit, the importance of which cannot at all be minimised, the appellants or their lawyer when filing written statement would not have hesitated in setting out the said term; and would take fullest advantage of it in resisting the respondents' claim. Strangely enough, they have not done so; and no reasons have been given for not doing so. The appellants' proprietor Mr. Madha when cross-examined on this point by Mr. Soorma states as follows:

Q. Can you tell us why you did not specifically mention in Exhibit Q that you have asked for amendment of the letter of credit ?

A. Because I have already explained this personally to the officer of the Bank.

Q. Did you at any time instruct your advocate to plead that fact in your written

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statement that you had asked the Bank to amend the letter of credit ?

A. I did.

Q. You did not plead it in the written statement ?

A. Not in this manner.

Q. Nor do you allege in your written statement that the letters of credit had been opened without your instructions ?

A. How can I say ?

I am therefore unable to accept the second contention urged by the appellants' counsel.

As regards the non-issue of commission to examine some witnesses which the appellants sought to examine at Hongkong, Mr. Burjorjee conceded that he would not dispute the principle laid down in that regard in case of *Ram Sewak Koeri Mosadi Koeri* v. *Rai Bahadur Harihar Prasad Singh and one* (1). It was held therein that a Court has discretion to grant or refuse a commission under Order 26, Rule 4, Civil Procedure Code but that in refusing a commission, the Court would not be justified when the evidence is material to the case. In other words, in the matter of issue of commission to examine certain witnesses in a distant country, especially where his examination would cause delay, the Court must be fully convinced that the evidence of such a witness is really relevant and necessary for the proper decision of the case, *cf. M. Palaniappa Chettiar* v. *Narayanan Chettyar* (2). We may here note that when we asked Mr. Burjorjee appearing for the appellants what evidence the witnesses sought to be examined by him would really give, he says he does not know; but he expects that some sort of evidence

(1) A.I.R. (1927) Ran. 175=5 B.L.J. 242.

(2) 226 I.C. 111=A.I.R. (1946) Mad. 331.

will be given by them. We have scrutinised the list of witnesses whom Mr. Burjorjee wished to call, and we fully agree with the learned trial Judge that witnesses sought to be examined would not give any material evidence relevant to the present claim of the respondents as against the appellants. The claim of the Bank against the appellants, as we have already observed above, is a claim for reimbursement of the sums paid on the draft which they have negotiated as against documents, purporting to be invoices, bills of lading, insurance policies of merchandise described as " Toilet requisites and cigarettes " on the strength of a certificate issued by the Chinese General Chamber of Commerce at Hongkong. Since there is no other term under which the respondent Bank are obliged to observe the specified terms before they negotiate the draft, we do not see how the evidence of the witnesses whom the appellants desired to examine on commission at Hongkong would materially help or advance their defence in any way.

After a careful survey of the entire evidence and from the facts and circumstances obtaining in the case, I do not see how the bankers (respondents) could be debarred from claiming reimbursement against the appellants when they have paid out according to the true tenor of the letters of credit opened at the instance of the appellants. I see no justification whatsoever to interfere with the judgment and decree of the trial Court and this appeal is therefore dismissed with costs.

U SAN MAUNG, J.—I have had the advantage of reading the judgment just pronounced by the learned Chief Justice and I must say that I am in full agreement with him. However, owing to the importance of the matter now under consideration I would like to add a few remarks to his judgment.

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Three points have been stressed by the learned Advocate for the appellants Messrs. The Asiatic Corporation. They are as follows:

(1) That by the terms of the letters of credit the paying Bank *viz.* the Hongkong Branch of the Marcantile Bank of India, Limited was under a duty to see that the goods of the right quality and quantity had been shipped before they made the necessary payments to the sellers, *viz.* The Asiatic General Trading Co. of Hongkong.

(2) That the respondents, *viz.* The Mercantile Bank of India, Limited, Rangoon Branch, were negligent in not having communicated to their Branch at Hongkong the instructions contained in the letter (Exhibit 8) which reads:

> " Please include the following clause in the L.Cs. and intimate the same accordingly by cable your Hongkong Office :—
>
> ' Goods to be surveyed in the wharf by General Superintendence Company Hongkong for the entire consignment of cigarettes and toilet goods in respect of quality, quantity and value according to the terms of Letters of Credit.' "

(3) That in any event the learned trial Judge was wrong in having decided the case without examining the persons cited by the appellants on commission. They were (*a*) Collector of Customs, Hongkong; (*b*) Custom Officer in Hongkong who passed the goods in suit; (*c*) The President of the Chinese Chamber of Commerce, Hongkong; (*d*) The

Secretary of the Chinese Chamber of Commerce, Hongkong; (*e*) The Manager of the Shipping Agents, S.S. "Sangola," at Hongkong; (*f*) The Proprietor or Partner of Messrs. Asiatic General Trading Co.; (*g*) The Manager of Messrs. Asiatic General Trading Company, Hongkong.

As regards the first point, the learned Advocate for the appellants can cite no authority in support of the proposition that in the case of irrevocable letters of credit in terms of Exhibits A and J, the paying Banks are under a duty to see to it that the goods of the right quality and quantity had been shipped before making payments to the sellers. On the other hand, from the very language of the exhibits letters of credit it is clear that payment was to be made on drafts to be drawn at sight accompanied by documents purporting to be invoice, certificate of origin, full set clean on board bills of lading, evidencing despatch to the Mercantile Bank of India, Limited, Rangoon A/c. Openers The Asiatic Corporation and Insurance Policy or Policies, Certificate or Certificates of a First Class British and/or Dominion Insurance Co., covering war, marine (combined marine surcharge conditions): W.P.A., theft, pilferage, non-delivery, riots, strikes, civil commotion, malicious damage, etc. In the letters of credit there is also a stipulation to the effect that the Banks are not to be responsible for the regularity or genuineness of the aforesaid documents if they are apparently in order.

From these terms in the letters of credit it is clear that no duty had been cast upon the paying Bank to see that the goods of the right quality and quantity had been shipped before payment was made to the sellers concerned. In this connection the

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following passage from the Law relating to Commercial Letters of Credit by A. G. Davis is apposite. The learned author says (at page 72):

"Rowlatt, J., said—

> The basis of this form of banking facility (is) that the buyer is taken for the purposes of all questions between himself and the seller to be content to accept the invoices of the seller as correct . . . . . The buyer having authorised his banker to undertake to pay the amount of the invoice as presented, it follows that any adjustment must be made by way of refund by the seller, and not by way of retention by the buyer.

> The dictum of Rowlatt, J., quoted above, that the basis of the letter of credit is that the buyer is taken to be content to accept the invoices of the seller as correct was in the particular circumstances of the case a correct exposition of the law. But the buyer need not rely wholly on the seller. He can protect himself against sharp practice, or, it may be, genuine error, on the part of the seller by including in the sales contract a term that one of the documents to be called for by the letter of credit is, for example, a certificate by the buyer's agent, vouching the correctness of the invoice, and by ensuring that, in the letter of credit as issued, this is one of the documents to be provided. This latter point is of paramount importance, for, whatever may be the terms of the sales contract, unless any particular provision is incorporated in the letter of credit, then as between the seller and the banker, that provision has no application. So far from the letter of credit being qualified by the contract of sale, the latter must accommodate itself to the letter of credit."

Further, on the learned author after quoting the case of *Frey* v. *Sherburne and the National City*

Bank of New York (1) in support of the proposition that a buyer's remedy when goods of the right quality and quantity had not been shipped is as against the seller for damages, goes on to say—

"Nor can the banker refuse to honour his undertaking if the goods delivered under the sales contract are inferior in quality to those contracted for, even though the banker knows of this defect. The banker's duty is to pay against documents and not against goods. If, therefore, the documents are in order, it is not open to the banker, nor has he any right, to enquire into questions of quality or quantity."

In support of this proposition he cited two cases *O'Meara Co.* v. *National Park Bank of New York* (2) and the *Continental National Bank* v. *National City Bank of New York* (3) and concludes as follows:

"Pressed to a logical conclusion, these decisions would seem to imply that the buyer must put himself at the mercy of an unscrupulous seller who delivers documents which comply with the terms of the letter of credit but which do not, in fact, describe the goods actually shipped. In some cases this may be so, but the remedy lies in the buyer's hands. If he is unwilling to trust the seller, then it is an easy matter for him to stipulate in the sales contract that payment under the letter of credit will be made only against (*inter alia*) certificates of quality provided by his (the buyer's) agent at the port of embarkation; or, again, if the goods are to be carried by sea, he can require the tender of clean bills of lading, describing the goods as of the contract description, and so throw on the carrier the liability to produce such goods."

These observations appear to be not only sound law but also in conformity with sound commercial practice and they are, in my opinion, complete answers to the argument of the appellants' Advocate that by the terms of the letters of credit (Exhibits A and J). A duty had been cast upon the paying Bank to ensure that goods of the right description

(1) (1920) 193 App. Div. 849. (2) (1925) 239 N.Y. 386.
(3) (1934) 69 F. (2d). 312.

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had been shipped before payment was made to the seller.

As regards the letter (Exhibit 8), it appears to me to be clearly an afterthought. If, in fact, a letter couched in the same language as Exhibit 8 had been delivered by the sole proprietor of the defendant-appellant firm, the Asiatic Corporation, to the then Manager of the Mercantile Bank of India Limited at Rangoon, I see no reason why the Manager should not have communicated the new conditions to the Hongkong Branch especially when the letter was said to have been delivered a day before the letters of credit were confirmed by airmail to Hongkong. Then again, if such a letter as Exhibit 8 had been delivered by Mr. Madha to the then Manager of the Mercantile Bank of India Limited at Rangoon, I see no reason why Mr. Madha should not have sent a notice to the respondents as soon as it was discovered that instead of cigarettes and toilet goods only old newspapers had been shipped by S. S. "Sangola". As it is even when the respondent Bank sent a notice (Exhibit P) to the appellants on the 2nd of May 1953 long after the bale of old newspapers instead of cigarettes and toilet goods had been received in Rangoon, the appellants in their reply (Exhibit Q) dated the 5th of May 1953 did not state specifically that they were not liable to pay because the respondents had failed to carry out the instructions contained in the letter (Exhibit 8). Exhibit Q was drafted not by Mr. Madha but by his Advocate Mr. Burjorjee. If therefore Mr. Madha had, by the date of the letter, informed his Advocate of the fact of a letter in the form of Exhibit 8 had been delivered to the respondents' agent on the 2nd of March 1953, it is inconceivable that Mr. Burjorjee would not have made the utmost capital out of this fact. If,

on the other hand, Mr. Madha had not informed Mr. Burjorjee about such an important fact as a letter like Exhibit 8 being delivered to the respondents' agent, it only means that no such letter had ever been in existence. In any event, the internal evidence in the case points to the fact that Exhibit 8 was the result of an afterthought and this conclusion is more than confirmed by the failure to plead specifically in the written statement filed by the appellants that the plaintiff-respondents were negligent in not having carried out the instructions contained in Exhibit 8 that the Hongkong Office should be instructed to have the goods surveyed on the wharf by the General Superintendence Company, Hongkong, to ensure that the entire consignment of cigarettes and toilet goods of the right quality and quantity had been shipped. The existence of a letter like Exhibit 8 was also not disclosed in the list of correspondence relied upon by the defendants. In fact, no such list was appended to the written statement as it should have been.

As regards the third point, I may observe that even when the matter was argued before us the learned Advocate for the appellants had not the faintest idea what the witnesses whom he would like to examine on commission at Hongkong were likely to state in support of his defence. In fact, two of the witnesses whom he wished to examine, namely, the Proprietor or Partner of Messrs. Asiatic General Trading Company and the Manager of the same Company were fugitives from the law. As regards the Collector of Customs, Hongkong, the Custom Officer, Hongkong, the President and Secretary of the Chinese Chamber of Commerce, Hongkong and the Manager of the Shipping Agents at Hongkong, I do not know what the defendant-respondents wished

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them to state. Did he think that they or any of them would state that they were in conspiracy not only with the seller of the goods but with the paying Bank, to cheat the defendants? Nothing short of participation in such a conspiracy by the paying Bank would absolve the appellants from the liability to pay on the letters of credit as it cannot be denied that the documents accompanying the drafts were apparently in order. As held by Maung Ba, J. in *Ram Sewak Koeri Mosadi Koeri* v. *Rai Bahadur Haribur Prasad and one* (1), a Court had a discretion to grant or refuse a Commission although the discretion must be exercised judicially and the reasons given for refusal must be adequate. In the case under consideration, I am not prepared to say that the learned trial Judge had wrongly exercised his discretion in refusing to examine the witnesses cited by the defendant-appellants on commission at Hongkong.

One point also touched upon by the learned Advocate for the appellants is that the respondent Bank had failed to inform the appellants about the cable received from their Hongkong Branch that the Asiatic General Trading Company was a newly established firm of small means *vide* Exhibit 7. As to this I am not prepared to differ from the learned trial Jugde that the probabilities are that an information of this nature would be passed on by the Bank to its client as a matter of routine. Besides, it is clear from the evidence on record that the reason why the defendant-appellants placed their order for cigarettes and toilet requisites with the Asiatic General Trading Company Limited of Hongkong was because Mr. Madha had met one Mr. Mirani, a canvasser of that Company several times at Rangoon

(1) A.I.R. (1927) Ran. 175=5 B.L.J. 242.

before he decided to place his orders. In these circumstances the fact that the firm of Asiatic General Trading Company of Hongkong was a newly established firm of small means would not, in my opinion, have made any difference to the defendants.

For these reasons, I concur in the judgment just delivered by the learned Chief Justice with order as to costs as proposed.

APPELLATE CIVIL.

Before U Chan Tun Aung, Chief Justice and U San Maung, J., and U Ba Thoung, J.

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THE COMMISSIONER OF INCOME TAX, BURMA (APPLICANT)

v.

THE BURMA OIL COMPANY (BURMA CONCESSIONS) LTD. (RESPONDENT).*

Income Tax Act, s. 66 (1)—Reference to High Court—The Company disbursed £ 38,258 to its employees in compliance with the award of the Court of Industrial Arbitration in 1952—Whether such disbursement permissible expenditure under s. 10 (2) (ix) of the Burma Income Tax Act, or allowable commercial loss and is therefore deductible from the taxable profits for the assessment year 1953-54—Distinction between "Expenditure" and "Loss incidental to the business"—English Income Tax Act, 1918—Vital consideration for deciding whether a certain item is deductible or not—S. 20 (1) Trade Disputes Act—Payment whether correlated to the accounting year or any year prior to that.

Held: That for purposes of deductions of certain items as loss or expenditure, the vital consideration that should be given is, whether such loss or expenditure is laid out, expended or incurred wholly and exclusively for purposes of the said business, or one connected with or arising out of the trade or profession, or one which it is necessary to incur for the purpose of carrying on the assessee's Trade, profession or business. *Allen* v. *Farquharson Bros. & Co.*, (1932) 17 Tax Cas. 59 at 64, referred to.

In the Commissioner of Income Tax, Burma v. *Hajee Adul Ganny Ayoob*, (1941) R.L.R. 529; *Commissioner of Income Tax Central Provinces and Berar* v. *Sir S. Chitnavis*, 59 I.A. 290, approved.

Held further: That the payment can only be correlated to the accounting year in which the liability to pay was incurred by the company, that is, the year 1952.

In re Chouthmal Golapchand, (1938) I.T.R. (VI) 733 (1939) A.I.R. Cal 559, referred to.

C.I.R. v. *Falkirk Iron Co.*, 17 T.C. 625, approved.

Rhodesia Railways Ltd. v. *Income Tax Collector, Bechuanaland Protectorate*, (1933) I.T.R. 227 (P.C.), referred to.

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* Civil Reference No. 8 of 1956 against the $\frac{\text{decree}}{\text{order}}$ of the Income Tax Appellate Tribunal of Rangoon in Income Tax Reference No 1 of 1956.

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Ba Kyine (Government Advocate) for the applicant.

Horrocks for the respondent.

U CHAN TUN AUNG, C.J.—This reference arises out of an assessment to income-tax of the respondent Company for the year 1953-54. In its trading and Profit and Loss Account for the year ended 31st December 1952, the respondent Company claimed as deduction a sum of £ 38,258 paid to its employees who were in its service for not less than 2 years, in compliance with the award of the Court of Industrial Arbitration (*vide* Case No. 4 of 1951). This deduction was disallowed by the Income-tax Officer, Companies Circle, on the ground that the payment was in discharge of an old liability, and that it was not in any way connected with the business activities of the respondent Company during the year 1952. On appeal to the Appellate Assistant Commissioner of Income-tax, the order of the Income-tax Officer was upheld on the same ground as put forth by the Income-tax Officer, Companies Circle.

It may here be pertinent to set out briefly how and under what circumstances the Court of Industrial Arbitration made an award for payment of the aforesaid sum of £ 38,258 to the employees of the Company. As a result of the invasion of Burma by the Japanese forces, the Company had to evacuate to India, and many of its employees were left behind in Burma. On or after complete reoccupation of Burma by the Allied Forces, and on restoration of civil administration, the Company resumed its business. In or about the year 1951 diverse disputes arose between the Company and its former employees over demands for payment of their wages for the period of Japanese occupation of Burma. Such

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disputes being in the nature of trade disputes within the meaning of the Trade Disputes Act, they were referred to the Court of Industrial Arbitration on the 19th May 1951, whereupon the said Court, in one of its proceedings (No. 4 of 1951), *inter alia*, ordered the payment of a sum of money equivalent to two months' wages to the employees of the Company who had been in its service at the time of the evacuation for not less than two years. The Court further ordered that the payment was to be made within two weeks from the date of their applications by employees concerned, beginning from 11th August 1952. Accordingly, the aforesaid sum of £ 38,258 was paid to all the employees concerned.

Now, to resume to the facts of the case, the Respondent Company next preferred an appeal to the Income-tax Appellate Tribunal, and the main ground raised before the Appellate Tribunal was the same as that raised before the Income-tax Officer and the Appellate Assistant Commissioner. The Company contended that the sum of £ 38,258 paid to its employees in consequence of the award made by the Court of Industrial Arbitration in the year 1952 was a permissible charge against the taxable profits of the Company for the assessment year 1953-54. The majority of the Appellate Tribunal was of the view that the sum paid out was in the nature of a loss *incurred* in the account year in question, and that it should be taken into consideration in the assessment of profits and gains for that year.

The majority held that the said payment was in the nature of a loss incidental to the respondent's business. They concluded further, on some English authorities, that although the payment was not strictly within the ambit of section 10 (*2*) (ix) of the Burma Income-tax Act, yet it was deductible as a

business loss according to the principles of commercial accounting, there being no prohibition by the Act, expressly or impliedly, against such debit. However, there was a note of dissent by one member who holds the view that the said sum paid by the Company was not a permissible expenditure as it was, according to him, unconnected with the carrying on of the respondent's business in Burma, the respondent Company being at the relevant time "practically dead." He concluded by saying that the payment was "neither an act of volition on the part of the appellant Company, nor was it made on grounds of commercial expediency;" nor did it fall within the ambit of section 10 (2), Clause (ix) of the Income-tax Act. There being thus, a difference of opinion, the Commissioner of Income-tax, acting under section 66 (1) of the Income-tax Act, moved the Appellate Tribunal to refer the question hereunder which has been finally approved by the parties concerned, for the decision of this Court :

"Whether the sum of £ 38,258 disbursed by the company in 1952 to its employees in compliance with the award of the Court of Industrial Arbitration, Burma, made on the 7th July 1952 in case No. 4 of 1951 of the said Court, is legally deductible from the incomings for the purpose of computing the profits and gains of the company for the purpose of income-tax for the assessment year 1953-54?"

In answering the above reference, we are to get over two questions involved. The first question is whether the said payment in consequence of an order of the Court of Industrial Arbitration falls within the category of permissible expenditure described in section 10 (2) (ix) of the Burma Income-tax Act, or even if it is not covered by the aforesaid provisions, whether it is an allowable commercial loss incurred by the company in connection with its business.

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The second question involved is, whether the said payment could be correlated to the Profit and Loss Account for the year ended 31st December 1952. As a matter of fact, when the Income-tax Officer and the Income-tax Appellate Commissioner rejected the respondent's claim for deduction, the rejection was mainly on the ground that it was a payment of old debt or old liability incurred long before the accounting year, and that the payment could not be taken into consideration in the computation of profits and gains of the relevant assessment year, inasmuch as, under the Income-tax laws, each year is a separate self-contained period of time in regard to which profits earned or losses sustained before its commencement or after its close are regarded as irrelevant.

With due respect, we find that there has been some confusion of thoughts, relying upon certain observations of Finlay, J. in *Allen* v. *Farquharson Bros. & Co.* (1) whereby a distinction is sought to be made between the word "expenditure" and the word "loss incidental to the business" in the interpretation of section 10 (2) (ix) of the Burma Income-tax Act. We are of the view that the distinction sought to be made is of no help to us for the purposes of the present reference.

Under the English Income-tax Act, 1918, income-tax is charged in respect of profits or gains arising out of property, occupation of lands, tenements or profits arising from interests, annuities, dividends, shares, business or profession, etc. having regard to the charging Schedules A, B, C, D, and E contained in the First Schedule of the Act. Lord Finlay's observations are with regard to interpretation of the Rule 3 applicable to Schedule D having reference to

(1) (1932) 17 Tax Cas. 59 at 64.

the classes of cases enumerated in Cases I and II thereunder.

Relevant Rules 3 (*a*) and (*e*) read:

"3. In computing the amount of profits or gains to be charged, no sum shall be deducted in respect of—

(*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation,

* * * *

(*e*) any loss not connected with or arising out of the trade, profession, employment or vocation."

His Lordship in drawing a distinction between Rule 3(*a*) and (*e*) observes thus:

"Now these two Rules have been discussed in a great many cases (in one very wellknown case, *Strong* v. *Woodifield*, in the House of Lords in particular) together and no doubt they do run rather close to each other, but I cannot help thinking that there is a distinction between (*a*) and (*e*). Now a case might be put in which it was not very easy to say whether a thing was a disbursement or expense or was a loss. It is conceivable—such things sometimes happen that there may be cases in which a thing might fall alternately—it might be either within (*a*) or within (*e*), but, none the less, I do think that there is a distinction to be drawn between the two. (*a*) relates to disbursements; that means something or other which the trader pays out; I think some sort of volition is indicated. He chooses to pay out some disbursement; it is an expense; it is something which comes out of his pocket. A loss is something different. That is not a thing which he expends or disburses. That is a thing which, so to speak comes upon him 'ab extra'. It is not very easy to formulate the thing but it is easy enough to put illustrations falling on one side or the other of the line which may show what is, I think, the distinction, and the real distinction, between these things. Take the case of money being stolen from a till: I should say that that quite plainly, was not a disbursement or an expense, and, equally plainly, I should say it was a loss. Take, on the other hand, a sum of money expended, let us say, for legal expenses. I am not, of course,

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on the immediate question in this case. A trader thinks that he requires legal advice, or he thinks he wants a conveyance, or something of that sort; that I should say, could not possibly and properly be said to be a loss, but obviously was a disbursement or expense."

It must however be conceded that the Burma Income-tax Act makes no such elaborate provisions as those found in the English Income-tax Act; and we consider that for the purposes of the present reference it is of little moment whether we classify the payment in question as an expenditure voluntarily incurred within the meaning of section 10 (2)(ix), or an involuntary disbursement, such as a loss in business which, so to speak, comes upon a person *ab extra*, not provided for by the Act. However, we are certain that for purposes of deductions of certain items as loss or expenditure, the vital consideration that should be given is, whether such loss or expenditure is laid out, expended or incurred wholly and exclusively for purposes of the said business, or one connected with or arising out of the trade or profession.

In re The Commissioner of Income-tax, Burma v. *Hajee Abdul Ganny Ayoob* (1) (Sir Goodman-Roberts, C.J., Dunkley and Sharpe, JJ.) following the judgment of Their Lordships of the Privy Council in *Commissioner of Income-tax, Central Provinces and Berar* v. *Sir S. Chitnavis* (2) held that although the Income-tax Act nowhere in terms authorizes the deduction of bad debt of a business, yet such a deduction was held to be allowable if it was connected with or arising out of the business of the assessee. We quote the following observation of Sharpe, J. at page 534 with approval:—

"In computing profits for the purpose of assessment to income-tax any loss connected with or arising out of the trade

(1) (1941) R.L.R. 529. (2 I.A. 290.

or profession of the assessee may be deducted. That is not to be expanded so as to mean that every loss incurred by an assessee is deductible. In order to permit of deduction the loss must be in the nature of commercial or professional loss. I think that perhaps as good a way as any of defining a loss which may be deducted is to say that it must be a loss which it was either reasonable or necessary to incur in carrying on the particular trade or profession concerned. If any particular loss falls within that definition, it follows that it is connected with and arises out of the trade or profession of the assessee ; that it is, in other words, a commercial loss."

In the aforesaid case, the reference was with respect to a loss of Rs. 24,213-12-6 sustained by the assessee owing to the insolvency of a certain Chettiar firm with whom the assessee had a banking account directly connected with his business. It appears that the daily receipts from the business of the assessee were paid into and, payments for goods purchased for and on account of assessee's business were drawn by cheques on the said Chettiar firm.

The principle deducible from the above decision is that even if a particular payment or disbursement does not come within any of the items of permissible payments or disbursements listed under sub-section (2) of section 10 of the Income-tax Act, stress is laid upon the fact whether the amount paid had been paid wholly and exclusively for the purpose of the assessee's business or in other words, a payment which is necessary to incur for the purpose of carrying on the assessee's trade, profession or business.

From the facts and circumstances obtaining in the present case it can admit of no doubt that the assessee company paid out the said sum, be it named expenditure, or a business loss in order to enable it to continue its business in Burma ; or in other words, it is a payment which is necessary to the continued

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running of its business in Burma, and that the same is clearly not a capital expenditure. The finding of the Court of Industrial Arbitration shows that the amount ordered to be paid is without reference to any particular period of time, though it held that the claimants were deemed to be the employees of the company. It was over and above the payments already made by the company, namely, one month's wages in lieu of notice and two months' *ex-gratia* payment, that the Court of Industrial Arbitration has directed the company to make further payments equivalent to two months' wages within two weeks of the date of their application beginning from 11th August 1952. It may also be noted that the company has, in our view rightly disclaimed any liability for payment of arrears of wages to the employees on the ground that their claim was time barred under the Limitation Act. It appears to us also that the employees' claim for wages was *prima facie* time barred. Therefore, the order of the Court of Industrial Arbitration for the additional payment was not based upon the Company's legal liability towards its employees, but based purely upon expediency or public policy. Moreover, under section 20 (*l*) of the Trade Disputes Act, the award given by the Court of Industrial Arbitration is binding on the parties, and any party failing to carry out the terms of its award is liable to be punished with fine which may extend to K 1,000 for every day on which the terms of ward are not carried out.

Taking into consideration the aforesaid facts and circumstances, we are unable to fall in line with the note of dissent by one member of the Appellate Tribunal wherein he says that the payment in question was "neither an act of volition on the part of the respondent company, nor was it made on ground

of commercial expediency." Would it not be the highest commercial expediency so that the respondent company may be able to carry on its business without any let or hindrance to pay up the aforesaid sum awarded by the Industrial Court of Arbitration to its employees and not mulcted in K 1,000 for every day of default in carrying out the terms of the award? This disposes of the first question involved.

The next question is whether this payment should be correlated to the Profit and Loss Account of the year in which the actual payment was made, or whether it should have been correlated to any year prior to that of disbursement. In this regard we notice that the officers of the income-tax department have made reference to certain head-notes *In re Chouthmal Golapchand* (1) which read:—". . . . . every year is a self-contained period and the profits earned or the loss sustained either before that year or after that year are not at all relevant for the purpose of an assessment relating to a particular year." However, when we examine the facts of the case we find that the above head-notes are based upon certain observations of Lord Russell in *Commissioner of Income-tax C. P. and Berar* (2) and at page 296 the following observation appears:—

"Although the Act nowhere in terms authorizes the deduction of bad debts of a business, such a deduction is necessarily allowable. What are chargeable to income-tax in respect of a business are the profits and gains of a year; and in assessing the amount of the profits and gains of a year account must necessarily be taken of all losses incurred, otherwise you would not arrive at the true profits and gains. But the losses must be losses *incurred in that year.*"

We would lay special emphasis on his Lordship's observation that the losses for the purposes of

(1) (1938) I I.R. (VI) 733=(1939) A.I.R. Cal. 559.
(2) 59 I.A. 290.

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deduction in computing the profits and gains of a particular year must be the losses *incurred in that year.*

Now, on the facts and circumstances available in the present case, it is obvious that the respondent company incurred the liability to pay the aforesaid sum of £ 38,258 to its employees only when the Industrial Court of Arbitration makes its award. Moreover, the award made, as observed above, was not based upon any ascertainable legal principles of liability founded upon tort or contract, but was purely *ex-gratia* founded upon what we may call public policy or state expediency. How can it therefore be said that the liability to pay such an amount was a liability incurred by the respondent company at any time prior to the date of the award of the Court of Industrial Arbitration ? In our view the liability to pay that sum was incurred by the company only on the date when the Industrial Court of Arbitration made its award, and as such it cannot be correlated to the Profit and Loss Account of any particular previous year for the obvious reason that the liability to pay the amount in question was neither foreseeable with certainty, nor materialized or crystallized in that accounting year. It necessarily follows, therefore, that the payment can only be correlated to the accounting year in which the liability to pay was incurred by the company, that is, the year 1952. Here, we would quote with approval the following observation *per* Lord Sands in *C.I.R.* v. *Falkirk Iron Co.* (1) which is cited in V. S. Sundaram's The Law of Income-tax in India at page 540 :—

"It would be a fallacious view to take it that each particular year is to be treated as a water-tight compartment and each item of expenditure in that year is to be strictly correlated to the profit of that year. Every company carrying

(1) 17 T.C. 625.

on business makes future contracts. It may turn out that one of these contracts is a source, not of profit, but, of liability. The company must fulfil its contract; fulfilment of its contract is a fulfilment of one of the purposes of the business."

Similarly, the following observations of their Lordships of the Privy Council in *Rhodesia Railways Ltd.* v. *Income-tax Collector, Bechuanaland Protectorate* (1) are also apposite to the question as to whether for purposes of computing profit and loss each particular year is to be treated as a water-tight compartment for purposes of expenditure in a particular year :—

"Nor do their Lordships agree that expenditure in order to form a permissible deduction must have been incurred in the production of the actual year's income which is the subject of the assessment, if by this it is meant that the benefit of the expenditure must not extend beyond the year of assessment, for very many repairs have the result of enabling income to be earned in future years as well as in the year in which they are effected."

For the foregoing reasons we must therefore answer the question referred to us in the affirmative. The assessee company will be entitled to costs of this reference and we fix the Advocate's fee at 10 gold mohurs.

U SAN MAUNG, J.—I have had the opportunity of reading the order proposed to be passed by the learned Chief Justice. However owing to the importance of the matter involved I would like to give very briefly my own reasons for concurring in the answer to be given to the question referred to this Court by the Income-tax Appellate Tribunal, Rangoon.

I need not recapitulate the facts which have been fully set out in the order of the learned Chief Justice.

(1) (1933) I.T.R. 227 (P.C.).

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U SAN MAUNG, J.

The sum of £ 38,258 paid by the respondent Company during the year 1952 to its employees was in compliance with the award of the Court of Industrial Arbitration, Burma, on the 7th July 1952 in Case No. 4 of 1951 of the said Court. This award was the result of a trade dispute which arose between the Company and its employees as a result of demands made by the latter that they should be paid wages for the period of Japanese occupation of Burma and that payment of the sum equivalent to one month's wage paid to them before the flight of the executives of the Company from Burma and two month's wages as gratuity on their return to Burma on the reoccupation of the country by the British was wholly insufficient. The dispute was referred to the Court of Industrial Arbitration constituted under section 8 of the Trade Disputes Act, 1929 by the President of the Union acting under section 9 of the Act and the award in question was made by that Court under the provisions of section 10. The question involved is whether the payment made by the Company in pursuance of that award should be regarded as an expenditure relating to wages payable by them during the Japanese occupation of Burma and, therefore, not to be brought within the computation of profits and gains of the Company for the purpose of income-tax for the assessment year 1953-54 or whether it was an expenditure for that income-tax year. The members of the Income-tax Appellate Tribunal were divided in opinion, the majority holding that it was deductible expenditure for the assessment year in question while the Revenue Member was of the contrary opinion.

Now, in order to determine what was the nature of the payment made it is necessary to refer briefly to some of the relevant provisions of the Trade

Disputes Act, 1929. Trade dispute, as defined in clause (*j*) of section 2, means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or service including pension, gratuity, bonus and allowances, or with the conditions of labour, of any person. This definition seems wide enough to include within its ambit all manner of disputes between employers and employees relating to the working conditions and remuneration of the employees. Where a trade dispute as defined in the Act arises the President of the Union may under section 9 of the Act refer any particular matter at issue to the Court of Industrial Arbitration, if he is satisfied that—

(*a*) by reason of the continuance of the dispute—

(i) a serious outbreak of disorder or a breach of the public peace is likely to occur, or

(ii) serious or prolonged hardship to a large section of the community is likely to be caused, or,

(iii) the industry concerned is likely to be seriously affected or the prospect and scope of employment therein curtailed; or

(*b*) the dispute is not likely to be settled by other means; or

(*c*) it is necessary in the public interest to do so.

Therefore, it is clear that it is a matter of public interest that trade disputes should be quickly and amicably settled. When a trade dispute is referred to the Court of Industrial Arbitration under section 9

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it must make such award as it thinks fit (section 10) and the award cannot be called in question in any civil or criminal Court (section 14). Section 20 provides the penalty for failure to carry out the terms of award by the Industrial Court. Sub-sections (*1*) and (*2*) read:

"(1) If any party or person on whom the award is binding fails to carry out the terms of any award of the Industrial Court he shall, on conviction, be punishable with fine which may extend to Rs. 1,000 for every day on which the terms of the award are not carried out.

(2) When the employer is a corporation, company or other association of persons, any Secretary, Director or other officer or person concerned with the management thereof, shall be punishable for the failure of the corporation, company or other association of persons, as the case may be, to comply with the terms of the award made by the Industrial Court under section 10."

From these provisions it is clear that when the Court of Industrial Arbitration ordered payment of a sum of money equivalent to two months' wages to those employees who had been in the service of the Company at the time of evacuation for not less than two years, it was highly expedient on the part of the Company to have paid a sum of £ 38,258 in compliance with the award. Failure to do so would result (*a*) in more disputes with its employees, (*b*) the probable loss of goodwill with the public as a Company that fails to carry out the award of a Court of Industrial Arbitration duly constituted by law and (*c*) in incurring the penalty prescribed by section 20 of the Trade Disputes Act, 1929. Clause (ix) of sub-section (*2*) of section 10 of the Income-tax Act provides that the profits and gains of a company or an individual shall be computed after making allowances for any expenditure (not being in the nature of capital expenditure) incurred solely for the

purpose of earning such profits or gains. In my opinion, this clause is wide enough to cover such a payment as made by the respondent Company in order to avoid the consequences set out above. These consequences are indeed far reaching in its effect and any expenditure incurred for their avoidance should be considered as being incurred for the purpose of enabling the Company to carry on its business and therefore incurred soley for the purpose of earning profits or gains. In this connection, the commentary in V. S. Sundaram's Law of Income-tax in India under the caption " Need not be compulsory expenditure nor directly remunerative " at page 536 of the seventh edition may be usefully quoted. It reads :

" It was made clear in the above cited case of *Usher's Wiltshire Brewery, Ltd.* v. *Bruce and Smith* v. *Incorporated Council of Law Reporting* that a sum of money expended, not of necessity and with a view to a direct and immediate benefit— but voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on the business, may yet be expended wholly and exclusively for the purposes of the trade ". (*Per Viscount Cave in Atherton* v. *British Insulated and Helsby Cables, Ltd.*, 10 T.C. 155.)

" Expenditure in course of the trade, which is unremunerative is none the less a proper deduction if wholly and exclusively made for the purposes of the trade ; and it does not require the presence of a receipt on the credit side to justify the deduction of an expense ". [*Per Lord Thankerton in Hughes* v. *Bank of New Zealand*, (1938) I.T.R. 636].

Although the trade dispute in question related to the non-payment of wages for the Japanese occupation period I have no doubt whatsoever in my mind that the expenditure of £ 38,258 incurred related to the assessment year 1953-54. No one could have envisaged earlier that such a trade dispute would have arisen, that it would have been referred to the

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Court of Industrial Arbitration and that such an award as that made on 7th July 1952 would have been the result.

Assuming for the sake of argument that the Company should out of abundance of caution have made provisions while they were fugitives in England for the possible claim for wages by their employees who remained in Burma for the period of Japanese occupation, the Company would be well within its right to have considered by the 31st March 1947 that most of the claims would be time barred. The British re-occupation of Burma took place on or about March 1945 and the claim for wages for that month also would be time barred by April 1948.

The present payment of £ 38,258 has, therefore, no relation to whatever contractual liability that could conceivably be fastened upon the Company. It was clearly the result of a dispute which the President of the Union had under section 9 of the Trade Disputes Act, 1929, considered it expedient to refer to the Court of Industrial Arbitration.

Assuming for the sake of argument that the present payment is not a voluntary expenditure within the ambit of clause (ix) of sub-section (2) of section 10 of the Income-tax Act, it can be considered as a loss which fell to the Company during the assessment year 1953-54. It is also a loss which is necessary to incur in carrying on the trade. If any authority is needed, the ruling in the case of the *Commissioner of Income-tax, Burma* v. *Hajee Abdul Ganny Ayoob* (1) is clear on the point that such a loss is deductible. There it was held following the observations of the Lordships of the Privy Council in *Commissioner of Income-tax, Central Provinces and Berar* v. *Sir S. M. Chitnavis* (2) that although the Income-tax Act

(1) (1941) R.L.R. 529. (2) 59 I.A. 290.

nowhere in terms authorizes the deduction of bad debts of a business, such a deduction is necessarily allowable, that what are chargeable to income-tax in respect of a business are the profits and gains of a year and that in assessing the amount of the profits of a year, account must necessarily be taken of all losses incurred in order to arrive at a true profits and gains.

The loss incurred must of course be in the nature of a commercial or professional loss, namely, a loss which it was either reasonable or necessary to incur in carrying on the particular trade or profession concerned.

For these reasons, I concur in the answer proposed to be given by the learned Chief Justice and his order regarding the costs awarded to the respondent Company.

U BA THOUNG, J.—I respectfully agree with the learned Chief Justice and my learned brother U San Maung, J. that the question referred to us must be answered in the affirmative. I would only like to add a few words in emphasis, regarding the two questions which involved in this reference. On the question as to whether the payment of £ 38,258 by the respondent Company in consequence of an order of the Court of Industrial Arbitration falls within the category of permissible expenditure described in section 10 (2) (ix) of the Burma Income-tax Act, or even if it is not covered by the aforesaid provisions, whether it is an allowable commercial loss incurred by the Company in connection with its business, I would say that the most essential point to be considered is whether the payment of the said sum of £ 38,258 by the respondent Company was made wholly and exclusively for the purpose of carrying on

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the Company's business. If it was so made, it is not criterion whether the payment amounts to a business loss or a disbursement, for in any case, it would be a proper deduction from income-tax as it relates to an amount expended for commercial expediency and in order to facilitate the carrying on of the Company's business. In the present case if the Company had refused payment of the said sum of £ 38,258 the Company would have to face consequences such as the loss of goodwill with the public, more misunderstandings and disputes with its employees resulting in delay and difficulty in carrying on the Company's business; and in addition, the Company would even have to face the penalty prescribed by section 20 of the Trade Dispute Act, 1929. Under the circumstances the Company was bound to expend this amount for the purpose of carrying on its business, and hence I am of the opinion that it would be proper and justified to make a deduction of this amount for the purpose of income-tax.

Regarding the other question as to whether the payment made by the Company in consequence of the order of the Court of Industrial Arbitration should be regarded as an expenditure relating to wages payable by the Company to its employees during the period of the Japanese occupation of Burma and therefore not computable for the purpose of income-tax assessment for the year 1953-54 or whether it was computable for the purpose of income-tax assessment for that income-tax year, *viz.* 1953-54, I am of the view that the decision would turn on the point as to when the liability was incurred by the Company. In the present case it may be true that the payment relates to the wages payable by the Company to its employees during the Japanese occupation period of Burma, but what amount was

payable or whether the Arbitration Court would at all order payment, in view of the fact that the claim was time barred under the Limitation Act, could not be forestalled by the Company with certainty until the Court of Industrial Arbitration made its award. I therefore consider that the Company incurred that liability only when the Arbitration Court made its award on the 7th July 1952 as it was only then that the payment of £ 38,258 materialized, and therefore it was computable for the purpose of income-tax assessment for the assessment year 1953-54.

APPELLATE CRIMINAL.

Before U Chan Tun Aung, Chief Justice.

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Dec. 5.

U KAN THA (APPLICANT)

v.

THE UNION OF BURMA (U NYI LAY) (RESPONDENT).*

Quashing of criminal proceedings—S. 406, Penal Code—Criminal Breach of trust committed by co-partner during the subsistence of a partnership.

Held: It is only when it is established that a partner who has been entrusted with the partnership assets or with any dominion over property converts to his own use such specific property or assets, in breach of specific terms of the trust imposed upon him can he be prosecuted for criminal breach of trust. In the absence of any special agreement concerning as to how he should dispose of, or otherwise deal with specific partnership property entrusted to him, he cannot be said to have received or dealt with the said property in a fiduciary capacity and be prosecuted for criminal breach of trust.

Saw Tha Oo v. *Ma Aye Thi*, Criminal Revision No. 112 (B) of 1957; *Bhuban Mohan Rana* v. *Surendra Mohan Das*, (1952) I.L.R. Cal. Vol. 11. p. 23, followed.

Ba Swe for the applicant.

U Chit (Government Advocate) for the respondent.

U CHAN TUN AUNG, C.J.—This application in revision seeks to quash the proceedings, namely, Criminal Regular Trial No. 3 of 1957 now pending before the 4th Additional (Special Power) Magistrate, Magwe, in which the applicant U Kan Tha has been charged at the instance of U Nyi Lay, the complainant, for an alleged offence under section 406 of the Penal Code.

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* Criminal Revision No. 109 (B) of 1957.

Review of the order of the 4th Additional (S.P.) Magistrate of Magwe, dated the 27th day of July 1957 passed in his Criminal Regular Trial No. 3 of 1957.

The charge reads:

" That you (U Kan Tha) between the 27th day of July 1954 and 26th July 1955 at Magwe being entrusted with certain property, to wit, Kyats 60,722 being sums of money paid by Government on account of supply of stones for Natmauk Road, committed criminal breach of trust by dishonestly disposing that money in violation of legal contract and thereby committed an offence punishable under section 406 of the Penal Code."

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On U Nyi Lay's (complainant's) own showing it appears that the applicant U Kan Tha and himself entered into a partnership agreement for the supply of metal (stones) to the Public Highways Department for the construction of a segment of the Magwe-Natmauk Road. According to the partnership deed filed in the proceedings it can admit of no doubt that the applicant is to be an active, working partner; whereas the respondent U Nyi Lay is to be a financier of the partnership—his role being more or less that of a sleeping partner—and that they were to share the losses and profits equally. It also appears in evidence that the petitioner U Kan Tha himself contributed K 30,000 towards the partnership. The partnership deed is filed as Exhibit (က) in the proceedings, and some of its terms read:

(၃) နောက်လုပ်ငန်းအတွက် ထုတ်လိုသည့်ငွေများကို ဝယ်ယူထားသော ကျောက်လေားစက်ရင်းနှင့်တင်ပြ၍၊ ဦးညီလေးထံမှ ထုတ်ယူရမည်။

(၄) ကျောက်လုပ်ငန်းတွင် ကျောက်လေားများ အစိုးရသို့ အရစ်ကျအပ်သွင်း၍၊ ကျသင့်ငွေကိုထုတ်ယူရရှိတိုင်း၊ ဦးညီလေးထံသို့ စာရင်းနှင့်တကွအပ်သွင်းထားပြီး လျှင်လိုသောအခါမှသာလျှင်၊ အထက်ပါအပိုဒ်(၃)တွင် ဆိုခဲ့သည့်နည်းအတိုင်း ထုတ်ယူရမည်။

Pursuant to the terms of the partnership metal stones for road making were supplied from time to time to the Highways Department and payments from the Highways Department were drawn by

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U Kan Tha. For continued and regular supply of the required metal stones, it also appears from the evidence, that they had to be purchased from other suppliers, and then made over to the Highways Department at rates which the two partners have agreed to supply. The business of the partnership thus involved a lot of advance payment of money to the suppliers of metal stones and also their collection at various points to be finally conveyed to the Magwe-Natmauk Road between Miles 20 to 31. It is plain from some of the terms of the partnership set out above that on his showing a statement of account of previous purchase of metal stones U Kan Tha, the petitioner, is entitled to draw upon the respondent U Nyi Lay further sums required for the partnership work. He is further allowed to receive payments from the Highways Department the price of the stones supplied and also to adjust such payments received with the outgoings of the partnership towards the purchase of the stones from the various suppliers.

In or about July 1955, the partners fell out and each demanded from the other for settlement of accounts. As it usually happened in such cases the respondent claimed that he had to get a sum of K 36,000 from the petitioner and eventually lodged a complaint for cheating and misappropriation against the petitioner with the Magwe Police.

The petitioner is being tried in the aforesaid criminal proceedings and charge has been framed against him as stated above.

The respondent has clearly stated on oath that there was no settlement of accounts between the parties as yet and that the work undertaken is a partnership venture both parties having agreed to share the losses and profits equally. From these

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admissions on the part of the respondent and also from the terms of the partnership deed, Exhibit (ဃ), I really do not see how a charge under section 406 of the Penal Code as set out above is warranted as against the applicant. The learned Government Advocate who appears for the respondent is also of the same view. The respondent himself has filed civil suits for the recovery of certain sums under the said partnership and these suits are still pending before the District Court. Once, the respondent admits that the deed executed between himself and the petitioner is a partnership deed and that no accounts has been settled between them, such admission clearly takes away the criminal liability of the co-partner for anything done by him under the partnership agreement in the absence of any special terms whereby the co-partner (the petitioner) is put in a fiduciary capacity with respect to the partnership assets. This Court had occasion to point out in Criminal Revision No. 112 (B) of 1957 (*Saw Tha Oo* v. *Ma Aye Thi*) what special care should be taken before the processes of a criminal Court are moved for alleged offences of criminal breach of trust committed by co-partner during the subsistence of a partnership. Following upon the Full Bench decision of the Calcutta High Court in *Bhuban Mohan Rana* v. *Surendra Mohan Das* (1) I have pointed out the special circumstances under which a partner can be prosecuted for criminal breach of trust as laid down in section 406 of the Penal Code. It is only when it is established that a partner who has been entrusted with the partnership assets or with any dominion over property converts to his own use such specific property or assets, in breach of specific terms of the trust imposed upon him can he be prosecuted for

(1) (1952) I.L.R. Cal. Vol. II, p. 23.

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criminal breach of trust. In the absence of any special agreement concerning as to how he should dispose of, or otherwise deal with specific partnership property entrusted to him, he cannot be said to have received or dealt with the said property in a fiduciary capacity and be prosecuted for criminal breach of trust.

In the present case, I have not the slightest doubt from the admissions of the respondent himself that the petitioner, co-partner, is entitled to the partnership assets as much as the respondent himself, and in the absence of any complete rendition of accounts to be followed by a dissolution, he cannot be said to have dealt with any of the partnership assets in his fiduciary capacity when he himself is as much an owner thereof as the respondent. Therefore, from the facts appearing in the case, the charge for criminal breach of trust as against the applicant is clearly unsustainable and it would be clear abuse of the process of the Court to continue with his trial. Accordingly, I quash the criminal proceedings, being Criminal Regular Trial No. 3 of 1957, now pending as against the petitioner before the 4th Additional (Special Power) Magistrate, Magwe, and he is hereby discharged. The bailbond given by the petitioner shall also be cancelled.

APPELLATE CIVIL.

Before U Chan Tun Aung, Chief Justice and U San Maung, J.

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U TIN ENG (APPELLANT)

v.

Sept. 2.

U BA YOKE (RESPONDENT).*

Tenancy or licence—Distinction between a bare licence and a licence with contractual right—Enforceability of licensee's rights against third parties.

The Respondent was a tenant of a room of a house belonging to one Mr. Jarvis, who subsequently sold the house to the appellant.

There were two doors leading to the main hall for the purpose of entry and exit into the room occupied by the Respondent.

The appellant claimed that the Respondent had no exclusive use of the two doors, and that the right, if any, was a mere licence revocable at will.

The Respondent replied that his was a tenant's right under the tenancy with the previous owner.

The question was whether the Respondent had acquired any tenancy right of free access through the two doorways or whether his tenancy right was limited to the room only.

The appellant further contended that a licensee's right, if any, only binds the licensor and not a third party.

Held: On the evidence, that the entire room was rented out without any reservation whatsoever. The use of the two doorways was not given as a distinct permission, but as a necessary incident of the tenant's right accompanying the tenancy of the room in question.

The Respondent has already acquired a tenancy right of using the two doorways from the very inception of his attornment of tenancy with the previous owner.

Held further: That the licence though revocable a will at Common Law, notwithstanding a Contract to the Contrary, cannot now be revoked in Equity. Equitable rights now prevail.

When there is a licence with a contractual right, Equity would always intervene to protect by injunction, the licensee's right of any revocation or threatening interference in breach of such contract.

The appellant who has full knowledge of the Respondent's right of use of these two doorways, even as a licensee, and there being an implied

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* Civil 1st Appeal No. 50 of 1956, against the decree of the District Court of Insein in Civil Regular No. 1 of 1955, dated the 5th June 1956.

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contractual obligation of the former owner to allow the Respondent free and uninterrupted use of the two doorways must be held to be bound by such obligation.

Therefore, firstly, the Respondent's right is a tenant's right, and secondly it is a contractual licensee's right created under an implied contract to last as long as the tenancy lasts.

King v. *David Allen & Sons, Billposting Ltd.*, (1916) 2 A.C. 54 ; *Clore* v. *Theatrical Properties Ltd.*, (1936) 3 All E.R. 483, facts distinguished.

Errington v. *Errington and Woods*, 1 K.B. 290, followed.

Wood v. *Leadbitter*, 13 M & W 838, referred to.

Booker v. *Palmer*, (1942) 2 All E.R. 674 ; *Thompson* v. *Park*, (1944) K.B. 408 ; *Winter Garden Theatre (London), Ltd.* v. *Millennium Productions, Ltd.*, (1946) 1 All E R. at p. 685 ; *Per Viscount Simon*, (1948) A.C. at pp. 189-91 ; *Foster* v. *Robinson*, (1951) 1 K.B. 149.

"Licences and Third Parties" Professor Wade, 68 Law Quarterly Review, pp. 337—345.

Gurbachan Singh Bindra v. *Jos. E. Fernando*, B.L.R. (1951) (S.C.) 255 ; *S. R. Raju* v. *The Assistant Controller of Rents, Rangoon and two others*, B.L.R. (1950) (S.C.) 10 ; *The Indian Starch Products Limited and another* v. *The Controller of Rents, Rangoon and another*, B.L.R. (1953) (S.C.) 64, referred to.

Fairman v. *Perpetual Investment Building Society*, (1923) A.C. 74 at 85, approved.

Appeal dismissed.

U Aye and *W. T. Shan* for the appellant.

Nyunt Han for the respondent.

U CHAN TUN AUNG, C.J.—This appeal raises quite an interesting question whether the appellants predecessor-in-title, one Henry Jarvis, having accepted the respondent as his monthly tenant, the southern room of his house known as No. 28, Prome Road, Kamayut Quarter, Insein, (graphically set out in the rough plan, Exhibit 1) has given a tenancy right to his tenant, the present respondent, the use of the two doorways in the main central hall of the house so as to enable the tenant (Respondent) enter and leave his tenement from and by the front steps leading on to the main road (Prome Road). That the appellant

is a purchaser of the said entire premises from its previous owner Henry Jarvis is not in dispute. The house in question is a single storey building consisting of three rooms, one central room and two adjoining side-rooms on either side of the central room. The side-rooms are separated from the main central room by wooden partition which has two doors communicating with the central rooms. In the front part of the said partition which separates the two side-rooms from the main central room there is a collapsible iron door. In each of these side-rooms there is also a doorway leading to the backyard on the west of the house, the entire house facing Prome road on the east (*vide* plan Exhibit 1.)

The respondent U Ba Yoke became a monthly tenant of Mr. Henry Jarvis in or about the year 1949 and he admittedly occupied the southern room, of the premises in question.

The appellant-plaintiff's case is that at no time his predecessor-in-title, Henry Jarvis had given the respondent the exclusive use of the two doors leading to the main hall for the purpose of ingress and egress into the side-rooms occupied by the respondent. He claims that that right, if any, was a mere license and not a tenant's right and that as such it is revocable at the will of the licensor. He has since revoked the same when he purchased the property with the consent and knowledge of its previous owner, and he sought for a perpetual injunction restraining the respondent from unlawfully interfering with his right of exclusive user of the entire hall with the two doorways on the side of the respondent's room.

The defendant-respondent's case, on the other hand, is that he has a tenant's right of entry and exit through the doors in question under the tenancy with the previous owner Henry Jarvis and that the

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appellant has no right in law to prevent him from using the said doors.

The suit went to trial before the lower Court mainly on the issue whether the defendant-respondent had acquired any tenancy right of free access through the said doorways or whether the defendant's tenancy right was limited to the southern room only without any right of use of the two doorways. The appellant merely relied upon what has been told him by Henry Jarvis, about the respondent's right of user of those two doors. According to him, Henry Jarvis and his wife Mrs. Jarvis informed him when he was about to purchase the house that the respondent could use the two doorways only with their permission. It appears Mrs. Jarvis predeceased her husband Mr. Jarvis before the sale of the suit premises in favour of the appellant. Mr. Jarvis was not called as a witness in the case though at one time attempt was made by the appellant to examine him *de benesse*, as he was about to leave the country for Australia. The application was too late as Mr. Jarvis had already left the country, and the appellant withdrew his application. So we have the bare statement of the appellant that before he purchased the house in question he was assured by Mr. Jarvis that the respondent's right of use of the two doorways was only under Jarvis' permission revocable at will or in legal parlance the respondent was a "bare licensee" so far as his right of use of the two doorways was concerned.

The trial Court found on the evidence that the respondent's right of use of those two doorways for entry into his room from the front steps leading on to the road on the east side is a tenant's right acquired by him as a tenant from the previous owner. It follows as a corollary that once it is

found as of fact on the evidence that the respondent had acquired the tenancy right of using the two doorways in question, the issue as to whether his right to use was a bare license or not, revocable at the will of the licensor does not, in our opinion, really arise at all.

Strenuous argument was advanced on appeal before us by the appellant's Counsel that on the evidence it should be held that the respondent's right of user of the two doorways in question was a licensee's right and that the same having been revoked by Mr. Jarvis, or in other words, the use of the two doorways by the respondent being dependent upon the permission given by Jarvis as and when he pleased, the trial Court was not justified in concluding that such right was a tenancy right already acquired by the respondent under the tenancy. We are unable to accept this submission and we do not see any substance in it. There is preponderance of evidence indicating that as a tenant of Jarvis to whom he had to pay a monthly rent of Rs. 80 (as could be seen from the exhibit rent receipts filed in the proceedings), many respectable friends of the respondent when visiting him used the front steps and the two doorways in question. We find no good reason whatsoever to disbelieve the testimony of these witnesses. There is nothing on record, nor is there any specific agreement concerning the use of the two doorways to support the appellant's case. In our opinion, the probabilities are that a person of the respondent's standing would not have become a tenant of the room in question, unless he was assured of the usual entrance to that room from the front side, which, in our opinion, is the only reasonably use a tenant can have in the circumstances. It is common knowledge that

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in the early part of 1949 housing accommodation was not so acute and Mr. and Mrs. Jarvis must have, in all probability, rented out the entire southern room of the said house with no reservation whatsoever; and that in creating a monthly tenancy with the respondent in respect thereof they must have agreed that the respondent shall have the use of the two doorways, not as a distinct separate permission given by them, but as a necessary incident of the tenant's right accompanying the tenancy of the room in question. Our view of the case that the respondent has already acquired a tenancy right of using the two doorways in question from the very inception of his attornment of tenancy with the previous owner Mr. Jarvis is supported by the fact that previous to the respondent's application for fixing of standard rent of the said premises, the respondent had been freely using those two doorways without any restriction whatsoever, until the respondent made a successful application to the Assistant Rent Controller, Insein, reducing the monthly rent of the room from Rs. 80 to Rs. 45 thereby incurring the displeasure of the Jarvises who then started locking up the two doorways in question. The respondent then sought for sanction to prosecute Mrs. Javis and in moving the Assistant Controller of Rents he asserted as follows :

> "That on the 25th and 28th October 1951, the door which is a part of the applicant's occupied area and which is the only opening for an access to and from the applicant's tenanted part of the premises was locked and thereby the applicant, other inmates and visitors had no access which they were enjoying before."

Sanction was accorded to prosecute Mrs. Jarvis. The case was tried before the 4th Additional Special Power Magistrate, Insein, and Mrs. Jarvis pleaded

guilty to the charges and she was convicted and fined Rs. 30 or in default to suffer one month's simple imprisonment. We also find that when the proceedings were taken before the Assistant Rent Controller neither Mr. Jarvis nor Mrs. Jarvis ever asserted that the respondent had no free and unfettered right of use of the two doorways in question. From these facts and circumstances we are satisfied that the respondent's rights of using the two doorways in question were given him by his previous landlord, as a necessary tenant's right for reasonable use and enjoyment of the southern room of which he is a monthly tenant.

However, the learned counsel appearing for the appellant after referring to English cases *King* v. *David Allen and Sons, Billposting Ltd.* (1) and *Clore* v. *Theatrical Properties, Ltd.* (2) further sought to contend that the respondent's right of using the two doorways in question is merely permissive, no better than that of a licensee's interest, and being a personal interest and not a proprietory interest, the present appellant who is a successor-in-title of the suit premises is not bound to sustain such right. In other words it is submitted that the respondent is merely a licensee or permissive user of the doorways in question, and this right being revocable at the will of the licensor, the previous owner, the appellant, a third party, is not bound by it. Even if we concede that the respondent's right of using the two doorways in question was merely that of a licensee, we are afraid that the trend of recent English decisions does not at all support the learned counsels thesis.

There are recent English authorities which throw a flood of light as to the precise nature of and the legal incidents of a licensee's interest, which can

(1) (1916) 2 A C. 54. (2) (1936) 3 All E.R. 483.

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under certain circumstances be bound up with contractual obligations, generally called contractual licences, and becomes irrevocable, either by the licensor or by any one claiming through him, except as purchaser for value without notice. *Errington* v. *Errington and Woods* (1) is an authority which lays down the contractual licensee's right, and to what extent such right is binding on a third party. It appears that the old Common Law rule of a license being revocable at will notwithstanding a contract to the contrary, *Wood* v. *Leadbitter* (2) has no more application after the fusion of law and Equity; and as a result whereof a licensor will not be permitted to evict a licensee contrary to contractual obligation which allows a licensee to remain. The facts in *Errington* v. *Errington* (1) were, A, wishing to provide a home for his son and daughter-in-law bought a house for £ 750, paying £ 250 in cash, and borrowing £ 500 from a building society by mortgaging the house. The house was then made over to his son and daughter-in-law, telling them that the house would be theirs if they pay up the instalments due on the mortgage. The son and the daughter-in-law occupied the house and paid the instalments, but before completion of instalments A died leaving the house to his wife (widow) under a will. A dispute arose between the widow and the daughter-in law as to the right of possession of the said house. In a suit brought by the widow as against the daughter-in-law for eviction, her action failed in the 1st Court (the County Court) as being time-barred. On appeal also she failed, the Court of Appeal holding that the daughter-in-law was a licensee with an irrevocable right to possession in equity, and that this right was binding on the widow as

(1) 1 K.B. 290. (2) 13 M. & W. 838.

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successor in title to her husband, A. It appears that in the Court of Appeal the precise nature of the transaction between A and his son and daughter-in-law was considered, whether it was a contract for sale, a tenancy agreement or a licence. It was held that it was a licence with a contractual right in equity or in other words, it was a contract for a licence enforceable in equity. Denning, L.J. delivering the judgment, very succinctly lays down the distinction between a bare licence, and a licence with contractual right, in the light of several authoritative decisions since the fusion of law and Equity. His Lordship observes:

"They (the daughter-in-law and her husband) were licensees with a contractual right to remain. As such they have no right at law to remain, but only in equity, and equitable rights now prevail. I confess however, that it has taken the courts some time to reach this position. At common law a licence was always revocable at will, notwithstanding a contract to the contrary: *Wood* v. *Leadbitter* (1). The remedy for a breach of contract was only in damages. That was the view generally held until a few years ago: see, for instance, what was said in *Booker* v. *Palmer* (2); *Thompson* v. *Park* (3). The rule has however, been altered owing to the interposition of equity. Law and equity have been fused for nearly eighty years, and since 1948 it has become clear that, as a result of the fusion, a licensor will not be permitted to eject a licensee in breach of a contract to allow him to remain: see *Winter Garden Theatre (London), Ltd.* v. *Millennium Productions, Ltd., per Lord Greene, M.R.*, (4) *per Viscount Simon* (5); nor in breach of a promise on which the licensee has acted, even though he gave no value for it: see *Foster* v. *Robinson* (6) where Sir Raymond Evershed, M.R., said that as a result of the oral agreement to let the man stay, he was entitled as licensee to occupy the cottage without charge for the rest of his days.

(1) 13 M. & W. 838.
(2) (1942) 2 All E. R. 674.
(3) (1944) K. B. 408.
(4) (1946) 1 All E.R. at p. 685.
(5) (1948) A.C. at pp. 189-91.
(6) (1951) 1 K.B. 149.

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This infusion of equity means that contractual licences now have a force and validity of their own and cannot be revoked in breach of the contract. Neither the licensor nor anyone who claims through him can disregard the contract except a purchaser for value without notice."

The decisions relied upon by the appellant's Counsel in support of his thesis that a licensee's right only binds the licensor and not a third party are found to be somewhat inappropriate and they do not at all help us in solving the question involved in the present case. Those cases are founded upon specific terms of licence made between the licensor and the licensee, and such terms were not binding on the third parties, because they were considered to be personal rights, never within the contemplation of parties to go beyond them. In *King* v. *David Allen and Sons, Billposting Ltd.* (1) the licence agreed upon was to entitle the plaintiffs to display advertising posters on the wall of a picture house. The licence was in the first place for 4 years and thereafter to continue subject to six months' notice. The licensor, who owned the land on which the picture house was to be built, let it for a term of 40 years to a company. The picture house was built and the licensor could not persuade the company to honour the licensee's agreement, which he had entered with the licensee. The licensee then brought an action for damages against the licensor asserting that by granting the lease to the company, the licensor had put it out of his power to perform the agreement. The House of Lords affirming the decision of the Courts below held that the plaintiff, *i.e.* the licensee, has a right to claim for damages. Here it will be noticed that the claim by the licensee was as against the licensor only and not against the third party.

(1) (1916) 2 A.C. 54.

Clore v. *Theatrical Properties Ltd.* (1) was a suit filed by a third party—a lessee of a theatre hall the use of refreshment rooms of which for the sole purpose of supplying refreshments, etc., to the theatre's patrons had been " leased " out to another person. Both the theatre and the so called " lease " for supplying refreshment having been assigned into other hands, the suit was (as stated above) brought by the assignee of the " lessor " to prevent the assignee of the lessee from exercising the " lessee's " rights, *i.e.* supplying refreshment. The plaintiff succeeded, and was granted a declaration and an injunction against the assignee of the " lessee ". The Court of Appeal upheld this decision on the grounds that the indenture between the parties was not a lease, but a licence and that being a personal contract had only to be enforced by the persons between whom there was privity of contract. The assignee of the lessee had therefore no right under the document.

The above two cases are cases decided earlier to *Errington* v. *Errington and Woods* (2); but even then, it appears to us that the proposition they laid down relating to the extent of the binding force—so to say—of contractual obligation under a licence, beyond immediate parties largely depended upon the precise terms of the licence itself expressed or implied. But *Errington* v. *Errington and Woods* (2) lays down that once there is a contract for a licence, or when there is licence with a contractual right, equity would always intervene to protect by injunction, the licensee's right of any revocation or threatening interference in breach of such contract. It, therefore, appears to us that even in England the old common law principle of limited right of a licensee has been given away. Professor Wade in his article on

(1) (1936) 3 All E R. 483. (2) 1 K. B. 290.

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Licences and Third Parties, (*vide* The Law Quarterly Review, Volume 68, page 337 at page 345), very aptly remarks :

"All the old rules which restricted the rights of licensees have lost their authority since 1948 ; for then it was first discovered that equity would intervene to protect (by injunction) a licensee who was threatened by revocation of his licence in breach of a contract. This has revolutionised the status of licensees : for not only have contractual licences become irrevocable ; they have become specifically protected interests in land which will bind third parties just like the other recognised interests."

The above English authorities, though they have no binding force upon us, have great persuasive value showing what the latest trend of judicial thinking is, as regards the nature of licensee's right especially when it is a contractual licence, or a licence created under a contract expressed or implied.

Here, in the present case, even if we hold that the permission given by Henry Jarvis for the use of the two doorways in question amounted to a licence, yet, inasmuch as the respondent had use of the same uninterruptedly for a number of years, and also inasmuch as Henry Jarvis had not challenged the right of use before the Rent Controller, when the standard rent was fixed, it is a reasonable inference that a contractual obligation has been created in favour of the respondent in the use of the same as a licensee. Therefore, the appellant, who has full knowledge of the respondent's right of use of these two doorways, even as a licensee, and there being an implied contractual obligation of the former owner to allow the respondent free and uninterrupted use of the two doorways in question, must be held to be bound by such obligation. *Lakhmichand Khetsey Punja* v. *Ratanbai*

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and others (1) was also cited by the appellant's Counsel in support of his submission that the respondent's right of the use of the two doorways was that of a licensee, and as such, only binding between immediate parties. This case affords no help to the appellant. The widow and the three minor daughters, (including the mother) of a deceased tenant of a building having common privies and bathrooms filed a suit against the owners of the building for damages, alleging negligence for allowing the entire building to be in a dangerous condition which resulted in the death of the tenant by the collapse of a part of the said building. The claim was made under the Indian Fatal Accidents Act. The trial Court awarded the damage to the deceased tenant's legal representatives. In the determination of the question as to whether the deceased tenant had any tenancy rights or a mere license for the use of the common privies available in each flat of the said building, it was held, in appeal (Martin, C.J. and Kemp, J.), that the tenants are mere licensees in respect of the privies not expressly included in the lease, and that the privies remained under the control of the landlord, both as regards user and repairs. However, we notice that though the learned Judges found that the tenant was licensee as regards common privies, yet the Indian Easement Act was invoked and the landlord was held liable by virtue of sections 57 and 58 of the Indian Easement Act, whereunder he was under a duty to disclose any defect in his property likely to be dangerous, to the licensee, of which he was aware and the licensee was not. The Easement Act referred to in the above

(1) A.I.R (1927) Bom. 115.

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case is not in force in our country. Our laws regarding easement rights are founded upon Torts (English Common Law) or upon expressed grant, or by prescription or length of user for a number of years as provided in the Limitation Act.

We may also note that *Gurbachan Singh Bindra* v. *Jos. E. Fernando* (1), *S. R. Raju* v. *The Assistant Controller of Rents, Rangoon and two others* (2), *The Indian Starch Products Limited and another* v. *The Controller of Rents, Rangoon, and another* (3) cited before us are of no help to the present case and those cases merely showed the limited interest of a licensee under different circumstances; but we may, however, note that in *Gurbachan Singh Bindra* v. *Jos. E. Fernando* (1) where a person was allotted a floor space of a certain flat on payment of certain consideration, it was held that the space allotted to him having exclusive right of occupation for that area amounts to a lease and not a licence.

Under the facts and circumstances obtaining in the case we would rate the respondent's right of use of the two doorways in question first, as a tenant's right; and secondly as a contractual licensee's right created under an implied contract to last as long as the tenancy lasts, since it is reasonably necessary for the use and enjoyment of the room of which he is a monthly tenant. His right may, perhaps, be compared with the right of tenants over the use of common staircase. In this connection we quote with approval the observation of Lord Atkinson in *Fairman* v. *Perpetual Investment Building Society* (4):

"When the owner of a flat lets it to a tenant for the purpose of its being resided in by the tenant and his family

(1) B.L.R. (1951) (S.C.) 255.
(2) B.L.R. (1950) (S.C.) 10.
(3) B.L.R. (1950) (S.C.) 64.
(4) (1923) A.C. 74 at 85.

the landlord must, I think, be taken to have given permission for whatever is reasonably necessary for the reasonable use and enjoyment of the flat for that purpose. This would necessarily include permission to the tenant and his family, his servant, the messengers of the tradesmen with whom he dealt, his visitors and guests and suchlike persons, to have access to his flat in order to enable him and his family to live in it with the customary amenities."

Lastly, it was urged upon us that there being an exit through the bath-room in the back of the room in question which the respondent can conveniently use as an alternative to the two doorways in dispute, the injunction sought for was quite justified. That, in our view, is most unreasonable. There is evidence to show that the respondent has fixed up his name-plate on the verandah in front of the house, and it would surely amount to forcing the respondent and his family and even his friends the unreasonable use of a back door in the bath-room to enter his room.

Considering the facts and circumstances appearing in the case as a whole, we are satisfied that the lower Court's judgment is quite correct and we see no good reason whatsoever to interfere, and this appeal is therefore dismissed with costs.

U SAN MAUNG, J.—I am in general agreement with the learned Chief Justice whose judgment I have had the advantage of reading. On the point of law involved, the foundation on which he based his decision is the judgment in the case of *Errington* v. *Errington and Woods* (1). However, this judgment has been severely criticised by Professor Wade in his article on Licenses and Third Parties (The Law Quarterly Review, Vol. 68, p. 337). Referring to the

(1) (1952) 1 K.B. 290.

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principle laid down by Denning, L.J., the learned Professor observed (at page 340):

"The narrower question is whether the existing authorities permit the Court of Appeal to hold that contractual licences may bind third parties at all. Generalisation about the effect of equitable remedies will be futile if the path so opened up turns out to be blocked by adverse authority. It will be seen, first that Denning, L.J. cited no direct authority for his proposition that 'neither the licensor nor anyone who claims through him can disregard the contract except a purchaser for value without notice'. In leading up to this conclusion he mentioned a number of cases; but in none of them except one was there any transfer of the land affected by the licence, and in that one case, *Booker* v. *Palmer* (1) (which the learned Lord Justice referred to only as an example of what he considered to be an obsolete rule) the decision was merely that a gratuitous licence was just as revocable by the licensor's successor in title as by the licensor himself. The new proposition as to third parties is therefore founded on inference from cases in which no third parties appeared."

Further on (at p. 345) he said,

"One may ask, therefore, whether there is any escape from the fact that in two modern cases, both binding on the Court of Appeal, it has been laid down that a licence, even though reinforced by a contract not to revoke it, cannot bind a purchaser with notice. There is no hint of consciousness of this difficulty in the judgments delivered in *Errington* v. *Errington*."

With regard to the passage quoted by the learned Chief Justice in his judgment he had this to say,

"So sudden an apocalypse, not vouchsafed to the House of Lords in 1916 or to the Court of Appeal in 1936, would be somewhat remarkable. But authority is cited, and it must be looked into."

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(1) (1942) 2 All E.R. 674.

The answer to the learned Professor is not far to seek. The change in the law relating to license by the interposition of equity is not more remarkable than the change in the law relating to real property by the interposition of equitable principles. With the progress of time, human affairs become more and more complex. Accordingly, the law which cannot remain static must also progress. The change involved may sometime be imperceptible. It may sometime appear to be revolutionary.

In regard to licences the classical definition is that given by Vaughan, C.J., in *Thomas* v. *Sorrel* (1) " that a licence properly passeth no interest but only legitimates what would otherwise have been a tort." However, generations of eminent judges have been at pain to find justification for licences which they deem to be irrevocable. Such notions as " licence coupled with a grant ", " contractual licence ", etc., are the result of their endeavours. In the case now under consideration, it seems clear to me that the right to enter through the front doorway to the part of the building leased to the respondent U Ba Yoke must be deemed to be irrevocable during the pendency of the lease. Ignoring the back door which involves entering the premises through the bath-room and the lavatory the only reasonable means of approach is the front doorway which involves passage through the main central hall in the occupation of the landlord. Otherwise it would mean denying to the tenant the necessary concomitant of his lease. For instance, take a compound in which is situated a house occupied by the tenant and another occupied by the landlord, Assume that the compound has only one gate through which persons and vehicles may enter, it is only reasonable in such circumstances to conclude that the entrance

(1) (1673) Vaughan 330,351 .

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through the common compound gate being the necessary concomitant of the lease must subsist during the pendency of the lease and that it must also subsist when the compound containing the two houses has been conveyed to another owner, because the lease of the first house to the tenant must subsist until it is duly terminated accordiug to law.

In the case of *Gurbachan Singh Bindra* v. *Jos. E. Fernando* (1) where the parties entered into an agreemnt whereby the appellant was allotted a floor space 17′ × 5′ and agreed to pay a guaranteed monthly commission of Rs. 100 as consideration and the appellant constructed fixtures and show cases on the space allotted to him with exclusive right of occupation in that area, it was held by the Supreme Court that the appellant was a lessee, and not a mere licensee. In that case, the landlord Fernando was in control of the entrance to the premises, (*vide* the judgment of the High Court at page 8 of 1950, Burma Law Reports). Therefore it is clear that the entry of Gurbachan Singh through the common entrance must endure during the subsistence of the lease to Gurbachan Singh although it involved passage over the portion occupied by the landlord. U Ba Yoke in the case now under appeal is in a stronger position than Gurbachan Singh in the case cited above. For these reasons I hold that the appeal must be dismissed with costs.

(1) (1951) B.L.R. 552.