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(1958) B.L.R

Containing cases determined by the Supreme Court of the Union of Burma and of the High Court, Burma



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SUPREME COURT

1958

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

Parts I to VI.—U TUN MAUNG, B.A., B.L., *Bar.-at-Law*, EDITOR.
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HON'BLE JUDGES OF THE SUPREME COURT OF THE UNION OF BURMA DURING THE YEAR 1958

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CORRIGENDUM

အမှားပြင်ဆင်ချက်

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On or about the 22nd April 1955 on the strength of the Bills of Lading which bore the date 10th March 1955 the Customs allowed the applicants to clear the goods from the S.S. "Isuzu Maru" as having been despatched prior to 11th March 1955. In December 1955 the Collector of Customs relying on the date shown in the Log Book of the said ship came to the conclusion that the goods in question were loaded on to the "Isuzu Maru" on or after the 17th March and holding that on that account the applicants were not entitled to the relief clauses of the said Press Communiqué, imposed on them a penalty equivalent to (twice) the value of the goods, after rejecting the explanation tendered by them. An application in Revision to the Financial Commissioner brought no relief to the applicants. *Held :* As can be seen from the preamble of the Bills of Lading Act the provision of the Burma Carriage of Goods by Sea Act that it is an accepted commercial practice to issue Bills of Lading after goods have been received by the master of the vessel or the agent of the carrier, therefore there was no justification for the view held by the Financial Commissioner that the Bills of Lading were false documents, merely because the date of their issue did not correspond with the date shown in the Log Book. *Obiter :* With the passage of time and the increased tempo of commercial activity, when shippers rarely see the ship on which their goods are carried and when the process of loading is left entirely to the carrier, the meaning of the word "shipped" may have come to mean that the goods had been given into the custody of the carrier even if the goods had not been actually loaded nor had the ship actually sailed. *Bowes* v. *Shand*, L.R. 11 A.C. (1876-1877) 455, referred to. *Held further :* That even if any offence had been committed in respect of their goods, the applicants were innocent participants and that since no offence under s. 167 of the Sea Customs Act was committed by the applicants, no penalty should have been imposed on them.

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COMPENSATION—*Equitable Compensation—"Public purpose" and "public interest"—Distinction between—Constitution—S. 218—Utility service—Bazaar—A form of—Whether it would be in the public interest to have it operated by a local authority—Act No. 15 of 1951—Silent about public interest—Payment of equitable compensation prescribed—Equitable compensation—Assessment of—Market value as well as cost to the Company to be taken into consideration—Act does not contemplate that only one of these two factors must be adopted—Equitable compensation and quest for equity—Relationship between—Equitable compensation under the Act—Restitution—Not to be equated—Assessment of—Factors to be taken into account—Proviso to s. 5 taken by itself contemplates no payment in respect of buildings of certain vintage—Construction of statutes—Rule—Proviso cannot control main section.* There is a difference between "public purpose" and "public interest." The acquisition of land for a burial ground would be for a public purpose but it may be against public interest to have it in an unsuitable locality. A bazaar is a form of public utility service envisaged in s. 218 of the Constitution and it would be in the public interest to have it operated by a local authority, a desirability which s. 218 expresses. The Soortee Bara Bazaar (Theingyizay) Municipalisation Act is silent about public interest. This Act (Act No. 15 of 1951) prescribes payment of equitable compensation and, in assessing it, the market value as well as the cost to the Company should be taken into consideration. The Act requires equitable compensation to be awarded and in prescribing the method of fixing it, market value and costs are mentioned as factors to be considered. The Act does not contemplate that only one of these two factors must be adopted, and the Constitution requires payment of compensation to the extent provided by law and the Act prescribes equitable compensation. Equitable compensation under the Act should not be equated with restitution and in assessing it the following main factors should be taken into account, *viz.*:—

(1) the market value of the property at the relevant date, though it should not be a final factor because the property may have acquired an inflated value due to circumstances such as the development and expansion of the city ;

(2) the original purchase price, regard being had to the difference in the value of money at the time of the purchase and at the relevant date ;

(3) the profits made by the Company in respect of the property over the relevant period of time but also the skill and labour that have gone into the making of those profits ;

(4) the costs of maintenance and repairs of the property along with depreciation in value ; and

(5) the historical background of the property such as its nature and the circumstances under which it was acquired by the Company.

The award of compensation has no relation to the quest for equity. Though equitable compensation is specifically mentioned in s. 5, the proviso taken by itself contemplates no payment in respect of buildings of a certain vintage. A proviso cannot control the main section and this is the rule of construction of statutes. *Daw E Sint* v. *Additional Commissioner of Income-tax,*

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C.M.A. 124/57, followed. S. 5 of the Act and the proviso thereto must be read as a whole and each must be given its due effect, the proviso not controlling the substantive enactment but being controlled by the paramount rule in the substantive enactment that the compensation awarded must be equitable.

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COMPENSATION—*Equitable Compensation—Private property in Burma—Sacrosanct—Subject to the rule of Eminent Domain—S. 23 (4) of Constitution—Envisages three requirements.* The concept that private property is sacrosanct, subject to the rule of Eminent Domain, is accepted in Burma and thus s. 23 (4) finds a place in the Constitution. It envisages three requirements. First, it has to be in the public interest, secondly, it has to be in accordance with law, and thirdly, compensation, which may be limited under the Constitution must be paid.

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CONFESSIONS—*The duty of Court in recording confessions, s. 24, Evidence Act—Confession to be accepted or rejected as a whole. Held:* The Court is required to examine the circumstances under which the confession came to be made and recorded, and if it should appear to the Court that there was inducement or threat which led to the making of the confession, then the confession would be inadmissible. It may be taken as settled law that length of time during which an accused was in custody before he made a confession would be one factor that should be taken into consideration in enquiring into the *bonâ fides* of a confession ; the credibility of the statements in the confession would be another factor. But in themselves they do not make the confession inadmissible. They merely provide the means of testing whether threats or inducements had been held out to an accused to persuade him to make a confession, which may be true or which may be false. *Queen-Empress* v. *Narayan*, I.L.R. 25 Bom. 543 ; *The King* v. *San Min*, (1939) R.L.R. 97 ; *The King* v. *Hla Maung*, (1946) R.L.R. 102, referred to. *Held also:* Where there is no other evidence to show affirmatively that any portion of the exculpatory element in a confession is false, the court must accept or reject the confession as a whole and cannot accept only the inculpatory element, while rejecting the exculpatory element as incredible. *Emperor* v. *Balmukund*, I.L.R. 52 All. 1011 ; *Palvinder Kaur* v. *The State of Punjab*, (1953) S.C.R. Vol. IV, 94 ; *Maung Po Thin* v. *The Queen-Empress*, S.J. L.B. 324, approved.

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CRIMINAL CONSPIRACY—CANNOT BE COMMITTED BY ONE PERSON ALONE 173

CRIMINAL PROCEDURE CODE—*Chap. XIV—Investigation under—Recording of confession under s. 164 could be made only in the course of—Penal Code, s. 120B—Criminal conspiracy—Cannot be committed by one person alone—No panacea for defects in prosecution case—Suppression of Corruption Act, s. 4 (1) (d)—Acts to which it must relate.* The recording of a confession under s. 161 of the Criminal Procedure Code can only be done in the course of an investigation under Chapter XIV of the Code. Investigation by the Bureau of Special Investigation is done under the authority of ss. 6, 7 and 17 of the Special Investigation Administration Board and Bureau of Special Investigation Act. There can be no conspiracy of one person alone. S. 120B of the Penal Code is no panacea for defects in the prosecution case. There must initially be general evidence which would enable the Court at least to infer that there must have been a conspiracy. Sub-s. 4 (*1*) (*d*) of the Suppression of Corruption Act must relate either to "fraud to the detriment of public interest" or to an act of misappropriation or misconduct "in respect of public property entrusted."

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CRIMINAL PROCEDURE CODE, S. 234—*Deals with offences and not with charges—Violation of provisions contained in—Not curable by s. 537.* S. 234 of the Criminal Procedure Code deals with offences and not with charges. Misappropriation of monies drawn from the Government Treasury under different dates and on different occasions would clearly amount to separate offences. Where three First Information Reports were lodged against the appellant who was alleged to have prepared ten different muster rolls and drawn monies under them on nine different occasions it would appear that no less than nine separate offences had been committed by him and it was open to the prosecution to split the offences into three different cases as originally intended or to lump up all the 9 items together and charge the accused with misappropriation of the gross total of the 9 items. Failure to follow this procedure amounts to a violation of the provisions contained in s. 222 (2) and 234 (1) of the Criminal Procedure Code. *Wazir Singh* v. *Emperor*, A.I.R. (1942) Oudh 89 at 92, referred to. Where the trying Magistrate to whom these complaints were forwarded opened a single proceeding against the appellant under the erroneous belief that s. 234 of the Code empowered him to do so, tried and convicted the appellant. *Held* : That the charges in the present case having combined more than three offences of the same kind in direct contravention of s. 234 of the Code the trial was conducted in a manner not warranted by the Criminal Procedure Code and was wholly bad irrespective of the question whether there was any actual prejudice to the accused or not. *Subramania Iyer* v. *King-Emperor*, 25 Mad. 61 ; *Abdul Rahman* v. *King-Emperor*, 5 Ran. 53 at 67 ; *Rex* v. *Daya Shanker*, A.I.R. (37) '1950) All. 167 at 174, referred to. S. 537 of the Criminal Procedure Code deals with mere errors and irregularities in the charges and not with illegalities such as plurality of offences in a manner not allowed by law. *G. H.*

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Astell v. *Eng Take*, (1941) R.L.R. 559 ; *Pulukuri Kottaya* v. *Emperor*, A.I.R. (34) (1947) (P.C.) 67, referred to.

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EVIDENCE ACT, S. 138—*Comprehensive—Must be read with s. 33—Right under—Procedure in Civil Proceedings—Procedure in Summons case—Procedure in Warrant case—Two stages in Warrant case—Procedure under—Different from procedure under s. 256, Cr.P.C., s. 33—Proviso—Three requisites in—Application of Criminal Procedure Code—Chapter XXI—In trials under—Evidence of absent witnesses given at earlier stage of same proceeding—Admissibility—Identification—Conviction upon—Wisdom of.* S. 138 of the Evidence Act in its entirety is comprehensive and embodies the normal procedure to be adopted in regard to examination of witnesses. It even sets out what could be asked in examination-in-chief, cross-examination and re-examination. It gives the right to a party, whether he be complainant or accused, plaintiff or defendant, to cross-examine any witness examined by the opposite party. The express provision as to cross-examination, embodied in s. 256 of the Criminal Procedure Code is an added right given to an accused to compel the prosecution to produce a witness for further cross-examination. In civil proceedings where cross-examination naturally follows the examination-in-chief and when rarely a witness is called again to give further evidence, the test of admissibility of evidence in a subsequent proceeding would not centre on the question of "right" to examine, though it might be raised in connection with "opportunity," if, for example for lack of time the Court had to adjourn the cross-examination, and the witness's presence became unavailable later. With criminal proceedings, in respect of Summons cases, which are tried under Chapter 20 of the Criminal Procedure Code, the position would be the same as in a civil case. Even if the sections in the Chapter make no mention of cross-examination, the provisions of s. 138 must be respected ; and there must be both right and opportunity for the accused to cross-examine any prosecution witness. But where the case is a warrant case, then the proceedings are in two stages. The first stage is the enquiry before the charge is framed and the second stage, the trial after charge. The relevant section for the first stage, which is s. 252, makes no express mention of cross-examination. The procedure under s. 256 of the Criminal Procedure Code is different from the procedure under s. 138 of the Evidence Act, for the prosecution witness is not again examined-in chief, as in

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a Sessions trial, but he is made to submit direct to cross-examination. S. 33 of the Evidence Act mentions "a subsequent judicial proceeding." This section is followed by the proviso which sets out three requisites. The first is that the proceeding has to be between the same parties or their representatives in interest. The significant fact is the use of the word "was." This requisite can have no relation to "a later stage of the same judicial proceedings" and, in criminal cases, is meaningless since the prosecutor is the State and the question of representative in interest cannot arise as the death of an accused would terminate the proceedings. The second requisite is the right and opportunity to cross-examine in the *first* proceeding. This requisite will apply where a case began as an enquiry before a Magistrate and is later committed for subsequent trial before a Judge. These would involve two separate proceedings unlike the trial of a warrant case before the same Magistrate where the proceedings after charge are only a later stage in the same proceedings. The third is the necessity of the same questions being substantially in issue in the *second* proceeding. The second and third requisites, which specify different proceedings, cannot relate to the same judicial proceeding. In a case tried by a Special Judge who took cognizance of the offence without the accused being committed for trial, and had followed the procedure prescribed in Chapter XXI of the Criminal Procedure Code for the trial of warrant cases by a Magistrate under s. 4 (2) of the Special Judges Act, 1946, the proviso to s. 33 of the Evidence Act has no application. The proviso would apply only when there are two proceedings. The evidence of the witnesses given in an earlier stage of the same proceeding, who were cross-examined by the accused then, is admissible under the main paragraph of s. 33. *Nga Pein* v. *The Union of Burma*, (1953) B.L.R. (S.C.) 116, dissented from. *W. H. Lockley* v. *Emperor*, A.I.R. (1920) Mad. 201; *Rex* v. *Daya Shanker*, A.I.R. (1950) All. 167; *Emperor* v. *C. A. Mathews*, A.I.R. (1929) Cal. 822; *Biswas* v. *The State*, A.I.R. (1950) Pat. 550; *Emperor* v. *Lachmi Narain*, I.L.R. (1932) 54 All. 212; *Miller* v. *The State*, A.I.R. (1950) Cal. 436; *Bramachari Ajitnanda* v. *Anath Bandu*, A.I.R. (1954) Cal. 395; *Krishnayya* v. *Venkata Kumara*, A.I.R. (1933) (P.C.) 202, referred to. "It is often and wisely, not thought safe to convict a person upon his identification by one individual under circumstance of strain and terror accompanying violent crime." *Per* Buckhill, J. in *Golam Mohammed Khan* v. *King-Emperor*, I.L.R. (1925) 4 Pat. 327, referred to.

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HABEAS CORPUS—*Directions in the nature of habeas corpus and or Mandamus—Registration of Foreigners Rules, 1948, Rule 15—Issue of "D" Forms to aliens not within the discretion of the Controller of Immigration—Refusal to issue at the request of the Official Assignee, whether Controller has legal authority to accede to such request—Aliens' rights under the Constitution and under the International Law—Fundamental rights—Rights of an alien to leave a country.* The applicant, an Indian subject applied for a "D" Form under Rule 15 of the Registration of Foreigners Rules, 1948, to the Controller of Immigration, without which he could not leave the Union of Burma. The Controller refused to issue the Form on the request of the Official Assignee,

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High Court. On an application for directions in the nature of Habeas Corpus and or Mandamus. *Held :* The right of an alien to leave a country is a basic human right, which is internationally recognised. Oppenheims' International Law, Volume I, paragraph 322, approved. *Held also :* Certain fundamental rights are guaranteed specifically to citizens under Chapter II of the Constitution, but this does not mean that they are denied to aliens. Full exercise of such rights may be subject to conditions, as in the case of transfer of land to an alien, which requires the permission of the President under the Transfer of Property (Restriction) Act. But most rights are assured to citizen and alien alike and their full enjoyment is unrestricted ; and such rights are not to be denied without legal authority. The issue of "D" Form is not within the discretion of the Controller. He must issue it when the stage for its issue is reached, and it was improper on the part of the Official Assignee to have made the request to have it withheld.

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SUPPRESSION OF CORRUPTION ACT, s. 4 (*2*)—*Forgery*. Maung Kyi made fictitious entries in Post Office Savings Bank Pass Books and withdrew sums of money with the aid of Hla Tun U and Win Myaing. Four cases were sent up :—

In Criminal Regular Trial Nos. 3 and 4 of 1957 of the Court of 3rd Special Judge (B.S.I.A. & S.I.A.B.), Maung Kyi alone was sent up and convicted under s. 4 (*2*) of the Suppression of Corruption Act.

In Criminal Regular Trial No. 5 of 1957, Maung Kyi, Hla Tun U and Win Myaing were sent up. Maung Kyi was Charged under s. 4 (*2*) of the Suppression of Corruption Act and was convicted. Hla Tun U was charged under s. 4 (*2*) of the Suppression of Corruption Act read with s. 120-B, Penal Code and was acquitted. Win Myaing was discharged.

In Criminal Regular Trial No. 6 of 1957, Maung Kyi and Win Myaing were sent up. Maung Kyi was convicted under s. 4 (*2*), while Win Myaing was discharged. Government appealed against the order of acquittal of Hla Tun U to the High Court, but the appeal was dismissed.

On an application for special leave to appeal, the Supreme Court, *held* : The convictions of Maung Kyi under s. 4 (*2*) in Criminal cases Nos. 5 and 6 were erroneous, as the offence committed by Maung Kyi is simple forgery under the Penal Code. *Held also* : The inclusion of instances of misconduct in the explanation in the Act No. 67 of 1948 does not make them offences in themselves and the explanation must be read in relation to the offences defined in sub-clauses (*a*) to (*d*). Clearly they can be read only into the second part of sub-clause (*d*), that is to say, in relation to misconduct concerning public property entrusted. Maung Kyi was not entrusted with anything. *Held further* : The Supreme Court is no ordinary Court of appeal and where justice has been meted out, it would be extremely reluctant to interfere, even if the conviction is under a wrong provision of law. *Held further* : That the charge actually framed against Hla Tun U was under s. 4 (*2*) read with s. 120-B of the Penal Code and since Win Myaing was discharged and Maung Kyi was charged only with s. 4 (*2*), there could not be a conspiracy by one person, since the main culprit must be found to be guilty of conspiracy as well.

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THE PRESENT WAR TERMINATION (DEFINITION) ACT, 1946 (BURMA ACT NO. XII OF 1946), s. 2—*Date of termination of war—Official declaration of—Transfer of Property Act, s. 53A—Right under—Bar imposed by*. The Appellants obtained possession of some pieces of land belonging to the Respondent Association under the terms of an agreement of sale set out in the minutes of a meeting of the Managing Committee of the

Association held on the 18th September 1943. The agreement contains a provision for the return of the properties to the Respondents on payment of the original price within six months of the Government's announcement or publication of the termination of the Great War. The agreement further provides that in the event of the Respondents' failure to make the repurchase within the time agreed upon, the Appellants would pay a further sum of K 5,000 before they could perfect their title to the property by means of a registered sale deed. In July 1947 the Respondents offered to repay the agreed sum of K 10,000 and demanded the return of these lands. Failing compliance the Respondents brought four separate suits in the District Court of Mandalay against the Appellants for recovery of possession of these lands. The suits were decreed and the decrees were later confirmed on appeal by the High Court. As in the lower Courts it is contended before this Court that since the war must be deemed to have ended with the simultaneous announcements that were made in London, Washington, Moscow and Chungking regarding the unconditional surrender of Japan on the 14th August 1945 the offer made by the Respondents to repurchase the properties did not fall within the time limit set out in the agreement, *i.e.* within six months of the official declaration of the end of the Great War and that the Respondents were not entitled to bring their suits for recovery of possession of the lands on the basis of their title, but should file instead a suit for specific performance of contract. *Held*: That in pursuance of s. 2 of The Present War Termination (Definition) Act, 1946 (Burma Act No. XII of 1946) the Government on the 5th February 1947 declared by announcement that the 1st day of February 1947 was to be treated as the date of termination of war in Burma and that in interpreting the terms of agreement it would be unnecessary to look beyond the declaration made under Act XII of 1946. *Held also*—

(1) that s. 53A of the Transfer of Property Act confers a right to the transferee in possession under an unregistered contract of sale to protect his possession, but confers no active title on the transferee.

Probodh Kumar Dass and others v. *Dantmara Tea Co. Ltd. and others*, A.I.R. (1940) (P.C.), pp. 1 and 2, referred to.

(2) that this section only entitles a person in possession to invoke the doctrine of part performance as a shield to protect his possession if the conditions therein referred to are satisfied and does not enable a person (transferee) who has lost possession to sue for recovery of it.

Venangi Veera Raghave Rao v. *Vedangi Gopalarao*, A.I.R. (1942) Mad. 125 at 126-7; *Peary Lal and another* v. *Prithi Singh and others*, A.I.R. (1945) All. 422, referred to.

(3) that the terms of s. 53A of the Transfer of Property Act imposes a bar on the transferor if the transferred possession is challenged by him in breach of the terms of the contract or instrument of transfer but where such an agreement expressly provides that the transferor could repurchase the property within a fixed period, he cannot justly be debarred from enforcing his right so expressly provided by the terms of the contract.

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Ram Protab Kayan v. *The National Petroleum Co. Ltd.*, A.I.R. (1950) Cal. 23 at 27, referred to. *Held further*: That although the Appellants had entered upon the property under the agreement in question, they had acquired no title whatsoever to the same to enable them to resell the property and the Respondents could not therefore ask for a decree for specific performance of the contract to resell. In other words, the Respondents' suits for recovery of possession of lands on the basis of their title were held to be competent.

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TRADE DISPUTE—*Competency of workmen still in service to raise on behalf of workmen who are no longer in employ of company—Writ proceedings—Wrong conception of law—No ground for interference in—Certiorari—Directions in nature of—Discretionary—Non-interference where substantial justice done.* Where it was contended that the dispute, if any, being one between the company and its former workmen, it could not be the subject of a "trade dispute." *Held*: That the present-day employees are competent to raise a trade dispute on behalf of the former employees. *The Burma Oil Company (Burma Concessions) Ltd.* v. *The Court of Industrial Arbitration*, (1951) B.L.R. (S.C.) 1, followed. *Held also*: That the fact that an Award was based on a wrong conception of law is in itself no ground for interference in writ proceedings. *Held further*: That directions in the nature of certiorari are discretionary and that this Court will not interfere if substantial justice has been done. *Cassim Jeewa* v. *Moulmein Municipality*, (1951) B.L.R. (S.C.) 176; *Markaji* v. *Nahari*, (1901) 27 I.A. 216, followed.

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UNION JUDICIARY ACT, S. 6—*Appeal from the decision of a Court-martial—Import Control Order—S. 3 (1), Control of Imports and Exports (Temporary) Act, 1947—S. 167-A, s. 19, Sea Customs Act.* The applicant was convicted by a Court-martial of "committing a civil offence" of importing goods in contravention of the provisions of the Import Control Order made under s. 3 (*1*) of the Control of Imports and Exports (Temporary) Act, 1947. Applicant contended that the goods were found with him in Rangoon and not at any port of entry in Burma. *Held*: That under s. 6 of the Union Judiciary Act, the Supreme Court has discretion to grant special leave to appeal from a decision of a Court-martial. *Khin Maung Myint* v. *Union of Burma*, (1953) B.L.R. (S.C.) 54, relied on. *Held also*: S. 3 (2) of the Control of Imports and Exports (Temporary) Act, 1947 provides that s. 19 of the Sea Customs Act and all the provisions of that Act are applicable to all goods the import or export of which have been prohibited or restricted. Since the Sea Customs Act applies in its entirety, s. 167 (*a*) of that Act comes into play and in this prosecution under the special rule of evidence, the burden of proof that the applicant had not imported the goods, is on the applicant himself.

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URBAN RENT CONTROL ACT, s. 16-B—*Commission of offence relevant—Identity of sub-tenant irrelevant.* The landlord of certain premises applied to the Controller of Rents to take action against her tenant for having sub-let one of the rooms tenanted by him to A. In the course of an enquiry made by the Assistant Controller of Rents under the proviso to s. 16-B of the Urban Rent Control Act it was found that the room in question was occupied by B who, according to the tenant, was in unauthorised occupation of the said room. The Assistant Controller of Rents then proceeded to lay a complaint under s. 16-B of the Act against the tenant. It was contended on behalf of the tenant that in view of the discrepancy in the identity of the alleged sub-tenant the laying of the complaint was not justified. *Held* : (1) that the identity of the unauthorised occupant of the room in question was of no relevance whatsoever, (2) that it was the commission of the offence mentioned in s. 16-B of the Act by the tenant, of which the Controller was authorised to take cognizance, and (3) that the fact that a wrong person was named as being in unauthorised occupation of the room in question would not affect the validity of the action taken by the Assistant Controller.

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အက်ဥပဒေများ။

နိုင်ငံခြားငွေ လဲလှယ်ရေး ကြီးကြပ်မှုအက်ဥပဒေ။

ပြည်ထောင်စုမြန်မာနိုင်ငံသားဖြစ်မှု အက်ဥပဒေ။

ဒွေစည်းအုပ်ချုပ်ပုံ အခြေခံအက်ဥပဒေ။

မြို့ပြဆိုင်ရာ ဌါးရမ်းခ ကြီးကြပ်ရေးအက်ဥပဒေ။

မြန်မာနိုင်ငံတော် ယေဘုယျစကားရပ် အက်ဥပဒေ။

ရန်ကုန်မြို့တော် မြို့နီပါယ်အက်ဥပဒေ။

လူဝင်မှုကြီးကြပ်ရေး (လတ်တလော) ပြဋ္ဌာန်းချက်များ အက်ဥပဒေ။

လယ်ယာမြေနိုင်ငံတိုင်းပြုလုပ်ရေး အက်ဥပဒေ။

လယ်ယာလုပ်ကိုင်သူတို့ ကြွေးမြီသက်သာရေး ဥပဒေ (၁၉၄၇ ခုနှစ်)။

ဝိန္ဒယခုံအက်ဥပဒေ။

စာမျက်နှာ

ဝိနိစ္ဆယဋ္ဌာနအက်ဉပဒေ (၁၃၁၁ ခုနှစ်)။
ဝိနိစ္ဆယဋ္ဌာနအက်ဉပဒေ (၁၃၁၆ ခုနှစ်)။
ဝါဏိဇဥပဋ္ဌပကဉ္ဇာအက်ဉပဒေ။
အကောက်တော်အက်ဉပဒေ။
အလုပ်ရုံများအက်ဉပဒေ။

ချေပရန်အခွင့်အရေး လယ်ယာလုပ်ကိုင် သူတို့ကြွေးမြီသက်သာရေးအက်ဉပဒေနှင့် ပတ်သက်၍ နိုင်ငံတော်သမတက ပြင်ဆင်သည့်အမိန့် နှစ်နာမည့်သူကို ပေးရန်သင့်တော်ခြင်း ၃၀

စီရင်ပိုင်ခွင့်အာဏာ ဝိနိစ္ဆယရုံးဥပမရှိလျှင်ချမှတ်သော စီရင်ချက်ပျက်ပြယ်ခြင်း ... ၃၉

" ညှိနှိုင်းတိုင်ပင်ပြီးမှ "—ဆောင်ရွက်ရမည့် ဆိုသော ပြဋ္ဌာန်းချက်—ညွှန်ကြားချက်သာဖြစ်သည် ၁၁

" ထာဝစဉ်နေထိုင်သူ " မြန်မာနိုင်ငံသား ဖြစ်မှု အက်ဉပဒေတွင် သတ်မှတ်သောအဓိပ္ပါယ် ၁၉၀

နိုင်ငံတော် သမတ—ပြည်သူ့လွှတ်တော် အမတ်တဦးအား နုတ်ထွက်ခွင့်ပေးနိုင်သောအာဏာသော်၎င်း၊ နုတ်ထွက်ခွင့် ငြင်းပယ်ခြင်း အာဏာသော်၎င်း—ပေးနိုင်ခွင့်မရှိ ၉၅

နိုင်ငံခြားငွေလဲလှယ်ကြေးကြေပ်မှု အက်ဉပဒေ အာဘော်နှင့်အရ၊ နိုင်ငံခြားသို့တင်ပို့သော ပစ္စည်း၏တန်ဘိုးနှင့်ညီမျှသော နိုင်ငံခြားငွေကို မြန်မာပြည်တွင်းသို့ တင်သွင်းရမည်။ ၎င်းအက်ဉပဒေပုဒ်မ ၁၃၊ ပုဒ်မငယ် (၂) အရ၊ မည်သည့် အခါ တရားမစွဲနိုင်ခြင်း၊ မည်သည့်အခါတရားစွဲနိုင်ခြင်း၊ ယင်းအက်ဉပဒေ ပုဒ်မ ၁၁ ပါ ပြဋ္ဌာန်းချက်များ၊ ထိုဥပဒေပုဒ်မ ၁၃၊ ပုဒ်မငယ်(၁)နှင့်မဆိုင်သော သူများနှင့်လည်း သက်ဆိုင်ခြင်း။ ။ဆုံးဖြတ်ချက်။ ။နိုင်ငံခြားငွေလဲလှယ်မှုကြေးကြေပ်ရေးမှူးက၊ လျှောက်ထားသူအား၊ ထိုင်း (ယိုးဒယား) ပြည်သို့ တင်ပို့ရောင်းချသော သတ္တုများ၏တန်ဘိုးကို စတာလင်ငွေဖြင့်၊ မြန်မာပြည်သို့တင်သွင်းရန် စာဖြင့်ညွှန်ကြားသည်တွင်၊ လျှောက်ထားသူက၊ မိမိမှာ ထိုင်းပြည်မှလုပ်သားများ၊ ပစ္စည်းများကို အသုံးပြုပြီးတူးဖေါ်ရသဖြင့်၊ ရောင်းချရသည့်ငွေအားလုံးကို တင်ပို့ခြင်းမပြုနိုင်ကြောင်း ဖေါ်ပြပါစရိတ်များနုတ်ပြီးမှ၊ကျန်ငွေကိုသာ မြန်မာပြည်ကိုတင်ပို့နိုင်မည်ဖြစ်ကြောင်းနှင့် ပြန်ကြားလျှောက်ထားလေသည်။ ထိုလျှောက်ထားချက်သည် တရားဝင်သော လျှောက်ထားချက်မဟုတ်ဟု။ အဘယ်ကြောင့်ဆိုသော်၊ နိုင်ငံခြားငွေလဲလှယ်ရေးကြေးကြေပ်မှု အက်ဉပဒေ၏ အာဘော်နှင့်အရအားဖြင့်၊ နိုင်ငံခြားသို့ ကုန်ပစ္စည်းတင်ပို့သူတို့သည်၊ ထိုပစ္စည်း၏တန်ဘိုးနှင့်ညီမျှသော နိုင်ငံခြား၏ငွေကို မြန်မာပြည်တွင်းသို့ တင်သွင်းရမည်ဖြစ်သည်။ လျှောက်ထားသူသည်၊ နိုင်ငံခြားငွေလဲလှယ်မှုကြေးကြေပ်ရေး ဥပဒေပုဒ်မ ၁၃၊ ပုဒ်မငယ် (၁) အရ၊ ထိုပစ္စည်းများ၏တန်ဘိုးကို၊ နိုင်ငံခြားငွေဖြင့်၊ ကြေးကြေပ်ရေးမှူးက သတ်မှတ်သောဘဏ်သို့ ပေးသွင်းပါမည်ဟု ကတိမပြုခဲ့

စာမျက်နှာ

သည်ဖြစ်ရကား၊ ထိုပုဒ်မ၏ ပုဒ်မငယ် (၂) အရ တရားစွဲဆိုခြင်းမပြုနိုင်။ ထို့ပြင်လည်း၊ ထိုပုဒ်မငယ် (၂) ၏ခြွင်းချက်အရ၊ ထိုပုဒ်မငယ်ပါပြဋ္ဌာန်း ချက်များကို ချိုးဖေါက်ကြောင်းနှင့် တရားစွဲဆိုလျှင်၊ ပုဒ်မငယ်(၁)အရ၊ သတ်မှတ်ထားသောကာလသည် ကျော်လွန်ပြီး၊ နိုင်ငံခြားငွေကို သတ်မှတ် သောနည်းအတိုင်း၊ ပေးသွင်းခြင်းမပြုမှသာလျှင် တရားစွဲဆိုရမည်ဟု ပြဋ္ဌာန်းထားသဖြင့်၊ ပုဒ်မ ၁၃၊ ပုဒ်မငယ် (၁) ပါပြဋ္ဌာန်းချက်များကိုချိုး ဖေါက်မှသာလျှင် ပုဒ်မငယ် (၂) အရ၊တရားစွဲဆိုနိုင်သည်ဟု ယူဆရပေ မည်။ သို့သော်ငြားလည်း၊ နိုင်ငံခြားငွေလဲလှယ်မှုကြီးကြပ်ရေး အက်ဥပဒေ ပုဒ်မ ၁၁ ပါပြဋ္ဌာန်းချက်များသည်၊ ရသင့်ရထိုက်သော နိုင်ငံခြားငွေ မြန်မာပြည်တွင်းသို့ရောက်ရှိရေးကို ဖင့်နှေးစေသည့်သူများအား၊ အပြစ် ဒဏ်ပေးရန်အတွက် ပြဋ္ဌာန်းထားသည်ဖြစ်ရာ၊ ထိုဥပဒေပုဒ်မ ၁၃၊ ပုဒ်မ ငယ် (၁) နှင့် မဆိုင်သောသူများနှင့်လည်း သက်ဆိုင်ကြောင်း တွေ့ရှိရ လေသည်။

အယ်(လ်)၊ အဖတ် နှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော် ... ၁၄၁

ပြည်နယ်ဝန်ကြီးများခန့်ထားခြင်းကိစ္စ—နိုင်ငံတော်ဝန်ကြီးချုပ်၏အာဏာများ... ၈၁

ပြည်သူ့လွှတ်တော်အမတ်နုတ်ထွက်မှု—နုတ်ထွက်မှုမူဝါဒခြင်းကိစ္စ ... ၉၄

————————နည်းဥပဒေများ—ဌာနတို့မှာ ပြည်သူ့လွှတ်တော် အတွင်းသာ သုံးရမည့် နည်းဥပဒေများဖြစ်၍၊ လွှတ်တော်အပြင်ပဘို့ ပေါ် ပေါက်သောကိစ္စများအတွက် မသက်ရောက်နိုင်ခြေ ... ၉၅

————————လုပ်ငန်းစဉ်နည်းဥပဒေ (၂)—အခြေခံ ဥပဒေ ပြဋ္ဌာန်း ချက်နှင့် ဆန့်ကျင်နေခြင်း ၉၄

ပြည်ထောင်စု မြန်မာနိုင်ငံသားဖြစ်မှု အက်ဥပဒေ၊ ပုဒ်မ ၁၂ (၃) နိုင်ငံ သားမဟုတ်သော မိဘနှစ်ပါးမှ ပြည်ထောင်စုအတွင်းမွေးဖွါးသူတဦး၊ နိုင်ငံသားလက်မှတ် ရရှိလိုကြောင်း လျှောက်ထားနိုင်ခြင်း၊ မည်သည့် အရည်အချင်းရှိအပ်သည် "ထာဝစဉ်နေထိုင်သူ"ဟူသောစကား၏ အဓိပ္ပါယ်၊ စစ်ဘေးစစ်ဒဏ်မှ လွတ်မြောက်ရန်၊ မြန်မာပြည်မှအခြား နိုင်ငံများတွင်သွားနေစဉ်သေဆုံးသူ။ ။ဆုံးဖြတ်ချက်။ ပြည်ထောင်စု မြန်မာနိုင်ငံသားဖြစ်မှု အက်ဥပဒေပုဒ်မ ၁၂ (၃) အရ၊ ပြည်ထောင်စု အတွင်းတွင် ပြည်ထောင်စု၏ အာဏာအောက်၌ ထာဝစဉ်နေထိုင် သည့် နိုင်ငံသားမဟုတ်သော မိဘနှစ်ပါးမှ ပြည်ထောင်စုအတွင်းတွင် မွေးဖွါးသူတဦးသည် အကျင့်စာရိတ္တကောင်းမွန်သည်ဖြစ်၍၊ အရည် အချင်းချို့ငဲ့သူလည်းမဟုတ်လျှင်၊ ၁၉၅၅ ခုနှစ်၊ ဧပြီလ ၁ ရက်နေ့ မတိုင်မီ နိုင်ငံသားလက်မှတ် ရရှိလိုကြောင်း လျှောက်ထားနိုင်သည်။ လျှောက်သူသည် ပြည်ထောင်စုတွင် ထာဝစဉ်နေထိုင်သူ ဖြစ်ရ မည်။ ။အိန္ဒိယလူမျိုးဖြစ်သူ၊ လျှောက်သူ၏ဘခင်သည် မြန်မာပြည် ၌ နှစ်ပေါင်း ၅၀ ကျော်မှ ထာဝစဉ်နေထိုင်လာပြီး၊စစ်ဘေးစစ်ဒဏ် ကြောင့် ခေတ္တအခြားတိုင်းပြည်များတွင် သွားနေစဉ် သေဆုံးသည့်

စာမျက်နှာ

အတွက်၊ ၎င်းသေသူမှာ မြန်မာပြည်၌ ''ထာဝစဉ်နေထိုင်သူ'' မဟုတ်ဟု ဥပဒေသဘောအရ ကောက်ယူရန်မဖြစ်နိုင်။ မြန်မာနိုင်ငံသို့ ပြန်လည်နေထိုင်ရန် ဆန္ဒရှိလျက်ဖြင့်၊ နိုင်ငံရပ်ခြားသို့ သွားရောက်ခြင်းသည် ''ထာဝစဉ်နေထိုင်သူ''အဖြစ်ကိုထိခိုက်စေနိုင်မည်မဟုတ်ချေ။ စစ်ဘေးစစ်ဒဏ်မှ လွတ်မြောက်ရန် မြန်မာပြည်မှ အမြောက်အများ အခြားနိုင်ငံများသို့ပြေးကြသည်ကို မြန်မာပြည်မှအပြီးအပြတ်ထွက်ခွာသွားကြသည်ဟု ဆိုရန်မဖြစ်နိုင်။ ၁၉၄၆ ခုနှစ်၌ မြန်မာပြည်သို့ ပြန်လည်နေထိုင်ကြသည်ကို ထောက်ခံခြင်းအားဖြင့်၊ မြန်မာပြည်တွင် ထာဝစဉ်နေထိုင်ရန် ကြံစဉ်ကြသောသူများ ဖြစ်ကြသည်ဟု ယူဆရပေမည်။

ဟာရှင်အာမက်ဝါဟစ် နှင့် လူဝင်မှုကြီးကြပ်ရေးနှင့်အမျိုးသားမှတ်ပုံတင်ရေး ဝန်ကြီးဌာနအတွင်းဝန် ... ၁၉၀

ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေ၊ ပုဒ်မ ၆၃ (၃) ၈၁

——————၊ပုဒ်မ ၁၀၁ (၁) ၈၁

——————၊ပုဒ်မ ၁၅၀ ... ... ၁၀၂

——————၊ပုဒ်မ ၁၇ (၄) အရ၊ အခွင့်အရေး၊ ၎င်းအခွင့်အရေးကို ထိခိုက်ခြင်းမှ ကင်းလွတ်တော်ချုပ်က ကာကွယ်ပေးရန်။ ။ပြည်သူ့ ငြိမ်ဝပ်ပိပြားရေး (ထိန်းသိမ်းစောင့်ရှောက်မှု) ဥပဒေအရ၊ လူတဦးတယောက်အပေါ်၌ အရေးယူရန် အကြောင်းမလုံလောက်လျှင်၊ ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေပုဒ်မ ၁၇ (၄) အရ၊ထိုသူသည်၊ ပြည်ထောင်စုနိုင်ငံအတွင်း၊ မည်သည့်နေရာ၌မဆို၊ နေထိုင်အခြေစိုက်နိုင်သော အခွင့်အရေး ရှိသဖြင့် ၎င်းအခွင့်အရေးကို ထိခိုက်ခြင်းမှ ဤရုံးတော်က ကာကွယ်ရပေမည်။

တန်ဂျုပ်စိန်(ခေါ်)ရောင်စိန် နှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံတော်အစိုးရ၊ ပြည်ထဲရေးဝန်ကြီး ၁၉၂

ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေ၊ပုဒ်မ ၁၅၁—၇၃ (၂) (ခ)—အမတ်အဖြစ်နုတ်ထွက်လျှင်၊ ဘယ်အချိန်အခါ၊ ၎င်း၏နေရာလစ်လပ်သနည်း၊ ပုဒ်မ ၇၃ (၁) (၂) (ခ)—နုတ်ထွက်ခြင်းထမြောက်ပါက၊ နုတ်ထွက်ခြင်းကို ရုပ်သိမ်းနိုင်ခွင့် လုံးဝမရှိ၊ ထွက်သည်နှင့်တပြိုင်နက်၊ ထိုအခါ၌ အမတ်၏ နေရာလစ်လပ်ခြင်း—အခြေခံဥပဒေပုဒ်မ ၀၀ (၁) အရပြုလုပ်ထားသော ပြည်သူ့လွှတ်တော်လုပ်ငန်းစဉ် နည်းဥပဒေ ၇ (၂) အခြေခံဥပဒေပုဒ်မ ၂၁၇ နည်းဥပဒေ ၇ (၂) ကို လွှတ်တော်က သတ်မှတ်ပိုင်ခွင့်မရှိ၊ ။မအူပင်မြောက်ပိုင်း မဲဆန္ဒနယ် ပြည်သူ့လွှတ်တော်အမတ် ဦးဘဦးသည် ''ပါလီမန်အမတ်အဖြစ်မှနုတ်ထွက်လိုပါကြောင်း'' ဟု ၁၉၅၀ ခုနှစ်၊ မေလ ၁၉ ရက်နေ့စွဲပါ ရေစက်တြိစာဖြင့် ။အပ်စာတိုက်မှ၊ ပြည်သူ့လွှတ်တော်ဥက္ကဋ္ဌကြီးမှတဆင့်၊ နိုင်ငံတော်သမတထံသို့ပေးပို့လိုက်ကြောင်း။ ။ဤကဲ့သို့ပြုပြီးနောက်၊ ၁၉၅၀ ခုနှစ်၊ မေလ ၂၁ ရက်နေ့၌တဖန် ''ကျွန်တော်၏နုတ်ထွက်စာကို

ပြန်လည်ရုပ်သိမ်းခွင့်ပြုပါ " ဟု လွှတ်တော် ဥက္ကဋ္ဌကြီးမှ တဆင့် နိုင်ငံတော်သမတထံသို့ မေးမြို်ပြန်လေသည်။ ။အဆိုပါစာနှစ်စောင်ကို၊သမတကြီးထံသို့ တကြိမ်တည်းတင်သွင်းရာ၊ သမတကြီးက မအူပင်မြောက်ပိုင်း မဲဆန္ဒနယ် အမတ်၏နေရာသည်၊ ၁၉၅၈ ခုနှစ်၊မေလ ၁၉ ရက်နေ့မှစ၍ လစ်လပ်သည်ဟု ကျေညာခဲ့ကြောင်း။ ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေ ပုဒ်မ ၁၅၁ အရ၊ နိုင်ငံတော်သမတကအောက်ပါဥပဒေကြောင်းဆိုင်ရာပြဿနာများကို လွှတ်တော်ချုပ်သို့ စဉ်းစားဆုံးဖြတ်စေရန် လွှဲလိုက်ကြောင်း။

(၁) အခြေခံဥပဒေပုဒ်မ ၇၃ (၂)(ခ) အရ၊ လွှတ်တော်အမတ်တဦးသည် နိုင်ငံတော်သမတထံသို့ မိမိကိုယ်တိုင်လက်မှတ်ထိုး၍ အမတ်အဖြစ်မှ နုတ်ထွက်စာတင်သွင်းခဲ့သော် ထိုနုတ်ထွက်စာကို ဥပဒေအရ ရုပ်သိမ်းနိုင်ပါသလော။

(၂) ၎င်းကဲ့သို့မရုပ်သိမ်းနိုင်ပါလျှင်၊သို့တည်းမဟုတ် မရုပ်သိမ်းလျှင် ထိုအမတ်နေရာသည် ဘယ်သောအခါ၌ လစ်လပ်ပါမည်နည်း။

ဆုံးဖြတ်ချက်။ ။အခြေခံဥပဒေပုဒ်မ ၇၃ (၁) (၂) (ခ) အရ၊နုတ်ထွက်ခြင်းထမြောက်ပါက၊ နုတ်ထွက်ခြင်းကို ရုပ်သိမ်းနိုင်ခွင့်လုံးဝမရှိ။ ။နိုင်ငံတော်သမတတွင် နုတ်ထွက်ခွင့်ကိုပေးနိုင်သောအာဏာသော်၎င်း၊ငြင်းပယ်နိုင်သည့် အာဏာသော်၎င်း လုံးဝမရှိချေ။ ။အမတ်တဦးနုတ်ထွက်သည်နှင့် တပြိုင်နက်၊ ထိုအခါ၌ ၎င်း၏နေရာလစ်လပ်ရမည်ဟု ပုဒ်မ ၇၃ (၂) (ခ) တွင် အတိအလင်းပါရှိသည်။ ။လွှတ်တော် နည်းဥပဒေများကို၊ အခြေခံဥပဒေ ပုဒ်မ ၈၀ (၁) အရပြုလုပ်သောအခါ၌ အခြေခံဥပဒေရှိ ပြဋ္ဌာန်းချက်များနှင့် မဆန့်ကျင်စေဘဲ နည်းဥပဒေများ ပြုလုပ်ရမည်။ ပြည်သူ့လွှတ်တော်နည်းဥပဒေ ၇(၂) သည် အခြေခံဥပဒေပြဋ္ဌာန်းချက်နှင့် ဆန့်ကျင်နေသည့်အပြင် လွှတ်တော်၏လုပ်ငန်းစဉ်နှင့် မူခင်းကိစ္စဆောင်ရွက်မှုများ၏ ပြင်ပသို့ရောက်နေသည်။ ပြည်သူ့လွှတ်တော်နည်းဥပဒေ ဆိုသည်မှာ၊ ပြည်သူ့လွှတ်တော်အတွင်းတွင်သာ သုံးရမည့် နည်းဥပဒေများဖြစ်၍၊ လွှတ်တော်ပြင်ပ၌ပေါ်ပေါက်သောကိစ္စများအတွက် မသက်ရောက်နိုင်ချေ။ ထို့ကြောင့်လွှတ်တော်က နည်းဥပဒေ ၇ (၂) ကိုသတ်မှတ်ပိုင်ခွင့်မရှိ။ ။အထက်ပါပြဿနာများကိုအောက်ပါအတိုင်းဖြေဆိုသည်။

(၁) အခြေခံဥပဒေပုဒ်မ ၇၃ (၂) (ခ) အရ လွှတ်တော်အမတ်တဦးသည်၊ နိုင်ငံတော်သမတထံသို့ မိမိကိုယ်တိုင်လက်မှတ်ထိုး၍ နုတ်ထွက်စာတင်သွင်းခဲ့သော် ထိုနုတ်ထွက်စာကို ဥပဒေအရ မရုပ်သိမ်းနိုင်။

(၂) ထိုအမတ်၏နေရာသည် နုတ်ထွက်စာတင်သွင်းသည့် အချိန်အခါ၌လစ်လပ်သည်။

မအူပင်မြောက်ပိုင်းမဲဆန္ဒနယ် ပြည်သူ့လွှတ်တော်အမတ် ဦးဘဦး
၏ အမတ်အဖြစ် နုတ်ထွက်လွှာမှ ပေါ်ပေါက်လာသော
ပြဿနာကို ဆုံးဖြတ်ချက်ရယူရန်လွှဲအပ်မှု ... ၉၄

ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေ ပုဒ်မ ၁၅၁ အရ၊ လွှဲအပ်မှု—၎င်းအမှုသည် ပြီးဆုံးခဲ့သည့်ကိစ္စဖြစ်၍ စဉ်းစားဝေဖန်ရန်မလို၊သို့သော်တရားလွှတ်တော်ချုပ်က နောင်အခါ၌ကဲ့သို့အလားတူ အခြေအနေမျိုးပေါ်ပေါက်လျှင် ပြေပြစ်

အောင်ဆောင်ရွက်နိုင်စေရန် စဉ်းစားစေဖန်ခြင်း၊ အခြေခံဥပဒေ ပုဒ်မ ၁၈၁ (၁) ဖ၃ (၃) နိုင်ငံခြားတရားလွှတ်တော်များ၏ စီရင်ထုံးများအကိုး အကားပြုခြင်း—အခြေခံဥပဒေများ အဓိပ္ပါယ် ကောက်သောထုံးစဉ်လာများ—ညှိနှိုင်းတိုင်ပင်ခြင်း၏အဓိပ္ပါယ်—ဥပဒေသည် မဖြစ်နိုင်သည်ကိုမရည်ရွယ်—*Lex non cogit impossibilia*—အခြေခံ ဥပဒေ ပုဒ်မ ၁၈၁ (ခ) အရ၊ ပြည်နယ်ဝန်ကြီးများခန့်အပ်ရန်၊ နိုင်ငံတော်သမတထံသို့ အမည်တင်သွင်းရာ၌၊ နိုင်ငံတော်ဝန်ကြီးချုပ်သည် ပြည်နယ်ကောင်စီများနှင့် ညှိနှိုင်းတိုင်ပင်ခြင်းမပြုဘဲ၊ အမည်များ တင်သွင်းခဲ့ရာ နိုင်ငံတော်သမတအား ပြည်နယ်ဝန်ကြီးများ ခန့်အပ်ခဲ့သည်၊ ။ဤသို့ဖြစ်ခြင်းကြောင့်၊ နိုင်ငံတော်သမတက၊ အခြေခံဥပဒေ ပုဒ်မ ၁၅၁ အရ၊ အောက်ပါပြဿနာများကို စစ်ဆေးပြီးအစီရင်ခံစာကို တရားလွှတ်တော်ချုပ်သို့လွှဲအပ်သည်။

(၁) ဤကဲ့သို့ခန့်ထားခြင်းများသည်၊ အခြေခံဥပဒေနှင့် ညီညွတ်ပါသလော။

(၂) မညီညွတ်လျှင် မည်သည့်နည်းနှင့် ညီညွတ်အောင်ဆောင်ရွက်ခန့်ထားသင့်ပါသည်။

(၃) သို့ဘည်းမဟုတ် အဆိုပါပြည်နယ်ဝန်ကြီးများကို သက်ဆိုင်ရာ ကောင်စီများနှင့် ညှိနှိုင်းတိုင်ပင်ခြင်းမပြုခြင်း မခန့်အပ်ဘဲထားသင့်ပါသလော။ ဖြေဆိုရမည့်ပြဿနာမှာ၊ ပုဒ်မ ၁၈၁ (၁) တွင်ပါရှိသော ပြဋ္ဌာန်းချက်များသည်မလိုက်နာလျှင် မနေရသော ပြဋ္ဌာန်းချက်များ ဖြစ်သလော။ ။ဆုံးဖြတ်ချက်။ ။ပဌမပြဿနာသည် နိုင်ငံတော်ဝန်ကြီးချုပ်က အမည်တင်သွင်းသည့်အတိုင်း၊ နိုင်ငံတော်သမတသည် အခြေခံဥပဒေအရ ပြုလုပ်ခဲ့ခြင်းဖြစ်၍၊ အခြေခံဥပဒေပါပြဋ္ဌာန်းချက်များနှင့် ကိုက်ညီသည်မညီသည်ဟူသော အချက်မှာပုဒ်မ ဖ၃ (၃) အရ၊စစ်ကြောမေးမြန်းနိုင်သောအချက်မဟုတ်။ ပြဿနာမှာ နိုင်ငံတော်ဝန်ကြီးချုပ်သည်၊ ကရင်ပြည်နယ်၊ ကချင်ပြည်နယ် ကောင်စီများနှင့် ညှိနှိုင်းတိုင်ပင်ခြင်းမပြုဘဲ၊ဝန်ကြီးများခန့်အပ်ရန်၊ နိုင်ငံတော်သမတထံသို့ အမည်များတင်သွင်းခြင်းမှာ၊ အခြေခံဥပဒေနှင့် ညီညွတ်သည် မညီညွတ်ဟူသောပြဿနာဖြစ်ရမည်၊ ။ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေများကို အဓိပ္ပါယ်ကောက်ရာ၌၊ တရားရုံးများလိုက်နာလေ့ရှိသော ထုံးတမ်းစဉ်လာများအချို့မှာ—

(၁) အခြေခံဥပဒေ၏အဓိပ္ပါယ်သဘောကို ကောက်ယူရာတွင် ကျဉ်းမြောင်းအောင် ကြပ်ကြပ်တည်းတည်း မကောက်ယူဘဲကျယ်ပြန့်အောင် ရက်ရက်ရောရောကောက်ယူရမည် ဖြစ်ကြောင်း၊

(၂) အခြေခံဥပဒေများသည် ခေတ်ကာလအားလျော်စွာ ပေါ်ပေါက်လာသောအဖြစ်အပျက် အကြောင်းချင်းရာများကိုလွှမ်းခြုံမိအောင် ကြီးပွါးကျယ်ပြန့်၍ လာကြရမည့် ဥပဒေများဖြစ်ကြသည်ဟု အသိအမှတ်ပြု၏ အဓိပ္ပါယ်သဘော ကောက်ယူရမည်ဖြစ်ကြောင်း၊

(၃) အခြေခံဥပဒေများတွင် ပေးချထားသော တန်ခိုးအာဏာများကို ကျယ်ပြန့်နိုင်သမျှ ကျယ်ပြန့်စေရန် အဓိပ္ပါယ်သဘော ကောက်ယူရမည် ဖြစ်ကြောင်း၊

(၄) သက်ဆိုင်ရာ နိုင်ငံ၏ ပြည်သူလူထုမှာ အကျိုးအများဆုံးဖြစ်ထွန်း
နိုင်စေမည့်သဘောအဓိပ္ပါယ်ကိုကောက်ယူရမည်ဖြစ်ကြောင်း။

လွှတ်တော်ချုပ်။ ၁၉၅၂ ခုနှစ် လွှဲအပ်မှု အမှတ် (၂)ကြည့်ပါ။ ။အခြားထုံးတမ်းစဉ်လာနှင့် နည်းဥပဒေ၊ တိုင်းပြည်ပြုလွှတ်တော်၏ ရည်ရွယ်ချက်နှင့်အကြံ အစည်များအတိုင်းဖြစ်စေရန်၊ အခြေခံဥပဒေတစောင်လုံးကို ဖြို့ချ အဓိပ္ပါယ်သဘောကောက်ယူရမည်။ အနည်းဆုံးအလားတူ အကြောင်းချင်းရာများနှင့် စဉ်လျှင်းသော ပြဋ္ဌာန်းချက်များကိုပါ ထည့်သွင်းစဉ်းစားပြီးမှ အဓိပ္ပါယ်သဘောကိုကောက်ယူရမည်။ ပုဒ်မတခု၊သို့မဟုတ် ပြဋ္ဌာန်းချက်တခု၏သဘောအဓိပ္ပါယ်သည် မရှင်းလင်းမပြတ်သားစေကာမူ၊ အခြားအလားတူပုဒ်မများပြဋ္ဌာန်းချက်များကိုပါ ထည့်သွင်း၍ စဉ်းစားလျှင်အဓိပ္ပါယ်ပေါ်လွင်ထင်ရှား၍ လာနိုင်ကြောင်း သတိပြုရမည်ဟူသော ထုံးတမ်းစဉ်လာနှင့် ဥပဒေသများဖြစ်သည်။ [(1953) B.L.R. (S.C.) 30] ကြည့်ပါ။ ။အက်ဥပဒေဖြင့်သော်၎င်း၊ အခြေခံဥပဒေဖြင့်သော်၎င်း ကိစ္စတခုခုကိုဆောင်ရွက်ရန်ပြဋ္ဌာန်းထားလျှင်၊ ထိုပြဋ္ဌာန်းချက်မှာမလုပ်မနေရသော အချက်သော်လည်းဖြစ်နိုင်သည်။ ညွှန်ကြားချက်မှသော်လည်းဖြစ်နိုင်သည်။ ခြားနားခြင်းမှာမလုပ်မနေရဟူသောအချက်ကို ရှောင်ဖယ်၍မရ၊ တသွေမတိမ်းလိုက်နာရမည်၊ ညွှန်ကြားချက်သာဖြစ်ခဲ့ပါမူ၊ လိုက်နာနိုင်သမျှလိုက်နာဆောင်ရွက်လျှင်လုံလောက်သည်။ ။တသွေမတိမ်းမလိုက်နာသည့်အတွက် ဆောင်ရွက်ချက်ပျက်ပြယ်သည်ဟု မယူဆနိုင်ချေ။ [*Woodward* v. *Sarsons*, (1875) K.B. 10. C.P. 733 at 746] ။ ။မလိုက်နာလျှင် မနေရသော ပြဋ္ဌာန်းချက်ကို မလိုက်နာဘဲပြုမူခဲ့ပါမူ ပြုမူချက်မှာလုံးဝတရားမဝင်၊ ညွှန်ကြားချက်သာဖြစ်ခဲ့ပါမူ၊ပြုမူခဲ့ခြင်းမှာတည်မြဲသည်၊ ပြဋ္ဌာန်းထားသည့်အချက်တခုသည် မလုပ်မနေရသောအချက်ဖြစ်သည်၊သို့တည်းမဟုတ် ညွှန်ကြားချက်သာ ဖြစ်သည်ဆိုသောပြဿနာကိုဆုံးဖြတ်ရာ၌ အမြဲတစေလိုက်နာရန်စည်းမျဉ်းကိုတိတိကျကျလေ့နံခါးထစ်သတ်မှတ်၍မဖြစ်နိုင်၊ တရားရုံးများ၏တာဝန်မှာ စီရင်ထုံးတွင်ညွှန်းထားသည့်အတိုင်းပြဋ္ဌာန်းချက်မှာ မည်ရွေ့မည်မျှ အရေးကြီးသည်၊ထိုပြဋ္ဌာန်းချက်သည်အဓိကရည်ရွယ်ချက်နှင့်မည်သို့သက်ဆိုင်သည်တို့ကို ချိန်ဆပြီးလျှင်၊ပြဋ္ဌာန်းချက်တခုတည်းကိုသာ အဓိပ္ပါယ်မကောက်ဘဲ သက်ဆိုင်သမျှပြဋ္ဌာန်းချက်အားလုံးကိုခြုံ၍ သုံးသပ်ရပေမည်။ [*Howard* v. *Bodington*, (1877) 2 P.D. 203 at 211 ; Craies on Statute Law, p. 242] ညှိနှိုင်းတိုင်ပင်ရမည် ဆိုသည်မှာ လိုက်နာနိုင်သမျှ လိုက်နာရမည်ဖြစ်သည်။ မလိုက်နာနိုင်၍ ပြဋ္ဌာန်းချက်ကို မလိုက်နာခြင်းနှင့် လိုက်နာနိုင်ပါလျက်၊မလိုက်နာခြင်းမှာအလွန်ခြားနားသည်။ ပြည်နယ်နှင့်တကွ၊ပြည်ထောင်စုအကျိုးကိုထောက်ထား၍၊ ဆောင်ရွက်ရန်ကိစ္စရှိသမျှကို မိမိနှင့်အတူဆောင်ရွက်နိုင်မည့်သူကို ရွေးချယ်ရာ၌ ကောင်စီ၏သဘောကို သိရှိနိုင်စေရန်ညှိနှိုင်းတိုင်ပင်ရမည်ဟု ပြဋ္ဌာန်းထားခြင်း ဖြစ်သည်။ ။ညှိနှိုင်း တိုင်ပင်ပြီးမှ (after consultation with) ဆောင်ရွက်ရမည်ဆိုသောပြဋ္ဌာန်းချက်မှာညွှန်ကြားချက်သာဖြစ်သည်။ [*Biswanath Khemka* v. *Emperor*, (1945) A.I.R. (F.C.) 67] ကြည့်ပါ။ ။တာဝန် တခုခုဆောင်ရွက်ရာ၌၊ ပြဋ္ဌာန်းထားသောနည်းအတိုင်းလုပ်ရန် လုံးဝမဖြစ်နိုင်ပါက၊ပြဋ္ဌာန်းချက်ကို လိုက်နာရန်မလို (*Lex non cogit impossibilia*) ဥပဒေ

စာမျက်နှာ

သည်မဖြစ်နိုင်သည်ကိုမရည်ရွယ်၊ ။ယခုကိစ္စတွင်ညှိနှိုင်းတိုင်ပင်ရန်မဆိုထား ဘိ၊တွေ့ဆုံရန်ပင်မဖြစ်နိုင်လောက်သောအခြေမျိုးဖြစ်နေသည်။ထို့ကြောင့်—

(၁) စောလူလှနှင့် ဒူးဝါးဇော်ရစ်တို့၏ အမည်များကို တင်သွင်းရာ၌ အခြေအနေအရ၊ပြည်နယ်ကောင်စီများနှင့် ညှိနှိုင်းတိုင်ပင်ရန် နည်းလမ်းမရှိ၍၊ ညှိနှိုင်းတိုင်ပင်ခြင်းမပြုဘဲ၊ ယာယီအားဖြင့် ခန့်အပ်ရန်၊ နိုင်ငံတော်ဝန်ကြီးချုပ်ကတင်သွင်းခြင်းမှာအခြေခံ ဥပဒေနှင့်ဆန့်ကျင်သည်ဟု မယူဆနိုင်ခဲ့။

(၂) အခြားနည်းလမ်းမရှိ။

(၃) ပြည်နယ်ဥက္ကဋ္ဌမရှိလျှင်၊ အုပ်ချုပ်ရေးကိုပင် တာဝန်ယူ၍ဆောင် ရွက်နိုင်မည့်သူရှိမည်မဟုတ်၍ မခန့်အပ်ဘဲမထားသင့်၊

ပြည်နယ်ဆိုင်ရာဝန်ကြီးများခန့်ထားခြင်းနှင့် စပ်လျဉ်း၍ပေါ်ပေါက် လာသောပြဿနာကိုဆုံးဖြတ်ချက် ရယူရန်လွှဲအပ်မှု ... ၈၁

ဒွဲစည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေ ပုဒ်မ ၁၈၁ ... ... ၈၁

———— ပုဒ်မ ၂၁၇ ... ... ၉၄

————များကို အဓိပ္ပါယ်ကောက်ရာ၌ တရားရုံးများ လိုက် နာလေ့ရှိသောထုံးတမ်းစဉ်လာများ ၈၂

မြန်မာနိုင်ငံတော် ယေဘုယျစကားရပ်အက်ဥပဒေ "အားထုတ်မှု" (attempt) ဆိုသည့်ဝေါဟာရကို အဓိပ္ပါယ်ရှင်းလင်းချက်မတွေ့ရ ... ၁၉၅

မြန်မာနိုင်ငံတော် ယေဘုယျစကားရပ် အက်ဥပဒေပုဒ်မ ၂၃ ... ၂၇

မြို့ပြဆိုင်ရာ ဌါးရမ်းခကြီးကြေးရေးအက်ဥပဒေ ပုဒ်မ ၁၁ (၁)(ဃ)အရ၊ စဉ်းစားရ မည့်အချက်များ ဌါးရမ်းခကြီးကြေးရေးဝန်၏ဆုံးဖြတ်ချက် တရားမကျင့်ထုံး ကိုဇ ဥပဒေ ၁၁ တွင် အကျုံးမဝင်။ ။ဆုံးဖြတ်ချက်။ ။မြို့ပြဆိုင်ရာ ဌါးရမ်းခကြီးကြေးရေး အက်ဥပဒေပုဒ်မ ၁၁ (၁) (ဃ)အရ၊ နှင်ထုတ် လိုမှု တရားစွဲနိုင်ရန်အတွက်၊ တရားစွဲဆိုခွင့် လက်မှတ်စာလျှောက်ထား ရာတွင်၊ အခင်းဖြစ်မြေကို လျှောက်ထားသူများသည်၊ အဆောက်အဦ ဆောက်လုပ်ရန်အတွက်၊ သဘောရိုးရိုးဖြင့် အလိုရှိ မရှိ ပြဿနာကို စဉ်းစားရမည်ဖြစ်ပေသည်။ ယင်းသို့စဉ်းစားရာ၌၊ လျှောက်ထားသူများ သည်၊ အခင်းဖြစ်မြေပေါ်၌ အဆောက်အဦတည်ဆောက်ရန် အကယ်ပင် ရည်ရွယ်ချက် ရှိ မရှိကို ထည့်သွင်းစဉ်းစားရပေလိမ့်မည်။ ဌါးရမ်းခ ကြီးကြေးရေးဝန်၏ ဆုံးဖြတ်ချက်သည်၊ တရားမကျင့်ထုံးကိုဇဥပဒေ ပုဒ်မ ၁၁ တွင် အကျုံးမဝင်ခဲ့။

ဟာဂိုအစွမ်း(လ်) ပါ ၅ နှင့် မန္တလေးမြို့၊ နယ်ပိုင်တရားမ တရား သူကြီး ပါ ၄ ... ... ၁၃၈

မြို့ပြဆိုင်ရာ ဌါးရမ်းခကြီးကြေးရေးအက်ဥပဒေ ပုဒ်မ ၁၁ (၁) (ဂ)၊ ၁၄ (က) တရားစွဲခွင့်ပေးသော အဓိန့်ကိုပယ်ဖျက်ခြင်း။ ပုဒ်မ ၁၁ (၁) (ဂ) အရ၊ အိမ်ရှင်ရသင့်ရထိုက်သော အခွင့်အရေးတို့ကို ထည့်သွင်းစဉ်းစားရမည်။ ။ ဆုံးဖြတ်ချက်။ ။မြို့ပြဆိုင်ရာ ဌါးရမ်းခကြီးကြေးရေး အက်ဥပဒေပုဒ်မ ၁၁ (၁) (ဂ)တွင်ပါရှိသော ဥပဒေအချက်အလက်များအရ၊ အိမ်ရှင်ရသင့်

စာမျက်နှာ

ရထိုက်သော အခွင့်အရေးတို့ကို ထည့်သွင်းစဉ်းစားခြင်းမပြုဘဲ၊ ၎င်း အက်ဥပဒေပုဒ်မ ၁၁ (၁) (ဂ)၊ ၁၄ (က)အရ၊ ငှါးရမ်းခကြိုးကြေပ်ရေး ဝန်ထံတွင် တရားစွဲခွင့် လျှောက်တောင်းသဖြင့်၊ ကြိုးကြေပ်ရေးဝန်က ထုတ် ပေးသော တရားစွဲခွင့်အမိန့်ကို၊ တရားရုံးတော်ကပယ်ဖျက်ခဲ့လျှင်၊ အထင် အရှားမှားယွင်းသည်။ ဦးလူကလေးနှင့် မောင်သောင်းတင် ပါ ၄၊ တရားလွှတ်တော်ချုပ် တရားမအသေးအဖွဲမှုအမှတ် ၁၀၆/၅၅။ ကိုသာဒင် ပါ ၃ နှင့် ရန်ကုန်မြို့၊ မြို့ပြဆိုင်ရာ ငှါးရမ်းခကြိုးကြေပ်ရေးဝန် ပါ ၄၊ ၁၉၅၅ ခုနှစ်၊ မြန်မာပြည်စီရင်ထုံးများ၊ တရားလွှတ်တော်ချုပ် စာမျက်နှာ ၉ လိုက်နာသည်။

ဒေါ်ထွေး နှင့် အီဘရာဟင်ယဒ်အင်ကုမ္ပဏီလီမိတက် ပါ ၂ ... ၁၂၀

မြို့ပြဆိုင်ရာငှါးရမ်းခကြိုးကြေပ်ရေး အက်ဥပဒေပုဒ်မ ၁၁(၁)(ဃ)၊ ပုဒ်မ ၂၂။ ။ လျှောက်ထားသူက၊ မြို့ပြဆိုင်ရာ ငှါးရမ်းခကြိုးကြေပ်ရေး အက်ဥပဒေ ပုဒ်မ ၁၁ (၁) (ဃ) အရ၊ မိမိပိုင်မြေပေါ်တွင် အဆောက်အဦတခု ဆောက် လိုရှိ၊ ၎င်းမြေပေါ်ရှိ၊ လျှောက်ထားခံရသူအမှတ် ၁ နှင့် ၂ တို့အား ဖယ် ရှားပေးစေလိုမှု စွဲဆိုခွင့်ပြုရန်အမိန့်ကို တွဘက် လက်ထောက်မြို့ပြဆိုင်ရာ မြေငှါးခကြိုးကြေပ်ရေးအရာရှိထံတွင်လျှောက်ရာ၊ စွဲဆိုရန်အမိန့်ထုတ်ပေးလိုက် သည်၊ ထိုအမိန့်ကို၊ အလျှောက်ခံရသူနှစ်ဦးတို့က ပုဒ်မ ၂၂ အရ၊ နယ်ပိုင် တရားမတရားသူကြီးထံသို့လျှောက်ထားရာ၊ တရားသူကြီးက—

(၁) လျှောက်ထားခံရသူနှစ်ဦးတို့ အပေါ်တွင် လျှောက်လွှာတခု တည်းပူးပေါင်း၍ လျှောက်ထားခြင်းသည် ဥပဒေနှင့်မကိုက် ညီခြင်း၊

(၂) (က) အိမ်ပုံစံကိုတင်ပြခြင်းမပြုခြင်း၊

(ခ) အိမ်ဆောက်လုပ်ရန်အတွက်လိုအပ်သည့်ပစ္စည်းများအသင့်ရှိခြင်း မဖြစ်ခြင်း

ဟုအဓိကအချက်ထားပြီး၊ ကြိုးကြေပ်ရေးအရာရှိ၏အမိန့်ကိုပယ်လိုက်သည်။ ။ ဆုံးဖြတ်ချက်။ ။မြို့ပြဆိုင်ရာငှါးရမ်းခ ကြိုးကြေပ်ရေးအက်ဥပဒေပုဒ်မ ၁၁ (၁) (ဃ) အရ၊ တင်သွင်းသောလျှောက်လွှာမျိုးသည် အကျဉ်းနည်းအား ဖြင့်စစ်ဆေးစီရင်ရမည့်ကိစ္စမျိုးသာဖြစ်သည်။ တရားမကျင့်ထုံး ကိုဥပဒေတွင် ပါရှိသည့်ပြဋ္ဌာန်းချက်များအတိုင်း လိုက်နာစီရင်ရမည့်ကိစ္စမျိုး မဟုတ်ချေ။ ထိုပြင်ပုဒ်မ ၂၁ တွင်သက်သေများကို ဆင့်ခေါ်ခြင်း၊ သက်သေခံစာရွက်စာ တမ်းများကပ်ပြစေခြင်း စသည့်ကိစ္စမျိုးအတွက်သာလျှင် တရားမကျင့်ထုံး ကိုဥပဒေတွင်ပါရှိသည်အတိုင်း အာဏာရှိရမည်ဟု ပြဋ္ဌာန်းထားသည်။ ယခု ကိစ္စမှာ အိမ်ငှါးများအပေါ်တွင် ထွက်သွားစေလိုမှု တရားစွဲဆိုရန်အတွက် အခွင့်တောင်းသည့် ကိစ္စမျှသာဖြစ်သည်။ တရားမကြောင်းဖြင့် တရားစွဲဆို သည့်ကိစ္စမျိုးမဟုတ်ချေ။ စဉ်းစားရန်ပေါ်ပေါက်သည့် အကြောင်းအချက် များမှာနှစ်ဦးစလုံးအတွက် အတူတူပင်ဖြစ်သည်။ ထို့ကြောင့်လျှောက်ထား ခံရသူအိမ်ငှါးနှစ်ဦးတို့အား ပူးပေါင်း၍ လျှောက်လွှာတခုတည်းဖြင့်လျှောက်

စာမျက်နှာ

ထားခြင်းမှာ တရားဥပဒေနှင့်ဆန့်ကျင်သည်ဟုယူဆရန် မသင့်ချေ။ ဤပုဒ်မ ၁၁၊ ပုဒ်မခွဲ (၁) (ဃ) အရ လျောက်ထားသောအခါများတွင်—

(၁) အိမ်ပုံစံကိုတင်ပြခြင်း။

(၂) ဆောက်လုပ်ရန်အတွက်လိုအပ်သည့် ပစ္စည်းများ အသင့်ပုံရှိပြီး ရမည်ဟုမလိုချေ။

ဦးဘိုးခိုင် နှင့် ကာစင်အလီ ပါ ၃ ... ... ၃၅

ရန်ကုန်မြို့တော် မြို့နယ်စီပါယ်အက်ဥပဒေ ပုဒ်မ ၂၃၀၊ ၂၃၃ ရွေးကောက်ပွဲဆိုင်ရာ နည်းဥပဒေများကို ပြင်ဆင်နိုင်ခွင့်အာဏာ ၂၇

ရန်ကုန်မြို့နယ်စီပါယ်ရွေးကောက်ပွဲ နည်းဥပဒေ ၃၀၊ ၃၁၊ ၃၂ ... ၂၆

လယ်ယာမြေနိုင်ငံပိုင်ပြုလုပ်ရေး အက်ဥပဒေပုဒ်မ ၆၊ နည်းဥပဒေ ၄၃ (၄) ဆုံးဖြတ်ချက်။ ။လယ်ယာမြေ နိုင်ငံပိုင်ပြုလုပ်ရေး နည်းဥပဒေ ၄၃ (၄)အရမှာ နိုင်ငံတော်က ပြန်လည်သိမ်းယူခြင်းမှ ကင်းလွတ်ခွင့်ပြုရန် လျောက်ထားသူ အိမ်ထောင်သားစုသည်၊ မိမိတို့ပိုင်မြေအနက် မည်သည့်မြေကို ကင်းလွတ်ခွင့် ပြုစေလိုကြောင်း ရွေးချယ်နိုင်ခွင့်ရှိသည်။

ဒေါ်သဲနွဲ့ နှင့် မောင်သန်းဇေ ပါ ၅ ... ... ၁၅

လယ်ယာလုပ်ကိုင်သူတို့ ကြွေးမြီသက်သာရေးဥပဒေ (၁၉၄၇ ခုနှစ်) ပုဒ်မ ၂ (ဃ) ပုဒ်မ ၂၃။ ။ဆုံးဖြတ်ချက်။ ။၁၉၄၇ ခုနှစ်၊ လယ်ယာလုပ်ကိုင်သူတို့ကြွေးမြီသက်သာရေး ဥပဒေပုဒ်မ ၂၃ အရ၊ အယူခံ၊ သို့မဟုတ်ပြင်ဆင်ရန်လျောက်လွှာကို တင်သွင်းခြင်းကို တားမြစ်ထားသော်လည်း၊ နိုင်ငံတော်သမတသည် အဖွဲ့၏အမှုတွဲကိုတောင်းယူ၍ ချမှတ်သည့်အမိန့်မှာ၊ တရားဥပဒေနှင့်မညီ၊ သို့တည်းမဟုတ် လွဲချော်မှားယွင်းသည့် လက္ခဏာရှိလျှင် အဖွဲ့၏အမိန့်ကိုပြောင်းလဲနိုင်သည်။ ထိုပုဒ်မတွင်သက်ဆိုင်သောသူများအား အသိပေးရမည်ဟုမဆိုခြားသော်လည်း၊ အမိန့်ကိုပြင်ဆင်ပါက နှစ်နာမည့်သူကိုချေပရန်အခွင့်အရေးပေးမှသာသင့်တော်မည်။

ဒေါ်ငြိမ်းနှင့်ပြည်ထောင်စုမြန်မာနိုင်ငံတော်အစိုးရ ပါ ၄ ... ၃၀

လူဝင်မှုကြီးကြပ်ရေး (လတ်တလောပြဋ္ဌာန်းချက်များ) အက်ဥပဒေ ပုဒ်မ ၇ ကိုပြင်ဆင်ခြင်းမပြုမီက၊ နိုင်ငံတော်သမတနှင့် ထိုအက်ဥပဒေ ၇ ပုဒ်မ ငယ်(၁)အရ ခန့်အပ်သောအာဏာပိုင်တို့၏ အာဏာ။ ။ယင်းအက်ဥပဒေ ပုဒ်မ ၇ ကိုပြင်ဆင်ပြီးနောက်၊ နိုင်ငံတော်သမတနှင့် နိုင်ငံတော်သမတက ခန့်အပ်သည့်အာဏာပိုင်တို့၏အာဏာများ။ ၎င်းအာဏာများအရ၊ တရားရုံးတော်များစစ်ဆေးစီရင်သည့်နည်းတူ စစ်ဆေးစီရင်ခွင့်ရှိသဖြင့်၊ ထိုအာဏာများမှာ၊ အာဏာချုပ်ရေးနှင့် သက်ဆိုင်သောအာဏာဟု မယူဆနိုင်။ ။ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံ ဥပဒေ၊ ပုဒ်မ ၁၅၀ သက်ရောက်သည့် သဘော၊ ။ ဆုံးဖြတ်ချက်။ ။လူဝင်မှုကြီးကြပ်ရေး (လတ်တလော ပြဋ္ဌာန်းချက်များ) အက်ဥပဒေပုဒ်မ ၇ ကိုပြင်ဆင်ခြင်းမပြုမီက၊ နိုင်ငံတော်သမတသည်၎င်း၊ ထိုအက်ဥပဒေပုဒ်မ ၇၊ ပုဒ်မငယ် (၁) အရ၊ ခန့်အပ်သော အာဏာပိုင်သည်၎င်း၊ ထိုအက်ဥပဒေပုဒ်မတခုခုကို၊ သို့တည်းမဟုတ် ထိုအက်ဥပဒေအရ၊ ပြဋ္ဌာန်းထားသောနည်းဥပဒေတခုခုကို ကျူးလွန်ကြောင်းဖြင့်၊ တရားရုံး

စာမျက်နှာ

တော်က၊ အပြစ်ပေးခံရသူ၊နိုင်ငံခြားသားအား၊ ပြည်နှင်ဒဏ်ခတ်နိုင်သည်ဟု ပြဋ္ဌာန်းထားလေသည်။ ။ယင်းအက်ဥပဒေ ပုဒ်မ ၇ ကို၊ ၁၉၅၇ ခု နှစ်၊ အက်ဥပဒေအမှတ် ၃၉ အရပြင်ဆင်ရာတွင် နိုင်ငံတော်သမတသည်ဖြစ်စေ၊ နိုင်ငံတော်သမတက ခန့်အပ်သည့် အာဏာပိုင်သည်ဖြစ်စေ၊ အဆိုပါအက်ဥပဒေ၊ သို့တည်းမဟုတ် နည်းဥပဒေကိုချိုးဖောက်သူ နိုင်ငံခြားသားအား၊ တရားစွဲမည့်အစား၊ ပြည်နှင်ဒဏ်ခတ်နိုင်ကြောင်းနှင့်၊ ပြဋ္ဌာန်းလိုက်လေသည်။ ထို့ပြင်လည်း ယင်းသို့ပြည်နှင်ဒဏ်ခတ်ခြင်းမပြုမီ၊ နိုင်ငံခြားသားတဦးသည်၊ ထိုအက်ဥပဒေကိုသော်ငင်း၊ အက်ဥပဒေအရ ပြဋ္ဌာန်းသည့်နည်းဥပဒေတရပ်ရပ်ကိုသော်ငင်း၊ ကျူးလွန်သည်၊ မကျူးလွန်သည်ကို ဆုံးဖြတ်ပိုင်ခွင့်ရှိသည်ဟု ပြဋ္ဌာန်းလိုက်လေသည်။ ။ယင်းသို့ ပြဋ္ဌာန်းသည်များကို ထောက်ထားသော် နိုင်ငံတော်သမတ၊ သို့တည်းမဟုတ် နိုင်ငံတော်သမတ ခန့်အပ်သောအာဏာပိုင်က၊ နိုင်ငံခြားသားတဦးဦးသည်၊ အဆိုပါအက်ဥပဒေနှင့် ဆန့်ကျင်သောပြစ်မှုကို ကျူးလွန်သည့်မှုခင်းကိစ္စ၌ တရားရုံးတော်များ စစ်ဆေးစီရင်သည့်နည်းတူ စစ်ဆေးစီရင်ခွင့်ရှိသည်မှာ ထင်ရှားလေသည်။ ယင်းသို့သောတရားရုံးများနှင့် စစ်ဆေးစီရင်ပိုင်ခွင့်အာဏာမျိုးမှာ၊ အုပ်ချုပ်ရေးနှင့်သက်ဆိုင်သည့်အာဏာမျိုးဖြစ်သည်ဟုမယူဆနိုင်ပေ။ ဗွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေပုဒ်မ ၁၅၀ အရ၊ ကန့်သတ်ထားသည့် တရားစီရင်ရေးဆိုင်ရာအလုပ်ဝတ္တရားများကိုဖြစ်စေ၊ အာဏာကိုဖြစ်စေ သုံးစွဲဆောင်ရွက်သည့် သဘောသက်ရောက်သည်ဟု ယူဆရပေမည်။

ရောင်ယွန်းဆောင် နှင့် လူဝင်မှုကြီးကြပ်ရေးဝန်ကြီးဌာန ပါ၃ ... ၁၀၂

ဝါကိုင်္ဂပဋိပက္ခ အက်ဥပဒေ ပုဒ်မ ၁၄(ဂ)အရ၊ တင်သွင်းသောလျှောက်လွှာကို၊ နိုင်ငံတော်သမတက ပုဒ်မ ၉ အရ၊ ခုံရုံးတော်သို့ လွှဲအပ်ခြင်းမပြုသောကြောင့် ဥပဒေအရ ပိတ်ပင်သည်ဟုမဆိုနိုင်။ ။ဆုံးဖြတ်ချက်။ ။အလုပ်သမား ၅၆ ယောက်ကိုထုတ်ပစ်သည့်ကိစ္စနှင့်ပတ်သက်၍၊ အလုပ်ရှင်ဖြစ်သူ လျှောက်ထားခံရသူ အမှတ် ၂ နှင့် လျှောက်ထားသူများဖြစ်သူ၊ ဗမာနိုင်ငံလုံးဆိုင်ရာ ရေနံအလုပ်သမားအစည်းအရုံးအဖွဲ့ချုပ်တို့ အချင်းများကြရာ၌ ပြဿနာကို၊ လျှောက်ထားခံရသူ အမှတ် ၁ ဖြစ်သူ၊ မြန်မာနိုင်ငံတော် ဝါကိုင်္ဂပဋိပက္ခခုံရုံးသို့ တင်ပို့စစ်ဆေးစေရန်၊ နှစ်ဦးနှစ်ဘက် သဘောတူလက်မှတ်ရေးထိုးကြပြီးသည့်နောက်၊ အလုပ်ရှင်သည်၊ အလုပ်သမား ၅၆ ယောက်အား၊ အလုပ်မှထုတ်ပစ်သည်ကို ပြန်လည်ရုပ်သိမ်းလိုက်လေသည်။ ၎င်းနောက် အလုပ်ရှင်က၊ အဆိုပါအလုပ်သမား ၅၆ ယောက်ကို၊ ဝါကိုင်္ဂပဋိပက္ခခုံရုံးသို့၊ ဝါကိုင်္ဂပဋိပက္ခ ဥပဒေပုဒ်မ ၁၄(ဂ)အရ၊ ထုတ်ခွင့်ပြုပါရန်လျှောက်ထားရာ၊ လျှောက်ထားသူများက၊ အပြင်းအထန် ကန့်ကွက်လေသည်။ ခုံရုံးတော်သည်၊ နှစ်ဘက်သော အမှုသည်များ တင်ပြသည့် သက်သေများကို၊ သေချာကျနစွာစစ်ဆေးပြီးနောက်၊ အလုပ်သမားအချို့တို့ကို ထုတ်ခွင့်ပြုလေသည်။ ၎င်အမှုတွင် လျှောက်ထားသူများက အဓိကပြုသည့်အချက်မှာ အလုပ်ရှင်နှင့် အလုပ်သမားတို့၏ ကိုယ်စားလှယ်များသည်၊ ဝါကိုင်္ဂပဋိပက္ခခုံရုံးသို့ မိမိတို့၏အခင်းပြဿနာကို တင်ပို့စစ်ဆေးရန် သဘောတူလက်မှတ်ထိုးပြီးနောက်၊ အလုပ်ရှင်သည် ပုဒ်မ ၁၄(ဂ) အရ၊ အလုပ်သမား ၅၆ ယောက်ကို ထုတ်နိုင်ခွင့်မတောင်းနိုင်ဟုဆိုသည်။

သို့သော်ငြားလည်း၊ ယင်းသို့သဘောတူညီပြီးနောက်၊ နိုင်ငံတော်သမတက ထိုအက်ဥပဒေပုဒ်မ ၉ အရ၊ ခုံရုံးတော်သို့လွှဲအပ်ခြင်း မပြုသောကြောင့်၊ ပုဒ်မ ၁၄(ဂ)အရ လျှောက်ထားသည်ကို၊ ဥပဒေအရ ဝိတ်ပင်သည်ဟုမဆို နိုင်ချေ။

ဗမာနိုင်ငံလုံးဆိုင်ရာ ရေနံအလုပ်သမားအစည်းအရုံးများ အဖွဲ့ချုပ်၊ ရန်ကုန်မြို့ နှင့် မြန်မာနိုင်ငံတော် ဝါကင်္ဘပဋိပက္ခခုံရုံး ပါ ၂ ... ၁၃၄

ဝိနိစ္ဆယဌာနအက်ဥပဒေ (၁၉၁၁ ခုနှစ်)၊ ဝိနိစ္ဆယဌာန (ပြင်ဆင်ချက်) အက်ဥပဒေ(၁၉၁၆ ခုနှစ်)ကျောင်းတိုက်မှနှင်ထုတ်ပေးစေလိုမှု။ ။အမှုအတော အတွင်း မည်သူမျှမနေရ၊ ချိုပိတ်ထားရမည်ဟုကြားဖြတ်အမိန့်။ ကျောင်း တိုက်အတွင်းမှနှင်ထုတ်သည့်စီရင်ချက်အမိန့်။ ။ဒုတိယစုဒီဘက ဦးသံဝရက မိမိပုဂ္ဂလိကပိုင်ကျောင်းတိုက်များမှ၊စောဒကပုဂ္ဂိုလ်များအား ကျောင်းတိုက် မှနှင်ထုတ်ပေးစေလိုမှုကို ရန်ကုန်မြို့အလယ်ပိုင်းမြို့နယ် ဝိနိစ္ဆယရုံးတော်တွင် ၁၀-၁-၅၈ နေ့၌ တရားစွဲလေသည်။ ဝိနိစ္ဆယရုံးတော်က၊ ကျောင်းတိုက် အတွင်းတွင်၊ အမှုအတောအတွင်း၌၊ မည်သူမျှမနေရဟု ချိုပိတ်ကြားဖြတ် အမိန့်တခု ၂၁-၁-၅၈ နေ့တွင်ချမှတ်လေသည်။ ဤအမှုအတောအတွင်း၊ စောဒကပုဂ္ဂိုလ်များက၊ အလယ်ပိုင်းမြို့နယ် ဝိနိစ္ဆယဌာနတွင် မိမိတို့အဆုံး အဖြတ်ခံယူရန်သဘောမတူ၊ ၎င်းဌာနတွင် စီရင်ပိုင်ခွင့်အာဏာလုံးဝ မရှိ ကြောင်းနှစ်ကြိမ်တိုင်တိုင် ကန့်ကွက်ကြလေသည်။ အလယ်ပိုင်းဝိနိစ္ဆယဌာန က၊ ၁၈-၂-၅၈ နေ့တွင် စောဒကများကျောင်းတိုက်အတွင်းမှ ၇ ရက် အတွင်း ထွက်ခွါသွားရန် နှင်ထုတ်သည့် အမိန့်ကို ချမှတ်လေသည်။ ။ ဆုံးဖြတ်ချက်။ ။ဤအမိန့်ကရုဏ်းမှုကို ရန်ကုန်မြို့၊အလယ်ပိုင်းမြို့နယ် ဝိနိစ္ဆယ ဌာနရုံးတော်သည် စီရင်ပိုင်ခွင့်အာဏာမရှိဘဲ စီရင်ဆုံးဖြတ်ခြင်းကိုပြုခဲ့သဖြင့်၊ ၁၈-၂-၅၈ နေ့ကချမှတ်သောစီရင်ချက်သည် ဝိနိစ္ဆယဌာနနှင့် ဝိနိစ္ဆယခုံ အက်ဥပဒေနှင့် တိုက်ရိုက်ဆန့်ကျင်သောကြောင့် ပျက်ပြယ်သည်။ ၎င်းပြင်၊ ၂၁-၁-၅၈ နေ့ကချမှတ်ခဲ့သောကြားဖြတ် အမိန့်သည်လည်း အလယ် ပိုင်းမြို့နယ်ဝိနိစ္ဆယဌာနတွင် စီရင်ပိုင်ခွင့်အာဏာမရှိသဖြင့် ပျက်ပြယ်ရမည်။ အဓမ္မရုန်းရင်းဆန်ခတ်အမှုအခင်းမျိုးမဖြစ်ပွါးနိုင်ရန်တားဆီးဘို့ ကြားဖြတ် အမိန့်မျိုးထုတ်နိုင်သည့်အာဏာသည် မည်သူထံတွင်မရှိ၊ ဤကဲ့သို့အဓမ္မအမှု မျိုးကိုတားဆီးနိုင်ရန်နှင့် ကျောင်းတိုက်အတွင်းမှ နှင်ထုတ်သည့်အမိန့်ချမှတ် နိုင်ရန်၊ ဝိနိစ္ဆယအက်ဥပဒေကိုပြင်သင့်သည်။

ဦးဝိဇယ ပါ ၄ နှင့် ဦးပရမ ပါ ၂ ... ... ၃၉

ဝိနိစ္ဆယဌာန အက်ဥပဒေ ပုဒ်မ ၃၀၊ မရွေမပြောင်းနိုင်သော ပစ္စည်းကို လွှဲပြောင်းဆုံးဝယ် မှတ်ပုံတင်အက်ဥပဒေအရ အထမမြောက်သဖြင့်၊ ၎င်းနှင့် ပတ်သက်သည့်အမှုမျိုးကို လက်မခံရန်ပိတ်ပင်ခြင်း။ ပုဒ်မ ၃၃ (၁) ခြင်း ချက်။ ။ဆုံးဖြတ်ချက်။ မှတ်ပုံတင် အက်ဥပဒေအရမှာ မရွေမပြောင်း နိုင်သည့်ပစ္စည်းကို လွှဲပြောင်းရာတွင် မှတ်ပုံတင်သည့် စာချုပ်စာတမ်းမရှိ လျှင် မည်သည့်တရားရုံးကမျှ လက်ခံခြင်း၊ အသိအမှတ်ပြုခြင်း မရှိစေ ရန် တားမြစ်ပိတ်ပင် ထားလေသည်။ တနည်းဆိုသော် မရွေမပြောင်း နိုင်သည့် ပစ္စည်းကို မှတ်ပုံတင်သည့်စာချုပ်၊ စာတမ်းဖြင့် ပေးလွှဲခြင်း မပြုလျှင် ပေးလွှဲခြင်းအထမမြောက်ချေ။ ထို့ကြောင့် ဤကဲ့သို့ မှတ်ပုံတင်

စာမျက်နှာ

သည့် စာချုပ် စာတမ်းဖြင့် လှူဒါန်းထားခြင်း မဟုတ်သော မရွေ့မပြောင်းနိုင်သည့် ပစ္စည်းအတွက် တရားစွဲဆိုခြင်းကို တရားမရုံးများ၌ မပြုနိုင်သည့်နည်းတူ ဝိနိစ္ဆယဌာနများကလည်း ထိုအမှုမျိုးကို လက်မခံရဟု ပုဒ်မ ၃၀ က တိုက်ရိုက် ပိတ်ပင်ထားလျက်ရှိသည်။ ။ဤကဲ့သို့ ပိတ်ပင်ထားသောယေဘုယျ ဥပဒေမှာ ခြွင်းချက်အားဖြင့် ပုဒ်မ ၃၁ (၁) တွင် ပြဋ္ဌာန်းချက်ထည့်သွင်းထားလေသည်။ ထိုခြွင်းချက်မှာ မှတ်ပုံတင် ဥပဒေအရ မှတ်ပုံတင်ရုံးတွင် မှတ်ပုံတင်သည့် စာချုပ်စာတမ်း မရှိစေကာမူ မရွေ့မပြောင်းနိုင်သည့် ပစ္စည်းကို လှူဒါန်းရာ၌ ထိုလှူဒါန်းခြင်းသည် ဝိနည်းတော်နှင့် ညီသည်ဖြစ်၍ ဆိုင်ရာမြို့နယ် ဝိနိစ္ဆယဌာနတွင် ထိုလှူဒါန်းသည့် စာချုပ်စာတမ်းကို မှတ်ပုံတင်သည် လည်းဖြစ်လျှင် ထိုသို့လှူဒါန်းခြင်းသည် အထမြောက် အောင်မြင်စေရမည်ဟု ပြဋ္ဌာန်းထားလေသည်။

ဒေါ်အို ပါ ၆ နှင့် ပြည်မြို့၊ မြို့နယ်ဝိနိစ္ဆယဌာန ပါ ၄ ... ၁၀၇

သီးစားချထားရေးနည်းဥပဒေ ၈(၁) အရ အပ်နှင်းထားသော အာဏာများ၊ တဦးတယောက်ကို စေလွှတ်၍ ဆိုင်ရာ နေရာဌာနများကို ကြည့်ရှုစစ်ဆေးစေခြင်း။ ။ဆုံးဖြတ်ချက်။ ၁၉၅၃ ခု၊ သီးစား ချထားရေးနည်းဥပဒေ ၈(၁)အရ၊ တိုင်းကော်မိတီအား သက်ဆိုင်ရာအမှုသည်များနှင့် သက်သေများကို လာရောက်စေရန်ဆင့်ခေါ်ပြီး၊ သက်သေများကို ကျမ်းသစ္စာဖြင့်စစ်ဆေးခြင်း၊ ဆိုင်ရာ စာချုပ်စာတမ်းများနှင့် သက်သေခံပစ္စည်းများကို တင်ပြစေရန်ဆင့်ဆိုခြင်း၊ ဆိုင်ရာ နေရာဌာနများကို ကြည့်ရှုစစ်ဆေးခြင်း ပြုလုပ်နိုင်သည့် အာဏာများ အပ်နှင်းထားလေသည်။ အခင်းဖြစ်လယ်မြေသို့ အတွင်းရေးမှူးကိုဖြစ်စေ၊ အခြားသူ တဦးတယောက်ကိုဖြစ်စေ စေလွှတ်ပြီး စုံစမ်းစစ်ဆေးနိုင်သည့် အခွင့်အာဏာမရှိချေ။

ဦးအုန်းညွန့် ပါ ၂ နှင့် ဥက္ကဋ္ဌ၊ တနင်္သာရီတိုင်း သီးစားချထားရေး ကော်မိတီ၊ မော်လမြိုင် ပါ ၂ ... ... ၂၀၁

သီးစားချထားရေး နည်းဥပဒေ ၁၃။ ။ဆုံးဖြတ်ချက်။ ။သီးစား ချထားရေး နည်းဥပဒေ ၁၃ အရ၊ လားမည်နှစ်အတွက် သီးစားလုပ်ကိုင်လိုသူတိုင်း သည်သတ်မှတ်ထားသော အချိန်ကာလအတွင်း သက်ဆိုင်ရာ ကျေးရွာသီးစားချထားရေးအဖွဲ့သို့ လျှောက်ထားရမည်ဖြစ်သည်၊ ထိုသို့လျှောက်ထားသည့်သူများအထဲမှ ကျေးရွာသီးစားချထားရေးအဖွဲ့က သင့်တော်သူကိုသီးစားချထားရမည်ဖြစ်သည်။ ဤကဲ့သို့လျှောက်ထားခဲ့ခြင်း မရှိလျှင်၊ သီးစားလုပ်ရန်အခွင့်အရေးရနိုင်သူမဟုတ်၊ သီးစားဟောင်းလက်ငုတ်ပင်ဖြစ်လင့်က စားလာမည့်နှစ်အတွက် လုပ်ကိုင်လိုကြောင်း လျှောက်ထားခြင်း မပြုလျှင် လုပ်ကိုင်နိုင်သောအခွင့်အရေး မည်သူကမျှပေးနိုင်ခြင်းမရှိ။

အပွဲသူမိုဇစ် နှင့် ဥက္ကဋ္ဌ၊ ရခိုင်သီးစားချထားရေးအဖွဲ့ ပါ ၃ ... ၃၂

အကောက်ဘော်ဥပဒေ "အားထုတ်မှု" (attempt) ဟူသောဝေါဟာရ ရှင်းလင်းချက် မတွေ့ရ ၁၉၅

အဓမ္မမှုများကိုတားမြစ်ရန် ထုတ်နှုတ်သည့်အမိန့်အာဏာ လက်ရှိဝိနိစ္ဆယ ဥပဒေအရ မည်သူ့ထံတွင်မှမရှိခြင်း ၃၉

အလုပ်ရုံများအက်ဥပဒေ၊ ၁၉၅၁ ခုနှစ် ရည်ရွယ်ချက်၊ သတိမူရမည့်အချက်၊ ပုဒ်မ ၁၀ နှင့် ၁၁ ''အင်စပက်တော်'' ဆိုသည့်စကားရပ်၊ တွဲဘက်အင်စပက်တော်ပါဝင်ခြင်း။ ပုဒ်မ ၉၇(၁) အရ၊ အာဏာကိုတွဲဘက်အင်စပက်တော်သုံးနိုင်ခြင်း။ ပုဒ်မ ၇၃(၁)တွင် သုံးထားသည့် ''လုပ်ရလျှင်'' ဆိုသောစကားရပ်၊ ပုဒ်မ ၅၉ နှင့် ၆၂ နှင့်အညီဆောင်ရွက်သော်လည်း၊ ပုဒ်မ ၇၁(၂)အရ ကင်းလွတ်ခွင့်မရလျှင်၊ ပုဒ်မ ၇၁ (၁)ကို ချိုးဖောက်ရာရောက်ပေလိမ့်မည်။ ပုဒ်မ ၈၅၊ ၈၆၊ ပုဒ်မ ၈၅ (၁) ခြင်းချက်၊ ရည်ရွယ်ချက်၊ ထည့်သွင်းသင့်သည့်စကားရပ်၊ ထည့်သွင်းလျှင်ကောက်ယူရမည့်အဓိပ္ပါယ်၊ ၁၉၅၄ ခုနှစ်၊ အက်ဥပဒေအမှတ် ၇၄ အရ၊ ပြင်ဆင်ခဲ့ခြင်းအရ၊ ကောက်ယူနိုင်သောအဓိပ္ပါယ်၊ ၎င်းအဓိပ္ပါယ်ကောက်ယူနိုင်သောအချက်တရပ်။ ပုဒ်မ ၈၅ ပါပြဋ္ဌာန်းချက်များနှင့်ပုဒ်မ ၈၆ ပါပြဋ္ဌာန်းချက်များ ဆန့်ကျင်ခြင်း၊ ပြဋ္ဌာန်းထားသည့်အချက် မသေချာ၍ အဓိပ္ပါယ်နှစ်မျိုးကောက်နိုင်ခြင်း၊ အက်ဥပဒေများကို သုံးသပ်ဝေဘန်ရာ၌ အဓိပ္ပါယ်နှစ်မျိုးကောက်ယူနိုင်သော်၊ တရားခံသက်သာမည့်အဓိပ္ပါယ်ကိုကောက်ယူရပေမည်။ ပုဒ်မ ၈၅ တွင်မရှင်းလင်းသည့်အချက်များ။ ။ဆုံးဖြတ်ချက် ။ ။၁၉၅၁ ခုနှစ်၊ အလုပ်ရုံများ၏ အက်ဥပဒေမှာ အလုပ်သမားများနှင့် ပတ်သက်၍၊ ၎င်းတို့၏နေမှု၊ စားမှု၊ သက်သာချောင်ချိရေး၊ အလုပ်သမားတို့၏ အကျိုးဖြစ်ထွန်းရေးကို ရည်ရွယ်သည်။ လုပ်ခပိုမိုရရှိလတ်တလောသက်သာချောင်ချိမည်ဖြစ်သော်လည်း၊ အလုပ်သမားများ၏ အရှည်ကောင်းကျိုးဖြစ်ထွန်းရန် အလုပ်လုပ်ခြင်းကိုကြိုးကြပ်ရန်နှင့် အလုပ်သမားများ၏ကျန်းမာရေး၊ ဘေးရန်ကင်းရှင်းမှုနှင့် သက်သာချောင်ချိရေး အားလုံးကိုချိန်ဆပြီး ပြဋ္ဌာန်းသည့်အက်ဥပဒေဖြစ်သည်။ သို့သော် လုပ်ခ နှစ်ဆရရှိ၊ နာရီအကန့်အသတ်မရှိဘဲ နေ့စဉ်ဆက်လက်လုပ်ကိုင်ပါမူ၊ ကျန်းမာရေးကိုပင် ထိခိုက်မည်ကို သတိမူရပေမည်။ တွဲဘက်အင်စပက်တော်သည်၊ ဤအက်ဥပဒေပုဒ်မ ၉၇ (၁)အရ၊ တရားစွဲဆိုနိုင်ခွင့် အာဏာမရှိဟုလျောက်ထားချက်နှင့်ပတ်သက်၍ ၎င်းအက်ဥပဒေ အခန်း(၂)၊ ပုဒ်မ ၁၀ နှင့် ၁၁ ကိုကြည့်ရှုခြင်းအားဖြင့် ''အင်စပက်တော်'' ဆိုသည့်စကားရပ်မှာ၊ အင်စပက်တော်သာမဟုတ်၊ အင်စပက်တော်ချုပ်၊ ခရိုင်ဝန်နှင့် တွဲဘက်အင်စပက်တော်များကိုပါ ထည့်သွင်း၍ခေါ်ဝေါ်သော စကားရပ်ဖြစ်ရပေမည်။ သို့အတွက် တွဲဘက်အင်စပက်တော်သည်လည်း တရားစွဲဆိုခွင့်ရှိသူတဦးဖြစ်သည်။ ပုဒ်မ ၇၃(၁)တွင်သုံးထားသည့် ''လုပ်ရလျှင်'' ဆိုသော်စကားရပ်ကိုထောက်ရှုခြင်းအားဖြင့်၊ အလုပ်ရုံကြိုးကြပ်သူကခွင့်ပြုမှ အလုပ်သမားကလုပ်နိုင်မည်မှာထင်ရှားသည်။ ဤပုဒ်မတွင် ပုဒ်မ ၅၉ နှင့် ၆၂ ကိုဖော်ပြပြီး၊ ကင်းလွတ်ခွင့်ပေးနိုင်သော ပုဒ်မ ၇၁(၂)ကိုဖော်မပြ၍၊ သာမန်ရရှိသောအခန့်နှုန်းထက် နှစ်ဆပေး၍ ခိုင်းစေခဲ့လျှင်၊ ကင်းလွတ်ခွင့်တောင်းယူရန်မလို ဟူသောယူဆချက်ကို လက်ခံပါမူ၊ ပုဒ်မ ၇၁(၂)တွင်ပြဋ္ဌာန်းသောအချက်များမှာ လုံးဝအဓိပ္ပါယ် ရှိတော့မည်မဟုတ်၊ သာမန်နှုန်း၏နှစ်ဆမပေးဘဲ၊ အချိန်ပိုခိုင်းစေလိုလျှင်သာ ပုဒ်မ ၇၁ (၂) အရ ကင်းလွတ်ခွင့်တောင်းယူရန်လိုသည်ဟုယူဆခြင်းမှာ မဖြစ်နိုင်။ ပုဒ်မ ၅၉ နှင့် ၆၂ တွင်ပြဋ္ဌာန်းထားသောအချိန်ကန့်သတ်ချက်များမှ ပုဒ်မ ၇၁ (၂) အရ၊ ကင်းလွတ်ခွင့်ကို မယူဘဲနှင့် အလုပ်သမားတဦးတယောက်ကို၊

ကန့်သတ်သည့်အချိန်ထက်ပိုမိရှိ အလုပ်လုပ်ခွင့်ပြုခဲ့ပါမူ၊ သာမန်အခန့်နှုန်း ထက် နှစ်ဆပင်ပေးငြားသော်လည်း၊ ပုဒ်မ ၇၁ (၁) ကို ချိုးဖေါက်ရာ ရောက်ပေလိမ့်မည်။ ၁၉၅၄ ခုနှစ်တွင်၊ အက်ဥပဒေအမှတ် ၄၇ အရ၊ ပုဒ်မ ၀၅ ၏ လက်ရှိခြွင်းချက်ကို အပိုဒ်ငယ် (၂) ဟု မှတ်သားထားပြီး အပိုဒ်ငယ်(၁)အဖြစ်ဖြင့်ပြင်ဆင်ရာ၌၊ ရည်ရွယ်ချက်မှာ ကင်းလွတ်ခွင့်မရဘဲ နှင့် အချိန်ပိုလုပ်ခွင့်ပေးခဲ့ပါမူ၊ ပဌမအကြိမ်ဆန့်ကျင်လျှင်ပင် အနည်းဆုံး ဒဏ်ငွေ ၅၀၀ တပ်ရမည်ဟုဖြစ်ပါက၊ ပုဒ်မ ၀၅ တွင် ခြွင်းချက်အနေနှင့် မထည့်သွင်းဘဲ၊ "ဒဏ်နှစ်ရပ်လုံးဖြစ်စေ စီရင်ခြင်းခံရမည်" ဟူသောစကား ရပ်နောက်တွင် ထည့်သင့်သည်။ ဤကဲ့သို့ထည့်သွင်းမှ စကားအဓိပ္ပါယ် တမျိုးသာကောက်ယူနိုင်မည်။ ဤကဲ့သို့ထည့်သွင်းခဲ့ပါမူ၊ အချိန်ပိုလုပ်စေ သည့်ဆန့်ကျင်ခြင်းမှအပ၊ အခြားနည်းဖြင့် ဆန့်ကျင်ခြင်းများကို ဒဏ်ငွေ ၅၀၀ ထက်မပို၊ သို့မဟုတ် ထောင်ဒဏ်သုံးလထက်မပိုသော ပြစ်ဒဏ် ကို သတ်မှတ်နိုင်ပြီး၊ အချိန်ပိုလုပ်စေခဲ့သော်၊ ငွေဒဏ်တပ်လျှင် ၅၀၀၊ သို့မဟုတ် ပုဒ်မ ၇၃(၁)တွင်ပြဋ္ဌာန်းထားသည့် လုပ်ခကြေးငွေနှုန်းဆနှင့် ညီမျှသောငွေ၊ ထိုငွေဒဏ်နှစ်ရပ်အနက် များရာငွေဒဏ်ကို သတ်မှတ်ရမည် ဟု အဓိပ္ပါယ်ကောက်ယူရပေမည်။ သို့သော် ၁၉၅၄ ခုနှစ်က ပြင်ဆင်ခဲ့ သည့်အတိုင်းဆိုလျှင်၊ ပုဒ်မကြီး ၀၅ တွင် သတ်မှတ်သော အပြစ်ဒဏ်စာ ပိုဒ်နှင့် ခြွင်းချက်အပိုဒ်(၁)တို့ကြားတွင်ပြဋ္ဌာန်းချက်တခု ရှိနေသေးသည်။ ထိုအချက်မှာ၊ ဆက်လက်ရှိဆန့်ကျင်နေခြင်းနှင့်သက်ဆိုင်ရှိ ခြွင်းချက်အပိုဒ် (၁)မှာ ဆက်လက်ဆန့်ကျင်ရှိ ထပ်မံတရားစွဲဆိုသောအမှုဦးသာ ချမှတ် ရမည့်အပြစ်ဒဏ်သာဖြစ်ရမည်ဟု အဓိပ္ပါယ်ကောက်ယူနိုင်သည်။ ယင်းသို့ အဓိပ္ပါယ်ကောက်ယူနိုင်သည့် အချက်တရပ်ကား၊ ပဌမအကြိမ်ကျူးလွန် သည့်ပြစ်မှုအတွက်၊ ပုဒ်မ ၀၅၊ ခြွင်းချက် အပိုဒ်(၁)အရ၊ ငွေဒဏ်စီရင်ရာ၌ ပုဒ်မ ၇၃ (၁)တွင် ပြဋ္ဌာန်းထားသည့် အချိန်ပိုလုပ်ခကြေးငွေ၏နှုန်းဆနှင့် ညီမျှသောငွေဒဏ်သည်၊ ကုပ်ဂါးရာအောက်ဖြစ်လျှင်၊ ငွေဒဏ် ကုပ်ဂါးရာ စီရင်ရမည်ဖြစ်သော်လည်း၊ နောက်ထပ်တဖန် အလားတူပြစ်မှုကိုကျူးလွန် သည့်အခါ၌၊ ပုဒ်မ ၀၆ အရ၊ အပြစ်ပေးရာတွင် အနည်းဆုံးနှုန်းရာမှ အများဆုံး တထောင်ထက်မပိုသော ငွေဒဏ်ကိုစီရင်နိုင်သည်။ ထိုကြောင့် ပဌမအကြိမ်ကျူးလွန်သည့်ပြစ်မှုအတွက် ငွေဒဏ်ဂါးရာစီရင်ရမည်ဖြစ်သော်လည်း၊ ဒုတိယအကြိမ်ကျူးလွန်သည့်ပြစ်မှုအတွက်၊ ငွေဒဏ်နှစ်ရာ၊ သုံးရာ စသည် စီရင်နိုင်သည်ဖြစ်သဖြင့်၊ ပုဒ်မ ၀၅ ပါပြဋ္ဌာန်းချက်များနှင့် ပုဒ်မ ၀၆ ပါပြဋ္ဌာန်းချက်များသည် ဆန့်ကျင်ပြီး အမြီးအမောက်မတည့်ဖြစ်ပေ မည်။ ရည်ရွယ်ချက်မှာ မည်ကဲ့သို့ပင်ဖြစ်စေကာမူ၊ ဥပဒေများကိုသုံးသပ် ဝေဘန်ရာ၌ လုပ်ရိုးလုပ်စဉ် လိုက်နာသည့်နည်းအတိုင်း၊ အဓိပ္ပါယ်နှစ်မျိုး ကောက်ယူနိုင်ခဲ့သော်၊ တရားခံသက်သာမည့်အဓိပ္ပါယ်ကို ကောက်ယူရ ပေမည်။

ပြည်ထောင်စုမြန်မာနိုင်ငံတော် နှင့် အမ်၊ ဒီ၊ ဒါရွှေဝါလား၊ ဒါရွှေ ဝါလားနှင့်သားများဆန်စက် ပါ၂ ... ... ၁၂၃

ဥပဒေသည် မဖြစ်နိုင်သည်ကိုမရည်ရွယ် (*Lex non cogit impossibilia*) ... ၀၁

စာမျက်နှာ

ဥပဒေများကိုသုံးသပ်ဝေဘန်မှု၊ အဓိပ္ပါယ်နှစ်မျိုး ကောက်ယူနိုင်ခဲ့သော်၊ တရားခံသက်သာမည့်အဓိပ္ပါယ်ကို ကောက်ယူရမည်ဖြစ်ခြင်း ... ၁၂၇

အားထုတ်မှု(attempt)ဆိုသည့်ဝေါဟာရဥပဒေများတွင် အဓိပ္ပါယ်ရှင်းလင်းချက်မရှိ။ ။လျှောက်ထားသူသည် မူဆယ်မြို့နှင့်အနီးတဝိုက်တွင် ရေနံဆီရောင်းဝိုင်ခွင့်ရရှိသော မူဆယ်မြို့အတွက်၊ ရေနံဆီကိုယ်စားလှယ်တဦးဖြစ်သည့်အလျောက်၊ ရေနံချောင်းမှ ရေနံဆီဂါလံ ၃,၀၀၀ ကို မူဆယ်မြို့သို့ယူရာတွင် လမ်းတွင်ရှိသော တရုပ်ပြည်နှင့် မိုင် ၁၀၀ ကျော်မျက်ကွာဝေးသည့် လားရှိုးမြို့သို့ရောက်သောအခါ၊ ၎င်းရေနံဆီများကို တရုပ်ပြည်သို့ခိုးထုတ်ရန် ကြံစည်ပြီး ယူဆောင်လာသည်ဟု ယူဆရန် အကြောင်းများရှိသဖြင့် အကောက်တော်ဝန်က သယ်ယူလာသော ရေနံဆီများ၊ သံပုံးအလွတ်များကို အစိုးရဘဏ္ဍာတော်အဖြစ်ဖြင့်သိမ်းဆည်းပြီး လျှောက်ထားသူအား ဒဏ်ငွေ ၅,၄၀၀ ပေးဆောင်စေရန် အမိန့်ချမှတ်ခဲ့လေသည်။ ။ဆုံးဖြတ်ချက်။ အကောက်တော်အက်ဥပဒေများတွင်၎င်း၊ မြန်မာနိုင်ငံတော် ယေဘုယျစကားရပ်အက်ဥပဒေတွင်သော်၎င်း၊ အားထုတ်မှု(attempt)ဆိုသည့်ဝေါဟာရကို အဓိပ္ပါယ်ရှင်းလင်းချက်မတွေ့ရချေ။ ။ရေနံဆီများကိုအကောက်တော်ဝန်က သိမ်းဆည်းသောလားရှိုးမြို့သည် တရုပ်ပြည်နှင့် မိုင် ၁၀၀ ကျော်မျက်ကွာဝေး၍၊ လားရှိုးမှမူဆယ်သို့ရောက်ပြီးမှသာ တရုပ်ပြည်သို့ထိုရေနံဆီများကို ခိုးထုတ်နိုင်မည်ဖြစ်သဖြင့် လျှောက်ထားသူသည် ယင်းသို့ဖမ်းဆီးသည့်အချိန် ရေနံဆီများကို တရုပ်ပြည်သို့တင်ပို့ရန် အားထုတ်သည့် (attempt)ဟု မယူဆနိုင်ပေ။ ။နာရယာနာဆွာမီ ဝီလေးနှင့်ဘုရင်ကောစ် [(1932) Mad. Weekly Notes 545] ကို ရည်ညွှန်းသည်။

လာ(လ်)ဆင်နှင့် ဘဏ္ဍာရေးနှင့်အခွန်တော်ဝန်ကြီး ပါ ၄ ... ၁၉၅

အာဏာပေး စာချွန်တော်၊ ရန်ကုန် မြို့နိုင်စီပါယ် ရွေးကောက်ပွဲ နည်းဥပဒေ ၃၀၊ ၃၁၊ ၃၂။ ရန်ကုန်မြို့၊ မြို့နိုင်စီပါယ်ရပ်ကွက် အမှတ် ၂၀ အတွက် လျှောက်ထားသူနှင့် ဦးဘညွန့်ဆိုသူတို့နှစ်ယောက် မြို့နိုင်စီပါယ်လူကြီးအဖြစ် ယှဉ်ပြိုင်အရွေးခံကြရာ၊ ရွေးကောက်ပွဲနေ့မတိုင်မီ ဦးဘညွန့်အနိုစွဲရောက်လေသည်။ သို့အတွက် ရွေးကောက်ပွဲနှင့်သက်ဆိုင်သော နည်းဥပဒေများတွင် နည်းဥပဒေ ၃၂ (က) ကို ထပ်လောင်းဖြည့်သွင်း၍၊ ဒီမိုကရေစီ ဒေသန္တရအုပ်ချုပ်ရေးနှင့် ဒေသန္တရအဖွဲ့များ ဝန်ကြီးဌာနမှ ရွေးကောက်ပွဲအသစ်တရပ်ကျင်းပရန် ပြဋ္ဌာန်းလိုက်ကြောင်း။ ဤသို့ ပြင်ဆင်ပြဋ္ဌာန်းခွက်သည်တရားမဝင်၊ အာဏာမတည်သည့်အတွက် မိမိသာလျှင် ပို့ိင်ဘက်မရှိ၊ မြို့နိုစီပါယ်လူကြီးဖြစ်ကြောင်း၊ အာဏာပေးစာချွန်တော် လျှောက်ထားလေသည်။ ဆုံးဖြတ်ချက်။ ။လျှောက်ထားသူသည်၊ မိမိအား ယှဉ်ပြိုင်သူမရှိ မြို့နိုစီပါယ်လူကြီးဖြစ်ကြောင်း ကျေညာရန်အတွက် ဥပဒေ အထောက်အထား အကိုးအကားမရှိ။ ရန်ကုန်မြို့နိုစီပါယ် ရွေးကောက်ပွဲ နည်းဥပဒေ ၃၀၊ ၃၁၊ ၃၂ တွင် မည်ကဲ့သို့သော အခြေအနေမျိုး၌ မဲဆန္ဒပေးခြင်း မပြုရဘဲ၊ ရွေးကောက်ခြင်းခံရသည်ဟု တရားဥပဒေအရ ယူမှတ်ရမည်ကို

စာမျက်နှာ

အတိအလင်း ပြဋ္ဌာန်းထားလေသည်။ ထိုပြဋ္ဌာန်းချက်များတွင် ယှဉ်ပြိုင်အရွေးခံမည့်သူ ကွယ်လွန်အနိုင်ရောက်သဖြင့် ကျန်ရှိသော ပုဂ္ဂိုလ်အား အရွေးခံရသည်ဟု မှတ်ရန် ပြဋ္ဌာန်းချက်မရှိချေ။ လျှောက်ထားသူသည်၊ လျှောက်ထားသည့်အတိုင်း လျှောက်ထားနိုင်သည့် အခွင့်အရေးမရှိချေ။ ဤသည့်အခွင့်အရေးမျိုးမရှိရကား၊ ယခုလျှောက်ထားသော အာဏာပေးစာချွန်တော်အမိန့်ကိုရရှိပိုင်ခွင့်မရှိချေ။ [*The State of Madhya Pradesh* v. *G. C. Mandawar*, A.I.R. (1954) (S.C.) 493] ကို ထိုက်နာသည်။

ဦးထွန်းရီ နှင့် မြို့နယ်ပါယ်မင်းကြီး ပါ ၂ ... ... ၂၆

SUPREME COURT.

THE UNION OF BURMA *v.* AUNG TUN (*a*) AUNG MYINT

† S.C. 1958

Feb. 8.

AUNG TUN (*a*) AUNG MYINT *v.* THE UNION OF BURMA.*

Confessions—The duty of Court in recording confessions, s. 24, Evidence Act—Confession to be accepted or rejected as a whole.

Held : The Court is required to examine the circumstances under which the confession came to be made and recorded, and if it should appear to the Court that there was inducement or threat which led to the making of the confession, then the confession would be inadmissible. It may be taken as settled law that length of time during which an accused was in custody before he made a confession would be one factor that should be taken into consideration in enquiring into the *bona fides* of a confession; the credibility of the statements in the confession would be another factor. But in themselves they do not make the confession inadmissible. They merely provide the means of esting whether threats or inducements had been held out to an accused to persuade him to make a confession, which may be true or which may be false.

Queen-Empress v. *Narayan*, I.L.R. 25 Bom. 543; *The King* v. *San Min*, (1939) R.L.R. 97; *The King* v. *Hla Maung*, (1946) R.L.R. 102, referred to.

Held also : Where there is no other evidence to show affirmatively that any portion of the exculpatory element in a confession is false, the court must accept or reject the confession as a whole and cannot accept only the inculpatory element, while rejecting the exculpatory element as incredible.

Emperor v. *Balmukund*, I.L.R. 52 All. 1011; *Palvinder Kaur* v. *The State of Punjab*, (1953) S.C.R. Vol. IV, 94; *Maung Po Thin* v. *The Queen-Empress*, S.J.L.B. 324, approved.

Hla Maung (Government Advocate) for Union of Burma.

Than Aung, Barrister-at-Law, for Aung Tun.

Judgment delivered by

U MYINT THEIN, CHIEF JUSTICE OF THE UNION.—On the sixth of September 1955 one Maung Soe Lu,

* Criminal Misc. Applications Nos. 41 and 81 of 1957.

† *Present :* U MYINT THEIN, Chief Justice of the Union, U CHAN HTOON, J and U AUNG THA GYAW, J.

S C. 1958

THE UNION OF BURMA v. AUNG TUN (a) AUNG MYINT

AUNG TUN (a) AUNG MYINT v. THE UNION OF BURMA.

a boy of fifteen was sent out on a errand on a bicycle by his father U Nanda and failed to return. The next day the appellant Aung Tun *alias* Aung Myint came to a bicyle repair shop with the bicyle and tried to sell its Chain case. The bicycle was recognised and Aung Myint was taken to a Ward Headman. The bicycle was detained and Aung Tun was asked to come the next day and substantiate his story that he had won the bicycle at gambling. That was the last time Aung Tun was seen until he was arrested at Mandalay on 2nd February 1956. On the day the bicycle was seized, a search party found Maung Soe Lu with his throat cut.

The substantive evidence against Aung Tun is the finding of the bicycle in his possession and if he had not made a confession, the charge that could be levelled at him would be one for possession of "stolen property" a term which is defined under section 410 of the Penal Code as to include the proceeds of theft or robbery. But he made a confession before a Magistrate in which he said (1) that the boy who was unknown to him offered him a ride on the bicycle when he was waiting for a bus; he actually pedalled while the boy sat on the pillion (2) that on the way the boy got down to relieve himself, (3) that something came over him (the actual words are စိတ်ဓေါကြွန်လာသည် "my mind became disordered") which led him to stab the boy once, (4) that after the stabbing he came away on the bicycle.

At the trial the accused retracted his confession and suggested vaguely that he was induced to make the confession as he was led to believe that he would get away with a short term of imprisonment. The trial Judge rejected the plea that there was any such inducement and held the confession to be substantially

correct. He then drew the conclusion that as the bicycle was found in Aung Tun's possession the murder had been committed in the course of a robbery, an offence punishable under section 302 (1) (*c*) and sentenced him to death.

On appeal it was urged for the appellant that it would be unsafe to act on the retracted confession but the plea was not countenanced. The High Court held that the confession was substantially correct but that it was to be accepted as a whole. And thus as the statement as to the stabbing was accepted, the accompanying statement that he had acted as he did, because of a disordered mind, was also accepted. The High Court also accepted the statement that only after the stabbing the appellant thought of taking away the bicycle and that he had done so. In short the finding of the High Court was that there was no premeditation to kill but that the deed was done on a sudden impulse and that the killing was not in the course of robbing the boy of the bicycle. The conviction for murder was upheld but the sentence was altered to ten years' R.I. In regard to the bicycle the High Court held that theft had been committed, and 2 years' R. I. to run concurrently with the ten years for murder was awarded.

The offence committed by the appellant Aung Tun was clearly murder but as the law stood at the time the offence was committed (Act XXXIII of 1947), the death sentence was imperative only when (*a*) the offence was committed by a person already undergoing a sentence of life imprisonment, or (*b*) when it was done with premeditation, or (*c*) when the murder was done in the course of any offence punishable under the Penal Code with a sentence of seven years R.I. In all other cases the punishment provided was life or ten years R.I. The law has since been

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amended by Act LVI of 1957 and as it stands now the penalty for the present offence would be death. The fact that the law has been amended back to the original position makes no difference in this case, in view of section 24 of the Constitution which safeguards an offender from a penalty greater than that applicable at the time of the commission of the offence.

Government has appealed against the order of the High Court and seeks enhancement of sentence to one of death, and three arguments are advanced, these being, (1) the Court had erred in accepting the confession as a whole, (2) that the circumstances revealed premeditation and (3) even if there was no premeditation there was justification to hold that the murder was committed to facilitate the robbery of the bicycle. Aung Tun being served with a notice to show cause as to why special leave should not be granted to Government, has responded with an application for leave to appeal against the conviction itself, basing his appeal on the plea that the confession which he had retracted was the result of inducement, and therefore inadmissible in evidence. Objection was taken to Aung Tun's appeal by Government on the ground of the inordinate delay in filing it but we must condone the delay for obviously, Aung Tun would not have filed his appeal if Government had not sought enhancement of sentence. In any case under section 439 (6) of the Criminal Procedure Code, Aung Tun in showing cause against enhancement is entitled to show cause against his conviction without filing a separate appeal. Leave to appeal was granted in both cases.

It will be convenient to deal with Aung Tun's appeal first. Two points were emphasised by his learned Counsel. First, the confession which was retracted, was made late, in fact ten days after his

arrest and detention. Second, the appellant's statement in the confession that he had stabbed the boy in the chest was not correct as the actual wound was a severed throat. It was suggested therefore that the appellant was induced to make a false confession. In support *Queen-Empress* v. *Narayan* (1), *The King* v. *San Min* (2) and *The King* v. *Hla Maung* (3) were cited. These cases stress the need to comply strictly with the provisions relating to the recording of confessions and also on the duty that is cast upon a Court by section 24 of the Evidence Act. The Court is required to examine the circumstances under which the confession came to be made and recorded, and if it should appear to the Court that there was inducement or threat which led to the making of the confession, then the confession would be inadmissible. It may be taken as settled law that length of time during which an accused was in custody before he made a confession would be one factor that should be taken into consideration in enquiring into the *bonâ fides* of a confession ; the credibility of the statements in the confession would be another factor. But in themselves they do not make the confession inadmissible. They merely provide the means of testing whether threats or inducements had been held out to an accused to persuade him to make a confession, which may be true or which may be false.

We note that in this case the accused was produced before a competent magistrate to have his confession recorded. There was strict compliance with the provisions of sections 164 and 364 of the Criminal Procedure Code. From the recorded statement it is clear that the accused was given time

(1) I.L.R. 25 Bom. 543. (2) (1939) R.L.R. 97.
(3) (1946) R.L.R. 102.

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for reflection by the Magistrate. He was told that he was not bound to make a confession and he was warned that it might be used against him. He asked the accused whether there were inducements or threats and he even examined his body for marks of injuries, and only after the Magistrate was satisfied as to the voluntary nature of the accused's action, that he proceeded to examine him. We note also that that the Magistrate was produced at the trial as a witness to enable the accused to cross-examine him. However, no effective question was put to him.

In regard to the discrepancy about the wound the statement in the confession is "I gave one stab with an Army dagger which I had on me on the young boy's chest". The medical evidence is "a large incised wound, five inches by quarter inch cutting right across the front of the neck severing and exposing the carotid artery and jugular vein of both sides of the neck, and also cutting the wind pipe".

It might appear at first sight that it was a cut rather than a stab but Dr. Daw Yin Mya was emphatic that it could have been caused either by stabbing or by cutting with a sharp edged weapon such as a dagger. The position of the assailant, she further said, would be from the front. We agree with the view expressed by the High Court that in the excitement of the sudden stabbing the appellant may not have looked where the blow had actually landed.

The confession was no doubt retracted but such retraction by itself does not render it inadmissible. The lower Courts found nothing to suggest that the confession was brought about either by inducement or by threat, and bearing in mind the corroboration of the statement in the confession, afforded by the finding of the bicycle in the appellant's possession, we can find nothing which would make us disagree with

the lower Courts that the confession was credible and that it was made voluntarily.

In regard to the charge of theft, the learned Government Advocate doubted if there could be theft since the person who had possession was dead. He pointed at section 378, illustration (*g*) of the Penal Code. But the bicycle was that of U Nanda, the boy's father who had sent the boy on the bicycle. Thus U Nanda also was in possession of the bicycle just as spoons and forks actually held by guests at a party would still be in the possession of the host.

For these reasons the appeal of Aung Tun is dismissed.

Coming now to the appeal lodged by Government, the learned Government Advocate took exception to the High Court's acceptance of the confession as a whole. We can find no force in his objection. As pointed out in *Emperor* v. *Balmukund* (1) where there is no other evidence to show affirmatively that any portion of the exculpatory element in a confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as incredible. The Supreme Court of India in *Palvinder Kaur* v. *The State of Punjab* (2) has endorsed this view. This has been the accepted dictum in Burma. As far back as 1881 the Judicial Commissioner, Lower Burma said in *Maung Po Thin* v. *The Queen-Empress* (3) :

"Unless the prosecution can show that any part of a confession of an accused, so far as it exculpates him is untrue or violently improbable, it is not fair to act on so much that criminates him, omitting all that which goes to explain his own conduct and diminish the gravity of his offence. The only fair method is to take the confession as a whole."

(1) I.L.R. 52 All. 1011. (2) (1953) S.C.R. Vol. IV, 94.
(3) S.J.L.B. 324.

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THE UNION OF BURMA v. AUNG TUN (a) AUNG MYINT

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With great respect we give full endorsement to this view.

Applying the principle to the case, the other two contentions made by the Government Advocate, namely (1) that there was premeditation and (2) that the murder was committed in the course of a robbery must fail as we can find no violent improbability in the accused's confession that he acted suddenly because something came over him, and that his action in taking away the bicycle was an afterthought, an action taken only after the murder. The only evidence of murder was the retracted confession and the prosecution could not put forward anything to show that the statements made in the confession were false.

For these reasons the appeal of Government is also dismissed.

SUPREME COURT.

THE UNION OF BURMA (APPLICANT)

v.

HLA TUN U (*a*) MAUNG TIN U (RESPONDENT).*

†S.C. 1958

Feb. 7.

Suppression of Corruption Act, s. 4 (2)—Forgery.

Maung Kyi made fictitious entries in Post Office Savings Bank Pass Books and withdrew sums of money with the aid of Hla Tun U and Win Myaing. Four cases were sent up :

In Criminal Regular Trial Nos. 3 and 4 of 1957 of the Court of 3rd Special Judge (B.S.I.A. & S.I.A.B.), Maung Kyi alone was sent up and convicted under s. 4 (2) of the Suppression of Corruption Act.

In Criminal Regular Trial No. 5 of 1957, Maung Kyi, Hla Tun U and Win Myaing were sent up.

Maung Kyi was Charged under s. 4 (2) of the Suppression of Corruption Act and was convicted.

Hla Tun U was Charged under s. 4 (2) of the Suppression of Corruption Act read with s. 120-B Penal Code and was acquitted.

Win Myaing was discharged.

In Criminal Regular Trial No. 6 of 1957, Maung Kyi and Win Myaing were sent up. Maung Kyi was convicted under s. 4 (2), while Win Myaing was discharged.

Government appealed against the order of acquittal of Hla Tun U to the High Court, but appeal was dismissed.

On an application for special leave to appeal, the Supreme Court, *held* : The convictions of Maung Kyi under s. 4 (2) in Criminal cases Nos. 5 and 6 were erroneous, as the offence committed by Maung Kyi is simple forgery under the Penal Code.

Held also : The inclusion of instances of misconduct in the Explanation in the Act No. 67 of 1948 does not make them offences in themselves and the explanation must be read in relation to the offences defined in sub-clauses (*a*) to (*d*). Clearly they can be read only into the second part of sub-clause (*d*), that is to say, in relation to misconduct concerning public property entrusted. Maung Kyi was not entrusted with anything.

Held further : The Supreme Court is no ordinary Court of appeal and where justice has been meted out, it would be extremely reluctant to interfere, even if the conviction is under a wrong provision of law.

Held further : That the charge actually framed against Hla Tun U was under s. 4 (2) read with s. 120-B of the Penal Code and since Win Myaing was discharged and Maung Kyi was charged only with s. 4 (2), there could not be a conspiracy by one person, since the main culprit must be found to be guilty of conspiracy as well.

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* Criminal Misc. Application No. 2 of 1958.

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

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Tin Maung (Government Advocate) for the applicant.

Judgment delivered by

U MYINT THEIN, CHIEF JUSTICE OF THE UNION.— In November 1956 three persons who gave their names as Maung Hla, Maung Yi and Maung U, opened Savings Accounts at the Ahlone Post Office by depositing two kyats each. On the 30th November all three turned up together and made small deposits. They pointed to the endorsements in their Pass Books that they had on the 28th November deposited large sums at the Botataung Post Office and that they wanted to withdraw K 3,500 each the next day at the Ahlone Post Office. Under the rules deposit at any Post Office is permissible, and though the endorsements, duly stamped with the seal of the Botataung Post Office, appeared on all the three Pass Books, the Savings Accounts Clerk Ma E Hline was suspicious and so after consulting the Post Master she went to the Botataung Post Office. The Savings Accounts Clerk Maung Kyi of that Post Office was not there but she examined the register of deposits and found no entries. She reported to her superiors who in turn contacted the Bureau of Special Investigation. Investigation revealed that similar token deposits had been made at other Post Offices in Rangoon and that depositors had also come that day with the information that they would be requiring withdrawal of substantial sums the next day. The authorities were on the alert. The next day at Kemmendine Post Office Hla Tun U turned up and presented a passbook and requested withdrawal of K 3,500. In order to trap him the money was paid out and he was immediately arrested. Nine Pass

Books with fictitious entries of deposits made at Botataung were found on him. One Win Myaing made a similar attempt at Lanmadaw Post Office. No money was paid out but he was arrested. At the Bandoola Park Post Office another man turned up to draw K 4,000 but was asked to draw it at the General Post Office, their being no sufficient funds.

It was discovered that all the fictitious entries were made by Maung Kyi who had naturally access to the Botataung Post Office seal. Further investigation revealed that Maung Kyi had fraudulently drawn out sums out of the accounts of two depositors at the Botataung Post Office, namely Barua and Ma Shwe Chein.

On this evidence four cases were sent up. The first two, Criminal Regular Trials Nos. 3 and 4 of 1957 of the 3rd Special Judge (B.S.I.A. & S.I.A.B.), were against Maung Kyi alone in respect of his withdrawals from the accounts of Barua and Ma Shwe Chein. He was convicted under section 4 (*2*) of the Suppression of Corruption Act and sentenced to a total term of four years rigorous imprisonment. Criminal Regular Trial No. 5 was against Maung Kyi, Hla Tun U and Win Myaing while Criminal Regular No. 6 was against Maung Kyi and Win Myaing. Win Myaing was discharged in both cases, the trial Judge accepting his plea that he had acted merely at the behest of Maung Kyi. Maung Kyi was convicted in both cases under section 4 (*2*). In regard to Hla Tun U, the Judge framed a charge under section 4 (*2*) read with section 120-B of the Penal Code for conspiracy but he was later acquitted.

Government accepted Win Myaing's discharge but sought in the High Court the setting aside of the acquittal order of Hla Tun U. The appeal was however dismissed. Special leave to appeal is now

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sought before us and the actual prayer in the Memorandum of Appeal is—

"the acquittal of the respondent may be set aside and the respondent be convicted under section 4 (*1*) (*d*)/4 (2) read with section 120-B of the Penal Code."

It is necessary to delve deeper into all the cases, as we doubt the correctness of the convictions under section 4 (*2*) of Maung Kyi in Criminal Regular Nos. 5 and 6. The section provides for punishment in respect of the offence of "misconduct" as defined in section 4 (*1*) (*a*) to (*d*). (*a*) and (*b*) relate to habitual acceptance or attempts to obtain illegal gratification. (*c*) relates to obtaining any valuable thing or pecuniary advantage by corrupt or illegal means, *or* by abuse of office as a public servant. (*d*) relates to fraud to the detriment of public interest *or* misconduct in respect of public property entrusted. Under the original Act (67 of 1948) "misconduct" was restricted to these specifically mentioned modes of conduct but in 1951 an explanation was put in the Act (16 of 1951) and now "misconduct", a term which comprises both "အကျင့်ဖောက်ပြန်မှု" and "ဖောက်လွဲဖောက်ပြန်မှု" includes "မှားသောစီမံအုပ်ချုပ်မှု" "မှားသောပြုမှု" "မှားသောပျက်ကွက်မှု" "ရိုရင်းအခြေအနေများတွင်မပြုသင့်သောအရာကိုပြုမှု" and "ရိုရင်းအခြေအနေများတွင်ပြုသင့်သောအရာကိုမပြုမှု". These may be translated as "wrongful administration", "wrongful action", "wrongful inaction", "uncalled for action when circumstances prevailing did not call for such action" and "inaction when circumstances prevailing called for action".

But the inclusion of these instances of misconduct in the explanation does not make them offences in themselves and the explanation must be read in relation to the offences defined in sub-clauses (*a*) to (*d*). Clearly they can be read only into the second part of sub-clause (*d*), that is to say, in relation to

misconduct concerning public property entrusted. Maung Kyi was not entrusted with anything.

The further objection is that offences defined under section 4 (*1*) (*c*) and (*d*) are completed offences, no provision being made for attempts as in sub-clauses (*a*) and (*b*), and therefore section 511 of the Penal Code cannot be tacked on to cover Maung Kyi's abortive attempt to enrich himself. See *Ebrahim A. Aziz* v. *The Union of Burma* (1). In our judgment the offence committed by Maung Kyi was the simple but heinous crime of forgery which is punishable under the Penal Code.

We make mention of this aspect of the cases, for if we should interfere with the acquittal of Hla Tun U, interference in the cases of Maung Kyi would also be called for. We would not like to do that for clearly Maung Kyi had committed an heinous offence and the sentence awarded was appropriate, even if the conviction was under a wrong provision of law. If he were to ask for special leave to appeal we shall have no qualms about refusing such leave since this Court is no ordinary Court of Appeal, and where justice has been meted out we would be extremely reluctant to interfere.

The case against Hla Tun U is that he had used a forged document and had attempted to withdraw money. If he had been sent up alone for that it might have been a flawless case for the prosecution. But by joining him in the same trial with Maung Kyi and Win Myaing the case became complicated. Apart from objections to joinder of accused (*see* section 239 of the Criminal Procedure Code) the charge actually framed against him under section 4 (*2*) read with section 120-B of the Penal Code was bad since Win Myaing was discharged and Maung Kyi

(1) (1950) B.L.R. (H.C.) 338.

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was charged only with section 4 (2). The trial Judge should have realised that there could not be a conspiracy by one person.

As we have pointed out, interference in Hla Tun U's case will entail interference with regard to Maung Kyi and in the interests of justice, it will have to be by way of ordering new trials. We cannot merely turn a verdict of acquittal into one of conviction under section 4 (2) read with section 120-B of the Penal Code as prayed for in the Memorandum of Appeal. It would require the main culprit to be found guilty of conspiracy as well.

It may be that both Win Myaing and Hla Tun U are fortunate not to be convicted but as the trial Judge had held, they may have been only carrying out the behest of Maung Kyi. No loss was involved and these boys (they are both 19), were in custody for seven months.

For all these reasons we refuse special leave to appeal.

တရားလွှတ်တော်ချုပ်

† ၁၉၅၇ ခုနှစ်၊ ဇွန်လ ၇ ရက်။

ဒေါ်သန့စ် (လျှောက်ထားသူ)

နှင့်

မောင်သန်းဇေ ပါ ၅ (လျှောက်ထားခံရသူများ)*

လယ်ယာမြေနှင်းပိုင်ပြုလုပ်ရေးအက်ဥပဒေပုဒ်မ ၆၊ နည်းဥပဒေ ၄၃ (၄)။ ဆုံးဖြတ်ချက်။ ။ လယ်ယာမြေနှင်းပိုင်ပြုလုပ်ရေးနည်းဥပဒေ ၄၃ (၄)အရမှာ နှင်းတော်ကပြန်လည်သိမ်းယူခြင်းမှ ကင်းလွတ်ခွင့်ပြုရန် လျှောက်ထားသူ အိမ်ထောင်သားစုသည်၊ မိမိတို့ပိုင်မြေအနက် မည်သည့်မြေကိုကင်းလွတ်ခွင့်ပြုစေလိုကြောင်း ရွေးချယ်နှင်းခွင့်ရှိသည်။

လျှောက်ထားသူအကွက် ဦးဘိုးအေးလိုက်ပါဆောင်ရွက်သည်။

လျှောက်ထားခံရသူများဖြစ်ကြသော (၁)မှ (၄)အထိအစွဲက် ဦးသွယ်လိုက်ပါဆောင်ရွက်၍၊

တရားဝန်ကြီးဦးချန်ထွန်း။ ။လျှောက်ထားသူ၊ ဒေါ်သန့စ်နှင့် ၎င်း၏ဘခင် ဦးဘိုးကောက်တို့သည်၊ ဟံသာဝတီခရိုင်၊ သုံးခွမြို့နယ်၊ ဥက္ကံရွာတွင် အတူနေထိုင်ကြသူများဖြစ်သည်။ ဦးဘိုးကောက်က မိမိအမည်ဖြင့်ရှိသည့် ၆၅.၃၀ ကေခန့် လယ်မြေကိုထွန်း၊ မသဲနှစ်က ၎င်း၏အမည်ဖြင့်ရှိသည့် ၄၉.၁၁ ကေခန့် လယ်မြေကိုထွန်း လယ်ယာမြေနှင်းပိုင်ပြုလုပ်ရေး အက်ဥပဒေပုဒ်မ ၆ အရ ကင်းလွတ်ခွင့် ပေးပါရန် လျှောက်လွှာအသီးသီးဖြင့် လက်ပန်ကျိုးကျေးရွာ မြေယာကော်မတီသို့ လျှောက်ထားခဲ့လေသည်။

လျှောက်ထားခံရသူ အမှတ် (၁)မှ (၄) တို့သည် မသဲနှစ်အမည်ဖြင့်ရှိသည့် မြေကို လုပ်ကိုင်လာခဲ့ကြသူသီးစားများ ဖြစ်လေသည်။ လက်ပန်ကျိုးကျေးရွာ မြေယာကော်မတီက၊ မသဲနှစ် နှင့် ဦးဘိုးကောက်တို့သည် တောင်သူလယ်သမားအိမ်ထောင်သားစုတခုတည်းဖြစ်သည်ဟု ဆုံးဖြတ်ကြပြီးလျှင်၊ လျှောက်လွှာနှစ်ခုကို တခုတည်းပူးပေါင်း၍ ဒေါ်သန့စ်အမည်ဖြင့်ရှိသည့် လယ်မြေ ၄၉.၁၁ ကေကိုသာ

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* ၁၉၅၇ ခုနှစ်၊ တရားမဒီသေးအမှုအမှတ် ၅၄။

† နှင်းတော်တရားဝန်ကြီးချုပ် ဦးမြင့်သိန်း၊ တရားဝန်ကြီး ဦးချန်ထွန်းနှင့် တရားဝန်ကြီး ဦးဘိုးကြီးတို့ကြားနာ၍၊ တရားဝန်ကြီး ဦးချန်ထွန်း အမိန့်ချမှတ်သည်။

၁၉၅၇
ဒေါ်သန္တစ်
နှင့်
မောင်သန်းဖေ
ပါ ၅။

လျှင် ကင်းလွတ်ခွင့်ပြုလိုက်လေသည်။ ၎င်းအမိန့်ကို လျှောက်ထားခံရသူများက မကျေနပ်သဖြင့် ဟံသာဝတီခရိုင် မြေယာကော်မိတီသို့ အယူခံဝင်ရောက်ရာ၊ ကျေးရွာကော်မိတီ၏အမိန့်အတိုင်း တည်စေရန်သာလျှင် အမိန့်ချလိုက်လေသည်။ တဖန် လျှောက်ထားသူများသည် မကျေနပ်သဖြင့် လယ်ယာမြေနှိုင်းငံပိုင်ပြုလုပ်ရေး အယူခံခုံရုံးသို့ အယူခံဝင်ရောက်ကြပြန်သည်။ အယူခံခုံရုံးက ၁၈-၅-၅၇ နေ့စွဲဖြင့် ချမှတ်သောအမိန့်တွင် ဖေါ်ပြထားသည်မှာ ဦးဘိုးကောက်သည် လယ်နှစ်ယှဉ် အနက် မိမိလုပ်ကိုင်နေသော လယ်မြေ ၆၅.၃၀ ကေကိုမရွေးချယ်ဘဲ၊ လျှောက်ထားခံရသူများ သီးစားလုပ်ကိုင်နေသောမြေကို ရွေးချယ်ခဲ့သည်ဟူ၍၎င်း၊ ဦးဘိုးကောက်သည် မိမိအမည်ဖြင့် တည်ရှိသောလယ်မြေကိုသာ ရွေးချယ်ခွင့်ရှိ၍ အခြားသူ တဦးအမည်ဖြင့် တည်ရှိသောလယ်ယာမြေကို ရွေးချယ်ခွင့်မရှိဟူ၍၎င်း ဖေါ်ပြပြီး၊ ကျေးရွာနှင့် ခရိုင်ကော်မိတီများ၏ အမိန့်ကို ပယ်ဖျက်လိုက်ပြီးလျှင် ဦးဘိုးကောက်အား ၎င်းအမည်ဖြင့်ရှိသောလယ်မြေ ၆၅.၃၀ ကေအနက်မှ ရထိုက်သော ဧရိယာကိုသာ ကင်းလွတ်ခွင့်ပေးရန်ဟု အမိန့်ချမှတ်လိုက်သေသည်။

၎င်းအမိန့်ကိုမကျေနပ်သဖြင့် ဒေါ်သန္တစ်က ဤရုံးတော်သို့ လျှောက်ထားခဲ့ခြင်းဖြစ်သည်။ လယ်ယာမြေ နိုင်ငံပိုင်ပြုလုပ်ရေး နည်းဥပဒေ ၄၃ (၄) အရမှာ နိုင်ငံတော်က ပြန်လည်သိမ်းယူခြင်းမှ ကင်းလွတ်ခွင့်ပြုရန် လျှောက်ထားသူ အိမ်ထောင်သားစုသည် မိမိတို့ပိုင်မြေအနက် မည်သည့်မြေကို ကင်းလွတ်ခွင့်ပြုစေလိုကြောင်း ရွေးချယ်နိုင်ခွင့်ရှိလေသည်။ ထို့ကြောင့် ဤအမှုတွင် ဦးဘိုးကောက်နှင့် ဒေါ်သန္တစ်တို့ ပါဝင်သော အိမ်ထောင်စုသည် မိမိတို့ ပိုင်မြေနှစ်ယှဉ်အနက် ကော်မိတီများက ကင်းလွတ်ခွင့်ပေးလိုက်သော လယ်ယာမြေ ၄၉.၁၁ ကေကို ကင်းလွတ်ခွင့်ပေးသည့် လယ်မြေအဖြစ်ဖြင့် ကျေနပ်စွာ လက်ခံခဲ့ကြပြီးဖြစ်သည်။ ထို့ကြောင့် ၎င်းအိမ်ထောင်သားစု၏ မြေနှစ်ယှဉ်အနက် မိမိတို့နှစ်သက်သည့်မြေကို လက်ခံယူပြီးဖြစ်သည်တကြောင်း၊ ထိုကဲ့သို့ ၎င်းတို့နှစ်သက်သည့်မြေကို ကင်းလွတ်ခွင့်ပေးခဲ့ပြီးဖြစ်ခြင်းတို့ကြောင့် ကျေးရွာနှင့် ခရိုင်ကော်မိတီတို့၏အမိန့်သည် တရားဥပဒေနှင့် ညီညွတ်သည့် အမိန့်ဖြစ်သည်ဟု ယူဆရပေမည်။ လယ်ယာမြေ နိုင်ငံပိုင်ပြုလုပ်ရေး ခုံရုံး၏အမိန့်မှာ အမှုတွင် ဖြစ်ပျက်ခဲ့သည့် အကြောင်းအရာများကို ဖေါ်ပြရာတွင်၎င်း၊ သုံးသပ်ရာတွင်၎င်း လွဲမှားနေသည်ကို တွေ့ရသည်။ ဦးဘိုးကောက်က မိမိလုပ်ကိုင်သောမြေကို ရွေးချယ်ခြင်းမပြုဘဲ၊ လျှောက်ထားခံရသူများ သီးစားလုပ်ကိုင်နေသည့်မြေကို ရွေးချယ်ခဲ့သည်ဟု ဖေါ်ပြထားသည့်အချက်သည်၎င်း ဦးဘိုးကောက်သည် မိမိအမည်ဖြင့်တည်ရှိသော လယ်ယာမြေကိုသာ ရွေးချယ်ခွင့်ရှိ၍ အခြားသူအမည်ဖြင့်တည်ရှိသော လယ်ယာ

၁၉၅၇
ဒေါ်သန္တစ်
နှင့်
မောင်သန်းဖေ
ပါ ၅။

မြေကိုရွေးချယ်ခွင့်မရှိဟု ဖေါ်ပြချက်သည်၎င်း လွဲမှားသည်ဟုဆိုရပေမည်။ အမှန်မှာ ဦးဘိုးကောက်နှင့် ဒေါ်သန္တစ်တို့သည် အိမ်ထောင်သားစုဘဝတည်းအနေဖြင့် သာလျှင်၊ နည်းဥပဒေ ၄၃ (၄) အရ၊ မြေနှစ်ယှဉ်အနက် တခုခုကို ရွေးချယ်ခွင့်ရှိသည်မှာ ထင်ရှားသည်။ ဤအမှုဘွင် ဦးဘိုးကောက်အမည်ဖြင့်ရှိသောမြေကို ထိုအိမ်ထောင်သားစုသည် လက်လွှတ်ရပြီး ဖြစ်သည်မှာ ထင်ရှားပြန်သည်။ ထို့ပြင် လျှောက်ဆားခံရသူများသည် သီးစားလုပ်ကိုင်သူများသာဖြစ်သဖြင့်၊ လယ်ယာမြေနိုင်ငံပိုင်ပြုလုပ်ရေးကိစ္စတွင် ၎င်းဘို့သည် အကျိုးဝင်သူများဖြစ်သည်ဟု မဆိုနိုင်ချေ။ ၎င်းတို့၏ ဆက်လက်လုပ်ကိုင်ရေးကိုထိပါးစရာအကြောင်းလည်းမရှိချေ။

အဖောက်ပါအကြောင်းများကြောင့် လယ်ယာမြေ နိုင်ငံပိုင်ပြုလုပ်ရေး အယူခံခုံရုံး၏ ၁၉၅၇ ခုနှစ်၊အယူခံအမှုဘွဲ့အမှတ် ၂၃၉ တွင်ချမှတ်သော ၁၀-၁၀-၅၇ နေ့စွဲနှင့် အုပ်ချုပ်ရေးမှူးကို စုရိတ်နှင့်တကွ ပယ်ဖျက်လိုက်သည်။

ဤရုံးတော်၏ ရှေ့နေစရိတ်မှာ ငွေ ၈၅ (ငွေရှစ်ဆယ့်ငါးကျပ်တိတိ) ဖြစ်စေရမည်။

SUPREME COURT

†S.C. 1958

Mar. 31.

MAJOR SAN AUNG (APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Union Judiciary Act, s. 6—Appeal from the decision of a Court-martial—Import Control Order—S. 3 (1), Control of Imports and Exports (Temporary) Act, 1947—S. 167-A, s. 19, Sea Customs Act.

The applicant was convicted by a Court-martial of "committing a civil offence" of importing goods in contravention of the provisions of the Import Control Order made under s. 3 (*1*) of the Control of Imports and Exports (Temporary) Act, 1947.

Applicant contended that the goods were found with him in Rangoon and not at any port of entry in Burma.

Held: That under s. 6 of the Union Judiciary Act, the Supreme Court has discretion to grant special leave to appeal from a decision of a Court-martial. *Khin Maung Myint* v. *Union of Burma*, (1953) B.L.R. (S.C.) 54, relied on.

Held also: S. 3 (*2*) of the Control of Imports and Exports (Temporary) Act, 1947 provides that s. 19 of the Sea Customs Act and all the provisions of that Act are applicable to all goods the import or export of which have been prohibited or restricted. Since the Sea Customs Act applies in its entirety, s. 167 (*a*) of that Act comes into play and in this prosecution under the special rule of evidence, the burden of proof that the applicant had not imported the goods, is on the applicant himself.

Mon San Hlaing for the applicant.

Judgment delivered by

U MYINT THEIN, CHIEF JUSTICE OF THE UNION.—*Khin Maung Myint v. Union of Burma* (1) is authority for the view that section 6 of the Union Judiciary Act empowers this Court in its discretion to grant special leave to appeal from a decision of a Court-

* Criminal Misc. Application No. 8 of 1958.

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

(1) (1953) B.L.R. (S.C.) 54.

martial. This Court would however look upon the finding of a Court-martial in exactly the same way as it would the finding of a jury and it follows that there must be finality in regard to its findings of facts. Special leave to appeal may be granted if, for example, there was misdirection or if there was total lack of evidence to support the conviction. But where there is evidence, the Court-martial is competent to accept or reject it, and any decision passed upon the facts must have finality.

The applicant, who was a Battalion Commander, was charged and found guilty of "committing a civil offence" of importing goods in contravention of the provisions of the Import Control Order made under section 3 (*1*) of the Control of Imports and Exports (Temporary) Act, 1947 in that he had on the 6th April 1957, on arrival at Rangoon by train from Martaban had among his baggages a large quantity of goods not imported under license. These were some 600 yards of Nylon pieces, 986 Fountain Pens and 216 dozen Ladies' Scarves, altogether valued by the Customs at K 32,620·90 C.I.F. and at K 1,06,969·15 market value.

It was urged before us that the applicant had no knowledge of the contents of the boxes which were brought by Sergeant Bon Kyin and Corporal Saw Lwin. This aspect of the case was emphasised in the accused's statement before the Court-martial and in the submission of his counsel but it would appear that the statements of Sgt. Bon Kyin and Cpl. Saw Lwin, who had accompanied the applicant on the journey to Rangoon and who had said that the cases in question were those of the applicant and brought to Rangoon under his orders, were accepted.

The plea was raised before us that Sgt. Bon Kyin and Cpl. Saw Lwin were accomplices and

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MAJOR SAN AUNG v. THE UNION OF BURMA.

that therefore their evidence is unworthy of credit. Section 133 of the Evidence Act says that a conviction is not illegal merely because it proceeds upon the testimony of an accomplice but as a rule of prudence, Courts have insisted upon corroboration. According to Warrant Officer Maung Maung who met the applicant's party by chance on the train, Sgt. Bon Kyin had told him that the boxes brought down contained condemned properties of their Unit back-loaded to the Ordnance Department. If this statement is believed it may be justifiable to hold that Sgt. Bon Kyin had guilty knowledge as to what the contents were and that he was trying to lay off suspicion. It might therefore be held that he was an accomplice. But in regard to Cpl. Saw Lwin, as far as he was concerned, he had to unload these boxes from the station waggon that was used by the applicant, on to the verandah of the applicant's house at Kawkareik on the night of the 3rd April 1957. The next day he was asked to paint these boxes and to put marks on them. He did so. On the 5th he accompanied the party by road to Kyondo and by boat from Kyondo to Martaban and by rail from Martaban to Rangoon. He states that he had no knowledge of what these boxes contained and so, there is nothing to suggest that he was an accomplice. Quite apart from Cpl. Saw Lwin's statement, corroboration comes from the Chief Preventive Officer, Rangoon Customs, U Hla Pe. He was the Officer who intercepted the party at the Rangoon Station and tried to examine the boxes. He took the applicant to the guard's van from where the goods were being unloaded and asked the applicant to sort out his baggage. The applicant claimed all the boxes as his. This appears to us to be conclusive evidence against the applicant.

The next point urged was that since the applicant was found with the goods only in Rangoon and not at any port of entry in Burma, it was for the prosecution to show that it was he who had in fact imported the goods without a license. The argument is misconceived, for section 3 (*2*) of the Control of Imports and Exports (Temporary) Act, 1947 provides that section 19 of the Sea Customs Act and all the provisions of that Act are applicable to all goods the import or export of which have been prohibited or restricted. Since the Sea Customs Act applies in its entirety, section 167-A of that Act comes into play and in this prosecution under the special rule of evidence, the burden of proof that the applicant had not imported the goods, is on the applicant himself. No attempt was made by him to discharge this burden and as the goods were admittedly found with him, the conviction, in our judgment, was correct.

Special leave to appeal is refused and the application is dismissed.

SUPREME COURT

†S.C. 1958

Mar. 24.

MAUNG AYE PE AND ONE (APPLICANTS)

v.

SECRETARY, NATIONAL HOUSING BOARD AND ONE (RESPONDENTS).*

Certiorari—Directions in the nature of—Rangoon Development Trust Act, 1920—National Housing Board Act, 1951 (Act No. 63 of 1951)—Act No. 69 of 1954—Title by adverse possession not applicable to leaseholds in the City of Rangoon.

Held: Claim to any right, title or interest in the land by virtue of continuous possession and regular payment of rent for a period of 12 years is admissible only under s. 7 of the Lower Burma Land and Revenue Act, 1876, in respect of culturable land for acquisition of what is known as "the status of a land holder". In the absence of any writing or a registered deed, no such claim could be made to leasehold property in the City of Rangoon.

Held also: A landlord is not bound to accept payment of rent except where it is made by the lessee or his agent or his successors in title, including sub-lessees and mortgagees. The rent can be paid by a person only where there is privity of contract or privity of estate between him and the landlord.

Smith v. *Cox*, (1940) 2 K.B. 558, referred to.

Hla Tun Pru for the applicants.

Hla Maung (Government Advocate) and

Myint Toon for the respondents.

Judgment delivered by

U CHAN HTOON, J.—This application relates to a piece of land known as Third Class Lot No. 38 in Survey Block 23-M, Ahlone Circle in the City of Rangoon, and a house standing thereon known as No. 5 Tharapi Street, Ahlone, Rangoon. The land was leased by a deed dated the 3rd May 1923 to

* Civil Misc. application No. 36 of 1957.

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

one Amin Ulla for a term of 90 years by the Trustees for the Development of the City of Rangoon, which was a statutory body established by the Rangoon Development Trust Act, 1920. The house was built by the lessee as required under one of the covenants contained in the lease.

On 5th October 1956 the land and the house were sold by public auction under the orders of the National Housing Board which was established by Act No. 63 of 1951. This Board succeeds to the Trustees for the Development of the City of Rangoon under the provisions of Act No. 69 of 1954. The land and the house were sold to the 2nd respondent as being the highest bidder. The objections against the sale made by the applicants, who claim to be successors-in-title to the lessee, were rejected by the Board, and the sale was confirmed. The applicants now come to this Court to have the said sale set aside.

As the rent fell into arrears for a number of years, the National Housing Board proceeded to cancel the lease on or about 4th July 1956, exercising its powers under Clause II of the lease, which provides that if the rent or any part thereof falls into arrears for three calendar months, the lessor may cancel the lease. The Board then opened proceedings for recovery of the arrears of rent amounting to K 364·50 in Ah-La 252/RR-55, and a Sale Proclamation was issued fixing the date for the sale of the house excluding the land. But when the auction was held on 5th October 1956 the Revenue Officer of the Board sold not only the house but also the land for a sum of K 6,600.

The applicants contend that the Board had no right to sell the land and the house, claiming that they have a title to both the properties on the grounds firstly that the 1st applicant and his father purchased

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MAUNG AYE PE AND ONE v. SECRETARY, NATIONAL HOUSING BOARD AND ONE.

the properties for a sum of Rs. 300 from the owner Amin Ullah some time in the beginning of 1942 (during the period of the Japanese occupation); this was done by a verbal agreement. Secondly, the applicants have been in continuous possession and paying rent regularly for over 12 years. Thirdly, the rent fell into arrears only because the Board refused to accept their offer to pay the rent.

It must at once be said that the applicants' claim to any right, title or interest in the land by virtue of their continuous possession and regular payment of rent for a period of 12 years is entirely misconceived. This kind of claim is admissible only under section 7 of the (Lower) Burma Land and Revenue Act, 1876, in respect of culturable land for acquisition of what is known as "the status of a land holder." In the absence of any writing or a registered deed the applicants cannot claim to have acquired any title to this leasehold property.

It therefore remains to be considered whether the applicants have the right to pay the rent of the land and prevent the cancellation of the lease by virtue of their being in possession of the same. A landlord is not bound to accept payment of rent except where it is made by the lessee or his agent or his successors in title, including sub-lessees and mortgagees. Vide *Smith* v. *Cox* (1). In other words, the rent can be paid by a person only where there is privity of contract or privity of estate between him and the landlord. In the present case the applicants being total strangers to the tenancy, the landlord is under no obligation to accept any rent from them or recognise them as persons having any right, title or interest in the property. It must therefore be held that so far as the land is concerned the Board's

(1) (1940) 2 K.B. 558.

action in cancelling the lease was perfectly within its rights and powers under the covenants contained in the lease.

But it is common ground that the Board does not claim any title whatsoever to the house standing on the land except its right to proceed against it for recovery of the rents due in respect of the land. On the other hand, the applicants as persons in possession can hold it against all the world except the true owner. It must therefore be said that as against the Board the applicants are entitled to the house subject to the right of the Board for recovery of the arrears of the rent due on the land.

In our view two courses are open to the applicants, since the sale is set aside. They may pay up the arrears of rent and remove the house from the land or allow the Board to sell the house by auction and receive the balance of the sale proceeds after deducting the arrears of rent and the cost of the recovery proceedings. To the Board we would suggest that a fresh Sale Proclamation be issued. This will afford the applicants reasonable time to make arrangements. The Board might even be disposed to consider the grant of a lease to the applicants who are on the land. It is appreciated that the original lease having been cancelled, they will have to take their chances with others who may wish to apply. The house was sold together with the land and therefore it is impossible to determine the amount of the sale price of the house in question.

Under the circumstances the sale of the house and the land which took place on 5th October 1956 must be and is hereby set aside with costs. Advocates' fees in this Court are fixed at Kyats eighty-five only.

တရားလွှတ်တော်ချုပ်

†၁၉၅၈
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မတ်လ
၃ ရက်။

ဦးထွန်းရီ (လျှောက်ထားသူ)
နှင့်
မြို့နိုစီပါယ်မင်းကြီး ပါ ၂ (လျှောက်ထားခံရသူများ)*

အာဏာပေးစာချွန်တော်၊ ရန်ကုန်မြို့နိုစီပါယ်ရွေးကောက်ပွဲနည်းဥပဒေ ၃၀၊၃၁၊၃၂။ ရန်ကုန်မြို့၊ မြို့နိုစီပါယ်ရပ်ကွက်အမှတ် ၂၀ အတွက် သျှောက်ထားသူနှင့် ဦးဘညွန့်ဆိုသူတို့ နှစ်ယောက် မြို့နိုစီပါယ်လူကြီးအဖြစ် ယှဉ်ပြိုင်အရွေးခံကြရာ၊ ရွေးကောက်ပွဲနေ့ မတိုင်မီ ဦးဘညွန့်အနိစ္စရောက်လေသည်။ သို့အတွက် ရွေးကောက်ပွဲနှင့်သက်ဆိုင်သော နည်းဥပဒေများတွင် နည်းဥပဒေ ၃၂ (က) ကိုထပ်လောင်းဖြည့်သွင်း၍၊ ဒီမိုကရေစီ ဒေသန္တရအုပ်ချုပ်ရေးနှင့် ဒေသန္တရအဖွဲ့များဝန်ကြီးဌာနမှ ရွေးကောက်ပွဲအသစ်တရပ်ကျင်းပရန် ပြဋ္ဌာန်းလိုက်ကြောင်း၊ ဤသို့ပြင်ဆင်ပြဋ္ဌာန်းချက်သည် တရားမဝင်၊ အာဏာမတည်သည့်အတွက်၊ မြို့သာလျှင်ပြိုင်ဘက်မရှိ၊ မြို့နိုစီပါယ်လူကြီးဖြစ်ကြောင်း အာဏာပေးစာချွန်တော်(လျှောက်ထာ) လေသည်။ ။ဆုံးဖြတ်ချက်။ ။လျှောက်ထားသူသည်၊ မိမိအား ယှဉ်ပြိုင်သူမရှိ မြို့နိုစီပါယ်လူကြီးဖြစ်ကြောင်းကျေညာရန်အတွက် ဥပဒေအထောက်အထား အကိုးအကားမရှိ၊ ရန်ကုန်မြို့နိုစီပါယ်ရွေးကောက်ပွဲနည်းဥပဒေ ၃၀၊၃၁၊၃၂ တွင်မည်ကဲ့သို့သော အခြေအနေမျိုးဌ မဲဆန္ဒပေးခြင်းမပြုရဘဲ၊ ရွေးကောက်ခြင်းခံရသည်ဟု တရားဥပဒေအရ ယူမှတ်ရမည်ကို အတိအလင်း ပြဋ္ဌာန်းထားလေသည်။ ထိုပြဋ္ဌာန်းချက်များတွင် ယှဉ်ပြိုင်အရွေးခံမည့်သူ ကွယ်လွန်အနိစ္စရောက်သဖြင့် ကျန်ရှိသောပုဂ္ဂိုလ်အား အရွေးခံရသည်ဟုမှတ်ရန် ပြဋ္ဌာန်းချက်မရှိချေ။ လျှောက်ထားသူသည်၊ လျှောက်ထားသည့်အတိုင်း လျှောက်ထားနိုင်သည့် အခွင့်အရေးမရှိချေ၊ ၎င်းသည့်အခွင့်အရေးမျိုး မရှိရကား ယခုလျှောက်ထားသော အာဏာခေပးစာချွန်တော် အမိန့်ကို ရရှိခွင့်မရှိချေ။ ***The State of Madhya Pradesh v. G. C. Mandawar***, A.I.R. (1954) (S.C.) 493 ကိုလိုက်နာသည်။

လျှောက်ထားသူ အတွက်။ ။လွှတ်တော် ရွှေနေကြီး ဒေါက်တာ ဦးဇေမောင်လိုက်ပါဆောင်ရွက်သည်။

တရားဝန်ကြီးဦးဘိုကြီး။ ။၎င်းလျှောက်လွှာသည်၊ အာဏာပေးစာချွန်တော်အမိန့်ထုတ်ဆင့်ရန်အတွက်၊ လျှောက်ထားသောလျှောက်လွှာဖြစ်သည်။

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* ၁၉၅၈ ခုနှစ်၊ တရားမအသေးအဖွဲလျှောက်လွှာအမှတ် ၃၁၊ နေ့စွဲ၊ ၃၀-၃-၅၈။

† ဦးမြင့်သိန်း၊ နိုင်ငံတော်တရားဝန်ကြီးချုပ်။ ဦးဘိုကြီး၊ တရားဝန်ကြီး၊ ဦးဇအောင်သာကျော်၊ တရားဝန်ကြီး၊ တရားဝန်ကြီးဦးဘိုကြီး အမိန့်ချမှတ်သည်။

၁၉၅၈

ဦးထွန်းရီ နှင့် မြန်မာနိုင်ငံတော် အစိုးရ အမှု

လွန်ခဲ့သည့်ဇေဖော်ဝါရီလ ၂၄ ရက်နေ့တွင်၊ ရန်ကုန်မြို့ မြို့နယ်စီပါယ်ခုံရုံးက အမှတ် ၂၀ အတွက်၊ မြို့နယ်စီပါယ်လူကြီး ရွှေကောက်တင်မြောက်ရန် အလို့ငှါ၊ မဲဆန္ဒရွေးကောက်ပွဲတရပ် ကျင်းပရန်၊ ပြဋ္ဌာန်းထားငြားသော်လည်း၊ ကျန်စစ်အစည်တင်သွင်းခြင်းခံရသော ယှဉ်ပြိုင်အရွေးခံမည့်ပုဂ္ဂိုလ်နှစ်ဦးအနက်၊ ဦးဘညွန့်မှာ၊ မဲဆန္ဒပေးရမည့်နေ့မတိုင်မီ ရက်အနည်းငယ်အတွင်း ကွယ်လွန်အနိစ္စရောက်လေသည်။ သို့အတွက်ယင်းရွေးကောက်ပွဲနှင့်သက်ဆိုင်သော နည်းဥပဒေများကို ပြင်ဆင်ပြီး ရွေးကောက်ပွဲကိုဖျက်သိမ်းကာ၊ ရွေးကောက်ပွဲအသစ်တရပ်ကျင်းပရန် ပြဋ္ဌာန်းသည်ကို မဒကျနဝ်သဖြင့်၊ ကျန်ရှိသော ယှဉ်ပြိုင်အရွေးခံမည့် ပုဂ္ဂိုလ်တဦးဖြစ်သူ ဦးထွန်းရီက ရန်ကုန်မြို့နယ်စီပါယ်မင်းကြီးအပေါ်၌ငင်း၊ ဒီမိုကရေစီဒေသန္တရအုပ်ချုပ်ရေးနှင့် ဒေသန္တရအဖွဲ့များ ဝန်ကြီးဌာနအတွင်းဝန်မင်းအပေါ်၌ငင်း ဤရုံးတော်မှ အာဏာပေးစာချွန်တော်အမိန့် ထုတ်ဆင့်လျက် ဇေါ်ပြခဲ့သည့် ပြင်ဆင်ပြဋ္ဌာန်းချက်များကိုတရားမဝင်၊ အာဏာမတည်သည့်အနေနှင့်ဝင်ရောက်စွက်ဘက်ခြင်းလျှင်၊ မိမိအားယှဉ်ပြိုင်သူမရှိ မြို့နယ်စီပါယ်လူကြီးဖြစ်ကြောင်း၊ ရန်ကုန်မြို့နယ်စီပါယ်မင်းကြီးအား ကေညာစေရန်အတွက် လျှောက်ထားလေသည်။

ဦးထွန်းရီ၏ရှေ့နေကြီးဒေါက်တာမောင်က လျှောက်ထားသည်မှာ၊ ယခုကဲ့သို့သောအမှုမျိုးတွင်၊ ရွေးကောက်ပွဲဆိုင်ရာ နည်းဥပဒေများကို ပြင်ဆင်နိုင်သည့်အာဏာသည်၊ ရန်ကုန်မြို့တော် မြို့နယ်စီပါယ် အက်ဥပဒေပုဒ်မ ၂၃၀ အရ ကော်ပိုရေးရှင်း(ခေါ်) ရန်ကုန်မြို့နယ်စီပါယ်အဖွဲ့၌ငင်း၊ ယင်းအက်ဥပဒေပုဒ်မ ၂၃၃ အရ၊ နိုင်ငံတော်သမတ၌ငင်း တည်ရှိသည်ဖြစ်သင့်၍၊ အခြားမည်သူ တဦးတယောက်ကမျှ ဝင်ရောက်စွက်ဖက်ပြင်ဆင်ခြင်းမပြုနိုင်ချေ။ ယခုကိစ္စတွင်မူကား၊ မြို့နယ်စီပါယ် လူကြီးအဖွဲ့ကလည်း ပြင်ဆင်ခြင်းမပြု။ နိုင်ငံတော်သမတကလည်း ပြင်ဆင်ခြင်း မပြုပါဘဲလျက်၊ ၁၉၅၈ ခု၊ ဇေဖော်ဝါရီလ ၁၀ ရက်နေ့၌ပါ၊ ပြည်ထောင်စုမြန်မာနိုင်ငံတော် အထူးအမိန့်ပြန်တမ်းတွင်၊ ဒီမိုကရေစီဒေသန္တရအုပ်ချုပ်ရေးနှင့် ဒေသန္တရအဖွဲ့များဝန်ကြီးဌာနမှထုတ်ပြန်သော အမိန့်ကြော်ငြာစာအရ၊ နိုင်ငံတော်သမတသည်၊ ထိုရွေးကောက်ပွဲဆိုင်ရာ နည်းဥပဒေများတွင်၊ နည်းဥပဒေ ၃၂ (က) ကိုထပ်လောင်းဖြည့်သွင်းခွင့်ရှိကြောင်းဖြင့် ကေညာသည်ကိုတွေ့ရှိရသဖြင့်၊ ယင်းနည်းဥပဒေပြင်ဆင်ချက်မှာ တရားမဝင် အာဏာမတည်နိုင်ဟုလျှောက်ထားလေသည်။ ထို့ပြင်လည်း၊ အထက်ဇေါ်ပြပါအက်ဥပဒေပုဒ်မ ၂၃၂ အရဆိုလျှင်၊ မြို့နယ်စီပါယ်လူကြီးအဖွဲ့သည်၊ နည်းဥပဒေကိုပြင်ဆင်ရာ၌ နိုင်ငံတော်သမတ၏ခွင့်ပြုချက်ကို ခံယူရမည့်အပြင်၊ ကနဦးထုတ်ပြန်ကေညာပြီးမှ၊ ပြင်ဆင်ရမည်ဟု ပြဋ္ဌာန်းထားငြားသော်လည်း မြန်မာနိုင်ငံတော် ယေဘုယျ

၁၉၅၈
ဦးထွန်းရီ
နှင့်
မြို့နယ်ပါယ
မင်းကြီး ပါ ၂။

စကားရပ် အက်ဥပဒေပုဒ်မ ၂၃ ၌ ယင်းသို့ကနဦး ထုတ်ပြန်ကျေညာရမည့်အစီ
အစဉ်များပြဋ္ဌာန်းထားသည်ကို မလိုက်နာဘဲ ပြုလုပ်ဆောင်ရွက်သောကြောင့်၊
ထိုပြင်ဆင်ချက်သည် တရားမဝင် အာဏာမတည်ကြောင်းနှင့် ထပ်လောင်း၍
လျှောက်ထားပြန်လေသည်။

ဤအမှုတွင်၊ ယခုလျှောက်ထားသူသည်၊ မိမိအားယှဉ်ပြိုင်သူမရှိ မြို့နယ်ပါယ်
လူကြီးဖြစ်ကြောင်းကျေညာရန်အတွက် ဥပဒေအထောက်အထား အကိုးအကား
တင်ပြခြင်းမပြုနိုင်သောကြောင့်၊ လျှောက်ထားခံရသူများထံသို့ နို့တစ်စာမထုတ်
တော့ဘဲ လျှောက်လွှာကိုပယ်ရုပေမည်။ သို့ဖြစ်၍၊ လျှောက်ထားသူ၏ရှေ့နေကြီး
တင်ပြသောအချက်များသည်၊ တိကျမှန်ကန်ခြင်းဟုတ်မဟုတ်ကို၊ ဤရုံးတော်က
အဆုံးအဖြတ်ပေးနိုင်စွမ်းမရှိချေ။ သို့စေကာမူ၊ အကယ်၍သာထိုအချက်အလက်
များမှန်ကန်ပါလျှင်၊ ရွေးကောက်ပွဲဆိုင်ရာနည်းဥပဒေပြင်ဆင်ချက်သည်၊ တရား
ဝင်အာဏာ တည်သလောဟူသည့် ပြဿနာတရပ် ပေါ်ပေါက်ပေလိမ့်မည်။
ဒေါက်တာဧမောင်ကလည်း၊ လျှောက်ထားသူသည် မိမိနှင့်ယှဉ်ပြိုင်အရွေးခံမည့်
သူအနိစ္စရောက်သည်ကိုအကြောင်းပြုပြီး၊ အနိုင်ရလိုမှုမရှိပါ။ သို့သော် ယခုကဲ့သို့
သောပြင်ဆင်ဆောင်ရွက်မှုများသည်၊ နောင်ရွေးကောက်ပွဲ အသစ်တရပ်ပြုလုပ်
ရာ၌ အရှုပ်အရှင်းမရှိစေရန် အတွက်၊ ကောင်းမြတ်သော စေတနာဖြင့်လျှောက်
ထားရပါသည်ဟုနိဂုံးချုပ်အားဖြင့်ပြောကြားလေသည်။ ယင်းကဲ့သို့သော မွန်မြတ်
သောစေတနာထားသည်ကို ဤရုံးတော်ကဦးကျူးရမည်ဖြစ်ပေသည်။

လျှောက်ထားသူ၏ အခွင့်အရေးနှင့်ပတ်သက်၍ကား၊ ရန်ကုန်မြို့နယ်ပါယ်
ရွေးကောက်ပွဲနည်းဥပဒေ ၃၀၊၃၁၊၃၂ တွင်၊ မည်ကဲ့သို့သောအခြေအနေမျိုး၌
ဓဆန္ဒပေးခြင်းမပြုရဟု၊ ရွေးကောက်ခြင်းခံရသည်ဟု တရားဥပဒေအရ ယူမှတ်ရ
မည်ကို အဘိအလင်းပြဋ္ဌာန်းထားလေသည်။ ထိုပြဋ္ဌာန်းချက်များတွင်၊ ယှဉ်ပြိုင်
အရွေးခံမည့်သူ ကွယ်လွန်အနိစ္စရောက်သဖြင့်၊ ကျန်ရှိသောပုဂ္ဂိုလ်အား အရွေးခံရ
သည်ဟုမှတ်ရန် ပြဋ္ဌာန်းချက်မရှိချေ။

ယင်းသို့ဖြစ်၍၊ ဦးထွန်းရီမှာ၊ မိမိလျှောက်ထားသည့်အတိုင်း လျှောက်ထား
နိုင်သည့်အခွင့်အရေးမရှိချေ။ ဤသည့်အခွင့်အရေးမျိုးမရှိရကား၊ ယခုလျှောက်
ထားသော အာဏာပေးစာချွန်တော်အမိန့်ကို ရရှိပိုင်ခွင့်မရှိချေ။ အိန္ဒိယပြည်
တရားလွှတ်တော်ချုပ်ကလည်း၊ *The State of Madhya Pradesh* v. *G. C. Mandawar* အမှု (၁) တွင်လျှောက်ထားခံရသူအား၊ တာဝန်
ဝတ္တရားဆောင်ရွက်စေရန်အတွက် ပြောဆိုပိုင်သောအခွင့်အရေး မိမိ၌မရှိလျှင်၊

(1) A.I.R. (1954) (S.C.) 493.

လျောက်ထားသူသည်၊ အာဏာပေး စာချုပ်တော်အပိုဒ်ကို မရရှိနိုင်ဟုဆိုကာ အကောင်းဆုံးရှာတတ်နိုင်အောင် ကြိုးပမ်းခဲ့ပေသည်။

အထက်ဖော်ပြပါအကြောင်းများကြောင့်၊ ဦးတွန်းမိန်းလျောက်လွှာကိုပယ်လိုက်သည်။

ဦးတွန်းမိန်း နှင့် မြို့တော်ဝါယမ မင်းကြီး ၀၀၂။

တရားလွှတ်တော်ချုပ်

† ၁၉၅၀
ဇွန်လ ၄ ရက်။

ဒေါ်ငြိမ်း (လျှောက်ထားသူ)
နှင့်
ပြည်ထောင်စုမြန်မာနိုင်ငံတော် အစိုးရ ပါ ၄ (လျှောက်ထားခံရသူများ)*

လယ်ယာလုပ်ကိုင်သူတို့ ကြွေးမြီသက်သာရေး ဥပဒေ (၁၉၄၇ ခုနှစ်) ပုဒ်မ ၂ (ဃ) ပုဒ်မ ၂၃။

ဆုံးဖြတ်ချက်။ ။၁၉၄၇ ခုနှစ်၊ လယ်ယာလုပ်ကိုင်သူတို့ ကြွေးမြီသက်သာရေး ဥပဒေ ပုဒ်မ ၂၃ အရ၊ အယူခံ၊ သို့မဟုတ် ပြင်ဆင်ရန်လျှောက်လွှာကို တင်သွင်းခြင်းကို တားမြစ်ထားသော်လည်း၊ နိုင်ငံတော်သမတသည် အဖွဲ့၏အမှုတွဲကိုတောင်းယူ၍ ချမှတ်သည့်အမိန့်မှာ တရားဥပဒေနှင့်မညီ၊ သို့တည်းမဟုတ် လွဲချော်မှားယွင်းသည့်လက္ခဏာရှိလျှင် အဖွဲ့၏အမိန့်ကိုပြောင်းလဲနိုင်သည်။ ထိုပုဒ်မတွင် သက်ဆိုင်သောသူများအား အသိပေးရမည်ဟုမဆိုထားသော်လည်း၊ အမိန့်ကိုပြင်ဆင်ပါက နစ်နာမည့်သူကိုချေပရန် အခွင့်အရေးပေးမှသာ သင့်တော်မည်။

လျှောက်ထားသူအတွက်၊ လွှတ်တော်ရှေ့နေကြီး ဦးဘမောင်လိုက်ပါဆောင်ရွက်သည်။

လျှောက်ထားခံရသူ ၁ နှင့် ၂ တို့အတွက်၊ အစိုးရရှေ့နေကြီး ဦးလှမောင်လိုက်ပါဆောင်ရွက်၍၊

လျှောက်ထားခံရသူ ၃ နှင့် ၄ တို့အတွက်၊ လွှတ်တော်ရှေ့နေကြီး ဦးဘအုန်းတို့ လိုက်ပါဆောင်ရွက်ကြသည်။

တရားဝန်ကြီးချုပ် ဦးမြင့်သိန်း။ ။လျှောက်ထားသူ ဒေါ်ငြိမ်းက ၁၉၄၇ ခုနှစ်၊ လယ်ယာလုပ်ကိုင်သူတို့ ကြွေးမြီသက်သာရေး အက်ဥပဒေအရ၊ ဝါးခယ်မမြို့ အဖွဲ့တွင် သက်သာခွင့်လျှောက်ထားရာ၌၊ မိမိပေးဆပ်စရာရှိသော

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* ၁၉၅၀ ခုနှစ်၊ တရားမအယေးအဖွဲ့လျှောက်လွှာ အမှတ် ၂၀၊

† ဦးမြင့်သိန်း၊ နိုင်ငံတော်တရားဝန်ကြီးချုပ်၊ ဦးချန်ထွန်း၊ နိုင်ငံတော်တရားဝန်ကြီး၊ ဦးဘိုကြီး၊ နိုင်ငံတော်တရားဝန်ကြီးတို့ရှေ့မှောက်တွင် နိုင်ငံတော်တရားဝန်ကြီးချုပ်အမိန့်ချမှတ်သည်။

ကြွေးမြီများကို ၉,၀၀၀ ကျပ်သာဖြစ်သည်ဟုဖေါ်ပြသည်။ ကြွေးမြီမှာ ၁၀,၀၀၀ ကျပ်ထက်ပိုခဲ့လျှင်၊ အက်ဥပဒေပုဒ်မ ၄ ခွင့်ချက်အရ အဖွဲ့က လျှောက်လွှာကို လက်ခံစစ်ဆေးရန် အာဏာမရှိ၍၊ မြို့ရှင်ဖြစ်သူ ဦးသက်နှင့် ဒေါ်သန်းကြည်တို့က၊ မြောင်းမြို့မှ၊ ခရိုင်တရားမရုံးတော်၏ ဒီကရီအရ၊ အရင်းအတိုး ၁၆,၅၀၀ ကျပ်နှင့် တရားစရိတ် ၁,၆၆၄ ကျပ် ဖြစ်ကြောင်းကိုဖေါ်ပြ၍၊ ဒေါ်ငြိမ်း၏လျှောက်လွှာကို လက်မခံရန် ကန့်ကွက်ကြသည်။ သို့သော်လည်း အဖွဲ့က၊ မူတည်ငြိုးစဉ်းစားရမည့် ကြွေးမြီမှာ ငွေရင်း ၉,၀၀၀ ကျပ်သာဖြစ်၍၊ အဖွဲ့၌ လျှောက်လွှာကိုလက်ခံစစ်ဆေးရန် အာဏာရှိသည်ဟု ဆုံးဖြတ်သည်။

၁၉၅၀
ဒေါ်ငြိမ်းနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော် အစိုးရပါ၄။

"ကြွေးမြီ" ဆိုသည်မှာ၊ ပုဒ်မ ၂ (ဃ) အရ "တရားမရုံးတော်၏ ဒီကရီ၊ သို့မဟုတ် အမိန့်အရ ပေးရမည့်ငွေ" ပါဝင်ရမည်ဟု အတိုအလင်းပါရှိရာ၊ အဖွဲ့၏ ယူဆချက်မှာ အထင်အရှားမှားယွင်းသည်ဖြစ်၍၊ အက်ဥပဒေပုဒ်မ ၂၃ အရ၊ နိုင်ငံတော်သမတက အဖွဲ့၏အမိန့်ကို ပယ်ဖျက်ခဲ့လေသည်။

ထိုသို့ပယ်ဖျက်ခြင်းကို မကျေနပ်၍၊ ဤရုံးတော်တွင် စာချုပ်တော်လျှောက်ထားရာ ဒေါ်ငြိမ်း၏ ပညာရှိရွှေနေကြီးက ကြွေးမြီမှာ ငွေ ၁၀,၀၀၀ ကျပ်ထက်ပိုနေကြောင်းကို ဝန်ခံသော်လည်း၊ အဖွဲ့၏အမိန့်ကိုပယ်ဖျက်ရာ၌ ဒေါ်ငြိမ်းအား အသိမပေး၊ တဘက်သတ်အမိန့်မချထိုက်ဟု လျှောက်ထားသည်။

အက်ဥပဒေပုဒ်မ ၂၃ အရ၊ အယူခံ၊ သို့မဟုတ် ပြင်ဆင်ရန်လျှောက်လွှာကို တင်သွင်းခြင်းကို တားမြစ်ထားသော်လည်း၊ နိုင်ငံတော်သမတသည်၊ အဖွဲ့၏ အမှုတွဲကိုတောင်းယူ၍ ချမှတ်သည့်အမိန့်မှာ တရားဥပဒေနှင့်မညီ၊ သို့တည်းမဟုတ် လွဲချော်မှားယွင်းသည့်လက္ခဏာရှိလျှင်၊ အဖွဲ့၏အမိန့်ကိုပြောင်းလဲနိုင်သည်။ ထိုပုဒ်မတွင် သက်ဆိုင်သောသူများအား အသိပေးရမည်ဟု မဆိုပြားသော်လည်း၊ အမိန့်ကိုပြင်ဆင်ပါက၊ နစ်နာမည့်သူကိုချေပရန် အခွင့်အရေးပေးမှသာ သင့်တော်မည်ဟု ဤရုံးတော်ကယူဆကြောင်းကို ဖေါ်ပြလိုသည်။ သို့သော်လည်း ဤအမှုတွင် အသိမပေးသည့်အကြောင်းကြောင့်သာ၊ နိုင်ငံတော်သမတ၏ အမိန့်ကိုပယ်ဖျက်ရန်မသင့်။ ကြွေးမြီမှာ ငွေ ၁၀,၀၀၀ ကျပ်ထက်ပိုနေသည်ကို မငြင်းနိုင်။ ဝါးခယ်မမြို့အဖွဲ့က ဒေါ်ငြိမ်း၏လျှောက်လွှာကို လက်ခံရန် အာဏာမရှိသည်မှာ ထင်ရှား၍၊ စာချုပ်တော်အားဖြင့် ဤရုံးတော်က စွက်ဖက်လျှင်လည်း အကြောင်းထူးမည်မဟုတ်။ သို့အတွက် စာချုပ်ဘော်ထုတ်ပေးရန် လျှောက်လွှာကို စရိတ်နှင့်တကွပယ်လိုက်သည်။ ရွှေနေခမှာ ၀၅ ကျပ်ဖြစ်စေရမည်။

တရားလွှတ်တော်ချုပ်

† ၁၉၅၀
ဇွန်လ ၄ ရက်။

အပ္ပဒူမိဇစ် (လျှောက်ထားသူ)
နှင့်
ဥက္ကဋ္ဌ၊ ရခိုင်သီးစားချထားရေးအဖွဲ့ ပါ ၃ (လျှောက်ထားခံရသူများ)*

သီးစားချထားရေးနည်းဥပဒေ ၁၃။

ဆုံးဖြတ်ချက်။ ။သီးစားချထားရေးနည်းဥပဒေ ၁၃ အရ၊ လာမည့်နှစ်အတွက် သီးစား လုပ်ကိုင်လိုသူတိုင်းသည် သတ်မှတ်ထားသောအချိန်ကာလအတွင်း သက်ဆိုင်ရာ ကျေးရွာသီးစားချထားရေးအဖွဲ့သို့ လျှောက်ထားရမည်ဖြစ်သည်။ ထိုသို့လျှောက်ထားသည့် သူများအထဲမှ ကျေးရွာသီးစားချထားရေးအဖွဲ့က သင့်တော်သူကို သီးစားချထားရမည် ဖြစ်သည်။

ဤကဲ့သို့ လျှောက်ထားခဲ့ခြင်းမရှိလျှင်၊ သီးစားလုပ်ရန် အခွင့်အရေးရနိုင်သူမဟုတ်၊ သီးစားဟောင်း လက်ငုတ်ပင်ဖြစ်လင့်ကစား လာမည့်နှစ်အတွက် လုပ်ကိုင်လိုကြောင်း လျှောက်ထားခြင်းမပြုလျှင် လုပ်ကိုင်နိုင်သောအခွင့်အရေး မည်သူကမျှပေးနိုင်ခြင်းမရှိ။

လျှောက်ထားသူအတွက်၊ လွှတ်တော်ရှေ့နေကြီး ဦးစိန်ထွန်းနှင့် ဦးစိန်ဟုတ်တို့ လိုက်ပါဆောင်ရွက်သည်။

ပဌမနှင့် ဒုတိယ လျှောက်ထားခံရသူများ အတွက်၊ လွှတ်တော် ရှေ့နေကြီး မစ္စတာဂန်ဂူလီ လိုက်ပါဆောင်ရွက်သည်။

တရားဝန်ကြီး ဦးချန်ထွန်း။ ။လျှောက်သူသည် အချင်းဖြစ်မြေကိုပိုင်သည့်ပိုင်ရှင်ဖြစ်သည်။ ၁တတိယ လျှောက်ထားခံရသူမှာ၊ ၁၉၅၆-၅၇ ခုနှစ်က လျှောက်ထားသူနှင့်ပြိုင်ဆိုင်၍၊ ၎င်းမြေကို သီးစားလုပ်ကိုင်ရန် လျှောက်ထားခဲ့သူ ဖြစ်သည်။ ၎င်းနှစ်အတွက် နှစ်ဦးနှစ်ဘက်သောသူတို့မှာ အချင်းများကြပြီးလျှင်၊

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* ၁၉၅၇ ခုနှစ်၊ တရားမအသေးအဖွဲလျှောက်လွှာ အမှတ် ၁၁၀။

† ဦးမြင့်သိန်း၊ နိုင်ငံတော်ဘရားဝန်ကြီးချုပ်၊ ဦးချန်ထွန်း၊ နိုင်ငံတော်တရားဝန်ကြီး၊ ဦးဘိုကြီး၊ နိုင်ငံတော်တရာ ဝန်ကြီးတို့ရှေ့မှောက်တွင် တရားဝန်ကြီး ဦးချန်ထွန်းအမိန့်ချမှတ်သည်။

ကျေးရွာသီးစားချထားရေးအဖွဲ့၊ ခရိုင်သီးစားချထားရေးအဖွဲ့နှင့် တိုင်းသီးစား ချထွန်းရေးအဖွဲ့အထိ တက်ရောက်ခဲ့ကြရာ၊ နောက်ဆုံးတွင်တတိယလျှောက်ထား ခံရသူ ကာလာများက ထိုနှစ်အတွက် သီးစားလုပ်ပိုင်ခွင့်ရရှိခဲ့လေသည်။

၁၉၅၀

အပ္ပဒူမိုဇစ် နှင့် ဥက္ကဋ္ဌ၊ ရခိုင် သီးစားချထား ရေးအဖွဲ့ ပါ ၃။

၁၉၅၇-၅၀ ခုနှစ်အတွက် သီးစားလုပ်လိုသူများသည် ဇစာနိုင်သမျှစောစွာ လျှောက်ထားကြရန်နှင့် သက်ဆိုင်ရာ ကျေးရွာ သီးစားချထားရေး အဖွဲ့က ၁၀-၆-၅၇ နေ့တွင် နောက်ဆုံးထား၍ သီးစားချထားခြင်းကိစ္စကို ပြုရမည်ဟု စစ်တွေမြို့၊ နယ်ပိုင်ဝန်ထောက်က ကျေညာခဲ့သည်ဟုသိရသည်။ အချင်းဖြစ်မြေနှင့် စပ်လျဉ်း၍ ကပ္ပခေါင်း ကျေးရွာသီးစားချထားရေးအဖွဲ့၏အမှုတွဲတွင် တွေ့ရသည့် မှာ ၂၀ဦး-၅၇ နေ့က ၎င်းမြေကို ၁၉၅၇-၅၀ ခုနှစ်အတွက် သီးစားချထား ပါရန် လျှောက်ထားသူ အပ္ပဒူမိုဇစ်က လျှောက်လွှာတင်သွင်းကြောင်း။ ဤကိစ္စ အတွက် စစ်ဆေးရန် ၉-၆-၅၇ နေ့အထိ ရွှေဆိုင်းထားခဲ့ကြောင်းတွေ့ရသည်။ ထိုသို့ရွှေဆိုင်းထားခြင်းမှာ အခြားသီးစားလုပ်ကိုင်လိုသဖြင့် လျှောက်ထားသူများ ရှိလျှင် လျှောက်ထားနိုင်ရန် အချိန်ပေးဘို့ရည်ရွယ်ဟန်တူသည်။ ထို့ပြင် ဤကိစ္စ တွင် အခြားသီးစားချထားရေးကိစ္စများနှင့်မတူ၊ နယ်ပိုင်ဝန်ထောက်၏ ကျေညာ ထားသည်အတိုင်း ၁၀-၆-၅၇ နေ့တွင် စစ်ဆေးစီရင်ရန် ရက်ချိန်းပေးဟန်ရှိ သည်။ ထိုနောက် ၁၀-၆-၅၇ နေ့တွင် အဆိုပါ ကျေးရွာသီးစားချထားရေး အဖွဲ့၏ နေ့စဉ်မှတ်တမ်း၌ အောက်ပါအတိုင်းဖော်ပြထားသည်ကိုတွေ့ရသည်။

> "ထိုဦးပိုင်နံပါတ် ၁၉(ခ)အရ မြေချိန် ၂.၀၀ ဧကကို မြေရှင် အပ္ပဒူမိုဇစ် လျှောက်လွှာစာရေးအပြင် တစုံတယောက်မှ လျှောက်ထား သူမရှိ၍၊ ၎င်းမြေရှင် အပ္ပဒူမိုဇစ်အား လုပ်စာနှင့် အမိန့်ထုတ်ပေးလိုက် သည်။"

ဤနည်းဖြင့် အချင်းဖြစ်မြေကို ၁၉၅၇-၅၀ ခုနှစ်အတွက် လုပ်ကိုင်ရန် လျှောက်ထားသူအား၊ ကျေးရွာ သီးစားချထားရေးအဖွဲ့က ချပေးလိုက်သည်။ တတိယ လျှောက်ထားခံရသူ ကာလာများသည် ကျေးရွာသီးစားချထားရေးအဖွဲ့ တွင် လျှောက်ထားခြင်းမပြုဘဲ ခရိုင်သီးစားချထားရေးအဖွဲ့သို့ ၁၉-၆-၅၇ နေ့က လျှောက်ထားဟန်တူသည်။ သို့ရာတွင် ခရိုင်သီးစားချထားရေးအဖွဲ့၏အမှုတွဲတွင် ၁၇-၇-၅၇ နေ့က ကာလာများလျှောက်လွှာကို ရရှိသည်ဟုမှတ်တမ်းတင်ထား သည်ကိုတွေ့ရသည်။ ခရိုင်သီးစားချထားရေးအဖွဲ့က မိမိတို့ထံသို့ လျှောက်ထားသူ ကာလာများသည်၊ ၁၉၅၃ ခုနှစ်၊ သီးစားချထားရေးနည်းဥပဒေ ၁၁ ပါ အချက် များအရ တစုံတခုပျက်ကွက်ခြင်းမရှိသော လက်ငုတ်သီးစားဖြစ်သဖြင့် ၎င်းသာ လျှင် ၁၉၅၇-၅၀ ခုနှစ်အတွက်လည်း လုပ်ကိုင်ခွင့်ရှိသည်ဟုဆုံးဖြတ်ကြပြီးလျှင်၊

၁၉၅၀

အပ္ပဒူမိုစစ် နှင့် ဥက္ကဋ္ဌ၊ ရန်ကင်း သီးစား ချထား ရေးအဖွဲ့ ပါ ၃။

ကျေးရွာသီးစားချထားရေးအဖွဲ့၏အမိန့်ကို ပယ်ဖျက်လိုက်ပေသည်။ အပ္ပဒူမိုစစ်က တိုင်းသီးစားချထားရေးအဖွဲ့သို့လျှောက်ထားခဲ့သော်လည်း ခရိုင်သီးစားချထားရေးအဖွဲ့၏ အမိန့်အတိုင်းသာတည်စေရမည်ဟု တိုင်းသီးစားချထားရေး အဖွဲ့က အမိန့်ချမှတ်ခဲ့လေသည်။ ထို့ကြောင့် ၎င်းက ဤရုံးတော်သို့ လာရောက်ခြင်းဖြစ်သည်။

သီးစားချထားရေးနည်းဥပဒေ ၁၃ အရမှာ လာမည့်နှစ်အတွက် သီးစားလုပ်ကိုင်လိုသူတိုင်းသည် သတ်မှတ်ထားသောအချိန်ကာလအတွင်း သက်ဆိုင်ရာကျေးရွာသီးစားချထားရေးအဖွဲ့သို့ လျှောက်ထားရမည်ဖြစ်သည်။ ထိုသို့ လျှောက်ထားသည့်သူများအထဲမှ ကျေးရွာသီးစားချထားရေးအဖွဲ့က သင့်ပေါ်သူကို သီးစားချထားရမည်ဖြစ်သည်။ ဤအမှုတွင် ကာလာများသည် ၁၉၅၇-၅၈ ခုနှစ်အတွက် အချင်းဖြစ်မြေကို လုပ်ကိုင်လိုကြောင်း သက်ဆိုင်ရာကျေးရွာ သီးစားချထားရေးအဖွဲ့တွင် လျှောက်ထားခဲ့ခြင်းမရှိသဖြင့် ၎င်းသည် သီးစားလုပ်ရန် အခွင့်အရေးရနိုင်သူမဟုတ်သည်မှာ ထင်ရှားသည်။ သီးစားဟောင်းလက်ငုတ်ပင်ဖြစ်လင့်ကစား လာမည့်နှစ်အတွက် လုပ်ကိုင်လိုကြောင်း လျှောက်ထားခြင်းမပြုလျှင် လုပ်ကိုင်နိုင်သောအခွင့်အရေးကို မည်သူကမျှပေးနိုင်ခြင်းမရှိချေ။

ထို့ကြောင့် ခရိုင်သီးစားချထားရေးအဖွဲ့နှင့် တိုင်းသီးစားချထားရေးအဖွဲ့တို့က ချမှတ်သောအမိန့်သည်၊ ဥပဒေနှင့် တိုက်ရိုက်ဆန့်ကျင်လျက် ရှိသောကြောင့် ပယ်ဖျက်လိုက်သည်။

လျှောက်ထားသူနှင့် လျှောက်ထားခံရသူများသည် မိမိတို့၏စရိတ်ကို မိမိတို့ကျခံစေရမည်ဖြစ်သည်။

တရားလွှတ်တော်ချုပ်

ဦးဘိုးခိုင် (လျှောက်ထားသူ)

နှင့်

ကာစင်အလီ ပါ ၃ (လျှောက်ထားခံရသူများ)*

† ၁၉၅၈ ဇွန်လ ၉ ရက်။

မြို့ပြဆိုင်ရာ ဌါးရမ်းခကြီးကြပ်ရေးအက်ဥပဒေ ပုဒ်မ ၁၁ (၁) (ဃ)၊ ပုဒ်မ ၂၂။

လျှောက်ထားသူက၊ မြို့ပြဆိုင်ရာဌါးရမ်းခကြီးကြပ်ရေး အက်ဥပဒေပုဒ်မ ၁၁ (၁)(စ၁) အရ၊ မိမိပိုင်မြေပေါ်တွင် အဆောက်အဦတခု ဆောက်လိုရှိ၊ ၎င်းမြေပေါ်ရှိ၊ လျှောက်ထားခံရသူအမှတ် ၁ နှင့် ၂ တို့အား ဖယ်ရှားပေးစေလိုမှု စွဲဆိုခွင့်ပြုရန် အမိန့်ကို တွဘက်လက်ထောက်မြို့ပြဆိုင်ရာ မြေဌါးခကြီးကြပ်ရေး အရာရှိထံတွင်လျှောက်ရာ၊ စွဲဆိုရန်အမိန့်ထုတ်ပေးလိုက်လေသည်။

ထိုအမိန့်ကို၊ အလျှောက်ခံရသူနှစ်ဦးတို့က ပုဒ်မ ၂၂ အရ၊ နယ်ပိုင်တရားမတရားသူကြီးထံသို့ လျှောက်ထားရာ၊ တရားသူကြီးက—

(၁) လျှောက်ထားခံရသူ နှစ်ဦးတို့အပေါ်တွင် လျှောက်လွှာတခုတည်းပူးပေါင်းရှု၊ လျှောက်ထားခြင်းသည် ဥပဒေနှင့်မကိုက်ညီခြင်း။

(၂) (က) အိမ်ပုံစံကို တင်ပြခြင်းမပြုခြင်း။

(ခ) အိမ်ဆောက်လုပ်ရန်အတွက် လိုအပ်သည့် ပစ္စည်းများ အသင့်ရှိပြီးမဖြစ်ခြင်းဟု အဓိကအချက်ထား၍၊ ကြီးကြပ်ရေးအရာရှိ၏ အမိန့်ကို ပယ်လိုက်သည်။

ဆုံးဖြတ်ချက်။ ။မြို့ပြဆိုင်ရာဌါးရမ်းခကြီးကြပ်ရေးအက်ဥပဒေပုဒ်မ ၁၁ (၁) (ဃ) အရ တင်သွင်းသော လျှောက်လွှာမျိုးသည် အကျဉ်းနည်းအားဖြင့် စစ်ဆေးစီရင်ရမည့် ကိစ္စမျိုးသာဖြစ်သည်။ တရားမကျင့်ထုံး ကိုဓဥပဒေတွင်ပါရှိသည့် ပြဋ္ဌာန်းချက်များအတိုင်း လိုက်နာစီရင်ရမည့်ကိစ္စမျိုးမဟုတ်ချေ။ ထို့ပြင်ပုဒ်မ ၂၁ တွင် သက်သေများကို ဆင့်ခေါ်ခြင်း သက်သေခံစာရွက်စာတမ်းများတင်ပြစေခြင်း စသည့်ကိစ္စမျိုးအတွက်သာလျှင် တရားမကျင့်ထုံး ကိုဓဥပဒေတွင်ပါရှိသည်အတိုင်း အာဏာရှိရမည်ဟုပြဋ္ဌာန်းထားသည်။ ယခုကိစ္စမှာ အိမ်ဌါးများအပေါ်တွင် ထွက်သွားစေလိုမှုတရားစွဲဆိုရန်အတွက် အခွင့်တောင်းသည့် ကိစ္စမျှသာဖြစ်သည်။ တရားမကြောင်းဖြင့် တရားစွဲဆိုသည့် ကိစ္စမျိုးမဟုတ်ချေ။ စဉ်းစားရန်ပေါ်ပေါက်သည့် အကြောင်းအချက်များမှာ နှစ်ဦးစလုံးအတွက် အတူတူပင်ဖြစ်သည်။

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* ၁၉၅၇ ခုနှစ်၊ တရားမအသေးအဖွဲမှုအမှတ် ၁၀၀။

† နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးမြင့်သိန်း၊ တရားဝန်ကြီး ဦးချန်ထွန်းနှင့် တရားဝန်ကြီးဦးတိုးတို့၏ ရှေ့မှောက်တွင် တရားဝန်ကြီး ဦးချန်ထွန်းအမိန့်ချမှတ်သည်။

၁၉၅၈
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နှင့်
ကာစင်အလီ
ပါ ၃။

ထို့ကြောင့်လျှောက်ထားခံရသူ အိမ်ငှါးနှစ်ဦးတို့အားပူးပေါင်း၍ လျှောက်လွှာတခုတည်းဖြင့် လျှောက်ထားခြင်းမှာ တရားဥပဒေနှင့်ဆန့်ကျင် သည်ဟုယူဆရန် မသင့်ချေ။

၌ပုဒ်မ ၁၁ ပုဒ်မခွဲ (၁) (ဃ) အရ လျှောက်ထားသောအခါများတွင်—

(၁) အိမ်ပုံစံကိုတင်ပြခြင်း။

(၂) ဆောက်လုပ်ရန်အတွက် လိုအပ်သည့် ပစ္စည်းများအသင့်ပုံရှိခြင်းရမည်ဟု မလိုချေ။

လျှောက်ထားသူအတွက်၊ လွှတ်တော်ရှေ့နေကြီး မစွတာ ဒစ်တာနှင့်လွှတ်တော်ရှေ့နေကြီး ဦးထွန်းစိန်တို့လိုက်ပါဆောင်ရွက်သည်။

ပဌမနှင့်ဒုတိယလျှောက်ထားခံရသူများအတွက်၊လွှတ်တော်ရှေ့နေကြီး ဦးစိန်ဟုတ်လိုက်ပါဆောင်ရွက်သည်။

တရားဝန်ကြီးဦးချန်ထွန်း။ ။၌အမှုတွင် လျှောက်ထားသူ ဦးဘိုးခိုင်က အချင်းဖြစ်မြေကွက်သည် မိမိပိုင်မြေဖြစ်၍၊ ၎င်းမြေပေါ်ရှိ အဆောက်အဦမှာ စစ်အတွင်းကမုန်းမှန်၍ပျက်စီးသွားသောကြောင့် မိမိပိုင်အဆောက်အဦတခု ဆောက်လိုရှိ မြို့ပြဆိုင်ရာ ငှါးရမ်းခကြီးကြပ်ရေး အက်ဥပဒေပုဒ်မ ၁၁ (၁) (ဃ) အရ၊ မြေပေါ်တွင်ရှိနေသည့် လျှောက်ထားခံရသူ ကာစင်အလီနှင့်ဦးအောင်ဘတို့အား ဖယ်ရှားပေးစေလိုမှု စွဲဆိုခွင့်ပြုရန် အခွင့်အမိန့်ထုတ်ပေးဘို့ စစ်တွေမြို့၊ တွဲဘက်လက်ထောက်မြို့ပြဆိုင်ရာ မြေငှါးခကြီးကြပ်ရေးအရာရှိထံတွင် လျှောက်ထားခဲ့လေသည်။ ထိုအရာရှိက နှစ်ဦးနှစ်ဘက်သော အမှုသည်များနှင့်သက်သေများကို စစ်ဆေးပြီးနောက် လျှောက်ထားသူသည် အမှန်တကယ်ပင် အချင်းဖြစ် မြေပေါ်တွင် အဆောက်အဦဆောက်လုပ်ရန်အလို့ငှါ၊ ၎င်းမြေကိုအကယ်ပင်အလိုရှိသူဖြစ်ကြောင်းထင်ရှားသည်ဟု ယူဆပြီးလျှင်စွဲဆိုရန် အခွင့်အမိန့်ထုတ်ပေးဘို့ဆုံးဖြတ်ခဲ့လေသည်။ ၎ဆုံးဖြတ်ချက်ကို မကျေနပ်သဖြင့် လျှောက်ထားခံရသူ ကာစင်အလီနှင့်ဦးအောင်ဘတို့က ပုဒ်မ ၂၂ အရ၊ စစ်တွေမြို့၊နယ်ပိုင်တရားမတရားသူကြီးထံသို့ လျှောက်ထားကြလေသည်။ နယ်ပိုင်တရားမ တရားသူကြီးက ကြီးကြပ်ရေးအရာရှိ၏ အမိန့်ကို ပယ်ဖျက်လိုက်လေသည်။ ထို့ကြောင့် လျှောက်ထားသူက ၎ရုံးတော်သို့ လာရောက်လျှောက်ထားခြင်းပင်ဖြစ်သည်။

နယ်ပိုင်တရားမ တရားသူကြီး၏အမိန့်တွင် အဓိကအားဖြင့် ကိုးကားထားသည့်အချက်နှစ်ချက်ရှိသည်။ပဌမအချက်မှာ လျှောက်ထားခံရသူ ကာစင်အလီနှင့် ဦးအောင်ဘတို့သည် သီးခြားနေထိုင်သူအိမ်ငှါးများဖြစ်သည်တကြောင်း၊ ထို့ပြင် အမှု၏အကြောင်းခံရာများမှာလည်း သီးခြားဖြစ်သည် တကြောင်းတို့ကြောင့်

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ပါ ၃။

လျောက်ထားသူက ထိုသူနှစ်ဦးတို့ကပေါ်တွင် လျောက်လွှာ တခုတည်းတွင် ပူးပေါင်းရှဲလျောက်ထားခြင်းသည် ဥပဒေနှင့်မကိုက်ညီဟု ယူဆထားလေသည်။ အမှုနှစ်မှာ ဤကဲ့သို့သော လျောက်လွှာမျိုးသည် အကျဉ်းနည်းအားဖြင့် စစ်ဆေးစီရင်ရမည့်ကိစ္စမျိုးသာဖြစ်သည်။ တရားမကျင့်ထုံး ကိုဥပဒေတွင် ပါရှိသည့် ပြဋ္ဌာန်းချက်များအတိုင် လိုက်နာစီရင်ရမည့်ကိစ္စမျိုးမဟုတ်မချေ။ ထို့ပြင်ပုဒ်မ ၂၁ တွင် သက်သေများကို ဆင့်ခေါ်ခြင်း၊ သက်သေခံစာရွက် စာတမ်းများတင်ပြစေခြင်း စသည့် ကိစ္စမျိုးအတွက်သာလျှင် တရားမကျင့်ထုံး ကိုဥပဒေတွင်ပါရှိသည့် အတိုင်း အာဏာရှိရမည်ဟု ပြဋ္ဌာန်းထားသည်။ ယခုကိစ္စမှာ အိမ်ငှါးမှုအပေါ်တွင် ထွက်သွားစေလိုမှု တရားစွဲဆိုရန်အတွက် အခွင့်တောင်းသည့် ကိစ္စမျှသာဖြစ်သည်။ တရားမကြောင်းဖြင့် တရားစွဲဆိုသည့် ကိစ္စမျိုးမဟုတ်ချေ။ စဉ်းစားဉာဏ် ပေါ်ပေါက်သည့် အကြောင်းအချက်များမှာ နှစ်ဦးစလုံးအတွက် အတူတူပင်ဖြစ်သည်။ ထို့ကြောင့်လျောက်ထားခံရသူ အိမ်ငှါးနှစ်ဦးတို့အား ပူးပေါင်း၍ လျောက်လွှာတခုတည်းဖြင့် လျောက်ထားခြင်းမှာ တရားဥပဒေနှင့် ဆန့်ကျင်သည်ဟူ ယူဆရန်မသင့်ချေ။ ဤအချက်ကိုကြီးကြပ်ရေး အရာရှိရွှေတွင် ဖေါ်ပြကန့်ကွက်ခဲ့ခြင်းမရှိဘဲ၊ နယ်ပိုင်တရားမတရားသူကြီးထံသို့ ရောက်မှသာလျှင် ဖေါ်ပြကန့်ကွက်ခြင်းဖြစ်၍ အရေးယူသင့်သောအချက်မဟုတ်ဟုယူဆကြသည်။

ဒုတိယအချက်မှာ ပုဒ်မ ၁၁၊ပုဒ်မခွဲ (၁) (ဃ)အရ၊လျောက်ထားသော အခါများတွင် ဆောက်လုပ်မည့် အဆောက်အဦ၏ပုံစံကို တင်သွင်းခြင်းသည်ငင်း၊ ထိုအဆောက်အဦအတွက် လိုအပ်သော ပစ္စည်းများအသင့်ရှိနေခြင်းသည်ငင်း အမှန်တကယ် သက်ဆိုင်ရာမြေကို ထိုသို့ဆောက်လုပ်ရန်အတွက် လိုမလိုဟူသော ပြဿနာကို စဉ်းစားရာတွင် လိုအပ်သောအချက်များ ဖြစ်သည်ကို နယ်ပိုင်တရားမတရားသူကြီးကယူဆထားလေသည်။ ထိုကြောင့်သာလျှင် ဤအမှုတွင် လျောက်ထားသူက အိမ်ပုံစံကို တင်ပြခြင်းမပြုသောကြောင့် တကြောင်း၊ ထို့ပြင်အိမ်ဆောက်လုပ်ရန်အတွက် လိုအပ်သည့်ပစ္စည်းများအသင့်ရှိပြီးမဖြစ်ခြင်းကြောင့် တကြောင်း လျောက်ထားသူသည် အချင်းဖြစ်မြေကို အကယ်ပင် အိမ်ဆောက်ရန်အတွက်လိုသည်ဟု မိမိယူဆနိုင်ကြောင်းဖြင့် ဆုံးဖြတ်ထားလေသည်။ အမှုနှစ်မှာအိမ်ဆောက်ရန်အတွက် လိုအပ်သည့် သွပ်များနှင့်အုတ်များကို အလိုရှိသောအခါတွင် ရနိုင်ရန်စီစဉ်ထားပြီး ဖြစ်ကြောင်း၊ ဆောက်လုပ်မည့် ကန်ထရိုက်တာနှင့်လည်း ပြောဆိုပြီးဖြစ်ကြောင်းကို ကြီးကြပ်ရေး အရာရှိက လျောက်ထားသူပြောဆိုသည့်အတိုင်း လက်ခံယုံကြည်ခဲ့လေသည်။ အဆောက်အဦပုံစံတင်ပြခြင်းသည် အကယ်ပင်ဆောက်လုပ်ရန် ရည်ရွယ်ကြောင်း ထင်ရှား

၁၉၅၀
ဦးဘိုးခိုင်
နှင့်
ကာစင်အလီ
ပါ ၃။

စေရန်အတွက် အထောက်အထား တခုသာလျှင် ဖြစ်နိုင်ပေသည်။ အခြား သက်သေခံအထောက်အထားများလုံလောက်လျှင် ပုံစံတင်ပြရန် လိုမည်မဟုတ်ချေ။ အဆောက်အဦပုံစံမတင်ပြလျှင် မပြီးနိုင်ဟုယူဆခြင်းသည် မသင့်တော်ချေ။ အဆောက်အဦအတွက် လိုအပ်သည့်ပစ္စည်းများကို အားလုံးစုပုံ၍ပြီးဖြစ်ရမည် ဟုယူဆခြင်းသည်လည်း မသင့်တော်ချေ။ တရားစွဲဆိုခွင့်ရပြီးနောက် တရားစွဲဆို၍ မြေကိုလက်ရောက်ရသောအခါမှသာလျှင် အဆောက်အဦကို ဆောက်ရမည် ဖြစ်သဖြင့် ထိုအချိန်တွင်အသင့်ရနိုင်ရန် စီစဉ်ပြီးဖြစ်လျှင် လုံလောက်ပြီဟုယူဆသင့်သည်။ ဤအမှုတွင် လျှောက်ထားသူသည် မိမိ၏အဘိုးတန်မြေပေါ်တွင် မိမိပိုင်အဆောက်အဦ ပြန်လည်ဆောက်လုပ်လိုခြင်းမှာ ဓမ္မတာအတိုင်းပင်ဖြစ်ပေမည်။ ၎င်းဥပဒေလည်းထိုကဲ့သို့အဆောက်အဦကို ဆောက်လုပ်ရန်အတွက် လိုအပ်သည့်ငွေကြေးကို ကျခံနိုင်သည်အခြေအနေ ရှိသည်ဟူသောအချက်ကို လျှောက်ထားခံရသူများက မငြင်းနိုင်ချေ။ လိုအပ်သောပစ္စည်းများကို ရရန်စီစဉ်ထားပြီးဖြစ်ကြောင်းနှင့် ဆောက်လုပ်ပေးရန်အတွက် ကန်ထရိုက်တာနှင့်လည်း စီစဉ်ပြီးဖြစ်ကြောင်းများမှာလည်း ထင်ရှားလျက်ရှိသည်။ ထို့ကြောင့်၎င်းသည် အချင်းဖြစ်မြေပေါ်တွင် အဆောက်အဦဆောက်လုပ်ရန်အတွက် ထိုမြေကို အကယ်ပင် အလိုရှိသည်မှာ ထင်ရှားသည်ဟု ဤရုံးတော်က ယူဆသည်။ ထို့ကြောင့် စစ်တွေမြို့နယ်ပိုင်တရားမ တရားသူကြီး၏အမိန့်ကို စရိတ်နှင့်တကွ ပယ်ဖျက်လိုက်သည်။

ဤရုံးတော်အတွက် ရွှေနေခမှာ ငွေ ၀၅ ကျပ် (ရှစ်ဆယ့်ငါးကျပ်) ဖြစ်စေရမည်။

တရားလွှတ်တော်ချုပ်

ဦးဝဇယ ပါ ၄ (စောဒကများ)

နှင့်

ဦးပရမ ပါ ၁ (စုဒိတကများ) *

†၁၉၅၈ ဇွန်လ ၁၆။

ဝိနိစ္ဆယဌာန အက်ဥပဒေ (၁၉၁၁ ခုနှစ်)၊ ဝိနိစ္ဆယဌာန (ပြင်ဆင်ချက်) အက်ဥပဒေ (၁၉၁၆ ခုနှစ်)။

ကျေးငှက်မှ နှင့်ထုတ်ပေးစေလိုမှု၊ အမှုအတောအတွင်း မည်သူမျှ မနေရ၊ ချိုပ်ဖိတ်ထားရမည်ဟု ကြားဖြတ်အမိန့်၊ ငှက်ကျေးတိုက်အတွင်းမှ နှင့်ထုတ်သည့်စီရင်ချက်အမိန့်။

ဒုတိယစုဒိတ်က ဦးသံဝရက မိမိပုဂ္ဂလိကဝိုင် ကျောင်းတိုက်များမှ စောဒက ပုဂ္ဂိုလ်များအား ကျောင်းတိုက်မှနှင်ထုတ်ပေးစေလိုမှုကို၊ ရန်ကုန်မြို့၊ အလယ်ဝိုင်းမြို့နယ် ဝိနိစ္ဆယရုံးတော်တွင် ၁၀-၁-၅၈ နေ့၌ တရားစွဲဆိုလေသည်။

ဝိနိစ္ဆယရုံးတော်က ကျောင်းတိုက်အတွင်းတွင် အမှုအတောအတွင်း၌၊ မည်သူမျှမနေရဟု ခိုင်ပိတ် ကြားဖြတ်အမိန့်တခု ၂၁-၁-၅၈ နေ့တွင် ချမှတ်လေသည်။

ဤအမှုအတောအတွင်း၊ စောဒကပုဂ္ဂိုလ်များက အလယ်ဝိုင်းမြို့နယ် ဝိနိစ္ဆယဌာနတွင် မိမိတို့ အဆုံးအဖြတ်ခံယူရန် သဘောတူ၊ ၎င်းဌာနတွင် စီရင်ဝိုင်ခွင့် အာဏာ လုံးဝမရှိကြောင်း နှစ်ကြိမ်တိုင်တိုင်ကန့်ကွက်ကြလေသည်။

အလယ်ဝိုင်း ဝိနိစ္ဆယဌာနက၊ ၁၈-၂-၅၈ နေ့တွင် စောဒကများ ကျောင်းတိုက်အတွင်းမှ ၇ ရက်အတွင်းထွက်ခွါသွားရန် နှင့်ထုတ်သည့်အမိန့်ကို ချမှတ်လေသည်။

ဆုံးဖြတ်ချက်။ ။ဤအဓိကရုဏ်းမှုကို ရန်ကုန်မြို့၊ အလယ်ဝိုင်း မြို့နယ်ဝိနိစ္ဆယ ဌာနရုံးတော်သည် စီရင်ဝိုင်ခွင့်အာဏာမရှိဘဲ စီရင်ဆုံးဖြတ်ခြင်းကို ပြုခဲ့သဖြင့်၊ ၁၈-၂-၅၈ နေ့က ချမှတ်သောစီရင်ချက်သည် ဝိနိစ္ဆယဌာနနှင့် ဝိနိစ္ဆယခုံ အက်ဥပဒေနှင့် တိုက်ရိုက် ဆန့်ကျင်သောကြောင့် ပျက်ပြယ်သည်။

၎င်းပြင်၊ ၂၁-၁-၅၈ နေ့ကချမှတ်ခဲ့သော ကြားဖြတ် အမိန့်သည်လည်း အလယ်ဝိုင်း မြို့နယ် ဝိနိစ္ဆယဌာနတွင် စီရင်ဝိုင်ခွင့်အာဏာမရှိသဖြင့် ပျက်ပြယ်ရမည်။ အဓမ္မ ရုန်းရင်းဆန်ခတ် အမှုအခင်းမျိုးမဖြစ်ပွါးနိုင်ရန် တားဆီးဘို့ ကြားဖြတ် အမိန့်မျိုး ထုတ်နိုင်သည့် အာဏာသည် မည်သူထံတွင်မရှိ။

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* ၁၉၅၈ ခုနှစ်၊ တရားမအသေးအဖဲ့လျှောက်လွှာအမှတ် ၃၃။

† ဦးမြင့်သိန်း၊ နိုင်ငံတော် တရားဝန်ကြီးချုပ်၊ ဦးချန်ထွန်း၊ နိုင်ငံတော် တရားဝန်ကြီး၊ ဦးဘိုကြီး၊ နိုင်ငံတော်တရားဝန်ကြီးတို့ရှေ့ဌေးတွင် တရားဝန်ကြီး ဦးချန်ထွန်း အမိန့်ချမှတ်သည်။

၁၉၅၈

ဦးဆိုဇယ ပါ ၄
နှင့်
ဦးဟရမ ပါ ၁၊

ဤကဲ့သို့ အဝမ္မအမှုမျိုးကို တားဆီးနိုင်ရန်နှင့် ကျောင်းတိုက်အတွင်းမှ နှင်ထုတ်သည့် အမိန့် ချမှတ်နိုင်ရန် ဝိနိစ္ဆယအက်ဥပဒေကို ပြင်သင့်သည်။

စောဒကများအတွက်၊ လွတ်တော်ရှေ့နေကြီး ဦးဘသန်း (၁) လိုက်ပါဆောင်ရွက်သည်။

စုဒိတကအမှတ် (၁) အတွက်၊ မည်သူမျှမလာ။

စုဒိတကအမှတ် (၂) အတွက်၊ လွတ်တော်ရှေ့နေကြီး ဦးဘကျင် လိုက်ပါဆောင်ရွက်သည်။

တရားဝန်ကြီး ဦးချန်ထွန်း။ ။ဒုတိယ စုဒိတကပုဂ္ဂိုလ် ဦးသံဃရက၊ရန်ကုန်မြို့၊ဝင်ဒါမီယာလမ်းရှိ ဗေဓိကုန်းကျောင်းတိုက်သည် မိမိ၏ပုဂ္ဂလိကပိုင်ပစ္စည်းဖြစ်၍ (ဤရုံးတော်၌) စောဒကပုဂ္ဂိုလ်များကနောက်ပါသံဃာပေါင်းများစွာဖြင့်အတင်းအဓမ္မဝင်ရောက်နေထိုင်ကြခြင်းကြောင့် ၎င်းတို့အား အဆိုပါကျောင်းတိုက်မှ နှင်ထုတ်ပေးစေလိုမှုကို၊ ရန်ကုန်မြို့၊ အလယ်ပိုင်း ဦးနယ် ဝိနိစ္ဆယ ရုံးတော်တွင် ၁၀-၁-၅၇ နေ့က တရားစွဲဆိုလေသည်။ ၂၁-၁-၅၇ နေ့တွင် အဆိုပါကျောင်းတိုက်အတွင်းရှိ ကျောင်း သုံးကျောင်းကို အမှုအတောအတွင်း၌ မည်သူမျှ မနေရ ချိပ်ပိတ်ထားရမည်ဟူသော ကြားဖြတ်အမိန့် တခုကို ဝိနိစ္ဆယဌာနက ချမှတ်ခဲ့လေသည်။ ထိုအမိန့်ကိုမကျေနပ်သဖြင့် စောဒကပုဂ္ဂိုလ်များက ဤရုံးတော်တွင် ဝင်ရောက်စွက်ဖက်ရန် မေတ္တာရပ်ခံလွှာသွင်းခဲ့သည်။ ၎င်းကိစ္စမှာ ၁၉၅၈ ခုနှစ်၊ တရားမ အသေးအဖွဲ့ လျှောက်လွှာ အမှတ် ၂၆ ဖြစ်သည်။ ဤအမှု အတောအတွင်း ၄-၂-၅၈ နေ့တွင် စောဒကပုဂ္ဂိုလ်များ ဖြစ်ကြသော ဦးဝိဇယတို့က အလယ်ပိုင်းမြို့နယ် ဝိနိစ္ဆယဌာနတွင် မိမိတို့သည် အဆုံးအဖြတ် ခံယူရန်သဘောမတူကြောင်း၊ သို့ဖြစ်ပါ၍ ဝိနိစ္ဆယဌာနတွင် စီရင်ပိုင်ခွင့်အာဏာလုံးဝမရှိကြောင်းဖြင့် ကန့်ကွက်လွှာတင်သွင်းခဲ့သည်။ ဝိနိစ္ဆယဌာနက ၎င်းပုဂ္ဂိုလ်တို့အား စာဖြင့်သော်၎င်း၊ လူကိုယ်တိုင်သောဥင်း ထူချေရှင်းလင်းရန် အမိန့် ချမှတ်ပြန်သဖြင့် ၎င်းတို့က ၁၀-၂-၅၁ နေ့တွင် နောက်တကြိမ်ထပ်မံ၍ အဆိုပါ ဝိနိစ္ဆယဌာနတွင် အဆုံးအဖြတ်ခံယူလိုခြင်းမရှိသဖြင့် စီရင်ပိုင်ခွင့် လုံးဝမရှိကြောင်း ကန့်ကွက်ကြပြန်သည်။ အလယ်ပိုင်းမြို့နယ် ဝိနိစ္ဆယဌာနက ၁၀-၂-၅၈ နေ့တွင်ပင် ဦးသံဝရ ဟောင်းဆိုသည့်အတိုင်း ဦးဝိဇယနှင့်တကွ အားလုံးသော ပုဂ္ဂိုလ်များသည် ကျောင်းတိုက်အတွင်းမှ ၇ ရက်အတွင်း ထွက်ခွါသွားရန် နှင်ထုတ်သည့် စီရင်ချက်အမိန့်ကို ချမှတ်လေသည်။ ထိုသို့ချမှတ်ခံရသည့်စီရင်ချက်ကို ပယ်ဖျက်ပေးပါရန် ဦးဝိဇယပါရဟန်းတော် ၄ ပါးတို့က ဤရုံးတော်တွင် ထပ်မံ၍ မေတ္တာရပ်ခံ

လွှာ တင်သွင်းကြလေသည်။ ထိုမေတ္တာရပ်ခံလွှာမှာ ၁၉၅၈ ခုနှစ်၊ တရားမ အသေးအဖွဲလျှောက်လွှာအမှတ် ၃၃ ဖြစ်သည်။

၁၉၅၈ ဦးဘိုးယဲ ဝါ ၄ နှင့် ဦးဟန်မော ဝါ ၁။

၁၃၁၁ ခုနှစ်၊ ဝိနိစ္ဆယဋ္ဌာန အက်ဥပဒေကို၊ ၁၃၁၆ ခုနှစ်၊ ဝိနိစ္ဆယဋ္ဌာန (ပြင်ဆင်ချက်) အက်ဥပဒေ (၁၉၅၅ ခုနှစ်၊ အက်ဥပဒေအမှတ် ၂၀) ဖြင့်ပြင်ဆင်လိုက်ရာ အခြေအနေမှာ အရေးကြီးသော အချက်များတွင် အတော်ပင် ပြောင်းလဲလာခဲ့ပြီဖြစ်သည်ကို၊ ရန်ကုန်မြို့၊ အလယ်ပိုင်း မြို့နယ် ဝိနိစ္ဆယဋ္ဌာန ရုံးတော်က သတိရှိခဲ့ဟန်မတူချေ။ ပြင်ဆင်လိုက်လည်အတိုင်းဆိုလျှင် ထိုအက်ဥပဒေ၏အမည်မှာ "၁၃၁၁ ခုနှစ်၊ ဝိနိစ္ဆယဋ္ဌာနနှင့် ဝိနိစ္ဆယခုံ အက်ဥပဒေ" ဟု ခေါ်တွင်လာခဲ့ချေမည်။ ထို့ပြင် "ဝိနိစ္ဆယခုံ" နှင့် စပ်လျဉ်း၍ များစွာသော ပြဋ္ဌာန်းချက်များကို အခန်း ၂ အဖြစ်ဖြင့် မူလအက်ဥပဒေတွင် ထည့်သွင်းပြင်ဆင်ခဲ့လေသည်။ ထို့ကြောင့် ပြင်ဆင်ထားပြီးဖြစ်သည့် ယခုလက်ရှိ အက်ဥပဒေအရ ဆိုလျှင် ဝိနည်းမမှန်အမိုကရုဏ်းမှု တခုခုကို စွဲဆိုလိုသောအခါ စောဒကပုဂ္ဂိုလ်တို့သည်—

(၁) သက်ဆိုင်ရာမြို့နယ် ဝိနိစ္ဆယဋ္ဌာနအဆုံးဖြတ်ခြင်း ကို ခံယူရန် မိမိနှင့်တကွ စုဒီတကပုဂ္ဂိုလ်တို့ကပါ သဘောတူလျှင် ထိုဝိနိစ္ဆယဋ္ဌာနသို့ တင်သွင်း ၍အမှုစွဲဆိုနိုင်သည်။ သို့မဟုတ်

(၂) မိမိနှင့် စုဒီတကပုဂ္ဂိုလ်တို့က သဘောတူဖွဲ့စည်းသည့် ဝိနိစ္ဆယခုံ၏ စီရင်ဆုံးဖြတ်ခြင်း ကို ခံယူလိုလျှင် ထိုသို့ မိမိတို့ သဘောတူဖွဲ့စည်းသည့် ဝိနိစ္ဆယခုံသို့ ပုဒ်မ ၃၅ အရ လွှဲအပ်နိုင်သည်။

(၃) အကယ်၍ အထက်အပိုဒ် (၁)နှင့် (၂) အတိုင်း သက်ဆိုင်ရာ မြို့နယ် ဝိနိစ္ဆယဋ္ဌာန၏ အဆုံးအဖြတ်ကိုခံယူရန်သော်၎င်း၊ နှစ်ဦး နှစ်ဘက်သဘောတူ အနုညာတခုံဖွဲ့စည်း၍ ဆုံးဖြတ်စေရန် သဘောမတူသျှင် သော်၎င်း၊ ထိုအမိုကရုဏ်းမှုကို သက်ဆိုင်ရာ စီရင်ပိုင်နှင့် ရှိသည့် နယ်ပိုင်တရားမရုံးတွင် ပုဒ်မ ၃၆ အရ လွှဲအပ်ရမည်ဖြစ်သည်။

ထိုသို့ ပုဒ်မ ၃၆ အရ၊ အမှု စွဲဆိုသည့်အခါ နယ်ပိုင် တရားမရုံးက စောဒကနှင့် စုဒီတကပုဂ္ဂိုလ်တို့အား ၎င်းတို့၏ အမိုကရုဏ်းမှုကို စီရင်ဆုံးဖြတ်ရန်အလို့ငှါ သက်ဆိုင်ရာ မြို့နယ် ဝိနိစ္ဆယဋ္ဌာနသို့ လွှဲအပ်လိုသောဆန္ဒ၊ သို့မဟုတ် နှစ်ဦးသဘောတူဖွဲ့စည်းသည့် ဝိနိစ္ဆယခုံသို့ လွှဲအပ်လိုသောဆန္ဒရှိလျှင် စာဖြင့်ရေးသားဖေါ်ပြရန် အကြောင်းကြားမည် ဖြစ်သည်။ နှစ်ဦး

၁၉၅၈
ဦးဝိဇယ ပါ ၄
နှင့်
ဦးပရမ ပါ ၁။

နှစ်ဘက်လုံး သဘောတူသည့် သက်ဆိုင်ရာ ဝိနိစ္ဆယဌာန၊ သို့မဟုတ် သဘောတူ ဖွဲ့စည်းသည့် ဝိနိစ္ဆယခုံသို့ နယ်ပိုင်တရားမရုံးသည် အဆိုပါအမှုကို လွှဲအပ်ပေးပို့ရမည်ဖြစ်သည်။ အမှုသည် နှစ်ဦးနှစ်ဘက်လုံးကသော်ငင်း၊ ဟဘက်ဘက်ကသော်ငင်း၊ မိမိတို့၏ အဓိကရုဏ်းမှုကို သက်ဆိုင်ရာ မြို့နယ် ဝိနိစ္ဆယဌာနသို့ လွှဲအပ်စေရန် ဖြစ်စေ၊ နှစ်ဦး သဘောတူ ဝိနိစ္ဆယခုံဖွဲ့စည်း၍ လွှဲအပ်ရန်ဖြစ်စေ သဘောမတူလျှင် နယ်ပိုင်တရားမရုံးကငင်း အမှုကို ပုဒ်မ ၃၀ အရ ဖွဲ့စည်းသည့် ဝိနိစ္ဆယခုံသို့ လွှဲအပ်ရမည်ဖြစ်သည်။

ယခုအမှုတွင် စုဒိတကပုဂ္ဂိုလ်များက အဆိုပါအမှုကို၊ ရန်ကုန်မြို့၊ အလယ်ပိုင်းမြို့နယ် ဝိနိစ္ဆယဌာနရုံးတော်၏ စီရင်ဆုံးဖြတ်ခြင်းကို ခံယူရန် သဘောတူညီမှု မရှိခဲ့သဖြင့် စောဒကပုဂ္ဂိုလ် ဦးသံဝရသည် အဆိုပါ ဝိနိစ္ဆယဌာန ရုံးတော်တွင် တရားစွဲဆိုပိုင်ခွင့်မရှိသည်မှာ ထင်ရှားသည်။ တနည်းဆိုသော် ရန်ကုန်မြို့အလယ်ပိုင်းမြို့နယ်ဝိနိစ္ဆယဌာနရုံးတော်သည် ဤသို့စောဒကပုဂ္ဂိုလ်ဦးသံဝရက စွဲဆိုသော အမှုကို လက်ခံနိုင်သည့်အာဏာနှင့် စီရင်ပိုင်ခွင့်အာဏာ လုံးဝမရှိချေ။ စုဒိတက ပုဂ္ဂိုလ်များက နှစ်ဘြမ်တိုင်တိုင် အတိအလင်း မိမိတို့သည်၊ရန်ကုန်မြို့၊ အလယ်ပိုင်းမြို့နယ် ဝိနိစ္ဆယဌာနရုံးတော်၏ ကြားနာစစ်ဆေး စီရင်ပိုင်ခွင့်အာဏာလည်း မရှိကြောင်းဖြင့်ကန့်ကွက်ခဲ့ကြသေးသည်။ ထို့ကြောင့် ဤအဓိကရုဏ်းမှုကို၊ရန်ကုန်မြို့၊ အလယ်ပိုင်းမြို့နယ် ဝိနိစ္ဆယဌာနရုံးတော်သည် စီရင်ပိုင်ခွင့်အာဏာမရှိဘဲ စီရင်ဆုံးဖြတ်ခြင်းကို ပြုခဲ့သဖြင့် ၁၃၁၉ ခု၊ စောဒကမှုအမှတ် ၅၁ တွင်၊ ၁၃၁၉ ခု၊ တပေါင်းလဆန်း ၁ ရက် (၁၀-၂-၅၇) နေ့က ချမှတ်သော စီရင်ချက်သည် ဝိနိစ္ဆယဌာနနှင့် ဝိနိစ္ဆယခုံအက်ဥပဒေနှင့် တိုက်ရိုက် ဆန့်ကျင် နေသောကြောင့် ပျက်ပြယ်ယည်ဟု ယူဆရမည်ဖြစ်သည်။ ဦးသံဝရသည် အဆိုပါ အဓိကရုဏ်းမှုကို ရန်ကုန်မြို့တော် တရားမရုံးတွင် စတင်စွဲဆိုမှသာလျှင် အဆိုပါ အက်ဥပဒေနှင့် ကိုက်ညီမည်ဖြစ်သည်။ ထိုသို့ ရန်ကုန်မြို့တော်တရားမရုံးတွင် စွဲဆိုသောအခါ၊ ပုဒ်မ ၃၇ နှင့် ၃၈ အရ တရားမရုံးက ဆက်လက်ဆောင်ရွက်သွားလိမ့်မည် ဖြစ်သည်။

အလယ်ပိုင်းမြို့နယ် ဝိနိစ္ဆယဌာနရုံးတော်က ဝိနိစ္ဆယဌာန အက်ဥပဒေပုဒ်မ ၃၂ (၂) အရ၊ အချင်းဖြစ် ကျောင်းတိုက်အတွင်းရှိ တိုက်ကျောင်း၊ ဦးရွှေမဲ့ ကျောင်းနှင့် ကံကြီးစု ကျောင်းပေါင်း သုံးကျောင်းတို့တွင် အမှုမပြီးမချင်း မည်သူမျှမနေရ၊ ထိုသို့မနေနိုင်ရန် သက်ဆိုင်ရာမှ ချိပ်ပိတ်ထားရန် ကြားဖြတ် အမိန့်တခုကို ၂၁-၁-၅၇ နေ့က ချမှတ်ခဲ့လေသည်။ ဤအမိန့်သည်လည်း အထက်

တွင် ဗေါ်ပြခဲ့သည့်အတိုင်း အလယ်ပိုင်းမြို့နယ် ဝိနိစ္ဆယဌာနတွင် စီရင်ပိုင်ခွင့် အာဏာမရှိသဖြင့် ပျက်ပြယ်ရမည်ပင်ဖြစ်သည်။ ၎င်းကြားဖြတ်အမိန့်ကို ချမှတ်ရာတွင် ဝိနိစ္ဆယရုံးတော်က မိန့်ဆိုထားသည်မှာ—

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"ဦးသံဝရပိုင် (၁) တိုက်ကျောင်း၊ (၂) ဦးရွှေမဲ့ကျောင်း၊ (၃) ကံကြီးစုကျောင်း၊ ၎င်းကျောင်းသုံးကျောင်းအပေါ်၌ ဦးသံဝရ၏ အမိန့်မရဘဲ အတင်းအဓမ္မတက်ရောက်နေသော (၁) ဦးစန္ဒောဘာသ၊ (၂) ဦးကောဝိဒ၊ (၃) ဦးသောဘိတ၊ (၄) ရှင်တေဇနှင့် အမည်မသိ အပေါင်းပါသံဃာ ၂၀ ခန့်နှင့် ၎င်းသံဃာများကို ခေါ်ဆောင်လာသော (၁) ဦးဝိဇယ၊ (၂) ဦးစန္ဒေ၊ (၃) ဦးဥတ္တမ၊ (၄) ဦးပညာသာမိနှင့် အပေါင်းပါ သံဃာများ ဝင်ရောက် နေထိုင်ကြခြင်းကြောင့် အဓိကရုဏ်းဖြစ်ပါက သာဓုကျောင်းတိုက်ကဲ့သို့ သာသနာတော်၌ အရှုပ်ဆိုးစရာဖြစ်မည်။ မောဓိကုန်းကျောင်းတိုက်ရှိ ဦးသံဝရ၏တပည့်များနှင့် အဓိကရုဏ်းဖြစ်စရာ အကြောင်းရှိပါသည်။" ထို့ပြင်၊

"မောဓိကုန်းတိုက်ကို ဓမ္မဝိနိယနှင့်အညီ ပိုင်ဆိုင်သော ပုဂ္ဂိုလ်မှာ ဦးသံဝရဖြစ်ကြောင်း.....ထိုကျောင်းတိုက်တွင်းရှိ ကျောင်းများပေါ်သို့ ဓမ္မဝိနိယနှင့်အညီ ပိုင်ဆိုင်ခွင့်မရှိသော ရဟန်းတော်အချို့က ပြင်ပမှ ရဟန်းများကိုလက်ခံ၍ ကျောင်းပိုင် ဦးသံဝရနှင့် တပည့်ရဟန်းများအား နှေ့စဉ် ဆန့်ကျင်ဘက်ပြုလုပ်နေသည်ဟု တိုင်ကြားစာအရ သိရပါသည်။ ကြည့်မြင်တိုင် သာဓုတိုက်မှာကဲ့သို့ အဓိကရုဏ်းဖြစ်မည်ကိုလည်း စိုးရိမ်ရသောအခြေအနေရှိနေပါသည်။ သို့ပါ၍ သံဃာအချင်းချင်း အဓိကရုဏ်း မဖြစ်ရအောင် .....ဝင်းသုံးကျောင်းကို ခဲဘက်ဆိုင်ရာက ပိတ်ပင်ထားခြင်းဖြင့် လောင်မည့်မီးကို ကြိုတင်တားဆီးမှုပြုပေးပါရန်"

ဟု သာသနာ့ဥယျာန်ကြားရေးဝန်က ၂၀-၁-၅၈ နေ့တွင် သာသနာရေး ဝန်ကြီးဌာနအတွင်းဝန်ထံသို့ အစီရင်ခံထားသည်ကိုလည်း တွေ့ရသည်။

ယခုပြင်ဆင်ကားသည့် ဝိနိစ္ဆယဌာန အက်ဥပဒေအရမှာ (စောဒကနှင့် စုဒီတက နှစ်ဦးနှစ်ဘက်တို့က သက်ဆိုင်ရာမြို့နယ် ဝိနိစ္ဆယဌာန၏ အဆုံးအဖြတ်ကို ခံယူရန် တင်ကြို၍ သဘောတူညီထားပြီးမရှိလျှင်) သက်ဆိုင်ရာမြို့နယ် တရားမရုံးသို့ အမှုစွဲချက်တင်သည့်အချိန်မှစ၍ ဝိနိစ္ဆယခုံရုံး ဖွဲ့စည်းပြီးသည့်နောက် ထိုသို့ ဖွဲ့စည်းသည့် ဝိနိစ္ဆယခုံက အမှုစတင် စစ်ဆေးသည့်အချိန်အထိ ထိုမျှသောကာလအတွင်းတွင် မနှစ်မြို့ဘွယ်ရာဖြစ်သော အဓမ္မရုန်းရင်းဆန်ခတ် အမှုအခင်း

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ဦးဝိဇယ ပါ ၄ နှင့် ဦးပရမ ပါ ၁။

မျိုး မဖြစ်ပွါးနိုင်ရန်တားဆီးဘို့ ကြားဖြတ်အမိန့်မျိုး ထုတ်နိုင်သည့်အာဏာသည် မည်သူထံတွင်မှမရှိဘဲ ဖြစ်နေသည်ကို တွေ့ရသည်။ ထို့ကြောင့် ဤကဲ့သို့ မလိုလားအပ်သည့် အဓမ္မမှုမျိုးကို တားဆီးနိုင်ရန်အလို့ငှါ ကြားဖြတ်အမိန့် ထုတ်ပေးနိုင်သည့်၊ သို့မဟုတ် တနည်းအားဖြင့် အရေးယူ ဆောင်ရွက်ထားနိုင်သည့် အာဏာကို အာဏာပိုင်တဦးဦးအား ပေးထားရန်အလို့ငှါ ဝိနိစ္ဆယဌာန အက်ဥပဒေကို ပြင်သင့်သည် ဟု ဤရုံးတော်ကယူဆသည်။

ထို့ပြင် အခြားအရေးကြီးသော အချက်တရပ်ကို အလျဉ်းသင့်၍ ဖော်ပြလိုပါသေးသည်။ ဤအမှုတွင် အလယ်ပိုင်းမြို့နယ် ဝိနိစ္ဆယဌာနရုံးတော်က ထိုရုံးတော်ရှေ့ရှိ စုဒိတကပုဂ္ဂိုလ်များအား အချင်းဖြစ်ကျောင်းတိုက်အတွင်းမှ ထွက်ခွါသွားစေရန် စီရင်ချက်အမိန့် ချမှတ်ရခြင်းမှာ ဤကျောင်းတိုက်သည် စောဒက ပုဂ္ဂိုလ် ဦးသံဝရ၏ ပုဂ္ဂလိကပိုင်ကျောင်းတိုက်ဖြစ်ကြောင်းမှာ မည်သူမျှ မငြင်းနိုင်လောက်အောင် ထင်ရှားလျက် ရှိသောကြောင့် ဖြစ်လေသည်။ ဤကဲ့သို့ ၎င်းကျောင်းတိုက်သည် ဦးသံဝရ၏ တဦးတည်း ပုဂ္ဂလိကပိုင် ကျောင်းတိုက်ဖြစ်သည်ဟု အခိုင်အမာ ယူဆရခြင်းအကြောင်းမှာ မူလက ကျောင်းတိုက် စတင်တည်ထောင်သည့် ဆရာတော်ကြီးလက်ထက်မှစ၍ စဉ်ဆက်မပြတ် ပုဂ္ဂလိက အဖြစ်ဖြင့် ခံယူရရှိသည်တကြောင်း၊ ယခုလက်ရှိ ပုဂ္ဂလိကပိုင်ရှင် ဦးသံဝရ၏ အရင် တဆက်တည်းဖြစ်သော ပုဂ္ဂလိကပိုင်ရှင် ဆရာတော် ဦးတိလောကသည်၊ ထိုကျောင်းတိုက်ကို မိမိပိုင် ပုဂ္ဂလိကကျောင်းတိုက်ဖြစ်ကြောင်း၊ ရန်ကုန်မြို့၊ အလယ်ပိုင်းမြို့နယ် ဝိနိစ္ဆယရုံးတော်၊ ခရိုင်ဝိနိစ္ဆယရုံးတော်နှင့် နိုင်ငံတော် ဝိနိစ္ဆယဒုံးတော်မှ မကြာသေးမီကပင် အဆုံး အဖြတ် ခံယူရရှိခဲ့သည် တကြောင်း၊ ထိုသို့ ပိုင်ဆိုင်သူ ဦးတိလောကသည် အဆိုပါကျောင်းတိုက်ကို မိမိနှင့်အတူ နှစ်ဦးပိုင် ဖြစ်စေရန် အလို့ငှါ ဒို့သန္တကစာချုပ်တခုကို ၂၀-၈-၅၀ နေ့က ရန်ကုန်မြို့၊ အလယ်ပိုင်းမြို့နယ် ဝိနိစ္ဆယဌာနရုံးဦးပင်လျင် (အက်ဥပဒေပုဒ်မ ၃၁ အရ) ချုပ်လုပ်၍ မှတ်ပုံတင်ခဲ့ရာ၊ ထိုစာချုပ်တွင် သက်သေအဖြစ်ဖြင့် ဤအမှုတွင် ပဌမ စုဒိတက တဦးဖြစ်သူဦးဝိဇယကိုယ်တိုင်ပင် လက်မှတ်ရေးထိုးခဲ့သေးသည် တကြောင်းတို့ကြောင့် အချင်းဖြစ်ကျောင်းတိုက်မှာ ဦးသံဝရ၏ပုဂ္ဂလိကပိုင် ဖြစ်သည်မှာ မည်သူမျှ မငြင်းဆိုနိုင်လောက်အောင် ခိုင်မာ လုံလောက်ကြောင်းဖြင့် ဝိနိစ္ဆယဌာနက ယူဆခဲ့ခြင်းဖြစ်သည်။ ထို့ပြင် ပုဂ္ဂလိကပိုင် ကျောင်းထိုင်ပုဂ္ဂိုလ်က မိမိ၏သြဇာ မခံယူသူ မည်သည့်ရဟန်းအားမဆို ဒိမိကျောင်းတိုက်၏ အရာမအတွင်းမှ ထွက်ခွါသွားစေရန် နှင်ထုတ်ပိုင်ခွင့်သည် ကျောင်းတိုက်များ၏ စည်းကမ်း သေဝပ်မှုအတွက် အရေးကြီးသည့်အခွင့်အရေးဖြစ်ပေသည်။ ထိုကဲ့သို့သော အခွင့်အရေး

မျိုးကို ထိရောက်ဆောလျင်စွာ ကျင့်သုံးနိုင်မှသာလျှင် ကျောင်းတိုက်များ၏ငြိမ်ဝပ် ပိပြားရေးနှင့် စည်းကမ်းသေဝပ်ရေးအတွက် စိတ်ချရမည်ဖြစ်သည်။ ယခုလက်ရှိ ဝိနိစ္ဆယဌာနနှင့် ဝိနိစ္ဆယခုံအက်ဥပဒေအရဆိုလျှင် မည်သို့ပင် မိမိ၏ပုဂ္ဂလိကပိုင် ကျောင်းတိုက်ဖြစ်ကြောင်း ထင်ရှားစေကာမူ တရားမရုံးသို့ တရားစွဲဆိုခြင်း ပြု၍ ဝိနိစ္ဆယခုံဖွဲ့စည်းပြီးသည့်နောက် စီရင်ချက်ချသည့်အထိ အဆိုပါအခွင့်အရေးမှာ မိမိလက်တွင်းတွင် မရှိသကဲ့သို့ ဖြစ်၍နေချေသည်။ ထို့ကြောင့် ဤရုံးတော်က ရန်ကုန်မြို့၊ အလယ်ပိုင်းမြို့နယ် ဝိနိစ္ဆယဌာနရုံးတော်က ချမှတ်ထားသည့် နှင်ထုတ် စေရန် စီရင်ချက်အမိန့်ကို ဥပဒေအရ မလွဲမကင်းသာ၍ ပယ်ဖျက်ရသော်လည်း၊ ပြဆိုခဲ့သည့်အတိုင်း ပုဂ္ဂလိကပိုင် ကျောင်းတိုက်များအတွင်း ငြိမ်ဝပ် ပိပြားရေး နှင့် စည်းကမ်းသေဝပ်ရေးများ ထိခိုက်ပျက်ပြားသွားမည်ကို အတော်ပင် စိုးရိမ်ပူပန်ခြင်းဖြစ်ရပေသည်။ ထို့ကြောင့် နှစ်ဦးနှစ်ဘက်သော စောဒကနှင့် စုဒီတက ပုဂ္ဂိုလ်တို့ကပင်လျှင် ပုဂ္ဂလိကပိုင် မဟုတ်ဟု ငြင်းဆိုခြင်း မရှိသောကြောင့်၎င်း၊ ပိုင်ရှင်က စောဒကပုဂ္ဂိုလ်သို့ လွှဲဒါန်း လွှဲပြောင်းပေးကြောင်း မှတ်ပုံတင်သည့် စာချုပ်စာတမ်းရှိနေသောကြောင့်၎င်း၊ ဝိနိစ္ဆယဌာန၊ သို့မဟုတ် ဝိနိစ္ဆယခုံရုံးက ဖြစ်စေ၊ အာဏာပိုင်သည့် တရားရုံးတခုခုကဖြစ်စေ အပြီးအပြတ်ဆုံးဖြတ်ထားသည့် စီရင်ချက်ရှိသောကြောင့်၎င်း၊ ကျောင်းတိုက်၊ သို့မဟုတ် ကျောင်းတခုခုသည် စောဒကပုဂ္ဂိုလ်တို့၏ ပုဂ္ဂလိကပိုင်ပစ္စည်းဖြစ်ကြောင်း ထင်ရှားသည့် ကိစ္စများတွင် ထိုပုဂ္ဂလိကပိုင်ကျောင်းထိုင်ပုဂ္ဂိုလ်က မိမိကျောင်းတိုက် အရာမှအတွင်းမှ ထွက်ခွါသွားစေလိုသည့် မည်သည့်ရဟန်းကိုမဆို နှင်ထုတ်သည့် အမိန့် ချမှတ်နိုင်ရန်နှင့် ထိုအမိန့်ကို ဝိနိစ္ဆယဌာနနှင့် ဝိနိစ္ဆယခုံ ဥပဒေပုဒ်မ ၂၄ အရသော်၎င်း၊ အခြား တနည်းနည်းဖြင့်သော်၎င်း အာဏာတည်စေရန် ဥပဒေ ပြဋ္ဌာန်းချက်တခုခုရှိဘို့ လိုအပ်သည်ဟု ဤရုံးတော်က ယူဆကြသည်။ သို့မှသာလျှင် ပုဂ္ဂလိကပိုင် ကျောင်းထိုင်ပုဂ္ဂိုလ်များသည် မိမိတို့၏ကျောင်းတိုက် အရာမှအတွင်း၌ ငြိမ်ဝပ်ပိပြားမှုနှင့် စည်းကမ်းသေဝပ်မှုတို့ကို အနှောင့်အရှက်ကင်းစွာ ထိန်းသိမ်းသွားနိုင်လိမ့်မည်ဟုယူဆကြသည်။

1958

ဦးဆိုးယေ ပါ ၄ နှင့် ဦးဟရမ ပါ ၁။

အထက်တွင်ဖော်ပြခဲ့သည့် အကြောင်းများကြောင့်၎င်း၊ ရန်ကုန်မြို့၊အလယ်ပိုင်းမြို့နယ် ဝိနိစ္ဆယဌာနက ၂၁-၁-၅၈ နေ့တွင် ချမှတ်သည့် ကြားဖြတ်အမိန့်သည်၎င်း၊ ၁၈-၂-၅၈ နေ့တွင် ချမှတ်သည့် စီရင်ချက်အမိန့်သည်၎င်း ပျက်ပြယ်သည်ဟု ဤရုံးတော်ကယူဆသည်။

နှစ်ဦးနှစ်ဘက်သော ပုဂ္ဂိုလ်များသည် မိမိတို့၏စရိတ်နုံး မိမိတို့ ကျခံစေရန် ဖြစ်သည်။

SUPREME COURT.

†S.C. 1958

Aug. 14.

CAPT. L. T. CARTER (APPLICANTS)

v.

THE SECRETARY, MINISTRY OF FINANCE AND REVENUE AND ONE (RESPONDENTS).*

CAPT. O. OFTEDAL (APPLICANTS)

v.

THE FINANCIAL COMMISSIONER (COMMERCE) AND ONE (RESPONDENTS).*

Certiorari—Directions in the nature of—Ss. 167 (8), (34) and (56), 137 of Sea Customs Act—Contraband on ship—Master's Liability—Conviction without evidence—Invocation of writ of certiorari on grounds of excess of jurisdiction and error of law apparent on the face of the records.

Held: In taking cognisance of offences under s. 167 of the Sea Customs Act, the Custom Officers are bound to act on judicial principles.

Ranchodas Jetthaibhai v. *The Secretary of the Union Government in the Ministry of Judicial Affairs*, (1950) B.L.R. 68; *Abdul Gaffar* v. *U Kyaw Nyun and one*, (1950) B.L.R. 218, referred to.

Held also: In the complete absence of evidence on record showing the petitioner to be "concerned" even remotely in the infringement of the provisions of the Act, mere illogical assumptions and surmises cannot be regarded as substitute for legal proof: Dispensing with such proof, on the part of the Custom authorities would amount to acting in excess of the jurisdiction vested in them under the Act.

Proceedings quashed.

C. A. Soorma and *Myint Soe* for Capt. L. T. Carter.

Than Aung for Capt. O. Oftedal.

Hla Maung (Government Advocate) for the respondents.

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* Civil Misc. Applications Nos. 55 and 86 of 1957.

† *Present:* U MYINT THEIN, Chief Justice of the Union, JUSTICE U BO GYI and JUSTICE U AUNG THA GYAW.

S.C. 1958

CAPT. L. T. CARTER v. THE SECRETARY, MINISTRY OF FINANCE AND REVENUE AND ONE.

CAPT. O. OFTEDAL v. THE FINANCIAL COMMISSIONER (COMMERCE) AND ONE.

Judgment of the Court was delivered by

JUSTICE U AUNG THA GYAW.—These two writ applications arise out of two similar incidents separated in point of time by a matter of some fourteen months. On 31st August 1955 while S.S. "Sirdharna" was moored in the Rangoon harbour loading her cargo, a Customs patrol staff rummaged the ship and found 44 packets of raw opium weighing 63 lbs. stuffed in a sack, concealed inside the ventilator shaft over the portside boiler of the ship's engine room. A similar search conducted on board the ship M.S. "Hai Wong" on 25th October 1956 yielded 32 lbs. 15½ oz. raw opium packed in plastic packages placed in two tins and concealed in the Coffer dam in the engine room of the ship.

The Masters of the two ships, the petitioners Capt. L. T. Carter and Capt. O. Oftedal, were called upon to show cause why action should not be taken against them under sections 167 (*8*), (*34*) and (*56*) of the Sea Customs Act. The two petitioners denied knowledge of the presence of the contraband in their ships and any infringement of the provisions of the Act. Against the petitioner Capt. L. T. Carter the Assistant Collector of Customs found that he had infringed section 137 of the Sea Customs Act, *i.e.*, taking on board goods not covered by shipping bills and a fine of K 2,200, the sum deposited by him as security, was imposed upon him. This order was confirmed by the Collector of Customs and on further appeal before the Financial Commissioner the imposition of the fine was held justified under section 167 (*8*) of the Act, *i.e.*, concealment of dutiable good or goods the export and import of which is prohibited. A revision application made to the President was dismissed. Against the petitioner Capt. O. Oftedal,

S.C. 1958

CAPT. L. T. CARTER v. THE SECRETARY, MINISTRY OF FINANCE AND REVENUE AND ONE.

CAPT. O. OFTEDAL v. THE FINANCIAL COMMISSIONER (COMMERCE) AND ONE.

the Assistant Collector of Customs found that he was liable to penalty under section 67 (*8*) and (*56*) of the Act and a fine of K 10,000 was imposed on him and this order was confirmed on appeal by the Financial Commissioner.

Against these orders the supervisory power of this Court by way of writs of certiorari is now invoked on grounds of excess of jurisdiction on the part of Custom authorities and of error of law apparent on the face of the records.

The supervisory power of this Court over these two matters cannot be seriously questioned. The infringements of the provisions of the Sea Customs Act are described in section 167 of the Act as offences and with the exception of those triable summarily by Magistrates, they are within the cognisance of Custom Officers (section 187), and under section 188, in case of appeal, the Appellate Authority may make further enquiry into the offences. In taking action against persons for offences set out in section 167 of the Act, the Custom Officers are in fact dispensing criminal justice and they are accordingly bound to act on judicial principles. See *Ranchodas Jetthaibhai* v. *The Secretary of the Union Government in the Ministry of Judicial Affairs* (1) and *Abdul Gaffar* v. *U Kyaw Nyun and one* (2).

In the case of the petitioner Capt. L. T. Carter, the offence for which he was originally penalised by the Assistant Collector of Customs was one under section 167 (*56*) of the Act. The penalty imposed on the petitioner was confirmed on appeal under section 167 (*8*) of the Act. The relevant clause describing this offence relates to the concealment of dutiable goods. To arrive at the conclusion that the petitioner was "concerned" in the commission

(1) (1950) B.L.R. 68. (2) (1950) B.L.R. 218.

of this offence, the appellate authority took note of the following matters: (*a*) the contraband found was rather large in quantity and value, being 63 lbs. in weight distributed into 44 packets; (*b*) these packets, stuffed in a sack, could not have been secreted inside the ventilator shaft going into the Engine Room without the knowledge of the Engineer in charge; and (*c*) the Master of the ship as a fellow officer of the Engineer is presumed to be on friendly and fraternal terms with the latter and must therefore be privy to this secret storage of the contraband.

Column 3 of the Schedule of Offences set out under section 167(*8*) of the Act fixes the penalty on "any person concerned" in the commission of the offence. To make the Master of the ship liable to such penalty, he must be shown to be, "concerned" in the infringement of the provisions of the Act, *i.e.*, that he was in some way interested in or was connected with the smuggling venture. There is on the record no evidence even remotely connecting the petitioner with the concealment of the contraband. Mere illogical assumptions and surmises upon which the Appellate Authority acted in this case cannot be regarded as substitute for legal proof. Dispensing with such proof on the part of the Custom authorities would, in the circumstances of this case, amount to acting in excess of the jurisdiction vested in them under the Act.

As against the petitioner Capt. O. Oftedal, a penalty of K 10,000 was imposed by the Assistant Collector of Customs under section 167 (*8*) and (*56*) of the Sea Customs Act. Section 167 (*56*) relates to import or export of legitimate goods and, has no application to the case and nc proper reason whatever has been given to show how the Master of the ship was "concerned" in the concealment of the

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contraband inside the Coffer dam of the engine room. When the Master of the vessel, after an enquiry, produced the actual culprit, a member of the crew, the authorities would not take action against him. For the reasons already set out there was no ground or justification for the infliction of the penalty on the petitioner under the aforesaid sections of the Act.

Accordingly the orders imposing penalties of K 2,200 on Capt. L. T. Carter and K 10,000 on petitioner Capt. O. Oftedal are quashed. The fines will be refunded to them.

SUPREME COURT.

MA HAWA BI (APPLICANT)

v.

MA NGE AND TWO (RESPONDENTS).*

†S.C. 1958

July 10.

Certiorari—Directions in the nature of—Urban Rent Control Act, s. 14A (3)—Application by landlord to sue in respect of entire house—Permit restricted to a portion only of the house, whether valid—Respective functions of Controller under s. 14A, Clause (3) and the Judge in the ejectment suit.

The applicant applied for a permit under s. 14A (3) of the Urban Rent Control Act to institute an ejectment suit against her tenant in respect of the entire premises.

The Assistant Controller of Rents granted the permit to cover, only a "portion of the ground floor" and to enter into a bond for K 2,000, which was on reference confirmed by the Subdivisional Judge, relying on *Mrs. Constance Minoo Writer* v. *A. M. Khan* (1951) B.L.R. (S.C.) 169.

Held: Under s. 14A (3), the Controller need not go deeply into the merits of each case. All that he has to do is to satisfy himself that sufficient grounds exist for the launching of a suit. He could even act without a formal enquiry.

A permit is merely a preliminary step and in dealing with such an application, the Controller should not take upon himself the task of deciding issues which would appropriately be dealt with in the suit.

The function of the Judge is to decide whether the requirement of the landlord is both reasonable and *bonâ fide*. Questions such as whether the landlord is unreasonable in her demand for the entire house, or what portion of the house would be reasonable for her requirements or whether because of the peculiar construction of the house, it can only accommodate one family are matters for the Judge to decide.

Held further: The restriction placed on the permit for a portion only of the ground floor and the insistence on a bond by the Controller under s. 11 (*f*) are beyond the competence of the Controller.

Ba Thaw for the applicant.

S. A. A. Pillay for the respondent No. 1.

Hla Maung (Government Advocate) for the respondents Nos. 2 and 3.

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* Civil Misc. Application No. 18 of 1958.

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

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

U MYINT THEIN, C.J.—The applicant sought a permit to institute a suit for ejectment against her tenant in respect of the premises known as No. 29, Carthew Street in Moulmein. The Assistant Rent Controller granted the permit but in doing so, he restricted the permit to cover only a "portion of the ground floor of the said house" on her entering into a bond binding herself in the sum of K 2,000 to use the premises for her personal residence.

The applicant being dissatisfied took the matter on reference and the tenant also did likewise. Relying upon *Mrs. Constance Minoo Writer* v. *A. M. Khan* (1) the learned Subdivisional Judge held that a permit in respect of such portion only of a building as is necessary, could be granted. No doubt the learned Judge based his decision on the passages in the authority quoted, which recite the facts prevailing in that case. These were, Mrs. Writer had asked for a permit in respect of an entire building (as was done in the case before us) but the Controller gave a permit in respect of "either the upper floor or the ground floor" of the premises. Mrs Writer accepted the position, issued a notice to the tenant to quit the upper floor and filed a suit upon the tenant's failure to quit. Her suit was decreed.

The point was not raised nor any finding arrived at on the question whether the Controller was justified in restricting the permit to cover one floor only. The case was decided on the issue, whether the notice to quit a part of a building did not offend the general proposition that a landlord may not break up a

(1) (1951) B.L.R. (S.C.) 169.

tenure and give effective notice to quit a fraction of a building.

In the matter before us the point is specifically raised and it is urged that the function of a Controller in an enquiry under section 14 A (3) is merely to satisfy himself that sufficient grounds exist for a permit to issue. It is contended that the Controller, judging by his order, was satisfied, and that therefore he should have issued a permit in respect of the entire house.

Section 14A reads thus:

"(1) No suit or proceeding by a landlord for ejectment or recovery of possession of any premises against a tenant or a person permitted to occupy under section 12 (*11*) in which any of the grounds specified in clause (*d*), (*e*) or (*f*) of section 11 or clause (*c*) of section 13 is taken as a ground for such ejectment of such recovery of possession shall be entertained by any Court unless the landlord has been permitted by the Controller by an order in writing under sub-section (*3*) to institute such suit or proceeding and has produced before such Court proof that such permission has been granted.

(2) A landlord who desires to obtain from the Controller an order referred to in sub-section (*1*) shall make an application to the Controller in that behalf.

(3) On receipt of such application, if the Controller, after making such enquiries as may be deemed necessary, is satisfied that there is sufficient cause to hold that any of the grounds specified in clause (*d*), (*e*) or (*f*) of sub-section (*1*) of section 11 or clause (*c*) of sub-section (*1*) of section 13 exists, the Controller shall make an order in writing granting the application, and if the Controller is not so satisfied, he shall make an order rejecting the application."

It will be noted that the reference to certain clauses of sections 11 and 12 restricts the applicability of section 14A and in fact it is confined to suits by landlords based upon the requirement, to erect or re-erect, or to effect major structural repairs. It is applicable also when the landlord seeks recovery

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of the premises for himself to live in. The references to these clauses however do not mean that the Controller has to go deeply into the merits of each case, for under clause (3) all that he is required to do is to satisfy himself that sufficient grounds exist for the launching of a suit. The phrase "after making such enquiries as may be deemed necessary" suggests that the Controller could act even without a formal enquiry.

A permit is merely a preliminary step towards the launching of a suit, and in dealing with an application for a permit, the Controller should not take upon himself, the task of deciding issues which would be more appropriately dealt with in the suit itself. Thus in the matter before us, it will be the function of the Controller to see if there is sufficient cause to hold that the landlord really needs the house and intends to live in it if she should get it back. In the event of a permit being granted and a suit instituted, it will then be the function of the Judge trying the suit to decide whether the requirement of the landlord is both reasonable and *bonâ fide*. Questions such as whether the landlord is unreasonable in her demand for the entire house, or what portion of the house would be reasonable for her requirements, or whether because of the peculiar construction of the house, it can only accommodate one family, are matters for the Judge to decide.

We do not wish our observations to be interpreted as to mean that the grant of a permit is to be automatic. The Controller must be satisfied as to the existence of sufficient grounds. Thus, for example, if an application is based upon clause (*d*) of section 11, he must be satisfied that the landlord intends to build and has the means to build. In regard to clause (*e*) the test would be the same. In

case of major structural repairs the Controller would have to be satisfied that there is need for such repairs. In regard to clause (*f*) the test is whether the landlord's need is real and whether he intends to live in the house. Similarly in regard to clause (*c*) of section 13 one test would have to be whether the landlord or the members of his family really intend to occupy.

The restriction placed on the permit that the landlord may sue only in respect of a portion of the ground floor amounts to a pre-judgment of an issue which is likely to arise in the ejectment suit to follow and in our judgment it was beyond the competence of the Rent Controller. This being our view we set aside his order dated 1st June 1957 passed in Rent Control Case No. 6 of 1955 and those of the Subdivisional Judge, dated 23rd October 1957 in Civil Miscellaneous Nos. 7 and 12 of 1957. The records are returned to the Assistant Controller of Rents, Moulmein. As he has already come to a finding that the landlord really needs the house and intends to live in it we direct the Assistant Rent Controller to issue a permit to sue, in accordance with law. We desire to add that the necessity to enter into a bond will arise only in the event of a decree being passed under section 11 (*1*) (*f*). The Controller is not competent to insist upon a bond.

The costs in this case will follow the final result. Advocate's fees Kyats eighty-five only.

SUPREME COURT.

†S.C. 1958

July 31.

THE SOORTEE BARA BAZAAR CO., LTD. (APPELLANTS)

v.

MUNICIPAL CORPORATION AND ONE (RESPONDENTS).*

Compensation—Equitable Compensation—"Public purpose" and "public interest"—Distinction between—Constitution—S. 218—Utility service—Bazaar—A form of—Whether it would be in the public interest to have it operated by a local authority—Act No. 15 of 1951—Silent about public interest—Payment of equitable compensation prescribed—Equitable compensation—Assessment of Market value as well as cost to the Company to be taken into consideration—Act does not contemplate that only one of these two factors must be adopted—Equitable compensation and quest for equity—Relationship between—Equitable compensation under the Act—Restitution—Not to be equated—Assessment of—Factors to be taken into account—Proviso to s. 5 taken by itself contemplates on payment in respect of buildings of certain vintage—Construction of statutes—Rule—Proviso cannot control main section.

There is a difference between "public purpose" and "public interest." The acquisition of land for a burial ground would be for a public purpose but it may be against public interest to have it in an unsuitable locality.

A bazaar is a form of public utility service envisaged in s. 218 of the Constitution and it would be in the public interest to have it operated by a local authority, a desirability which s. 218 expresses.

The Soortee Bara Bazaar (Thein-gyi-zay) Municipalisation Act is silent about public interest. This Act (Act No. 15 of 1951) prescribes payment of equitable compensation and, in assessing it, the market value as well as the cost to the Company should be taken into consideration.

The Act requires equitable compensation to be awarded and in prescribing the method of fixing it, market value and cost are mentioned as factors to be considered. The Act does not contemplate that only one of these two factors must be adopted, and the Constitution requires payment of compensation to the extent provided by law and the Act prescribes equitable compensation.

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* Civil Appeal No. 4 of 1954.

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

Equitable compensation under the Act should not be equated with restitution and in assessing it the following main factors should be taken into account, *viz.* :

(1) the market value of the property at the relevant date, though it should not be a final factor because the property may have acquired an inflated value due to circumstances such as the development and expansion of the city ;

(2) the original purchase price, regard being had to the difference in the value of money at the time of the purchase and at the relevant date ;

(3) the profits made by the Company in respect of the property over the relevant period of time but also the skill and labour that have gone into the making of those profits;

(4) the costs of maintenance and repairs of the property along with depreciation in value; and

(5) the historical background of the property such as its nature and the circumstances under which it was acquired by the Company.

The award of compensation has no relation to the quest for equity.

Though equitable compensation is specifically mentioned in s 5, the proviso taken by itself contemplates no payment in respect of buildings of a certain vintage. A proviso cannot control the main section and this is the rule of construction of statutes.

Daw E Sint v. *Additional Commissioner of Income-tax*, CMA 124/57, followed.

S. 5 of the Act and the proviso thereto must be read as a whole and each must be given its due effect, the proviso not controlling the substantive enactment but being controlled by the paramount rule in the substantive enactment that the compensation awarded must be equitable.

E Maung and *R. Basu* for the appellants.

C. C. Khoo and *U Chit* (Government Advocate) for the respondents.

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

U MYINT THEIN, C.J.—This case deals with the assessment of equitable compensation in respect of the Rangoon Soortee Bara Bazaar which will eventually be taken over by the Rangoon Municipal Corporation. The Bazaar, which has been in existence since 1853, suffered considerable damage as a result of the denial scheme adopted in the last war. It was rehabilitated to a large measure after

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the liberation of Rangoon but by 1948 the Company ran into trouble with the stall-holders, mainly due to shortage of stalls. There were several incidents and one main block which had been re-constructed could not be opened lest there should be riots. To ease the pressure, the Rangoon Corporation took over the A, B, C and D Blocks on lease but the troubles magnified and Government stepped in with the promulgation of Act No. 15 of 1951 which is entitled: "ရုရတီဘရားဘဇား (သိမ်ကြီးစျေး) ကိုမြန်မာပါယိုင် မြူလုံရေး အက်ဥပဒေ". "The Soortee Bara Bazaar (Thein-gyi-zay) Municipalisation Act." This Act contemplates the eventual taking over of the Bazaar on payment of equitable compensation; the immediate appointment of a Commission of three to determine (*a*) the particulars of the properties to be taken over from the Company (ကုမ္ပဏီမှသိမ်းယူမည့်ပစ္စည်းများ အကြောင်းအရာများကို သတ်မှတ်ဆုံးဖြတ်ရန်); (*b*) the amount of equitable compensation payable and the dues the Company owes to the Corporation and *vice versa*; and (*c*) the method of payment to the Bazaar Company. The latter part of (*b*) is no more an issue as agreement was arrived at an early stage of the proceedings.

The Government proceeded to appoint a Judge of the High Court as Chairman, with a Municipal Councillor and the Legal Adviser of the Bazaar Company as members. Before anything much could be done, the situation deteriorated and by Act 23 of 1951 a new section, section 9, was added under which the President was empowered (i) to take over the premises known as the Soortee Bazaar on date to be fixed; (ii) vest the administration of the Bazaar in an Administration Board; and (iii) to vest it later in the Rangoon Municipality. Rule making powers were also enacted. The President took over the A, B, C, D and E Blocks on 1st August 1951.

The next Act, No. 53 of 1951, vested power in the Administration Board to lease stalls and sites, and from then the Bazaar passed completely out of the hands of the Company.

In December 1951 the two members were replaced by two Advocates. Nothing much had been done by August 1953 when, with the retirement of the Chairmen, the Commission was reformed with another High Court Judge as Chairman, and a District and Sessions Judge and a senior Advocate as members. About the same time Act No. 68 of 1953 was enacted to give the Government a right of appeal to the Supreme Court. Under the Original Act the right to appeal both on law and on facts is vested in the Bazaar as well as the Corporation.

In 1954, by Act No. 26 of 1954, section 9 (*1*) was amended so as to enable the President to take over not only the premises known as the Soortee Bara Bazaar but also lands and buildings with their fixtures belonging to the Company, enumerated in a schedule. These were being used mostly as dwelling houses by tenants with the ground floor as shops.

The Commission by then was well on the way to complete the enquiry in respect of the A, B, C, D and E Blocks, and therefore the enquiry in regard to the properties enumerated in the schedule in Act No. 26 of 1954 was dealt as a separate case.

In 1955, by Act No. 47 of 1955, the schedule was amended so as to include the entire area bounded North by Fraser Street, South by Dalhousie Street, East by Edward Street and West by 24th Street. There were also consequential minor amendments. In the area specified there are premises which do not belong to the Soortee Bara Bazaar Co. A third case was opened and it is still pending before the Commission.

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In connection with the A, B, C, D and E Blocks which comprise the Bazaar, the Company valued them as—

		K
Buildings	... ...	39,50,630
Land	... ...	1,47,20,815
		1,86,71,445

The Corporation's and the Government's valuation was—

		K
Buildings	... ...	3,72,645
Land	... ...	20,40,570
		24,13,215

The Commission awarded—

		K
Buildings	... ...	3,48,838·00
Land	... ...	14,91,836·70
		18,40,674·70

To understand how the Commission's figures were arrived at, it is necessary to look to the original Act, which by section 4 (*a*) enacts that equitable compensation (တရားမျှတသောလျော်ကြေး) should be paid. Section 5 runs :

"၅။ ။ပုဒ်မ ၄ အရ၊ပေးသင့်သည့်တရားမျှတသောလျော်ကြေးကို သတ်မှတ်ဆုံးဖြတ်ရာတွင် ကော်မရှင်အစ္ဆက ၅၂အက်ဥပဒေစတင်အာဏာတည်သည့်နေ့တွင် သိမ်းယူရမည့်ပစ္စည်း၏ ကာလတန်ဘိုးကို၊ သို့တည်းမဟုတ် ထိုဂနေ့အထိ ကုမ္ပဏီ၌ ထိုပစ္စည်းအပေါ်တွင် ကုန်ကျမည့်ငွေကို တရားမျှတမည်ထင်မြင်သည့်အတိုင်း ထည့်သွင်းစဉ်းစားရမည်။"

The proviso to this section enacts that in assessing the value (တန်ဘိုး) of a building 3 per cent per annum should be deducted from the original cost.

The words "ထည့်သွင်းစဉ်းစားရမည်" indicate that the market value of the property and the money spent on it are some of the items that are to be included in the matters to be considered in assessing equitable compensation.

Now, in regard to land, the area on which Blocks A to E stand comprise 6·26 acres and since what originally were Back Drainage Spaces measuring 29,280 square feet in all or a little over 0·8 of an acre were bought from the Development Trust for K 13,81,850 in the years 1930 and 1933, this sum was allowed in its entirety as original cost. Taking this sum out of K 14,91,836 awarded in respect of land, it leaves only K 1,09,986 as compensation in respect of the balance 5·4 acres.

The Commission, on page 46 of the Award, enumerated the points they took into consideration, these being—

(*a*) the nature and history of the plot under consideration;

(*b*) the circumstances under which the particular plot in question was acquired by the Company;

(*c*) the price paid at the time of acquisition;

(*d*) the profits derived by the Company over a period of 100 years as compared with the original capital; and

(*e*) the fact that the case is one of nationalisation-*cum*-municipalisation.

The Commission's findings on these in short are that the original share-holders of the Company came as exploiters in the wake of the annexation of Burma

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and that they had raked in enormous profits during the last 100 years. This is a historical incident, common in the past and which will also prevail in the future. The second is a consideration which should be balanced by the thought that the earning of profit in most cases is the result of hard work and sound administration. We do not mean that the Commission was wrong in taking note of the profits earned, but if consideration is taken, it should also be noted that the act of expropriation has deprived the Company of these enormous profits while the Municipality will be getting them instead in the future.

The Commission was correct in taking into consideration the actual price paid for these properties but should have borne in mind the factor the Commission had pointed out at page 32 of the Award, that the price of rice was Rs. 52 per hundred baskets in 1852—56.

The Company based their claim in the market value and endeavoured to show how much each plot (which ultimately came to be included in the Bazaar precincts) had cost them actually but in most cases the actual cost was discarded. Thus in regard to the land on which A Block stands, the Commission found that in those days the Government sold land at rates varying between 9 pice to 12 pice per sq. foot. The Award was made calculated on the rate of 9 pice. In Block B the rate applied ranged between 9 pice and 8 annas depending upon the year of acquisition. In Block C the method of computation varied. There was one particular plot purchased from one Mr. Moola at the rate of Rs. 100 per sq. foot (page 57 of the Award). The cost was rejected on the ground that it was too high. The Commission compared it with the rate of Rs. 31 per sq. ft. purchased from the Chulia gentleman, failing to note that this

purchase was made in 1895 while the purchase from Mr. Moola was in 1919. But even in accepting the Chulia gentleman's sale price, the Commission adopted a rule of thumb that since the property purchased was house and land, the value of the land must be one-fifth of the purchase price. Other plots in this Block were assessed at 8 annas per sq. foot.

The major portion of *D Block* was originally the property of the Rangoon Bazaar Co. which was amalgamated with the Soortee Bara Bazaar Co. This merger was brought about by the issue of shares amounting to Rs. 1,73,072 and thus this sum was claimed by the Company as costs. The claim was rejected and the compensation assessed at 8 annas per sq. foot.

In *Block E* the Company claimed at the rate of Rs. 60 per sq. foot, that being the rate at which they had to buy from the Rangoon Development Trust for the area comprising the Back Drainage Spaces. The Commission found that a strip of 1½ ft. by 116 ft. was purchased from the Government in 1899 for Rs. 105. This sum was allowed. In regard to the other strip Rs. 4,667 was allowed at the rate of 9 annas per sq. foot.

The Commission, as we have already stated, accepted the purchase price for the Back Drainage Spaces as compensation.

In regard to the *Buildings*, the Commission adopted the proviso to section 5 as a basic guide. On Blocks C and E a happy arrangement was arrived at. There were no standing buildings and the Company was allowed to remove the debris which, according to the statement made at the Bar, they sold for about K 7 lakhs.

In regard to *A Block*, there are two structures built in 1905 at a cost of Rs. 2,58,046 and Rs. 20,740

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respectively. According to the 3 per cent per annum deduction under the proviso to section 5, the depreciation deduction would go beyond the original cost. The Commission therefore left 3 per cent of the original cost as the untouchable corpus and awarded the sums of Rs. 774 and Rs. 60 respectively.

The structures in *Block B* were built in 1938 costing Rs. 2,59,479 and Rs. 2,600 respectively. After 3 per cent per annum deduction K 2,20,868 was awarded.

In regard to the structures in *Block D*, Section I built in 1905 costing Rs. 1,57,644 was allowed K 471; Section II built in 1910 costing Rs. 3,33,212 was allowed K 1,22,918. The portico built in the same year costing Rs. 9,075 was allowed K 3,357 a total award of K 1,27,136. The grand total award for the buildings amounts to K 3,48,838 a figure which does not stand comparison with the sale of debris in Blocks C and E.

We must now examine the law to see if the Award can be allowed to stand.

Section 23 (*4*) of the Constitution under which expropriation is made reads:

> "23. * * * * *
>
> (4) Private property may be limited or expropriated if the public interest so requires but only in accordance with law which shall prescribe in which cases and to what extent the owner shall be compensated."

Dr. E Maung who appears for the Company points to section 299, Government of India Act, 1935, section 145 of the Government of Burma Act, 1935, Article 31 (2) (as it stood before and stands after the 1955 amendment) of the Indian Constitution where similar provisions provide for compulsory acquisition.

for "public purposes". He also points to the Land Acquisition Act where the same term is used. He draws a distinction between "public purpose" and "public interest". We can appreciate there is a difference, for the acquisition of land for a burial ground would be for a public purpose but it may be against public interest to have it in an unsuitable locality. But that is merely by the way, Dr. E Maung's point is, whether it is for a public purpose or it is in the public interest, is a matter which requires a decision. Under the Land Acquisition Act it is the President who decides and issues the declaration under section 6 (2) and such a declaration, according to the Act, is conclusive evidence that the land is needed for public purposes. The Soortee Bazaar Municipalisation Act is silent about public interest and the Commission took it for granted that to municipalise a bazaar would be in the public interest. Incidentally, Dr. E Maung drew a distinction between nationalisation and municipalisation but what in fact has happened that Government has taken over the Bazaar which would be later vested in the Rangoon Municipal Corporation, for it is unthinkable that Government should directly run a bazaar.

Dr. E Maung concedes that a bazaar is a form of utility service envisaged in section 218 of the Constitution and from that point of view it might be assumed that it would be in the public interest to have it operated by a local authority, a desirability which section 218 expresses. But, Dr. E Maung asks, what is a bazaar? and proceed to answer it himself by saying that it is a site, buildings and a licence. Take away the licence, he says, and all that is left is the land and buildings, which is no more a bazaar, and if that is wanted for a public purpose, the Land Acquisition Act, he says, should be invoked.

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It is an interesting argument but it is not for us to question why a separate Act has been enacted.

The Soortee Bazaar was taken over as a going concern and we consider that being a public utility service, it is in accordance with the spirit of section 218 to take it over. Dr. E Maung concedes that it is a valid point of view but is adamant that the presumption of public interest in relation to a bazaar will not hold good in respect of properties of the Company which form no part of the Bazaar. We shall deal with this aspect in the second case.

We have mentioned earlier in the judgment that Act No. 15 of 1951 prescribes payment of equitable compensation and in assessing it, the market value as well as the cost to the Company should be taken into consideration. What the Commission has done, however, is to interpret section 5 of the Act to mean that it must either be the market value or the costs to the Company that has to be adopted as equitable compensation. For various reasons, which the Commission advanced, the market value was not considered and an attempt was made only to get at the actual cost. But, as we have pointed out, this is true only in respect of the back drainage spaces. Where actual cost was shown in respect of some plots, the Commission held that the price paid was too high. In some cases the arbitrary assumption was made that the value of the land must necessarily be one-fifth of the value of the land and the house which stood on it. Different tests were applied in respect of different properties, which made the whole assessment unreal.

In regard to the buildings, true there is the proviso which fixes the depreciation at 3 per cent per annum. If taken to its logical conclusion, since the buildings are over 40 years old, the Company would

be fortunate in not being called upon to pay. The absurdity of assessing equitable compensation in this manner must be apparent to the Commission which had to adopt a balance 3 per cent as the untouchable corpus. Such assessment is not provided for by the proviso itself.

Though equitable compensation is specifically mentioned in section 5, the proviso taken by itself contemplates no payment in respect of buildings of a certain vintage. In a recent case before us, *Daw E Sint* v. *Additional Commissioner of Income-tax* (1) we held that a proviso cannot control the main section, and we must repeat here this rule of construction of statutes.

The Commission however has not considered this aspect and has adopted it as the only method of assessing equitable compensation for the buildings. Nor would the Commission consider the costs of repairs and maintenance on the ground that the Act did not provide for such expenses (page 68 of the Award). The Commission also said (page 72) that equitable compensation can only be given to those who come with clean hands. We must observe that the award of equitable compensation has no relation to the quest for equity.

In our judgment the approach to the case is misconceived. The Act requires equitable compensation to be awarded and in prescribing the method of fixing it, market value and costs are mentioned as factors to be considered. The Act does not contemplate that only one of these two factors must be adopted, and the Constitution requires payment of compensation to the extent provided by law and the Act prescribes equitable compensation.

(1) Civil Miscellaneons Application, 124 of 1957.

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Dr. E Maung for the Bazaar Company concedes that equitable compensation under the Act should not be equated with restitution, but submits that in assessing it the following main factors should be taken into account, *viz* :

(1) the market value of the property at the relevant date, though it should not be a final factor because the property may have acquired an inflated value due to circumstances such as the development and the expansion of the city;

(2) the original purchase price, regard being had to the difference in the value of money at the time of the purchase and at the relevant date;

(3) the profits made by the Company in respect of the property over the relevant period of time but also the skill and labour that have gone into the making of those profits;

(4) the costs of maintenance and repairs of the property along with depreciation in value; and

(5) the historical background of the property such as its nature and the circumstances under which it was acquired by the Company.

The Commission has taken some of these factors into consideration in making the Award. The proposition enunciated by Dr. E Maung has not been challenged by learned Counsel for the opposite parties and in view of the provisions of section 5 of Act 15 of 1951, we find ourselves in agreement with it. We hasten to add, however that section 5 of the Act and the proviso thereto must be read as a whole and that each must be given its due effect, the proviso not controlling the substantive enactment but being controlled by the paramount rule in the substantive enactment that the compensation awarded must be equitable.

For the reasons given we set aside the Award and remand it to the Commission for a fresh assessment of compensation in the light of the above observations. The case has been very ably argued by learned Counsel and has taken a great deal of time and energy. Because of the nature of proceedings, it is pointless to consider the question of costs and we award none.

SUPREME COURT.

†S.C. 1958

July 31.

THE SOORTEE BARA BAZAAR CO., LTD. (APPELLANTS)

v.

THE MUNICIPAL CORPORATION OF RANGOON AND ONE (RESPONDENTS).*

Compensation—Equitable Compensation—Private property in Burma—Sacrosanct—Subject to the rule of Eminent Domain—S. 23 (4) of Constitution—Envisages three requirements.

The concept that private property is sacrosanct, subject to the rule of Eminent Domain, is accepted in Burma and thus s. 23 (4) finds a place in the Constitution. It envisages three requirements. First, it has to be in the public interest, secondly, it has to be in accordance with law, and thirdly compensation, which may be limited under the Constitution must be paid.

E Maung and *R. Basu* for the appellants.

C. C. Khoo and *U Chit* (Government Advocate) for the respondents.

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

U MYINT THEIN, C.J.—This case relates to properties stituated in 25th, 26th and Edward Streets and mentioned in the Schedule introduced by Act No. 26 of 1954. There are altogether 18 items of properties belonging to the Company. The 19th item relates to back drainage spaces, which cannot belong to the Company. The Company's properties do not lie adjacent but are separated by holdings belonging to people unconnected with the Company.

Since the matter was treated as a separate case, proceedings began only after orders had been passed

* Civil Appeal No. 13 of 1955.

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

in the Bazaar matter, and the Company anticipating that the same formula of assessing compensation would also be adopted in respect of the premises in the schedule, took the stand (1) that Act No. 15 of 1951 and No. 26 of 1954 offend against section 23 (*4*) of the Constitution since they contemplate expropriation without payment of compensation, and (2) that as those properties do not form part of the Bazaar, the expropriation would amount to discrimination as against the Company and thus offend section 13 of the Constitution. The Company also submitted a statement in which a valuation of K 9,61,500 was placed on the buildings and K 15,49,000 on the lands, a total claim of K 25,10,500. The Corporation's figures were K 16,226 for the lands and K 13,806 for the buildings, a total of K 30,132. The Corporation Assessor on whom the task of valuing the properties fell gave dispassionate evidence when he said :-

> "I do not hold any personal views as regards the valuation. As stated already I have adopted the method which I consider was laid down by this Commission in the Award in Part A (the Bazaar)".

The Commission awarded K 19,951 for the lands
K 14,213 for the buildings

Total ... K 34,164

In arriving at this figure the Commission applied the same principles that it had applied to the Bazaar itself. Since the buildings are about 40 years old, the corpus 3 per cent was awarded. No costs of repairs nor maintenance were considered on the ground that the Act was silent on the point. Where land and building had been purchased, the arbitrary rule that the land value was one-fifth that of the land and building, was adopted.

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As we have pointed out in the connected case, the calculation was arrived at by methods of computation not warranted by the Act which contemplates payment of equitable compensation. For these reasons the award is set aside and the case is remanded to the Commission for disposal.

In doing so, we desire to make our observations in the light of Dr. E Maung's submissions regarding the need for determination as to whether the expropriation is really in the public interest.

The concept that private property is sacrosanct, subject to the rule of Eminent Domain, is accepted in Burma and thus section 23 (*4*) finds its place in the Constitution. It envisages three requirements. First it has to be in the public interest, secondly, it has to be in accordance with law, and thirdly, compensation, which may be limited under the Constitution, must be paid.

Now, Act No. 15 of 1951 having been enacted for the award of equitable compensation, the second and third requirements are satisfied but the Act makes no mention of public interest. While a decision in respect of the Bazaar itself may be avoided by the saving grace of section 218 of the Constitution which envisages the desirability of operating public utility services by local authorities, there is still the need to determine whether it would be in the public interest to take over the properties which do not form part of the Bazaar, on the ground that the intention is to expand the Bazaar. We cannot anticipate what the final award may be. The measure of compensation that has to be paid by the Municipality may itself be such a burden that it might be against public interest to expand the Bazaar. Or it may be that the Bazaar in its present dimensions is adequate for the needs of the Rangoon public, and extension might prove to be

only a burden. All these factors must be taken into consideration when the question of public interest is enquired into.

Dr. E Maung suggests also that property adjacent to that belonging to the Company, if acquired at all will be subject to the Land Acquisition Act which prescribes the market value as the basis of compensation. Thus, Dr. E Maung contends, there will be arbitrary discrimination. The validity of the Act No. 15 of 1951 in that respect will therefore have to be considered by the Commission, the question of discrimination being one of mixed law and fact.

Similar questions will arise in connection with the proceedings relating to properties which do not belong to the Company and which are meant to be taken over as well. These questions will have to be decided first, before the measure of equitable compensation to be awarded can be considered.

SUPREME COURT.

†S.C. 1958

July 7.

V.E. RM. N. RM. KASI VISWANATHAN CHETTYAR (APPLICANT)

v.

THE OFFICIAL ASSIGNEE AND ONE (RESPONDENTS).*

Habeas Corpus—*Directions in the nature of* habeas corpus *and/or Mandamus—Registration of Foreigners Rules, 1948, Rule 15—Issue of "D" Forms to aliens not within the discretion of the Controller of Immigration—Refusal to issue at the request of the Official Assignee—Whether Controller has legal authority to accede to such request—Aliens' rights under the Constitution and under the International Law—Fundamental rights—Rights of an alien to leave a country.*

The applicant, an Indian subject applied for a "D" Form under Rule 15 of the Registration of Foreigners Rules, 1948, to the Controller of Immigration, without which he could not leave the Union of Burma.

The Controller refused to issue the Form on the request of the Official Assignee, High Court.

On an application for directions in the nature of *Habeas Corpus* and/or Mandamus.

Held: The right of an alien to leave a country is a basic human right, which is internationally recognised.

Oppenheims' International Law, Volume I, paragraph 322, approved.

Held also: Certain fundamental rights are guaranteed specifically to citizens under Chapter II of the Constitution, but this does not mean that they are denied to aliens.

Full exercise of such rights may be subject to conditions, as in the case of transfer of land to an alien, which requires the permission of the President under the Transfer of Property (Restriction) Act. But most rights are assured to citizen and alien alike and their full enjoyment is unrestricted; and such rights are not to be denied without legal authority.

The issue of "D" Form is not within the discretion of the Controller. He must issue it when the stage for its issue is reached, and it was improper on the part of the Official assignee to have made the request to have it withheld.

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* Criminal Misc. Application No. 42 of 1958.

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

Kyaw Myint for the applicant.

Hoke Sein, for the respondent 1.

Hla Maung (Government Advocate) for the respondent 2.

Judgment of the Court was delivered by the Chief Justice of the Union

U MYINT THEIN, C.J.—The applicant, an Indian subject, states he came to Burma on a temporary *visa* in February 1958 and that he had intended to return to India on the 30th April. His departure has been prevented by his inability to obtain a "D" Form which everybody leaving Burma has to get under the Registration of Foreigners Rules, 1948. Without the production of such a form no shipping or aircraft company would sell him a ticket.

Rule 15 of these rules states that copies of Form D may be obtained on application from any Registration Officer. Though under this rule it might appear that a form may be obtained merely for the asking, as one would if one were to apply for a Telegraph message form, in practice it is issued in only three places in Burma, namely, at Rangoon, Mandalay and Akyab, by the Controller of Immigration who exercises authority under the Registration of Foreigners Act. Such practice, we understand, came to be followed to ensure that whoever leaves Burma goes through certain formalities. Thus a foreigner who is required to surrender his Registration Certificate under Rule 15 before his departure from Burma would not be granted a "D" Form without actual surrender of his certificate.

In this case the applicant has complied or is willing to comply with all the formalities but the issue

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of a "D" Form has been withheld on the request of the Official Assignee.

To obtain a correct perspective of the situation that has arisen, it is necessary to examine the circumstances that led to it. The records of Insolvency Case No. 265 of 1933 were lost or destroyed during the war and an interested party through his agent, Sunderasen Chettyar, applied for the reconstruction of the lost records. In this petition it was averred that the petitioner himself had no papers but that the Official Assignee was in possession of the accounts of the estate. The Official Assignee's report was that he had only a draft report relating to the case. He alleged that the petitioner himself had collected some of the assets of the insolvent and these not being disclosed, the Official Assignee suggested that the petitioner should not be granted any relief. There the matter has rested and no orders have been passed for the reconstruction of records. But even without such an order and though he had suggested that the petitioner should be granted no relief, the Official Assignee has been most active. He has obtained permission from the Court to engage a lawyer and another man to help him realise the assets of the insolvent. He has launched on a roving commission to fish for material by applying under section 36 of the Rangoon Insolvency Act for the examination of Sunderasen Chettyar himself not in connection with the reconstruction of the records but to find out if the petitioner has assets of the insolvent in his possession. Next, the Official Assignee, having learnt of the applicant's presence in Burma, sent him a notice through his Advocate on the 6th March alleging that the applicant's firm had been unauthorisedly credited with the assets of the insolvent. The applicant was called upon "to see that this K. E. G.

Sunderasen Chettyar render a true and full account of his and his predecessor's assets and pay the amount to the O.A." He was also threatened with legal proceedings.

The applicant naturally protested that he was on a visit and that he was in no position to force Sundarasen Chettyar to do anything. Since his *visa* was expiring he sought for the " D " Form, only to be told of the Official Assignee's instructions. In the meantime the Official Assignee had asked the applicant to interview him. Not only did he interview the Official Assignee but he had to submit to examination by the Official Assignee's Advocate at the Advocate's house, on two occasions, each occasion lasting several hours. The applicant states, and we consider the statement reasonable, that he submitted to these examinations on the promise held out that the Official Assignee would withdraw his instructions to the Controller.

By the 25th April, faced with the prospect of overstaying his *visa*, he wrote through his Advocate to the Official Assignee that unless the instructions to the Controller were withdrawn by the next day, he would be applying to this Court for a writ. The Official Assignee's retaliation was by way of an application to the High Court for permission to examine the applicant under section 36 of the Rangoon Insolvency Act.

The writ application was filed the next day and when the Official Assignee and the Controller were called upon to submit their returns, they could say that the applicant was under summons by the High Court. However they were in no position to justify what had been done prior to the issue of summons.

The application under section 36 is taking its course. When the applicant presented himself for

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examination, the Official Assignee's Advocate asked for production of certain account books dating as far back as 1934, which obviously cannot be with him in Burma, even if they exist. After a lengthy examination lasting three sittings on different days, the Insolvency Registrar ruled on the 21st May 1958 that (*a*) he was not satisfied that applicant has in his possession either the books or assets relating to or belonging to the estate, and (*b*) that examination of the applicant would continue.

This order was taken on reference to the Insolvency Judge who varied it to the extent that the examination of the applicant under section 36 of the Act would be dispensed with on his undertaking to produce all documents in his possession relating to certain properties specified in the order, dating from 1945 onwards. We do not know if the applicant will give the undertaking but we are informed that the Official Assignee has taken the matter on appeal.

We are concerned only with the question whether it was proper on the part of the Official Assignee to have made the request and whether the Controller of Immigration has legal authority to accede to it.

Learned Counsel for the Official Assignee has made four submissions. First, he says that the applicant not being a citizen nor even a resident of Burma has no right to move this Court for enforcement of any fundamental right guaranteed only to citizens under the Constitution.

It is true that certain fundamental rights are guaranteed specifically to citizens under Chapter II of the Constitution but this does not mean that they are denied to aliens. Full exercise of such rights may be subject to conditions, as in the case of transfer of land to an alien, which requires the permission of the President under the Transfer of Property

(Restriction) Act. But most rights are assured to citizen and alien alike and their full enjoyment is unrestricted; and such rights are not to be denied without legal authority. The right of an alien to leave a country is internationally recognised. *See* Oppenheim's International Law, Volume 1, paragraph 322 which says:

> "Since a State holds only territorial and not personal supremacy over an alien within its boundaries, it can never, in any circumstances, prevent him from leaving its territory, provided he has fulfilled his local obligations, such as payment of rates and taxes, of fines, of private debts and the like."

We endorse this view and we would only add that the "local" obligations must refer not to mere claims but to legal obligations such as decrees and orders of Courts and competent authorities.

The second point is that an aplication for directions in the nature of a writ of *Habeas Corpus* is misconceived because there is no detention of the applicant in a prison. We do not labour on this question since the application is also for directions in the nature of Mandamus in respect of which no fault can be found.

It is alleged, as the third point, that the applicant has suppressed or withheld material or relevant facts. We have looked at the evidence recorded before the Registrar in Insolvency and we note that the applicant has adopted the understandable attitude that he must refer to his books which are in India. He has been pressed to produce them but with his enforced detention in Burma it is a physical impossibility.

The fourth point is that the grant of a "D" Form is within the discretion of the Controller. We are unable to accept this contention. The Rules as framed may be stretched to ensure that a person leaving Burma complies with formalities required of

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him but when he has complied with them, the stage is reached for the Controller to perform his duty, that being to issue a "D" Form so that the person seeking it may make his final arrangements for departure.

We have mentioned that an alien has the right to leave a country. It is a basic human right which should not be denied. In the matter before us, it will only be in conformity with recognised international practice to lift the ban placed upon the applicant. We therefore direct the Controller of Immigration to issue a " D " Form to the applicant.

We are not unmindful of the proceedings before the Registrar in Insolvency. The summons to attend Court may have been vacated. If it is not and the applicant is still required to submit to further examination, it is not the concern of the Controller. The Court has ample powers to ensure the applicant's attendance whenever required, and the enforcement of such powers will be in a manner sanctioned by law and not by way of an improper request to the Controller which has already placed him in an untenable position.

We award costs Kyats one hundred and seventy only against the Official Assignee.

တရားလွှတ်တော်ချုပ်။

ပြည်နယ်ဆိုင်ရာဝန်ကြီးများခန့်ထားခြင်းနှင့်စပ်လျဉ်း၍ပေါ် ပေါက်လာသောပြဿနာကိုဆုံးဖြတ်ချက်ရယူရန် လွှဲအပ်မှု။*

† ၁၉၅၈ ခုနှစ် ဖေဖော်ဝါရီလ ၂၇ ရက်။

ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေ ပုဒ်မ ၁၅၁ အရ လွှဲအပ်မှု၊ ၎င်းအမှုသည် ပြီးဆုံးခဲ့သည့် ကိစ္စဖြစ်၍ စဉ်းစားဝေဖန်ရန်မလို၊ သို့သော်တရားလွှတ်တော်ချုပ်က နောင်အခါ ဤကဲ့သို့ အလားတူ အခြေအနေမျိုး ပေါ်ပေါက်လျှင် ပြေပြစ်အောင်ဆောင်ရွက်နိုင်စေရန် စဉ်းစားဝေဖန်ခြင်း—အခြေခံဥပဒေ၊ ပုဒ်မ ၁၈၁ (၁)၊ ၆၃ (၃) နိုင်ငံခြားတရားလွှတ်တော်များ၏ စီရင်ထုံးများ အကိုးအကားပြုခြင်း—အခြေခံဥပဒေများအမြဲပါယ်ကောက်သော ထုံးဘဝ်းစဉ်လာများ—ညှိနှိုင်းတိုင်ပင်ခြင်း၏အမြဲပါယ်—ဥပဒေသည် မဖြစ်နိုင်သည်ကိုမရည်ရွယ်—(*Lex non cogit impossibilia*)။

အခြေခံဥပဒေပုဒ်မ ၁၈၁ (၁) အရ၊ ပြည်နယ်ဝန်ကြီးများခန့်အပ်ရန် နိုင်ငံတော်သမတထံသို့ အမည်တင်သွင်းရာ၌၊ နိုင်ငံတော်ဝန်ကြီးချုပ်သည်၊ ပြည်နယ်ကောင်စီများနှင့် ညှိနှိုင်းတိုင်ပင်ခြင်းမပြုဘဲ၊ အမည်များတင်သွင်းခဲ့ရာ နိုင်ငံတော်သမတ က ပြည်နယ်ဝန်ကြီးများခန့်အပ်ခဲ့သည်။

ဤသို့ဖြစ်ခြင်းကြောင့်၊ နိုင်ငံတော်သမတ က၊ အခြေခံဥပဒေပုဒ်မ ၁၅၁ အရ၊ အောက်ပါ ပြဿနာများကိုစစ်ဆေးပြီး အစီရင်ခံစာကိုတရားလွှတ်တော်ချုပ်သို့လွှဲအပ်သည်။

(၁) ဤကဲ့သို့ခန့်ထားခြင်းများသည်၊ အခြေခံဥပဒေနှင့်ညီညွတ်ပါသလော။

(၂) မညီညွတ်လျှင် မည်သည့်နည်းနှင့် ညီညွတ်အောင် ဆောင်ရွက်ခန့်ထားသင့်ပါသနည်း။

(၃) သို့တည်းမဟုတ် အဆိုပါပြည်နယ်ဝန်ကြီးများကို သက်ဆိုင်ရာကောင်စီများနှင့် ညှိနှိုင်းတိုင်ပင်ခြင်းမပြုမီ မခန့်အပ်ဘဲထားသင့်ပါသလော။

ဖြေဆိုရမည့်ပြဿနာမှာ၊ ပုဒ်မ ၁၈၁ (၁) တွင် ပါရှိသော ပြဋ္ဌာန်းချက်များသည် မလိုက်နာလျှင် မနေရသော ပြဋ္ဌာန်းချက်များဖြစ်သလော။

ဆုံးဖြတ်ချက်။ ။ပဌမပြဿနာသည် နိုင်ငံတော်ဝန်ကြီးချုပ်က အမည်တင်သွင်းသည့် အတိုင်း၊ နိုင်ငံတော်သမတသည် အခြေခံဥပဒေအရ ပြုလုပ်ခဲ့ခြင်းဖြစ်၍၊ အခြေခံဥပဒေပါ

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* ၁၉၅၈ ခုနှစ်၊ လွှဲအပ်မှုအမှတ် ၂။

† နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးမြင့်သိန်း၊ တရားဝန်ကြီး ဦးချန်ထွန်းနှင့် ကရားဝန်ကြီး ဦးဘိကြီးတို့က အမိန့်ချမှတ်သည်။

၁၉၅၈

ပြည်နယ်ဆိုင်ရာ ဝန်ကြီးများခန့်ထားခြင်းနှင့် စစ်လျှင်း၌ပေါ်ပေါက်လာသော ပြဿနာကို ဆုံးဖြတ်ချက်ရယူရန် လွှဲအပ်မှု။

ပြင်ဒုန်းချက်များနှင့်ကိုက်ညီသည် မညီသည်ဟူသောအချက်မှာ ပုဒ်မ ၆၃(၃) အရ၊ စစ်ကြောမေးမြန်းနိုင်သောအချက်မဟုတ်။

ပြဿနာမှာ နိုင်ငံတော်ဝန်ကြီးချုပ်သည်၊ ကာရောပြည်နယ်၊ ကချင်ပြည်နယ်ကောင်စီများနှင့် ညှိနှိုင်းတိုင်ပင်ခြင်းမပြုဘဲ၊ ဝန်ကြီးများခန့်အပ်ရန် နိုင်ငံတော်သမတထံသို့ အမည်များတင်သွင်းခြင်းမှာ၊ အခြေခံဥပဒေနှင့်ညီညွတ်သည်မညီညွတ်ဟူသော ပြဿနာဖြစ်ရမည်။

ဤစည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေများကို အဓိပ္ပါယ်ကောက်ရာ၌၊ တရားရုံးများ လိုက်နာလေ့ရှိသော ထုံးတမ်းစဉ်လာများအနက်မှာ—

(၁) အခြေခံဥပဒေ၏ အဓိပ္ပါယ်သဘောကို ကောက်ယူရာတွင် ကျဉ်းမြောင်းအောင် ကြပ်ကြပ်တည်းတည်းမကောက်ယူဘဲ၊ ကျယ်ပြန့်အောင် ရက်ရက်ရောရော ကောက်ယူရမည်ဖြင့်ကြောင်း။

(၂) အခြေခံဥပဒေများသည် ခေတ်ကာလအားလျော်စွာ ပေါ်ပေါက်လာသော အဖြစ် အပျက် အကြောင်းချင်းရာများကို လွှဲခြွင်ခုံမိအောင် ကြိုးပမ်း ကျယ်ပြန့်၍ လာကြရမည့် ဥပဒေများ ဖြစ်ကြသည်ဟု၊ အသိအမှတ်ပြု၍၊ အဓိပ္ပါယ်သဘောကောက်ယူရမည်ဖြစ်ကြောင်း။

(၃) အခြေခံဥပဒေများတွင်ပေးနိုင်ထားသော တန်ခိုးအာဏာများကို ကျယ်ပြန့်နိုင်သမျှ ကျယ်ပြန့်စေရန် အဓိပ္ပါယ် သဘော ကောက်ယူရမည်ဖြစ်ကြောင်း။

(၄) သက်ဆိုင်ရာနိုင်ငံ၏ ပြည်သူလူထုမှာ အကျိုးအများဆုံး ဖြစ်ထွန်းနိုင်စေမည့် သဘောအဓိပ္ပါယ်ကို ကောက်ယူရမည်ဖြစ်ကြောင်း။

လွှတ်တော်ချုပ် ၁၉၅၂ ခုနှစ်၊ လွှဲအပ်မှု အမှတ် (၂) ကြည့်ပါ။

အခြားထုံးတမ်းစဉ်လာနှင့် နည်းဥပဒေမှာ၊ တိုင်းပြည်ပြုလွှတ်တော်၏ ရည်ရွယ်ချက်နှင့် အကြိုအစည်များအတိုင်းဖြစ်စေရန်၊ အခြေခံဥပဒေတစောင်လုံးကိုခြုံ၍အဓိပ္ပါယ်သဘောကောက်ယူရမည်။ အနည်းဆုံးအလားတူအကြောင်းချင်းရာများနှင့်စပ်လျဉ်းသော ပြင်ဒုန်းချက်များကိုပါ ထည့်သွင်းစဉ်းစားပြီးမှ အဓိပ္ပါယ်သဘောကို ကောက်ယူရမည်။ ပုဒ်မတခု၊ သို့မဟုတ် ပြင်ဒုန်းချက်တခု၏ သဘောအဓိပ္ပါယ်သည် မရှင်းလင်း မပြတ်သားစေကာမူ၊ အခြားအလားတူ ပုဒ်မများ၊ ပြင်ဒုန်းချက်များကိုပါ ထည့်သွင်း၍စဉ်းစားလျှင် အဓိပ္ပါယ်ပေါ်လွင်ထင်ရှားခဲ့ လာနိုင်ကြောင်းသတိပြုရမည်ဟူသော ထုံးတမ်းစဉ်လာနှင့်ဥပဒေသများဖြစ်သည်။

(1953) B.L.R. (S.C.) 30 ကြည့်ပါ။

အက်ဥပဒေဖြင့်သော်၎င်း၊ အခြေခံဥပဒေဖြင့်သော်၎င်း၊ ကိစ္စတခုခုကိုဆောင်ရွက်ရန် ပြဋ္ဌာန်းထားလျှင်၊ ထိုပြဋ္ဌာန်းချက်မှာ မလုပ်မနေရသော အချက်သော်လည်း ဖြစ်နိုင်သည်။ ညွှန်ကြားချက်မှသော်လည်းဖြစ်နိုင်သည်။ ခြားနားခြင်းမှာ မလုပ်မနေရဟူသော အချက်ကို ရှောင်ဖယ်၍မရ၊ တသွေမတိမ်းလိုက်နာရမည်။ ညွှန်ကြားချက်သာဖြစ်ခဲ့ပါမူ၊ လိုက်နာနိုင်သမျှ လိုက်နာဆောင်ရွက်လျှင် လုံလောက်သည်။ တသွေမတိမ်း မလိုက်နာမိသည့်အတွက် ဆောင်ရွက်ချက်ပျက်ပြယ်သည်ဟုမယူဆနိုင်ချေ။

Woodward v. *Sarsons*, (1875) K.B. 10 C.P. 733 at 746.

၁၉၅၀

ပြည်နယ်ဆိုင်ရာ ဝန်ကြီးများ ခန့်ထားခြင်းနှင့် စပ်လျဉ်း၍ ပေါပေါက်လာသော ပြဿနာကို ဆုံးဖြတ်ချက်ရယူရန် လွှဲအပ်မှု။

မှလိုက်နာလျှင် မနေရသောပြဋ္ဌာန်းချက်ကိုမလိုက်နာဘဲ ပြုမူခဲ့ပါမူ၊ ပြုမူချက်မှာ လုံးဝ တရားမဝင်။ ညွှန်ကြားချက်သာဖြစ်ခဲ့ပါမူ၊ ပြုမူခဲ့ခြင်းမှာ တည်မြဲသည်။ ပြဋ္ဌာန်းထားသည့် အချက်တခုသည် မလုပ်မနေရသောအချက်ဖြစ်သည်၊ သို့တည်းမဟုတ် ညွှန်ကြားချက်သာ ဖြစ်သည်ဆိုသောပြဿနာကို ဆုံးဖြတ်ရာ၌ အခြေတစေလိုက်နာရန် စည်းမျဉ်းကို တိတိကျကျ ဖွဲ့နှံခါးထစ်သတ်မှတ်၍မဖြစ်နိုင်၊ တရားရုံးများ၏ တာဝန်မှာ စိစဉ်ထုံးတွင် ညွှန်းထားသည့် အတိုင်း ပြဋ္ဌာန်းချက်မှာ မည်ရွေ့မည်မျှအရေးကြီးသည်၊ ထိုပြဋ္ဌာန်းချက်သည် အဓိက ရည်ရွယ်ချက်နှင့်မည်သို့သက်ဆိုင်သည်တို့ကို ချိန်ဆပြီးလျှင်၊ ပြဋ္ဌာန်းချက် တခုတည်းကိုသာ အခြေပြု၍မကောက်ယူဘဲ သက်ဆိုင်သမျှ ပြဋ္ဌာန်းချက်အားလုံးကိုခြုံ၍ သုံးသပ်ရပေမည်။

Howard v. *Bodington*, (1877) 2. P.D. 203 at 211 ; Craies on Statute Law, p. 242 ကြည့်ပါ။

ညှိနှိုင်းတိုင်ပင်ရမည်ဆိုသည်မှာ လိုက်နာနိုင်သမျှ လိုက်နာရမည်ဖြစ်သည်။ မလိုက်နာ နိုင်၍ပြဋ္ဌာန်းချက်ကိုမလိုက်နာခြင်းနှင့်လိုက်နာနိုင်ပါလျက် မလိုက်နာခြင်းမှာ အလွန်ခြားနား သည်၊ ပြည်နယ်နှင့်တကွ ပြည်ထောင်စုအကျိုးကိုထောက်ထား၍၊ ဆောင်ရွက်ရန်ကိစ္စရှိသမျှ ကို မိမိနှင့်အတူဆောင်ရွက်နိုင်မည့်သူကိုရွေးချယ်ရာ၌ ကောင်စီ၏သဘောကို သိရှိနိုင်စေရန် ညှိနှိုင်းတိုင်ပင်ရမည်ဟု ပြဋ္ဌာန်းထားခြင်းဖြစ်သည်။

ညှိနှိုင်းတိုင်ပင်ပြီးမှ (after consultation with) ဆောင်ရွက်ရမည်ဆိုသော ပြဋ္ဌာန်း ချက်မှာ ညွှန်ကြားချက်သာဖြစ်သည်။

Biswanath Khemka v. *Emperor*, (1945) A.I.R. F.C. 67 ကြည့်ပါ။

တာဝန်တခုခုဆောင်ရွက်ရာ၌၊ ပြဋ္ဌာန်းထားသောနည်းအတိုင်း လုပ်ရန်လုံးဝမဖြစ်နိုင် ပါက၊ ပြဋ္ဌာန်းချက်ကိုလိုက်နာရန်မလို (*Lex non cogit impossibilia*) ဥပဒေသည် မဖြစ် နိုင်သည်ကို မရည်ရွယ်။

ယခုကိစ္စတွင် ညှိနှိုင်းတိုင်ပင်ရန်မဆိုထားဘိ၊ တွေ့ဆုံရန်ပင်မဖြစ်နိုင်လောက် အခြေမျိုး ဖြစ်နေသည်။

ထို့ကြောင့်—

(၁) စောလူလူနှင့် ဦးဝါးဇော်ရစ်တို့၏ အမည့်များကို တင်သွင်းရာ၌ အခြေအနေ အရ၊ ပြည်နယ်ကောင်စီများနှင့် ညှိနှိုင်းတိုင်ပင်ရန် နည်းလမ်းမရှိ၍၊ ညှိနှိုင်းတိုင်ပင်ခြင်းမပြုဘဲ၊ ယာယီအားဖြင့်ခန့်အင်ရန် နိုင်ငံတော်ဝန်ကြီး ချုပ်က တင်သွင်းခြင်းမှာ အခြေခံဥပဒေနှင့်ဆန့်ကျင်သည်ဟု မယူဆ နိုင်ချေ။

(၂) အခြားနည်းလမ်းမရှိ။

(၃) ပြည်နယ်ဥက္ကဋ္ဌမရှိလျှင်၊ အုပ်ချုပ်ရေးကိုပင် တာဝန်ယူ၍ ဆောင်ရွက်နိုင် မည့်သူရှိမည်မဟုတ်၍၊ မခန့်အပ်ဘဲမထားသင့်၊

၁၉၅၈

ပြည်နယ်ဆိုင်ရာ ဝန်ကြီးများ ခန့်ထားခြင်းနှင့် စပ်လျဉ်း၍ ဗေါဗေါက်လာသော ပြဿနာကို ဆုံးဖြတ်ချက်ရရှိရန် လွှဲအပ်မှု။

လိုက်ပါဆောင်ရွက်သောရွေးနေများ—

နိုင်ငံတော်ရွေးနေချုပ်ကြီးအတွက်၊ ဒေါက်တာဦးမောင်နှင့် ဦးရန်ဇာအောင် လိုက်ပါဆောင်ရွက်၍။

ပြည်နယ်ဆိုင်ရာအတွက်၊ အကြံပေးအရာရှိ ဦးမြင့်ထူးလိုက်ပါဆောင်ရွက်သည်။

ပြည်နယ်ဝန်ကြီးဟောင်းများအတွက်၊ ဒေါက်တာ ဘမော် လိုက်ပါဆောင်ရွက်သည်။

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ပြည်ထောင်စုအစိုးရအဖွဲ့ဝင် ဝန်ကြီးများဖြစ်ကြသော ကရင်ပြည်နယ်ဝန်ကြီး ဒေါက်တာ စောလှထွန်းနှင့် ကချင်ပြည်နယ်ဝန်ကြီး ဦးဇန်ထားဆင် တို့သည်၊ ၁၉၅၈ ခုနှစ်၊ ဇွန်လ ၄ ရက်နေ့ မွန်းလွဲ ၄ နာရီအချိန်တွင် ရံထူးမှနုတ်ထွက်သွားကြရာ၊ ထိုပြည်နယ်များတွင် စီရင်အုပ်ချုပ်ရေးကိစ္စများကို တာဝန်ယူဆောင်ရွက်ရမည့်သူ မရှိသည်တကြောင်း၊ ပြည်နယ်ကောင်စီများကိုလည်း ဆင့်ခေါ်နိုင်သူပင် မရှိသည်တကြောင်း၊ ဤအကြောင်းများကြောင့် လစ်လပ်သောနေရာများ၌၊ ပြည်နယ်ဝန်ကြီးများခန့်အပ်ရန် နိုင်ငံတော်သမတထံသို့ အမည်တင်သွင်းရာ၌ နိုင်ငံတော်ဝန်ကြီးချုပ်သည် ပြည်နယ်ကောင်စီများနှင့် ညှိနှိုင်းတိုင်ပင်၍ တင်သွင်းရမည်ဖြစ်သော်လည်း ညှိနှိုင်းတိုင်ပင်ခြင်းမပြုဘဲ စောလူလူနှင့် ဦးဝါးဇော်ရစ်တို့၏ အမည်များကို တင်သွင်းခဲ့ရာ၊ နိုင်ငံတော်သမတက ခန့်အပ်ခဲ့သည်။

ဤကဲ့သို့ ဖြစ်ပျက်ပုံ အကြောင်းချင်းရာကို ဖေါ်ပြ၍၊ တရားလွှတ်တော်ချုပ်က အောက်ပါ ပြဿနာများကို ကြားနာစစ်ဆေးပြီး အဓိဋ္ဌာန်ခံရန် နိုင်ငံတော်သမတက ဇွဲစည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေပုဒ်မ ၁၅၁ အရ လွှဲအပ်သည်။

ယင်းပြဿနာများမှာ—

"(၁) ဤကဲ့သို့ခန့်ထားခြင်းများသည်၊ အခြေခံဥပဒေနှင့် ညီညွတ်ပါသလော။

(၂) မညီညွတ်လျှင် မည်သည့်နည်းနှင့် ညီညွတ်အောင် ဆောင်ရွက်ခန့်ထားသင့်ပါသနည်း။

(၃) သို့တည်းမဟုတ် အဆိုပါပြည်နယ်ဝန်ကြီးများကို သက်ဆိုင်ရာကောင်စီများနှင့် ညှိနှိုင်းတိုင်ပင်ခြင်းမပြုမီ မခန့်အပ်ဘဲ ထားသင့်ပါသလော။"

ဝန်ကြီး စောလူလူနှင့် ဝန်ကြီး ဦးဝါးဇော်ရစ် တို့သည်၊ ပြည်နယ်ကောင်စီအသီးသီး၏ညီလာခံကို ၁၉၅၈ ခုနှစ်၊ ဇူလိုင်လ ၄ ရက်နေ့၌ ကျင်းပရန်သတ်

မှတ်ဆင့်ခေါ်ပြီးနောက် ဇူလိုင်လ ၃ ရက်နေ့ မွန်းလွဲပိုင်းတွင် နုတ်ထွက်ခဲ့ကြ၍ ဤကိစ္စမှာ ပြီးဆုံးခဲ့သည့် ကိစ္စဖြစ်သည့်အားလျော်စွာ စဉ်းစားဝေဖန်ရန်ပင် မလို တော့ဟု ယူဆထိုက်သော်လည်း၊ နောင်အခါ ဤကဲ့သို့သော အခြေအနေမျိုး ပေါ်ပေါက်လာသဖြင့် အခက်အခဲနှင့် တဖန်တွေ့ကြုံပါက ပြေပြစ်အောင် ဆောင်ရွက်နိုင်စေရန်အလို့ငှါ၊ ဤကိစ္စကို စဉ်းစား ဝေဖန်သင့်ကြောင်းဖြင့် လိုက်ပါဆောင်ရွက်ကြသူ ပညာရှိရှေ့နေကြီးများက လျောက်ထားကြသည့်အတိုင်း ဤရုံးတော်ကလည်း ကြားနာဝေဖန်ရန် သဘောတူခဲ့သည်။

၁၉၅၈

ပြည်နယ်ဆိုင်ရာ ဝန်ကြီးများ ခန့်ထားခြင်းနှင့် စပ်လျဉ်း၍ ပေါ်ပေါက်လာသော ပြဿနာကို ဆုံးဖြတ်ချက်ရယူရန် လွှဲအပ်မှု။

ဤကဲ့သို့ ဝေဖန်ခြင်းမပြုမီ ပဌမ ပြဿနာနှင့် စပ်လျဉ်း၍ ဖေါ်ပြလိုသည်မှာ ခန့်အပ်ခြင်းကို နိုင်ငံတော်ဝန်ကြီးချုပ်က အမည်တင်သွင်းသည်အတိုင်း၊ နိုင်ငံတော်သမတသည် အခြေခံဥပဒေအရပြုလုပ်ခဲ့ခြင်းဖြစ်၍၊ ထိုသို့ခန့်အပ်ရာ၌ အခြေခံဥပဒေပါပြဋ္ဌာန်းချက်များနှင့် ကိုက်ညီသည် မညီသည်ဟူသော အချက်မှာ ပုဒ်မ ၆၃ (၃) အရ၊ စစ်ကြော မေးမြန်းနိုင်သော အချက်မဟုတ်ချေ။ ပြဿနာမှာ နိုင်ငံတော်ဝန်ကြီးချုပ်သည် ကရင်ပြည်နယ်၊ ကချင်ပြည်နယ် ကောင်စီများနှင့် ညှိနှိုင်းတိုင်ပင်ခြင်းမပြုဘဲ ဝန်ကြီးများခန့်အပ်ရန် နိုင်ငံတော်သမတထံသို့ အမည်များတင်သွင်းခြင်းမှာ အခြေခံဥပဒေနှင့် ညီညွတ်သည် မညီညွတ်သည် ဟူသော ပြဿနာသာဖြစ်ရမည်။

ပြည်နယ်အသီးသီး၏ ပြည်နယ်ဝန်ကြီးခန့်အပ်ရေးဆိုင်ရာ အခြေခံဥပဒေပါ ပြဋ္ဌာန်းချက်များမှာ အတူတူကဲ့သို့ပင် ဖြစ်လေရာ၊ ကရင်ပြည်နယ်ဝန်ကြီး ခန့်အပ်ရေးနှင့် သက်ဆိုင်သော ပုဒ်မ ၁၈၁ (၁) ကို စဉ်းစားသုံးသပ်လျှင် လုံလောက်ပေမည်။ ထိုပုဒ်မမှာ အောက်ပါအတိုင်းဖြစ်သည်။

> "၁၈၁(၁)။ ။ဝန်ကြီးချုပ်သည်၊ ကရင်ပြည်နယ် ကောင်စီနှင့် ညှိနှိုင်းတိုင်ပင်၍ ထိုကောင်စီအမတ်များအနက် အမတ်တဦးဦး၏အမည်ကို တင်သွင်းသောအခါ၊ ထိုသို့အမည်တင်သွင်းခြင်းခံရသောအမတ်ကို နိုင်ငံတော်သမတသည် အောက်တွင် 'ကရင်ပြည်နယ်ဝန်ကြီး' ဟု ခေါ်တွင်ရမည်ဖြစ်သော ပြည်ထောင်စုအစိုးရအဖွဲဝင် ဝန်ကြီးအဖြစ်ဖြင့် ခန့်ထားရမည်။ ထိုသို့ခန့်ထားခြင်းခံရသော ဝန်ကြီးသည်၊ အခြေခံဥပဒေ၏ကိစ္စများအတွက် ကရင်ပြည်နယ် ဥက္ကဋ္ဌလည်းဖြစ်ရမည်။"

ယခုကိစ္စတွင် နိုင်ငံတော်ဝန်ကြီးချုပ်က စောလွန်လူ၏အမည်ကို ကရင်ပြည်နယ်ဝန်ကြီး ခန့်အပ်စေရန် အလို့ငှါ၊ နိုင်ငံတော် သမတထံသို့ တင်သွင်းရာတွင် ကရင်ပြည်နယ်ကောင်စီနှင့် ညှိနှိုင်းတိုင်ပင်ခြင်းမပြုခဲ့ချေ၊ ၎နေ့ချုပ်ကြိုး၏ ကိုယ်စား လိုက်ပါဆောင်ရွက်သော ပညာရှိရှေ့နေကြီး ဦးရန်အောင်၊ ပြည်သူ့

၁၉၅၀

ပြည်နယ်ဆိုင်ရာ ဝန်ကြီးများ ခန့်ထားခြင်းနှင့် စပ်လျဉ်း၍ ပေါ်ပေါက်လာသော ပြဿနာကို ဆုံးဖြတ်ချက် ရယူရန် လွှဲအပ်မှု။

အမျိုးသား ညီညွတ်ရေး တပ်ပေါင်းစု အတွက်၊ လိုက်ပါ ဆောင်ရွက်သော ဒေါက်တာ ဦးဓမောင်နှင့် ပြည်နယ်ဥပဒေ အကြံပေးအရာရှိ ဦးမြင့်ထူး တို့က ကျင့်ကဲ့သို့ ဝန်ကြီးချုပ်က မည်သို့နှင်းမတိုင်ပင်ဘဲ အမည်တင်သွင်းခဲ့ရခြင်းအကြောင်းရင်းမှာ (၁) ညှိနှိုင်းတိုင်းပင်ရန် အတွက် ကောင်စီကိုဆင့်ခေါ်နိုင်သည့်အာဏာမှာ အခြေခံဥပဒေပုဒ်မ ၁၈၀ (၁၂) အရ၊ ကရင်ပြည်နယ် ဝန်ကြီးဌာန တည်ရှိကြောင်း၊ (၂) ပုဒ်မ ၁၈၀ (၁) တွင်ပါရှိသော ညှိနှိုင်း တိုင်ပင်ရမည်ဆိုသည်မှာ မလုပ်မနေရ (mandatory) ပြဋ္ဌာန်းချက်မဟုတ်၊ ညွှန်ကြားချက် (directory) မျှသာဖြစ်ကြောင်း၊ (၃) ပုဒ်မ ၁၈၁ (၂) အရ၊ ကရင်ပြည်နယ် စီရင်အုပ်ချုပ်ရေးကိစ္စအဝဝကို ကရင်ပြည်နယ်ဥက္ကဋ္ဌကသာတာဝန်ယူဆောင်ရွက်ရမည်ဖြစ်၍၊ ပြည်နယ်ဥက္ကဋ္ဌမရှိလျှင် စီရင် အုပ်ချုပ်ရေးကို ဥပဒေအရ မဆောင်ရွက်နိုင်ခြင်းကြောင့် ယာယီအားဖြင့်ခန့်အပ်ရန် စောလူလူ၏အမည်ကို တင်သွင်းရခြင်းဖြစ်ကြောင်း လျှောက်ထားကြသည်။

ဒေါက်တာစောလှထွန်းနှင့် ဦးဇန်ထားဆင်အတွက် လိုက်ပါဆောင်ရွက်သူ ပညာရှိရွှေနေကြီး ဒေါက်တာဘာမော်က ချေပရာ၌ အောက်ပါအကြောင်းများကို ဖော်ပြသည်။

(၁) ပုဒ်မ ၁၈၁ (၁) တွင် ပါရှိသည့် ပြဋ္ဌာန်းချက် အားလုံးမှာ မလုပ်မနေရ (mandatory) ဖြစ်၍၊ ကရင်ပြည်နယ်ကောင်စီ ညှိနှိုင်းခြင်းမပြုဘဲ အမည်တင်သွင်းခြင်းမှာ အခြေခံ ဥပဒေကို ချိုးဖောက်ရာရောက်ကြောင်း။

(၂) ကျင့်ကဲ့သို့ ချိုးဖောက်ခဲ့၍ စောလူလူကို နိုင်ငံတော်သမတက ခန့်အပ်ခြင်းမှာ ဥပဒေနှင့် မကိုက်ညီသဖြင့် တရားမဝင်ကြောင်း။

(၃) ကရင်ပြည်နယ် ဥက္ကဋ္ဌ သာလျှင်၊ ကရင်ပြည်နယ် ကောင်စီ အစည်းအဝေးကို ဆင့်ခေါ်နိုင်သည့်အာဏာရှိသည်ဟုဆိုခြင်းကို လက်မခံနိုင်ကြောင်း။

ပညာရှိရွှေနေကြီးများက အထူးပင်ကြိုးစားပြီး ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေကို မည်ကဲ့သို့ အဓိပ္ပါယ်ကောက်ယူသင့်ကြောင်းကိုလျှောက်ထားကြသည်။ ဤရုံးတော်၏ ၁၉၅၂ ခုနှစ်၊ လွှဲအပ်မှု အမှတ် ၂ တွင် တရားရုံးများက အဓိပ္ပါယ်ကောက်ယူရာ၌ လိုက်နာလေ့ရှိသော ထုံးတန်းစဉ်လာတို့ကို ဝေဖန်ထားရာ အောက်ပါတို့ကို ကောက်နုတ်ဖော်ပြလိုက်သည်။

"(၁) အခြေခံဥပဒေ၏ အဓိပ္ပါယ်သဘောကို ကောက်ယူရာတွင် ကျဉ်းမြောင်းအောင် ကြပ်ကြပ်တည်းတည်း မကောက်ယူဘဲ ကျယ်

ပြန်အောင် ရက်ရက်ရောရော ကောက်ယူရမည် ဖြစ်ကြောင်း။

၁၉၅၀

ပြည်နယ်ဆိုင်ရာ ဝန်ကြီးများ ခန့်ထားခြင်းနှင့် စပ်လျဉ်း၍ ပေါ်ပေါက်လာသော ပြဿနာကို ဆုံးဖြတ်ချက် ရယူရန် လွှဲအပ်မှု၊

(၂) အခြေခံဥပဒေများသည် ခေတ်ကာလအားလျော်စွာ ပေါ်ပေါက်လာသော အဖြစ်အပျက် အကြောင်း ချင်းရာများကို လွှမ်းခြုံနိုင်မိအောင် ကြိုးပမ်းကျယ်ပြန့်၍ လာကြရမည့်ဥပဒေများ ဖြစ်ကြသည်ဟုအသိအမှတ်ပြု၍၊ အဓိပ္ပါယ်သဘောကောက်ယူ ရမည်ဖြစ်ကြောင်း။

(၃) အခြေခံဥပဒေများတွင် ပေးဆ်ထားသော တန်ခိုးအာဏာများကို ကျယ်ပြန့်နိုင်သမျှ ကျယ်ပြန့်စေရန် အဓိပ္ပါယ် သဘော ကောက်ယူရမည်ဖြစ်ကြောင်း။

(၄) သက်ဆိုင်ရာနိုင်ငံ၏ ပြည်သူလူထုမှာ အကျိုးအမြားဆုံး ဖြစ်ထွန်းနိုင်စေမည့် သဘောအဓိပ္ပါယ်ကို ကောက်ယူရမည် ဖြစ်ကြောင်း။

အထက်တွင်ဖော်ပြခဲ့သော ထုံးတမ်းစဉ်လာ နည်းဥပဒေသများမှ တပါး၊ အခြားထုံးတမ်းစဉ်လာနှင့် နည်းဥပဒေသများလည်းရှိသေးသည်။ ၎င်းတို့အနက် အချို့မှာ တိုင်းပြည်ပြုလုပ်တော်၏ ရည်ရွယ်ချက်နှင့် အကြံအစည်များ အတိုင်း ဖြစ်စေရန်၊ အခြေခံဥပဒေတစောင်လုံးကိုခြုံ၍ အဓိပ္ပါယ်သဘော ကောက်ယူရ မည်။ အနည်းဆုံး အလားတူအကြောင်းချင်းရာများနှင့် စပ်လျဉ်းသော ပြဋ္ဌာန်း ချက်များကိုပါ ထည့်သွင်းစဉ်းစားပြီးမှ အဓိပ္ပါယ်သဘောကို ကောက်ယူရမည်။ ပုဒ်မတခု၊ သို့မဟုတ် ပြဋ္ဌာန်းချက်တခု၏ သဘော အဓိပ္ပါယ်သည် မရှင်းလင်း မပြတ်သားစေကာမူ၊ အခြား အလားတူပုဒ်မများ၊ ပြဋ္ဌာန်းချက်များကိုပါ ထည့် သွင်း၍စဉ်းစားလျှင် အဓိပ္ပါယ်ပေါ်လွင်ထင်ရှား၍လာနိုင်ကြောင်း သတိပြုရမည် ဟူသော ထုံးတမ်းစဉ်လာနှင့် ဥပဒေသများဖြစ်သည်။''*

အချက်အလက်များကို အသေးစိတ် ဝေဖန်လျှောက်လဲရာ၌၊ ဒေါက်တာ ဘမော်က အိန္ဒိယဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေပုဒ်မ ၇၄ (၁) ကို ကိုးကား၍၊ အိန္ဒိယပြည်တွင် အုပ်ချုပ်မှုအာဏာအားလုံးသည် ဝန်ကြီးအဖွဲ့တွင်ရှိပြီး၊ နိုင်ငံ တော်သမတမှာမူ ဝန်ကြီးအဖွဲ့၏ အကြံပေးချက် အတိုင်းသာ ဆောင်ရွက်ရ ကြောင်း။ မြန်မာပြည်၌မူကား အခြေခံဥပဒေပုဒ်မ ၆၃ (၁) အရ၊ နိုင်ငံတော် သမတသည် အချို့သောကိစ္စများတွင် ပြည်ထောင်စုအစိုးရ၏ အကြံပေးချက်အရ ဆောင်ရွက်ရ၍၊ အချို့သောကိစ္စများတွင် မိမိသဘောအတိုင်းဆောင်ရွက်နိုင်သည့် အခွင့်အရေးများလည်းရှိကြောင်း၊ ထို့ပြင်လည်း ပုဂ္ဂိုလ်တဦးဦးထံမှဖြစ်စေ၊ အဖွဲ့

* (1953) B.L.R. (S.C.) 30.

၁၉၅၈

ပြည်နယ်ဆိုင်ရာ ဝန်ကြီးများ ခန့်ထားခြင်းနှင့် စပ်လျဉ်း၍ ပေါ်ပေါက်လာသော ပြဿနာကို ဆုံးဖြတ်ချက်ရယူရန် လွှဲအပ်မှု။

တခုခုထံမှဖြစ်စေ၊ အကြံပေးချက်အရ၊ သို့တည်းမဟုတ် အမည် တင်သွင်းချက်အရ ဆောင်ရွက်ရမည့် ကိစ္စများလည်း ရှိကြောင်းကို လျှောက်ထားသည်။ ထို့မှတဖန် လျှောက်ထားပြန်သည်မှာ ပြည်နယ်ဝန်ကြီးခန့်အပ်ရန်အတွက် အမည်တင်သွင်းရာ၌၊ နိုင်ငံတော်ဝန်ကြီးချုပ်နှင့် ပြည်နယ်ကောင်စီတို့ ညှိနှိုင်းတိုင်ပင်ပြီးနှစ်ကိုယ်တစိတ်ဖြစ်ရသော တင်သွင်းရမည်ဟု ဒေါ်ပြသည်။ "ညှိနှိုင်းတိုင်ပင်" ဆိုသည့် စကားရပ်ကို အဓိပ္ပါယ် ကောက်ရာ၌၊ အင်္ဂလိပ်စာမူတွင် ပါရှိသော "in consultation with" ဆိုသည်မှာ၊ အခြေခံဥပဒေ၏ အသုံးအနှုန်းဖြစ်၍၊ မည်သူ၏အမည်ကို တင်သွင်းခြင်းပါသနည်းဟု တာဝန်ကျေရုံမျှသာ မေးမြန်းခြင်းဖြင့် မလုံလောက်။ တကယ်ပင်တိုင်ပင်ပြီး အလိုဆန္ဒခြင်းညီရန် နှစ်ဘက် သဘောတူညီချက်ကိုသာ တင်သွင်းသင့်ကြောင်း။ အမည်တင်သွင်းရာ၌လည်း၊ ဝန်ကြီးချုပ်တွင် တာဝန်နှင့် အခွင့်အရေးရှိသကဲ့သို့ ပြည်နယ်ကောင်စီတွင်လည်း တူညီသောတာဝန်နှင့် အခွင့်အရေးရှိကြောင်း။ သို့အတွက် ပုဒ်မ ၁၈၀ (၁) တွင် အတိအလင်း ထည့်သွင်းထားသော ပြဋ္ဌာန်းချက်များမှာ မလုပ် မနေရသော (mandatory) ပြဋ္ဌာန်းချက်များ ဖြစ်သည်ဟု မြွက်ဆိုလေသည်။

ပြည်နယ်ကောင်စီကို ဆင့်ခေါ်နိုင်သူမရှိဟူသော အချက်ကို ဒေါက်တာဘမော်က လက်မခံ၊ ပုဒ်မ ၁၈၀ (၁၂) အရ၊ ကရင်ပြည်နယ် ကောင်စီကို ပြည်နယ်ဥက္ကဋ္ဌကသာ ဆင့်ခေါ်နိုင်သည် ဆိုသည့်အချက်နှင့်စပ်လျဉ်း၍၊ ဒေါက်တာဘမော်က ပုဒ်မ ၁၈၀ (၁၂) တွင် သုံးနှုန်းသော အင်္ဂလိပ် စာမူဖြင့်၊ "summon", "prorogue", "session", "meeting" မြန်မာမူဖြင့် "ဆင့်ခေါ်", "ရုပ်သိမ်း", "ညီလာခံ", "အစည်းအဝေး" ဆိုသည့် စကားရပ်များကို အခြေပြုပြီး၊ ထိုစကားရပ်များမှာ ပါလီမန်အသုံးအနှုန်းများ ဖြစ်သည့်အလျောက်၊ ဤပြဋ္ဌာန်းချက်မှာ ဥပဒေပြုကိစ္စအလို့ငှါ၊ ညီလာခံဆင့်ခေါ်နိုင်သည့် အာဏာနှင့်သာ သက်ဆိုင်သည်ဟု ယူဆသင့်ကြောင်း။ စီမံအုပ်ချုပ်ရေး (executive) အတွက် လိုအပ်သောအစည်းအဝေးကို ကောင်စီသဘာပတိကပင် ဆင့်ခေါ်နိုင်ကြောင်း လျှောက်ထားသည်။ ချင်းဝိသေသတိုင်းနှင့် သက်ဆိုင်သည့် အခြေခံဥပဒေပုဒ်မ ၁၉၆၊ ၁၉၇ နှင့် ၁၉၀ တို့ဘွင်၊ ချင်းရေးရာကောင်စီ ဆင့်ခေါ်ရန် မည်သူအားမျှ အာဏာပေးအပ်ထားခြင်းမရှိပါသျက်၊ မည်ကဲ့သို့ ဆင့်ခေါ်နိုင်ပါသနည်းဟုလည်း မေးခွန်းထုတ်သေးသည်။

ပြည်နယ်ကောင်စီကို၊ ပြည်နယ်ဥက္ကဋ္ဌအပြင်၊ အခြားသူ တဦးတယောက်က ဥပဒေပြဋ္ဌာန်းချက်မရှိဘဲ ဆင့်ခေါ်နိုင်သည်ဆိုသော လျှောက်လဲချက်ကို၊ ဤရုံးတော်က လက်ခံရန်မဖြစ်နိုင်။ ပြည်နယ်ကောင်စီကို ဥပဒေပြုမှုအတွက်သော်၎င်း၊

အုပ်ချုပ်မှုအတွက်သော်၎င်း မည်သည့်အတွက် ဆင့်ခေါ်စေကာမူ၊ အခြေခံ ဥပဒေနှင့်တရားဥပဒေအရ ပေးအပ်ထားသည့်အာဏာနှင့် တာဝန်ဝတ်တရားများကို သုံးစွဲဆောင်ရွက်ရန် ကိစ္စအတွက် ဆင့်ခေါ်ခြင်းသာဖြစ်ရမည်။ ပြည်နယ်ကောင်စီအစည်းအဝေး၊ သို့မဟုတ် ညီလာခံကျင်းပရန် ဆင့်ခေါ်နည်းမှာ အခြေခံ ဥပဒေပုဒ်မ ၁၈၁ (၁၁) အရ၊ (ဤကိစ္စအလို့ငှါ ပြဋ္ဌာန်းထားသည့် ဥပဒေမရှိသေးသမျှ) ပြည်နယ်ဥက္ကဋ္ဌက ဆင့်ခေါ်သော နည်းတနည်းသာ ရှိသည်။ အလားတူ ပြည်သူ့လွှတ်တော်ကိုဆင့်ခေါ်နိုင်သူမှာ ပုဒ်မ ၅၇ အရ၊ နိုင်ငံတော်သမတသာဖြစ်သည်။ နိုင်ငံတော်သမတမရှိခဲ့သော် ပုဒ်မ ၆၄ (၁) အရ၊ ပြည်သူ့လွှတ်တော်ကို ဦးသျှောင်အဒွေကသာ ဆင့်ခေါ်နိုင်၏။ ပြည်နယ်ကောင်စီနှင့် စပ်လျဉ်း၍ကား ပုဒ်မ ၆၄ (၁) ကဲ့သို့သော ပြဋ္ဌာန်းချက်သည်၊ အခြေခံ ဥပဒေတွင် မပါရှိခဲ့။ ချင်းဝိသေသတိုင်းအတွက် ချင်းရေးရာ ဧကာင်စီကို ဆင့်ခေါ်နိုင်ရန် အခြေခံဥပဒေတွင် ပြဋ္ဌာန်းချက်မပါရှိခဲ့၊ ကောင်စီ သဘာပတိကဲ့သို့သောသူတို့ကား ဆင့်ခေါ်နိုင်သည့်အာဏာမရှိ၊ ချင်းရေးရာနှင့်ဘိုးက ဆင့်ခေါ်နိုင်စေရမည်ဟု ချင်းရေးရာကောင်စီ လုပ်ငန်းစဉ်နည်းဥပဒေ ၃ တွင် ပြဋ္ဌာန်းထားသည်ကို တွေ့ရသည်။

ဒေါက်တာဘဘမော်မှာ၊ နိုင်ငံတော်ခေါင်းဆောင်ကြီးတဦးအနေနှင့် ၁၉၁၉ ခုနှစ်၊ အိန္ဒိယပြည်သူ့အုပ်ချုပ်ရေးအက်ဥပဒေအရ ဝန်ကြီးလည်း ဖြစ်ခဲ့ဘူးသည်။ ၁၉၃၅ ခုနှစ်၊ မြန်မာပြည်အုပ်ချုပ်ရေးအက်ဥပဒေအရ၊ နန်းရင်းဝန်လည်း ဖြစ်ခဲ့ဘူးသည့်အလျောက် မိမိကိုယ်တိုင် ကြုံတွေ့ခဲ့ရသောကိစ္စအမျိုးမျိုးအနက် မြန်မာပြည် ဘုရင်ခံအသီးသီးနှင့် မည်ကဲ့သို့ ညှိနှိုင်း တိုင်ပင်ခဲ့ရသည်တို့ကို ထုတ်ဖော်လျောက်လဲရာ များစွာမှပင် စိတ်ဝင်စားဘွယ်ရာ အချက်အလက်များကို ဤရုံးတော်က ကြားနာရသည်။ ဖေါ်ပြပါအုပ်ချုပ်ရေးအက်ဥပဒေများတွင် (" after consultation with ") " ညှိနှိုင်းတိုင်ပင်ပြီးနောက် " ဆိုသောအချက်ကို မည်ကဲ့သို့ လိုက်နာခဲ့သည်ကိုလည်း ထုတ်ဖော်ပြောသည်။ သို့သော် ဤရုံးတော်သို့ ရောက်နေသောကိစ္စ (" in consultation with ") " ညှိနှိုင်းကိုင်တင်ခြင်း " ဆိုသည်မှာ၊ မည်ကဲ့သို့အဓိပ္ပါယ်သက်ရောက်သည်၊ မည်သို့ ဆောင်ရွက်မှသာညှိနှိုင်းတိုင်ပင်ရာရောက်မည် စသောပြဿနာ မပေါ်ပေါက်ချေ။ စာလူလူ၏အမည်ကို တင်သွင်းရာ၌၊ ညှိနှိုင်းတိုင်ပင်ခြင်း လုံးဝမပြုနိုင်ခဲ့သည်ဖြစ်၍၊ ဖြေဆိုရမည့် ပြဿနာမှာ၊ ပုဒ်မ ၁၈၁ (၁) တွင်ပါရှိသောပြဋ္ဌာန်းချက်များသည်မလိုက်နာလျှင် မနေရသောပြဋ္ဌာန်းချက်များဖြစ်သလော၊ ဤကဲ့သို့ဖြစ်ပါလျှင် စာလူလူကိုခန့်အပ်ခြင်းမှာ ဥပဒေနှင့်ဆန့်ကျင်ပါသလော ဆိုသောပြဿနာများသာ ဖြစ်သည်။

၁၉၅၈

ပြည်နယ်ဆိုင်ရာ ဝန်ကြီးများ ခန့်ထားခြင်းနှင့် စပ်လျဉ်း၍ ပေါ်ပေါက်လာသော ပြဿနာကို ဆုံးဖြတ်ချက်ရယူရန် လွှဲအပ်မှု။

၁၉၅၈

ပြည်နယ်ဆိုင်ရာ ဝန်ကြီးများခန့်ထားခြင်းနှင့် စစ်လျှင်း၍ ပေါ်ပေါက်လာသော ပြဿနာကို ဆုံးဖြတ်ချက်ရယူရန် လွှဲအပ်မှု။

အက်ဥပဒေတခုခုတွင်သော်၎င်း၊ အခြေခံဥပဒေတခုခုတွင်သော်၎င်း ပါရှိသည့် ပြဋ္ဌာန်းချက်သည် မလိုက်နာလျှင် မနေရသော ပြဋ္ဌာန်းချက် ဖြစ်သည်။ သို့တည်းမဟုတ် ညွှန်ကြားချက်မျှသာ ဖြစ်သည်ဆိုသောပြဿနာမှာ အခြေးတိုင်း ပြည်များ၌လည်း မကြာခဏပေါ်ပေါက်ခဲ့သည်။

နိုင်ငံခြား တရားလွှတ်တော်များက ဆုံးဖြတ်သည့် စီရင်ထုံးများကို၊ ဤရုံးတော်ကလိုက်နာရန် တာဝန်မရှိသော်လည်း၊ အခြေခံဥပဒေဆိုသည်မှာ တနိုင်ငံနှင့်တနိုင်ငံ တူသောအချက်အလက်များပါရှိ၍၊ ထိုတရားရုံးများ၏ ဆုံးဖြတ်ချက်များကိုပင်လျှင် ကောင်းမွန်သင့်လျော်ရာ၌ အကိုးအကားပြုထိုက်ပေသည်။ မြောက်မြားစွာသော စီရင်ထုံးတို့ကိုဘတ်ရှလေ့လာရာ အများကပင်လက်ခံဆော အချက်မှာ အက်ဥပဒေဖြင့်သော်၎င်း၊ အခြေခံဥပဒေဖြင့်သော်၎င်း၊ ကိစ္စတခုခုကိုဆောင်ရွက်ရန် ပြဋ္ဌာန်းထားလျှင်ထိုပြဋ္ဌာန်းချက်မှာ မလုပ်မနေရသော အချက်သော်လည်း ဖြစ်နိုင်သည်။ ညွှန်ကြားချက်မျှသော်လည်းဖြစ်နိုင်သည်။ ခြားနားခြင်းမှာ မလုပ်မနေရဟူသောအချက်ကို ရှောင်ဖယ်၍မရ၊ တသွေမတိမ်း လိုက်နာရမည်။ ညွှန်ကြားချက်သာဖြစ်ခဲ့ပါမူ၊ လိုက်နာနိုင်သမျှ လိုက်နာဆောင်ရွက်လျှင် လုံလောက်သည်။ တသွေမတိမ်းမလိုက်နာမိသည့်အတွက်ဆောင်ရွက်ချက်ပျက်ပြယ်သည်ဟု မယူဆနိုင်ချေ (*Woodward* v. *Sarsons*)။*

တနည်းအားဖြင့်ဆိုသော် မလိုက်နာလျှင်မနေရသော ပြဋ္ဌာန်းချက်ကိုမလိုက်နာဘဲ ပြုမူခဲ့ပါမူ၊ ပြုမူချက်မှာလုံးဝတရားမဝင်။ ညွှန်ကြားချက်သာ ဖြစ်ခဲ့ပါမူ၊ ပြုမူခဲ့ခြင်းမှာတည်မြဲသည်။ ပြဋ္ဌာန်းထားသည့်အချက်တခုသည် မလုပ်မနေရသော အချက်ဖြစ်သည်၊ သို့တည်းမဟုတ် ညွှန်ကြားချက်သာဖြစ်သည်ဆိုသော ပြဿနာကိုဆုံးဖြတ်ရာ၌ အမြဲတစေလိုက်နာရန် စည်းမျဉ်းကို တိတိကျကျ လွှဲနံ မါးထစ်သတ်မှတ်၍မဖြစ်နိုင်။ တရားရုံးများ၏တာဝန်မှာ (*Howard* v. *Bodington*) စီရင်ထုံးတွင် ညွှန်းထားသည့်အတိုင်း ပြဋ္ဌာန်းချက်မှာ မည်ရွေ့မည်မျှ အရေးကြီးသည်၊ ထိုပြဋ္ဌာန်းချက်သည် အဓိကရည်ရွယ်ချက်နှင့် မည်သို့သက်ဆိုင်သည်တို့ကို ချိန်ဆပြီးလျှင်၊ ပြဋ္ဌာန်းချက်တခုတည်းကိုသာ အဓိပ္ပါယ်မကောက်ဘဲ သက်ဆိုင်သမျှပြဋ္ဌာန်းချက်အားလုံးကို ရှုမြင်သုံးသပ်ရပေမည်။†

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* (1875) K R. 10 C.P. 733 at 746.

† You cannot go safely further than that in each case you must look to the subject-matter, consider the importance of the provision and the relation of the provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory." [Craies on Statute Law, p. 242, (1877), 2 P.D. 203 at 211].

ပုဒ်မ ၁၈၁ (၁) တွင် သတ်မှတ်ထားသောအချက်များမှာ—

(၁) နိုင်ငံတော်သမတက ကရင်ပြည်နယ်ဝန်ကြီးခန့်ထားရမည်။

(၂) ထိုသူမှာ ပြည်နယ်မှ ပါလီမန်လွှတ်တော်ဒေသတံဘဦးဖြစ်ရမည်။ (ကချင်ပြည်နယ်ဝန်ကြီးမှာ၊ ကချင်အမျိုးသား အမတ် တဦး ဖြစ်ရမည်)။

(၃) ထိုသူ၏အမည်ကို နိုင်ငံတော် ဝန်ကြီးချုပ်က၊ ကရင်ပြည်နယ် ကောင်စီနှင့် ညှိနှိုင်းတိုင်ပင်ပြီး တင်သွင်းရမည်။

၁၉၅၈

ပြည်နယ်ဆိုင်ရာ ဝန်ကြီးများ ခန့်ထားခြင်းနှင့် စင်လျှင်း၍ ပေါ်ပေါက်လာသော ပြဿနာကို ဆုံးဖြတ်ချက် ရယူရန် လျှောက်ထားမှု။

ဒေါက်တာဘမော်က ဤအချက်အားလုံးကိုပင် မလိုက်နာမနေရသော အချက်များဖြစ်ကြောင်း လျှောက်ထားသည်ကို၊ ဒေါက်တာဗမောင်က ချေပရာ၌၊ အခြေခံဥပဒေပုဒ်မ ၅၆ (၂) အရ၊ နိုင်ငံတော်ဝန်ကြီးချုပ်သည်၊ ဝန်ကြီးတဦးခန့်အပ်ရန် အမည်ကို နိုင်ငံတော်သမတထံ တင်သွင်းရကြောင်း။ သို့ရာတွင် ရာထူးမှနုတ်ထွက်စေလိုသောအခါ၊ ညှိနှိုင်းတိုင်ပင်ရန်ပင်မလိုကြောင်း။ ပုဒ်မ ၅၆ (၃) အရ၊ နိုင်ငံတော်သမတအား အကြံပေးလျှင် ပြီးမြောက်ကြောင်း တို့ကိုဖော်ပြသည်။ ခန့်အပ်ရန်သော်၎င်း၊ နုတ်ပယ်ရန်သော်၎င်း၊ နိုင်ငံတော်ဝန်ကြီးချုပ်၏ အကြံပေးချက်ကို၊ နိုင်ငံတော် သမတ က လက်ခံရမည်ဖြစ်၍ ညှိနှိုင်းတိုင်ပင်ရမည်ဟု ပြဋ္ဌာန်းချက်ကဆိုစေကာမူ၊ နိုင်ငံတော်ဝန်ကြီးချုပ်၏ဆန္ဒအတိုင်းသာလျှင် နောက်ဆုံး၌ဖြစ်ရန်ရှိသဖြင့်၊ နှစ်ဦးနှစ်ဘက် သဘောတူညီမှုရလိုရငြားအတွက်သာ တိုင်ပင်ရခြင်းဖြစ်သည်ဟုလျှောက်ထားသည်။ အခြေခံဥပဒေပုဒ်မ ၁၁၅ အရလည်း၊ အစိုးရအဖွဲ့သည် အဖွဲ့လိုက်စုပေါင်းတာဝန်ခံရမည်ဖြစ်၍၊ နိုင်ငံတော် ဝန်ကြီးချုပ်သည် မိမိအား ပဋိပက္ခပြုမည့်သူ တဦးတယောက်ကို၊ ပြည်နယ်ဝန်ကြီး ခန့်အပ်နိုင်လိမ့်မည် မဟုတ်ဟုသည်း ထပ်မံလျှောက်ထားပြန်သည်။

အခြေခံဥပဒေတွင်ပါရှိသည့် ပြည်နယ်များနှင့်သက်ဆိုင်ရာပြဋ္ဌာန်းချက်များကိုလေ့လာကြည့်ရှုရာ၊ ပြည်နယ်စီရင်အုပ်ချုပ်ရေးကိစ္စများကို တာဝန်ယူ၍ ဆောင်ရွက်ရသူ၊ ပြည်နယ်ဥက္ကဋ္ဌများရှိရန်လိုသည်မှာအဓိကအချက်ဖြစ်သည်။ သို့အတွက် ပြည်နယ်ဥက္ကဋ္ဌ ခန့်ရမည်ဆိုသည့်အချက်မှာ မလုပ်မနေရသောအချက်ဖြစ်သည်။ ပြည်နယ်ပါလီမန်အမတ်တဦးဦးကို၊ သို့တည်းမဟုတ် ကချင်အမျိုးသား အမတ်တဦးဦးကို ခန့်အပ်ရမည် ဆိုသည်မှာလည်း မလိုက်နာဘဲနေ၍ ဖြစ်မည်မဟုတ်။ ညှိနှိုင်းတိုင်ပင်ရမည်ဆိုသည်မှာ လိုက်နာနိုင်သမျှ လိုက်နာရမည် ဖြစ်သည်။ မလိုက်နာနိုင်၍ ပြဋ္ဌာန်းချက်ကို မလိုက်နာခြင်းနှင့် လိုက်နာနိုင်ပါလျက်၊ မလိုက်နာခြင်းမှာ အလွန်ခြားနားသည်။ နောက်ဆုံး၌ ဝန်ကြီးချုပ်၏ဆန္ဒအတိုင်းဖြစ်ရ

၁၉၅၈

ပြည်နယ်ဆိုင်ရာ ဝန်ကြီးများ ခန့်ထားခြင်း နှင့်စပ်လျဉ်း၍ ပေါ်ပေါက်လာသော ပြဿနာကို ဆုံးဖြတ်ချက်ရယူရန် လွှဲအပ်မှု။

မည်ဟု ကိုးကားပြီးလျှင်၊ ဝန်ကြီးချုပ်က တိုင်ပင်နိုင်ပါလျက် မတိုင်ပင်ဘဲ မိမိလိုလားသည့် အမတ်တဦး၏ အမည် တင်သွင်းလျှင်၊ ဥပဒေကို ဆန့်ကျင်ရာရောက်မည်။ ပြည်နယ်နှင့်တကွ ပြည်ထောင်စုအကျိုးကိုထောက်ထား၍ ဆောင်ရွက်ရန်ကိစ္စရှိသမျှကို မိမိနှင့်အတူ ဆောင်ရွက်နိုင်မည့်သူကို ရွေးချယ်ရမည်ဖြစ်သည်။ ဤကဲ့သို့ ရွေးချယ်ရာ၌ ကောင်စီ၏သဘောကို သိရှိနိုင်စေရန် ညွှန်ကြားတိုင်ပင်ရမည်ဟု ပြဋ္ဌာန်းထားခြင်းဖြစ်သည်။

ယခုကိစ္စနှင့်အနီးစပ်ဆုံးအမှုမှာ (*Biswanath Khemka* v. *Emperor*)* ဖြစ်သည်။ ၁၉၃၅ ခုနှစ်၊ အိန္ဒိယပြည်အုပ်ချုပ်ရေး အက်ဥပဒေပုဒ်မ ၁၂၆ အရ၊ ပုဂ္ဂိုလ်တဦးအား ရာဇဝတ်အာဏာ အပ်နှင်းရာ၌သော်၎င်း၊ ထိုအာဏာကို နုတ်သိမ်းရာ၌သော်၎င်း၊ ခရိုင်ဝန်နှင့်ညှိနှိုင်းတိုင်ပင်ပြီးမှ (after consultation with) ဆောင်ရွက်ရမည်ဆိုသော ပြဋ္ဌာန်းချက်မှာညွှန်ကြားချက်သာဖြစ်၍ ညှိနှိုင်းတိုင်ပင်ခြင်းမရှိခဲ့သော်လည်း အာဏာအပ်ခြင်းမှာ တရားဝင်သည်ဟု ဆုံးဖြတ်ခဲ့သည်။

ဤကိစ္စတွင် ပြည်နယ်ကောင်စီနှင့် ညှိနှိုင်းတိုင်ပင်ရန် မဖြစ်နိုင်လောက်သော အခြေအရိုဆိုက်ရောက်၍၊ ညှိနှိုင်းတိုင်ပင်ခြင်းမပြုခဲ့ရပါဆိုသောအချက်သည် ဥပဒေဆိုရိုးစကား "ဥပဒေသည် မဖြစ်နိုင်သည်ကို မရည်ရွယ်" (*Lex non cogit impossibilia*) နှင့်လည်းကိုက်ညီသည်။ အဓိပ္ပါယ်မှာ တာဝန်တခုခုဆောင်ရွက်ရာ၌ ပြဋ္ဌာန်းထားသောနည်းအတိုင်းလုပ်ရန် လုံးဝမဖြစ်နိုင်ပါက၊ ပြဋ္ဌာန်းချက်ကို လိုက်နာရန်မလို။ ယခုကိစ္စတွင် ညှိနှိုင်းတိုင်ပင်ရန်အဘွက်၊ ပြည်နယ်ကောင်စီကို ဆင့်ခေါ်နိုင်သည့် အာဏာပိုင်သူအကယ်ပင်မရှိသဖြင့်၊ တိုင်ပင်ရန်မဆိုထားဘိ၊ တွေ့ဆုံရန်ပင် မဖြစ်နိုင်တော့ပေ။ ဤကဲ့သို့ ဆင့်ခေါ်ခြင်း မဖြစ်နိုင်အောင်လည်း၊ နိုင်ငံတော်ဝန်ကြီးချုပ်က ဖန်တီးခဲ့သည်မဟုတ်။ လက်ရှိဝန်ကြီးက နုတ်ထွက်သွား၍သာ၊ ဤအခြေအရောက်ရှိခဲ့ရသည်။ ပုဒ်မ ၁၀၁ (၁) အရ၊ ညှိနှိုင်းတိုင်ပင်ရမည်မှာလည်း၊ အဖွဲ့ဝင်များအား ပုဂ္ဂိုလ်အနေဖြင့်မဟုတ်ဘဲ၊ ပြည်နယ်ကောင်စီအား အဖွဲ့အနေဖြင့် တိုင်ပင်ညှိနှိုင်းရမည်ဖြစ်၍၊ ဥပဒေနှင့်အညီ ဆင့်ခေါ်မှသာ အစည်းအဝေးသော်၎င်း၊ ညီလာခံသော်၎င်း၊ အထမြောက်ပေမည်။ ညှိနှိုင်းတိုင်ပင်နိုင်ရန်အလို့ငှါ၊ ပြည်နယ်ကောင်စီကို ဆင့်ခေါ်နိုင်သည့် အာဏာရှိသူ ပြည်နယ် ဥက္ကဋ္ဌတဦးကို ယာယီသဘောဖြင့် ဖန်တီးပေးခြင်းသာ ဖြစ်သည့် အလျောက်၊ ဤသို့ဆောင်ရွက်ခဲ့ခြင်းသည် ပျက်ပြယ်သည်ဟုဆိုင်း၊ ဥပဒေနှင့် ဆန့်ကျင်သည်ဟုဆိုင်း၊ ဤရုံးတော်က မယူဆနိုင်ပေ။

* (1945) A.I.R. (F.C.) 67.

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ပြည်နယ်ဆိုင်ရာ ဝန်ကြီးများ ခန့်ထားခြင်း နှင့်စပ်လျဉ်း၍ ပေါ်ပေါက်လာသော ပြဿနာကို ဆုံးဖြတ်ချက်ရယူရန် လွှဲအပ်မှု။

နိဂုံးချုပ်အားဖြင့် ဤရုံးတော်၏ယူဆချက်ကို ဖေါ်ပြရမည်ဆိုလျှင်၊ ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေသည်၊ ပြည်ထောင်စုကြီးမင်္ဂလာမဟာစီးစေရန် ထိန်းထားသော အကွပ်ဖြစ်သည့်အားလျော်စွာ ထိုအခြေခံဥပဒေကို တသွေမတိမ်းလိုက်နာဆောင်ရွက်ရန်မှာ၊ ပြည်ထောင်စုသားတိုင်း၏ တာဝန်ဖြစ်သည်။ သို့ရာတွင် အခြေခံဥပဒေဆိုသည်မှာ၊ ပစ္စုပ္ပန်ကာလအတွက်သာခေတ္တတည်မြဲသော ဥပဒေမျိုးမဟုတ်။ နောင်လာလတ္တံ့သော အနာဂတ်ကာလ၌ ပေါ်ပေါက်မည့်မှုခင်း ကိစ္စအဝဝအတွက်လည်း အာဏာတည်ရမည်ဖြစ်သဖြင့်၊ နောင်ဖြစ်ပေါ်မည့် ကိစ္စတိုင်းအတွက် အသေးစိတ်အားဖြင့် ပြဋ္ဌာန်းခြင်းမပြုနိုင်ပေ။ ယခုကဲ့သို့ မမြော်လင့်သော အခက်အခဲမျိုး ပေါ်ပေါက်လာသည့်အခါ၊ အုပ်ချုပ်ရေး၊ ဥပဒေပြုရေး၊ တရားစီရင်ရေး စသည်တို့ ဆိတ်သုဉ်းခြင်းမဖြစ်ရလေအောင် အဓိပ္ပါယ်ကောက်ယူ၍ ဆောင်ရွက်ရမည်ဖြစ်သည်ကို သတိချပ်ရပေမည်။

ဤအကြောင်းများကြောင့်၊ ဤရုံးတော်က အောက်ပါအတိုင်း ဖြေဆိုပါသည်။

(၁) စောလူလှန့်ဒူးဝါးဇော်ရစ်တို့၏ အမည်များကို တင်သွင်းရာ၌ အခြေအနေအရ၊ ပြည်နယ်ကောင်စီများနှင့်ညှိနှိုင်းတိုင်ပင်ရန် နည်းလမ်းမရှိ၍၊ ညှိနှိုင်းတိုင်ပင်ခြင်းမပြုဘဲ၊ ယာယီအားဖြင့် ခန့်အပ်ရန် နိုင်ငံတော် ဝန်ကြီးချုပ်က တင်သွင်း ခြင်းမှာ အခြေခံဥပဒေနှင့်ဆန့်ကျင်သည်ဟု မယူဆနိုင်ချေ။

(၂) အခြားနည်းလမ်းမရှိ။

(၃) ပြည်နယ် ဥက္ကဋ္ဌ မရှိလျှင်၊ အုပ်ချုပ်ရေးကိုပင် တာဝန်ယူ၍ ဆောင်ရွက်နိုင်မည့်သူ ရှိမည်မဟုတ်၍၊ မခန့်အပ်ဘဲမထားသင့်။

နောင်အခါတွင်၊ ဤအခက်အခဲမျိုးနှင့် တွေ့ကြုံခြင်းမှ ကင်းလွတ်စေရန်၊ ပြည်နယ်များအတွက် လိုအပ်သည့်အက်ဥပဒေများကို ပြဋ္ဌာန်းထားသင့်ကြောင်း ကိုဖေါ်ပြရပေမည်။ ကရင်ပြည်နယ်အတွက်ဆိုလျှင် ပုဒ်မ ၁၈၁ (၁၁) အရ၊ ပြည်နယ်ခွဲစည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေဆိုင်ရာ ကိစ္စအားလုံးကို တရားဥပဒေဖြင့် ပြဋ္ဌာန်းသတ်မှတ်နိုင်သည်ဖြစ်၍၊ ပြည်နယ်ဥက္ကဋ္ဌမရှိသောအခါများတွင် အုပ်ချုပ်ရေး ဆက်လက်တည်မြဲစေရန်နှင့် ပြည်နယ်ကောင်စီကို ဆင့်ခေါ်နိုင်ရန် ဥပဒေပြဋ္ဌာန်းသင့်ကြောင်းကို၊ ဤရုံးတော်က သတိပေးနှိုးဆော်လိုက်ပါသည်။

တရားလွှတ်တော်ချုပ်။

† ၁၉၅၈
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ဇူလိုင်လ
၂၈ ရက်။

မအူပင်မြောက်ပိုင်း မဲဆန္ဒနယ် ပြည်သူ့လွှတ်တော် အမတ် ဦးဘဦး၏ အမတ်အဖြစ် နုတ်ထွက်လွှာမှ ပေါ်ပေါက် လာသောပြဿနာကို ဆုံးဖြတ်ချက်ရယူရန် လွှဲအပ်မှု။ *

ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေပုဒ်မ ၁၅၁၊၇၃ (၂) (ခ)—အမတ်အဖြစ်မှ နုတ်ထွက်လျှင်၊ ဘယ်အချိန်အခါ ၎င်း၏နေရာလစ်လပ်သနည်း၊ ပုဒ်မ—၇၃ (၁) (၂) (ခ) နုတ်ထွက်ခြင်းထမြောက်ပါက၊ နုတ်ထွက်ခြင်းကို ရုပ်သိမ်းနိုင်ခွင့် လုံးဝမရှိ—ထွက်သည်နှင့်တပြိုင်နက်၊ ထိုအခါ၌ အမတ်၏နေရာလစ်လပ်ခြင်း—အခြေခံဥပဒေပုဒ်မ ၈၀ (၁) အရ၊ ပြုလုပ်ထားသော ပြည်သူ့လွှတ်တော် လုပ်ငန်းစဉ်နည်းဥပဒေ ၇ (၂)—အခြေခံဥပဒေပုဒ်မ ၂၁၇၊ နည်းဥပဒေ ၇ (၂) ကိုလွှတ်တော်က **သတ်မှတ်ပိုင်မရှိ။**

မအူပင်မြောက်ပိုင်းမဲဆန္ဒနယ် ပြည်သူ့လွှတ်တော်အမတ် ဦးဘဦးသည်၊ "ပါလီမန်အမတ်အဖြစ်မှ နုတ်ထွက်လိုပါကြောင်း" ဟု၊ ၁၉၅၈ ခုနှစ်၊ မေလ ၁၉ ရက် နေ့စွဲပါ ရေးစွဲကြေစာဖြင့် မအူပင် စာတိုက်မှ၊ ပြည်သူ့လွှတ်တော်ဥက္ကဋ္ဌကြီးမှတဆင့်၊ နိုင်ငံတော်သမတထံသို့ ပေးပို့လိုက်ကြောင်း။

ဤကဲ့သို့ပြုပြီးနောက် ၁၉၅၈ ခုနှစ်၊ မေလ ၂၁ ရက်နေ့၌တဖန်၊ "ကျွန်တော်၏ နုတ်ထွက်စာကို ပြန်လည်ရုပ်သိမ်းခွင့်ပြုပါ" ဟု လွှတ်တော်ဥက္ကဋ္ဌကြီးမှတဆင့် နိုင်ငံတော်သမတထံသို့ ပေးပို့ပြန်လေသည်။

အဆိုပါစာနှစ်စောင်ကို၊ သမတကြီးထံသို့ တကြိမ်တည်း တင်သွင်းရာ၊ သမတကြီးက မအူပင်မြောက်ပိုင်း မဲဆန္ဒနယ်အမတ်၏နေရာသည်၊ ၁၉၅၈ ခုနှစ်၊ မေလ ၁၉ ရက်နေ့မှစ၍ လစ်လပ်သည်ဟု ကျေညာခဲ့ကြောင်း။

ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေပုဒ်မ ၁၅၁ အရ၊ နိုင်ငံတော်သမတက အောက်ပါဥပဒေကြောင်းဆိုင်ရာ ပြဿနာများကို လွှတ်တော်ချုပ်သို့ စဉ်းစားဆုံးဖြတ်စေရန် လွှဲလိုက်ကြောင်း။

(၁) အခြေခံဥပဒေပုဒ်မ ၇၃ (၂) (ခ) အရ၊ လွှတ်တော်အမတ် ဦးသည် နိုင်ငံတော်သမတထံသို့ မိမိကိုယ်တိုင် လက်မှတ်ထိုး၍ အမတ်အဖြစ်မှ

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* ၁၉၅၈ ခုနှစ်၊ လွှဲအပ်မှုအမှတ် ၁။

† နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးမြင့်သိန်း၊ တရားဝန်ကြီး ဦးချန်ထွန်းနှင့် တရားဝန်ကြီး ဦးဘိုကြီးတို့က အမိန့်ချမှတ်သည်။

နှုတ်ထွက်စာဘင်သွင်းခဲ့သော် ထိုနှုတ်ထွက်စာကို ဥပဒေအရ ရုပ်သိမ်းနိုင်ပါသလော။

(၂) ဤကဲ့သို့ မရုပ်သိမ်းနိုင်ပါလျှင်၊ သို့ဘည်းမဟုတ် မရုပ်သိမ်းလျှင် ထိုအမတ်၏ နေရာသည် ဘယ်သောအခါ၌ လစ်လပ်ပါမည်နည်း။

၁၉၅၈

မအူပင်မြောက်ဝိုင်း မဲဆန္ဒနယ်ပြည်သူ့လွှတ်တော်အမတ် ဦးဘဦး၏ အမတ်အဖြစ် နုတ်ထွက်လွှာမှ ပေါ်ပေါက်လာသော ပြဿနာကို ဆုံးဖြတ်ချက် ရယူရန် လွှဲအပ်မှု။

ဆုံးဖြတ်ချက်။ ။အခြေခံဥပဒေပုဒ်မ ၇၃ (၁) (၂) (ခ) အရ၊ နုတ်ထွက်ခြင်းထမြောက်ပါက၊ နုတ်ထွက်ခြင်းကို ရုပ်သိမ်းနိုင်ခွင့်လုံးဝမရှိ။

နိုင်ငံတော်သမတတွင် နုတ်ထွက်ခွင့်ကို ပေးနိုင်သော အာဏာသော်ငှား၊ ငြင်းပယ်နိုင်သည့် အာဏာသော်ငင်း လုံးဝမရှိချေ။

အမတ်တဦးနုတ်ထွက်သည်နှင့် တပြိုင်နက်၊ ထိုအခါ၌၊ ၎င်း၏နေရာလစ်လပ်ရမည်ဟု ပုဒ်မ ၇၃ (၂) (ခ) တွင် အတိအသင်းပါရှိသည်။

လွှတ်ဆာ်နည်းဥပဒေများကို၊ အခြေခံဥပဒေပုဒ်မ ၈၀ (၁) အရ၊ ပြုလုပ်သောအခါ၌၊ အခြေခံဥပဒေ၌ ပြဋ္ဌာန်းချက်များနှင့် မဆန့်ကျင်စေဘဲ နည်းဥပဒေများ ပြုလုပ်ရမည်။ ပြည်သူ့လွှတ်တော်နည်းဥပဒေ ၇ (၂) သည် အခြေခံဥပဒေပြဋ္ဌာန်းချက်နှင့် ဆန့်ကျင်နေသည့်အပြင်၊ လွှတ်တော်၏ လုပ်ငန်းစဉ်နှင့် မှုခင်းကိစ္စဆောင်ရွက်မှုများ၏ ပြင်ပသို့ရောက်နေသည်။ ပြည်သူ့လွှတ်တော် နည်းဥပဒေဆိုသည်မှာ၊ ပြည်သူ့လွှတ်တော်အတွင်းတွင်သာ သုံးရမည့် နည်းဥပဒေများဖြစ်၍၊ လွှတ်တော်ပြင်ပ၌ ပေါ်ပေါက်သောကိစ္စများအတွက် မသက်ရောက်နိုင်ချေ။ ထိုကြောင့်လွှတ်တော်က နည်းဥပဒေ ၇ (၂) ကို သတ်မှတ်ပိုင်ခွင့်မရှိ။

အထက်ပါပြဿနာများကို အောက်ပါအတိုင်းဖြေဆိုသည်။

(၁) အခြေခံဥပဒေပုဒ်မ ၇၃ (၂) (ခ) အရ၊ လွှတ်တော်အမတ်တဦးသည်၊ နိုင်ငံတော်သမတထံသို့ မိမိကိုယ်တိုင်လက်မှတ်ထိုး၍ နုတ်ထွက်စာ တင်သွင်းခဲ့သော် ထိုနုတ်ထွက်စာကို ဥပဒေအရမရုပ်သိမ်းနိုင်။

(၂) ထိုအမတ်၏နေရာသည် နုတ်ထွက်စာတင်သွင်းသည့် အချိန်အခါ၌ လစ်လပ်သည်၊

နိုင်ငံတော်ရှေနေချုပ်ကြီးအတွက် ဦးဓမောင်နှင့် ဦးရန်အောင်လိုက်ပါဆောင်ရွက်၍

ယခင်က ပြည်သူ့လွှတ်တော် အမတ်ဖြစ်သူ ဦးဘဦးအတွက် ဦးဘမော်လိုက်ပါဆောင်ရွက်သည်။

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ဤစည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေ ပုဒ်မ ၁၅၁ အရ၊ နိုင်ငံတော်သမတက အောက်ပါဥပဒေကြောင်းဆိုင်ရာ ပြဿနာများကို ဤရုံးတော်က စဉ်းစားစေရန် လွှဲအပ်လိုက်သည်။

(၁) အခြေခံဥပဒေပုဒ်မ ၇၃ (၂) (ခ) အရ၊ လွှတ်တော်အမတ်တဦးသည် နိုင်ငံတော်သမတထံသို့ မိမိကိုယ်တိုင်လက်မှတ်

၁၉၅၈

မအူပင်မြောက်ပိုင်း မဲဆန္ဒနယ် ပြည်သူ့လွှတ်တော်အမတ် ဦးဘဦး၏ အမတ်အဖြစ် နုတ်ထွက်လွှာမှ ပေါ်ပေါက်လာသော ပြဿနာကို ဆုံးဖြတ်ချက် ရယူရန် လွှဲအပ်မှု။

ထိုး၍ အမတ်အဖြစ်မှ နုတ်ထွက်စာတင်သွင်းခဲ့သော် ထိုနုတ်ထွက်စာကို ဥပဒေအရ ရုပ်သိမ်းနိုင်ပါသလော။

(၂) ဤကဲ့သို့မရုပ်သိမ်းနိုင်ပါလျှင်၊ သို့တည်းမဟုတ် မရုပ်သိမ်းလျှင် ထိုအမတ်၏နေရာသည်၊ ဘယ်သောအခါ၌ လစ်လပ်ပါ မည်နည်း။

ဤပြဿနာများမှာ မအူပင်မြောက်ပိုင်း မဲဆန္ဒနယ် ပြည်သူ့လွှတ်တော် အမတ် ဦးဘဦး၏ အမတ်အဖြစ်မှ နုတ်ထွက်စာတင်သွင်းခြင်းနှင့် ပတ်သတ်၍ ပေါ်ပေါက်လာသည်။ ဖြစ်ပျက်ပုံအကြောင်းခြင်းရာမှာ အောက်ပါအတိုင်းပင် ဖြစ်ကြောင်း လိုက်ပါဆောင်ရွက်ကြသော ပညာရှိရှေ့နေကြီးများက သဘောတူ ဝန်ခံကြသည်။

(၁) ၁၉၅၈ ခုနှစ်၊ မေလ ၁၉ ရက်နေ့၌ "ပါလီမန်အမတ်အဖြစ်မှ နုတ်ထွက်လိုက်ပါကြောင်း လေးစားစွာ အစီရင်ခံအပ်ပါသည်" ဟုပါရှိသော စာကိုလက်မှတ်ထိုး၍ နိုင်ငံတော် သမတထံသို့၊ ပြည်သူ့လွှတ်တော် ဥက္ကဋ္ဌကြီးမှတဆင့် မအူပင် စာတိုက်တွင်ရေစစ်ကြိုလုပ်ပြီးထိုနေ့ကပင်ပေးပို့လိုက်ကြောင်း။

(၂) ၁၉၅၈ ခုနှစ်၊ မေလ ၂၁ ရက်နေ့၌တဖန် ပြည်သူ့လွှတ်တော် ဥက္ကဋ္ဌကြီးမှတဆင့် နိုင်ငံတော် သမတထံသို့ "ကျွန်တော်၏ နုတ်ထွက်စာကို ပြန်လည်ရုပ်သိမ်းခွင့်ပြုပါရန် လေးစားစွာနှင့် မေတ္တာရပ်ခံအပ်ပါသည်" ဟုပါရှိသည့်စာကို၊ လူတယောက်နှင့် ပေးပို့လိုက်ကြောင်း။

(၃) ဒုတိယစာကို ဗဟူဆောင် လာသူက ပြည်သူ့လွှတ်တော် ဥက္ကဋ္ဌကြီးရုံးတွင်၊ ၁၉၅၈ ခုနှစ်၊ မေလ ၂၂ ရက်နေ့ နံနက် ၁၀ နာရီအချိန်၌ ပေးအပ်ကြောင်း။ ၁၉၅၈ ခုနှစ်၊ မေလ ၁၉ ရက်နေ့က ပေးပို့လိုက်သောစာမှာမူ စာတိုက်ကလာရသဖြင့် နောက်နှစ်နာရီကြာမှ လွှတ်တော် ဥက္ကဋ္ဌကြီးရုံးသို့ ရောက်ရှိကြောင်း။

(၄) နိုင်ငံတော် ရှေနေချုပ်ကြီး၏ အကြံပေးချက်အရ၊ ၎င်း၏ အစီရင်ခံစာနှင့်အတူ အဆိုပါစာနှစ်စောင်ကို သမတကြီးထံသို့ တင်သွင်းရာ၊ ထိုနေ့၌ပင် မအူပင်မြောက်ပိုင်းမဲဆန္ဒနယ် အမတ်၏နေရာသည်၊ ၁၉၅၈ ခုနှစ်၊ မေလ ၁၉ ရက်နေ့မှစ၍ လစ်လပ်သည်ဟု ကျေညာခဲ့ကြောင်း။

ပေါ်ပေါက်သောပြဿနာများကို စဉ်းစားဝေဖန်ရာ၌ အခြေခံဥပဒေအရ၊ ဆန်းစစ်ဆောင်ရသည့် ရာထူးများကို သက်ဆိုင်ရာပုဂ္ဂိုလ်အသီးသီးအား စွန့်လွှတ်နိုင်ခွင့်ပေးထားကြောင်းကို တွေ့မြင်သည်။ ဥပမာဆိုသော် အခြေခံဥပဒေပုဒ်မ ၆၄ (၁) အရ၊ နိုင်ငံတော်သမတပင်လျှင် ထွက်ခွင့်ရှိကြောင်းထင်ရှားသည်။ သို့သော် မည်ကဲ့သို့နုတ်ထွက်ရမည်ကို ဖော်ပြထားခြင်းမရှိ။

ပုဒ်မ ၆၇ (၂) နှင့် (၅) အရ၊ ပြည်သူ့လွှတ်တော်ဥက္ကဋ္ဌနှင့် ဒုတိယဥက္ကဋ္ဌ၊ လူမျိုးစုလွှတ်တော်နာယကနှင့် ဒုတိယ နာယကတို့သည် "နိုင်ငံတော်သမတထံသို့ မိမိကိုယ်တိုင် လက်မှတ်ရေးထိုးတင်သွင်းသော စာဖြင့်ရာထူးမှ နုတ်ထွက်နိုင်သည်။"

ပုဒ်မ ၁၁၇ (၁) အရ၊ "နိုင်ငံတော်သမတလက်သို့ မိမိ၏နုတ်ထွက်လွှာကို ပေးအပ်ခြင်းဖြင့် ဝန်ကြီးချုပ်သည် အခါမရွေးရာထူးမှ နုတ်ထွက်နိုင်သည်။

ပုဒ်မ ၁၁၇ (၂) အရ၊ နိုင်ငံတော်သမတထံသို့ တင်သွင်းစေရန်၊ မိမိ၏နုတ်ထွက်လွှာကို ဝန်ကြီးချုပ်လက်သို့ပေးအပ်ခြင်းဖြင့် မည်သည့်အစိုးရအဖွဲ့ဝင် ဝန်ကြီးမဆို၊ ရာထူးမှနုတ်ထွက်နိုင်သည်။ * * * * နိုင်ငံတော်သမတကလက်ခံသောအခါ၊ ထိုသို့နုတ်ထွက်ခြင်းသည် အတည်ဖြစ်ရမည်။"

ပုဒ်မ ၁၂၇ (၁) အရ၊ "နိုင်ငံတော်သမတထံသို့ တင်သွင်းရန်ဖြစ်သော နုတ်ထွက်စာကို၊ ဝန်ကြီးချုပ်အား ပေးအပ်ခြင်းဖြင့် နိုင်ငံတော်ရွှေနေချုပ်သည် အခါမရွေးရာထူးမှ နုတ်ထွက်နိုင်သည်။"

ပုဒ်မ ၁၄၃ (၁) အရ၊ တရားဝန်ကြီးတဦးသည် "မိမိကိုယ်တိုင် လက်မှတ်ထိုးသော နုတ်ထွက်စာကို၊ နိုင်ငံတော် သမတထံသို့ တင်သွင်းခြင်းဖြင့် ရာထူးမှ နုတ်ထွက်နိုင်သည်။"

ပုဒ်မ ၇၃ (၂) (ခ) အရ၊ "နိုင်ငံတော်သမတထံသို့ မိမိကိုယ်တိုင် လက်မှတ်ထိုး၍ နုတ်ထွက်စာဘင်သွင်းခြင်းအားဖြင့် အမတ်အဖြစ်မှ နုတ်ထွက်ခဲ့သော်၊ ထိုအမတ်၏နေရာသည် ထိုအခါ၌ လစ်လပ်ရမည်။"

အထက်ပါကောက်နုတ်ချက်များကို ကြည့်ခြင်းအားဖြင့် အခြေခံဥပဒေအရ၊ ရာထူးမှ နုတ်ထွက်လိုပါက၊ နိုင်ငံတော်သမတထံသို့ တိုက်ရိုက်သော်ငင်း၊ ဝန်ကြီးချုပ်မှတဆင့်သော်ငင်း နုတ်ထွက်စာ တင်သွင်းရမည်ဖြစ်သည်။ သို့ရာတွင် ဝန်ကြီးများနှင့် အမတ်များရာထူးမှ ထွက်ခြင်းနှင့်သက်ဆိုင်သော ပုဒ်မများမှာ ခြားနားသည်ကို တွေ့မြင်ရသည်။ ဝန်ကြီးများမှာ မိမိတို့၏နုတ်ထွက်စာကို နိုင်ငံတော်သမတက လက်ခံသောအခါမှသာ ထွက်ခွင့်ရသော်လည်း၊ အမတ်

၁၉၅၈

မအူပင်မြောက်ပိုင်း မဲဆန္ဒနယ် ပြည်သူ့လွှတ်တော်အမတ် ဦးဘဦး၏ အမတ်အဖြစ် နုတ်ထွက်လွှာမှ ပေါ်ပေါက်လာသော ပြဿနာကို ဆုံးဖြတ်ချက် ရယူရန် လွှဲအပ်မှု။

၁၉၅၀

မအူပင် မြောက်ပိုင်း မဲဆန္ဒနယ် ပြည်သူ့လွှတ်တော်အမတ် ဦးဘဦး၏ အမတ်အကြွစ် နုတ်ထွက်လွှာမှ ပေါ်ပေါက်လာသော ပြဿနာကို ဆုံးဖြတ်ချက် ရယူရန် လွှဲအပ်မှု။

များမှာ နုတ်ထွက်ပါသည်ဟု အကြောင်းကြားသောအခါ၌ ထိုအမတ်၏ နေရာသည် လစ်လပ်ရပေမည်။

ပုဒ်မ ၇၃ (၁) (၂) (ခ) တွင် အထူးပင်ရှင်းလင်းသော စကားလုံးများကို သုံးစွဲထား၍၊ အဓိပ္ပါယ်နှစ်မျိုးကောက်ယူနိုင်ရန် မဖြစ်ခြေ။ ထို့ကြောင့် ဦးဘဦးအတွက် လိုက်ပါဆောင်ရွက်သူပညာရှိ ရှေနေကြီးက နုတ်ထွက်ခြင်း ထမြောက်ပါက၊ နုတ်ထွက်သောအမတ်မင်းမှာ နုတ်ထွက်ခြင်းကိုရုပ်သိမ်းနိုင်ခွင့် လုံးဝမရှိသည်ကို ဝန်ခံသည်။ သို့သော် ပညာရှိရှေနေကြီးက နိုင်ငံတော်သမတထံသို့ အမတ်တဦးသည် နုတ်ထွက်သည်ဟု စာရေးရုံမျှဖြင့် နုတ်ထွက်ခြင်းအရာ မရောက်သေးပါ နိုင်ငံတော်သမတလက်သို့ လုပ်ရိုးလုပ်စဉ်အတိုင်း ရောက်ရှိမှသာ နုတ်ထွက်ခြင်းဖြစ်မြောက်ပါသည်ဟု လျှောက်ထားသည်။ ဦးဘဦး၏နုတ်ထွက်စာသည် နိုင်ငံတော်သမတထံသို့ နောက်ဆုံး၌ ရောက်ရှိသည်ကို၊ ရုံးတော်ကသတိပေးခဲ့ရာ၊ ပညာရှိရှေနေကြီးက နိုင်ငံတော်သမတထံသို့ နောက်ထပ်ပေးပို့သည့် နုတ်ထွက်ခြင်းကို ရုပ်သိမ်းခွင့်တောင်းသောစာနှင့် အတူရောက်သဖြင့်၊ ပဌမ နုတ်ထွက်စာပေါ်တွင် အရေးယူရန် မလိုဟုချေပသည်။ ယခုကိစ္စ၌ မူကား နိုင်ငံတော်သမတတွင် နုတ်ထွက်ခွင့်ကိုပေးနိုင်သော အာဏာသော်၎င်း၊ ငြင်းပယ်နိုင်သည့် အာဏာသော်၎င်း ရှိခဲ့ပါမူ၊ ပညာရှိရှေနေကြီး၏ လျှောက်ထားချက်မှာ အခြေအမြစ်ရှိကောင်းရှိပေမည်။ သို့သော် နိုင်ငံတော်သမတတွင် ဤကဲ့သို့သော အာဏာ လုံးဝမရှိချေ။အမတ်တဦး နုတ်ထွက်သည်နှင့်တပြိုင်နက်၊ထိုအခါ၌ဌာန၏ နေရာလစ်လပ်ရမည်ဟု ပုဒ်မ ၇၃ (၂) (ခ)တွင် အတိအလင်းပါရှိသည်။

ပညာရှိရှေနေကြီးက အင်္ဂလိပ်ဘာသာဖြင့် ရေးသားထားသော အခြေခံဥပဒေတွင် ပါရှိသည့်စကားရပ်ဖြစ်သော “by writing addressed to the President” ကို ကိုးကား၍၊ “addressed to” ဆိုသည်မှာ အခြားနိုင်ငံအချို့တို့၏အခြေခံဥပဒေတွင် သုံးလေ့ရှိသော စကားလုံးဖြစ်ကြောင်း။ ထိုကြောင့် ၎င်းစကားရပ်ကို “ပေးပို့သည်” ဟု သာမန်အဓိပ္ပါယ်မကောက်ယူဘဲ၊ အခြေခံဥပဒေအသုံးအနှုန်းဖြစ်သည့်အလျောက် ပေးပို့ရာ၌ မည်ကဲ့သို့ပေးပို့ရမည်ဟု ပြဋ္ဌာန်းထားသောနည်းဥပဒေအတိုင်း လိုက်နာမှသာ “addressed to” ဆိုသောစကားလုံးနှင့် ကိုက်ညီမည်။ ပေးပို့ရမည့်နည်းမှာလည်း၊ အခြေခံဥပဒေ ပုဒ်မ ၈၀ (၁) အရ၊ ပြုလုပ်ထားသော ပြည်သူ့လွှတ်တော်လုပ်ငန်းစဉ်နည်းဥပဒေ ၇ (၂) က ညွှန်ကြားထားသည့်အတိုင်း နုတ်ထွက်စာကို၊ နိုင်ငံတော်သမတကယောက်ခံမှသာ နုတ်ထွက်ခြင်းသည် အရာရောက်မည်ဟု လျှောက်ထားပြန်သည်။

အင်္ဂလိပ်ဘာသာဖြင့် ရေးသားထားသော အခြေခံဥပဒေတခုတည်းကိုသာ ကိုးကားရမည်ဆိုလျှင်၊ " addressed to " ဆိုသောစကားလုံးမှာအခြေခံဥပဒေ အသုံးအနှုန်းဖြစ်သည်မဖြစ်သည်၊ ၎င်းနေသောအဓိပ္ပါယ်မျိုးရှိသည်မရှိသည်တို့ကို လေးနက်စွာဝေဖန်ရပေမည်။ သို့သော်အခြေခံ ဥပဒေပုဒ်မ ၂၁၇ အရ၊ မြန်မာ ဘာသာစာမူနှင့် အင်္ဂလိပ်ဘာသာစာမူနှစ်မူလုံးသည် ထိုဥပဒေကိုပြဋ္ဌာန်းချက် များအတွက် အပြီးအပြတ်တည်စေရမည်ဖြစ်၍၊ နှစ်မူလုံးကိုပင် အားထားဝေဖန် ရမည်။ မြန်မာစာမူတွင် " addressed to " ဟူသောစကားရပ်အတွက် " တင်သွင်းသည် " ဟုပါရှိသည်။ ရှင်း လင်း သော စ ကား လုံး ပင် ဖြစ် ၍ " addressed to " ဆိုသောစကားလုံးမှာလည်း အင်္ဂလိပ် ဘာ သာ အ ရ " directed " သို့မဟုတ် " sent " ဟူ၍သာ၊ သာမန်အားဖြင့် ပြန်ဆိုရပေ မည်။ *

၁၉၅၀

မအူပင်မြောက် ဝိုင်း မဲဆန္ဒနယ် ပြည်သူ့လွှတ် တော်အမတ် ဦးဘဦး၏ အမတ်အဖြစ် နုတ်ထွက်လွှာမှ ပေါ်ပေါက် လာသော ပြဿနာကို ဆုံးဖြတ်ချက် ရယူရန်။ လွှဲအပ်မှု။

ပြည်သူ့လွှတ်တော် လုပ်ငန်းစဉ်နည်းဥပဒေ ၇ မှာ အောက်ပါအတိုင်း ဖြစ်သည်။

" ၇။ (၁) အမတ်တဦးသည်၊ မိမိကိုယ်တိုင် လက်မှတ်ရေးထိုး ထားသော နုတ်ထွက်စာကို နိုင်ငံတော်သမတထံ ဥက္ကဋ္ဌမှတဆင့် တင်သွင်းခြင်းဖြင့် အမတ်အဖြစ်မှ နုတ်ထွက်နိုင်သည်။

(၂) နိုင်ငံတော်သမတက နုတ်ထွက်စာကို လက်ခံရရှိသောအချိန် မှစ၍ ထိုအမတ်၏နေရာ လစ်လပ်သည်ဟု ယူဆရမည်။"

လွှတ်တော်နည်းဥပဒေများကို ပြုလုပ်ရာ၌ အခြေခံဥပဒေပုဒ်မ ၈၀ (၁) အရသာ ပြုလုပ်နိုင်ခွင့်ရှိသည်။ ပုဒ်မ ၈၀ (၁) ကလည်း " ဤအခြေခံဥပဒေရှိ ပြဋ္ဌာန်းချက်များနှင့် မဆန့်ကျင်စေဘဲ ပါလီမန်ဆိုင်ရာလွှတ်တော် အသီးသီးသည်၊ လွှတ်တော်၏ လုပ်ငန်းစဉ်နှင့် မှခင်းကိစ္စဆောင်ရွက်မှုတို့ကို စည်းမျဉ်းသတ်မှတ် စေရန် နည်းဥပဒေများကို ပြုနိုင်သည်။ " ဟုဖေါ်ပြထားသည်။

သို့ဖြစ်၍၊ ပြည်သူ့လွှတ်တော် နည်းဥပဒေများ ပြဋ္ဌာန်းရာ၌၊ အခြေခံဥပဒေ ကိုလည်း မဆန့်ကျင်စေရ၊ ထို့ပြင်လည်း ပြည်သူ့လွှတ်တော်လုပ်ငန်းစဉ်နှင့် မှခင်းကိစ္စဆောင်ရွက်မှုတို့နှင့်သာ သက်ဆိုင်ရပေမည်။ ဤအကြောင်းများကို ထောက်ထားသော်၊ နည်းဥပဒေ ၇ (၁) တွင် နိုင်ငံတော်သမတထံမှတဆင့် တင်ရမည်ဟု ဆိုထားခြင်းသည် အခြေခံဥပဒေပုဒ်မ ၇၃ (၂) (ခ) အရ၊ အမတ်တဦး၏ နိုင်ငံတော်သမတထံသို့ တိုက်ရိုက်တင်သွင်းနိုင်ခွင့်ကို ချုပ်ချယ် ထားရာရောက်နေသည်။ ဥက္ကဋ္ဌမှတဆင့် တင်သွင်းရမည်ဆိုခြင်း၏ ရည်ရွယ်ချက်

* Shorter Oxford English Dictionary.

၁၉၅၈

မအူပင် မြောက်ပိုင်း မဲဆန္ဒနယ် ပြည်သူ့လွှတ်တော်အမတ်ဦးဘဦး၏ အမတ်အဖြစ် နုတ်ထွက်သွားမှု ပေါ်ပေါက်လာသော ပြဿနာကို ဆုံးဖြတ်ချက် ရယူရန် လွှဲအပ်မှု။

မှာ၊ နိုင်ငံတော်သမတကို လေးစားသောအားဖြင့်ဝင်း၊ လွှတ်တော်ဥက္ကဋ္ဌကို နုတ်ထွက်ကြောင်း အသိပေးစေလိုခြင်းကြောင့်ဝင်း ဖြစ်ပေမည်။ ဤကဲ့သို့ဥက္ကဋ္ဌမှ တဆင့်တင်လျှင်လည်း၊ အခြေခံဥပဒေနှင့် ဆန့်ကျင်သည်ဟု ဤရုံးတော်က မဆိုလိုချေ။ သို့သော်အမတ်တဦးသည် ဥက္ကဋ္ဌထံမှတဆင့် မတင်သွင်းဘဲ၊ နိုင်ငံတော်သမတထံသို့ တိုက်ရိုက်တင်သွင်းလိုလျှင်လည်း၊ အခြေခံဥပဒေအရ တင်သွင်းခွင့်ရှိကြောင်းကိုသာ ဖေါ်ပြလိုသည်။ အခြေခံဥပဒေပုဒ်မ ၇၃ (၂)၊ (ခ) က နုတ်ထွက်ခဲ့သော် ထိုအခါ၌အမတ်၏နေရာသည် လစ်လပ်ရမည်ဟူ အတိအလင်းပါရှိပါလျက်၊ နည်းဥပဒေ ၇ (၂) က နိုင်ငံတော်သမတလက်ခံ ရရှိမှသာထိုနေရာသည် လစ်လပ်ရမည်ဆိုထားခြင်းမှာ၊ အခြေခံဥပဒေပြဋ္ဌာန်း ချက်နှင့် ဆန့်ကျင်နေသည့်အပြင် လွှတ်တော်၏ လုပ်ငန်းစဉ်နှင့်မွန်းကိစ္စ ဆောင်ရွက်မှုများ၏ ပြင်ပသို့ ရောက်နေသည်။ ပြည်သူ့လွှတ်တော်နည်းဥပဒေ ဆိုသည်မှာ၊ ပြည်သူ့လွှတ်တော်အတွင်းတွင်သာ သုံးရမည့်နည်းဥပဒေများဖြစ်၍၊ လွှတ်တော်ပြင်ပ၌ ပေါ်ပေါက်သော ကိစ္စများအတွက် အကျိုးမသက်ရောက်နိုင်ချေ။ ထို့ကြောင့် နည်းဥပဒေ ၇ (၂) ကို သတ်မှတ်ပိုင်ခွင့်မရှိဟု ဤရုံးတော်က ယူဆသည်။

ဤအကြောင်းများကြောင့်၊ ပြဿနာများကို စဉ်းစားသုံးသပ်ရာ၌၊ အခြေခံဥပဒေပုဒ်မ ၇၃ (၂) (ခ)ကို အဓိကထားရမည်။ ၎င်းပုဒ်မအရ အမတ်တဦးသည် နုတ်ထွက်လိုက ပဌမမိမိကနုတ်ထွက်ကြောင်းကို ဆုံးဖြတ်ရမည်။ ဒုတိယထိုကဲ့သို့ ဆုံးဖြတ်ကြောင်းကို လက်မှတ်ထိုးရေးစာဖြင့် နိုင်ငံတော်သမတထံသို့ တင်သွင်းရမည်။ နိုင်ငံတော်သမတထံသို့ ဘယ်အချိန်အခါမှ ထိုစာရောက်သည် ဆိုသောအချက်မှာ အဓိကမဟုတ်။ စိတ်ပိုင်းဖြတ်ပြီးနုတ်ထွက်ခြင်းသည်သာလျှင် အဓိကဖြစ်၍၊ နိုင်ငံတော်သမတထံသို့ စာတင်သွင်းခြင်းမှာ နုတ်ထွက်ကြောင်းကို အသိပေးခြင်းသာဖြစ်သည်ဟု ယူဆရပေမည်။ ဤကိစ္စတွင်၊ အမတ်မင်းဦးဘဦးမှာ မအူပင်မြို့နေထိုင်သူဖြစ်၍၊ မအူပင်စာတိုက်တွင် ရေစစ်တြိလုပ်ပြီးနုတ်ထွက်စာကို ရန်ကုန်မြို့ရှိပြည်သူ့လွှတ်တော် ဥက္ကဋ္ဌမှတဆင့် နိုင်ငံတော်သမတထံသို့ ပေးပို့သောအခါ၌၊ အခြေခံဥပဒေတွင် ပြဋ္ဌာန်းထားသည့်အတိုင်း တင်သွင်းခြင်း အထမြောက်သည်။

ဤအကြောင်းများကြောင့် ပြဿနာများကို အောက်ပါအတိုင်း ဖြေဆိုပါသည်။

(၁) အခြေခံဥပဒေပုဒ်မ ၇၃ (၂) (ခ) အရ၊ လွှတ်တော်အမတ်တဦးသည်၊ နိုင်ငံတော်သမတထံသို့ မိမိကိုယ်တိုင်လက်မှတ်

ထိုး၍ နုတ်ထွက်စာတင်သွင်းခဲ့သော် ထို နုတ်ထွက်စာ ကို ဥပဒေအရ မရုပ်သိမ်းနိုင်။

(၂) ထိုအမတ်၏နေရာသည် နုတ်ထွက်စတင်သွင်းသည့် အချိန်အခါ၌ လစ်လပ်သည်။

၁၉၅၈

မအူပင်မြောက်ပိုင်း မဲဆန္ဒနယ်ပြည်သူ့လွှတ်တော်အမတ် ဦးဘဦး၏ အမတ်အဖြစ် နုတ်ထွက်လွှာမှ ပေါ်ပေါက်လာသော ပြဿနာကို ဆုံးဖြတ်ချက် ရယူရန် လွှဲအပ်မှု။

နိုင်ငံတော်သမတ၏စာလွှာ၌၊ ၁၉၅၄ ခုနှစ်က ပေါ်ပေါက်ခဲ့သော အမတ်မင်း ဦးကျော်တင့်၏ကိစ္စကို ဖော်ပြထားသည်။ သက်ဆိုင်ရာစာရွက်စာတမ်းများကို စစ်ဆေးကြည့်ရှုရာ အဖြစ်အပျက်မှာ ဦးဘဦးကိစ္စနှင့် ခြားနားခြင်းကို တွေ့ရသည်။

ဦးကျော်တင့်၏စာမှာ "ကျွန်တော်အား (ပြည်သူ့လွှတ်တော်အမတ်၊ သထုံမြောက်ပိုင်း) အဖြစ်မှ နုတ်ထွက်ခွင့်ပြုပါမည့်အကြောင်း ရိုသေလေးမြတ်စွာ လျှောက်ထားအစီရင်ခံအပ်ပါသည်" ဟုပါရှိသည်။ နောက်ထပ်၍ "ကျွန်တော်၏ ပြည်သူ့လွှတ်တော်အမတ်အဖြစ်မှ နုတ်ထွက်ရန် ခွင့်ပြုပါမည့်အကြောင်း လျှောက်လွှာကို ပြန်လည်နုတ်သိမ်းပါသည်" ဟု စာတစောင်ပေးပို့ပြန်သည်။

ဦးကျော်တင့်၏စာမှာ နုတ်ထွက်စာမဟုတ်၊ နုတ်ထွက်ခွင့် တောင်းသော စာသာဖြစ်၍၊ နိုင်ငံတော်သမတထံတွင် ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေ ပုဒ်မ ၇၃ (၂) (ခ) အရ၊ ဤကဲ့သို့ခွင့်ပေးနိုင်ရန်အာဏာ မရှိသည် တကြောင်း၊ ခွင့်တောင်းခြင်းကိုလည်း နောက်ပေးပို့သောစာဖြင့် ပြန်လည်ရုပ်သိမ်းခဲ့သည် တကြောင်းတို့ကြောင့်၊ နိုင်ငံတော်သမတက ထိုစာများအပေါ်တွင် အရေးမယူခဲ့သည်မှာ ထင်ရှားသည်။

တရားလွှတ်တော်ချုပ်။

† ၁၉၅၀ ခြေဂုတ်လ ၁၁ ရက်။

ရောင်ယွန်းဆောင် (လျှောက်ထားသူ) နှင့် လူဝင်မှုကြီးကြပ်ရေး ဝန်ကြီးဌာနပါ ၃ (လျှောက်ထားခံရသူများ)။*

လူဝင်မှုကြီးကြပ်ရေး (လတ်တလောပြဋ္ဌာန်းချက်များ) အက်ဥပဒေပုဒ်မ ၇ ကို ပြင်ဆင်ခြင်းမပြုမီက၊ နိုင်ငံတော်သမတနှင့် ထိုအက်ဥပဒေ ၇ ပုဒ်မငယ် (၁) အရ ခန့်အပ်သော အာဏာပိုင်တို့၏အာဏာ။

ယင်းအက်ဥပဒေပုဒ်မ ၇ ကို ပြင်ဆင်ပြီးနောက်၊ နိုင်ငံတော်သမတနှင့် နိုင်ငံတော်သမတက ခန့်အပ်သည့်အာဏာပိုင်တို့၏အာဏာများ၊ ၎င်းအာဏာများအရ၊ တရားရုံးတော်များ စစ်ဆေးစီရင်သည့်နည်းတူ စစ်ဆေးစီရင်ခွင့်ရှိသဖြင့်၊ ထိုအာဏာများမှာ၊ အုပ်ချုပ်ရေးနှင့်သက်ဆိုင်သောအာဏာဟု မယူဆနိုင်။

ဒွဲစည်းအုပ်ချုပ်ပုံအခြေခံ ဥပဒေပုဒ်မ ၁၅၀ သက်ရောက်သည့်သဘော။

ဆုံးဖြတ်ချက်၊ ။လူဝင်မှုကြီးကြပ်ရေး (လတ်တလောပြဋ္ဌာန်းချက်များ) အက်ဥပဒေပုဒ်မ ၇ ကို ပြင်ဆင်ခြင်းမပြုမီက၊ နိုင်ငံတော်သမတသည်၎င်း၊ ထိုအက်ဥပဒေပုဒ်မ ၇ ပုဒ်မငယ် (၁) အရ၊ ခန့်အပ်သော အာဏာပိုင်သည်၎င်း၊ ထိုအက်ဥပဒေပုဒ်မ တခုခုကို သို့တည်းမဟုတ်၊ ထိုအက်ဥပဒေအရ၊ ပြဋ္ဌာန်းထားသောနည်းဥပဒေတခုခုကို ကျူးလွန်ကြောင်းဖြင့်၊ တရားရုံးတော်က အပြစ်ပေးခံရသူ နိုင်ငံခြားသားအား ပြည်နှင်ဒဏ်ခတ်နိုင်သည်ဟု ပြဋ္ဌာန်းထားလေသည်။

ယင်းအက်ဥပဒေပုဒ်မ ၇ ကို၊ ၁၉၅၇ ခုနှစ်၊ အက်ဥပဒေအမှတ် ၃၉ အရ ပြင်ဆင်ရာတွင်၊ နိုင်ငံတော်သမတသည်၎င်း၊ နိုင်ငံတော်သမတက ခန့်အပ်သည့်အာဏာပိုင်သည်၎င်း၊ အဆိုပါအက်ဥပဒေ၊ သို့တည်းမဟုတ် နည်းဥပဒေကို ချိုးဖောက်သူနိုင်ငံခြားသားအား၊ တရားစွဲမည့်အစား၊ ပြည်နှင်ဒဏ်ခတ်နိုင်ကြောင်းနှင့် ပြဋ္ဌာန်းလိုက်လေသည်။ ထို့ပြင်လည်း ယင်းသို့ပြည်နှင်ဒဏ်ခတ်ခြင်းမပြုမီ၊ နိုင်ငံခြားသားတဦးသည်၊ ထိုအက်ဥပဒေကိုသော်၎င်း၊ အက်ဥပဒေအရ ပြဋ္ဌာန်းသည့် နည်းဥပဒေတရပ်ရပ်ကိုသော်၎င်း ကျူးလွန်သည် မကျူးလွန်သည်ကို ဆုံးဖြတ်ပိုင်ခွင့်ရှိသည်ဟု ပြဋ္ဌာန်းလိုက်လေသည်။

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* ၁၉၅၀ ခုနှစ်၊ ရာဇဝတ်အယေးအဆွဲလျှောက်လွှာအမှတ် ၃၉။

† နိုင်ငံတော်တာဝန်ကြီးချုပ် ဦးမြင့်သိန်း၊ တရားဝန်ကြီး ဦးဘိုကြီးနှင့် တရားဝန်ကြီး ဦးအောင်သာကျော်တို့ရှေ့မှောက်တွင်၊ တရားဝန်ကြီး ဦးဘိုကြီးက အမိန့်ချမှတ်သည်။

၁၉၅၈

ရောင်ယွန်းဆောင်နှင့် လူဝင်မှုကြီးကြပ်ရေးဝန်ကြီးဌာနပါ ၃။

ယင်းသို့ပြဋ္ဌာန်းသည်များကိုထောက်ထားသော် နိုင်ငံတော်သမတ၊ သို့တည်းမဟုတ် နိုင်ငံတော်သမတက ခန့်အပ်သောအာဏာပိုင်က၊ နိုင်ငံခြားသားတဦးဦးသည်၊ အဆိုပါ အက်ဥပဒေနှင့်ဆန့်ကျင်သောပြစ်မှုကို ကျူးလွန်သည့်မှုခင်းကိစ္စ၌ တရားရုံးတော်များစစ်ဆေးစီရင်သည့်နည်းတူ စစ်ဆေးစီရင်ခွင့်ရှိသည်မှာ ထင်ရှားလေသည်။ ယင်းသို့သော တရားရုံးများနှင့်နှင် စစ်ဆေးစီရင်ပိုင်ခွင့်အာဏာမျိုးမှာ၊ အုပ်ချုပ်ရေးနှင့်သက်ဆိုင်သည့်အာဏာမျိုး ဖြစ်သည်ဟု မယူဆနိုင်ပေ။ ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေပုဒ်မ ၁၅၀ အရ၊ ကန့်သတ်ထားသည့် တရားစီရင်ရေးဆိုင်ရာ အလုပ်ဝတ္တရားများကိုဖြစ်စေ၊ အာဏာကိုဖြစ်စေ၊ သုံးစွဲဆောင်ရွက်သည့်သဘော သက်ရောက်သည်ဟု ယူဆရပေမည်။

လျှောက်ထားသူအတွက်၊ ဦးကျော်မြင့် လိုက်ပါဆောင်ရွက်သည်။

လျှောက်ထား ခံရသူများအတွက်၊ အစိုးရ ရှေ့နေကြီး ဦးလှမောင် လိုက်ပါ ဆောင်ရွက်သည်။

ထရား၀န်ကြီး ဦးဘိုကြီး။ ။ယခု အချုပ်ခံနေရသူ နိုင်ငံခြားသား ရောင်အီချင်း သည်၊ စိတ္တဇရောဂါခံစားနေရသည်ဟု အကြောင်းပြပြီး၊ ၎င်းနှင့် ဆွေမျိုးတော်စပ်သည်ဆိုသော လျှောက်ထားသူ ရောင်ယွန်းဆောင်က ရှေ့တော်သွင်း စာရွက်တော်အမိန့်ဖြင့်ဖြစ်စေ၊ အခြားသက်ဆိုင်ရာ အမိန့်တရပ်ရပ်ဖြင့်ဖြစ်စေ၊ ရောင်အီချင်းအား အချုပ်မှလွှတ်ပါရန် ဤရုံးတော်သို့လျှောက်ထားလေသည်။ ၁၉၅၈ ခုနှစ်၊ ဖေဖော်ဝါရီလ ၂၀ ရက်နေ့၌ ရန်ကုန်မြို့၊ ၃၅ လမ်းတွင် နေထိုင်သော နိုင်ငံခြားသားများအား လူဝင်မှုကြီးကြပ်ရေးဌာန စုံစမ်းထောက်လှမ်းရေးအဖွဲ့က စစ်ဆေးရာ ရောင်အီချင်းလည်း အပါအဝင်ဖြစ်လေသည်။ ရောင်အီချင်း၌ ပြည်ဝင်ဗီဇာပါရှိသည့် နိုင်ငံကူးလက်မှတ်သော်၎င်း၊ လူဝင်မှုကြီးကြပ်ရေးဌာနမှထုတ်ပေးထားသော ပြည်ဝင်ခွင့်နှင့် ပြည်နေခွင့်လက်မှတ် တစုံတရာသော်၎င်း မရှိချေ။ ၎င်းအား စစ်ဆေးရာတွင်၊ မိမိသည် လွန်ခဲ့သည့် ၁၀ နှစ်ခန့်က၊ တရုပ်ပြည်မှ မြန်မာပြည်သို့ သင်္ဘောဖြင့်လာရောက်ကြောင်း။ ထိုသို့ ရောက်လာစဉ်က မည်သည့်နိုင်ငံကူးလက်မှတ်မျှမရှိကြောင်းနှင့်အစစ်ခံလေသည်။ လွန်ခဲ့သည့် ၁၀ နှစ်ခန့်က မြန်မာပြည်တွင်းသို့ဝင်ရောက်ပြီး ရန်ကုန်မြို့၊ အင်းစိန်မြို့၌ နေထိုင်ခဲ့သည်ဆိုသော်လည်း၊ ထိုစဉ်အခါက ပေါ်ပေါက်ခဲ့သည့်အရေးတော်ပုံများကို သိရှိသည်မဆိုထားဘိ၊ ကြားပင်မကြားခဲ့ဘူးပါဟု အယစ်ခံလေသည်။ ယင်းသို့အစစ်ခံချက်ကို ထောက်ထားပြီးလျှင်၊ မြန်မာပြည်တွင်းသို့ ပြည်ဝင်လက်မှတ် တစုံတရာမရှိဘဲဝင်ရောက်လာပြီး၊ လူဝင်မှုကြီးကြပ်ရေး (လတ်တလော ပြဋ္ဌာန်းချက်များ) အက်ဥပဒေပုဒ်မ ၁၃ ကို ချိုးဖောက်ကျူးလွန်ခဲ့သည်ဟု ယူဆ

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ရောင်ယွန်းဆောင်နှင့် လူဝင်မှုကြိုးကြပ်ရေး ဝန်ကြီးဌာနပါ ၃။

ပြီးလျှင်၊ ထိုအက်ဥပဒေပုဒ်မ ၇ ပုဒ်မငယ် (၂) အရ နိုင်ငံတော် သမတက ရောင်အီချင်းအား ပြည်နှင်ဒဏ်ခတ်လေသည်။

လူဝင်မှုကြိုးကြပ်ရေးနှင့် အမျိုးသားမှတ်တင်ရေး ဝန်ကြီးဌာန တွဲဘက် အတွင်းဝန် ဦးမောင်ကြီးက လျှောက်ထားခံရသူများအတွက်၊ ပြန်လှန်ကျမ်းကျိန် ဆိုချက် တင်သွင်းရာ၌၊ ယင်းကဲ့သို့ နိုင်ငံတော်သမတ ချမှတ်သည့် ပြည်နှင်ဒဏ် အမိန့်သည်၊ တရားစီရင်ရေးနှင့်မသက်ဆိုင်။ အုပ်ချုပ်ရေးနှင့်သာသက်ဆိုင်သည့် အမိန့်ဖြစ်ကြောင်းနှင့် ချေပလေသည်။ လူဝင်မှုကြိုးကြပ်ရေး (လတ်တလော ပြဋ္ဌာန်းချက်များ) အက်ဥပဒေပုဒ်မ ၇ ကို ပြင်ဆင်ခြင်းမပြုမီက နိုင်ငံတော်သမတ သည်၎င်း၊ ထိုအက်ဥပဒေပုဒ်မ ၇၊ ပုဒ်မငယ် (၁) အရ၊ ခန့်အပ်သောအာဏာပိုင် သည်၎င်း၊ ထိုအက်ဥပဒေပုဒ်မ တခုခုကို၊ သို့တည်းမဟုတ် ထိုအက်ဥပဒေအရ ပြဋ္ဌာန်းထားသော နည်းဥပဒေတခုခုကို ကျူးလွန်ကြောင်းဖြင့်၊ တရားရုံးတော်က အပြစ်ပေးခံရသူ နိုင်ငံခြားသားအား၊ ပြည်နှင်ဒဏ်ခတ်နိုင်သည်ဟု ပြဋ္ဌာန်းထား လေသည်။ ယင်းအက်ဥပဒေပုဒ်မ ၇ ကို၊ ၁၉၅၇ ခုနှစ်၊ အက်ဥပဒေအမှတ် ၃၉ အရ၊ ပြင်ဆင်ရာတွင် နိုင်ငံတော်သမတသည်၎င်း၊ နိုင်ငံတော်သမတက ခန့်အပ်သည့် အာဏာပိုင်သည်၎င်း၊ အဆိုပါအက်ဥပဒေ၊ သို့တည်းမဟုတ် နည်း ဥပဒေကို ချိုးဖေါက်သူနိုင်ငံခြားသားအား တရားစွဲမည့်အစား၊ ပြည်နှင်ဒဏ် ခတ်နိုင်ကြောင်းနှင့် ပြဋ္ဌာန်းလိုက်လေသည်။ ထို့ပြင်လည်း၊ ယင်းသို့ပြည်နှင်ဒဏ် ခတ်ခြင်းမပြုမီ၊ နိုင်ငံခြားသားတဦးသည်၊ ထိုအက်ဥပဒေကိုသော်၎င်း၊ အက် ဥပဒေအရပြဋ္ဌာန်းသည့် နည်းဥပဒေတရပ်ရပ်ကိုသော်၎င်း ကျူးလွန်သည် မကျူး လွန်သည်ကို ဆုံးဖြတ်ပိုင်ခွင့်ရှိသည်ဟု ပြဋ္ဌာန်းလိုက်လေသည်။ ယင်းသို့ပြဋ္ဌာန်း သည်များကိုထောက်ထားသော်၊ နိုင်ငံတော်တမတ၊ သို့တည်းမဟုတ် နိုင်ငံတော် သမတက ခန့်အပ်သောအာဏာပိုင်က နိုင်ငံခြားသားတဦးဦးသည်၊ အဆိုပါ အက်ဥပဒေနှင့်ဆန့်ကျင်သောပြစ်မှုကို ကျူးလွန်သည့်မှုခင်းကိစ္စ၌ တရားရုံးတော်မှ များ စစ်ဆေးစီရင်သည့်နည်းတူ စစ်ဆေးစီရင်ခွင့်ရှိသည်မှာ ထင်ရှားလေသည်။ ယင်းသို့သော တရားရုံးများနှင့်နှင် စစ်ဆေးစီရင်ပိုင်ခွင့်အာဏာမျိုးမှာ အုပ်ချုပ် ရေးနှင့်သက်ဆိုင်သည့် အာဏာမျိုးဖြစ်သည်ဟု မယူဆနိုင်ပေ။ ဒဿစည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေပုဒ်မ ၁၅၀ အရ၊ ကန့်သတ်ထားသည့် တရားစီရင်ရေးဆိုင်ရာ အလုပ်ဝတ္တရားများကိုဖြစ်စေ၊ အာဏာကိုဖြစ်စေ၊ သုံးစွဲဆောင်ရွက်သည့်သဘော သက်ရောက်သည်ဟု ယူဆရပေမည်။

ရောင်အီချင်းသည် မိမိအား စုံစမ်းထောက်လှမ်းရေးအဖွဲ့က စစ်ဆေးသည့် အခါ၌ စိတ္တဇရောဂါခံစားနေရသည်ဟုဆို၏။ သို့ရာတွင် ၎င်း၏အစစ်ခံချက်ကို

လေ့လာသုံးသပ်သည့်အခါ၌၊ သာမန်လူတယောက်ကဲ့သို့ပင် အစစ်ခံနိုင်ကြောင်း တွေ့ရှိရလေသည်။ အထက်ဖေါ်ပြပါအကြောင်းများကြောင့်၊ ရောင်အိချင်းသည်၊ မြန်မာပြည်တွင်းသို့ ပြည်ဝင်လက်မှတ်တစုံတရာမရှိဘဲ ဝင်ရောက်လာသူဖြစ်သဖြင့်၊ ဥပဒေကို ချိုးဖေါက်သူတယောက် ဖြစ်သည့်အလျောက်၊ နိုင်ငံတော်သမတက ပြည်နှင်ဒဏ်ခတ်သည်ကို တစုံတရာ ဝင်ရောက်စွက်ဖက်ရန် အကြောင်းမရှိင် သဖြင့်၊ ယခုလျှောက်လွှာကို ပလပ်လိုက်သည်။

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ရောင်ယွန်း ဆောင် နှင့် လူဝင်မှု ကြီးကြပ်ရေး ဝန်ကြီးဌာန ပါ ၃။

SUPREME COURT.

‡ S.C. 1958 — *Sept. 6.*

BURMA OIL COMPANY LABOURERS UNION (APPLICANT)

v.

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

BURMA OIL COMPANY (REFINERIES) LTD. (APPLICANT)

v.

COURT OF INDUSTRIAL ARBITRATION, RANGOON, AND ONE (RESPONDENTS).†

Trade dispute—Competency of workmen still in service to raise on behalf of workmen who are no longer in employ of company—Writ proceedings—Wrong conception of law—No ground for interference in—Certiorari—Directions in nature of — Discretionary — Non interference where substantial justice done.

Where it was contended that the dispute, if any, being one between the company and its former workmen, it could not be the subject of a "trade dispute".

Held: That the present-day employees are competent to raise a trade dispute on behalf of the former employees.

The Burma Oil Company (Burma Concessions) Ltd. v. *The Court of Industrial Arbitration,* (1951) B.L.R. (S.C.) 1, followed.

Held also: That the fact that an Award was based on a wrong conception of law is in itself no ground for interference in writ proceedings.

Held further: That directions in the nature of certiorari are discretionary and that this Court will not interfere if substantial justice has been done.

Cassim Jeewa v. *Moulmein Municipality,* (1951) B.L.R. (S.C.) 176; *Markaj* v. *Nahari,* (1901) 27 I.A. 216, followed.

Messrs. N. R. Burjorjee and *G. N. Banerji* for B.O.C. Labourers Union.

Than Aung for B.O.C. (Refineries) Ltd.

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* Civil Misc. Application No. 72 of 1956.

† Civil Misc. Application No. 83 of 1956.

‡ *Present:* U MYINT THEIN, Chief Justice, JUSTICE U BO GYI and JUSTICE U AUNG THA GYAW.

S.C. 1958

BURMA OIL COMPANY LABOURERS UNION v. COURT OF INDUSTRIAL ARBITRATION, RANGOON, AND ONE.

BURMA OIL COMPANY (REFINERIES) LTD. v. COURT OF INDUSTRIAL ARBITRATION, RANGOON, AND ONE.

Hla Maung (Government Advocate) for Industrial Court of Arbitration.

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

U MYINT THEIN, C.J.—With the advent of the war into Burma the labour employees of the Burma Oil Company, which had formed a Union in 1941, were declared to be Essential Workers and were required to remain at their posts. This was in January 1942. Naturally there was much concern on the part of the workers who approached their departmental heads as to the arrangements made for them in the event of evacuation from Burma. The events were swift and before anything could even be thought out, the Refinery at Syriam was closed down on the 19th February 1942, and while the Burmese employees dispersed to various parts of Burma, most of the Indian employees, availing themselves of whatever facilities there were, got away to India. The Refinery was demolished on 7th March 1942 under the denial scheme, adopted as tactics, during the war. Mr. Rahman, who was the President of the Labourers Union and who retains the position up to now, reached Chittagong. He contacted the B.O.C. (India Trading) at Chittagong and started a lively correspondence beginning from 16th March 1942 asking for pay, allowances, gratuity, etc. The B.O.C. (India Trading), a sister company of the organizations in Burma, did what it could by absorbing some of the Burma employees into their operational fields in Digboi and Abadan. It is accepted by the parties that service at Abadan was looked upon as severance from the service in the Refinery but that service at Digboi was a continuation

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of service in Burma. Those who could not be absorbed were paid off, the sum being, the nineteen days' pay for February 1942 *plus* a month's salary in lieu of notice *plus* payment of another two months' salary, which the Company maintains was payment *ex-gratia*.

The Company returned to Burma in 1946 when the same kind of payments were made to the employees traced in Burma. If the Company had come full of hopes to revive the industry, they soon found out that the destruction was complete and facilities few. The employees had also hoped that they would be immediately taken back, but that was impossible in the circumstances, and re-employment was a slow and staggered process though some of the pre-war employees were eventually taken in with rehabilitation gaining momentum. The Union made its demands more vociferously and maintained that the very payments of three months' wages in all, and the fact that some of them were absorbed into Digboi were indicative of their continued employment by the B.O.C. (Refineries) during the war years. They maintained that they were discharged only in 1946 by these payments. They claimed repatriation allowance, evacuation pay, gratuity or pension, payment of war bonus, compensation for loss, surplus leave, travelling allowance for rejoining duty in 1946 and payment of Provident Fund monies to the next of kin of employees deceased.

In June 1951, the President in exercise of his powers under section 9 of the Trade Disputes Act referred the dispute to the Court of Industrial Arbitration.

The Company took the stand from the outset that the demands were by former employees as specifically stated in the order of reference and that therefore

there could be no "trade dispute" as defined in the Act. It took the further stand that the Refinery was completely destroyed and averred that (1) since there existed no refinery where employees could work and (2) since further work, even if it were possible, would be in aid of the enemy—an indictable offence—the contract of employment must be deemed to have been frustrated, and the employees automatically discharged.

By consent of the parties, ten issues were framed by the Industrial Court, these being:

1. Are the demands under reference to this Court not trade disputes within the Trade Disputes Act?
2. Were the Respondent Company under any obligation to make any arrangements for evacuation of the employees and for the protection of their lives and properties; if so, did they fail in the said obligation?
3. Were the services of the employees terminated as alleged in paragraph 10 of the written statement?
4. Is pension and gratuity payable as set out in Demand No. 1 of the Applicants; if so, what is the amount payable?
5. To what gratuity, repatriation allowance and or war bonus, if any, are the employees who evacuated in 1942 entitled?
6. To what evacuation pay, if any, are the employees entitled?
7. To what surplus leave salary, if any, are the employees entitled?
8. Whether compensation should be paid to the Next of Kin of employees who died during evacuation?

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9. What expenses should be given to workers who returned to duties on the re-occupation of Burma by the Allies ?

10. Are the Next of Kin of the deceased employees entitled to the balance of the subsidiary provident fund standing to the credit of such deceased employees ?

The Industrial Court found in a preliminary award Issue 3 to be a "trade dispute". Issues 2, 4, 5, 6 and 7 were similarly classified.

The Company came up to this Court on a writ application and in Civil Miscellaneous Application No. 172 of 1952, the preliminary award was set aside mainly on the ground that the question whether there was, in fact, termination of services due to the war, was a mixed question of law and fact, and that therefore the Industrial Court should not have decided the issue on considerations of law alone. The case was remanded.

The Industrial Court has now made its final award. It has held again that Issues 8, 9 and 10 are not "trade disputes". In regard to Issue 2, the Court held that Government provided whatever facilities that could be provided. In regard to Issue 3, it was held that the services were not terminated. The demand for pension or gratuity (Issue 4) was rejected. Lumping Issues 5, 6 and 7 together, the Court awarded two months' salary as surplus leave pay on the basis of "no work no pay".

Both the Union and the Company have come up before us to seek interference by way of writ proceedings. The Union's grievance is, (i) the Industrial Court having found that there was no frustration, the employees were in continuous service until discharged in 1946 and that therefore their

pension and gratuity should have been fixed; (ii) the issue regarding the grant of travelling allowances on rejoining duty in 1946 (Issue No. 9) was a "trade dispute"; and (iii) that the award of only two months' surplus leave pay (Issue No. 7) was grossly inadequate.

On the other hand, the Company reiterated their contention of frustration of the contract of employment in 1942. The demands, it is alleged, were made by the President of the Workers Union on 16th March 1942 when the contract of employment ceased to exist, and if there is any dispute at all, it being one between the Company and its former workmen, it could not be the subject of a "trade dispute". It is also contended that the Industrial Court had exceeded its jurisdiction in granting two months' wages not really as surplus pay but as solatium for being discharged.

Learned counsel for the parties have made their submissions very ably. For the Company U Than Aung has stressed on the question of frustration and has taken us through a series of authorities.

The Industrial Court in reaching the conclusion that there was no frustration said—

> ". . . . we are of the view that the demolition of the Respondents' Refinery . . . . . by way of denial to the Japanese enemy . . . . did not by itself put an end to the contract of service of the employees involved in this case in such a way as to say that there was frustration of contract between the employees and the Respondent Company". (Page 31 of Final Award).
>
> ". . . . and that it was neither illegal nor unlawful for the Respondent company to continue its operations with the staff available during the Japanese occupation according to the laws of this country". (Page 33 of Final Award).

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It will be seen therefore that the Industrial Court had reached the finding that there was no frustration upon the surmise that, firstly, the Company could have carried on even under Japanese occupation and, secondly, it would be lawful to do so.

The Company's activities were confined to refining crude oil sent to Syriam from Upper Burma and the processing of by-products such as wax. Apart from the impossibility of getting crude oil during the war years, for the oil wells themselves were destroyed, there was no plant left for refining purposes. It is common ground that the Refinery was destroyed and what was salvaged was despatched by the Japanese to Java. Further, if production were possible, it would be the occupying power that would operate the plant and not the Company. And incidentally, whoever should help the enemy in the production of a commodity vital for war purposes such as oil, would be aiding the enemy and thus be engaging in an unlawful pursuit. On these considerations, if the issue had arisen before us or before any other Court of law, the finding on the question of frustration of contract might well be just the opposite, in view of section 56 of the Contract Act.

But the probability of a different conclusion would not dispose of the case for we have to see if, apart from the question of discharge of the contract of service, the dispute falls within the definition of the term "trade dispute". The case of discharged workmen was the subject of a decision in *The Burma Oil Company (Burma Concession) Ltd.* v. *The Court of Industrial Arbitration* (1), where it was held that a dispute arising after discharge would not be in respect

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

of " workmen " as defined in section 2 (*k*) of the Trade Disputes Act. The same decision, however, is authority for the proposition that " a trade dispute can be raised on their behalf by other workmen who are still in the service of the companies ".

We have mentioned that the Company took up the point that the Union was a Union of former employees at the earliest stage. The finding in the preliminary Award (page 2) was—

> " Great reliance has been placed by the Company that the dispute is between the Company and its former employees. It is clear, however, that the Union includes men who were in the employ of the Company before the war and are even now in service. We accept the contention of the Union that those in service can raise a trade dispute which may affect ' former employees ' ".

Dealing with the point, this Court said in Civil Miscellaneous Application No. 172 of 1952—

> " However, the trade dispute is stated therein (in the President's reference) to have arisen out of certain specified demands; it appears from the endorsements on the Notification of the order of reference that the Burma Oil Coy. Labourers Union, Syriam (the second respondent) was a party to the dispute and many ' former employees ' *i.e.* those who were in the service of the Company at the outbreak of the last war and whose services are alleged to have been terminated as stated above, are admittedly among the members of the Union. Having regard to the long list of matters in dispute which is contained in the order of reference, there can be no doubt of the President having applied his mind to the subject matter of the reference; nor can there be any doubt as to the dispute which he intended to refer; but as this Court has pointed out in *The Namtu Workers Union* v. *The Court of Industrial Arbitration* [(1950) B.L.R. (S.C.) 176 at 179] the President's reference is not conclusive of the nature of the dispute and it is for the Court of Industrial Arbitration to decide whether the dispute, which has been referred to it, is a trade dispute or not".

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It will be noticed that this Court left it open for the matter to be pursued before the Industrial Court but it seems that the matter was not specifically re-agitated and in any case there is no mention of this aspect of the case in the award. U Than Aung stated at the Bar that the Union involved is the Burma Oil Coy. Labour Union, 1941 and quite distinct from the Labour Union formed by the present-day employees. We feel that it will not be justifiable for us to probe into this aspect at this late stage and we must therefore accept, that the present-day employees are raising a trade dispute on behalf of the former employees, which they are competent to do.

The Industrial Court also seem to have accepted the position and proceeded on the basis that there was in fact a trade dispute and found that the employees were entitled to surplus leave salary. The actual finding is :

> " Taking into consideration the facts which we have discussed earlier in the award, we are of opinion that some kind of wages and or allowances should be paid to the workers for the unforeseen and abrupt termination of their services after the re-occupation of Burma by the Allied forces. In view of the principle of ' no work no pay ' and in view also of the fact that the workers of the applicant Union had been paid their full entitlements *plus* two months wages at the time they were discharged after the reoccupation of Burma, we are of opinion that over and above what has been paid to them, surplus leave pay which is equivalent to two months salary at the time of their evacuation should be paid to each of the employees involved in the dispute," (Pages 37 and 38 of award).

As stated earlier U Than Aung attacks this as an excess of jurisdiction. But the issue involved was,

> "7. To what surplus leave salary, if any, are the employees entitled ?."

The Industrial Court has found that they were entitled to surplus leave and it is only in fixing the quantum, they took into consideration the fact of their abrupt termination of their services. It cannot therefore be said that the Court has strayed from the issue nor that there was an excess of jurisdiction.

Coming to the Union's case, to Mr. Banerji's contention that the amount awarded was grossly inadequate, all that need be said is that the Court was competent to fix it and that it was well within the exercise of their jurisdiction.

The question of travelling expenses for rejoining duty in 1946 was held not to be a trade dispute. Even if it was so, since an employee rejoins after a break in service for the purpose of resuming work, he would be expected to do so at his own expense. There can be no justification to saddle the Company with this liability.

In regard to the claim for gratuity and pension, the Industrial Court rejected it on the evidence that apart from a Provident Fund payment, grant of pensions to those with twenty-five years service, and gratuity to those with less, were paid at the discretion of the Company. It is true, as pointed out in *Steel Bros.* v. *The Court of Industrial Arbitration* (1) that the Court could have substituted its discretion for that of the employers but the fact that the Court did not choose to must be taken as an indication that the existing scheme was considered sufficient. As pointed out in the Award, while it would be impossible for the Industrial Court to work out these figures since most of the workers involved in the dispute have either left the service or had their services terminated, individual applications by those

(1) (1951) B.L.R. (S.C.) 56.

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entitled, made to the Company, will no doubt be considered.

The common ground is that the employees were discharged. The dispute is as to the point of time. The Company's case is, the discharge was in 1942 while the Union maintains it was in 1946. The real question is, how much should the employees have been paid upon discharge? In the circumstances prevailing, the Industrial Court came to the conclusion that an extra two months' wages was sufficient.

The reason underlying the Award may be based upon a wrong conception of law but this in itself is no ground for interference in writ proceedings. See *Cassim Jeewa* v. *Moulmein Municipality* (1) which followed *Markaji* v. *Nahari* (2), a judgment of the Privy Council. Directions in the nature of certiorari are discretionary and this Court will not interfere if substantial justice has been done. And in our judgment substantial justice has been done in this case, for the members of the applicant Union will receive two months' wages over and above three months' wages which the Company had, of its own volition, already paid to them. Many in India who did not return to Burma to rejoin duty in 1946 apparently were satisfied with this voluntary payment.

We must therefore decline to interfere and accordingly the applications are dismissed with no order as to costs.

(1) (1951) B.L.R. (S.C.) 176. (2) (1906) 27 I.A. 126.

SUPREME COURT.

DR. A. H. BHUIYA (APPLICANT)

v.

DAW THAN HTAY AND TWO OTHERS (RESPONDENTS).*

† S.C. 1958

Sept. 1.

Urban Rent Control Act, s. 16-B—Commission of offence relevant—Identity of sub-tenant irrelevant.

The landlord of certain premises applied to the Controller of Rents to take action against her tenant for having sub-let one of the rooms tenanted by him to A. In the course of an enquiry made by the Assistant Controller of Rents under the proviso to s. 16-B of the Urban Rent Control Act it was found that the room in question was occupied by B who, according to the tenant, was in unauthorised occupation of the said room. The Assistant Controller of Rents then proceeded to lay a complaint under s. 16-B of the Act against the tenant.

It was contended on behalf of the tenant that in view of the discrepancy in the identity of the alleged sub tenant the laying of the complaint was not justified.

Held: (1) that the identity of the unauthorised occupant of the room in question was of no relevance whatsoever,

(2) that it was the commission of the offence mentioned in s. 16-B of the Act by the tenant, of which the Controller was authorised to take cognisance, and

(3) that the fact that a wrong person was named as being in unauthorised occupation of the room in question would not affect the validity of the action taken by the Assistant Controller.

P. N. Ghosh for the applicant.

San Thein and *Hla Maung* (Government Advocate) for the respondents.

The judgment of the Court was delivered by

U AUNG THA GYAW, J.—In Proceedings No. 371 of 1957 before the Controller of Rents,

* Civil Misc. Application No. 52 of 1958.

† *Present:* U MYINT THEIN, Chief Justice, JUSTICE U BO GYI and JUSTICE U AUNG THA GYAW.

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DR. A. H. BHUIYA v. DAW THAN HTAY AND TWO OTHERS.

Rangoon, respondent Daw Than Htay as landlord of Rooms Nos. 5 and 6, House No. 113, 42nd Street, Rangoon, sought to move the Controller to take action against the applicant Dr. A. H. Bhuiya, her tenant, for sub-letting Room No. 6 tenanted by him to one Dhanaraju. The applicant denied sub-letting his room No. 6 to Dhanaraju but admitted that some 10 or 11 days before the presentation of the respondent's petition to the Rent Controller an unknown Indian lady came and lived in the said room with her children without his knowledge and consent. An enquiry was duly made under the proviso to section 16-B of the Act and the Assistant Controller of Rents found that one Mrs. Jones, an unauthorised person was in occupation of Room No. 6 and he accordingly decided to lay a complaint under section 16-B of the Act against the applicant for infringement of section 16-AA (*1*) (*e*) and (*2*) (*e*) of the Act. This complaint was duly laid and the applicant is now undergoing trial before the 4th Additional Magistrate, Rangoon, in Criminal Regular Trial No. 227 of 1958.

The applicant has now come before this Court with his application for writs of certiorari or prohibition in order to have these two proceedings quashed on the ground that the learned Assistant Rent Controller had acted in excess of his jurisdiction in instituting his enquiry and laying the complaint against the applicant.

It is put forward on the applicant's behalf that in the petition made by the landlord against him one Dhanaraju was alleged to be the sub-tenant, and the finding arrived at by the Assistant Rent Controller that one Mrs. Jones was in fact in occupation of the room did not justify the laying of the complaint against him. This objection has no substance

whatsoever. Section 16-B of the Rent Control Act provides that "if any person contravenes the provisions of sub-section (*1*) or (*2*) of section 16-A or of sub-section (*1*) or (*2*) or (*3*) or of clause (*b*) of sub-section (*4*) of section 16-AA he shall be punishable ...". And under the proviso to this section "the Controller may, on information received of a person having committed an offence under this section, institute an enquiry and cause the offender to be prosecuted in a Court". The enquiry conducted by the Assistant Rent Controller in his proceedings No. 371 of 1957 was evidently made under this proviso and he had done what he was authorised by law to do. The identity of the unauthorised occupant of the tenanted room was of no relevance whatsoever. It was the commission of the offence mentioned in section 16-B of the Act by the tenant, of which the Controller was authorised to take cognizance. The fact that a wrong person was named as being in unauthorised occupation of the applicant's room would not affect the validity of the action taken by the Assistant Controller.

Learned Counsel for the applicant maintains that the applicant had not permitted Mrs. Jones to occupy the room but that she had forcibly taken possession. If this is so, the applicant will have the opportunity of substantiating this contention in the criminal proceedings.

The application will accordingly be dismissed with costs, Advocate's fees K 85.

တရားလွှတ်တော်ချုပ်

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စက်တင်ဘာလ
၁၀ ရက်။

ဒေါ်ထွေး (လျှောက်ထားသူ)

နှင့်

အီဘရာဟင်ယမ်အင်၊ ကုမ္ပဏီလိမိတက်ပါ ၂ (လျှောက်ထား ခံရသူများ)*

မြို့ပြဆိုင်ရာဌာနခံရမ်းခ ကြီးကြပ်ရေးအက်ဥပဒေ ပုဒ်မ ၁၁ (၁) (ငါ)၊ ၁၄ (က) တရားစွဲခွင့်ပေးသော အမိန့်ကို ပယ်ဖျက်ခြင်း။ ပုဒ်မ ၁၁ (၁) (ငါ) အရ၊ အိမ်ရှင်ရသင့်ရထိုက်သော အခွင့်အရေးတို့ကို ထည့်သွင်း စဉ်းစားရမည်။

ဆုံးဖြတ်ချက်။ ။မြို့ပြဆိုင်ရာဌာနခံရမ်းခ ကြီးကြပ်ရေးအက်ဥပဒေ ပုဒ်မ ၁၁ (၁) (ငါ) တွင်ပါရှိသော ဥပဒေအချက်အလက်များအရ၊ အိမ်ရှင်ရသင့်ရထိုက်သော အခွင့်အရေးတို့ကို ထည့်သွင်းစဉ်းစားခြင်းမပြုဘဲ ၎င်းအက်ဥပဒေ ပုဒ်မ ၁၁ (၁) (ငါ)၊ ၁၄ (က) အရ၊ ဌာနခံရမ်းခ ကြီးကြပ်ရေးဝန်ထံတွင် တရားစွဲခွင့် လျှောက်တောင်းသဖြင့် ကြီးကြပ်ရေးဝန်က ထုတ်ပေးသော တရားစွဲခွင့်အမိန့်ကို တရားရုံးတော်က ပယ်ဖျက်ခဲ့လျှင် အထင်အရှားမှားယွင်းသည်၊ ဦးလူကလေးနှင့် မောင်သောင်းတင် ပါ ၄။ တရားလွှတ်တော်ချုပ် တရားမအယေးအဖဲ့မှုအမှတ် ၁၀၆/၅၅။ ကိုသာဒင် ပါ ၃ နှင့် ရန်ကုန်မြို့၊ မြို့ပြဆိုင်ရာ ဌာနခံရမ်းခ ကြီးကြပ်ရေးဝန် ပါ ၄။ ၁၉၅၅ ခုနှစ်၊ မြန်မာပြည်စီရင်ထုံးများ၊ တရားလွှတ်တော်ချုပ် စာမျက်နှာ ၉ လိုက်နာသည်။

လျှောက်ထားသူအတွက်၊ လွှတ်တော်ရှေ့နေကြီး ဦးကျော်မြင့် လိုက်ပါဆောင်ရွက်သည်။

လျှောက်ထား ခံရသူအမှတ် (၁) အတွက်၊ လွှတ်တော် ရှေ့နေကြီး ဦးဖသာထော် လိုက်ပါဆောင်ရွက်သည်။

တရားဝန်ကြီး ဦးဘိုကြီး။ ။မန္တလေးမြို့၊ နယ်ပိုင်တရားမတရားသူကြီးရုံးတော်၊ စောဒကမူဋ္ဌ အထောက်အထားပြုသည့် အကြောင်းပြချက်သည်၊

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* ၁၉၅၀ ခုနှစ်၊ တရားမအယေးအဖဲ့လျှောက်လွှာအမှတ် ၅၀။

† နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးမြင့်သိန်း၊ နိုင်ငံတော် တရားဝန်ကြီး ဦးဘိုကြီး နှင့် တရားလွှတ်တော်တရားဝန်ကြီး ဦးဘညွန့်တို့ ရှေ့မှောက်တွင် တရားဝန်ကြီး ဦးဘိုကြီးက အမိန့်ချမှတ်သည်။

အထင်အရှား မှားယွင်းနေသည်ကို တွေ့ရှိရလေသည်။ အမှုအဖြစ်အပျက်မှာ အောက်ပါအတိုင်းဖြစ်သည်။

၁၉၅၈

ဒေါ်ထွေးနှင့် အီဘရာဟင် ယမ် အင်ကုမ္ပဏီလီမိတက် ပါ၂။

မန္တလေးမြို့၊ ချမ်းအေးသာဇံရပ်ကွက်အမှတ် ၆၀၂၊ ဦးဝိုင်နံပါတ် ၆၄ မြေပေါ်တွင် ဂ ခန်းရှိသော နှစ်ထပ်တိုက်တလုံးတည်ရှိရာ၊ အနောက်ဘက် ၄ ခန်းကို၊ ယခုလျှောက်ထားသူ ဒေါ်ထွေးပိုင်ဆိုင်၍၊ ထို ၄ ခန်းဌ လျှောက်ထားခံရသူအမှတ် (၁) အီဘရာဟင်ယမ်အင်ကုမ္ပဏီလီမိတက်က အိမ်ငှါးအဖြစ်ဖြင့် နေထိုင်ခဲ့လေသည်။ ၁၉၅၆ ခုနှစ်၊ မတ်လတွင်မန္တလေးမြို့၊ မြို့နိုစီပါယ်အဖွဲ့က ဒေါ်ထွေးထံသို့စာပေးပို့ပြီး၊ ထိုတိုက်ခန်း ၄ ခန်းမှာ၊ အလည်တည့်တည့်အခြေခံ မိကျောင်းတုံးကြီးကျိုးနေသည့်အပြင်၊ တိုင် ၂ လုံးမှာလည်း နိမ့်ကျနေသည်ဖြစ်သဖြင့်၊ အချိန်မရွေးတိုက်ခန်းများ ပြိုကျနိုင်သည်ဖြစ်ကြောင်း။ သို့ဖြစ်၍ အမြန်ပြင်ဆင်ရန်နှိုးဆော်လိုက်ကြောင်း။ အကယ်၍နှိုးဆော်သည့်အတိုင်း မပြင်ဘဲနေခဲ့ပါမူ၊ ဥပဒေအရအရေးယူရလိမ့်မည်ဖြစ်ကြောင်းနှင့်နို့တစ်ပေးခဲ့လေသည်။ ထိုသို့နို့တစ်စာပေးပြီးနောက်၊ ထိုနှစ် ဇူလိုင်လတွင် မန္တလေးမြို့၌ မြေငလျင်လှုပ်ရာ၊ ထိုတိုက်ခန်းများမှာ အခြားသောအဆောက်အဦများနည်းတူ ပျက်စီးချို့ယွင်းခဲ့လေသည်။ သို့ဖြစ်၍ ဒေါ်ထွေးသည်၊ ထိုတိုက်ခန်းများကိုဖျက်ဆီးပြီးလျှင်၊ ထိုနေရာ၌ ၃ ထပ်တိုက်တလုံးတည်ဆောက်ရန်ဆုံးဖြတ်ပြီး၊ မန္တလေးမြို့၊ မြို့နိုစီပါယ်အဖွဲ့ထံ တိုက်သစ်ဆောက်ရန်ပုံစံများတင်သွင်းပြီး ဆောက်လွှင့်တောင်းခဲ့ရာ၊ မြို့နိုစီပါယ်အဖွဲ့က ခွင့်တောင်းသည့်အတိုင်း၊ ဆောက်လွှင့်ပေးခဲ့လေသည်။ ထိုသို့အမိန့်ရရှိပြီးနောက်၊ မန္တလေးမြို့၊ ၄ါးရမ်းခကြီးကြပ်ရေးဝန်ထံသို့ မြို့ပြဆိုင်ရာ ၄ါးရမ်းခကြီးကြပ်ရေး အက်ဥပဒေ ပုဒ်မ ၁၁ (၁) (ဂ)၊ ၁၄(က)အရ၊ လျှောက်ထားခံရသူအမှတ် (၁) အပေါ်၌ တရားစွဲခွင့် လျှောက်တောင်းရာတွင်၊ ကြီးကြပ်ရေးဝန်က တရားစွဲဆိုခွင့်အမိန့်ထုတ်ပေးလိုက်လေသည်။

ထိုအမိန့်ကိုမကျေနပ်သဖြင့်၊ လျှောက်ထားခံရသူအမှတ် (၁) က၊ မန္တလေးမြို့၊ နယ်ပိုင်တရားမတရားသူကြီးရုံးခတော်သို့ စောဒကဝင်၍၊ အမှုမပြီးမပြတ်မီ အတောအတွင်းတွင် ဒေါ်ထွေးခွင့်ပြုချက်မရရှိဘဲ၊ ထိုတိုက်ခန်းများကို ပြင်ဆင်လေသည်။ ယင်းသို့ပြင်ဆင်ပြီးနောက် တိုက်ခန်းများမှာပြင်ဆင်ပြီးဖြစ်သဖြင့်၊ အသစ်ဆောက်ရန် မလိုတော့ပါကြောင်းနှင့်ထုချေလေသည်။ နယ်ပိုင်တရားမရုံးတော်က ယင်းသို့ထုချေသည်ကိုလက်ခံပြီးလျှင်၊ ကြီးကြပ်ရေးဝန်၏အမိန့်ကို ပယ်ဖျက်ခဲ့လေသည်။

ထိုသို့ပယ်ဖျက်သည်တွင်၊ နယ်ပိုင်တရားမရုံးတော်သည် ၄ါးရမ်းခကြီးကြပ်ရေး အက်ဥပဒေ ပုဒ်မ ၁၁ (၁) (ဂ)တွင်ပါရှိသော ဥပဒေအချက်အလက်များအရ၊ လျှောက်ထားသူ ဒေါ်ထွေးရသင့်ရထိုက်သောအခွင့်အရေးတို့ကို ထည့်သွင်းစဉ်းစားခြင်းလုံးဝမပြုခဲ့သည်မှာ၊ အထင်အရှားမှားယွင်းလေသည်။ ထိုဥပဒေအရ အိမ်ရှင်ဖြစ်သူ ဒေါ်ထွေးသည်၊ မိမိ၏တိုက်အိမ်ဟောင်းနေရာ၌ သဘောရိုးဖြင့် တိုက်အိမ်သစ်ဆောက်လုပ်လိုသလော၊ ယင်းသို့ဆောက်လုပ်လိုခြင်းသည် ယုတ္တိ

၁၉၅၈

ဒေါ်ထွေးနှင့် အီဘရာဟင် ယဒ် အင့်ကုမ္ပဏီ လီမိတက် ပါ ၂ ။

တန်သလောဟူသောပြဿနာများကိုသာလျှင် စဉ်းစားရမည်ဖြစ်သည်။ ကြီးကြပ်ရေးဝန်မင်းသည် ထိုအချက်များကိုစဉ်းစားခဲ့ဟန် လက္ခဏာရှိသည်။ ယခုကဲ့သို့သော အမှုမျိုးတွင် မည်သည့် အချက်သည် ပဓါနအချက်ဖြစ်ကြောင်းကို၊ ဦးလူကလေး နှင့် မောင်သောင်းတင် ပါ ၄ (၁) အမှုတွင်လည်းအကျယ်တဝင့် ဖေါ်ပြပြီးဆုံးဖြတ်ချက်ချခဲ့လေပြီ။ ဝန်မင်း၏ ဆုံးဖြတ်ချက်မှာလည်း တရားမကြီးမှုစွဲဆိုရာတွင်၊ တရားရုံးတော်အားဝိတ်ပင်မည့်ဆုံးဖြတ်ချက်မျိုးမဟုတ်ပေ။ ၄ါးရမ်း ခကြီးကြပ်ရေးအက်ဥပဒေ ပုဒ်မ ၁၄ (က)၊ ပုဒ်မငယ် (၃) အရ၊ ရွှေပြေး အနေနှင့်တီးခေါက်ကြည့်ခြင်းမျှသာဖြစ်သည်ဟု ဤရုံးတော် ကိုသာဒင်ပါ ၃ နှင့် ရန်ကုန်မြို့၊ မြို့ပြဆိုင်ရာ၄ါးရမ်းခကြီးကြပ်ရေးဝန်ပါ ၄ (၂) အမှုတွင်ဆုံးဖြတ်ခဲ့လေပြီ။

အထက်ပါ အကြောင်းများကြောင့်၊ လျှောက်ထားခံရသူအမှတ် (၂) မန္တလေးမြို့၊ နယ်ပိုင်တရားသူကြီးမင်း၏ အမိန့်ကို စရိတ်နှင့်တကွပယ်ဖျက်လိုက်သည်။ ဤရုံးတော်၏ ရွှေနေခမှာ ၅၀ ဖြစ်စေရမည်။

(၁) တရားသွတ်တော်ချုပ်၊ တရားမအယေးအဒွဲမှုအမှတ် ၁၀၆/၅၅။

(၂) ၁၉၅၅ ခုနှစ်၊ မြန်မာပြည် စီရင်ထုံးချား၊ တရားလွှတ်တော်ချုပ် စာမျက်နှာ ၉။

တရားလွှတ်တော်ချုပ်

* ပြည်ထောင်စုမြန်မာနိုင်ငံတော် (အယူခံတရားလို) † ၁၉၅၈ စက်တင်ဘာလ ၆ ရက်။

နှင့်

၁။ အမ်၊ ဒီ၊ ဒါရူးဝါလားး၊ ဒါရူးဝါလားးနှင့် သားများဆန်စက်၊ ရွာဘဲရပ်၊ ပြည်မြို့။
၂။ စံလားးဘတ်(စ်)၊ ဒါရူးဝါလားးနှင့် သားများဆန်စက်၊ ရွာဘဲရပ်၊ ပြည်မြို့။ } (အယူခံတရားခံများ)*

၁၉၅၁ ခုနှစ်၊ အလုပ်ရုံများအက်ဥပဒေ ရည်ရွယ်ချက်သတိမူရမည့်အချက်၊ ဟ်မ ၁၀ နှင့် ၁၁ "အင်စပက်တော်" ဆိုသည့်စကားရင်း၊ တွဘက်အင်စပက်တော်ပါဝင်ခြင်း။

ဟ်မ ၉၇ (၁) အရ၊ အာဏာကို တွဘက် အင်စပက်ဆက်သုံးနိုင်ခြင်း။ ဟ်မ ၇၃ (၁)တွင် သုံးထားသည့် "လုပ်ရလျှင်" ဆိုသောစကားရင်း၊ ဟ်မ ၅၉ နှင့် ၆၂ နှင့် အညီဆောင်ရွက်သော်လည်း ဟ်မ ၇၁ (၂) အရ၊ ကင်းလွတ်ခွင့်မရလျှင် ဟ်မ ၇၁ (၁) ကို ချိုးဖောက်ရာရောက်ပေလိမ့်မည်။

ဟ်မ ၀၅၊ ၀၆၊ ဟ်မ ၀၅ (၁)။ ခြင်းချက်၊ ရည်ပြယ်ချက်၊ ထည့်သွင်းသည့်စကားရပ်၊ ထည့်သွင်းလျှင် ကောက်ယူရမည့် အဓိပ္ပါယ် ၁၉၅၄ ခုနှစ်၊ အက်ဥပဒေအမှတ် ၇၄ အရ၊ ပြင်ဆင်ခဲ့ခြင်းအရ၊ ကောက်ယူနိုင်သောအဓိပ္ပါယ်၊ ၎င်းအဓိပ္ပါယ်ကောက်ယူနိုင်သော အချက်တရပ်၊ ဟ်မ ၀၅ ပါ ပြဋ္ဌာန်းချက်များနှင့် ဟ်မ ၀၆ ပါ ပြဋ္ဌာန်းချက်များဆန့်ကျင်ခြင်း၊ ပြဋ္ဌာန်းထားသည့်အချက်မသေချာ၍ အဓိပ္ပါယ်နှစ်မျိုးကောက်နိုင်ခြင်း။

အက်ဥပဒေများကို သုံးသပ်ဝေဘန်ရာ၌ အဓိပ္ပါယ်နှစ်မျိုးကောက်ယူနိုင်သော် တရားခံသက်သာမည့်အဓိပ္ပါယ်ကိုကောက်ယူရပေမည်။

ဟ်မ ၀၅ တွင် မရှင်းလင်းသည့်အချက်များ။

ဆုံးဖြတ်ချက်။ ။၁၉၅၁ ခုနှစ်၊ အလုပ်ရုံများ၏အက်ဥပဒေမှာ အလုပ်သမားများနှင့် ပတ်သက်၍ ၎င်းတို့၏ နေမှ စားမှ သက်သာချောင်ချိရေး၊ အလုပ်သမားတို့၏ အကျိုးခြုံ

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* ၁၉၅၁ ခုနှစ်၊ ချစေဝတ်အယူခံမှု အမှတ် ၁။

† နိုင်ငံတော် တရားဝန်ကြီးချုပ် ဦးမြင့်သိန်း၊ နိုင်ငံတော်တရားဝန်ကြီး ဦးဘိုကြီး၊ နိုင်ငံတော်တရားဝန်ကြီး ဦးအောင်သာကျော်တို့ ရှေ့တော်ကွင်း နိုင်ငံတော်တရားဝန်ကြီး ချုပ်အဓိန့်ချမှတ်သည်။

၁၉၅၈

ပြည်ထောင်စု မြန်မာနိုင်ငံ တော်နှင့် ၁။ အမ်၊ဒီ၊ ဒါရူး ဝါလား၊ ဒါရူး ဝါလား နှင့်သားများ ဆန်စက်၊ ရွာဘဲရပ်၊ ပြည်မြို့။ ၂။ ဝါလား ဘာဘ်(စ်)၊ ဒါရူး ဝါလားနှင့် သားများဆန်စက်၊ ရွာဘဲရပ်၊ ပြည်မြို့။

ထွန်းရေးကို ရည်ရွယ်သည်။ လုပ်ခပိုမိုရရှိ လတ်တလော သက်သာချောင်ချိမည်ဖြစ်သော်လည်း အလုပ်သမားများ၏ အရှည်ကောင်းကျိုးဖြစ်ထွန်းရန် အလုပ်လုပ်ခြင်းကို ကြီးကြပ်ရန်နှင့် အလုပ်သမားများ၏ ကျန်းမာရေး၊ ဘေးရန်ကင်းရှင်းမှုနှင့် သက်သာချောင်ချိရေး အားလုံးကို ချိန်ဆပြီးပြဋ္ဌာန်းသည့်အက်ဥပဒေဖြစ်သည်။ သို့သော် လုပ်ခနှုန်းဆရရှိ နာရီအကန့်အသတ်ရှိသော နေ့စဉ်ဆက်လက်လုပ်ကိုင်ပါမူ၊ ကျန်းမာရေးကိုပင် ထိခိုက်မည်ကို သတိမူရပေမည်။

တွဲဘက် အင်စပက်တော်သည် ဤအက်ဥပဒေ ပုဒ်မ ၉၂ (၁) အရ၊ တရားစွဲဆိုနိုင်ခွင့် အာဏာမရှိဟု လျှောက်ထားချက်နှင့်ပတ်သက်၍ ၎င်းအက်ဥပဒေ အခန်း (၂)၊ပုဒ်မ ၁၀ နှင့် ၁၁ ကိုကြည့်ရှုခြင်းအားဖြင့် ''အင်စပက်တော်'' ဆိုသည့်စကားရပ်မှာ အင်စပက်တော်သာမဟုတ် အင်စပက်တော်ချုပ်၊ ခရိုင်ဝန်နှင့်တွဲဘက်အင်စပက်တော်များကိုပါ ထည့်သွင်း၍ ခေါ်ဝေါ်သော စကားရပ်ဖြစ်ရပေမည်။ သို့အတွက် တွဲဘက် အင်စပက်တော်သည်လည်း တရားစွဲပိုင်ခွင့်ရှိသူတဦးဖြစ်သည်။

ပုဒ်မ ၇၃ (၁) တွင် သုံးထားသည့် '' လုပ်ရလျှင် '' ဆိုသောစကားရပ်ကို ထောက်ရှုခြင်းအားဖြင့် အလုပ်ရုံ ကြီးကြပ်သူက ခွင့်ပြုမှအလုပ်သမားက လုပ်နိုင်မည်မှာထင်ရှားသည်။ ဤပုဒ်မတွင် ပုဒ်မ ၅၉ နှင့် ၆၂ ကို ဖော်ပြပြီး ကင်းလွတ်ခွင့်ပေးနိုင်သော ပုဒ်မ ၇၁(၂)ကို ဖော်မပြ၍ သာမန်ရရှိသော အခန့်နှုန်းထက် နှစ်ဆပေး၍ ခိုင်းစေခဲ့လျှင် ကင်းလွတ်ခွင့်တောင်းယူရန်မလိုဟူသော ယူဆချက်ကို လက်ခံပါမူ၊ ပုဒ်မ ၇၁(၂) တွင် ပြဋ္ဌာန်းသောအချက်များမှာ လုံးဝအဓိပ္ပါယ်ရှိတော့မည်မဟုတ်၊ သာမန်နှုန်း၏ နှစ်ဆမပေးဘဲ၊ အချိန်ပိုခိုင်းစေလို လျှင်သာ ပုဒ်မ ၇၁ (၂) အရ၊ ကင်းလွတ်ခွင့်တောင်းယူရန် လိုသည်ဟု ယူဆခြင်းမှာ မဖြစ်နိုင်။

ပုဒ်မ ၅၉ နှင့် ၆၂ တွင် ပြဋ္ဌာန်းထားသောအချိန် ကန့်သတ်ချက်များမှ ပုဒ်မ ၇၁ (၂)အရ၊ ကင်းလွတ်ခွင့်ကို မယူဘဲနှင့် အလုပ်သမားတဦးတယောက်ကို ကန့်သတ်သည့် အချိန်ထက်ပိုမိုရှိ အလုပ်လုပ်ခွင့်ပြုခဲ့ပါမူ၊ သာမန်အခန့်နှုန်းထက် နှစ်ဆပင်ပေးငြားသော်လည်း၊ ပုဒ်မ ၇၁ (၁)ကို ချိုးဖောက်ရာရောက်ပေလိမ့်မည်။

၁၉၅၄ ခုနှစ်တွင် အက်ဥပဒေအမှတ် ၄၇ အရ၊ ပုဒ်မ ၀၅ ၏ လက်ှ်ခြင်းချက်ကို အပိုဒ်ငယ် (၂) ဟု မှတ်သားထားပြီး၊ အပိုဒ်ငယ် (၁) အဖြစ်ဖြင့် ပြင်ဆင်ရာ၌ ရည်ရွယ်ချက်မှာ ကင်းလွတ်ခွင့်မရဘဲနှင့် အချိန်ပိုလုပ်ခွင့်ပေးခဲ့ပါမူ၊ ပဌမအကြိမ်ဆန့်ကျင်လျှင်ပင် အနည်းဆုံးဒဏ်ငွေ ၅၀၀ ဘဝ်ရမည်ဟုဖြစ်ပါက၊ ပုဒ်မ ၀၅ တွင် ခြွင်းချက်အနေနှင့်မထည့်သွင်းဘဲ '' ဒဏ်နှစ်ရပ်လုံးဖြစ်စေ စီရင်ခြင်းခံရမည် '' ဟုသောစကားရပ်နောက်တွင် ထည့်သင့်သည်၊ ဤကဲ့သို့ ထည့်သွင်းမှ စကားအဓိပ္ပါယ်တမျိုးသာ ကောက်ယူနိုင်မည်။ ဤကဲ့သို့ ထည့်သွင်းခဲ့ပါမူ၊ အချိန်ပိုလုပ်စေသည့်ဆန့်ကျင်ခြင်းမှအပ အခြားနည်းဖြင့် ဆန့်ကျင်ခြင်းများကို ဒဏ်ငွေ ၅၀၀ ထက်မပို၊ သို့မဟုတ် ထောင်ဒဏ် သုံးလထက် မပိုသောဥဒဏ်ကို သတ်မှတ်နိုင်ပြီး အချိန်ပိုလုပ်စေခဲ့သော် ငွေဒဏ်တပ်လျှင် ၅၀၀၊ သို့မဟုတ် ပုဒ်မ ၇၃ (၁) တွင် ပြဋ္ဌာန်းသားသည့်လုပ်ကြွေးငွေနှစ်ဆနှင့်ညီမျှသောငွေ ထိုငွေဒဏ်နှစ်ရပ်အနက် များရာငွေဒဏ်ကိုသတ်မှတ်ရမည်ဟု အဓိပ္ပါယ်ကောက်ယူရပေမည်။ သို့သော် ၁၉၅၄ ခုနှစ်က

ပြင်ဆင်ခဲ့သည့်အတိုင်းဆိုလျှင်၊ ပုဒ်မကြီး ဂ၅ တွင် သတ်မှတ်သောအပြစ်ဒဏ် စာပိုဒ်နှင့် ခြွင်းချက် အပိုဒ် (၁) တို့ကြားတွင် ပြဋ္ဌာန်းချက်တခုရှိနေသေးသည်။ ထိုအချက်မှာ ဆက်လက်၍ ဆန့်ကျင်နေခြင်းနှင့် သက်ဆိုင်၍ ခြွင်းချက်အပိုဒ် (၁) မှာ ဆက်လက်ဆန့်ကျင်၍ ထပ်မံတရားစွဲဆိုသောအမှုဖြစ်သာ ချမှတ်ရမည့်အပြစ်ဒဏ်သာဖြစ်ရမည်ဟု အဓိပ္ပါယ်ကောက် ယူနိုင်သည်။

၁၉၅၀

ပြည်ထောင်စု မြန်မာနိုင်ငံ တော်နှင့် ၁။ အမ်းဒီး၊ ဒါရိုး ဝါလား။ ဒါရိုး ဝါလားနှင့်သားများ ဆန့်ကျင်ရွာဘဲရပ်၊ ပြည်မြို့။ ၂။ ဝါလား ဘတ်(စ်)။ဒါရိုး ဝါလားနှင့် သားများဆန့်ကျင်ရွာဘဲရပ်၊ ပြည်မြို့။

ယင်းသို့ အဓိပ္ပါယ်ကောက်ယူနိုင်သည့်အချက်တခုပင်ကား၊ ပဌမအကြိမ် ကျူးလွန်သည့် ပြစ်မှုအတွက် ပုဒ်မ ဂ၅၊ ခြွင်းချက်အပိုဒ် (၁) အရ၊ ငွေဒဏ်စီရင်ချုပ် ပုဒ်မ ၇၁ (၁)တွင် ပြဋ္ဌာန်းထားသည့် အချိန်ပိုလုပ်ခကြေးငွေ၏ နှစ်ဆနှင့်ညီမျှသော ငွေဒဏ်သည် ကျပ် ငါးရာ အောက်ဖြစ်လျှင် ငွေဒဏ် ကျပ် ငါးရာ စီရင်ရမည်ဖြစ်သော်လည်း နောက်ထပ်တဝန် အလားတူ ပြစ်မှုကိုကျူးလွန်သည့်အခါ၌ ပုဒ်မ ဂဖ အရ၊ အပြစ်ပေးရာတွင် အနည်းဆုံး နှစ်ရာမှ အများဆုံး တထောင်ထက်မပိုသော ငွေဒဏ်ကို စီရင်နိုင်သည်။ ထို့ကြောင့် ပဌမ အကြိမ် ကျူးလွန်သည့်ပြစ်မှုအတွက် ငွေဒဏ် ငါးရာ၊ စီရင်ရမည်ဖြစ်သော်လည်း၊ ဒုတိယ အကြိမ်ကျူးလွန်သည့်ပြစ်မှုအတွက် ငွေဒဏ်နှစ်ရာ၊ သုံးရာ စသည် စီရင်နိုင်သည်ဖြစ်သဖြင့်၊ ပုဒ်မ ဂ၅ ပါ ပြဋ္ဌာန်းချက်များနှင့် ပုဒ်မ ဂဖ ပါ ပြဋ္ဌာန်းချက်များသည် ဆန့်ကျင်ပြီး အငြိုး အမောက်မတည့်ဖြစ်ပေမည်။

ရည်ရွယ်ချက်မှာ မည်ကဲ့သို့ပင်ဖြစ်စေကာမူ၊ ဥပဒေများကို သုံးသပ်ဝေဘန်ရာ၌ လုပ်ရိုး လုပ်စဉ်လိုက်နာသည့်နည်းအတိုင်း အဓိပ္ပါယ်နှစ်မျိုးကောက်ယူနိုင်ခဲ့သော် တရားခံသက်သာ မည့်အဓိပ္ပါယ်ကို ကောက်ယူရပေမည်။

အယူခံတရားလိုအတွက်၊ အစိုးရရှေ့နေကြီး ဦးလှမောင် လိုက်ပါဆောင်ရွက်သည်။

အယူခံတရားခံများအတွက်၊ ဦးဘဆွေ ကလိုက်ပါဆောင်ရွက်သည်။

တရားဝန်ကြီးချုပ် ဦးမြင့်သိန်း။ ။အလုပ်ရုံများ အက်ဥပဒေ ပုဒ်မ ၅၉ အရ၊ ရက်သတ္တပတ်လျှင် လူကြီး အလုပ်သမားတဦးကို လေးဆယ့်လေးနာရီထက် ပိုရှိ အလုပ်မလုပ်စေရ၊ လုပ်ခွင့်မပြုရဟုပြဋ္ဌာန်းထားသည်။ ပုဒ်မ ၆၂ အရ၊ လူကြီး အလုပ်သမားတဦးကို တနေ့လျှင် အလုပ်ချိန်နာရီပေါင်း ရှစ်နာရီထက်မပိုရဟု ပြဋ္ဌာန်းထားသည်။ ဤကဲ့သို့ကန့်သတ်ထားသော အလုပ်ချိန်ထက်ပိုရှိ လုပ်ခွင့်ပြုစေရန် ပုဒ်မ ၇၁ (၂) အရ၊ နိုင်ငံတော်သမတ၊ သို့မဟုတ် အင်စပက်တော်ချုပ်ကသာ ပုဒ်မ ၅၉ နှင့် ၆၂ တွင် ပါရှိသော ပြဋ္ဌာန်းချက်များမှ ကင်းလွတ်ခွင့်ပြုနိုင်သည်၊ ဤကဲ့သို့ကင်းလွတ်ခွင့်ပေးလျှင်လည်း ပုဒ်မ ၇၁ (၄) အရ၊ ပြဋ္ဌာန်း ထားသည့် အများဆုံးအချိန် ကန့်သတ်ချက်နှင့် မဆန့်ကျင်စေရဟု ပုဒ်မ ၇၁ (၃) က ကန့်သတ်ထားပြန်သည်။

စဈ၅၈

ပြည်ထောင်စု မြန်မာနိုင်ငံတော် နှင့် ဘ။ အမ်၊ ဒီ၊ ဒါရိုး ဝါလား၊ ဒါရိုးဝါလား နှင့် သားများ ဆန်စက်၊ ရွာဘဲရပ်၊ ပြည်မြို့။ ၂။ ဝါလား ဘတ်(စ်)၊ ဒါရိုး ဝါလားနှင့် သားများ ဆန်စက်၊ ရွာဘဲရပ်၊ ပြည်မြို့။

ပြည်မြို့ရှိ ဒါရိုးဝါလားနှင့်သားများဆန်စက်၌ ၁၉၅၆ ခုနှစ်၊ ဖေဖော်ဝါရီလ နှင့်မတ်လအတွင်းတွင် အလုပ်သမားများကို တနေ့ရှစ်နာရီထက် ပိုမိုပြီးလုပ်ငန်းစေခဲ့သည်ဖြစ်၍၊ တွဘက်အင်စပက်တော် ဦးသန်းမောင်က ဆန်စက်ပိုင်ရှင်နှင့်ဆန်စက်မန်နေဂျာတို့ကိုအလုပ်ရုံများအက်ဥပဒေပုဒ်မ ၀၅ အရ တရားစွဲဆိုခဲ့ရာ၊ အလုပ်သမားများကို အချိန်ပိုလုပ်စေခဲ့သော်လည်း ပုဒ်မ ၇၃ (၁) အရ၊ အချိန်ပိုလုပ်ရသည့်အတွက် သာမန်ရရှိသောအခနှုန်း၏ နှစ်ဆပေးခဲ့၍ အပြစ်မရှိ။ တရားလိုမှာလည်း တွဘက်အင်စပက်တော်သာဖြစ်၍ အင်စပက်တော် တဦးတယောက်၏ တရားစွဲဆိုခွင့် အာဏာလည်းမရှိဟု ဖေါ်ပြပါ မူလ အမှုစစ်ဆေးသောပြည်မြို့ ၁ ရာဘက်အထူးအာဏာရ ရာဇ၀တ်တရားသူကြီးရုံးတော်က ၁၉၅၆ ခုနှစ်၊ ရာဇ၀တ်ကြီးမှုအမှတ် ၂၂ တွင် တရားခံများကို တရားသေလွှတ်လိုက်သည်။ တရားလွှတ်တော်သို့ နိုင်ငံတော်အစိုးရက အယူခံဝင်ရာတွင် ၁၉၅၇ ခုနှစ်၊ ရာဇ၀တ်အယူခံမှုအမှတ် ၃၂ ၌ အောက်ရုံးအမိန့် တည်စေရမည်ဟု အမိန့်ချမှတ်ပြန်သည်။

ပေါ်ပေါက်သော ပြဿနာမှာ ပြည်ထောင်စုအတွင်းရှိ အလုပ်ရုံများ အလုပ်သမားများအားလုံးနှင့် သက်ဆိုင်ရုံသာမက အစိုးရ၏ ရည်ရွယ်ချက်နှင့် ချမှတ်သောလမ်းစဉ်ပင် ထိခိုက်နေပါသည်ဟု ဖေါ်ပြပြီး ဤရုံးတော်သို့ အထူးအယူခံခွင့် တောင်းဆို၍ အခွင့်ပေးခဲ့သည်။

၁၉၅၆ ခု၊ ဖေဖော်ဝါရီလ ၁၃ ရက်နေ့တွင် (၂) တရားခံ ဝါလားဘတ်(စ်)က ထိုနေ့ကစ၍ စက်ကို ၂၄ နာရီခုတ်မောင်းမည်ဟု ဦးသန်းမောင်အားစာဖြင့်အသိပေးသော်လည်း အလုပ်သမားများကိုကန့်သတ်သည့်အချိန်ထက်ပိုမို၍လုပ်ခွင့်ပေးနိုင်စေရန်လျှောက်လွှာကိုမသွင်းဘဲနှင့်ထိုနေ့ကပင်စတင်ပြီး အချို့အလုပ်သမားများကိုရှစ်နာရီထက်ပိုမို၍ သာမန်နှုန်းထက်နှစ်ဆတိုးပေးပြီးခိုင်းစေခဲ့သည်ကို တရားခံများကမငြင်း၊ သို့သော် (၁) တရားခံ အမ်၊ ဒီ၊ ဒါရိုး၀ါလားက မိမိသည် စက်ပိုင်ရှင်သာဖြစ်ကြောင်း။ ခြေတဖက်ဖြတ်ထားရသူ တဦးလည်းဖြစ်ကြောင်း၊ ဆန်စက်လုပ်ငန်းအ၀ဝမှာ မန်နေဂျာဖြစ်သူ (၂) တရားခံက တာ၀န်ခံ၍သာ ဆောင်ရွက်သည်ဖြစ်ကြောင်း လျှောက်ထားပြီး မိမိ၏လျှောက်ထားချက်ကို ထောက်ခံသူသက်သေများကိုလည်း စစ်ဆေးသည်။ ၎င်းအပေါ်တွင် အပြစ်ရှိသည်ဟု ဤရုံးတော်တွင် လိုက်ပါဆောင်ရွက်သူ အစိုးရရှေ့နေကြီးကလည်း အထူးအထွေလျှောက်ထားခြင်းမပြု။ အလုပ်ရုံကို ကြီးကြပ်သူကသာ သမတထံမှဖြစ်စေ၊ အင်စပက်တော်ချုပ်ထံမှဖြစ်စေ ကင်းလွတ်ခွင့်မတောင်းဘဲနှင့် အလုပ်သမားများကို တနေ့ ရှစ်နာရီထက်ပိုမိုပြီး အလုပ်လုပ်ခွင့် မပေးနိုင်ဟူသော အချက်ကိုသာ

ဌ္ဍရုံးတော်၏ဆုံးဖြတ်ချက်ကို ရယိုကြောင်းလျှောက်ထားသည်။ သို့အတွက် (၁) တရားခံဆန့်စက်ပိုင်ရှင် အမ၊ ဒီ၊ ဒါရှေ့ဝါလားအား တရားသေလွတ်ခြင်းကို ဝင်ရောက်စွက်ဖက်ရန် အကြောင်းမရှိ။

၁၉၅၈

ပြည်ထောင်စု ပြုန်မာနိုင်ငံ တော် နှင့် ၁။ အမ၊ ဒီ။ ဒါရှေ့ ဝါလား။ ဒါရှေ့ ဝါလား နှင့်သားများ ဆန့်စက်၊ ရွာဘဲရပ်၊ ပြည်မြို့။ ၂။ ဝါလား ဘတ်(စ်)၊ ဒါရှေ့ ဝါလားနှင့် သားများ ဆန့်စက်၊ ရွာဘဲရပ်၊ ပြည်မြို့။

တရားလိုသည် တွဲဘက်အင်စပက်တော်သာဖြစ်၍၊ ပုဒ်မ ၉၇ (၁) အရ၊ တရားစွဲဆိုနိုင်ခွင့် အာဏာမရှိဟု လျှောက်ထားချက်ကို၊ ဌ္ဍရုံးတော်၌ ထပ်လောင်း၍ လျှောက်ထားရာ၊ အစိုးရရှေ့နေကြီးက တွဲဘက် အင်စပက်တော်မှာ၊ အင်စပက်တော်၏ အာဏာအလုံးစုံကို သုံးစွဲနိုင်သည့်အပြင်၊ ဌ္ဍအမှုတွင် တရားစွဲဆိုခွင့်ကို ပုဒ်မ ၉၇ (၁) နှင့် အညီ အင်စပက်တော်ချုပ်ကလည်း ကြိုတင်၍ တရားစွဲဆိုရန် အခွင့်ပေးကြောင်းနှင့် ချေပသည်။

အလုပ်ရုံများအက်ဥပဒေ အခန်း (၂) တွင် "ကြည့်ရှုစစ်ဆေးသည့် ရာထမ်းမှုထမ်းအဖွဲ့" ဟု ခေါင်းစဉ် (heading) တပ်၍၊ ပုဒ်မ ၁၀ ၏ နံဘေးကွက်လပ် (margin) တွင်၊ "အင်စပက်တော်" ဟု သတ်မှတ်ပြီး၊ ထိုပုဒ်မအရ နိုင်ငံတော်သမတသည်၊ မိမိသင့်တော်သည်ဟု ထင်မြင်သူကို အက်ဥပဒေအရ အင်စပက်တော်ခန့်အပ်ပြီး၊ ထိုအင်စပက်တော်က စစ်ဆေးကြည့်ရှုရမည့် နယ်နိမိတ်ကိုသတ်မှတ်ပေးနိုင်သည်။ ထိုနည်းအတူ "အင်စပက်တော်ချုပ်" တဦးလည်း ခန့်အပ်နိုင်သည်။ "အင်စပက်တော်ချုပ်"သည် အက်ဥပဒေ အပ်နှင်းထားသော အာဏာများအပြင်၊ ပြည်ထောင်စုမြန်မာပြည်တဝှမ်းလုံးအတွက် "အင်စပက်တော်" ၏ အာဏာများကိုလည်း သုံးစွဲဆောင်ရွက်နိုင်သည်။ ၎င်းပြင် ခရိုင်ရာဇဝတ်တရားသူကြီးအားလုံးတို့ကို ရာထူးအရ မိမိတို့၏ ခရိုင်အတွင်း "အင်စပက်တော်" များ ဖြစ်ကြောင်းကိုလည်း ပြဋ္ဌာန်း ထားသည်။ ထို့ပြင် နိုင်ငံတော်သမတသည် သင့်တော်သည့် အစိုးရ အရာရှိများကိုလည်း "တွဲဘက် အင်စပက်တော်" များ ခန့်အပ် ထားနိုင်သည်။ ပုဒ်မ ၁၁ ၏ နံဘေးကွက်လပ် (margin) မှာလည်း၊ "အင်စပက်တော်၏ အာဏာများ" သတ်မှတ်ပြီး ထိုပုဒ်မတွင် အာဏာများကို အသေးစိတ်ပြဋ္ဌာန်းထားသည်။ အက်ဥပဒေအခန်း (၂)၊ ပုဒ်မ ၁၀ နှင့် ၁၁ တို့ကို ကြည့်ရှုခြင်းအားဖြင့် "အင်စပက်တော်" ဆိုသည့် စကားရပ်မှာ အင်စပက်တော်သာမဟုတ်၊ အင်စပက်တော်ချုပ်၊ ခရိုင်ဝန်နှင့် တွဲဘက်အင်စပက်တော်များကိုပါ ထည့်သွင်းခေါ်ဝေါ်သော စကားရပ် ဖြစ်ရပေမည်။ တရားလို ဦးသန်းမောင်မှာ ပြည်မြို့ ဧရိယာတွင် တွဲဘက် အင်စပက်တော်ခန့်အပ်ခြင်းခံရသူဖြစ်သည့်အလျောက်၊ ပြည်မြို့နယ်နိမိတ်

၁၉၅၈

ပြည်ထောင်စု မြန်မာနိုင်ငံတော် နှင့် ၁။ အမ်၊ဒီ၊ ဒါရှူး ဝါလား၊ ဒါရှူးဝါလား နှင့် သားများ ဆန်စက်၊ ရွာဘဲရပ်၊ ပြည်မြို့။ ၂။ ဝါလား ဘတ်(စ်)၊ ဒါရှူး ဝါလားနှင့် သားများ ဆန်စက်၊ ရွာဘဲရပ်၊ ပြည်မြို့။

အတွင်းတွင် အင်စပက်တော်၏ အာဏာများကို သုံးစွဲနိုင်သူ တဦးတယောက်ဖြစ်ပေသည်။ သို့အတွက် ပုဒ်မ ၉၇ (၁) အရ၊ တရားစွဲဆို ပိုင်ခွင့်ရှိသည်မှာ ထင်ရှားသည်။

တရားခံဘက်က အဓိကထားသော အချက် ပုဒ်မ ၇၃ (၁) မှာ၊ အောက်ပါအတိုင်းဖြစ်သည်။

အချိန်ပိုလုပ်ရသည့်အတွက် အခပို။

၇၃။ ။(၁) အလုပ်သမား တဦးတယောက်သည်၊ အလုပ်ရုံတွင် ပုဒ်မ ၅၉ နှင့် ၆၂ တွင် သတ်မှတ်ထားသည့် အချိန်ထက်ပို၍လုပ်ရလျှင်၊ ထိုသူသည် မိမိ အချိန်ပိုလုပ်ရသည့်အတွက်၊ မိမိ သာမန်ရရှိသည့် အခနှုန်း၏ နှစ်ဆရစေရမည့်ပြင်၊ ရှားပါးစရိတ်ရနေလျှင်၊ ထိုအချိန်ပိုလုပ်ရသည့်နှေ့အတွက် ပေးမြဲနှုန်းအတိုင်း ရှားပါးစရိတ်ကိုလည်း ရစေရမည်။

ဤပုဒ်မတွင် ပုဒ်မ ၅၉ နှင့် ၆၂ ကို ဖေါ်ပြပြီး၊ ကင်းလွတ်ခွင့် ပေးနိုင်သော ပုဒ်မ ၇၁ (၂) ကို ဖေါ်မပြ၍ သာမန်ရရှိသော အခနှုန်းထက် နှစ်ဆပေး၍ ခိုင်းစေခဲ့လျှင်၊ ကင်းလွတ်ခွင့်တောင်းယူရန် မလိုဟူသော အောက်ရုံးများ၏ ယူဆချက်ကို လက်ခံပါမူ၊ ပုဒ်မ ၇၁ (၂) တွင် ပြဋ္ဌာန်းသော အချက်မှာ လုံးဝ အဓိပ္ပါယ်ရှိတော့မည်မဟုတ်။ မူလစစ်ဆေးသောရုံးတော်က သာမန်နှုန်း၏ နှစ်ဆမပေးဘဲ အချိန်ပို ခိုင်းစေလိုလျှင်သာ ပုဒ်မ ၇၁ (၂) အရ ကင်းလွတ်ခွင့် တောင်းယူရန် လိုသည်ဟုယူဆခြင်းမှာ မဖြစ်နိုင်။ အလုပ်သမားတဦးသည် မိမိ ရထိုက်သည့်နှုန်းထက် လျော့၍ ယူမည်မဟုတ်၊ ယူလျှင်လည်း အလုပ်သမား လောကတွင် ဂယက်ရိုက်ပြီး၊ အလုပ်ရုံပင်ပိတ်ရသည့်အခြေအနေကို ရောက်မည်မှာမလွဲဧကေ။ ဤကဲ့သို့ ကင်းလွတ်ခွင့်ကိုလည်း ဘယ်သောအခါမှ ရနိုင်မည်မဟုတ်။

ပုဒ်မ ၇၃ (၁) တွင်ဆိုထားသည့် "လုပ်ရလျှင်" ဆိုသော စကားရပ်ကို ထောက်မြုခြင်းအားဖြင့်၊ အလုပ်ရုံကြီးကြပ်သူကခွင့်ပြုမှ အလုပ်သမားက လုပ်နိုင်မည်မှာထင်ရှားသည်။ ဤကဲ့သို့ အလုပ်ရုံ ကြီးကြပ်သူက ခွင့်ပြုနိုင်ရန်လည်း နိုင်ငံတော်သမတထံမှသော်ဝင်း၊ အင်စပက်တော်ချုပ်ထံမှသော်ငင်း ပုဒ်မ ၅၉ နှင့် ၆၂ တွင်ပြဋ္ဌာန်းထားသော အချိန်ကန့်သတ်ချက်များမှ ကင်းလွတ်ခွင့်ကို လျှောက်ထားရပါမည်းမှ ခွင့်ပြုနိုင်ပေမည်။ ဤကဲ့သို့ ကင်းလွတ်ခွင့်ကို မယူဘဲနှင့် အလုပ်သမားတဦးတယောက်ကို ကန့်သတ်သည့်အချိန်ထက် ပိုမိုး၍ အလုပ်လုပ်

ခွင့်ပြုခဲ့ပါမူ၊ သာမန်အခန္ဓနိုး၏ နှစ်ဆပင်ပေးငြားသော်လည်း ပုဒ်မ ၇၁(၁) ကို ချိုးဖေါက်ရာရောက်ပေလိမ့်မည်။

၁၉၅၈

ပြည်ထောင်စု မြန်မာနိုင်ငံ တော် နှင့် ၁။ အမ်၊ဒီ၊ ဒါရှူး ဝါလား၊ ဒါရှူး ဝါလား နှင့်သားများ ဆန့်စက်၊ရွှာဘဲ ရပ်၊ ပြည်မြို့။ ၂။ ဝါလား ဘတ်(စ်)၊ဒါရှူး ဝါလား နှင့် သားများ ဆန့် စက်၊ ရွှာဘဲရပ်၊ ပြည်မြို့။

တရားလွှတ်ဘော်၏စီရင်ချက်တွင် ၁၉၅၁ ခုနှစ်၊ အလုပ်ရုံများ အက်ဥပဒေမှာ အလုပ်သမားများနှင့်ပတ်သက်၍ ၎င်းတို့၏နေမှု၊ စားမှု၊ သက်သာ ချောင်ချိရေး အလုပ်သမားများတို့၏အကျိုးဖြစ်ထွန်းရေးကိုရည်ရွယ်သည်ဆိုသည် မှာမှန်ကန်သည်။သို့သော်လုပ်ခနှစ်ဆရ၍ နာရီအကန့်အသတ်မရှိဘဲ နေ့စဉ်ဆက် လက်လုပ်ကိုင်ပါမူ၊ ကျန်းမာရေးကိုပင် ထိခိုက်မည်ကို သတိမူရပေမည်။ လုပ်ခ ပိုမိုရ၍ လတ်တလော သက်သာချောင်ချိမည်ဖြစ်သော်လည်း အလုပ်သမားများ၏ အရှည်ကော်ငင်းကျိုးဖြစ်ထွန်းရန် အလုပ်လုပ်ခြင်းကို ကြိုးကြော်ရန်နှင့် အလုပ် သမားများ၏ ကျန်းမာရေး၊ ဘေးရန်ကင်းရှင်းမှုနှင့် သက်သာ ချောင်ချိရေးအား လုံးကို ချိန်ဆပြီးပြဋ္ဌာန်းသည့် အက်ဥပဒေဖြစ်သည်။

၎င်းအကြောင်းများကြောင့် (၂) တရားခံ ဝါလားဘတ်(စ်)အား၊ တရား သေလွှတ်သောအမိန့်များမှာ မှားယွင်း၍ ၎င်းတို့ကို ပယ်ဖျက်ရပေမည်။

၁၉၅၁ ခုနှစ်တွင် အလုပ်ရုံများအက်ဥပဒေကို ပြဋ္ဌာန်းရာ၌ ပုဒ်မ ၁၅ နှင့် ၁၆ မှာ အောက်ပါအတိုင်းဖြစ်သည်။

ပြစ်မှုများအတွက် သာမန် ပြစ်ဒဏ်။

"၁၅။ ။အလုပ်ရုံ၊ သို့တည်းမဟုတ် အလုပ်ရုံဖြစ်သည်ဟု ၎င် အက်ဥပဒေတွင် ပြဋ္ဌာန်းထားသည့်၊ သို့တည်း မဟုတ် ၎င်အက်ဥပဒေအရ ကျေညာထား သည့်နေရာတခုခုတွင်သော်၎င်း၊ ထိုအလုပ်ရုံ၊ သို့တည်းမဟုတ် နေရာနှင့် စပ်လျဉ်း၍သော်၎င်း ၎င်အက်ဥပဒေ၌ ပြဋ္ဌာန်း ချက်များကို ဖြစ်စေ၊ ၎င်အက်ဥပဒေအရ ပြုသည့် နည်းဥပဒေ များကို ဖြစ်စေ၊ သို့တည်းမဟုတ် ၎င်အက်ဥပဒေအရ စာဖြင့်ရေးသားချမှတ်သည့် အမိန့်ကိုဖြစ်စေ ဆန့်ကျင်လျှင် အလုပ်ရှင်မန်နေဂျာနှင့် လုပ်ငန်းပိုင်ရှင်တို့ သည် ပြစ်မှုထင်ရှား စီရင်ခြင်း ခံရသောအခါ၊ သုံးလထက်မပိုသော ထောင်ဒဏ်ဖြင့်စေ၊ ငါးရာထက် မပိုသော ငွေဒဏ်ဖြင့်စေ၊ သို့တည်း မဟုတ် ဒဏ်နှစ်ရပ်စလုံးဖြင့်စေ စီရင်ခြင်းခံရမည်။ ထို့ပြင် ယင်းသို့ ပြစ်ဒဏ်စီရင်ခြင်းခံရပြီးနောက် ဆက်လက်ဆန့်ကျင်ပါက၊ ထိုသူအသီးသီး သည် နောက်ထပ်ပြစ်မှုထင်ရှားစီရင်ခြင်းခံရမည့်ပြင်၊ ၎င်ကဲ့သို့ ဆက်လက် ဆန့်ကျင်သည့် ရက်များအတွက်တရက်လျှင် ခုနစ်ဆယ့်ငါးကျပ်ထက်မပို သောငွေဒဏ်ကိုလည်း စီရင်ခြင်းခံရမည်။

၁၉၅၀

ပြည်ထောင်စု မြန်မာနိုင်ငံ တော် နှင့် ၁။ အမ်၊ဒီ၊ ဒါရှိုး ဝါလား၊ ဒါရှိုးဝါလား နှင့်သားများ ဆန်စက်၊ရွှာဘဲ ရပ်၊ ပြည်မြို့။ ၂။ ဝါလား ဘတ်(စ်)၊ဒါရှိုး ဝါလား နှင့် သားများ ဆန်စက်၊ ရွာဘဲရပ်၊ ပြည်မြို့။

သို့ရာတွင် မန်နေဂျာနှင့် လုပ်ငန်းပိုင်ရှင်နှစ်ဦးလုံးသည် ပြစ်ဒဏ် စီရင်ခြင်းခံရလျှင်၊ ဆန့်ကျင်မှုတခုတည်းနှင့် စပ်လျဉ်း၍ စီရင်ခြင်းခံရလည့် ငွေဒဏ်စုစုပေါင်းသည် ဆိုခဲ့သည့်ငွေဒဏ်များထက်မပိုစေရ။''

အထက်ကပြစ်ဒဏ်စီရင်ခြင်းခံရဘူးသူများကို ပြစ်ဒဏ် တိုးချစီရင်ခြင်း။

''၀၆။ ။ပုဒ်မ ၀၅ အရ၊ ပြစ်မှုထင်ရှားစီရင်ခြင်းခံရဘူးသူသည်၊ ယခင်က ဆန့်ကျင်ခဲ့သော ပြဋ္ဌာန်းချက်ကို နောက်ထပ်ဆန့်ကျင်သည့် ပြစ်မှုအတွက် ပြစ်မှုထင်ရှားစီရင်ခြင်းခံရလျှင်၊ ထိုသူသည် နောက်ထပ်ပြစ်ဒဏ် စီရင်ခြင်းခံရသောအခါ၊ ခြောက်လထက် မပိုသော ထောင်ဒဏ်ဖြစ်စေ၊ အနည်းဆုံး နှစ်ရာမှ အများဆုံး တထောင်ထက်မပိုသောငွေဒဏ်ဖြစ်စေ၊ သို့တည်းမဟုတ် ဒဏ်နှစ်ရပ်လုံး ဖြစ်စေ စီရင်ခြင်းခံရမည်။

သို့ရာတွင် ဤပုဒ်မအရ ပြစ်ဒဏ်စီရင်ရန်အလို့ငှါ နှစ်နှစ်ကျော်က ထိုသူအပေါ်တွင် ချမှတ်သည့်ပြစ်ဒဏ်ကို ထည့်သွင်းအရေးမယူရ။''

ဤအတိုင်းသာတည်ရှိပါမူ၊ အဓိပ္ပါယ်ကောက်ယူရန် အခက်အခဲ မရှိနိုင်။ လုပ်ငန်းပိုင်ရှင်သော်ငင်း၊ မန်နေဂျာ သော်ငင်း၊ နှစ်ဦးစလုံးကပင် သော်ငင်း အက်ဥပဒေပြဋ္ဌာန်းချက်၊ နည်းဥပဒေပြဋ္ဌာန်းချက်၊ သို့မဟုတ် အမိန့်ကို ဆန့်ကျင်လျှင်၊ သုံးလထက်မပိုသော ထောင်ဒဏ်၊ သို့မဟုတ် ငါးရာထက် မပိုသော ငွေဒဏ်၊ သို့မဟုတ် ၂ ရပ်စလုံးပင်စီရင်ခြင်းခံရမည်။ နောက်ထပ် ဆန့်ကျင်ပြန်လျှင် ထပ်မံ တရားစွဲဆိုရှိ ပြစ်ဒဏ်ပေးသောအခါ ပုဒ်မ ၀၆ အရ၊ ၆ လထက် မပိုသော ထောင်ဒဏ်၊ သို့မဟုတ် အနည်းဆုံးဒဏ်ငွေနှစ်ရာ၊ အများဆုံးတထောင်ကို စီရင်ခြင်းခံရမည်။ ထို့ပြင်လည်း ပုဒ်မ ၀၅ နောက်ပိုင်းအရ၊ ဆန့်ကျင်သောရက်များအတွက် တနေ့ ၇၅ ထက်မပိုသော ငွေဒဏ်ကိုလည်း ရုံးတော်ကချမှတ်နိုင်သည်။

၁၉၅၄ ခုနှစ်တွင် အက်ဥပဒေအမှတ် ၇၄ အရ၊ ပုဒ်မ ၀၅ ၏ ခြွင်းချက်ကိုပြင်ဆင်ရာ၌ လက်ရှိခြွင်းချက်ကို အပိုဒ်ငယ် (၂) ဟု မှတ်သားပြီး၊ အပိုဒ်ငယ် (၁) အဖြစ်နှင့် အောက်ပါတို့ကိုထည့်သွင်းသည်။

''(၁) ပုဒ်မ ၅၉ ၏၊ သို့တည်းမဟုတ်ပုဒ်မ ၆၂ ၏ပြဋ္ဌာန်းချက်ကို ဆန့်ကျင်သောအလုပ်ရုံမန်နေဂျာအား၊ သို့တည်းမဟုတ် လုပ်ငန်း ပိုင်ရှင်အား ငွေဒဏ်စီရင်ရာ၌ တရားရုံးသည် ကျပ်ငါးရာတိတိ ငွေဒဏ်ကို ဖြစ်စေ၊ ပုဒ်မ ၇၃ (၁) တွင်ပြဋ္ဌာန်းထားသည့် အချိန်ပိုလုပ်ခကြေးငွေ၏

နှစ်ဆနှင့်ညီမျှသော ငွေဒဏ်ကိုဖြစ်စေ ထိုငွေဒဏ်နှစ်ရပ်အနက် များရာ ငွေဒဏ်ကိုစီရင်ရမည်။''

၁၉၅၀

ပြည်ထောင်စု မြန်မာနိုင်ငံ တော် နှင့် ၁။ အမ်၊ ဒီ၊ ဒါရူး ဝါလား၊ ဒါရူး ဝါလား နှင့် သားများ ဆန်စက်၊ ရွာဘဲရပ်၊ ပြည်မြို့။ ၂။ ဝါလား ဘတ်(စ်)၊ ဒါရူး ဝါလား နှင့် သားများ ဆန်စက်၊ ရွာဘဲရပ်၊ ပြည်မြို့။

ရည်ရွယ်ချက်မှာ၊ ကင်းလွတ်ခွင့်မရဘဲနှင့် အချိန်ပိုလုပ်ခွင့်ပေးခဲ့ပါမူ၊ ပဌမအကြိမ် ဆန့်ကျင်လျှင်ပင် အနည်းဆုံးဒဏ်ငွေ ၅၀၀ တပ်ရမည်ဟုဖြစ်ခဲ့လျှင်၊ ပုဒ်မ ၀၅ တွင် ခြွင်းချက်အနေနှင့် မထည့်သွင်းဘဲ ''ဒဏ်နှစ်ရပ်လုံးဖြစ်စေ စီရင်ခြင်းခံရမည်''ဟူသော စကားရပ်နောက်တွင် ထည့်သွင်းသင့်သည်။ ဤကဲ့သို့ ထည့်သွင်းမှ အဓိပ္ပါယ်တမျိုးသာ ကောက်ယူနိုင်သည်။ ဤကဲ့သို့ ထည့်သွင်းခဲ့ပါမူ၊ အချိန်ပိုလုပ်စေသည့် ဆန့်ကျင်ခြင်းမှအပ၊ အခြားနည်းဖြင့် ဆန့်ကျင်ခြင်းများကို ဒဏ်ငွေ ၅၀၀ ထက်မပို၊ သို့မဟုတ် ထောင်ဒဏ်သုံးလထက်မပိုသောပြစ်ဒဏ်ကို သတ်မှတ်နိုင်ပြီး၊ အချိန်ပိုလုပ်စေခဲ့သော်၊ ငွေဒဏ်တပ်လျှင် ၅၀၀၊ သို့မဟုတ် ပုဒ်မ ၇၃ (၁) တွင် ပြဋ္ဌာန်းထားသည့် လုပ်ခကြေးငွေ၏ နှစ်ဆနှင့်ညီမျှသောငွေ၊ ထိုငွေဒဏ်နှစ်ရပ်အနက် များရာငွေဒဏ်ကိုသတ်မှတ်ရမည်ဟု အဓိပ္ပါယ်ကောက်ယူရပေမည်။ သို့သော် ၁၉၅၄ ခုနှစ်က ပြင်ဆင်ခဲ့သည့် အတိုင်းဆိုလျှင်၊ ပုဒ်မကြီး ၀၅ တွင်သတ်မှတ်သော အပြစ်ဒဏ်စာပိုဒ်နှင့် ခြွင်းချက်အမှတ် (၁) တို့ကြားတွင် ပြဋ္ဌာန်းချက်တခုရှိနေသေးသည်။ ထိုအချက်မှာ ဆက်လက်၍ဆန့်ကျင်နေခြင်းနှင့် သက်ဆိုင်၍ ခြွင်းချက်အပိုဒ် (၁) မှာ ဆက်လက်ဆန့်ကျင်၍ ထပ်မံတရားစွဲဆိုသောအမှုဌာန ချမှတ်ရမည့် အပြစ်ဒဏ်သာဖြစ်ရမည်ဟု အဓိပ္ပါယ်ကောက်ယူနိုင်သည်။

ယင်းသို့ အဓိပ္ပါယ်ကောက်ယူနိုင်သည့် အချက်တရပ်ကား၊ အကယ်၍ ဆက်လက်ဆန့်ကျင်မှုနှင့် မသက်ဆိုင်လျှင် အချိန်ပိုအလုပ်လုပ်စေသော အလုပ်ရုံမန်နေဂျာ၊ သို့မဟုတ် လုပ်ငန်းပိုင်ရှင်အား၊ ပဌမအကြိမ် ကျူးလွန်သည့် ပြစ်မှုအတွက် ပုဒ်မ ၀၅၊ ခြွင်းချက်အပိုဒ် (၁) အရ ငွေဒဏ်စီရင်ရာ၌၊ ပုဒ်မ ၇၃ (၁) တွင် ပြဋ္ဌာန်းထားသည့် အချိန်ပိုလုပ်ခကြေးငွေ၏ နှစ်ဆနှင့်ညီမျှသော ငွေဒဏ်သည် ကျပ်ငါးရာအောက်ဖြစ်လျှင်၊ ငွေဒဏ် ကျပ်ငါးရာ စီရင်ရမည်ဖြစ်သော်လည်း၊ နောက်ထပ်တဖန် အလားတူပြစ်မှုကို ကျူးလွန်သည့်အခါ၌၊ ပုဒ်မ ၀၆ အရ အပြစ်ပေးရာတွင် အနည်းဆုံး နှစ်ရာမှ၊ အများဆုံး တထောင်ထက် မပိုသော ငွေဒဏ်ကိုစီရင်နိုင်သည်။ ထို့ကြောင့် ပဌမအကြိမ် ကျူးလွန်သည့် ပြစ်မှုအတွက် ငွေဒဏ်ငါးရာစီရင်ရမည်ဖြစ်သော်လည်း၊ ဒုတိယအကြိမ် ကျူးလွန်သည့် ပြစ်မှုအတွက်၊ ငွေဒဏ်နှစ်ရာ၊ သုံးရာ စသည်စီရင်နိုင်သည်ဖြစ်သဖြင့်၊ ပုဒ်မ ၀၅ ပါ ပြဋ္ဌာန်းချက်များနှင့် ပုဒ်မ ၀၆ ပါပြဋ္ဌာန်းချက်များသည် ဆန့်ကျင်ပြီး အငြိုး အမောက်မတည့်ဖြစ်ပေမည်။

၁၉၅၈

ပြည်ထောင်စု မြန်မာနိုင်ငံ တော် နှင့် ၁၂ အခ်ဲဒီ၊ ဒါ ရွှေဝါလား၊ ဒါရွှေ ဝါလား နှင့်သားများ ဆန်စက်၊ရွာဘဲရပ်၊ပြည်မြို့။ ၂။ ဝါလား ဘတ်(စ်)၊ဒါရွှေ ဝါလား နှင့် သားမွေး ဆန်စက်၊ ရွာဘဲရပ်၊ ပြည်မြို့။

ရည်ရွယ်ချက်မှာ မည်ကဲ့သို့ပင်ဖြစ်စေကာမူ၊ ပြဋ္ဌာန်းထားသည့်အချက်မှာ မသေချာလှ၍၊ အဓိပ္ပါယ်နှစ်မျိုးကောက်နိုင်သည်။ အက်ဥပဒေများကို သုံးသပ်ဝေဖန်ရာ၌ လုပ်ရိုးလုပ်စဉ် လိုက်နာသည့်နည်းအတိုင်း အဓိပ္ပါယ်နှစ်မျိုးကောက်ယူနိုင်ခဲ့သော်၊ တရားခံသက်သာမည့် အဓိပ္ပါယ်ကို ကောက်ယူရပေမည် [၁]။

ပြည်မြို့တွင်လည်း၊ ဤကဲ့သို့အမှုမျိုး ငါးမှုပင် ရှိသေးသည်ကို ထောက်ရှုသော်၊ အလုပ်ရုံပိုင်ရှင်သည် သာမန်နှုန်းထက် နှစ်ဆပိုရှိပေးလျှင် အလုပ်သမားများကို ကန့်သတ်ထားသည့်အချိန်ထက် ပိုမိုရှိစေခိုင်းနိုင်သည်ဟု ဥပဒေအယူလွဲနေကြကြောင်းမှာ ထင်ရှားသည်။ တရားခံက ဆန့်ကျင်ခြင်းမှာ၊ ပဌမ အကြိမ်သာ ဖြစ်သည်။ သို့သော် နောက်နောင်ကို ပုဒ်မ ၇၁ (၂) အရ ကင်းလွတ်ခွင့်ကို တောင်းယူရမည်ကို သတိပေးသည့်အနေဖြင့်၊ အောက်ရုံးနှစ်ရုံးက ချမှတ်သော တရားသေလွှတ်ခြင်းအမိန့်များကို ပယ်ဖျက်ပြီး၊ တရားခံ ဝါလားဘတ်(စ်)အား အလုပ်ရုံများ အက်ဥပဒေပုဒ်မ ၁၅ အရ အပြစ်ရှိရှိ ဒဏ်ငွေ ၅၀၊ သို့မဟုတ် အလုပ်မရှိ ထောင်ဒဏ် ၇ ရက်ကျခံစေရန် အမိန့်ချမှတ်သည်။

ဤကဲ့သို့အမိန့်ချမှတ်ရာ၌၊ ပုဒ်မ ၁၅ မှာ မရှင်းလင်းသည်ကို ထပ်လောင်း၍ ဖေါ်ပြလိုသည်။ တကယ်စင်စစ်ပင် အချိန် ကန့်သတ်ထားသည်ထက် ပိုမိုရှိလုပ်စေခဲ့ပါမူ၊ ပဌမအကြိမ်၌ပင် ဒဏ်ငွေ ၅၀၀ တပ်ရမည်ဟု ရည်ရွယ်ချက်ရှိလျှင်၊ ဤစီရင်ချက်တွင် ဖေါ်ပြခဲ့သည့်အတိုင်း၊ ခြွင်းချက်အပိုဒ် (၁) တွင် ပြဋ္ဌာန်းထားသောအချက်ကို ခြွင်းချက်အနေဖြင့်မထားဘဲ၊ ပုဒ်မကြီး ၁၅ တွင် ထည့်သွင်းသင့်သည်။ သို့ရာတွင်အလုပ်သမား ၁၀ ယောက်ထက်ပိုလျှင် ဥပဒေအရ အလုပ်ရုံ ဖြစ်နေ၍၊ အမျိုးသမီး ၁၁ ယောက်ရှိသော ဆေးလိပ်ခုံကလေးကို ဒဏ်ငွေ ၅၀၀ တပ်ရမည်ဆိုပါက အလုပ်ကို ဖျက်သိမ်းရာသို့ ရောက်ပေမည်ကိုလည်း သတိမူသင့်သည်။ ထို့ပြင်လည်း ဆက်လက် ဆန့်ကျင်၍ နောက်ထပ်တရားစွဲဆိုရသည်နှင့် ပတ်သက်သောအချက်မှာ ပုဒ်မ ၁၅ တွင်မထားဘဲ၊ ပုဒ်မ ၁၆ တွင် ထည့်သွင်းသင့်သည်။ နောက်တချက်မှာ၊ ယခုလက်ရှိခြွင်းချက် အပိုဒ် (၁) တွင်ပါရှိသော "ပုဒ်မ ၇၃ (၁) တွင်ပြဋ္ဌာန်းထားသည့် အချိန်ပိုလုပ်ခကြေးငွေ၏ နှစ်ဆနှင့်ညီမျှသောငွေဒဏ်" ဆိုသည်မှာ၊ မရှင်းလင်းချေ။ ပုဒ်မ ၇၃

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[1] **Maxwell—On the Interpretation of Statutes, 10th Edition, page 285.**

The effect of the rule of strict construction might almost be summed up in the remark that, "where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of doubt should be given to the subject and against the legislature which has failed to explain itself."

(၁) တွင် သတ်မှတ်သည်မှာ သာမန်အခန္ဓနှုန်း၏ နှစ်ဆဖြစ်၍၊ ခြွင်းချက် အရဆို လျှင် သာမန်နှုန်း၏လေးဆဖြစ်ပေမည်။ ရုံပိုင်ရှင်က လုပ်သမားအားလုံးအား အပို ပေးရသမျှငွေ၏ လေးဆကို ဒဏ်ငွေဆောင်ရမည်ဟု ရည်မှန်းလျှင်လည်း သေချာ စွာဖေါ်ပြသင့်သည်။

၁၉၅၈

ပြည်ထောင်စု မြန်မာနိုင်ငံ တော် နှင့် ၁။ အမ်၊ ဒီ၊ ဒါရှိး ဝါလား၊ ၎ါရှိး ဝါလား နှင့် သားများ ဆန်စက်၊ ရွာဘဲ ရပ်၊ ပြည်မြို့။ ၂။ ဝါလား ဘတ်(စ်)၊ဒါရှိး ဝါလား နှင့် သားများ ဆန်စက်၊ ရွာဘဲရပ်၊ ပြည်မြို့။

တရားလွှတ်တော်ချုပ်

† ၁၉၅၀ စက်တင်ဘာလ ၂၆ ရက်။

မောင်ဘဒေါင် အတွင်းရေးမှူး၊ အထွေထွေ အာဏာရကိုယ်စားလည်း၊ ဗမာနိုင်ငံလုံးဆိုင်ရာ ရေနံအလုပ်သမား အစည်းအရုံးများ အဖွဲ့ချုပ်၊ ရန်ကုန်မြို့ (လျှောက်ထားသူ)

နှင့်

၁။ မြန်မာနိုင်ငံတော် ဝါကင်္ဘပဋိပက္ခခုံရုံး။
၂။ နတ်ဆင် ရေနံကုမ္ပဏီ လိမိတက်၊ ရေနံချောင်းမြို့။ (လျှောက်ထားခံရသူများ) *

ဝါကင်္ဘပဋိပက္ခ အက်ဥပဒေပုဒ်မ ၁၄ (ဂ) အရ၊ တင်သွင်းသော လျှောက်လွှာကို နိုင်ငံတော် သမတ က ပုဒ်မ ၉ အရ၊ ခုံရုံးတော်သို့ လွှဲအပ်ခြင်းမပြုသောကြောင့် ဥပဒေအရ ဝိတ်ပင်သည်ဟု မဆိုနိုင်။

ဆုံးဖြတ်ချက်။ ။အလုပ်သမား ၅၆ ယောက်ကို ထုတ်ပစ်သည့်ကိစ္စနှင့်ပတ်သက်၍ အလုပ်ရှင်ဖြစ်သူ လျှောက်ထားခံရသူအမှတ် ၂ နှင့် ခလျှောက်ထားသူများဖြစ်သူ၊ ဗမာနိုင်ငံလုံးဆိုင်ရာ ရေနံအလုပ်သမား အစည်းအရုံးအလွှဲချုပ်တို့ အချင်းများကြရာ ၎င်းပြဿနာကို လျှောက်ထားခံရသူအမှတ် ၁ ဖြစ်သူ မြန်မာနိုင်ငံတော် ဝါကင်္ဘပဋိပက္ခခုံရုံးသို့ တင်သို့စစ်ဆေးစေရန် နှစ်ဦးနှစ်ဘက် သဘောတူ လက်မှတ်ရေးထိုးကြပြီးသည့်နောက် အလုပ်ရှင်သည် အလုပ်သမား ၅၆ ယောက်အား အလုပ်မှထုတ်ပစ်သည်ကို ပြန်လည်ရုပ်သိမ်းလိုက်လေသည်။ ၎င်းနောက် အလုပ်ရှင်က အဆိုပါ အလုပ်သမား ၅၆ ယောက်ကို ဝါကင်္ဘပဋိပက္ခခုံရုံးသို့ ဝါကင်္ဘပဋိပက္ခဥပဒေပုဒ်မ ၁၄ (ဂ) အရ ထုတ်ခွင့်ပြုပါရန်လျှောက်ထားရာ လျှောက်ထားသူများက အပြင်းအထန် ကန့်ကွက်လေသည်။ ခုံရုံးတော်သည်၊ နှစ်ဘက်သော

* ၁၉၅၀ ခုနှစ်၊ တရားမအသေးအဖွဲလျှောက်လွှာ အမှတ် ၃၀။

† နိုင်ငံတော် တရားဝန်ကြီးချုပ် ဦးမြင့်သိန်း၊ နိုင်ငံတော်တရားဝန်ကြီး ဦးချန်ထွန်းနှင့် နိုင်ငံတော်တရားဝန်ကြီး ဦးဘိုကြီး တို့ရှေ့မှောက်တွင် တရားဝန်ကြီး ဦးဘိုကြီးက အဓိန္ဓိချမှတ်သည်။

အမှုသည်များတင်ပြသည့် သက်သေများကို သေချာကျနစွာစစ်ဆေးပြီးနောက် အလုပ်သမား အချို့တို့ကို ထုတ်ခွင့်ပြုလေသည်။

ဤအမှုတွင် လျှောက်ထားသူများက အဓိက ပြုသည့် အချက်မှာ အလုပ်ရှင်နှင့် အလုပ်သမားတို့၏ ကိုယ်စားလည်များသည် ဝါကီဇူပဋိပက္ခခုံရုံးသို့ မိမိတို့၏ အခင်းပြဿနာကို တင်ပို့စစ်ဆေးရန် သဘောတူ လက်မှတ်ထိုးပြီးနောက် အလုပ်ရှင်သည် ပုဒ်မ ၁၄ (ဂ) အရ၊ အလုပ်သမား ၅၆ ယောက်ကို ထုတ်နှုတ်ခွင့် မတောင်းနိုင်ဟုဆိုသည်။ သို့သော်ငြားလည်း ယင်းသို့ သဘောတူညီပြီးနောက် နိုင်ငံတော် သမတ က ထိုအက် ဥပဒေပုဒ်မ ၉ အရ၊ ခုံရုံးတော်သို့ လွှဲအပ်ခြင်း မပြုသောကြောင့် ပုဒ်မ ၁၄ (ဂ) အရ၊ လျှောက်ထားသည်ကို ဥပဒေအရ ပိတ်ပင်သည်ဟုမဆိုနိုင်ချေ။

လျှောက်ထားသူအတွက်၊ လွှတ်တော်ရှေ့နေကြီး ဦးသန်းတင် လိုက်ပါဆောင်ရွက်သည်။

လျှောက်ထားခံရသူ အမှတ် (၁) အတွက်၊ အစိုးရလွှတ်တော်ရှေ့နေကြီး ဦးလှမောင် လိုက်ပါဆောင်ရွက်သည်။

လျှောက်ထားခံရသူ အမှတ် (၂) အတွက်၊ လွှတ်တော်ရှေ့နေကြီး ဦးဘဆွေ လိုက်ပါဆောင်ရွက်သည်။

တရားဝန်ကြီးဦးဘိုကြီး။ ။ဤအမှုတွင် လျှောက်ထားခံရသူအမှတ်(၂) နတ်ဆင် ရေနံကုမ္ပဏီလီမိတက်က မိမိတို့လက်အောက်ရှိ အလုပ်သမားပေါင်း ၂၀၄ ယောက် အနက် ၅၆ ယောက်ကို ထုတ်ခွင့်ပြုပါရန် လျှောက်ထားခံရသူ အမှတ် (၁) မြန်မာနိုင်ငံတော် ဝါကီဇူပဋိပက္ခခုံရုံးတော်သို့ ဝါကီဇူပဋိပက္ခ အက်ဥပဒေပုဒ်မ ၁၄ (ဂ) အရ၊ လျှောက်ထားခဲ့သည်တွင်ထိုရုံးတော်က နှစ်ဦးနှစ်ဘက် အထောက်အထားပြုသော သက်သေများကို သေချာကျနစွာ စစ်ဆေးပြီးလျှင် မိမိအလို အလျောက် အလုပ်မှထွက်သူ မောင်ထွန်းညိုနှင့် ကွယ်လွန်သူ မောင်ဘိုးခင်မှအပ ထိုရုံးတော်အမှုတွဲ သက်သေခံအမှတ် ''စီ'' ၌ပါရှိသော အလုပ်သမားစာရင်းကို စစ်ဆေးပြီးလျှင် အလုပ်သမားအချို့ကို ချန်လှပ်၍ ကျန်ရှိသောအလုပ်သမားများကို ထုတ်ခွင့်ပြုလေသည်။ ယင်းသို့ထုတ်ခွင့်ပြုသည်ကို ယခု လျှောက်ထားသူ မမာနိုင်ငံလုံးဆိုင်ရာ ရေနံလုပ်သား အစည်းအရုံးများ အဖွဲ့ချုပ်က မကျေနပ်သဖြင့် အမှုခေါ် စာချွန်တော်အမိန့်ဖြင့်ဝင်း၊ အခြားသင့်လျော်သောအမိန့်ဖြင့်ဝင်း ပယ်ဖျက်ရန်အတွက် ဤရုံးတော်သို့ လျှောက်ထားလေသည်။

ဒုတိယကမ္ပာစစ်ကြီး ပြီးဆုံးသည့်နောက် အလုပ်ရှင်ပြုစုသူ ရေနံကုမ္ပဏီသည် ပြန်လည်ထူထောင်ရေး လုပ်ငန်းများကို လုပ်ကိုင်ဆောင်ရွက်လာခဲ့ရာ

၁၉၅၈

မောင်ဘအောင် အတွင်းရေးမှူး၊ အထွေထွေအာဏာရ ကိုယ်စားလည်၊ မမာနိုင်ငံလုံးဆိုင်ရာ ရေနံအလုပ်သမား အစည်းအရုံးများအဖွဲ့ချုပ်၊ ရန်ကုန်မြို့နှင့် ၁။ မြန်မာနိုင်ငံတော် ဝါကီဇူပဋိပက္ခခုံရုံး။ ၂။ နတ်ဆင် ရေနံကုမ္ပဏီလီမိတက်၊ ရေနံချောင်းမြို့။

၁၉၅၈

မောင်ဘ
အောင်
အတွင်းရေးမှူး၊
အထွေထွေ
အာဏာရ
ကိုယ်စားဆည်၊
ဗမာနိုင်ငံသုံး
ဆိုင်ရာရေနံ
အလုပ်သမား
အစည်းအရုံး
များအဖွဲ့ချုပ်၊
ရန်ကုန်မြို့
နှင့်
၁။ မြန်မာနိုင်ငံ
တော် ဝါကင်္ဘ
ပဋိပက္ခခုံရုံး။
၂။ နတ်ဆင်
ရေနံကုမ္ပဏီ
လီမိတက်၊
ရေနံချောင်းမြို့။

၁၉၅၅ ခုနှစ်တွင် လုပ်ငန်းတခုလုံးသည် နေထားတကျရှိသော အခြေသို့ဆိုက်ခဲ့လေသည်။ သို့ရာတွင် စစ်မဖြစ်မီကာလက ရေနံထုတ်လုပ်ရေးအပြင် အခြားလုပ်ငန်းများကိုပါ လုပ်ကိုင်ခဲ့သော်လည်း စစ်ပြီးကာလတွင်မူကား ရေနံထုတ်လုပ်ရေး အလုပ်တခုတည်းကိုသာ အဓိကထား၍ လုပ်ကိုင်လေသည်။ အလုပ်သမားများမှာ လက်ရှိလုပ်ငန်းထက် ပိုနေသဖြင့် ၁၉၅၆ ခုနှစ်၊ ဧမလ ၃၁ ရက်နေ့တွင် အလုပ်ရှင်သည် အလုပ်သမား ၅၆ ယောက်အား တလနို့တစ်ပေးမည့် အစား တလစာငွေကို အပိုပေးပြီး အလုပ်မှထုတ်ခဲ့ရာ အလုပ်သမားများမှာ မကျေနပ်သဖြင့် ရေနံချောင်းမြို့၊ အလုပ်သမား ဖြန်ဖြေရေးအရာရှိက ၁၉၅၆ ခုနှစ်၊ ဇွန်လ ၁၂ ရက်နေ့၌ တကြိမ်၊ ၁၉၅၆ ခုနှစ်၊ ဇွန်လ ၂၆ ရက်နေ့တကြိမ် ဖြန်ဖြေရေး အစည်းအဝေးခေါ်ယူပြီး အလုပ်ရှင်နှင့် အလုပ်သမားများကိုယ်စားလည်တို့ ဆွေးနွေးစေသော်လည်း ဖြန်ဖြေ၍မရသဖြင့် နောက်ဆုံး၌ နှစ်ဘက်သောကိုယ်စားလည်များသည် ထိုပြဿနာကို ဝါကင်္ဘပဋိပက္ခခုံရုံးသို့ တင်ပို့စစ်ဆေးစေရန်သဘောတူလက်မှတ်ထိုးကြလေသည်။ ထို့နောက် အလုပ်ရှင်သည် မိမိနှင့်အလုပ်သမားတို့ အကြင်းဖြစ်ပွါးသော ဆုငွေ၊ ထောက်ညှာကြေး စသည်တို့နှင့် စပ်လျဉ်းသည့် ပြဿနာများမှာ ဝါကင်္ဘပဋိပက္ခ ခုံရုံးရှေ့မှောက်၌ မပြီးမပြတ်ရှိနေသဖြင့် အလုပ်သမားများကို အလုပ်မှမထုတ်နိုင်ကြောင်း သိရှိရသော အခါ ၁၉၅၆ ခုနှစ်၊ မေလ ၃၁ ရက်နေ့က အလုပ်သမား ၅၆ ယောက်အား အလုပ်မှထုတ်သည်ကို ပြန်လည်ရုပ်သိမ်းလိုက်လေသည်။

၁၉၅၆ ခုနှစ်၊ ဇူလိုင်လ ၄ ရက်နေ့သို့ ကျရောက်သောအခါ အလုပ်ရှင်သည် ဝါကင်္ဘပဋိပက္ခခုံရုံးသို့ အထက်ဖေါ်ပြပါ အလုပ်သမား ၅၆ ယောက်ကို အက်ဥပဒေပုဒ်မ ၁၄ (၈) အရ ထုတ်ခွင့်ပြုပါရန် လျှောက်ထားလေသည်။ ယင်းသို့ လျှောက်ထားသည်ကို ယခုလျှောက်ထားသူ ဗမာနိုင်ငံလုံးဆိုင်ရာရေနံလုပ်သား အစည်းအရုံးများအဖွဲ့ချုပ်က အပြင်းအထန် ကန့်ကွက်လေသည်။ ခုံရုံးတော်သည် နှစ်ဘက်သော အမှုသည်များ တင်ပြသည့် သက်သေများကို သေချာကျနစွာ စစ်ဆေးပြီးလျှင်၊ အထက်၌ ဖေါ်ပြခဲ့သည့်အတိုင်း အမိန့်ချမှတ်လေသည်။ လျှောက်ထားသူများ အဓိကပြုသည့်အချက်မှာ အလုပ်ရှင်နှင့် အလုပ်သမားတို့၏ ကိုယ်စားလည်များသည် ဝါကင်္ဘပဋိပက္ခခုံရုံးသို့ မိမိတို့၏အခင်းဖြစ်ပြဿနာကို တင်ပို့စစ်ဆေးရန် သတောတူ လက်မှတ်ထိုးပြီးနောက် အလုပ်ရှင်သည် ပုဒ်မ ၁၄ (၈) အရ၊ အလုပ်သမား ၅၆ ယောက်ကို ထုတ်ခွင့်မတောင်းနိုင်ဟုဆိုသည်။ သို့သော်ငြားလည်း ယင်းသို့ သဘောတူညီပြီးနောက် နိုင်ငံတော်သမတ က ထိုအက်ဥပဒေပုဒ်မ ၉ အရ၊ ခုံရုံးတော်သို့ လွှဲအပ်ခြင်းမပြုသော

ကြောင့် ပုဒ်မ ၁၄ (ဂ) အရ လျှောက်ထားသည်ကို ဥပဒေအရ ဝိတ်ပင်သည်ဟု မဆိုနိုင်ချေ။

ဒုတိယအချက်မှာ အလုပ်ရှင်သည် အဆိုပါအလုပ်သမား ၅၆ ယောက်ပါဝင်သော အစည်းအရုံးကို ဖြိုခွင်းလိုသည့် ဆန္ဒဖြင့်သာ ယင်းသို့ ၎င်းတို့အား အလုပ်မှ ထုတ်ခွင့်တောင်းသည်ဟု ဆို၏။ ထိုအချက်နှင့်စပ်လျဉ်း၍ ခုံရုံးတော်က သေချာစွာ သုံးသပ်စစ်ဆေးခဲ့ဟန် တူသည်။ ခုံရုံးတော်၏ အဓိန္ဓိတွင် "ထိုစွပ်စွဲချက်ကို ထင်ရှားစေရန် အစည်းအရုံးဝင်ဖြစ်သူ တဦးတယောက်၊ သို့မဟုတ် အလုပ်သမားတစုအပေါ်၌ မည်သည့်အခါက မည်သို့အလုပ်ရှင်များက အငြိုးထားပြီး မည်သည့် မတရားညှဉ်းပန်းမှုများပြုခဲ့သည်။ ထိုကဲ့သို့ ညှဉ်းပန်းသောကြောင့် မည်ကဲ့သို့အရေးဆိုသဖြင့် မည်သို့သော အဆုံးအဖြတ်ရခဲ့သည်ဟု အငြိုးထားသော ညှဉ်းပန်းမှုရာဇဝင်ကို တင်ပြရန်ရှိလေသည်။ ထိုကဲ့သို့ တိကျပြတ်သားသော အဖြစ်အပျက် အကြီးအကားမပြုဘဲ စွပ်စွဲခဲ့သော် ထိုစွပ်စွဲချက်ကို လက်ခံစဉ်းစား ဆုံးဖြတ်ရန် မဖြစ်နိုင်" ဟု မြွက်ဆိုထားလေသည်။

ထို့ပြင် လျှောက်ထားသူများ၏ ပညာရှိ ရှေ့နေကြီးက ခုံရုံးတော်သည် အလုပ်သက်နှုသူများကိုသာ ရွေးချယ်ပြီး ထုတ်ခွင့်ပြုသည်မဟုတ်ဘဲ အပေါ်ယံမှ သာစစ်ဆေးပြီးလျှင် ထုတ်ခွင့်ပြုခဲ့လေသည်ဟု ဆို၏။ သို့ရာတွင် အလုပ်ရှင်က မည်သို့သော အကြောင်းများကြောင့် ထုတ်ခွင့်တောင်းဆိုရကြောင်း၊ မည်သူများကို အလုပ်ထုတ်လိုကြောင်း ၎င်းတို့၏ လုပ်သက်နှင့်တကွ အသေးစိတ်ဖော်ပြခဲ့လေသည်။ ဤရုံးတော်ရှေ့မှောက်၌ အလုပ်ရှင်၏ ကျမ်းကျိန်လွှာတွင်လည်း အလုပ်သက်နှုသူများကိုသာ ရွေးချယ်ပြီး ထုတ်ကြောင်း မြွက်ဆိုချက်ကို လျှောက်ထားသူများက ငြင်းဆိုခြင်းမပြုပေ။

ထို့ပြင်တဝ လျှောက်ထားသူများ၏ ရှေ့နေကြီးက အလုပ်ထုတ်ခံရသူများသည် လခဘလစာမျှသာ ရရှိကြောင်း၊ အခြားအခွင့်အရေးများ မရရှိခဲ့ကြောင်းနှင့် လျှောက်ထားလေသည်။ အခြားအခွင့်အရေးများကို ခုံရုံးတော်ရှေ့မှောက်၌ တောင်းဆိုသည်ဟု မပေါ်လွင်ချေ။ အလုပ်ထုတ်ခံရသောသူများသည် လပေါင်းများစွာအလုပ်မရှိဘဲ အလုပ်ရှင်က လစာပေးထားရသည်ကို ထောက်သဖြင့် ခုံရုံးတော်က နို့တစ်စာ၊ သို့တည်းမဟုတ် တလနို့တစ်စာအစား တလအတွက် လုပ်ခပေးပြီး အလုပ်မှထုတ်ရန် ခွင့်ပြုလိုက်ပါန်တူသည်။

ထို့ကြောင့် ဤအမှုတွင် ဝင်ရောက်စွက်ဖက်ရန် အကြောင်းမပြင်သဖြင့် လျှောက်ထား သူများ၏ လျှောက်လွှာကို စရိတ်နှင့်တကွ ပယ်လိုက်သည်။ ဤခုံရုံးတော်၏ ရှေ့နေခမှာ ၀၅ ဖြစ်စေရမည်။

၁၉၅၈

မောင်ဘအောင် အတွင်းရေးမှူး၊ အထွေထွေအာဏာရကိုယ်စားလည်း၊ မဓာနိုင်ငံလုံးဆိုင်ရာ ရေနံအလုပ်သမား အစည်းအရုံးများအဖွဲ့ချုပ်၊ ရန်ကုန်မြို့နှင့် ၁။ မြန်မာနိုင်ငံတော် ဝါဒီမိုးပင့်ပင်ကမ္ဘဏီ ၂။ နတ်ဆင်ရေနံကုမ္ပဏီ လိမိတက်၊ ရေနံချောင်းမြို့

တရားလွှတ်တော်ချုပ်

† ၁၉၅၀

အောက်တိုဘာ လ ၂၄ ရက်၊

ဟာဂျီအစ္စမေး(လ) ပါ ၅ (လျှောက်ထားသူများ)

နှင့်

မန္တလေးမြို့၊နယ်ပိုင်တရားမ တရားသူကြီး ပါ ၄ (လျှောက်ထားခံရသူများ)*

မြို့ပြဆိုင်ရာ ဌါးရမ်းခကြေးကြေပ်ရေး အက်ဥပဒေ ပုဒ်မ ၁၁ (၁) (ဃ) အရ စဉ်းစားရမည့် အချက်များ၊ ဌါးရမ်းခကြေးကြေပ်ရေးဝန်၏ဆုံးဖြတ်ချက်၊ တရားမကျင့်ထုံးကိုဥပဒေ ၁၁ တွင် အကျုံးမဝင်။

ဆုံးဖြတ်ချက်။ ။မြို့ပြဆိုင်ရာဌါးရမ်းခ ကြေးကြေပ်ရေးအက်ဥပဒေ ပုဒ်မ ၁၁ (၁) တွင် (ဃ) အရနှင့်ထုတ်လိုမှု တရားစွဲနိုင်ရန်အတွက် တရားစွဲဆိုခွင့်လက်မှတ်စာ 'လျှောက်ထား' ရာတွင် အခင်းဖြစ်မြေကို လျှောက်ထားသူများသည်၊ အဆောက်အဦ ဆောက်လုပ်ရန် အတွက် သဘောရိုးရိုးဖြင့် အလိုရှိမရှိ ပြဿနာကို စဉ်းစားရမည်ဖြစ်ပေသည်။ ယင်းသို့ စဉ်းစားရာ၌ လျှောက်ထားသူများသည်၊ အခင်းဖြစ် မြေပေါ်၌ အဆောက်အဦတည် ဆောက်ရန် အကယ်ပင် ရည်ရွယ်ချက်ရှိမရှိကို ထည့်သွင်းစဉ်းစားရပေလိမ့်မည်။

ဌါးရမ်းခ ကြေးကြေပ်ရေးဝန်၏ ဆုံးဖြတ်ချက်သည်၊ တရားမကျင့်ထုံးကိုဥပဒေ ပုဒ်မ ၁၁ တွင် အကျုံးမဝင်ချေ။

လျှောက်ထားသူများအတွက်၊ လွှတ်တော်ရှေ့နေကြီး ဦးအောင်မင်း (၁) လိုက်ပါဆောင်ရွက်သည်။

လျှောက်ထားခံရသူအမှတ် ၁ နှင့် ၄ အတွက်။ } အစိုးရ ရှေ့နေကြီး ဦးလှမောင် လိုက်ပါ ဆောင်ရွက်သည်။

လျှောက်ထားခံရသူ အမှတ် ၂ နှင့် ၃ အတွက်။ } လွှတ်တော်ရှေ့နေကြီး မစွတာ ဂျေ၊ အာ (ရ)။ ချောင်ဒရီ လိုက်ပါဆောင်ရွက်သည်။

တရားဝန်ကြီးဦးဘိုကြီး။ ။လျှောက်ထားခံရသူအမှတ် ၂၊အင် (နံ)။ အယ် (လ)၊ ဆင်ဝူတနှင့် တင်းဇ်၏ သားလျှောက်ထားခံရသူ အမှတ် ၃၊

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* ၁၉၅၀ ခုနှစ်၊ တရားမအယေးအဖွဲလျှောက်လွှာအမှတ် ၃၆။

† နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးမြင့်သိန်း၊ နိုင်ငံတော်တရားဝန်ကြီး ဦးချန်ထွန်း၊ နိုင်ငံတော်ဘရားဝန်ကြီး ဦးဘိုကြီး တို့ရှေ့မှောက်တွင် နိုင်ငံတော်တရားဝန်ကြီး ဦးဘိုကြီး က အဓိကံချမှတ်သည်။

မောင်ကျောက်လုံးတို့သည်၊ မန္တလေးမြို့၊ ချမ်းအေးသာဇံရပ်ကွက် အမှတ် ၆၀၃၊ ဦးပိုင်နံပါတ် ၁၊ ၂ ရှိမြေပေါ်တွင် ယခုအမှုနှင့် ပတ်သက်သည့် အချိန်ကာလအတောအတွင်း ဟာဂျီဦးဘိုးသာဝကဖ် ဂေါပကလူကြီးများထံမှ မြေငှါးရမ်းနေထိုင်သူများဖြစ်ကြသည်။ အင် (နှ)၊ အယ် (လ)၊ ဆင်ဥတနှင့် မောင်ကျောက်လုံးတို့သည်၊ ထိုမြေပေါ်ရှိ မူလငှါးရမ်းခဲ့သူများဖြစ်သူ ယင်း အင် (နှ)၊ အယ် (လ)၊ ဆင်ဥတနှင့် အာဂဝါလားတို့ဆောက်လုပ်ထားသောအိမ်တွင် နေထိုင်ကြသည် အာဂဝါလားသည် မိမိ၏ပိုင်ဆိုင်ခွင့်တဝက်ကို မောင်ကျောက်လုံးအားရောင်းခဲ့လေသည်။

၁၉၅၈

ဟာဂျီအစ္စမေ (လ်) ပါ ၅ နှင့် မန္တလေးမြို့၊ နယ်ပိုင်တရားမတရားသူကြီးပါ ၄။

လျှောက်ထားသူများသည် မန္တလေးမြို့၊ မြို့ပြဆိုင်ရာ ငှါးရမ်းခကြိုးကြပ်ရေးဝန်ထမ်းသို့ အင် (နှ)၊ အယ် (လ)၊ ဆင်ဥတနှင့် မောင်ကျောက်လုံးတို့အား မြို့ပြဆိုင်ရာ ငှါးရမ်းခကြိုးကြပ်ရေးအက်ဥပဒေပုဒ်မ ၁၁ (၁) (ဃ) အရ နှင်ထုတ်လိုမှုတရား စွဲဆိုနိုင်ရန်အတွက် တရားစွဲဆိုခွင့်လက်မှတ်စာ လျှောက်ထားလေသည်။ ထို လျှောက်လွှာကိုအထောက်အထားပြုသည့်အနေဖြင့် ဆောက်လုပ်မည့်အဆောက်အဦ ပုံစံနှင့်တကွ မန္တလေးမြို့၊ မြို့နေစီပါယ်မှ အဆောက်အဦ ဆောက်လုပ်ခွင့် အမိန့်စာကိုပါတင်သွင်းလေသည်။ ငှါးရမ်းခကြိုးကြပ်ရေးဝန်သည် လျှောက်ထားသူများ သဘောရိုးဖြင့် တရားစွဲဆိုခွင့်အမိန့်တောင်းသည် မဟောင်းသည်ကို ဝေဖန်ရာ၌ အခင်းဖြစ်မြေပေါ်တွင် လျှောက်ထားသူများသည် မိမိတို့အကြောင်းပြသကဲ့သို့ ကောင်းမွန်သောအဆောက်အဦကို တည်ဆောက်ရန် ရည်ရွယ်ချက်ရှိခဲ့ပါက လျှောက်ထားခံရသူများအား ကောင်းမွန်ခိုင်ခံ့သောအဆောက်အဦကို ဆောက်ခွင့်မပေးသင့်ဟုယူဆပြီးလျှင်၊ မူလငှါးရမ်းစဉ်အခါက မည်ကဲ့သို့သော အဆောက်အဦကိုသာဆောက်လုပ်သင့်သည်၊ မည်သည့်အချိန်ကာလအထိသာ အခင်းဖြစ်မြေကို ငှါးရမ်းသည်စသည့် အချက်အလက်များ ပေါ်ပေါက်ခြင်းမရှိကြောင်းတွေ့ရသည်ဟု အကြောင်းပြကာ ယခုလျှောက်ထားသူများ၏လျှောက်လွှာကိုပယ်ခဲ့လေသည်။ ယင်းသို့လျှောက်လွှာပယ်သည်ကို မကျေနပ်သဖြင့် ယခု လျှောက်ထားသူများက မန္တလေးမြို့၊ နယ်ပိုင်တရားမရုံးတော်သို့ စာဒကဝင်ရာတွင် ထိုရုံးတော်က လျှောက်ထားသူများသည် ဆောက်လုပ်မည့်အဆောက်အဦပုံစံများနှင့်တကွ၊ မန္တလေးမြို့၊ မြို့နေစီပါယ်မှအဆောက်အဦဆောက်လုပ်ခွင့် အမိန့်စာကိုပါ တင်ပြပြီးသည့်အပြင်၊ အဆောက်အဦကို ဆောက်လုပ်နိုင်သည့် ငွေကြေးအင်အားနှင့် ပြည့်စုံကြောင်း ပေါ်လွင်ထင်ရှားသည်ဟု ယူဆသည်။ သို့ရာတွင် ယခုလျှောက်ထားသူများသည် ၁၉၅၁ ခုနှစ်က လျှောက်ထားခံရသူများအပေါ်၌ နှင်ထုတ်လိုမှုစွဲဆိုနိုင်ခွင့်အမိန့်ရရှိရန်နှင့် စံငှါးခသတ်မှတ်ရန်အတွက်

၁၉၅၈

ဟာရိုအစ္စ မေ (လ်) ပါ၅ နှင့် မန္တလေးမြို့၊ နယ်ပိုင်တရားမ တရားသူကြီး ပါ၂ ၄။

လျှောက်ထားခဲ့ဘူးသည်ဖြစ်သဖြင့် ယခုလျှောက်လွှာမှာ ပိတ်ပင်ပြီးဖြစ်သည်ဟု ယူဆပြီးလျှင် စောဒကဝင်လွှာကိုပယ်လိုက်လေသည်။

ဌါးရမ်းခကြီးကြပ်ရေးဝန်၏အမိန့်နှင့် မန္တလေးမြို့၊နယ်ပိုင်တရားမရုံးတော်၏ အမိန့်များသည် အထင်အရှားမှားယွင်းနေသည်ကို တွေ့ရှိရလေသည်။ ဝန်မင်းသည် ဌါးရမ်းခကြီးကြပ်ရေး အက်ဥပဒေ ပုဒ်မ ၁၁ (၁) (ဈ) အရ စဉ်းစားရာဝယ် အခင်းဖြစ်မြေကို လျှောက်ထားသူများသည်၊ အဆောက်အဦဆောက်လုပ်ရန်အတွက် သဘောရိုးဖြင့် အလိုရှိမရှိဆိုသည့် ပြဿနာကိုသာ စဉ်းစားရမည်ဖြစ်ပေသည်။ ယင်းသို့ စဉ်းစားရာ၌ လျှောက်ထားသူများသည်၊ အခင်းဖြစ်မြေပေါ်၌ အဆောက်အဦ တည်ဆောက်ရန် အကယ်ပင် ရည်ရွယ်ချက် ရှိမရှိကို ထည့်သွင်းစဉ်းစားရပေလိမ့်မည်။ ဤအမှုတွင် လျှောက်ထားသူများသည် ဆောက်လုပ်မည့် အဆောက်အဦ ပုံစံနှင့်တကွ မြို့နိုစီပါယ်မှ ဆောက်လုပ်ခွင့် အမိန့်စာကိုပါတင်ပြသည့်အပြင် မိမိတို့မှာဆောက်လုပ်နိုင်စွမ်းရှိကြောင်းကိုလည်း သက်သေပြခဲ့လေသည်။ ဌါးရမ်းခကြီးကြပ်ရေးဝန်သည် မည်သို့သောစည်းကမ်းချက်များနှင့် မူလက ထိုမြေကိုဌါးရမ်းခဲ့ကြောင်းကိုသိရှိလိုက မြေဌါးစာချုပ်ကို ခေါ်ယူစစ်ဆေးသင့်လေသည်။ ဤရုံးတော် ရှေ့မှောက်၌ လျှောက်ထားခံရသူ အင် (နှ) ၊အယ် (လ) ၊ဆင်ဉူတနှင့်မောင်ကျောက်လုံးတို့၏ ပညာရှိရှေ့နေကြီးကယင်း စာချုပ်မိတ္တူကိုတင်ပြလေသည်။ ထိုစာချုပ်အရဆိုလျှင် ၎င်းလျှောက်ထားခံရသူများသည်၊ အခင်းဖြစ်မြေပေါ်၌ အစဉ်ထာဝရနေထိုင်ခွင့်မရှိသည်ကို တွေ့ရှိရလေသည်။

တဖန် မန္တလေးမြို့၊နယ်ပိုင်တရားမရုံးတော်က လျှောက်ထားသူများ၏ ယခုလျှောက်လွှာမှာ ပိတ်ပင်ပြီးဖြစ်သည်ဟု ဆုံးဖြတ်ခဲ့သည်မှာလည်း အထင်အရှားမှားယွင်းသည်ဟု တွေ့ရှိရလေသည်။ ဌါးရမ်းခကြီးကြပ်ရေးဝန်၏ ဆုံးဖြတ်ချက်သည် တရားမကျင့်ထုံးကိုဓည၀ေပုဒ်မ ၁၁ တွင် အကျုံးမဝင်ချေ။ အကယ်၍ ကြီးကြပ်ရေးဝန်၏ ပဌမအမိန့်သည် အပြီးသတ်အမိန့်ဖြစ်သင့်သည်ဟု စောဒကဝင်လျှင်လည်း၊ ထိုအမိန့်အရ တရားစွဲဆိုခွင့် လျှောက်တောင်းသည့်အချက်နှင့်စပ်လျဉ်း၍ မည်ကဲ့သို့မှုဆုံးဖြတ်ခြင်းမရှိခဲ့ချေ။

အထက်ပါအကြောင်းများကြောင့် ဌါးရမ်းခကြီးကြပ်ရေးဝန်၏ အမိန့်နှင့် နယ်ပိုင်တရားမရုံးတော်၏အမိန့်များကို ပယ်ဖျက်ပြီးလျှင်၊ ဤအမှုကိုပြန်လည်စစ်ဆေးဆုံးဖြတ်ရန်အတွက် ဌါးရမ်းခကြီးကြပ်ရေးဝန်ရုံးတော်သို့ပေးပို့လိုက်သည်။

ဤရုံးတော်၏တရားစရိတ်ကို ဌါးရမ်းခကြီးကြပ်ရေးဝန်ရုံးတော်၌ အနိုင်ရသူကရရှိစေရမည်။ ဤရုံးတော်၏ရှေ့နေခမှာ ဂ၅ ဖြစ်စေရမည်။

တရားလွှတ်တော်ချုပ်

အယ် (လ်)၊ အဖတ် (လျှောက်ထားသူ)

နှင့်

ပြည်ထောင်စု မြန်မာနိုင်ငံတော် (လျှောက်ထားခံရသူ)*

† ၁၉၅၈ စက်တင်ဘာလ ၁ ရက်။

နိုင်ငံခြားငွေလဲလှယ်ကြီးကြပ်မှုအက်ဥပဒေ အာဘော်နှင့်အရ၊ နိုင်ငံခြားသို့တင်ပို့သောပစ္စည်း၏တန်ဘိုးနှင့်ညီမျှသော နိုင်ငံခြားငွေကို မြန်မာပြည်တွင်းသို့တင်သွင်းရမည်။

ဌာနအက်ဥပဒေပုဒ်မ ၁၃၊ ပုဒ်မငယ် (၂) အရ၊ မည်သည့်အခါ တရားမစွဲနိုင်ခြင်း၊ မည်သည့်အခါတရားစွဲနိုင်ခြင်း။

ယင်းအက်ဥပဒေပုဒ်မ ၁၁ ပါပြဋ္ဌာန်းချက်များ၊ ထိုဥပဒေပုဒ်မ ၁၃၊ ပုဒ်မငယ် (၁) နှင့်မဆိုင်သောသူများနှင့်လည်းသက်ဆိုင်ခြင်း။

ဆုံးဖြတ်ချက်။ ။ နိုင်ငံခြားငွေလဲလှယ်မှု ကြီးကြပ်ရေးမူးက၊ လျှောက်ထားသူအား ထိုင်း (ယိုးဒယား) ပြည်သို့တင်ပို့ရောင်းချသော သတ္တုများ၏ တန်ဘိုးကို၊ စတာလင်ငွေဖြင့် မြန်မာပြည်သို့ဘင်သွင်းရန် စာဖြင့်ညွှန်ကြားသည်တွင်၊ လျှောက်ထားသူက၊ မိမိမှာ ထိုင်းပြည်မှလုပ်သားများ၊ ပစ္စည်းများကိုအသုံးပြုပြီး တူးဖေါ်ရသဖြင့်၊ ရောင်းချရသည့် ငွေအားလုံးကို တင်သွင်းမပို့နိုင်ကြောင်း ဖေါ်ပြပါစရိတ်များနုတ်ပြီးမှ ကျန်ငွေကိုသာ မြန်မာပြည်ကို တင်သွင်းနိုင်မည်ဖြစ်ကြောင်းနှင့် ပြန်ကြားလျှောက်ထားလေသည်။ ထိုလျှောက်ထားချက်သည် တရားဝင်သောလျှောက်ထားချက်မဟုတ်ပေ။ အဘယ်ကြောင့်ဆိုသော် နိုင်ငံခြားငွေလဲလှယ်ရေးကြီးကြပ်မှုအက်ဥပဒေ၏ အာဘော်နှင့်အရအားဖြင့် နိုင်ငံခြားသို့ကုန်ပစ္စည်း တင်ပို့သူတို့သည် ထိုပစ္စည်း၏တန်ဘိုးနှင့်ညီမျှသောနိုင်ငံခြား၏ငွေကို မြန်မာပြည်တွင်းသို့တင်သွင်းရမည်ဖြစ်သည်။

လျှောက်ထားသူသည်၊ နိုင်ငံခြားငွေလဲလှယ်မှုကြီးကြပ်ရေးဥပဒေပုဒ်မ ၁၃၊ ပုဒ်မငယ် (၁) အရ၊ ထိုပစ္စည်းများ၏တန်ဘိုးကို နိုင်ငံခြားငွေဖြင့် ကြီးကြပ်ရေးမူးကသတ်မှတ်သော ဘဏ်သို့ပေးသွင်းပါမည်ဟုကတိမပြုခဲ့သည်ဖြစ်ရကား၊ ထိုပုဒ်မ၏ ပုဒ်မငယ် ၂ အရတရားစွဲဆိုခြင်းမပြုနိုင်။

ထို့ပြင်လည်း ထိုပုဒ်မငယ် (၂) ၏ခြွင်းချက်အရ၊ ထိုပုဒ်မငယ်ပါပြဋ္ဌာန်းချက်များကို ချိုးဖေါက်ကြောင်းနှင့် တရားစွဲဆိုလျှင်၊ ပုဒ်မငယ် (၁) အရသတ်မှတ်ထားသော ကာလသည် ကျော်လွန်ပြီး နိုင်ငံခြားငွေကို သတ်မှတ်သော နည်းအတိုင်း၊ ပေးသွင်းခြင်း မပြုမသာ

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* ၁၉၅၇ ခုနှစ်၊ ဆုဇဝ တ်အယူခံမှုအမှတ် ၂၊၃၊၄၊၅၊

† နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးမြင့်သိန်း၊ တရားဝန်ကြီး ဦးဘိုကြီး နှင့် တရားဝန်ကြီး ဦးအောင်သာကျော် တို့ရှေ့မှောက်တွင် တရားဝန်ကြီးချုပ် ဦးဘိုကြီးက အဓိန်ချမှတ်သည်။

၁၉၅၈
အယ် (လ)၊
အဖတ် နှင့်
ပြည်ထောင်စု
မြန်မာနိုင်ငံ
တော်။

လျှင်တရားစွဲဆိုရမည်ဟုပြဋ္ဌာန်းထားသဖြင့် ပုဒ်မ ၁၃၊ ပုဒ်မငယ် (၁) ပါပြဋ္ဌာန်းချက်များကို ချိုးဖောက်မှသာလျှင် ပုဒ်မငယ် (၂)အရတရားစွဲဆိုနိုင်သည်ဟုယူဆရပေမည်။

သို့သော်ငြားလည်း နိုင်ငံခြားငွေလဲလှယ်မှုကြီးကြပ်ရေးအက်ဥပဒေပုဒ်မ ၁၁ ပါ ပြဋ္ဌာန်းချက်များသည်၊ ရသင့်ရထိုက်သောနိုင်ငံခြားငွေ မြန်မာပြည်တွင်းသို့ရောက်ရှိရေးကို ဖင့်နှေးစေသည့်သူများအား၊ အပြစ်ဒဏ်ပေးရန်အတွက်ပြဋ္ဌာန်းထားသည်ဖြစ်ရာ၊ ထိုဥပဒေပုဒ်မ ၁၃၊ ပုဒ်မငယ် (၁) နှင့်မဆိုင်သောသူများနှင့်လည်းသက်ဆိုင်ကြောင်းတွေ့ရှိရလေသည်၊

လျှောက်ထားသူအတွက်၊ မွန်စံလှိုင် လိုက်ပါ ဆောင်ရွက်သည်။

လျှောက်ထားခံရသူအတွက်၊ အစိုးရရှေ့နေကြီး ဦးတင်မောင် လိုက်ပါ ဆောင်ရွက်သည်။

တရားဝန်ကြီးဦးဘိုကြီး။ ။မြိတ်ခရိုင်၊ ဘုတ်ပြင်းမြို့နယ်ရှိ၊ အဖြိုက်နက်၊ ခဲမဖြူ စသည့်သယံဇာတပစ္စည်းများ ကြွယ်ဝသည့်နမ်မြင်းခေါ်သတ္တုတွင်းကို တူးဖော်ခွင့် လိုင်စင်ရရှိပြီးနောက်၊ ၁၉၄၉ ခုနှစ်ကုန်လောက်တွင် အယူခံတရားလို အယ် (လ်)၊ အဖတ်သည်၊ စတင်တူးဖော်၍၊ ၁၉၅၀-၅၁၊ ၁၉၅၂-၅၃ ခုနှစ်များတွင်လည်းဆက်လက်တူးဖော်လုပ်ကိုင်ခဲ့သည်။ ထိုဒေသသည် ထိုင်း (ယိုးဒယား) မြန်မာနယ်စပ်မှ ၆ မိုင်မျှသာကွာဝေးပြီး၊ ထိုင်းပြည်နှင့် ကူးလူးဆက်ဆံရေးခွင့် လွယ်ကူသည်နှင့်အမျှ၊ မြိတ်မြို့နှင့်လမ်းခရီး မသာယာသဖြင့် သယ်ယူပို့ဆောင်ရေးအခက်အခဲများရှိလေသည်။ ထိုအတောအတွင်း ဘဏ္ဍာတော်မင်းကြီးသည် နမ်မြင်း သတ္တုတွင်းတဝိုက်မှ သတ္တုအမြောက် အမြားကို၊ တိုင်းပြည်သို့ အခွန်မဆောင်ဘဲ ခိုးထုတ်ကြောင်းသတင်းရသဖြင့် သက်သေခံ အမှတ် ၁၁ စာကို မြိတ်ခရိုင်ဝန်သို့ ပို့ပြီး ထိုဒေသတဝိုက်မှသတ္တုများကို ထိုင်းပြည်သို့တင်ပို့လိုသည့် သတ္တုတူးဖော်ခွင့်လိုင်စင် ရသူများသည်၊ မိမိတို့တင်ပို့လိုသည့် သတ္တုတန်ချိန်ကို ကျမ်းကျိန်လွှာဖြင့် မြိတ်မြို့၊ ကော်လိတ်တော်အရာရှိ ရှေ့မှောက်၌ ကျေညာပြီး ကျသင့်သည့် အခကာက်တော်ကို ပေးဆောင်လျှင် တင်ပို့နိုင်ခွင့်ရှိကြောင်းဖြင့် ညွှန်ကြားလေသည်။ ထိုညွှန်ကြားချက်ကို မြိတ်ခရိုင်ဝန်က၊ အယ် (လ်)၊ အဖတ် နှင့် အခြားလိုင်စင်ရသူ ၄ ဦးတို့အား အကြောင်းကြားလိုက်လေသည်။

၁၉၅၀ ခုနှစ်၊ ဒီဇင်ဘာလ ၁၉ ရက်နေ့၌၊ နိုင်ငံခြားငွေလဲလှယ်မှုကြီးကြပ်ရေးမှူးက အယ်(လ)၊ အဖတ်အား ထိုင်းပြည်သို့တင်ပို့ရောင်းချသောသတ္တုများ၏ တန်ဘိုးကို စတာလင်ငွေဖြင့် မြန်မာပြည်သို့တင်သွင်းရန်စာဖြင့် ညွှန်ကြားသည်တွင်၊ အယ်(လ်)၊ အဖတ်က မိမိမှာထိုင်းပြည်မှလုပ်သားများ၊ပစ္စည်းများကို အသုံးပြုပြီးတူးဖော်ရသဖြင့်ရောင်းချရသည့် ငွေအားလုံးကိုတင်ပို့ခြင်း မပြုနိုင်ကြောင်း။

ဖေါ်ပြပါစရိတ်များကိုနုတ်ပြီးမှ ကျန်ငွေကိုသာ မြန်မာပြည်သို့တင်ပို့နိုင်မည်ဖြစ်ကြောင်းနှင့်ပြန်ကြားလျှောက်ထားလေသည်။ ထိုလျှောက်ထားချက်သည် တရားဝင်သောလျှောက်ထားချက်မဟုတ်ပေ။ အဘယ်ကြောင့်ဆိုသော် နိုင်ငံခြားငွေလဲလှယ်ရေးကြီးကြပ်မှုအက်ဥပဒေ၏ အာဘော်နှင့်အရေအာနဖြင့်၊ နိုင်ငံခြားသို့ကုန်ပစ္စည်းတင်ပို့သူတို့သည် ထိုပစ္စည်း၏တန်ဘိုးနှင့်ညီမျှသော နိုင်ငံခြားငွေကို မြန်မာပြည်တွင်းသို့ တင်သွင်းရမည်ဖြစ်သည်။ ထို့နောက် ကြီးကြပ်ရေးမှူးနှင့် အယ် (လ)၊ အဖတ်တို့သည် တဦးနှင့်တဦး နိုင်ငံခြားငွေပြန်လည်ပေးသွင်းရန် ကိစ္စနှင့်ပတ်သက်၍ စာအတန်တန်ရေးကြလေသည်။ ၁၉၅၃ ခုနှစ်တွင်မှသာ အယ် (လ)၊ အဖတ်သည် မြန်မာပြည်သို့စတာလင်ငွေ ၇,၀၀၀ တလီ၊ ၅၀,၀၀၀ တလီတင်ပို့လေသည်။

1958

အယ်(လ)၊ အဖတ်နှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံတော်။

အယ်(လ)၊အဖတ်သည် သတ္တုရောင်းချခွင့်ရရှိသောငွေ အမြောက်အမြားကို ထိန်ချန်ထားသည်ဟု စွပ်စွဲပြီးလျှင်၊ ၎င်းအားနိုင်ငံတော်အစိုးရက အထူးတရားသူကြီး ၂ (အထူးစုံစမ်းစစ်ဆေးရေးဌာန အက်ဥပဒေ) ရုံးတော်၊ ရာဇဝတ်ကြီးမှုအမှတ် ၃၂/၅၄၊ ၃၃/၅၄၊ ၃၄/၅၄၊ ၃၅/၅၄ တို့တွင်၊နိုင်ငံခြားငွေလဲလှယ်မှုကြီးကြပ်ရေးအက်ဥပဒေပုဒ်မ ၁၃ ကိုချိုးဖောက်သည်ဟူစွပ်စွဲကာ၊ထိုအက်ဥပဒေပုဒ်မ ၂၄ အရ တရားစွဲဆိုခဲ့ရာ၊ ထိုရုံးတော်က စွဲဆိုသည့်အတိုင်း မှုပြစ်ထင်ရှားစီရင်လိုက်လေသည်။ တရားလွှတ်တော်ကလည်း ယင်းသို့စီရင်သည်ကို အတည်ပြုပြီး ထောင်ဒဏ်ကိုအနည်းငယ်လျှော့လိုက်သည်။ အယ် (လ)၊ အဖတ်သည် ယခုထောင်မှလွတ်မြောက်ခဲ့ပြီဟုသိရှိရသည်။

အယ်(လ)၊ အဖတ်သည် ရာဇဝတ်ကြီးမှုအမှတ် ၃၂/၅၄ တွင် ၁၉၅၀ ခုနှစ်အတွင်း သတ္တုတန်ချိန် ၉၅၊ တန်ဘိုးငွေ ၅,၉၁,၀၁၄ ကျပ် ၅၄ ပြားရှိသတ္တုများတင်ပို့ခြင်းနှင့်စပ်လျဉ်း၍ အပြစ်ခံရသည်။ ရာဇဝတ်ကြီးမှုအမှတ် ၃၃/၅၄ တွင် ၁၉၅၁ ခုနှစ်အတွင်းသတ္တုတန်ချိန် ၇၄၊ တန်ဘိုးငွေ ၉,၅၉,၂၁၀ ကျပ် ကိုရောင်းချရာ၊ ထိုငွေအနက်ငွေ ၀,၂၇,၂၂၅ ကျပ် နှင့်စပ်လျဉ်း၍ အပြစ်ခံရသည်။ ရာဇဝတ်ကြီးမှုအမှတ် ၃၄/၅၄ တွင် ၁၉၅၂ ခုနှစ်အတွင်း သတ္တုတန်ချိန် ၁၆၀၊ တန်ဘိုးငွေ ၂၂,၀၅,၀၉၀ ကျပ်တင်ပို့ခြင်းနှင့်စပ်လျဉ်း၍ အပြစ်ခံရသည်။ ရာဇဝတ်ကြီးမှုအမှတ် ၃၅/၅၄ တွင် ၁၉၅၃ ခုနှစ် အတွင်း သတ္တုတန်ချိန် ၉၃ တန်၊ တန်ဘိုးငွေ ၉,၃၃,၇၄၄ ကျပ် တင်ပို့ခြင်းနှင့် ပတ်သက်၍ အပြစ်ခံရသည်။

အယ် (လ)၊ အဖတ်၏ပညာရှိရွှေနေကြီးက၊ အဓိကလျှောက်လဲသည်မှာ သတ္တုများကို ထိုင်းပြည်သို့တင်ပို့ရာ၌၊ အယ် (လ)၊ အဖတ်သည်နိုင်ငံခြားငွေလဲလှယ်မှုကြီးကြပ်ရေးအက်ဥပဒေပုဒ်မ ၁၃၊ ပုဒ်မငယ် (၁) အရ ထိုပစ္စည်းများ၏

၁၉၅၈
အယ် (လ)၊ အဖတ် နှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံ တော်၊

တန်ဘိုးကို နိုင်ငံခြားငွေဖြင့် ကြိုးကြပ်ရေးမှူးက သက်မှတ်သောဘဏ်သို့ ပေးသွင်းပါမည်ဟု ကတိမပြုခဲ့သည်ဖြစ်ရကား၊ ထိုပုဒ်မ၏ပုဒ်မငယ် (၂) အရတားစဲဆိုခြင်းမပြုနိုင်ဟု လျှောက်ထားလေသည်။ ထိုပုဒ်မ ၁၃ ပါစကားရပ်များကို လေ့လာ သုံးသပ်ရာ၌ ယင်းသို့သော လျှောက်ထားချက်ကို ထောက်ခံကြောင်း တွေ့ရှိရသည်။ ထို့ပြင်လည်း ထိုပုဒ်မငယ် (၂)၏ ခြွင်းချက်အရထိုပုဒ်မငယ်ပါ ပြဋ္ဌာန်းချက်များကို ချိုးဖောက်ကြောင်းနှင့် တရားစွဲဆိုလျှင်၊ပုဒ်မငယ် (၁) အရ သတ်မှတ်ထားသော ကာလသည်ကျော်လွန်ပြီး နိုင်ငံခြားငွေကို သတ်မှတ်သော နည်းအတိုင်းပေးသွင်းခြင်း မပြုမှသာလျှင် တရားစွဲဆိုရမည်ဟုပြဋ္ဌာန်းထားသဖြင့်၊ ပုဒ်မ ၁၃၊ ပုဒ်မငယ် (၁) ပါပြဋ္ဌာန်းချက်များကို ချိုးဖောက်မှသာလျှင် ပုဒ်မငယ် (၂) အရ၊ တရားစွဲဆိုနိုင်သည်ဟုယူဆရပေမည်။

သို့သော်ငြားလည်း နိုင်ငံခြားငွေလဲလှယ်မှု ကြိုးကြပ်ရေးအက်ဥပဒေ ပုဒ်မ ၁၁ ပါပြဋ္ဌာန်းချက်များသည်၊ရသင့်ရထိုက်သော နိုင်ငံခြားငွေမြန်မာပြည်တွင်းသို့ ရောက်ရှိရေးကို ဖင့်နှေးစေသည့်သူများအား အပြစ်ဒဏ်ပေးရန်အတွက်ပြဋ္ဌာန်း ထားသည်ဖြစ်ရာ၊ထိုအက်ဥပဒေပုဒ်မ ၁၃၊ ပုဒ်မငယ် (၁) နှင့်မသက်ဆိုင်သောသူ များနှင့်လည်း သက်ဆိုင်ကြောင်းတွေ့ရှိရလေသည်။ ဤအမှုများတွင် အယ် (လ)၊ အဖတ်သည် မိမိတင်ပို့သော သတ္တုများအတွက် ရရှိသောနိုင်ငံခြား ငွေများ မြန်မာပြည်ဘွင်းသို့ ရောက်ရှိရေးကို ဖင့်နှေးစေသည်ဟု တရားစွဲဆိုခြင်းခံခဲ့ရသည် ဖြစ်ရကား၊ ပုဒ်မ ၁၃၊ ပုဒ်မငယ် (၂) ကိုချိုးဖောက်သည်ဟု မဆိုနိုင်သော်လည်း သက်သေအထောက်အထား လုံလောက်လျှင် ပုဒ်မ ၁၁ ကိုချိုးဖောက်သည်ဟု ယူဆနိုင်လေသည်။

အယ် (လ)၊ အဖတ်၏ ပညာရှိရွှေနေကြီးကအယ် (လ)၊ အဖတ်မှာအထူး စုံစမ်းစစ်ဆေးရေးဌာနက ၁၉၅၂ ခုနှစ်၊ဇန်နဝါရီလ ၂၀ ရက်နေ့တွင်ဘမ်းဆီးပြီး ထိုနှစ် ဩဂုတ်လ ကြမ္မသာ အာမခံဖြင့်လွှတ်ကြောင်း။ ထို့ပြင် ၁၉၅၃ ခုနှစ်၊ ဩဂုတ်လ ၅ ရက်နေ့၌ ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေး ထိန်းသိမ်းစောင့်ရှောက်မှုအက်ဥပဒေအရ၊ ဘမ်းဆီးချုပ်နှောင်ခြင်းခံနေရသဖြင့်၊ နိုင်ငံခြားငွေများကို မြန်မာပြည် တွင်းသို့ ပြန်လည်ပေးဆွဲခြင်း မပြုနိုင်ပါဟု လျှောက်ထားသည်။ သို့ရာတွင် အယ် (လ)၊ အဖတ်သည် ဘန်ကောက်မြို့၌ အလုပ်တိုက်ခွဲဖွင့်ထားပြီး မိမိ၏သား ကိုမန်နေဂျာ အဖြစ်ဆောင်ရွက်စေသည့်အပြင်၊ အချုပ်ခံနေရသည့်အချိန်မှ အပ၊ အခြားသော အချိန်များတွင် ဘန်ကောက်မြို့တလည့်၊ မြိတ်မြို့တလည့်၊ မိမိ၏ လုပ်ငန်းဆောင်တာများကို လုပ်ကိုင်ဆောင်ရွက်နေသည်ဟု သက်သေအထောက် အထားရှိလေသည်။ ထို့ပြင်လည်း ထိုင်းပြည်ရှိနိုင်ငံခြား ငွေလဲလှယ်မှုကြိုးကြပ်

ရေးအရာရှိထံ မြန်မာပြည်သို့စတာလင်ငွေ တင်သွင်းရန်အတွက် ၁၉၅၃ ခုနှစ်၊ ဇန်နဝါရီလ ၃၁ ရက်နေ့၌ လျှောက်ထားသည်တွင် ထိုအရာရှိကယင်းသို့ လျှောက်ထားသည်ကို၊ မူအားဖြင့်ကန့်ကွက်ရန်မရှိကြောင်းနှင့်ပြန်ကြားလေသည်။ ယင်းသို့ စတာလင်ငွေကို မြန်မာပြည်သို့ တင်ပို့ရာ၌၊ အခက်အခဲ မရှိသည်တကြောင်း။ ဘန်ကောက်မြို့ အလုပ်တိုက်ခွဲ၌လည်း အယ် (လ်)၊ အဖတ်မရှိလျှင်၊ ၎င်း၏ သားမန်နေဂျာအဖြစ် အုပ်ချုပ်နေသည် တကြောင်းတို့ကြောင့်၊ အကယ်၍သာ အယ်(လ်)၊ အဖတ်သည် နိုင်ငံခြားငွေကို မြန်မာပြည်တွင်းသို့ တင်သွင်းလိုပါက တင်သွင်းနိုင်မည်ဖြစ်ကြောင်း တွေ့ရှိရလေသည်။ ထို့ပြင်လည်း ၁၉၄၉ ခုနှစ်ကုန် လောက်ကစ့တင်ပြီး သတ္တုများတင်ပို့ရောင်းချခဲ့ရာ ၁၉၅၀ ခုနှစ်၊ ဒီဇင်ဘာလ ၁၉ ရက်နေ့၌၊ နိုင်ငံခြားငွေလဲလှယ်မှု ကြီးကြပ်ရေးမှူးက၊ သတ္တုများရောင်းချ၍ ရရှိသော နိုင်ငံခြားငွေများကို တင်ပို့ရန် အကြောင်းကြားပြီး အတန်တန်သတိပေးသော်လည်း ၁၉၅၃ ခုနှစ်၊ ဇန်နဝါရီလ ၃၁ ရက်နေ့ကျမှသာ ထိုင်းပြည်ကြီးကြပ်ရေးအရာရှိသို့ နိုင်ငံခြားငွေ တင်သွင်းခွင့်တောင်းခဲ့လေသည်။

၁၉၅၀ အယ် (လ်)၊ အဖတ် နှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံတော်၊

အထက်ဖေါ်ပြပါ အကြောင်းများကို ထောက်ထားပြီးလျှင်၊ အယ် (လ်)၊ အဖတ်အား နိုင်ငံခြားငွေ လဲလှယ်မှုကြီးကြပ်ရေးအက်ဥပဒေပုဒ်မ ၂၄ အရပြစ်မှု ထင်ရှားစီရင်သည်ကို ဝင်ရောက်စွက်ဘက်ရန် အကြောင်းမမြင်သဖြင့် အယူခံလွှာများကိုပလပ်လိုက်သည်။

၁၉၅၁ ခုနှစ်၊ ရာဇဝတ်ဥပဒေပြင်ဆင်ချက်အက်ဥပဒေ ပုဒ်မ ၁၂ (၁) အရ အထက်ဖေါ်ပြပါပြစ်မှုများကို ကျူးလွန်ခြင်းဖြင့်၊ အယ်(လ်)၊အဖတ် ရရှိသည်ဟု အောက်ရုံးများကဆုံးဖြတ်ချက်ချထားသည့် ငွေများမှာ၊ သက်သေအထောက် အထားများရှိသဖြင့် ဝင်ရောက်စွက်ဘက်ရန်အကြောင်းမမြင်။

၁၉၅၁ ခုနှစ်အတွင်း တင်ပို့ရောင်းချသော သတ္တုတန်ချိန် ၇၄၊ တန်ဘိုးငွေ ၉,၅၉,၂၁၈ ကျပ် ရှိရာ၊ ၎င်းငွေများမှတရားခံပေးသွင်းသော စတာလင်ငွေ ၁၂,၀၀၀ နှင့်ညီမျှသောမြန်မာငွေ ၁,၆၀,၀၀၀ ကျပ်အနက်၊ ငွေ ၁,၃၁,၉၉၃ ကျပ်နုတ်ပြီး၊ ကျန်ငွေ ၀,၂၇,၂၂၅ ကျပ် အတွက် တရားစွဲဆိုလေသည်။ အထက်ဖေါ်ပြပါငွေ ၁,၆၀,၀၀၀ ကျပ် မှငွေ ၁,၃၁,၉၉၃ ကျပ် မနုတ်မီ၊ ၁၉၄၉ ခုနှစ်တွင် တင်ပို့ရောင်းချသော သတ္တုများတန်ဘိုးငွေ ၂၀,၀၀၆ ကျပ် ကိုနုတ်ခဲ့ဟန်လက္ခဏာရှိသည်။ အောက်ရုံးများဆုံးဖြတ်ချက်ချသည်ကို လက်ခံသော်လည်းသတ္တုများရောင်းချ၍ရရှိသောငွေများမှ တရားဝင်သောစရိတ်များကို နုတ်ရန်ကိစ္စနှင့် ပတ်သက်၍ ဤအမှုတွင်သက်သေခံချက်အပြည့်အစုံ အခိုင်အလုံ မရှိသဖြင့်၊ ဤရုံးတော်ကမည်သို့မျှ ဆုံးဖြတ်ချက်ချမှတ်ခြင်းမပြုနိုင်ချေ။

SUPREME COURT.

1958 Dec. 18.

C. AH LON AND ONE
DAW TIN TIN AND ONE
DAW TIN TIN ....
U LON ....
(APPELLANTS)

v.

R.I.A. U MAUNG GYI AND ONE (RESPONDENTS).*

The Present War Termination (Definition) Act, 1946 (Burma Act No. XII of 1946), s. 2—Date of termination of war—Official declaration of—Transfer of Property Act, s. 53A—Right under—Bar implied by.

The Appellants obtained possession of some pieces of Land belonging to the Respondent Association under the terms of an agreement of sale set out in the minutes of a meeting of the Managing Committee of the Association held on the 18th September 1943. The agreement contains a provision for the return of the properties to the Respondents on payment of the original price within six months of the Government's announcement or publication of the termination of the Great War. The agreement further provides that in the event of the Respondent's failure to make the repurchase within the time agreed upon, the Appellants would pay a further sum of K 5,000 before they could perfect their title to the property by means of a registered sale deed. In July 1947 the Respondents offered to repay the agreed sum of K 10,000 and demanded the return of these lands. Failing compliance the Respondents brought four separate suits in the District Court of Mandalay against the Appellants for recovery of possession of these lands. The suits were decreed and the decrees were later confirmed on appeal by the High Court. As in the lower Courts it is contended before this Court that since the war must be deemed to have ended with the simultaneous announcements that were made in London, Washington, Moscow and Chungking regarding the unconditional surrender of Japan on the 14th August 1945 the offer made by the Respondents to repurchase the properties did not fall within the time limit set out in the agreement *i.e.* within six months of the official declaration of the end of the Great War and that the Respondents were not entitled to bring their suits for recovery of possession of the lands on the basis of their title, but should file instead a suit for specific performance of contract.

Held: That in pursuance of s. 2 of the Present War Termination (Definition) Act, 1946 (Burma Act No. XII of 1946) the Government on the 5th February 1947 declared by announcement that the 1st day of February 1947

* Civil Appeals Nos. 4, 5, 6 and 7 of 1956.

† *Present*: U MYINT THEIN, Chief Justice of the Union, U BO GYI, J. and U ACHE TUA GYAW, J.

was to be treated as the date of termination of war in Burma and that in interpreting the terms of the agreement it would be unnecessary to look beyond the declaration made under Act XII of 1946.

Held also—

(1) that s. 53A of the Transfer of Property Act confers a right to the transferee in possession under an unregistered contract of sale to protect his possession, but confers no active title on the transferee.

Probodh Kumar Dass and others v. *Dantmara Tea Co. Ltd. and others*, A.I.R. (1947) (P.C.) pp. 1 and 2, referred to.

(2) that this section only entitles a person in possession to invoke the doctrine of part performance as a shield to protect his possession if the conditions therein referred to are satisfied and does not enable a person (transferee) who has lost possession to sue for recovery of it.

Venangi Veera Raghave Rao v. *Vedangi Gopalarao*, A.I.R. (1942) Mad. 125 at 126-7; *Peary Lal and another* v. *Prithi Singh and others*, A.I.R. (1945) All. 422, referred to.

(3) that the terms of s. 53A of the Transfer of Property Act imposes a bar on the transferor if the transferee's possession is challenged by him in breach of the terms of the contract or instrument of transfer but where such an agreement expressly provides that the transferor could repurchase the property within a fixed period, he cannot justly be debarred from enforcing his right so expressly provided by the terms of the contract.

Ram Protab Kayan v. *The National Petroleum Co. Ltd.*, A.I.R. (1950) Cal. 23 at 27, referred to.

Held further: That although the Appellants had entered upon the property under the agreement in question, they had acquired no title whatsoever to the same to enable them to resell the property and the Respondents could not therefore ask for a decree for specific performance of the contract to resell. In other words, the Respondents' suits for recovery of possession of lands on the basis of their title are held to be competent.

Ba Han for the appellants.

E Maung and *K. R. Venkatram* for the respondents.

Judgment delivered by

U AUNG THA GYAW, J.—These are four appeals brought by the appellants U Ah Lon and his wife Daw Tin Tin against the Buddhist Infirmary Association of Mandalay represented by its officers B.I.A. U Maung Gyi and U San Hla. The appellants obtained possession of some pieces of land belonging to the

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C. AH LON AND ONE ; DAW TIN TIN AND ONE ; DAW TIN TIN : U LON *v.* B. I. A. U MAUNG GYI AND ONE.

respondent Association under the terms of an agreement of sale set out in the minutes of a meeting of the Managing Committee of the Association held on the 5th waning of *Tawthalin* 1305 B.E. (18th September 1943). The agreement contains a provision for the return of the properties to the respondents on repayment of the original price within the time fixed therein. The respondents in July 1947 offered to repay the agreed sum of K 10,000 and demanded the return of these lands. Failing compliance they brought four separate suits in the District Court of Mandalay against the appellants for recovery of possession of the lands. These suits were decreed and the decrees were later confirmed on appeal by the High Court.

In both these Courts the appellants unsuccessfully set up the defences that the respondents were not entitled to bring their suits for recovery of possession of the lands on the basis of their title but should file instead a suit for specific performance of contract and that under the terms of the agreement the offer made to repurchase the properties did not fall within the time limit set out in the agreement *i.e.* within six months of the official declaration of the end of the Great War. The correctness of these findings have now been challenged in this Court.

The particular Burmese expression of the terms of the agreement giving rise to the appellants' latter contention runs as follows:

"စစ်ကြီးပြီးပါကြောဟုအစိုးရကကျေညာသည့်နေ့ရက်မှ၊ နောက် ၆ လ အထိ၊ ဦးလုံးက အသင်းမှဝယ်ယူရင်း ငွေ ၁၀,၀၀၀ နှင့်၊ အသင်းက ပြန်၍ဝယ်ယူသောအခါ၊ အသင်းသို့ပြန်လည်ရောင်းချပါမည်။"

Rendered into English these words mean: "If the society buys back for K 10,000, being the original price paid by U Ah Lon, within six months of the

Government's annòuncement or publication of the end or termination of the Great War, (U Ah Lon) shall resell to the society etc."

For the appellants it is put forward that the word "Government" occurring in this agreement could not mean the Government of Burma, for Burma was not directly involved in the Great War as a belligerent but that the term would more aptly mean the Governments of the Great Powers which were actively engaged in hostilities; and the declaration or announcement of the end of the war would therefore refer only to the simultaneous announcements that were made in London, Washington, Moscow and Chungking regarding the unconditional surrender of Japan on the 14th August 1945. By reason of this surrender hostilities would have ceased in all battle fronts and the six months period mentioned in the agreement must, according to the appellants, be deemed to commence from the date of this announcement.

Apart from the difficulty of crediting the parties entering into the contract in occupied Burma in 1943 with any foreknowldge of this great event that was in store within the next few following years, there is the fact that the end of hostilities in the countries involved in the Great War did not immediately result in the restoration of normal civic life. In Japan the occupation forces remained in the country for a number of years. In this country the cessation of hostilities was followed by a period of military administration. What the parties in this case had possibly in mind was some official declaration of the end of the war which would make it possible for them to carry out the terms of the agreement. The respondent Association was in financial straits and after the restoration of peace in the country it would

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need some considerable time to rehabilitate its finances to be in a position to repay the sum agreed upon for the return of the lands.

As far as Burma was concerned an announcement of this nature was in fact made by the Government on 5th February 1947 declaring that the 1st of February 1947 was to be treated as the date of termination of the war in Burma. This declaration was made in pursuance of section 2 of The Present War Termination (Definition) Act, 1946 (Burma Act No. XII of 1946) which reads:

> "The Governor may declare what day is to be treated as the date of the termination of the present war, and the present war shall be treated as being terminated on the date so declared for the purposes of any provision in any Act, Proclamation, or Regulation for the time being in force in the Union of Burma, and, except where the context otherwise requires, of any provision in any contract or instrument referring, expressly or impliedly, to the present war."

The termination of the war was expressly referred to in the agreement between the parties to the suit and in interpreting the terms of the agreement it would be unnecessary to look beyond the declaration made under Act XII of 1946 by the Government of Burma.

The need for making such declarations by Governments is well explained by McNair in his Legal Effects of War, 2nd Edition, at page 5, as follows:

> "It is important to know definitely when a state of war comes to an end, so that normal commercial and other intercourse with the late enemy may be resumed. An armistice does not produce this result. . . . Nor does the signature of a treaty of peace have that effect so long as the treaty remains unratified. . . . . Towards the close of the war of 1914-18 Parliament by The Termination of the Present War (Definition) Act,

> 1918 conferred upon the Crown in Council power to declare the date of termination of the war. . . . . Such a date was to be as nearly as might be the date of the exchange or deposit of ratification of the treaty or treaties of peace."

Thus, it was in accord with the practice in Great Britain that the Government of Burma enacted Act No. XII of 1946 and made the declaration of 5th February 1947. [See also *Kotzias* v. *Tyser* (1) and Hackworth's Digest of International Law, Vol. 6, page 429.] Consequently, the view advanced on the appellants' behalf cannot prevail.

The appellants' further contention that the respondents should be driven to a suit for specific performance of that part of the agreement relating to the repurchase of the properties is also of no merit whatsoever. The agreement permitting the respondents to repurchase the properties on payment of the original price received by them from the appellants forms only a part of the contract which the parties agreed to perform before title to the property could be obtained by means of registered conveyances. After the clause permitting the respondents to repurchase the properties, the agreement between the parties further provided that in the event of the respondents' failure to make the repurchase within the time agreed upon, the appellants would pay a further sum of K 5,000 before they could perfect their title to the property by means of a registered sale deed. It is thus clear that, although the appellants had entered upon the property under the agreement in question, they had acquired no title whatsoever to the same to enable them to resell the property. The Respondents could not therefore ask for a decree for specific performance of the contract

(1) 2 K.B. 69 at 77.

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to resell. From the terms of the agreement taken as a whole it would appear that only on the respondents' failure to offer repurchase of the properties within the appointed period and on the appellants' payment of a further sum of K 5,000, their defence based on section 53A of the Transfer of Property Act would prevail against the respondents' claim.

This section confers a right to the transferee in possession under an unregistered contract of sale to protect his possession but confers no active title on the transferee. [See *Probodh Kumar Dass and others* v. *Dantmara Tea Co. Ltd. and others* (1)].

Section 53A only entitles a person in possession to invoke the doctrine of part performance as a shield to protect his possession if the conditions therein referred to are satisfied and does not enable a person (transferee) who has lost possession to sue for recovery of it. [See *Venangi Veera Raghave Rao* v. *Vedangi Gopalarao* (2) and *Peary Lal and another* v. *Prithi Singh and others* (3)].

The terms of section 53A of the Transfer of Property Act impose a bar on the transferor if the transferee's possession is challenged by him in breach of the terms of the contract or instrument of transfer but where such an agreement expressly provides that the transferor could repurchase the property within a fixed period, he cannot justly be debarred from enforcing his right so expressly provided by the terms of the contract. "When the section says that the transferor shall be debarred from enforcing any right against the property other than a right expressly provided by the terms of the contract, by plain implication it sanctions an enforcement of a right which has been so provided. And there is

(1) A.I.R. (1940) pp. 1 and 2. (2) A.I.R. (1942) Mad. 125 at 126-7.
(3) A.I.R. (1945) All. 422.

obvious justice in this for if the transferor is to be held to his bargain with the transferee in respect of the property it is only just that he should be given liberty to enforce his contractual rights against the latter in respect of it." [See *Ram Protab Kayan* v. *The National Petroleum Co. Ltd.* (1)].

The respondent-plaintiffs were thus entitled to sue for recovery of possession of the properties from the appellants as their right to the return of the same is expressly provided in the agreement under which possession was originally transferred to the appellants.

Accordingly, these appeals fail and will be dismissed with costs. Advocate's fee K 340.

(1) A.I.R. (1950) Cal. 23 at 27.

SUPREME COURT.

† S.C. 1958

Dec. 15.

RUGLAL THANDURAM (APPLICANT)

v.

THE FINANCIAL COMMISSIONER (COMMERCE), BURMA (RESPONDENT).*

Bills of Lading Act—Preamble—Bills of Lading—When issued—Accepted commercial practice—Burma Carriage of Goods by Sea Act—Sch.—Art. III—"Shipped"—Meaning—(Obiter)—*Sea Customs Act, s. 167—No offence committed under—No penalty should be imposed.*

In consequence of the Press Communiqué No. 6 of 1955 issued by the Government of Burma in the Import Policy Branch of the Ministry of Trade Development, on the 10th March 1955 the applicants who had opened a letter of credit on the 7th March 1955 took immediate steps to cancel their orders placed in February by despatch of a cable and a letter on the 11th March 1955. Instead of a reply to their cable the applicants received an Air letter from Tokyo, dated the 11th March 1955 advising that the goods ordered had been shipped by S.S. "Isuzu Maru" which eventually arrived in Rangoon. On or about the 22nd April 1955 on the strength of the Bills of Lading which bore the date 10th March 1955 the Customs allowed the applicants to clear the goods from the S.S. "Isuzu Maru" as having been despatched prior to 11th March 1955. In December 1955 the Collector of Customs relying on the date shown in the Log Book of the said ship came to the conclusion that the goods in question were loaded on to the "Isuzu Maru" on or after the 17th March and holding that on that account the applicants were not entitled to the relief clauses of the said Press Communiqué, imposed on them a penalty equivalent to twice the value of the goods, after rejecting the explanation tendered by them. An application in Revision to the Financial Commissioner brought no relief to the applicants.

Held: As can be seen from the preamble of the Bills of Lading Act and the provisions of the Burma Carriage of Goods by Sea Act that it is an accepted commercial practice to issue Bills of Lading after goods have been received by the master of the vessel or the agent of the carrier; therefore there was no justification for the view held by the Financial Commissioner that the Bills of Lading were false documents, merely because the date of their issue did not correspond with the date shown in the Log Book.

Obiter: With the passage of time and the increased tempo of commercial activity, when shippers rarely see the ship on which their goods are carried and when the process of loading is left entirely to the carrier, the meaning of the word "shipped" may have come to mean that the goods had been given into the custody of the carrier even if the goods had not been actually loaded nor had the ship actually sailed.

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* Civil Misc. Application No. 49 of 1957.

† *Present:* U MYINT THEIN, Chief Justice of the Union, U BO GYI, J. and U AUNG THA GYAW, J.

Bowes v. *Shand*, L.R. 11 A.C. (1876-1877) 455, referred to.

Held further : That even if any offence had been committed in respect of their goods, the applicants were innocent participants and that since no offence under s. 167 of the Sea Customs Act was committed by the applicants, no penalty should have been imposed on them.

Kyaw Min for the applicant.

Hla Maung (Government Advocate) for the respondent.

The judgment was delivered by the Chief Justice of the Union

U MYINT THEIN, C.J.—To understand the position which prevailed in this case it is necessary to refer back to the time when Press Communiqué No. 6 of 1955 was issued by the Import Policy Branch of the Ministry of Trade Development, on the 10th March 1955. It runs :

> "It has come to the knowledge of the Government that there has been a great deal of speculative activity with regard to O.G.L. goods and that orders far in excess of the actual requirements of the country have been placed by importers. It has therefore been decided, pending a review of the situation to suspend immediately until further notice, all O.G.Ls. for imports. Therefore, all goods which are covered by existing O.G.Ls. and which are shipped on and after the 11th March 1955 require individual licences. Importers who had opened letters of credit on or before the 10th March 1955 but are unable to cancel their orders in time must apply for individual import licences submitting full documentary evidence to show that shipment has been or will be effected on or after the 11th March 1955 because of circumstances entirely beyond their control. Goods not covered by such letters of credit will be allowed to be imported without individual licences only if shipped before midnight of the 10th March 1955.
>
> The Government wishes to assure the consumer public that these measures have been taken merely to prevent wastage of foreign exchange by speculators and that

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RUGLAL THANDURAM v. THE FINANCIAL COMMISSIONER (COMMERCE), BURMA.

steps are being taken to ensure that regular supply of essential commodities are not in any way affected."

The applicants are importers of textiles and seemed to have imported in large quantities. In respect of the goods involved in this case, a sale note was executed in Japan on the 7th February 1955. On the 7th March 1955 a letter of credit was opened for £ 20,000 through the Punjab National Bank of Rangoon. The sum represents the price of goods of which the particular consignment formed a part. With the publication of the Press Communiqué, they made immediate efforts to have their orders cancelled by the despatch of the following cable on the 11th March 1955—

> "Government closed O.G.L. goods shipped after tenth not allowed therefore don't ship any goods cancel all our goods reply."

A letter confirming the above was depatched the same day. No reply to the cable was received but this is explained by the arrival of an Air Letter dated the 11th March 1955 and bearing the Tokyo Post Mark 12.111.55, a letter which must have been written before the arrival of the cable in Japan. It contains the information that the goods had been shipped by the S.S. "Awa Maru" and the S.S. "Isuzu Maru". We are not concerned with the "Awa Maru" shipment.

The "Isuzu Maru" arrived at Rangoon in due course and on the strength of the Bills of Lading which bear the date 10th March 1955, they were accepted by the Customs as relating to goods despatched prior to 11th March 1955, and delivery was taken by the applicants on or about the 22nd April 1955.

In December 1955, the Collector of Customs came to the conclusion that the goods were actually loaded on to the "Isuzu Maru" on or after the 17th

March. He accepted the date shown in the Log Book as the day the goods were actually loaded and rejected the date shown on the Bills of Lading. Therefore he held that the goods were actually shipped after the 10th March and thus, the consignment did not come within the relief clauses of Press Communiqué No. 6. Applicants were called upon to show cause but their explanation was not accepted and a penalty of K 99,600, being twice the value of the goods, was imposed. An application in Revision to the Financial Commissioner brought no relief to the applicants

The Log Book is not among the records placed before us, but we see no reason to question the finding of the Customs authorities that according to the Log Book entries, actual loading began on the 17th March 1956. We would, however, point out that there is no justification for the view held by the Financial Commissioner that the Bills of Lading were false documents. It is commercial practice to issue Bills of Lading after the goods have been received by the master of the vessel or the agent of the carrier. This is an accepted practice as can be seen from the preamble of the Bills of Lading Act, part of which reads as follows:

> "And whereas it frequently happens that the goods in respect of which bills of lading purported to be signed have not been laden on board, and it is not proper that such bills of lading in the hands of a *bona fide* holder for value should not be questioned by the master or other person signing the same, on the ground of goods not having been laden as aforesaid . . ."

There is also the Burma Carriage of Goods by Sea Act. Article III of its schedule reads:

> "After receiving the goods into his charge the carrier, or the master or agent of the carrier shall, on demand of

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RUGLAL THANDURAM v. THE FINANCIAL COMMISSIONER (COMMERCE), BURMA.

the shipper, issue to the shipper a bill of lading showing among other things, . . ."

This aspect, however, does not dispose of the case, for the phrase used in Press Communiqué No. 6 is "shipped before midnight of the 10th March 1955". There is some difficulty in regard to the interpretation of the word "shipped". Learned counsel for the applicants contends that since the goods had been given into the custody of the carrier, the applicants had no means of recalling them and that, as far as the applicants are concerned, it should be taken the goods had been "shipped", even if the goods had not been actually loaded nor had the ship actually sailed. The leading authority on the meaning of the word "shipped" appears to be the House of Lords case of *Bowes* v. *Shand* (1) where their Lordships, reversing a unanimous verdict of the Court of Appeal, interpreted that word to mean "put on board". This case was decided in the leisurely days of 1877 and we do not know if, with the passage of time and the increased tempo of commercial activity, when shippers rarely see the ship on which their goods are carried and when the process of loading is left entirely to the carrier, the meaning of the word "shipped" has not come to mean what learned counsel has suggested. On the meagre materials before us and because of the summary nature of the proceedings, we do not propose to express an opinion. Furthermore, for the purpose of this case, a decision on the point is not necessary.

Assuming that the goods were not actually "shipped" before the 11th March, then the applicants could have been granted relief under the provisions set out in Press Communiqué No. 6. The goods were contracted for in February, the letter

(1) L.R. 11 A.C. (1876-1877) 455.

of credit was opened on the 7th March, insurance was affected in Japan by Hind Coy. on the 7th March, the invoices were issued on the 9th March, the Bills of Lading were obtained on the 10th March and the Bills of Exchange negotiated on the 15th and 16th March. The applicants' action, judged by their cable and letter of the 11th March to Hind Coy., was *bona fide* and above board.

The learned Government Advocate lays stress on the Financial Commissioner's observations that the applicants should have applied for an individual license. But the applicants had relied on the letter of Hind Coy. dated the 11th March and since the customs authorities had accepted the date of the Bill of Lading as the date of shipment, the goods were cleared, and there was no occasion to apply for an individual license. It was not until December 1955 that proceedings against the applicants were started and it was only in March 1956 that the order imposing penalty was passed.

It is clear to us that, in so far as the applicants are concerned, they had done what they could, even to the extent of sending instructions to cancel their order, both by cable and by letter on the 11th March 1955. Even if any offence had been committed in respect of their goods, the applicants were innocent participants. Action against them was under section 167 of the Sea Customs Act which deals with offences and penalties. Since no offence was committed by the applicants, no penalty should have been imposed upon them.

In these circumstances, the orders of the Financial Commissioner confirming the imposition of the penalty of K 99,600 and the original orders imposing the penalty are set aside. The Banker's guarantee put forward in respect of the same is to be vacated.

SUPREME COURT.

† S.C. 1958

Dec. 29.

THE UNION OF BURMA (APPLICANT)

v.

U HLA TUN PRU AND TWO OTHERS (RESPONDENTS)*.

Evidence Act, s. 138—Comprehensive—Must be read with s. 33—Right under—Procedure in Civil Proceedings—Procedure in Summons case—Procedure in Warrant case—Two stages in Warrant case—Procedure under—Different from procedure under s. 256, Cr P.C.—S. 33—Proviso—Three requisites in—Application of—Criminal Procedure Code—Chapter XXI—In trials under—Evidence of absent witnesses given at earlier stage of same proceeding—Admissibility—Identification—Conviction upon—Wisdom of.

S. 138 of the Evidence Act in its entirety is comprehensive and embodies the normal procedure to be adopted in regard to examination of witnesses. It even sets out what could be asked in examination in-chief, cross-examination and re-examination.

It gives the right to a party, whether he be complainant or accused, plaintiff or defendant, to cross-examine any witness examined by the opposite party. The express provision as to cross-examination, embodied in s. 256 of the Criminal Procedure Code is an added right given to an accused to compel the prosecution to produce a witness for further cross-examination.

In civil proceedings where cross-examination naturally follows the examination-in-chief and when rarely a witness is called again to give further evidence, the test of admissibility of evidence in a subsequent proceeding would not centre on the question of "right" to examine, though it might be raised in connection with "opportunity", if, for example for lack of time the Court had to adjourn the cross-examination, and the witness's presence became unavailable later.

With criminal proceedings, in respect of Summons cases, which are tried under Chapter 20 of the Criminal Procedure Code, the position would be the same as in a civil case. Even if the sections in the Chapter make no mention of cross-examination, the provisions of s. 138 must be respected; and there must be both right and opportunity for the accused to cross-examine any prosecution witness.

But where the case is a warrant case, then the proceedings are in two stages. The first stage is the enquiry before the charge is framed and the second stage, the trial after charge. The relevant section for the first stage, which is s. 252, makes no express mention of cross-examination.

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* Criminal Misc. Application No. 35 of 1957.

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

The procedure under s. 256 of the Criminal Procedure Code is different from the procedure under s. 138 of the Evidence Act, for the prosecution witness is not again examined-in-chief, as in a Sessions trial, but he is made to submit direct to cross-examination.

S. 33 of the Evidence Act mentions "a subsequent judicial proceeding". This section is followed by the proviso which sets out three requisites.

The first is that the proceeding has to be between the same parties or their representatives in interest. The significant fact is the use of the word "was": This requisite can have no relation to "a later stage of the same judicial proceeding" and, in criminal cases, is meaningless since the prosecutor is the State and the question of representative in interest cannot arise as the death of an accused would terminate the proceedings.

The second requisite is the right and opportunity to cross-examine in the *first* proceeding. This requisite will apply where a case began as an enquiry before a Magistrate and is latercommitted for subsequent trial before a Judge. These would involve two separate proceedings unlike the trial of a warrant case before the same Magistrate where the proceedings after charge are only a later stage in the same proceedings.

The third is the necessity of the same questions being substantially in issue in the *second* proceeding.

The second and third requisites, which specify different proceedings, cannot relate to the same judicial proceeding.

In a case tried by a Special Judge who took cognizance of the offence without the accused being committed for trial, and had followed the procedure prescribed in Chapter XXI of the Criminal Procedure Code for the trial of warrant cases by a Magistrate under s. 4 (2) of the Special Judges Act, 1946, the proviso to s. 33 of the Evidence Act has no application. The proviso would apply only when there are two proceedings. The evidence of the witnesses given in an earlier stage of the same proceeding, who were cross-examined by the accused then, is admissible under the main paragraph of s. 33

Nga Pein v. *The Union of Burma*, (1953) B.L.R. (S.C.) 116, dissented from.

W. H. Lockley v. *Emperor*, A.I.R. (1920) Mad 201 ; *Rex* v. *Daya Shanker*, A.I.R. (1950) All. 167 ; *Emperor* v. *C. A. Mathews*, A.I.R. (1929) Cal. 822; *Biswas* v. *The State*, A.I.R. (1950) Pat. 550 ; *Emperor* v. *Lachmi Narain*, I.L.R. (1932) 54 All. 212 ; *Mitter* v. *The State*, A.I.R. (1950) Cal. 436; *Bramachari Ajitnanda* v. *Anath Bandu*, A.I.R. (1954) Cal. 395 ; *Krishnayya* v. *Venkata Kumara*, A.I.R. (1933) (P.C.) 202, referred to.

> "It is often and wisely, not thought safe to convict a person upon his identification by one individual under circumstances of strain and terror accompanying violent crime."

Per Buckhill, J. in *Golam Mohammed Khan* v. *King-Emperor*, I.L.R. (1925) 4 Pat. 327, referred to.

Ba Han for the applicant.

Sein Tun (2) and *Sein Hock* for the respondents.

S.C. 1958

THE UNION OF BURMA v. U HLA TUN PRU AND TWO OTHERS.

Judgment was delivered by the Chief Justice of the Union

U MYINT THEIN, C.J.—The first respondent Maung Kyaw was convicted of murder, and the second respondent Hla Tun Pru and the third respondent San Tun Aung of abetment of murder, by the Sessions Judge, Akyab, and sentenced to suffer death. The first respondent's conviction is based mainly upon identification by U Aung Khine Hoe, the father of the deceased who was in the car when his son was shot dead. The supporting evidence came from one Ba Hla who said that he had seen Maung Kyaw with the third respondent immediately before the murder. The evidence against the second and third respondents is that of one Chit Hpaw Thu who spoke of the handing over of a revolver and money by the second respondent to the third respondent. The prosecution suggestion is that the third respondent later got hold of the first respondent to do the actual shooting. It is suggested also that there was ill-feeling, between the second respondent and U Aung Khine Hoe and that U Aung Khine Hoe was meant to be the victim.

On appeal, it was held that since Chit Hpaw Thu and Ba Hla were not available for cross-examination after charge, their evidence taken prior to the framing of charge was inadmissible in view of the proviso to section 33 of the Evidence Act. This is in accordance with the dictum laid down in a decision of this Court, *Nga Pein* v. *The Union of Burma* (1). Without the evidence of these two persons there was no case for the respondents 2 and 3 to answer. In regard to the first respondent the Appellate Court

(1) (1953) B.L.R. (S.C.) 116.

did not consider the evidence of identification safe enough for a conviction. Thus all three respondents were acquitted.

The Union of Burma has now sought leave to appeal and Dr. Ba Han, representing the Attorney-General, with his usual skill, has urged that the decision in *Nga Pein*'s case (1) requires further consideration. He goes further and contends also that even if the proviso to section 33 of the Evidence Act bars admission of the evidence, since section 252 of the Criminal Procedure Code has been amended by the Criminal Law (Second Amendment) Act (No. LVI of 1957), so as to give an accused the right to cross-examine before charge, this procedural change should be taken to have retrospective effect, thus rendering the evidence of Chit Hpaw Thu and Ba Hla admissible. Section 33 of the Evidence Act reads:

> "33. Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:
>
> Provided that the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the right and opportunity to cross-examine; that the questions in issue were substantially the same in the first as in the second proceeding."
>
> *Explanation.*—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."

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Now, the normal procedure to be adopted in regard to examination of witnesses is embodied in section 138 of the Evidence Act which reads :

> "Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.
>
> The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.
>
> The re-examination shall be directed to the explanation of matters referred to in cross-examination ; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

If this section is read with section 33, as it must it is apparent that in regard to civil proceedings where cross-examination naturally follows the exmination-in-chief, and when rarely a witness is called again to give further evidence, the test of admissibility of evidence in a subsequent proceeding would not centre on the question of "right" to examine, though it might be raised in connection with "opportunity" if, for example for lack of time the Court had to adjourn the cross-examination, and the witness' presence became unavailable later. With criminal proceedings, in respect of summons cases, which are tried under Chapter 20 of the Criminal Procedure Code, the position would be the same as in a civil case. Even if the sections in the Chapter make no mention of cross-examination, the provisions of section 138 must be respected ; and there must be both right and opportunity for the accused to cross-examine any prosecution witness. But where the case is a warrant case, then the proceedings are in two stages. See Chapter 21 of the Criminal Procedure Code. The first stage is the enquiry

before charge is framed and the second stage, the trial after charge. The relevant section for the first stage, which is section 252, makes no express mention of cross-examination. In cases triable by a Court of Session or the High Court, there is first the committal proceedings (Chapter 18) and then the trial, (Chapter 23). The relevant section in chapter 18, 208 (2), gives the accused "liberty to cross-examine" in the committal proceedings that is to say, before charge is framed.

Thus the difficulty in respect of criminal proceedings would centre on the question whether in a warrant case, the evidence taken before charge would be admissible after charge if at that later stage the witness is unavailable.

There are a host of authorities for either view but we shall examine those where the question was considered fully. In favour of admissibility, there is *W. H. Lockley* v. *Emperor* (1) where it was said that where the cross-examination of a witness had taken place, the evidence taken became complete for the purpose of being admitted in a later proceeding. The mere fact, it was said, that the witness would have been subjected to a further cross-examination in the exercise of a further right was no ground for holding the evidence to be inadmissible.

The second case is *Rex* v. *Daya Shanker* (2) where it was said that even if under the law, an accused may not have the right of cross-examination before charge, still where the accused was given permission to cross-examine, the accused became vested with the right and that if he had exercised the right so given, section 33 would ensure the admissibility of the evidence. We note that this was a trial upon committal and the reference in

(1) A.I.R. (1920) Mad. 201. (2) A.I.R. (1950) All. 167.

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the judgment to section 252 is misleading. The evidence should have been admitted, since the accused had the liberty to cross-examine in the committal proceedings and had availed himself of his right under section 208 (2).

The contrary view is expressed in *Emperor* v. *C. A. Mathews* (1) upon which all later decisions seemed to be based. The case against Mathews started as a warrant case trial and the proceedings were under Chapter 21 but after charge was framed Mathews claimed and obtained a jury trial. In the earlier stage, before charge, after a particular prosecution witness had been examined under section 252, the accused was called upon to cross-examine but the accused refused. He claimed at the subsequent trial that he had not the right to cross-examine before Charge and as the witness was unable to appear at the trial the accused maintained that the witness' evidence was inadmissible. A Bench of the Calcutta High Court examined the position, and Cumings, J. (with whom Lort-Williams, J. agreed) laid stress on the fact that while section 256 makes express provision for cross-examination, section 252 is silent. From this he seemed to have deduced that a right must be expressly given. If this were so, since section 289 (i) in Chapter 23, which deals with trials before Court of Session or High Courts, makes no mention either of cross-examination a Magistrate or a Judge may in his discretion, refuse to allow cross-examination at the trial, as it happened in the case of *Biswas* v. *The State* (2). The learned Judge referred to section 138 of the Evidence Act but brushed it aside with the remark that it dealt " not with the rights of the party but only provides the order in which the proceedings are to be conducted". We wish to

(1) A.I.R. (1929) Cal. 822. (2) A.I.R. (1950) Pat. 550.

observe that even if the marginal note reads "Order of Examination", the section in its entirety is comprehensive and even sets out what could be asked in examination-in-chief, cross-examination and re-examination.

In *Emperor* v. *Lachmi Narain* (1), King, J. said that though section 244 contains no express provision for cross-examination, the right nevertheless would be exercisable because "cross-examination must certainly be allowed at some stage" in the trial of summons cases. But when stressed that the phraseology of section 244 (Chapter 20) was substantially the same as in section 252 (Chapter 21) and that a similar right must exist, King, J. said—

> "There is some force in the argument but it is far from conclusive. One cannot lose sight of the fact that no express provision for exercising the right of cross-examination has been made in the trial of summons cases whereas in the trial of warrant cases such express provision is to be found in section 256."

To the argument that the word "evidence" occurring in the phrase common to both sections 244 and 252, "shall proceed to hear the complaint (if any) and take all such evidence as may be produced in support of the prosecution" must include examination-in-chief, cross-examination and re-examination, the learned Judge's comment was that if it were so, then section 208 (2) would be wholly redundant. It must be presumed, he said, that the Legislature does not enact wholly redundant provisions. In our view, however, it could well be by way of abundance of caution that this right to cross-examine was emphasised.

Coming to more recent cases, the Patna High Court in *Biswas* v. *The State* (2) followed Mathews'

(1) I.L.R. (1932) 54 All. 212. (2) A.I.R. (1950) Pat. 550.

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case. But in Biswas' matter the Magistrate had refused to allow cross-examination after charge on the ground that the witness had been substantially cross-examined before charge. On the question of accused's right to cross-examine Jha, J. said—

> "Reading the relevant sections of Chapters 18 and 21 in juxtaposition it is clear that s. 252 does not give the accused a statutory right, and the opportunity of cross-examination before charge, which in practice he is given, is given as a matter of interpretation and on the principles that the accused must get every reasonable opportunity of establishing his innocence whereas s. 208 gives an absolute right to the accused to cross-examine the witness for the prosecution before the charge and the Magistrate has no power to refuse the accused the right of cross-examination if the latter insists on his right to cross-examine the witness for the prosecution. S. 256 gives a statutory right to the accused to cross-examine the witnesses after the charge is framed. There is no corresponding right in the accused if the enquiry is under Chapter 18; this makes it essential that s. 208 (2) must be strictly complied with. Merely because the accused in the initial proceeding has been permitted to cross-examine the witnesses before the charge, it cannot be said that he has exercised his right under s. 208 (2). Therefore, in our opinion, that would not be a ground for refusing the right of cross-examination under the mandatory provisions of s. 208."

The interesting point in these observations is the reference to actual practice in the examination of a witness. Even if there is no statutory right, the learned Judge thought that opportunity to cross-examine must be given. In our view, it is not mere practice but compliance with section 138 of the Evidence Act.

Mitter v. *The State* (1) really turned on the question whether a particular witness was in fact

(1) A.I.R. (1950) Cal. 436.

unavailable. The point involved was not as to right but to opportunity.

Nga Pein v. *The Union of Burma* (1) followed *Emperor* v. *Mathews* (2), *Emperor* v. *Lachmi Narain* (3) and *Mitter* v. *The State* (4).

In *Bramachari Ajitnanda* v. *Anath Bandu* (5), Mitter, J. quoted Mathews' case and came to the conclusion that in view of the absence of any provision as regards cross-examination in Chapters 22 and 23 and its express mention in Chapter 18, the Legislature had laid down a particular stage in a warrant case when the accused may, as of right, cross-examine a prosecution witness.

If absence of provision is to be the guide, then, as we have remarked earlier, there would be no cross-examination as of right in a summons case or in a trial before a Court of Session or the High Court and thus a Magistrate or a Judge may act in his discretion and refuse to allow cross-examination.

Sen, J. who sat with Mitter, J. agreed with the final result of the case but on the question of admissibility of evidence, he pointed to various authorities and said—

> "I do not see how it can be maintained that the Magistrate has the duty to allow cross-examination before charge in every case, yet the accused has not the right to cross-examine before charge. If a Magistrate were to refuse cross-examination before charge, the accused would move this Court in revision and get an order allowing such examination. . . . . Thus the accused can enforce his right of cross-examination before charge and it appears to be idle to hold that he has no such right.
>
> To be consistent, we should either hold clearly that the accused has such a right and that therefore the deposition of a witness who ceases to be available after

(1) (1953) B.L.R. (S.C.) 116.
(2) A.I.R. (1929) Cal. 822.
(3) I.L.R. (1932) 54 All. 212.
(4) A.I.R. (1950) Cal. 436.
(5) A.I.R. (1954) Cal. 395.

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framing of the charge, is admissible or that the accused has no such right and that a magistrate would be quite right in refusing cross-examination before he has framed the charge in a warrant case. At present, under the two sets of rulings referred to, the accuse has it both ways in his favour, but such result is against elementary practice."

We share the misgivings of Sen, J. but for ourselves, we are convinced that section 138 of the Evidence Act gives the right to a party, whether he be complainant or accused, plaintiff or defendant, to cross-examine any witness examined by the opposite party. We hold the view also that the express provision as to cross-examination, embodied in section 256 of the Criminal Procedure Code is an added right given to an accused to compel the prosecution to produce a witness for further cross-examination. The procedure under section 256, it will be noticed, is different from the procedure under section 138 of the Evidence Act, for the prosecution witness is not again examined-in-chief, as in a Sessions trial, but he is made to submit direct to cross-examination.

The position may also be viewed from another angle. Section 33 mentions "a subsequent judicial proceeding". The section is followed by the proviso which sets out three requisites. The first is that the proceeding has to be between the same parties or their representatives in interest. The significant fact is the use of the word "was". The second requisite is right and opportunity to cross-examine in the *first* proceeding, and the third, the necessity of the same questions being substantially in issue in the *second* proceeding. The use of the past tense and the specification of the proceedings as "first" and "second" suggest that the proviso would apply only when there are two proceedings. Support of this view can be gathered from *Krishnayya* v. *Venkata*

Kumara (1), a Privy council decision in a civil case.

If the requisities are examined further it will be seen that the first requisite can have no relation to "a later stage of the same judicial proceeding". Nor can the second and third requisites, which specify different proceedings, relate to the same judicial proceeding. Further, in criminal cases, the first requisite is meaningless since the prosecutor is the State and the question of a representative in interest cannot arise. The death of an accused would terminate proceedings. But the second requisite would apply where a case began as an enquiry before a Magistrate and is later committed for subsequent trial before a Judge. These would involve two separate proceedings unlike a trial of a warrant case before the same Magistrate where the proceedings after charge are only a later stage in the same proceedings. But section 208 (1) is more pertinent. In regard to the third requisite it might arise where a person is prosecuted again on a different charge. The evidence in the first proceeding would be inadmissible as the matter in issue would be different.

In the case before us, the case was tried by a Special Judge who took congizance of the offence without the accused being committed for trial, and had followed the procedure prescribed for the trial of warrant cases by a Magistrate under section 4 (2) of the Special Judges Act, 1946. In our judgment the proviso to section 33 of the Evidence Act has no application. The evidence of the two witnesses given in an earlier stage of the same proceeding, who by the way were cross-examined by the accused then, is admissible under the main paragraph of section 33.

(1) A.I.R. (1933) (P.C.) 202.

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With this principle in mind we shall deal with the facts of the case, but before we do so, we would observe that since we have ruled that the evidence is admissible there is no need to go into the second question raised by Dr. Ba Han, that being, whether the amendment of section 252 of the Criminal Procedure Code by the Criminal Law (Second Amendment) Act is merely a procedural change and therefore restrospective in nature.

In regard to Maung Kyaw, he was identified at a parade held eleven days later. Chit Hpaw Thu does not implicate him. As Buckhill J. said in *Golam Mohammed Khan* v. *King-Emperor* (1)—

> "It is often and wisely, not thought safe to convict a person upon his identification by one individual under circumstances of strain and terror accompanying violent crime."

The circumstances prevailing at the time of the incident were such that even if Aung Khine Hoe says that he could recognize the assailant by the headlights of the car, the entire incident must have lasted seconds. Aung Khine Hoe had never seen Maung Kyaw before and there is the possibility that he is mistaken.

There are no substantial and compelling reasons for us to disagree with the acquittal order of the High Court and in the result we must decline to grant special leave to appeal.

(1) I.L.R. (1925) 4 Pat. 327.

SUPREME COURT.

U KYAW Oo
THE UNION OF BURMA } (APPELLANT)

v.

THE UNION OF BURMA
D. E. ATCHA AND ONE } (RESPONDENTS).*

S.C. 1958
Nov. 14.

Criminal Procedure Code—Chap. XIV—Investigation under—Recording of confession under s. 164 could be made only in the course of—Penal Code, s. 120B—Criminal conspiracy—Cannot be committed by one person alone—No panacea for defects in prosecution case—Suppression of Corruption Act, s. 4 (1) (d)—Acts to which it must relate.

The recording of a confession under s. 164 of the Criminal Procedure Code can only be done in the course of an investigation under Chapter XIV of the Code. Investigation by the Bureau of Special Investigation is done under the authority of ss. 6, 7 and 17 of the Special Investigation Administration Board and Bureau of Special Investigation Act.

There can be no conspiracy of one person alone. S. 120B of the Penal Code is no panacea for defects in the prosecution case. There must initially be general evidence which would enable the Court at least to infer that there must have been a conspiracy.

Sub-s. 4 (*1*) (*d*) of the Suppression of Corruption Act must relate either to "fraud to the detriment of public interest" or to an act of misappropriation or misconduct "in respect of public property entrusted".

Kyaw Myint and *Pha Tha Htaw* for U Kyaw Oo,

Cassim for D. E. Atcha, and

Ba Swe for P. Agarawala.

Tin Maung (Government Advocate) for the Union of Burma.

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* Criminal Appeals Nos. 2 and 3 of 1958.

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

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U KYAW OO
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THE UNION OF BURMA
D. E. ATCHA AND ONE.

Judgment was delivered by the Chief Justice of the Union

U MYINT THEIN, C.J.—The people accused in this case are (1) U Kyaw Oo, a Preventive Officer in the Customs Department, (2) D. E. Atcha who deals in watches, and (3) P. Agarawala who deals in lace. It does not appear in the evidence as to how it came about that investigation against them was taken by the Bureau of Special Investigation. The Investigating Officer's evidence began with an account of raids made on the respective houses of the accused on the 24th March 1956. According to him all the accused were arrested on the 25th. It may be correct if formal arrest is meant but it seems that Atcha was brought to the Office of the Bureau of Special Investigation on the 23rd, made to sleep the night there and later, kept in one of the local police stations until the 28th when both he and Agarawala (who was not detained) were produced before Magistrates to have their confessions recorded under section 164 of the Criminal Procedure Code. We are uncertain if this procedure was correct for the recording of a confession under section 164 can only be done "in the course of an investigation under this Chapter" which means Chapter XIV of the Criminal Procedure Code. Investigation by the Bureau of Special Investigation is done under the authority of sections 6, 7 and 17 of the Special Investigation Administration Board and Bureau of Special Investigation Act. It is interesting to note that in India section 164 has been amended by Act 46 of 1952 by the addition of the words "or under any other law for the time being in force" to cover investigations outside the scope of the Chapter.

It was only on the 21st June 1956 that the Investigating Officer made what is erroneously purported to be a First Information Report at the Rangoon Airport Police Station.

When the case was sent up, the Investigating Officer had gathered the following evidence :—

(i) Agarawala had K 50,000 lying idle. Atcha told him that he could have that sent to Hongkong but suggested a larger sum to be sent as expenses would be heavy. Agarawala therefore collected another K 25,000 and this sum *plus* K 16,000 which Atcha had contributed were placed in a Pan American Airways overnight bag. On 7th June 1956 Agarawala and some members of his family and Atcha went to the Airport. Atcha had earlier explained how this bag would be made over to a Customs Officer. On arrival Agarawala went and conversed with his brother who was a transit passenger bound for Hongkong by the Thai Airways, leaving it to Atcha to do the needful. Later Atcha told him that the bag had been delivered to the wrong person and thus lost. Enquiries from a Customs Officer the next day brought no satisfaction. (*Vide* Agarawala's confession).

(ii) U Kyaw Oo had told Atcha in February 1956 that Agarawala would be attempting to send out sterling and dollars and Burmese money, details of which were given by U Kyaw Oo who said he would seize the money. At the time of the seizure Agarawala would run away, the money would be "ownerless" and they would share the 60% reward. U Kyaw Oo gave Atcha detailed instructions to persuade Agarawala to bring the money and as to where the car that they would be using, should be parked. The bag was to be handed over to a person he would indicate at the airport restaurant.

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All the instructions were followed on the 7th June 1956 and the bag was handed to Sergt. Tun Pe of the Army Security Section, Mingaladon Airport. That was the last he saw of the bag. Enquiries from U Kyaw Oo the next day brought no satisfaction. No mention was made of the contents of the bag, nor did he suggest that he himself had contributed. (*Vide* Atcha's confession).

(iii) Evidence in the nature of "padding" to the effect that all the three accused were at the airport when the Thai Airways plane came in after 6 p.m. (when U Kyaw Oo's term of duty had ended); that U Kyaw Oo was seen talking to Atcha and was accosted by Lieut. Win Maung, the Army Security Officer; that U Kyaw Oo went off but Atcha was questioned by Lieut. Win Maung but nothing material was stated; that Agarawala and Atcha went to U Kyaw Oo's house the next day; and that Lieut. Win Maung was asked by Capt. Maung Maung Lwin at the instance of one Maung Nyunt Sein if U Kyaw Oo had seized 2 lakhs Kyat from Atcha.

It will be noticed that the so-called confessions of Agarawala and Atcha do not fit in. Furthermore U Kyaw Oo denied all knowledge. The Investigating Officer apparently could not make up his mind as to the appropriate offence with which the accused could be charged. If Agarawala was to be believed, he was the victim of Atcha and U Kyaw Oo. If Atcha was to be believed, then he was the agent provocateur to enable U Kyaw Oo to seize the money. Or was it Sergt. Tun Pe who had double-crossed everybody? We do not know if Sergt. Tun Pe was examined at all, for the Police papers that were sent to the Court contain only the Diary Sheets for the 21st and 22nd June 1956 together with the statements of some of the witnesses examined in Court.

However, in sending up the case the Investigating Officer sought action against all three accused for conspiracy to send out some 1 lakh Kyat and £ 3,000 and for conspiracy to enable a public servant to commit "misconduct" in that he had failed to seize the money meant to be sent.

The case was tried and the two accused who had confessed, promptly retracted their confessions but nevertheless they were charged for conspiracy. The charge against U Kyaw Oo runs thus:

> "That you, on or about the 7th day of March 1956 at Rangoon being a public servant namely, a Preventive Officer of Customs Department agreed with two Indian merchants D. E. Atcha and P. Agarawala to do an illegal act, to wit, to send K 91,000 to Hongkong without the previous permission of the Controller of Foreign Exchange, Burma, Rangoon, and you did some acts, to wit, you failed to arrest D. E. Atcha who brought the said sum of K 91,000 to Mingaladon Airport besides the agreement in pursuance of the said agreement, committed criminal conspiracy to commit the offence of criminal misconduct by public servant in discharge of official duties punishable under section 120B, Penal Code read with section 4 (*1*) (*d*)/4 (2) Suppression of Corruption Act, 1948 and within my cognizance."

The charges against the other two accused are in similar strain. In our judgment, the charge is badly framed. What the trial Judge had in mind, judging by the use of the phrase "to do an illegal act, to wit, to send K 91,000 to Hongkong without the previous permission of the Controller of Foreign Exchange", was that there was a conspiracy to evade the Foreign Exchange Regulations. The later reference in the charge about failure to arrest was cited as an act committed in the course of the conspiracy. If his finding was that there was in fact a conspiracy to evade the Foreign Exchange

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Regulations, then the accused should have been charged under the appropriate sections of the Foreign Exchange Act read with section 120B of the Penal Code.

In a judgment, as incoherent as the charge, the trial Judge found the accused guilty and sentenced each of them to one year's rigorous imprisonment. On appeal Agarawala and Atcha were acquitted but the conviction of U Kyaw Oo was upheld.

U Kyaw Oo has appealed to this Court and since there can be no conspiracy of one person alone, we have no hesitation in holding that the conviction on the conspiracy charge cannot be allowed to stand. But the State has also appealed against the order of acquittal in respect of Agarawala and Atcha and we must therefore see, if there is sufficient evidence against the three accused for a conviction to be sustained.

The trial Judge and the Judge of the Appellate Court seem to have treated the retracted confessions as substantive and true evidence. If both confessions are to be treated as true, Agarawala had meant to send Burmese money to Hongkong by unauthorized means. U Kyaw Oo, however, had no thought of sending it but he was going to seize it. Atcha's idea was merely to see that Agarawala should make the attempt to enable U Kyaw Oo to seize it and later to share the reward for seizure. Thus there was no common purpose among the three. We have mentioned the evidence described by us as "padding". By themselves these pieces of evidence are immaterial and they were obviously adduced to lend the colour of truth to the confessions. But when the confessions are examined in detail, the prosecution's stand becomes untenable. If Atcha's confession is true, then he was striving for a legitimate

customs seizure to be made. However morally reprehensible may be his method, it would not be an offence. If, as he had stated in his so-called confession, which is self-exculpatory, then U Kyaw Oo might have really meant to make a seizure, but it was Sergt. Tun Pe who walked off with the bag supposed to contain money. Agarawala in his confession, did not mention U Kyaw Oo. His arrangements were made with Atcha alone.

How much reliance can be placed on these "confessions" which were retracted? It is a well accepted rule of law that a retracted confession of one accused cannot form the basis of a conviction against a co-accused. And when these confessions are discarded as against U Kyaw Oo, there is no other evidence worthy to be called as such, against U Kyaw Oo. In regard to Atcha, if his own confession is taken as truthful, then, as we have pointed out earlier, it is exculpatory and he has committed no offence. In regard to Agarawala there might be the ingredients in the confession to bring home to him the offence of attempting to evade the Foreign Exchange laws, but in view of its retraction, we would expect some supporting evidence. The bag containing the money was not recovered; Sergt. Tun Pe, who might be able to shed some light, was not even cited as a witness. Agarawala's presence at the airport may well be for the legitimate purpose of meeting his brother, who was passing through Rangoon. Our attention was drawn to the fact that certain witnesses were declared hostile by the prosecution in the trial Court. If they had not stuck to their statements made to the police and had been declared hostile, such procedure does not make their statements to the police, admissible as substantive evidence.

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In attempting to obtain a conviction against all three accused, the prosecution had invoked section 120B of the Penal Code. This section is no panacea for defects in the prosecution case. There must initially be general evidence which would enable the Court at least to infer that there must have been a conspiracy. Instead, the prosecution, by relying on the confessions of both Agarawala and Atcha, has made it plain that there could not have been a common purpose. Agarawala's intent, according to the prosecution, was to send out the money. U Kyaw Oo's intent was to seize it and then to claim a reward. Atcha's intent was to see that Agarawala made the attempt. From this it is impossible to infer either (i) that there was a common aim among all the three accused to evade the Foreign Exchange Regulations, or (ii) that there was a common aim among them for U Kyaw Oo to commit " misconduct ".

We would mention here also that the reference in the charge to section 4 (*1*) (*d*) of the Suppression of Corruption Act is inappropriate. We have expressed our views in previous cases that sub-section 4 (*1*) (*d*) must relate either to " fraud to the detriment of public interest " or to an act of misappropriation or misconduct " in respect of public property entrusted ". The prosecution case itself is that the money was Agarawala's and on the vague evidence led, the money did not reach U Kyaw Oo, even if it is accepted that it was brought to the airport by Agarawala.

The prosecution has not been able to bring home the offence of conspiracy against the accused. Nor is there any reliable evidence against Agarawala to warrant a conviction for an attempt. As for Atcha and U Kyaw Oo there was nothing even to warrant

a prosecution for conspiracy. The prosecution in chasing the shadow has lost the substance in the process.

In the circumstances, the appeal of U Kyaw Oo is allowed and he is acquitted. The appeal of the State against Agarawala and Atcha is dismissed. The orders of the Appellate Court in regard to disposal of property which is not foreign currency will stand. In respect of the foreign currency seized in the raids (which altogether amount to the equivalent of less than four hundred Kyat), because of prevailing Exchange regulations, these should be sent on to an authorized Bank. The persons from whom they were seized will be entitled to claim the equivalent in Burmese currency.

SUPREME COURT.

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Dec. 24.

U. THA HLAING (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Criminal Procedure Code, s. 234—Deals with offences and not with charges—Violation of provisions contained in—Not curable by s. 537.

S. 234 of the Criminal Procedure Code deals with offences and not with charges. Misappropriation of monies drawn from the Government Treasury under different dates and on different occasions would clearly amount to separate offences.

Where three First Information Reports were lodged against the appellant who was alleged to have prepared ten different muster rolls and drawn monies under them on nine different occasions it would appear that no less than nine separate offences had been committed by him and it was open to the prosecution to split the offences into three different cases as originally intended or to lump up all the 9 items together and charge the accused with misappropriation of the gross total of the 9 items. Failure to follow this procedure amounts to a violation of the provisions contained in s. 222 (2) and 234 (1) of the Criminal Procedure Code.

Wasir Singh v. *Emperor*, A.I.R. (1942) Oudh 89 at 92, referred to.

Where the trying Magistrate to whom these complaints were forwarded opened a single proceeding against the appellant under the erroneous belief that s. 234 of the Code empowered him to do so, tried and convicted the appellant.

Held: That the charges in the present case having combined more than three offences of the same kind in direct contravention of s. 234 of the Code the trial was conducted in a manner not warranted by the Criminal Procedure Code and was wholly bad irrespective of the question whether there was any actual prejudice to the accused or not.

Subramania Iyer v. *King-Emperor*, 25 Mad. 61; *Abdul Rahman v. King-Emperor*, 5 Ran. 53 at 67; *Rex* v. *Daya Shanker*, A.I R. (37) (1950) All. 167 at 174, referred to.

S. 537 of the Criminal Procedure Code deals with mere errors and irregularities in the charges and not with illegalities such as plurality of offences in a manner not allowed by law.

G. H. Astell v. *Eng Take*, (1941) R.L.R. 559; *Pulukuri Kottaya* v. *Emperor*, A.I.R. (34) (1947) (P.C.) 67, referred to.

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* Criminal Appeal No. 4 of 1958.

† *Present*: U MYINT THEIN, Chief Justice of the Union, U CHAN HTOON, J. and U AUNG THA GYAW, J.

E Maung for the appellant.

Tin Maung (Government Advocate) for the respondent.

Judgment delivered by

U AUNG THA GYAW, J.—The Appellant U Tha Hlaing was convicted under section 4 (*1*) (*c*)/4 (*2*) of the Suppression of Corruption Act and was sentenced to six months' rigorous imprisonment by the Special Judge of Mawlaik in his Criminal Regular Trial No. 41 of 1956. His appeal to the High Court being unsuccessful he has preferred the present appeal in which his contention regarding misjoinder of charges and consequent vitiation of the trial has been reiterated.

An examination of the trial record would seem to show that the objection to the legality of the trial on the ground of misjoinder is well founded. The appellant was a Subdivisional Officer in the Public Works Department of the Homalin Subdivision and in that capacity he had to prepare muster rolls of the coolies and other labourers employed by him in road construction and other works and make payments. The subject matter of the three charges brought against him covered payments made by him under ten separate muster rolls during the period extending from 1st August 1952 to January 1953. Two of these payments made under muster roll' Exhibits (Nga) and (Sa) were made on 13th January 1953. The rest of the payments were made on different dates between August and December 1952.

The misappropriation alleged against the appellant was said to have been committed in respect of certain sums shown in these muster rolls. When the

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prosecution was first launched, three First Information Reports were lodged against the appellant setting out three different sums of money as having been misappropriated by the appellant. The Township Magistrate of Khamti to whom the complaints were forwarded by the District Magistrate for disposal, opened a single proceeding against the appellant believing that section 234 of the Criminal Procedure Code empowered him to do so. Neither his successor nor the Special Judge before whom the proceeding eventually came for disposal thought that anything was wrong in the procedure adopted by the Township Magistrate.

Now section 234 (*1*) reads as follows:

> "When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with, and tried at one trial for, any number of them not exceeding three."

It is clear from this that the section deals with offences and not with charges. Misappropriation of monies drawn from the Government Treasury under different dates and on different occasions would clearly amount to separate offences. As the appellant is alleged to have prepared ten different muster rolls and drawn monies under them on nine different occasions, it would appear that no less than nine separate offences had been committed by him. Section 222(2) of the Criminal Procedure Code to which reference has been made in the judgment of the High Court has no application to the facts of this case, since the charges make no reference to the sum total of the different items of monies misappropriated by the appellant on the three occasions referred to in the judgment.

Here in this case criminal misappropriation was alleged to have been committed in respect of 9 items of money received on 10 muster rolls prepared and presented on 9 different dates and it was open to the prosecution to split the offences into three different cases as originally intended or to lump up all the 9 items together and charge the accused with misappropriation of the gross total of the 9 items. Failure to follow this procedure amounts to a violation of the provisions contained in section 222 (2) and 234 (1) of the Criminal Procedure Code. See *Wazir Singh* v. *Emperor* (1).

The charges in the present case having combined more than three offences of the same kind in direct contravention of section 234 of the Criminal Procedure Code, it is put forward on the appellant's behalf that this contravention of the mandatory provisions of the law would render the trial of the accused bad and that the defect cannot be cured by section 537 of the Code. Reliance has been placed on the decision of their Lordships of the Privy Council in the case of *Subramania Iyer* v. *King-Emperor* (2) which was referred to in *Abdul Rahman* v. *King-Emperor* (3) where it was observed :

> "The distinction between that case and the present is fairly obvious. The procedure adopted was one which the Code positively prohibited, and it was possible that it might have worked actual injustice to the accused."

Section 537 of the Criminal Procedure Code deals with mere errors and irregularities in the charges and not with illegalities such as trials for a plurality of offences in a manner not allowed by law. See *G. H. Astell* v. *Eng Take* (4). In *Pulukuri Kottaya*

(1) A.I.R. (1942) Oudh 89 at 92.
(2) 25 Mad. 61.
(3) 5 Ran. 53 at 67.
(4) (1941) R.L.R. 559

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v. *Emperor* (1) the law in Subramania Iyer's case (2) was reaffirmed in these words :

> " When a trial is conducted in a manner different from that prescribed by the Code, the trial is bad, and no question of curing an irregularity arises ; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct the irregularity can be cured under section 537 and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code."

The trial in the present case was conducted in a manner not warranted by the Criminal Procedure Code and was wholly bad irrespective of the question whether there was any actual prejudice to the accused or not. See *Rex* v. *Daya Shanker* (3).

Accordingly the conviction and sentence passed on the appellant will be quashed. The appellant was in custody for upwards of 18 months during the trial and he has since served the full term of the sentence of six months passed upon him. The interest of justice would not require his retrial.

(1) A.I.R. (34) (1947) (P.C.) 67. (2) 25 Mad. 61.
(3) A.I.R. (37) (1950) All. 167 at 174.

တရားလွှတ်တော်ချုပ်။

ဒေါ်အိ ပါ ၆ (လျှောက်ထားသူများ)

နှင့်

ပြည်မြို့၊ မြို့နယ် ဝိနိစ္ဆယဌာန ပါ ၄ (လျှောက်ထား ခံရသူများ)*။

† ၁၉၅၈ ခု နိဝင်္ဘာလ ၂၀ ရက်။

ဝိနိစ္ဆယဌာန အက်ဥပဒေ၊ ဟုတ်မ ၃၀၊ မရွှေ့မပြောင်းနိုင်သော ပစ္စည်းကိုလွှဲခါနီးရာဝယ် မှတ်ပုံတင်အက်ဥပဒေအရ၊ အထမမြောက်သဖြင့် ငင်းနှင့်ပတ်သက်သည့်အမှုမျိုးကို လက်မခံရန် ပိတ်ပင်ထားခြင်း။ ဟုတ်မ ၃၃ (၁)၊ ခြွင်းချက်။

ဆုံးဖြတ်ချက်။ ။မှတ်ပုံတင်အက်ဥပဒေအရမှာ မရွှေ့မပြောင်းနိုင်သည့် ပစ္စည်းကို လွှဲခါနီးရာတွင် မှတ်ပုံတင်သည့် စာချုပ်စာတမ်းမရှိလျှင် မည်သည့်တရားရုံးကမျှလက်ခံခြင်း အသိအမှတ်ပြုခြင်း မရှိစေရန်၊ တားမြစ်ပိတ်ပင်ထားလေသည်။ တနည်းဆိုသော် မရွှေ့ မပြောင်းနိုင်သည့်ပစ္စည်းကို မှတ်ပုံတင်သည့်စာချုပ် စာတမ်းဖြင့် ပေးလွှဲခြင်းမပြုလျှင် ဥပဒေ အရ ပေးလွှဲခြင်းအထမမြောက်ချေ။ ထို့ကြောင့် ဤကဲ့သို့ မှတ်ပုံတင်သည့်စာချုပ်စာတမ်းဖြင့် လွှဲခါနီးထားခြင်းမဟုတ်သော မရွှေ့မပြောင်းနိုင်သည့် ပစ္စည်းအတွက် တရားစွဲဆိုခြင်းကို တရားမရုံးများ၌ မပြုနိုင်သည့်နည်းတူ ဝိနိစ္ဆယဌာနများကလည်း ထိုအမှုမျိုးကို လက်မခံရဟု ဟုတ်မ ၃၀၊ က တိုက်ရိုက်ပိတ်ပင်ထားပြီးသား ဖြစ်သည်။

ဤကဲ့သို့ပိတ်ပင်ထားသော ယေဘုယျဥပဒေမှ ခြွင်းချက်အားဖြင့် ဟုတ်မ ၃၃ (၁) တွင် ပြဋ္ဌာန်းချက်ထည့်သွင်းထားလေသည်။ ထိုခြွင်းချက်မှာ မှတ်ပုံတင်ဥပဒေအရ၊ မှတ်ပုံတင်ရုံး တွင် မှတ်ပုံတင်သည့်စာချုပ်စာတမ်း မရှိစေကာမူ၊ မရွှေ့မပြောင်းနိုင်သည့်ပစ္စည်းကိုလွှဲခါနီး ရာ၌၊ ထိုလွှဲခါနီးခြင်းသည်၊ ဝိနည်းတော်နှင့်ညီသည်ဖြစ်၍၊ ဆိုင်ရာမြို့နယ် ဝိနိစ္ဆယဌာနတွင်၊ ထိုလွှဲခါနီးသည့် စာချုပ်စာတမ်းကို မှတ်ပုံတင်သည်လည်းဖြစ်လျှင်၊ ထိုသို့လွှဲခါနီးခြင်းသည် အထမြောက်အောင်မြင်စေရမည်ဟု ပြဋ္ဌာန်းထားလေသည်။

လျှောက်ထားသူများအတွက် သခင်ချစ်လိုက်ပါဆောင်ရွက်သည်။

စုတိဒကများအတွက် အစိုးရ ရှေ့နေကြီး ဦးလှမောင်လိုက်ပါဆောင်ရွက်သည်။

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* ၁၉၅၈ ခုနှစ်၊ တရားမ အသေးအဖွဲလျှောက်လွှာ အမှတ် ၆၁။

† ဦးမြင့်သိန်း နိုင်ငံတော်တရားဝန်ကြီးချုပ်၊ ဦးချန်ထွန်း တရားဝန်ကြီး၊ ဦးအောင်သာကျော် တရားဝန်ကြီးတို့၏ ရှေ့မှောက်တွင်၊ တရားဝန်ကြီး ဦးချန်ထွန်းက အဓိကချမှတ်သည်။

၁၉၅၀
ဒေါ်အိ ပါ ၆၊
နှင့်
ပြည်မြို့၊ မြို့နယ်
၀ိန်ဆွယ်ဌာန
ပါ ၄။

တရားဝန်ကြီး ဦးချန်ထွန်း။ ။ဤအမှုဖြစ်ပေါ်လာရသည့် အကြောင်း. ခြင်းရာများမှာအောက်ပါအတိုင်းဖြစ်ပါသည်။

ပြည်မြို့၊ အိုးတန်းရပ်၊ရွှေလက်လှလမ်းနှင့်ပန်းတိုင်လမ်းထောင့်ရှိ ဈေးရပ်ကွက်အမှတ် ၆၊ ၁၉၄၈-၄၉ ခုနှစ်၊ ဦးပိုင်နံပါတ် ၇၄ နှင့် ၇၃ မြေယာ ၂ ကွက်သည် မိမိအား ကွယ်လွန်သူ ဒေါ်မြွန်းက ၎င်းမသေမီ လှူဒါန်းထားခဲ့သည့်မြေယာကွက်များဖြစ်၍ မိမိသာလျှင် ပိုင်ဆိုင်ခွင့်ရှိကြောင်းဖြင့် ရဟန်းတော် ဦးဓမ္မဝံသက ပြည်မြို့ မြို့နယ် ၀ိန်ဆွယ်ဌာနတွင် ဒေါ်အိနှင့် ၎င်း၏သားသမီး ၅ ဦး၊ ထို့ပြင် ထိုမြေပေါ်တွင် လက်ရှိနေထိုင်သူ ဦးဘခင်တို့အား တရားစွဲဆိုခဲ့လေသည်။ ဒေါ်အိနှင့်သားသမီးများက အမျိုးမျိုးသော ချေပချက်များတင်သွင်းခဲ့သော်လည်း မြို့နယ်၀ိန်ဆွယ်ဌာနက ထိုမြေကွက်များကို ဦးဓမ္မဝံသသာလျှင် အလှူခံရယူလိုက်သည့်အတိုင်းပိုင်ဆိုင်ခွင့်ရှိကြောင်း၊ ဒေါ်အိ ပါ သားသမီးများနှင့်တကွ ဦးဘခင်တို့အား ထိုမြေကွက်မှထွက်ခွါစေရန် အဆုံးအဖြတ်ချမှတ်ခဲ့လေသည်။ ဤသို့ချမှတ်သည့် မြို့နယ်၀ိန်ဆွယ်ဌာန၏ဆုံးဖြတ်ချက်ကို မကျေနပ်သဖြင့် ဒေါ်အိနှင့် သားသမီးများက နိုင်ငံတော်၀ိန်ဆွယ်ဌာနသို့ အယူခံဝင်ရောက်ကြလေသည်။ ဦးဘခင်ကလည်း မြို့နယ်၀ိန်ဆွယ်ဌာနတွင် အမှုစွဲဆိုသည်ကို မိမိမသိရကြောင်း၊ ဇာရီပြုလုပ်သောအခါမှသာလျှင် သိရကြောင်းဖြင့် အကြောင်းအမျိုးမျိုးပြ၍ ခရိုင်၀ိန်ဆွယ်ဌာနသို့ သီးခြားအယူခံဝင်ရောက်လေသည်။ ခရိုင်၀ိန်ဆွယ်က အယူခံမှုတခုလုံးကိုပင် ပယ်လိုက်လေသည်။ တဖန်နိုင်ငံတော်၀ိန်ဆွယ်ဌာနသို့ သီးခြားအယူခံဝင်ကြပြန်ရာ အောက်၀ိန်ဆွယ်ဌာနများကဲ့သို့ပင် အယူခံမှုများကိုပယ်လိုက်လေသည်။ ထို့ကြောင့် ၀ိန်ဆွယ်ဌာနအားလုံးက ချမှတ်သည့် အဆုံးအဖြတ်များကို မကျေနပ်သဖြင့် ဤရုံးတော်သို့ အယူခံ ဝင်ရောက်ခဲ့ကြလေသည်။ ဒေါ်အိနှင့် သားသမီး ၅ ဦးတို့၏အမှုမှာ ၁၉၅၀ ခုနှစ်၊ တရားမအသေးအဖွဲလျှောက်လွှာအမှတ် ၆၁ ဖြစ်၍၊ ဦးဘခင်၏အမှုမှာ ၁၉၅၀ ခုနှစ်၊ တရားမအသေးအဖွဲလျှောက်လွှာအမှတ် ၆၂ ဖြစ်လေသည်။ ဤအမှု ၂ ခုလုံးနှင့် စပ်လျဉ်း၍ အကြောင်းခြင်းရာများသည်၎င်း၊ ဥပဒေအချက်အလက်များသည်၎င်း ထပ်တူဖြစ်သောကြောင့် ဤယူခံမှု ၂ ခုကို ပူးတွဲကြားနာကြသည်။

ဤရုံးတော်တွင် အယူခံတရားလိုများက ထုတ်ဖော်ပြဆိုသည့်အရေးကြီးဆုံးသောအချက်မှာ ဦးဓမ္မဝံသက မိမိအား ဒေါ်မြွန်းက အဆိုပါအိမ်ယာမြေများကိုလှူဒါန်းသည်ဟုပြဆိုသော်လည်း မှတ်ပုံတင်အက်ဥပဒေအရ မှတ်ပုံတင်ဌာနတွင်၎င်း၊ ၀ိန်ဆွယ်ဌာန အက်ဥပဒေအရ သက်ဆိုင်ရာမြို့နယ် ၀ိန်ဆွယ်ဌာနတွင်၎င်း၊ မှတ်ပုံတင်သည့် စာချုပ်စာတမ်းလုံးဝ မရှိခြင်းကြောင့် လှူဒါန်းခြင်း

မမြောက်ခဲ့သည့်အပြင်၊ ဝိနိစ္ဆယဌာနများတွင်လည်း လက်ခံ စစ်ဆေးစီရင်ပိုင်ခွင့် အာဏာမရှိကြောင်းဟူသော ပြဆိုချက်များဖြစ်သည်။

၁၉၅၈ ဒေါ်အိ ပါ ၆၊ နှင့် ပြည်မြို့၊ မြို့နယ် ဝိနိစ္ဆယဌာန ပါ ၄။

ဤအမှုတွင် အချင်းဖြစ်အိမ်ယာမြေကွက်များသည် ကွယ်လွန်သူ ဒေါ်မြဝွန်း ပိုင်ဆိုင်ခဲ့သည်ဟူသော အချက်သည်ငင်း၊ ဦးမြဝံသအား ဒေါ်မြဝွန်းက လှူဒါန်း ခဲ့ခြင်းမှာ မှတ်ပုံတင်ရုံးတွင်ဖြစ်စေ၊ မြို့နယ်ဝိနိစ္ဆယဌာန တခုခုတွင်ဖြစ်စေ မှတ်ပုံ တင်ထားသော စာချုပ်စာတမ်းလုံးဝ မရှိသော အချက်သည်ငင်း၊ အားလုံးက သဘောတူဝန်ခံထား၍ အငြင်းမထွက်သောအချက်များဖြစ်သည်။ ဝိနိစ္ဆယဌာန များက ကြားနာစစ်ဆေးပိုင်ခွင့် အာဏာရှိသည်မှာ ဝိနိစ္ဆယဌာန အက်ဥပဒေ ပုဒ်မ ၁၅ (၁) ပါ ပြဋ္ဌာန်းချက်များက ပေးအပ်သဖြင့်သာလျှင် စီရင်ပိုင်ခွင့် အာဏာရှိခြင်းဖြစ်သည်။ ပုဒ်မ ၁၅ (၁) ပါ ပြဋ္ဌာန်းချက်များမှာ အောက်ပါ အတိုင်းဖြစ်သည်။

"၁၅။ ။(၁) အခြားတည်ဆဲဥပဒေတခုခုတွင် မည်သို့ပင်ပါရှိစေကာမူ၊ ဤဥပဒေအရ ပဲ့ပြစည်းထားသောဝိနိစ္ဆယဌာနများမှာ ဤဥပဒေတွင် တိုက်ရိုက်ဖြစ်စေ၊ သဘောအမိပ္ပါယ်ရောက်အောင်ဖြစ်စေ၊ လက်ခံခြင်းမပြုစေရန် တားမြစ်ပိတ်ပင်ထားသည့် အမှုများမှတပါး အခြားဝိနည်းဓမ္မကံ အမိကရဏီမှုအားလုံးကို ဤဥပဒေအရ ကြားနာစစ်ဆေး၍ ဝိနည်းတော်နှင့်အညီ စီရင်ဆုံးဖြတ်ရန် အခွင့်အာဏာရှိစေရမည်။"

ဝိနိစ္ဆယဌာနများက ဝိနည်းတော်နှင့်အညီ စီရင်ဆုံးဖြတ်ရမည့် ဝိနည်းဓမ္မကံ အမိကရဏီမှုများမှခြွင်းချန်ထားသော အမှုများမှာ "ဤအက်ဥပဒေတွင် တိုက်ရိုက်ဖြစ်စေ၊ သဘောအမိပ္ပါယ်ရောက်အောင်ဖြစ်စေ၊ လက်ခံခြင်း မပြုစေရန် တားမြစ်ပိတ်ပင်ထားသည့်အမှုများဖြစ်သည်။တနည်းဆိုသော် ဤအက်ဥပဒေအရ ဝိနိစ္ဆယဌာနများက လက်ခံခြင်းမပြုရဟု တားမြစ်ပိတ်ပင်ထားသည့် အမှုများကို ဝိနိစ္ဆယဌာနများက ဝိနည်းဓမ္မကံ အမိကရဏီမှုများဖြစ်စေကာမူ၊ ကြားနာ စစ်ဆေးစီရင်ပိုင်ဆိုင်ခွင့်မရှိချေ။ ဤအမှုနှင့်စပ်လျဉ်း၍ အရေးကြီးသောပြဋ္ဌာန်း ချက်များမှာ ဝိနိစ္ဆယဌာန အက်ဥပဒေပုဒ်မ ၃၀ နှင့် ၃၁ (၁) ပါအောက်ပါ ပြဋ္ဌာန်းချက်များဖြစ်သည်။

"၃၀။ ။ဤဥပဒေအခြားနေရာများတွင် မည်သို့ပင်ပါရှိစေကာမူ၊ ကာလ စည်းကမ်း သတ်မှတ် အက်ဥပဒေ ပြဋ္ဌာန်းချက် တခုခု အရ စည်းကမ်းသတ်မှတ်ထားသည့် ကာလအပိုင်းအခြား ကုန်လွန်ပြီးသည့် အကြောင်းကြောင့်ဖြစ်စေ၊ မှတ်ပုံတင်အက်ဥပဒေပြဋ္ဌာန်းချက် တစုံတခုရှိ နေသည့်အကြောင်းကြောင့်ဖြစ်စေ၊ ဤဥပဒေအာဏာတည်သည့်နေ့တွင်

၁၉၅၀
ဒေါ်အို ပါ ၆၊ နှင့် ပြည်မြို့၊ မြို့နယ် ဝိနိစ္ဆယဌာန ပါ ၄။

တရားမရုံး၌ တရားစွဲဆိုခြင်းမပြုနိုင်သည့် ဝိနည်းဓမ္မကံ အဓိကရဏ်းမှ တစုံတခုကို ပည်သည့်ဝိနိစ္ဆယဌာနကမှ လက်မခံရ။''

''၃၁။ ။(၁) မှတ်ပုံတင်အက်ဥပဒေတွင် ည်သို့ပင်ပါရှိစေကာမူ၊ မရွှေမပြောင်းနိုင်သော ပစ္စည်းတစုံတရာကို ဝိနည်းတော်နှင့်အညီ လူဒါန်းလွှဲပြောင်းသည့်အခါ၊ ထိုပစ္စည်းကို လူဒါန်းလွှဲပြောင်းပေးသူနှင့် လက်ခံသူတို့က စာချုပ်စာတမ်း ချုပ်ဆိုရေးမှတ်ပြီးလျှင် ဆိုင်ရာမြို့နယ် ဝိနိစ္ဆယဌာနတွင် ထိုစာချုပ်စာတမ်းကို မှတ်ပုံတင်နိုင်သည်။ ထိုဝိနိစ္ဆယဌာနက ယင်းသို့ လူဒါန်းလွှဲပြောင်းခြင်းသည် ဝိနည်းတော်နှင့်လျော်ညီသည်ဟု ကြေနပ်လျှင်၊ အဆိုပါ စာချုပ်စာတမ်းကို မှတ်ပုံတင်ပေးရမည်။ ထို့ပြင် ထိုဝိနိစ္ဆယက ယင်းသို့ မှတ်ပုံတင်သည့်စာချုပ်စာတမ်း၏မိတ္တူကို ဆိုင်ရာမှတ်ပုံတင်အရာရှိရုံးသို့ ထိန်းသိမ်းထားရန်နှင့် လိုအပ်သည့်အတိုင်း ဆောင်ရွက်ရန် ပေးပို့ရမည်။''

မှတ်ပုံတင် အက်ဥပဒေအရမှာ မရွှေမပြောင်းနိုင်သည့် ပစ္စည်းကို လူဒါန်းရာတွင် မှတ်ပုံတင်သည့်စာချုပ်စာတမ်းမရှိလျှင် မည်သည့်တရားရုံးကမျှ လက်ခံခြင်း၊ အသိအမှတ်ပြုခြင်းမရှိစေရန် တားမြစ်ပိတ်ပင်ထားလေသည်။ တနည်းဆိုသော် မရွှေမပြောင်းနိုင်သည့်ပစ္စည်းကို မှတ်ပုံတင်သည့်စာချုပ်စာတမ်းဖြင့် ပေးလှူခြင်းမပြုလျှင် ပေးလှူခြင်းအထမမြောက်ချေ။ ထို့ကြောင့် ဤကဲ့သို့ မှတ်ပုံတင်သည့်စာချုပ်စာတမ်းဖြင့် လူဒါန်းထားခြင်း မဟုတ်သော မရွှေမပြောင်းနိုင်သည့် ပစ္စည်းအတွက် တရားစွဲဆိုခြင်းကို တရားမရုံးများ၌ မပြုနိုင်သည့်နည်းတူ ဝိနိစ္ဆယဌာနများကလည်း ထိုအမှုမျိုးကို လက်မခံရဟု ပုဒ်မ ၃၀၊ က တိုက်ရိုက်ပိတ်ပင်ထားလျက်ရှိသည်။

ဤသို့ပိတ်ပင်ထားသော ယေဘုယျဥပဒေမှာ ခြွင်းချက်အားဖြင့် ပုဒ်မ ၃၁ (၁) တွင် ပြဋ္ဌာန်းချက်ထည့်သွင်းထားလေသည်။ ထိုခြွင်းချက်မှာ မှတ်ပုံတင်ဥပဒေအရ မှတ်ပုံတင်ရုံးတွင် မှတ်ပုံတင်သည့် စာချုပ်စာတမ်းမရှိစေကာမူ၊ မရွှေမပြောင်းနိုင်သည့်ပစ္စည်းကို လူဒါန်းရာ၌ ထိုလူဒါန်းခြင်းသည် ဝိနည်းတော်နှင့်ညီသည်ဖြစ်၍ ဆိုင်ရာမြို့နယ် ဝိနိစ္ဆယဌာနတွင် ထိုလူဒါန်းသည့်စာချုပ်စာတမ်းကို မှတ်ပုံတင်သည်လည်းဖြစ်လျှင် ထိုသို့လူဒါန်းခြင်းသည်အထမြောက်အောင်မြင်စေရမည်ဟု ပြဋ္ဌာန်းထားလေသည်။ ဤအမှုတွင် မှတ်ပုံတင်အက်ဥပဒေအရ မှတ်ပုံတင်ထားသော စာချုပ်စာတမ်းမရှိသည့်အပြင် သက်ဆိုင်ရာ ဝိနိစ္ဆယဌာနတွင်လည်း မှတ်ပုံတင်သည့်စာချုပ်စာတမ်းမရှိခဲ့သောကြောင့် မည်သည့်ဝိနိစ္ဆယဌာနကမျှ လက်ခံစစ်ဆေးနိုင်သော အမှုမဟုတ်သည်မှာ ထင်ရှားသည်။

၁၉၅၀

ဒေါ်အိ ပါ ၆၊ နှင့် ပြည်မြို့၊ မြို့နယ် ဝိန်ဆွယ်ဌာန ပါ ၄။

အထက်ပါအကြောင်းများကြောင့် ပြည်မြို့ မြို့နယ် ဝိန်ဆွယ်ဌာနက ၁၃၁၉ ခုနှစ်၊ အဓိကရုဏ်းမှုအမှတ် ၂ တွင် ချမှတ်သည့် ဝိန်ဆွယ်သည်၎င်း၊ ပြည်ခရိုင် ဝိန်ဆွယ်ဌာနက ၁၄၁၉ ခုနှစ်၊ စောဒနာဝင်မှုအမှတ် ၁ တွင် ချမှတ်သည့် ဝိန်ဆွယ်သည်၎င်း၊ နိုင်ငံတော်ဝိန်ဆွယ်ဌာနက ၁၉၅၉ ခုနှစ်၊ စောဒနာဝင်မှုအမှတ် ၃ တွင် ချမှတ်သည့်ဝိန်ဆွယ်သည်၎င်း၊ စီရင်ပိုင်ခွင့်အာဏာမရှိဘဲ ချမှတ်သည့်ဝိန်ဆွယ်များဖြစ်သည်မှာ ထင်ရှားသည်။ ထို့ကြောင့် အဆိုပါဝိန်ဆွယ်များသည် ဥပဒေအာဏာမတည်သော ဝိန်ဆွယ်များဖြစ်သည်ဟု ယူဆရမည်ဖြစ်သည်။ ဝိန်ဆွယ်ဌာနများနှင့် ဤခုံးတော်တွင် စောဒကနှင့် စုတ်ဒကများသည် မိမိတို့စကိုတ်ကို မိမိတို့ကျခံစေရမည်။

တရားလွှတ်တော်ချုပ်။

တန်ဂျုပ်စိန် (ခေါ်) ရောင်စိန် (လျှောက်ထားသူ)
နှင့်
ပြည်ထောင်စု မြန်မာနိုင်ငံတော်အစိုးရ ပြည်ထဲရေးဝန်ကြီး (လျှောက်ထားခံရသူ)။*

၁၉၅၈ †
နိုဝင်ဘာလ
၇ ရက်။

ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေပုဒ်မ ၁၇ (၄) အရ၊ အခွင့်အရေး၊ ၎င်းအခွင့်အရေးကို ထိခိုက်ခြင်းမှ တရားလွှတ်တော်ချုပ်က ကာကွယ်ပေးရန်။

ပြည်သူ့ငြိမ်ဝပ်ပိပြားရေး (ထိန်းသိမ်းစောင့်ရှောက်မှု) ဥပဒေအရ၊ လူတဦးတယောက် အပေါ်၌ အရေးယူရန်အကြောင်း မလုံလောက်လျှင်၊ ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေပုဒ်မ ၁၇ (၄) အရ၊ ထိုလူသည် ပြည်ထောင်စုနိုင်ငံအတွင်း မည်သည့်နေရာ၌မဆို၊ နေထိုင် အခြေစိုက်နိုင်သော အခွင့်အရေးရှိသဖြင့်၊ ၎င်းအခွင့်အရေးကို ထိခိုက်ခြင်းမှ ဤရုံးတော်က ကာကွယ်ရပေမည်။

လျှောက်ထားသူအတွက်၊ လွှတ်တော်ရှေ့နေကြီး ဦးကျော်မြင့် လိုက်ပါ ဆောင်ရွက်သည်။

လျှောက်ထားခံရသူအတွက်၊ အစိုးရလွှတ်တော်ရှေ့နေကြီး ဦးလှမောင် လိုက်ပါ ဆောင်ရွက်သည်။

တရားဝန်ကြီး ဦးဘိုကြီး။ ။ယခုလျှောက်ထားသူ တန်ဂျုပ်စိန် (ခေါ်) ရောင်စိန်သည်၊ မန္တလေးမြို့၌ အမြဲနေထိုင်ခဲ့ရာ နိုင်ငံတော်အစိုးရက ၎င်းသည် ဘိန်းဖိုးထုတ် ခိုးသွင်းခြင်းအလုပ်များကို တိုက်ရိုက်သော်၎င်း၊ သွယ်ဝိုက်သော နည်းလမ်းများဖြင့်သော်၎င်း ပြုလုပ်ကျူးလွန်နေသည်ဟုဆိုပြီး၊ ပြည်သူ့ငြိမ်ဝပ် ပိပြားရေး (ထိန်းသိမ်းစောင့်ရှောက်မှု) (ပြင်ဆင်ချက်) အက်ဥပဒေပုဒ်မ ၅-က (၁) (ဃ) (င) (ဇ) နှင့်ပုဒ်မ ၅-က (၂) အရ၊ အရေးယူပြီးလျှင် မန္တလေး မြို့မှထွက်ခွါ၍မပြောင်းစေပြီးကျောက်ဖြူခရိုင်၊ ရမ်းပြိုမြို့၌ခြေချုပ်နှင့်ထားလေသည်။

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* ၁၉၅၀ ခုနှစ်၊ ရာဇဝတ်အလေးအဖဲ့လျှောက်လွှာအမှတ် ၆၀။

† နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးမြင့်သိန်း၊ နိုင်ငံတော် တရားဝန်ကြီး ဦးချန်ထွန်းနှင့် နိုင်ငံတော် တရားဝန်ကြီး ဦးဘိုကြီးတို့ရှေ့မှောက်တွင် နိုင်ငံတော်တရားဝန်ကြီး ဦးဘိုကြီးက အမိန့်ချမှတ်သည်။

၁၉၅၀
တန်ဖျဉ်စိန် (ခေါ်) ရောင်စိန် နှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံ တော်အစိုးရ ပြည်ထဲရေး ဝန်ကြီး။

ယင်းသို့ ကနဦးချမှတ်သည့်အမိန့်သည်၊ ၁၉၅၅ ခုနှစ်၊ ဩဂုတ်လ ၁၅ ရက်နေ့၌ ဖြစ်၍၊ ရန်ပြုမှုဥ ၁၉၅၆ ခုနှစ်၊ ဩဂုတ်လ ၃၁ ရက်နေ့အထိ တနှစ်တာအတွင်း အတည်ဖြစ်သည်။ တဖန် ၁၉၅၇ ခုနှစ်၊ ဩဂုတ်လ ၃၁ ရက်နေ့အထိ ရန်ပြုမှုဥ ဆက်လက်နေထိုင်စေရန် အမိန့် ချမှတ်လိုက်သည်။ ဒုတိယနှစ် ကုန်ဆုံးသော အခါ၊ ၁၉၅၈ ခုနှစ်၊ ဩဂုတ်လ ၃၁ ရက်နေ့အထိ ထိုမြို့မှပင် ဆက်လက်နေထိုင်ရန် အမိန့်ချမှတ်လေသည်။ ယခုတဖန် စတုတ္ထအကြိမ် ရန်ပြုမှုမှပင် ဆက်လက်နေထိုင်ရန် အမိန့်ချမှတ်သည်ဟု သိရှိရသည်။

လျှောက်ထားသူက၊ မိမိသည် ရန်ပြုမှုတွင်ကောင်းမွန်စွာနေထိုင်ခဲ့ကြောင်း။ ယင်းသို့ နေထိုင်သည့်အတွင်း၊ သွေးတိုးရောဂါရှိသဖြင့် ဆရာဝန်နှင့် ကုသနေရကြောင်းများကို အကြောင်းပြပြီးလျှင် မိမိ၏အပေါ်၌ချမှတ်သော အမိန့်ကိုပယ်ဖျက်ပေးပါရန်၊ ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံ ဥပဒေပုဒ်မ ၂၅ အရ၊ ဌာနီးတော်သို့ လျှောက်ထားလေသည်။ ပြည်သူ့ဦးမဝပိပြားရေး (ထိန်းသိမ်းစောင့်ရှောက်မှု) ဥပဒေအရ လျှောက်ထားသူအပေါ်၌ အရေးယူရန် အကြောင်းမလုံလောက်လျှင် ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေ ပုဒ်မ ၁၇ (၄) အရ၊ လျှောက်ထားသူသည်၊ ပြည်ထောင်စုနိုင်ငံအတွင်းတွင် မည်သည့်နေရာ၌မဆို နေထိုင်အခြေစိုက်နိုင်သော အခွင့်အရေးရှိသဖြင့်၊ ၎င်း၏အခွင့်အရေးကို ထိခိုက်ခြင်းမှ ဌာနီးတော်က ကာကွယ်ရပေမည်။

ယခုလျှောက်ထားသူအား၊ ပဌမအကြိမ်၌ မန္တလေးမြို့မှ ရန်ပြုမှုသို့ နယ်ပြောင်းပြီး တနှစ်တာမျှသာ ခြေချုပ်နှင့်နေထိုင်စေခဲ့သည်။ ယင်းသို့ တနှစ်တာမျှသော အချိန်ကာလကိုသတ်မှတ်ရာတွင် သက်ဆိုင်ရာအာဏာပိုင်သည် လျှောက်ထားသူနှင့်ပတ်သက်၍ အကြောင်းခြင်းရာအားလုံးကို သုံးသပ် ဝေဖန်ပြီးနောက် သတ်မှတ်သည်ဟု ယူဆရမည် ဖြစ်သည်။ နိုင်ငံတော်အစိုးရ ပြည်ထဲရေးဝန်ကြီးဌာနအတွင်းဝန်မင်း၏ ကျမ်းကျိန်ချေပလွှာအပိုဒ် (၃)၌၊ အောက်ပါအတိုင်း ဖော်ပြထားလေသည်။

> "လျှောက်ထားသူအား၊ ၎င်း၏နေရပ်ဖြစ်သော မန္တလေးမြို့သို့ ပြန်လည်နေထိုင်ခွင့်ပြုပါက လျှောက်ထားသူသည်၊ ၎င်း၏ တပည့်တော်များနှင့် ပြည်လည် ပူးပေါင်းဆက်သွယ်ပြီး ဘိန်း ခိုးထုတ် ခိုးသွင်းခြင်း အလုပ်များကို အမှန်ပင်ဆက်လက်ကျူးလွန်လိမ့်မည်ဟု ယူဆပါ၍၊ ၎င်း အား နောက်ထပ် တနှစ်တိတိ ဆက်လက်၍ ယခင်က အမိန့်ပေးထားသည့် ကျောက်ဖြူခရိုင်၊ ရန်ပြုမှုတွင် ဆက်လက်နေထိုင်ရန် အမိန့်သစ်တရပ်ကို ထုတ်ဆင့်ခဲ့ပါသည်။ ယင်းသို့ အမိန့်သစ်တရပ် ထုတ်သည်မှာ

၁၉၅၈

တန်ဂျုပ်စိန်
(ခေါ်)
ရောင်စိန်
နှင့်
ပြည်ထောင်စု
မြန်မာနိုင်ငံ
တော်အစိုးရ
ပြည်ထဲရေး
ဝန်ကြီး

လည်း လုံလောက်သော သက်သေခံ အထောက်အထား အပေါ်တွင် အခြေပြုရန် ထုတ်ဆင့်ခြင်းဖြစ်ပါသည်။ ''

ဤမှုလောက်သောအကြောင်းဖြင့်၊ လျှောက်ထားသူအား တနှစ်ပြီးတနှစ် ခက်ခါဆက်ခါချုတ်ချယ်ထားခဲ့သည်မှာ ကြာမြင့်ပြီဖြစ်သည်တကြောင်း၊ နောက် ထပ်တဝန် ခြေချုပ်နှင့်နေစေရန် အကြောင်းသုံးပေါ်ပေါက်ခြင်းမရှိဟု ဤရုံးတော် က တွေ့ရှိရသည်တကြောင်းတို့ကြောင့်၊ လျှောက်ထားယူအပေါ်၌ နောက်ဆုံး ချမှတ်သော နယ်နှင်-ခြေချုပ်အမိန့်ကို ပယ်ဖျက်လိုက်သည်။

တရားလွှတ်တော်ချုပ်။

လာ(လ်)ဆင် (လျှောက်ထားသူ)

နှင့်

ဘလွှာရေးနှင့်အခွန်တော်ဝန်ကြီးပါ ၄ (လျှောက်ထားခံရသူများ)။*

၁၉၅၇ †
ဧပြီ ၁၁
ရက်။

အားထုတ်မှု (attempt) ဆိုသည့် ဝေါဟာရ၊ ဥပဒေများတွင် အဓိပ္ပါယ်ရှင်းလင်းချက်မရှိ။

လျှောက်ထားသူသည်၊ မူဆယ်မြို့နှင့်အနီးတဝိုက်တွင် ရေနံဆီရောင်းဝိုင်ခွင့် ရရှိသော မူဆယ်မြို့အတွက်၊ ရေနံဆီကိုယ်စားလှယ်တဦးဖြစ်သည့်အလျောက်၊ ရေနံချောင်းမှ ရေနံဆီ ဂါလံ ၃,၀၀၀ ကို၊ မူဆယ်မြို့သို့ယူရာတွင် လမ်းတွင်ရှိသော တရုပ်ပြည်နှင့် မိုင် ၁၀၀ ကျော်မျှကွာဝေးသည့် လားရှိုးမြို့သို့ ရောက်သောအခါ၊ ၎င်းရေနံဆီများကို တရုပ်ပြည်သို့ ခိုးထုတ်ရန်ကြံစည်ပြီး ယူဆောင်လာသည်ဟု ယူဆရန်အကြောင်းများရှိသည်ဟု ထင်မြင်သဖြင့် အကောက်တော်ဝန်က သယ်ယူလာသော ရေနံဆီများ၊ သံပုံးအလွတ်များကို အစိုးရဘဏ္ဍာတော်အဖြစ်ဖြင့်သိမ်းဆည်းပြီး၊ လျှောက်ထားသူအား ဒဏ်ငွေ ၅,၅၀၀ ပေးဆောင်စေရန် အမိန့်ချမှတ်ခဲ့လေသည်။

ဆုံးဖြတ်ချက်။ ။အကောက်တော် အက်ဥပဒေ များတွင်၎င်း၊ မြန်မာ နိုင်ငံတော် ယေဘုယျစကားရပ်အက်ဥပဒေတွင်သော်၎င်း၊ အားထုတ်မှု (attempt) ဆိုသည့် ဝေါဟာရကို အဓိပ္ပါယ်ရှင်းလင်းချက်မတွေ့ရချေ။

ရေနံဆီများကို အကောက်တော်ဝန်က သိမ်းဆည်းသော လားရှိုးမြို့သည် တရုပ်ပြည်နှင့်မိုင် ၁၀၀ ကျော်မျှ ကွာဝေးရ၍၊ လားရှိုးမှ မူဆယ်သို့ရောက်ပြီးမှသာ တရုပ်ပြည်သို့ ထိုရေနံဆီများကို ခိုးထုတ်နိုင်မည်ဖြစ်သဖြင့် လျှောက်ထားသူသည် ယင်းသို့ ဘမ်းဆီးသည့်အချိန်၌ ရေနံဆီများကို တရုပ်ပြည်သို့ တင်ပို့ရန်အားထုတ်သည် (attempt) ဟုမယူဆနိုင်ပေ။

နာရယာနာဆွာမိဘီလေးနှင့် ဘုရင်ကေရာဇ် (1932) Mad. Weekly Notes 545 ကို ရည်ညွှန်းသည်။

အယ်ဒီတာ၏မှတ်ချက်။

၎င်အမှုကို ဆုံးဖြတ်ပြီးသည့်နောက်၊ ၁၉၅၉ ခုနှစ်၊ ပင်လယ်အကောက်တော် (ပြင်ဆင်ချက်) အက်ဥပဒေတွင် "အားထုတ်မှု" (attempt) ဟူသော ဝေါဟာရ အဓိပ္ပါယ်ကို၊ ပါလီမန်လွှတ်တော်က သတ်မှတ်လိုက်လေသည်။

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* ၁၉၅၇ ခုနှစ်၊ တရားမအသေးအဖွဲလျှောက်လွှာအမှတ် ၁၁၉။

† နိုင်ငံတော် တရားဝန်ကြီးချုပ် ဦးမြင့်သိန်း၊ နိုင်ငံတော် တရားဝန်ကြီး ဦးဘိုကြီးနှင့် နိုင်ငံတော်တရားဝန်ကြီး ဦးအောင်သာကျော်တို့၏ ရှေ့မှောက်တွင် မိုင်ငံတော်တရားဝန်ကြီး ဦးဘိုကြီးက အမိန့်ချမှတ်သည်။

၁၉၅၈

လာ (လ) ဆင်နှင့် ဘဏ္ဍာရေးနှင့် အခွန်တော် ဝန်ကြီး ပါ ၄။

လျောက်ထားသူအတွက်၊ လွှတ်တော်ရှေ့နေကြီး ဦးဘဆွေ။

လျောက်ထားခံရသူများအတွက်၊ အစိုးရရှေ့နေကြီး ဦးလှမောင်။

တရား ဝန်ကြီးဦး ဘိုကြီး။ ။ယခုလျောက်ထားသူ လာ (လ) ဆင်သည်၊ ရှမ်းပြည်မြောက်ပိုင်း မူဆယ်မြို့၌နေထိုင်၍၊ ရေနံချောင်းမြို့ အင် (နှ) ၊အို့၊စီ၊ကုမ္ပဏီ၏ မူဆယ်မြို့အတွက်ခန့်ထားသော ရေနံဆီကိုယ်စားလှယ်ဖြစ်ပေသည်။ ၎င်းသည် ၁၉၅၅ ခုနှစ်၊ဇွန်လ ၂၅ ရက်နေ့မှစ၍မူဆယ်မြို့နှင့်အနီးတဝိုက်တွင်ရေနံဆီရောင်းဝိုင်ခွင့်ရရှိပြီးနောက်၊ ထိုနှစ် ဇူလိုင်လ ၂၁ ရက်နေ့၌ ရေနံဆီ ဂါလံ ၃,၀၀၀ ကို ရေနံချောင်းမှ မူဆယ်မြို့မှ တင်ပို့လေသည်။ ထိုနှစ် စက်တင်ဘာလ ၂၆ ရက်နေ့၌ နောက်ထပ် ဂါလံပေါင်း ၃,၀၀၀ ကို ရေနံချောင်းမှ ထပ်မံသယ်ယူလာပြီး လမ်းတွင် လားရှိုးမြို့ အကောက်တော် ဌာနသို့ သွားရောက် အစစ်ဆေးခံရာတွင် အကောက်တော်ဝန်က လာ (လ) ဆင်ထံ၌ ရေနံဆီသယ်ယူခွင့်ပြုလွှာမှာ ရေနံဆီကိုယ်စားလှယ်အားထုတ်ပေးသော ခွင့်ပြုလွှာမျိုးမဟုတ်ဘဲ၊ သာခန်ကုန်သည်များအား ထုတ်ပေးသောခွင့်ပြုလွှာမျိုးဖြစ်သဖြင့်၊စုံစမ်းစစ်ဆေးပြီးလျှင် လာ(လ)ဆင်သည် ထိုရေနံဆီများကို တရုပ်ပြည်သို့ တင်ပို့ရန်ကြံစည်ပြီး ယူဆောင်လာသည်ဟု ယူဆရန်အကြောင်းများရှိသည်ဟု ထင်မြင်သဖြင့်၊ သယ်ယူလာသောရေနံဆီများ၊ သံပုံး အလွတ်များကို အစိုးရ ဘဏ္ဍာတော်အဖြစ်ဖြင့် သိမ်းဆည်းပြီး၊ လာ(လ)ဆင်အား ဒဏ်ငွေ ၅,၅၀၀ ပေးဆောင်စေရန် အမိန့်ချမှတ်ခဲ့လေသည်။

ထိုသို့ အမိန့်ချမှတ်သည်ကို မကျေနပ်သဖြင့် လာ (လ) ဆင်က၊ အကောက်တော်မင်းကြီးထံသို့ အယူခံရာတွင်လည်း အယူခံလွှာကို ပယ်လိုက်လေသည်။ ဘဏ္ဍာတော် မင်းကြီးထံသို့ဝင်း၊ ဘဏ္ဍာရေးနှင့် အခွန်တော် ဝန်ကြီးထံသို့ဝင်း စောဒကတက်ရာတွင်လည်း မအောင်မြင်ချေ။ သို့ဖြစ်၍ လာ (လ) ဆင်သည်၊ အမှုခေါ်စာခွန်တော်အမိန့်ဖြင့် အထက်ဇော်ပြပါ အမိန့်များကို ပယ်ဖျက်ပါရန်၊ ဤရုံးတော်သို့ လျောက်ထားလေသည်။

ယင်းသို့ အမိန့်ချမှတ်သော အာဏာပိုင်များ၏ အကြောင်းပြချက်များကို လာ (လ) ဆင်က မိမိ၏ကျမ်းကျိန်လွှာတွင်ချေပလေသည်။ ထိုအကြောင်းပြချက်များသည်၊ မှန်ကန်သည်ဟု ယူဆစေကာမူ၊ ယခု ဆုံးဖြတ်ရမည့် ပြဿနာမှာ လာ(လ)ဆင်သည်၊ ၁၉၅၅ ခုနှစ်၊ စက်တင်ဘာလတွင် ရေနံချောင်းမြို့မှ သယ်ယူလာသော ရေနံဆီ ဂါလံ ၃,၀၀၀ ကို တရုပ်ပြည်သို့ခိုးထုတ်ရန် အားထုတ်သည်မထုတ်သည်ဟူသောပြဿနာ ဖြစ်လေသည်။ အာဏာပိုင်များက အကိုးအကားပြုသော အက်ဥပဒေများအရလည်း၊ နိုင်ငံခြားသို့ အခွင့်မရှိဘဲ ခိုးထုတ်ရန် အား

ထုတ်မှသာလျှင် အပြစ်ပေးနိုင်လေသည်။ ထိုအက်ဥပဒေများတွင်ငင်း၊ မြန်မာနိုင်ငံတော် ယေဘုယျ စကားရပ် အက်ဥပဒေတွင် သော်ငင်း၊ အားထုတ်မှု (attempt) ဆိုသည့်ဝေါဟာရကို အဓိပ္ပါယ်ရှင်းလင်းချက်မတွေ့ရချေ။

၁၉၅၀ လာ(လ)ဆင်နှင့် ဘဏ္ဍာရေးနှင့် အခွန်တော်ဝန်ကြီး ဝါဒ။

ဥပဒေလောကတွင်၊ သာမန်အားဖြင့် နားလည်ကြသည်မှာ ပြစ်မှုတခုကို ကျူးလွန်ရာ၌ ကြံစည်ခြင်း၊ ပြင်ဆင်ခြင်း၊ အားထုတ်ခြင်း၊ ကျူးလွန်ခြင်း ဟူ၍ အဆင့်ဆင့်ရှိလေသည်။ ဤအမှုတွင် လာ(လ)ဆင်သည်၊ ရေနံဆီဂါလံ ၃,၀၀၀ ကို ရေနံချောင်းမြို့မှ လားရှိုးမြို့အထိ၊ သယ်ယူလာသည်ကားမှန်၏။ သို့ရာတွင် လားရှိုးမြို့မှ ငင်းနေထိုင်သော မူဆယ်မြို့သို့ ဆက်လက်သယ်ယူရန်ရည်ရွယ်ချက်ဖြင့် သယ်ယူလာကြောင်းထင်ရှား၏။ မူဆယ်မြို့ရောက်ပြီးမှသာ တရုပ်ပြည်သို့ ထိုရေနံဆီများကို ခိုးထုတ်နိုင်မည်ဖြစ်သည်။ အခြားလမ်းဖြင့် လားရှိုးမှ တရုပ်ပြည်သို့ ခိုးထုတ်နိုင်သည့်လမ်းရှိသည်ဟု ဤအမှုတွင် မပေါ်လွင်ချေ။

ရေနံဆီများကို အကောက်တော်ဝန်က သိမ်းဆည်းသော လားရှိုးမြို့သည်၊ တရုပ်ပြည်နှင့် မိုင် ၁၀၀ ကျော်မျှ ကွာဝေးလေသည်။ အထက် ဇေါ်ပြပါ အကြောင်းများကိုထောက်သဖြင့် လာ(လ)ဆင်သည်၊ ယင်းသို့ဘမ်းဆီးသည့် အချိန်၌ ရေနံဆီများကို တရုပ်ပြည်သို့တင်ပို့ရန် အားထုတ်သည် (attempt) ဟု မယူဆနိုင်ပေ။

နာရယာနာဆွာမိပီလေး နှင့် ဘုရင်ကောင် * တွင် တရားခံသည်၊ မြတိသျှပိုင်နယ်အတွင်း၌ ဘတ်(စ်)ကားတစင်းဖြင့် ခရီးသွားနေစဉ်၊ ငင်းအား ရှာဖွေရာ ဘိန်းများမိလေသည်။ စစ်ဆေးရာတွင်၊ ထိုဘိန်းများကို ပြင်သစ်ပိုင်နယ်အတွင်းရှိ ရွာတရွာသို့ သယ်ယူပြီး အချိန်းအခဲချက်ရှိသူအား ပေးအပ်ရန် ဖြစ်သည်ဟု အစစ်ခံ၏။ ချိန်းထားသည့်ရွာသို့ ရောက်ရှိရန်အတွက် တရားခံသည်၊ မြတိသျှနယ်အတွင်းရှိ ရွာတရွာ၌ဆင်းပြီး ၆ မိုင် ၇ မိုင်မျှ ဆက်လက်ခရီးသွားရမည်ဖြစ်၏။ ထိုအကြောင်းများကိုထောက်၍ မဒရပ်တရားလွှတ်တော်က တရားခံအား ဘိန်းများကို ပြင်သစ်ပိုင်နယ်အတွင်းသို့ သယ်ယူရန် အားထုတ်သည်ဟု မယူဆနိုင်ကြောင်းဖြင့် ဆုံးဖြတ်လေသည်။

အထက်ဇေါ်ပြပါအကြောင်းများကြောင့်၊ လျှောက်ထားခံရသူများအားလုံး၏ အဓိန့်များကိုပယ်ဖျက်ပြီး၊ လျှောက်ထားသူထံမှ သိမ်းယူထားသော ပစ္စည်းများဖြစ်စေ၊ ငင်း၏တန်ဘိုးဖြစ်စေ၊ လျှောက်ထားသူအား ပြန်လည်ပေးအပ်ရန်နှင့်၊ လျှောက်ထားသူဆောင်ခဲ့သည်ဆိုသော ဒဏ်ငွေကိုပါ ငင်းအား ပြန်လည်ပေးအပ်ရန်အမိန့်ချမှတ်လိုက်သည်။

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* 1932, Mad. Weekly Notes p. 545.

တရားလွှတ်တော်ချုပ်။

†၁၉၅၀
နိုဝင်ဘာလ
၇ ရက်။

ဟာရွင်အာမက်ဝါဟစ် (လျှောက်ထားသူ)
နှင့်
လူဝင်မှုကြီးကြပ်ရေးနှင့်အမျိုးသားမှတ်ပုံတင်ရေးဝန်ကြီး ဌာနအတွင်းဝန် (လျှောက်ထားခံရသူ)။*

ပြည်ထောင်စုမြန်မာနိုင်ငံသားဖြစ်မှု အက်ဥပဒေ၊ ပုဒ်မ ၁၂ (၃) နိုင်ငံသားမဟုတ်သော မိဘနှစ်ပါးမှ ပြည်ထောင်စုအတွင်း မွေးဖွါးသူတဦး၊ နိုင်ငံသားလက်မှတ် ရရှိလို ကြောင်းလျှောက်ထားနိုင်ခြင်း၊ မည်သည့်အရည်အချင်း ရှိအင်သည် "ထာဝစဉ် နေထိုင်သူ" ဟူသော စကား၏အဓိပ္ပါယ်၊ စစ်ဘေးစစ်ဒဏ်မှ လွတ်မြောက်ရန်၊ မြန်မာပြည်မှအခြားနိုင်ငံများတွင် သွားနေစဉ်သေဆုံးသူ။

ဆုံးဖြတ်ချက်။ ။ပြည်ထောင်စုမြန်မာနိုင်ငံသားဖြစ်မှုအက်ဥပဒေပုဒ်မ ၁၂ (၃) အရ၊ ပြည်ထောင်စုအတွင်းတွင် ပြည်ထောင်စု၏ အာဏာအောက်၌ ထာဝစဉ်နေထိုင်သည့် နိုင်ငံသားမဟုတ်သော မိဘနှစ်ပါးမှ ပြည်ထောင်စုအတွင်းတွင် မွေးဖွါးသူတဦးသည် အကျင့် စာရိတ္တကောင်းမွန်သည်ဖြစ်၍၊ အရည်အချင်းရှိငွေသူဌေးမဟုတ်လျှင်၊ ၁၉၅၅ ခုနှစ်၊ ဖေဖော်ဝါရီလ ၁ ရက်နေ့မတိုင်မီနိုင်ငံသားလက်မှတ်ရရှိလိုကြောင်းလျှောက်ထားနိုင်သည်၊ လျှောက်သူသည် ပြည်ထောင်စုတွင် ထာဝစဉ်နေထိုင်သူဖြစ်ရမည်။

အိန္ဒိယလူမျိုးဖြစ်သူ၊ လျှောက်သူ၏ဘခင်သည် မြန်မာပြည်၌၊ နှစ်ပေါင်း ၅၀ ကျော်မှ ထာဝစဉ်နေထိုင်လာပြီး၊ စစ်ဘေးစစ်ဒဏ်ကြောင့်ခေတ္တအခြားတိုင်းပြည်များတွင်သွားနေစဉ် သေဆုံးသည့်အတွက်၊ ၎င်းသေသူမှာ မြန်မာပြည်၌ "ထာဝစဉ်နေထိုင်သူ" မဟုတ်ဟု ဥပဒေသဘောအရ၊ကောက်ယူရန်မဖြစ်နိုင်၊မြန်မာနိုင်ငံသို့ပြန်လည်နေထိုင်ရန်ဆန္ဒရှိလျက်ဖြင့်၊ နိုင်ငံရပ်ခြားသို့ သွားရောက်ခြင်းသည် "ထာဝစဉ်နေထိုင်သူ" အဖြစ်ကို ထိခိုက်စေနိုင်မည်မဟုတ်ဆေ။ စစ်ဘေးစစ်ဒဏ်မှလွတ်မြောက်ရန် မြန်မာပြည်မှအမြောက်အမြား၊ အခြားနိုင်ငံများသို့ ပြေးကြသည်ကို မြန်မာပြည်မှ အပြီးအပြတ်ထွက်ခွါသွားကြသည်ဟု ဆိုရန်မဖြစ်နိုင်။ ၁၉၄၆ ခုနှစ်၌၊ မြန်မာပြည်သို့ပြန်လည်နေထိုင်ကြသည်ကို ထောက်ခံခြင်းအားဖြင့်၊ မြန်မာပြည်တွင် ထာဝစဉ်နေထိုင်ရန်ကြိစည်ကြသောသူများဖြစ်ကြသည်ဟု ယူဆရပေမည်။

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* ၁၉၅၀ ခုနှစ်၊ တရားမအသေးအဖွဲလျှောက်လွှာအမှတ် ၂၀။

† နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးမြင့်သိန်း၊ နိုင်ငံတော်တရားဝန်ကြီး ဦးချန်ထွန်းနှင့် နိုင်ငံတော်တရားဝန်ကြီး ဦးဘိုကြီးတို့ရှေ့မှောက်တွင်နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးမြင့်သိန်း က အမိန့်ချမှတ်သည်။

လျှောက်ထားသူအတွက်၊ လွှတ်တော်ရှေ့နေကြီး ဦးကျော်ခင် လိုက်ပါဆောင်ရွက်သည်။

၁၉၅၈

ဟာရွှင်အာမက်ဝါဟစ် နှင့် လူဝင်မှုကြီးကြပ်ရေးနှင့် အမျိုးသားမှတ်ပုံတင်ရေးဝန်ကြီးဌာန အတွင်းဝန်။

လျှောက်ထားခံရသူအတွက်၊ အစိုးရရှေ့နေကြီး ဦးလှမောင် လိုက်ပါဆောင်ရွက်သည်။

တရားဝန်ကြီးချုပ်ဦးမြင့်ဆိန်း။ ။ပြည်ထောင်စု မြန်မာနိုင်ငံသားဖြစ်မှုအက်ဥပဒေပုဒ်မ ၁၂ (၃) အရ၊ ပြည်ထောင်စုအတွင်းတွင် ပြည်ထောင်စု၏ အာဏာအောက်၌ ထာဝစဉ်နေထိုင်သည့် နိုင်ငံသားမဟုတ်သော မိဘနှစ်ပါးမှ ပြည်ထောင်စုအတွင်းတွင် မွေးဖွါးသူတဦးသည် အကျင့်စာရိတ္တကောင်းမွန်သည်ဖြစ်၍ အရည်အချင်း ချို့ငဲ့သူလည်းမဟုတ်လျှင်၊ ၁၉၅၅ ခုနှစ်၊ ဧပြီလ ၁ ရက်နေ့မတိုင်မီ နိုင်ငံသားလက်မှတ် ရရှိလိုကြောင်း လျှောက်ထားနိုင်သည်။ လျှောက်သူသည် ပြည်ထောင်စုတွင် ထာဝစဉ်နေထိုင်သူဖြစ်ရမည်။

လျှောက်သူ ဟာရွှင်အာမက်ဝါဟစ်က မိမိသည် ပုဒ်မ ၁၂ (၃) တွင် သတ်မှတ်သည့် အရည်အချင်းအားလုံးတို့နှင့် ပြည့်စုံသည်ဟုဖေါ်ပြပြီး၊ နိုင်ငံသားလက်မှတ်ရရှိရန်လျှောက်ထားရာ၊ လူဝင်မှုကြီးကြပ်ရေးနှင့် အမျိုးသားမှတ်ပုံတင်ရေးဝန်ကြီးဌာနက၊ "ပုဒ်မ ၁၂ (၃) အရ၊ နိုင်ငံသားလက်မှတ်ကို လျှောက်ထားရန် အရည်အချင်းပြည့်စုံခြင်းမရှိပါ၍၊ လျှောက်လွှာကို ပယ်ချကြောင်း" ပြန်ကြားလိုက်လေသည်။

အမိန့်ကိုမကျေနပ်၍ ဤရုံးတော်တွင် စာချုပ်တော်လျှောက်ထားသည်ကို သက်ဆိုင်ရာဝန်ကြီးဌာန တွဲဘက်အတွင်းဝန်မင်းက အောက်ပါအတိုင်းချေပသည်။

> "လူဝင်မှုကြီးကြပ်ရေးနှင့် အမျိုးသား[illegible]တင်ရေးဝန်ကြီးဌာနတွင် 'ထာဝစဉ်နေထိုင်သူ' ဟူသော စကားရပ်နှင့်ပတ်သက်၍ လိုက်နာဆောင်ရွက်နေသော စည်းကမ်းချက်မှာ၊ ပြည်ထောင်စုမြန်မာနိုင်ငံ၏ အာဏာပိုင်နက်အတွင်း၌အမြဲတန်းနေထိုင်ပြီးလျှင် ပြည်ထောင်စု မြန်မာနိုင်ငံ၏အာဏာပိုင်နက်အတွင်း၌ပင် သေဆုံးသူဖြစ်ရမည်ဟူသော အချက်ပင်ဖြစ်ပါသည်။ လျှောက်ထားသူ၏မိခင်မှာ မြန်မာနိုင်ငံအတွင်းတွင် ထာဝစဉ်နေထိုင်သူတဦးဟုယူဆနိုင်သော်လည်း၊ ၎င်း၏ဘခင်မှာ အိန္ဒိယလူမျိုး နိုင်ငြားသားဖြစ်သည့်အပြင် အိန္ဒိယတွင် သေဆုံးသူဖြစ်သဖြင့် ၎င်း၏ဘခင်မှာ အထက်ပါစည်းကမ်းချက်အရ၊ မြန်မာနိုင်ငံတွင်ထာဝစဉ်နေထိုင်သူဟု မယူဆနိုင်ပါ။"

၁၉၅၈

ဟာရွှင်အာမက်ဝါဟစ်နှင့် လူဝင်မှုကြီးကြပ်ရေးနှင့် အမျိုးသားမှတ်ပုံတင်ရေးဝန်ကြီးဌာနအတွင်းဝန်။

လျှောက်သူက ရန်ကုန်မြို့ ခရိုင်ရာဇဝတ်တရားသူကြီးထံ တင်သွင်းသော ကျမ်းကျိန်စာတွင် မိမိ၏ဘခင်သည် မြန်မာပြည်တွင်၊ ၁၈၉၀ ခုနှစ်ကစ၍ ၁၉၄၂ ခုနှစ်အထိ ထာဝစဉ်နေထိုင်လာခဲ့ရာ၊ စစ်ပြေးရင်း အိန္ဒိယပြည်တွင် မြန်မာပြည်သို့ ပြန်ရန်စီစဉ်နေခိုက်၊ ၁၉၄၆ ခုနှစ် အတွင်းတွင် သေဆုံးသွားကြောင်းဖော်ပြထားသည်ကိုတွေ့ရှိရသည်။

စစ်ဘေးစစ်ဒဏ်မှလွတ်မြောက်ရန် မြန်မာပြည်မှ အမြောက်အမြား အခြားနိုင်ငံများသို့ ပြေးကြသည်ကို၊ မြန်မာပြည်မှ အပြီးအပြတ်ထွက်ခွါသွားကြသည်ဟု ဆိုရန်မဖြစ်နိုင်။ လျှောက်သူနှင့် ၎င်း၏မိခင်၊ ၎င်း၏ညီ၊ နှမများအားလုံးသည်၊ ၁၉၄၆ ခုနှစ်၌ မြန်မာပြည်သို့ ပြန်လည်နေထိုင်ကြသည်ကို ထောက်ရှုခြင်းအားဖြင့်၊ မြန်မာပြည်တွင် ထာဝစဉ်နေထိုင်ရန် ကြံစည်ကြသောသူများ ဖြစ်ကြသည်ဟု ယူဆရပေမည်။ ကွယ်လွန်သူဘခင်မှာလည်း၊ ၁၈၉၀ ခုနှစ်ကစ၍ ၁၉၄၂ ခုနှစ်တိုင်အောင် မြန်မာပြည်တွင် နေထိုင်ခဲ့သူဖြစ်၍ မကွယ်လွန်ခဲ့ပါမူ၊ မြန်မာပြည်သို့ အမှန်ပင်ပြန်လာမည်ဟု ယူသင့်ပေသည်။

စစ်ဘေးစစ်ဒဏ်ကြောင့်ခေတ္တအခြားတိုင်းပြည်များတွင်သွားနေစဉ် သေဆုံးသည့်အတွက်လျှောက်သူ၏ဘခင်သည်၊ မြန်မာပြည်၌ "ထာဝစဉ်နေထိုင်သူ" မဟုတ်ဟု ဥပဒေသဘောအရ အဓိပ္ပါယ်ကောက်ယူရန်မဖြစ်နိုင်။ မြန်မာနိုင်ငံသို့ ပြန်လည်နေထိုင်ရန် ဆန္ဒရှိလျက်ဖြင့်၊ နိုင်ငံရပ်ခြားသို့ သွားရောက်ခြင်းသည် "ထာဝစဉ်နေထိုင်သူ" အဖြစ်ကို ထိခိုက်စေနိုင်မည်မဟုတ်ချေ။

သို့ဖြစ်၍ ဟိန္ဒူမဒ ၂ (၃) အရ လျှောက်သူသည် လျှောက်လွှာတင်သွင်းနိုင်ရန်ပင် အရည်အချင်းမရှိ ဆိုသည်မှာ မှားယွင်းသောအဓိပ္ပါယ်ဖြစ်၍ ပယ်ဖျက်လိုက်သည်။ လျှောက်သူသည် နိုင်ငံသားလက်မှတ်တကယ်ပင်ရထိုက်သည်၊ မရထိုက်သည်ဟူသောပြဿနာမှာ ဤရုံးတော်တွင်ပေါ်ပေါက်ခြင်းမရှိ။ လျှောက်လွှာတင်သွင်းနိုင်ရန် အရည်အချင်းရှိသူတဦးဖြစ်ကြောင်းကိုသာဆုံးဖြတ်ခြင်းဖြစ်သည်။ သို့အတွက် တင်သွင်းသောလျှောက်လွှာကို ဝန်ကြီးဌာနက ဆက်လက်စဉ်းစားဆုံးဖြတ်ထိုက်ကြောင်းကို ဖော်ပြလိုက်သည်။

တရားလွှတ်တော်ချုပ်။

ဦးအုန်းညွန့် ပါ ၂ (လျှောက်ထားသူများ)
နှင့်
ဥက္ကဋ္ဌ၊ တနင်္သာရိတိုင်းသီးစားချထားရေးကော်မိတီ၊
မော်လမြိုင် ပါ ၂ (လျှောက်ထားခံရသူများ)။*

†၁၉၅၀
ဒီဇင်ဘာလ
၂၄ ရက်။

၁၉၅၃ ခုနှစ်၊ သီးစားချထားရေးနည်းဥပဒေ ၈ (၁) အရ အပ်နှင်းထားသော အာဏာများ၊ တဦးတယောက်ကိုစေလွှတ်၍ ဆိုင်ရာနေရာဌာနများကို ကြည့်ရှုစစ်ဆေးစေခြင်း။

ဆုံးဖြတ်ချက်။ ။၁၉၅၃ ခု၊ သီးစားချထားရေးနည်းဥပဒေ ၈ (၁) အရ၊ တိုင်းကော်မိတီအား၊ သက်ဆိုင်ရာအမှုသည်များနှင့် သက်သေများကို လာရောက်စေရန်ဆင့်ခေါ်ပြီး၊ သက်သေများကို ကျမ်းသစ္စာဖြင့်စစ်ဆေးခြင်း၊ ဆိုင်ရာစာချုပ်စာတမ်းများနှင့် သက်သေခံပစ္စည်းများကို တင်ပြစေရန် ဆင့်ခေါ်ခြင်း၊ ဆိုင်ရာနေရာဌာနများကို ကြည့်ရှုစစ်ဆေးခြင်း ပြုလုပ်နိုင်သည့်အာဏာများ အပ်နှင်းထားလေသည်။

အခင်းဖြစ်လယ်မြေသို့ အတွင်းရေးမှူးကိုဖြစ်စေ၊ အခြားသူတဦးတယောက်ကိုဖြစ်စေ၊ စေလွှတ်ပြီးစုံစမ်းစစ်ဆေးနိုင်သည့် အခွင့်အာဏာမရှိချေ။

လျှောက်ထားသူအတွက်၊ လွှတ်တော်ရှေ့နေကြီး၊ ဦးခင်မောင် (၄) လိုက်ပါဆောင်ရွက်သည်။

လျှောက်ထားခံရသူ အမှတ် (၂) အတွက်၊ လွှတ်တော်ရှေ့နေကြီး မစွတာတီ၊ ဒီ၊ ဝမ်း က လိုက်ပါဆောင်ရွက်သည်။

တရားဝန်ကြီး ဦးဘိုကြီး။ ။အမှုတွင်၊ ကျိုက္ခမီခရိုင်၊ ချောင်းဆုံမြို့နယ်၊ သခွတ်ကွင်းအမှတ် ၆၈၇၊ ဦးပိုင်အမှတ် $\frac{3}{64}$၊ ၄၃၊၄၅ စုစုပေါင်း ရေယာ ၁၄ ဧက ၈၀ ကောန်ရှိ လယ်မြေကွက်များကို၊ ၁၉၅၇-၅၀ ခုနှစ်အတွက်၊ စိုက်ပျိုးလုပ်ကိုင်ရန် ယခုလျှောက်ထားသူ ဦးအုန်းညွန့်၊ ဒေါ်မြညွန့်တို့အား၊ ကွမ်ရိုက်

* ၁၉၅၀ ခုနှစ်၊ တရားမအသေးအဖွဲလျှောက်လွှာအမှတ် ၆၇။

† နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးမြင့်သိန်း၊ နိုင်ငံတော်တရားဝန်ကြီး ဦးချန်ထွန်းနှင့် နိုင်ငံတော်တရားဝန်ကြီး ဦးဘိုကြီးတို့ရှေ့မှောက်တွင် နိုင်ငံတော်တရားဝန်ကြီး ဦးဘိုကြီးက အမိန့်ချမှတ်သည်။

၁၉၅၈

ဦးအုန်းညွန့် ပါ ၂ နှင့် ဥက္ကဋ္ဌ၊ တနင်္သာရီတိုင်း သီးစားချထားရေးကော်မိတီ၊ မော်လမြိုင် ပါ ၂။

ကျေးရွာသီးစားချထားရေးကော်မိတီက၊ ၁၉၅၇ ခုနှစ်၊ ဇွန်လ ၄ ရက်နေ့စွဲပါ အမိန့်အရ ခွင့်ပြုလိုက်လေသည်။ ကျွန်ုပ်မခရိုင်၊ သီးစားချထားရေးကော်မိတီ ကလည်း၊ ကျေးရွာကော်မိတီ၏ အမိန့်ကို အတည်ပြုလိုက်ရာ၊ လျှောက်ထားခံရသူအမှတ် ၂၊ ဦးရွှေမွန်းသည် တနင်္သာရီတိုင်း၊ သီးစားချထားရေး ကော်မိတီသို့ စောဒကတင်လေသည်။

တိုင်းသီးစားချထားရေးကော်မိတီသည်၊ နှစ်ဦးနှစ်ဘက်သော အမှုသည်များနှင့် သက်သေများကို စစ်ဆေးပြီးလျှင်၊ မိမိတို့၏အတွင်းရေးမှူးအား၊ အခင်းဖြစ်မြေပေါ်သို့ သွားရောက်၍ အမှုသည်တို့လျှောက်ခဲ့သော အချက်အလက်များမှန်၊ မမှန်ကို စုံစမ်းစစ်ဆေးစေပြီးနောက်၊ အတွင်းရေးမှူး၏အစီရင်ခံစာကို ဘတ်ရှုပြီးလျှင်၊ ကျေးရွာသီးစားချထားရေးကော်မိတီနှင့် ခရိုင်သီးစားချထားရေးကော်မိတီတို့၏ အမိန့်အသီးသီးကို ပယ်ဖျက်လိုက်သည်။ ယင်းအမိန့်ကိုမကျေနပ်သဖြင့် လျှောက်ထားသူများက အမှုခေါ် စာချွန်တော် အမိန့်ဖြင့် ပယ်ဖျက်ပါရန် ဤရုံးတော်သို့ လျှောက်ထားလေသည်။

သီးစားချထားရေးကော်မိတီအသီးသီးသည်၊ ၁၉၅၃ ခုနှစ်၊ သီးစားချထားရေးအက်ဥပဒေနှင့် ထိုနှစ်သီးစားချထားရေး နည်းဥပဒေများက အပ်နှင်းထားသော အာဏာများအတိုင်းသာ မိမိထံသို့ရောက်ရှိသော ကိစ္စရပ်များနှင့် စပ်လျဉ်း၍ ဆောင်ရွက်နိုင်သည်။ ထိုအာဏာများကို ကျော်လွန်၍မဆောင်ရွက်နိုင်ချေ။ ၁၉၅၃ ခုနှစ်၊ သီးစားချထားရေးနည်းဥပဒေ ၈ (၁) ၌ အောက်ပါအတိုင်းပြဋ္ဌာန်းထားလေသည်။

> "၈။ ။(၁) ကော်မိတီအသီးသီးမှာ မိမိနှင့် သက်ဆိုင်သော နယ်အတွင်းတွင် သီးစားချထားရေးဆိုင်ရာ မှုခင်းများကို စီရင်ဆုံးဖြတ်ရန်အလို့ငှါ၊ အောက်ပါအာဏာများကို ရရှိစေရမည်။
>
> (က) သက်ဆိုင်ရာ အမှုသည်များနှင့် သက်သေများကို လာရောက်စေရန်ဆင့်ခေါ်ခြင်း။
>
> (ခ) သက်သေများကို ကျမ်းသစ္စာဖြင့် စစ်ဆေးခြင်း။
>
> (ဂ) ဆိုင်ရာစာချုပ်စာတမ်းများကိုငင်း၊ သက်သေခံပစ္စည်းများကိုငင်း၊ တင်ပြစေရန် ဆင့်ဆိုခြင်း။
>
> (ဃ) ဆိုင်ရာနေရာဌာနများကို ကြည့်ရှုစစ်ဆေးခြင်း။"

ထိုနည်းဥပဒေများတွင် တိုင်းကော်မိတီအား သက်ဆိုင်ရာအမှုသည်များနှင့် သက်သေများကို လာရောက်စေရန်ဆင့်ခေါ်ပြီး၊ သက်သေများကိုကျမ်းသစ္စာဖြင့် စစ်ဆေးခြင်း၊ ဆိုင်ရာစာချုပ်စာတမ်းများနှင့် သက်သေခံပစ္စည်းများကို တင်ပြ

စေရန်ဆင့်ဆိုခြင်း၊ ဆိုင်ရာနေရာဌာနများကို ကြည့်ရှုစစ်ဆေးခြင်းပြုလုပ်နိုင်သည့် အာဏာများ အပ်နှင်းထားလေသည်။ အခင်းဖြစ်လယ်မြေသို့ အတွင်းရေးမှူးကို ဖြစ်စေ၊ အခြားသူတဦးတယောက်ကိုဖြစ်စေ စေလွှတ်ပြီးစုံစမ်းစစ်ဆေးနိုင်သည့် အခွင့်အာဏာမရှိချေ။

၁၉၅၈
ဦးအုန်းညွန့် ပါ ၂ နှင့် ဥက္ကဋ္ဌ၊ တနင်္သာရီတိုင်း သီးစားချထားရေးကော်မိတီ၊ မော်လမြိုင် ပါ ၂။

အထက်ဖော်ပြပါအကြောင်းများကြောင့်၊ တနင်္သာရီတိုင်း သီးစားချထားရေးကော်မိတီ၏ ၁၉၅၈ ခုနှစ်၊ မတ်လ ၁၅ ရက်နေ့စွဲပါအမိန့်ကို ပယ်ဖျက်လိုက်သည်။ ယခုဖြစ်ပွားသည့်မှုခင်းကိစ္စကို တိုင်းသီးစားချထားရေးကော်မိတီက တရားဥပဒေအတိုင်း ပြန်လည်စစ်ဆေးဆုံးဖြတ်ရန် ပေးပို့လိုက်သည်။ ဤရုံးတော်၏ တရားစရိတ်ကို တိုင်းသီးစားချထားရေးကော်မိတီရှေ့မှောက်တွင် အနိုင်ရသူက ရရှိစေရမည်။ ဤရုံးတော်၏ရှေ့နေခမှာ ၅၀ ဖြစ်စေရမည်။

BURMA LAW REPORTS

HIGH COURT

1958

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

Parts I to VI.—U TUN MAUNG, B.A., B.L., *Bar.-at-Law*, EDITOR.
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CORRIGENDA

In the *Burma Law Reports,* 1956, in the list of Honourable Judges of the High Court :

For the words

" 1. The Hon'ble Justice *Maha Thray Sithu* U CHAN TUN AUNG, B.A., B.L., *Barrister-at-Law*, Chief Justice."

Substitute :

" 1. The Hon'ble Justice *Thado Maha Thray Sithu* U CHAN TUN AUNG, B.A., B.L., *Barrister-at-Law,* Chief Justice."

In the *Burma Law Reports,* 1957, at page 206 (High Court), seventh line :

For ". . . it is urged that an offence of misconduct. . ."

Read ". . . it is urged that *no* offence of misconduct. . ."

In the *Burma Law Reports,* 1958, at page 571 (High Court):

For " Aung Min (2),
S. K. N. Aiyar."

Substitute : " Tun Lwin (3),
U Kyaw (1)"

respectively.

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ARBITRATION ACT, s. 34—*Proceedings—Taking Steps in—Stay of.* Where a party to the suit applied for stay of proceedings under s. 34 of the Arbitration Act after taking two adjournments to file a written statement. *Held:* That the application for adjournment to file a written statement was taking a step in the proceedings and by implication amounted to a submission to Court's jurisdiction and that therefore the application for stay of proceedings under s. 34 of the Arbitration Act could not be entertained. *The Karnani Industrial Bank, Ltd.* v. *Satya Niranjan Shaw and others*, 28 C.W.N. 771; *U. K. Banerji* v. *Governor-General of India in Council*, I.L.R. (1950) Cal. Vol. II, p. 561, referred to.

THE UNION OF BURMA *v.* P. JAMES 691

ARBITRATION—*Civil Procedure Code (Act V, 1908)—Sch. II, s. 15—Legal Misconduct—Ground for setting aside an award—Meaning of—Perversity is misconduct—What is not perversity—Arbitration Act, 1944—S.30—Award—Setting aside—Ground for—Review of awards—Limited jurisdiction of Courts.* Legal misconduct is a term which is commonly used in reference to awards and it has been described generally to mean an erroneous breach of duty on the part of arbitrator, however honest, which causes miscarriage of justice. Misconduct is a question of fact in each case. If a material piece of evidence is tendered and rejected it may amount to misconduct entitling the party to set aside the award. *Aboobaker Latif* v. *Reception Committee of the 48th Indian National Congress and another*, A.I.R. (1937) Bom. 410, referred to. Perversity is misconduct within the meaning of s. 15, Sch. II, C.P.C. (Act V, 1908). *Nga Tok* v. *Nga Kassim and three others* 5 B.L.T. 55, explained. A Court cannot set aside an award of an Umpire as perverse simply because it has formed an opinion and drawn conclusions different from those formed and drawn by the Umpire on questions of fact. *Hajee Ebrahim Kassim Cochinwalla* v. *Northern Indian Oil Industries, Ltd.*, A.I.R (1951) Cal. 230, referred to. An award cannot be set aside except on one or more of the grounds mentioned in s. 30, Arbitration Act, 1944. The appraisement of evidence by the Arbitrator is ordinarily never a matter which the Court questions and considers. The Arbitrator is the only Judge of the quality or quantity of evidence and it will not be for the Court to take upon itself the task of being a judge of the evidence before the Arbitrator. The Courts have very limited jurisdiction to review awards passed by Arbitrators or Umpires. They have not the jurisdiction of a Court of Appeal while reviewing the decision of an inferior Court. *G. Martirosi* v. *A.K.C.T. Subramanian Chettyar*, A.I.R. (1930) Mad. 723; *Mt. Aftab Begam* v. *Haji Abdul Majid Khan*, A.I.R. (1924) All. 800; *Debi Das* v. *Keshava Deo*, A.I.R. (1945) All. 423, referred to.

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BURMA DIVORCE ACT, S. 17—*Duty of Court to go into facts before passing decree for dissolution of marriage—Confirmation of decree for dissolution—Objection to—Where filed.* Where the wife and her paramour admitted adultery alleged by the husband and where the husband declared that there was no collusion between the parties to obtain a dissolution of the marriage, such admissions and declarations ordinarily would not absolve the Court from its duty to go into the facts of the case to see whether circumstances exist to justify passing of a decree for dissolution of marriage. All objections against confirmation of the decree for dissolution of marriage must be made in the High Court and not before the Court which passes the decree.

U THAN HTAY *v.* MYINT MYINT YEE (*a*) DOROTHY KE ... 579

BURMA IMMIGRATION (EMERGENCY PROVISIONS) ACT, 1947, S. 13 (*1*)—*Prosecution under—For failure to renew stay permit—Impossibility of doing same due to default on the part of the Immigration Department—Legality of conviction under s. 15 (1).* Where the Immigration Department without returning the passport or sending intimation to the applicant regarding her application for a stay permit prosecuted her under s. 13 (*1*) of the Burma

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Immigration (Emergency Provisions) Act, 1947 for failure to apply for a renewal of her stay permit and obtained a conviction under s. 15 (*1*) of the Act. *Held :* That before the applicant could possibly apply for the renewal of her stay permit it was essential for her to know whether such a permit had been issued to her by the Immigration Department, that without the passport it was impossible for the applicant to know whether a stay permit had been issued to her nor was it possible for her to apply for a renewal of that permit and that as the law does not expect anyone to do what is impossible, the conviction was bad in law. *In the matter of U Khin Maung, Higher Grade Pleader as an Advocate for the High Court*, (1948) B.L.R. 504, followed.

MRS. KANTA BHAI *v.* THE UNION OF BURMA 532

BURMA INCOME-TAX ACT—s. 54 (*2*)—CONFIDENTIAL NATURE OF FACTS AND INFORMATION 172

BURMA INCOME-TAX ACT, 1948—*S. 22* (4), *23* (2), *23* (4), *27 and 33—A "best-of-judgment assessment"—Ss. 66* (2) *and 66* (3)*—Reference to High Court—Ss. 5-A and 5-B, Burma Income-Tax (Amendment) Act, 1953—Function of a Court of Law in administering Law.* The applicant was assessed to Income-Tax for the assessment year 1948-49, *i.e.*, under the old Burma Income-Tax Act as amended up to 1st June, 1948. On 28th September, 1956, the applicant moved the Commissioner for reference to High Court under s. 66 (*2*) of the Burma Income-Tax Act, 1948, which was rejected. Before the Commissioner could pass orders, the applicant had on the 11th February, 1955 filed a petition under s. 66, sub-s. (*2*) of the old Income-Tax Act to call upon the Commissioner to state a case. A preliminary legal question arose as to whether this application under sub-s. (*3*) of s. 66 of the old Burma Income-Tax Act, lies in view of s. 5-B of the Burma Income-Tax (Amendment) Act, 1953. *Held :* That neither the petition dated the 28th September, 1956, to the Commissioner for reference to the High Court under sub-s. (*2*) of s. 66 of the old Income-Tax Act, nor the application to the High Court for requisition to the Commissioner to state a case under sub-s. (*3*) of s. 66 could be said to be pending. Even assuming that such applications can be said to be pending, the application moving this Court to call upon the Commissioner to state the case under sub-s (*3*) of s. 66 of the old Act does not come within the contemplation of s. 5-B. What is allowed to be continued and disposed of in accordance with the provisions of sub-s. (*2*), (*3*), (*3-A*), (*4*), (*5*) and (*6*) of s 65 of the old Act is only in relation to appeals and proceedings referred to in clauses (*a*) and (*b*). Therefore this Court has no power to call upon the Commissioner under sub-s. (*3*) of s. 66 of the old Act to state the case. *Held also :* That the function of a Court of Law is to administer the law as it is, and not to attempt by judicial decisions to amend what the Court may rightly or wrongly deem to be faulty legislation.

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BURMA INCOME-TAX ACT—*S. 66* (1)*—Reference under— Burma Income-Tax Act—S. 17-A, 34, 4-A* (6)*—Tests for determination of residence of a joint Hindu family—"Control and management"—Undivided Hindu family Non-resident in Burma.* The local agent and a member of a joint Hindu family were resident in Burma, but the *Karta* of the family was outside of the Union of

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Burma, and the control and management of the affairs of the family were wholly without the Union of Burma. *Held:* If the control and management, the directive power or head and brain of a Hindu family remains with some degree of permanence in a certain place, and if he functions his power of directive control and management from that place, that place will be treated as his residence for purposes of income-tax, although it may be recognized from the use of the word "wholly" that the possibility of the seat of such direction, control and management being shared in some cases between such places. The following points should be considered in the determination of the residence of "artificial" persons in relation to their business activity :—

(1) The locality of residence of such "persons" should be determined by asking where is the head and seat and the directing power of such "persons"?

(2) Mere activity by such "persons," in a place does not create residence.

(3) The central management and control of such "persons" may be divided, and it may keep house and do business in more than one place and, it may thus have more than one residence.

(4) In case of dual residence it must be shown that such "persons" perform the vital organic functions incidental to their existence as such in both places.

Therefore, as the control and management of the affairs of the assessee is situated wholly without the Union of Burma, the applicant is a non-resident within the meaning of s. 4-A (*b*) of the Burma Income-Tax Act, *V. Vr. N.M. Subbayya Chettiar* v. *Commissioner of Income-Tax, Madras*, (1951) 19 I.T.R. 168, followed. *Held also:* The mere fortuitous residence of a member of Hindu undivided family at a certain place divorced from control and management of the family business is not a determining factor for purposes of assessment either as resident or non-resident with reference to s. 4-A (*b*) of the Burma Income Tax Act. *Commissioner of Income-Tax and Excess Profits Tax* v. *The Erin Estate*, (1951) 20 I.T.R. 412; *Commissioner of Income-Tax, Burma* v. *S.P.K. A.R.M. Family*, (1941) 9 I.T.R. 685, referred to *Held further:* That it is quite contrary to the principles of Hindu Law that a *Karta* of the joint Hindu family can apportion the management of the family business and thereby entrust the *de facto* management in one of the co-parceners. *Thandavaroya Pillai and another* v. *Shummugan Pillai*, (1909) I.L.R. 32 Mad. 167 at 169 approved.

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BURMA INCOME-TAX ACT—*S. 66 (1)—Reference under—Whether subscriptions from members of the Nursing Home Association Ltd., taxable within the purview of s. 2 (15) of the Burma Income Tax Act—Application of the principle "No one can make a profit out of himself."* The Nursing Home Association Ltd., is a limited company by guarantee, incorporated under the Burma Companies Act. In the accounts of Income and Expenditure under the head "annual subscriptions" the sum of Rs. 71,833-7 was shown as receipts. The reference was whether this sum can be treated as income within the purview of s. 2 (15), Burma Income-Tax Act. Relying on: *The United Service Club,*

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Simla v. *The Crown*, Vol. I, I.T.C., p. 113; *New York Life Insurance Co.* v. *Styles*, (1889) 14 A.C. 381; *Carlisle and Silloth Golf Club* v. *Smith*, (1913) 3 K.B. 75, it was contended: Firstly, that the subscriptions paid by the members are not income and should be excluded in computing income for purposes of Taxation, and Secondly, that even if such subscriptions can be treated as income, they are to be excluded from computation of profits or gains on the principle that no one can make profits out of himself. *Held:* That the word "income" means "a periodical monetary return: 'coming in'" and accruing to the assessee independently, and not as the nett proceeds, of a business carried on by the assessee as defined in s. 2 (*4*) of the Act. "Income" in this sense connotes incomings without regard to outgoings. *In re the Commissioner of Income-Tax, Burma* v. *The Bengalee Urban Co-operative Credit Society, Limited*, 2 Ran. p. 521, referred to. *Held also:* That what Style's case lays down is that if there are no dealings with outsiders and exclusive mutuality is established between a mutual benefit company, association or a club (artificial persons) and its members in the sharing of surplus or loss then, the principle that no one can make a profit out of himself applies. *Commissioner of Income Tax, Bombay City* v. *The Royal Western India Turf Club, Limited*, (1953) I.T.R. Vol. 24, p. 551; *The Dibrugarh District Club, Ltd.* v. *The Commissioner of Income-Tax, Assam*, Vol. II, I.T.C. p. 521; *The Maharaj Bag Club, Ltd.* v. *The Commissioner of Income-Tax, Central Provinces and Berar*, Vol. V, I.T.C. p. 201, referred to. *Held further:* The activities of the Nursing Home Association, Ltd., *are not only confined to the Members, but also to outsiders*, and is therefore not a Mutual Benefit Association within the rule laid down in Style's case and that it is actively concerned in doing a business within the meaning of sub-s. (*4*) of s 2, read with s. 10, of the Burma Income-Tax Act. *Per* U SAN MAUNG, J.—One of the tests which must be satisfied by a mutual benefit society is to show that the members were entitled to participate in the surplus. *Municipal Mutual Insurance Ltd.* v. *Hills*, (1932) 16 Tax Cases 430 at 448; *Commissioner of Income Tax, Bombay City* v. *The Royal Western India Turf Club, Limited*, (1953) I.T.R. p. 551: *South Indian Planting and Commercial Representation Fund* v. *Commissioner of Income-Tax, Madras*, (1957) 32 I.T.R., 513, referred to. Reference answered in the affirmative.

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BURMA INCOME-TAX ACT—*S. 66 (1)—Reference under—Assessment made on evidence not disclosed to the assessee, and without giving details of computation—The best of judgment basis of assessment under s. 23 (4), Income-Tax Act—Necessity of "Order in writing"*. The applicant made a Return of income of only Rs. 295 being derived from house property. He made no return from his business at all. The Income-Tax Officer assessed the applicant's income from business at Rs. 22,500. On appeal, this assessment order was set aside and a fresh assessment ordered, which was determined at Rs. 50,590 on the best of judgment basis under s. 23 (*4*) of the Income-Tax Act, on failure to produce accounts under s 22 (*4*) of the Income-Tax Act. On further appeal under s. 33 (*a*) of the Income-Tax Act against this fresh assessment, the Income Tax appellate Tribunal reduced the assessment to Rs. 36,000. Two questions of law were referred to the High Court: (1) "Whether

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upon the facts and in the circumstances of the case the Income-Tax Appellate Tribunal and the Income-Tax Officer were right in law in relying upon evidence not disclosed to the assessee ?" (2) " Whether in the circumstances of the case and in view of the fact that an assessment made under s. 23 (*4*) of the Burma Income-Tax Act has now been made appealable, the Income-Tax authorities were right in law in assessing an amount of income without giving details of the computation ?" With regard to the first question, it was contended that the non-disclosure of facts and information upon which the income-tax authorities had based their assessment was prejudicial to the applicant as he had been deprived of his right of rebuttal. *Held :* That the facts and information are of confidential nature under s. 54, sub-s. (*2*) of the Income-Tax Act and that the applicant was not entitled to look into them much less furnished with copies thereof. *Held also:* In a best of judgment—proceeding under s. 23 (*4*) of the Income-Tax Act, inasmuch as the assessee has not co-operated with the Income-Tax Officer in order to arrive at a fair and equitable assessment both the Income-Tax Officer and the appellate authorities are entitled to make use of such outside facts and information as would materially help them to make an assessment as best as they could. *Held further :* That as the applicant has not availed himself of the provisions of s. 27 of the Income-Tax Act for cancellation of assessment made under s. 23 (*4*) he has no right to challenge in appeal either before the Assistant Commissioner or before the Appellate Tribunal the validity of assessment made under s. 23 (*4*). *Naba Kumar Singh Dudhuria* v. *Commissioner of Income-Tax, Bengal*, (1944) 12 I.T.R. 327, followed. Regarding the second question ; *Held :* In a best of judgment assessment under sub-s. (*4*) of s. 23 the Income-Tax Officer is under no obligation to make his order of assessment in writing. The legislature never intended that the best of judgment assessment must be made in writing containing full details of computation as to how the Income-Tax Officer arrived at certain figures in his assessment. *Commissioner of Income-Tax, Central and United Provinces* v. *Laxminarain Badridas*, (1937) I.T.R. Vol. V, 170; *Abdul Bari Choudhury* v. *Commissioner of Income-Tax*, 9 Ran. 281 ; *Krishna Kumar and Mahendra Kumar Ghose* v. *The Commissioner of Income-Tax, Bengal*, 5 I.T.C. (1933) 295, referred to. *Commissioner of Income-Tax, Bombay* v. *Khemchand Ramdas*, 8 I.T.R. (1940) 159 ; *Narayan Chandra Baidya* v. *Commissioner of Income-Tax*, 20 I.T.R. (1951) 287 ; *Dhakeswari Cotton Mills, Ltd.* v *Commissioner of Income-Tax, West Bengal*, (1954) 26 I.T.R. 775, distinguished. *Held also :* That the observations made by learned writers are mere individual views or opinions without specific sanction of any affirmative judicial pronouncements and the Court is not to be swayed by them. The function of the Court is to interpret the law as it stands and not in the guise of interpretation introduce a new requirement—which the legislature has not provided. (Sir Jamshedji B. Kanga and N. A. Palkhivala's Law and Practice of Income Tax, 1950 Edition, p. 468), V. S. Sundaram law of Income-Tax, 7th Edition, p. 893, referred to. *Per* U SAN MAUNG, J. *Held :* That the very nature of an assessment under s. 23, sub-s (*4*) precludes the necessity for an order in writing. A best of judgment assessment being in the nature of an honest estimate or an honest piece of guess work on the part of the Income-Tax Officer acting as a *persona designata* on whatever material he can lay his hand on, it is for that very reason incapable of being couched in the

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form of an order in writing similar to that required by sub-s. (3) of s. 23. *In re Abdul Bari Chowdhury* v. *Commissioner of Income-Tax, Burma*, (1931) I.L.R. 9 Ran 281 at 295; *Macpherson* v. *Moore*, 6 Tax Cases at p. 115; *S.P.K.A.A.M. Chettyar Firm* v. *The Commissioner of Income-Tax*, (1929) I.L.R. 7 Ran. 669; *Commissioner of Income-Tax, Central and United Provinces* v. *Laxminarain Badridas*, (1937) I.T.R. Vol. 5, p. 170, referred to. *Held also*: That since there has been a change in the law in as much as a right of appeal has been given to an assessment under s. 23 (4), it will no longer be sufficient for the Income-Tax Officer to make his assessment under s. 23 (4) by entering such a cryptic note as "Business Rs. 30,000". *Krishna Kumar and Mahendra Kumar Ghose* v. *The Commissioner of Income-Tax, Bengal*, I.T.C. (1933) Vol. V, p. 295, referred to. *Held further*: When an Income-Tax Officer has to make a best of judgment assessment he must make an honest piece of guess work and in the process some sequence of thought must have entered into his mind. All that would be necessary, therefore, in a best of judgment assessment to render it susceptible of appeal is to make the Income-Tax Officer record his sequence of thought sufficiently to show that he had made an honest estimate or an honest piece of guess work and, that he was not actuated by dishonesty, vindictiveness or caprice. No hard and fast rule can be laid down as to what should be the contents of the note by which an Income-Tax Officer makes his best of judgment assessment under s. 23 (4). Both questions answered in the affirmative.

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———S. 13 (3)—THE COMMON LAW OF ENGLAND WAS AND IS STILL APPLIED AS THE LAW ENVISAGED IN S. 13 (3) OF THE BURMA LAWS ACT, *i.e.*, LAW WHICH IS ACCORDING TO JUSTICE, EQUITY AND GOOD CONSCIENCE 50

BURMESE BUDDHIST LAW—*Succession and inheritance—Relative rights of brothers and sisters of the half-blood and nephews and nieces of the full blood to the estate of a deceased Burmese Buddhist*. On the death of an unmarried Burmese Buddhist leaving behind brothers and sisters of the half blood, and nephews and nieces of the full blood, they all stand in the same degree of relationship for the purpose of succession. It makes no difference whether the nephews and nieces are the offsprings of a brother or sister younger or older than the deceased. A, a Burmese Buddhist spinster, left her surviving a brother of the half blood B, a sister of the half blood C, and a nephew and two nieces of the full blood D, E and F and G, the husband of A's elder sister (predeceased) and father of D, E, and F. B and C each filed administration suits, and claimed a half-share each in the estate of A. D, E, F and G, on the other hand claimed the entire estate between them as A's sole heirs. *Held*: Confirming the decision of the District Judge, that a brother or sister of the half blood stand in the same degree of relationship for the purposes of succession as a nephew or niece of the full blood and would share equally, and that at Burmese Buddhist law a nephew or niece is not excluded by a half brother or sister and that both would be heirs. Therefore B, C, D, E and F are to share equally in the estate of A. *Held also*: G is not an heir. *Ma Galay and one* v. *Ma E Mya and others*, I.L.R. 8 Ran. 23 and *Ma Kin Oh* v. *Ma Kin Gale*, I.L.R. 8 Ran. 17, followed. *Held further*: It makes no difference whether D, E and F are the children of A's

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elder sister, or A's younger sister, because they are not claiming their share of inheritance as representing their parents, they are claiming their share in their own right as nephews and nieces of A. *Ma Kin* v. *Maung Po Myit and others*, I.L.R. 7 Ran. 811 and *U Po Tha Dun and others* v. *Maung Tin and others*, I.L.R. 8 Ran. 480, followed.

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CARRIERS ACT (ACT III, 1865)—*Common carrier—Definition—Liability under Contract Act, s. 10—Notice in writing—Necessity of—To bring a suit for loss of injury—Period in which it should be given.* If a person holds himself out to carry goods or if one makes a business of carrying goods from a jetty to a ship in harbour, he is a common carrier. *K. C. Dhar* v *Ahmad Bux*, I.L.R. 60 Cal. 879, referred to. The liability of a common carrier is not affected by the Contract Act. A suit against a common carrier for compensation under the Contract Act does not lie. *Irrawaddy Flotilla Co., Ltd.* v. *Bugwandas*, 18 I.A. p. 121, referred to. Where no notice in writing has been given within the time prescribed by s. 10 of the Carriers Act, a suit against a common carrier for compensation for loss of or injury to goods entrusted to him for carriage, is incompetent.

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CITIZENSHIP CERTIFICATE—EFFECT OF GRANT OF CITIZENSHIP CERTIFICATE TO A FOREIGNER AFTER TRANSFER OF IMMOVEABLE PROPERTY TO HIM 216

CITY CIVIL COURT ACT, SS. 24 AND 25—*Right of appeal—Not extended to decrees made in Small Cause Jurisdiction—Bank draft—A Bill of Exchange—A negotiable instrument—Prohibitory order on bank issuing bank draft—Validity.* The right of appeal given by s. 24 of the Rangoon City Civil Court Act, as amended by Act No. 5 of 1950, is only as against the decree made by the Court in exercise of its civil jurisdiction other than its jurisdiction as a Court of Small Causes, Civil Revision No. 21 of 1952 of High Court, followed. A draft issued by a bank is a bill of exchange and a negotiable instrument. *Ross* v. *London Country and Westminister Bank*, (1919) 1 K.B., 678 at 687; *In the matter of the Indian Companies Act of 1913 and of the New Bank of India Ltd.*, A.I.R. (1949) East Punj. 373, referred to. Where a person pays a certain amount into a Bank for getting a draft in exchange drawn by the Bank on its branch, the transaction is nothing more than a purchase of the draft. *In the matter of Travancore National and Quilon Bank, Ltd.*; *S. Bakat Ali and others* v. *James Voce Pierries, Cyril Gill and John*

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Stanley Goodwin, A.I.R. (1940) Mad. 101, referred to. No prohibitory order could be served on the bank which had issued the draft, even if it could not be considered as a bill of exchange because the bank was only seller of the draft and with the issue of the draft the sale transaction in respect of the bank draft was complete.

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CITY OF RANGOON MUNICIPAL ACT, S. 157, SPECIFIC RELIEF ACT, S. 56 (*d*)—*Suit for a declaration and an injunction against the Rangoon Corporation, without first resorting to statutory provisions for appeals whether maintainable—Civil Procedure Code, s 9.* Appellants filed a suit against the Rangoon Corporation for a declaration that an eviction notice is null and void and for an injunction restraining the Building Engineer from interfering with the possession of a Building. *Held:* That statutory functions that are assigned to and performable by a Municipal body such as the Corporation of Rangoon, are regarded as the same as *public duties* assigned to and performable by any departments of the Government, and s. 56 (*d*), Specific Relief Act, operates as a bar to such suit against the Corporation of Rangoon. *Mohamed Ebrahim* v. *Municipal Corporation of Rangoon and two others*, Civil Regular Suits Nos. 74 and 75 of 1952 (H. C.); *Patel Panachand Girdhar and others* v. *The Ahmedabad Municipality*, I.L.R. 22 Bom. 230; *U Hee Yar and one* v. *U Ba Gyan and others*, Civil First Appeal No. 87 of 1954 (H.C.), followed. *Held also:* Where there are statutory modes of redressing the grievances complained of by the appellants, by way of preferring appeals from one authority to another, and ultimately even to the President of the Union, the appellant's suit is not maintainable, being impliedly barred by the provisions of the Rangoon Municipal Act. Therefore Appellants' suit is barred under s. 9 of the Civil Procedure Code read with s. 56 (*1*) of the Specific Relief Act. *Sasala Raminaidu* v. *Secretary of State, represented by Collector of Vizagapatam*, A.I.R. (1942) Mad. 127; *Bhaishankar Nanabhai* v. *The Municipal Corporation of Bombay and others*, 31 Bom. p. 604; *Liquidators, Janda Rubber Work, Ltd.* v. *Collector of Bombay and another*, A.I.R. (1950) (East) Punj. 204; *Sultan Ali* v. *Nur Hussain*, A.I.R. (1949) Lah. 131; *Raleigh Investment Co., Ltd.* v. *Governor General in Council*, 74 I. A. 50; *Chunilal Thakordas Modi* v. *The Surat City Municipality*, 27 Bom. 403, referred to.

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CIVIL COURT—JURISDICTION BARRED BY S. 15 (*4*) OF THE VINASAYA ACT AND S. 9, CIVIL PROCEDURE CODE 474

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CIVIL PROCEDURE CODE, S. 10—*Stay of suit—Ground for—Whether Court can order stay of suit* suo moto. The applicants obtained a decree for ejectment of the respondent from the suit premises for breach of a term of tenancy. The respondent then appealed. During the pendency of the appeal the applicants brought a suit against the respondent in the same Court for the recovery of compensation for use and occupation of the suit premises.

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Despite the fact that there was no application for stay of the suit, the trial Court purporting to act under s. 10 of the Civil Procedure Code stayed the suit pending the decision of the appeal. *Held:* That where the substantial matter in issue in a suit subsequently filed is substantially in issue in the suit under appeal the subsequent suit must be stayed under s. 10 of the Civil Procedure Code. *Madan Gopal Bagla* v. *The Chettyar Firm of S.P.K.A.A.M. and another*, 12 Ran. 687, followed. *Ramchandram Pillai* v. *Neelambal Achi*, A.I.R. (1923) Mad 88, referred to. *Held also:* That as the substantial matter in issue in the suit under appeal was whether there had been a breach of a term of tenancy and as the substantial matter in issue in the suit under revision is whether compensation should be awarded for use and occupation of the suit premises, the substantial matter in issue in the former is not substantially in issue in the latter and that therefore the order for stay of the suit should not have been made. *Ma Kho U and others* v. *Maung Ba Sein and another*, 6 Ran. 775, followed. *Hathi Ram* v. *Hazi Mohammad*, A.I.R. (1954) All. 141, referred to. *Obiter:* In appropriate cases the Courts are bound to stay a subsequent suit if a former suit is pending irrespective of whether a party makes an application for stay or not. *Maung Thit Maung* v. *Maung Tin and three others*, (1949) B.L.R. 64 (H.C.), followed.

DAW KHIN KYI AND FIVE OTHERS *v.* L. E. SAY 464

CIVIL PROCEDURE CODE, s. 11—Res judicata—*Previous proceedings before a body of persons which has no Civil Judicial powers cannot amount to a "former suit"—Orders passed in such proceedings cannot bar suit brought subsequently on the principles of* res judicata. In a dispute for the possession of a piece of land referred by parties to the suit to the office of the A.F.P.F.L., Meiktila, two "lugyis" who were deputed by that office to look into that matter gave a certain decision. Subsequently, the respondents filed a suit in respect of the same subject matter in the Township Court of Meiktila and obtained a decree, which was upheld by the District Court. For the first time in the second appeal before the High Court it was urged on behalf of the appellants that the decision given by the two "lugyis" who were deputed by the office of the A.F.P.F.L. was a bar to the suit by the respondents under s. 11 of the Civil Procedure Code. *Held:* That the office of the A.F.P.F.L., not having Civil Judicial powers, the proceedings before it was not a "former suit" between the parties and that any decision made therein was no bar to the subsequent suit on the principles of *res judicata*.

MAUNG SHEIN AND FIVE OTHERS *v.* U SAN HLA (deceased)... 658

CIVIL PROCEDURE CODE, s. 47 252

CIVIL PROCEDURE CODE, s. 60 (*1*) (*b*)—*Artisan—Definition—Whether hair-dresser an artisan.* An artisan is one who practises an industrial art; mechanic; handicraftsman; artificer; one who cultivates an art; an artist. A hair-dresser is not an artisan. *Tulsiram Dewaji Kunbi* v. *Paikan Babu*, A.I.R., (1941) Nag. 132, referred to.

MAUNG KYINE *v.* U BA ON AND ANOTHER 321

CIVIL PROCEDURE CODE, s. 80—NOTICE UNDER—MAY BE WAIVED BY GOVERNMENT OR THE PUBLIC OFFICER CONCERNED ... 83

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CIVIL PROCEDURE CODE, ss. 92, 99—*O. 1, R. 8—Public charitable trust—Relief claimed—Not under s. 92—Necessity to comply with O. 1, R. 8—Failure to do so—A substantial error or defect not saved by s. 99—Aim and object of O. 1, R. 8.* Even where the relief sought in a suit in respect of a public charitable trust does not come within the ambit of s. 92, Civil Procedure Code, the requirements of Order 1, Rule 8 of the Civil Procedure Code must be complied with in bringing the suit. Non-compliance with the provisions of this rule constitutes a substantial error or defect affecting the merits of the case which cannot be saved by s. 99 of the Civil Procedure Code. *Kazi Hassan and others* v. *Sugun Balkrishna and others*, (1900) I.L.R. 24 Bom. 171; *Gulba* v. *Basanta and Krishan Lal*, (1910) I.L.R. 32 All. 2>4; *Maulavi Muhammad Fahimul Huq* v. *Jagat Ballay Ghosh*, (1923) I.L.R. 2 Pat. 391, distinguished. *Jawahra* v *Akbar Hussain*, (1885) I.L.R. 7 All. 178, referred to. The aim and object of Order 1, Rule 8 of the Civil Procedure Code is obvious. In order to avoid needless litigation over the same subject-matter in which numerous persons are interested—such as a Public Trust—all persons interested must be joined as parties.

TAW PIN AUN *v.* TAW CHENG CHYE AND TWO OTHERS ... 357

CIVIL PROCEDURE CODE, S. 99—OMISSION TO SIGN OR VERIFY PLAINT —EFFECT OF 150

CIVIL PROCEDURE CODE, S. 104 416

——————————S. 144—RESTITUTION 555

CIVIL PROCEDURE CODE, S. 144—*Application for restitution of premises—When can be granted.* The provisions of s. 144 of the Code of Civil Procedure are applicable to a case where the character of the subject-matter of restoration has been altered. *Permeshar Singh and others* v. *Sitladin Dube and another*, A.I.R. (1943) All. 626 (F.B.), referred to.

ABDUL RAZAK *v.* MAUNG AUNG THEIN 237

CIVIL PROCEDURE CODE, S. 148—NOT APPLICABLE TO AN ORDER UNDER S. 14 (*1*), URBAN RENT CONTROL ACT 500

CIVIL PROCEDURE CODE, S. 151—*Inherent Powers of Court—Urban Rent Control Act, s. 14* (1)—*Rescission of decree.* Where payment of the last instalment payable under the decree in a suit for arrears of house rent was defaulted not wilfully but due to wrong information supplied by a clerk of the Court and in consequence the decree-holder applied for and obtained a decree for ejectment of the judgment-debtor. *Held:* That there is nothing to prevent the Court, in exercise of its inherent power, to make such orders as may be necessary for the ends of justice and that the omission to pay the last instalment being due to the wrong information furnished by the clerk the Court has an inherent power to accept payment of the last instalment, which remains unpaid and then to rescind the ejectment decree as provided for in s. 14 (*1*) of the Urban Rent Control Act. *Jalil Hogs* v. *N. C. Behara*, Special Civil Second Appeal No. 9 of 1958 of High Court; *In re V.K.P. Chockalingam Ambalam* v. *Maung Tin and others*, 14 Ran. 173 (F.B.), followed. *Hukum Chand Boid* v. *Kamalanand Singh*, (1906) I.L.R. 33 Cal. 927 at 931, referred to.

DAW SEIN CHIT *v.* DAW THEIN MAY 483

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CIVIL PROCEDURE CODE, ORDER 1, RULE 8—*Suit for recovery of possession of property entrusted by "Aphwe" (association) filed by president and committee members of the "Aphwe" only—Should have been brought as a representative suit under.* Where only the Respondents as president and committee members of an "Aphwe" (association) filed a suit for the recovery of cups and trophies alleged to have been won by the said "Aphwe" and entrusted to the Applicant by the whole "Aphwe" for safe custody. *Held :* That the suit should have been brought as a representative suit under Order 1, Rule 8 of the Civil Procedure Code as the alleged entrustment was made by the whole "Aphwe" collectively. *Kumaravelu Chettiar and others* v. *Ramaswami Ayyar and others*, 60 I.A. 278 at 290; *Ma Gyi and others* v. *Pat Lon*, A.I.R. (1917) L.B. 36, followed. *Maulu and others* v. *Ghanaya and others*, I.L.R. 15 Lah. 807, referred to.

DAW NYUN HLAING *v.* DAW KHIN CHIT AND FIVE OTHERS ... 479

CIVIL PROCEDURE CODE, O. 1, R. 8—*Representative Suit—Formalities to be complied with—Competency of any member to file suit on behalf of association split into two rival factions.* In a suit filed under Order 1, Rule 8 of the Civil Procedure Code on behalf of an association, notice must be served on all members of the association, whether personally, or if that method is "not reasonably practicable, by public advertisement". The mere fact that there are two rival factions in the association does not prevent any member of that association from filing a suit on behalf of that association. *Haji Sahib Hameed Labhai* v. *S. Mohamed Khather Pillai Marakayar*, A.I.R., (1925) Mad. 985, referred to.

PHU KYAW WAI *v.* AH SEIN AND ANOTHER 353

CIVIL PROCEDURE CODE, ORDER 5, RULE 15—*Service of summons on defendant at a place other than at the place given in summons—Whether good service.* Where summons was served on the mother of the defendant at the residence of the defendant with whom the mother was living and not at the defendant's place of business mentioned in the summons. *Held :* That there is no provision of law that a defendant must be served with summons at no other place than the place as given in the summons and that the service of summons was a good service as provided under Order 5, Rule 15 of the Civil Procedure Code.

U KO KO GYI *v.* DAW KHIN THAUNG 387

CIVIL PROCEDURE CODE, O. 9, R. 13 AND O. 9, R. 34—*Setting aside of an ex-parte order for a temporary injunction by trial Court—Powers of trial Court.* Where it was contended in an appeal against the order setting aside an *ex-parte* order granting a temporary injunction, that there was want of jurisdiction on the part of the Judge, and that O. 9, r. 13 of the Code of Civil Procedure has no application :—

Held : (1) that the Judge who granted the temporary injunction *ex-parte* had jurisdiction to set aside the *ex-parte* order : *G.R.D. Goswami* v. *Vijiaramaraju and another*, A.I.R. (1929) Mad. 803, distinguished.

(2) that O. 9, r. 13 of the Code of Civil Procedure applies to interlocutory orders ; that the wording of this rule is quite different from the wording used in O. 9, r. 13 of the Code of Civil Procedure of India and that this rule

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covers decrees as well as orders. *U Po Mya* v. *Father Rioufreyt*, (1939) R.L.R. 134, explained.

K. MOHIDEEN *v.* BURMA STATE PAWNSHOP BOARD AND ANOTHER 204

CIVIL PROCEDURE CODE, O. 17, R. 2—*Disposal of part-heard case in the absence of one of the parties comes under—O. 9, R. 3 provides for setting aside of* ex-parte *decrees passed under O. 17, R. 3—Application.* The disposal of a part-heard case in the absence of one of the parties on the date to which the case has been adjourned for further hearing is one made under Order 17, Rule 2 of the Civil Procedure Code and an application to set aside an *ex-parte* decree made thereunder is maintainable under Order 9, Rule 3 of the Code. Order 17, Rule 3 of the Code applies only to cases where the parties are present and have not satisfied the Court as to the existence of any adequate reason for their not having done what they were directed to do. *Prativadi Bhavankaram Pichamma* v. *Kamisetti Sree Ramulu*, I.L.R. 41 Mad. 286, referred to. *Ko Tha Lin Bwin and another* v. *Ko Hla Kye*, I.L.R. 8 Ran. 168, followed. *Panna Lal Marwari* v. *Bishen Dei*, I L.R. (1946) All. 833 ; *Sitalprasad* v. *Sukya*, I.L.R. (1948) Nag. 462, distinguished.

BASIL P. MARTIN *v.* MOHAMED AYOOB 458

CIVIL PROCEDURE CODE, ORDER 17, RULE 3—*Refusal to grant further adjournment of case on date fixed for per-emptory hearing after ample opportunity given to produce witnesses—Justification.* Where on the day fixed for per-emptory hearing of a suit after ample opportunity had been given to the party to the suit to produce witnesses, the Court refused to grant further adjournment to produce witnesses and proceeded to decide the suit. *Held :* That under Order 17, Rule 3, Civil Procedure Code, the Court was quite correct in refusing to grant further adjournment and in proceeding to decide the suit.

JWALA PRASAD
LACHMI NARAYAN *v.* KESHWAR SINGH 278

CIVIL PROCEDURE CODE, O. 21. R. 2.—CERTIFICATION OF PART PAYMENT ... ...

CIVIL PROCEDURE CODE, O. 21, R. 10—*Only holder of decree competent to execute the decree.* Where the Managing Trustee of certain trust property obtained a decree for ejectment of the respondent from the trust property in his personal capacity and one of the surviving trustees tried to execute the decree. *Held :* That under Order 21, Rule 10 of the Civil Procedure Code the decree being granted to the Managing Trustee in his personal capacity, he alone was competent to execute it and that the execution case taken out by one of the surviving trustees of the said trust property to execute that decree was void *ab initio*. *Mahant Singh* v. *U Aye and others*, I.L.R. 14 Ran. 336, referred to.

N. E. MOHAMED GANI ROWTHER AND THREE OTHERS *v.* AMEENA BI BI 346

CIVIL PROCEDURE CODE, O. 21, R. 97—*Order made under—Not appealable—Interlocutory order—Practice of High Court in revision—O. 21, R. 98—Order under, s. 47—Inapplicable—Not a decree, s. 2 (2)—No appeal from—R. 103.* Where as the result of resistance offered to the execution of a decree by

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respondents, who were not judgment-debtors nor were they representatives of the judgment-debtor, the Township Court, which executed the decree, on application by the decree-holder under Order 21, Rule 97 of the Civil Procedure Code, ordered an inquiry against the respondents and the District Court set aside the order on appeal. *Held*: That—

(1) as no appeal lay from an order of the Township Court made under Order 21, Rule 97 of the Civil Procedure Code, the order of the District Court in the appeal from that order was made without jurisdiction;

(2) the order of the Township Court made under Order 21, Rule 97 being merely an interlocutory order, it is not the practice of the High Court to interfere in revision with the order of a lower Court at an interlocutory stage;

(3) s. 47 of the Civil Procedure Code, is inapplicable to the determination of questions arising between persons who are neither judgment-debtors nor representatives of the judgment-debtor and the decree-holder;

(4) such a determination cannot be a decree as defined in s. 2 (2) of the Civil Procedure Code;

(5) there is no appeal from an order made under Order 21, Rule 98 as Rule 103 provides that any party not being a judgment-debtor against whom an order is made under Rule 98 may institute a suit to establish the right which he claims to the present possession of the property; but, that subject to the result of the suit, the order shall be conclusive.

DAW SINT *v.* MAUNG MYA SHEIN AND ONE 252

CIVIL PROCEDURE CODE, O. 22, R. 3—*No abatement by party's death—Survival of right to sue on death of plaintiff suing in dual capacity as administrator and heir—Widow's right to proceed with suit as legal representative—No such right if husband had sued solely as administrator—Judge cannot question or set aside his predecessor's order in the case.* Where a Burman Buddhist filed a suit in his dual capacity as an administrator of and as sole heir to the estate of a deceased person and died during the pendency of the suit leaving behind a wife as his heir and legal representative, the suit does not abate and the wife can apply to the Court, under Order 22, Rule 3 (1) of the Civil Procedure Code, to be made a party and proceed with the suit. But if he was suing solely as an administrator to that estate then the wife who survives him as an heir cannot succeed to his right as an executor or administrator to that estate, which would remain unrepresented until fresh Letters-of-Administration are granted. *Ma Po Po* v. *Ma Lat Gyi*, 3 L.B.R. 208, distinguished. A Judge cannot question or set aside the order passed by his predecessor in the case directing that the appellant be brought on the record as the plaintiff in place of her deceased husband and to proceed with the suit on its merits.

MA MYA KYI *v.* MAUNG NYI BU AND THREE OTHERS ... 301

CIVIL PROCEDURE CODE, O. 22, R. 10—*Order made under—Appealable under O. 43, R. 1 (1) of the Code—Not judgment within the meaning of s. 20, Union Judiciary Act—Word "judgment"—Meaning of.* An order made under Order 22, Rule 10 of the Civil Procedure Code is an order appealable under Order 43, Rule 1 (1) of the Code and is not a judgment within the meaning of s. 20 of the Union Judiciary Act as to require a certificate under that section. "The word 'judgment' in clause 13 of the Letters

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Patent is intended to cover an order as well as a decree, but the effect of adjudication must be such as to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding. If it has this effect, the adjudication is a judgment; otherwise not." *P.K.R.V.E. Chidambaram Chettyar and another* v. *N.A. Chettyar Firm*, (1928) I.L.R. 6 Ran. 703, followed. "The word 'judgment' in clause 13 of the Letters Patent means and is a decree in a suit by which the rights of the parties at issue in the suit are determined." *In re Dayabhai Jiwandas and others* v. *A.M.M. Murugappa Chettiar*, (1935) I.L.R. 13 Ran. 457, followed. *Ramaswami Chettyar* v. *Roy Kannaippa Mudaliar and two others*, 55 Mad. 491; *Appaji Reddiar* v. *Thailammal*, 56 Mad. 689, referred to.

A. R. NIZAMI *v.* DAW KHIN KHIN 446

CIVIL PROCEDURE CODE, O. 23, R. 1 (2)—*Withdrawal of suit with liberty to file fresh suit—Costs ordered—No time specified for payment—Payment not condition precedent to filing of fresh suit.* Where under Order 23, Rule 1 (2) of the Civil Procedure Code, a suit was withdrawn with permission to institute a fresh suit and no time was specified for payment of costs. *Held:* That the payment of costs was not a condition precedent to the institution of a fresh suit and that the failure to pay costs on or before the institution of the fresh suit is no bar to the maintainability of the suit. *Ma San Myint* v. *U Tun Sein*, (1939) R.L.R. 749, followed. *Shidramappa Mutappa Biradar* v. *Mallappa Ramchadrappa Biradar*, (1930) I.L.R. 55 Bom. 206; *Bhai Chanan Singh* v. *Committee of Management for Gurdwara Mai Malan*, A.I.R. (1941) Lah. 192, referred to.

DAW KIN LIN *v.* TAN KOT HTAING AND FOUR OTHERS ... 211

CIVIL PROCEDURE CODE—*Order 41, Rule 31—Whether applicable to the Shan States—S. 20, Shan States Civil Justice (Subsidiary) Order, 1906—Reasons for decisions must be given in judgments. Held:* By virtue of s. 20, Shan States Civil Justice (Subsidiary) Order, 1906, the provisions of Order 41, Rule 31 of the Civil Procedure Code are applicable to the Shan States. *Held further:* Even assuming the aforesaid Order 41, Rule 31 to be inapplicable, it is a fundamental principle of Civil law that a Court deciding a dispute should state its reasons for the decision. If there was no such principle and if Judges could decide cases without giving any reasons for their decision, the chaos resulting therefrom may well be imagined and there could not possibly be any appeals for any judgments.

SHER BAHADUR *v.* RAM KISHAN 223

CIVIL PROCEDURE CODE, O. 43—*Appeals from orders—O. 41, R. 1—Not complied with—Copy of order appealed from filed subsequently, but within time—Appeal in order.* Where a memorandum of appeal was filed without complying with the provisions of Order 41, Rule 1 of the Civil Procedure Code by omitting to file a certified copy of the order appealed from. *Held:* That there was no proper presentation of the appeal. But where the certified copy of the order appealed from was filed subsequently within the period of limitation. *Held:* That the filing of the certified copy of the order appealed from, though belated, had the effect of validating the appeal as from the date it was filed.

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COMMON CARRIER—DEFINITION OF—UNDER THE CARRIERS ACT ... 138

COMPANIES ACT, S. 4—*Unregistered company—S. 4 (4)—Meaning of word "every" in—Joint and several liability of individual members—Contract Act, s. 43—Choice of defendants—Right of plaintiff.* Where a suit for the recovery of the price of goods supplied to an unregistered company carrying on business in contravention of s. 4 of the Companies Act brought against only two out of 39 shareholders of the company was dismissed on the ground that only two out of the 39 shareholders could not be chosen and held personally liable. *Held:* That the meaning of the word "every" in s. 4 (*4*) of the Companies Act is "each and every" and that the liability of the individual members of the unregistered Company in respect of liabilities by that Company in the course of its business is joint and several. *Appa Dada* v. *Ramkrishna Vasudeo*, I.L.R. 53 Bom. 652, referred to. *Held further:* That the unregistered Company being in fact nothing more than a partnership firm s. 43 of the Contract Act allows a plaintiff suing on a contract made with such a firm to select any of the partners against whom he wishes to proceed and to omit those against whom he desires no relief. In other words the liability of the members of such a partnership is clearly joint and several. *Lukmidas Khimji* v. *Purshotum Haridas, Oodhowji Wallji and Goculdas Jewraz*, I.L.R. 6 Bom. 70, referred to.

U MAUNG *v.* TAN KUT HTAI AND ONE 675

CONFESSION—WHETHER STATEMENT AMOUNTS TO—TESTS TO DETERMINE. One of the tests to determine whether a statement amounts to a confession is whether the statement by itself is sufficient for the conviction of its maker of the offence for which he is tried jointly with those against whom the statement is sought to be given 584

CONFESSIONS—*Retracted Confession—Ss. 3 and 30, Evidence Act—S. 396, Penal Code. Held:* That the following is a Synthesis of all the rules regarding the use of confessions (retracted or otherwise) :—

(i) as against the maker, and
(ii) as against co-accused,

1. So far as they relate to retracted confessions :

(i) A confession judicially recorded is not to be regarded as involuntarily made merely because it is retracted at the trial;

(ii) As against the maker of a confession a retracted confession can form the basis of conviction—

(*a*) if the Court believes to be true and
(*b*) if it is found to have been made voluntarily;

(iii) Though an uncorroborated retracted confession can sustain a conviction, the ordinary rule of prudence is that some kind of corroboration is necessary unless the circumstances are exceptional.

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2. So far as they appertain to the use of a confession (retracted or otherwise) against a co-accused ;

(i) A Confession retracted or not may be taken into consideration not only as against the person making it, but also against the person jointly tried with the confessing accused for the same offence.

(ii) The confession of a co-accused as such is not sufficient to sustain the conviction of other accused.

(iii) If there is other relevant evidence as against the accused person, the confession of a co-accused may be taken into consideration along with the other evidence as lending assurance to it. In other words, the evidence against the co-accused excluding the confession must first be assessed to find out whether it believed it can be a basis of conviction. If it can be believed independently of the confession, then it is not necessary to call the confession in aid. Only in cases where a Court is not prepared to act on the other evidence as it stands, then in such an event, the Court may call in aid the confession of a co-accused and use it to lend assurance to the other evidence.

The above synthesis of law as regards the use of confession against co-accused is subject to the rule in *The King* v. *Nga Myo*, (1938) R.L.R. 190 (F.B.) wherein it is laid down that in cases where it has been established by extraneous evidence or matters appearing on the record that the confessing accused are not acting in collusion with one another, the cumulative effect of their evidence may suffice to remove the *primâ facie* presumption of individual unworthiness of credit of their statements ; and if that be the case, the Court can legitimately record a conviction acting upon their confessions alone if it is convinced of their truth. *Nga Po Kauk and one* v. *King-Emperor*, I.L.R 4 Ran. 45 ; *The King* v. *Hla Maung*, (1946) R.L.R. 102 ; *Muthuswami* v. *The State of Madras*, (1954) A.I.R. (S.C.) 4 ; *Puran* v. *The State of Punjab*, (1953) A.I.R. (S.C.) 459 ; *Nga Po Hlaing and others* v. *Emperor*, A.I.R. (1933) Ran. 320; *Nga Pyaung and others* v. *Emperor*, A.I.R. (1934) Ran. 30 ; *Maung Nyi and one* v. *The Union of Burma*, (1952) B.L.R. 282 (H.C.) ; *Maung Mya and another* v. *The King*, (1938) R.L.R. 30 ; *Ah Phut and others* v. *The King*, (1940) R.L.R. 104 ; *Khaw Taw and one* v. *The Union of Burma*, (1948) B.L.R. 310 (H.C.) ; *Ba Pe and one* v. *The Union of Burma*, (1950) B.L.R. 178 (H.C.) ; *Kashmira Singh* v. *The State of Madhya Pradesh*, A.I.R. (1952) (S.C.) 159 ; *Bhuboni Sahu* v. *The King*, 76 I.A. 147 ; *The King* v. *Nga Myo*, (1938) I.L.R. 190 (F.B.), referred to. *Per*, U SAN MAUNG, J.—*Held :* That the confession of a co-accused is not evidence in the ordinary sense of the term as defined in s. 3 and cannot therefore be made the foundation of a conviction ; that it can only be used in support of other evidence ; that the proper way is, first, to marshall the evidence against the accused person excluding the confession of his co-accused altogether from consideration and see whether, if it is believed a conviction could be based on it ; that if it is so capable of belief independently of the confession of the co-accused, it would be unnecessary to call the confession in aid, but that there may be cases where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction, and that it is in such a case that a Judge may call in aid the confession of the co-accused and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept. *Maung Mya and another* v.

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The King, (1938) R.L.R. ; *Emperor* v. *Lalit Mohan Chuckerbutty and others*, (1911) I.L.R. 38 Cal. 559, referred to. *Khaw Taw and one* v. *The Union of Burma*, (1948) B.L.R. 310 (H.C.) ; *Kashmira Singh* v. *The State of Madhya Pradesh*, A.I.R. (1952) (S.C.) 159, re-affirmed.

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———————————S. 226 (*1*) AND 221—" EXISTING LAW " AS MENTIONED IN S. 226 (*1*) OF THE CONSTITUTION CANNOT APPLY TO PERSONAL LAW 11

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CONTEMPT OF COURTS ACT, 1952, S. 2 (*1*) 50

CONTEMPT OF HIGH COURT—*Press Registration Act—Special Enquiry Committee, constituted under the Resolution of the Government of the Union of Burma—Enquiry Committees Act, 1950 (Act IV of 1950), s. 5—Enquiry by the Committee, adjudicial proceeding—Scurrilous attack on the integrity of the Judges composing the Committee—S. 2* (1), *Contempt of Courts Act, 1952—S. 148, 223 of the Constitution—S. 30, Union Judiciary Act—Article 215, Constitution of India—S. 13* (3), *Burma Laws Act—Applicability of Common Law principles in Burma—Meaning of the word "Court"*. The Government of the Union of Burma appointed a Committee of Enquiry consisting of three Judges of the High Court to inquire into the death of a young student Harry Tan in the shooting incident during a students' demonstration on 22nd March 1958. The Respondent in his Daily newspaper "Htoon Daily" published an article with the caption :

ကျောင်းသား ပစ်ခတ်ခံရမှုနှင့် ကျောင်းသားများလွှဲချခြင်းခံရခြင်း

The article, *ex-facie*, constitutes a scurrilous attack on the integrity of the Judges composing the Committee. The Respondent was called upon to show cause why he should not be punished for contempt as against the High Court. The Respondent contended :

(i) That though the Committee of Enquiry was constituted by these Hon'ble Judges of the High Court, it was not a Court or a Division or a Bench of the High Court and therefore not a Court of Record within the meaning of s. 148 of the Constitution.

(ii) That the power in contempt enjoyed by the late High Court of Judicature was based on the King's prerogative and the contempt against any Judge was contempt against the King and with the gaining of independence, all prerogative rights ceased under the proviso to s. 233 of the Constitution, and therefore the High Court has no more *inherent power* to commit for contempt.

Held : That the High Courts in India and Burma even before their independence have power to punish summarily contempt of court as against them or their Judges as Superior Courts of Record and that such powers have been exercised in their inherent jurisdiction, by virtue of their being Courts of Record

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established by letters Patent, following the Common Law of England and not in exercise of prerogatives on behalf of the King as King's Judges. S. 30 of the Union Judiciary Act clearly perpetuates the inherent powers of the previous High Court to deal in contempt in the present High Court as a Court of Record. *In re Surendranath Banerjea*, 10 I.A. p. 171 at p. 179; *Ebrahim Mamdojee Parekh* v. *King-Emperor*, 4 Ran. p. 257; *In the matter of Tusharkanti Ghosh*, 63 Cal. (I.L.R. 1936) p. 217; *In re Murli Manohar Prasad*, I.L.R. (1929) Pat. Series, Vol. 8, p. 323; *Mohamad Yusuf* v. *Imtiaz Ahmad Khan*, I.L.R. (1939) Luck. Vol. 14. p. 492; *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Khagendra Nath Das Gupta*, A.I.R. (1930) Cal. 795; *In re Abdul Hasan Jauhar and another*, I.L.R. (1926) 48 All. p. 711; *Sukhdev Singh Sodhi* v. *The Chief Justice and Judges of the Pepsu High Court*, (1954) Supreme Court Report, Vol. 5, p. 454; *In re Abdool and Mahtab*, (1867) 8 Weekly Reporter, Cr. 32 at 33; Halsbury's Laws of England, 3rd Edition, Vol. 9, referred to. *Held also*: That the English Common Law Principles in so far as they have not been expressly abrogated by Statute or otherwise are still being followed by our Courts. The common law of England was and is still applied as the law envisaged in s. 13 (3) of the Burma Laws Act, *i.e.*, law which is according to justice, equity and good conscience. *Dr. Tha Mya* v. *Ma Khin Pu*, (1940) R.L.R. p. 807; *The Tajmahal Stationery Mart* v. *K. E. Mohamed Ebrahim V. S. Aliar & Co.*, (1950) B.L.R. (H.C.) p. 41, referred to. *Held further*: That when any act is done or writing published which is to bring a Judge of the Court into contempt or lower his authority, that publication or act amounts to contempt of Court In contempt proceedings the word "Court" also means Judges who constitute the Court, and who are entrusted with the portion of jurisdiction defined and marked out by the Acts of Parliament. An attack made on a Judge not in his individual private capacity, but in his authority as a Judge entrusted with the function of administering justice constitutes not only scandalising the Judge himself, but also scandalising the Courts of Justice in contempt of Court. *The King* v. *Almon*, 97 E.R. p. 94 (Wilmot); *Reg* v. *Gray*, (1900) I.K.B. 32, referred to.

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CONTRACT ACT—DOES NOT AFFECT THE LIABILITY OF A COMMON CARRIER 138

CONTRACT ACT, S. 62—*Novation—Mere variation in one of several clauses in contract could not be regarded as.* Where only one clause regarding shipment out of several clauses in the contract, namely, (i) the quality and the specification of the goods indented, (ii) the price of the goods, (iii) shipment, (iv) packing, (v) assurance and (vi) terms of payment was varied at the request of the party, who now seek to impugn the contract on the ground that due to this variation there had been a novation of contract. *Held*: That this variation as to the shipment of the goods could not be regarded as a novation of contract as contemplated in s. 62 of the Contract Act, for it had not made a complete rescission of the contract in this case, as all other clauses in the contract remained unaltered and that it cannot be said that a new contract had been substituted in place of the old one. "Mere extension of time did not operate so as to rescind the original contract." *Lachminarain Bhareodan* v. *Hoare, Miller & Co.*, I.L.R. 41 Cal. 35, referred to.

MESSRS. I.A.G. MOHAMED & SONS *v.* MESSRS. THE EAST ASIATIC CO. LTD. 524

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CONTRACT ACT—s. 188—APPLICATION OF 208

COSTS—*Awarded against a number of defendants or respondents—Absence of indication of proportion in which costs shall be borne by different defendants or respondents—Liability of defendants or respondents to pay costs jointly and severally.* Where costs are awarded against several defendants or several respondents without indicating the proportion in which these costs shall be borne by the different defendants or different respondents, the defendants or respondents as the case may be are jointly and severally liable for costs, and the order for costs may be executed against any one of them. *The Midnapur Zemindary Co., Ltd.* v. *Madan Marwari and others*, A.I.R. (1923) Pat. 215, referred to. *S. Ramiah Pillay* v. *K. M. Abdul Kader*, (1954) B.L.R. 245, followed.

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COURTS MANUAL—PARAGRAPH 497—INSTRUCTIONS CONTAINED IN THE COURTS MANUAL HAS NO STATUTORY FORCE—PROVISIONS REGARDING RE-ARREST OF ACCUSED 43

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CRIMINAL PROCEDURE CODE, S. 145—*Omission to state grounds for being satisfied—Not an illegality, s. 146—Action taken under—At initial stage of proceedings—Erroneous—When such action should be taken—Finding of fact by a subordinate Magistrate—When High Court will interfere with—Practice.* Where the Subdivisional Magistrate came to a finding that he was satisfied that there was a dispute likely to cause a breach of the peace, but omitted to state the grounds for being satisfied that such a dispute existed as required by s. 145 of the Criminal Procedure Code and at the same time purporting to act under s. 146 of the Code directed attachment of the subject-matter in dispute. *Held*: That the omission of the Magistrate to state the grounds that he was satisfied of the existence of a dispute likely to cause a breach of the peace is not an illegality to vitiate the whole proceedings. *Maung Pu* v. *Maung Chit Pyu*, 5 Ran. 129, followed. *Kapoor Chand and another* v. *Suraj Prasad*, (1933)

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I.L.R. 55 All. 301, referred to. *Nga Po Tin* v. *Nga Po Saung and one*, 1 Ran. 53, distinguished. *Held also:* That the action taken by the Subdivisional Magistrate under s. 146 of the Criminal Procedure Code at the initial stage of the proceedings is erroneous and that action as contemplated by s. 146 of the Code is to be taken by the Magistrate after he has made the enquiry envisaged in sub-s. (4) of s. 145 of the Code. *Held further:* That it is not the practice of the High Court to interfere with the finding of fact of a subordinate Magistrate unless it is demonstrated to be grossly perverse.

U THAN PE *v.* THE UNION OF BURMA (U TUN MYAING) ... 681

CRIMINAL PROCEDURE CODE, s. 162 226

CRIMINAL PROCEDURE CODE, s. 162 (*1*)—*Procedure—Proviso to—Right of both defence and prosecution to use statement of witness to police—Purpose—Evidence Act—Ss. 145 and 155.* Where the request of the Public Prosecutor to declare a certain witness hostile was refused and the trial Magistrate proceeded to cross-examine the witness on the point on which there was a contradiction between the witness's statement on oath in Court and his statement to the police and allowed the said statement to the police to be admitted in evidence through the Investigating Officer. *Held:* That the procedure adopted by both the Public Prosecutor and the trial Magistrate is not in accordance with law; for there is no necessity to have a witness declared hostile for the purpose of confronting him with his statement to the police. *Held also:* That under the proviso to s. 162 (1) of the Code of Criminal Procedure, as amended by Act XIII of 1945, both the defence and the prosecution are entitled to use the statement of a witness to the police, if duly proved, for the purpose of contradicting such witness in the manner provided by s. 145 of the Evidence Act or for the purpose of impeaching the credit of such witness in the manner provided by s. 155 of the Evidence Act. *Fazlur Rahman and others* v. *The Emperor*, 47 Cr. L.J. 814, referred to.

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CRIMINAL PROCEDURE CODE, s. 190 (*1*) (*c*)—*Addition of a person as a co-accused—Not taking cognisance of offence under—Cognisance of offence different from prosecution of offender—Power of Magistrate taking cognisance of offence.* The addition of a person as a co-accused does not amount to taking cognisance of an offence under s. 190 (*1*) (*c*) of the Criminal Procedure Code. There is a difference between cognisance of an offence and the prosecution of an offender. When a case is sent up before a Magistrate by the police, cognisance is taken under s. 190 (*1*) (*b*) of the Criminal Procedure Code of the offence charged and not necessarily of the offender whose name is mentioned by the police in the charge sheet. When a Magistrate takes cognisance of an offence he is empowered to summon all persons against whom there appears to be any reason for their prosecution. In other words, once a Magistrate takes cognisance of an offence he may add any number of co-accused against whom there is reasonable evidence to connect them with the offence under investigation.

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CRIMINAL PROCEDURE CODE, s. 242—*Particulars of offence—Omission to state—When illegality, s. 537—To what cases applicable.* The omission to state particulars of offence to an accused person in

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a summons case as required by s. 242, Criminal Procedure Code amounts to an illegality, where such omission has resulted in the unfair trial of the case and miscarriage of justice. Whether there has been a miscarriage of justice or not is a question to be gauged by the gravity of the irregularity. The mandatory provisions of the Code must be fully complied with by the Court in the interest of justice. It is incumbent upon the Court to make the accused person understand clearly what is the nature of the charge made against him. S. 537 of the Criminal Procedure Code applies to mere errors of procedure arising out of mere inadvertence and not to substantive errors of law or to cases of disregard or disobedience of the mandatory provisions of law. *The Union of Burma* v. *Govindaswamy*, (1949) B L.R. 662 (H.C.), explained. *Gopal Krishna* v. *Matilal*, 54 Cal. 359; *Shadi Ranjan*, 48 Cr. L.J. 92, referred to.

U BA AYE AND THREE OTHERS *v.* THE UNION OF BURMA ... 548

CRIMINAL PROCEDURE CODE, SS. 263 AND 264—*Requisites of a judgment in a summary trial—Omission of trial Magistrate to record reasons—Whether vitiates conviction. Held :* A judgment in a summary trial, must, in accordance with clause (*l*) of s. 263, Criminal Procedure Code, set out a brief statement of the reasons for the conviction, which includes the findings of facts upon which the conviction is based. *Me Da Li* v. *The Crown*, 1 L.B.R. 208, and *Vadivaloo Swamy* v. *The Crown*, 1 L.B.R. 95, followed. In appealable cases the Magistrate must record before passing sentence, a judgment embodying the substance of the evidence in addition to the particulars required by s. 263, Criminal Procedure Code. "The substance of the evidence", is a matter distinct from the facts which may be considered as proved by evidence. It means such evidence as is sufficient to justify the order made and to enable the Appellate Court to perform its function on appeal. *Po Kha* v. *King-Emperor*, 4 L.B.R., p. 358, followed. The statement of reasons for a conviction which the Magistrate is bound to record under clause (*k*) of s. 263 of the Criminal Procedure Code should present a clear statement of the facts constituting the offence and should show that each of the ingredients for a conviction has been considered and held proved by the Magistrate. The omission of the trial Magistrate to record reasons vitiates the conviction. A judgment in which no reason is recorded for conviction must be clearly set aside. *Maasodd Alan and others* v. *Emperor*, 57 I.C. 672, referred to.

MAUNG SEIN THEIN *v.* THE UNION OF BURMA 327

CRIMINAL PROCEDURE CODE, S. 337 (3)—*Approver—Detention of.* Where the accused to whom pardon is tendered is already on bail, there is no necessity for him to be remanded to custody thereafter but that if he is not on bail, the Magistrate is bound by the provisions of sub-s. (3) of s. 337 of the Criminal Procedure Code to retain the approver in custody until the termination of the trial. *Haji Ali Mahomed* v. *Emperor*, 33 Cr. L.J. 906, referred to.

MAUNG MYINT *v.* THE UNION OF BURMA 646

CRIMINAL PROCEDURE CODE—S. 344, 435, 439 AND 561-A—POWER OF HIGH COURT TO ORDER STAY OF CRIMINAL PROCEEDINGS ... 102

CRIMINAL PROCEDURE CODE, S. 403—*Plea of* autrefois acquit—*Whether a person acquitted of charge of rape can be subsequently tried and convicted for abduction committed in the course of same transaction—Penal Code, ss. 366 and 376—Distinct offences.*

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The appellants, who were alleged to have abducted and ravished two girls, had previously been acquitted on a charge of rape under s. 376 of the Penal Code. They were subsequently tried and convicted for the offence of abduction under s. 366 of the Penal Code. On appeal it is contended that the subsequent trial for abduction was barred under the provisions of s. 403, Criminal Procedure Code in view of the acquittal in the previous trial on a charge of rape. *Held:* That abduction and rape are two distinct offences and that as a charge under s. 366 of the Penal Code involves different elements and different questions of fact from a charge under s. 376 of the Penal Code, the plea of *autrefois acquit* is not open to the appellants. *Chit Hlaing Maung* v. *Emperor*, A.I.R. (1930) Ran. 360; *Yeok Kuk* v. *Emperor*, I.L.R. 6 Ran. 386; *Abdul Hamid* v. *King-Emperor*, 14 Ran. 24; *Hakim and two others* v. *The Union of Burma*, (1949) B.L.R. 112 (S.C.), followed *Emperor* v. *Sakharam Genu*, 3 Cr. L.J. 240; *Ghulam Mohammad* v. *The Crown*, 7 Lah. 484, referred to.

MAUNG HAN KYI AND ONE *v.* THE UNION OF BURMA ... 508

CRIMINAL PROCEDURE CODE, s. 403—Autrefois convict—*Principle inapplicable to trial for distinct offence, s. 561-A—Inherent power of High Court to interfere—When to be exercised—Purpose—When cannot be invoked.* Under sub-s. 2 of s. 403 of the Criminal Procedure Code, the *autrefois convict* principle does not apply to a trial of a person for a distinct offence for which a separate charge could have been framed against him in a former trial, under s. 235 (1) of the Criminal Procedure Code. The High Court has, under s. 561-A of the Criminal Procedure Code inherent power to interfere with the criminal proceedings of the lower Court at any stage if it is satisfied that any further continuation of such proceedings would palpably be an abuse of the process of law. But this power is exercised by this Court only in exceptional circumstances in order to prevent harassment. And the presence or absence of exceptional circumstances must be tested on sufficient materials, and not on bare assertions by the person concerned. Where the quashing is sought for on the bare assertions made in the charge sheet without any evidence as yet being led by the prosecution, it will be too premature for the High Court to interfere with the trial. It is well known that this inherent power cannot be invoked for the purpose of doing an act which will directly conflict with any specific provision of law. *Chaman Lal* v. *Emperor*, A.I.R. (1943) Lah. p. 304; *Emperor* v. *Anant Narayan Kulkarni*, A.I.R. (1945) Bom. p. 403, distinguished.

R. GOPALAN AND ONE *v.* THE UNION OF BURMA... ... 535

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*Chapter XX—Summons case—Trial of—As a warrant case—No provision for discharging accused in—Order of discharge—Order of acquittal in law—Bars subsequent prosecution for same offence under s. 403.* Where in a prosecution under s. 447 of the Penal Code the applicants were released under an order described as an order of discharge and purported to be made under s. 253 of the Criminal Procedure Code and the applicants were again prosecuted for the same offence subsequently. *Held:* That there is no provision for discharging an accused in a summons case and that the order made therein and described as an order of discharge was in law and order of acquittal, as which it bars the subsequent prosecution under s. 403 of the Criminal Procedure Code. *Held also:* That a summons case is a

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summons case and that it is not converted into a warrant case by being tried as a warrant case. *Thetharappa Pillai* v. *Vencatrama Aiyar*, (1910) Cr. L.J. (Vol. II) 350; *Mahmud and others* v. *Mir Hassan Shah*, (1951) Cr. L.J. (Vol. 52) 480, referred to.

ABDUL RAHIM AND ONE *v.* K. MADHA SAHIB AND ONE ... 613

CRIMINAL PROCEDURE CODE, s. 476—*Whether preliminary enquiry obligatory when a judge decides to take action under that section—Competency of Court to deal with an offence under the section at any time—Desirability of early initiation of proceedings.* When a Magistrate or a Judge decides to take action under s. 476 (1), Criminal Procedure Code, it is not obligatory for him to hold any inquiry. Such inquiry, which is only preliminary in nature, should be made when the Court considers it necessary. Such a preliminary inquiry is not a *sine qua non* in all cases. Holding of such inquiry is left to the discretion of the Court. When the Court in the course of any trial or inquiry contemplated in the aforesaid section *suo motu* or at the instance of one of the parties holds that one or more of the offences enumerated in the said section has or have been committed, and it considers that a *primâ facie* case is made out against the person concerned on the materials before it, no preliminary inquiry is necessary. *H. V. Subba Rao* v. *Government of Mysore*, 9 Cr. L.J. 319, referred to. The language of s. 476 of the Criminal Procedure Code is not imperative in regard to the preliminary inquiry where the record of the judicial proceeding in the course of which an offence had been committed or brought to notice itself, contains sufficient materials, for thinking that a *primâ facie* case exists against the accused person in question. *H. V. Subba Rao* v. *Government of Mysore*, 9 Cr. L.J. 319, and *Abdul Ghafur and another* v. *Raza Hussain*, I.L.R. 34 All. 267, referred to. It is entirely discretionary and not obligatory with a Court to hold a preliminary inquiry. *Jagat Singh* v. *Emperor*, A.I.R., (1930) Lah. 55, referred to. It is most desirable that a prosecution basing upon s. 476 of the Criminal Procedure Code should be initiated as early as possible, especially when the matter is not *suo motu*, but at the instance of one of the parties. *Mohamed Kaka* v. *The District Judge of Bassein*, (1937) Ran 276, distinguished. There is nothing in s. 476 of the Criminal Procedure Code which requires the exercise of power conferred by it at any period or at any particular time. The Court is not incompetent or powerless to deal with an offence found to have been committed before it where the knowledge that the said offence has been committed was not brought to its notice until it was pointed out by the party concerned. *Emperor* v. *Tilak Pandev and others*, 37 All. 344 and *In re Lakshmidas Lalji*, I.L.R. 32 Bom. 184, referred to. A Court would be wanting in its duty if serious notice is not taken of any false statements made therein which would mislead the Court in regard to the credit and other attendant circumstances appertaining to the person who offered himself as a surety.

HIRALAL (*a*) HIRALAL DHANUKA *v.* TIN TIN U 268

CRIMINAL PROCEDURE CODE, s. 497—AS AMENDED BY CODE OF CRIMINAL PROCEDURE (TEMPORARY PROVISIONS) ACT, 1953 ... 43

CRIMINAL PROCEDURE CODE, s. 526—*Transfer of criminal case—Stay or proceedings—Conduct of trying Magistrate.* Although with the deletion of sub-ss. 8 to 10 of s. 526 of the Criminal

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Procedure Code by the Court of Criminal Procedure Amendment) Act, 1945 (Burma Act No. XIII of 1945), a Magistrate is no longer bound to stay a case merely because a party expresses a desire to apply to the High Court for the transfer of the case, he should await the result of an application for transfer of the case, where such an application has been filed and admitted by the High Court. It is necessary to avoid not only any partiality on the part of a Magistrate, but any circumstances that might lead to a reasonable apprehension of a partiality in the mind of an accused person; that is to say, it is desirable not only that justice should be done but that it should be manifest to all the world that justice is being done.

KYAW SEIN *v.* UNION OF BURMA (MAUNG SEIN) ... 639

CRIMINAL PROCEDURE CODE, s. 530 (*p*)—*Irregularity which vitiates proceedings—S. 342—Examination of accused—Purpose of—Improper examination.* Where a District Magistrate, who is also invested with the powers of a Sessions Judge, tried a murder case punishable under s. 302 of the Penal Code in the exercise of the powers as a District Magistrate and not as a Sessions Judge, the proceedings were void *ab initio*, *vide* s. 530 (*p*) of the Criminal Procedure Code. S. 342 of the Criminal Procedure Code empowers a Court at any stage of a criminal proceeding to examine an accused person but only "for the purpose of enabling the accused to explain any circumstances appearing against him". Such an examination cannot be conducted in the form of cross-examination not with a view to fill up gaps in the prosecution evidence nor to inveigle the accused into admitting the offence with which he has been charged.

MANDAT HMYAR AND TWO OTHERS *v.* THE UNION OF BURMA 643

CIVIL PROCEDURE CODE, s. 549—STATUTORY RULES MADE UNDER THAT SECTION MUST BE CONSTRUED STRICTLY 231

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DAMAGES—AMOUNT OF DAMAGES IN DEFAMATION—MATTER WITHIN DISCRETION OF TRIAL COURT—BUT APPELLATE COURT HAS AMPLE POWER TO RE-FIX AMOUNT 398

DEFAMATION—*Damages—Quantification of—Discretion of Court—Proper and reasonable exercise of—Excessive damages—Power of appellate Court to re-fix the amount—Greatest moment in a defamation suit—Liability of share-holders of Press for defamatory article published by the Press.* The quantification of damages as a "solatium" to a plaintiff in a suit for defamation, in so far as the Courts in Burma and India are concerned, is within the discretion of the Court. Although the fixing of damages is within the discretion of the Court, yet unless a reasonable proportion exists between the sum awarded and the circumstances of the case, the Court would be wanting in the proper and reasonable exercise of its discretion. Exercising of discretion does not mean doing what a Court likes, disregarding the facts and circumstances of the case. The greatest moment in a defamation suit, especially concerning a person of high social standing or who holds high official position, is not the quantum of damage, but whether he has fully vindicated his rights. *C. M. G. Ogilvie* v. *Punjab Akhbarat and Press Company,*

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I.L.R. 11 Lah. 45, referred to. If the amount of damage awarded by the trial Court was so extremely high as to make it entirely unreasonable having regard to the circumstances of the case, the appellate Court has ample power in its discretion to re-fix the amount. *Flint* v. *Lowell*, (1935) K.B. 354, referred to. In the case of an author, printer, publisher and proprietor of a press all of them can be sued jointly for defamation, inasmuch as they are all instrumental in the publication of a defamatory article. So far as the 4th and 5th appellants, who are merely share-holders of the *Bama Khit Press*, are concerned, there is no allegation of joint authorship, printing or publication of the defamatory article. In these circumstances there was no justification for impleading them as defendants and also for making them liable for the article complained of.

U ON KIN AND FIVE OTHERS *v.* U SAW HAN 398

DEMOCRATISATION ACT—*Village Court—No power to revise its own orders.* A Village Court tried and fined the applicants for an offence. The fines were paid. Subsequently the Village Court again tried the applicants for the same offence and ordered them to pay fines in sums differing from those which the applicants had paid under the previous order of the Village Court, the explanation for making the subsequent order being that the new order was found to be necessary as its previous order was discovered to be incomplete and to contain a number of omissions. Being aggrieved with this action on the part of the Village Court, the applicants filed a revision application before the District Magistrate, Hanthawaddy, who, however, refused to interfere. *Held:* A Village Court has no power to revise its own orders; the procedure was highly incorrect, and thus vitiated the whole proceedings.

PONNA AND THREE OTHERS *v.* KUPUSWAMY AND FIVE OTHERS 662

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ENQUIRY COMMITTEES ACT, 1950 (ACT IV OF 1950) S. 5—ENQUIRY BY THE COMMITTEE—A JUDICIAL PROCEEDING 50

EQUITABLE MORTGAGE BY DEPOSIT OF TITLE DEEDS—*Creation of—Thing of vital importance in—Purpose of deposit—Securing of debt antecedently due—Subsequent deposit of one of title deeds—Mere possession of title deeds by creditor not enough to presume intention of creating equitable mortgage.* What is of vital importance in the creation of an equitable mortgage by deposit of title deeds is the handing over of the title deeds by the debtor to the creditor or his agent which may be contemporaneous or may be later, with the intention that the title deeds so handed over shall be security for the loan taken. The purpose of the deposit of title deeds is to secure the repayment of the loan. A debt antecedently due can be effectively secured by a subsequent deposit of title deeds. The deposit of a title deed made subsequent to the deposit of other title deeds, so long as the

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deposit was made with the intention of securing the loan already taken would be quite sufficient for creation of an equitable mortgage. The headnotes in the case of ***Ma Ohn Kyi and five others*** v. ***Daw Hmin Nwe and three others*** reported in 1953 Burma Law Reports page 322 (H.C.) are misleading and must be read omitting the words "at the time of the loan." The intention of creating equitable mortgage cannot be presumed from mere possession of the title deeds by the creditor, because mere possession of deeds is not enough, without evidence as to the manner in which the possession originated so as to infer the contract of loan or mortgage. ***Heng Moh & Co.*** v. ***Lim Saw Yean and others***, I.L.R. 2 Ran. 545, followed. ***A. B. Miller*** v. ***Babu Madho Das***, I.L.R. XIX (1897) All. 76 (P.C.), referred to.

DAW YIN *v.* MAUNG KYAW AND TWO OTHERS 490

ESSENTIAL SUPPLIES AND SERVICES ACT, 1947, s. 5 (*3*)—*Offends s. 23 (4) of the Constitution of the Union of Burma*—Ultra vires *of the legislature*. Sub-s. 3 of s. 5 of the Essential Supplies and Services Act of 1947 in so far as it contravenes the provision of sub-s. 4 of s. 23 of the Constitution will be *ultra vires* of the legislature. ***Sudhindra Nath Dutta*** v. ***Sailendra Nath Mitra***; A.I.R. (39) (1952) Cal. 65; ***The State of Bombay*** v. ***Heman Santlal Ahreja***, A.I.R. (39) (1952) Bom. 16, referred to.

MESSRS. UNITED COMMERCIAL COMPANY *v.* THE UNION OF BURMA 331

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EVIDENCE ACT—Ss. 3 & 30—CONFESSION OF CO-ACCUSED—NOT EVIDENCE IN THE ORDINARY SENSE OF THE TERM AS DEFINED IN S. 3. 29

EVIDENCE ACT, s. 25 226

EVIDENCE ACT, s. 41—*Judgments in* rem—*Civil Procedure Code, s. 11*—Res judicata—*Explanation VI not confined to cases covered by O. 1, R. 8.* A filed a suit against B in the Township Court of Mandalay and obtained a decree for removal of obstruction over the right of way over B's land which adjoined A's land as well as a perpetual injunction against B from obstructing that right. Subsequently, C, D and E along with another, who died later, claiming the land in dispute in the previous suit to be a religious land and themselves to be trustees thereof sued A in the same Court for a permanent injunction to restrain him from making use of that land for going to and from his house to the main road. A contended that the judgment in the previous suit filed by him operated as a bar to the subsequent suit on the principles of *res judicata*. The Township Court refused to accept his plea and decreed the suit. On appeal the District Court of Mandalay set aside the decree on the ground that the decision in the previous suit by A acted as a bar to the subsequent suit and that the right of passage acquired by A was an easement available "against all the world". *Held*: That the wordings of s. 41 of the Evidence Act clearly lay down that the only judgments which may be regarded as judgments in *rem* are those passed by a competent Court in the exercise of probate, matrimonial or insolvency jurisdiction and that the Township Court of Mandalay did not purport to exercise any such jurisdiction at the time when the previous suit was decided. *Held further*: That Explanation VI of s. 11 of the Civil Procedure Code is not

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confined to cases covered by Order 1, rule 8 of the Code, but would include any litigation in which, apart from the rules altogether, parties are entitled to represent interested persons other than themselves and that since C, D, E and the deceased person were interested in the same manner as B, *i.e.*, to prevent the right of passage over the suit land, which was litigated in the former suit the subsequent suit filed by them was barred by the principles of *res judicata*.

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FRUSTRATION OF CONTRACT—*Impossibility of performance on account of insurgents' activities.* A contract which became impossible of performance on account of insurgents' activities was frustrated.

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GUARDIAN AND WARDS ACT (ACT VIII, 1890), s. 17—*Matters to be considered by the Court in appointing guardian—S. 17* (3). In dealing with applications for the guardianship and custody of a child, the welfare of a child is of paramount importance and outweighs any other considerations. "If the minor is old enough to form an intelligent reference, the Court may consider that preference," s. 17 (*3*) of the Act.

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GUARDIAN AND WARDS ACT, S. 25 (*1*), BAR TO A REGULAR SUIT FOR CUSTODY OF A MINOR—*The doctrine of* factum valet—*Hindu Law—Inter-caste Marriages—The Hindu Marriages Validity Act, 1949 (Act No. 21), s. 3—The Hindu Marriages Act, 1955, s. 5—Constitution, s. 226 (1) and 221—Burma Laws Act, s. 13.* The Respondent filed a suit against the appellant :- (i) for a declaration that the alleged marriage between the appellant and the Respondent's minor daughter is null and void, illegal and invalid, and (ii) for recovery of possession or custody of the girl. (The suit was decreed by the trial Court and confirmed by the first appellate Court). On second appeal, it was contended by the Respondent that :

(i) The marriage was without the consent of the guardian,
(ii) absence of essential ceremony to validate the marriage, and
(iii) the parties belong to different castes.

Held : S. 25 (1) of the Guardians and Wards Act is a bar to the jurisdiction of the Court to entertain a regular suit and the remedy must be by way of application under the Guardians and Wards Act, and not by filing a regular suit. *Shadeo* v. *Mahraji and another*, I.L.R. 9 Ran. 569, approved *Ma Shwe Ge* v. *Maung Shwe Pan*, 2 L.B.R. 140; *Mathuranban* v. *D. Tewary*, 10 B.L.T. 186, referred to. *Held also :* (i) No marriage between Hindus which has been solemnised according to Hindu Law

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shall be defeated by reason only of the absence of consent given by a guardian. (ii) If the parties go through certain marriage ceremonies a presumption shall arise that the marriage ceremony has been duly performed. The doctrine of *factum valet* must be applied. *Bai Diwali* v. *Moti Karson*, 22 Bom. 509; *Mulchand Kuber* v. *Bhudhia and another*, 22 Bom. 812, referred to. (iii) Inter-caste marriages are now recognised amongst Hindus. The Indian Legislature is a competent authority to pass Acts relating to Hindu Law and it is to Indian Legislature that all Hindus must look for their protection in respect of cases coming within the sphere of their personal law. "Existing law" as mentioned in Article 226 (1) of the Constitution, cannot apply to personal law. S. 13 of the Burma Laws Act, provides that the Hindu Law shall apply in cases where the parties are Hindus, and the Hindu law with regard to marriage shall apply to the cases of Hindu marriages contracted in the Union of Burma.

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JURISDICTION—*Burma State Lottery, 62nd Series—First Prize—Ticket purchased at Henzada—Payment at Rangoon—Suit for declaration and possession instituted in Henzada—Territorial jurisdiction—Notice under s. 80, Civil Procedure Code, waiver thereof.* The first three Respondents obtained a decree against applicant and the fourth Respondent in the District Court of Henzada for a declaration of title and possession of the first prize winning ticket in the 62nd Series of the Burma State Lottery, which was purchased at Henzada. In revision to the High Court it was contended that :—

(i) The District Court of Henzada had no territorial jurisdiction, and

(ii) The suit not maintainable for want of Statutory notice under s. 80 of the Civil Procedure Code.

Held : That the winning of the first prize of the draw which had admittedly taken place at Rangoon gave rise to the cause of action of the suit, the primary cause being the winning of the prize and payment thereof at Rangoon. That the suit for declaration and possession of the suit ticket and the prize money of one lakh Kyats which money is in the custody of and payable by the Controller, Burma State Lottery, Rangoon, must be instituted at Rangoon where the cause of action wholly arose. *The Jupiter General Insurance Company Limited and two others* v. *Abdul Aziz*, 1 Ran. 231 ; *J. D. John and others* v. *Oriental Government Security Life Assurance Co., Ltd.*, A.I.R. (1929) Mad. 347, referred to. *Held further :* The right to notice under s. 80 of the Civil Procedure Code may be waived by Government or the Public Officer concerned. *The Secretary of State for India in Council* v. *Kalekhan and another*, I.L.R. 37 Mad. 113 ; *Firm of R. S. Gangaram and R. S. T. Rupchand & Co.* v. *Secretary of State*, 40 A.I.R. (1937) Sind 291 ; *Government of Province of Madras* v. *Al. Ar. Rm. Vellayan Chettiar and others*, A.I.R. (1944) Mad. 544 ; *Vellayan Chettiar and others* v. *The Government of the Province of Madras and another* A.I.R. (1947) (P.C.) 197 at 198 ; *The District Board, Banaras* v. *Churhu Rai and another*, A.I.R. (1956) All. 680 at 681 ; *Ruplal Agarwala* v. *Dhansar Coal Co. and another*, A.I.R. (1933) Pat. 49 ; *B.N.W. Railway Co.* v. *Mohammed Abdul Halim*, A.I.R. (1930) Pat. 528 ; *National Petroleum Company Ltd., Bombay* v. *Meghraj Ramkaranji Golcha and another*, A.I.R. (1937) Nag. 334, referred to. Application for revision allowed.

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LETTERS OF ADMINISTRATION—*Right to administer estate—Personal right—Death of person granted this right—Abatement of suit on—Right does not survive to his heirs.* Where during the pendency of the appeal from an order granting letters of administration to the plaintiff and before the letters could actually be issued to him the plaintiff died and his legal representatives were brought on record. *Held :* That the power granted to a person to administer an estate ceases on his death and this personal right does not survive to his heirs and that the plaintiff's suit for letters of administration must be considered to have abated.

U BA SEIN *v.* KO TUN AUNG AND TWO OTHERS 553

LIMITATION ACT, S. 20 (1), ARTICLE 182 (5)—*Receipt of part payment shown in Column 5 of the execution application, whether proper certification under Order 21, Rule 2, Civil Procedure Code and whether it is a step-in-aid of execution* The Decree-holder

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obtained a decree for Rs. 2,300 against the judgment-debtor on 9th October 1947. He filed an execution application on 15th January 1951, mentioning in column 5 the receipt of Rs. 200 on 27th March 1950. *Prima facie*, the application for execution was time-barred. The Decree-holder contended:

(i) That there is a conclusive finding of fact that there had been a part payment of the decretal amount.

(ii) That there has been a step-in-aid of execution as part payment had been duly certified under Order 21, Rule 2, Civil Procedure Code.

(iii) That a fresh starting point of limitation had begun from 27th March 1950.

Held: Under s. 20 (*1*) of the Limitation Act, before an alleged part payment of the debt can be taken into account for the extension of the limitation period, the Court must be satisfied that together with the payment there is an acknowledgment in the handwriting of or in a writing signed by the person making the payment. The alleged part payment towards the decree not being witnessed by acknowledgment in the handwriting of the judgment-debtor cannot be recognised by the Court. *Held also:* The mere certification of the decree-holder in the execution application itself regarding the alleged part payment to him by the judgment-debtor cannot be regarded as an application to the Court to take a step-in-aid of the execution or is in itself a step-in-aid of the execution. The decree-holder cannot take shelter under either Article 182 (5) or s. 20 of the Limitation Act. Appeal allowed. *Law San* v. *Po Thein*, 2 Ran. 393; *Daw Ywet* v. *U Tin and one*, 8 Ran. 310; *Fattu* v. *Nanak Chand*, A.I.R. (1924) Lah. 676, referred to. *Prokash Singh* v. *Allahabad Bank, Ltd.*, A.I.R. (1929) (P.C.) 19; *Amar Krishna Chaudhury and another* v. *Jagat Bandhu Biswas and others*, A.I.R. (1931) Cal. 719, approved.

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LIMITATION ACT, ARTS. 106 AND 120—*Suit for account of a dissolved partnership and suit for dissolution of partnership and account—Period of limitation for—Existence of relationship of partnership—Mixed question of law and fact—When necessary to determine.* If the suit is for mere account of a dissolved partnership, or in other words, if the suit brought is one *after* the dissolution of the partnership, then the period of limitation for such a suit under Article 106 of the Limitation Act, is three years from the date of dissolution. However, if the suit is not for account only, but for dissolution and account, then the relevant article of the Limitation Act is Article 120, and the period provided is six years from the date when the right to sue accrues. *A. Khorasany* v. *C. Acha and four others*, (1928) I.L.R. 6 Ran. 198, followed. In a suit for dissolution of partnership where limitation is raised and when, in that regard no express terms are embodied in the agreement of partnership; and where also, abandonment of partnership rights by a partner is pleaded in view of his conduct contrary to the relationship of partnership exists or not, depending as it does on facts and circumstances, and such question being a mixed one of law and fact, a decision must be arrived at by a Court basing upon proper issues, and a careful appraisal of evidence adduced in those regards. *Moung Tha Hnyin* v. *Ma Thein*

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Myah and another, (1901) I.L.R. 28 Cal. (P.C.), p. 53, followed. *L. Shiam Lal* v. *Shiam Lal and another*, (1935) All. 1008, referred to.

TAN SOON LEE *v.* YEO TONG HOE 365

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PENAL CODE, s. 302 (2)—*Motiveless crime and insanity—S. 84, Penal Code. Held:* That an apparently motiveless crime is not attributable to insanity or mental derangement of the perpetrator. *Nga San Pe* v. *Emperor*, 38 C.L.J. 307, approved. *Held also:* The exemption from liability contemplated by s. 84 of the Penal Code is the commission of an offence by a person who by reason of his unsoundness of mind is, *at the time of the commission of the offence*, incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law. *McNaughton's case*, (1843) 4 State Trials; *Sa Font* (alias) *Paw Lu* v. *The Union of Burma*, B.L.R. (1950) 352, referred to.

THE UNION OF BURMA *v.* OO HLA KHINE 143

PENAL CODE—*Ss. 392 and 302—S. 41, Burma Army Act and s. 549, Criminal Procedure Code—Non-Compliance with Statutory rules made thereunder. Held:* Statutory rules made under s. 549, Criminal Procedure Code must be construed strictly; non-compliance with the special procedure laid down therein will not only render the entire proceeding illegal, but also has the effect of having tried without jurisdiction. *In re Captain Hugh May Stollery Mundy*, I.L.R. (1946) Mad. 138, approved.

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PENAL CODE, ss. 415, 420—*Cheating—S. 439 read with s. 561A, Criminal Procedure Code—Quashing of criminal proceedings—S. 415, illustration (f), Penal Code. Held:* To bring an offence of cheating within the ambit of s. 415 of Penal Code there must be two elements :—

(1) deception and
(2) fraudulent or dishonest inducement to do or omit to do something.

The deception must precede inducement to deliver any property or to consent that any person shall retain any property, etc. *Held also:* The offence of cheating basing on a loan transaction as shown by illustration (*f*) to s. 415, Penal Code, depends upon two ingredients :—

(1) intentional deception, and
(2) the borrower did not at all intend at the time of taking the loan to repay the loan made to him.

Until and unless specific facts and circumstances are disclosed that the borrower being not in a position to repay the loan, and not intending to repay borrowed money by practising deception upon the lender, there can be no offence of cheating within the purview of s. 415 of the Penal Code. *Maung Ba Yone* v. *Ma Hla Kin*, A.I.R. (1933) Ran. 297 at 298, referred to.

MA SHWE (*a*) MA KYIN SHWE *v.* THE UNION OF BURMA ... 306

PENAL CODE, ss. 494 AND 497—*Liability of person marrying a woman during subsistence of marriage with husband for abetment of bigamy and for adultery for living with her as man and wife.* Where a person marries a married woman during the subsistence of her marriage with her husband and lives with her as man and wife, he can be prosecuted for abetment of bigamy committed by the wife, but not for bigamy punishable under s. 494 of the

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Penal Code, and also for the offence of adultery, punishable under s. 497 of the Code. *Munir* v. *Emperor*, 27 Cr.L.J. p. 101, referred to.

SUBRAMANIAM *v.* SAKRA 540

PERMANENT STRUCTURE—PARTITIONS SECURED BY SCREWS AND MOVEABLE—NOT PERMANENT STRUCTURE—S. 108 (*p*), TRANSFER OF PROPERTY ACT 504

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PLAINT—OMISSION TO SIGN OR VERIFY PLAINT—CURABLE EVEN IN APPELLATE COURT 150

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PLEA OF "GUILTY"—*Ignorance of seribus consequences ensuing—Ignorance of nature or quality of charge levelled—Convictions and sentences upon—Duty of trial Court before accepting plea.* Where the accused who appear to have been totally ignorant of the serious consequences which might ensue on their plea of guilty and of the nature or quality of the charge levelled at them pleaded guilty and were convicted and sentenced on their plea. *Held:* That the convictions and sentences passed on them were bad in law. *Sri Sawarmal* v. *The Union of Burma* (*U Thein Maung*), (1954) B.L.R. 331, followed

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PRINCIPAL AND AGENT—*Extension of time by agent—Whether within scope of authority—Contract Act, s. 188—Ratification—Whether acknowledgment of Act of agent by principal in another proceeding amounts to ratification or admission of ratification—Evidence and pleading—Acceptability—Extent of.* An agreement for the sale of certain immoveable property was made between the buyer and seller under which part of the price was paid at the time of the agreement, and it was agreed that the balance was to be paid within one year. On the buyer being unable to pay the balance price within a year, the seller's agent, in the absence of the seller, entered into a new agreement of sale, wherein the time of payment was extended for another year. The balance price was alleged to have been paid during that year by the buyer to the seller's agent. The registration of the sale deed was however postponed till the arrival of the seller, who on his arrival about three years later, refused to accept the agreement made by his agent.

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Held : (1) S. 188 of the Contract Act has no application to the present case. The making of a fresh agreement for sale of immoveable property by an agent is not a lawful thing necessary for the purpose or usually done in the course of conducting the business of collecting the rents and outstanding debts due to the principal. Therefore the fresh agreement of sale made by his agent was not binding on the seller.* The alleged payment of the balance price by the buyer to the seller's agent after the expiry of the period allowed by the original agreement of sale was therefore of no relevance.

Bryant, Powis and Bryant Ltd. v. *La Banque Du Peuple*, (1893) A.C. p. 170 ; *The United Provinces Government, Lucknow* v. *The Church Missionary Trust Association Ltd., London*, I.L.R. 2 Luck. p. 93 ; and *Ebrahim Mahomed Patail* v. *S.R.M.M. Arunachellum Chetty*, (1902-03) II U.B.R. p. 5, referred to.

(2) The statement by the seller in the plaint filed by him in another suit that an extension of time was granted to the buyer at his request as he could not pay the balance price within one year, does not amount to ratification of the subsequent agreement, or admission of the ratification.

In order to establish a case of ratification it appears to be essential that the party ratifying should be conscious that an act beyond the authority of the agent had been done, and further after notice of that fact the party consciously by an overt act agreed to be bound by it or by acquiescence in the situation arising thereafter allowed the business to continue.

There can be no ratification without any intention to ratify, and there can be no intention to ratify an illegal act without knowledge of the illegality.

While a Court of law is entitled to accept a part of the evidence of a witness and to reject another part, a pleading cannot be so dissected, but must be taken either as a whole or left alone altogether.

Daw Cho v. *U Ganni and others*, (1951) B.L.R. 158 (S.C.); *T. R. Pratt (Bombay) Ltd.* v *E. D. Sassoon & Co. Ltd. and another*, A.I.R. (1936) Bom. p. 62 ; *Ganpatrao Madharao Potdar and others* v. *Ishwar Singh and another*, A.I.R. (1938) Nag. p. 482 ; and *Fateh Chand Murlidhar* v. *Juggilal Kamlapat*, A.I.R. (1955) Cal. 465, referred to.

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PUBLIC CHARITABLE TRUST—REQUIREMENT OF SUIT IN RESPECT OF ... 357

PUBLIC PROPERTY PROTECTION ACT, s. 6 (*1*)—*Prosecution under—Possession of teak scantlings and planks*, s. 6 (*2*)—*Presumption*. In a prosecution under s. 6 (*1*) of the Public Property Protection Act for possession of teak scantlings and planks it does not necessarily follow that they being teak were Government property and no presumption as provided in s. 6 (*2*) of the Act can be drawn in respect of them.

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RENT—CONTRACTUAL RENT—RECOVERABLE FOR THE PERIOD BEFORE FIXATION OF STANDARD RENT 616

REPRESENTATIVE SUIT—FORMALITIES TO BE COMPLIED WITH ... 353

REPRESENTATIVE SUIT—*Use of word "represented" in title of suit—Suit not converted into representative suit thereby—Civil Procedure Code (Act V, 1908), s. 99—Omission to sign or verify plaint—A mere defect not affecting merits of a case or jurisdiction of Court—Curable even in appellate Court—Principal Officer—Signing of plaint by—Lack of authority to do so—By itself no ground for dismissal of suit—Signing of plaint—A matter of procedure only—Suit for accounts—When not necessary—Even when there is a dispute between parties regarding accounts rendered—Limitation Act (Act IX, 1908), Sch. I, Art. 89—Non-applicability when accounts rendered by agent.* The use of the word "represented" in the title of a suit by a Government Board which is represented in the suit by one of its principal officers does not convert the suit into a representative suit. Even where the principal officer who has signed the plaint in the suit is not authorised to do so, the suit cannot be dismissed on this ground alone as the defect can be cured by allowing a competent officer to sign the same. This is permitted by s. 99, C.P.C. The signing of plaints is merely a matter of procedure. The omission to sign or verify a plaint is not such a defect as could affect the merits of a case or the jurisdiction of the Court. If the omission is discovered at any time before judgment, the Court may allow the plaintiff to amend the plaint by signing the same. And if the defect is not discovered until the case comes on for hearing before an appellate Court, the appellate Court may order the amendment to be made in that Court. The appellate Court ought not to dismiss the suit or interfere with the decree of the lower Court merely because the plaint has not been signed. *Maung Po Lun* v. *Ma E Mai*, A.I.R. (1923) Ran. 57; *U Maung Maung* v. *Daw Thein May*, (1950) B.L.R. (S.C.) 151, followed. Where an agent has already rendered his accounts to his principal and where the exact amount due and payable by the agent to the principal can be ascertained, there is no necessity to sue for accounts although there is some dispute between the parties regarding these accounts. The right to claim a statement of accounts is an unusual form of relief granted only in certain specific cases and is only to be claimed when the relationship between the parties is such that is the only relief which will enable the claimant to satisfactorily assert his legal rights. *Firm Joint Hindu Family Diwan Chand Sant Ram* v. *Bhagat Ram and*

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others, A.I.R. (1946) Lah. 82, referred to. A suit contemplated by Art. 89 of Sch. I of the Limitation Act is a suit in which accounts have to be taken. Where an account has been rendered Art. 89 has no application. *Kesho Prosad Singh* v. *Sarwan Lal*, 21 C.W.N. 591, referred to.

U BA CHIT *v.* THE STATE TIMBER BOARD 150

Res Judicata—PROCEEDINGS BEFORE TWO "LUGYIS" DEPUTED BY THE A.F.P.F.L. NOT "FORMER SUIT"—ANY DECISION MADE THEREIN NO BAR TO SUBSEQUENT SUIT 658

RES JUDICATA—*When subsequent suit barred by former suit—Whether "the matter directly and substantially in issue" in the subsequent suit was "directly and substantially in issue" in the former suit.* The respondent obtained a decree for ejectment of the appellant from certain stalls in the Zegyo Bazaar, Mandalay, under s. 11 (*l*) of the Urban Rent Control Act in the Township Court of Mandalay. The decree was confirmed by the District Court and the High Court. Subsequently, on the application of the appellant, the Mandalay Municipality entered his name in the registers of the Zegyo Bazaar, as the recognised occupant of the sites on which the stalls in question stood. On the strength of this entry in the bazaar registers, the appellant sued the respondent in the Subdivisional Court, Mandalay, for a Declaration that he was the registered occupant of the stall sites in dispute, and for an injunction to restrain the respondent from executing the decree and to direct her to remove her shops from the stall sites. In view of the decision in the previous suit mentioned above, the Subdivisional Judge held that the suit was barred by the principle of *res judicata*. This decision of the Subdivisional Judge was upheld by the District Court and the High Court. On special appeal to the High Court: *Held*: That the questions in issue in the suit in the Township Court of Mandalay were whether the appellant was the tenant of the respondent in respect of the stalls and whether the appellant had fallen into arrears with rent; and that the contention in the subsequent suit in the Subdivisional Court was that by reason of the fact that he was recognised by the municipality as the occupant of the stall sites in dispute in preference to the respondent, he could not be evicted from those stall sites and that the decree obtained by the appellant against him in the former suit was inoperative. *Held further*: That the matter directly and substantially in issue in the above-mentioned two suits being not the same, the subsequent suit was not barred by the principle of *res judicata*.

U KYI *v.* DAW MYAING 393

RES JUDICATA—*Whether suit for administration of the estate of a deceased barred by former suit for declaration as his heirs and for possession of immoveable property.* One B died at Mandalay leaving behind a house and land. The respondent then sued the appellant and her husband who were described as strangers to the deceased, for a declaration that they were the only heirs of the deceased and for possession of the house and land in question. There was also a prayer for permission to file a fresh suit in respect of moveable properties said to have been left behind by the deceased. The appellant contested the suit on the ground that she being in fact a cousin of the deceased, she was a sole heir to the estate to the exclusion of the respondents.

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The suit was decreed in favour of the respondents who were held to be the sole heirs of the deceased. On appeal the District Court set aside the decree of the trial Court on the ground that on the evidence on record the respondents could not be held to be the only heirs of the deceased B. Subsequently, in the same Court, the 1st respondent again filed a fresh suit for "the administration of the estate of B (deceased)" in which he claimed a one-third share. The 2nd respondent was made a defendant along with the appellant in that suit and he admitted the claim. One of the grounds raised by the appellant was that in view of the previous suit, the suit was barred by the principles of *res judicata*. The trial Court accepted her contentions and dismissed the suit, but on appeal the District Court reversed the judgment and decree of the trial Court on the ground that the suit was not barred by *res judicata* and that the parties were each entitled to a one-third share in the estate of the deceased. The main ground urged in support of the appeal brought by the appellant before the High Court was that the subsequent suit by the 1st respondent was barred by the principles of *res judicata* in view of the decision in the former suit. *Held:* (1) That the former suit was one for a declaration and possession based on title and against "alleged" strangers to the estate and that the subsequent suit was one for administration of the estate of the deceased. (2) That therefore the subsequent suit was not barred by the decision in the former suit on the principles of *res judicata*. *Ma Khin* v. *Ma Pu and two others*, (1948) B.L.R. 343, followed. *Sukh Lal* v. *Bhikhi*, I.L.R. 11 All. 188, explained. *Maung Sin* v. *Maung Byaung and others*, (1946) B.L.R. 149, distinguished. *Maung Thein* v. *Daw Htwe and others*, (1951) B.L.R. 410, referred to.

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RETROSPECTIVITY OF STATUTE—AN ACT OPERATES FROM THE TIME IT CAME INTO FORCE AND APPLIES TO CIRCUMSTANCES WHICH CAME INTO EXISTENCE SINCE THEN 216

SALE OF PROPERTY—*Belonging jointly to Burmese husband and wife by wife alone with the knowledge and consent of husband—Whether binding on husband also—Transfer of Property Act—S. 106—Month of tenancy.* Where a house belonging jointly to a Burmese husband and wife was sold by the wife alone by means of a registered deed of sale with the knowledge and consent of the husband the sale of the house is binding on the husband. *U Rai Kyaw Thoo & Co., Ltd.* v. *Ma Hla U Pru*, (1940) B.L.R. 150, followed. Where the tenancy did not begin with the first day of the month, it would not end with the end of the month. Consequently, the notice by which the tenancy was purported to be terminated with effect from the end of the month, *viz.*, 31st October 1956 is invalid in law.

DAW NYEIN MYA AND ONE *v.* U BA OHN AND ONE ... 248

SALE WITH A CONDITION TO RE-PURCHASE AND MORTGAGE BY CONDITIONAL SALE—DETERMINING FACTOR—INTENTION OF PARTIES—HOW TO BE ASCERTAINED 314

SEA CUSTOMS ACT, 1878—*Ss. 169, 170, 173 and 174—Preventive Constables in Customs not police officers—Admissibility in evidence of Statements made to them—S. 24* (1), *Foreign Exchange Regulation Act. Held:* Preventive Constables employed by the Customs Department are not police officers

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within the purview of s. 162 of the Criminal Procedure Code or s. 25 of the Evidence Act. Admission made to them are admissible in evidence. *The Union of Burma* v. *G. M. Mehta*, (1955) B.L.R. 320 ; *Re. Someshwar H. Shelat*, (1946) A.I.R. Mad. 430, distinguished. *S. Fernandes* v. *The State*, A.I.R. (1953) Cal. 219, dissented from. *Nga Myin* v. *King-Emperor*, 11 Ran. 31, referred to.

SULTAN AHMED *v.* THE UNION OF BURMA 226

SHAN STATES CIVIL JUSTICE (SUBSIDIARY) ORDER, 1906, S. 15 ... 191

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SHAN STATES—*Court of the Resident, whether competent to entertain appeals from Courts subordinate to it in cases under the Urban Rent Control Act—S. 15, Urban Rent Control Act —S. 15, Shan States Civil Justice (Subsidiary) Order, 1906—Concurrent jurisdiction of the High Court and the District Court.* An appeal against the judgment and decree of the Court of the Assistant Superintendent was filed in the Court of the District Judge (Resident), Taunggyi, under s. 15 of the Urban Rent Control Act. The District Court dismissed the appeal, holding that under s. 15 of the Urban Rent Control Act, the appeal lies to the High Court. Does s. 15, Urban Rent Control Act abrogate any other right of appeal allowed under any other law in force in the Shan States ? *Held :* That s. 15 of the Urban Rent Control Act does not expressly or by implication divest the Court of the Resident with appellate jurisdiction conferred on it by s. 15 of the Shan States Civil Justice (Subsidiary) Order, 1906. The High Court and the District Court have concurrent jurisdiction to entertain such appeals. *Haw Lim On* v. *Ma Aye May*, (1951) B.L.R. (S.C.) 68, relied on.

BISWANATH KALWA *v.* HARI SINGH 191

SPECIFIC RELIEF ACT, s. 54—*Mandatory Injunction—Grant of—Where there has been an invasion of the right to quiet enjoyment of property—Cost incurred in doing wrongful act—Not to be set off against rent of property.* Where a tenant without the permission of his landlord and inspite of the landlord's protests constructed a substantial building of his own on the land belonging to his landlord. *Held :* That the tenant had clearly invaded the right of the landlord to the quiet enjoyment of his premises and that the landlord was entitled to a mandatory injunction. *Kehari Singh* v. *Holasi and others*, A.I.R. (1914) All 285 ; *Chhedi Manjhi and others* v. *Mahipal Bahadur Singh and others*, A.I.R. (1951) Pat. 600 ; *Murarilal* v. *Balkisan and another*, A.I.R. (1926) Nag. 416, referred to. *Ram Kissen Joydoyal* v. *Pooran Mull and others*, I.L.R. 47 Cal. 733 ; *Sardari Mal* v. *Hirde Nath and others*, I.L.R. 6 Lah. 384 ; *Ramanadhan* v. *Zamindar of Ramnad and others*, I.L.R. 16 Mad. 407 ; *Surendra Narain Singh* v. *Hari Mohan Misser*, I.L.R. 31 Cal. 174, distinguished. *Held also :* That it would be a dangerous doctrine to allow the tenant to set off the cost of the new building to be constructed against the rents due for a good number of years. *Shelfer* v. *City of London Electric Lighting Company*, (1895) 1 Ch. Div. 287, referred to. *L. Dawson* v. *Princess Rounac Zamini Begum*, I.L.R. 6. Ran. 456 at 460.

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SPECIFIC RELIEF ACT—S. 56 (*d*)—SUIT FOR A DECLARATION AND INJUNCTION AGAINST THE RANGOON CORPORATION 20

STANDARD RENT—FIXATION OF—UNDER THE URBAN RENT CONTROL ACT—WHETHER RETROSPECTIVE 616

STATE LAND—*Dispute in respect of—Jurisdiction of Civil Courts—Upper Burma Land and Revenue Regulation—Ss. 25, 53 (1), 53 (2) (ii).* Where in an appeal from the order of the District Court confirming the decree of the Township Court directing the ejectment of the appellants from a plot of State land for which the respondent had obtained a licence, it was contended that the land in suit being State land the Civil Courts have no jurisdiction to entertain the suit. *Held:* That the Township Court was competent to entertain the suit. *U Thu Daw* v. *U Myo Nyun*, (1942) R.L.R. 6, followed. *The Burmah Oil Co., Ltd.* v. *Baijnath Singh and one*, (1917—20) 3 U.B.R. 212; *Arjan Singh* v. *Kishen Singh*, (1938) R.L.R. 569; In re *Maung Naw* v. *Ma Shwe Hmut and Maung Pein*, (1915-16) 8 L.B.R. 227, referred to.

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STATEMENT OF REASONS BY COURT—A FUNDAMENTAL PRINCIPLE OF CIVIL LAW THAT A COURT DECIDING A DISPUTE SHOULD STATE ITS REASONS FOR ITS DECISION 223

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—— OF CRIMINAL PROCEEDINGS PENDING APPLICATION FOR TRANSFER OF CASE—TESTS TO BE APPLIED ... 639

STAY OF CRIMINAL PROCEEDINGS—*Penal Code—S. 408—Criminal Procedure Code—S. 344, 435 read with s. 439 and 561-A—Power of High Court to stay criminal proceedings in a subordinate Court pending civil proceedings—No hard and fast rule whether, and when High Court should interfere. Held:* The High Court has power not only under s. 439 of the Criminal Procedure Code but also under s. 561-A, thereof to interfere with an order of a subordinate Court refusing to stay criminal proceedings under s. 344 of the Criminal Procedure Code. *Emperor* v. *Panna Lal*, (1943) All. 27; *U Tha Zan* v. *U Pyant*, A.I.R. (1935) Ran. 487; *Kanhaiya Lal* v. *Bhagwan Das*, 48 All. 60 at 63; *Louis Phillip Dias* v. *Mahadev Barik Raut*, 147 I.C. 230; *Shatrunjaya Singh* v. *D. S. Saxena*, A.I.R. (30) (1943) Oudh 184; *Dharmeswar Kalita* v. *The State*, (1952) Cr. L.J. 654, referred to. *Held also:* That no hard and fast rule can be laid down as to whether and when a criminal proceeding should be kept pending the decision of a civil suit. Courts of law which exist to do justice between the parties have to consider in the light of the circumstances of each particular case whether justice and expediency demand that the criminal proceedings should be stayed pending the trial of the Civil Suit. *Anna Ayyar and others* v. *Emperor*, 40 Mad. 226; *Pars Ram* v. *Jalal Din*, A.I.R. (1916) Lah. 174; *Emperor* v. *Bishen Das*, 8 I.C. 1161; *J. M. Lucas* v. *Official Assignee of Bengal*, 24 C.W.N. 418, referred to.

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SUIT—FILING OF—BY PRESIDENT AND COMMITTEE MEMBERS OF "APHWE"—NOT COMPETENT—TO BE FILED AS REPRESENTATIVE SUIT UNDER O.1.,R.8, CIVIL PROCEDURE CODE ... 479

SUIT FOR DECLARATION AND POSSESSION—*Defendant in possession unable to prove title—Whether plaintiff should succeed on that account.* In a suit for declaration of title and for possession of immoveable property the plaintiff is not entitled to succeed merely because the defendant who is in possession is unable to prove her title. *Maung Min Din* v. *Maung On Gaing and one*, (1897—01) 2 U.B.R. 421, followed.

KO THAN AUNG *v.* MA CHIT 291

SUIT FOR MONEY ON AN AGREEMENT—*Money consisting of arrears of rent collected and arrears of rent due—Urban Rent Control Act—S. 16—Not applicable.* Where in a suit for the recovery of a certain sum of money due on a written agreement, it was contended that the sum of money due and payable on the suit document being arrears of rent collected from other tenants and the arrears of rent due by the defendant and that the suit was not maintainable in law in the absence of a certificate of Rent Controller certifying the standard rent of the premises under s. 16 of the Urban Rent Control Act. *Held:* That the moment the amount of rents collected and the arrears of rent due were agreed to be treated as a debt and a written agreement to that effect and for payment thereof was signed, the relationship between the parties became that of the debtor and creditor in respect of the sum involved in the document and that the provisions of s. 16 of the Urban Rent Control Act will not come into play in so far as the suit on the said document is concerned.

U SAN WIN *v.* DAW AYE KYI AND ONE 422

SUIT MAINTAINABILITY OF—WITHOUT PAYMENT OF COSTS IN PREVIOUS SUIT 241

SUMMARY TRIAL—WHETHER OMISSION OF MAGISTRATE TO RECORD REASONS VITIATES THE CONVICTION 327

SUMMONS—SERVICE OF—WHETHER CAN BE ISSUED IN A PLACE OTHER THAN THAT GIVEN IN SUMMONS 387

SUPPRESSION OF CORRUPTION ACT, s. 4(*1*) (*d*)/4(2)—*Read with s. 120-B, Penal Code, s. 497, Criminal Procedure Code as amended by Code of Criminal Procedure (Temporary Provisions) Act, 1953 (Act No. 56 of 1953)—Paragraph 497, Courts Manual. Held:* The instructions contained in the Courts Manual have no statutory force. The provisions of the Court Manual relating to the re-arrest of the accused enlarged on bail after framing of the charge in non-bailable cases are mainly administrative and executive measures aimed at preventing the accused from absconding and safeguarding against any unlawful activities, which will endanger the life not only of the trial Judge and Prosecuting Officers engaged in the trial of the case, but also of the public concerned.

THE UNION OF BURMA *v.* MR. BERNARD AND FOUR OTHERS 43

TEAK—MERE POSSESSION OF—NO PRESUMPTION THAT IT IS GOVERNMENT PROPERTY—PUBLIC PROPERTY PROTECTION ACT, s. 6(2) 543

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TENANCY DISPOSAL ACT, 1953—*Exemption from operation of—Question of fact—Jurisdiction of special Tribunals created under the Act arises on determination of—Jurisdiction of civil court to consider the correctness of decision of question—Question of exemption of land from operation of the Act—Civil court to determine—Civil Procedure Code, s. 11*—Res judicata. In Civil Regular Suit No. 10 of 1956 of the Subdivisional Court of Moulmein the Respondent obtained a declaration against the Appellant and two others that the 22 acres of paddy land belonging to him having been cultivated by him as owner agriculturist was exempted from the operation of the Disposal of Tenancies Act. Inspite of this declaration the Appellant entered into possession of the suit land and the Respondent, therefore, filed a suit for possession of the land in question together with standing crops thereon against the Appellant in Civil Regular Suit No. 30 of 1956 of the same Court. In this suit the Appellant contended that the decree passed in Civil Regular Suit No. 10 of 1956 of this Court was a nullity in view of s. 8 of the Disposal of Tenancies Act, 1953. This section provides that the orders passed by the authorities empowered by the President under s. 4 of the Act could not be questioned in a court of law. The court accepted this contention and dismissed the suit. On appeal by the Respondent the District Court of Amherst set aside the judgment and decree of the Subdivisional Court of Moulmein and passed a decree as prayed for by the Respondent on the ground that civil courts have jurisdiction to consider whether a Village Agricultural Committee or a District Agricultural Committee has jurisdiction to deal with a matter which it has decided and that therefore a suit for a declaration that the Disposal of Tenancies Act is not applicable to a particular piece of land in view of the proviso to s. 3 of the Act, is maintainable in law. The lower appellate Court also held that the issue whether the particular land in suit was not so exempt was *res judicata* in view of the decision in the previous suit. *Held :* That the question whether a certain piece of land is or is not exempt from the operation of the Disposal of Tenancies Act, because it comes within proviso (*a*) to s. 3 thereof is a fact upon the determination of which the jurisdiction of the special Tribunals created under the Disposal of Tenancies Act arises. Therefore, civil courts have jurisdiction to consider whether or not the question has been correctly decided so as to give jurisdiction to the special Tribunals created by the Act in the absence of anything in the Act to show that such special Tribunals have exclusive jurisdiction to determine this matter. *Maung Chaw* v. *Ma Aye Mya and three others*, (1955) B.L.R. 89 (H.C.), followed. *Chandmal Jaskaran* v. *Chhaganlal Pratap*, (1951) A.I.R. Madhya Bharat 63 ; *In the State of Bombay* v. *The Maharashtra Sugar Mills Ltd.*, (1951) A.I.R. Bom. 68, referred to. *Held also :* That it is for the civil court to determine whether or not the land in suit is exempted from the operation of the Disposal of Tenancies Act. *Sardar Mohammad Nawaz Khan* v. *Bhagata Nand*, 65 I.A. 301, referred to. *Held further :* That regarding the question of *res judicata* the Appellant was undoubtedly bound by the declaration in the former suit.

U NYI *v.* U HLA BAW 563

TITLE DEEDS—MERE POSSESSION OF BY CREDITOR—DOES NOT PROVE AN INTENTION TO CREATE AN EQUITABLE MORTGAGE 490

TRADE MARK—*Acquisition of right of property in—Irrespective of length of user and extent of trade—Not assignable or transferable*

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apart from the business connected with that mark. A trader acquires a right of property in a distinctive trade mark merely by using it upon and in connection with his goods, irrespective of the length of such user and the extent of his trade. *Gaw Kan Lye* v. *Saw Kyone Saing*, (1939) R.L.R. 488, followed. A trade mark cannot be assigned or transferred except with the business connected with that mark and the document purporting to be a deed of sale of the trade mark did not in fact transfer or assign the trade mark as the business was not transferred alone with the mark.

U CHIT SWE *v.* MA THAN AND THREE OTHERS 377

TRADE MARK—ASSIGNMENT OF—HOW TO BE MADE 377

TRANSFER OF PROPERTY ACT, s. 41—*Reasonable care—Protection afforded by—Right of person in possession despite failure to renew lease—Trust Act, s. 90.* A together with his brother B, now deceased, received equal shares in a piece of leasehold land belonging to their father on his death. Before his death B sold his share, *viz.*, the suit land to the respondent in 1941. The original lease expired in 1944 and in 1948 A applied for and obtained a renewal of the original lease in the name of his father without the knowledge of the respondent. In 1952 he sold the suit land already sold by his deceased brother B to the respondent to the appellants in the name of his deceased father as the vendor. Before the purchase of the suit land the appellants made two insertions, one in English and the other in Burmese newspapers about the intended purchase of the suit land and calling for objections from persons claiming to have any interest in the property, but made no search in the Registration Office. *Held:* That A had sold the land over which he had no legal title. *Held also:* That even assuming that A had acquired a valid lease which was issued in the name of his father the right title and interest of the respondent remained unimpaired and that whatever advantages A had obtained by getting the renewal of the lease he must hold it for the benefit of the respondent. *Faizer Rahman* v. *Maimuna Khatun*, 17 C.W.N. 1233, referred to. *Held also:* That the respondent having been in constructive possession of the land in dispute his right over it remained good as against all other persons even though he had not applied for the renewal of the original lease. *Ma Pwa Zon and two* v. *Ma Pan I and one*, I.L.R. 5 Ran. 154, followed. *Held further:* That under s. 41 of the Transfer of Property Act a transferee must of necessity inquire into the title and if he omits to do that he would not be protected by this section and that the insertions in the newspapers alone would not absolve the appellants to institute searches in the Registration Office to get the exact particulars of the land.

U PO MIN AND ONE *v.* LIM BOON KYUN 410

TRANSFER OF PROPERTY ACT, s. 52—Lis pendis—*Transferee* pendente lite *bound by any legal decision against transferor—Civil Procedure Code, s. 144—Restitution—Damages and mesne profits recoverable from ejector only and not from his representative.* Where after the respondent was ejected from the suit premises by the first appellant in the execution of a decree for ejectment and before the ejectment decree against the respondent was finally adjudicated upon, the lease of the suit premises was made by the first appellant to the second respondent. *Held:* That the doctrine of *lis pendis* as embodied in s. 52 of the Transfer of

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Property Act applies and that the second appellant being a transferee of the suit premises *pendente lite* was bound by any legal decision against his transferor and he could not be allowed to plead that he was not bound by the decision against his transferor, the first appellant, on the ground that he was not a party thereto. *Nishi Kanta Shaha Mondal and others* v. *Kumar Promotha Nath Roy and others*, A.I.R. (1934) Cal. 145, referred to. *Held also*: That possession can therefore be recovered from the second appellant also on an application under s. 144, Civil Procedure Code; but that as he was not responsible for the eviction of the respondent from the suit premises, no damages and mesne profits could be recovered from him and that these could only be recovered from the ejector, the first appellant. *Phani Bhusan Dhar* v. *Anukul Mukherjee and others*, A.I.R. (1929) Cal. 590; *Sukhan Singh and others* v. *Uma Shankar Misir and others*, A.I.R. (1935) All. 65, referred to.

U JONE BIN AND ONE *v.* N. B. SEN GUPTA 555

TRANSFER OF PROPERTY ACT, s. 58 (*c*)—*Proviso—Condition to repurchase embodied in sale deed—Whether a mortgage by conditional sale—Intention of parties.* Where the transaction effecting or purporting to effect a sale and a condition of repurchase are embodied in one document, the transaction does not, as a result of the proviso added by the Amendment Act, 1929, necessarily become a mortgage by conditional sale, irrespective of the intention of the parties. If from the contents of the document it can be gathered from its clear express words that the intention of the parties was to effect an outright sale with a condition of repurchase, the deed could be construed as an outright sale with a condition of repurchase even though that condition is embodied in one document, because the determining factor in such cases is the intention of the parties. The intention of the parties should be ascertained from the terms of the document and the surrounding circumstances. The adequacy of consideration, and the time given to the vendor to make a repurchase, have important bearings to the truth of the intention of the parties. *Debi Singh and others* v. *Jagdish Saran Singh and others*, A.I.R. (1952) All. 716; *Chunchun Jha* v. *Ebadat Ali and another*, A.I.R. (1954) (S.C.) 345; *Thakur Shambhu Singh and others* v. *Thakur Jagdish Bakhsh Singh and others*, A.I.R. (1941) Oudh. 582, referred to.

MAUNG AUNG THIN AND ONE *v.* BISNATH SINGH AND ONE ... 314

TRANSFER OF PROPERTY ACT, s. 106—*Notice to quit—Wording—Construing—Validity.* Where it is contended that a notice to quit in Burmese containing the words—"ဝင္ဂြာ ၃၌၆၊ ဟတ်လ ၃၁ ရက် နောက်ဆုံးထားပြီး အသာတကြည်၊ အဆိုပါနေအိမ်မှ ရွှေ့ပြောင်းထွက်ခွါ သွားရမည်" is invalid as calling upon the tenants to quit on or before the 31st March 1957 and not on the 31st March 1957, in view of the provisions of s. 106 of the Transfer of Property Act. *Held*: That the notice in effect was a notice to quit on the expiry of the 31st March 1957, and that even if it can be construed as a notice to quit on or before the 31st March 1957 it would still be a valid notice. *Ismail Dada Bhamani* v. *Bai Zulekhabai*, A.I.R. (1944) Bom. 181, referred to. Notices issued under s. 106 of the Transfer of Property Act should be construed strictly but this does not necessarily mean that they should be worded with the accuracy of a plea in a civil suit.

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TRANSFER OF PROPERTY ACT, S. 108 (*f*)—*Permanent structure.* Partitions made in a building which are secured by means of screws and which are detachable and moveable are not permanent structures within the meaning of s. 108 (*f*) of the Transfer of Property Act.

LOUNG E SAY (*a*) LEONG E KYAIN *v.* DAW KHIN KYI AND FIVE OTHERS 504

TRANSFER OF IMMOVEABLE PROPERTY (RESTRICTION) ACT, 1947—*Ss. 3 and 5—Sale to a foreigner, whether void* ab initio—*Effect of grant of Citizenship Certificate to a foreigner after sale—Retrospective effect of Statutes—Operation of Act—Time.* The sale to a foreigner of immoveable property at a time when s. 5 of the Transfer of Immoveable Property (Restriction) Act, 1947 was in force, is void *ab initio. Chan Lu Ghai* v. *Lim Hock Seng* (a) *Chin Huat*, (1949) B.L.R. 24 (H.C.) F.B., and *P.R.P.F. Ramaswamy Chettiar* v. *Ma Aye and another*, (1951) B.L.R. (H.C.) 320, followed. *Hakim M. A. Rahim* v. *Subdivisional Judge, Syriam and two others*, (1954) B.L.R. 1 (S.C.), distinguished. A transfer of immoveable property obtained by a foreigner who has applied for citizenship, but before the certificate is obtained, is void under ss. 3 and 5 of the Transfer of Immoveable Property (Restriction) Act, 1947 *Ko Mya Din and another* v *Ko Bin Nga*, (1952) B.L.R. 240 (H.C.), followed. The law as enacted by s. 5 of the Transferof Immoveable Property (Restriction) Act, 1947 is not a matter of procedure only. Where the provision of law is a matter of procedure only and no date has been fixed to indicate up to which date the retrospective operation was to take effect, full retrospective effect can be given to the statute. The Transfer of Immoveable Property (Restriction) (Amendment) Act, 1952 cannot have retrospective effect on the sale which was done when the Transfer of Immoveable Property (Restriction) Act, 1947 was in force An Act is interpreted as operating from the time it came into force and applying to circumstances which came into existence since then. *Messrs. Burma Corporation Ltd.* v. *The Union of Burma*, (1953) B.L.R. (H.C.) 403 and *Ramani Ramjan Bose* v. *Corpn. of Cal.*, A.I.R. (1955) Cal. 410, followed. When a law is altered during the pendency of an action the law to be applied is the law as it existed when the action was begun: *Kulamani Hota* v. *Parbati Debi*, A.I.R. (1955) Orissa 77, referred to.

KO AUNG *v.* ABDUL LATIFF 216

TRANSFER OF IMMOVEABLE PROPERTY (RESTRICTION) (AMENDMENT) ACT, 1952—RETROSPECTIVE EFFECT OF 216

TRANSFEREE OF IMMOVEABLE PROPERTY—DUTY TO TAKE REASONABLE CARE—UNDER S. 41 OF TRANSFER OF PROPERTY ACT ... 410

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TRUST PROPERTY—DECREE OBTAINED BY MANAGING TRUSTEE IN HIS PERSONAL CAPACITY—WHETHER SURVIVING TRUSTEES CAN EXECUTE THE DECREE ON HIS DEATH 346

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UMPIRE—PERVERSITY OF 68

UNION JUDICIARY ACT, S. 5—*Order refusing leave to amend plaint—Merely interlocutory and not final order.* In order that s. 5 of the Union Judiciary Act may be applicable, the subject-matter

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of the appeal must be either "a judgment or a decree or a final order of the High Court." There is no definition of "final order" in the Union Judiciary Act. An order refusing leave to amend the plaint is neither a judgment nor a decree nor a final order, but it is an interlocutory order which can only be made a ground of objection in the memorandum of appeal against the decree in a suit. *Maung Sin* v. *Maung Byaung and others*, (1938) R.L.R. 330; *Ma Hla Yi* v. *Ma Than Sein and two*, (1953) B.L.R. 55 (S.C.), followed.

U IN LYAUNG (*a*) ENG LEONG AND ONE *v.* WHEELOCK MARDEN & CO. LTD., AND TWO OTHERS ... 671

UNION JUDICIARY ACT, S. 30—CLEARLY PERPETUATES THE INHERENT POWERS OF THE PREVIOUS HIGH COURT TO DEAL IN CONTEMPT IN THE PRESENT HIGH COURT AS A COURT OF RECORD 50

UNLAWFUL ASSOCIATIONS ACT—*S. 17 (1) Criminal Procedure Code—S. 562 (1)*. Whether a person convicted under s. 17 (1) of the Unlawful Associations Act can get the benefit of s. 562 (1) of the Criminal Procedure Code? *Held*: That sub-s. (1) of old s. 562 of the Criminal Procedure Code is confined to offences under the Penal Code. That the new s. 562 applies to an offender convicted of an offence punishable with imprisonment of not more than a certain period and the sub-section covers the case of conviction under any law. *Chhotan Hasmat Ali* v. *Emperor*, Vol. LIX, I.L.R. Bom. Series p. 514, relied on. A.I.R. (1926) Lah. 317, A.I.R. (1935) Bom. 402 (F.B.), referred to.

THE UNION OF BURMA *v.* SAW THEIN 47

UNREGISTERED COMPANY—LIABILITY OF INDIVIDUAL MEMBERS—BOTH JOINT AND SEVERAL 675

UNSTAMPED DOCUMENT—*Admissibility of—Collateral purpose and collateral matter—Distinction between*. The admissibility of an unstamped document for the proof of any fact turns upon the distinction between a collateral purpose and a collateral matter. A collateral purpose is any matter the proof of which depends upon proof of the transaction whereas a collateral matter is any matter the proof of which does not depend upon proof of the transaction. An acknowledgment of a liability is a collateral purpose because the proof of the acknowledgment must depend upon proof of the transaction which has to be acknowledged. But proof of payments which have been made and which are endorsed on the promissory note is a collateral matter and the endorsements would be receivable in evidence. *J. N. Ezekiel* v. *E. Mordecai and another*, (1937) R.L.R. 127, followed.

RAM OUDH MISSIR *v.* RAM PRASAD 664

UPPER BURMA LAND AND REVENUE REGULATION, SS. 25, 53 (i), 53 (2) (ii) 323

URBAN RENT CONTROL ACT—*Fixation of standard rent—No retrospective effect—S. 9 (1)—Specific prohibition in—Two kinds—S. 19—Two parts in—S. 5 (1) read with provisos—True construction to be put on—S. 16—No bar to grant of decree at contractual rate—S. 11 (1) (a)—Notice under—Demand for rent in respect of period before fixation of standard rent—At what rate*. The Urban Rent Control Act of 1948 in its present form does not have any specific provisions, whereby the Controller is given powers to fix standard rent with retrospective effect. The fixation of standard rent by the Controller is effective only from the date of

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his order fixing that rent. There is a specific provision of law in s. 9 (*1*) of the Act which prevents the fixation of the standard rent being retrospective in effect where the standard rent is more than the contractual rent. There are two kinds of fixation of standard rent, namely, one by the Controller under s. 19 and the other by clause (II) of the definition of standard rent occurring in s. 2 (*f*). S. 19 of the Act is in two parts: Sub-s (*1*) requires the Controller, on application, to grant a certificate certifying the standard rent already fixed by the Act, namely, under clause (II) of the definition of standand rent or the standard rent as fixed by him under sub-s. (*2*). Sub-s. (*2*) enables the Controller to fix the standard rent. Upon a true construction of s. 5 (*1*) of the Urban Rent Control Act read with the provisos thereto it seems clear that what has been made irrecoverable is the amount which has been increased over and above the standard rent after the standard rent has been fixed by the Controller under s. 19 (*2*) or by clause (II) of the definition. All that s. 16 says is that no civil Court shall accept a plaint in any suit for the recovery of rent which became due after the commencement of the Urban Rent Control Act, 1948, unless a certificate issued by the Controller certifying the standard rent of the premises has been attached to the plaint. Where, the certificate is merely in respect of the standard rent fixed by clause (II) of the definition, the standard rent is effective from the date of coming into force of the Urban Rent Control Act of 1948. However, on the other hand, where the certificate is in respect of the standard rent fixed by the Controller under sub-s. (*2*) of s. 19, in the absence of any express provisions in s. 16 prohibiting civil Courts from giving a decree at the contractual rate for the period prior to the date of fixation of the standard rent, civil Courts will not be justified to refuse to give a decree at the contractual rate merely because s. 16 requires the plaint to be accompanied by a certificate of the Controller certifying the standard rent. When a landlord gives notice under clause (*a*) of sub-s. (*1*) of s. 11 of the Urban Rent Control Act in respect of the period before the fixation of the standard rent rent should be demanded at the contractual rate. *Daw Thein Nu* v. *Mr Saw Kyin Tsong* (a) *U Saw Maung Aye*, Special Civil First Appeal No. 75 of 1947 of the High Court; *Ko Than Nyunt* v. *Maung Khin Myint*, (1951) B.L.R. 124, overruled; *S. I. Abowath and five others* v. *T. H. Khan*. (1950) B.L.R 308 (H.C.); *S. L. Barua* v. *S. M. Abowath*, (1950) B.L.R. 404 (H.C.); *Ko Tin* v. *Ko Kyin Thein and one*, (1952) B.L.R. 37. approved. *Sobha Rani Roy* v. *S. N. Guha Roy*, A.I.R. (36) (1949) Cal. 681, referred to.

KO BA YIN (*a*) ALI MOHAMED MUSA AND ONE *v.* KO THEIN AND ONE 616

URBAN RENT CONTROL ACT, S 11 (*e*)—"*Give effect to*"—*Meaning of the words in.* The words "Give effect to" in sub-s. (*e*) of s 11 of the Urban Rent Control Act mean "make or become operative" and not "complete".

T. KUTTI KAKA *v.* SAW BA KHWE AND ONE 667

URBAN RENT CONTROL ACT—*Suit for ejectment under s. 11* (1) (a)—*Consent Decree—Meaning of "Arrears of rent" in s. 14 (1) —Whether it covers only the rent as claimed in the notice served under s. 11* (1) *of the Act or whether it also covers the rent which accrued subsequent to the filing of the suit up to the date of decree. Held*: "Arrears of rent" under s. 14 (*1*) of the Urban

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Rent Control Act is not only the amount as mentioned in the notice served under s. 11 (*1*) (*a*) of the Act, but also the subsequent accumulation of rent up to the time the decree was passed. *G. C. Mukarjee* v. *A.K.M Peer Mohamed* (a) *U Ohn Gaing*, Civil Misc. Appeal No. 4 of 1953 (H.C.) approved.

KOMORUDDIN *v.* DAW HLA THEIN ... ...

URBAN RENT CONTROL ACT, s. 11 (*1*) (*d*) *and* (*e*)—*Buildings—Outside the scope of s. 11* (1) (d)—*Meaning of expression "will give effect to such purpose" in s. 11* (1) (e)—*Bond—Execution of—When invalid. Held*: There is nothing in law or in the Urban Rent Control Act to prevent a landlord from putting up an entirely new building on his land or to substantially reconstruct his old building. The real object of Notification No. 35, dated the 16th February, 1951, is to encourage the construction of new buildings on vacant house-sites and the re-erection substantially of existing old buildings. Clause (*d*) of s. 11 (*1*) of the Urban Rent Control Act is applicable to premises which are lands and not to premises which are buildings. Under clause (*e*) of s. 11 (*1*) of the Urban Rent Control Act, the landlord is entitled to ejectment of the tenant from his building if he reasonably and *bona fide* requires it either for the purpose of re-erection or for the purpose of essential major and structural repairs on his executing a bond (1) that the said premises will be used for such repairs or re-erection (2) that he will give effect to such purpose within such period not exceeding nine months from the date of vacation of the premises by the tenant and (3) that he will, if so desired by the tenant, re-instate the tenant displaced from the premises on completion of such repairs or erection. The expression "will give effect to such purpose" is used to mean "will start the work of re-erection or essential major and structural repairs" within the time specified in the bond and should not be stretched to mean and include "the completion of the re-erection or the repairs." Where a bond taken under clause (*e*) of s. 11 (*1*), Urban Rent Control Act, contains a condition to complete the erection or repairs within the time specified therein, instead of simply requiring the landlord to give effect to the purpose of repairs or re-erection within the said period, it must be deemed to be invalid as being *ultra vires* clause (*e*) of s. 11 (*1*) of the Urban Rent Control Act. A Bond executed under clause (*e*) of s. 11 (*1*), Urban Rent Control Act, could be forfeited only in the event of the landlord using the re-erected or repaired building for letting purposes after its completion, and not re-instating his displaced tenant who desires to be re-instated.

HAJEE MOHAMED AKBAR *v.* U MYA 257

URBAN RENT CONTROL ACT, s. 12 (*1*)—*Certificate granted under—Legal effect of—Premises—Meaning of*. Where the respondent in occupation of the ground floor of a building situated within a compound applied for and obtained a "certificate" or permit under s. 12 (*1*) of the Urban Rent Control Act from the Rent Controller, he becomes the statutory tenant of the owner of the premises, although the respondent had been permitted to occupy the ground floor of the building by someone other than the owner and the word "premises" referred to in the "certificate" includes the ground floor of the building and the compound in which it is situated.

MAUNG MYAT AND ONE *v.* THE UNION OF BURMA (AH KYAN) 520

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URBAN RENT CONTROL ACT, 1948, S. 14 (*1*)—*Order made under—S. 148, C.P.C. not applicable—Rescission of decree for ejectment.* An order passed under s. 14(*1*) of the Urban Rent Control Act, 1948, directing stay of execution of the ejectment decree and permitting payment of arrears of rent by monthly instalments being not for the doing of any act prescribed or allowed by the Civil Procedure Code, s. 148 of the Code has no application to it. An order for the rescission of a decree for ejectment on the due payment of arrears of rent or mesne profits is a thing quite unknown to the Civil Procedure Code. *Syed Qazi Muhammad Afzal* v. *Lachman Singh*, 5 Pat. 306; *R. M. P. R. M. M. Subramaniam Chettiar* v. *K. S. Subbiah Ayyar*, Mad. L.J. Vol. LXV, p. 538, distinguished.

JALIL HOGS *v.* N. C. BEHARA (DECEASED) 500

URBAN RENT CONTROL ACT, S. 14 (*1*)—"*Arrears of rent*"—*Expression—Includes rent accumulated up to time of decree—Limitation Act—Applicability of—In determining arrears of rent.* The expression "arrears of rent" occurring in s. 14 (*1*) of the Urban Rent Control Act should cover not only the rent mentioned in the notice given under s. 11 (*1*) of the Act, but also the subsequent accumulation of rent up to the time the decree was passed. *Komoruddin* v. *Daw Hla Thein*, [(1958) B.L.R. 8 H.C.] C.M.A. No. 1 of 1956 of High Court, Rangoon, followed In a suit for ejectment for non-payment of rent the plaintiff is not entitled to a decree for payment of those arrears of rent, the claim for which is barred by the law of limitation.

U SAW HLA MAUNG *v.* U OHN SHWE 571

URBAN RENT CONTROL ACT, S. 14 (*1*)—*Discretion available under—When exercisable.* Where the Court, in exercise of its discretion available under s. 14 (*1*) of the Urban Rent Control Act, has not made any order as it considers fit or reasonable with reference to a compromise decree in default of which one of the parties invoked the said provision, the Court is fully competent to act thereunder and modify the decree, even if it is a compromise decree. But where the party who had invoked and obtained the relief under s. 14 of the Urban Rent Control Act failed to carry out one of the conditions under which the relief was granted he cannot again invoke the provisions of s. 14 (*1*) of the Urban Rent Control Act for fresh exercise of the discretion. The second application would amount to reagitating what had already been decided by the Court. *K. S. Abdul Kader* v. *Sri Kali Temple Trust*, (1949) B.L.R. (H.C.) 175, followed. *Chandrabhan Singh* v. *Kishore Chand Minhas*, (1955) B.L.R. 14; *K. A. Elias* v. *U Ba Hin*, (1954) B.L.R. 41, distinguished.

MUN HAIN LONE BROTHERS CO., LTD. *v.* THE BOMBAY BURMAH TRADING CORPORATION LTD. 340

URBAN RENT CONTROL ACT, S. 15—WHETHER IT ABROGATES ANY RIGHT OF APPEAL ALLOWED UNDER ANY OTHER LAW IN FORCE IN THE SHAN STATES 191

URBAN RENT CONTROL ACT—*Orders passed by Courts subordinate to District Court in suits for recovery of possession under—S. 15—District Court—Power to entertain appeals from—Civil Procedure Code—S. 104, Order XLIII, s. 2 (2), s. 47.* Where a District Court, purporting to act under s. 15, Urban Rent Control Act, entertained and allowed an appeal from an order of a

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Township Court which directed the suit under s. 11 (*1*) (*d*) of the Urban Rent Control Act for the recovery of possession of certain premises to proceed on the merits after holding that the permit granted by the Rent Controller under s. 14 (*A*) of the Act was valid. *Held* : That there is nothing in s. 15 of the Act to suggest that all orders passed by Courts subordinate to the District Court in suits for the recovery of possession of any premises to which this Act applies shall be appealable to the District Court concerned. *Held also* : That if any such order falls within the ambit of s. 104 or Order XLIII or comes within the definition of a "Decree" in s. 2 (2) read with s. 47 of the Civil Procedure Code, then clearly an appeal will lie to the District Court. *Haw Lim On* v. *Ma Aye May*, (1951) B.L.R. (S.C.) 68, explained. *Held further* : That in the present case the order was not a "decree" as defined in s. 2 (2) read with s. 47 of the Civil Procedure Code and that the District Court was not competent to entertain the appeal.

U PO THI AND ONE *v.* U KYAW SINT AND ONE 416

URBAN RENT CONTROL ACT, S. 16—WHEN APPLICABLE IN RESPECT OF SUITS FOR MONEY ON AN AGREEMENT RELATING TO ARREARS OF RENT 422

VILLAGE COURT—NO POWER TO REVISE ITS OWN ORDERS ... 662

VINASAYA ACT, S. 15—*Scope* : *S. 31* (1)—*Religious gifts*—*Not necessary to be in writing or to be registered, s. 15* (4) *read with s. 9, Civil Procedure Code bars jurisdiction of Civil Court*. The contention that as between a layman and a Buddhist monk s. 15 of the Vinasaya Act of 1940 will only be applicable in respect of lands which are admittedly religious lands cannot be allowed to prevail for the phrase "ဘာသာဝင်အားလုံးနှင့်သက်ဆိုင်သော လယ်ယာစပျစ်ကိုင်း" appearing in the explanation to sub-s. (2) of s. 15 of the Vinasaya Act is wide enough to cover the dispute as to whether or not a certain piece of paddy land or garden land has or has not been given to a monk as a religious gift. S. 31 (*1*) of the Vinasaya Act merely says that religious gifts when reduced to writing may be registered under the Act, if they conform to the rules of Vinaya. It does not say that every religious gift to be valid must be in writing and registered under s. 31 of the Act. S. 15 (*4*) of the Vinasaya Act read with s 9 of the Civil Procedure Code bars the jurisdiction of a civil Court.

DAW MA MA (*a*) MARIAM BI BI *v.* U NANDA THAHA ... 474

WELFARE OF CHILD—QUESTION OF PARAMOUNT IMPORTANCE IN APPLICATION FOR GUARDIANSHIP AND CUSTODY 311

WITNESS—NO NECESSITY TO DECLARE A WITNESS HOSTILE—TO CONFRONT HIM WITH HIS STATEMENT TO THE POLICE ... 513

WORKMEN'S COMPENSATION—*Liability of employer for death caused to employee—Scope of employment*. The respondent had engaged a certain contractor for repairing an oil-well, who in turn had engaged workmen including the deceased. The repair work was completed, and the implements which had been borrowed for the work were put on a winch-car for the purpose of returning them. The deceased and other workmen were also put in the car to unload the implements. While travelling in the car, the deceased fell out of it and died. On a claim being made

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on behalf of the deceased, the Commissioner of Workmen's compensation dismissed the claim. *Held:* On appeal; that irrespective of whether the wages of the workmen had been paid on completion of the major portion of the work, the workmen who were carried in the winch-car for the purpose of doing the unloading work must be deemed to be still in the employment of the respondent as their services were still required for unloading the implements and that the employer was liable to pay compensation for the death of the deceased workman.

DAW OHN BWINT AND ONE *v.* U HLAING 200

WORKMEN'S COMPENSATION—*Death of workman from accident on premises of the employer after stoppage of work—Whether accident arose out of and in the course of employment.* While a workman was about to leave the premises of his employer after the gong for the stoppage of work had been struck, a bale of paper which was being unloaded in the premises fell on the workman and injured him. As a result of the injuries received, the workman died subsequently. *Held:* That the accident arose out of and in the course of employment of the deceased in the work, and the claim for compensation (by the mother of the deceased) was admissible.

THE SUPERINTENDENT, GOVERNMENT PRINTING AND STATIONERY, BURMA *v* DAW AYE MAY 370

WORKMEN'S COMPENSATION ACT, s. 2 (*h*)—*Workman*—S. 12 (1)—*Liability for payment of compensation*—Quasi-*penal statute*—*To be construed strictly.* Where the owner of a cinema hall entered into a contract with an electrical contractor for the installation of electric fittings in his cinema hall and the latter for the performance of his contract engaged workmen, one of whom died as a result of an accident while engaged in wiring work. *Held:* That the deceased was a workman within the meaning of s. 2 (*h*) of the Workmen's Compensation Act and that the work of installing electric fitting ordinarily being not the business of the owner of the cinema hall, he was not liable under s. 12 (*1*) of the Workmen's Compensation Act to compensate the deceased's family. *Rabia Mahamed Tahir* v. *G.I.P. Railways*, A.I.R. (1929) Bom. 179; *Bai Kokilabai* v. *Messrs. Keshaval Mangaldas & Co.*, I.L.R. (1942) Bom. 139, referred to. The Workmen's Compensation Act is a *quasi*-penal statute and therefore it has to be construed not with sympathetic leniency but strictly. *Bombay Burmah Trading Corporation Limited* v. *Ma E Nyun*, I.L.R. 14 Ran. 753, followed.

V. NATH SINGH *v.* MA KHIN TINT AND TWO OTHERS ... 424

WORKMEN'S COMPENSATION ACT, s. 10 (*1*)—*Proviso—Interest of minors involved—Liberal construction to be adopted—Purpose of Act.* Where the application for payment of compensation under the Workmen's Compensation Act to the minor children of the employee, who died as a result of injuries received in the course of employment, was filed a few days after the period of 12 months prescribed by s. 10 of the Act by the widowed mother of the deceased, the delay being due to the mistaken belief that Government was taking necessary action for the purpose of giving compensation and where the Commissioner for Workmen's Compensation condoned the delay under the last proviso to s. 10 (*1*) of the Act, admitted the application and decided the claim. *Held:* That as the interests

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of the 'minors' are, in fact, involved in this case a more liberal construction of the relevant proviso to s. 10 (*1*) should be adopted so as to be in conformity with purposes of the Workmen's Compensation Act which was to give relief to the injured workmen and that in admitting the claim made in this case the Commissioner was not exercising the discretion unjudicially. *The Consolidated Tin Mines of Burma, Ltd.* v. *Maung Tun E*, 9 Ran. 118 ; *Roles* v. *Pascall & Sons*, (1911) 1 K.B. 982 ; *Abdul Matin* v. *Bidesi Rajwar and another*, A.I.R (1939) Pat. 181; *Munshi & Co.* v. *Tukaram Teli*, A.I.R. (1948) Bom. 44, referred to.

MAUNG OHN SHWE *v.* DAW MA 649

အက်ဥပဒေများ။

တရားမကျင့်ထုံးကိုဥပဒေ။

ရာဇဝတ်ကျင့်ထုံးဥပဒေ။

ရာဇသတ်ကြီး။

သက်သေခံဥပဒေ။

သီးခြားသက်သာခွင့်အက်ဥပဒေ။

တရားမကျင့်ထုံးကိုဇ ဥပဒေ၊ ပုဒ်မ ၉၉—အယူခံရုံးက အောက်ရုံး၏ အဓိန့်ကို ပယ်ဖျက်ခြင်းနှင့်ပတ်သက်သော တားမြစ်ချက်များ ... 433

တရားခံတဦး၏အမှုတွင် သက်သေခံခွင့်—ချေလွှာတွင် တရားလိုစွဲသည့် အတိုင်း မှန်သည်ဟု ဝန်ခံထားက—သက်သေခံခွင့်ရှိ မရှိ—သက်သေခံရန် ခွင့် တောင်းနိုင်ခြင်း—တရားလိုကလည်း သက်သေအဖြစ်ပြနိုင်ခြင်း—သက် သေမခံသော်လည်း အမှုကိုမထိခိုက်နိုင်ခြင်း။ ။သံလျင်မြို နယ်ပိုင်တရား မတရားသူကြီးရုံးတော်၌ အယူခံတရားလိုက၊ အယူခံတရားခံများအပေါ် တွင်၊ အချင်းဖြစ်အိမ်သည်ကွယ်လွန်သူ ဒေါ်ရွှေယုပိုင်မဟုတ်၊ အယူခံ တရားလိုသာလျှင် ပိုင်ဆိုင်ကြောင်း အတိအလင်း ကျေညာပေးပါရန် တရားစွဲဆိုခဲ့ရာ၊အယူခံတရားခံအမှတ် ၁ နှင့် ၃ တို့ကချေလွှာတင်သွင်း၍၊ ယုချေပြီး၊အယူခံတရားခံအမှတ် ၂ ကမူ၊အယူခံတရားလိုစွဲဆိုသည့်အတိုင်း၊ မှန်ပါသည်ဟု ဝန်ခံဖြောင့်ဆိုချက် တင်သွင်းလေသည်။ ။အမှုစစ်ဆေး သောရုံးတော်မှ အယူခံတရားလို၏ အမှုကိုတရားစရိတ်နှင့်တကွ ပလပ်ခဲ့ လေသည်။ ထို့နောက် ဟံသာဝတီခရိုင်တရားမတရားသူကြီး ရုံးတော်တွင်၊ အယူခံတရားလိုကအယူခံခဲ့ရာ၊ ၎င်းရုံးတော်က၊ အယူခံမှကိုတရားစရိတ် နှင့်တကွ ပလပ်ခဲ့လေသည်။ ။အမှုစစ်ဆေးသောရုံးပေါ်တွင်၊ ၂ တရား ခံမည္ဆန့်ကို၊ စစ်ဆေးခွင့်ပေးသင့်မပေးသင့်ကို၊ အငြင်းပွားခဲ့ရာ၊ တဘက် နှစ်ချက်ရှေ့နေကြီးများ၏ လျောက်လဲချက်များကို၊ ကြားနာပြီးနောက်၊ အမှုစစ်ဆေးသော ပညာရှိတရားသူကြီးက၊ ၂ တရားခံသည် တရားလို၏ အဆိုလွှာတွင်ပါရှိသောစကားရပ်များအားလုံး မှန်ပါသည်ဟု ခြွင်းချက် မရှိဝန်ခံထားပြီးဖြစ်သည့် အလျောက်၊ ၎င်းသည်တရားခံတယောက်အနေ ဖြင့်၊ သက်သေခံရန်ခွင့်မပြုနိုင်ဟု အဓိန့်ချမှတ်ခဲ့လေသည်။ ။ဤရုံးတော် တွင်၊အယူခံတရားလိုက၊အယူခံရာဝယ်၊အဆိုပါအဓိန့်ကို၊ ချမှတ်ခြင်းအား

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ဖြင့် အမှုစစ်ဆေးသောပညာရှိ တရားသူကြီးသည်၊ မိမိရရှိသည့်စီရင်ခွင့်အာ
ဏာကိုတရားဥပဒေနှင့်ညီညွတ်စွာ မဆောင်ရွက်ဟု အယူခံတရားလိုဘက်
မှလိုက်ပါဆောင်ရွက်သော ပညာရှိရှေ့နေကြီးက ဖျောက်ထားလေသည်။
ဤလျှောက်ထားချက်ကို၊ ဤရုံးတော်က၊ လက်မခံနိုင်၊ အာဃာယ်ကြောင့်ဆို
သော်အယူခံတရားလိုသည်၊ ၂ တရားခံ မည္သန့်အား ၎င်း၏သက်သေ
အဖြစ်ဖြင့်စစ်ဆေးနိုင်ပါလျက်၊ ဤသို့စစ်ဆေးခြင်းမပြုခဲ့ပေ၊ ယင်းကဲ့သို့စစ်
ဆေးရန်လည်း အားမထုတ်ခဲ့ပေ၊ ထို့အပြင်၊ ၂ တရားခံမည္သန့်က၊ တရား
ခံတယောက်အနေဖြင့်၊ သက်သေခံလိုလျှင်၊ တရားလိုနှင့် တရားလိုပြသက်
သေများကိုစစ်ဆေးပြီး အခြားတရားခံများကို စစ်မေးခြင်းမပြုမီ၊ သက်သေ
ခံရန်အတွက် ခွင့်တောင်းဆိုနိုင်ပေသည်၊ ၂ တရားခံသည် ၎င်း၏ချေလွှာ
အတိုင်း၊ သက်သေခံစေကာမူ၊ အယူခံတရားခံများဘက်မှ၊ တင်ပြသော
သက်သေခံချက်များကိုမိမိခိုင်လုံနေသည့်အတွက်၊ ၂ တရားခံသည်တရား
ခံတယောက်အနေဖြင့် သက်သေခံခွင့်မရရှိခြင်းကြောင့်၊ အယူခံတရားလို
စွဲဆိုသောအမှုတွင် အကျိုးပျက်စီးစေရန်အကြောင်းမရှိချေ။

ဦးပွေး နှင့် ဦးထွန်းစိန် ပါ ၉ ဦး 428

ရာဇဝတ်ကျင့်ထုံးပုဒ်မ ၂၃၅ (၁) က ပြစ်မှုများကို တရုတည်းတွင်စစ်ဆေးခြင်း
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ရာဇဝတ်ကျင့်ထုံးပုဒ်မ ၃၄၂ (၁) အရ၊ တရားခံတဦး၏ကျမ်းဖြင့် အစစ်ခံချက်၊
အခြားတရားခံများအပေါ်တွင်အသုံးပြုခြင်း၊ ပုဒ်မ ၂၃၅ (၁) ပြဋ္ဌာန်းချက်၊
ပုဒ်မ ၁၆၂ (၁) ခဲအရာရှိထံ၌ ရေးသားထားသော အစစ်ခံချက်ကို
သုံးခြင်းနှင့်သုံးစွဲနည်း၊ တားမြစ်ချက် အမှု၌ ထည့်သွင်းစဉ်းစားနိုင်ခြင်း။
ပြစ်ဒေဏ်ဒီတဂ်သားများဟုဆိုသောသူများ၊ နိုင်ငံတော်သတော်၏ ၁၉၅၈
ခုနှစ်၊ ဇူလိုင်လ ၃၀ ရက်နေ့တွင် ထုတ်ပြန်သော လွှတ်ငြိမ်းချမ်းသာခွင့်
အမိန့် အပိုဒ် (၃) "လက်နက်ကိုင်တော်လှန်မှု၊ သောင်းကျန်းမှုတို့
ပရောဂျက်ရန်၊ နှိမ်နင်းရန်လုပ်ကိုင်ဆောင်ရွက်ရာ၌" ဆိုသော စကား၏
အဓိပ္ပါယ်။ မည်သည့်အခါ ကျူးလွန်သော ပြစ်မှုကိုသာ လွှတ်ငြိမ်းခွင့်
ပြုခြင်း၊ ဖြောင့်ချက်အသုံးမဖြုခြင်း။ Confession—Whether statement
amounts to—Tests to determine. ဆုံးဖြတ်ချက်။ ။တရားခံတ
ယောက်၏ရုံးတော်တွင် ကျမ်းဖြင့် အစစ်ခံချက်ကို အခြားတရားခံများအ
ပေါ်တွင် တရားလိုဘက်မှ စွဲချက်တင်နိုင်သော အခြားခိုင်လုံသောစွပ်စွဲချက်
မရှိပါက ရာဇဝတ်ကျင့်ထုံးပုဒ်မ ၃၄၂ (၁) အရ၊ ထိုတရားခံ၏ကျမ်းဖြင့်
အစစ်ခံသော အစစ်ခံချက်ကို အကိုးအကားပြု၍ အပြစ်မပေးနိုင်၊ ထိုကျမ်း
ကိုန်အစစ်ခံချက်မှာလည်း အခြားပေါ်လွင်သော သက်သေခံချက်များ၏
အထောက်အထားအနေနှင့်သာသုံးနိုင်သည်။ တနေ့တည်းတွင် ၃ နေရာ၌
ကျူးလွန်သောပြစ်မှုများသည် တခုနှင့်တခု တဆက်တည်းဖြစ်ပြီး၊ တခုတည်း
သောပြုလုပ်ဆောင်ရွက်မှုမှ ပေါ်ပေါက်လာသော တဆက်တည်းသောပြု
လုပ်ချက်များဖြစ်သော်၊ ယင်းသို့ ကျူးလွန်သောအမှုများကို အမှုတမှု
တည်းတွင်စီရင်စစ်ဆေးနိုင်ကြောင်း၊ ရာဇဝတ်ကျင့်ထုံးပုဒ်မ ၂၃၅ (၁) က
အတိအလင်းပြဋ္ဌာန်းထားသည်။

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သက်သေတဦးတယောက်သည်၊ ရဲအရာရှိထံ၌ ရေးသားထားသော အစစ်ခံချက်တခုပေးထားသော် ထိုအစစ်ခံချက်သည်၊ ထိုသက်သေရုံးရှေ့တွင် အစစ်ခံသော ထွက်ချက်နှင့်ဖိလာဖြစ်နေလျှင်၊ ထိုသက်သေအစစ်ခံချက်၏ တန်ရာတန်ကိုးကို ပျက်စီးစေလိုသောသဘောဖြင့် တရားလိုဘက်ကသော်၎င်း၊ တရားခံဘက်ကသော်၎င်း အဆိုပါရဲအရာရှိရှေ့တွင် အစစ်ခံခဲ့သော အစစ်ခံချက်ဖြင့် သက်သေခံအက်ဥပဒေပုဒ်မ ၁၄၅ တွင်ပြဋ္ဌာန်းထားသည့်အတိုင်းသုံးနိုင်ပေသည်။ ဤသို့သုံးစွဲနည်းမှာ ၎င်း၏သက်ဆိုင်ရာရဲအစစ်ခံချက်ကို ကောက်နုတ်၍ မိတ္တူတင်သွင်းခြင်းဖြင့်သာ အသုံးပြုနိုင်ပေသည်။ သို့သော် ထိုသက်သေ၏ ရဲအရာရှိရှေ့အစစ်ခံချက်သည် အမှုစစ်ဆေးသော ရုံးတော်က အမှုတွင်ထည့်သွင်းစဉ်းစားနိုင်သော သက်သေအစစ်ခံချက်မဟုတ်၊ ထိုသက်သေ၏အစစ်ခံချက်ကို ယုံကြည်ထိုက်၊ မယုံကြည်ထိုက်၊ သို့တည်းမဟုတ် တန်ဘိုးမည်၍မည်မျှရှိသည်ကို ချိန်ဆနိုင်ရာသာဖြစ်သည်။ သို့ရာတွင် ထိုသက်သေကို မေးခွန်းထုတ်ရာ၌ ရဲအရာရှိထံတွင် ဤမည်သောအစစ်ခံချက်များ ပြုလုပ်ခဲ့ပါသလားဟု အစစ်ခံခဲ့သော ကောက်နုတ်ချက်ကိုဖတ်ပြ၍ မေးမြန်းသောအခါ၊ ထိုအတိုင်းအစစ်ခံခဲ့ပါသည်ဟုထွက်ဆိုလျှင်၊ ထို့ပြင် ထိုအစစ်ခံချက်သည် ယခုရုံးရှေ့တွင်ထွက်ဆိုသော အစစ်ခံမှုက်နှင့် ကွဲလွဲနေပါလျက် မည်သည့်အစစ်ခံချက်က မှန်သနည်းဟု မေးမြန်းသောအခါ၊ သက်သေက ရဲအရာရှိထံတွင် အစစ်ခံခဲ့သော အစစ်ခံချက်သည် မှန်ပါသည်ဟုထွက်ဆိုလျှင်၊ ထိုမှန်သည်ဆိုသော ရဲအစစ်ခံချက်သည် ရာဇဝတ်ကျင့်ထုံးဥပဒေပုဒ်မ ၁၆၂ တွင် တားမြစ်ထားသော ရဲအစစ်ခံချက်မဟုတ်တော့ဘဲ၊ ထိုသက်သေက ရုံးရှေ့ကိုယ်တိုင် အစစ်ခံသော အစစ်ခံချက်အခြေသို့ ရောက်နေ၍၊ ဤအစစ်ခံချက်များကို ရုံးတော်က အမှုစစ်ဆေးရာ၌ ထည့်သွင်းစဉ်းစားနိုင်ပေသည်။ ဘဒေပါ ၁ ဦးနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံ (1959) B.L.R. 178 (H.C.) လိုက်နာသည်။ ပြစ်ဒေါထီးတပ်သားများ ဆိုသောသူများမှာ ကြည်းတပ်သားလည်းမဟုတ်၊ ရေတပ်သားလည်းမဟုတ်၊ လေတပ်သားလည်းမဟုတ်၊ ရဲအမှုထမ်းများလည်းမဟုတ်၊ သို့သော် ၎င်းတို့ကို အရံရဲ (Special Reserve Police) အဖြစ်ဖြင့် ရဲအက်ဥပဒေ (Police Act). အရ၊ နောက်များမကြာမီတွင် ဖွဲ့စည်းရန်ရည်ရွယ်ထားသောသူများဖြစ်ကြောင်း။ ထိုသူများမှာ ကြည်းတပ်၊ ရေတပ်၊ လေတပ် သားမဟုတ်စေကာမူ၊ ထိုတပ်သားများ၏ အခွင့်အာဏာအရ ဆောင်ရွက်သော သူများဟု မှတ်ယူနိုင်ပေသည်။ နိုင်ငံတော်သမတ၏ ၁၉၅၈ ခုနှစ်၊ ဇူလိုင်လ ၃၀ ရက်နေ့တွင် ထုတ်ပြန်သော လွတ်ငြိမ်းချမ်းသာခွင့်အမိန့်အမှိန် (၃) နှင့် စပ်လျဉ်း၍၊ လက်နက်ကိုင်တော်လှန်မှု၊ သောင်းကျန်းမှုတို့ ပမျောက်ရန်၊ နှိမ်နင်းရန် လုပ်ကိုင်ဆောင်ရွက်ရာ၌ ကျူးလွန်ခဲ့သော ပြစ်မှုဆိုရာတွင် တကယ် တိုက်ခိုက်နေသည့် အချိန်အခါအတွင်း တကယ်စစ်စစ်ကိုက်နေစဉ်အတွင်း (in the course of actual operation) ကိုသာဆိုလိုသည်။ တိုက်ခိုက်နေစဉ်မဟုတ်ဘဲ၊ တိုက်ပွဲနှင့်မဆိုင်သည့် ပြင်ပကျူးလွန်မှုများသည် လွတ်ငြိမ်းချမ်းသာခွင့်နှင့် အကျုံးမဝင်၊ ဥပမာ၊ ရွာတရွာ၌ သောင်းကျန်းမှုနှိမ်နင်းရန်ဆောင်ရွက်နေသော ကြည်းတပ်၊ ရေတပ်၊ လေ

"တပ်သားတဦးတယောက်သည်၊ သို့တည်းမဟုတ် ၎င်းတို့၏အခွင့်အာဏာ အရဆောင်ရွက်သောသူများသည်၊ ထိုသို့နှိမ်နင်းနေစဉ်အတွင်း (during actual operation) ရှာဖွေခြင်း၊ လူသွတ်ခြင်း၊ ဓါးပြတိုက်ခြင်း၊ မုဒိမ်းမှုပြုခြင်း၊ ကျူးလွန်ပါက ထိုကျူးလွန်ခြင်းတို့သည်၊ လွတ်ငြိမ်းချမ်းသာခွင့်အတွင်းသို့ကျရောက်နေသည်ဟုယူဆရပေမည်။ သို့သော် ထိုတိုက်ပွဲရပ်စဲရန် တိုက်ပွဲမှ အပြန်တွင်ဆော်၍၊ တိုက်ပွဲနေရာသို့တွက်ခွါသွားစဉ် တရုန်းရွာရပ်နားနေစဉ်သော်၎င်း ကျူးလွန်သောပြစ်မှုမျိုးမှာ ဤလွတ်ငြိမ်းချမ်းသာခွင့်အတွင်းသို့ ကျရောက်သော ရာဇဝတ်မှုမျိုးမဟုတ်၊ လွတ်ငြိမ်းချမ်းသာခွင့်အဓိပ္ပါအဝိုင် (၃) တွင် ပြဋ္ဌာန်းသော လွတ်ငြိမ်းချမ်းသာခွင့်သည် ကြည်းတပ်၊ ရေတပ်၊ လေတပ်၊ ပြည်သူ့ဝန်ထမ်းမြို့ပြဆိုင်ရာအမှုထမ်း၊ ထိုတည်းမဟုတ် ၎င်းတို့၏အခွင့်အာဏာအရ ဆောင်ရွက်သောသူများထိုသည် လက်နက်ကိုင်တော်လှန်နေသောသူပုန်များ၊ သို့တည်းမဟုတ် သောင်းကျန်းမှုများကို နှိမ်နင်းရန် တိုက်ခိုက်နေစဉ်၊ ကျူးလွန်သောမည်သည့်ပြစ်မှုကိုမဆို လွတ်ငြိမ်းချမ်းသာခွင့်ရနိုင်သည်။ နှိမ်နင်းနေစဉ်၊ သို့တည်းမဟုတ် ဆောင်ရွက်နေစဉ် ဆိုသည်မှာ နှိမ်နင်းဆောင်ရွက်ရာ၌ ဟူသောအဓိပ္ပါယ်နှင့်ထင်တူထပ်မျှဖြစ်သည်။ သို့အတွက်ကြောင့် (in the course of actual operation) တွင်ကျူးလွန်သော ပြစ်မှုကိုသာ လွတ်ငြိမ်းခွင့်ပြုကြောင်း ဖေါ်လွင်နေသည်။ ဥပမာပြုပေဉီးအုံ၊ လက်နက်ကိုင်တပ်သားတဦးတယောက်သည်၊ သောင်းကျန်းမှုနှိမ်နင်းရန်အတွက် မိမိတပ်ရှင်တော်ရွက်လာပြီး၊ ထိုတပ်သည် တရုန်းရွာရပ်နားနေစဉ် ထိုတပ်ဆာဆာထံ အိမ်းအနားရှိ ရွာထဲသို့သွားရှာ ဓါးပြမှုသော်၎င်း၊ မုဒိမ်းမှုသော်၎င်း၊ ကျူးလွန်လျှင် ထိုကဲ့သို့ကျူးလွန်သောပြစ်မှုသည် သောင်းကျန်းမှုပယောက်ရန် နှိမ်နင်းလုပ်ကိုင်ရာ၌ ကျူးလွန်သောပြစ်မှုမဟုတ်ကြောင်းမှာ များစွာထင်ရှားပေသည်။ ထိုနည်းတူစွာ တိုက်ပွဲနှင့်မဆိုင်ဘဲ တိုက်ပွဲအပြီး ပြန်ရာလမ်းဘွင်၎င်း၊ တိုက်ပွဲဧရိယာနေစဉ်နှင့် အလွန်းမသက်ဆိုင်ဘဲ ပြင်ပနေရာ၌ ကျူးလွန်သော ပြစ်မှုများ အကျူးမဝင်ကြောင်းမှာလည်း ထင်ရှားပေသည်။ ဖြောင့်ချက်ပေးသူ၏ဖြောင့်ချက်ကို မိမိနှင့်အတူးစစ်ခံရသော သက်ဆိုင်သောတရားခံတဦးအပေါ်တွင် သက်သေခံချက်အဖြစ်ဖြင့် တိုက်ရိုက်မသုံးနိုင်ပေ။ သို့သော် သက်ဆိုင်သောတရားခံအပေါ်တွင် အခြားသက်သေခံများရှိ၍ ထိုသက်သေခံချက်ရှိသည်နှင့်အမျှ၊ အနည်းငယ် သံသယရှိနေပါက အဆိုပါ ဖြောင့်ချက်ပေးသူ တရားခံ၏ဖြောင့်ချက်ကို သက်ဆိုင်ရာတရားခံများ အပြစ်ရှိ၊မရှိ ဆုံးဖြတ်ရာ၌ အထောက်အထား အကူအညီအဖြစ်ဖြင့်သာ ထည့်သွင်းစဉ်းစားနိုင်ကြောင်းသာဖြစ်ပေသည်။ ပြည်ထောင်စုမြန်မာနိုင်ငံနှင့် အလှပါ ၃ ဦးအမှု၊ ၁၉၅၇ ခု၊ ရာဇဝတ် အယူခံမှုအမှတ် ၂၄၀၊ (1958) B.L.R. 29 လိုက်နာသည်။ One of the tests to determine whether a statement amounts to a confession is whether the statement by itself is sufficient for the conviction of its maker of the offence for which he is tried iointly with those against whom the statement is sought to be given—*Per* U SAN MAUNG, J. *Tan Chit Lye* v. *The Union of Burma*, (1950) B.L.R. 172 (S.C.), followed.

ချစ်လိုင်၊ထွန်းဝိုင်း၊ သိန်းအောင်ပါ ၂၂ ဦးနှင့် ပြည်ထောင်စုမြန်မာ

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ရာဇသတ်ကြီး ပုဒ်မ ၃၀၀၊ ခြွင်းချက်အပိုဒ် (၁)၊ လူအများရှေ့၌ဆဲရေးတိုင်းထွာခြင်း၊ ခြွင်းချက်အတွင်းသို့ကျရောက်သည့် အကြောင်းချင်းရာများလုံးဝမရှိ။ ဆုံးဖြတ်ချက်။ ။လူအများရှေ့၌သော်၎င်း၊ မိန်းကလေးရှေ့၌သော်၎င်း၊ "ခွေး" နှင့် နှိုင်းဆိုခြင်းမှာ အယူခံတရားလိုနှင့်ပတ်သက်၍၊ အလွန်ဆိုးဆဲရေးတိုင်းထွာသော စကားလုံးမျှသာ ဖြစ်ပေသည်။ ထိုစကားလုံးများသည်၊ အယူခံတရားလိုကို ရုတ်တရက် အကြီးအကျယ်မိမိကိုယ်ကို မိမိမချုပ်တီးနိုင်လောက်အောင် ဒေါသဖြစ်စေသည်ဟု မည်သည့်နည်းနှင့်မျှ မယူဆနိုင်၊ ရာဇသတ် ပုဒ်မ ၃၀၀၊ ခြွင်းချက် (၁) အတွင်းသို့ကျရောက်သည်အကြောင်းချင်းရာများလုံးဝမရှိ။

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သီးခြားသက်သာခွင့်အက်ဥပဒေ၊ ပုဒ်မ ၄၂၊ ခြွင်းချက်ပြဋ္ဌာန်းထားသောပိတ်ပင်ချက်၊ မည်သည့်အခါမကိုက်ဆိုင်—တရားမကျင့်ထုံးဥပဒေ၊ ပုဒ်မ ၉၉ ၏တားမြစ်ချက်—အယူခံရုံးတော်ကလွယ်ကူစွာဖြင့် မပယ်ဖျက်သင့်သောအောက်ရုံးတော်မှ ဆုံးဖြတ်ခဲ့သောအချက်များ—မူလအမှုကိုတိုက်ရိုက်စစ်ဆေးကြားနာသောတရားသူကြီး၏—ယူဆချက်တို့ကို အထူးလေးစားရ၍၊ အထူးလေးနက်သောအကြောင်းမရှိဘဲ၊ မပယ်ဖျက်နိုင်။ ။ဆုံးဖြတ်ချက်။ အယူခံတရားခံက၊ အယူခံတရားလိုအပေါ်တွင် ငှင်းတို့နှစ်ဦးနာမည်ဖြင့် *National Bank of India Ltd.* ဘဏ်တိုက်တွင်ရှိသောငွေသည်းငှင်းတဦးတည်းပိုင်ငွေဖြစ်ကြောင်း သီးခြားသက်သာခွင့်အက်ဥပဒေပုဒ်မ ၄၂ အရ၊ မြွက်ဆိုပြဋ္ဌာန်းသောဒီကရီ တခုချမှတ်ပေးရန် တရားစွဲဆိုရာတွင်၊ ဘဏ်တိုက်ကိုတရားခံအဖြစ် မထည့်သွင်းခြင်းသည်၊ အဆိုပါပုဒ်မခြွင်းချက် ပြဋ္ဌာန်းထားသော ပိတ်ပင်ချက်နှင့် မထိုက်ဆိုင်။ ။အမှုတွင်၊ တရားခံအဖြစ်ဖြင့်သော်၎င်း၊ တရားလိုအဖြစ်ဖြင့်သော်၎င်း၊ ပူးတွဲထည့်သွင်းသင့်လျက် မပူးတွဲမထည့်သွင်းဘဲ၊ စပ်ဆေးကြားနာခဲ့ပါက၊ ထိုချို့ယွင်းချက်ကြောင့် အမှုမှ၊ ထိုက်သင့်ရာထိုက်တန်ရာ အကျိုးအပြစ်ကို ထိခိုက်ခြင်းမရှိလျှင်၊ အောက်ရုံးမှချမှတ်လိုက်သောဒီကရီကို အယူခံရာတွင်၊ ပယ်ဖျက်ခြင်း၊ သို့တည်းမဟုတ် အကြီးအကျယ် ပြောင်းလွဲပြင်ဆင်ခြင်း၊ အောက်ရုံးသို့ ပြန်ပို့ခြင်း မရှိစေရဟူသော တားမြစ်ချက်ကို၊ တရားမကျင့်ထုံးဥပဒေပုဒ်မ ၉၉ တွင်၊ အတိအလင်း ပြဋ္ဌာန်းထားသဖြင့်၊ သို့အတွက်ကြောင့်၊ ဤအမှုတွင် ဘဏ်တိုက်ကို တရားခံအဖြစ်ဖြင့် ထည့်သွင်းခြင်းမှာ၊ တရားမစွဲဆိုခဲ့ခြင်းမှာ၊ အမှုကို အကြီးအကျယ် ပြောင်းလွဲပြင်ဆင်ယုတ်စီးနိုင်လောက်သော အချက်မဟုတ်။ ။အောက်ရုံးတော်မှ အခြေအနေကိုစောက်ထား၍၊ သင့်တင့်ရာ၊ ချင့်ချိန်ပြီး ဆုံးဖြတ်နိုင်သောအာဏာရှိသည့် အလျောက် ဆုံးဖြတ်ခဲ့သောအချက်များကို အယူခံရုံးတော်က လွယ်ကူစွာဖြင့် မပယ်ဖျက်သင့်။ ။ *Jaipal Kunwar and another* v. *Indar Baladur Singh*, 26 All. 238; *Fateh Mohamed Khan* v. *Gurbux Singh and others*, A.I.R. (36) (1949) East Punj.

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210; *Mt. Tehl Kuar* v. *Amar Nath and others*, A.I.R. (1925) Lah. 2, တို့ကိုရည်ညွှန်းသည်။ ။ *Nawab Humayun Begam* v. *Nawab Shah Mohammad Khan and another*, A.I.R. (30) (1943) (P.C.) 94, ကိုရှင်းပြသည်။ ။သီးခြား သက်သာခွင့် ဥပဒေပုဒ်မ ၄၂ အရ၊ မြွက်ဆိုပြဋ္ဌာန်းချက် ဒိုက်ရိုက်ပေးသောရုံးသည်၊ အမှု၏အကြောင်းခြင်းရာနှင့် တရားလိုကတောင်းဆိုသော အခွင့်အရေးများ ရသင့် မရသင့် တောင်းဆိုသောပိုင်ဆိုင်ခွင့်၊ ရသင့်၊မရသင့်ဆိုသော အချက်အလက်များကို၊ ပတ်ဝန်းကျင်အခြေအနေနှင့် ထောက်ထားကြည့်ရှုပြီး၊ သင့်သည်ဟု ချင့်ချိန်ရွေးဆုံးဖြတ်ခဲ့လျှင်၊ ထိုဆုံးဖြတ်ချက်ကို သမန်ကာ၊ ရှုန်ကာပေါ့ပေါ့ ဆဆယူဆပြီးပယ်ဖျက်ရန် မသင့်ချေ။ ။အောက်ရုံးလွှတ်တော် တရားဝန်ကြီးသည်၊ အယူခံတရားလိုနှင့် အယူခံ တရားခံတို့ကို တိုက်ရိုက်စစ်ဆေးကြားနာခဲ့သူဖြစ်၍ ဖြစ်သည့်အလျောက် မည်သူ၏ပြောဆိုချက်သည် ယုတ္တိယုတ္တာရှိရှိ ယုံကြည်ထိုက်သည်၊ ယုံကြည်ထိုက်သည်ကို ချိန်ဆ ရာ၌ ၎င်းတရားဝန်ကြီး၏ ယူဆချက်တို့ကို အထူးလေးစားရပေမည်၊ အမှုအကြောင်းခြင်းရာနှင့်ပတ်သက်၍၊ ၎င်းသာလျှင်တိုက်ရိုက်ကြားနာတွေ့မြင်ခဲ့ရသည့်အလျောက်၊ ၎င်း၏ယူဆချက်များကို၊ အထူးလေးနက်သောအကြောင်းမရှိဘဲ၊ ပယ်မဖျက်နိုင်ချေ။ *Chinnaya* v. *U Kha*, 14 Ran. 11 ကိုလိုက်နာသည်။

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APPELLATE CIVIL.

Before U Aung Khine, J.

H.C.
1958

Feb. 1.

HAJEE HABIB (APPELLANT)

v.

BABU DEDRAJ BRAHMAN (RESPONDENT).*

Limitation Act, s. 20 (1), Article 182 (5)—Receipt of part payment shown in Column 5 of the execution application, whether proper certification under Order 21, Rule, 2, Civil Procedure Code and whether it is a step-in-aid of execution.

The Decree-holder obtained a decree for Rs. 2,300 against the judgment-debtor on 9th October 1947. He filed an execution application on 15th January 1951, mentioning in Column 5, the receipt of Rs. 200 on 27th March 1950.

Primâ facie, the application for execution was time-barred.

The Decree-holder contended :

(i) That there is a Conclusive finding of fact that there had been a part payment of the decretal amount.

(ii) That there has been a step-in-aid of execution as part payment had been duly certified under Order 21, Rule 2, Civil Procedure Code.

(iii) That a fresh starting point of limitation had begun from 27th March 1950.

Held : Under s. 20 (*1*) of the Limitation Act, before an alleged part payment of the debt can be taken into account for the extension of the limitation period, the Court must be satisfied that together with the payment there is an acknowledgment in the handwriting of or in a writing signed by the person making the payment. The alleged part payment towards the decree not being witnessed by acknowledgment in the handwriting of the judgment-debtor cannot be recognised by the Court.

Held also : The mere certification of the decree-holder in the execution application itself regarding the alleged part payment to him by the judgment-debtor cannot be regarded as an application to the Court to take a step-in-aid of the execution or is in itself a step-in-aid of the execution.

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* Civil 2nd Appeal No. 2 of 1957, against the decree of the District Court of Amherst in Civil Appeal No. 19 of 1951, dated 29th September 1956, arising out of the decree of the Subdivisional Court, Moulmein, in Civil Execution No. 10 of 1951, dated 24th November 1951.

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The decree-holder cannot take shelter under either Article 182 (5) or s. 20 of the Limitation Act.

Appeal allowed.

Law San v. *Po Thein*, 2 Ran. 393 ; *Daw Ywet* v. *U Tin and one*, 8 Ran. 310 ; *Fattu* v. *Nanak Chand*, A.I.R. (1924) Lah. 676, referred to.

Prokash Singh v. *Allahabad Bank, Ltd.*, A.I.R. (1929) (P.C.) 19 ; *Amar Krishna Chaudhury and another* v. *Jagat Bandhu Biswas and others*, A.I.R. (1931) Cal. 719, approved.

San Thein for the appellant.

Aung Min (2) for the respondent.

U AUNG KHINE, J.—In Civil Regular Suit No. 84 of 1947 Babu Dedraj Brahman obtained an *ex parte* decree for Rs. 2,300 as against Hajee Sattar on 9th October 1947. In Civil Execution Proceeding No. 10 of 1951 the decree-holder filed an application for the execution of the decree as against the judgment-debtor on 15th January 1951. *Primâ facie* the application was time-barred. It was however claimed that as there had been a payment of Rs. 200 on 27th March 1950 out of Court towards the decree by the judgment-debtor to the decree-holder, limitation was saved. An enquiry was held as to whether the allegation of the decree-holder that he had received such payment from the judgment-debtor was true. This enquiry was held *ex parte*. Several notices issued to the judgment-debtor were returned unserved. Substituted notice subsequently was declared executed. After the enquiry the Subdivisional Judge dismissed the application by his order dated the 24th November 1951. The decree-holder appealed and it was discovered that the judgment-debtor had died before the enquiry in the Court of the Subdivisional Judge was held and by the consent of the parties a fresh enquiry was directed to be taken. The case was remanded to the lower Court for the holding of the

enquiry. Only Babu Dedraj Brahman and another witness by the name of Yashin were examined. In the former enquiry a man by the name of Wahab was the witness cited by Babu Dedraj Brahman but at the time of the second enquiry Wahab was already dead. It was held by the trial Court that the payment of Rs. 200 by the judgment-debtor to the decree-holder had been satisfactorily proved. The District Court endorsed this view and that decision has now become final; but this is not yet the end of the matter.

On the ground that the payment of Rs. 200 by the judgment-debtor to the decree-holder was proved and as the note in column 5 of the execution application showing that payment was a proper certification as required under Order 21, Rule 2 of the Civil Procedure Code, a fresh starting point of limitation had arisen on 27th March 1950, and therefore the execution application was held to have been filed within time. On this ground the learned District Judge set aside the order of the Subdivisional Judge and the execution proceeding was directed to be dealt with according to law.

During the pendency of the appeal before the District Judge, the judgment-debtor Hajee Sattar died and his brother Hajee Habib was brought on record as his legal representative.

This is an appeal by Hajee Habib against the order of the learned District Judge.

In this appeal a new point of law not pleaded in the two lower Courts was raised for the first time. It is contended that as no acknowledgment of the payment in the handwriting of or in any writing signed by the judgment-debtor was recorded, the execution application is barred by limitation. (See section 20 of the Limitation Act).

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It is the case of the decree-holder that as the payment had been duly certified according to law it must be considered a step-in-aid of the execution of the decree. Secondly, the decree-holder claimed that as there had been a part payment of the debt by the judgment-debtor on 27th March 1950 before the expiration of the prescribed period of 3 years, a fresh starting point for the computation of the period of limitation had arisen as from that date.

The law of limitation relating to the first point can be found in Article 182 (5) of the Limitation Act. In *Law San* v. *Po Thein* (1) it was held by Mr. Justice Godfrey that—

> "An application to certify payment was a step-in-aid of execution and that an application by a decree-holder to certify payments made within three years from the date of the decree may be made at any time within three years from such date of payment and will afford the decree-holder a fresh starting point for limitation within the meaning of Article 182 (5) of the Limitation Act."

This view, taken in conjunction with the opinion expressed by Baguley, J. in the case of *Daw Ywet* v. *U Tin and one* (2) that the decree-holder's application for certification of payment under the decree may be made at any time after such payment and such certification even if made after the execution had been filed will suffice to support the application for execution, seems to imply that the note made in the execution application that the decree-holder had received Rs. 200 from the judgment-debtor is a valid certification according to law. Mr. Justice Baguley observed that a certificate of payment by a decree-holder is no more than a statement that the payment has been made, which the decree-holder makes to the Court and it is not prescribed that it shall be made

(1) 2 Ran. 393. (2) 8 Ran. 310.

in any particular form or with any particular details and that the information may be conveyed even incidentally in the application for execution.

It is further stressed on behalf of the decree-holder that there is a conclusive finding of fact that there had been a part payment of the decretal amount by the judgment-debtor to the decree-holder and this at least amounted to a certification of payment made. In this submission reliance is placed in the Lahore Case of *Fattu* v. *Nanak Chand* (1).

I have considered carefully whether such a certification made in the execution petition can be treated as an application made within the meaning of Article 182 (5) of the Limitation Act. A certification by the decree-holder of the payment made outside the Court is designed to comply with the requirements of Rule 2 (1) of Order 21 of the Code of Civil Procedure. Can this be treated as an application made within the spirit of Article 182 (5) of the Limitation Act? I do not think so. I am fortified in this view by what their Lordships of the Privy Council said in the case of *Prokash Singh* v. *Allahabad Bank Limited* (2):

"The terms of Order 21, Rule 2 (1), in their ordinary meaning do not involve any application by the decree-holder; the decree-holder would comply with the terms of the rule if he were to certify to the Court that money payable under the decree had been paid to him out of Court, and it would then rest with the Court to record the payment in accordance with the provisions of the rule. The rule imposes a duty upon the decree-holder to certify the payment, and a duty upon the Court upon such certificate being given to record such payment.

Rule 2 (3) provides that a payment which has not been certified, as recorded as aforesaid, shall not be recognised by any Court executing the decree. The provision in Rule 2 (3)

(1) A.I.R. (1924) Lah. 676. (2) A.I.R. (1929) (P.C) 19.

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no doubt was inserted for good reasons known to the legislature, and it is obvious that the provision must tend to simplify and expedite the proceedings in the Court executing the decree. There is nothing however in Rule 2 (3) to indicate that the legislature intended that the certification of a payment by the decree-holder under Rule 2 (1) should be treated as an 'application'."

Next in the Full Bench decision of the Calcutta High Court in *Amar Krishna Chaudhury and another* v. *Jagat Bandhu Biswas and others* (1) it was held that certification of a payment by a decree-holder under Order 21, Rule 1 (2) is not and cannot be treated as an application to the Court to take some step-in-aid of the execution of the decree. To take some step-in-aid of the execution must mean some proceeding to obtain an order of the Court in furtherance of the execution of the decree and a step-in-aid of execution can only be taken in the course of an execution proceeding which is pending or capable of being kept alive and there can be no step-in-aid of execution where execution itself is already time-barred. It was also held that certification by itself is not a step-in-aid of execution of the application for execution. Thus in this case the mere certification of the decree-holder in the execution application regarding the alleged payment of Rs. 200 to him by the judgment-debtor in the light of the observations made in the cases quoted above, cannot be regarded either as an application to the Court to take a step-in-aid of the execution of the decree or is in itself a step-in-aid of the execution.

Next in view of the amendments introduced in the Limitation Act in the year 1927, payments of debts including money payable on the decree or order of the Court must be accompanied by an

(1) A.I.R. (1931) Cal. 719.

acknowledgment of such payment in the handwriting of, or in a writing signed by, the person making the payment. [See proviso to section 20 (*1*) of the Limitation Act]. Before the alleged part payment of the debt can be taken into account for the extension of the limitation period, the Court must be satisfied that together with the payment there is an acknowledgment in the handwriting of or in a writing signed by the judgment-debtor. In this case there is no such acknowledgment. Thus the alleged part payment towards the decree not being witnessed by acknowledgment in the handwriting of the judgment-debtor cannot be recognised by the Court. For these reasons I must hold that the decree-holder cannot take shelter under either Article 182 (5) or section 20 of the Limitation Act and his application for execution must be rejected as barred by limitation.

In the result the appeal is allowed and the order of the District Court, Amherst, dated the 29th September 1956 is set aside and that of the Subdivisional Court dated the 24th November 1951 restored with costs throughout.

APPELLATE CIVIL.

Before U Aung Khine and U Ba Thoung, JJ.

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Oct. 15.

KOMORUDDIN (APPELLANT)

v.

DAW HLA THEIN (RESPONDENT).*

Urban Rent Control Act—Suit for ejectment under s. 11 (1) (a)—Consent Decree—Meaning of "Arrears of rent" in s. 14 (1)—Whether it covers only the rent as claimed in the notice served under s. 11 (1) of the Act or whether it also covers the rent which accrued subsequent to the filing of the suit up to the date of decree.

Held: "Arrears of rent" under s. 14 (1) of the Urban Rent Control Act is not only the amount as mentioned in the notice served under s. 11 (1) (a) of the Act, but also the subsequent accumulation of rent up to the time the decree was passed.

G. C. Mukarjee v. *A. K. M. Peer Mohamed* (a) *U Ohn Gaing*, Civil Misc. Appeal No. 4 of 1953 (H.C.), approved.

Aung Min (2) for the appellant.

S. K. N. Aiyar for the respondent.

U AUNG KHINE, J.—In Civil Regular No. 1095 of 1953 before the 2nd Judge of the Rangoon City Civil Court, the respondent Daw Hla Thein filed a suit for the ejectment of the appellant under section 11 (*1*) (*a*) of the Urban Rent Control Act from the suit premises. The suit was filed on the 4th of August 1953 and on 22nd November 1954 a consent decree was passed. It was agreed that the judgment-debtor should pay up the full arrears of rent and costs of the suit by monthly instalments of K 95 and that if that was done the decree would be rescinded; on the other hand if he failed to pay up the monthly instalments the decree-holder would have the right to

* Civil Misc. Appeal No. 1 of 1956, against the order of the 2nd Judge's City Civil Court of Rangoon in Civil Execution Case No. 841 of 1955, dated the 15th December 1955.

execute the decree. Arrears of rent was mentioned in the decree as the rent beginning with the month of March 1953 at the rate of K 95 until such time as the law allowed it to be. The appellant Komoruddin, the tenant, paid up all the arrears of rent as mentioned in the notice sent to him by the respondent prior to the filing of the suit and the costs but nothing more.

The respondent therefore filed an application for the execution of the decree by the ejectment of the judgment-debtor from the suit premises. An objection was filed on behalf of the appellant stating that the decree-holder was not entitled in law to claim anything more than the arrears of rent as mentioned in the notice sent and that the decree-holder was only entitled to the arrears of rent up to 31st July 1953. The objection was overruled on the ground that no authority had been furnished by the appellant for the Court to take the view as submitted by him. On the other hand, the decree-holder filed a certified copy of the judgment in Civil Miscellaneous Appeal No. 4 of 1953 of this Court in *G. C. Mukarjee* v. *A. K. M. Peer Mohamed* (a) *U Ohn Gaing* in which an opinion was expressed *obiter* by U San Maung, J. that the term " arrears of rent " occurring in section 14 (*1*) seems wide enough to include the arrears outstanding against the judgment-debtor at the time payment by instalment or otherwise of such arrears of rent was ordered as a condition precedent to the rescission of the ejectment decree. We are entirely in accord with this expression of opinion as it would be hardly fair to the respondent that she should be driven to another suit against the appellant for the arrears of rent that had been accumulated since the filing of the suit and the passing of a consent decree.

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U AUNG KHINE, J.

There has been no previous decision in this Court to define what "arrears of rent" exactly means: whether it covers only the rent as claimed in the notice sent to the defendant by the plaintiff under section 11 (*1*) of the Act or whether it also covers the rent which accrued subsequent to the filing of the suit up to the date of the decree. It is our considered opinion that the reasonable view that should be taken in a case like this is to treat the arrears of rent not only the amount as mentioned in the notice but also the subsequent accumulation of rent up to the time the decree was passed.

It is contended by the learned Advocate for the appellant that even if the extreme view is taken, the non-compliance on the part of the decree-holder was only a non-compliance of the terms of the consent decree and that the appellant would still be entitled to invoke the aid of the provisions of section 14 (*1*) of the Urban Rent Control Act. However, that was not the stand the appellant had taken in the lower Court. When the respondent presented her application for the execution of the decree, the appellant did not invoke the aid of the provisions of section 14 (*1*) of the Act but merely submitted that the arrears of rent meant only such arrears as mentioned in the notice sent to the appellant by the respondent. We consider that there is no merit in this appeal and it is accordingly dismissed with costs.

U BA THOUNG, J.—I agree.

APPELLATE CIVIL.

Before U Aung Khine, J.

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RAMADHAR KEOT (APPELLANT)

v.

Feb. 13.

RATIPAL AHIR (RESPONDENT).*

Guardian and Wards Act, s. 25 (1), bar to a regular suit for custody of a minor—The doctrine of factum valet*—Hindu Law—Inter-caste Marriages—The Hindu Marriages Validity Act, 1949 (Act No. 21), s. 3—The Hindu Marriages Act, 1955, s. 5—Constitution, s. 226 (1) and 221—Burma Laws Act, s. 13.*

The Respondent filed a suit against the appellant :— (1) for a declaration that the alleged marriage between the appellant and the Respondent's minor daughter is null and void, illegal, and invalid, and (2) for recovery of possession or custody of the girl.

(The suit was decreed by the trial Court and confirmed by the first appellate Court).

On second appeal, it was contended by the Respondent that :

(i) The marriage was without the consent of the guardian,

(ii) absence of essential ceremony to validate the marriage, and

(iii) the parties belong to different castes.

Held : S. 25 (1) of the Guardians and Wards Act is a bar to the jurisdiction of the Court to entertain a regular suit and the remedy must be by way of application under the Guardians and Wards Act, and not by filing a regular suit.

Shadeo v. *Mahrajt and another*, I.L.R. 9 Ran. 569, approved.

Ma Shwe Ge v. *Maung Shwe Pan*, 2 L.B.R. 140 ; *Mathuranbas* v. *D. Tewary*, 10 B.L.T. 186, referred to.

Held also : (i) No marriage between Hindus which has been solemnised according to Hindu Law shall be defeated by reason only of the absence of consent given by a guardian.

(ii) If the parties go through certain marriage ceremonies a presumption shall arise that the marriage ceremony has been duly performed.

The doctrine of *factum valet* must be applied.

Bai Diwali v. *Moti Karson*, 22 Bom. 509 ; *Mulchand Kuber* v. *Bhudhia and another*, 22 Bom. 812, referred to.

(iii) Inter-caste marriages are now recognised amongst Hindus.

The Indian Legislature is a competent authority to pass Acts relating to Hindu Law and it is to Indian Legislature that all Hindus must look for their protection in respect of cases coming within the sphere of their personal law.

* Civil 2nd Appeal No. 3 of 1956, against the decree of the District Court of Bassein in Civil Appeal No. 5 of 1955, dated 5th November 1955.

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"Existing Law" as mentioned in Article 226 (1) of the Constitution, cannot apply to personal law.

S. 13 of the Burma Laws Act, provides that the Hindu Law shall apply in cases where the parties are Hindus, and the Hindu Law with regard to marriage shall apply to the cases of Hindu marriages contracted in the Union of Burma.

Appeal allowed.

N. C. Sen for the appellant.

Dutt for the respondent.

U AUNG KHINE, J.—This second appeal arises out of Civil Appeal No. 5 of 1955 of the District Court of Bassein in which the judgment and decree passed in Civil Regular Suit No. 2 of 1955 of the Subdivisional Court of Bassein was confirmed.

The suit was for a declaration that the alleged marriage of the appellant Ramadhar Keot with Budraji, a minor daughter of the respondent Ratipal Ahir is null and void, illegal and invalid and also for the recovery of possession or custody of the said Budraji. Budraji went away with the appellant Ramadhar Keot on 16th May 1954 while she was residing in the house of her father Ratipal Ahir. Claiming that Budraji was then a minor, a report was made to the police and acting on the information of the father, the police managed to trace Budraji and she was restored to the custody of her parents. However, about a month later the girl together with her father was summoned to the police station and there, it is alleged that the police handed over the girl to the appellant.

A direct complaint was made in the Court of the District Magistrate, Bassein, by the respondent Ratipal Ahir charging the appellant and his brother under section 363 read with section 114 of the Penal Code for the alleged kidnapping of Budraji. The

case was tried by the 1st Additional Magistrate, Bassein in Criminal Regular Trial No. 52 of 1954. After hearing of the prosecution witnesses, the two accused were discharged.

In the meantime, the appellant Ramadhar Keot and the girl Budraji went through a form of marriage ceremony at the former's residence. Attempts were made by the respondent Ratipal Ahir to have the criminal case against the appellant reopened, but these attempts came to naught. This suit was filed in the Subdivisional Court after the discharge of the appellant in the Criminal Court. It will be seen that the suit is in two parts, *viz.*, (1) for a declaration that the alleged marriage between the appellant and the girl Budraji is null and void, illegal and invalid; and (2) for recovery of possession or custody of the girl Budraji. In both the two lower Courts it was strenuously contended that as the main relief sought for in the suit being the custody of the girl, the trial Court had no jurisdiction. This contention, however, did not find favour in the two lower Courts. The District Court relied on the following two cases :—

(i) *Ma Shwe Ge* v. *Maung Shwe Pan* (1), and
(ii) *Mathuraban* v. *D. Tewary* (2)

to hold that the provision of a special remedy in section 25 of the Guardians and Wards Act does not bar the jurisdiction of the Courts to entertain a regular suit for the custody of the minor. A proper study of these two cases would show that section 25 of the Guardians and Wards Act had no application in those cases. Section 25 (*1*) of that Act reads :

"If a ward leaves or is removed from the custody of the guardian of his person, the Court, if it is of the opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return,

(1) 2 L.B.R. 140. (2) 10 B.L.T. 186.

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and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian."

The circumstances under which the girl Budraji left her parents have been outlined above and it is clear from the wording of the section that the remedy must be by way of application under the Guardians and Wards Act and not by filing a regular suit. The decision in *Shadeo* v. *Mahraji and another* (1) supports this view. I would therefore hold that so far as the claim for the custody of the girl Budraji is concerned the respondent Ratipal Ahir is out of Court.

We are now confined only to the question as to whether the alleged marriage between the appellant Ramadhar Keot and the girl Budraji is null and void. Three grounds were furnished by the respondent why it should be so held, namely (1) the marriage was without the consent of the guardian; (2) absence of essential ceremony to validate the marriage; and (3) the parties belong to different castes.

It is pleaded on behalf of the appellant (1) that in this case as the marriage ceremony had been duly solemnised, the principle of *factum valet* should be applied; (2) that the rule requiring the consent of the guardian for the purpose of marriage is simply a directory rule and as the marriage was duly performed and solemnised, it must be held to be valid. I am in entire agreement with the lower appellate Court that before the principle of *factum valet* can be applied in this case, it is essential to find out whether the marriage rites performed by the parties are such as to establish a legal and valid marriage.

(1) I.L.R. 9 Ran. 569.

There are two essential ceremonies, *viz.*, (1) invocation before the sacred fire and (2) *Saptapadi* that is the taking of seven steps by the bridegroom and the bride jointly before the sacred fire. The evidence adduced by the appellant shows that a marriage ceremony was held in his house where some 50 to 60 persons were invited. At the ceremony a Hindu Priest presided and it is quite apparent that the guests knew that they were invited to be present at a marriage ceremony. The details of the ceremony are lacking but it is clear that *homa* at least was performed. *Homa* is an invocation before the sacred fire. The witnesses were not questioned as to whether *saptapadi* was performed and it is stressed on behalf of the respondent that in the absence of such evidence it must be held that the marriage was in fact incomplete. The learned counsel for the appellant however contended that there is sufficient evidence to prove in the case that some of the ceremonies usually observed on the occasion of a marriage had been performed and therefore a presumption must be drawn that they were duly completed unless the contrary is shown.

Ramrut Upatara (PW 1) stated in his evidence that he had been to the house of the appellant to perform a *homa* ceremony but that was the ceremony not connected with the marriage of the appellant with the girl Budraji. The appellant stated that his marriage was attended by a Hindu Priest by the name of Ramrut Pande. Ramrut Upatara (PW 1) may not be the same person who presided at the marriage ceremony of the appellant with Budraji. Ramrut Upatara may have been speaking of a distinct occasion other than that of the occasion in which the marriage was performed. The lower appellate Court

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appears to hold that Ramrut Upatara (PW 1) is the same man as Ramrut Pande as mentioned by the appellant. Thus there is lack of evidence on the part of the respondent to show that *Saptapadi* ceremony was not performed. In support of his claim that presumption as to the completion of marriage ceremonies should be drawn where evidence shows that some of the ceremonies usually observed on the occasion of a marriage was performed, the learned Advocate for the appellant cited the case of *Bai Diwali* v. *Moti Karson* (1). Thus it will be seen that the contention put forward by the learned Advocate for the appellant is fully supported by authority.

In *Mulchand Kuber* v. *Bhudhia and another* (2) it was held that in the absence of evidence to show fraud or force, the marriage must be recognised and it cannot be declared invalid merely on the ground that the girl was not given away in marriage with the free consent of the father.

Taking these two points together the doctrine of *factum valet* must be applied in this case in favour of the appellant.

Yet there remains another question to be solved that is whether the inter-caste marriage in this case can be recognised as legal. Appellant Ramadhar Keot belongs to the lower class of Sudra and the girl belongs to a higher caste. *Prathiloma* unions have hitherto been not recognised as legal; *prathiloma* union is a union between males of lower caste and females of higher caste. However, in the Indian Legislature in the year 1949 the Hindu Marriages Validity Act was passed (Act No. 21). Section 3 of the Act provided that notwithstanding anything contained in any other law for the time being in

(1) 22 Bom. 509. (2) 22 Bom. 812.

force or in any text, rule or interpretation of Hindu Law or any custom or usage, no marriage between the Hindus shall be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belong to different religions, castes, sub-castes or sects. In 1955 the Indian Legislature passed another Act known as the Hindu Marriage Act. It repealed Act No. 21 of 1949. Act No. 21 of 1949 was repealed in the sense that it was merged more or less into the Hindu Marriage Act of 1955. Section 5 of the Act says that a marriage may be solemnised between any two Hindus provided certain conditions are fulfilled. Therefore it is apparent that inter-caste marriages are no longer discountenanced by law amongst the Hindus. Section 13 of the Burma Laws Act provides that where in any suit or other proceeding in Burma it is necessary for the Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Hindu law shall apply in cases where the parties are Hindus. Therefore it is argued on behalf of the appellant that the point at issue in this case shall be governed by Hindu law that is now extant. He has in his argument made it succinctly clear that (1) no marriage between Hindus which has been solemnised according to Hindu law shall be defeated by reason only of the absence of consent given by a guardian; (2) if the parties go through certain marriage ceremonies a presumption shall arise that the marriage ceremony has been duly performed; and (3) inter-caste marriages are now recognised amongst the Hindus.

Regarding the last proposition of the three, the learned Advocate for the respondent contended that the Constitution of the Union of Burma is against the adoption of the provisions of the Indian Acts passed

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after the transfer of power in 1948. Shelter is taken under Article 226 (1) of the Constitution which reads :

"Subject to this Constitution and to the extent to which they are not inconsistent therewith, the existing laws shall continue to be in force until the same or any of them shall have been repealed or amended by a competent legislature or other competent authority."

On the strength of the provisions contained in this Article, it is claimed that the new provisions in the Hindu Law as passed in the Indian Legislature should not be recognised. This, to my mind, is an incorrect view to take. After all, Indian Legislature is a competent authority to pass Acts relating to Hindu Law and it is to Indian Legislature that all Hindus must look for their protection in respect of cases coming within the sphere of their personal law.

Furthermore, "existing law" as mentioned in Article 226 (1), in my opinion, cannot apply to personal law. This will be clear if we refer to the meaning of "existing law" shown in Article 222 (1) of the Constitution. "Existing law" means any law, Ordinance, Order, bye-law, rule or regulation passed or made before the commencement of the Constitution by any legislature, authority or person in any territories included within the Union of Burma being a legislature, authority or person having power to make such law, Ordinance, Order, bye-law, rule or regulation. It nowhere says that they cover the personal law of any person residing within the Union of Burma. Therefore I would hold that the objection fails and that the Hindu law with regard to marriage as is now observed by the Hindus shall apply to the cases of Hindu marriages contracted in the Union of Burma.

For these reasons I am of the view that the marriage between the appellant Ramadhar Keot and

Budraji, the daughter of the respondent Ratipal Ahir, is legal and valid.

In the result the appeal is allowed and the judgment and the decree of the lower appellate Court set aside and the suit of the plaintiff-respondent Ratipal Ahir is dismissed with costs throughout.

APPELLATE CIVIL.

Before U Chan Tun Aung, C.J.

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Nov. 27.

TAN KONG BU AND TWO OTHERS (APPELLANTS)

v.

BUILDING ENGINEER, RANGOON MUNICIPAL CORPORATION AND ONE (RESPONDENTS).*

City of Rangoon Municipal Act, s. 157 Specific Relief Act, s. 56 (d)—Suit for a declaration and an injunction against the Rangoon Corporation, without first resorting to statutory provisions for appeals whether maintainable—Civil Procedure Code, s. 9.

Appellants filed a suit against the Rangoon Corporation for a declaration that an eviction notice is null and void and for an injunction restraining the Building Engineer from interfering with the possession of a Building.

Held : That statutory functions that are assigned to and performable by a Municipal body such as the Corporation of Rangoon, are regarded as the same as *public duties* assigned to and performable by any departments of the Government, and s. 56 (*d*) Specific Relief Act, operates as a bar to such suit against the Corporation of Rangoon.

Mohamed Ebrahim v. *Municipal Corporation of Rangoon and two others*, Civil Regular Suits Nos. 74 and 75 of 1952 (H.C.); *Patel Panachand Girdhar and others* v. *The Ahmedabad Municipality*, I.L.R. 22 Bom. 230 ; *U Hee Yar and one* v. *U Ba Gyan and others*, Civil First Appeal No. 87 of 1954 (H.C.), followed.

Held also : Where there are statutory modes of redressing the grievances complained of by the appellants, by way of preferring appeals from one authority to another, and ultimately even to the President of the Union, the appellant's suit is not maintainable, being impliedly barred by the provisions of the Rangoon Municipal Act.

Therefore Appellants' suit is barred under s. 9 of the Civil Procedure Code read with s. 56 (*l*) of the Specific Relief Act.

Sasala Raminaidu v. *Secretary of State, represented by Collector of Vizagapatam*, A.I.R. (1942) Mad. 127 ; *Bhaishankar Nanabhai* v. *The Municipal Corporation of Bombay and others*, 31 Bom. p. 604 ; *Liquidators, Janda Rubber Work, Ltd.* v. *Collector of Bombay and another*, A.I.R. (1950) (East) Punj. 204 ; *Sultan Ali* v. *Nur Hussain*, A.I.R. (1949) Lah. 131 ; *Raleigh Investment Co. Ltd.* v. *Governor-General in Council*, 74 I.A. 50 ; *Chunilal Thakordas Modi* v. *The Surat City Municipality*, 27 Bom. 403, referred to.

Appeal dismissed.

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* Civil 1st Appeal No. 48 of 1957 against the decree of the 3rd Judge, City Civil Court of Rangoon (U THEIN HAN), in Civil Regular Suit No. 26 of 1957, dated the 18th July 1957.

Dr. Ba Maw and *Khin Maung*, Advocates, for the appellants.

C. C. Khoo, Advocate, for the respondent No. 1.

Dutt, Advocate, for the respondent No. 2.

U CHAN TUN AUNG, C.J.—This appeal arises from the judgment and decree of the 3rd Judge of the Rangoon City Civil Court, dismissing the appellants' suit for a declaration that the eviction notice (Exhibit A) served upon them by the Rangoon Corporation is null and void, and for issue of an injunction, restraining the first-respondent from interfering with the possession of the building No. 12 Crisp Street of which the appellants are the tenants.

The second-respondent is the owner of the premises in question, and it is alleged that she had, by misrepresenting the first-respondent, that the building in question was in a dangerous condition caused the first-respondent to serve the notice of eviction for purpose of demolition of the said building. It appears that the proposed eviction and demolition thereafter of the said building was pursued under the statutory power given to the Rangoon Corporation under section 157 of the City of Rangoon Municipal Act. The first-respondent does not dispute having sent the notice in question. He avers that the building in question is in a ruinous and dangerous condition—a finding which was arrived at by certain members of the Roads and Buildings Standing Committee of the Municipal Corporation of Rangoon and himself, on one of the inspection tours, and that with a view to prevent any danger to person and property from the collapse of the said building, the Roads and Buildings Standing Committee

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had condemned the said building, and decided to have the same demolished. This decision of the Roads and Buildings Standing Committee was said to have been confirmed by the Municipal Corporation of the City of Rangoon. He further denies that he was approached in the matter by the second-respondent, and/or acting *mala fide*. In my view, although the relief sought for by the appellants is directed against the first-respondent, who after all was merely trying to give effect to the decision of the Municipality of the City of Rangoon, yet their main objective is to nullify the carrying out of statutory duties imposed upon the Municipal authorities by the City of Rangoon Municipal Act.

Certain objections were taken at the trial at the instance of the first-respondent, and the point that fell for determination as a preliminary issue was whether the suit as such was maintainable as against the first-respondent by reason of the fact that the appellants' relief for declaration and injunction being in effect directed towards nullifying the order of the Corporation of Rangoon. It is also clear that the second-respondent has been added as a *pro forma* defendant in suit. On the authority of a Single Judge of this Court (U Aung Tha Gyaw, J.) in *Mohamed Ebrahim* v. *Municipal Corporation of Rangoon and two others*, (Civil Regular Suits Nos. 74 and 75 of 1952), the learned 3rd Judge of the City Civil Court came to the conclusion that section 56 (*d*) of the Specific Relief Act operates as a bar to such a suit as against the Corporation of Rangoon and he relied upon the following observations in the said case :—

"Moreover, under section 56 of the Specific Relief Act an injunction cannot be granted to interfere with the public duties of a department of Government which, in a sense, the

Municipal Corporation of the City of Rangoon is. It is not the practice of the Court to interfere with the Corporate bodies unless they are manifestly abusing their power."

A reference to the said judgment indicates that the above observation stemmed from a decision of the Bombay High Court in *Patel Panachand Girdhar and others* v. *The Ahmedabad Municipality* (1) wherein it was held that if a Municipality was found to have adopted the proper procedure in the matter of removal of buildings, no Court could review its decision on the ground that in the opinion of the Court, the removal of the building was not likely to promote public convenience; and that the Legislature having confided to the Municipality, the duty of deciding what measures within its legal powers were for the public convenience, the exercise of such discretion by the Municipality was not subject to control by a Court. Again, this decision of U Aung Tha Gyaw, J. was found to have been approved and followed by a Bench (U Aung Khine and U Ba Thoung, JJ.) in Civil First Appeal No. 87 of 1954 (*U Hee Yar and one* v. *U Ba Gyan and others*). In so far as I can comprehend, the basic reason for holding that section 56 (*d*) of the Specific Relief Act debars filing of suit of present nature is, that statutory functions that are assigned to and performable by a Municipal Body such as the Corporation of Rangoon, are regarded as the same as *public duties* assigned to and performable by any departments of the Government. As a single Judge, I am afraid, I am bound by the decision of the Bench. However, strenuous effort was made by the learned Counsel appearing for the appellants to challenge the correctness of the Lower Court's order by contending that the ruling relied upon merely indicates that the bar of suit is

(1) I.L.R. 22 Bom. 230.

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operative subject to the absence of *mala fide* on the part of a department of the Government or a Municipal Corporation, and that the question whether there was *mala fide* or not being a question of fact which can only be decided after adducing evidence, the dismissal of their suit at the preliminary stage was clearly unjustified. I regret I cannot accept this contention. It appears, that at the trial the appellants were not quite sure of their ground, whether relief they were seeking should be directed against the first-respondent, the Buildings Engineer as such, or as against the Rangoon Corporation itself. *Primâ facie*, the appellants are fully aware that the Buildings Engineer of a statutory body, such as the Corporation of Rangoon is, for purposes of section 157 of the City of Rangoon Municipal Act, nowhere authorised to act independently, but he only carries out the orders of the Corporation. The appellants' awareness is clearly borne out by the fact that the very notice of ejectment served upon them (*vide* Exhibit A) shows that it emanated from the Rangoon Corporation. Moreover, their plaint nowhere asserts that the Corporation of Rangoon was abusing its powers in directing the eviction of the appellants and demolition of the building in question. Thus, this contention is clearly unsustainable even assuming that section 56 (*d*) of the Specific Relief Act is inapplicable to the facts and circumstances obtaining in the case.

It has been urged on behalf of the first-respondent that by reason of special right of appeal expressly given to the appellants, against any of the decisions made by the Buildings Engineer in the Rules to be found in Chapter XXI, Schedule I of the City of Rangoon Municipal Act, made pursuant to section 235, clause (*v*), and also in view of section 56, clause (i) of the Specific Relief Act, read with section 9 of

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the Civil Procedure Code, the appellants' suit for injunction is not maintainable. There is considerable merit in this contention. It seems quite clear that even assuming that the decision to evict and demolish the suit building in question is a decision arrived at by the Buildings Engineer independently—a fact not conceded by the Buildings Engineer himself, as could be seen from his written-statement—an appeal or revision against his order lies to the Commissioner. (See Rule 3). Under Rule 4, even if there has been delegation of functions by the Commissioner to the Buildings Engineer, matters under section 157 of the City of Rangoon Municipal Act are exercised and performed under the control of the Commissioner and subject to his revision. Again, under Rule 1, if the Commissioner in exercise of such powers and the performance of such duties entrusted to him, makes decision thereunder, an appeal against his decision lies to the Corporation and to the Standing Committee of the Corporation. And, under section 223 of the Rangoon Municipal Act, the President of the Union has authority to suspend the execution of any order of the Corporation of Rangoon or any officer subordinate thereto or prohibit the doing of any act which is about to be done by the Corporation in pursuance of, or under cover of the Municipal Act, if in his opinion such order or act is in excess of the powers conferred by law or the execution of the resolution or order for the doing of the act is likely to lead to a serious breach of peace or to cause serious injury or annoyance to the public or to any class or body of persons. In view of these special remedies available, or in other words, where there are statutory modes of redressing the grievances complained of by the appellants, by way of preferring appeals from one authority to another, and ultimately even to the

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President of the Union, I am of the view that the appellants' suit in its present form is clearly not maintainable, being impliedly barred by the provisions of the Rangoon Municipal Act. There are numerous authorities on this point to be found under section 9 of the Civil Procedure Code. I would only refer to a few of them. In *Sasala Raminaidu* v. *Secretary of State, represented by Collector of Vizagapatam* (1), it was held that where a right has been given by a special statute and a remedy is provided for the violation of that right in the very statute, ordinarily, the person whose right is violated is bound to follow the remedy so provided in the said Act. It appears that in the said case under section 23 of the Madras Hereditary Village Offices Act, a village headman who has been dismissed has a right of appeal to the District Collector and further appeal to the Board of Revenue. The appellant filed a suit for a declaration that the dismissal order was *ultra vires* on the ground that the rules had not been followed and it was held that the suit was not maintainable. Similarly, in *Bhaishankar Nanabhai* v. *The Municipal Corporation of Bombay and others* (2), the plaintiff filed a suit under section 33 of the City of Bombay Municipal Act against its Commissioner for a declaration that the election of Councillors by Justices was invalid and that by virtue of section 34 (*1*) of the Bombay Municipal Act, he be declared to be re-elected. It was held that no such suit lay as the right of claim by the plaintiff was the creation of the Municipal Act, that the special remedy having been provided by the Act, namely, the delegation under section 33 to the Chief Judge of the Small Cause Court and that therefore the jurisdiction of the Civil Court was excepted by implication. In a recent ruling of East

(1) A.I.R. (1942) Mad. 127. (2) 31 Bom. p. 604.

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Punjab in *Liquidators, Janda Rubber Works Ltd.* v. *Collector of Bombay and another* (1), it was held that where a statute confers powers and a citizen has a complaint or has suffered an injury because of the exercise of powers conferred by that statute, the remedy for the citizen is to proceed in accordance with the provisions of that statute and seek under it the particular remedy prescribed by it. In such cases, the jurisdiction of the ordinary civil court is barred. That proposition of law is based upon the decision in *Sultan Ali* v. *Nur Hussain* (2), which is a Full Bench case of Lahore; and also the Privy Council case of *Raleigh Investment Co. Ltd.* v. *Governor-General in Council* (3).

Now, as regards the applicability of section 56 (i) of the Specific Relief Act, the question whether an equally efficacious relief can certainly be obtained by any other usual mode of proceeding within the meaning of that provision is a question of fact that should be determined in each case on its own circumstances and no hard and fast rule can be laid down in the matter. However, in the present case, the appellants are seeking relief in the nature of a mandatory injunction; and the granting of such a remedy is undoubtedly discretionary (*vide* section 55 of the Specific Relief Act) and further, such granting is circumscribed by the provisions of section 56 of the said Act. Therefore, I must hold that in view of the special mode of redress available to the appellants under the Rangoon Municipal Act, and by reason of the fact that the granting of such relief being purely discretionary, and that the discretion is to be exercised with extreme caution and only in very clear cases, the appellants' suit is barred under

(1) A.I.R. (1950) (East) Punj. 214. (2) A.I.R. (1949) Lah. 131.
(3) 74 I.A. 50.

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section 9 of the Civil Procedure Code, read with section 56 (i) of the Specific Relief Act. [See *Chunilal Thakordas Modi* v. *The Surat City Municipality* (1)]. There is thus no merit in this appeal and it is therefore dismissed with costs. Advocate's fee is fixed at 10 gold mohurs for the first-respondent and 5 gold mohurs for the second-respondent.

(1) 27 Bom. 403.

APPELLATE CRIMINAL.

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

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THE UNION OF BURMA (APPELLANT)

v.

Feb. 17.

AH HLA (*a*) MAUNG HLA AND TWO OTHERS (RESPONDENTS).*

Confessions—Retracted Confessions—Ss. 3 and 30, Evidence Act—S. 396, Penal Code.

Held: That the following is a Synthesis of all the rules regarding the use of confessions (retracted or otherwise).

(i) as against the maker, and

(ii) as against co-accused.

1. So far as they relate to retracted confessions:

(i) A confession judicially recorded is not to be regarded as involuntarily made merely because it is retracted at the trial;

(ii) As against the maker of a confession a retracted confession can form the basis of conviction—

(*a*) If the Court believes to be true and

(*b*) If it is found to have been made voluntarily;

(iii) Though an uncorroborated retracted confession can sustain a conviction, the ordinary rule of prudence is that some kind of corroboration is necessary unless the circumstances are exceptional.

2. So far as they appertain to the use of a confession (retracted or otherwise) against a co-accused:

(i) A confession retracted or not may be taken into consideration not only as against the person making it, but also against the person jointly tried with the confessing accused for the same offence.

(ii) The confession of a co-accused as such is not sufficient to sustain the conviction of other accused.

(iii) If there is other relevant evidence as against the accused person, the confession of a co-accused may be taken into consideration along with the other evidence as lending assurance to it. In other words, the evidence against the co-accused excluding the confession must first be assessed to find out whether if believed it can be a basis of conviction. If it can be believed independently of the confession, then it is not necessary to call the confession in aid. Only in cases where a Court is not prepared to act on the other evidence as it stands, then in such an event,

* Criminal appeal No. 248 of 1957.

Appeal from the order of the 2nd Special Judge of Pyapon, dated the 28th day of March 1957 passed in his Criminal Regular Trial No. 7 of 1956.

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the Court may call in aid the confession of a co-accused and use it to lend assurance to the other evidence.

The above synthesis of law as regards the use of confession against co-accused is subject to the rule in *The King* v. *Nga Myo*, (1938) R.L.R. 190 (F.B.) wherein it is laid down that in cases where it has been established by extraneous evidence or matters appearing on the record that the confessing accused are not acting in collusion with one another, the cumulative effect of their evidence may suffice to remove the *primâ facie* presumption of an individual unworthiness of credit of their statements; and if that be the case, the Court can legitimately record a conviction acting upon their confessions alone if it is convinced of their truth.

Nga Po Kauk and one v. ***King-Emperor***, I.L.R. 4. Ran. 45; ***The King*** v. ***Hla Maung***, (1946) R.L.R. 102; ***Muthuswami*** v. ***The State of Madras***, (1954) A.I.R. (S.C.) 4; ***Puran*** v. ***The State of Punjab***, (1953) A.I.R. (S.C.) 459; ***Nga Po Hlaing and others*** v. ***Emperor***, A.I.R. (1933) Ran. 320; ***Nga Pyaung and others*** v. ***Emperor***, A.I.R. (1934) Ran. 30; ***Maung Nyi and one*** v. ***The Union of Burma***, (1952) B.L.R. 282 (H.C.); ***Maung Mya and another*** v. ***The King***, (1938) R.L.R. 30; ***Ah Phut and others*** v. ***The King***, (1940) R.L.R. 104; ***Khaw Taw and one*** v. ***The Union of Burma***, (1948) B.L.R. 310 (H.C.); ***Ba Pe and one*** v. ***The Union of Burma***, (1950) B.L.R. 178 (H.C.); ***Kashmira Singh*** v. ***The State of Madhya Pradesh***, A.I.R. (1952) (S.C.) 159; ***Bhuboni Sahu*** v. ***The King***, 76 I.A. 147; *The King* v. *Nga Myo*, (1938) R.L.R. 190 (F.B.), referred to.

Per, U SAN MAUNG, J.—*Held*: That the confession of a co-accused is not evidence in the ordinary sense of the term as defined in s. 3 and cannot therefore be made the foundation of a conviction; that it can only be used in support of other evidence; that the proper way is, first, to marshall the evidence against the accused person excluding the confession of his co-accused altogether from consideration and see whether, if it is believed a conviction could be based on it; that if it is so capable of belief independently of the confession of the co-accused, it would be unnecessary to call the confession in aid, but that there may be cases where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction, and that it is in such a case that a Judge may call in aid the confession of the co-accused and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.

Maung Mya and another v. ***The King***, (1938) R.L.R. 30; ***Emperor*** v. ***Lalit Mohan Chuckerbutty and others***, (1911) I.L.R. 38 Cal. 559, referred to.

Khaw Taw and one v. ***The Union of Burma***, (1948) B.L.R. 310 (H.C.); ***Kashmira Singh*** v. ***The State of Madhya Pradesh***, A.I.R. (1952) (S.C.) 159, re-affirmed.

Attorney-General and *Yan Aung* for the appellant.

Ba Shun for the respondent.

U CHAN TUN AUNG, C.J.—This is an appeal filed by the Government against the order of the 2nd

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U CHAN TUN AUNG, C.J.

Special Judge, Pyapon, acquitting the three respondents of the charge of dacoity with murder, an offence under section 396 of the Penal Code. The learned Attorney-General has submitted *in limine* that, in preferring this appeal, he is concerned not so much with the acquittal of the respondents as with the learned trial Judge's wrong enunciation of law regarding retracted confessions. Five accused were sent up for trial, and two of them, *viz.*, Aung Than and Maung Kyi were convicted. The present three respondents were, however, acquitted. The facts leading to their trial are fairly simple and they may be briefly stated.

About the last *lazan* of *Wazo* (*i.e.* 8th to 20th July 1956) Maung Thein Maung, (the deceased) along with his uncle U Ba Ohn (the deceased) left Wakema in a sampan loaded with broken rice for sale in riverine villages. Maung Chit Maung (PW 1) and Maung Thwe Khin (PW 5) who are brothers of deceased Thein Maung felt rather anxious when, after a lapse of time, Thein Maung and U Ba Ohn failed to come back with their sampan. Thus, to find out where they had gone, and also to vend sundry goods, these two set out in another sampan. On 19th July 1956, they reached Bogale and there they saw a sampan belonging to their two deceased relatives being rowed by two strangers come towards them. Chit Maung then hailed out wishing to know who those two persons were. The sampan, however, did not stop, but rowed away rapidly. Suspecting that there had been foul play, Chit Maung reported the matter to the Bogale police. The Police Station Officer, U Ba Lu accompanied by one U Aung Ze Ya set out in search of the sampan and the two strangers. They finally found the sampan without any occupants near Kakuyan jetty at Bogale. On enquiry from

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Maung Hla Maung (PW 2) they were told that the two persons from the said sampan had gone towards the shore. A search was made in the sampan and they found a note-book [Exhibit (c)] and other exhibits. On examining the note-book, they found the signatures of two persons, Aung Than and Maung Kyi. Later on, the body of U Ba Ohn was found floating in the river, but Thein Maung's dead body could not be traced. Aung Than and Maung Kyi were eventually traced and arrested and on the strength of their statements, the three respondents were also arrested.

All the five accused gave confessions, and their confessional records were duly admitted in evidence in the trial Court. Later, all of them denied the charges and retracted their confessions. They asserted that the confessions were not given voluntarily, but were in consequence of ill-treatment by the police in whose custody they were kept for some time. The learned trial Judge convicted Maung Aung Than and Maung Kyi, and acquitted the three respondents. The learned trial Judge, however, examined U Soe Myint (PW 9), the Magistrate who recorded the confessions of the accused and he was satisfied that the confessions were given voluntarily and that the allegation of ill-treatment was an afterthought; but in acquitting the respondents he observes :

> "There is no other link to connect them with the present case save their confessions, which in turn having been retracted is of not much value under the circumstances. Hence for these reasons these accused persons would as such be entitled to the benefit of doubt and to an acquittal as such."

It is as against the above observations the learned Attorney-General has directed his objection; and he

contends that they embody a wrong enunciation of the law regarding retracted confessions. He submits that the learned trial Judge's dictum amounts to this: A retracted confession has no value, and it should not be taken into consideration in assessing the guilt of the accused concerned. This submission merits our attention, inasmuch as there has been, not infrequently, a good deal of misconception regarding the use of a retracted confession and the weight to be given to it in assessing the guilt or otherwise of an accused person. We therefore propose to resurvey the law in that regard for the guidance of the Courts.

Numerous Indian decisions have propounded in varying terms the rules as to the use of a retracted confession against the maker; but we do not propose to burden our proceedings with a detailed discussion of them. We would only confine ourselves to the decisions of the late High Court of Judicature at Rangoon, and the post-independence decisions of our High Court and Supreme Court and also to some recent decisions of the Supreme Court of India. Since the present appeal raises a question concerning retracted confession not only as to its use against the maker, but also as against co-accused, we would also re-assess the law in that regard in the light of section 30 of the Evidence Act.

Now, regarding the use of retracted confessions as against the maker (the confessor) the well-known ruling *Nga Po Kauk and one* v. *King-Emperor* (1) lays down that an accused person can lawfully be convicted on his own confession even if that confession has been retracted, if a court is satisfied of its truth, and that such confession whether retracted or not, can be taken into consideration as against a co-accused. But an accused person cannot be convicted

(1) I.L.R. 4. Ran. 45.

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solely on the confession or confessions of his co-accused, unsupported by other evidence. This decision is by a single Judge (Carr, J.) and makes references to some old rulings of the Chief Court of Lower Burma.

Again, in *The King* v. *Hla Maung* (1), a Bench of the late High Court (Ba U and Wright, JJ.) while re-affirming the rule enunciated in *Nga Po Kauk*'s *case* (2) and discussing the law as to the admissibility of a confession in evidence under section 24 of the Evidence Act, lays down that a retracted confession is admissible in evidence and that there is no law which prevents conviction being based upon an uncorroborated retracted confession; but added that ordinary rule of prudence is that some kind of corroboration is required, unless the circumstances are exceptional. It also emphasised that the weight to be attached to such a retracted confession depended upon the circumstances of each case.

Now, turning to recent decisions of the Supreme Court of India, in *Muthuswami* v. *The State of Madras* (3), the principle enunciated by our Courts is re-affirmed in the following terms:—

"No hard and fast rule can be laid down regarding the necessity of corroboration in the case of a retracted confession in order to base a conviction thereon. But apart from the general rule of prudence where the circumstances of a particular case cast a suspicion on the genuineness of the confession it would be sufficient to require corroboration of the retracted confession."

[See also *Puran* v. *The State of Punjab* (4), *Nga Po Hlaing and others* v. *Emperor* (5), *Nga Pyaung and others* v. *Emperor* (6) and *Maung Nyi and one* v. *The Union of Burma.* (7)].

(1) (1946) R.L.R. 102.
(2) I.L.R. 4 Ran. 45.
(3) (1954), A.I.R. (S.C.) 4.
(4) (1953) A.I.R. (S.C.) 459
(5) A.I.R. (1933) Ran. 320.
(6) A.I.R. (1934) Ran. 30.
(7) (1952) B.L.R. 282 (H.C.).

Now, as regards the value of confession of a co-accused we would only make reference to the decisions given by our Court both before and after independence. *Maung Mya and another v. The King* (1) lays down that the Court may take the confession of a co-accused into consideration under section 30 of the Evidence Act against the other co-accused and that the purpose of section 30 of the Evidence Act is that the Court can only treat the confession as lending assurance to other evidence against a co-accused.

While in *Ah Phut and others v. The King* (2) a Bench of the late High Court (Mya Bu and Dunkley, JJ.) re-affirming the dictum in *Maung Mya's case* (1) enunciates that the confession of a co-accused can only be treated as lending assurance to other evidence against the co-accused and that it cannot be relied upon as the main evidence.

Again, in a post-independence ruling *Khaw Taw and one v. The Union of Burma* (3), the above principles are accepted and in re-affirmation thereof, a Bench of this Court (U Thein Maung, C.J. and U San Maung, J.) in *Ba Pe and one v. The Union of Burma* (4) lays down that the confession of a co-accused is not on the same footing as testimony of an approver which is substantive evidence in the sense that conviction can be based on it alone under section 133 of the Evidence Act. It is also laid down that if there is no *primâ facie* evidence against an accused person, the confession of a co-accused should be excluded. However, a note of caution was struck that a co-accused's confession cannot be used to fill up the gap in the evidence of the prosecution. The same principle is propounded by the Supreme Court

(1) (1938) R.L.R. 30.
(2) (1940) R.L R. 104
(3) (1948) B.L.R. 310 (H.C.).
(4) (1950) B.L R. 178 (H.C.).

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of India in *Kashmira Singh v. The State of Madhya Pradesh* (1). [See also *Bhuboni Sahu v. The King* (2)].

Thus, from survey of the above decisions and also in the light of some recent Indian decisions to which we do not propose to make specific references, lest we will be only burdening the records, we may observe that though varying forms of expression have been used in the enunciation of the rules regarding the use of confession (retracted or otherwise) (i) as against the maker and (ii) as against co-accused, yet a synthesis of all such rules demonstrates as follows :

I. *So far as they relate to retracted confession* :—

(i) A confession judicially recorded is not to be regarded as involuntarily made merely because it is retracted at the trial ;

(ii) as against the maker of a confession, a retracted confession can form the basis of conviction (*a*) if the Court believes it to be true and (*b*) if it is found to have been made voluntarily ;

(iii) though an uncorroborated retracted confession can sustain a conviction, the ordinary rule of prudence is that some kind of corroboration is necessary unless the circumstances are exceptional.

II. *So far as they appertain to the use of a confession (retracted or otherwise) against a co-accused:*—

(i) A confession retracted or not may be taken into consideration not only as against the person making it, but also

(1) A.I.R. (1952) (S.C.) 159. (2) 76 I.A. 147.

against the person jointly tried with the confessing accused for the same offence.

(ii) The confession of a co-accused as such is not sufficient to sustain the conviction of other accused.

(iii) If there is other relevant evidence as against the accused person, the confession of a co-accused may be taken into consideration along with the other evidence as lending assurance to it. In other words, the evidence against the co-accused excluding the confession must first be assessed to find out whether if believed it can be a basis of conviction. If it can be believed independently of the confession, then it is not necessary to call the confession in aid. Only in cases where a Court is not prepared to act on the other evidence as it stands, then in such an event, the Court may call in aid the confession of a co-accused and use it to lend assurance to the other evidence.

However, the above synthesis of law as regards the use of confession against co-accused should be subject to what is laid down in the Full Bench case of *The King v. Nga Myo* (1) that in cases where it has been established by extraneous evidence or matters appearing on the record that the confessing accused are not acting in collusion with one another, the cumulative effect of their evidence may be sufficient to remove the *primâ facie* presumption of individual

(1) (1938) R.L.R. 19[illegible] (F.B.).

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unworthiness of credit of their statements; and if that be the case, the Court can legitimately record a conviction acting upon their confessions alone if it is convinced of their truth. The facts and circumstances under which a *primâ facie* presumption of individual unworthiness can be removed are concretely set out at pages 207 to 209 of the report and we do not propose to reiterate them.

Now, in the light of the rules set out above on assessment of the evidence adduced by the prosecution as against the three respondents, though we may at once say in full accord with the trial Judge, that the confessions of the respective respondents were made voluntarily yet, we are unable to persuade ourselves to come to a conclusion that the confessions are true or, in other words, the facts and circumstances set out in the confessions are true so as to justify us acting upon them and sustain a conviction of the respondents. It is with respect to this second question the learned trial Judge has not addressed his mind in rendering his judgment in so far as the respondents are concerned. This function of ascertaining the truth or otherwise of the confessions is as important as the ascertaining of their voluntariness. The learned trial Judge has no doubt been satisfied with their voluntariness, but he has failed to address his mind to the 2nd condition as to whether the facts narrated in the confessions are true. We have now carefully gone through the three confessions given by the respondents, and we may at once note that though in each confession the co-accused are implicated, yet the factual and circumstantial matters narrated in them do not have any corroborative value whatsoever. Besides being briefly recorded, the confessions contain broad statements about respondents and the two other accused meeting together, their partaking of some drinks and then

hitting upon a plan to commit dacoity. Then, they boarded a sampan and after tying up the two occupants one of them was taken away in a *Bauktu* while the other was left in the sampan. Next, they heard somebody jumping off the sampan. The *Bauktu* with respondents also rowed up to the sampan and when the respondents met together accused Aung Than was said to have handed over some money to Ah Hla (1st respondent) and the remaining three Maung Kyi, Maung Maung and Kyaw Shein (2nd and 3rd respondents) rowed away in two *bauktus* thus leaving Aung Than and Ah Hla (1st respondent) in the sampan. In view of their retraction, we have carefully examined whether the internal matters disclosed in their respective confessions received any corroboration whatsoever, and we find none on the record. Again, in the light of the law enunciated in *The King* v. *Nga Myo* (1) we try to ascertain whether the confessions given by the respective accused are under such circumstances as to exclude the possibility of their collaboration before they gave their confessions. We find none whatsoever. They were all arrested the same day and put together in the Bogale Lockup. They were also taken to the Magistrate to record the confessions the same day, at the same hour, *viz.* on the 23rd July 1956, and all the five confessions were recorded one after another by the Magistrate the same day.

Under these circumstances we are not at all convinced with the truth of the factual and circumstantial matters disclosed in the confessions of the respondents. Neither are we satisfied, notwithstanding their implication of co-accused, the recording of confessions having been done under circumstances as stated above, that there was no opportunity for

(1) (1938)R.L,R. 199 (F.B.)

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collaboration among the accused before they gave their confessions. Thus, we cannot place any reliance on the confessions to justify the conviction of the respondents. Therefore, this appeal must fail and it is hereby dismissed.

U SAN MAUNG, J.— I am entirely in agreement with the judgment of the learned Chief Justice, which I have had the opportunity of reading. However, owing to the importance of the question of law involved in the case I would like to add a few remarks, especially as I was one of the Judges who had decided the case of *Khaw Taw and one* v. *The Union of Burma* (1).

In the case of *Nga Po Kauk and one* v. *King-Emperor* (2) the learned Judge (Carr, J.) laid down three propositions of law relating to a confession: (1) An accused person can be lawfully convicted on his own confession even if that confession has been retracted, if the Court is satisfied of its truth. (2) The confession of an accused person, whether retracted or not, can be taken into consideration as against his co-accused. (3) But an accused person cannot be convicted solely on the confession or confessions of his co-accused unsupported by other evidence. I have nothing to quarrel with the first and second of these propositions. However, the third is apt to be misleading if it is construed that the confession or confessions of his co-accused can be regarded as substantive evidence against an accused person, so that the accused can be convicted if such confession or confessions are corroborated in some material particulars. To hold that this could be done would be to equate the confession of a co-accused with the testimony of an approver.

(1) (1948) B.L.R. 310 (H.C.) (2) I.L.R. 4 Ran. 45.

The law in this respect has been correctly laid down in the dictum of Mackney, J., in *Maung Mya and another* v. *The King* (1), where the learned Judge following the decision of the Calcutta High Court in *Emperor* v. *Lalit Mohan Chuckerbutty and others* (2) observed that all that section 30 of the Evidence Act provides is that the Court may take the confession of a co-accused person into consideration against the other co-accused and that the Court can only treat a confession as lending assurance to other evidence against a co-accused. However, since it appeared to us in the case of *Khaw Taw and one* v. *The Union of Burma* (3) that Magistrates were still finding it difficult to interpret section 30 of the Evidence Act in spite of the above dictum in *Maung Mya and another* v. *The King* (1) we ventured to lay down the following propositions of law: (1) The confession of a co-accused is not substantive evidence in the sense that a conviction on that alone can stand. (2) If there is other relevant evidence tending to prove the guilt of the accused, the confession of a co-accused may be taken into consideration along with the said evidence as lending assurance to it. (3) If there is no other evidence, or if the other evidence in the case is insufficient to establish a *primâ facie* case against the accused, the confession must be excluded altogether and cannot be taken into consideration. (4) The confession cannot be added to supplement evidence *otherwise insufficient* and in no case can it be used to fill gaps in the prosecution evidence.

Nearly a decade has passed since the above propositions of law had been laid down by us and the time is ripe for their re-appraisal. Four years after *Khaw Taw*'s case was decided the Supreme

(1) (1938) R.L.R. 30. (2) (1911) I.L.R. 38 Cal. 559.
(3) (1948) B.L.R. 310 (H.C.).

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Court of India held in *Kashmira Singh* v. *The State of Madhya Pradesh* (1) that the confession of a co-accused is not evidence in the ordinary sense of the term as defined in section 3 and cannot therefore be made the foundation of a conviction, that it can only be used in support of other evidence, that the proper way is, first, to marshall the evidence against the accused person excluding the confession of his co-accused altogether from consideration and see whether, if it is believed a conviction could be based on it, that if it is so capable of belief independently of the confession of the co-accused, it would be unnecessary to call the confession in aid, but that there may be cases where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction, and that it is in such a case that a Judge may call in aid the confession of the co-accused and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept. With due respect I am of the opinion that the Supreme Court of India had in the above case laid down a working formula which is entirely in accord with the four propositions laid down by us in *Khaw Taw*'s case.

Not a single decision of recent years has been brought to our notice to detract from the propositions laid down in *Khaw Taw and one* v. *The Union of Burma* (2) and *Kashmira Singh* v. *The State of Madhya Pradesh* (1), so that I have no hesitation now whatsoever in re-affirming what I have ventured to express in *Khaw Taw*'s case.

For the reasons given by the learned Chief Justice I consider that the present appeal fails and must be dismissed.

(1) A.I.R. (1952) (S.C.) 159. (2) (1948) B.L.R. 310 (H.C.).

CRIMINAL REVISION.

Before U Chan Tun Aung, Chief Justice.

THE UNION OF BURMA (APPLICANT)

v.

MR. BERNARD AND FOUR OTHERS (RESPONDENTS).*

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Feb. ..

Suppression of Corruption Act—S. 4 (1) (d)/4 (2)—Read with s. 120-B, Penal Code—S. 497, Criminal Procedure Code as amended by Code of Criminal Procedure (Temporary Provisions) Act, 1953 (Act No. 56 of 1953)—Paragraph 497, Courts Manual.

Held: The instructions contained in the Courts Manual have no statutory force. The provisions of the Courts Manual relating to the re-arrest of the accused enlarged on bail after framing of the charge in non-bailable cases are mainly administrative and executive measures aimed at preventing the accused from absconding and safeguarding against any unlawful activities, which will endanger the life not only of the trial Judge and Prosecuting Officers engaged in the trial of the case, but also of the public concerned.

U Chit (Government Advocate) for the applicant.

H. M. Fisher, Advocate, for Nos. 1, 3 and 5.

N. R. Burjorjee, Advocate, for No. 4.

Kyaw Myint, Barrister-at-Law, Advocate, for No. 2.

U CHAN TUN AUNG, C.J.—Against the five respondents, charges have been framed for the offence under section 4 *(1)(d)/4(2)* of the Suppression of Corruption Act, read with section 120-B of the Penal Code by the Special Judge (2) (SIAB & BSIA), Rangoon. The trial records which are two in numbers, namely, Criminal Regular Trial No. 35 of

* Criminal Revision No. 138 (B) of 1957. Application to cancel the bail granted by the Special Judge (2) (SIAB & BSIA) Rangoon, by his order dated 16th September, 1957 in Criminal Regular Trial No. 34/1953 and 35/1953.

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1953 and 34 of 1953 show that they were sent up for trial on 5th October 1953. The Trial Judge enlarged the respondents on bail under the then provisions of section 497 of the Code of Criminal Procedure, as amended by the Code of Criminal Procedure (Temporary Provisions) Act, 1953 (Act No. 56 of 1953). Since then, the trial has continued in the somewhat dilatory manner, culminating in charges being framed against the accused on 6th September, 1957 in Criminal Regular Trial No. 35 of 1953 and on 25th July, 1955 in Criminal Regular Trial No. 34 of 1953. The Government Advocate then moved the Trial Judge, mainly relying upon paragraph 497 of the Courts Manual to cancel the bail-bond and place the respondents in custody. The application was made verbally, and he gave no special reason for the cancellation of the bail. The application was rejected with these words:— "Evidently, the discretion given to the Court under paragraph 497, Courts Manual is to be exercised according to the circumstances of each particular case, and in the present case no special reasons have been brought to the notice of the Court and in consequence, the accused are allowed to stand trial on bail."

The learned Government Advocate, who has now pursued this revision before me, has to concede that under the law then in force, the Trial Judge was fully justified in allowing the bail when the accused appeared before him. What he now complains is that after the framing of the charges, the Trial Judge should have at least obeyed the instructions contained in paragraph 497 of the Courts Manual, and put all the respondents into custody; although he agrees that such instructions have no statutory force. I fail to see why this Court, in exercise of its revisional

powers, should set aside the order passed by the Trial Judge. It is clear that the provisions of the Courts Manual relating to the re-arrest of the accused enlarged on bail after framing of the charge in non-bailable cases are mainly administrative and executive measures aimed at preventing the accused from absconding and safeguarding against any unlawful activities which will endanger the life, not only of the Trial Judge and Prosecuting Officers engaged in the trial of the case, but also of the public concerned. Thus, in police cases, the accused is made to report to the Court Prosecuting Officer at 10·30 a.m. and the Court Prosecuting Officer is to search the accused and place him before the Magistrate, when the Magistrate or Judge decides to sentence the accused to a term of imprisonment. The Magistrate or Judge is also instructed before passing judgment to inform the Court Prosecuting Officer to have the accused arrested, searched and placed in the dock. The Judge or Magistrate has further discretionary power to exclude the public or issue such orders forbidding any person from bringing into the Court room or building any fire-arm, knife, lathi or other dangerous weapons, or even give orders to search persons, entering the Court room or building. (*Vide* paragraph 50 of the Courts Manual). These are all precautionary measures which can be taken by a Judge or Magistrate to ensure safety for all concerned. It will thus be seen that the aforesaid measures are only discretionary measures to be exercised by a Judge having regard to the aforesaid conditions. The question how far and to what extent the Judge should have regard to these instructions is a matter, which is left to his discretion.

In the present case, the learned Government Advocate has frankly conceded before me that he

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has no special reason whatsoever for the cancellation of the bail-bond and for placing the respondents in custody; but he says he mainly relies upon the instructions contained in the Courts Manual. Under the then law available, bail being allowable, and the Judge having exercised his own discretion in not cancelling the bail-bond and replacing the respondents into custody, I fail to see how the Special Judge can be said to have acted illegally. This application is therefore dismissed.

A few more words. The trial of the respondents has been very dilatory and its termination is not yet fathomable. I do hope that the Trial Judge will try and dispose of it as expeditiously as possible and will also reconsider the enhancement of the bail-bond in view of the fact that the offence with which the respondents are being charged has now been expressly made non-bailable by the Code of Criminal Procedure (Temporary Provisions) Act, (Act No. XLIII of 1957).

CRIMINAL REVISION·

Before U Po On, J.

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Jan. 14.

THE UNION OF BURMA (APPLICANT)

v.

SAW THEIN (RESPONDENT).*

Unlawful Associations Act—S. 17 (1)—Criminal Procedure Code—S. 562 (1).

Whether a person convicted under s. 17 (*1*) of the Unlawful Associations Act can get the benefit of s. 562 (*1*) of the Criminal Procedure Code?

Held: That sub-s. (*1*) of old s. 562 of the Criminal Procedure Code is confined to offences under the Penal Code.

That the new s. 562 applies to an offender convicted of an offence punishable with imprisonment of not more than a certain period and the sub-section covers the case of conviction under any law.

Chhotan Hasmat Ali v. *Emperor*, Vol. LIX, I.L.R. Bom. Series p. 514, relied on.

A.I.R. (1926) Lah. 317; A I.R. (1935) Bom. 402 (F.B.), referred to.

Min Han (Government Advocate) for the applicant.

Ba Maung, Advocate, for the respondent.

U PO ON, J.—This revision case arises out of the recommendation made by the District Magistrate, Bassein, to impose a legal sentence of imprisonment on Saw Thein, as he is of opinion that no benefit under section 562 (1), Criminal Procedure Code can be given to an offender who gets a conviction under section 17 of the Unlawful Associations Act.

No doubt section 17 of the Unlawful Associations Act says:

"17. (1) Whoever is a member of an unlawful association, or takes part in meetings of any such association, or contributes or receives or solicits any contribution for the

* Criminal Revision No. 123 (B) of 1957. Review of the order of the District Magistrate of Bassein, dated the 10th day of May 1957 passed in Criminal Revision No. 128 of 1957, arising out of Criminal Regular Trial No. 59 of 1956 of the Court of 4th Additional Magistrate, Bassein.

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U PO ON, J.

purpose of any such association, or in any way assists the operations of any such association, shall be punished with imprisonment for a term 'which shall not be less than two years and more than three years and shall also be liable to fine.'

(2) Whoever manages or assists in the management of an unlawful association, or promotes or assists in promoting a meeting of any such association, or of any members thereof as such members, shall be punished with imprisonment for a term which shall not be less than three years and more than five years and shall also be liable to fine."

What the section contemplates is that the imprisonment, if awarded, to an offender shall not be less than the period specified in it. It does not, however, indicate that no benefit under sub-section (1) of section 562 of the Criminal Procedure Code can be given to an offender who gets convicted under section 17 of the Unlawful Associations Act.

This leads me to consider whether sub-section (1) of section 562 of the Code of Criminal Procedure can come in, if the offender is convicted of an offence not under the Penal Code but under any other law. The old section is apparently confined to offences under the Penal Code. This restriction has now been removed by the new section 562 which is substituted by section 157 of the Code of Criminal Procedure (Amendment) Act, 1923 (Act XVIII of 1923). The present section is expressed in general language. It clearly applies to an offender convicted of an offence punishable with imprisonment of not more than a certain period and this sub-section, unlike sub-section (1A), which only applies in the case of convictions under particular sections of the Penal Code, covers the case of conviction under any law. The words "convicted of an offence" in the section itself support my view, because "offence" is defined in the section 4 (1) (*o*)

of the Code of Criminal Procedure as " any act or omission made punishable by any law for the time being in force." I am further fortified by the ruling in *Chhotan Hasmat Ali* v. *Emperor* (1). Please also see A.I.R. (1926) Lahore 317; A.I.R. (1935) Bombay 402 (F.B.).

So, the order of 4th Additional Magistrate, Bassein, releasing Soe Thein, on probation of good conduct under section 562 (1), Criminal Procedure Code is not illegal.

Let the proceedings be returned to the District Magistrate, Bassein, with these remarks.

(1) Vol. LIX, I.L.R. Bom. Series, p. 514.

ORIGINAL CRIMINAL.

Before U Chan Tun Aung, Chief Justice and U Ba Thoung, J.

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Aug. 13.

THE UNION OF BURMA (APPLICANT)

v.

U HTOON PE (RESPONDENT).*

***Contempt of High Court**—Press Registration Act—Special Enquiry Committee, constituted under the Resolution of the Government of the Union of Burma—Enquiry Committees Act, 1950 (Act IV of 1950), s. 5—Enquiry by the Committee, a judicial proceeding—Scurrilous attack on the integrity of the Judges composing the Committee—S. 2 (l), Contempt of Courts Act, 1952—Ss. 148, 223 of the Constitution—S. 30, Union Judiciary Act—Article 215, Constitution of India—S. 13 (3), Burma Laws Act—Applicability of Common Law principle in Burma—Meaning of the word "Court."*

The Government of the Union of Burma appointed a Committee of Enquiry consisting of three Judges of the High Court to inquire into the death of a young student Harry Tan in the shooting incident during a students' demonstration on 22nd March 1956.

The Respondent in his Daily newspaper "Htoon Daily" published an article with the caption :

ဓာတ်ခွင်းသားပစ်မှုစုံစမ်းစေရး မစ္စရှင် ဓာတ်ခွင်းသားများ လွှဲချန်လွတ် မခံနိုင်။

The article, *ex-facie*, constitutes a scurrilous attack on the integrity of the Judges composing the Committee.

The Respondent was called upon to show cause why he should not be punished for contempt as against the High Court.

The Respondent contended :

(I) That though the Committee of Enquiry was constituted by three Hon'ble Judges of the High Court, it was not a Court or a Division or a Bench of the High Court and therefore not a Court of Record within the meaning of s. 148 of the Constitution.

(II) That the power in contempt enjoyed by the late High Court of Judicature was based on the King's prerogative and the contempt against any Judge was contempt against the King and with the gaining of independence, all prerogative rights ceased under the proviso to s. 233 of the Constitution, and therefore the High Court has no more *inherent power* to commit for contempt.

Held : That the High Courts in India and Burma even before their independence have power to punish summarily contempt of court as against

* Criminal Misc. application No. 46 of 1956. Proceeding under the Contempt of Courts Act.

them or their Judges as Superior Courts of Record and that such powers have been exercised in their inherent jurisdiction, by virtue of their being Courts of Record established by letters Patent, following the Common Law of England and not in exercise of prerogatives on behalf of the King as King's Judges.

S. 30 of the Union Judiciary Act clearly perpetuates the inherent powers of the previous High Court to deal in contempt in the present High Court as a Court of Record.

In re Surendranath Banerjea, 10 I.A. p. 171 at p. 179 ; *Ebrahim Mamoojee Parekh* v. *King-Emperor*, 4 Ran. p. 257 ; *In the matter of Tusharkanti Ghosh*, 63 Cal. I.L.R. (1936) p. 217 ; *In re Murli Manohar Prasad*, I.L.R. (1929) Pat. Series, Vol. 8, p. 323 ; *Mohamad Yusuf* v. *Imtiaz Ahmad Khan*, I.L.R. (1939) Luck. Vol. 14, p. 492 ; *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Khagendra Nath Das Gupta*, A.I.R. (1930) Cal. 759 ; *In re Abdul Hasan Jauhar and another*, I.L.R. (1926) 48 All. p. 711 ; *Sukhdev Singh Sodhi* v. *The Chief Justice and Judges of the Pepsu High Court*, (1954) Supreme Court Report, Vol. 5, p. 454 ; *In re Abdool and Mahtab*, (1867), 8 Weekly Reporter, Cr. 32 at 33 ; Halsburys Laws of England, 3rd Edition, Vol. 9, referred to.

Held also : That the English Common law principles in so far as they have not been expressly abrogated by Statute or otherwise are still being followed by our Courts. The Common law of England was and is still applied as the law envisaged in s. 13 (*3*) of the Burma Laws Act, *i.e.* law which is according to justice, equity and good conscience.

Dr. Tha Mya v. *Ma Khin Pu*, (1940) R.L.R. p. 807; *The Tajmahal Stationery Mart* v. *K. E. Mohamed Ebrahim V.S. Aliar & Co.*, (1950) B.L.R. (H.C.) p. 41, referred to.

Held further : That when any act is done or writing published which is to bring a Judge of the Court into contempt or lower his authority, that publication or act amounts to contempt of Court.

In contempt proceedings, the word " Court " also means Judges who constitute the court, and who are entrusted with the portion of jurisdiction defined and marked out by the Acts of Parliament.

An attack made on a Judge not in his individual private capacity, but in his authority as a Judge entrusted with the function of administering justice constitutes not only scandalising the Judge himself, but also scandalising the Courts of Justice in contempt of Court.

The King v. *Almon*, 97 E.R. p. 94 (Wilmot) ; *Reg* v. *Gray*, (1900) I.K.B. 32, referred to.

Mya Thein (Assistant Attorney-General) for the applicant.

Dr. E Maung, Barrister-at-Law, for the respondent.

U CHAN TUN AUNG, C.J.—The respondent in this case is the printer, publisher and editor of a Burmese

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U CHAN TUN AUNG, C.J.

Daily newspaper registered under the Press Registration Act called "Htoon Daily." He has been called upon to show cause why the publication which appeared in the "Htoon Daily" dated the 5th June, 1956 under the heading in Burmese: "ကျောင်းသားပစ်မှုစုံစမ်းရေးမစ်ရှင် ကျောင်းသားများ လွှဲချိန်ခွင်လက်မခံနိုင်" should not be considered to constitute contempt of High Court and why he should not be punished in accordance with law. The article in question refers to the enquiry proceeding of the Special Enquiry Committee which was then in the course of its enquiry into the cause of the death of a young student named Harry Tan in the shooting incident that took place before the "Bamakhit" Press on the 22nd March, 1956 during a demonstration by the students over the leakage of Seventh Standard Examination question papers.

The Government of the Union of Burma has by its resolution in the Ministry of Home Affairs, dated the 23rd March 1956 appointed a Committee of Enquiry consisting of three Judges of the High Court, namely, (1) The Hon'ble Justice U San Maung, Chairman, (2) The Hon'ble Justice U Aung Tha Gyaw, (3) The Hon'ble *Mahathiri Thudama* Justice U Thoung Sein to enquire into the matter and in particular, the Committee was entrusted with certain specific duties of finding out *inter alia* the origin of the students' riot, its cause; and also to determine whether in the circumstances under which the demonstration had taken place, the shooting was necessary in order to disperse the student crowd, and if found not necessary, to determine the person or persons responsible for ordering the shooting. The Committee was also empowered to make suitable recommendations and give advice, as to what steps should be taken to prevent the recurrence of similar

incidents in future, *vide* the *Burma Gazette Supplement*, dated 7th April, 1956, Extract of the Resolution of the Home Department, Proceeding No. 156-ဝဝ-56. The Enquiry Committee being one constituted under the Resolution of the Government of the Union of Burma clearly comes within the scope of Enquiry Committees Act, 1950 (Act IV of 1950) section 5 whereof says that the proceedings before the Committee are deemed to be in the nature of judicial proceedings. The Act further empowers the Committee to enforce the attendance of witnesses, to compel the production of documents and material things, to issue commission for examination of witnesses in the same manner as is provided in the case of the Courts by the Code of Civil Procedure. Any appearance or act required to be made or done by any person before the Committee other than the appearance of witnesses can be made or done on behalf of such person by a lawyer or other person authorised in writing by such person.

Therefore, entrusted as it was with the duty of giving certain findings as to the person or persons responsible for ordering the shooting on the testimony of witnesses examined by it and also upon material placed before it, and also entrusted as it was with the function of recommending what course of action should or should not be taken to prevent the recurrence of such incident in future, we do not entertain the slightest doubt that the function so entrusted was in the nature of judicial function. The article in question is quite short, and in order to appreciate the full force and significance of contumelious

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attacks made on the Committee of Enquiry, we reproduce it, hereunder, in full :

ကျောင်းသား ပစ်မှုစုံစမ်းရေးမစ်ရှင် ကျောင်းသားများအပေါ်သွဲ့ချ၍ လက်မခံနိုင်

ပါဝင်ဆောင်ရွက်ရန်။

ကျောင်းသားရဲဘော် ဟယ်ရီတန်ကျဆုံးပြီးနောက်၊ မ၊က၊သ။တ၊က၊သ၊ နှင့် ရ၊က၊သ၊တို့ပူးပေါင်း၍ ကျောင်းသားအရေးတော်ပုံကော်မီတီကို (၂၅-၃-၅၈) နေ့၌ ဖွဲ့စည်းခဲ့လေသည်။ ၎င်းအရေးတော်ပုံကော်မီတီကို ပိုမိုကျယ်ပြန့်စေရန်အတွက် ကျောင်းသား မိတ်ဖွဲ့များကိုယ်တိုင် ပါဝင်သော ကျောင်းသားအရေးတော်ပုံတိုးချဲ့ ဗဟိုကော်မီတီကို ထပ်မံဖွဲ့စည်းပြီး—

၁။ ကျောင်းသား သေနတ်ပစ်မှုစုံစမ်းရေးကော်မရှင်တွင် ကျောင်းသားနှင့်ပြည်သူ့ကိုယ်စားလှယ်များပါဝင်ခွင့်ပြုရန်။

၂။ တာဝန်ရှိသော ပြည်ထဲရေးဝန်ကြီး မိုလင်မောင်ကလေး၊ ကျောင်းသားများသေနတ်ဖြင့်ပစ်သတ်ရန်အမိန့်ပေးသော တရားသူကြီး ပါစိမြမောင်နှင့် သေနတ်နှင့် ပစ်သတ်သော ပုလိပ်များအား ချက်ချင်းဖမ်းဆီးအရေးယူရန်။

၃။ မေခွန်းပုစ္ဆာ ပေါက်ကြားမှုသည် ပညာရေးဌာန၏ တာဝန်သာဖြစ်၍၊ တာဝန်ရှိသော ပညာရေးဌာနအရာရှိများ အပြစ်ပေး အရေးယူရန် စသည်တို့ကို တောင်းဆိုခဲ့ကြောင်း။

အပြစ်ပုံချကာ။

ဤကဲ့သို့တောင်းဆိုခဲ့သော်လည်း အစိုးရအာဏာပိုင်တို့သည်၊ ၎င်းတို့ကြိုးဆွဲရာ ကမည် ရုပ်သေးသေနတ်ပစ်မှု စုံစမ်းရေးကော်မရှင် တရပ်ကို ဇွတ်အတင်းဖွဲ့စည်း၍ စုံစမ်းစစ်ဆေးစေခဲ့၍ ၎င်းတို့အလိုကျ ဖွဲ့စည်းခဲ့သည့် ရုပ်သေးကော်မရှင်၏ ရှေ့မှောက်၌ တရားသူကြီး ပါစိမြမောင်နှင့် ၎င်း၏မတရားပုလိပ်သက်သေများသည် ကျောင်းသားများထိန်းသိမ်း မနိုင်လောက်အောင်ဆူပူကြသဖြင့် သေနတ်နှင့်ပစ်ရသည်ဟု မိမိတို့၏ အပြစ်ကင်းမဲ့လေဟန် ကျောင်းသားထုအား အပြစ်ပုံချကာ လိမ်ညာ၍ ထွက်ဆိုခဲ့ပေသည်။

ဗမာ့ခေတ်မဝင်။

သို့သော်တရားသူကြီး ပါစိမြမောင်နှင့် လက်ထောက်ပုလိပ်မင်းကြီးတို့၏ အစီရင်ခံစာ၌ ကျောင်းသားများ ဗမာ့ခေတ်သတင်းစာတိုက် ခြေဝင်း

အတွင်းသို့ဝင်သည်ဟု မပါရှိခြင်း၊ တရားဝန်ကြီးများကိုယ်တိုင် ဗမာ့ခေတ် သတင်းစာတိုက်သို့ သွားရောက်စစ်ဆေးသည့်အခါတွင် ကျောင်းသားများ ဗမာ့ခေတ်ခြံဝင်းအတွင်းသို့ ဝင်ရောက်သည့် သက်သေအမှတ်အသားများမတွေ့ခြင်း။ ဗမာ့ခေတ်သတင်းစာတိုက် ဝင်းထဲက်ပင် လွယ်ကူစွာဝင်ရောက်နိုင်သည့် ပညာမင်းကြီးရုံးကိုပင် ဝင်ရောက်ရန် မကြိုးစားခြင်း။

စသည့်အချက်အလက်တို့ကို ထောက်ရှုကြည့်ခြင်းအားဖြင့် ဗမာ့ခေတ် သတင်းစာတိုက်အတွင်းသို့ ဝင်ရောက်ရန်မကြိုးစားသည်မှာ ထင်ရှားကြောင်း၊ တဖန် ကော်မရှင် ရှေ့မှောက်၌ ထွက်ဆိုခဲ့ကြသော သက်သေအားလုံးတို့၏ ထွက်ဆိုချက်များကို ချုံ့၍လေ့လာလိုက်ပါက ကျောင်းသားများသည် ဗမာ့ခေတ်သတင်းစာ ဝင်းခြံအတွင်းသို့ ဝင်ရောက်ရန် မကြိုးစားကြောင်း ထင်ရှားကြောင်း။

ဤသို့ကျောင်းသားများက ဗမာ့ခေတ် သတင်းစာတိုက် အတွင်းသို့ ဇွတ်အတင်းဝင်ရောက်မှုမရှိခြင်းသည်သေနတ်နှင့်ပစ်ခတ်၍ ထိန်းသိမ်းရမည့် အခြေအနေမဟုတ်ကြောင်း ထင်ရှားပေသည်။ ၎င်းတို့၏ ထစ်ခနဲရှိ သေနတ်နှင့်ပစ်ခတ်သည့် ဖက်ဆစ် အလေ့အထသာ ဖြစ်ကြောင်း သိသာလှသည်ဟုဆိုကြောင်း။

မတရားထွက်ဆိုခြင်းသာ။

ယခုအခါတွင် သေနတ်ပစ်မှု စုံစမ်းရေးကော်မရှင်မှ အစီရင်ခံစာကို တင်သွင်းပေတော့မည်။ ဤအစီရင်ခံစာသည်၊ ငါတို့တောင်းဆိုထားသည့်တောင်းဆိုချက်များကို အထောက်အကူပေးမည့် အစီရင်ခံစာ ဖြစ်လိမ့်မည် မဟုတ်ကြောင်း စုံစမ်းစစ်ဆေးရေး ကော်မရှင်တွင် ကျောင်းသားကိုယ်စားလှယ်နှင့် ကျောင်းသားမိဘ ကိုယ်စားလှယ်များပါဝင်ခွင့်မပေးခြင်း။ ၎င်းတို့၏ မတရားသက်သေများ ထွက်ဆိုချက်များကိုသာအသားပေးနေခြင်းစသည်တို့ကရှင်းလင်းစေပေသည်။

ထို့ကြောင့် မကြာမီအတွင်း ၎င်းတို့၏တရားရုံးတော်မှ၊ မတရားတဘက်သတ်ချမှတ်တော့မည့် အယုတ်တမာစီရင်ချက်အား ငါတို့ကျောင်းသားထုက ခါးခါးသီးသီးရှုံ့ချကန့်ကွက်တိုက်ဖျက်ရန်အတွက် ယခုကတည်းကအသင့်ပြင်ထားသင့်ပေသည်။

ကော်မိတီဖွဲ့စည်းကား။

ယနေ့အရေးတော်ပုံ ကော်မိတီများ အချို့နယ်တို့တွင် ယခုထက်တိုင် မပေါ်ပေါက်ဖင့်နွဲ့နေသည့် အရေးတော်ပုံကော်မိတီကို အမြန်ဆုံး ဖေါ်ထုတ်ခြင်းသည်သာလျှင်ကျောင်းသားနှင့်မိဘများပူးတွဲရေးသည်လည်း ပေါ်ပေါက်လာပြီး၊ ကျောင်းသားလုပ်ငန်းအရပ်ရပ်အတွက်

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အခြေအနေကောင်းမွန်လာပေမည်။ ထို့ကြောင့် ၎င်းတို့၏ မတရား တဘက်သတ်ချမှတ်တော့မည့် အယုတ်တမာစီရင်ချက်အား အရေး ဆိုဝုန်းကနဲလှည့်နေ လေအောင်းမြင်းဇောင်းပါ၊ကျွန် ကျောင်းသား မှန်တအိမ်တယောက်ထွက်ပြီး ကန့်ကွက်တိုက်ဖျက်နိုင်ရန် အတွက် ယခုကတည်းက အနှယ်နယ်အရပ်ရပ် နေရာအနှံ့အပြားတွင် စည်း လုံးခိုင်မာသည့် အရေးတော်ပုံကော်မတီများကို လက်မနွေးတန်း အလျင်အမြန်ဖွဲ့စည်းကြရန် ကျောင်းသားအရေးတော်ပုံ တိုးချဲ့ကော် မိတီကအရေးတကြီးညွှန်ကြားလိုက်ကြောင်း။

A mere perusal of the article will at once disclose that it constitutes a gross and scandalous attack on the integrity of the Judges, composing the said Committee. One will also notice that the article refers to the Committee as a Court (တရားရုံးတော်) and the Judges sitting on it as the Hon'ble Judges of the High Court (တရားဝန်ကြီးများ). With reference to the Report which the Enquiry Committee was to submit to the Government, the article described it as a judgment (စီရင်ချက်) and gave a derisive epithet *wicked*, *loathsome* or *despicable* (အယုတ်တမာစီရင်ချက်). The article then exhorts the students to keep themselves ready to rise up all in body and protest against that "judgment". The Committee, the article says, was not one desired by the students as it was not composed of student representatives; but one with members who will dance to the tune of the executive, or in other words, mere puppets of the executive. Even to a casual reader, the scandalous and mischievous remarks concerning the three Judges composing the Committee would be apparent. The remark that the Hon'ble Judges are mere puppets who would dance to the tune of the executive and that the report they were about to submit is wicked and loathsome, clearly amounts to contempt, because their authority and integrity has been attacked in relation to their function in a judicial proceeding.

Dr. U E Maung, who appears on behalf of the respondent in showing cause first of all contended that contempt action did not lie against his client under section 2 (*l*) of the Contempt of Courts Act, inasmuch as the Student's Shooting Enquiry Commission was neither a Court, nor a Court subordinate to the High Court. However, we pointed out to him that there was an error in the first notice issued to his client in that the reference was made to the Enquiry Commission as a Court, and that in reality, the contempt for which his client had been called to answer was contempt as against the High Court. An amended notice was directed to be issued to the respondent and Dr. U E Maung accepted it on behalf of his client. Dr. U E Maung now maintains that though the Commission was constituted by three Hon'ble Judges of the High Court, yet it was not functioning as a division or a Bench of the High Court and that therefore, it was not a Court of Record within the meaning of section 148 of the Constitution. Concerning the article itself, he however frankly concedes that he could offer no excuse for the respondent, that in his opinion, it was most indiscreet, wholly uncalled for, and written in a very bad taste and that he would ordinarily have advised tendering of unqualified apology, had no legal principle which is being raised been involved. As we have already observed above, there can be no doubt that the article quoted *in extenso* above with the passages on which we have laid special emphasis read as a whole, does contain most scurrilous attacks upon the three Judges sitting on the Commission.

The learned Assistant Attorney-General appearing on behalf of the Government however contends that the contempt action now taken being with reference to the attack made upon the three Judges of the

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High Court, the High Court has, as a Court of Record, inherent summary powers to commit the contemner quite apart from the Contempt of Courts Act. To this, Dr. U E Maung countered with the submission that the power in contempt enjoyed by the late High Court of Judicature was based upon King's prerogative and the theory that the King sat in all the Courts, and that all the Judges of superior Courts were his representatives. He further contends that the contempt against any Judge was, in theory, contempt against the King himself, and it was in exercise of the King's prerogative rights the offender was committed for contempt, and that with the gaining of independence, all such prerogative rights were given a burial under the proviso to section 223 of the Constitution. Therefore, it was submitted, there was no more *inherent power* of the High Court to commit for contempt summarily. The learned Assistant Attorney-General has however referred to us section 30 of the Union Judiciary Act which declares that the jurisdiction and law to be administered in the present High Court and the respective powers of the Judges therein in relation to the administration of justice shall be the same as immediately before the commencement of the new Constitution. In other words, the learned Assistant Attorney-General submits that so far as matters relating to the administration of justice and the powers and functions of Judges of the High Court in relation to the administration of justice in the Union of Burma including the inherent power to deal with contempt are concerned, they are continued by section 30 of the Union Judiciary Act and that the very expressed declaration that the High Court and the Supreme Court are Courts of Record (*vide* section 148 of the Constitution) confers upon the

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said superior Courts of Record the power to deal with contempt of themselves. Our attention has been drawn to numerous decisions of the High Courts in India regarding the existence of inherent power of dealing with contempt as Courts of Record irrespective of the provisions of Contempt of Courts Act, 1926, and we are fully convinced that the inherent powers in contempt proceedings are assumed not in exercise of the prerogative rights of the King as King's Judges but by virtue of inherent powers born of Common Law. We also find that it is a necessary incident of a Court of Record to have jurisdiction to punish for contempt. Though Dr. U E Maung conceded Courts of Record possess inherent powers to deal with contempt cases as against themselves, yet he cannot cite any authority whatsoever in support of his submission that such proceedings were in exercise of the prerogative rights of the King. Thus, there is no room for doubt that the High Courts in India and Burma even before their independence have power to punish summarily contempt of Court as against them or their Judges as superior Courts of Record and that such powers have been exercised in their inherent jurisdiction, by virtue of their being Courts of Record established by Letters Patent, following the Common Law of England and not in exercise of prerogatives on behalf of the King as King's Judges. (See *In re. Surendranath Banerjea* (1); *Ebrahim Mamoojee Parekh* v. *King-Emperor* (2); *In the matter of Tusharkanti Ghosh* (3); *In re Murli Manohar Prasad* (4); *Mohammad Yusuf* v. *Imtiaz Ahmad Khan* (5); *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Khagendra Nath Das*

(1) 10 I.A. p. 171 at p. 179.
(2) 4 Ran. p. 257.
(3) 63 Cal. (I.L.R. 1936) p. 217.
(4) I.L.R. (1929) Pat. Series, Vol. 8, p. 323
(5) I.L.R. (1939) Luck. Vol. 14, p. 492.

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Gupta (1), *In re Abdul Hasan Jauhar and another* (2). That the Courts of Record in punishing contemner did so, not in exercise of prerogative rights of the King, as King's representatives, but by virtue of the Common Law of England which under various Charters and Letters Patent continue to be administered by the Courts of Record in India and Burma was clearly stated by Sir Barnes Peacock, one of the Lordships of the Privy Council in *In re Surendranath Banerjea* (3) in these words:

> "Such an offence is something more than mere defamation. . . . . It is an offence which by the common law of England is punishable by the High Court in a summary manner by fine or imprisonment, or both. That part of the common law of England was introduced into the Presidency towns when the late Supreme Courts were respectively established by the Charters of Justice. The High Courts in the Presidencies are Superior Courts of Record, and the offence of contempt, and the powers of the High Court for punishing it are the same there as in this country, not by virtue of the Penal Code for British India and the Code of Criminal Procedure, 1882, but by virtue of the common law of England."

In the numerous authorities we have carefully gone through, we do not find anywhere that the power of Courts of Record to deal with the offence of contempt has for its basis the prerogatives of the King. We find however that such power has been referred to as being inherent in Courts of Record by virtue of the Common Law. Even after India's attainment of independence, and even after the enactment of the new Contempt of Courts Act, (Act No. 32 of 1952) which repealed the Contempt of Courts Act of 1926, Bose, J. delivering the judgment of the Supreme Court

(1) A.I.R. (1930) Cal. 759. (2) I.L.R. (1926) 48 All. p. 711.
(3) 10 I.A. p. 171 at p. 179.

of India in *Sukhdev Singh Sodhi* v. *The Chief Justice and Judges of the Pepsu High Court* (1) said at page 456:—

"' . Contempt is a special subject and the jurisdiction is conferred by a special set of laws peculiar to courts of record.

This has long been the view in India. In 1867 Peacock, C.J. laid down the rule quite broadly in these words in *In re Abdool and Mahtab* (2);

'there can be no doubt that every court of record has the power of summarily punishing for contempt.'

It is true the same learned Judge sitting in the Privy Council in 1883 traced the origin of the power in the case of the Calcuttá, Bombay and Madras High Courts to the common law of England. (See *Surendranath Banerjea* v. *Chief Justice and Judges of the High Court of Bengal* (3). . . ."

The point for determination in the said case of *Sukhdev Singh Sodhi* v. *The Chief Justice and Judges of the Pepsu High Court* was whether the Supreme Court has any power under section 527 of the Criminal Procedure Code or under any other provision of law to transfer from a High Court a proceeding which that Court has instituted for contempt of itself to another High Court. It was held that section 527 of the Criminal Procedure Code does not apply to such a case as the power of High Court to institute proceeding for contempt of itself and punish the contemner is a special jurisdiction which is inherent in a Court of Record and that section 1 (2) of the Criminal Procedure Code excludes such special jurisdiction from its scope. The observation in the said judgment is noteworthy in that even after India's independence and even

(1 (1954), Supreme Court Report, Vol. 5, p. 454.
(2) (1867), 8 Weekly Reporter, Cr. 32 at 33.
(3) 10 I.A. p. 171 at p. 179.

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after coming into force of the new Constitution of India in 1950, wherein article 215 states that every High Court shall be a Court of Record and shall have all the powers of such a Court including the power to punish for contempt of itself, yet it accepts that, irrespective of whether section 215 makes a fresh conferral of power on the High Court or continues the inherent powers to commit the contemner, "a Court of Record" and "power to punish for contempt" had already acquired special significance before the coming into force of the Indian Constitution. The decision further goes to show that though a new section 5 has been added to the Contempt of Courts Act, 1952, yet in view of section 3 which is quite similar to old section 2 of 1926 Act, no new jurisdiction whatsoever was given, but assumes as did the old Act, the existence of the right to punish for contempt in every High Court, and also assumes the existence of a special practice and procedure inasmuch as it says that every High Court shall exercise the same jurisdiction, powers and authority "in accordance with the same procedure and practice". Regarding the provision of section 5 it says that it expands the ambit of the authority of the Courts of Record beyond what was still then considered to be possible, but that it does not confer a new jurisdiction. It merely widens the scope of an existing jurisdiction of a special kind. From this decision, it is quite clear to us that the jurisdiction in contempt exercisable by a Court of Record had no origin whatsoever in the perpetuation of King's prerogative, but it is a matter inherent and recognised throughout as part of the Common Law of England and that it is also a necessary and inalienable feature of a Court of Record. Our view in that regard has been

further reinforced by what has has been observed in Halsbury's Laws of England, 3rd Edition, Volume 9 regarding special legal consequences flowing from the division of Courts into Courts of Record and Courts not of Record. In paragraph 816, it says:

"Another manner of division is into courts of record and courts not of record. Certain courts are expressly declared by statute to be courts of record. In the case of courts not expressly declared to be courts of record, the answer to the question whether a court is a court of record seems to depend in general upon whether it has power to fine or imprison, by statute or otherwise, for contempt of itself or other substantive offences; if it has such power, it seems that it is a court of record."

Therefore, we really do not see any substance in the submission of the learned counsel for the respondent concerning the cessation of the prerogative power of the British Crown *per se* as contemplated in the proviso to section 223 of the Constitution, and we do not feel persuaded to subscribe to the view he has expressed. Moreover, if his contention were allowed to prevail, there will be no meaning whatsoever in declaring both the High Court and the Supreme Court as Courts of Record; and most astounding consequences would follow in matters of contempt affecting themselves. Section 30 of the Union Judiciary Act, in our view clearly perpetuates the inherent rights of the previous High Court to deal in contempt in the present High Court as a Court of Record.

Since proceedings in contempt before Courts of Record are held to be founded upon Common Law of England it might be argued whether before and after Burma's emergence as an independent State, the English Common Law was being followed by our Courts. That the Common Law of England was

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and is still applied as the law envisaged in section 13 (3) of the Burma Laws Act, *i.e.*, law which is according to justice, equity and good conscience is clearly laid down in *Dr. Tha Mya* v. *Ma Khin Pu* (1). So also in *The Tajmahal Stationery Mart* v. *K. E. Mohamed Ebrahim V. S. Aliar & Co* (2). The principle of English Common Law was held to be applicable in the determination of registration of trade-marks in Burma. Therefore, the Common Law principles in so far as they have not been expressly abrogated by statutes or otherwise, are still being followed in our judicial decisions.

As regards the contention that the three Hon'ble Judges sitting on the Committee do not constitute a Court or form a Bench or Division of the High Court and as such, committals for contempt for any contemptuous utterances made against them do not lie, we are afraid the learned counsel for the respondent is trying to draw too narrow a distinction between the Judge in his private capacity and the High Court itself; but he has neither addressed us, nor cited any authority concerning attacks directed against a Judge *qua* Judge even with no reference to any pending trial or judicial proceedings before him. There is ample authority for the view that when any act is done or writing published which is to bring a Judge of the Court into contempt or lower his authority, that publication or act amounts to contempt of Court. Here, the word "Court", as has been observed by Mr. Justice Wilmot in his notes of "Opinions and Judgments" and also in his undelivered judgment in *The King* v. *Almon* (3) means "Judges who constitute the Court and who are entrusted with the portion of jurisdiction defined and marked out by

(1) (1940), R.L.R. p. 807. (2) (1950) B.L.R. (H.C.) p. 41.
(3) 97 E.R. p. 94 (Wilmot).

the Common Law or Acts of Parliament". Again, in *Reg* v. *Gray* (1), Lord Russell observes :

> "Any act done or writing published calculated to bring a court or a judge of the court into contempt, or lower his authority, is a contempt of court. That is one class of contempt. Further any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the courts is a contempt of court. The former class belongs to the category which Lord Hewart characterises as scandalising a court or a Judge."

This observation of Lord Russell was quoted with approval in *In the matter of Tusharkanti Ghosh* (2). In the Calcutta case of *Tusharkanti Ghosh*, Sir Tej Bahadur Sapru for the respondent, contended *inter alia*, that the passage appearing in the impugned newspaper, *Amrita Bazar Patrika*, namely, " that the Chief Justice and Judges take a peculiar delight in hobnobbing with the Executive, with the result the judiciary is robbed of its independence which at one time attracted the admiration of the whole country", having made no reference whatsoever to any case which had been heard or pending, or in other words, being general remarks which had no direct reference to any Judge or to any pending judicial proceeding, his client could not be made constructively liable for contempt. This contention was ruled out, and the passage referred to was held to be clearly within the mischief of contempt characterised by Lord Hewart as " scandalising a court or a judge ". We also observe that Derbyshire, C.J., who delivered the leading judgment in the said case quoted the observations of Wills, J., in *Rex* v. *Davies* (3) which in fact are reiterations of what Justice Wilmot had said in *Almon*'s case as follows :

(1) (1900) 2 Q.B. 36. 40. (2) 63 Cal. (I.L.R. 1936) p. 217.

(3) (1906) 1 K.B. 32.

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"Attacks which excite in the minds of the people a general dissatisfaction with all judicial determinations . . . . and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and dangerous obstruction of justice, and in my opinion calls out for a more rapid and immediate redress than any other obstruction whatsoever. . ."

Therefore, we are unable to accept the contention put forward by the learned counsel for the respondent. An attack made on a Judge not in his individual private capacity, but in his authority as a judge entrusted with the function of administering justice constitutes not only scandalising the Judge himself, but also scandalising the Courts of Justice in contempt of Court. If a defamatory attack is made on a Judge in his individual or private capacity, it may be a case of libel so far as the Judge is concerned. It would then be open to the Judge to proceed against the person responsible in an action for defamation. If however, the publication or the article is one which interferes with the due course of justice or proper administration of justice, then the person responsible for the publication can be dealt with for contempt. The former, in our view is a wrong done to the Judge personally, while the other is a wrong done to the public. We consider that it is an injury to the public if the offending matter tends to create apprehension in the mind of the public regarding the integrity, ability or fairness of a Judge or to deter actual and prospective litigants from placing complete reliance upon Courts administering justice or if it is also likely to cause embarrassment in the mind of the Judge himself in the discharge of his duty. Now, the article before us undoubtedly to our mind is a reflection as to the ability and integrity of the Hon'ble Judges of the High Court. It certainly

has a a tendency to create an apprehension in the minds of the people as to the integrity, ability and fairness of the Judges in question in the assessment and determination of several questions referred to them, thereby undermining the very administration of justice, and that to our mind, clearly amounts to contempt of the High Court. Such being our view, we must hold that the respondent is guilty of the said offence and he is hereby directed to pay a fine of K 500 within seven days hereof, or in default to suffer two months' simple imprisonment.

U BA THOUNG, J.—I agree.

APPELLATE CIVIL.

Before U San Maung and U Ba Thoung, JJ.

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BURMA INDO-CEYLON RICE CORPORATION LIMITED (APPELLANT)

v.

THE STATE AGRICULTURAL MARKETING BOARD (RESPONDENT).*

Arbitration—Civil Procedure Code (Act V, 1908)—Sch. II, cl. 15—Legal Misconduct—Ground for setting aside an award—Meaning of—Perversity is misconduct—What is not perversity—Arbitration Act, 1944—S. 30—Award—Setting aside—Ground for—Review of awards—Limited jurisdiction of Courts.

Legal misconduct is a term which is commonly used in reference to awards and it has been described generally to mean an erroneous breach of duty on the part of arbitrator, however honest, which causes miscarriage of justice.

Misconduct is a question of fact in each case. If a material piece of evidence is tendered and rejected it may amount to misconduct entitling the party to set aside the award.

Aboobaker Latif v. *Reception Committee of the 48th Indian National Congress and another*, A.I.R. (1937) Bom. 410, referred to.

Perversity is misconduct within the meaning of cl. 15, Sch. II, C.P.C. (Act V, 1908); *Nga Tok* v. *Nga Kassim and three others*, 5 B.L.T. 55, explained.

A Court cannot set aside an award of an Umpire as perverse simply because it has formed an opinion and drawn conclusions different from those formed and drawn by the Umpire on questions of fact.

Hajee Ebrahim Kassim Cochinwalla v. *Northern Indian Oil Industries Ltd.*, A.I.R. (1951) Cal. 230, referred to.

An award cannot be set aside except on one or more of the grounds mentioned in s. 30, Arbitration Act, 1944.

The appraisement of evidence by the Arbitrator is ordinarily never a matter which the Court questions and considers. The Arbitrator is the only Judge of the quality or quantity of evidence and it will not be for the Court to take upon itself the task of being a Judge of the evidence before the Arbitrator.

The Courts have very limited jurisdiction to review awards passed by Arbitrators or Umpires. They have not the jurisdiction of a Court of Appeal while reviewing the decision of an inferior Court.

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* Civil Misc. Appeal No. 60 of 1955 from the order of the Original Side (U THEIN MAUNG) of this Court in Civil Misc. No. 93 of 1953, dated the 15th August 1955.

G. Martirosi v. *A.K.C.T. Subramanian Chettiyar*, A.I.R. (1930) Mad. 723; *Mt. Aftab Begam* v. *Haji Abdul Majid Khan*, A.I.R. (1924) All. 800; *Debi Das* v. *Keshava Deo*, A.I.R. (1945) All. 423, referred to.

C. A. Soorma, for the appellant.

Ba Shun for the respondent.

U BA THOUNG, J.—This is an appeal under section 39 of the Arbitration Act, 1944, read with section 20 of the Union Judiciary Act against the order of the learned Judge of the Original Side of this Court passed in Civil Miscellaneous No. 93 of 1953, setting aside the Award filed by the Umpire in the matter of an Arbitration referred to, by Messrs. The Burma Indo-Ceylon Rice Corporation Limited, (In Voluntary Liquidation) Rangoon, and the State Agricultural Marketing Board.

The facts giving rise to the appeal are briefly as follows:

By an agreement dated the 29th January 1947 between the Governor of Burma and the appellant The Burma Indo-Ceylon Rice Corporation Limited, the appellant Burma Indo-Ceylon Rice Corporation acted as Agent of the Governor of Burma and of the Agricultural Projects Board who were the predecessors of the respondent State Agricultural Marketing Board, for purchasing rice and rice products on the terms as set out in the said agreement. On the 25th April 1947 while the appellant was acting as the agent of the respondent for buying rice in what is known as Zone No. 22 which includes the area of the Prome Railway-line, Ganjee Palan, a cashier from the appellant Corporation's branch office at Letpadan, accompanied by a clerk and the office Jemadar, went from Letpadan to Tharrawaddy in their office truck to cash a draft and a cheque for

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Rs. 2 lakhs sent from their head office at Rangoon. The money was sent for the purchase of rice in that area on behalf of the respondent. They arrived at Letpadan at about 11 a.m. and presented the draft and the cheque at Tharrawaddy Treasury. As the Treasury Officer had to wait till about 2 p.m. for the arrival by post of the duplicate advice list, disbursement was made only at about 4 p.m. Ganjee Palan and his party after receiving Rs. 2 lakhs in cash from the treasury returned to Letpadan in their truck. After they had proceeded about 4 miles towards Letpadan, they were held up by about 10 dacoits fully armed with sten-gun, tommy-gun, revolvers and hand grenades, and the sum of two lakhs of rupees was taken away by those dacoits. A report was promptly made to the Police at Tharrawaddy and to the appellants' Head Office at Rangoon and to the Agricultural Project Board who were later succeeded by the respondent State Agricultural Marketing Board. Some of the dacoits were arrested, tried and convicted in Special Trial No. 4 of 1948 of the Fourth Special Judge, Tharrawaddy; and among those convicted was Maung Myint Than, an employee of the Tharrawaddy Treasury, who sent a message to the dacoits on the day of incident that 2 lakhs of rupees had been drawn from the Treasury. He was convicted under section 395/109, Penal Code for an abetment of dacoity and was given 10 years' rigorous imprisonment. A dispute then arose between the appellant and the respondent over the loss of this sum of two lakhs of rupees by dacoity, and it is contended by the appellant Corporation that under the terms of the agreement dated the 29th January 1947 between the parties, all risks incurred in the business of purchasing rice for the Agricultural Projects Board and all losses suffered or sustained by the appellant

Corporation in the said business were to be borne by the State Agricultural Marketing Board which succeeded the Agricultural Projects Board. On the other hand the respondent State Agricultural Marketing Board contended that it was not liable to make good the said loss of two lakhs of rupees. The parties then referred the matter to Arbitration by an agreement dated the 6th January 1951. The appellant Burma Indo-Ceylon Rice Corporation nominated Mr. P. K. Basu as its arbitrator, and the respondent State Agricultural Marketing Board nominated Mr. K. W. Foster as its arbitrator. The only matter referred to the Arbitrators was whether the loss of Rs. 2,00,000 should be borne by the Burma Indo-Ceylon Rice Corporation or by the State Agricultural Marketing Board. Before the Arbitrators, the appellant Burma Indo-Ceylon Rice Corporation contended that in view of clause 13 of the Agency Agreement dated the 29th January 1947, the said loss of two lakhs of rupees suffered by them must be borne by the respondent State Agricultural Marketing Board. Clause 13 of the Agency agreement was in the following terms:—

"It is the intention of this Agreement that the Board will accept all risks incurred in the business and will bear all losses incurred or sustained by the Company in relation to this agreement and the Board shall indemnify the Company against all suits, proceedings, claims, liabilities and demands whatsoever unless such losses or liabilities shall be occasioned or incurred by the negligence or default of the Company its servants or agents. Provided that the Board's liability for any loss shall not extend to the unrecoverable price of goods delivered by the Company its agents or servants to anyone on credit without the order, in writing, of the Board."

The respondent State Agricultural Marketing Board contended that it was not liable to make good the said loss of Rs. 2 lakhs as it incurred on account of the

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negligence on the part of the Burma Indo-Ceylon Rice Corporation. The decision on the matter in dispute therefore depends mainly on whether the loss of Rs. 2 lakhs was due to the negligence of the Burma Indo-Ceylon Rice Corporation, for if the loss was not due to their negligence, they would be entitled to be indemnified by the State Agricultural Marketing Board under clause 13 of the Agency Agreement; while on the other hand if the loss was due to their negligence, then they would not be entitled to any indemnity from the Board. On this issue the two Arbitrators could not come to a unanimous decision, as Mr. Foster, the Arbitrator nominated by the State Agricultural Marketing Board came to a finding that the loss of Rs. 2 lakhs was due to the negligence of the Burma Indo-Ceylon Rice Corporation, while Mr. P. K. Basu, the Arbitrator nominated by the Burma Indo-Ceylon Rice Corporation, came to a finding that there was no negligence on the part of the Corporation; and the result was that the matter was referred to an Umpire as provided in the Agreement for Arbitration.

In the agreement for Arbitration it is provided that the Arbitrators, if they considered it necessary, shall appoint an Umpire in accordance with the provisions of the said agreement *viz.* the agreement between the parties dated the 29th January 1947. Paragraph 21 of the said agreement reads:

"21. In the event of any question, dispute or controversy arising between the Board and the Company touching this agreement or any clause contained therein or any matter connected with this agreement the same shall be referred to the award of two arbitrators, one to be nominated by the Board and the other by the Company, or in the case of disagreement between the Arbitrators, to the award of an Umpire to be appointed by them and the decision of such Arbitrators or Umpire shall be final and conclusive and the provisions of the

Burma Arbitration Act, 1944, and of the Rules thereunder or any statutory modification thereof shall be deemed to apply to and be incorporated in the agreement."

Accordingly the Arbitrators appointed Mr. G. Horrocks, *Barrister-at-Law*, on the 28th July 1951 to be the Umpire. Mr. Horrocks, at first agreed to act as the Umpire, but subsequently he requested that his appointment may be cancelled; and the Arbitrators appointed U Paing, *Barrister-at-Law*, to be the Umpire in place of Mr. Horrocks. U Paing proceeded to hear with the argument of the Counsel for both the parties, and in the course of argument, Counsel for the State Agricultural Marketing Board raised certain legal points one of which affected the appointment and jurisdiction of U Paing as the Umpire. U Paing then stated a special case for the opinion of the High Court in Civil Miscellaneous Case No. 166 of 1952, on the following questions of law :—

1. Whether in the circumstances of the case, the appointment of Mr. G. Horrocks as Umpire was irregular and if so whether such irregularity vitiates the proceedings ?
2. Whether in the circumstances of the case, the appointment of the new Umpire in place of Mr. G. Horrocks was irregular, and if so, whether such irregularity vitiates the proceedings ?
3. Whether in the circumstances of the case, my appointment as Umpire was valid ?
4. Whether in the circumstances of the case, the absence of one of the two Arbitrators at the time the findings of the Arbitrators were communicated to the parties on 14th June 1952, is irregular and if so

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whether such irregularity vitiates the proceedings ?

The above questions of law were raised on account of the following circumstances in the case: (1) The appointment of Mr. G. Horrocks was made more than one month from the latest date of the appointment of Arbitrators and it is alleged that it had contravened the mandatory provisions of Clause 2 of the First Schedule of the Arbitration Act, 1944. (2) At the time the findings of the Arbitrators were communicated to the parties on the 14th June 1952, one of the Arbitrators Mr. Foster was absent, and it is contended that the Arbitrators must be present at every stage of the Arbitration proceedings. The learned Judge, U Aung Tha Gyaw, J., after hearing counsel for both the parties and after discussing the facts leading to the above circumstances and the case law relating to them, had, with due respect, given a well considered opinion in his order dated the 2nd day of March 1953; that (*a*) the appointment of Mr. G. Horrocks as an Umpire was not irregular; (*b*) that the appointment of U Paing in place of Mr. G. Horrocks was valid and (*c*) that the manner in which the findings of the Arbitrators were communicated to the parties on 14th June 1952 was not irregular and the proceedings thereafter before the Umpire was not vitiated thereby. On having this opinion from the High Court, the Umpire U Paing, by his award dated the 25th June 1953, decided that the loss of Rs. 2 lakhs by dacoity was not due to the negligence on the part of the appellant Burma Indo-Ceylon Rice Corporation but that it was due to information conveyed to the dacoits by Maung Myint Than, an employee of the Tharrawaddy Treasury, who was later tried and convicted in Special Trial No. 4 of 1948 of the Fourth Special Judge,

Tharrawaddy, and that the loss should be borne by the State Agricultural Marketing Board. He therefore directed the Board to pay the said sum of Rs. 2 lakhs together with costs amounting to Rs. 13,000. The award of the Umpire was filed on the Original Side of the High Court, and the respondent State Agricultural Marketing Board filed its objections to the award in Civil Miscellaneous No. 93 of 1953 of the High Court, under section 30 of the Arbitration Act. After hearing counsel for the parties in the said Civil Miscellaneous No. 93 of 1953, the learned Judge of the Original Side of the High Court (The late Mr. Justice Thein Maung) set aside the award made by the Umpire, and the present appeal is against his order setting aside the award.

The learned Judge accepted the opinion given by U Aung Tha Gyaw, J. in his order dated the 2nd day of March 1953, and held that the appointment of U Paing as Umpire was valid and that he had jurisdiction to make an award in this case; but in setting aside the award filed by the Umpire, the learned Judge held that the appellant Burma Indo-Ceylon Rice Corporation, in not making use of the Government Sub-Treasury at Letpadan, by opening a personal ledger account there and by making payments by cheques on the account at Tharrawaddy Treasury, had failed to carry out the terms provided under Clause 11 of the Agency agreement, and that its failure to carry out the terms as provided under the said clause 11, amounted to a negligence on its part; and that it had also acted negligently in sending its men to Tharrawaddy and bringing back cash amounting to Rs. 2 lakhs from the Treasury without an armed escort. The learned Judge held that the finding of the Umpire in this case that there was no negligence on the part of the Burma Indo-Ceylon

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Rice Corporation was perverse and therefore there was legal misconduct of the Umpire justifying the setting aside of his award under section 30 of the Arbitration Act. The award was accordingly set aside.

It is contended by the learned Counsel for the respondent that the Government of Burma should be made a party in this case as the Secretary to the Government of Burma, Agriculture and Rural Economy Department was one of the signatories to the Agency agreement (Exhibit B), and that a notice should therefore be issued to that department ; but we do not consider that there is any force in this contention inasmuch as the respondent State Agricultural Marketing Board represents the Government of Burma.

We are of the view that there are only two points to be considered in this case: *Firstly:* whether the appointment of U Paing as Umpire was valid and that he had jurisdiction to determine the dispute between the parties in this case; and *Secondly:* whether the finding of the Umpire (U Paing) that there was no negligence on the part of the appellant Burma Indo-Ceylon Rice Corporation was so perverse that it amounted to legal misconduct on the part of the Umpire justifying the setting aside of his award under section 30 of the Arbitration Act.

Now as regards the first point U Aung Tha Gyaw, J. had given his opinion on it in his order dated the 2nd March 1953 and with which the learned Judge entirely agreed that the appointment of U Paing as Umpire was valid and that he had jurisdiction to determine the dispute between the parties in this case. The opinion given by U Aung Tha Gyaw, J., when U Paing stated a special case for the opinion of the Court on questions of law

under section 13 (*b*) of the Arbitration Act, forms part of the award, under section 14 (*3*) of the Act; and such an opinion being a part of the award, the party dissatisfied with the opinion can still take up the matter again and argue in an appeal under section 39 of the Act. It is therefore still open to us in this appeal to consider the question of the validity or otherwise of the appointnent of U Paing as an Umpire and whether he had jurisdiction to settle the dispute referred to arbitration. We have, however, very little to add to what U Aung Tha Gyaw, J. had stated in his order dated the 2nd March 1953, for we respectfully agree with the well considered opinion given by him in that order. On the contention, made by the respondent, that the appointment of Mr. G. Horrocks being made more than one month after the latest date of the appointment of Arbitrators had contravened the mandatory provisions of clause 2 of the First Schedule to the Act and as such the appointment of Mr. Horrocks was not a valid appointment and that similarly the appointment of U Paing as Umpire was also not a valid appointment and therefore he had no jurisdiction to settle the dispute, we have only to add that if Civil Reference No. 116 of 1951 of this Court is referred to, it will be seen that a joint application of both the parties was made to the Court on 29th May 1951 under section 3 of the First Schedule to the Burma Arbitration Act, 1944, for an extension of time for the Arbitrators to make their award, and four months' extension of time was given on 11th June 1951; after that as the Arbitrators had to record considerable evidence and the award could not be filed in time, two similar joint applications for extension of time were made to the Court on 25th September 1951 and 31st January 1952 and an

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extension of time for 4 months was given on each of these applications. After that, the Arbitrators Mr. Foster and Mr. Basu differed in their finding on one issue, *viz.* regarding the question of negligence or non-negligence on the part of the appellant Corporation, and they appointed Mr. G. Horrocks as the Umpire on 28th July 1951; but as Mr. Horrocks, after accepting to act as Umpire, later requested to cancel his appointment, U Paing was appointed by the Arbitrators as the Umpire in place of Mr. Horrocks; and during the time of U Paing as Umpire, as the award could not be filed in time owing to a special case stated by him for the opinion of the High Court on questions of law, both the parties again made a joint application to the High Court in the same Civil Miscellaneous No. 116 of 1951 for an extension of two months time, and the Court granted it on 30th March 1953 to enable the Umpire to make his award. A similar joint application and a last one was made to the Court on 23rd May 1953 for further extension of two months time, and the Court granted it on 29th May 1953. Ultimately U Paing made his award on 24th June 1953 *i.e.* within the time extended by the Court. From the above it will be seen that the appointment of Mr. Horrocks and U Paing could only be made after the Arbitrators had differed their finding on the question of negligence in issue, and after several extensions of time were given to the Arbitrators by the Court on the joint applications of the parties. The question of appointing an Umpire did not arise until the Arbitrators differed in their finding, and the Agreement of Arbitration provides the appointment of an Umpire only if and when the Arbitrators consider it necessary and not otherwise. It is an express provision, and therefore the implied

conditions set out in the First Schedule of the Act, being subject to the terms of section 3 of the Act itself, will not apply to this case. We therefore agree that the appointment of U Paing as Umpire was valid and that he had jurisdiction to make the award.

Regarding the second point as to whether the finding of the Umpire (U Paing) on the question of negligence was perverse and amounted to legal misconduct, we are not, with due respect, inclined to agree with the learned trial Judge that the Umpire's finding was perverse and that it amounted to legal misconduct. The learned trial Judge has held on this point *firstly* that the appellant Burma Indo-Ceylon Rice Corporation, in not making use of the Government Sub-Treasury, at Letpadan by opening a personal ledger account there and by making payments by cheques on the account at Tharrawaddy Treasury, had failed to carry out the terms under clause 11 of the Agency Agreement and it had therefore committed an act of negligence. Now, clause 11 of the Agency Agreement (Exhibit B filed in the Arbitration Proceedings) reads :

> "11. The Company shall be permitted to use the Government Treasuries situate within the area covered by this Agreement for the deposit, transmission and withdrawal of funds employed by them under this agreement."

Regarding this, both the Arbitrators have held that the Burma Indo-Ceylon Rice Corporation did not fail to carry out the terms of clause 11, since that clause merely permitted the Corporation to make use of Government Treasuries and the facilities offered by opening a personal ledger account at Treasuries, and since that clause did not compel the Corporation to make use of those facilities. The Umpire accepted the above finding

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of the Arbitrators, and we are also inclined to agree with their finding, because clause 11 of the Agency Agreement was only a permissive clause to enable the Corporation to make use of the facilities given under that clause. The Corporation was not compelled, under that clause, to open a personal ledger account at Letpadan Sub-Treasury and make payments by cheques. Besides, it appears from the evidence recorded in the proceedings, that the rice millers at Letpadan wanted their payments in cash and that they declined to accept payments by cheques, hence the Corporation had adopted the procedure of drawing money from the Tharrawaddy Treasury for payments in cash at Letpadan. The Anglo-Burma Rice Company, who were the predecessors of the appellant Corporation as agents of the Government to purchase rice in the same area, had also carried out their transactions through the Tharrawaddy Treasury. Therefore it cannot be said that negligence could be attributed to the appellant Burma Indo-Ceylon Rice Corporation on the ground that it had not made use of the Letpadan Sub-Treasury by opening a personal ledger account there, and by not making payments by cheques,

Secondly, on the same question of negligence, the learned Judge has held that the appellant Corporation had acted negligently in sending its men to Tharrawaddy and bringing cash amounting to two lakhs of rupees from the Treasury without an armed escort. With respect, we do not think the learned trial Judge was justified in taking this view, for there appears to be no reason why the appellant Corporation should seek police protection or apply for an armed escort in bringing cash amounting to two lakhs of rupees from Tharrawaddy Treasury,

for they have been adopting the same procedure of sending their men in a truck to Tharrawaddy without an armed escort for withdrawal of cash from the Treasury, and bringing back the same to Letpadan since the time their agency started their rice buying business at Letpadan up to the date of the incident, without any mishap whatever. It appears also that during the period from 3rd January 1947 up to 31st March 1947 their withdrawals from Tharrawaddy Treasury amounted to Rs. 45,00,000 and not a single incident of dacoity or robbery had happened on the way between Letpadan and Tharrawaddy during that period. There is no evidence on record to show that any case of dacoity had occurred in Letpadan and Tharrawaddy area during that period. Everything appeared to be calm and under law and order at that time. Therefore the Burma Indo-Ceylon Rice Corporation could not have reasonably apprehended that they were running great risks in bringing large sums of money from Tharrawaddy Treasury without an armed escort. There is also no evidence to show that the other agents of the Government for buying rice in the other Zones had ever asked for police protection or for an armed escort when they were carrying cash in large sums while doing their business. Besides, even if they asked for and obtained police protection, what chance would a few armed police have had against dacoits numbering ten or twenty fully armed with sten-guns, revolvers and hand grenades and who were bent to commit dacoity at all risks ?

There is one outstanding fact which remains unchallenged in this case to show that the dacoity of two lakhs of rupees in this case was accomplished on account of the message sent by the Tharrawaddy

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Treasury clerk Maung Myint Than to the dacoits on the day of incident that a sum of two lakhs of rupees had just been drawn from the Treasury. Maung Myint Than was the first accused in connection with this dacoity and he was convicted and sentenced to 10 years' rigorous imprisonment in Special Trial No. 4 of 1948 of the Court of the Fourth Special Judge, Tharrawaddy. On the face of these circumstances in the case, it cannot be said that the Umpire was perverse in arriving at a finding that the loss of two lakhs of rupees by dacoity was not due to the negligence of the appellant Burma Indo-Ceylon Rice Corporation.

The view taken by the learned Judge in this case could be regarded as a mere difference of opinion from the Umpire; and the question will be, whether the Court can set aside the award made by the Umpire when it had formed a different opinion and had come to different conclusions from that of the Umpire on a question of fact. We are, in this respect, of the opinion that the Court cannot set aside the award of the Umpire or the Arbitrator on such ground. We are fortified in this view by the case of *Haji Ebrahim Kassim Cochinwalla* v. *Northern Indian Oil Industries Ltd.* (1) where it was held:

> "Appraisement of evidence by the Arbitrator is ordinarily never a matter which the Court questions and considers. The Arbitrator is the only Judge of the quality or the quantity of evidence and it will not be for the Court to take upon itself the task of being a judge of the evidence before the Arbitrator. It may be possible that on the same evidence the Court might arrive at a different conclusion than the Arbitrator but that by itself is no ground of setting aside an award of an Arbitrator."

The Courts have very limited jurisdiction to review awards passed by arbitrators or umpires.

(1) A.I.R. (1951) Cal. 230.

They have not the jurisdiction of a Court of Appeal while reviewing the decision of an inferior Court. A similar observation was made by Anantakrishna Ayyar, J. in the case of *G. Martirosi* v. *A.K.C.T. Subramanian Chettiar* (1) that :

"The jurisdiction of Courts to review awards passed by Umpires is not the jurisdiction of a Court of Appeal while reviewing the decisions of inferior Courts. It is much narrower."

It has also been observed by Walsh, A.C.J. in the case of *Mt. Aftab Begam* v. *Haji Abdul Majid Khan* (2) as follows :

"An arbitration in substance ousts the jurisdiction of the Court except for the purpose of controlling the arbitrators and preventing misconduct and for regulating the procedure after the award. So far as the hearing of the merits is concerned and the decision contained in the Award the Court has nothing to say, good, bad or indifferent. It has no right to review it or to consider it; to hear an appeal from the arbitrator and delete from the Award something with which it did not agree is beyond the jurisdiction of Court."

This case was followed with approval by a decision of a Bench of the Allahabad High Court in the case of *Debi Das and others* v. *Keshava Deo* (3), which was decided in 1945, *i.e.* after the Arbitration Act, 1944.

Now, under section 30 of the Arbitration Act, 1944, (Burma Act No. IV of 1944) an award cannot be set aside except on one or more of the following grounds, namely :—

(*a*) that an arbitrator or umpire has misconducted himself or the proceedings ;

(*b*) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration

(1) A.I.R. (1930) Mad. 723. (2) A.I.R. (1924) All. 800.
(3) A.I.R. (1945) All. 423.

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proceedings have become invalid under section 35;

(c) that an award has been improperly procured or is otherwise invalid.

The present case cannot fall under the second or the third ground under section 30 of the Act; but we may have to consider whether it can come under the first ground, *i.e.* whether the Umpire has misconducted himself or the proceedings. In the case of *U Sein Win & Co. Ltd.* v. *The State Agricultural Marketing Board* (1) it has been held that:

> "It is not necessary to allege any dishonesty or moral turpitude to attribute legal misconduct on the part of an arbitrator, which term does not really amount to much more than such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice."

In the present case, it cannot be said that there had been a mishandling of the arbitration by the Arbitrator or by the Umpire which amounts to substantial miscarriage of justice. The parties were given full opportunities to adduce evidence, and on the evidence adduced, the Umpire had fully discussed the evidence and the findings of the arbitrators before he came to his conclusions. This is quite apparent from the award of the Umpire itself. The learned Judge had relied on the case of *Nga Tok* v. *Nga Kassim and three others* (2) where it was held that perversity of the arbitrators was misconduct justifying the setting aside of their award. But the facts in that case are entirely different from the present case. In that case it was provided in the reference that the dispute should be decided according to Mohamedan Law and the parties had a right to expect that the arbitrators would decide

(1) (1954) B.L.R. 200. (2) The Burma Law Times, Vol. V, p. 55

it according to Mohamedan Law to the best of their ability; that if they had done so, the fact that they were ignorant of Mohamedan Law and had made a mistake would be no ground for setting aside the award. But the four arbitrators who overruled the fifth did not even profess to have decided the matter according to Mohamedan Law; and it was held that the decision of the Arbitrators was perverse and that perversity was misconduct within the meaning of clause 15 of the second schedule of the Civil Procedure Code (Act V of 1908) and that therefore the learned District Judge was justified in setting aside the award. But the facts in the present case are different. We have held that the finding of the Umpire in the award was not perverse, and that the finding of the Judge, differently from that of the Umpire, could only amount to a difference of opinion.

In the case of *Aboobaker Latif* v. *Reception Committee of the 48th Indian National Congress and another* (1), B. J. Wadia, J. observed:

"Legal misconduct is a term which is commonly used in reference to awards. It does not necessarily involve any moral turpitude or dishonesty on the part of the arbitrator. It is misconduct in the judicial sense of the word and has been described generally to mean an erroneous breach of duty on the part of the arbitrator, however honest, which causes miscarriage of justice. Misconduct is a question of fact in each case and has to be ascertained from the facts of the entire proceedings before the Arbitrator. It really lies in the conduct of the arbitration proceedings, and the onus of proof lies on the party who alleges it. The Court never sits in appeal from the award of an Arbitrator. Its function is to see whether the grounds of misconduct alleged by the party have been strictly proved. If a material piece of evidence is tendered and rejected, it may amount to misconduct entitling the party to set aside the award."

(1) A.I.R. (1937) Bom. 410.

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It was observed further that—

"In order that the Court may set aside an award which has been duly made, the irregularities complained of must be of such a nature as to amount to no hearing at all. Parties cannot get out of an award upon objections which do not affect the substantial justice in the case."

In the present case also we do not see that any irregularity had been committed by the Umpire in his conduct which amounted to no hearing of the case at all.

For the reasons stated we allow this appeal and set aside the order dated the 15th August 1955 and confirm the award of the Umpire (U Paing) in its entirety with costs throughout.

U SAN MAUNG, J.—I agree.

CIVIL REVISION.

Before U Ba Nyunt, J.

DAW KYIN HLAING (APPLICANT)

v.

U WIN MAUNG AND THREE OTHERS (RESPONDENTS).*

H.C. 1958

Mar. 6.

Jurisdiction—Burma State Lottery, 62nd Series—First Prize—Ticket purchased at Henzada—Payment at Rangoon—Suit for declaration and possession instituted in Henzada—Territorial jurisdiction—Notice under s. 80, Civil Procedure Code, waiver thereof.

The first three Respondents obtained a decree against applicant and the fourth Respondent in the District Court of Henzada for a declaration of title and possession of the first prize winning ticket in the 62nd Series of the Burma State Lottery, which was purchased at Henzada.

In revision to the High Court it was contended that :

(i) The District Court of Henzada had no territorial jurisdiction, and

(ii) The suit not maintainable for want of Statutory notice under s. 80 of the Civil Procedure Code.

Held : That the winning of the first prize of the draw which had admittedly taken place at Rangoon gave rise to the cause of action of the suit, the primary cause being the winning of the prize and payment thereof at Rangoon.

That the suit for declaration and possession of the suit ticket and the prize money of one lakh Kyats which money is in the custody of and payable by the Controller, Burma State Lottery, Rangoon, must be instituted at Rangoon where the cause of action wholly arose.

The Jupiter General Insurance Company Limited and two others v. *Abdul Aziz*, 1 Ran. 231 ; *J. D. John and others* v. *Oriental Government Security Life Assurance Co. Ltd.*, A.I.R. (1929) Mad. 347, referred to.

Held further : The right to notice under s. 80 of the Civil Procedure Code may be waived by Government or the Public Officer concerned.

The Secretary of State for India in Council v. *Kalekhan and another*, I.L.R. 37 Mad. 113 ; *Firm of R.S. Gangaram and R.S.T. Rupchand & Co.* v. *Secretary of State*, 40 A.I.R. (1937) Sind 291 ; *Government of Province of Madras* v. *Al. Ar. Rm. Vellayan Chettiar and others*, A.I.R. (1944) Mad. 544 ; *Vellayan Chettiar and others* v. *The Government of the Province of Madras and another*, A.I.R. (1947) (P.C.) 197 at 198 ; *The District Board, Banaras* v. *Churhu Rai and another*, A.I.R. (1956) All. 680 at 681 ; *Ruplal Agarwala* v. *Dhansar Coal Co. and another*, A.I.R. (1933) Pat. 49 ; *B.N.W. Railway Co.*

* Civil Revision No. 33 of 1957, against the order of the District Court of Henzada in Civil Regular No. 6 of 1955, dated the 15th June 1957.

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v. *Mohammad Abdul Halim*, A.I.R. (1930) Pat. 528; *National Petroleum Company Ltd., Bombay* v. *Meghraj Ramkaranji Golcha and another*, A.I.R. (1937) Nag. 324, referred to.

Application for revision allowed.

Ba Swe and *Than Maung*, for the applicant.

V. S. Venkatram, for the respondents.

Mya Shein (Government Advocate) for respondent No. 4.

U BA NYUNT, J.—In Civil Regular Suit No. 6 of 1955 of the District Court of Henzada, the lst, 2nd and 3rd respondents filed a suit against the applicant and the 4th respondent for declaration that they are the owners of lottery ticket No. A523386 of the 62nd Series of the Burma State Lottery, which had won a first prize of one lakh Kyats and for possession of the same and the prize money thereof. The applicant and the 4th respondent stated, among other defences that—

(*a*) the Henzada District Court has no territorial jurisdiction and

(*b*) it cannot entertain the suit as the plaintiff had failed to serve the statutory notice under section 80 of the Code of Civil Procedure against the 2nd defendant (now the 4th respondent) before filing the suit.

The plaintiffs (now the lst, 2nd and 3rd respondents) admitted that no notice was served on the 2nd defendant (now the 4th respondent) but claimed that the 2nd defendant had waived his right.

On 15th June 1957 the trial Court decided (1) that the Henzada Court has territorial jurisdiction

and (2) that want of notice to the 2nd defendant (now the 4th respondent) was not fatal to the suit, as it had been waived. Hence this application for revision. It is contended that the trial Court has exercised the jurisdiction not vested in it by law by entertaining the suit without territorial jurisdiction and also against the express provision of section 80 of the Code of Civil Procedure. In support of these contentions, the learned Advocate for the applicant has cited the case of *The Jupiter General Insurance Company, Limited and two others* v. *Abdul Aziz* (1) where it was held that—

"For the purposes of section 20 of the Code of Civil Procedure, the words "cause of action," so far as suits on contract are concerned, include the making of the contract and the payment of money under the contract and that in cases based on contract of insurance, they do not include the loss or damage of the property insured."

The next case cited is that of *J. D. John and others* v. *Oriental Government Security Life Assurance Co. Ltd.* (2) where it was held that—

"Where a Life Assurance Company has agency in Madras, but the agency does nothing, but act as a post office forwarding proposals and sending moneys and not having any discretion in the matter either to conclude contracts or to vary them or to enter into them, it does not carry on business in Madras."

True it is that for the purposes of section 20 of the Code of Civil Procedure the words "cause of action" so far as suits on contract are concerned include the making of the contract and the performance or completion of performance of the contract and the payment of money under the contract. In the case under revision lottery tickets were offered for sale at Rangoon or sent out to the districts for

(1) 1 Ran. 231. (2) A.I.R. (1929) Mad. 347.

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sale. It is the case of the respondents that they purchased the winning ticket from Bo Bo Aung Lottery Shop at Henzada town. Be that as it may, it is an admitted fact that the drawing of the Burma State Lottery took place at Rangoon and the first prize of Kyats one lakh was payable at Rangoon. It is contended on behalf of the respondents that inasmuch as the sale of the ticket which won the first prize was made at Henzada, the District Court of Henzada has territorial jurisdiction to try the suit. But unfortunately for the respondents they have, in their original and two amended plaints, stated that the cause of action of the suit arose at Henzada on 29th March 1955, which was the date on which the aforesaid ticket had drawn the first prize. Thus it is apparent that the winning of the first prize of the draw which had admittedly taken place at Rangoon gave rise to the cause of action of the suit. The alleged purchase of the ticket and the alleged entrustment of the same with Ko Pu at Henzada were only secondary causes which were purely accidental, the primary cause being the winning of the prize and payment thereof at Rangoon. It was however held by the learned District Judge that the rules regarding payment of the prize money at Rangoon was not a binding contract. He seems to have overlooked the fact that those were the conditions under which lottery tickets were sold. It cannot therefore be said that those rules are not binding on the respondents. That being the view I take I am of opinion that the suit for declaration and possession of the suit ticket and the prize money of one lakh kyats which money is in the custody of and payable by the Controller, Burma State Lottery, Rangoon, must be instituted at Rangoon where the cause of action wholly arose. The Henzada District

Court has no jurisdiction to try the present suit because the bundle of facts which constitute the cause of action in a civil suit does not and is not intended to comprise every fact which may be proved in evidence.

With regard to the question of issuing notice to the Controller, State Lottery Office, Rangoon, I must say that the learned Advocate for the applicant has taken me through various authorities in support of his contention that section 80 is to be strictly complied with and is applicable to all forms of action and all kinds of relief. The earliest case quoted is that of *The Secretary of State for India in Council* v. *Kalekhan and another* (1) where it was held that—

> " Under section 424 of the Civil Procedure Code (Act XIV of 1882) [Corresponding to section 80, Code of Civil Procedure, (Act V of 1908)], notice is necessary in all suits of whatever description against the Secretary of State for India in Council."

That was a case in which the plaintiffs asked for a decree granting an injunction restraining the first defendant, that is, the Secretary of State for India in Council or any of his servants, from collecting any amount from the plaintiffs. The next case is that of *Firm of R.S. Gangaram and R.S.T. Rupchand & Co.* v. *Secretary of State* (2) where it was held that—

> " The provisions of s. 80, Civil P.C., are mandatory and contain a clear and unqualified prohibition upon the institution of suit without the statutory notice. It is not in the public interest that the provisions as to notice can be waived at the whim of the officer concerned."

That also was a case in which the appellant-firm were contractors and they filed a suit against the Secretary of State claiming one lakh and thirty-five

(1) I.L.R. 37 Mad. 113. (2) A.I R (1937) Sind. 291.

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thousand rupees and interest at six per cent for work done. The next important case is that of *Government of Province of Madras* v. *Al. Ar. Rm. Vellayan Chettiar and others* (1) where it was held that—

"Section 80 is express, explicit and mandatory, and admits of no implications or exceptions. When the section has not been complied with the Court has no jurisdiction to try the suit against Government. The language of the section is imperative and consequently there can be no question of waiver and no question of estoppel. It is very desirable that the objection that s. 80 has not been complied with should be taken at the earliest possible moment but failure to do so will not deprive the section of its force."

That was a suit in which the 1st and 2nd respondents instituted a suit against the Provincial Government and the Municipal Council for a decree setting aside a decision of a Survey Officer, under the Madras Survey and Boundaries Act, 1923. These authorities have no direct bearing on the facts of the present case.

The notice contemplated under section 80 of the Code of Civil Procedure is to give the Government or the Public Officer concerned, an opportunity to consider the legal position and to make amends or settle the claim without litigation. In the present case there does not seem to be any necessity to consider the legal position and to make amends or settle the claim of the respondents who are admittedly not in possession of the winning ticket entitling them to receive payment of the prize. The learned Government Advocate has submitted that his client is prepared to pay the prize to any rightful owner of the winning ticket and that his client is not interested in the result of the present litigation and that no

(1) A.I.R. (1944) Mad. 544.

costs be awarded either for or against him. His client has not also joined in the present application as one of the applicants. He is therefore made one of the respondents. That being the attitude rightly taken by the learned Government Advocate it can be safely said that the right to the notice contemplated under section 80 of the Code of Civil Procedure has been waived on behalf of the Controller of State Lottery Office, Rangoon. In the case of *Vellayan Chettiar and others* v. *The Government of the Province of Madras and another* (1) it was held that—

"The notice required to be given under s. 80 is for the protection of the authority concerned. If in a particular case he does not require that protection and says so, he can lawfully waive his right to the notice."

In the case of *The District Board, Banaras* v. *Churhu Rai and another* (2) it was held that—

"It is open to a defendant for whose benefit a notice is prescribed by law to waive it. Thus where the plea of defect in or want of notice was not pressed in trial Court, nor was it raised in the memorandum of first appeal and of second appeal, the High Court, in the circumstances of the case held that the right based on the ground of notice was waived."

In the case of *Ruplal Agarwala* v. *Dhansar Coal Co. and another* (3) it was held that—

"A third party is not competent to raise the question of notice when the Secretary of State has waived it."

That this Court can interfere in revision with the order of the trial Court in such matters is laid down in the case of *B.N.W. Railway Co.* v. *Mohammad Abdul Halim* (4) and in the case of *National Petroleum Company Ltd., Bombay* v. *Meghraj Ramkaranji*

(1) A.I.R. (1947) (P.C.) 197 at 198.
(2) A.I.R. (1956) All. 680 at 681.
(3) A.I.R. (1933) Pat. 49.
(4) A.I.R. (1930) Pat. 528.

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Golcha and another (1). In the light of the authorities quoted above and in view of the circumstances obtaining in the case under revision I hold that the District Court of Henzada has no jurisdiction to try the suit; that the 2nd defendant has waived his right protection under section 80 of the Code of Civil Procedure and that the applicant is not competent to raise this question of notice. The application for revision is allowed in the sense indicated above. I make no order as to costs of this application.

(1) A.I.R. (1937) Nag. 334.

INCOME-TAX REFERENCE.

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

JIWANRAM RAMPARTAP (APPLICANT)

v.

THE COMMISSIONER OF INCOME-TAX, BURMA (RESPONDENT).*

H.C. 1958

Mar. 17

Burma Income Tax Act, 1948—Ss. 22 (4), 23 (2), 23 (4), 27 and 33—A "best-of-judgment assessment"—Ss. 66 (2) and 66 (3)—Reference to High Court—Ss. 5-A and 5-B, Burma Income-Tax (Amendment) Act, 1953—Function of a Court of Law in administering Law.

The applicant was assessed to Income-Tax for the assessment year 1948-49, *i.e.* under the old Burma Income-Tax Act as amended up to 1st June, 1948.

On 28th September, 1956, the applicant moved the Commissioner for reference to High Court under s. 66 (2) of the Burma Income-Tax Act, 1948 which was rejected.

Before the Commissioner could pass orders, the applicant had on the 11th February, 1955 filed a petition under s. 66 sub-s. (2) of the old Income-Tax Act to call upon the Commissioner to state a case.

A preliminary legal question arose as to whether this application under sub-s. (3) of s. 66 of the old Burma Income-Tax Act lies in view of s. 5-B of the Burma Income-Tax (Amendment) Act, 1953.

Held: That neither the petition dated the 28th September, 1956, to the Commissioner for reference to the High Court under sub-s. (2) of s. 66 of the old Income-Tax Act, nor the application to the High Court for requisition to the Commissioner to state a case under sub-s. (3) of s. 66 could be said to be pending.

Even assuming that such applications can be said to be pending, the application moving this Court to call upon the Commissioner to state the case under sub-s. (3) of s. 66 of the old Act does not come within the contemplation of s. 5-B. What is allowed to be continued and disposed of in accordance with the provisions of sub-s. (2), (3), (3-A), (4), (5) and (6) of s. 66 of the old Act is only in relation to appeals and proceedings referred to in clauses (*a*) and (*b*). Therefore this Court has no power to call upon the Commissioner under sub-s. (3) of s. 66 of the old Act to state the case.

Held also: That the function of a Court of law is to administer the law as it is, and not to attempt by judicial decisions to amend what the Court may rightly or wrongly deem to be faulty legislation.

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* Civil Reference No. 2 of 1955.

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JIWANRAM RAMPARTAP v. THE COMMISSIONER OF INCOME-TAX, BURMA.

C. A. Soorma, for the applicant.

Kyaw Thaung (Government Advocate) for the respondent.

U CHAN TUN AUNG, C.J.—The applicant belongs to a Hindu undivided family and is a timber merchant, carrying on business at No. 46, 29th Street, Rangoon, and he was assessed for the year 1948-49 by the Income-tax Officer, Central Circle, Section 1, Rangoon on an income of K 1,26,024. It appears that the assessment was a "best-of-judgment" assessment under section 23 (*4*) of the Income-tax Act, as the applicant has not complied with the notices issued under sections 22 (*4*) and 23 (*2*). Since this assessment related to the year 1948-49, the procedure that was followed was one laid down in the old Burma Income-tax Act as amended up to 1st of June, 1948.

As against the best-of-judgment assessment, the petitioner next moved the Income-tax Officer concerned for the cancellation of assessment under section 27 of the Act, but the Income-tax Officer refused to do so. Then, an appeal was preferred against the Income-tax Officer's refusal, but the same was rejected by the Assistant Commissioner of Income-tax, Eastern Range, Rangoon on the 29th September, 1950.

On the 5th December, 1950 the petitioner filed an application to the Commissioner, praying for two reliefs, (1) revision under section 33 of the Assistant Commissioner's order and for direction to the Income-tax Officer to make a fresh assessment on the basis of the petitioner's account-book, *and in the alternative*, (2) to refer to High Court the

following question of law under section 66 (*2*) of the Income-tax Act :—

(1) Whether the Income-tax Officer's asessment is legal and valid for the reason that the order was made on February 4, 1950 while an application explaining the delay and requesting for a short adjournment was received by his office on February 1, 1950, but not put up to the Income-tax Officer for his orders.

(2) Whether the Assessment made under section 23 (*4*) is valid in law after due compliance has been made by the assessee with the requirements of sections 22 (*4*) and 23 (*2*) and while the Income-tax Officer adjourned the case for essential reasons, namely that the ledgers were being posted.

(3) Whether the assessment made by the Income-tax Officer is valid in law and can be said to constitute a best-of judgment assessment.

It appears that the Additional Commissioner of Income-tax in his revision order, dated the 28th June, 1954, purporting to act under section 33 of the Act rejected *in toto* the applicant's application with these words :—" The application is rejected administratively ". The learned Additional Commissioner however failed to pass any order on the applicant's alternative prayer for reference to the High Court under section 66 (*2*) of the Act. However, the petitioner, by a fresh application dated the 28th September, 1956 moved the Commissioner to give a hearing and pass orders on the alternative application for reference to High Court under section 66

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(2) of the Burma Income-tax Act. Pursuant to that application, the Additional Commissioner, after giving a hearing to the applicant, rejected the applicant's application on the 5th November, 1956. But, before the Additional Commissioner had passed his orders, the petitioner had on 11th February 1955 filed in this Court a petition, which is the subject-matter of the present reference, purporting to be under sub-section (3) of section 66 of the old Income Tax Act to call upon the Commissioner to state the case on the three questions stated above.

A preliminary legal question has now arisen as to whether the applicant can pursue the present application under sub-section (3) of section 66 of the old Burma Income-tax Act to enable this Court to call upon the Commissioner to state the case in view of the fact that the new amendments to Burma Income-tax Act, which came into force on the 1st October, 1953 and which made sweeping changes to the old Income-tax Act, has created under section 5-A, an Appellate Tribunal to which has been virtually vested all appellate powers and those incidental thereto, exercisable by the Board of Referee, under section 33-A, and those available under section 66 of the old Act to the Commissioner, in the matter of stating a case to the High Court. Thus, the statement of case to the High Court, under the old law, could either be refused or allowed by the Commissioner; *whereas* under the new law (section 66) refusal or permission to state a case either at the instance of the assessee or of the Commissioner is done or given by the Appellate Tribunal.

Consequent on the establishment of the Appellate Tribunal under the Burma Income Tax (Amendment) Act, 1953, which came into force on 1st October, 1953, transitory provisions are made by the addition,

inter alia, of a new section, 5-B for the disposal of proceedings, applications and appeals pending on the said date, *i.e.*, 1st of October, 1953, and section 5-B reads as follows:

Transitory provisions consequent on the constitution of the Appellate Tribunal.

" 5-B. Notwithstanding the coming into force of the Burma Income-tax (Amendment) Act, 1953,—

(*a*) all appeals already duly instituted under section 32 at the time when the said Act comes into force,

(*b*) all proceedings then pending before the Commissioner in connection with the exercise of his powers of revision under section 33,

(*c*) all applications to the Commissioner, then pending for reference to the High Court under sub-section (*2*) of section 66, and

(*d*) all applications to the High Court, then pending, for the issue of requisition to the Commissioner under sub-section (*3*) of section 66

may be continued and disposed of as if the said Act had not come into force, and the provisions of sub-sections (*2*), (*3*), (*3-A*), (*4*), (*5*) and (*6*) of section 66, as subsisting before the said Act came into force shall continue to have effect in relation to the appeals and proceedings referred to in clauses (*a*) and (*b*) :"

To my reading, what the above section continues and permits disposal as if the new Amendment Act has not come into force, in so far as it might be said to be relevant for the purpose of the present case, are the pending applications referred to in clauses (*c*) and (*d*). From the facts and circumstances of the case stated above, it is quite clear that on the date when the new Income Tax (Amendment) Act, came into force *i.e.*, (1st October 1953) neither the applicant's petition to the Commissioner for reference to the High Court under sub-section (*2*) of section 66 of the old Income-tax Act, nor the application to the High Court for requisition to the

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Commissioner to state a case under sub-section (*3*) of section 66 could be said to be pending, inasmuch as in the former case, the petitioner filed his application on the 28th September, 1956, while in the latter case, only on the 11th February 1955. However, even assuming that such applications can be said to be pending applications and that they can be disposed of as if the new Income-tax Act has not come into force, yet according to new section 5-B, as it stands now, the provisions of sub-sections (*2*), (*3*), (*3-A*), (*4*), (*5*) and (*6*) of section 66 of the old Act continue to have effect only in relation to appeals and proceedings in clauses (*a*) and (*b*), *i.e.*, appeals under section 32, and pending revision proceedings before the Commissioner under section 33. In other words, section 5-B allows the continuity of proceedings, and the application of the old law available under sub-sections of section 66 of the Income-tax Act, only in relation to appeals and proceedings set out in clauses (*a*) and (*b*), *and not* (*c*) *and* (*d*).

Thus, in our opinion, from the plain reading of the existing provisions of section 5-B, the application of the applicant, moving this Court to call upon the Commissioner to state the case under sub-section (*3*) of section 66 of the old Act does not come within the contemplation of section 5-B. What is allowed to be continued and disposed of in accordance with the provisions of sub-sections (*2*), (*3*), (*3-A*), (*4*), (*5*) and (*6*) of section 66 of the old Act is only in relation to appeals and proceedings referred to in clauses (*a*) and (*b*) and not those referred to in clauses (*c*) and (*d*). Therefore, this Court has no power to call upon the Commissioner under sub-section (*3*) of section 66 of the old Act to state the case. To my mind, the omission of clauses (*c*) and

(*d*) in the latter part of section 5-B of the new Act might have been an unintentional error, but our function as a Court of Law is, "to administer the law as it is, and not to attempt by judicial decisions to amend what the Court may rightly or wrongly deem to be faulty legislation."

Therefore, in the result the application is hereby rejected. There will be no order as to costs.

U SAN MAUNG, J.—I agree.

U BA THOUNG, J.—I agree.

CRIMINAL REVISION.

Before U San Maung, J.

H.C. 1958

Mar. 5.

M. O. MOHAMED YASIN (APPLICANT)

v.

V. N. ABDUL RAHMAN (RESPONDENT).*

Stay of Criminal Proceedings—Penal Code, s. 408—Criminal Procedure Code —S. 344, 435 read with s. 439 and 561-A—Power of High Court to stay Criminal Proceedings in a subordinate Court pending civil proceedings— No hard and fast rule whether and when High Court should interfere.

Held: The High Court has power not only under s. 439 of the Criminal Procedure Code but also under s. 561-A, thereof to interfere with an order of a subordinate Court refusing to stay criminal proceedings under s. 344 of the Criminal Procedure Code.

Emperor v. *Panna Lal*, (1943) All. 27; *U Tha Zan* v. *U Pyant*, A.I.R. 1935) Ran. 487; *Kanhaiya Lal* v. *Bhagwan Das*, 48 All. 60 at 63; *Louis Phillip Dias* v. *Mahadev Barik Raut*, 147 I.C. 230; *Shatrunjaya Singh* v. *D. S. Saxena*, A.I.R. (30) (1943) Oudh 184; *Dharmeswar Kalita* v. *The State*, (1952) Cr. L.J. 654, referred to.

Held also: That no hard and fast rule can be laid down as to whether and when a criminal proceeding should be kept pending the decision of a civil suit. Courts of law which exist to do justice between the parties have to consider in the light of the circumstances of each particular case whether justice and expediency demand that the criminal proceedings should be stayed pending the trial of the Civil Suit.

Anna Ayyar and others v. *Emperor*, 30 Mad. 226; *Pars Ram* v. *Jalal Din*, A.I.R. (1916) Lah. 174; *Emperor* v. *Bishen Das*, 8 I.C. 1161; *J. M. Lucas* v. *Official Assignee of Bengal*, 24 C.W.N. 418, referred to.

C. A. Soorma for the applicant.

S. A. A. Pillay for the respondent.

U SAN MAUNG, J.—In Criminal Regular Trial No. 725 of 1956 of the Court of the 4th Additional Magistrate, Rangoon, V. N. Abdul Rahman as agent and attorney of Haji V. M. Halima Bibi filed a direct

* Criminal Revision No. 146 (B) of 1957. Review of the order of the Sessions Judge (U TUN TIN) of Hanthawaddy, dated the 28th day of September 1957 passed in Criminal Revision No. 15 of 1957 arising out of Criminal Regular Trial No. 725 of 1956 of the Court of the 4th Additional Magistrate, Rangoon.

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U SAN MAUNG, J.

complaint under section 408 of the Penal Code against M. O. Mohamed Yasin for alleged criminal breach of trust by a person who had been employed as a shop assistant. The complaint states *inter alia* that Haji V. M. Halima Bibi as widow of the late Syed Shamsuddeen, the sole proprietor of a firm known as Messrs. K.E.M.E.V.S. Aliar and Company, was in sole possession of the business of the firm, which was being carried on at No. 186-188, Mogul Street, Rangoon. The accused Mohamed Yasin was a mere shop assistant employed by the firm which, after the death of Syed Shamsuddeen, was under the management of V. M. Mohamed Essa, agent and attorney of Haji V. M. Halima Bibi. On the power of attorney given to V. M. Mohamed Essa being cancelled on suspicion that he was in collusion with the accused, the complainant who took charge of the management of the business found that the accused had without the knowledge and consent of Haji V. M. Halima Bibi withdrawn a total sum of K 39,618·75 pyas dishonestly and fraudulently with a view to cause wrongful loss to the said Halima Bibi. Repeated requests of the restoration of the sum having proved fruitless, resort had to be made to the criminal prosecution of the accused under section 408 of the Penal Code.

The complainant V. N. Abdul Rahman was examined on oath. He reiterated that Haji V. M. Halima Bibi, as widow of the late Syed Shamsuddeen, was the sole proprietor of the business, that the accused was merely a shop assistant of the deceased and that he had without any authority withdrawn sums of money to the total of K 39,618·75 pyas in collusion with her former agent and manager V. M. Mohamed Essa who also was a shop assistant in the employ of the deceased Syed Shamsuddeen.

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U SAN MAUNG, J.

He, however, admitted that there had been exchange of lawyers' notices between the accused and Haji V. M. Halima Bibi and stated that when the accused was called to task regarding the withdrawals, he had claimed that the sums were withdrawn on account of Hamsa Bibi and Maimoon Bibi who claimed to be the heirs of the deceased, a claim which was never admitted by the widow of Syed Shamsuddeen.

The complaint was filed on the 25th of October 1956. The next day the accused appeared in Court and asked for time to furnish security. Time was granted till 5th November 1956 when security was offered and the accused enlarged on bail. On the 21st December 1956 an application was filed by the accused for the stay of proceedings pending the disposal of Civil Regular Suit No. 107 of 1956 of the High Court which was instituted on the 25th of October 1956, namely on the same day as the present complaint was filed before the District Magistrate, Rangoon, by the complainant V. N. Abdul Rahman. In the application for stay of proceedings the accused stated that the deceased Syed Shamsuddeen died intestate leaving him surviving his widow Haji V. M. Halima Bibi and his sisters V.S.A. Hamsa Bibi and V.S.A. Maimoon Bibi who were his heirs under the Sunni Mohammedan Law, the widow's share being one-fourth and the combined share of the two sisters being three-fourths. The accused as son of V.S.A. Maimoon Bibi was a nephew of the deceased and the other sister V.S.A. Hamsa Bibi. On the 10th November 1955 the two sisters of the deceased appointed the accused their duly constituted attorney and agent under a power of attorney. V. M. Mohamed Essa who is no other person than an own brother of Haji V. M. Halima Bibi and who during the life-time of the deceased managed the business

of K.E.M.E.V.S. Aliar and Company was, after the death of the deceased, given a power of attorney by Haji V. M. Halima Bibi herself. Thereafter the accused and V. M. Mohamed Essa as agents respectively of the two sisters and the widow of the deceased continued to manage jointly the business of the firm. The sums of money which the accused had withdrawn were with the knowledge and consent of his co-manager V. M. Mohamed Essa, vouchers being given for them and the necessary entries being made in the books of account. This fact the widow Haji V.M. Halima Bibi either knew or ought to be fully aware of. The prosecution was, therefore, launched against the accused after the accused, acting in his capacity as agent for V.S.A. Hamsa Bibi and V.S.A. Maimoon Bibi, had instituted a civil suit against the widow, namely Civil Regular Suit No. 107 of 1956 of the High Court, with a view to coerce and harass him in the conduct of that suit. Therefore, the criminal case against him should be stayed under section 344 of the Criminal Procedure Code.

The statement of facts given in the application for stay of the criminal case found no reply in the written objection of the complainant who merely stated that the issues involved in the criminal case and in the civil suit being not the same the application should be dismissed. The learned Magistrate after a discussion of the authorities relating to the stay of criminal proceedings pending civil suit dismissed the application on the ground that the alleged withdrawal of the sums of money fraudulently by the accused without the consent of the widow was independent of the principal issue in the civil suit as to whether the two principals of the accused were the sisters of the deceased and as such entitled

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to a major share in the estate. For this decision the learned Magistrate relied mainly upon the observations in *Emperor* v. *Panna Lal* (1) and *U Tha Zan* v. *U Pyant* (2), although he had cited many other decisions enumerated in his order. The accused being dissatisfied with the order of the trial Magistrate refusing to stay the criminal proceedings filed an application for revision of the order before the Sessions Judge, Hanthawaddy, but the learned Sessions Judge refused to interfere for the same reasons as those given by the trial Magistrate. Hence the present application which is purported to be under section 435 read with section 439 of the Criminal Procedure Code.

Now, there is authority for the proposition that the High Court has power not only under section 439 of the Criminal Procedure Code but also under section 561-A thereof to interfere with an order of a subordinate Court refusing to stay criminal proceedings under section 344 of the Criminal Procedure Code. In *Kanhaiya Lal* v. *Bhagwan Das* (3) it was observed by Sulaiman, J., that the inherent power of the High Court to stay proceedings in a criminal Court is very wide and has been exercised in several cases by the Allahabad High Court. In *Louis Phillip Dias* v. *Mahadev Barik Raut* (4) it was pointed out by Divatia, J., that the High Court has powers both under section 439 and section 561-A of the Criminal Procedure Code to interfere so long as it is moved by the Sessions Judge because section 438 is not limited to the interference of the Court under section 439. In *Shatrunjaya Singh* v. *D. S. Saxena* (5) Bennett, J., held that the

(1) (1943) All. 27.
(2) A.I.R. (1935) Ran. 487.
(3) 48 All. 60 at 63.
(4) 147 I.C. 230.
(5) A.I.R (30) (1943), Oudh. 184.

High Court has power to interfere with an order passed under section 344, Criminal Procedure Code, whether such power be claimed for it under section 439 or section 561-A, Criminal Procedure Code and a similar view was held by a Bench of the Assam High Court in *Dharmeswar Kalita* v. *The State* (1).

As to whether the High Court should or should not interfere in a pending criminal case there is considerable diversity of opinion. In *Louis Phillip Dias* v. *Mahadev Barik Raut* (2) it was observed that if the Court sees reason to believe that criminal proceedings have been launched with the object of prejudicing a civil suit, stay of criminal proceedings should be granted and that one of the matters which should be considered is whether the object of the criminal proceedings is to prejudice the trial of the civil suit, that is to say, to use them as a lever to coerce the accused into a compromise of the civil suit. In *Anna Ayyar and others* v. *Emperor* (3) it was observed that the defendant in a civil suit ought not to be allowed to prejudice the trial of such suit by launching and proceeding with a criminal prosecution on the same facts against the plaintiffs and their witnesses pending the trial of such suit. The issue involved in both the criminal proceeding and in the civil suit was whether the will was a genuine one or a forgery. In *Pars Ram* v. *Jalal Din* (4) Shadi Lal, J., quoted with approval the observation of Rattigan, J., in *Emperor* v. *Bishen Das* (5) that it is a very sound general principle that parties should not be encouraged to resort to the criminal Courts in cases in which the point at issue between them is one which can more appropriately be decided

(1) (1952) Cr. L.J. 654.
(2) 147 I.C. 230.
(3) 30 Mad. 226.
(4) A.I.R. (1916) Lah. 174.
(5) 8 I.C. 1161.

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by a civil Court and that there is a tendency on the part of persons who consider themselves aggrieved to rush to the criminal Courts either for the purpose of obtaining at small cost to themselves a decision on matters which ought, in the ordinary course of things, to be adjudicated upon by the civil Courts or of prejudicing the course of proceedings already instituted, or about to be instituted, in a civil Court by the other side. In *J. M. Lucas* v. *Official Assignee of Bengal* (1) Jenkins, C. J., pointed out that though no universal rule can be laid down, it is ordinarily undesirable to institute criminal proceedings until determination of civil proceedings in which the same issues are involved because there is a danger of criminal proceedings being instituted either to exert improper pressure or with an imperfect appreciation of the facts where they have not been ascertained in the more searching investigation of a civil Court. In *Emperor* v. *Panna Lal* (2), however, Allsop, J. saw no reason why a criminal proceeding should be stayed even though the same issue might be involved in a civil suit between the parties. He pointed out that the criminal case was one between the Crown representing the interests of the general public to prevent dishonesty and insecurity on the one side and the accused on the other, while the issues in the civil case were entirely between the parties. Mackney, J., in *U Tha Zan* v. *U Pyant* (3) was compromising. He observed that it was undesirable that a criminal prosecution connected with a civil suit should be proceeded with until the civil suit is decided; but such a course should be only necessary where the criminal prosecutions arise directly out of the proceedings in the civil Court, such as for instance

(1) 24 C.W.N. 418. (2) (1943) All. 27.
(3) A I.R. (1935) Ran. 487.

prosecutions for perjury or forgery in relation to documents put in evidence in the civil Court. He also observed that it would be unreasonable and speculative to order stay of the proceedings in the criminal Court on the off-chance that there might be some decision in the civil Court which might have some bearing on the criminal prosecution.

In my opinion no hard and fast rule can be laid down as to whether and when a criminal proceeding should be kept pending the decision of a civil suit. Courts of law which exist to do justice between the parties have to consider in the light of the circumstances of each particular case whether justice and expediency demand that the criminal proceedings should be stayed pending the trial of the civil suit. The instances enumerated by Mackney, J., in *U Tha Zan* v. *U Pyant* (1) though no doubt serve as a useful guide cannot by any means be regarded as exhaustive.

Now, let us examine the facts of the present case. The complainant Abdul Rahman contended in his complaint as well as in his examination on oath that the accused Mohamed Yasin was only a shop assistant. However, the statement contained in the application for stay, which remains uncontroverted, is that Mohamed Yasin was not a mere shop assistant. He was a nephew of the deceased Syed Shamsuddeen and son of one of his sisters who had on the 24th October 1956 filed a suit for declaration that she and her sister as surviving sisters of the deceased were jointly entitled to three-fourths share in the business of K.E.M.E.V.S. Aliar and Company. Before the filing of this suit and during the period, in the course of which the accused was alleged to have misappropriated the money, the

(1) A.I.R. (1935) Ran. 487.

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accused as agent of his mother V.S.A. Maimoon Bibi and aunt V.S.A. Hamsa Bibi was in joint management of the business with V.M. Mohamed Essa who was admittedly the agent of Haji V. M. Halima Bibi. What the complainant had, however, suppressed in his complaint as well as in his examination on oath was the fact that V. M. Mohamed Essa was the own brother of Haji V. M. Halima Bibi. He had also suppressed another fact which was admitted in the correspondence between the parties when lawyers' notices were exchanged. That was that Mohamed Essa had also withdrawn from the business a sum of K 18,700 during the period when he and the accused were jointly managing the business.

A peculiar feature of the case is that whereas in his complaint as well as in his examination on oath the complainant alleged that V. M. Mohamed Essa had colluded with the accused and thus enabled the accused to withdraw the sums of money totalling K 39,618·75 pyas dishonestly and fraudulently with a view to cause wrongful loss to the widow of Syed Shamsuddeen, Mohamed Essa was never prosecuted along with the accused for abetment of the offence committed by the accused. The issue that will arise in both the civil suit and the criminal case is whether or not the sisters of the deceased Syed Shamsuddeen are the major shareholders in the business of K.E.M.E.V.S. Aliar and Company. The next issue that will arise in both the cases is whether or not a total sum of K 39,618·75 pyas was withdrawn by the accused as agent of the two sisters of the deceased and with the consent and knowledge of Mohamed Essa, brother and agent of Haji V. M. Halima Bibi. The fraudulent intention or otherwise of the accused Mohamed Yasin who was alleged to be a mere shop

assistant in the complaint filed by the complainant would depend largely upon the answers to these issues.

Accordingly, the indications are that the present complaint was field with a view to exert improper pressure upon the accused in the conduct of the civil suit as agent of his mother and aunt. In any event it is undesirable that the criminal proceedings should be allowed to proceed while the same facts are being ascertained in a more searching investigation that is being conducted in the High Court. Hence, it will be in the interests of justice and expediency that the criminal proceedings should be stayed.

Accordingly, in exercise of the powers conferred upon this Court by section 561-A, I direct that the proceedings in Criminal Regular Trial No. 725 of 1956 of the Court of the 4th Additional Magistrate, Rangoon, be stayed during the pendency of Civil Regular Suit No. 107 of 1956 of this Court.

INCOME-TAX REFERENCE.

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

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Mar. 10.

R.M.K.M.S. FAMILY (APPLICANT)

v.

COMMISSIONER OF INCOME-TAX, RANGOON (RESPONDENT). *

Burma Income-Tax Act—S. 66 (1)—Reference under—Burma Income-Tax Act—S. 17-A, 34, 4-A (6)—Tests for determination of residence of a joint Hindu family— "Control and management"—Undivided Hindu family—Non-resident in Burma.

The local agent and a member of a joint Hindu family were resident in Burma, but the *Karta* of the family was outside of the Union of Burma, and the control and management of the affairs of the family were wholly without the Union of Burma.

Held: If the control and management, the directive power or head and brain of a Hindu family remains with some degree of permanence in a certain place, and if he functions his power of directive control and management from that place, that place will be treated as his residence for purposes of income-tax, although it may be recognised from the use of the word "wholly" that the possibility of the seat of such direction control and management being shared in some cases between such places.

The following points should be considered in the determination of the residence of "artificial" persons in relation to their business activity:—

(1) The locality of residence of such "persons" should be determined by asking where is the head and seat and the directing power of such "persons"?

(2) Mere activity by such "persons" in a place does not create residence.

(3) The central management and control of such "persons" may be divided, and it may keep house and do business in more than one place and, it may thus have more than one residence.

(4) In case of dual residence it must be shown that such "persons" perform the vital organic functions incidental to their existence as such in both places.

Therefore, as the control and management of the affairs of the assessee is situated wholly without the Union of Burma, the applicant is a non-resident within the meaning of s. 4-A (*b*) of the Burma Income-Tax Act. *V.Vr. N. M. Subbayya Chettiar* v. *Commissioner of Income-Tax, Madras*, (1951) 19 I.T.R. 168, followed.

Held also: The mere fortuitous residence of a member of Hindu undivided family at a certain place divorced from control and management of

* Civil Reference No. 12 of 1956.

the family business is not a determining factor for purposes of assessment either as resident or non-resident with reference to s. 4-A (*b*) of the Burma Income-Tax Act.

Commissioner of Income-Tax and Excess Profits Tax v. *The Erin Estate*, (1951) 20 I.T.R. 412; *Commissioner of Income-Tax, Burma* v. *S.P.K. A.R.M. Family*, (1941) 9 I.T R. 685, referred to.

Held further : That it is quite contrary to the principles of Hindu Law that a *Karta* of the joint Hindu family can apportion the management of the family business and thereby entrust the *de facto* management in one of the co-parceners.

Thandavaroya Pillai and another v. *Shunmugam Pillai*, (1909) I.L.R. 32 Mad. 167 at 169, approved.

C. A. Soorma for the applicant.

Kyaw Thaung (Government Advocate) for the respondent.

U CHAN TUN AUNG, C.J.—This reference is made by the Income-tax Appellate Tribunal at the instance of R.M.K.M.S. Family, Kyauktan, Hanthawaddy District, by agent Karuppiah Pillay. The questions raised are :

(1) "Whether on the facts and circumstances of the case, the Tribunal was right in holding that the assessee was a non-resident for the purpose of income-tax assessment for the year 1953-54 ?

(2) If the answer to the first question is in the affirmative, whether on a correct interpretation of the first proviso to section 17-A, the action of the Income-tax Officer in taking proceedings under section 34 of the Burma Income-tax Act was correct ?"

Mr. Soorma appearing for the assessee R.M.K. M.S. Family has, however, stated that he does not wish to pursue the second question raised and that the same may be treated as withdrawn. We would accordingly confine ourselves to the first question only. The facts, as could be gathered from the statement of case presented by the Appellate Tribunal under section 66 (*1*) of the Burma Income-Tax Act,

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are briefly these:—The applicant Hindu undivided family owns some house properties and agricultural lands in Kyauktan, Hanthawaddy District, and for the previous year ended 12th April 1953 (Tamil year called "Nandana") declared an income of Rs. 1,457-7-3 for the assessment year 1953-54, and the Income-tax officer concerned accepting the return held the applicant non-assessable. However, it appears that another Income-tax Officer who presumably succeeded the previous Income-tax Officer considering that the applicant was a non-resident and having not complied with the first proviso to section 17-A of the Burma Income-tax Act, took action under section 34 and issued a notice for re-assessment. Nine months after the service of the notice a declaration by the applicant under section 17-A was received by the Income-tax Officer. This declaration was made at Athangudi, Ramnad District, South India, by R.M.K.M.S. Subramanian Chettiar who is admittedly the *Karta* of the applicant joint Hindu family. The said declaration was accompanied by a notice to the Income-tax Officer, Hanthawaddy, which reads:

> "I hereby give you notice under section 17-A of the Burma Income-tax Act, and declare that the tax including super-tax payable by me or on my behalf on my total income shall be determined with reference to my total world income."
>
> (Sd.) R.M.K.M.S. SUBRAMANIAN CHETTIAR."

The declaration filed under section 17-A was hopelessly time-barred, and the reason given therefore by the applicant was ignorance of law. The Income-tax Officer refused to accept the explanation, and treating the applicant as non-resident, tax at the maximum rate prescribed was levied on an Income of K 1,655. The applicant then made an unsuccessful appeal to

the Assistant Commissioner of Income-tax before whom he raised for the first time the issue that the applicant family was a resident for the purpose of income-tax. Again, the applicant appealed to the Income-tax Appellate Tribunal challenging the correctness of the Assistant Commissioner's finding that the applicant was a non-resident. The Appellate Tribunal, however, confirmed the Assistant Commissioner's finding and dismissed the applicant's appeal. The Appellate Tribunal found that, inasmuch as the *karta* of the assessee family, Subramanian Chettiar, was outside the Union of Burma, and that the local agent Karuppiah Pillay had to communicate with the said *karta* for instructions relating to the filing of notice and declaration under section 17-A of the Income-tax Act, although one Alagappa Chettyar, an adult member of the joint family, was present in Burma, the control and management of the affairs of the assessee for income-tax purposes was situate, at the relevant time, wholly without the Union of Burma.

The present reference arises out of that finding. The Burma Income-tax Act in section 4-A (*b*) which is in identical terms with those of the Indian Income-tax Act, for purposes of determining the residence of Hindu undivided family, a firm or other association, provides as follows:

> "For the purposes of this Act, Hindu undivided family, a firm or other association of persons is resident in the Union of Burma unless the control and management of the affairs is situated wholly without the Union of Burma;"

and the question referred to us can only be answered with reference to the factual matters stated above. Leaving aside the firm or other association of persons, the above provision for determining the residence of an assessee, so far as Hindu undivided family is

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concerned, appears to be this. If, from the facts and circumstances available to the Income-tax authorities it is found that the control and management of the affairs of a Hindu undivided family is situated wholly without the Union of Burma, then that assessee family or that Hindu undivided family must be treated as non-resident. If, on the other hand, the control and management of its affairs is situate in Burma, then it should be treated as resident. References to some English decisions do not really help us in this case. We do not find any provision in the English Act which corresponds with section 4-A (*b*) of the Burma Income-tax Act; but references to Indian cases are eminently helpful for arriving at a correct determination of the question referred to us. For the determination of residence of a joint Hindu family several tests have been laid down in many Indian decisions; but I only wish to refer to a decision of the Supreme Court of India in *V.Vr. N.M. Subbayya Chettiar* v. *Commissioner of Income-tax, Madras* (1) which confirmed the decision of the Madras High Court on appeal before it. Fazl Ali, J., of the Supreme Court of India in the leading judgment, while trying to expound the full import and meaning of section 4-A (*b*) of the Indian Income-tax Act, quoted with approval the observations of Patanjali Sastri, J.; and, with greatest respect, I would repeat hereunder, the same observations as being most clear and correct interpretation of section 4-A (*b*) of the Income-tax Act:

"'Control and management' signifies in the present context, the controlling and directive power, the head and brain as it is sometimes called, and 'situated' implies the functioning of such power at a particular place with some degree of permanence, while 'wholly' would seem to recognize

(1) (1951) 19 I.T.R. 168.

the possibility of the seat of such power being divided between two distinct and separated places."

From these observations, it seems clear to me that if the control and management, the directive power or head and brain of a Hindu family remains with some degree of permanence in a certain place, and if he functions his power of direction control and management from that place, that place will be treated as his residence for purposes of income-tax, although it may be recognized from the use of the word "wholly" that the possibility of the seat of such direction control and management being shared in some cases between some places.

Fazl Ali, J. on the basis of the above principle further lays down the following points to which regard should be given in the determination of the residence of artificial "persons" in relation to their business activity :—

(1) The locality of residence of such "persons" should be determined by asking where is the head and seat and the directing power of such "persons"?

(2) Mere activity by such "persons" in a place does not create residence.

(3) The central management and control of such "persons" may be divided, and it may keep house and do business in more than one place and, it may thus have more than one residence.

(4) In case of dual residence it must be shown that such "persons" perform the vital organic functions incidental to their existence as such in both places.

Applying the meaning of section 4-A (*b*) in the light of the principle as enunciated above to the facts

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and circumstances obtaining in this case, I have no hesitation in holding that the control and management of the affairs of the assessee is situated wholly outside the Union of Burma, and that as such the assessee is a non-resident.

Mr. Soorma for the applicant, relying upon the case of *Commissioner of Income-tax and Excess Profits Tax* v. *The Erin Estate* (1) sought to contend that what is contemplated in section 4-A (*b*) is *de facto* control and management and not *de jure*. He submits that even if Subramanian Chettiar, the *Karta* of the family, remained wholly outside the Union of Burma, yet *de facto* control and management being in the hands of Alagappa Chettyar who is also a co-parcener, the assessee's business must be treated as having been in Burma for the relevant assessment year. On the facts and circumstances appearing in the case, I am unable to accept this submission. The facts clearly indicate that although Alagappa, a co-parcener, holds a power from the *karta*, yet that power is very restricted, and it does not confer upon him the control and management of the family business in Kyauktan at all. This is made plain by the very fact that Karuppiah Pillay had to communicate with the *karta* Subramanian Chettiar at Athangudi for instructions in connection with the notice and declaration required under section 17-A of the Income-tax Act. As rightly observed by the Appellate Tribunal, had Alagappa Chettyar been a co-parcener, and even if under the Hindu law a *karta* can divide and split up the control and management of the joint family affairs— about which I am very doubtful—there is no necessity whatsoever for him to write and take instructions from Subramanian Chettiar. That in itself militates the contention that the control and

(1) (1951) 20 I.T.R. 412.

management of the assessee's business was situated in Burma at the relevant period. I am fully aware of the fact, from a number of Indian decisions cited before us, that in-as-much as some members of Hindu family together with *karta* having resided here and there, either for family business or for business in partnership with outsiders, such places of residence are taken as determining factor for purposes of assessment either as resident or non-resident. But, none of these cases shows that where the management and control is with the *karta,* the residence of a co-parcener in partial management of the family business elsewhere would, to that extent, affect the management and control of the *karta*, and accordingly determine the residence for the purposes of income-tax. *Commissioner of Income-tax, Burma* v. *S.P.K.A.R.M. Family* (1) has been cited to us in that regard, but it affords no help to the assessee. What was held therein (Roberts, C.J., Dunkley and Shaw, JJ.) is this:

"The fact that one member of a Hindu undivided family eats, drinks and sleeps at a particular place is not necessarily any evidence that the family resides there. The Indian Legi lature has, in section 4-A(*b*) of the Indian Income-tax Act, as amended by the Amendment Act of 1939, only clarified the existing position that residence of member of a Hindu undivided family where such residence is fortuitous and divorce from control and management of business could not be material from which it could be inferred that the family resided there."

It seems therefore clear that the mere fortuitous residence of a member of Hindu undivided family at a certain place divorced from control and management of the family business is not a determining factor for purposes of assessment

(1) (1941) 9 I.T.R. 685.

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either as resident or non-resident with reference to section 4-A (*b*) of the Burma Income-tax Act. Here, in the present case I am fully satisfied from the statement of facts made to us by the Appellate Tribunal and also from the very notice given by the *karta* of the assessee, R.M.K.M.S. Subramanian Chettiar to the Income-tax Officer requiring the assessment to be made with reference to world income under section 17-A, coupled with the fact that the agent Karuppiah Pillay himself had to communicate and take instructions from R.M.K.M.S. Subramanian Chettiar by-passing Alagappa Chettyar, that the inference drawn by the Appellate Tribunal, and also by the Assistant Commissioner that the control and mangement of the affairs of the assessee's business is wholly outside Burma, and that the assessee is not a resident, is entirely correct. Further contention was made by the applicant's Counsel that the *karta* of the joint Hindu family can apportion the management of the family business, and thereby entrust the *de facto* management in one of the co-parceners. By this, the applicant's Counsel wishes to urge that, because Alagappa Chettyar, a co-parcener, was in Burma in partial management of the family business by virtue of a power given by the *karta* the applicant family should, in the circumstances, be treated as a resident in Burma. I cannot subscribe to this view at all, it being quite contrary to the principles of Hindu law. I need in that regard quote with approval the observations of their Lordships Sankaran-Nair and Abdur Rahim, JJ., in *Thandavaroya Pillai and another* v. *Shunmugam Pillai* (1) which are as follows:

"So long as the members of a family (joint Hindu family) remain undivided the senior member of the family is

(1) (1909) I.L.R. 32 Mad. 167 at 169.

entitled to manage the family properties. He is also entitled to exercise the right of management vested in the family on its behalf. He is the representative of the family in whom the administration of the trust is vested. It may be open to the members of the family to limit his authority by a valid agreement * * * * But until partition no junior member is entitled to management of the trust in rotation any more than he is entitled to such possession or management of any family property."

This passage is also quoted with approval by D. F. Mulla in his Principles of Hindu Law, 11th Edition, at page 281. Alagappa Chettyar is undoubtedly a co-parcener and junior member, and as such it is inconceivable under the principles of Hindu law, in the absence of any evidence whatsoever limiting the authority of the *karta* that, he (Alagappa) can be said to have the management of the family property in rotation, or as having at all had the management of the family property at the relevant time. In my opinion, therefore, and for the reasons given above the question referred to should be answered in the affirmative. The applicant shall pay costs, ten gold mohurs to the Commissioner of Income-tax.

U SAN MAUNG, J.—I agree.

U BA THOUNG, J.—I agree.

INCOME-TAX REFERENCE.

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

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Mar. 17.

THE NURSING HOME ASSOCIATION LTD. (APPLICANT)

v.

COMMISSIONER OF INCOME-TAX, BURMA (RESPONDENT).*

Burma Income-Tax Act, s. 66 (1)—Reference under—Whether subscriptions from members of the Nursing Home Association Ltd., taxable within the purview of s. 2 (15) of the Burma Income-Tax Act—Application of the principle "No one can make a profit out of himself."

The Nursing Home Association Ltd., is a limited company by guarantee, incorporated under the Burma Companies Act.

In the accounts of Income and Expenditure under the head "annual subscriptions" the sum of Rs. 71,833-7 was shown as receipts.

The reference was whether this sum can be treated as income within the purview of s. 2 *15*), Burma Income-Tax Act.

Relying on :—*The United Service Club, Simla* v. *The Crown*, Vol. I, I.T.C. p. 113 ; *New York Life Insurance Co.* v. *Styles*, (1889) 14 A.C. 381 ; *Carlisle and Silloth Golf Club* v. *Smith*, (1913) 3 K.B. 75, it was contended :—

Firstly, that the subscriptions paid by the members are not income and should be excluded in computing income for purposes of Taxation, and

Secondly, that even if such subscriptions can be treated as income, they are to be excluded from computation of profits or gains on the principle that no one can make profits out of himself.

Held : That the word "income" means "a periodical monetary return : 'coming in'" and accruing to the assessee independently, and not as the nett proceeds, of a business carried on by the assessee as defined in s. 2 (*4*) of the Act. "Income" in this sense connotes incomings without regard to outgoings.

In re the Commissioner of Income-Tax, Burma v. *The Bengalee Urban Co-operative Credit Society, Limited*, 2 Ran. p. 521, referred to.

Held also : That what Style's case lays down is that if there are no dealings with outsiders and exclusive mutuality is established between a mutual benefit company, association or a club (artificial persons) and its members in the sharing of surplus or loss then, the principle that no one can make a profit out of himself applies.

Commissioner of Income-Tax, Bombay City v. *The Royal Western India Turf Club, Limited*, (1953) I.T.R. Vol. 24, p. 551 ; *The Dibrugarh District*

* Civil Reference No. I of 1956.

Club Ltd. v. *The Commissioner of Income-Tax, Assam*, Vol. II, I.T.C. p. 521; *The Maharaj Bag Club Ltd.* v. *The Commissioner of Income-Tax, Central Provinces and Berar*, Vol. V, I.T.C. p. 201, referred to.

Held further: The activities of the Nursing Home Association Ltd., *are not only confined to the Members, but also to outsiders*, and is therefore not a Mutual Benefit Association within the rule laid down in Style's case and that it is actively concerned in doing a business within the meaning of sub-s. (*4*) of s. 2, read with s. 10 of the Burma Income-Tax Act.

Per U SAN MAUNG, J.—One of the tests which must be satisfied by a mutual benefit society is to show that the members were entitled to participate in the surplus.

Municipal Mutual Insurance Ltd. v. *Hills*, (1932) 16 Tax Cases 430 at 448; *Commissioner of Income-Tax, Bombay City* v. *The Royal Western India Turf Club Limited*, (1953) I.T.R. p. 551; *South Indian Planting and Commercial Representation Fund* v. *Commissioner of Income-Tax, Madras*, (1951) 32 I.T.R. 513, referred to.

Reference answered in the affirmative.

F. C. Fischer and *U Paing*, for the applicants.

Kyaw Thaung (Government Advocate) for the respondent.

U CHAN TUN AUNG, C.J.—At the instance of the applicant, the Nursing Home Association Limited, the following question has been referred to us for decision by the Income-tax Appellate Tribunal under section 66 (*1*) of the Burma Income-tax Act:—

"Whether on the facts and in the circumstances of the case the members' subscriptions amounting to Rs. 71,833-7 received by the applicant Association from its members during the year ended the 31st December, 1951, should be deemed income for the purpose of income-tax assessment for the assessment year 1952-53?"

The facts as they appear from the statement of the case are these:

The applicant-association is incorporated under the Burma Companies Act as a limited company by guarantee and according to its Memorandum of Association, the objects for which the Association is

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established are, *inter alia* (i) to found, operate and maintain a Nursing Home primarily for the use of the members of the Association and their dependents and for such members of the public as may be prescribed by the regulations and bye-laws of the Association; (ii) to operate and maintain in connection with the said Nursing Home every kind of direct ancillary service such as outside nursing staff, electrical treatment, massage, etc.; (iii) to carry on any other business which may seem to the Association capable of being definitely carried on in connection with the above or calculated directly or indirectly to enhance the usefulness of the Association or the value of any of its properties or rights. And according to Article 3 of the Articles of Association, there are 3 classes of members, *viz.*, (1) Capital Subscribers; (2) Annual Subscribers; and (3) Honorary Members. The Capital Subscribers and Annual Subscribers pay subscriptions at the rates prescribed in Articles 7 and 8 of the Articles of Association. The benefits which members derive from the Association are set out in Article 12, while the charges payable by members as well as by non-members for the use of the Nursing Home are to be found in the rules and bye-laws framed pursuant to Article 3 (*a*) of the Memorandum of Association. Bye-law (11) prescribes the charges as follows:—

The daily charges for patients in the Home:—

	Accommodation & nursing, etc.	*Messing.*	*Total.*
	Rs.	Rs.	Rs.
Members	Nil.	16	16
Dependents of Members	14	16	30
Non-members ...	28	16	44

Besides these daily charges, there are special charges for service of the special class and for use of the

operating theatre which are fixed at Rs. 32 for a minor operation, and Rs. 50 for a major operation (*vide* Bye-law 16). A careful examination of the Articles of Association however reveals that the services of the Association are, in fact, not directly conferred upon members who are classed as Capital Subscribers, inasmuch as such members are, under Article 7 of the Articles of Association, mostly artificial persons, such as Companies, Firms or Associations. For such members, the benefits of the Nursing Home are given to their, what they have been described as "beneficiaries" *vide* Article 12 of the Articles of Association. It seems therefore, clear that so far as Capital Subscribers who are "artificial persons" are concerned only such persons, called "beneficiaries" as are nominated by them are entitled to receive the benefits given to the members. It also appears that the Association admitted for treatment such *non-members* as are approved by the Committee of the Nursing Home; and this is clearly in conformity with the objects set out in the Memorandum of Association. Such non-members are made to pay scheduled rates prescribed by the bye-laws. There are also other patients who are given treatment and they are called "dependents of the members", and they have to pay half of non-members' rate. Thus, the Association's incomings or receipts are mainly derived from the above activities.

For the assessment year 1952-53, relating to the accounting year ended the 31st December, 1951 the applicant-Nursing Home Association was assessed by the Income-tax Officer, Companies Circle, Rangoon on an income of Rs. 16,718 as against a Return of "Nil". The assessment was made after some adjustment on the basis of an Income and Expenditure Statement annexed to the Return; but

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the Income-tax Officer treated the annual subscriptions of Rs. 71,833-7 realised from members as *income* of the applicant-Association. It seems that, in the opinion of the Income-tax Officer, the applicant-Association is, in the way it has been functioning, a " business concern " within the meaning of section 2 (*4*) of the Burma Income-tax Act, and that as such, taxable under section 10 in respect of any profit or gain derived from such business. This view was not seriously challenged at all by the applicant. The applicant-Association however sought to contend by having reference to paragraph 4 of its Memorandum that its actual activities fall within the ambit of section 4 (*3*) clause (i) or clause (ii) of the Income-tax Act and that as such, it should be exempted from taxation. The Income-tax Officer refused to accept that contention.

On appeal to the Assistant Commissioner of Income-tax (Western Range) Rangoon, the Income-tax Officer's decision was upheld; but there were some modifications as regards quantum of depreciation allowed as expenditure on alterations and improvements, etc. to the building, which are however not relevant to present question referred to us.

Again, in the appeal before the Appellate Tribunal the applicant-Association challenged the correctness of the Income-tax Officer's inclusion of members' subscription amounting to Rs. 71,833-7 as income for purposes of assessment of tax. Here, we may however note that neither the applicant, the Income-tax authorities, nor the Appellate Tribunal appear to have approached the consideration of the entire case from the right point of view. With due respect, we may observe that much learning has been wasted upon an issue, which is not quite relevant to the case as to whether the applicant-Association's

income is an income derived from the property held under trust or other legal obligation wholly for religious or charitable purpose within the Union of Burma or whether it is an income of a religious or charitable institution derived from voluntary contributions, and applicable solely to the religious or charitable purposes, within the ambit of section 4, sub-section (*3*), clauses (i) and (ii) of the Burma Income-tax Act. With due respect, it should have been clear to all the parties concerned that from the very provision of the Memorandum of Association, the Articles, and the Bye-laws of the applicant-Association, some of which have been set out above *in extenso*, the income of the applicant-Association does not accrue out of the property held under trust wholly for religious or charitable purposes. Neither is the Association a religious or charitable institution, inasmuch as the income derived from its activities are admittedly, not being applicable *solely* to religious or charitable purposes. The only point of substance that has arisen in the course of appeal before the Appellate Tribunal appears to me to be, whether the subscriptions received from the members amounting to Rs. 71,833-7 should be excluded in computing income for purpose of taxation. That depends upon the answer to the question whether such subscriptions from members classified in the Memorandum of Association can be treated as income within the purview of the Burma Income-tax Act, section 2 (*15*) which gives the definition of "total income" in these terms:—"Total income" means total amount of income, profits and gains from all sources to which this Act applies computed in the manner laid down in section 16". Taxable sources of income are laid down in section 6, among which is "Business".

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In an old Indian case, *The United Service Club, Simla* v. *The Crown* (1) it was held, relying upon *New York Life Insurance Co.* v. *Styles* (2), and also upon *Carlisle and Silloth Golf Club* v. *Smith* (3) that money received by a club from the members composing it cannot properly be regarded as income. Now, relying upon those cases, the applicant-Association's Counsel contends that the subscriptions paid by the members are not income and that they should be excluded from the assessment of profits or gains of the Association for income-tax purposes. No doubt, the Burma Income-tax Act does not define precisely the meaning of " income ". However, *In re the Commissioner of Income-tax, Burma* v. *The Bengalee Urban Co-operative Credit Society, Limited* (4), a Bench of the late High Court of Judicature (Sir Arthur Page, C.J., Das and Mya Bu, JJ.) has pointed out at page 530, that the word " income " as contrasted not with capital, but with " profits " or " gains " in the Income-tax Act, means " a periodical monetary return 'coming in'" and accruing to the assessee independently, and not as the nett proceeds, of a business carried on by the assessee as defined in section 2 (*4*) of the Act. " *Income* " *in this sense connotes incomings without regard to outgoings.* In the light of the meaning given in the said case, I do not see any substance whatsoever in the submission made by the learned counsel for the applicant that the subscriptions realised from members of the Association are, in the circumstances of the case, not income. *New York Life Insurance Co.* v. *Styles* (2), which the applicant's Counsel mainly relies upon in support of his submission that even if such subscriptions can be

(1) Vol. I, I.T.C. p. 113.
(2) (1889) 14 A.C. 381.
(3) (1913) 3 K.B. 75.
(4) 11 Ran. p. 521.

treated as income, they are to be excluded from computation of profits or gains on the principle that no one can make profits out of himself does not really help him at all. A similar issue, but not identical to the one now before us arose in the case of *Commissioner of Income-tax, Bombay City* v. *The Royal Western India Turf Club Limited* (1). The Royal Western India Turf Club Limited by guarantee which carried on business of racing and other kindred activities in accordance with their Memorandum of Association claimed that in computing its total income, receipts derived from its members such as, (1) season admission tickets ; (2) daily admission gate tickets ; (3) use of private boxes and (4) income from entries and forfeits for horses that did not run the race during the season should be excluded. The High Court of Bombay held that the first three items were not taxable. On appeal to the Supreme Court by the Commissioner of Income-tax, it was held that the principle of *Style's case* (2) did not at all apply, inasmuch as there was no mutual dealing between the members *inter se* in the nature of mutual insurance, and that all items of receipts from members were received by the assessee from the business with its members within the meaning of section 10 (*l*) of the Indian Income-tax Act and that therefore, they were assessable to tax. The leading judgment of the Supreme Court was delivered by Das, J. and the question as to whether the subscriptions or periodical payments made by club members, mutual aid societies should be taken into consideration in the determination of profits or gains for taxation was discussed at length. The judgment also indicates precisely when and in what circumstances the principle laid down in Style's case that no one can

(1) (1953) I.T.R. Vol. 24, p. 551.

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make a profit out of himself should apply. The facts in Style's case are, the assessee-Company issued life policies of two kinds, namely, participating and non-participating and there were no shareholders, but every shareholder of a participating policy became a member of the Company and as such, entitled to share in the assets, and liable for a share in the losses. The question was whether the surplus returned to the members after the annual account was liable to income-tax as profit or gain. The Company was run for the purpose of insuring the life of the members who had associated themselves on the principle of mutual insurance, *i.e.*, they contributed annually to the common fund out of which payments were made in the event of death, to the representatives of the deceased members. These persons were owners of the common fund, and they alone are entitled to participate in the surplus. It was thus a case of mutual assurance of the individuals, and the individuals insured and those associated for the purpose of meeting the policies when they fell in and receiving the surplus, were identical. It was held that what the members received under these circumstances were not profits, but were their respective shares of the excess amount contributed by themselves. It is plain therefore, that what Style's case lays down is that if there are no dealings with outsiders and exclusive mutuality is established between a mutual benefit company, association or a club (artificial persons) and its members in the sharing of surplus or less then, the principle that no one can make a profit out of himself applies and that there can be no income, profit or gain to attract taxation.

The principle of Style's case was also considered in an earlier case of *The Dibrugarh District Club*

Ltd. v. *The Commissioner of Income-tax, Assam* (1). There, the assessee-club, a limited Company under the Indian Companies Act having conducted a club for the benefit of such members as may become members permanent or temporary. Under its articles, no shareholder was entitled to the benefit and privileges of the Club unless elected a member, the membership of the Club being distinct from and independent of holding of a share. Of the members of the Club, only 69 were shareholders and 220 were non-shareholders while 74 out of 445 of the shares of the Company were held by non-members of the Club. The profits of the Club were being distributed every year as dividend to the shareholders. The Company claimed exemption from assessment of its profits relying upon Style's case. It was held that the Company was assessable on the full amount of its profits as it was *not a mere mutual trading society making quasi profits by trading with its own members*, and returning such "profits" to the members. Rankin, C.J. delivering the judgment observes at page 523 : "The case is wholly different on the material facts from *New York Life Insurance Company* v. *Styles* (2). I agree with the Commissioner in his view that in this case it is not a matter of importance that some of the shareholders and some of the Club members are the people."

In *The Maharaj Bag Club Ltd.* v. *The Commissioner of Income-tax, Central Provinces and Berar* (3) a similar point arose as to whether the money received by the Maharaj Bag Club from members composing it can be regarded as income. The Maharaj Bag Club was a registered Company under the Indian Companies Act and consisted of 66

(1) Vol. II, I.T.C. p. 521. (2) (1889) 14 A.C. 381.
(3) Vol. V, I.T.C. p. 201.

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shareholders, 26 of them being members and 61 non-shareholders members, paying monthly subscriptions. It was held that the Club was not a mere mutual benefit society, and surplus income irrespective of its being income from business or not chargeable to tax as income from other sources. Reference was made to Rankin, C.J.'s observation in *The Dibrugarh District Club Ltd.* v. *The Commissioner of Income-tax, Assam* (1) quoted above.

Relying upon the absence in the Burma Income Tax Act of special definition of "Income" to be found in section 2 (*6C*) of the Indian Income-Tax Act, and also such provisions as are to be found in sub-section (*6*) of section 10 of the Act, whereby a trade, professional or similar Association performing specific services for its members for remuneration is deemed to carry on business in respect of those services and the profits and gains therefrom made liable to tax, the learned Counsel for the applicant-Association further contends that the subscriptions paid by members of the applicant-Association should not be computed as "Income" in the assessment of income-tax. I do not see any merit in this contention. If, under the Indian Income-Tax Act, profits of any business of insurance carried on by mutual Insurance Association are by specific definition of section 2 (*6C*) declared to be "Income", and by sub-section (*6*) of section 10, an Association performing specific purposes for its members for remuneration is deemed to carry on business and made liable to income-tax for any profit obtained therefrom, there is stronger reason for holding that for purposes of assessment, an Association, such as the applicant, whose activities *are not only confined to the members, but also to outsiders,* not to speak about the nominees of the

(1) Vol. II, I.T.C., p. 521.

members who are classed as " beneficiaries " and their dependents, is not a Mutual Benefit Association within the rule laid down in Style's case, and that it is actively concerned in doing a business within the meaning of sub-section (*4*) of section 2, read with section 10 of the Burma Income-Tax Act.

Therefore, from several decisions that have been referred to above, it appears quite clear to me that the principle laid down in Style's case cannot be applied, if from the facts and circumstances obtaining in a case, the characteristic of mutuality disappears and the incomings and outgoings of the Association are found to have been merged with its dealings with non-members or outsiders. Now, the applicant-Association undertakes two categories of business, namely, one with members and the other with individual outsiders, and non-members, and when the income derived from non-members merges with the income derived from members, the total income of such Association entirely loses the character of mutuality or exclusive trading between its members *inter se* within the rule of Style's case and it becomes liable to taxation. Therefore, the question formulated must be answered in the affirmative. The Commissioner of Income Tax shall be entitled to costs 10 gold mohurs in this reference.

I would however like to add a few more words. It appears that both the assessee and the Income-tax authorities have failed to consider the significance of the explanation under clause (iii) of sub-section (*2*) of section 10 of the Burma Income-Tax Act, which deems subscriptions paid periodically by shareholders or subscribers of a Mutual Benefit Society to be capital borrowed within the meaning of that clause. The question then for consideration is whether the subscriptions paid by the members of the

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applicant-Association, whether recurring or paid periodically, are not capital borrowed, and its annual account prepared, having regard to that explanation. However, it is not known whether the Income-Tax Authorities have prescribed in that regard to include the applicant-Association within the ambit of the said explanation. This however, is in passing, and strictly speaking, has no relevancy whatsoever for purposes of the answer to the question referred to us.

U BA THOUNG, J.—I agree.

U SAN MAUNG, J.—I would like to add a few remarks to the judgment just pronounced by the learned Chief Justice. On the facts which have been clearly set out by him it is difficult to resist the conclusion that the Nursing Home Association Limited was running the Nursing Home in Prome Road more or less as a business concern. Most of the members of the Association being business firms, the majority of persons who benefited from the Nursing Home were their nominees, the so-called "beneficiaries". A carefully graduated scale of charges has been prescribed not only for members, their nominees and their dependents but also for non-members who had to pay higher charges for accommodation and other services rendered by the Nursing Home.

There is complete lack of evidence to show that the members were entitled to participate in the surplus and therefore one of the tests which must be satisfied by a mutual benefit society strictly so-called is lacking in this case.

In this connection the observation of Lord Macmillan in *Municipal Mutual Insurance Ltd.* v. *Hills* (1) is apposite. His Lordship observed—

> "The cardinal requirement is that all the contributors to the common fund must be entitled to participate in the surplus and that all the participators in the surplus must be contributors to the common fund ; in other words, there must be complete identity between the contributors and the participators. If this requirement is satisfied, the particular form which the association takes is immaterial."

This test was applied by the learned Judges of the Supreme Court of India to the Royal Western India Turf Club Limited in the case of *Commissioner of Income-tax, Bombay City* v. *The Royal Western India Turf Club Limited* (2) and the Club was held not to be a mutual benefit society. In these circumstances the receipts from members in respect of season admission tickets, daily admission gate tickets, use of private boxes and entries and forfeits were assessable to income-tax.

In *South Indian Planting and Commercial Representation Fund* v. *Commissioner of Income-tax, Madras* (3) the assessee was an association formed to protect the commercial and other interests of its constituent members, all of whom were not trade concerns. Only members made contributions to the association but the services of its secretariat were available not only to its members but also to members of the Legislatures and Local Boards who need not themselves be members. There were no rules providing for the utilisation of its funds or surplus and the annual surplus was just accumulated. The question which arose was whether the surplus of the receipts of the association over the expenditure every

(1) (1932) 16 Tax Cases 430 at 448. (2) (1953) I.T.R. p. 551.
(3) (1957) 32 I.T.R. p. 513.

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year was assessable to income-tax. The learned Judges of the Madras High Court after quoting with approval the observation of Lord Macmillan in *Municipal Mutual Insurance Ltd.* v. *Hills* (1) held that as there was no evidence to show that the members of the association who alone made the contributions had an exclusive right to participate in the surplus the assessee was not a mutual benefit association and that the surplus of receipts of the assessee over the expenditure was "income" assessable as "income from other sources" under section 12 of the Indian Income-tax Act (XI of 1922). In this connection the following observations of Rajagopalan, J. may be usefully quoted :—

> "The alternative basis on which the learned counsel for the respondent sought to sustain the tax was section 12. That contention, in our opinion, is well founded. As the learned counsel pointed out, 'income', which is subjected to tax by the Indian Income-tax Act, is of much larger import than 'gains' and 'profits'. What the Fund received from its members was certainly income in the broad sense. The question is whether the surplus, after the expenditure of the Fund had been met, was assessable income. In our opinion it was assessable income from other sources within the scope of section 12. It was income, and as the Tribunal pointed out, if the assessee could not show any statutory basis for exemption from taxation, the income became assessable."

This observation would apply with full force to the sum shown as receipts under the head "Annual Subscriptions" in the accounts of Income and Expenditure of the Nursing Home Association Limited (Annexure H). The total amount shown under this head is Rs. 71,833-7-0 and even when this sum was taken into consideration as income there was excess of expenditure over income for the year of Rs. 5,393-5-0.

(1) (1932) 16 Tax Cases 430 at 448.

If this sum is not income at all I do not see how the Nursing Home could be maintained at all. For these reasons I concur with the answer that the question referred to us for decision should be in the affirmative.

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APPELLATE CIVIL.

Before U Aung Khine and U Ba Thoung, JJ.

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THE STATE AGRICULTURAL MARKETING BOARD, AKYAB (APPELLANT)

v.

THE ARAKAN CARRIERS SYNDICATE, AKYAB (RESPONDENT).*

Carriers Act (Act III, 1865)—Common carrier—Definition—Liability under Contract Act, s. 10—Notice in writing—Necessity of—To bring a suit for loss or injury—Period in which it should be given.

If a person holds himself out to carry goods or if one makes a business of carrying goods from a jetty to a ship in harbour, he is a common carrier.

K. C. Dhar v. *Ahmad Bux*, I.L.R. 60 Cal. 879, referred to.

The liability of a common carrier is not affected by the Contract Act. A suit against a common carrier for compensation under the Contract Act does not lie.

Irrawaddy Flotilla Co. Ltd. v. *Bugwandas*, 18 I.A. page 121, referred to.

Where no notice in writing has been given within the time prescribed by s. 10 of the Carriers Act, a suit against a common carrier for compensation for loss of or injury to goods entrusted to him for carriage, is incompetent.

Sein Tun (2) for the appellant.

Kyaw Min for the respondent.

U AUNG KHINE, J.—This is an appeal by the State Agricultural Marketing Board, Akyab, against the judgment and decree of the District Court of Akyab in Civil Regular Suit No. 2 of 1953 in which their suit against the Arakan Carriers Syndicate, Akyab, for recovery of K 64,638·69 was dismissed with costs.

* Civil 1st Appeal No. 101 of 1954, from the decree of the District Court of Akyab in Civil Regular Suit No. 2 of 1953, dated the 6th September 1954.

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It is the case of the plaintiff-appellants that the defendants were their lighterage agents and under agreement they were engaged to transport rice and rice products belonging to them from different points in Akyab to ships riding at anchor in the Kaladan River. On 18th October 1951 in one of the trips made in one of the defendant-respondents' barges carrying rice bags, due to negligence and want of care on the part of the defendants and their servants 2,399 bags of rice fell overboard and were lost. The defendant-respondents did not accept responsibility and hence the suit.

The defendant-respondents denied that they were the agents of the State Agricultural Marketing Board and averred that they were common carriers and therefore the suit filed against them was not maintainable and that it was barred by limitation. The District Court upheld the contention of the defendant-respondents that they were common carriers amenable only to the provisions of the Carriers Act of 1865. In view of this and as no notice required under section 10 of the Act was given, the suit was not maintainable and furthermore under Article 30 of the Limitation Act the suit was barred by limitation.

The most important point for consideration in this appeal is whether the defendant-respondents are the lighterage agents and bailees of the State Agricultural Marketing Board or whether they are common carriers. The Arakan Carriers Syndicate is a private firm formed for the purpose of carrying on the business of lighterage work in the port of Akyab. For that purpose, they had to hire barges from the Marine department of the Union Government. They had been transporting rice for the State Agricultural Marketing Board since 1948. Although there were written contracts between the parties in the earlier

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years, owing to a disagreement over certain terms no contract was drawn up for the year 1951. Nevertheless, the defendant-respondents continued transporting rice on behalf of the plaintiff-appellants on verbal understanding. The defendant-respondents were never paid any commission by the State Agricultural Marketing Board nor did they receive any advances and all that they earned from the plaintiff-appellants was the fees they charged for the transportation of rice in their barges on behalf of the plaintiff-appellants. There is no denying of the fact that the State Agricultural Marketing Board is not the only client the Arakan Carriers Syndicate has, and the latter does transportation work for every and anybody requiring their services.

We have referred to Exhibit A agreement drawn up between the parties in 1949 and also Exhibits C and D drawn up between the parties subsequent to the mishap that happened in 1951. No where in these agreements can we find any clause to show that the defendant-respondents had been designated as agents of the plaintiff-appellants. On the other hand, it is clear that the defendant-respondents had always styled themselves as carriers and never as agents or bailees. The defendant-respondents claimed that they cannot be deemed to be agents within the meaning of section 182 of the Contract Act merely because they were transporting rice on behalf of the plaintiff-appellants. It is admitted by U Thet Zin, Executive Officer, State Agricultural Marketing Board, that the defendants could not undertake any work which would in any way bind them. The defendant-respondents did not do any business with any third party on behalf of the plaintiff-appellants nor were they authorised to do so. The defendant-respondents cannot be deemed to be

bailees as well for the simple reason that the rice bags put on their barges were neither to be returned nor accounted for except for the purpose of payment of fees.

In the case of *K.C. Dhar* v. *Ahmad Bux* (1) quoted in the lower Court's judgment, the definition of a common carrier is given in very clear terms by Costello, J. He said—

"If a person holds himself out to carry goods or if one makes a business of carrying goods from a jetty to a ship in a harbour, he is, in my opinion, a common carrier."

These words, in our opinion, in a nutshell, clearly depict the status of the Arakan Carriers Syndicate as common carriers.

The learned Advocate for the plaintiff-appellants submitted that the appellants had more than one right to sue against the defendant-respondents and it was up to them to choose as to which of the rights they would pursue. They could sue the defendant-respondents either under the Carriers Act or under the Contract Act and as this suit was filed under the Contract Act it was well within time. This argument, in our view, has no force in the light of the decision in the *Irrawaddy Flotilla Company Ltd.* v. *Bugwandas* (2). It was held in that case that the liability of a common carrier in India is not affected by the Indian Contract Act of 1872. It follows therefore that the plaintiff-appellants had no right of suit against the defendant-respondents under the Contract Act.

Section 10 of the Carriers Act reads as follows:

"No suit shall be instituted against a common carrier for the loss of, or injury to, goods entrusted to him for carriage, unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six

(1) I.L.R. 60 Cal. 879. (2) 18 I.A. p. 121.

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months of the time when the loss or injury first came to the knowledge of the plaintiff."

It is clear that no notice under this section was given to the defendant-respondents by the plaintiff-appellants prior to the institution of the suit. We are therefore of the view that the suit of the plaintiff-appellants is incompetent. It is not disputed that if the defendant-respondents were held to be common carriers, the suit as against them would be barred under Article 30 of the Limitation Act.

For the reasons given above we see no grounds to interfere. The appeal is dismissed with costs.

U BA THOUNG, J.—I agree.

APPELLATE CRIMINAL.

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

THE UNION OF BURMA (APPELLANT)

v.

OO HLA KHINE (RESPONDENT).*

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Mar. 24.

Penal Code, s. 302 (2)—Motiveless crime and insanity—S. 84, Penal Code.

Held: That an apparently motiveless crime is not attributable to insanity or mental derangement of the perpetrator.

Nga Sau Pe v. *Emperor*, 38 Cr.L J. 307, approved.

Held also: The exemption from liability contemplated by s. 84 of the Penal Code is the commission of an offence by a person who by reason of his unsoundness of mind is, *at the time of the commission of the offence*, incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law.

McNaughton's case, (1843) 4 State Trials; *Sa Pont* (alias) *Paw Lu* v. *The Union of Burma*, B.L.R. (1950) 352, referred to.

Ganguli (Government Advocate) for the appellant.

Mya Than Nu for the respondent.

U CHAN TUN AUNG, C.J.—This is the Government appeal against the acquittal of the respondent Oo Hla Khine by Special Judge, Akyab, in his Criminal Regular Trial No. 24 of 1956, wherein the respondent was sent up for trial under section 302 (2) of the Penal Code for having caused the death of one Tun Phyu Yea of Kanbyin village in Akyab district.

The facts of the case are not in dispute, and there is overwhelming evidence that on the morning of 25th November 1956 the respondent did cut the deceased Tun Phyu Yea with a *dah* while the deceased was having breakfast together with some

* Criminal Appeal No. 2 of 1958. Appeal from the order of the Special Judge (U Ko Kyi) of Akyab, dated the 6th day of August 1957 passed in Criminal Regular Trial No. 24 of 1956.

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witnesses in the case, namely, Kyaw Zaw Aung (PW 1), Maung Htwee Aung (PW 4), Kyaw Aye (PW 10) and Phyu Thee (PW 12) on a platform in front of Kyaw Aye's house. It appears that these people happened to be in Kyaw Aye's house in Kanbyin village to enquire about the murder of one Maung Saw Tun; witness Phyu Thee being a police officer of Yathedaung Town. The deceased died instantaneously as a result of the *dah* cut wound which was in the mid-line of the back of the head. U Kyaw Tha (PW 13), the Investigating Officer arrested the respondent at once, and the only defence set up by the respondent at the trial, so far as we can make out from his statement on oath was, that he was forced by the police officer Phyu Thee to drink liquor although he declined; that after having three cups of liquor, he became drunk, and that thereafter he did not remember what happened to him. He added that when he came to his senses, he found himself in the Yathedaung lock-up. Thus, the respondent did not deny having cut the deceased, but he set up a plea of drunkenness to exonerate him from the alleged crime. In fact, when he was called upon after charge to state his defence, he stated that he was forced to drink, and being drunk he did not know what he was doing. No doubt, such a defence is available to him under section 85 of the Penal Code, provided of course that the drink that intoxicated him was administered to him without his knowledge or against his will. But on his own showing, the respondent took the three cups of liquor because he was asked to do so by Phyu Thee. The learned trial Judge, however, did not appear to have considered whether the respondent's plea of drunkenness falls within the ambit of section 85 of the Penal Code. And, to our mind he could not

have done that, inasmuch as, there was obviously no evidence whatsoever to support the respondent; except his bare assertion on oath. The learned Judge however concluded, basing upon certain facts and circumstances, that the respondent was at the time of the alleged crime, insane; that his act came within the exception of section 84 of the Penal Code, and that as such, he was entitled to an acquittal. Here, we would quote a passage from his judgment how he arrived at that conclusion:

"On the evidence on record, it will be seen that no motive whatsoever, has been set up for the commission of this crime. It will also be seen that there were no deliberation and preparation for the act. Further it is also clear that the accused did it in a manner which shew *a* (no?) desire for concealment. In fact it would appear that he did it deliberately in the presence of the police officer. On the evidence on record as a whole, I am of the opinion that the accused did not resist his arrest. On a careful consideration of the facts abovenamed, I am of the opinion that the accused acted while he was of unsound mind and as such he is entitled to the provisions of section 84 of the Penal Code."

Thus, it appears that the learned trial Judge inferred that the respondent was an insane person at the precise time of cutting Tun Pyu Yea (deceased) from the following facts and circumstances:—

(1) There being no motive for the alleged crime.

(2) No deliberation or preparation for the alleged crime.

(3) Absence of any desire for concealment of the crime, (it being committed in the presence of a police officer).

The learned Government Advocate for the appellant has strenuously challenged the propriety of the inferences drawn by the learned trial Judge. It

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is urged that mere absence of motive or inadequacy of motive is not a matter which should weigh the learned Judge's consideration as regards the mental derangement or insanity of the respondent. It is further contended that there is ample evidence on the record to show that there was deliberation and preparation on the part of the respondent, and also that after cutting the deceased he made an attempt to run away from the scene of crime, that he had to be pursued and arrested at some distance from the scene of crime. In support of his first contention the learned Government Advocate relied upon *Nga San Pe* v. *Emperor* (1), wherein Goodman Roberts, C.J. and Dunkley, J. observed:

> " Inadequacy of motive is not a matter which is conclusive evidence of insanity, and although in a case of doubt it may perhaps assist in turning the scale one way or the other, by itself it does not afford any strong evidence of mental derangement."

The accused in that case was charged with murder of his wife upon whom he had inflicted not less than 15 or 16 wounds and the plea of unsoundness of mind was set up, basing upon the total absence of motive in perpetrating the murder. We are in respectful agreement with the above observations. There are many apparently motiveless crimes committed, and it will have a most startling result if every apparently motiveless crime is attributable to insanity or mental derangement of the perpetrator. We are therefore unable to fall in line with the view of the learned trial Judge on the question of absence of motive. Regarding absence of deliberation or preparation, or concealment of his act, we are of the view that the material evidence in the proceeding do not at all justify the inference

(1) 38 Cr. L.J. 397.

drawn by the trial Judge. The evidence of the eye witnesses, namely, Kyaw Zaw Aung (PW 1), Maung Htwee Aung (PW 4), Kyaw Aye (PW 10), Tun Hla Aung (PW 11) and the police officer Phyu Thee (PW 12) clearly shows that the respondent was seen coming towards them holding a *dah* while they were having breakfast with the deceased in front of Kyaw Aye's house and then he suddenly attacked Tun Phyu Yea. After attacking Tun Phyu Yea the respondent ran away for about 8 cubits. They had to chase him and got him under arrest. We may note that Kyaw Aye (PW 10) gave quite a vivid account of how the respondent came upon the scene and cut Tun Phyu Yea, and thereafter retreated backwards two or three spaces before he was apprehended by Kyaw Zaw Aung and Htwee Aung. Tun Hla Aung (PW 11) also substantially supported the other witnesses. He averred that he saw the respondent come from the northerly direction while they were having meal in front of Kyaw Aye's house, then go up to his (respondent's) house from where he brought down a *dah*. Next, he was seen picking up a bamboo stick which he sharpened it with the *dah* he had. With these two weapons in hand the respondent came straight to the place where the witness and his friends including the deceased, were having breakfast. The respondent then dropped the bamboo stick, and with the *dah* he held he gave one cut to Tun Phyu Yea. Tun Phyu Yea fell forward and the respondent shouted while running, "Don't come near me. Don't come near me."

From this vivid account of the incident given by the eye witnesses, we find ourselves that we cannot agree with the conclusions arrived at by the learned trial Judge that the respondent was insane at the time of the alleged crime. No doubt the respondent himself

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and some members of his family were at one time, said to have been mentally deranged, but that fact *per se* is insufficient to sustain the defence of insanity under section 84 of the Penal Code. The exemption from liability contemplated by section 84 of the Penal Code is the commission of an offence by a person who by reason of his unsoundness of mind is *at the time of the commission of the offence*, incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law. In other words, in order to sustain a defence on the ground of insanity it must clearly be proved that at the time of the committing of the alleged offence the accused was labouring under such a defect of reason from disease of the mind as not to know *the nature and quality* of the act he was doing or he did not know he was doing what was wrong. (See McNaughton's case) (1). The most vital point which we have to consider in such a case is whether at the time of the commission of the alleged crime the accused was assailed by the unsoundness of mind so that his cognitive faculties were so impaired that he was incapable of knowing the nature of the act or that what he was doing was either wrong or contrary to law. See *Sa Pont* (alias) *Paw Lu* v. *The Union of Burma* (2). No evidence at all is forthcoming either from the prosecution or from the defence that at the time of the commission of crime the respondent was afflicted with unsoundness of mind. In fact, the evidence given by the eye witnesses who were present at the time when the respondent came up and cut the deceased clearly discloses that the respondent was fully sane and that he knew what he was doing. No doubt, the slight drinks he had, might have influenced him; but that defence was clearly not available to

(1) (1843) 4 State Trials 847. (2) B.L.R. (1950) 352.

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him in view of what we have already observed above. Furthermore, from a perusal of his own statement on oath the respondent was fully aware of what was taking place before Kyaw Aye's house prior to his attack upon the deceased, and his defence was not one of insanity as found by the learned trial Judge but one of drunkenness. In our view, the respondent was fully sane at the time of the crime on his own showing and from the trend of cross-examination apparently made at his suggestion by his counsel to some prosecution witnesses with reference to incidents just prior to his attack upon the deceased. Such being our view we must set aside the acquittal order of the trial Judge and register a conviction against the respondent. The next question is whether the respondent's act came within the purview of section 302 (1) or 302 (2) of the Penal Code. From the evidence we have discussed above, it is difficult to hold that the respondent had full deliberation or premeditation before he cut the deceased Tun Phyu Yea. He was seen coming towards the scene armed with a *dah* and a bamboo stick by some of the prosecution witnesses and gave a cut to Tun Phyu Yea while they were having a meal. There is thus certain elements of doubt whether he had the premeditation or not. Besides, the respondent was under the influence of liquor given to him by Phyu Thee. In view of this doubt we are not prepared to convict the respondent under section 302 (1) of the Penal Code. We therefore set aside the order of acquittal and we find the respondent guilty of the offence under section 302, sub-section (2) of the Penal Code and accordingly sentence him to undergo 10 (ten) years' rigorous imprisonment.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

Before U Thaung Sein and U Po On, JJ.

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Jan. 31.

U BA CHIT (APPELLANT)

v.

THE STATE TIMBER BOARD (represented by Edward Toke Gale, Executive Officer and Deputy Director, Forest, Mandalay) (RESPONDENT).*

Representative Suit—Use of word "represented" in title of suit—Suit not converted into representative suit thereby—Civil Procedure Code (Act V, 1908), s. 99—Omission to sign or verify plaint—A mere defect not affecting merits of a case or jurisdiction of Court—Curable even in appellate Court—Principal Officer—Signing of plaint by—Lack of authority to do so—By itself no ground for dismissal of suit—Signing of plaint—A matter of procedure only—Suit for accounts—When not necessary—Even when there is a dispute between parties regarding accounts rendered—Limitation Act (Act IX, 1908) Sch. I, Art. 89—Non-applicability when accounts rendered by agent.

The use of the word "represented" in the title of a suit by a Government Board which is represented in the suit by one of its principal officers does not convert the suit into a representative suit. Even were the principal officer who has signed the plaint in the suit is not authorised to do so, the suit cannot be dismissed on this ground alone as the defect can be cured by allowing a competent officer to sign the same. This is permitted by s. 99, C.P.C.

The signing of plaints is merely a matter of procedure. The omission to sign or verify a plaint is not such a defect as could affect the merits of a case or the jurisdiction of the Court. If the omission is discovered at any time before judgment, the Court may allow the plaintiff to amend the plaint by signing the same. And if the defect is not discovered until the case comes on for hearing before an appellate Court, the appellate Court may order the amendment to be made in that Court. The appellate Court ought not to dismiss the suit or interfere with the decree of the lower Court merely because the plaint has not been signed.

Maung Po Lun v. *Ma E Mai*, A.I.R. (1923) Ran. 57; *U Maung Maung* v. *Daw Thein May*, (1950) B.L.R. (S.C.) 151, followed.

Where an agent has already rendered his accounts to his principal and where the exact amount due and payable by the agent to the principal can be ascertained, there is no necessity to sue for accounts although there is some dispute between the parties regarding these accounts.

The right to claim a statement of accounts is an unusual form of relief granted only in certain specific cases and is only to be claimed when the

* Civil 1st Appeal No. 42 of 1954 from the decree of the District Court of Mandalay in Civil Regular No. 8 of 1951.

relationship between the parties is such that is the only relief which will enable the claimant to satisfactorily assert his legal rights.

Firm Joint Hindu Family Diwan Chand Sant Ram v. *Bhagat Ram and others*, A.I.R. (1946) Lah. 82, referred to.

A suit contemplated by Art. 89 of Sch. I of the Limitation Act is a suit in which accounts have to be taken Where an account has been rendered Art. 89 has no application.

Kesho Prosad Singh v. *Sarwan Lal*, 21 C.W.N. 591, referred to.

Sein Tun (3) for the appellant.

Ba Shun for the respondent.

U THAUNG SEIN, J.—These two appeals (Civil First Appeal No. 42 and 47 of 1954) which have arisen out of the same suit *viz.* Civil Regular Suit No. 8 of 1951 of the District Court of Mandalay, have been heard together and the present judgment will cover both the cases. According to the heading and cause title of the plaint the suit in question was one between "*The State Timber Board* represented by Edward Toke Gale, Executive Officer and Deputy Director, Forests, C. Road, Mandalay (Plaintiff)" and "U Ba Chit, formerly E.A.C. Forests and now Timber Trader, Kyaukthabeik Quarter, Mandalay (Defendant)" for the recovery of Rs. 2,09,988-1-0 "arising out of Agency Agreement". The learned District Judge decreed the suit in the plaintiff's favour but only for a sum of K 1,72,340·94 and both sides have now come up on appeal against that decree. The plaintiffs contend that they ought to have been granted a decree for the full amount claimed while the defendant asserts that the decree under consideration should be set aside and the suit dismissed. No less than twenty-five grounds have been advanced by the defendant in support of his appeal while the plaintiffs have set out seven grounds in their memorandum of appeal. Actually, the grounds urged by the defendant may be boiled down to two main contentions, *viz.*:

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(1) That the suit as framed was not by the State Timber Board but by Edward Toke Gale who had no *locus standi* to institute a suit against the defendant.

(2) That the accounts as filed by the State Timber Board were clearly unacceptable and that there was no legal proof of any monies being due and payable by the defendant to that Board.

With regard to the plaintiff's appeal, it is stressed that the learned District Judge erred in allowing a deduction of Rs. 37,646-2-0 from the amount claimed on the ground that the State Timber Board was liable for this expenditure which was in fact incurred by the defendant.

Before we deal with the above grounds, perhaps we should set out briefly the facts of the case as established by the pleadings and the evidence adduced by the parties. It will be recalled that the then Government of Burma while in exile at Simla in India during the Japanese occupation period of Burma, formulated a number of schemes and projects for the rehabilitation of the economy of the country on reoccupation. Among the numerous schemes drawn up on that occasion was the State Timber Project which was inaugurated by means of the Timber Project Order 1945 "for the purpose of managing and controlling the extraction, conversion and marketing of forest produce in Burma". A Timber Project Board then came into being and functioned for several years till it was replaced on the 10th April 1948 by the State Timber Board constituted in accordance with the State Timber Board Order, 1948 as per copy filed in the trial record as Exhibit B. This Board then took over all the assets and liabilities of the former Timber Project Board and continued with the "managing and controlling the

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extraction, conversion and marketing of forest produce in the Union of Burma". In other words, the newly constituted State Timber Board stepped into the shoes of the defunct Timber Project Board and carried on the latter's functions. Among the numerous "assets and liabilities of the Timber Project Board" which passed to the State Timber Board were several pending contracts and agreements between that Board and third parties. It appears that these contracts were carried out or continued as if they had been executed with the State Timber Board. The defendant U Ba Chit was one of those contractors who had served the Timber Project Board and continued to serve the State Timber Board when the latter was inaugurated on the 10th April 1948. To be precise, the defendant U Ba Chit was appointed a rafting agent of the Timber Project Board on the 21st February 1947 by means of an Agency Agreement entered into with that Board as per Exhibit D. The agreement was for a year but could be "extended for further periods by consent of both parties". A supplementary agreement as per Exhibit E was also entered into between the parties on the 1st May 1947 and this merely empowered the defendant to sell rafting materials. In February 1948, the Exhibit D agreement was extended by the Timber Project Board and a few months later *i.e.* 10th April 1948, the State Timber Board replaced the Timber Project Board. So far as the defendant was concerned, the change in the Boards made no difference whatsoever to his position and he continued to serve as a rafting contractor of the State Timber Board and the Exhibit D was extended from time to time *vide* the Exhibits F and G notes up to the 31st January 1950. In accordance with that Agency Agreement, the defendant drew large sums of money from the Timber

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Project Board and the State Timber Board as advances towards the cost of running the rafting agency and submitted monthly accounts of his expenditures. To all appearances, there was smoothness in the dealings between the defendant and the State Timber Board for several months. But from July 1949 onwards the defendant found himself in trouble with the Board over the accounts submitted by him. Without going into the details at this stage of the dispute which flared up between the parties, let it suffice that on the 15th May 1951, the present suit was filed in the District Court of Mandalay for the recovery of Rs. 2,09,988-1-0 said to be the amount unaccounted for by the defendant.

The defendant on his part pleaded *inter alia* that the suit as framed was not maintainable as Edward Toke Gale had no *locus standi* to act for the State Timber Board. In addition it was urged that there had been no privity of contract between the defendant and the State Timber Board and that the original Agency Agreement as per Exhibit D was entered into with the Timber Project Board and not the State Timber Board. These contentions have been pressed before us in appeal also. With regard to the latter plea it may be noted that paragraph 3 of the State Timber Board Order, 1948 was amended on the 11th January 1952 by means of the Exhibit C Notification which inserted the following clause :—

> "(3) All contracts entered into by the said Timber Project Board shall be deemed to have been entered into by the State Timber Board."

The learned counsel for the appellant (defendant) has pointed out that this amendment was introduced only after his client had set up the above plea in the District Court of Mandalay. For the purposes of the present

appeals it is immaterial when the above amendment was introduced so long as the Notification in question was a valid order within the competence of the Government of the Union of Burma. The learned counsel for the appellant-defendant has not disputed the validity of the notification or the competence of the Government to issue it and there is thus practically no need to consider the matter any further. It may be noted however that the notification in question though issued on the 11th January 1952 was retrospective in operation and the above amendment must be deemed to have been in force from the 5th April 1948 when the State Timber Board Order was promulgated. In short, the Agency Agreement—Exhibit D—entered into between the appellant-defendant and the State Timber Project Board must be deemed to have been an agreement executed with the State Timber Board with effect from the 5th April 1948.

The next ground urged by the appellant is that on the pleadings it is clear that the Suit is not by the State Timber Board but by Edward Toke Gale who has no cause of action against the appellant. In the first place, it is contended that Edward Toke Gale who is a Deputy Director of Forests and an employee of the State Timber Board was not competent to " represent " the Board as stated in the cause title of the plaint and in support of this contention reliance is placed on the provisions of Order 7, rule 4 of Code of Civil Procedure. A glance at the rule in question will reveal that the provisions contained therein refer to " representative " suits *e.g.* where a person has died and the heirs apply for and obtain letters of administration and sue as administrators of the estate. In the present case, Edward Toke Gale is not acting in a " representative " capacity but on the strength of a power of attorney—Exhibit A—granted to him by the

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Chairman of the State Timber Board and also as one of the "principal officers" of that Board. It should be remembered that the suit under consideration is by a Board and according to Order 29, rule 1 the plaint could have been signed by either the Secretary of the Board or a "principal officer" conversant with the facts of the case. The respondent-plaintiffs contend that in view of Order 29, rule 1 and Order 6, rule 14, Edward Toke Gale was empowered to sign the plaint on behalf of the State Timber Board.

We need hardly point out that the objection raised by the appellant-defendant is far too technical in nature. Even the most cursory glance at the plaint will indicate that the suit is one filed by the State Timber Board. If the plaint is read through carefully then indeed there cannot be the slightest doubt that the plaintiff is the State Timber Board and no other body or person. It is absurd for the appellant-defendant to suggest that he was prejudiced or in any way misled as to the real plaintiff and on the contrary, he was so certain that the State Timber Board were the plaintiffs that he was insisting on the plaint being signed by a duly authorised officer or agent of that Board. In this connection the following observations in *Radhe Lal* v. *East Indian Railway Company, Limited* (1) appear to be most apposite :

> "In the case of a Railway Company, the proper name under which the Company should be sued is the name and style under which it carries on its business; and if a plaintiff deliberately chooses to sue, not the Company, but the Agent, he cannot by any decree which he obtains in the suit bind the Company. Where, however, upon a fair reading of the plaint it is made out that the description of the defendant, is a mere error and that the Company is the real defendant, then the suit may proceed against the Company.

(1) I.L.R. 5 Pat. 129.

Where the plaint bore the name of the Agent of a Railway Company as the defendant, but plaintiff, the Company and the Court all treated the suit as one against the Company and the Company in fact appeared and conducted the case up to a certain stage of the proceedings on the footing that they were the defendants in the suit, held, that this was a case of mere misdescription and the suit was one against the Company."

Then again in *Maung Po Lun* v. *Ma E Mai* (1) it was laid down by the Rangoon High Court that " it is the duty of the Courts to administer justice taking a broad view and not to allow litigants to take advantage of legal technicalities and commit what is practically robbery by process of law ". This dictum was approved by the Supreme Court of the Union of Burma in *U Maung Maung* v. *Daw Thein May* (2).

Even assuming for the sake of argument that Edward Toke Gale was not authorised to sign the plaint, the suit cannot be dismissed on this ground alone as the defect can be cured by allowing a competent officer to sign the same. This is permitted by section 99 of the Code of Civil Procedure which is in the following strain :—

" 99. No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court."

Mulla has also emphasised this point in his " Civil Procedure Code—12th Edition " at page 591 under the heading " Omission to sign plaint " in the following terms :—

" The signing of plaints is merely a matter of procedure. If a plaint is not signed by the plaintiff or by a person duly authorised by him in that behalf, and the defect is discovered at any time before judgment, the Court may

(1) A.I.R. (1923) Ran. 57. (2) (1950) B.L.R. (S.C.) 151.

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allow the plaintiff to amend the plaint by signing the same. If the defect is not discovered until the case comes on for hearing before an appellate Court, the appellate Court may order the amendment to be made in that Court. The appellate Court ought not to dismiss the suit or interfere with the decree of the lower Court merely because the plaint has not been signed. The omission to sign or verify a plaint is not such a defect as could affect the merits of a case or the jurisdiction of the Court."

There are numerous authorities in support of this view but we do not consider that there is any necessity to quote them *in extenso*.

Now, Edward Toke Gale was not only a senior officer of the State Timber Board but also held a power of attorney as per Exhibit A expressly authorising him to represent that Board. The relevant portion of the power of attorney reads :

> " To appear and act for the State Timber Board in all Courts and Offices, in any suit action or other legal proceedings by or against the State Timber Board, and to execute any decree or order ; and to file and prosecute in any appeal, revision, review and application, and to accept the service of summons and notices, and to make affidavits, and to sign and verify plaints, written statements, petitions, applications and all other pleadings."

According to the learned counsel for the appellant-defendant, Edward Toke Gale was merely authorised " to appear and act " and not to sue on behalf of the State Timber Board. All that we propose to say with regard to this argument is that the whole of the above paragraph should be read and it will then be abundantly clear that Edward Toke Gale was empowered to represent the State Timber Board at all stages of the suit.

Apart from the fact that Edward Toke Gale held a power of attorney from the State Timber

Board, he was also a senior officer of that Board. He was a Deputy Director of that Board and we are thus at a loss to understand the appellant-defendant's contention that he (Edward Toke Gale) was not a "principal officer" of the Board and thus incompetent to sign the plaint *vide* Order 29, rule 1 of the Code of Civil Procedure. The term principal officer" is not defined in the Code of Civil Procedure but it will be noticed that in the case of *Delhi and London Bank Limited* v. *A. Oldham and others* (1), the accountant of a local branch of a bank was held to be a "principal officer" of the bank and thus competent to sign the plaint. Hence, it is difficult to appreciate how an officer of Edward Toke Gale's status cannot be considered a "principal officer" within the requirements of Order 29, rule 1. Taking all the above into consideration, we are in agreement with the finding of the trial court that Edward Toke Gale was competent to sign the plaint in suit.

Yet another plea put forward by the appellant-defendant is that the suit as framed is not maintainable as the State Timber Board should sue for accounts from their agent *i.e.* the appellant-defendant U Ba Chit and not for a specified sum. It is said that the accounts between the principal and agent have not been settled up to date and hence the present suit for the recovery of a definite sum does not lie. The answer to this argument is to be found in the ruling of *Firm Joint Hindu Family Diwan Chand Sant Ram* v. *Bhagat Ram and others* (2) the headnote of which reads :

"The right to claim a statement of accounts is an unusual form of relief granted only in certain specific cases and is only to be claimed when the relationship between the

(1) I.L.R. 21 Cal. 60. (2) A.I.R. (1946) Lah. 82.

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parties is such that it is the only relief which will enable the claimant to satisfactorily assert his legal rights. In a suit for accounts the plaintiff must satisfy the Court that either because of a particular trade, usage or of the peculiar relations between the parties the defendant is an accounting party. Or it is not possible for him to get any relief except by calling upon the defendant to render account to him and if he does so, the suit for accounts would lie."

Then again in *Kesho Prosad Singh* v. *Sarwan Lal* (1) it has been laid down as follows:

"A suit contemplated by Art. 89 of Sch. I of the Limitation Act is a suit in which accounts have to be taken.

Where an account has been rendered, Art. 89 has no application.

Where an account has been taken and adjusted and a specific sum has been found due from the agent to the principal, the principal becomes entitled to sue forthwith for recovery of that money, and the position is not altered even if the agent continues thereafter to hold his office as agent of that principal."

Mogha an eminent authority on pleadings has also made the following observations in his "Law of pleadings in India—Seventh Edition 1948" at page 329:—

"A suit for account becomes necessary when the plaintiff does not know the particulars sufficient enough to enable him to sue for recovery of the money due to him from the defendant. If, however, he knows such particulars of the amount which is due to him, he should bring a suit for recovery of that amount."

In the present case, the appellant-defendant has already rendered his accounts to his principal *i.e.* the respondent-plaintiffs and although there is some dispute between the parties *re* these accounts, the exact amount due and payable by the appellant-defendant can be ascertained and there is thus no

(1) 21. C.W.N. 591.

necessity to sue for accounts. In other words, the suit as framed for the recovery of a specified sum is maintainable.

Next, we come to the question of fixing the exact amount if any, due and payable by the appellant-defendant to the respondent-plaintiffs. It should be remembered that the transactions which form the subject matter of this suit occurred a long while ago and according to the appellant-defendant many of his papers were lost as a result of the insurrection which broke out all over Burma in 1949. Besides, there were endless disputes between the appellant-defendant and his principal *i.e.* the respondent-plaintiffs over the accounts and accounting system adopted by the former with the result that the accounts had to be revised several times. Under the circumstances it is hardly surprising that mistakes, errors, omissions, etc., crept into the accounts but a careful examination of the books and statements will soon reveal the true position of the appellant-defendant. It is also interesting to note that the appellant-defendant himself accepted most of the statements as prepared by the respondent-plaintiffs. The learned counsel for the appellant-defendant has urged however that the extracts from the accounts as maintained by the respondent-plaintiffs are not only unreliable but inadmissible as there is nothing to indicate that the books from which the accounts were prepared were those "regularly kept in the course of business". This argument clearly overlooks the evidence of U Soe Maung (PW 2) the Chief Accounts Officer and U San Tun Aung (PW 3), Assistant Accounts Officer of the State Timber Board who were at pains to explain the manner in which the account books were maintained and in addition, the extracts from

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those books were all certified by U San Tun Aung (PW 3) as "True Copy". We need hardly say therefore that the extracts in question are clearly admissible in evidence *vide* section 34 of the Evidence Act.

The accounts in question cover a period extending from 1947 to 1950 and it should be borne in mind that the accounting year of the State Timber Board extends from the 1st June of one year to the 31st May of the next year. As early as in April 1947, *i.e.* a few months after the appellant-defendant had started to work as a rafting agent of the Timber Project Board, he began to query as to the nature of the charges which should be debited to that Board—see Exhibit 1. The Board replied as per Exhibit 2 letter dated the 26th April 1947 saying that the charges for staff, etc. would be borne by them. The appellant-defendant drew several advances from that Board and submitted monthly accounts of his expenditure which were apparently accepted by the Board. But in or about March 1948, the appellant-defendant made another representation saying that the commission earned by him was insufficient to cover his expenses and that charges for clerical staff, travelling allowance incurred by him, rent for office building, etc. should be borne by the Board. The representation was sympathetically considered by the Board which decided to allow certain "concessions" to the appellant-defendant as per Exhibit H letter dated the 30th March 1948. Briefly put, the Board agreed to pay travelling allowance at a maximum of Rs. 700 per month as well as the salaries of clerks, peons, etc. which are set out in detail in the Exhibit H. This necessitated revised accounts in accordance with the "concessions" and the appellant-defendant was instructed to rewrite his monthly statements and

he did so as per Exhibit A-10, A-11 and A-12. These statements were eventually audited by the auditors of the State Timber Board and numerous items were disallowed as the expenditures in question were not debitable to the Board. In due course the Board drew up the Exhibit K Statement of Receipts by the appellant-defendant for the period 1947—50 from the accounts submitted by him. It was then pointed out to him that his accounts were incorrect, especially as regards the opening and closing cash balances and in particular his attention was drawn to the closing cash balance on the 30th April 1948. According to the State Timber Board this balance was Rs. 1,72,081-12-6 whereas the appellant-defendant's account showed a sum of Rs. 39,745-6 only. After scrutinising the statement as prepared by the State Timber Board the appellant-defendant furnished the following certificate as per Exhibit L which reads :—

"Certified that the closing balance of my Revised Cash Account for the month of April 1948 was Rs. 1,72,081-12-6 (Rupees one lakh seventy-two thousand and eighty-one annas twelve and pies six only). But my opening balance on 1st May 1948 was shown as Rs. 39,745-6 (Rupees thirty-nine thousand seven hundred and forty-five and annas six only). There is a difference of Rs. 1,32,336-6-6 (Rupees one lakh thirty-two thousand three hundred and thirty-six and annas six and pies six only) which will be accounted for by me in the forthcoming accounts."

The discrepancy was not in fact explained and the respondent-plaintiffs (State Timber Board) were accordingly obliged to re-examine the accounts submitted by the appellant-defendant and detailed statements of receipts and expenditures were then drawn up by U Soe Maung (PW 2) as per Exhibits M and N for the periods 1946-47 and

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1948-49. It appears that all sums which the respondent-plaintiffs considered to be legitimate charges against the State Timber Board were incorporated in these statements and copies were sent to the appellant-defendant. Once again the appellant-defendant scrutinised the statements and accepted the closing cash balance on the 31st May 1948 as Rs. 2,24,492-3-3 which was the figure mentioned on the last page of Exhibit N. The acceptance of this figure is to be found in the Exhibit O which is in the following strain :—

> " In continuation to my letter No. 245/6, dated 2nd June 1950, I confirm that my Cash Balance as at 31st May 1948 amounts to Rs. 2,24,492-3-3 (Rupees two lakhs twenty-four thousand four hundred and ninety-two, annas three and pies three only)."

This was followed by more detailed statements of Receipts and Expenditures drawn up by the respondent-plaintiffs as per Exhibit P for the period 1948-49, and Exhibit R for the period 1st June 1949 to October 1949, and Exhibit S for the period November 1949 to December 1949 and as usual the appellant-defendant was allowed to examine them. After some delay, the appellant-defendant " provisionally accepted " the figures furnished by the respondent-plaintiffs as per Exhibit T. In particular, he accepted the closing cash balance on the 31st December 1949 as Rs. 1,23,340-2. In addition to the closing cash balance, the respondent-plaintiffs asserted that the appellant-defendant was liable to reimburse a sum of Rs. 87,034-2 being the amounts advanced by him to rafting contractors and referred to in the evidence and trial record as " contractors' outstandings ". The total sum due from the appellant-defendant was thus shown as Rs. 2,10,374-4 (Rs. 1,23,340-2 + Rs. 87,034-2) as per Exhibit W.

The appellant-defendant on his part contended that as against the above figure, he was entitled to set off several sums *e.g.* the cost of six rafts lost in transit down the Irrawaddy River as a result of insurgent activity, travelling allowance for himself, etc., as per Exhibit X. The total amount claimed by the appellant-defendant was Rs. 93,732-9 and this was carefully examined by a panel of three officers consisting of Mr. Rosair (DW 4) the then Deputy Director of Forests, U Soe Maung, Chief Accounts Officer and U San Tun Aung, Assistant Accounts Officer. The decision arrived at by these three officers is to be found in the "Joint Note" as per Exhibit Y. In due course, a statement as per Exhibit A-4 was drawn up and the respondent-plaintiffs claimed a sum of Rs. 2,09,988-1 from the appellant-defendant as the sum unaccounted for by the latter. Needless to say this is the amount which forms the subject matter of the present suit.

Now, the appellant-defendant admits that he received from the Timber Project Board and the State Timber Board a total sum of Rs. 8,64,400 made up as follows:

		Rs.
(1) From the Timber Project Board	...	6,30,000
(2) From the State Timber Board	...	2,34,400
Total	...	8,64,400

If any breakdown of the above figures is required then it appears that the following cash advances were drawn by the appellant-defendant :—

		Rs.
(*a*) 1946-47	...	1,20,000
(*b*) 1947-48	...	5,20,000
(*c*) 1948-49	...	2,22,000
(*d*) 1949-50	...	2,400
Total	...	8,64,400

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In addition to the above cash advances the appellant-defendant also realised the following sums from the sale of rafting materials:—

		Rs.	A.	P.
(*a*) 1946-47	...	3,116	9	0
(*b*) 1947-48	...	69,301	0	0
(*c*) 1948-49	...	63,788	6	0
Total	...	1,36,205	15	0

There were also miscellaneous receipts as follows:

		Rs.	A.	P.
(*a*) 1948-49	...	4,563	1	0
(*b*) 1949-50	...	120	13	0
Total	...	4,683	14	0

Grand total of cash receipt = Rs. 8,64,400-0-0 + Rs. 1,36,205-15-0 + Rs. 4,683-14-0 = Rs. 10,05,289-13-0.

According to the respondent-plaintiffs the total amount debitable to them was Rs. 8,83,882-11 and the cash balance unaccounted for by the appellant-defendant was said to be Rs. 1,21,407-2-0. As against this sum the respondent-plaintiffs were prepared to deduct a sum of Rs. 2,585-14-0 being the commission on rafting ropes due to the appellant-defendant and the final cash balance was struck at Rs. 1,18,821-4-0. To this sum was added two items amounting to Rs. 87,034-2-0 and Rs. 4,132-11-0. The former amount *i.e.* Rs. 87,034-2-0 represent the total unrecovered sums against advances made by the appellant-defendant to rafting contractors. The respondent-plaintiffs' case is that these represent "bad debts" for which the appellant-defendant is liable in view of paragraph 4 of the Exhibit D agreement. The second sum of Rs. 4,132-11-0 is admittedly the excess commission drawn by the appellant-defendant. The final sum said to be due by the

appellant thus works out to Rs. 1,18,821-4-0 + Rs. 87,034-2-0 + Rs. 4,132-11-0 = Rs. 2,09,988-1-0.

As far as we can see from the pleadings and the evidence on the trial record the main dispute in this case is centred not so much on the accounts and statements as prepared by the respondent-plaintiffs but on the amount which the appellant-defendant was entitled to debit his principal *i.e.* the respondent-plaintiffs. We repeat that according to the appellant-defendant he was entitled to debit a sum of Rs. 93,732-9-3 as per statement furnished in Exhibit X. This claim was considered by three officers of the State Timber Board in their "Joint Note" Exhibit Y and all items which were supported by vouchers, documents or other supporting evidence were allowed. But in respect of those items *e.g.* Travelling Allowance claim for Rs. 11,234-11-0 etc. which were not only belated but unsupported by documents or other reliable evidence, they were disallowed. We do not see how it can be said that this decision was unfair or unjust as claims ought to be supported by the necessary documents or evidence.

There is however only one item which needs detailed and careful examination *viz.* the sum of Rs. 87,034-2-0. In this connection a reference is invited to the terms of the Exhibit D agreement by me of which the appellant-defendant was appointed a rafting agent. In paragraph 3 of that agreement it was provided that "the Rafting agent" *i.e.* the appellant-defendant should draw up contracts at the lowest rates obtainable with contractors to raft logs to Nandawgyun near Mandalay. Copies of the contracts signed with such contractors had to be submitted to the respondent-plaintiffs. Specimens of such contracts are to be found in Exhibits 5 and 6 and it will be noticed that they were contracts

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"between the Timber Project Board" and the contractors concerned and that the appellant-defendant signed "on behalf of the Deputy Director" of the Board. Advances were then made by the appellant-defendant on such contracts in accordance with paragraph 4 of the Agreement which makes interesting reading and we reproduce it below:

> "4. The Rafting Agent will be paid 10 per cent commission on actual payments made against logs delivered at Nandawgyun under all approved contracts executed by him. Losses due to bad debts shall be borne by the Rafting Agent, and the actual extraction cost and royalty paid by the Board on each and every log lost in transit shall be recoverable from the Rafting Agent, save under the provisions of clause 7 below."

A list of the contractors with whom the appellant-defendant entered into contracts and the amounts advanced to them and the amounts recovered are to be found in the Exhibit A-7 (1). It appears that a total sum of Rs. 4,91,691-13-0 was advanced to the contractors and a sum of Rs. 4,04,657-11-0 has been recovered from them, leaving a balance of Rs. 87,034-2-0 (Rs. 4,91,691-13-0—Rs. 4,04,657-11-0). It is this sum of Rs. 87,034-2-0 which has been classified as a "bad debt" which the appellant-defendant has been held responsible by the respondent-plaintiffs. The learned District Judge accepted the respondent-plaintiffs' interpretation of paragraph 4 of the Exhibit D agreement with the exception of the advances made to a contractor U Tint amounting to Rs. 32,714-11-0 —see list in Exhibit A-7 (1). From the evidence on record, the learned District Judge was satisfied that U Tint had in fact floated down six rafts and was entitled to a sum of Rs. 32,714-11-0. Unfortunately, the rafts were lost while in transit as a result of insurgent activity and it was held that the respondent-plaintiffs should bear the loss. But the learned

District Judge went on to allow a sum of Rs. 3,422-6 as commission to the appellant-defendant on these rafts and deducted a total sum of Rs. 37,646-12 from the amount claimed by the respondent-plaintiffs. The learned District Judge obviously overlooked the fact that according to paragraph 4 of the Exhibit D agreement " Rafting Agent will be paid a 10 per cent commission on actual payment made against logs delivered at Nandawgyun under all approved contracts executed by him ". Since the log's did not arrive at Nandawgyun, we are unable to understand how any commission could have been allowed to the appellant-defendant in respect of the six rafts in question. We are in agreement however with the learned District Judge that six rafts were in fact lost owing to the action of insurgents and that the respondent-plaintiffs should bear the loss. It was beyond the capacity of the appellant-defendant to prevent the loss of the rafts and there is no proof that he was negligent in any way and he cannot therefore be held responsible for the cost of these rafts. The learned counsel for the respondent-plaintiffs has argued that even if it be held that the State Timber Board should bear the cost of the six rafts lost in transit then according to the evidence of U Tint (DW 5) he was paid only a sum of Rs. 10,000 and not Rs. 32,714-11-0 as claimed by the appellant-defendant. If the evidence of U Tint is reliable then only a sum of Rs. 10,000 will have to be allowed for the six rafts, but in all probability U Tint was determined to minimise the claim against him and thus reduced the amount actually received by him. A sum of Rs. 32,714-11-0 had been shown in the accounts against U Tint for some time and we cannot accept that this figure was a fabrication. Hence, a sum of Rs. 34,223-12 made up of advances to the rafting

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contractor U Tint and cost of rafting materials used in the rafts will have to be debited to the respondent-plaintiffs.

Coming to the outstandings against other contractors listed in the Exhibit A-7 (1) it has been argued that these are not " bad debts " and that the appellant-defendant cannot be held responsible for them. No doubt the contracts with the rafting contractors were entered into by the appellant-defendant acting on behalf of the respondent-plaintiffs and according to section 230 of the Contract Act he might not have been able to enforce them personally. The respondent-plaintiffs had however entrusted the appellant-defendant with the task of selecting the rafting contractors and to pay out to them the necessary advances to enable them perform their duties. It will be seen from paragraph 4 of the Exhibit D agreement that the amount of advances to be paid out to such contractors was left entirely in the hands of the appellant-defendant and it is not surprising therefore that the respondent-plaintiffs should safeguard themselves by insisting that " bad debts " should be the responsibility of the appellant-defendant. Without this precaution, the appellant-defendant might have issued the advances at his own whim and fancy. As to the interpretation of paragraph 4 of the above agreement, the parties to the Exhibit D agreement were in no doubt as to its meaning. For instance in the Exhibit A (14) and A (15) letters addressed by the appellant-defendant to his principals on the subject of " contractors' outstandings " be disclaimed responsibility of a sum of Rs. 29,337-7 due by some of the contractors on the ground that he " was forced against my better judgment to employ these men ". With regard to the remaining contractors he admitted responsibility

for them as they were of "my own choice". After having employed the contractors it is absurd for the appellant-defendant to try and differentiate between those selected by him and the ones recommended to him by the respondent-plaintiffs especially as there is no evidence to suggest that he was compelled to accept any of the contractors of the latter category. That the outstandings against the contractors had become "bad debts" or irrecoverable debts was not seriously disputed by the appellant-defendant. Hence, with the exception of the advances made to U Tint amounting to Rs. 32,714-11-0 the appellant-defendant must be held liable for the outstandings in view of paragraph 4 of the Exhibit D agreement. Accordingly the amount due and payable by the appellant-defendant was as follows:—

	Rs.	A.	P.
Cash balance	1,18,821	4	0
Contractors' outstandings ...	55,319	7	0
Excess Commission drawn by appellant-defendant ...	4,132	11	0
Total ...	1,78,273	6	0

Hence Civil First Appeal No. 42 of 1954 will stand dismissed. With regard to Civil First Appeal No. 47 of 1954, the decree of the trial court will be modified and there will be a decree in favour of the respondent-plaintiff for the sum of Kyat 1,78,273·38.

This appeal will accordingly stand dismissed with costs.

U PO ON, J.—I agree.

INCOME-TAX REFERENCE.

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

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Mar. 25.

U KAN GYI (APPLICANT)

v.

COMMISSIONER OF INCOME-TAX, RANGOON (RESPONDENT).*

Burma Income-Tax Act—S. 66 (1)—Reference under—Assessment made on evidence not disclosed to the a sessee, and without giving details of computation—The best of judgment basis of assessment under s. 23(4), Income-Tax Act—Necessity of "Order in writing".

The applicant made a Return of income of only Rs. 295 being derived from house property. He made no return from his business at all.

The Income-tax Officer assessed the applicant's income from business at Rs. 22,500.

On appeal, this assessment order was set aside and a fresh assessment ordered, which was determined at Rs. 50,590 on the best of judgment basis under s. 23 (4) of the Income-tax Act, on failure to produce accounts under s. 22 (4) of the Income-tax Act.

On further appeal under s. 33 (4) of the Income-tax Act against this fresh assessment, the Income-tax Appellate Tribunal reduced the assessment to Rs. 36,000.

Two questions of law were referred to the High Court :

(1) "Whether upon the facts and in the circumstances of the case the Income-tax Appellate Tribunal and the Income-tax Officer were right in law in relying upon evidence not disclosed to the assessee ?"

(2) "Whether in the circumstances of the case and in view of the fact that an assessment made under s. 23 (4) of the Burma Income-tax Act has now been made appealable, the Income-tax authorities were right in law in assessing an amount of income without giving details of the computation ?"

With regard to the first question, it was contended that the non-disclosure of facts and information upon which the income-tax authorities had based their assessment was prejudicial to the applicant as he had been deprived of his right of rebuttal.

Held : That the facts and information are of confidential nature under s. 54, sub-s. (2) of the Income-tax Act and that the applicant was not entitled to look into them much less furnished with copies thereof.

Held also : In a best of judgment—proceeding under s. 23(4) of the Income-tax Act, inasmuch as the assessee has not co-operated with the Income-tax

* Civil Reference No. 6 of 1957.

Officer in order to arrive at a fair and equitable assessment both the Income-tax Officer and the appellate authorities are entitled to make use of such outside facts and information as would materially help them to make an assessment as best as they could.

Held further : That as the applicant has not availed himself of the provisions of s. 27 of the Income-tax Act for cancellation of assessment made under s. 23 (*4*) he has no right to challenge in appeal either before the Assistant Commissioner or before the Appellate Tribunal the validity of assessment made under s. 23 (*4*). *Naba Kumar Singh Dudhuria* v. *Commissioner of Income-Tax, Bengal*, (1944) 12 I.T.R. 327, followed.

Regarding the second question :

Held : In a best of judgment assessment under sub-s. (*4*) of s. 23 the Income-tax Officer is under no obligation to make his order of assessment in writing. The legislature never intended that the best of judgment assessment must be made in writing containing full details of computation as to how the Income-tax Officer arrived at certain figures in his assessment.

Commissioner of Income-Tax, Central and United Provinces v. *Laxminarain Badridas*, (1937) I.T.R. Vol. V, 170 ; *Abdul Bari Choudhury* v. *Commissioner of Income-tax*, 9 Ran. 281 ; *Krishna Kumar and Mahendra Kumar Ghose* v. *The Commissioner of Income-tax, Bengal*, 5. I.T.C (1933) 295, referred to.

Commissioner of Income-tax, Bombay v. *Khamchand Ramdas*, 8 I.T.R. (1940) 159 ; *Narayan Chandra Baidya* v. *Commissioner of Income-tax*, 20 I.T.R. (1951) 287 ; *Dhakeswari Cotton Mills Ltd.* v. *Commissioner of Income-tax, West Bengal*, (1954) 26 I.T.R. 775, distinguished.

Held also: That the observations made by learned writers are mere individual view or opinion without specific sanction of any affirmative judicial pronouncements and the Court is not to be swayed by them. The function of the Court is to interpret the law as it stands and not in the guise of interpretation introduce a new requirement—which the legislature has not provided. (Sir Jamshedji B. Kanga and N. A. Palkhivala's Law and Practice of Income Tax, 1950 Edition, p. 468).

V. S. Sundaram law of Income Tax, 7th Edition, p. 893, referred to.

Per U SAN MAUNG, J.—*Held* : That the very nature of an assessment under s. 23 sub-s. (*4*) precludes the necessity for an order in writing.

A best of judgment assessment being in the nature of an honest estimate or an honest piece of guess work on the part of the Income-tax Officer acting as a *persona designata* on whatever material he can lay his hand on, it is for that very reason incapable of being couched in the form of an order in writing similar to that required by sub-s. (*3*) of s. 23.

In re Abdul Bari Chowdhury v. *Commissioner of Income Tax, Burma*, (1931) I.L.R. 9 Ran. 281 at 295 ; *Macpherson* v. *Moore*, 6 Tax Cases at p. 115 ; *S.P.K.A.A.M. Chettyar Firm* v. *The Commissioner of Income-tax*, (1929) I.L.R. 7 Ran. 669 ; *Commissioner of Income-tax, Central and United Provinces* v. *Laxminarain Badridas*, (1937) I.T.R., Vol. 5, p. 170, referred to.

Held also : That since there has been a change in the law in as much as a right of appeal has been given to an assessment under s. 23 (*4*), it will no longer be sufficient for the Income-tax Officer to make his assessment under s. 23 (*4*) by entering such a cryptic note as "Business Rs. 30,000."

Krishna Kumar and Mahendra Kumar Ghose v. *The Commissioner of Income-tax, Bengal*, I.T.C. (1933) Vol. V, p. 295, referred to.

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Held further: When an Income tax Officer has to make a best of judgment assessment he must make an honest piece of guess work and in the process some sequence of thought must have entered into his mind. All that would be necessary, therefore, in a best of judgment assessment to render it susceptible of appeal is to make the Income-tax Officer record his sequence of thought sufficiently to show that he had made an honest estimate or an honest piece of guess work and that he was not actuated by dishonesty, vindictiveness or caprice.

No hard and fast rule can be laid down as to what should be the contents of the note by which an Income-tax Officer makes his best of judgment assessment under s. 23 (*4*).

Both questions answered in the affirmative.

U Paing and *F. C. Fischer*, Advocates, for the applicant.

Kyaw Thaung (Government Advocate) for the respondent.

U CHAN TUN AUNG, C.J.—Two questions of law have been referred to this Court by the Income-tax Appellate Tribunal under section 66 (*1*) of the Burma Income-Tax Act and they are these:

(1) "Whether upon the facts and in the circumstances of the case the Income-tax Appellate Tribunal and the Income-tax officer were right in law in relying upon evidence not disclosed to the assessee?"

(2) "Whether in view of the fact that an assessment, made under section 23 (*4*), Burma Income-tax Act has now been made appealable the Income-tax authorities were right in law in assessing an amount of income without giving details of computation?"

This reference, and the other two References Nos. 7 and 8 of 1957 have arisen at the instance of the applicant U Kan Gyi, a dealer in lampware, glassware and crockery, etc. at No. 400, Mogul Street, Rangoon and the questions of law raised are common to all the three references, except that they arose out of different assessment years. The present reference

relates to the assessment year 1945-46; Reference No. 7 of 1957 relates to 1946-47, and Reference No. 8 of 1957 to 1947-48.

The applicant returned an income of only Rs. 295 as being derived from house property for the assessment year 1945-46 in respect of 5 months from May to 30th September 1945. He made no return from his business at all by denying that he ever did any business during the relevant period. The Income-tax Officer concerned (Bazaar Circle) by his assessment order, dated 9th September 1946, however, despite the applicant's denial assessed the applicant's income from business at Rs. 22,500. On appeal, the assessment order was set aside and the Assistant Commissioner of Income-tax, Western Range, Rangoon, ordered fresh assessment. The fresh assessment was completed on the 8th March 1954, about 7 years and 3 months after the reassessment order of the Assistant Commissioner, and the applicant's income was determined, including that from his house property, at Rs. 50,590; the income from his house property being determined at Rs. 498. This fresh assessment was made by the Income-tax Officer on a best of judgment basis under section 23(*4*) of the Income-tax Act, inasmuch as the applicant had failed to produce any accounts as required to do so under section 22 (*4*) of the Income-tax Act. Again, an appeal was preferred against this fresh assessment to the Assistant Commissioner, Income-tax, Eastern Range, Rangoon, without success. The applicant then appealed to the Income-tax Appellate Tribunal under section 33 (*A*) of the Income-tax Act, but the Appellate Tribunal, relying upon various reports made by officers of the Income-tax Department, accepted the finding of fact arrived at by the Income-tax Officer, Bazaar Circle, that the applicant was doing business

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during the relevant period. It also examined the assessment proceedings of other assessees, who were doing similar trade during the relevant period, and reduced the estimated income of the applicant from business from Rs. 50,000 to Rs. 36,000.

The present reference, as stated above, has arisen at the instance of the applicant. With regard to the first question formulated, what has been contended before us by the applicant's counsel is that the non-disclosure to the applicant of facts and information the Income-tax authorities had obtained from other assessment proceedings upon which the Income-tax Officer and the Income-tax Appellate Tribunal had placed reliance in the assessment of the applicant's income had greatly prejudiced the applicant, in that he had not been given any opportunity of rebuttal to those facts and informations. I failed to see any merit in this contention in the special circumstances obtaining in the present case. When we asked the applicant's counsel whether in view of section 54 of the Burma Income-tax Act, sub-section (*2*) of which penalises an Income-tax Officer (a public servant) for disclosure of any particulars contained in any return, accounts, documents, evidence, affidavit, deposition or record, produced under the provisions of the Income-tax authorities, the applicant was entitled to look into such facts and informations and be furnished with copies thereof so as to give him the opportunity of rebuttal, the learned counsel for the applicant readily submitted that it would be difficult for him to press this point, and he properly conceded that the facts and informations relied upon by the Income-tax Officer and the Income-tax Appellate Tribunal are of confidential nature, and that the applicant was not entitled to look into them much less furnished with copies thereof.

In these circumstances, we really do not see how the applicant can make a grievance of non-disclosure to him by the Income-tax authorities of extraneous evidence not, strictly speaking, irrelevant to the assessment proceedings with which the applicant was concerned. To my mind, especially in a best of judgment proceeding under section 23(*4*) of the Income-tax Act, inasmuch as the assessee has not co-operated with the Income-tax Officer in order to arrive at a fair and equitable assessment, the Income-tax Officer has no alternative but to make use of the inadequate materials before him and assess as best as he can in the circumstances. In such a case, I am of the view that both the Income-tax Officer and the appellate authorities are entitled to make use of such outside facts and informations as would materially help them to make an assessment as best as they can. If a reference is made to section 37 of the Income-tax Act, it would be seen that the Income-tax Officer, the Assistant Commissioner and the Appellate Tribunal have wide powers to take evidence and call for information, etc. as they deem fit and proper. It appears that the Income-tax authorities and the Appellate Tribunal have in the present case considered various reports made by the officers of the Income-tax Department regarding the business done by the applicant at the relevant time, and they were satisfied that the applicant had some stock of goods and had done some business during the 5 months ending on 30th September 1945. To the common knowledge of all, there was then, great scarcity of consumers' goods. The reports also indicate that the volume of business done by the applicant was not negligible at all. For a person of applicant's standing, they considered that it was surprising that he did not keep any accounts

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whatsoever for that period. The applicant has thus committed a default resulting in a best of judgment assessment under section 23 (*4*). We may also observe that the applicant has not availed himself of the provisions of section 27 of the Income-tax Act for cancellation of assessment made under section 23(*4*), and on the authority available, namely, *Naba Kumar Singh Dudhuria* v. *Commissioner of Income-tax, Bengal* (1) it appears that the appplicant has no right to challenge in appeal either before the Assistant Commissioner or before the Appellate Tribunal the validity of assessment made under section 23(*4*).

For the reasons stated above, we must answer the 1st question formulated in the affirmative.

As regards the second question, the wording is not quite happy and we would have to recast it, and in so doing we are only reverting to what has been originally proposed by the applicant himself. It should read—

> "Whether in the circumstances of the case and in view of the fact that an assessment made under section 23 (*4*) of the Burma Income-tax Act has now been made appealable, the Income-tax authorities were right in law in assessing an amount of income without giving details of the computation ?"

No doubt, the prohibition against appeal which found a place in the old Act has been deleted, thereby giving a right of appeal to an assessment made under section 23 (*4*). The old proviso under section 30 (*1*) reads—

> "Provided that no appeal shall lie in respect of an assessment made under sub-section (*4*) of section 23 ; or under that sub-section read with section 27."

If we carefully examine the provisions of section 23, we find that under sub-section (*3*) thereof, the Income-tax Officer is required to make *an order in writing*

(1) (1944) 12 I.T.R. 327.

after hearing such evidence as the assessee may produce and such other evidence as the Income-tax Officer may require on specified points. Whereas in sub-section (*4*) of section 23, there is no such provision. In other words, in a best of judgment assessment under sub-section (*4*) of section 23 the Income-tax Officer is under no obligation to make his order of assessment in writing. In *Commissioner of Income-Tax, Central and United Provinces* v. *Laxminarain Badridas* (1) which approves the Full Bench decision of the Rangoon High Court in *Abdul Bari Choudhury* v. *Commissioner of Income-Tax* (2) the Privy Council has very clearly laid down the precise purpose, scope and the legal significance of a best of judgment assessment under sub-section (*4*) of section 23 of the Income-tax Act in these terms—

> "Under s. 23 (*4*) of the Income-Tax Act the officer (Income-tax Officer) is to make an assessment to the best of his judgment against a person who is in default as regards supplying information. He must not act dishonestly, or vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by, and assessments of, the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess-work in the matter, it must be honest guess-work. In that sense too the assessment must be, to some extent, arbitrary."

Abdul Bari Choudhury v. *Commissioner of Income-Tax, Burma* (2) is a Full Bench decision, and Dunkley, J. in his concurring judgment with the leading judgment of Page, C.J. propounded the

(1) (1937) I.T.R. Vol. V, 170. (2) 9 Ran. 281.

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purpose, scope and legal significance of a best of judgment assessment as follows:

> "The expression 'to the best of his judgment' means nothing more than 'as best he can'. It has to be borne in mind that sub-section (*4*) of section 23 is a penal clause, in the sense that if the assessee had complied with the legitimate requirements of the Income-tax authorities, he would not have been liable to this mode of assessment, and therefore it does not lie in his mouth to complain that it is arbitrary."

In view of the above observations which, with due respect, very clearly lay down the precise purpose, scope and legal significance of the best of judgment assessments, though no doubt, they were made when appeals against such assessments were unavailable, nevertheless, I cannot assent to the view that by the mere fact of deletion of the proviso under section 30 (*1*), thereby allowing appeals, an Income-tax Officer is enjoined thereafter that in the computation of assessments, he must put down in writing the details of how he arrived at those assessments so as to enable the Appellate Court to appraise whether such best of judgment assessments were done fairly, and not arbitrarily. In that regard I am in full accord with the observations of the learned appellate Tribunal that from the fact that there have been no changes in the wording of sub-section (*4*) of section 23 in spite of the deletion of the proviso in section 30 (*1*) which prohibited appeals against best of judgment assessments, and whereas in sub-section (*3*) of section 23, the Income-tax Officer is specifically required, as indicated above, to make his assessment order in writing, the Legislature ever intended that the best of judgment assessment must be made in writing containing full details of computation as to how the Income-tax Officer arrived at certain figures in his assessment.

In *Krishna Kumar and Mahendra Kumar Ghose* v. *The Commissioner of Income-Tax, Bengal* (1) the Income-tax Officer in a best of judgment proceeding merely recorded " Business Rs. 30,000 " and gave no basis or details of how he arrived at the figure ; but there are facts to show that the Income-tax Officer has made a local enquiry before making this assessment and also detailed notes of the results of his enquiry. Rankin, C.J. and Ghose, Buckland, JJ. held that although no basis or details as to how the Income-tax Officer arrived at the figure was given, yet the assessment was a valid assessment within the purview of sub-section (*4*) of section 23 of the Indian Income-tax Act.

However, this decision was made when no right of appeal was available to the assessee. But, relying upon the *Commissioner of Income-Tax, Bombay* v. *Khamchand Ramdas* (2) and *Narayan Chandra Baidya* v. *Commissioner of Income-Tax* (3) which were decided after the deletion of the proviso against appeal in section 30 (*1*) of the Indian Income-tax Act, the applicant's counsel further sought to contend that although strict letters of the law do not require the Income-tax Officer to put down in writing details of computation in his best of judgment assessment proceeding, yet natural justice demands such details so as to enable the Appellate authority and also the assessee to appreciate whether the assessment was fair or otherwise. I am afraid the cases relied upon afford no assistance to the applicant, and they are only authorities for the facts and circumstances appearing in them. In my view, the facts and circumstances obtaining in the cases cited and those available in the present case under reference are so different, that

(1) 5 I.T.C. (1933) 295. (2) 8 I.T.R. (1940) 159.
(3) 20 I.T.R. (1951) 287.

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I feel it would be wholly unjustified to apply categorically the principle enunciated therein to the present case. In *Commissioner of Income-Tax, Bombay* v. *Khamchand Ramdas* (1) the assessment was not an assessment under sub-section (*4*) of section 23, but was one under sub-section (*3*) of section 23, and since such order must be in writing and being appealable, their Lordships Davis, C.J. and West, J. are of the view that it should contain sufficient materials on which the assessment is made so that the Appellate authority can form a just opinion of fair assessment.

In *Narayan Chandra Baidya* v. *Commissioner of Income-Tax* (2) though the assessment was under section 23 (*4*) yet the failure on the part of the assessee was not as regards the accounts books concerning his business, but failure on the part of the assessee to return the business dealings of his adult son. And, the Income-tax Officer imported an item in his best of judgment assessment from a source outside the assessee's business by attributing it to the assessee, without indicating where he found a link between that source and the assessee. Thus, it was held that in the circumstances of the case, the Income-tax Officer was not justified in adding the additional source of income to the income of the assessee. Therefore these cases afford no assistance to the applicant.

Further reliance was made on the decision of the Supreme Court of India in *Dhakeswari Cotton Mills Ltd.* v. *Commissioner of Income-tax, West Bengal* (3) and it was urged that inasmuch as appeal is now available against best of judgment assessment there should be at least some materials showing the basis of assessment. This case also does not at all help

(1) 8 I.T.R. (1940) 159. (2) 20 I.T.R. (1951) 287.
(3) (1954) 26 I.T.R. 775.

the applicant. It was the case where the assessee moved the Supreme Court of India under Article 136 of the Constitution of India for a special appeal. The amount of tax involved was about 55 lakhs. The finding of the Income-tax authorities that this sum was a gross profit out of the proceeds of sale, which was confirmed by the Appellate Tribunal was found to have been based on surmises and suspicion. The case presented such extraordinary features that the Supreme Court of India held that on the facts of the case, both the Income-tax authorities and the Appellate Tribunal in finding that the aforesaid sum was the gross profits out of the sale proceeds of assessee's business did not act on any material whatsoever, but acted on pure guess and suspicion and that it was a fit case for interference by the Supreme Court of India by way of a special appeal under Article 136 of the Constitution of India.

Our attention was also drawn to certain observations made by learned writers on Indian Income-tax laws in support of the contention that inasmuch as appeal lies under our present Income-tax Amendment Act, 1953, just as in India it is desirable that the assessment order of the Income-tax Officer should disclose the basis so that the higher authorities may know the ground on which the assessment was based—*vide* Sir Jamshedji B. Kanga and N. A. Palkhivala's Book on the Law and Practice of Income-tax, 1950 Edition, at page 468, and also the Law of Income-tax in India by V. S. Sundaram, 7th Edition, at page 893 under the sub-heading "Orders in writing". With due respect, these are mere individual view or opinion without specific sanction of any affirmative judicial pronouncements, and we are not to be swayed by them especially when we are concerned with the plain interpretation of the Burma

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Income-tax Act as it stands. Our function is to interpret the law as it stands and not in the guise of interpretation introduce a new requirement which the legislature has not provided *cf.* sub-section (*3*) of section 23 which requires assessment order *in writing*. We understand that there are departmental instructions that in best of judgment assessment the Income-tax Officer is to avoid a "display of viciousness, and particularly in cases where the default is not deliberate, but technical," even though, as pointed out by their Lordships of the Privy Council in *Commissioner of Income-tax, Central and United Provinces* v. *Laxminarain Badridas* (1) that such assessment, in a sense, must be to some extent "arbitrary".

Therefore, for the reasons given above and also in view of the special circumstances of the case, we must answer the second question formulated in the slightly amended form as indicated above, in the affirmative. The Commissioner of Income-Tax is entitled to costs of 10 gold mohurs in this reference.

U BA THOUNG, J.—I agree.

U SAN MAUNG, J.—I would like to add a few remarks to the judgment just pronounced by the learned Chief Justice. The second question which was referred to us for opinion has been recast so as to read—

"Whether in the circumstances of the case and in view of the fact that an assessment made under section 23 (*4*) of the Burma Income-tax Act has now been made appealable, the Income-tax authorities were right in law in assessing an amount of income without giving details of the computation ?"

In order to come to a right decision on this point it is necessary to compare the language of sub-section (*3*)

(1) (1937) I.T.R. Vol. V, 170.

of section 23 with sub-section (*4*) thereof. Sub-section (*3*) in so far as is relevant for the purpose in hand reads—

"On the day specified in the notice issued under sub-section (2), or as soon afterwards as may be, the Income-tax Officer after hearing such evidence as such person may produce and such other evidence as the Income-tax Officer may require, on specified points shall *by an order in writing*, assess the total income of the assessee, and determine the sum payable by him on the basis of such assessment."

Shorn of unnecessary words sub-section (*4*) reads—

"If any person fails to make the return required by any notice given under sub-section (*2*) of section 22 and has not made a return by a revised return under sub-section (*3*) of the same section or fails to comply with all the terms of a notice issued under sub-section (*4*) of the same section, the Income-tax Officer shall make the assessment to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment."

It is clear from the above that whereas under sub-section (*3*) the Income-tax Officer is required to make his assessment by an order in writing, sub-section (*4*) merely requires him to make the assessment to the best of his judgment. This difference in the language is highly significant and the absence of the provision relating to an order in writing in the case of the assessment under sub-section (*4*) is, in my opinion, due to the fact that the very nature of such an assessment precludes the necessity for an order in writing.

In this connection the following observation in *In Re Abdul Bari Chowdhury* v. *Commissioner of Income-Tax, Burma* (1) is apposite:

"*Ex hypothesi* an assessment under section 23 (*4*) must be made upon inadequate materials. It is a mere estimate,

(1) (1931) I.L.R. 9 Ran. 281 at 295.

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and if it is made by the Income-tax Officer *bona fide* and 'to the best of his judgment' (which only means 'as best he can in the circumstances'), the assessee who has (not chosen to state an account so that the amount of profits may be strictly determined, cannot complain if a random assessment is made' upon him by the Crown; see per the Lord President in *Macpherson* v. *Moore* (1). The assessment necessarily must be in this sense, at any rate to some extent, an arbitrary one. In *S.P.K.A.A.M. Chettyar Firm* v. *The Commissioner of Income-tax* (2) it was further held that the assessment 'must also be reasonable, and the materials or reasons on which it is founded must be so stated that the Commissioner may be in a position to ascertain whether or not it is reasonable'. Why, if the assessment under section 23 (*4*) is a mere estimate made without materials upon which an accurate assessment can be based? Suppose the assessee has refused to furnish any statement, or to produce any materials upon which an assessment can be made, is he for that reason to escape assessment altogether? Certainly not. I respectfully agree with the observations of Lord Mackenzie that 'with regard to the practical difficulty of finding out the amount of profits upon which the assessment is to be laid, I can only say this, that it is not necessary to arrive at any satisfactory conclusion upon that matter, because it is not a matter with which the Court is concerned. If the Act of Parliament says the amount of profits is to be ascertained, ascertained they must be whether that can be done in a satisfactory method or not.' The estimated assessment is a mere guess. Who is to determine whether the guess is a reasonable one or not? Under section 23 (*4*) the Income-tax Officer is the *persona designata* to make the assessment, and from an assessment so made no appeal lies. If an assessment under section 23 (*4*) is made by the Income-tax Officer *mala fide*, and is 'arbitrary' in the sense that I first indicated, it cannot be doubted, I imagine, that the Commissioner would exercise the power of review with which he is entrusted under section 33."

The views expressed by the late High Court in *Abdul Bari Chowdhury* v. *Commissioner of Income-Tax, Burma* (3) were endorsed by the Privy Council in

(1) 6 Tax Cases at p. 115. (2) (1929) I.L.R. 7 Ran. 659
(3) (1931) I.L.R. 9 Ran. 281 at 295.

Commissioner of Income-Tax, Central and United Provinces v. *Laxminarain Badridas* (1) in the following words :

" Indeed the Judicial Commissioners in the present case seem to treat the matter as decided not by the view of High Court but rather by the opinion of the Commissioner for Income-Tax ; for they use the following language:—

> 'While the aforesaid remarks of the Commissioner of Income-Tax, Bengal, impliedly concede that 'local enquiry' and the placing on record of a note the results of such enquiry are essential in law to sustain an *ex parte* assessment the learned Commissioner of Income-Tax of these provinces thinks otherwise, presumably on certain observations in *Abdul Bari Chowdhury* v. *Commissioner of Income-Tax, Burma* (2) which go so far as to lay down that an *ex parte* assessment may as well be made on 'mere guess' of the Income-tax Officer who is the *persona designata* to make the assessment' and against whose order 'no appeal lies'. With due deference we hesitate to subscribe to such a widely stated proposition, as it is extremely likely to lead to certain abuse of the powers by the Income-tax Officers in the discharge of their duties which must be performed throughout in conformity with the rules of justice, equity and good conscience.'

The other authorities cited by the Judicial Commissioners do no more, their Lordships think, than affirm that the Officer must exercise judgment and must not act on mere caprice, or in any other way inconsistent with the exercise of judgment.

Their Lordships find themselves in agreement with the views expressed by the High Court at Rangoon in the case of *Abdul Bari Chowdury* v. *Commissioner of Income-Tax, Burma* (2). "

A best of judgment assessment being in the nature of an honest estimate or an honest piece of guess work on the part of the Income-tax Officer acting as a *persona designata* on whatever material

(1) (1937) I.T.R. Vol. 5, p. 170. (2) (1931) I.L.R. 9. Ran. 281 at 295.

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he can lay his hand on, it is for that very reason incapable of being couched in the form of an order in writing similar to that required by sub-section (*3*) of section 23. The question then arises, of what avail is the right of appeal now granted by the statute to the assessee against whom a best of judgment assessment has been made under section 23 (*4*). This right of appeal is given by section 30 of the Act, the relevant portion of which reads:—"Any assessee objecting to the amount of income assessed under section 23 may appeal to the Assistant Commissioner against the assessment." If this provision is read by itself, it would admit of a construction that the best of judgment assessment under section 23 (*4*) must also be by an order in writing in the same way as an assessment under section 23 (*3*). However, in view of the fundamental difference in the nature of the two assessments, I must reject the contention put forward by the learned Advocate for the applicant that by the grant of a right of appeal the provisions of section 23 (*4*) are so "assimilated" to those of section 23(*3*) as to make it necessary for the Income-tax Officer to give details of computation such as he would have to give in an assessment under section 23(*3*).

On the other hand it is impossible to shut our eyes to the fact that there has been a change in the law inasmuch as a right of appeal has been given to an assessment under section 23(*4*) which has been previously denied to the assessee. Therefore, it will no longer be sufficient for the Income-tax Officer to make his assessment under section 23 (*4*) by entering such a cryptic note as "Business. Rs. 30,000." This was actually what the Income-tax Officer had done in the case of *Krishna Kumar and Mahendra Kumar Ghose* v. *The Commissioner of Income-Tax, Bengal*(1).

(1) Reports of Income-tax Cases, 1933, Vol. 5, p. 295.

One of the questions which, therefore, was referred for the opinion of the Calcutta High Court was : " the Income-tax Officer simply puts ' Business— Rs. 30,000 '. No basis or details are apparent. Can this be an assessment to the best of one's judgment ? " The answer given by the learned Judges of the High Court was in the affirmative.

Now, when a right of appeal is given to an assessee, how can it possibly be expected of him to prepare a satisfactory ground of appeal against such a cryptic note ?

To my mind when an Income-tax Officer has to make a best of judgment assessment he must make an honest piece of guess work and in the process some sequence of thought must have entered into his mind. All that would be necessary, therefore, in a best of judgment assessment to render it susceptible of appeal is to make the Income-tax Officer record his sequence of thought sufficiently to show that he had made an honest estimate or an honest piece of guess work and that he was not actuated by dishonesty, vindictiveness or caprice.

I have advisedly not used the expression " record his reasons in writing " lest I might be misconstrued as meaning that his assessment under section 23 (*4*) must be based on evidence or some tangible fact. In the cases now under consideration the Income-tax Officer had in fact indicated sufficiently in his assessment note to show that he had made an honest estimate or an honest piece of guess work.

From the manner in which the question itself has been recast, it is clear that no hard and fast rule can be laid down as to what should be the contents of the note by which an Income-tax Officer makes his best of judgment assessment under section 23 (*4*).

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For the reasons given above, I concur that the answer to the second question is in the affirmative.

I have nothing to add to the remarks of the learned Chief Justice regarding the answer to the first question.

APPELLATE CIVIL.

Before U Thaung Sein, J.

BISWANATH KALWA (APPELLANT)

v.

HARI SINGH (RESPONDENT).*

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May 6.

Shan States—Court of the Resident, whether competent to entertain appeals from Courts subordinate to it in cases under the Urban Rent Control Act—S. 15, Urban Rent Control Act—S. 15, Shan States Civil Justice (Subsidiary) Order, 1906—Concurrent jurisdiction of the High Court and the District Court.

An appeal against the judgment and decree of the Court of the Assistant Superintendent was filed in the Court of the District Judge (Resident), Taunggyi, under s. 15 of the Urban Rent Control Act.

The District Court dismissed the appeal, holding that under s. 15 of the Urban Rent Control Act, the appeal lies to the High Court.

Does s. 15, Urban Rent Control Act abrogate any other right of appeal allowed under any other law in force in the Shan States ?

Held : That s. 15 of the Urban Rent Control Act does not expressly or by implication divest the Court of the Resident with appellate jurisdiction conferred on it by s. 15 of the Shan States Civil Justice (Subsidiary) Order, 1906. The High Court and the District Court have concurrent jurisdiction to entertain such appeals.

Haw Lim On v. *Ma Aye May*, (1951) B.L.R. (S.C.) 68, relied on.

K. Singh, Advocate, for the appellant.

P. K. Bose, Advocate, for the respondent.

Myint Htoo, Legal Adviser to Shan States as *amicus curiae*.

U THAUNG SEIN, J.—This appeal raises a question of interest for litigants in the Shan States. The question at issue is whether the Court of the Resident has any jurisdiction to entertain appeals

* Civil 2nd Appeal No. 23 of 1957. Appeal against the judgment and decree passed in Civil Appeal No. 6 of 1956 of the Resident (District Judge), Taunggyi.

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from Courts subordinate to it in cases decided under the Urban Rent Control Act in view of the provisions of section 15 of that Act as applied to the Shan States. That section is in the following strain :—

"An appeal on law and fact shall lie to the High Court of Judicature at Rangoon from any decree or order made by any Judge in any suit or application or proceeding arising out of such suit or application for the recovery of possession of any premises to which this Act applies or for ejectment of a tenant therefrom."

The facts giving rise to this appeal are briefly as follows. In Civil Regular Suit No. 41 of 1953-54 of the Court of the Assistant Superintendent for Civil Justice, Taunggyi, "the respondent-plaintiff Hari Singh sued for and obtained a decree for the ejectment of the appellant-defendant Biswanath Kalwa from certain premises situated in the town of Taunggyi. An appeal was then filed in the "Court of the District Judge (Resident) Taunggyi" but the learned "District Judge" (Resident) dismissed that appeal in the following terms :—

"I see no reason to interfere with the Lower Court's Order.

According to section 15 of the Urban Rent Control Act, 1948, the appeal of such nature lies with the High Court.

Therefore the appeal is dismissed. Each parties must bear its own costs."

That an appeal does lie to the High Court against the abovementioned judgment and decree is of course indisputable in view of the clear wording of section 15 of the Urban Rent Control Act. But does this section abrogate any other right of appeal allowed under any other law in force in the Shan States ? As it is essential to have a clear understanding of the laws in force in the Shan States and the types and grades of Civil Courts in such States, I decided to

call for the assistance of the learned Legal Adviser to the Shan States as *amicus curiae* and I am pleased to place on record that I was ably assisted by U Myint Htoo the Legal Adviser in question.

It may be noted that the Courts Act (Burma Act No. 55 of 1950) is not applicable to the Shan States or any other State in view of the provisions in section 92 (2) of the Constitution read with item 3 (3) and (4) of List II (State Legislature List). A Special Act known as the States Courts Act, 1953 (ဝင္ဂြၵ ခုၼ်ၵ ပြည်နယ်တရားရုံးများ အက်ဥပဒေ) (Burma Act No. 52 of 1953) has been enacted for the establishment of Civil Courts in the various States but this Act has not been extended to the Shan States at present. It appears that so far as the Shan States are concerned the administration of Civil Justice is governed by the Shan States Civil Justice (Subsidiary) Order, 1906 as reproduced at page 65 of the Shan States Manual. The grades of Civil Courts in the Shan States in the "notified areas" is to be found in section 4 of that order and it may be noted that the "Court of the Assistant Superintendent" is mentioned therein. Then again, in section 15 of the same order the Courts exercising appellate jurisdiction are set out under the heading "Appeals in certain cases". In particular an appeal from a decree or order of the Assistant Superintendent in a suit of a value exceeding Rs. 100 lies to the Superintendent. The designations "Assistant Superintendent" and "Superintendent" have been altered to that of "Assistant Resident" and "Resident."

It has been urged on behalf of the appellant that in view of the above provisions the Court of the Resident, Taunggyi was competent to entertain the present appeal despite the fact that an appeal against the same decree will also lie to the High Court under

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section 15 of the Urban Rent Control Act. There appears to be a good deal of force in this contention as section 15 of the Urban Rent Control Act does not expressly or by implication divest the Court of the Resident with appellate jurisdiction conferred on it by any other law or enactment. In other words, the High Court and the District Court are at present invested with concurrent jurisdiction to entertain such appeals. In this connection, I am fortified in the above view by the observations of the Supreme Court in *Haw Lim On* v. *Ma Aye May* (1)—

> "In our opinion section 15 of the Urban Rent Control Act must not be interpreted in an exclusive sense but must be given a construction as supplementing the right of appeal. A decree of a Civil Court is ordinarily appealable but an order made by a Civil Court unless it falls within section 47 or section 104 or Order 43 of the Civil Procedure Code, would not be appealable. Section 15 of the Urban Rent Control Act gives the right of appeal from all orders whatsoever made in a suit or proceeding coming within its provision. This section must not, as we have said earlier, be read as taking away the ordinary right of appeal given by the Civil Procedure Code or other relevant enactment in respect of decrees or orders of a Civil Court."

On the whole, there can be no doubt that the Court of the Resident, Taunggyi had jurisdiction to deal with the appeal under consideration and there is thus no other alternative but to remand the case to that Court for disposal according to law. Accordingly the judgment and decree of that Court are hereby set aside and the case will be remanded to that Court for disposal in accordance with law. Costs shall abide by the final decision of that case.

(1) (1951) B.L.R. (S.C.) 68.

APPELLATE CIVIL.

Before U Aung Khine, J. and U Ba Thoung, J.

DAW KYI KYI (APPELLANT)

v.

KO KO LAY AND THREE OTHERS (RESPONDENTS).*

H.C. 1958

June 16.

Burmese Buddhist Law—Succession and inheritance—Relative rights of brothers and sisters of the half-blood and nephews and nieces of the full blood to the estate of a deceased Burmese Buddhist.

On the death of an unmarried Burmese Buddhist leaving behind brothers and sisters of the half-blood, and nephews and nieces of the full blood, they all stand in the same degree of relationship for the purpose of succession. It makes no difference whether the nephews and nieces are the offsprings of a brother or sister younger or older than the deceased.

A, a Burmese Buddhist spinster, left her surviving a brother of the half-blood B, a sister of the half-blood C, and a nephew and two nieces of the full blood D, E, and F and G, the husband of A's elder sister (predeceased) and father of D, E and F. B and C each filed administration suits, and claimed a half-share each in the estate of A.

D, E, F and G, on the other hand claimed the entire estate between them as A's sole heirs.

Held: Confirming the decision of the District Judge, that a brother or sister of the half-blood stand in the same degree of relationship for the purposes of succession as a nephew or niece of the full blood and would share equally, and that at Burmese Buddhist law a nephew or niece is not excluded by a half-brother or sister and that both would be heirs. Therefore B, C, D, E and F are to share equally in the estate of A.

Held also: G is not an heir.

Ma Galay and one v. *Ma E Mya and others*, I.L.R. 8 Ran. 23 and *Ma Kin Oh* v. *Ma Kin Gale*, I.L.R. 8 Ran. 17, followed.

Held further: It makes no difference whether D, E and F are the children of A's elder sister or A's younger sister, because they are not claiming their share of inheritance as representing their parents, they are claiming their share in their own right as nephews and nieces of A.

Ma Kin v. *Maung Po Myit and others*, I.L.R. 7 Ran. 811 and *U Po Tha Dun and others* v. *Maung Tin and others*, I.L.R. 8 Ran. 480, followed.

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* Civil 1st Appeal No. 54 of 1956. Appeal against the decree of the District Court of Mandalay (U KAN LIN), in Civil Regular Suit No. 9 of 1956, dated 31st March 1956.

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DAW KYI KYI v. KO KO LAY AND THREE OTHERS.

C. Choung Po, Advocate, for the appellant.

G. N. Banerji, Advocate, for the respondent No. 1.

Pha Tha Htaw, Advocate, for the respondents Nos. 2, 3 and 4.

U BA THOUNG, J.—One Daw Thet a Burman Buddhist married U Maung Maung and had two children namely Khin May Gyi and Khin Ma Gyi. After the death of U Maung Maung, Daw Thet contracted a second marriage with one Ko U and had two children Daw Kyi (appellant) and Ko Ko Lay, 1st respondent. Khin May Gyi, the elder daughter of Daw Thet by her first husband, married U Ba Htoo and had three children namely, Maung Maung, Khin Ma Ma and Khin Mi Mi 2nd, 3rd and 4th respondents. Khin May Gyi predeceased Daw Thet and Khin Ma Gyi. Khin Ma Gyi died in 1955 leaving no issue and the present appeal arises out of the suit for administration of the estate of Khin Ma Gyi filed by Ko Ko Lay, 1st respondent, against Daw Kyi Kyi (appellant), Maung Maung, Khin Ma Ma, Khin Mi Mi (2nd, 3rd and 4th respondents) and U Ba Htoo, husband of Khin May Gyi, in Civil Regular Suit No. 9 of 1955 of the District Court of Mandalay. Daw Kyi Kyi had also applied for letters of administration to the estate of Khin Ma Gyi in Civil Miscellaneous Case No. 23 of 1955 of the same Court and these two cases were taken up together.

Ko Ko Lay claimed half share in the estate of Khin Ma Gyi and Daw Kyi Kyi claimed the other half share. On the other hand Maung Maung, Khin Ma Ma and Khin Mi Mi as nephew and nieces of Khin Ma Gyi, and U Ba Htoo as husband of Khin May Gyi claimed the entire estate of Khin

Ma Gyi as her sole heirs, and they contended that Ko Ko Lay and Daw Kyi Kyi had already obtained a house and some moveable properties from Daw Khin Ma Gyi as their share of inheritance.

The learned District Judge framed three issues as to (1) whether Ko Ko Lay and Daw Kyi Kyi had obtained a house and some moveable properties from Khin Ma Gyi as their share of inheritance and if so whether they could file this administration suit; (2) who are the heirs of Daw Khin Ma Gyi and what are their respective share of inheritance and (3), what are the properties owned by Daw Khin Ma Gyi. The first issue was not contested by Maung Maung, Khin Ma Ma, Khin Mi Mi and U Ba Htoo and hence the learned District Judge did not consider it necessary to go into that issue; and as the third issue would have to be gone into by the Commissioner when accounts are taken, the only issue taken up by the learned District Judge was, as to who are the heirs of Daw Khin Ma Gyi and what are their respective shares.

Regarding this issue, it is not disputed that Daw Kyi Kyi (appellant) and Ko Ko Lay (1st respondent) are a half-sister and a half-brother of the late Daw Khin Ma Gyi, and it is not disputed that Maung Maung, Khin Ma Ma and Khin Mi Mi are the children of Daw Khin May Gyi who was an elder sister of Daw Khin Ma Gyi. The contestants to the estate of Daw Khin Ma Gyi for inheritance are therefore Daw Kyi Kyi and Ko Ko Lay a half-sister and a half-brother of the deceased Daw Khin Ma Gyi on one part, and Maung Maung, Khin Ma Ma and Khin Mi Mi (2nd, 3rd and 4th respondents) as nephew and nieces of the late Daw Khin Ma Gyi, and by U Ba Htoo as a husband of Daw Khin May Gyi on the other part.

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DAW KYI KYI v. KO KO LAY AND THREE OTHERS.

U BA THOUNG, J.

The learned District Judge, relying on the case of *Ma Galay and one* v. *Ma E Mya and others* (1), where it was held that "a brother or sister of the half-blood stands in the same degree of relationship for the purposes of succession as a nephew or niece of the full blood and woud share equally," and also relying on the case of *Ma Kin Oh* v. *Ma Kin Gale* (2), where it was held "that, at Burmese Buddhist Law, a nephew or a niece is not excluded by a half-brother or sister; and both would be heirs," decided that Daw Kyi Kyi (appellant) and Ko Ko Lay (1st respondent) as a half-sister and a half-brother of Daw Khin Ma Gyi would share equally with Maung Maung, Khin Ma Ma and Khin Mi Mi (2nd, 3rd and 4th respondents) who are nephew and nieces of the deceased Daw Khin Ma Gyi. The suit as against U Ba Htoo was dismissed as he is not an heir of Daw Khin Ma Gyi. A preliminary decree was accordingly passed and a Commissioner, to go into accounts of the estate of Daw Khin Ma Gyi, was appointed by the learned District Judge in Civil Regular Suit No. 9 of 1955; and it is against this preliminary decree that the present appeal was filed by Daw Kyi Kyi.

The decisions made in the case of *Ma Galay and one* v. *Ma E Mya and others* (1) and in the case of *Ma Kin Oh* v. *Ma Kin Gale* (2) are still good law that a brother or sister of the half-blood stands in the same degree of relationship for the purposes of succession as a nephew or niece of the full blood and would share equally; and that at Burmese Buddhist Law a nephew or niece is not excluded by a half-brother or sister and that both would be heirs. The decision made by the learned Distric Judge relying on the above rulings is therefore

(1) I.L.R. 8 Ran. 23. (2) I.L.R. 8 Ran. 17.

correct. It is contended by the learned counsel for the appellant that the present case differs from that of the case of *Ma Galay and one* v. *Ma E Mya and others* (1) in that in the latter case, the nephews and nieces are the children of the deceased's younger brother, whereas in the present case the 2nd, 3rd and 4th respondents are the children of the deceased's elder sister Daw Khin May Gyi and therefore they should be excluded. We cannot accept that contention for we are of the opinion that it would have made no difference whether the 2nd, 3rd and 4th respondents are the children of the deceased's elder sister or the deceased's younger sister, because they are not claiming their share of inheritance as representing their parents, but they are claiming their share in their own right as nephews and nieces of the deceased Daw Khin Ma Gyi, and they could not be excluded by the half sister and half brother of the deceased.

See the case of *Ma Kin* v. *Maung Po Myit and others* (2) and the case of *U Po Tha Dun and others* v. *Maung Tin and others* (3).

For the reasons stated the learned District Judge was correct in holding that Daw Kyi Kyi (appellant) and Ko Ko Lay (1st respondent) as a half sister and half-brother of Daw Khin Ma Gyi would share equally with the 2nd, 3rd and 4th respondents as nephew and nieces of the deceased Daw Khin Ma Gyi.

The appeal is dismissed with costs.

U AUNG KHINE, J.—I agree.

(1) I.L.R. 8 Ran. 23. (2) I.L.R. 7 Ran. 811.
(3) I.L.R. 8 Ran. 480.

APPELLATE CIVIL.

Before U Aung Khine and U Ba Thoung, JJ.

H.C. 1958

June 30.

DAW OHN BWINT AND ONE (APPELLANTS)

v.

U HLAING (RESPONDENT).*

Workmen's compensation—Liability of employer for death caused to employee—Scope of employment.

The respondent had engaged a certain contractor for repairing an oil-well, who in turn had engaged workmen including the deceased. The repair work was completed, and the implements which had been borrowed for the work were put on a winch-car for the purpose of returning them. The deceased and other workmen were also put in the car to unload the implements. While travelling in the car, the deceased fell out of it and died

On a claim being made on behalf of the deceased, the Commissioner of Workmen's compensation dismissed the claim.

Held : On appeal ; that irrespective of whether the wages of the workmen had been paid on completion of the major portion of the work, the workmen who were carried in the winch-car for the purpose of doing the unloading work must be deemed to be still in the employment of the respondent as their services were still required for unloading the implements and that the employer was liable to pay compensation for the death of the deceased workman.

G. N. Banerji (for U Yan Aung), Advocate, for the appellants.

Than Sein, Advocate, for the respondent.

U AUNG KHINE, J.—This is an appeal against the order of the Commissioner for Workmen's Compensation (Oilfields), Yenangyaung, passed in Workmen's Compensation Case No. 4 of 1953. The applicants Daw Ohn Bwint and Maung Hla Thein are the wife and son respectively of U Chit Phwe (deceased).

* Civil Misc. Appeal No. 34 of 1955, against the order of the Commissioner for Workmen's Compensation (Oil-fields), Yenangyaung, in Workmen's Compensation Case No. 4 of 1953, dated 13th June 1955.

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DAW OHN BWINT AND ONE v. U HLAING.

U AUNG, KHINE, J.

It is their case that U Chit Phwe was employed by U Hlaing, the respondent, to carry out certain repairs in his oil-well at Khangone. On the 5th *lasan* of *Nayon* 1315 B.E. while U Chit Phwe and other workmen were returning home from the well in a winch-car belonging to the respondent there was an accident and as a result of which U Chit Phwe was killed. In the course of the inquiry conducted by the learned Commissioner it was ascertained that an obstruction had been caused by a pale in the oil-well of the respondent. To remove that pale, U Hlaing engaged, one U Po Kyaw who was given the necessary powers to engage his own workmen. U Chit Phwe was one of the workmen engaged by U Po Kyaw. The obstructing pale was successfully removed on the 4th day of the work and all the workmen were paid their dues by the respondent U Hlaing.

For the purpose of removing the pale it was found necessary to borrow some implements from different people by U Po Kyaw and the respondent and after the work was done these implements had to be returned to the respective owners and for that purpose they were put on the winch-car belonging to the respondent U Hlaing. U Chit Phwe and others were taken along in the car to unload these implements at the various places from where they were obtained. While travelling in the car U Chit Phwe fell out of the car when the same slid back about 40 feet in making a climb over a high ground.

On these facts it is to be considered whether U Chit Phwe met his death by an accident arising out of and in the course of his employment in the respondent's business. It is true that the main work for which U Chit Phwe and others were engaged had been successfully done and the wages of these workers

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U AUNG KHINE, J.

paid, but the borrowed implements had yet to be returned. U Hlaing denied that he was responsible for the bringing and the return of the implements. He asserted that when the men were engaged for the work he took no responsibility for the bringing and the return of these implements. However, he admitted that when certain implements were necessary for the work the owner of the well had to make the hire. He also admitted that on the first day the workmen brought some implements with them and on the second day he himself brought some in his own car.

The most important witness in the whole proceedings is U Po Kyaw (PW 2). U Po Kyaw is undoubtedly very intimate with the respondent U Hlaing. U Hlaing admits that U Po Kyaw is his *tabye*. In his statement U Po Kyaw said that the borrowed implements had to be loaded into the car by the workmen engaged on completion of the work and on return they had to be unloaded by the same workmen and of whom U Chit Phwe was one. To a question by Court, U Po Kyaw stated that he engaged four men not only for the purpose of removing the pale from the well but also for the purpose of loading and unloading the implements. U Po Kyaw's version is supported to a great extent by U Loo (PW 3).

On these facts we are of the opinion that irrespective of whether the wages of the workmen had been paid on completion of the major portion of the work, the workmen must be deemed to be still in the employ of the respondent U Hlaing when they were still required for the purpose of unloading the implements borrowed. It is not denied that the winch-car of U Hlaing was loaded with implements for return to their respective owners and no doubt U Chit Phwe was one of the men who was to do the unloading.

For all these reasons we hold that the learned Commissioner had misconceived the law applicable in the case and that he should have awarded the compensation admissible to the appellants. There is no dispute that the amount of K 2,650 claimed is excessive if the payment under the law is admissible. The appeal is allowed and we direct that the respondent U Hlaing do pay to the appellants Daw Ohn Bwint and Maung Hla Thein the sum of K 2,650 together with costs. Advocate's fees K 51.

U BA THOUNG, J.—I agree.

APPELLATE CIVIL.

Before U Choon Foung, J.

H.C. 1958

June 27.

K. MOHIDEEN (APPELLANT)

v.

BURMA STATE PAWNSHOP BOARD AND ANOTHER (RESPONDENTS).*

Civil Procedure Code, O. 9, r. 13 and O. 9, r. 34—Setting aside of an ex-parte *order for a temporary injunction by trial Court—Powers of trial Court.*

Where it was contended in an appeal against the order setting aside an *ex-parte* order granting a temporary injunction, that there was want of jurisdiction on the part of the Judge, and that O. 9, r. 13 of the Code of Civil Procedure has no application :—

Held : (1) that the Judge who granted the temporary injunction *ex-parte* had jurisdiction to set aside the *ex-parte* order ; *G. R. D. Goswami* v. *Vijiaramaraju and another*, A.I.R. (1929) Mad. 803, distinguished.

(2) that O. 9, r. 13 of the Code of Civil Procedure applies to interlocutory orders ; that the wording of this rule is quite different from the wording used in O. 9, r. 13 of the Code of Civil Procedure of India and that this rule covers decrees as well as orders. *U Po Mya* v. *Father Rioufreyt*, (1939) R.L.R. 134, explained.

R. Jaganathan, Advocate, for the appellant.

Myint Soe, Barrister-at-Law, for the 1st respondent.

Khin Maung, Advocate, for the 2nd respondent.

U CHOON FOUNG, J.—The appellant filed in the Rangoon City Civil Court a suit against the respondents for a declaration that he is a tenant in law of the first respondent and also for perpetual injunction that he (the first respondent) should not interfere or invade his right to occupation and enjoyment of the suit premises, namely the front portion of the ground floor of No. 248, Fraser Street,

* Civil Misc. Appeal No. 5 of 1958, against the order of the Third Judge (U THEIN HAN) of the City Civil Court of Rangoon, in Civil Regular Suit No. 96 of 1957, dated the 28th October 1957.

Rangoon. During the pendency of the suit, he also filed an application for temporary injunction. After the issue of notices to the parties concerned, the interlocutory matter was heard *ex-parte* as against the first respondent; and the learned Third Judge of the Rangoon City Civil Court, before whom the original suit was pending, passed orders *ex-parte* on 5th February 1957 granting the appellant the temporary injunction which he sought. Subsequently, the first respondent filed an application before the same Judge for settting aside his *ex-parte* order dated the 5th February 1957.

After due enquiry, the learned Third Judge of the Rangoon City Civil Court held on 28th October 1957 that the first respondent was prevented by sufficient cause from appearing when the application for temporary injunction was called for hearing and set aside his *ex-parte* order dated the 5th February 1957. Hence, this appeal against the said order dated the 28th October 1957 of the Third Judge of the Rangoon City Civil Court.

The learned Advocate for the appellant contended (1) that the Third Judge of the Rangoon City Civil Court had no jurisdiction to vary or set aside his *ex-parte* order dated the 5th February 1957 and (2) that in any case Order 9 Rule 13 of the Civil Procedure Code does not apply to this case.

In support of his first contention the learned Advocate for the appellant relied on *G. R. D. Goswami* v. *Vijiaramaraju and another* (1). In the said case it has been held that:

"Rule 4, Order 39 is not intended to set at nought the ordinary *cursus curiae* that, once a Court has decided a matter after giving each side an opportunity of being heard, its order

(1) A.I.R. (1929) Mad. 803.

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U CHOON FOUNG, J.

is final and binding on itself as much as on the parties and cannot be re-opened except on the presentation of some new matter not available when the original order was passed."

In my view, the aforesaid case is distinguishable from this case; for in this case, the first defendant (now the first respondent) did not have an opportunity of being heard. Therefore, the first contention of the learned counsel must be rejected.

The learned Advocate for the appellant relied on *U Po Mya* v. *Father Rioufreyt* (1) in support of his second contention. In the said case it has been held by a Bench of the former High Court of Judicature at Rangoon that—

"Order 9, Rule 13 of the Civil Procedure Code has no application to execution proceedings, but only to decrees in suits or in proceedings in administration or guardianship akin to suits."

I am of the opinion that the said ruling is no authority for the learned Advocate's second contention; for, in the first place, the said rule does not say that Order 9, Rule 13 is not applicable to interlocutory proceedings and, in the second place, Order 9, Rule 13 which is in force in Burma since the last world war is not the same as Order 9, Rule 13 which was in force in pre-war days. The Civil Procedure Code which was in force in Burma in pre-war days was the India Act No. 5 of 1908; whereas the Civil Procedure Code now in force in Burma since the last World War is the Civil Procedure Code published in Volume VII of the Burma Code (1944 Edition) pages 1—318. There is a difference in the wording of the two Codes of Civil Procedure in respect of Order IX, Rule 13. The relevant portion

(1) (1939) R.L.R. 134.

of Rule 13 of Order IX, of India Act No. 5 of 1908 (*i.e.*, the Indian Code of Civil Procedure) reads :

"In any case in which a decree is passed *ex-parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside * * * * the Court shall make an order setting aside the decree * * * ."

Whereas the relevant portion of Order IX, Rule 13 of the Code of Civil Procedure now in force in Burma runs as follows :

"In any case in which a decree or order is passed *ex-parte* against a defendant, he may apply to the Court by which the decree or order was passed for an order to set it aside * * * ; the Court shall make an order setting aside the decree or order * * * (the words 'or order' have been underlined to show the difference in the wordings of the Order 9, Rule 13 of the two Civil Procedure Codes)."

Even their marginal headlines are differently worded. The marginal headline against the said order and rule under the Indian Code of Civil Procedure is "setting aside the decree *ex-parte* against the defendant", while that used in the Burma Code of Civil Procedure is "setting aside decree or order *ex-parte* against the defendant."

For these reasons, it is futile to argue that Order 9, Rule 13 of the Civil Procedure Code which is in force in Burma is not applicable to an *ad interim* injunction order or to any other interlocutory order, and consequently the second contention of the learned Advocate for the appellant must also be rejected.

In the result, the appeal fails and is dismissed with costs. Advocate's fee K 85.

APPELLATE CIVIL.

Before U Ba Nyunt, J.

H.C 1958

June 24.

K.P.R.M. RAMAN CHETTYAR (APPELLANT)

v.

K. SUPAYA (RESPONDENT).*

Principal and Agent—Extension of time by agent—Whether within scope of authority—Contract Act, s. 188—Ratification—Whether acknowledgment of act of agent by principal in another proceeding amounts to ratification or admission of ratification—Evidence and pleading—Acceptability—Extent of.

An agreement for the sale of certain immoveable property was made between the buyer and seller under which part of the price was paid at the time of the agreement, and it was agreed that the balance was to be paid within one year. On the buyer being unable to pay the balance price within a year, the seller's agent, in the absence of the seller, entered into a new agreement of sale, wherein the time of payment was extended for another year. The balance price was alleged to have been paid during that year by the buyer to the seller's agent. The registration of the sale deed was however postponed till the arrival of the seller, who on his arrival about three years later, refused to accept the agreement made by his agent.

Held: (1) S. 188 of the Contract Act has no application to the present case. The making of a fresh agreement for sale of immoveable property by an agent is not a lawful thing necessary for the purpose or usually done in the course of conducting the business of collecting the rents and outstanding debts due to the principal. Therefore the fresh agreement of sale made by his agent was not binding on the seller. The alleged payment on the balance price by the buyer to the seller's agent after the expiry of the period allowed by the original agreement of sale was therefore of no relevance.

Bryant, Powis and Bryant Ltd. v. *La Banque Du Peuple*, (1893) A.C. p. 170; *The United Provinces Government, Lucknow* v. *The Church Missionary Trust Association Ltd., London*, I.L.R. 2 Luck. p. 93; and *Ebrahim Mahomed Patail* v. *S.R.M.M. Arunachellum Chetty*, (1902-03) II U.B.R. p. 5, referred to.

(2) The statement by the seller in the plaint filed by him in another suit that an extension of time was granted to the buyer at his request as he could not pay the balance price within one year, does not

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*Civil 2nd Appeal No. 126 of 1955, against the decree of the District Court of Pyapon in Civil Appeal No. 2 of 1955, dated 12th October 1955 arising out of the Subdivisional Court of Pyapon in Civil Regular No. 10 of 1953, dated 16th June 1955.

amount to ratification of the subsequent agreement, or admission of the ratification.

In order to establish a case of ratification it appears to be essential that the party ratifying should be conscious that an act beyond the authority of the agent had been done, and further after notice of that fact the party consciously by an overt act agreed to be bound by it or by acquiescence in the situation arising thereafter allowed the business to continue.

There can be no ratification without any intention to ratify, and there can be no intention to ratify an illegal act without knowledge of the illegality. While a Court of law is entitled to accept a part of the evidence of a witness and to reject another part, a pleading cannot be so dissected, but must be taken either as a whole or left alone altogether.

Daw Cho v. *U Ganni and others*, (1951) B.L.R. 158 (S.C.) ; *T. R. Pratt (Bombay) Ltd.* v. *E. D. Sassoon & Co. Ltd. and another*, A.I.R. (1936) Bom. p. 62 ; *Ganpatrao Madharao Potdar and others* v. *Ishwar Singh and another*, A.I.R. (1938) Nag. p. 482; and *Fateh Chand Murlidhar* v. *Juggilal Kamlapat*, A.I.R. (1955) Cal. 465, referred to.

Ba Than (3), Advocate, for the appellant.

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

U BA NYUNT, J.—In Civil Regular Suit No. 10 of 1953 of the Court of the Subdivisional Judge, Pyapon, the respondent instituted a suit for specific performance of contract of sale of a house and site against the appellant. According to him, the appellant contracted to sell the suit house and site for a price of Rs. 3,000 a sum of Rs. 1,000 was paid to the appellant on 23rd February 1948 as part of the purchase price and it was agreed that on payment of the balance price of Rs. 2,000 within the period of one year from that date, a deed of sale would be registered at the expense of the respondent. It was further agreed that the respondent was to pay a sum of Rs. 60 as rent although it was in reality interest on the balance price of Rs. 2,000 at 3 per cent per month. The respondent made monthly payments of Rs. 60 to the appellant

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K P.R.M. RAM AN CHETTYAR v. K. SUPAYA.

U BA NYUNT, J.

for the first three months and thereafter to his agent for all the months from June 1948 to November 1949, both inclusive. On 11th September 1949 a new agreement for sale was made whereby the period for payment of the balance price was extended for one year. It is alleged by the respondent that in November 1949 he gave the balance price of Rs. 2,000 to the appellant's agent K.P.R.M. Adaikappa Chettyar, who accordingly returned their copies of the agreements for sale, the time for registration of a sale deed having been postponed till the arrival of the appellant from Madras. The appellant arrived back in July 1952 and on or about 19th January 1953 he forcibly entered the suit premises for which he was prosecuted.

The appellant defended the suit on the ground (1) that the suit is not maintainable as the agreement was over one year (2) that the allegations made in the plaint are not true (3) that Adaikappa Chettyar had no authority to make a new agreement for sale and (4) that the suit is barred by limitation.

After hearing the evidence, the trial Court passed a decree in favour of the respondent answering the issues against the appellant. On appeal to the District Court of Pyapon, the judgment and the decree of the trial Court were confirmed. Hence this appeal.

It is contended in this appeal that the lower Appellate Court has erred in holding (1) that Adaikappa Chettyar had authority to extend time for payment of the balance price (2) that the appellant had ratified the extension of time granted by Adaikappa Chettyar (3) that the balance price of Rs. 2,000 was paid to Adaikappa Chettyar and (4) that section 188 of the Contract Act was applicable to the facts of the case.

In support of his contentions, the learned Advocate for the appellant has cited the case of

Bryant Powis and Bryant Ltd. v. *La Banque Du Peuple* (1) where it was held that,

"An agent who is authorised by his power to make contracts of sale and purchase, charter vessels, and employ servants, and as incidental thereto to do certain specified acts, including indorsement of bills and other acts for the purposes therein aforesaid, but not including the borrowing of money, cannot borrow on behalf of his principal or bind him by contract of loan, such acts not being necessary for the declared purposes of the power.

Where an agent accepts or indorses 'per pro' the taker of a bill or note so accepted or indorsed is bound to inquire as to the extent of the agent's authority; where an agent has such authority, his abuse of it does not affect a *bona fide* holder for value."

The next case cited on behalf of the appellant is that of *the United Provinces Government, Lucknow* v. *The Church Missionary Trust Association Ltd., London* (2) where it was held that,

"Powers of attorney must be strictly construed and in order to determine what powers a power-of-attorney purports to grant the whole of it must be read together.

A principal is not bound by the action of his agent if it is in excess of his authority."

My attention was drawn also to a passage at page 139 where it says—

"There can in truth be no ratification without any intention to ratify, and there can be no intention to ratify an illegal act without knowledge of the illegality."

The next relevant authority quoted by the learned Advocate for the appellant is the case of *Ebrahim Mahomed Patail* v. *S.R.M.M. Arunachellum Chetty* (3) where it was held that "when one is dealing with an agent, it is his duty to ascertain the extent of the

(1) (1893) A.C. p. 170. (2) I.L.R. 22 Luck. p. 93.
(3) (1902-03) 11 U.B.R. p. 5.

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U BA NYUNT, J.

agent's power. Where he knows that there is a power-of-attorney, he is liable for ignorance of its contents."

On the other hand, the learned Advocate for the respondent has contended that by his own statement in his plaint in Civil Regular Suit No. 2 of 1953 of the Additional District Court of Pyapon (Exhibit "Kha", the appellant ratified the extension of one year granted by Adaikappa Chettyar and that therefore he is bound by the new agreement for sale. He has cited the case of *Daw Cho* v. *U Ganni and others* (1) where it was held that,

> "Section 31 of Evidence Act provides that admissions are not conclusive of the matter admitted. Where a person is not a party to a deed there is no estoppel by that deed. The party making an admission may give evidence to rebut the presumption that arises against him owing to the admission; but unless and until that is satisfactorily done, the fact admitted must be taken to be established."

It is true that the appellant has specifically stated that an extension of time was granted to the respondent at his request as he could not pay the balance price within one year. That statement was made in the plaint in his suit for declaration of title of the suit premises. It is urged on behalf of the respondent that this statement is nothing short of an admission made by the appellant that he had ratified the terms of the new agreement for sale as made by his agent, Adaikappa Chettyar. It is admitted on all hands that the said Adaikappa Chettyar was neither specifically authorised to extend the time for payment of the purchase price by making a fresh agreement for sale nor specifically forbidden to do so, in the Power of Attorney granted to him. The first agreement for sale was made by the appellant on 23rd February

(1) (1951) B.L.R. 158 (S.C.).

1948 and the subsequent agreement extending time for payment of the purchase money was made by Adaikappa Chettyar on 11th September 1949, that is, after a lapse of one year and over six months. Admittedly, the appellant refused to carry out the terms of the new agreement for sale and he forcibly entered the suit premises on or about 19th January 1953 resulting in a criminal case against him. It was only on 25th February 1953 that the appellant mentioned in his plaint referred to above that extension of time was given to the respondent at his request. The question now is whether the said statement in the plaint is tantamount to ratification of the subsequent agreement or admission of the ratification as contended by the learned Advocate for the respondent. In the case of *T. R. Pratt (Bombay) Ltd.* v. *E. D. Sassoon & Co. Ltd and another* (1) it was held that,

> " In order to establish a case of ratification it appears to be essential that the party ratifying should be conscious that an act beyond the authority of the agent had been done, and further after notice of that fact the party consciously by an overt act agreed to be bound by it or by acquiescence in the situation arising thereafter allowed the business to continue. In either event it appears that consciousness of the act done by the agent without authority must be proved, and secondly, it should be proved that, after notice of such unauthorized act, the principal adopted the transaction. "

In the present case it is apparent on record that the appellant did not adopt the transaction as I have said earlier in this judgment.

In the case of *Ganpatrao Madhorao Potdar and others* v. *Ishwarsingh and another* (2) it was held as follows:

> " A manager of a joint Hindu family raised a loan by way of mortgage which was not for the benefit of the family.

(1) A.I.R. (1936) Bom. p. 52. (2) A.I.R. (1938) Nag. p. 482.

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U BA NYUNT, J.

In a subsequent agreement among the brothers this debt was admitted by them but the agreement was not communicated to the mortgagee :

Held that the agreement did not amount to ratification of the mortgage debt by the other brothers. "

In the case of *Fateh Chand Murlidhar* v. *Juggilal Kamlapat* (1) it was held that,

" While a Court of law is entitled to accept a part of the evidence of a witness and to reject another part, a pleading cannot be so dissected, but must be taken either as a whole or left alone altogether. In other words, if a written statement contains an admission of certain facts which are favourable to the plaintiff but contains a denial of other facts favourable to him or an assertion of other facts which are unfavourable, the plaintiff must, if he wants to avail himself of the admission, take not only the first set of facts as truly stated, but also the second set of facts. "

Following the principle enunciated above and reading through the plaint referred to above as a whole, it seems to me that the appellant has neither ratified the new agreement nor admitted having ratified the same.

Then, going back to the first agreement I find two conditions worthy of consideration and these are (1) that the respondent was to give the monthly rent of Rs. 60 regularly failing which the appellant had the right of legal action for recovery of the same against the respondent and (2) that even if the monthly payments of rent were made regularly the agreement for sale would be inoperative after a lapse of one year. It is therefore manifestly clear that the monthly payments of Rs. 60 have nothing to do with the contract for sale of the suit premises. Moreover the trial Court has rightly held from the very beginning that it was not open to the respondent

(1) A.I.R. (1955) Cal. 465.

to lead evidence that the monthly payment of Rs. 60 was not for rent but for interest on Rs. 2,000 at 3 per cent per month, as alleged by the respondent. Then, following the principle that the proper legal effect of a proved fact is essentially a question of law, I think it right for me to consider whether the said Adaikappa Chettyar had the authority to execute a fresh agreement varying the terms of the original agreement for sale so as to bind his principal in India. The facts of the case as appearing on record do not warrant the application of the provisions of section 188 of the Contract Act, inasmuch as making of a fresh agreement for sale of an immoveable property by an agent is not a lawful thing necessary for the purpose or usually done in the course of conducting the business of collecting the rents and outstanding debts due to the principal. That being my view of the law, I am of opinion that the said Adaikappa Chettyar had no such authority. Consequently the fresh agreement for sale of the suit premises made by him is not binding on the appellant. That being so, it does not matter whether the respondent has or has not paid a sum of Rs. 2,000 to the said Adaikappa Chettyar after the expiry of the period allowed by the original agreement for sale. I am therefore of the view that this appeal must be allowed. I accordingly set aside the judgments and the decrees of the two Courts below and dismiss the respondent's suit. I however make no order as to costs in the litigation.

APPELLATE CIVIL.

Before U Ba Nyunt, J.

H.C. 1958

June 17.

KO AUNG (APPELLANT)

v.

ABDUL LATIFF (RESPONDENT).*

Transfer of Immoveable Property (Restriction) Act, 1947—Ss. 3 and 5—Sale to a foreigner, whether void ab initio—Effect of grant of Citizenship Certificate to a foreigner after sale—Retrospective effect of Statutes—Operation of Act—Time.

The sale to a foreigner of immoveable property at a time when s. 5 of the Transfer of Immoveable Property (Restriction) Act, 1947 was in force, is void *ab initio.*

Chan Eu Ghai v. *Lim Hock Seng* (a) *Chin Huat*, (1949) B.L.R. 24 (H.C.) F.B. and *P.R.P.F. Ramaswamy Chettiar* v. *Ma Aye and another*, (1951) B.L.R. (H.C.) 320, followed.

Hakim M. A. Rahim v. *Subdivisional Judge, Syriam and two others*, (1954) B.L.R. 1 (S.C.), distinguished.

A transfer of immoveable property obtained by a foreigner who has applied for citizenship, but before the certificate is obtained, is void under ss. 3 and 5 of the Transfer of Immoveable Property (Restriction) Act, 1947.

Ko Mya Din and another v. *Ko Bin Nga*, (1952) B.L.R. 240 (H.C.), followed.

The law as enacted by s. 5 of the Transfer of Immoveable Property (Restriction) Act, 1947 is not a matter of procedure only.

Where the provision of law is a matter of procedure only and no date has been fixed to indicate up to which date the retrospective operation was to take effect, full retrospective effect can be given to the statute.

The Transfer of Immoveable Property (Restriction) (Amendment) Act, 1952 cannot have retrospective effect on the sale which was done when the Transfer of Immoveable Property (Restriction) Act, 1947 was in force.

An Act is interpreted as operating from the time it came into force and applying to circumstances which came into existence since then.

Messrs. Burma Corporation Ltd. v. *The Union of Burma*, (1953) B.L.R. (H.C.) 403, followed and *Ramani Ranjan Bose* v. *Corpn. of Cal.*, A.I.R. (1955) Cal. 410, followed.

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* Civil Misc. Appeal No. 50 of 1956 against the decree of the District Court of Insein in Civil Appeal No. 7 of 1956, dated 11th June 1956 setting aside the decree of the Subdivisional Court, Insein, in Civil Regular No. 32 of 1951, dated 23rd April 1956.

When a law is altered during the pendency of an action the law to be applied is the law as it existed when the action was begun.

Kulamani Hota v. *Parbati Debi*, A.I.R. (1955) Orissa 77, referred to.

Po Aye, *Barrister-at-Law*, for the appellant.

P. N. Ghose, Advocate, for the respondent.

U BA NYUNT, J.—In Civil Regular Suit No. 32 of 1951 of the Subdivisional Court of Insein, the respondent instituted a suit for possession of a house and for recovery of mesne profits on the ground that he had purchased the same from the original owner Mohamed Ismail, by a registered deed of sale. The main defence put up by the appellant was that the respondent was a foreigner and the said sale to him was void under the Transfer of Immoveable Property (Restriction) Act, 1947. On the pleadings, the following issues were framed by the trial Court :—

(1) Whether the plaintiff is a foreigner ?
(2) If so, whether the sale deed dated 22nd June 1949 is null and void.
(3) Whether the grant of the citizenship certificate to the plaintiff after the institution of the suit can have retrospective effect ?

On the evidence the trial Court decided (1) that the respondent was still a foreigner on the date of purchase of the property under litigation, (2) that the sale deed dated 22nd June 1949 was null and void and (3) that the grant of citizenship certificate to the plaintiff (respondent) after the institution of the suit could not have retrospective effect. The suit was accordingly dismissed with costs.

However, on appeal to the lower appellate Court the learned District Judge, while agreeing with the

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decisions of the trial Court on the first and third issues, passed an order remanding the case to the trial Court for disposal on merits after framing the necessary issues required for final disposal of the suit. In doing so, the learned District Judge has held in effect that the sale to the respondent in the present case was not void *ab initio*, following the decision in the case of *Hakim M.A. Rahim* v. *Subdivisional Judge, Syriam and two others* (1).

It is against the said order of remand in a case involving a delicate point of law that the appellant has come to this Court on appeal.

It is strenuously contended in this appeal that the sale involved in the case reported in the above decision was effected after the Transfer of Immoveable Property (Restriction) (Amendment) Act of 1952 came into force and that the said case was distinguishable from the case under appeal. The registered sale deed in that case was dated the 20th October 1952 and the Transfer of Immoveable Property (Restriction) (Amendment) Act, 1952 (Act No. XVII of 1952) was enacted on the 27th September 1952 as published in the *Burma Gazette* on the 11th October 1952. Thus the sale involved in the case cited above was done after the enactment of the said Act and the publication thereof in the official Gazette. It appears therefore that the case cited above is distinguishable from the case under consideration as contended by the learned Advocate for the appellant. But the matter does not come to an end there because the headnotes of the case quoted above read as follows:

"Under the Transfer of Property (Restriction) Act, 1947, as amended by Act XVII of 1952, a sale to a foreigner without the necessary permission renders the parties liable to

(1) (1954) B.L.R. 1 (S.C).

a prosecution with the sanction of the President ; and only upon a conviction being entered, the President may declare, if he should think fit, the transaction to be void."

The result of the headnotes seems to be that notwithstanding the date of the sale, a sale to a foreigner without the necessary permission is not void *ab initio* but avoidable only at the instance of the President. In the case under appeal, the sale was made on the 22nd June 1949 when the Transfer of Immoveable Property (Restriction) Act, 1947 was in force. Section 5 of the Act reads as follows :

" All transfers of immoveable property and of leases of immoveable property contrary to the provisions of this Act shall be void, and the Governor may, by order in writing, declare such property or any portion thereof to be forfeited to the State.

Provided that the Governor may as an alternative to forfeiture impose on all or any of the parties to such transaction penalties which in the aggregate shall not exceed the value of the property."

Apparently, a sale to a foreigner of immoveable property contrary to the provisions of the Act must be considered as void *ab initio*. I am fortified in this view by the Full Bench ruling in the case of *Chan Eu Ghai* v. *Lim Hock Seng* (a) *Chin Huat* (1) where it was held that a sale of immoveable property by the Bailiff at a Court sale on the Original Side to a foreigner comes within the mischief of section 3 of the Transfer of Immoveable Property (Restriction) Act, 1947 and that the sale was void.

Again in the case of *P.R.P.F. Ramaswamy Chettiar and others* v. *Ma Aye and another* (2) it has been held that—

" the purport of the Transfer of Immoveable Property (Restriction) Act, 1947 is to prohibit the transfer of immoveable property to a foreigner except in the circumstances

(1) (1949) B.L.R. 24 (H.C.) F.B. (2) (1951) B.L.R. 320 (H.C.).

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permitted under the Act. All transfers contrary to the Act are void *ab initio*, and the Court has no jurisdiction to sell the property to a foreigner."

In the case of *Ko Mya Din and another* v. *Ko Bin Nga* (1) it was held that,

"That mere filing of an application under Union Citizenship Election Act for Citizenship in Burma and an enquiry held are not sufficient to make a person citizen. A person attains the status of a citizen only when he obtains the Certificate of Citizenship after renouncing any other nationality or status as citizen of any foreign country.

Any transfer of immoveable property obtained by a foreigner who has applied for citizenship but has not yet obtained the certificate would be void under ss. 3 and 5 of the Transfer of Immoveable Property (Restriction) Act, 1947."

On the question of retrospective effect of an Act, a Bench of this High Court has held in the case of *Messrs. Burma Corporation Ltd.* v. *The Union of Burma* (2) that,

"It is a clear and well understood rule of construction that no retrospective operation will be attributed to a statute unless it is expressly stated to be so, or unless it clearly arises by necessary implication, and unless that effect cannot reasonably be avoided without doing some violence to the language of the statute; and no greater retrospective effect will be given to a statute more than what the language of the statute renders it to be necessary."

It was held further that—

"Where the provision of law is a matter of procedure only and no date has been fixed to indicate up to which date the retrospective operation was to take effect, full retrospective effect can be given to the statute."

The next point for consideration therefore is whether the provision of law as enacted by section 5 of the Transfer of Immoveable Property

(1) (1952) B.L.R. 240 (H.C.). (2) (1953) B.L.R. 403. (H.C.).

(Restriction) Act, 1947, was a matter of procedure only. To my mind it is not. The actual wording of the section will undoubtedly support this view. The result appears to be that the Transfer of Immoveable Property (Restriction) (Amendment) Act, 1952, cannot have retrospective effect on the transaction which was done when the Transfer of Immoveable Property (Restriction) Act of 1947 was in force. Moreover, it is the general rule that an Act is interpreted as operating from the time when it came into force and applying to circumstances which came into existence since then.

In the case of *Ramani Ranjan Bose* v. *Corporation of Calcutta* (1) it was held that—

"It is fundamental that no statute is to be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.

Where an enactment alters both the substantive rights and obligations of the parties as well as the procedure to enforce them, the intention of the legislature would seem fairly clear, namely, that the old rights and obligations are still to be determined by the old procedure and that only the new rights or obligations are to be dealt with by the new procedure."

This decision appears to me to be the solution of the problem involved in the present case.

In answer to the submission made by the learned Advocate for the respondent that the law that is existing at the time of adjudication should be applied in such a case, I would simply quote the case of *Kulamani Hota* v. *Parbati Debi* (2) where it was held that—

"When a law is altered during the pendency of an action the rights of the parties should be decided according to

(1) A.I.R. (1955) Cal. 410. (2) A.I.R. (1955) Orissa 77.

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the law as it existed when the action was begun unless the new statute either by express provision or by necessary implication, indicates a clear intention to affect pending actions also."

Thus, it appears to me clearly that the above decision, though not binding on us, can be taken by me as a guide for an answer to the contention raised by the learned Advocate for the respondent.

In the light of the authorities I have quoted and in view of the reasons given above, I am of opinion that the present appeal must be allowed. I therefore set aside the order of remand passed by the lower appellate Court and restore the judgment and decree of the trial Court. The appeal is allowed with costs.

APPELLATE CIVIL.

Before U Thaung Sein, J.

SHER BAHADUR (APPELLANT)

v.

RAM KISHAN (RESPONDENT).*

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May 6.

Order 41, Rule 31, Civil Procedure Code, whether applicable to the Shan States—S. 20, Shan States Civil Justice (Subsidiary) Order, 1906—Reasons for decisions must be given in judgments.

Held: By virtue of s. 20, Shan States Civil Justice (Subsidiary) Order, 1906, the provisions of Order 41, Rule 31 of the Civil Procedure Code are applicable to the Shan States.

Held further: Even assuming the aforesaid Order 41, Rule 31 to be inapplicable, it is a fundamental principle of Civil law that a Court deciding a dispute should state its reasons for the decision. If there was no such principle and if Judges could decide cases without giving any reasons for their decision, the chaos resulting therefrom may well be imagined and there could not possibly be any appeals for any judgments.

K. Singh, Advocate, for the appellant.

Maung Lat, Advocate, for the respondent.

U THAUNG SEIN, J.—The present appellant Sher Bahadur filed an appeal in the Court of the Resident, Taunggyi against a judgment and decree of the Assistant Resident, Taunggyi in his Civil Regular Suit No. 11 of 1955. It appears that after hearing the arguments of learned counsels for both sides the learned Resident, Taunggyi dismissed the appeal by means of an exceedingly brief "Order" which reads—

"The finding of the Lower Court was correct and I see no reason to doubt the genuiness of the cash bills and the liability of the appellant to pay. The appeal is dismissed with costs."

* Civil 2nd Appeal No. 37 of 1957, appeal against the judgment and decree of the Resident (District Judge), Taunggyi, passed on the 8th July 1957, in Civil Appeal No. 5 of 1956.

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The question is whether the "Order" may be considered as a satisfactory judgment of an appellate Court. There cannot be the slightest doubt that if the provisions of Order 41, Rule 31 of the Civil Procedure Code are applicable to the Shan States then indeed the above "Order" has not complied with the requirements of that rule and must be set aside and the case remanded to the lower appellate Court for disposal according to law. In this connection, the learned counsel for the respondent has drawn my attention to the fact that Order 41 of the Civil Procedure Code has not been extended to the Shan States and that only certain portions of that Code are applicable as set out at page 22 of the Shan States Manual. The reply to this argument is to be found in section 20 of the Shan States Civil Justice (Subsidiary) Order, 1906 reproduced at page 75 of the Manual which lays down that " in exercising the powers conferred by these rules, the Resident and Assistant Resident shall observe, as far as possible, the procedure prescribed for Courts in Upper Burma by any Act or Regulation for the time being in force." The Civil Appellate Courts in Upper Burma are bound by the provisions of Order 41, Rule 31 of the Civil Procedure Code. Even assuming for the sake of argument, that the provisions of Order 41, Rule 31 of the Civil Procedure Code are inapplicable to the Shan States, this does not necessarily mean that the Civil Appellate Courts in these States may dispose of cases filed before them without giving any reasons for their decisions. It is a fundamental principle of Civil law that a Court deciding a dispute should state its reasons for the decision. If there was no such principle and if Judges could decide cases without giving any reasons for their decision, the chaos resulting therefrom may

well be imagined and there could not possibly be any appeals for any judgments.

In the present case the learned Judge of the lower appellate Court does not appear to have applied his mind to the facts and law involved in the case. Accordingly the judgment and decree of the Court of the Resident, Taunggyi are hereby set aside and the case will be remanded to that Court for disposal in accordance with law.

CRIMINAL REVISION.

Before U San Maung, J.

H.C. 1958

May 26.

SULTAN AHMED (APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT).*

S. 24 (1), Foreign Exchange Regulation Act—Ss. 169, 170, 173 and 174 Sea Customs Act, 1878—Preventive Constables in Customs not police officers—Admissibility in evidence of Statements made to them.

Held: Preventive Constables employed by the Customs Department are not police officers within the purview of s. 162 of the Criminal Procedure Code or s. 25 of the Evidence Act.

Admissions made to them are admissible in evidence.

The Union of Burma v. *G. M. Mehta*, (1955) B.L.R. 320; *Re. Someshwar H. Shelat*, (1946) A.I R. Mad. 430, distinguished.

S. Fernandes v. *The State*, A I R. (1953) Cal. 219, dissented from.

Nga Myin v. *King-Emperor*, 11 R.n. 31, referred to.

For applicant *Nil.*

Hla Thin (Government Advocate) for the respondent.

U SAN MAUNG, J.—In Criminal Regular Trial No. 221 of 1956 of the Township Magistrate, Maungdaw, the accused Sultan Ahmed was convicted of an offence punishable under section 24 (*1*) of the Foreign Exchange Regulation Act for making an attempt to smuggle Burma currency notes to the value of K 5,990 to Pakistan and was sentenced to a fine of K 90 or in default five months' rigorous imprisonment.

The prosecution case, in brief, was that while Abdul Rahman (PW 1) and Nur Ahmed (PW 3), Preventive Constables of Maungdaw Customs, were

* Criminal Revision No. 11-B of 1958. Review of the order of Noor Ahmed, Township Magistrate of Maungdaw, dated the 18th day of October 1957 passed in Criminal Regular Trial No. 221 of 1956.

on patrol duty between Maungdaw and Htonchaung by a sampan they saw a *kisty* coming out of Mayinchaung and crossing the Naaf river towards Pakistan. The Naaf river being on the boundary between Burma and Pakistan, the two Preventive Constables gave chase and found the accused Sultan Ahmed in the *kisty* with five other persons. When searched he was found to be in possession of K 5,990 in Burmese currency notes and when questioned stated to the Preventive Constables that he was taking the money to one Ezaher in Pakistan. He was accordingly arrested and taken to the Superintendent of Customs, Maungdaw, U Hla Shwe (PW 2), who took action against him under section 24 (*1*) of the Foreign Exchange Regulation Act on instructions received from the Collector of Customs, Rangoon. The *kisty* in which the accused was travelling was actually on the Burma side of the border at the time of his arrest. For this reason, the learned Sessions Judge, Akyab, to whom the accused made an application for revision, had recommended in his Criminal Revision No. 69 of 1957 that the conviction and sentence on the accused be set aside and his defence to the effect that he was on his way to Bawli Bazaar to buy goods to the value of K 5,990 be accepted.

Now, besides the evidence to the effect that the accused was found in a boat heading towards Pakistan in the river which forms the boundary between Burma and Pakistan, there is evidence to the effect that he had admitted to the Preventive Constables of Maungdaw Customs that he was taking the money to Pakistan. The question which arises for consideration is whether this admission is admissible in evidence. Now, Preventive Constables employed by the Customs Department are not police

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officers under the Criminal Procedure Code. They are merely subordinates of the Customs Department charged with the duty of assisting the Preventive Officers of that department. Under section 169 of the Sea Customs Act, 1878, an officer of Customs duly employed in the prevention of smuggling may search any person on board of any vessel in any port in Burma. However, such a person may require the said officer to take him, previous to the search, before the nearest Magistrate or Customs-collector (*vide* section 170) and the Magistrate or Customs-collector before whom the person is brought shall, if he sees no reasonable ground for search, forthwith discharge such person. Under section 173 any person against whom a reasonable suspicion exists that he has been guilty of an offence under the Act may be arrested either on land or water by any officer of Customs or other person duly employed for the prevention of smuggling and such arrested person must be taken forthwith before the nearest Magistrate or Customs-collector (*vide* section 174).

Considering the limited powers of search and arrest given to the Preventive Officers of the Customs or other persons employed for the prevention of smuggling, such persons or employees cannot be regarded as police officers within the purview of section 162 of the Criminal Procedure Code or section 25 of the Evidence Act. In *the Union of Burma* v. *G. M. Mehta* (1) it was held that a B.S.I. officer is a police officer within the meaning of that term in section 162 of the Criminal Procedure Code, and one of the cases relied upon was that decided by the Madras High Court in *re. Someshwar H. Shelat* (2). There it was held that a special officer of the Commercial Tax Department who had been

(1) (1955) B.L.R. 320.

(2) (1946) A.I.R. Mad. 430.

empowered by the Governor under section 12 (3) of the Hoarding and Profiteering Prevention Ordinance was a police officer within the meaning and for the purpose of section 162 of the Criminal Procedure Code and section 25 of the Evidence Act, for the reason that such officers have all the powers, duties, privileges and liabilities of an officer in charge of a police station under the Code of Criminal Procedure, 1898, when investigating a cognisable offence within the limits of his station. Both these cases are, however, distinguishable from the present where an employee of the Customs Department appointed for the purpose of assisting Preventive Officers has only limited powers of search and arrest.

No doubt, a Bench of the Calcutta High Court has held in *S. Fernandes* v. *The State* (1) that a Preventive Officer of the Customs Department is a police officer in the extended sense within the meaning of section 25 of the Evidence Act and that as such no confession made to him can be proved against a person accused of an offence. The learned Judges who composed the Bench considered that these Preventive Officers have all the essential powers of a police officer in the prevention or detection of crimes even though they may not have been invested with powers of investigation. With the greatest respect, I find myself unable to agree with the view expressed by the learned Judges. In *Nga Myin* v. *King-Emperor* (2) a Full Bench of the late High Court held that a village headman is not a police officer, that section 25 of the Evidence Act does not exclude a confession made to him by an accused person, and that the mere bestowal of the same powers of arrest as are given to a police officer does not make the village headman a police officer. This

(1) A.I.R. (1953) Cal. 219. (2) 11 Ran. 31.

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decision, in my opinion, affords an ample answer to the view expressed by the learned Judges of the Calcutta High Court in the case cited above.

The statement alleged to have been made by the accused to Abdul Rahman (PW 1), Preventive Constable of Maungdaw Customs, being admissible in evidence, there is in the case now under consideration sufficient evidence which, if believed, would warrant the conviction of the accused under section 24 (*1*) of the Foreign Exchange Regulation Act. I therefore see no reason for accepting the recommendation of the learned Sessions Judge, Akyab, that the conviction and sentence on the accused be set aside. Let the proceedings be returned to him with these remarks.

APPELLATE CRIMINAL.

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

THE UNION OF BURMA (APPELLANT)

v.

TUN KYI (RESPONDENT).*

H.C. 1958

June 16.

Penal Code—Ss. 392 and 302—S. 41, Burma Army Act and s. 549, Criminal Procedure Code—Non-compliance with Statutory rules made thereunder.

Held : Statutory rules made under s. 549, Criminal Procedure Code must be construed strictly; non-compliance with the special procedure laid down therein will not only render the entire proceeding illegal, but also has the effect of having tried without jurisdiction. *In Re Captain Hugh May Stollery Mundy*, I.L.R (1946), Mad. 138, approved.

Gangooly (Government Advocate) for the appellant.

U Kyaw (1) for the respondent.

U CHAN TUN AUNG, C.J.—This is an appeal by the Government against the judgment and order of the Special Judge (Additional Sessions Judge), Bassein, acquitting the respondent, a Burma Army personnel, who was tried under sections 392 and 302 of the Penal Code. Besides the respondent, another soldier by the name Mya Khin was said to have been concerned in the robbery and murder in which 4 villagers were shot and killed. Mya Khin is still absconding.

The main ground put forth by the Government for setting aside the order of acquittal is that the respondent, who is obviously subject to the military law, has been illegally tried and acquitted by the learned Special Judge without complying with the provisions of section 549 of the Criminal Procedure

* Criminal Appeal No. 37 of 1958. Appeal from the order of U Ko Ko Gyi, Special (Additional Sessions) Judge of Bassein, dated the 30th day of November 1957 passed in Criminal Regular Trial No. 5 of 1957.

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Code and the rules made by the President in that regard. The respondent and the absconding accused are members of 29th Burma Regiment stationed at Myaungmya; and at the time of occurrence their unit was detailed for duty near Kyaukchaunggyi Village in an operation against the insurgents. The prosecution case is that on 15th March 1957 at about 7 p.m. the respondent and the absconding accused were responsible for waylaying and shooting with their fire-arms 6 villagers of Ywathit Village, namely, Maung Chet Gyi (PW 2), Maung Maung, Tun Sein, Tun Shin, Maung Aye Maung (PW 3) and Maung Sein who were on their way to Kyaukchaunggyi to hear sermons given at a *Phongyi Kyaung*. Maung Maung, Tun Sein, Tun Shin and Maung Sein were killed on the spot. The motive was said to be robbery in that, one of the witnesses, Maung Chet Gyi (PW 2) who survived, stated that the two attackers took away sundry properties belonging to them, in all, worth about K 290. Both Maung Chet Gyi (PW 2) and Maung Aye Maung (PW 3) who escaped the shooting could not, however, identify the robbers. However, the respondent who was apprehended not long after, gave a judicial confession, Exhibit "ə", before U Aye Thwin, 1st Additional Magistrate, Bassein (PW 7). There can be no doubt that since the respondent is a military personnel amenable to the Burma Army Act he is liable to be tried either by a Court-martial or by the civil Magistrate for the "civil offence" said to have been committed by him by virtue of section 41 of the Burma Army Act read with section 549 of the Criminal Procedure Code. Section 549 of the Criminal Procedure Code provides that the President may make rules consistent with the Criminal Procedure Code and the Army Act, the Naval Discipline Act

and the Air Force Act, and any similar law for the time being in force as to the cases in which persons subject to military, naval or air force law shall be tried by a Court to which the Criminal Procedure Code applies or by Court-martial; and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which the Criminal Procedure Code applies, or by a Court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver the accused, together with a statement of the offence of which he is accused, to the commanding officer of the regiment, corps, ship or detachment, to which he belongs, or to the commanding officer of the nearest military, naval or air-force station, as the case may be, for the purpose of being tried by Court-martial. Under section 41 of the Burma Army Act every person amenable to the said Act who commits a "civil offence" is also deemed to be guilty of an offence under military law, and if charged therewith he shall be, subject to certain provisions thereunder, liable to be tried for the said offence by a Court-martial. "Civil offence" is defined in section 7(18) as an offence which, if committed in the Union of Burma, would be triable by a criminal Court. The President of the Union of Burma has in exercise of the powers conferred by sub-section (1) of section 549 of the Code of Criminal Procedure framed rules applicable to cases in which persons subject to military, naval or air force law shall be tried by a civil Court or by a Court-martial [*vide* Ministry of Judicial Affairs (General Branch) Notification No. 77, dated 30th Mach 1951]. Rule 2, so far as material to the present case, reads :

"Where a person subject to military law is brought before a Magistrate and charged with an offence for which he

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is liable under the Burma Army Act to be tried by a Court-martial, such Magistrate unless he is moved by the competent military authority to proceed against the accused under the Code of Criminal Procedure shall, before so proceeding give notice to the Commanding Officer of the accused, and until the expiry of a period of twenty-one days from the date of service of such notice, shall not—

(*a*) convict the accused under section 243, acquit him under section 247 or section 248, or hear him in his defence under section 244, of the said Code or

(*b*) frame a charge against the accused under section 254 of the said Code.

(*c*) * * * * *

(*d*) * * * * * "

Rule 7 also defines "competent military authority", and in so far as the Burma Army is concerned, the "competent military authority" means the General Officer Commanding, Burma Army, and all Commanders of North and South Burma Sub-Districts, Northern and Southern Commands or, Divisions or Brigades or Areas.

We have carefully gone through the entire trial proceedings; and it should have been clear to the trial Judge from the very outset that the respondent is a military personnel amenable to the Burma Army Act in view of his clear statement given, not only in his judicial confession, but also in his statement on oath before the trial Judge; and we are not a little surprised why the learned Special Judge has not complied with the statutory provisions laid down in section 549 of the Criminal Procedure Code and the rules thereunder. We therefore adjourned the case for a week and requested the Attorney-General's Department to ascertain the reason for non-compliance. The learned Government Advocate has now stated before us that on ascertaining from

the learned trial special Judge as well as from the public prosecutor concerned he was informed that the non-compliance was entirely due to their complete unawareness of the existence of the relevant statutory provision and the rules thereunder. This is much to be regretted; and we do hope that such mistake shall not occur in the future.

The learned Government Advocate urged that the failure on the part of the Special Judge in not acting according to the statutory rules framed under section 549 of the Criminal Procedure Code is clearly illegal and that the acquittal order must be set aside. There is great cogency in his submission, and it merits our acceptance. The language of section 549 of the Criminal Procedure Code, and the rules made by the President thereunder are of very special nature, and they have the effect of taking away in certain circumstances the jurisdiction of ordinary civil Courts with respect to special classes of military personnel. The statutory provision of this kind must be construed strictly; and non-compliance with the special trial procedure laid down therein will not only render the entire proceeding illegal, but also has the effect of having tried without jurisdiction. This is clearly laid down, *In re Captain Hugh May Stollery Mundy*, (1) by a Bench of the Madras High Court (Sir Lionel Leach, C.J. and Justice Lakshmana Rao). We are in respectful agreement with this decision. The accused in the said case was a mechanic subject to the control of the Commanding Officer, Royal Naval Air Station, and he was convicted by an Honorary Presidency Magistrate and sentenced to a certain term of imprisonment for an offence under section 304-A of the Indian Penal Code, and also under the Motor Vehicles Act.

(1) I.L.R. (1946) Mad. 138.

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THE UNION OF BURMA v. TUN KYI.

U CHAN TUN AUNG, C.J.

The attention of the Magistrate who tried the case was not drawn to section 549 of the Criminal Procedure Code and the rules framed thereunder; and consequently the Magistrate did not act in accordance therewith. The entire trial was held to be illegal. In fact, the trial was sought to be quashed by a *writ* of *certiorari*; but the High Court Bench acting in revision, set aside the entire conviction and sentence, and felt it unnecessary to invoke the *writ* of *certiorari*. As we have already observed above, the learned trial special Judge could not assign any reason whatsoever why the provisions of section 549 of the Criminal Procedure Code and the rules framed thereunder were not complied with, except to say that he was unaware of these provisions. Such being the position, we must uphold the contention put forth on behalf of the appellant. The acquital order passed by the learned Special Judge is hereby set aside and we direct that he shall proceed to deal with the respondent's case according to law.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

Before U Ba Nyunt, J.

ABDUL RAZAK (APPELLANT)

v.

MAUNG AUNG THEIN (RESPONDENT).*

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July 22.

Civil Procedure Code, s. 144—Application for restitution of premises—When can be granted.

The provisions of s. 144 of the Code of Civil Procedure are applicable to a case where the character of the subject-matter of restoration has been altered.

Permeshar Singh and others v. *Sitladin Dube and another*, A.I.R., (1934) All. 626 (F.B.), referred to.

Aung Min (2) for the appellant.

Respondent in person.

U BA NYUNT, J.—In Civil Regular Suit No. 1390 of 1954 of the Rangoon City Civil Court, the appellant obtained an *ex parte* decree for ejectment against the respondent. In execution of that decree the respondent was ejected from the suit premises. Later, on the application of the respondent, the *ex parte* decree was set aside whereupon the respondent applied for restitution of the suit premises to him under section 144 of the Code of Civil Procedure.

The respondent's application for restitution was objected to by the appellant on the ground that the character of the premises had been altered owing to the pressing need for accommodation of the increased

* Civil Misc. Appeal No. 3 of 1958, against the order of the Registrar, City Civil Court of Rangoon, in Civil Execution No. 1301 of 1957, dated 3rd January 1958.

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U BA NYUNT, J.

number of orphans and that the premises was under the use and occupation of the orphan students. The Court, however, after inspecting the school building and hearing the arguments, passed an order granting restitution to the respondent on 5th July 1955.

On the 9th July 1955 the appellant preferred an appeal against the said order, in Civil First Appeal No. 45 of 1955, which was admitted. While it was pending, the appellant demolished the whole of the first floor of the school building as a result of his receiving a notice from the Corporation of Rangoon under section 153 of the Rangoon Municipal Act. Then the appellant withdrew his appeal in the High Court because the subject-matter of the dispute was no more in existence. The respondent filed an application before the original Court to execute the order of restoration of the suit premises. The appellant filed an objection on the ground that the subject-matter of the execution was no more in existence. The Court, however, passed an order directing the restoration of the premises to the respondent within 15 days from the date of the order. Hence this appeal.

In this appeal, the same point was canvassed by the learned Advocate for the appellant. No authority, however, is cited for the proposition that the provisions of section 144 of the Code of Civil Procedure are not applicable to a case where the character of the subject-matter of the restoration has been altered as in this case. I have carefully gone through the order of restoration passed by the learned trial Judge on the 5th July 1955 together with his notes on inspection of the suit premises. I am satisfied that he has applied his mind to the advisability or otherwise of the passing of the order of restoration and I do not see any reason why

I should interfere with his order. Besides, the notice of the Rangoon Corporation under section 153 of the Rangoon Municipal Act served on the respondent was the one for showing cause why the work of re-erection of the suit premises without the permission of the Rangoon Corporation should not be demolished. Apparently that was the notice issued after the respondent had demolished the whole of the first floor of the premises and had re-erected the same without the permission of the Rangoon Corporation. It therefore appears to me that the appellant has taken the law in his own hands in demolishing the whole of the first floor of the premises which has been under litigation with a view to serving his own purpose.

In the case of *Permeshar Singh and others* v. *Sitladin Dube and another* (1) it was observed at page 631 as follows:

> "Under the present section 144 the Court is not only bound to cause restitution to be made as will, so far as may be, place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed and for this purpose the Court may make any orders including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits which are properly consequential on such variation or reversal. The powers are therefore very wide and they include compensation by way of damages as well as payment of interest and mesne profits the payment of which would not be directed by the appellate decree. The Court is empowered to place the parties in the position which they would have occupied, but for the wrong decree passed, which has been subsequently reversed."

In the light of the above observations and in view also of the fact that the whole of the first floor of the premises including the subject-matter of the

(1) A.I.R. (1934) All. 626 (F.B.).

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pending litigation was demolished without any order of the Corporation of Rangoon, I see no reason to interfere with the order of restoration passed by the learned trial Judge. The appeal therefore stands dismissed. I, however, make no order as to costs in favour of the respondent who appears in person.

APPELLATE CIVIL.

U Aung Khine and U Ba Thoung, JJ.

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Aug. 19.

DAW KIN LIN (APPELLANT)

v.

TAN KOT HTAING AND FOUR OTHERS (RESPONDENTS).*

Civil Procedure Code, O. 23, R. 1 (2)—Withdrawal of suit with liberty to file fresh suit—Costs ordered—No time specified for payment—Payment not condition precedent to filing of fresh suit.

Where under Order 23, Rule 1 (2) of the Civil Procedure Code a suit was withdrawn with permission to institute a fresh suit and no time was specified for payment of costs.

Held: That the payment of costs was not a condition precedent to the institution of a fresh suit and that the failure to pay costs on or before the institution of the fresh suit is no bar to the maintainability of the suit.

Ma San Myint v. *U Tun Sein*, (1939) R.L R. 749, followed.

Shidramappa Mutappa Biradar v. *Mallappa Ramchadrappa Biradar*, (1930) I.L.R. 55 Bom. 206; *Bhai Chanan Singh* v. *Committee of Management for Gurdwara Mai Malan*, A.I.R., (1941) Lah. 192, referred to.

L. Hone Kyan for Messrs. Foucar and Soorma, and S. L. Verma for the appellant.

N. R. Majumdar for K. R. Venkatram for the respondents.

U BA THOUNG, J.—The plaintiff-appellant sued the defendants-respondents for the recovery of K 41,653·44 due on three promissory notes in Civil Regular Suit No. 7-B of 1953 in the Court of the Additional District Judge, Bhamo. The case was fixed for argument on 23rd June 1954 on the preliminary issue, as to whether the Additional District Judge of the said Court has pecuniary jurisdiction to entertain the suit. On the 12th June

* Civil 1st Appeal No. 43 of 1955 against the order of the District Court of Bhamo in Civil Regular Suit No. 5-B of 1954, dated the 26th February 1955.

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U BA THOUNG, J.

1954 the plaintiff-appellant filed two applications. One for the return of the plaint and the other for the withdrawal of the suit with leave to file a fresh suit. On the 15th June 1954 the application for return of the plaint was rejected, but the application for the withdrawal of the suit was allowed with costs with leave to file a fresh suit. The fresh suit, *viz.*, C.R. Suit No. 5-B of 1954 out of which this appeal has arisen was filed on the 14th June 1954, *i.e.*, one day before the previous suit C.R. Suit No. 7-B of 1953 was allowed to be withdrawn. The suit was filed without affixing the required Court-fee stamps, but the plaintiff-appellant had stated, in her application filed with the plaint the reasons why she had to file this suit, and why the necessary Court-fee stamps had not been affixed to the plaint. The plaint was filed in the District Court of Myitkyina, and the District Judge of Myitkyina who is also the District Judge of Bhamo accepted the plaint and gave time to the plaintiff-appellant for payment of the necessary Court-fees, and they were paid on the 22nd June 1954.

Now, in this suit the defendants-respondents took the following objections, *viz.* :

(1) That the plaint was not filed before the proper Court having territorial jurisdiction and so it should have been rejected.

(2) That the plaint was filed before withdrawal of the previous suit was allowed, and as such the present suit could not have been entertained.

(3) As no Court fees were paid when the plaint was presented, it should have been rejected.

(4) That the Court should not have granted time for payment of the Court-fees.

(5) That the suit had not been valued correctly for the purpose of Court-fees, and so it should have been rejected.

(6) That the costs allowed for the withdrawal of the previous suit had not been paid when the present plaint was filed, and as such it should not have been entertained.

The objections Nos. 1 to 5 were overruled in favour of the plaintiff-appellant by the learned District Judge; and although the defendants-respondents 1, 3 and 5 filed cross objections against this, their learned Counsel did not argue on the cross objections. As regards objection No. 6, the learned District Judge has held that the costs allowed for the withdrawal of the previous suit was a condition precedent to the institution of a fresh suit, and as the costs were not paid either before the institution of the fresh suit or on the day of the institution of the fresh suit or on the day the order was passed in this case, the present suit was void, and accordingly he dismissed the suit with costs. Hence this appeal. The learned Counsel for both the parties argued only on the question as to whether the costs awarded in Civil Regular Suit No. 7-B of 1953 was a condition precedent to the institution of the fresh suit.

In allowing the withdrawal of Civil Regular Suit No. 7-B of 1953 with leave to file a fresh suit, the learned District Judge passed the following order dated 15th June 1954:

" . . . . . Permission to withdraw with leave to file fresh suit is allowed with costs."

It will be seen from the above order, that there was no specified date for payment of the costs, nor does it say that the plaintiff shall pay the costs before

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the institution of a fresh suit. It is, however, clear that the plaintiff was to pay the costs. Now, in the case of *Shidramappa Mutappa Biradar* v. *Mallappa Ramchadrappa Biradar* (1) Patker, J., said :

"The conditions attached to the permission to bring a fresh suit after the withdrawal of the first suit may fall under different categories according to decided cases, (1) that the plaintiff shall pay the costs before a certain date specified in the order, (2) that the plaintiff shall pay the costs before the institution of the second suit, and (3) that the plaintiff shall pay the costs without specifying the time of the payment."

In that case the payment of costs falls under the second category and it was held to be a condition precedent.

The above observation was followed with approval in the case of *Ma San Myint* v. *U Tun Sein* (2) where Ba U, J., observed that if the plaintiff wants to withdraw the suit and at the same time wants to file a fresh suit on the same cause of action, he must resort to Rule 2 of Order 23, Civil Procedure Code; that under the said rule, he must ask for permission to withdraw with liberty to file a fresh suit, and the Court may grant the permission asked for on "such terms as it thinks fit"; that the terms may be of any kind and they might be, as pointed out by Patker, J., in the case of *Shidramappa Mutappa Biradar* v. *Mallappa Ramchadrappa Biradar*—(1) that the plaintiff shall pay the costs before a certain date specified in the order, or (2) that the plaintiff shall pay the costs before the institution of the second suit, or (3) that the plaintiff shall pay the costs without specifying the time of the payment. In the same case Ba U, J., observed that "where leave to bring a fresh suit on the same cause of action is granted on payment of costs on or before a specified

(1) (1930) I.L.R. 55 Bom. 206. (2) (1939) R.L.R. 749.

date or before the institution of a fresh suit, payment must be made before the specified date or before the institution of a fresh suit. If no payment is made, the second suit is void *ab initio*. The payment of costs is a condition precedent to the institution of a fresh suit. Where no time is fixed for payment of costs, then different considerations may arise." We respectfully agree with the above observation, and we are of the view that the payment of costs would be a condition precedent to the institution of a fresh suit, if it is specified in the order granting permission, under Order 23, Rule 1 (2) for withdrawal of suit with liberty to file a fresh suit, to pay the costs of the first suit to the defendant either on or before a specified date or before the institution of a fresh suit; but if no time is fixed for payment of costs, then in such a case we cannot consider that the payment of costs is a condition precedent to the institution of a fresh suit, for in such cases it may have to be considered differently.

In *Ma San Myint* v. *U Tun Sein* (2) the order was clear in the following terms:

> "I dismiss the suit with costs, as being withdrawn, and give the plaintiff liberty to institute a fresh suit if she is so advised. I fix the advocate's fee at seven gold mohurs; and I also make it a condition for the institution of a fresh suit that all the costs of the present suit must be paid to the defendant before the plaintiff is allowed to file a fresh suit."

The order definitely stated that the costs of the defendant should be paid before the institution of the second suit, and therefore it clearly came under the second category, and as no costs were paid before the institution of the second suit, it was held to be void.

In the present case, however, the payment of costs falls under the third category where no time

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was specified for payment, and we must hold that the payment of costs in the present case was not a condition precedent to the institution of a fresh suit, and that the failure of the plaintiff to pay costs on or before the institution of the present suit is no bar to the maintainability of the present suit. We are fortified in our view by a bench decision of the Lahore High Court in the case of *Bhai Chanan Singh* v. *Committee of Management for Gurdwara Mai Malan* (1) where it was held that:

> "Where permission to institute fresh suit is granted without fixing a definite date for the payment of the costs, or without stating that the institution of the suit was conditional upon the payment of costs, the failure of the plaintiff to pay costs is no bar to the maintainability of the second suit."

In fact, in the present case, there was no failure on the part of the plaintiff-appellant to pay costs awarded in Civil Regular Suit No. 7-B of 1953. There was, however, a delay in the payment, as it was not paid till 27th April 1955 (*see* Civil Execution No. 1-B of 1955 diary) order, dated 23rd June 1955. But the delay was not due to the fault of the plaintiff-appellant. It was entirely due to the officer of the Court who drew up the decree, for the decree drawn up was not correct. (*See* diary order dated 25th April 1955 in Civil Regular Suit No. 7-B of 1953.) A fresh decree was drawn up only on 27th April 1955 (*see* fresh decree drawn up in Civil Regular Suit No. 7-B of 1953). It appears that it took nearly a year for the District Court to draw up the correct decree in this case. The plaintiff-appellant paid the costs promptly on the day the decree was drawn up correctly, *i.e.*, on 27th April 1955. The plaintiff-appellant cannot be made to suffer for the

(1) A.I.R., (1941) Lah. 192.

delay in the payment of costs which was entirely due to the fault of the Court.

In the result the appeal is allowed with costs and the cross objection of the respondents is dismissed without costs, and the plaintiff-appellant's suit, Civil Regular Suit No. 5-B of 1954 of the District Court of Bhamo is to be restored for determination on merits.

U AUNG KHINE, J.—I agree.

APPELLATE CIVIL.

Before U San Maung and U Thoung Sein, JJ.

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July 8.

DAW NYEIN MYA AND ONE (APPELLANTS)

v.

U BA OHN AND ONE (RESPONDENTS).*

Sale of property belonging jointly to Burmese husband and wife by wife alone with the knowledge and consent of husband—Whether binding on husband also—Transfer of Property Act—S. 106—Month of tenancy.

Where a house belonging jointly to a Burmese husband and wife was sold by the wife alone by means of a registered deed of sale with the knowledge and consent of the husband the sale of the house is binding on the husband.

U Rai Kyaw Thoo & Co., Ltd. v. *Ma Hla U Pru*, (1940) B.L.R. 180, followed.

Where the tenancy did not begin with the first day of the month, it would not end with the end of the month. Consequently, the notice by which the tenancy was purported to be terminated with effect from the end of the month, *viz.*, 31st October 1956 is invalid in law.

S. L. Verma for the appellants.

Hla Nyunt for the respondents.

U SAN MAUNG, J.—In Civil Regular Suit No. 1 of 1957 of the Additional District Court of Pakôkku the plaintiffs U Ba Ohn and Ma Tin Sein who are the respondents in the present appeal, sued the defendant-appellants Daw Nyein Mya and her husband U Toe Maung for their ejectment from the premises in suit, which was a house and its site in Pakôkku Town. The plaintiffs' case was that they were the owners of the house by virtue of its purchase from the defendant Daw Nyein Mya with the consent of her husband U Toe Maung and that since the date of their purchase the defendants had been in occupation of the suit house as their tenants.

* Civil 1st Appeal No. 7 of 1957 (Mandalay) against the decree of the Additional District Court of Pakôkku in Civil Regular Suit No. 1 of 1957, dated the 22nd June 1957.

Contemporaneously with the registered deed of sale there was a deed of agreement whereby the plaintiffs agreed to re-sell the house to the defendant Daw Nyein Mya for the sum of K 3,000 which was the original purchase price, within three years from the date of the sale and that as that period had since elapsed without the defendants having exercised the option of re-purchase they were absolute owners of the suit house. The defendants by their written statement pleaded *inter alia* that although the house was the joint property of Daw Nyein Mya and U Toe Maung, the site on which the house was built belonged solely to U Toe Maung and that since the sale was effected by Daw Nyein Mya alone U Toe Maung's rights and interest in the property remain unimpaired. It was also contended that defendant Daw Nyein Mya had on three occasions tried to re-purchase the house from the plaintiffs but to no avail. It was also contended that the notice terminating the lease was invalid in law.

The learned trial Judge after examining witnesses cited by both parties, including the defendant U Toe Maung who figured as a witness for the plaintiffs, came to the conclusion that the sale of the house and its site by Daw Nyein Mya to the plaintiffs was with the knowledge and consent of the defendant U Toe Maung. He also came to the conclusion that since the date of the sale the defendants were in occupation of the suit house as tenants of the plaintiffs and that the notice terminating the lease complied with the provisions of section 106 of the Transfer of Property Act. He accordingly decreed the plaintiffs' suit with costs.

In this appeal it is contended on behalf of the defendant that the suit was, in essence, one for possession of the house based on title and that

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U SAN MAUNG, J.

therefore the Court-fee paid on the plaint was insufficient. Furthermore, the Additional District Court had no jurisdiction to try the suit as the property had been valued at K 7,000.

Regarding this contention, it is clear that the suit was, in essence, one for ejectment of a tenant. The issue regarding the ownership of the house by purchase from the defendant Daw Nyein Mya, had to be raised merely for the purpose of establishing the fact that since the date of the sale the defendants were in occupation of the suit house as tenants of the plaintiffs. Therefore the Court-fee stamps had been correctly paid and the Additional District Judge had jurisdiction to try the suit.

As regards the alleged sale of the house by Daw Nyein Mya to the plaintiffs, the learned Advocate for the defendant-appellants has frankly conceded that he cannot now contend that the plaintiffs had not acquired any title thereto. It is clear from the evidence adduced by the plaintiffs that the registered sale deed was executed with the knowledge and consent of the defendant U Toe Maung by his wife Daw Nyein Mya with whom he had been living. U Toe Maung in giving evidence for the plaintiffs himself admitted that he knew of the sale and that he had attested the sale deed. Although he tried to minimize the effect of this admission by later stating in his cross-examination that his wife did not consult him before selling the house, it is clear that the sale could not have been effected without his knowledge and consent. Consequently, as held in the case of *U Rai Kyaw Thoo & Co., Ltd.* v. *Ma Hla U Pru* (1), the sale of the suit house is binding upon the defendant-appellant U Toe Maung.

(1) (1940) R.L.R. 180.

As regards the alleged lease of the house to the defendant-appellants by the plaintiff-respondents, besides the plaintiffs' own evidence, U Toe Maung admitted that he and his wife were the tenants of the plaintiffs. Therefore the plaintiffs would have a right to bring a suit for ejectment of the defendants, if the requirements of section 106 of the Transfer of Property Act and of section 11 (*1*) (*a*) of the Urban Rent Control Act are fulfilled.

However, in the suit under consideration it is clear that the notice given by the plaintiffs to the defendants did not conform with the requirements of section 106 of the Transfer of Property Act. The sale of the house took place on the 3rd February 1953 and it is the plaintiffs' own case that the tenancy began from that date *vide* paragraph 5 of the plaint. In the notice, Exhibit "∞", dated the 16th October 1956, which was given to the defendants, it is stated that the lease would be terminated with effect from the 31st of October 1956. Now, under section 106 of the Transfer of Property Act the 15 days' notice must expire with the end of the month of the tenancy. In the present case since the tenancy did not begin with the first day of the month it would not end with the end of the month. Consequently, the notice by which the tenancy was purported to be terminated with effect from the 31st of October 1956 is invalid in law.

For these reasons, we would set aside the judgment and decree of the trial Court for the ejectment of the defendant-appellants and direct that the suit be dismissed with costs. Advocate fees in this Court three gold mohurs.

THOUNG SEIN, J.—I agree.

CIVIL REVISION.

Before U San Maung, J.

H.C. 1958

Aug. 18.

DAW SINT (APPLICANT)

v.

MAUNG MYA SHEIN AND ONE (RESPONDENTS).*

Civil Procedure Code—O. 21, R. 97—Order made under—Not appealable—Interlocutory order—Practice of High Court in revision—O. 21, R. 98—Order under s. 47—Inapplicable—Not a decree—S. 2 (2)—No appeal from R. 103.

Where as the result of resistance offered to the execution of a decree by respondents, who were not judgment-debtors nor representatives of the judgment-debtor, the Township Court, which executed the decree, on application by the decree-holder under Order 21, Rule 97 of the Civil Procedure Code, ordered an inquiry against the respondents and the District Court set aside the order on appeal.

Held that—

(1) as no appeal lay from an order of the Township Court made under Order 21, Rule 97 of the Civil Procedure Code, the order of the District Court in the appeal from that order was made without jurisdiction;

(2) the order of the Township Court made under Order 21, Rule 97 being merely an interlocutory order, it is not the practice of the High Court to interfere in revision with the order of a lower Court at an interlocutory stage;

(3) s. 47 of the Civil Procedure Code is inapplicable to the determination of questions arising between persons who are neither judgment-debtors nor representatives of the judgment-debtor and the decree-holder;

(4) such a determination cannot be a decree as defined in s. 2 (2) of the Civil Procedure Code;

(5) there is no appeal from an order made under Order 21, Rule 98 as Rule 103 provides that any party not being a judgment-debtor against whom an order is made under Rule 98 may institute a suit to establish the right which he claims to the present possession of the property; but, that subject to the result of the suit, the order shall be conclusive.

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* Civil Revision No. 39 of 1958 (Converted from Civil 2nd Appeal No. 13 of 1957) against the decree of the District Court of Magwe in Civil Appeal No. 18 of 1956.

S. T. Leong for the applicant.

W. Kyin Htone for the respondents.

U SAN MAUNG, J.—In Civil Execution Case No. 4 of 1956 of the Township Court of Taungdwingyi, Daw Sint who is the appellant in the present appeal filed an application against Maung Chit Tin and Ma Sein Yin for execution of a decree for possession passed in her favour in Civil Regular Suit No. 33 of 1947. Notice was issued to the judgment-debtors returnable on the 28th of February 1956 to show cause why execution should not be ordered against them. On the date fixed, Maung Chit Tin came before the Court to say that he had already vacated the land but that the land was still in possession of some other peoples with whom he had no concern. The decree-holder Daw Sint then asked for a delivery warrant to be issued and the same was returned on the 15th of March 1956 with an endorsement to the effect that Maung Mya Shein and Ma Mya Than, the present respondents, were in possession of the land and that they had refused to vacate. Accordingly the decree-holder Daw Sint filed an application purporting to be under Order XXI, Rule 97 of the Civil Procedure Code complaining of the obstruction to the execution of the delivery warrant and for necessary action under Rule 98 thereof. On a notice being issued to the respondents, they filed a written objection saying that they were not liable to be ejected in pursuance of the delivery warrant issued to Maung Chit Tin and Ma Sein Yin and that these judgment-debtors had in fact acted in collusion with the decree-holder Daw Sint. Daw Sint, in reply, said that whatever collusion there was was in fact between

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U SAN MAUNG, J.

Maung Chit Tin and the present respondents, Maung Mya Shein and Ma Mya Than. One of the objections subsequently raised by the present respondents against the application of Daw Sint under Order XXI, Rule 97 was that Daw Sint's original application against Maung Chit Tin and his wife Ma Sein Yin, dated the 23rd February 1956 was barred by limitation and that consequently Daw Sint's subsequent application under Order XXI, Rule 97 against the respondents was not maintainable in law. This plea of limitation was, however, rejected by the learned Township Judge by his order dated the 21st August 1956 and in doing so the learned Judge relied upon the decision of a Full Bench of this Court in Civil Reference No. 3 of 1955 where it was held that: "On a plain reading of the provisions of section 2 of Act XIX of 1950, all civil courts within any area in respect of which a proclamation under that section had been issued must be deemed to be closed within the meaning of section 4 of the Limitation Act until such time as the President of the Union of the Burma had fixed a date with effect from which the courts must be deemed to be reopened." The learned trial Judge accordingly directed that an enquiry against the respondents Maung Mya Shein and Ma Mya Than under Order XXI, Rules 97 and 98 should proceed. Being dissatisfied with this order the respondents appealed to the District Court of Magwe and the learned District Judge by his order dated the 9th of January 1957 in his Civil Appeal No. 18 of 1956 set aside the order of the trial Judge directing the enquiry to proceed on the ground that the appellant Daw Sint's application was barred by limitation. In coming to this conclusion, the learned District Judge distinguished the present case from that relied upon

by the trial Judge and held that even if the courts in Magwe district must be deemed to be closed for the purpose of section 4 of the Limitation Act, the application of Daw Sint for execution dated the 23rd February 1956 having been filed more than three years after the date on which her previous application for execution was closed must be considered as beyond time. As against this order of the learned District Judge, Daw Sint appealed.

However, by a subsequent application Daw Sint had asked this Court to convert her memorandum of appeal into an application for revision on the ground that there was in fact no appeal to the District Judge from the order of the Township Judge dated the 21st August 1956 and that therefore the District Judge's judgment dated the 9th of January 1957 in his Civil Appeal No. 18 of 1956 should be set aside by this Court in revision as having been made without jurisdiction. In my opinion, this contention must be allowed to prevail.

Maung Mya Shein and Ma Mya Than, the appellants in Civil Appeal No. 18 of 1956 of the District Court of Magwe and the respondents in the present case, were not judgment-debtors in Civil Regular Suit No. 33 of 1947; nor were they representatives of the judgment-debtor. Accordingly section 47 of the Civil Procedure Code is inapplicable to the determination of questions arising between them and Daw Sint and such a determination cannot be a decree as defined in section 2 (2) of the Civil Procedure Code.

The application of Daw Sint against Maung Mya Shein and Ma Mya Than was under Order XXI, Rule 97 of the Civil Procedure Code and if Daw Sint is successful she will obtain an order under Rule 98. To such an order there is no

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U SAN MAUNG, J.

appeal as Rule 103 provides that any party not being a judgment-debtor against whom an order is made under Rule 98 may institute a suit to establish the right which he claims to the present possession of the property but that subject to the result of the suit the order shall be conclusive.

Of course, if the present respondents Maung Mya Shein and Ma Mya Than can bring their application under section 115 of the Civil Procedure Code, the question whether or not the learned Township Judge had acted without jurisdiction or with material irregularity in the exercise of his jurisdiction may call for decision by this Court at the proper time and place. As matters now stand, the order of the learned Township Judge dated the 21st August 1956 is merely an interlocutory order in the sense that it only paves the way for an enquiry being proceeded with against the respondents Maung Mya Shein and Ma Mya Than. It is not the practice of the High Court to interfere in revision with the order of a lower Court at an interlocutory stage.

For these reasons I would allow the memorandum of appeal to be converted into an application for revision and I would set aside the order of the learned District Judge, Magwe, dated the 9th January 1957 and direct the learned Township Judge to proceed with the enquiry against the respondents Maung Mya Shein and Ma Mya Than in accordance with law. There will be no order as to costs regarding the application for revision.

APPELLATE CIVIL.

Before U Choon Foung, J.

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July 11.

HAJEE MOHAMED AKBAR (represented by his legal representatives Daw Shafiyabi and two others) (APPELLANT)

v.

U MYA (RESPONDENT).*

Urban Rent Control Act—S. 11 (1) (d) and (e)—Buildings—outside the scope of s. 11 (1) (d)—Meaning of expression "will give effect to such purpose" in s. 11 (1) (e)—Bond—Execution of—When invalid.

Held: There is nothing in law or in the Urban Rent Control Act to prevent a landlord from putting up an entirely new building on his land or to substantially reconstruct his old building.

The real object of Notification No. 35, dated the 16th February, 1951, is to encourage the construction of new buildings on vacant house-sites and the re-erection substantially of existing old buildings.

Clause (*d*) of s. 11 (*1*) of the Urban Rent Control Act is applicable to premises which are lands and not to premises which are buildings. Under clause (*e*) of s. 11 (*1*) of the Urban Rent Control Act, the landlord is entitled to ejectment of the tenant from his building if he reasonably and *bonâ fide* requires it either for the purpose of re-erection or for the purpose of essential major and structural repairs on his executing a bond (1) that the said premises will be used for such repairs or erection, (2) that he will give effect to such purpose within such period not exceeding nine months from the date of vacation of the premises by the tenant and (3) that he will, if so desired by the tenant, re-instate the tenant displaced from the premises on completion of such repairs or erection.

The expression "will give effect to such purpose" is used to mean "will start the work of re-erection or essential major and structural repairs" within the time specified in the bond and should not be stretched to mean and include "the completion of the re-erection or the repairs."

Where a bond taken under clause (*e*) of s. 11 (*1*) Urban Rent Control Act, contains a condition to complete the erection or repairs within the time specified therein, instead of simply requiring the landlord to give effect to the purpose of repairs or re-erection within the said period, it must be deemed to be invalid as being *ultra vires* clause (*e*) of s. 11 (*1*) of the Urban Rent Control Act.

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* Civil 2nd Appeal No. 35 of 1957, against the decree of the District Court of Pyinmana (U MAUNG SOE) in Civil Misc. Appeal No. 3 of 1957, dated the 1st April 1957, arising out of the decree of the Subdivisional Judge, Pyinmana, in Civil Execution No. 18 of 1953, dated the 15th January 1957.

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A Bond executed under clause (*c*) of s. 11 (*1*), Urban Rent Control Act, could be forfeited only in the event of the landlord using the re-erected or repaired building for letting purposes after its completion, and not re-instating his displaced tenant who desires to be re-instated.

L. Hone Kyan for the appellant.

Maung Gyi for the respondent.

U CHOON FOUNG, J.—The appellant is the owner of the suit premises—which was a single-storeyed barrack building situated at the corner of Shaw Road and Porter Road in Pyinmana—and the respondent was a tenant occupying two rooms of the said building. In Civil Regular Suit No. 4 of 1951 of the Subdivisional Court of Pyinmana, the appellant obtained a decree against the respondent for ejectment from the suit premises. In Civil Execution No. 18 of 1953 of the Subdivisional Court of Pyinmana, the respondent-defendant prayed that the decree for ejectment be rescinded on the ground that he had discharged the decree for arrears of rent by payments in monthly instalments, but the learned Judge refused to rescind the decree for ejectment. Under orders of the District Court of Pyinmana in its Civil Miscellaneous Appeal No. 38 of 1953, the Subdivisional Judge held an enquiry in the said civil execution case and found that the respondent-defendant had discharged the decree for arrears of rent, but that the appellant-plaintiff required the suit premises for the purpose of re-erection. The learned Subdivisional Judge therefore ordered that the appellant-plaintiff should execute a bond with one surety in the sum of K 2,000, that he should erect or carry on major and structural repairs within nine months from the date of vacation of the said premises by the respondent-defendant and that the

appellant-plaintiff should give the respondent-defendant the first option of reoccupation of two rooms in the re-erected premises, if the building be used for the purpose of letting out to tenants. Accordingly, the appellant-plaintiff executed the bond (Exhibit ဃ) on 25th October 1954. Thereafter, the respondent-defendant filed an application praying that the appellant-plaintiff be directed to give possession of two rooms in the re-erected building in accordance with the terms contained in the said bond (Exhibit ဃ). After holding an enquiry, the learned Subdivisional Judge of Pyinmana held that the re-erection of the said building was not yet complete and directed the appellant-plaintiff to complete the re-erection within three months from the date of his order dated the 15th January 1957 and to let two rooms thereof to the respondent-defendant in the event of the said new building being used for letting purposes. He further directed that, on the appellant-plaintiff's failure to comply with his order, the said bond be forfeited to the Government. The appellant-plaintiff then filed an appeal against the said order, but the District Court of Pyinmana in its Civil Miscellaneous Appeal No. 3 of 1957 dismissed it on 1st April 1957. This appeal is against the said judgment and decree of the District Court of Pyinmana.

The learned Advocate for the appellant contended (1) that, in view of the notification No. 35, dated the 16th February 1951 which exempts all newly constructed buildings and substantially re-constructed buildings from the operation of the Urban Rent Control Act, 1948, the lower appellate Court erred in upholding the decision of the trial Court that the bond Exhibit "ဃ" was validly executed and was binding on the appellant, (2) that

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the lower appellate Court erred in law in not holding that the said exhibit bond had been rendered invalid by virtue of the said notification, in spite of there being ample evidence on record that the original building was worth about K 600 only while the re-constructed building had cost the appellant between K 35,000 and K 40,000, (3) that the lower appellate Court erred in holding that the appellant committed an act of fraud by incurring heavy expenditure in the re-erection of the building in question with a view to claiming protection under notification No. 35, dated the 16th February 1951, (4) that the lower appellate Court erred in not holding that the trial Court was wrong in ordering the execution of the exhibit bond under section 11 (*1*) (*d*) of the Urban Rent Control Act, 1948 and (5) that even if the exhibit bond could be considered valid in law, it was premature to order the forfeiture of the bond inasmuch as the re-construction of the building in question had not been completed.

It is common ground that the old building (*i.e.*, the suit premises) was a single-storeyed building in dilapidated condition and that the new building is a two-storeyed building re-erected in its place. The learned Advocate for the respondent did not challenge the fact that the old building was worth about K 600 and that the re-erected building is worth about K 35,000 to K 40,000 but contended that although the cost of re-erection of the new building had exceeded the value of the old building by more than 40 per cent the notification No. 35, dated the 16th February 1951 would not apply to this case; for, as he put it, the re-erected building is not "a newly constructed building". I cannot accept this contention in view of the fact that the said notification (*i.e.*, Ministry of Finance and

Revenue Notification No. 35, dated the 16th February 1951) also covers "substantially re-constructed building", which has been defined in the explanation annexed thereto as follows, namely, "a building the value of re-construction of which is not less than forty per cent of the prevailing market value of the whole building".

The learned Advocate for the appellant contended that the re-erected building was almost a newly constructed building or at least a "substantially re-constructed building" in view of the evidence on record to show that the old building was a single-storeyed building worth about K 600 while the re-erected building was worth between K 35,000 and K 40,000. I agree with his contention on principle, but in the peculiar circumstances of this case I do not think that it would be fair and equitable to apply that notification to the building in question; for, in the first place the appellant did not raise this point at the enquiry held in Civil Execution No. 18 of 1953 of the Subdivisional Court of Pyinmana nor even mentioned then that he was going to re-erect the suit premises at a cost more than 40 per cent of its prevailing market value and, in the second place, the subject-matter of this appeal is the bond (Exhibit "ဃ") which he (the appellant) had executed then to enable him to recover possession of the suit premises, and consequently the question as to whether the said bond should have or should not have been executed does not arise now.

The 1st and 2nd contentions of the learned Advocate for the appellant are therefore of no avail in the peculiar circumstances of this case. If the appellant had told the learned Judge of the Subdivisional Court, Pyinmana, in the course of the enquiry that he was going to substantially re-construct the

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suit premises at a cost not less than 40 per cent of its prevailing market value, he would be justified in pleading that by virtue of Notification No. 35, dated the 16th February 1951, the Urban Rent Control Act would not apply to his re-erected building and that therefore he was not bound to execute a bond under section *(1)* *(e)* of the Urban Rent Control Act. But, as pointed out above, he failed to take up that plea and willingly executed the bond Exhibit "ဝ" to enable him to eject the respondent from the suit premises.

In connection with the 3rd contention of the learned Advocate for the appellant, the learned Advocate for the respondent submitted that the appellant had committed an act of fraud by purposely incurring heavy expenditure in the re-erection of the suit premises with a view to claiming protection under Notification No. 35 of 16th February 1951. There is nothing on record to justify this submission. Moreover, there is nothing in law or in the Urban Rent Control Act to prevent a landlord from putting up an entirely new building on his land or to substantially re-construct his old building. In fact, the real object of Notification No. 35, dated the 16th February 1951 is to encourage the construction of new buildings on vacant house sites and the re-erection substantially of existing old buildings. I cannot therefore accept the submission of the learned Counsel.

The 4th and 5th contentions of the learned Advocate for the appellant, in my view, have touched the core of the real bone of contention in this case; for the main point for consideration in this appeal is whether the bond Exhibit "ဝ" is valid, and if so, whether the appellate Court was right in upholding the order of the trial Court

directing the forfeiture of the said bond if the re-erection of the building in question could not be completed within three months from the date of its order.

From a perusal of the proceedings, it appears that there has been some confusion as to the relevant clause of section 11(*l*) of the Urban Rent Control Act which is really applicable to this case. It would appear that the bond Exhibit "ဃ" was executed under section 11 (*l*) (*d*) and/or 11 (*l*) (*e*) of the Urban Rent Control Act, 1948. Perhaps, both the lower Courts did not realise that clause (*d*) of section 11(*l*) of the Urban Rent Control Act is applicable to premises which are lands and not to premises which are buildings, that the said clause has been amended by Act No. 42 of 1952 and that in the amended clause (*d*) the provision for "reinstating the tenant displaced from the land on completion of erection or re-erection of such buildings in case the buildings are erected for the purpose of letting" has been deleted. The amended clause (*d*) provides that if his land is *bonâ fide* required by the landlord for erection or re-erection of a building or buildings he is entitled to recover possession thereof on his executing "a bond in such amount as the Court may deem reasonable that the premises will be used for erection or re-erection of a building or buildings and that he will give effect to such purpose within a period of one year from the date of vacation of the premises by the tenant."

The relevant clause of section 11 (*l*) of the Urban Rent Control Act which contains the provisions for the execution of a bond to reinstate the tenant displaced is clause (*e*) thereof. Section 11 (*l*) (*e*) of the Urban Rent Control Act runs as follows:

"(*e*) the building or a part thereof to which this Act applies is reasonably and *bonâ fide* required by the landlord

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for re-erection or essential, major and structural repairs and the landlord executes a bond in such amount as the Court may deem reasonable that the said premises will be used for such repairs or re-erection, that he will give effect to such purpose within such period not exceeding nine months from the date of vacation of the premises by the tenant, as the Court may prescribe, and that he will, if so desired by the tenant, reinstate the tenant displaced from the premises on completion of such repairs or re-erection : ".

Under clause (*e*) of section 11 (*1*) of the Urban Rent Control Act the landlord is entitled to ejectment of the tenant from his building if he reasonably and *bonâ fide* requires it either for the purpose of re-erection or for the purpose of essential, major and structural repairs on his executing a bond (1) that the said premises will be used for such repairs or re-erection, (2) that he will give effect to such purpose within such period not exceeding nine months from the date of vacation of the premises by the tenant and (3) that he will, if so desired by the tenant, reinstate the tenant displaced from the premises on completion of such repairs or erection.

Both the lower Courts appear to have misunderstood or misinterpreted the meaning of the expression " will give effect to such purpose ". A perusal of their judgments and orders would indicate that they had interpreted the said expression to mean that the landlord must finish or complete the re-erection or the essential, major and structural repairs within the period specified in the bond ; which in fact is not the case. It is an accepted principle of interpretation of statutes that words or phrases in a section of an Act must be read not by themselves but with reference to the context. In other words, words and expressions must be interpreted in the light of words and expressions used before and

after them in the same section and of other similar words and expressions used in other sections of the same Act.

The amended clause (*d*) of section 11 (*1*) of the Urban Rent Control Act which does not contain the provisions of the old clause in respect of reinstating the tenant displaced also contains the expression " that he will give effect to such purpose within a period of one year." In view of the fact that the provisions relating to reinstatement of the displaced tenant has been purposely deleted in the amended clause, there is no question of completing the erection or re-erection within the period specified in the bond executed thereunder. Therefore the expression " will give effect to such purpose " is used to mean " will start the erection or re-erection " within the time stipulated in the bond.

Again, the first condition of the bond to be executed under clause (*e*) is that the premises " will be used for such repairs or re-erection " and the third condition thereof is that the landlord " will, if so desired by the tenant, reinstate the tenant displaced . . . . on completion of such repairs or re-erection ". Now, if the second condition of the bond, *i.e.*, " that he will give effect to such purpose within such period . . . . " be read together or in conjunction with the first and the third conditions, the expression " will give effect to such purpose," could only be interpreted to mean " will start the work of re-erection or essential major and structural repairs " within the time specified in the bond and should not be stretched to mean and include " the completion of the re-erection or the repairs." In other words, the second condition of the bond would be fulfilled if the landlord would start the work of repairs or

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re-erection within the time specified in the bond. Moreover, since the extent of the major and structural repairs or the extent of re-erection has not been specified in clause (*e*), it is impossible for the legislature to lay down any period within which the re-erection or the essential major and structural repairs should be completed. The completion would naturally depend upon the nature and the extent of the re-erection or repairs that would be carried out.

Therefore, both the lower Courts have gone wrong in holding that the building in question must be completed within the period specified in the bond Exhibit "ဃ" or within the extended time allowed thereafter. And as the bond Exhibit "ဃ" contains a condition to complete the re-erection or repairs within the time specified therein instead of simply requiring the landlord (*i.e.*, the appellant) to give effect to the purpose of repairs or re-erection within the said period must be deemed to be invalid as it is *ultra vires* of clause (*e*) of section 11 (*1*) of the Urban Rent Control Act.

Moreover, according to the provisions of clause (*e*) of section 11 (*1*) of the Urban Rent Control Act, a bond executed thereunder could be forfeited only in the event of the landlord using the re-erected or repaired building for letting purposes after its completion and not reinstating his displaced tenant who desires to be so reinstated. Therefore, the order of the learned trial Judge directing the forfeiture of the bond if the construction of the building be not completed within three months from the date of his order as well as the judgment of the learned Judge of the lower appellate Court which confirmed the said order is *ultra vires* and must be set aside.

In the result, the appeal must succeed and is

allowed with costs, advocate's fees K 85. The order dated the 15th January 1957 of the Sub-divisional Judge, Pyinmana and the judgment and decree of the District Court of Pyinmana confirming the said order are set aside. The defendant-respondent will bear the costs throughout.

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U CHOON FOUNG, J.

APPELLATE CRIMINAL.

Before U Chan Tun Aung, C.J. and U Ba Thoung, J.

H.C. 1958

July 17.

HIRALAL (*a*) HIRALAL DHANUKA (APPELLANT)

v.

TIN TIN U (RESPONDENT).*

Criminal Procedure Code, s. 476—Whether preliminary enquiry obligatory when a judge decides to take action under that section—Competency of Court to deal with an offence under the section at any time—Desirability of early initiation of proceedings.

When a Magistrate or a Judge decides to take action under s. 476 (1) of the Criminal Procedure Code it is not obligatory for him to hold any inquiry. Such inquiry, which is only preliminary in nature, should be made when the Court considers it necessary. Such a preliminary inquiry is not a *sine qua non* in all cases. Holding of such inquiry is left to the discretion of the Court. When the Court in the course of any trial or inquiry contemplated in the aforesaid section *suo motu* or at the instance of one of the parties holds that one or more of the offences enumerated in the said section has or have been committed, and it considers that a *prima facie* case is made out against the person concerned on the materials before it, no preliminary inquiry is necessary.

H. V. Subba Rao v. *Government of Mysore*, 9 Cr. L.J. 319, referred to.

The language of s. 476 of the Criminal Procedure Code is not imperative in regard to the preliminary inquiry where the record of the judicial proceeding in the course of which an offence had been committed or brought to notice itself, contains sufficient materials, for thinking that a *prima facie* case exists against the accused person in question.

H. V. Subha Rao v. *Government of Mysore*, 9 Cr. L.J. 319 and *Abdul Ghafur and another* v. *Raza Hussain*, I.L.R. 34, All. 267, referred to.

It is entirely discretionary and not obligatory with a Court to hold a preliminary inquiry.

Jagat Singh v. *Emperor*, A.I.R. (1930) Lah. 55, referred to.

It is most desirable that a prosecution basing upon s. 476 of the Criminal Procedure Code should be initiated as early as possible, especially, when the matter is not *suo motu*, but at the instance of one of the parties.

Mohamed Kaka v. *The District Judge of Bassein*, (1937) Ran. 276, distinguished.

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* Civil Misc. Appeal No. 9 of 1956, against the order of the High Court of Rangoon (U AUNG THA GYAW, J.) in Civil Misc. No. 29 of 1954, dated 6th February 1956.

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There is nothing in s. 476 of the Criminal Procedure Code which requires the exercise of power conferred by it at any period or at any particular time. The Court is not incompetent or powerless to deal with an offence found to have been committed before it where the knowledge that the said offence has been committed was not brought to its notice until it was pointed out by the party concerned.

Emperor v. *Tilak Pandey and others*, 37 All. 344 and *In re. Lakshmidas Lalji*, I.L.R. 32 Bom. 184, referred to.

A Court would be wanting in its duty if serious notice is not taken of any false statements made therein which would mislead the Court in regard to the credit and other attendant circumstances appertaining to the person who offered himself as a surety.

G. N. Banerji for the appellant.

Nil for the respondent.

U CHAN TUN AUNG, C.J.—This is an appeal against the order of the learned Judge on the Original Side (U Aung Tha Gyaw, J.) made under the provisions of section 476 of the Criminal Procedure Code holding that a complaint should be laid against the appellant in respect of certain untrue statements made in the two affidavits dated the 5th May 1950 and 11th December 1950. The said affidavits are with respect to the ownership of certain landed property in Rangoon offered as security in two execution cases Nos. 26 and 27 of 1950 of the High Court. It appears that the appellant filed two applications for stay of execution pending the disposal of appeals from the main case supported by two affidavits, one dated the 5th May 1950 and the other dated the 11th December 1950. In the affidavit dated the 5th May of 1950 while offering security for stay of the execution, a landed property in Rangoon namely, one four-storeyed pucca building known as No. 46 in 31st Street, he stated that the said property was free from any encumbrances; and in the affidavit dated the 11th December 1950, the appellant further stated that the said four-storeyed

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HIRALAL (a) HIRALAL DHANUKA v. TIN TIN U.

U CHAN TUN AUNG, C.J.

pucca building—No. 46, 31st Street—"belongs to me". He further averred that the title deeds relating to the said property were kept at Rangoon in his shop prior to the War, and that the same had been lost owing to circumstances arising out of the late War.

On the strength of these affidavits, the property offered as security was accepted and a security bond was duly executed and registered by the Court. The respondent, who is the judgment-creditor, after the decision of the appeals in her favour, and on judgment-debtor's failure to comply with the condition in the bond aforesaid, sought to execute the decree *vide* Execution Case No. 6 of 1953 by way of sale of the aforesaid property. When a search for title in respect of the said property was made for the purpose of filing an affidavit of title, it was found in the registers of the Sub-Registration Office that the aforesaid property was an encumbered property, the same being mortgaged to secure repayment of a sum of K 30,000 with interest under a registered deed dated the 21st March 1947, executed by the appellant and one Srinava Dhanuka as members of a joint undivided Hindu family carrying on business under the name and style of Srinavas Hiralal, the mortgagees being the firm of Nanigram Jamnadass of No. 29-31, 30th Street, Rangoon. Thereupon, the respondent decree-holder made a complaint to the learned Judge on the Original Side for the initiation of proceedings under section 476 (1) of the Criminal Procedure Code. Full opportunity was accorded to the appellant by the learned trial Judge to show cause against the initiation of such proceedings and the appellant availed himself of it. In his written objection, the appellant averred that the contents of his affidavits in question were neither read over, nor

explained to him by his Advocate when he made them. He also denied having instructed his Advocate for the preparation of such affidavits. In other words, he asserted that the affidavits were not made to his knowledge.

With regard to the alleged encumbrances he maintained that the mortgage debt had long been liquidated, and that the property was no longer encumbered when it was offered as security for stay of execution. However, we may note here that the appellant had not adduced any evidence documentary or otherwise in support of his assertions made in his reply affidavit.

Two major grounds have been taken up in this appeal in assailing the order of the learned Judge on the Original Side. Firstly, it is contended that the learned Judge having not held a preliminary inquiry, has acted with irregularity; secondly, inasmuch as the decision to prosecute the appellant was arrived at only at a very late stage of the case, namely, the 6th February 1956—and even then, it was only at the instance of the respondent—; and whereas the alleged false statements in the affidavits were purported to have been made by the appellant some time in May 1950 and December 1950, the true aim and purpose of the provisions of section 476 of the Criminal Procedure Code have not been fulfilled. For the second submission reliance was placed on the decision of *Mohamed Kaka and others* v. *The District Judge of Bassein* (1). We regret that none of these submissions has made any impression upon us.

In our view, when a Magistrate or a Judge decides to take action under section 476 (1) of the Criminal Procedure Code it is not obligatory for him

(1) (1937) Ran. 276.

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to hold an inquiry. Such inquiry, which is only preliminary in nature, should be made when the Court considers it necessary. Such a preliminary inquiry is not *sine qua non* in all cases. Holding of such inquiry is left to the discretion of the Court. When the Court in the course of any trial or inquiry contemplated in the aforesaid section *suo motu* or at the instance of one of the parties holds that one or more of the offences enumerated in the said section has or have been committed, and it considers that a *prima facie* case is made out against the person concerned on the materials before it, no preliminary inquiry is necessary. We need only quote three authorities for this view. In *H. V. Subba Rao* v. *Government of Mysore* (1), it was held that the language of section 476 of the Criminal Procedure Code is not imperative in regard to the preliminary inquiry where the record of the judicial proceeding in the course of which an offence has been committed or brought to notice itself, contains sufficient materials for thinking that a *prima facie* case exists against the accused person in question. The same view was expressed in *Abdul Ghafur and another* v. *Raza Hussain* (2). Similarly the Lahore High Court in *Jagat Singh* v. *Emperor* (3) laid down that, under section 476, it is entirely discretionary and not obligatory with a Court to hold a preliminary inquiry.

Thus, we cannot allow the first submission of the appellant to prevail.

Now, as regards the second ground urged we are afraid that the facts and circumstances appearing in *Mohamed Kaka* v. *The District Judge of Bassein* (4) and those available in the present case are entirely

(1) 9 Cr.L J. 319.
(2) I.L.R. 34. All. 267.
(3) A.I.R. (1930) Lah. 55.
(4) (1937) Ran. 276.

at variance. No doubt, it is most desirable that a prosecution basing upon section 476 of the Criminal Procedure Code should be initiated as early as possible, especially when the matter is not *suo motu*, but at the instance of one of the parties. However, in the present case, the facts show that the learned trial Judge was not aware of the falsity of the affidavits sworn by the appellant until it was brought to his notice at a much later date. In other words, the commission of the alleged offence during the course of the proceeding was discovered by him only at a much later date when pointed out to him by the respondent. If we examine the provisions of section 476, there is nothing therein requiring the exercise of power conferred by it at any period or at any particular time. Therefore, it is absurd to suggest that a Court is incompetent or powerless to deal with an offence found to have been committed before it where the knowledge that the said offence has been committed was not brought to its notice until it was pointed out by the party concerned. This view of the law is not without authority. In *Emperor* v. *Tilak Pandev and others* (1), Chamier and Piggott, JJ. pointed out that there is nothing in section 476 of the Code of Criminal Procedure which requires a court to take action, if at all, immediately after the conclusion of the case in which the offences are said to have been committed or within any fixed time thereafter. [See also *In re. Lakshmidas Lalji* (2)].

The learned Judge on the Original Side has given full reasons why he has decided to take action against the appellant. It appears that sworn statements made by the appellant are very material in the proceedings before the Court; and we are in full

(1) 37. All. 344. (2) I.L.R. 32 Bom. 184.

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HIRALAL (a) HIRALAL DHANUKA v. TIN TIN U.

U CHAN TUN AUNG, C.J.

accord with him, that in such circumstances the person offering security on the strength of such sworn statements is bound to make a true disclosure to the Court. A Court would be wanting in its duty if serious notice is not taken of any false statements made therein which would mislead the Court in regard to the credit and other attendant circumstances appertaining to the person who offered himself as a surety. We also consider that the learned trial Judge was fully justified, on the statements filed before him, and also from the documentary evidence that were laid before him in coming to the conclusion that there was a *prima facie* case for laying a complaint against the appellant as aforesaid.

This appeal therefore fails and is dismissed.

U BA THOUNG, J.—I agree.

CRIMINAL REVISION.

Before U Thaung Sein, J.

HPAN PEIN HMWAY AND SEVEN OTHERS (APPLICANTS)

v.

UNION OF BURMA (RESPONDENT). *

H.C. 1958
Aug. 28.

Plea of "guilty"—Ignorance of serious consequences ensuing—Ignorance of nature or quality of charge levelled—Convictions and sentences upon—Duty of trial Court before accepting plea.

Where the accused who appear to have been totally ignorant of the serious consequences which might ensue on their plea of guilty and of the nature or quality of the charge levelled at them pleaded guilty and were convicted and sentenced on their plea.

Held: That the convictions and sentences passed on them were bad in law.

Sri Sawarmal v. *The Union of Burma (U Thein Maung)*, (1954) B.L.R. 331, followed.

Hla Nyunt for the applicants.

Min Han (Government Advocate) for the respondent.

U THAUNG SEIN, J.—The eight applicants in this case are members of a Chinese family who were sent up for trial before the learned Western Subdivisional Magistrate, Mandalay charged with offences under section 13 (*1*) of the Burma Immigration (Emergency Provisions) Act, 1947. The case against them was tried summarily and as they all pleaded "guilty" were convicted and the 1st, 2nd and 4th applicants who were adults were directed to pay a fine of K 40 each or in default one month's rigorous imprisonment, while the remaining 5th to 8th applicants whose ages range from 7 to 11 years were released

* Criminal Revision No. 12-B of 1958 (Mandalay). Review of the order of the Western Subdivisional Magistrate, Mandalay, in Summary Trial No. 76 of 1956, dated the 18th September 1956.

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after due admonition. Consequent to their convictions, the Deputy Commissioner, Mandalay proceeded to take action against the applicants for their deportation to China under section 7 of the Burma Immigration (Emergency) Provisions Act, 1947. It was only then that the applicants realised the serious consequences which were likely to ensue as a result of their plea of "guilty", the convictions which followed on that plea. The applicants pleaded with the Deputy Commissioner that they had been residents of Burma for many years prior to World War II and that they had not in fact entered Burma illegally. But unfortunately for them, their plea has not been accepted probably in view of their convictions which are now the subject of this revision application. The applicants in despair applied to the learned Sessions Judge, Mandalay for a revision of the order of the learned Western Subdivisional Magistrate but without result and hence the present application to the High Court.

All that I propose to say is that this case is almost identical in nature to the ruling in *Sri Sawarmal* v. *The Union of Burma* (*U Thein Maung*) (1) where it was laid down as follows:

"*Held:* Even when an accused person pleads 'guilty', before it accepts the plea and enters a conviction, the trial Court should consider whether the accused fully understand the nature of the charge, the facts of the case and the serious consequences which such a plea would entail.

Held also: Though the High Court's powers are restricted by s. 412 of the Criminal Procedure Code against entertaining appeals in cases where the accused has been convicted on his own plea of guilty, yet its revisional powers in such matters are not similarly restricted, and, at the same time its inherent jurisdiction under s. 561-A of the Criminal Procedure Code can be invoked to quash the conviction and sentence."

(1) (1954) B.L.R. 331.

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In the present case also the applicants four of whom are mere children appear to have been totally ignorant of the serious consequences which might ensue on their plea of guilty nor does it appear that they fully understood the nature or quality of the charge levelled at them. Accordingly, this application is allowed and the convictions and sentences passed on the eight applicants are hereby set aside and I direct that they be retried by a competent Magistrate to be selected by the learned District Magistrate, Mandalay. All fines paid if any, should be refunded to the applicants concerned.

APPELLATE CIVIL.

Before U Ba Thoung, J.

H.C. 1958

July 4.

JWALA PRASAD
LACHMI NARAYAN } (APPLICANTS)

v.

KESHWAR SINGH (RESPONDENT).*

Civil Procedure Code, Order 17, Rule 3—Refusal to grant further adjournment of case on date fixed for peremptory hearing after ample opportunity given to produce witnesses—Justification.

Where on the day fixed for peremptory hearing of a suit after ample opportunity had been given to the party to the suit to produce witnesses, the Court refused to grant further adjournment to produce witnesses and proceeded to decide the suit.

Held: That under Order 17, Rule 3, Civil Procedure Code, the Court was quite correct in refusing to grant further adjournment and in proceeding to decide the suit.

Than Maung for the applicants.

M. Ahmed for the respondent.

U BA THOUNG, J.—This is an application to revise the order of the Second Judge, Rangoon City Civil Court, dated the 9th December 1957 in which an adjournment asked for by the petitioners-defendants, owing to the absence of their witnesses to give evidence in Court, was refused and the case for the petitioners-defendants closed and a date for final argument of the case was given.

The suit was filed by the respondent-plaintiff against the petitioners-defendants for recovery of K 736 due on a promissory note. The petitioners-defendants denied executing the said promissory note

* Civil Revision No. 70 of 1957, against the order of the Second Judge, City Civil Court, Rangoon, in Civil Regular Suit No. 270 of 1953, dated the 9th December 1957.

and of receiving the money. On 12th August 1957 the respondent-plaintiff and his witness were examined and the case for the plaintiff was closed. The case was then fixed for 30th September 1957 for examination of the petitioners-defendants and their witnesses. On that day the first petitioner-defendant was examined. Summons were then issued to the petitioners-defendants' witnesses for their attendance in Court on 11th November 1957 to give evidence. On that day the petitioners-defendants' witnesses failed to appear in Court and the case was adjourned till 9th December 1957 for peremptory hearing. On 9th December 1957 the petitioners-defendants' witnesses again failed to appear in Court and when an adjournment was asked for, the trial Judge refused to grant it, and the petitioners-defendants' case was closed. The case was then fixed for final argument on 18th December 1957. It is against that order that the petitioners-defendants have filed this application in revision.

It is contended by the learned counsel for the petitioners that the failure of their witnesses to appear in Court could not be attributed to *malafides*, negligence or laches on their part; as they had applied for issue of summons without delay, and as they and the process server had used all due and reasonable diligence in serving the summons. It must however be pointed out that the petitioners-defendants' witnesses failed to appear in Court on more than one occasion. They failed to appear in Court on 11th November 1957 to give evidence, and the trial Judge adjourned the case to 9th December 1957 for a peremptory hearing. The petitioners-defendants therefore knew that no further adjournment would be given by the Court for examination of their witnesses if they fail to appear

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on that day. Now, on referring to the process file I find that on 7th November 1957 the petitioners-defendants took over the summons from the process server, giving an undertaking that they would personally serve the summons on their witnesses for their attendance in Court on 11th November 1957, but the witnesses failed to appear in Court on that day. Again, when the process server took the summons on 3rd December 1957 to be served on the petitioners-defendants' witnesses for their attendance on 9th December 1957, the petitioners-defendants took over the summons from the process server to serve on two of the three witnesses, undertaking again to serve the summons themselves. It is not known whether the petitioners-defendants managed to serve the summons on those witnesses, but the fact remains that none of their witness turned up in Court on 9th December 1957. Under these circumstances I consider that the trial Court was quite correct in acting under Order XVII, Rule 3 of the Code of Civil Procedure and in proceeding to decide the suit.

For the reasons stated the application is dismissed with costs. Advocates fees fixed at K 34.

CIVIL REVISION.

Before U Aung Khine and U Choon Foung, JJ.

H.C. 1958

Aug. 1.

KASINATH RAI { (APPELLANT) / (APPLICANT) }

v.

PURSHOTAM SINGH AND ONE (RESPONDENTS).*

City Civil Court Act—Ss. 24 and 25—Right of appeal—Not extended to decrees made in Small Cause jurisdiction—Bank draft—A Bill of Exchange—A negotiable instrument—Prohibitory order on bank issuing bank draft—Validity.

The right of appeal given by s. 24 of the Rangoon City Civil Court Act, as amended by Act No. 5 of 1950, is only as against the decree made by the Court in exercise of its civil jurisdiction other than its jurisdiction as a Court of Small Causes, Civil Revision No. 21 of 1952 of High Court, followed.

A draft issued by a bank is a bill of exchange and a negotiable instrument.

Ross v. *London Country and Westminister Bank*, (1919) 1 K. B., 678 at 687 ; *In the matter of the Indian Companies Act of 1913 and of the New Bank of India Ltd.*, A.I.R. (1949) East Punj. 373, referred to.

Where a person pays a certain amount into a Bank for getting a draft in exchange drawn by the Bank on its branch, the transaction is nothing more than a purchase of the draft.

In the matter of Travancore National and Quilon Bank Ltd., S. Bakat Ali and others v. *James Voce Pirrie, Cyril Gill and John Stanley Goodwin*, A.I.R. (1940) Mad. 101, referred to.

No prohibitory order could be served on the bank which had issued the draft, even if it could not be considered as a bill of exchange because the bank was only seller of the draft and with the issue of the draft the sale transaction in respect of the bank draft was complete.

Myint Soe for Messrs. Soorma and Boon for the { Appellant / Applicant.

Than Aung for Messrs. Horrocks and Khoo for the respondents.

* Civil Revision No. 41 of 1958 converted from Civil Misc. Appeal No. 12 of 1950 against the order of the Chief Judge, City Civil Court of Rangoon in Civil Execution No. 119 of 1950 of the Rangoon City Civil Court, arising out of Civil Small Cause Suit No. 1 of 1950 of the said Court.

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U CHOON FOUNG, J.—In Civil Small Cause Suit No. 1 of 1950 of the Rangoon City Civil Court the plaintiff-appellant sued the first defendant-respondent for recovery of Rs. 1,000 due on a promissory note and obtained a decree *ex parte* therefor with costs.

The said suit was filed on the 2nd January 1950 and the *ex parte* decree was passed on the 30th January 1950. On the day the suit was filed, the plaintiff-appellant also filed an application (being Civil Miscellaneous No. 1 of 1950 of the Rangoon City Civil Court) for issue of prohibitory order before judgment to the Hongkong and Shanghai Banking Corporation Ltd., Rangoon (the 2nd respondent above-named). The prohibitory order before judgment was issued and was duly served on the 2nd respondent on 3rd January 1950.

After the passing of the *ex parte* decree, to be more exact, on 9th February 1950 the plaintiff-appellant applied for execution of the decree by issue of prohibitory order to the manager of the 2nd respondent. In Civil Execution No. 119 of 1950 the learned Chief Judge of the Rangoon City Civil Court, by his order dated the 3rd April 1950, dismissed the application of the decree-holder (the plaintiff-appellant) for the issue of the prohibitory order with cost and also directed that the prohibitory order (before judgment) served on the Bank be withdrawn. This is an appeal against the said order of the learned Chief Judge of the Rangoon City Civil Court.

At the hearing of the appeal, the learned Advocate for the 2nd respondent raised a preliminary objection that the appeal was not maintainable as no appeal lies against an order of the Rangoon City Civil Court in exercise of its Small Cause jurisdiction. He referred us to Civil Revision No. 21 of 1952 of the High Court which was converted from Civil 1st

Appeal No. 45 of 1951 of the same Court and in which, a Bench of the High Court held that "the right of appeal given by section 24 of the Rangoon City Civil Court Act, as amended by Act No. 5 of 1950, is only as against the decree made by the Court in exercise of its Civil jurisdiction other than its jurisdiction as a Court of Small Causes".

Faced with this difficulty, the learned Advocate for the plaintiff-appellant requested us to treat the memorandum of appeal as an application for revision under section 25 of the City Civil Court Act as it was done in the said Civil First Appeal No. 45 of 1951, and we have agreed to do so.

In *Daw Saw* v. *L. Ramanathan Chettiar* (1) it has been held that the powers of the High Court under section 25 of the City Civil Court Act are much wider than those exercisable under section 115 of the Civil Procedure Code. Section 25 of the Rangoon City Civil Court Act runs as follows:

> "The High Court, for the purpose of satisfying itself that a decree or order was according to law, may call for the case and pass such order with respect thereto as it thinks fit."

Therefore, the point for consideration now is whether the order dated the 3rd April 1950 of the learned Chief Judge of the Rangoon City Civil Court was "according to law."

The learned Advocate for the plaintiff-appellant contended that the banker's draft issued by the 2nd respondent was not a cheque or bill of exchange and that as such it was not a negotiable instrument and that the lower Court was wrong in holding that the said draft was a negotiable instrument. He further contended that the lower Court had erred in holding that the money paid in by the plaintiff-appellant

(1) (1955) B.L.R. (H.C.) 49.

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for the said draft being in Calcutta at the time the prohibitory order was issued the Court had no jurisdiction to attach it.

In support of his first contention, the learned counsel relied on (1) *Capital and Counties Bank Ltd.* v. *Gordon* (1) where the House of Lords held that—

> " A banker's draft payable to order on demand addressed by one branch of a bank to another branch of the same bank and not crossed is not a cheque within the meaning of sections 60, 82 of the Bills of Exchange Act, 1882."

and (2) *Maturi C. Sanyasilingam* v. *The Exchange Bank of India and Africa Ltd.* (2) where it has been held—

> " that a bank draft issued by a bank on its own branch or by a branch of its own head-office is not a bill of exchange or cheque and did not have the protection given to a bill of exchange or cheque; that where the drawer and drawee of a draft were the same, no action could be brought by the drawer against the drawee; and that a bank which was both drawer and drawee of a draft was not entitled to treat such a draft as a bill of exchange although a holder thereof might sue the bank upon it and treat it as a bill of exchange."

A perusal of the latter ruling shows that the learned Judge who gave the ruling was obviously influenced by the House of Lords' decision in *Gordon*'s case (1). It must be pointed out that since the said decision was given by the House of Lords, the Bills of Exchange Act, 1882, has been amended by the Bills of Exchange Act (1882) Amendment Act, 1932, which provides that " the expression 'banker's draft' means a draft payable on demand drawn by or on behalf of a bank upon itself, whether payable at the head-office or some other office of the bank ". Thus, it will be seen that the said amendment in England has the effect of affirming the

(1) (1903) A.C., 240. (2) I.L.R. (1947) Bom. 643.

decision of Bailhache, J. in *Ross* v. *London Country and Westminister Bank* (1) that a banker's draft is a cheque within the meaning of the Bills of Exchange Act. Therefore, the House of Lords' decision in *Gordon*'s case (2) is no longer good law even in England.

In the matter of the Indian Companies Act of 1913 and of the New Bank of India Ltd. (3) the East Punjab High Court has held that—

"a banker's draft is a bill drawn either on demand or otherwise by one bank on another in favour of a third party or by one branch of a bank on another branch of the same bank or by the head-office on a branch or *vice versa*."

With due deference, we agree with the decision of the East Punjab High Court. In our view, it is undisputable that a draft is a bill of exchange. Section 5 of the Negotiable Instruments Act defines a bill of exchange as follows:

"A bill of exchange is an instrument in writing containing an unconditional order signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument."

And a banker's draft fulfills all these requirements. Moreover, there is the express reference to a draft as a bill of exchange in section 85-A of the said Act which runs as follows:

"Where any draft, that is, an order to pay money, drawn by one office of a bank upon another office of the same bank for a sum of money payable to order on demand, purports to be endorsed by or on behalf of the payee the bank is discharged by payment in due course."

In section 13 (*1*) of the Negotiable Instruments Act, a negotiable instrument is defined as "a promissory note, bill of exchange or cheque payable either

(1) (1919), I.K.B., 678 at 687. (2) (1903) A.C. 240.
(3) A.I.R. (1949) East Punj. 373.

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to order or to bearer". It, therefore, follows that a banker's draft is a negotiable instrument.

In the matter of Travancore National and Quilon Bank Ltd., S. Bakat Ali and others v. *James Voce Pirrie, Cyril Gill and John Stanley Goodwin* (1) it has been held that—

> "where a person pays a certain amount into a Bank for getting a draft in exchange drawn by the Bank on its branch, the transaction is nothing more than a purchase of the draft."

In our opinion, whether the bank draft in question can be considered as a bill of exchange or whether it cannot be so considered, it would make no difference in the present case; for if it were a bill of exchange, it would be a negotiable instrument and thus no prohibitory order could have been served on the 2nd respondents. And if the said bank draft could not be considered as a bill of exchange, the fact remains that, in view of the Madras ruling quoted above, the 2nd respondents were only sellers of the said bank draft which was purchased by the plaintiff-appellant for Rs. 10,000 and that the sale transaction being complete no prohibitory order could have been issued on the 2nd respondents after the said sale. We are of the opinion that if at all the plaintiff-appellant's money could be attached it would be the money which the Calcutta branch of the 2nd respondents is liable to pay to the plaintiff-appellant or order under the said draft. That money being in Calcutta at the time the prohibitory order was issued, the learned Chief Judge of the Rangoon City Civil Court was quite justified in holding that he had no jurisdiction to attach it.

For the reasons given above, both the contentions of the learned Advocate for the appellant must

(1) A.I.R. (1940) Mad. 101.

be rejected ; and we see no reason to interfere with the order dated the 3rd April 1950 of the learned Chief Judge of the Rangoon City Civil Court.

Accordingly, the application for revision is dismissed with costs, Advocate's fees five gold mohurs.

U AUNG KHINE, J.—I agree.

APPELLATE CIVIL.

Before U Thaung Sein, J.

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Aug. 27.

KO BA SHIN AND ONE (APPELLANTS)

v.

DAW KHIN (RESPONDENT).*

Transfer of Property Act—S. 106—Notice to quit—Wording—Construing—Validity.

Where it is contended that a notice to quit in Burmese containing the words—၁၉၅၇ ခုနှစ်၊ မတ်လ (၃၁) ရက် နောက်ဆုံးထားပြီး အသာတကြည်၊ အဆိုပါ နေအိမ်မှန်ရှေ့ပြောင်းထွက်ခွါသွားရမည်။—is invalid as calling upon the tenants to quit on or before the 31st March 1957 and not on the 31st March 1957, in view of the provisions of s. 106 of the Transfer of Property Act.

Held: That the notice in effect was a notice to quit on the expiry of the 31st March 1957; and that even if it can be construed as a notice to quit on or before the 31st March 1957 it would still be a valid notice.

Ismail Dada Bhamani v. *Bai Zulekhabai*, A.I.R. (1944) Bom. 181, referred to.

Notices issued under s. 106 of the Transfer of Property Act should be construed strictly but this does not necessarily mean that they should be worded with the accuracy of a plea in a civil suit.

P. K. Bose for the appellants.

S. L. Verma for the respondent.

U THAUNG SEIN, J.—In Civil Regular Suit No. 73 of 1957 of the Township Court of Mandalay, the respondent Daw Khin sued for and obtained a decree for the ejectment of the present appellants Ko Ba Shin and Ma Chit Tin who were her tenants in respect of certain premises in Mandalay town which according to her is a new building constructed in 1954 and hence exempted from the operation of the Urban Rent Control Act. That decree was

* Civil Appeal No. 27 of 1958 (Mandalay) against the judgment and decree passed by the Additional District Judge, Mandalay, in Civil Appeal No. 23 of 1957 on the 11th March 1958.

confirmed on appeal by the learned Additional District Judge, Mandalay and hence the present second appeal to the High Court.

Two main grounds have been urged in support of the appeal *viz.* (1) that the building in suit is not a "newly constructed building" or "substantially reconstructed building" within the meaning of those terms in Notification No. 35, dated the 16th February 1951 of the Ministry of Finance issued under section 3 (*1*) of the Urban Rent Control Act and (2) that the notice served on the appellants to quit the premises was invalid as it did not comply with the requirements of section 106 of the Transfer of Property Act. The first ground is one of pure fact and the issue framed in the Township Court was—

"Did the plaintiff build a new house in 1954 as shown in para. 1 of the plaint?"

Both the lower Courts have arrived at a concurrent finding that the building in suit was a new building constructed in 1954 and this finding of fact cannot be reagitated in appeal. In view of that finding it is clear that the suit premises are exempted from the provisions of the Urban Rent Control Act.

The next ground raises the question whether the notice served on the appellants to quit the premises was valid or not. In this connection section 106 of Transfer of Property Act lays down that a monthly tenancy shall be "terminable on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy." There is a concurrent finding by the lower Courts that in the present case the tenancy month began on the 1st of each month and hence the notice to quit must give fifteen days ending with a calendar month. A copy

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U THAUNG SEIN, J.

of the notice served on the appellants by the learned Advocate of the respondent is filed as Exhibit "ဝ" in the trial record and it contains the words "၁၉၅၇ ခု နှစ်၊ မတ်လ (၃၁) ရက် နေ့နောက်ဆုံးထားပြီး အသာတကြည်၊ အဆိုပါ နေအိမ်မှ ရွှေပြောင်းထွက်ခွါသွားရမည်။" It is urged that this notice called upon the appellants to quit before the 31st March 1957 and not on the 31st March 1957 and hence is invalid in view of the provisions in section 106 of the Transfer of Property Act. Notices issued under this section should be construed strictly but this does not necessarily mean that they should be worded with the accuracy of a plea in a civil suit. As far as I can see from the wording of the Exhibit "ဝ" notice it was in effect a notice to quit on the expiry of 31st March 1957 but even if it can be construed as a notice to quit on or before the 31st March 1957 it would still be a valid notice in view of the ruling in *Ismail Dada Bhamani* v. *Bai Zulekhabai* (1) as follows :

> "A notice to quit on or before a date, being the date on which the tenancy expires, is a good notice to quit."

This ruling was relied upon by the learned Additional District Judge, Mandalay with whose judgment I am in entire agreement.

On the whole, there are no merits in this appeal which shall stand dismissed with costs.

(1) (1944) A.I.R. Bom. 181.

APPELLATE CIVIL.

Before U Po On, J.

KO THAN AUNG (APPELLANT)

v.

MA CHIT (RESPONDENT).*

H.C. 1958

July 29.

Suit for declaration and possession—Defendant in possession unable to prove title—Whether plaintiff should succeed on that account.

In a suit for declaration of title and for possession of immoveable property the plaintiff is not entitled to succeed merely because the defendant who is in possession is unable to prove her title.

Maung Mu Din v. *Maung On Gaing and one*, (1897-01) 2 U.B.R. 421), followed.

Dutt for the appellant.

San Thein for the respondent.

U PO ON, J.—This appeal arises out of the suit brought in the Township Court of Bassein (West) by Maung Than Aung against Ma Chit for declaration and for possession of a piece of land marked with red ink on the Exhibit "o" map.

The allegation of Maung Than Aung was that he was the owner of the land in dispute by virtue of a sale deed executed in his favour by U Myo and his wife, Ma Thein Yin, and that Ma Chit had been in occupation of it with the permission of U Po Saing, the father of U Myo.

Ma Chit's defence was that she bought the land from the original owner, P. R. A. R. Chettiar Firm and that U Po Saing never acquired any title to or interest in it.

The Township Court decreed the suit in favour of Maung Than Aung. The lower Appellate Court,

* Civil 2nd Appeal No. 37 of 1957 against the decree of District Court, Bassein in Civil Appeal No. of 19 .

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U PO ON, J.

however, set aside the decree of the trial Court and dismissed the plaintiff's suit.

There is no dispute that the land in suit originally belonged to P. R. A. R. Chettiar Firm. There is also abundant evidence that Ma Chit had been in occupation of it for over twelve years. In the circumstances the burden is on Maung Than Aung to prove that U Po Saing, father of U Myo, bought the land in dispute from P. R. A. R. Chettiar Firm and that Ma Chit had been in occupation of it with U Po Saing's permission. U Myo (PW 1) was the son of U Po Saing. But he could not say when his father bought the land in question from P. R. A. R. Chettiar Firm and whether there was any sale deed executed by the said firm in his father's favour in respect of the land.

U Maung Aye (PW 4) says that about two years before the 2nd World War, U Po Saing showed him a document and that when he looked at the holding number and the *kwin* number therein, he found that U Po Saing had bought the suit land. It appears that he did not read the whole contents of the document. Besides, he did not say who was the vendor of the land and whether the deed was a registered deed or not. His evidence is, therefore, inadmissible in view of the ruling in *Ma Mi and another* v. *Kallander Ammal* (1).

K. E. Nina Mohamed (PW 3), the father-in-law of Maung Than Aung, also did not know whether the land was bought by U Po Saing from P. R. A. R. Chettiar Firm.

It is strange that though U Myo (PW 1) and U Maung Aye (PW 4) say that the land was sold to U Po Saing by the P. R. A. R. Chettiar Firm about the year 1940, the land was in the name of the

(1) Vol. V. Ran. Series, p. 18 (P.C.).

P. R. A. R. Chettiar Firm till a few months before it was sold in 1953 by U Myo (PW 1) to Maung Than Aung.

Furthermore, there is not a shred of admissible evidence that Ma Chit had been in occupation of the land with U Po Saing's permission. It was held in *U Maung Gyi* v. *Maung On Bwin and another* (1) as:

> "Ordinarily in a suit under Article 142 of the Limitation Act, the burden of proof would lie on the plaintiff, and in a suit under Article 144 it would lie on the defendant. Where a plaintiff avers that he was at one time the owner of immoveable property and that the defendant obtained possession from him, his suit falls under Article 142, and on his failing to prove the permissive nature of the occupation, plaintiff cannot succeed without at first showing that he had been in possession within twelve years of bringing the suit."

It may be that Ma Chit could not prove that she bought the land from P.R.A.R. Chettiar Firm. But she has been in possession of it. On the other hand, Maung Than Aung was out of possession of it. So, he is not entitled to succeed merely because Ma Chit was unable to prove her title. This is the law laid down in *Maung Min Din* v. *Maung On Gaing and one* (2).

The result is that the appeal fails and is dismissed with costs.

(1) I.L.R. Ran. Vol. VII. p. 85. (2) (1897-01) 2 U.B.R. 421.

APPELLATE CIVIL.

Before U Thaung Sein, J.

H.C. 1958

July 21.

MA HLA SHIN (APPELLANT)

v.

KO MIN AND ANOTHER (RESPONDENTS).*

Res judicata—*Whether suit for administration of the estate of a deceased barred by former suit for declaration as his heirs and for possession of immoveable property.*

One B died at Mandalay leaving behind a house and land. The Respondents then sued the Appellant and her husband who were described as strangers to the deceased, for a declaration that they were the only heirs of the deceased and for possession of the house and land in question. There was also a prayer for permission to file a fresh suit in respect of moveable properties said to have been left behind by the deceased.

The Appellant contested the suit on the ground that she being in fact a cousin of the deceased, she was a sole heir to the estate to the exclusion of the Respondents. The suit was decreed in favour of the Respondents who were held to be the sole heirs of the deceased.

On Appeal the District Court set aside the decree of the trial Court on the ground that on the evidence on record the respondents could not be held to be the only heirs of the deceased B.

Subsequently, in the same Court, the 1st Respondent again filed a fresh suit for "the administration of the estate of B (deceased)" in which he claimed a one-third share. The 2nd Respondent was made a defendant along with the Appellant in that suit and he admitted the claim. One of the grounds raised by the Appellant was that in view of the previous suit, the suit was barred by the principles of *res judicata*. The trial Court accepted her contentions and dismissed the suit, but on Appeal the District Court reversed the judgment and decree of the trial Court on the ground that the suit was not barred by *res judicata* and that the parties were each entitled to a one-third share in the estate of the deceased.

The main ground urged in support of the appeal brought by the Appellant before the High Court was that the subsequent suit by the 1st Respondent was barred by the principles of *res judicata* in view of the decision in the former suit.

Held: (1) That the former suit was one for a declaration and possession based on title and against "alleged" strangers to the estate and that the subsequent suit was one for administration of the estate of the deceased.

* Civil 2nd Appeal No. 1 of 1958. Appeal against the judgment and decree of the District Judge, Mandalay, passed in Civil Appeal No. 10 of 1957.

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(2) That therefore the subsequent suit was not barred by the decision in the former suit on the principles of *res judicata*.

Ma Khin v. *Ma Pu and two others*, (1948) B.L.R. 343, followed.

Sukh Lal v. *Bhikhi*, I.L.R. 11 All. 188, explained.

Maung Sin v. *Maung Byaung and others*, (1946) B.L.R. 149, distinguished.

Maung Thein v. *Daw Htwe and others*, (1951) B.L.R. 410, referred to.

Hla Nyunt for the appellant.

P. K. Bose and *Mya Sein* for the respondents.

U THAUNG SEIN, J.—On or about the 31st January 1953, one U Ba Thein died at Mandalay leaving behind a house and land situated within the area of Mandalay town. A few months later, the two respondents [Ko Min (*alias*) Ko Bo Min and Ko Bo] who claimed to be the "cousin brothers of the deceased" filed Civil Regular Suit No. 17 of 1953 in the Subdivisional Court of Mandalay against the present appellant (Ma Hla Shin) and her husband for a declaration that they "are the only legal heirs of the deceased Ko Ba Thein" and for possession of the land and house in question. It may be noted that they also applied to that Court for leave to file a fresh suit or "claim" in respect of the moveable properties said to have been left behind by the deceased. According to the plaint the appellant Ma Hla Shin and her husband who were strangers to the deceased had taken illegal possession of the house and land and were thus bound to give up possession to the respondents. The appellant Ma Hla Shin on the other hand contested the suit on the ground that she was in fact a cousin of the deceased and thus a sole heir to the estate to the exclusion of the respondents. On the pleading the learned trial Judge framed the following issue:—

"Who are the heirs of the deceased Ko Ba Thein ?"

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and held that the two respondents are the sole heirs of the deceased and accordingly decreed the suit in their favour.

The appellant Ma Hla Shin appealed to the District Court, Mandalay against that decree and the learned District Judge set aside the decree of the trial Court on the ground that " on the evidence, as it stands, it cannot be said that the plaintiff-respondents are the only heirs of the deceased Ko Ba Thein ".

The first respondent then filed a fresh suit *viz.* Civil Regular Suit No. 43 of 1955 in the Subdivisional Court, Mandalay for " the administration of the estate of Ko Ba Thein (deceased) " in which he claimed a one-third share. The other respondent Ko Bo was added as a defendant in the suit along with the appellant Ma Hla Shin. As might be expected, this respondent filed a written admission of the claim while the appellant Ma Hla Shin contested the suit on two main grounds. Her case was that she is the only surviving heir of the deceased and that the suit was barred by *res judicata* in view of the decision in the previous suit *i.e.* Civil Regular Suit No. 17 of 1953 of the Subdivisional Court of Mandalay. The trial Court accepted her contentions and dismissed the suit but on appeal, the learned District Judge, Mandalay reversed the judgment and decree of the lower Court on the ground that the parties were each entitled to a one-third share in the estate under consideration and granted a preliminary decree for the administration of that estate and appointed U Tha Da, the Bailiff of the District Court as Receiver for the purpose of taking charge of the properties comprised in the estate. The appellant Ma Hla Shin has in turn come up to the High Court in appeal against the judgment and decree of the District Court of Mandalay.

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The main ground urged in support of the appeal is that the subsequent suit by the first respondent *viz.* Civil Regular Suit No. 43 of 1955 was barred by the principles of *res judicata* in view of the decision in Civil Regular Suit No. 17 of 1953 of the Subdivisional Court of Mandalay. In the case of *Ma Khin* v. *Ma Pu and two others* (1), I had occasion to deal with the fine conditions which must be satisfied to constitute *res judicata* and I do not propose to reproduce them again. The learned counsel for the respondents asserts that the "matter directly and substantially in issue" in the above-mentioned suits were not the same, that the parties were different and that they were not litigating under the same title in both suits. As against the argument, the appellant relies on the ruling in *Sukh Lal* v. *Bhikhi* (2) the headnote of which reads:

"A suit for possession of immoveable property was wholly dismissed, on the ground that the plaintiff had not made out his title to the whole of the property claimed, though he had proved title to a one-third share of such property. The decree included an order in these terms:—'This order will not prevent the plaintiff from instituting a suit for possession of the one-third interest of Mussammat Lachminia in the files specified in the deed of sale,' upon which the suit was based. No appeal was preferred from this decree. Subsequently the plaintiff brought another (188) suit upon the same title to recover possession of the one-third share referred to in the order just quoted.

Held:—by the Full Bench that the Court in the former suit had no power to include in its decree of dismissal any such reservation or order; that the fact that the decree was not appealed against did not give the order contained in it, which was an absolute nullity, any effect that as in the former suit the plaintiff could have obtained a decree for the one-third share now claimed, and the whole of the claim in that suit was dismissed, the decree in that suit was a decision

(1) (1948) B.L.R. 343. (2) I.L.R. 11 All. 188.

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within s. 13 of the Civil Procedure Code; and the present suit was consequently barred as *res judicata*."

According to the learned counsel for the appellant, the learned District Judge, Mandalay has already held in the former suit that the two respondents and the appellants were equally entitled to a share in the estate of the deceased U Ba Thein *i.e.* one-third portion of the suit house and land, and that this question cannot be reagitated again under the guise of a suit for administration. The appellant was not unmindful of the fact that the respondents had not specifically prayed for partition of the estate but urged that in view of the omnibus prayer for "any other relief or reliefs which the plaintiffs are in law entitled" it was competent for the Courts concerned to have awarded each heir their respective share. In support of this view, reliance is placed on the Privy Council ruling in *Maung Sin* v. *Maung Byaung and others* (1) the headnote, of which is in the following strain:

Held: Though the suit was framed for partition alone and though the suit is not for the administration of an estate nor was there a claim for administration or for the accounts and the subject matter may be only for a portion of the estate; it is not only competent for the Court to ascertain and declare the shares of the heirs or the parties but also it is its plain duty to do so."

Now, a careful examination of the two suits in question reveal that at the former suit (Civil Regular Suit No. 17 of 1953) was for a declaration and possession based on title and against alleged "strangers" to the estate. The subsequent suit *i.e.* Civil Regular Suit No. 43 of 1955, was one for the administration of the estate of the deceased U Ba

(1) (1946) R.L.R. 149.

Thein and as explained in *Maung Thein* v. *Daw Htwe and others* (1) an "administration suit is really a suit for accounts as between members of the family of the deceased *i.e.* heirs to the estate of a deceased person as such". In *Sukh Lal* v. *Bhikhi* (2) the former suit between the parties was one for possession of the whole of certain immoveable property. The subsequent suit was for possession of a one-third share of that property. Obviously the nature of the two suits were identical *i.e.* they were suits for possession and it is hardly surprising that the principles of *res judicata* were applied. In the present case, the respondents originally claimed that they were entitled to recover possession of the house and land on the strength of their title. At that time they were said to have been unaware of the exact degree of relationship of the appellant with the deceased and she was thus treated as a stranger along with her husband. Furthermore the former suit was not one for partition of the estate or a partition of it and hence the principles enunciated in *Maung Sin* v. *Maung Byaung and others* (3) could not have been applied. All that the learned District Judge decided when the former suit came up on appeal before him was that as the respondents were not the only heirs of the deceased U Ba Thein, they could not expect to get the declaration and possession sought for by them and dismissed the suit. In view of the fact that the appellant was also an heir of the deceased there was no other alternative open to the respondents but to file a fresh suit for administration. I am in agreement therefore with the learned District Judge that the subsequent suit was not barred by *res judicata*.

(1) (1951) B.L.R. 410. (2) I.L.R. 11 All. 188.
(3) (1946) B.L.R. 149.

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Coming to the question of the relationship between the parties in this case and the deceased U Ba Thein, there can be no doubt from the evidence on record that the grandfather of respondents *viz.* U Kyin Ya and the grandfather of the deceased U Ba Thein *viz.* U San Nyein were brothers. Hence, the respondents were the second cousins of the deceased. In the case of the appellant Ma Hla Shin, her grandfather U Tauk Tar was the brother of Daw Sone Bu the grandaunty of the deceased *i.e.* wife of U San Nyein. In other words she was also a second cousin of the deceased. I do not propose to go into a detailed discussion of the evidence led as both the lower Courts have dealt with the matter. All that I propose to say is that I agree with the learned District Judge that the learned Subdivisional Judge was wrong in placing implicit faith on the evidence of one Daw Nyo Thon simply because she was older than the other witnesses. There were a number of discrepancies in her statements and in any case her evidence was not sufficient to negative the testimonies of the witnesses led by the respondents to prove their relationship with the deceased. On the whole, it is clear that the parties in this case are equidistant relatives of the deceased and thus entitled to share equally in the latter's estate. There is thus no reason to interfere either with the judgment or decree of the District Court and this appeal is accordingly dismissed with costs.

APPELLATE CIVIL.

Before U Aung Khine and U Ba Thoung, JJ.

H.C. 1958

Aug. 25.

MA MYA KYI (APPELLANT)

v.

MAUNG NYI BU AND THREE OTHERS (RESPONDENTS).*

Civil Procedure Code—O. 22, R. 3—No abatement by party's death—Survival of right to sue on death of plaintiff suing in dual capacity as administrator and heir—Widows right to proceed with suit as legal representative—No such right if husband had sued solely as administrator—Judge cannot question or set aside his predecessor's order in the case.

Where a Burman Buddhist filed a suit in his dual capacity as an administrator of and as sole heir to the estate of a deceased person and died during the pendency of the suit leaving behind a wife as his heir and legal representative, the suit does not abate and the wife can apply to the Court, under Order 22, Rule 3 (1) of the Civil Procedure Code, to be made a party and proceed with the suit.

But if he was suing solely as an administrator to that estate then the wife who survives him as an heir cannot succeed to his right as an executor or administrator to that estate, which would remain unrepresented until fresh Letters-of-Administration are granted.

Ma Po Po v. *Ma Lat Gyi*, 3 L.B.R. 208, distinguished.

A Judge cannot question or set aside the order passed by his predecessor in the case directing that the appellant be brought on the record as the plaintiff in place of her deceased husband and to proceed with the suit on its merits.

Mon San Hlaing, for E. Maung for the appellant.

Than Sein for the respondents Nos. 2, 3 and 4.

U BA THOUNG, J.—The appellant Ma Mya Kyi is the wife of one Maung Thein Maung, now deceased. Maung Thein Maung, a Burman Buddhist obtained Letters-of-Administration, as the only surviving

* Civil Misc. Appeal No. 75 of 1955, against the decree of the Additional District Court of Mandalay in Civil Regular Suit No. 30 of 1955.

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nephew and heir, to the estate of Daw U Zun who died in 1947; and he, in his dual capacity as an administrator of and as sole heir to the estate of Daw U Zun, sued the lst, 2nd and 3rd respondents Maung Nyi Bu, U Hlaing and Daw Ma Ma for recovery of three godowns Nos. 4, 5 and 6 in Pwezaydan Quarter, Mandalay, and for recovery of K 4,000 as mesne profits, in the Court of the Additional District Judge, Mandalay, in Civil Regular Suit No. 30 of 1951. The respondents contested the suit and a Receiver was appointed in Civil Miscellaneous No. 1 of 1952. Then the 4th respondent Maung Ba Aye objected to the seizing of godown No. 4 by the Receiver, contending that it forms part of the estate of one Daw Hnin in respect of which he had obtained Letters-of-Administration, and he filed an application to make him a party in this suit. Later he withdrew his application, and it was allowed to be withdrawn with a provision that any order or decree passed in the suit was not to be binding on him. Then after the preliminary issues had been framed in the suit, Maung Thein Maung died; and his wife, the present appellant applied to the Court to bring her on record as the legal representative in place of the deceased plaintiff Maung Thein Maung. The first three respondents objected to the application on the ground that the deceased plaintiff Maung Thein Maung having filed this suit in his capacity as the legal representative of the deceased Daw U Zun, the suit had abated with his death, and that the right of suit does not survive to the applicant Ma Mya Kyi and that she would have to file a fresh suit after obtaining fresh Letters-of-Administration. Ma Mya Kyi contended that the suit had not abated; and that even if it should be held that it had abated, she should be substituted as plaintiff and allowed to

continue with the suit under Order 22, Rules 9 and 10 of the Civil Procedure Code. The learned Additional District Judge (U Ohn Khin) after a careful consideration of the case, held that under Order 22, Rule 3 of the Code of Civil Procedure, where a sole plaintiff dies and the right to sue survives, it is incumbent on the Court, when an application is made by the legal representative of the deceased plaintiff to be made a party, to cause him or her to be brought on record and to proceed with the suit if the application is filed within the time allowed by law; he held that the application was filed within time and that there was no reason why the appellant should not pursue with the suit in her capacity as the surviving heir to the estate. The learned Additional District Judge held also that even if the suit had abated, the appellant could continue the suit under Order 22, Rules 9 and 10 of the Code of Civil Procedure, since she had applied in the alternative to be substituted as plaintiff and for continuance of the suit and as there was no other surviving heir to the estate of Daw U Zun.

Accordingly an order dated 17th September 1953 was passed allowing the appellant to be brought on record as the plaintiff in place of the deceased U Thein Maung and to proceed with the suit. Then subsequent to this, the appellant applied to the Court to implead the 4th respondent Maung Ba Aye as a defendant in the suit as he was claiming Godown No. 4 as part of the estate of one Daw Hnin. Maung Ba Aye filed an objection to this, and an order dated 3rd March 1954 was passed adding Maung Ba Aye as a 4th defendant in the case. It appears that after this order was passed the Additional District Judge (U Ohn Khin) was transferred and was succeeded by a new Additional District Judge. In the written

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statement filed by the 4th respondent-defendant Maung Ba Aye, the same contentions were made as previously that the appellant-plaintiff Ma Mya Kyi could not be brought on record as legal representative of the deceased Maung Thein Maung, that she had no status to represent the administrator Maung Thein Maung, deceased, in this case and continue with the suit, and that the suit had abated with the death of Maung Thein Maung. The learned Additional District Judge, who succeeded U Ohn Khin, considered all these questions again which had previously been considered and decided by his predecessor, and he held that Maung Thein Maung, deceased, had instituted the present suit as an administrator, and that his personal rights for administration of the estate of Daw U Zun lapsed with his death and that his wife, the present appellant, cannot represent him in this suit; and that the application of the appellant to be made a legal representative of her deceased husband Maung Thein Maung could not be said to be in order, and that as the appellant could not represent the deceased administrator Maung Thein Maung, the suit had abated; and he dismissed the appellant-plaintiff's suit. Hence this appeal.

Firstly, we have to point out that the learned Additional District Judge cannot question or set aside, as he had done in this case, the order dated the 17th September 1953 passed by his predecessor the then Additional District Judge, directing that the appellant Ma Mya Kyi be brought on record as the plaintiff in place of the deceased Maung Thein Maung and to proceed with the suit on its merits; and no appeal has been preferred against this order.

Secondly, the learned Additional District Judge was wrong in holding that the present suit had abated with the death of Maung Thein Maung. He had

overlooked the fact, as is apparent from paragraphs 1 and 4 of the plaint that the original plaintiff Maung Thein Maung was suing in the dual capacity as administrator of, and as sole heir to the estate of Daw U Zun, and that he was not suing solely as an administrator to that estate. If he was suing solely as an administrator to that estate, then of course the appellant who survives him as an heir cannot succeed to his rights as an executor or administrator to that estate, and Daw U Zun's estate in that case would remain unrepresented until fresh Letters-of-Administration are granted. The case of *Ma Po Po* v. *Ma Lat Gyi* (1) and other rulings relied upon by the learned Additional District Judge would then be apposite to such a case. But in the present case, Maung Thein Maung was suing in his capacity also as sole heir to the estate of Daw U Zun, and this right survives to his wife, the present appellant Ma Mya Kyi. It is conceded that the appellant is the sole heir and legal representative of the deceased plaintiff Maung Thein Maung; and therefore she, as the legal representative of the deceased plaintiff Maung Thein Maung, can apply to the Court, under Order 22, Rule 3 (1) of the Code of Civil Procedure, to be made a party and to proceed with the suit.

For the reasons stated the appeal succeeds, and the order of the trial Court dated the 22nd August 1955 in its Civil Regular Suit No. 30 of 1951 is set aside with costs, and the suit is remanded to that Court under Order 41, Rule 23 of the Code of Civil Procedure for trial in accordance with law. Advocates fees fixed at K 85.

U AUNG KHINE, J.—I agree.

(1) 3 L.B.R. p. 208.

APPELLATE CRIMINAL.

Before U Chan Tun Aung, Chief Justice.

H.C. 1958

July 24.

MA SHWE (*a*) MA KYIN SHWE (APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Penal Code—S. 415, s 420—Cheating—S. 439 read with s. 561-A, Criminal Procedure Code—Quashing of Criminal proceedings—S. 415, illustration from Penal Code.

Held: To bring an offence of Cheating within the ambit of s. 415 of the Penal Code there must be two elements :—

(1) deception and

(2) fraudulent or dishonest inducement to do or omit to do something.

The deception must precede inducement to deliver any property or to consent that any person shall retain any property, etc.

Held also: The offence of cheating basing on a loan transaction as shown by illustration (*f*) to s. 415, Penal Code, depends upon two ingredients :—

(1) intentional deception, and

(2) the borrower did not at all intend at the time of taking the loan to repay the loan made to him.

Until and unless specific facts and circumstances are disclosed that the borrower being not in a position to repay the loan, and not intending to repay borrowed money by practising deception upon the lender, there can be no offence of cheating within the purview of s. 415 of the Penal Code.

Maung Ba Yone v. *Ma Hla Kin*, A.I.R. (1933) Ran. 297 at 298, referred to.

Ba Shun for the applicant.

Hla Maung and *U Chit* (Government Advocate) for the respondent.

U CHAN TUN AUNG, C.J.—This application under section 439 read with section 561-A, Criminal Procedure Code is for quashing the criminal proceedings, namely, Criminal Regular Trial No. 593 of 1958, now pending before the 1st Additional Magistrate, Rangoon.

* Criminal Revision No. 50 (B) of 1958, Application under ss. 435 and 439 read with s. 561-A of the Code of Criminal Procedure to quash the charge.

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MA SHWE (a) MA KYIN SHWE v. THE UNION OF BURMA.

U CHAN TUN AUNG, C.J.

The applicant Ma Shwe is, at the instance of the complainant U Kyin, being prosecuted for an alleged offence under section 420 of the Penal Code. U Kyin complains that the applicant, on the 1st July 1957 borrowed a sum of K 40,000 from him saying that it was for the purpose of "investment in a joint venture business". U Kyin lent the aforesaid sum to the applicant who promised repayment of the loan within two or three months. A cheque for the said sum was issued in the name of the applicant drawn on Overseas Chinese Bank. The applicant did not repay the loan as promised; but, as alleged by U Kyin, she bought for herself with the said money a jeep, a motor-boat, jewellery, etc., instead of investing in a joint venture. When examined on oath by the 1st Additional Magistrate before cognizance was taken, U Kyin stated to the same effect as what he averred in his written complaint. Significantly enough, U Kyin further stated on oath that he met the applicant at one U Myo Myint's house on 1st July 1957, but that the cheque for K 40,000 was issued to her on 29th June 1957. In other words, on U Kyin's own showing, it appears that he had already on the 29th June 1957 issued the cheque in favour of the applicant long before the alleged negotiation for loan took place *i.e.* on 1st July 1957 at U Myo Myint's house. However despite these somewhat peculiar circumstances the trial Magistrate took cognizance of the offence alleged and issued a bailable warrant of arrest against the applicant.

The applicant has now come up to this Court to quash the trial proceedings on the ground that the complaint discloses no offence against her, and that it would amount to sheer abuse of the process of the Court if the prosecution continues. In my

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MA SHWE (a) MA KYIN SHWE v. THE UNION OF BURMA.

U CHAN TUN AUNG, C.J.

opinion, the complaint as it now stands not only on the face of it, but even if it is taken into consideration along with the sworn testimony of U Kyin, does not disclose any criminal offence against the applicant. It is clear from U Kyin's assertion that K 40,000 was a loan to the applicant to enable her to invest the same in a joint venture business, and that the applicant promised the return of the loan within two or three months. Now, if the applicant did not invest the money which had become hers from the moment the loan was made, how can it be said that she had cheated U Kyin when she spent the money so lent in purchasing other things, such as jewellery, jeep, motor-boat, etc. It is elementary that to bring an offence of cheating within the ambit of section 415 of the Penal Code there must be two elements (1) deception and (2) fraudulent or dishonest inducement to do or omit to do something. The deception must precede inducement to deliver any property or to consent that any person shall retain any property, etc. Here, in the case under consideration there is not a slightest suggestion whatsoever either in the complaint or in the sworn statement, about there being any deception practised at all by the applicant. In my opinion the applicant cannot be a total stranger to U Kyin; and it is highly improbable that a large sum of K 40,000 would have been lent out to her long before the alleged negotiation for loan took place in U Myo Myint's house. Even the learned Government Advocate who appears for the Government has to concede—and in my view very properly—that neither the complaint, nor the complainant's sworn testimony, as it now stands, discloses any fraudulent or dishonest intention on the part of the applicant, but that the alleged transaction, if it had at all taken place between the applicant and U Kyin,

was a simple loan transaction, and that as such, he was not prepared to oppose the application made by the applicant. The learned Counsel appearing for U Kyin, on the other hand, relying upon Illustration (*f*) under section 415 of the Penal Code urges that there is a *prima facie* case of cheating under section 415 of the Penal Code against the applicant. The illustration reads:

> " *A* intentionally deceives *Z* into a belief that *A* means to repay any money that *Z* may lend to him and thereby dishonestly induces *Z* to lend him money, *A* not intending to repay it. *A* cheats."

This very illustration shows that the offence of cheating basing on a loan transaction depends upon two ingredients (1) intentional deception and (2) the borrower did not at all intend at the time of taking the loan to repay the loan made to him. The words in the above illustration " not intending to repay " are noteworthy, and until and unless specific facts and circumstances are disclosed that the borrower being not in a position to repay the loan, and not intending to repay borrowed money by practising deception upon the lender, there can be no offence of cheating within the purview of section 415 of the Penal Code. Thus, the illustration affords no help to the learned Counsel inasmuch, as neither in the complaint, nor in the sworn statement made before the Court, did the complainant U Kyin allege any fact or circumstance indicating that the applicant, when she borrowed the aforesaid sum from him, did not intend to repay the sum in question and that he was, by dishonest deception, induced to part with the said sum. In my view it would be extremely difficult for the respondent to assert that he had been intentionally deceived by the applicant, because, on his own showing he had issued a cheque in favour

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MA SHWE (a) MA KYIN SHWE v. THE UNION OF BURMA.

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of the applicant long before the alleged talk for loan took place. As observed by Dunkley, J., in *Maung Ba Yone* v. *Ma Hla Kin* (1), "it is unjust to compel a person to stand his trial when the complainant in his complaint and statement on oath, has made no allegations of fact which would, if proved, constitute a criminal offence".

Therefore, for the reasons given above and in the light of the remarks by Dunkley, J., in the aforesaid case, I must hold that no offence of cheating under section 415 of the Penal Code has been disclosed as against the applicant in U Kyin's complaint as at present stands; and I direct that the entire proceeding *viz.* Criminal Regular Trial No. 593 of 1958 now pending before the 1st Additional Magistrate, Rangoon, shall be quashed and the applicant discharged from the case.

(1) A.I.R. (1933) Ran. 297 at 298.

APPELLATE CIVIL.

Before U San Maung and U Thaung Sein, JJ.

MAUNG AUNG KHIN (APPELLANT)

v.

MA SAW HLA (RESPONDENT).*

H.C. 1958

July 8.

Guardian and Wards Act (Act VIII, 1890)—S. 17—Matters to be considered by the Court in appointing guardian—S. 17 (3).

In dealing with applications for the guardianship and custody of a child, the welfare of a child is of paramount importance and outweighs any other considerations.

"If the minor is old enough to form an intelligent preference, the Court may consider that preference." s. 17 (3) of the Act.

Saw Hla Pru for the appellant.

B. M. Sarkar for the respondent.

U THAUNG SEIN, J.—The appellant Maung Aung Khin and the respondent Ma Saw Hla were married several years ago and lived together for about thirteen years but unfortunately in or about July 1956 differences and misunderstandings arose between the couple and they were finally divorced. During their coverture one child was born to them, *viz.*, Maung Aye Ko who is at present about five years of age. It appears that in due course both the couple were remarried to new spouses and the respondent married a Chettyar named U Yama (DW 4) while the appellant was married to a Ma Hla Win of Hopin. Be that as it may, in the following year after the divorce, the appellant applied to the District Court of Mandalay under the Guardians and Wards Act for the custody of the minor son Maung Aye Ko but

*Civil Misc. Appeal No. 2 of 1957 (Mandalay) against the judgment and decree of the District Judge, Mandalay, in Civil Misc. Appeal No. 6 of 1957.

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without success and hence the present appeal to the High Court. The learned District Judge dismissed the application mainly on the ground that the appellant is unfit for the custody of the child as he is in no position to take proper care of the minor and that it is for the welfare of the child to remain with his mother (respondent).

It should be remembered that in dealing with applications for the guardianship and custody of a child, the welfare of the child is of paramount importance and outweighs any other considerations. This is clearly laid down in section 17 of the Guardian and Wards Act. Then again, this section provides also that in selecting a guardian "if the minor is old enough to form an intelligent preference, the Court may consider that preference." In the present case, the appellant is on his own showing quite unfitted for the custody of his son for the following reasons. He admits that as a Cinema Operator, he is required to tour extensively and is seldom at Mandalay for any length of time. This will mean that if the child is handed over to him, it will be tantamount to handing him over to the custody of the stepmother. The appellant has also stressed that there is every danger of his son being brought up as a Hindu by the step-father who is a Chettyar. That these fears are groundless is borne out by the evidence on record which clearly establishes that U Yama is a Hindu but he also professes the Buddhist faith and he has made no attempt whatsoever to convert the child to Hinduism or any other religion. There cannot be no doubt that the mother Ma Saw Hla (respondent) has taken good care to see that her son is brought up in the Buddhist faith.

One other point taken by the appellant's counsel is that the appellant is in a better financial position

than the respondent to maintain the child. Judging from the evidence led there can be no doubt that the respondent's husband (U Yama) is in receipt of a regular income sufficient for the maintenance of the family and that the child will be well provided for. Hence, looked at from any angle we do not see how it will be for the welfare of the minor to be removed from the custody of his mother and handed over to the appellant. Add to all this that according to Máung Nyun (PW 2) a witness cited by the appellant himself the child has expressed a preference for his mother (respondent) rather than his father (appellant). In short, there are no merits in this appeal which is accordingly dismissed. There will be no order for costs.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

Before U Ba Thoung, J.

H.C. 1958

June 20.

MAUNG AUNG THIN AND ONE (APPELLANTS)

v.

BISNATH SINGH AND ONE (RESPONDENTS).*

Transfer of Property Act—S. 58 (c)*—Proviso—Condition to repurchase embodied in sale deed—Whether a mortgage by conditional sale—Intention of parties.*

Where the transaction effecting or purporting to effect a sale and a condition of repurchase are embodied in one document, the transaction does not, as a result of the proviso added by the Amendment Act, 1929, necessarily become a mortgage by conditional sale, irrespective of the intention of the parties. If from the contents of the document it can be gathered from its clear express words that the intention of the parties was to effect an outright sale with a condition of repurchase, the deed could be construed as an outright sale with a condition of repurchase even though that condition is embodied in one document, because the determining factor in such cases is the intention of the parties.

The intention of the parties should be ascertained from the terms of the document and the surrounding circumstances. The adequacy of consideration and the time given to the vendor to make a repurchase; have important bearings to the truth of the intention of the parties.

Debi Singh and others v. *Jagdish Saran Singh and others*, A.I.R. (1952) All. 716 ; *Chunchun Jha* v. *Ebadat Ali and another*, A.I.R. (1954) (S.C.) 345 ; *Thakur Shambhu Singh and others* v. *Thakur Jagdish Bakhsh Singh and others*, A.I.R. (1941) Oudh 582, referred to.

Po Aye for the appellants.

Kyin Htone for the respondents.

U BA THOUNG, J.—The plaintiffs-respondents sued the defendants-appellants in the Court of the Subdivisional Judge, Mergui, for redemption of a house and site. It is alleged by them that in 1946 they had borrowed from the defendants-appellants,

*Civil 2nd Appeal No. 57 of 1957 against the decree of the District Court of Mergui in Civil Appeal No. 5 of 1956.

K 2,600—in three sums at a time of K 1,000, K 600 and K 1,000 each at an interest of 10 per cent per mensem. That the defendants-appellants, saying that interests on the said loans had accrued to K 400, compelled them to execute a document (Exhibit A) by which the suit properties had to be transferred to the defendants-appellants. That a condition was embodied in this document (Exhibit A) that if the vendors pay a sum of K 6,600 to the vendees within one year from the date of the execution of the document, the vendees would reconvey the properties to the vendors. The document (Exhibit A) was described as " Sale Deed ", and it was dated the 28th August 1946. The plaintiffs-respondents contended that the document (Exhibit A) was a mortgage by conditional sale as contemplated in section 58 *(c)* of the Transfer of Property Act and that it was not an outright sale with a condition to repurchase. The defendants-appellants on the other hand contended that it was an outright sale with a condition to repurchase the properties within one year from the date of execution of the document. The learned Subdivisional Judge held that the transaction as evidenced by the document (Exhibit A) was not a mortgage by conditional sale but that it was an outright sale with a condition to repurchase; and he dismissed the plaintiffs-respondents' suit. On appeal to the District Court of Mergui, the learned District Judge reversed the finding of the trial Court and held that the transaction was a mortgage by conditional sale and not an outright sale with a condition to repurchase; and accordingly a decree in favour of the plaintiffs-respondents was given. Hence this appeal.

The only question to be considered is whether the transaction, as evidenced by the document

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(Exhibit A) in this case, was a mortgage by conditional sale or whether it was an outright sale with a condition to repurchase.

The learned District Judge in holding that the transaction was a mortgage by conditional sale took the view that the transaction of sale with the condition to repurchase embodied in one document must always be treated as a mortgage by conditional sale. He has relied on the case of *Debi Singh and others* v. *Jagdish Saran Singh and others* (1). It was decided by a Full Bench composed of Chandiramani, Agarwala and Nasirullah Beg, JJ., and the following observation was made by Chandiramani, J., in agreement with Agarwala, J.:—

> " After the amendment of section 58 (*c*) by the addition of the proviso, if a sale and one of the conditions mentioned in section 58 (*c*) are embodied in one document, the transaction is necessarily a mortgage by conditional sale. '

Chandiramani and Agarwala, JJ. held that if a deed effecting or purporting to effect a sale after the amendment in section 58 (*c*) of the Transfer of Property Act came into force contains any one of the conditions mentioned in section 58 (*c*) it is in every case a deed of mortgage by conditional sale irrespective of the intention of parties. Nasirullah Beg, J., however, dissented from their view and passed a dissenting judgment in which he made the following observations :—

> " Thus a consideration of the provisions of Section 58 of the Transfer of Property Act, a historical retrospect of the law on the subject, a reference to the rulings of their Lordships of the Privy Council as well as all the High Courts in India, an application of the rules of interpretation relevant to the question at issue drive one irresistibly to the conclusion that where the transaction is embodied in one document the

(1) A.I.R. (1952) All. 716.

transaction does not, as a result of the proviso added by the Amendment Act of 1929, necessarily become a mortgage by conditional sale irrespective of the intention of the parties."

I am, respectfully, of the same view as taken by Nasirullah Beg, J. that where the transaction is embodied in one document the transaction does not, as a result of the proviso added by the Amendment Act, 1929, necessarily become a mortgage by conditional sale, irrespective of the intention of the parties. If from the contents of the document it can be gathered from its clear express words that the intention of the parties was to effect an outright sale with a condition of repurchase, the deed could be construed as an outright sale with a condition of repurchase even though that condition is embodied in one document; because I consider that the determining factor in such cases is the intention of the parties. I am fortified in this view by the decision of the Supreme Court of India in the case of *Chunchun Jha* v. *Ebadat Ali and another* (1), where it was held that:

"The question whether a given transaction is a mortgage by conditional sale or a sale outright with a condition of repurchase is a vexed one and must be decided on its own facts. In such cases the intention of the parties is the determining factor.

The rule of law on this subject is one dictated by commonsense; that *prima facie* an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase. In every such case the question is, what upon a fair construction, is the meaning of the instruments?

The converse also holds good if, on the face of it, an instrument clearly purports to be a mortgage it cannot be turned into a sale by reference to a host of extraneous and

(1) A.I.R. (1954)(S.C.) 345.

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irrelevant considerations. Difficulty only arises in the border line cases where there is ambiguity.

Under the Proviso to Section 58 (*c*), Transfer of Property Act, if the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage whether the documents are contemporaneously executed or not. But the converse does not hold good, that is to say, the mere fact that there is only one document does not necessarily mean that it must be a mortgage and cannot be a sale. If the condition of repurchase is embodied in the document that effects or purports to effect the sale, then it is a matter for construction which was meant. The legislature has made a clear cut classification and excluded transactions embodied in more than one document from the category of mortgages therefore, it is reasonable to suppose that persons who, after the amendment choose not to use two documents, do not intend the transaction to be a sale, unless they displace that presumption by clear and express words; and if the conditions of Section 58 (*c*) are fulfilled, then the deed should be construed as a mortgage."

It has also been held in the case of *Thakur Shambhu Singh and others* v. *Thakur Jagdish Bakhsh Singh and others* (1) that:

"The effect of the proviso to section 58 (*c*) is only that a transaction shall not be deemed to be a mortgage unless the condition mentioned in section 58 (*c*) is embodied in the document. It does not necessarily follow that if the condition is embodied in the document the transaction shall be deemed to be a mortgage. The provision for reconveyance is not conclusive on the point. For determining whether a transaction is an out and out sale or a mortgage by conditional sale, the Court should examine the terms of the document in the light of the surrounding circumstances and ascertain the true intention of the parties. The period during which the property may be repurchased and the adequacy of consideration are some of the tests. If the period of time given to the vendor during which he can repurchase is a short one, it does suggest that it is an out and out sale with the right to repurchase, but where a long period of time is given to the vendor to

(1) A.I.R. (1941) Oudh. 582.

repurchase, it does suggest that there is no out and out sale at all, but merely a transfer of the property as a security."

Therefore it is clear that the mere fact that the condition is embodied in one document does not necessarily amount to a mortgage by conditional sale; and that in order to determine in such cases whether the transaction is a mortgage by conditional sale or an out and out sale with a condition to repurchase, the intention of the parties is a very important factor, and it should be ascertained from the terms of the document and the surrounding circumstances as to what intention the parties had when they executed the document. The adequacy of consideration, and the time given to the vendor to make a repurchase, have important bearings to the truth of the intention of the parties. Now in the present case on referring to the document (Exhibit A) it will be seen that:— (1) The deed was described as a "sale deed" (2) that it was expressed in clear words to the effect that as the vendors had said that they wanted to sell the house for K 3,000 and as the vendees had agreed to buy it for K 3,000 the vendees had bought the house outright; (3) that the vendors having received K 3,000 the property was conveyed outright to the vendees; (4) that when the vendors receive a grant from the Government in respect of the house site they would hand over this grant to the vendees. *Note*: The house site being a Government land the vendors had applied for a grant in respect of this land; (5) that on the opening of the Registration Office, (Registration Office had not yet been opened at the time of the execution of the document) the vendors would be prepared to get the deed registered; and (6) that the time given to the vendors to repurchase the property was only a short period of one year. From these, there cannot be any doubt

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that the parties intended the transaction to be an outright sale with a condition to repurchase and not a mortgage by conditional sale. The learned District Judge was therefore not correct in holding that the transaction as embodied in the document (Exhibit A) was a mortgage by conditional and not an outright sale with a condition to repurchase simply because the condition was embodied in one document only and without taking into consideration the intention of the parties in executing the document.

For the reasons stated the appeal is allowed.

The judgment and decree of the District Court of Mergui are set aside and the judgment and decree of the Court of the Subdivisional Judge, Mergui are restored with costs throughout.

APPELLATE CIVIL.

Before U Po On, J.

MAUNG KYINE (APPELLANT)

v.

U BA ON AND ANOTHER (RESPONDENTS).*

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July 24.

Civil Procedure Code—S. 60 (1) (b)—Artisan—Definition—Whether hair-dresser an artisan.

An artisan is one who practises an industrial art; mechanic; handicraftsman; artificer; one who cultivates an art; an artist.

A hair dresser is not an artisan.

Tulsiram Dewaji Kunbi v. *Paikan Bapu*, A.I.R. (1941) Nag. 132, referred to.

Thakin Chit for the appellant.

Tun Lwin for the respondents.

U PO ON, J.—This appeal raises a novel point.

In execution of their decree U Ba On and Daw Htway attached some chairs, tables, mirrors and cabinets of their judgment-debtor, Maung Kyine, a hair-dresser; and the judgment-debtor objected that his properties were exempt under section 60 (1) (*b*) of the Code of Civil Procedure as the "tools of artisan".

The lower Court was of opinion that the properties under attachment were not the tools of an artisan within the meaning of section 60 (1) (*b*) of the Civil Procedure Code even if the hair-dresser could be taken as "artisan".

An artisan is defined in the New Standard Dictionary of the English Language as "one who practises an industrial art; mechanic; handicrafts-man; artificer;" and also as "one who cultivates an

* Civil Misc. Appeal No. 49 of 1957, against the order of the City Civil Court of Rangoon in Civil Regular Suit No. 1379 of 1957.

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art; an artist". A hair-dresser is obviously neither a mechanic nor a handicraftsman nor an artificer. He cannot be said to be employed in any industrial art. The only question is whether he can be said to cultivate an art. Several illustrations are given in some of the English Dictionaries to show what an art is. But nowhere is the cutting of hair or shaving and trimming of beards included as one of the arts. Whether a modern hair-dresser who works on the heads of fashionable ladies can be considered an artist may perhaps be open to question. It is possible that the skill required by him places him in a higher category than the ordinary hair-dresser. In *Tulsiram Dewaji Kunbi* v. *Paikan Bapu* (1), it was held that a "village barber" was not an artisan. It may be that Paikan Bapu was a "barber" of "remote village". However, as he was a "barber" of the modern age, there cannot be any difference between him and the present appellant who is simply a hair-cutter and not a ladies hair-dresser.

The result is that the appeal fails and it is dismissed with costs.

(1) A.I.R. (1941) Nag. 132.

APPELLATE CIVIL.

Before U Thaung Sein, J.

MAUNG KYWE AND THREE OTHERS (APPELLANTS)

v.

MA ASHABI (RESPONDENT). *

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Aug. 8.

State land—Dispute in respect of—Jurisdiction of Civil Courts—Upper Burma Land and Revenue Regulation—Ss. 25, 53 (1), 53 (2) (ii).

Where in an appeal from the order of the District Court confirming the decree of the Township Court directing the ejectment of the appellants from a plot of State land for which the respondent had obtained a licence, it was contended that the land in suit being State land the Civil Courts have no jurisdiction to entertain the suit.

Held: That the Township Court was competent to entertain the suit.

U Thu Daw v. *U Myo Nyun*, (1942) R.L.R. 6, followed.

The Burma Oil Co., Ltd. v. *Baijnath Singh and one*, (1917-20) 3 U.B.R. 212; *Arjun Singh* v. *Kishen Singh*, (1938) R.L.R. 569; *In re Maung Naw* v. *Ma Shwe Hmut and Maung Pein*, (1915-16) 8 L.B.R. 227, referred to.

Mya Sein for the appellants.

Saw Hla Pru for the respondent.

U THAUNG SEIN, J.—The respondent Ma Ashabi sued the four appellants in the Township Court of Shwebo for the ejectment of the latter from a certain plot of State land for which she had obtained a licence from the Collector of Shwebo District. The main defence set up by the appellants was that they had been permitted by the respondent to remain in occupation of the plot till such time as the licence was ripe for renewal by the Collector. The learned Township Judge did not accept the contention and decreed the suit in the respondent's favour. Two out of the four

* Civil 2nd Appeal No. 11 of 1958 (Mandalay) against the judgment and decree of the District Judge, Shwebo, in Civil Appeal No. 10 of 1957, dated the 18th February 1958.

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U THAUNG SEIN, J.

appellants, *viz.*, Maung Kywe and Maung Kan appealed against that decree to the District Court, Shwebo but without result. The learned District Judge has held that the appellants failed to prove that there was any agreement by the respondent that they should remain on the land till the licence was ripe for renewal. It was also held that the appeal was bound to fail as only two out of the original four defendants had come up on appeal against the decree of the trial Court. The four defendants in question have now lodged the present second appeal and the main ground urged is that as the land in suit is admittedly State land, the Civil Courts have no jurisdiction to entertain a suit for ejectment and in support of this view reliance is placed on the ruling in *Arjan Singh* v. *Kishen Singh* (1) where Mackney, J. laid down as follows:

> "S. 25 of the Upper Burma Land and Revenue Regulation confers certain powers on the officers of the State and provides that occupiers of State Land may not be ejected from such land save in certain circumstances (non-payment of revenue or occupation without permission from the Collector) and by officers so empowered to act in those circumstances. The powers of these officers do not devolve on a lessee of State land, and s. 53 (1) of the Regulation debars a civil Court from exercising these powers.
>
> A civil Court would have jurisdiction if the person sought to be ejected was put into possession of the land by the lessee from Government."

On the strength of this ruling the respondents' suit would have to be dismissed on the ground that the Civil Courts have no jurisdiction to entertain a suit of the present nature. But there is also a Bench ruling in *U Thu Daw* v. *U Myo Nyun* (2) where it has been held that "S. 53 (2) (ii) of the Upper Burma

(1) (1938) R.L.R. 569. (2) (1942) R.L.R. 6.

Land and Revenue Regulation does not bar the jurisdiction of the civil Courts in respect of disputes between private persons regarding the possession of State land, or rents, profits or produce thereof". In that case, two earlier rulings, one from Upper Burma and one from Lower Burma were referred to, *viz.*, *The Burma Oil Co., Ltd.* v. *Baijnath Singh and one* (1) and *In re Maung Naw* v. *Ma Shwe Hmut and Maung Pein* (2) and Dunkley, J. remarked that "it has been settled law that Civil Courts have jurisdiction in disputes between private individuals regarding State land in Upper Burma or waste land in Lower Burma, and very many cases have been decided by the Civil Courts in accordance with the law as laid down in these two cases". He went on to point out further that it is only in respect of claims against the State that the jurisdiction of the Civil Courts was barred by section 53 (2) (ii) of the Upper Burma Land and Revenue Regulation. As far as I can see the attention of the Bench was not drawn to the ruling by Mackney, J. in *Arjan Singh* v. *Kishen Singh* (3). Then again, Mackney, J. himself was apparently unaware of the earlier rulings in *The Burma Oil Co., Ltd.* v. *Baijnath Singh and one* (1) and *In re Maung Naw* v. *Ma Shwe Hmut and Maung Pein* (2). Be that as it may, I have before me a ruling by a single Judge which is in conflict with that of a Bench and needless to say I am bound by the latter ruling. Mackney, J.'s judgment has not been overruled by the Bench but in effect it has been superseded by the latter ruling. I must hold therefore that the Township Court of Shwebo was competent to entertain the suit which has given rise to the present appeal.

(1) (1917—20) 3 U.B.R. 212. (2) (1915-16) 8 L.B.R. 227.
(3) (1938) R.L.R. 569.

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U THAUNG SEIN, J.

Coming to the facts, there is no dispute that the respondent is the holder of a licence from the Collector in respect of the suit land while the appellants have no right or title to the land. Hence, the respondent was bound to succeed in her suit and the learned Township Judge was correct in granting a decree for ejectment as prayed for. Accordingly, this appeal fails and is dismissed with costs.

APPELLATE CRIMINAL.

Before U Po On, J.

H.C. 1958

July 15.

MAUNG SEIN THEIN (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Criminal Procedure Code—Ss. 263 and 264—Requisites of a Judgment in a summary trial—Omission of trial Magistrate to record reasons—Whether vitiates conviction.

Held: A judgment in a summary trial, must, in accordance with clause (*h*) of s. 263, Criminal Procedure Code, set out a brief statement of the reasons for the conviction, which includes the findings of facts upon which the conviction is based.

Me Da Li v. *The Crown*, 1 L.B.R. 208; and *Vadivaloo Swamy* v. *The Crown*, 1 L.B.R. 95, followed.

In appealable cases the Magistrate must record, before passing sentence, a judgment embodying the substance of the evidence in addition to the particulars required by s. 263, Criminal Procedure Code.

"The substance of the evidence", is a matter distinct from the facts which may be considered as proved by evidence. It means such evidence as is sufficient to justify the order made and to enable the Appellate Court to perform its function on appeal.

Po Ka v. *King-Emperor*, 4. L.B.R. p. 338, followed.

The statement of reasons for a conviction which the Magistrate is bound to record under clause (*h*) of s. 263 of the Criminal Procedure Code should present a clear statement of the facts constituting the offence and should show that each of the ingredients for a conviction has been considered and held proved by the Magistrate.

The omission of the trial Magistrate to record reasons vitiates the conviction. A judgment in which no reason is recorded for conviction must be clearly set aside.

Maasodd Alan and others v. *Emperor*, 57. I.C. 672, referred to.

Ba Shun for the appellant.

Hla Thin (Government Advocate) for the respondent.

U PO ON, J.—Maung Sein Thein, the appellant, is convicted under section 23 (*l*) of the General Sales

* Criminal Appeal No. 36 of 1958. Appeal from the order of U Nyunt, 5th Additional Magistrate of Rangoon, dated the 1st day of November 1957 passed in Criminal Regular Trial No. 112 of 1954.

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U PO ON, J.

Tax Act, 1949 and sentenced to pay a fine of K 40 or in default to suffer one month's rigorous imprisonment by the 5th Additional Magistrate, Rangoon. He is further directed to pay K 5,673·38 pyas being the sale tax due by the Favourite Commercial House.

Aggrieved by conviction and sentence he has preferred this appeal.

One of the grounds of appeal is that the trial is void, as the learned Magistrate failed to observe the procedure prescribed for trial of cases in summary manner. The appellant relies on clause (*h*) of section 263, Criminal Procedure Code, which runs as:

"263. In cases where no appeal lies, the Magistrate or Bench of Magistrates need not record the evidence of the witnesses or frame a formal charge; but he or they shall enter in such form as the Governor may direct the following particulars:—

* * * *

(*h*) the finding, and in the case of a conviction a brief statement of the reasons therefor."

So, judgment in a summary trial must, in accordance with clause (*h*) of section 263, Criminal Procedure Code, set out a brief statement of the reasons for the conviction, which include the findings of facts upon which the conviction is based.

In *Me Da Li* v. *The Crown* (1) it was held as:

"The record of a summary trial, even though there lies no appeal, should show in cases of conviction that there were facts proved sufficient to constitute an offence."

[See also *Vadivaloo Swamy* (*Applicant*) v. *Crown* (*Respondent*) (2)].

Again, section 264, Criminal Procedure Code, says:

"In every case tried summarily by a Magistrate or Bench in which an appeal lies, such Magistrate or Bench

(1) 1 L B.R. 208. (2) 1 L.B.R. 95.

shall, before passing sentence, record a judgment embodying the substance of the evidence and also the particulars mentioned in section 263."

So, in appealable cases the Magistrate must record, before passing sentence, a judgment embodying the substance of the evidence in addition to the particulars required by section 263, Criminal Procedure Code. "The substance of the evidence" is a matter distinct from the facts which may be considered as proved by the evidence. It means such evidence as is sufficient to justify the order made and to enable the Appellate Court to perform its functions in appeal. For otherwise, the prisoner's right of appeal might be defeated in consequence of an insufficient and imperfect statement of the evidence. [See also *Po Ka* v. *King-Emperor* (1)]. Furthermore, it has been repeatedly held that the statement of reasons for a conviction which the Magistrate is bound to record under clause (*h*) of section 263 of the Criminal Procedure Code should present a clear statement of the facts constituting the offence and should show that each of the ingredients for a conviction has been considered and held proved by the Magistrate.

Now, the trial Magistrate simply recorded in his judgment as that the six accused persons were found to be partners of the Favourite Commercial House. No reason whatsoever was recorded why the appellant, Maung Sein Thein, was solely and personally liable for the Favourite Commercial House, though the sanction was given by the Assistant Commissioner of Commercial Taxes, Burma, to prosecute the Favourite Commercial House and though the said Favourite Commercial House was represented by six partners who were the accused in the case. In *Vadivaloo Swamy* v. *Crown* (2) the applicant was

(1) 4 L.B.R. 338.

(2) 1 L.B.R. 95.

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convicted by the District Magistrate, Rangoon, of an offence punishable under section 477, Penal Code, and was sentenced to one month's rigorous imprisonment. The trial was a summary one. In the space left in the prescribed form for the finding, and in the case of a conviction, a brief statement of the reasons therefor, the following is recorded:

> "He has been warned twice to clear off the land by Magistrates and is most obstinate. He refuses to go in spite of warnings by Magistrates and police. I must therefore sentence him to gaol. Any further warnings are useless."

It was held that this was not a judgment in accordance with law.

I must, therefore, hold that the omission of the trial Magistrate to record reasons vitiates the conviction. My view is fortified by the ruling in *Maasodd Alan and others* v. *Emperor* (1) wherein it was held that where in a summary trial a brief statement of the reasons is not recorded as required by clause (*h*) of section 263, Criminal Procedure Code, the conviction is illegal and is liable to be set aside. It is obvious that a judgment in which no reason is recorded for conviction must be clearly set aside.

In the circumstances I need not go into the other grounds of appeal. Besides, the Government Advocate says that as the trial in this case is void for the Magistrate's failure to observe the procedure prescribed by the Criminal Procedure Code, the Government is going to file a fresh case against the accused persons in respect of the same offence.

The result is that I set aside the conviction and sentence imposed on the accused, Maung Sein Thein. Fine to be refunded.

(1) 57 I.C. 672.

APPELLATE CIVIL.

Before U San Maung and U Ba Thoung, JJ.

MESSRS. UNITED COMMERCIAL COMPANY (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

H.C. 1958

July 27.

Essential Supplies and Services Act, 1947—S. 5 (3)—Offends s. 23 (4) of the Constitution of the Union of Burma—Ultra vires *of the legislature.*

Sub-s. 3 of s. 5 of the Essential Supplies and Services Act of 1947 in so far as it contravenes the provision of sub-s. 4 of s. 23 of the Constitution will be *ultra vires* of the legislature.

Sudhindra Nath Datta v. *Sailendra Nath Mitra*, A.I.R. (39) (1952) Cal. 65; *The State of Bombay* v. *Heman Saullal Alreja*, A.I.R. 39 (1952) Bom. 16, referred to.

J. R. Chowdhury for the appellant.

Ba Kyine (Government Advocate) for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 79 of 1953 of the Original Side of this Court the plaintiffs, United Commercial Company who are the appellants in the present appeal sued the defendant-respondent, Government of the Union of Burma, for the recovery of a sum of K 1,82,328 as the balance price due and interest thereon in respect of 200 Chevrolet motor truck engines which had been requisitioned by the Government under section 5 of the Essential Supplies and Services Act, 1947. The plaintiffs' case was that between July and August 1948, the Ordnance Directorate of the War Office removed from their godown at No. 178, Sparks Street, 200 cases of brand new and complete

*Civil 1st Appeal No. 82 of 1955 against the decree of the Original Side, High Court of Rangoon in Civil Regular Suit No. 79 of 1955.

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U SAN MAUNG, J.

Chevrolet motor truck engines, that on the 10th of June 1949, nearly a year later, the defendant issued an order purporting to be under section 5 of the Essential Supplies and Services Act, 1947, requisitioning the said 200 motor truck engines and that when the plaintiffs, in February 1950, claimed payment for the engines at the rate of K 1,000 each they were given a sum of K 62,000 in settlement of the entire claim. The letter sanctioning this payment was dated the 21st August 1951, and the plaintiffs with much reluctance finally accepted this sum without prejudice to any further claim that they might make in respect of the said requisition. It was the plaintiffs' case that as the engines were new and complete they were worth at least K 2,00,000 in all and that after making allowance for the payment of K 62,000 they were entitled to a sum of K 1,82,328 which included interest at 6 per cent per mensem till the date of the suit.

The defendant by its written statement admitted that 200 engines had been requisitioned as alleged by the plaintiffs but denied that the plaintiffs' claim for K 2,00,000 calculated at the rate of K 1,000 per engine was fair and reasonable. It also contended that the plaintiffs had accepted the sum of K 62,000 sanctioned by the defendant on the 21st August 1951, in full settlement of their claim for compensation, and that this sum represented a fair and reasonable compensation as calculated in the schedule annexed to the written statement.

On the pleadings the learned trial Judge framed three issues as follows :

1. Did the sum of K 62,000 paid to the plaintiffs by the defendant for the two hundred engines as compensation represent fair and reasonable value of the said

engines as alleged by the defendant in paragraph 4 of the written statement ?

2. Was the said sum of K 62,000 accepted by the plaintiffs in full settlement of the amount of compensation due to them as alleged in paragraph 3 of the written statement ?
3. Are the plaintiffs entitled to the compensation now claimed in suit ?
4. What relief, if any, are the plaintiffs entitled to ?

After examining the witnesses cited by both the parties, the learned trial Judge came to the conclusion that the sum of K 62,000 paid to the plaintiffs by the defendant represented a fair and reasonable value for the 200 engines seized by the defendant and that therefore the plaintiffs were not entitled to any further compensation. The learned trial Judge, however, did not touch upon the question whether or not the sum of K 62,000 was accepted by the plaintiffs as in full settlement of the compensation due to them. On the other hand, the learned trial Judge went further and said that in view of the fact that the requisition was under section 5 of the Essential Supplies and Services Act, 1947, the plaintiffs were entitled under section 5, sub-section (*3*) thereof to only such compensation as determined by the President and that therefore the quantum of the amount of compensation was not justifiable in a court of law. He also held that the sum awarded to the plaintiffs was not so grossly inadequate or inequitable as to amount to a non-exercise of the discretion on the part of the requisitioning authority. In the result, the plaintiffs' suit was dismissed with costs. Hence, this appeal.

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U SAN MAUNG, J.

In this appeal, one of the points raised on behalf of the plaintiffs is that sub-section (*3*) of section 5 of the Essential Supplies and Services Act, 1947, is *ultra vires* of the legislature as it offends the provision of section 23 (4) of the Constitution of the Union of Burma. This point although not raised in the pleadings is allowed to be taken as it is a point of law arising from facts which are beyond controversy. Now, sub-section (*3*) of section 5 of the Essential Supplies and Services Act, 1947, before its amendment by Act No. XXI of 1953, reads:

"Whenever in pursuance of sub-section (*1*) of section (2), the President requisitions or acquires any animal, product or thing, the owner thereof shall be paid such compensation as the President may determine."

In our opinion, it clearly offends the provision of sub-section (4) of section 23 of the Constitution of the Union of Burma which runs as follows:

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

Therefore, whereas the Constitution requires that the very law which allows limitation or expropriation of private property shall prescribe in which cases and to what extent the owner shall be compensated, sub-section (*3*) of section 5 of the Essential Supplies and Services Act, 1947, leaves it to the President to determine such quantum of compensation which should be paid in each individual case.

Now, sub-section (1) of section 226 of the Constitution enacts that "Subject to this Constitution and *to the extent to which they cre not inconsistent therewith*, the existing laws shall continue to be in force until the same or any of them shall have been repealed or amended by a competent

legislature or other competent authority." Undoubtedly, the Essential Supplies and Services Act of 1947 is an existing law as defined in section 222 (1) of the Constitution. However, on the date on which the Constitution came into force only such portion as was not inconsistent with the Constitution would continue to be in force. Therefore, sub-section (*3*) of section 5 of the Act in so far as it contravenes the provision of sub-section (4) of section 23 of the Constitution will be *ultra vires* of the legislature.

In this connection, it is interesting to compare the corresponding provisions in the Constitution of India. Article 31 of that Constitution in so far as is relevant for the purpose in hand reads:

"(1) No person shall be deprived of his property save by authority of law.

(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

* * * *

(5) Nothing in clause (2) shall affect—

(*a*) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or

(*b*) the provisions of any law which the State may hereafter make—

(i) for the purpose of imposing or levying any tax or penalty, or

(ii) for the promotion of public health or the prevention of danger to life or property, or

(iii) in pursuance of any agreement entered into between the Government of the Dominion

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of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any Court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of section 299 of the Government of India Act, 1935."

Thus, it is apparent that the Indian Constitution requires that when property is requisitioned, the law authorising the same must provide for compensation by either fixing the amount or specifying the principles on which, and the manner in which the compensation is to be determined and given. As regards the existing law there is a provision by which such laws passed more than 18 months before the commencement of the Constitution are *ipso facto* saved from being questioned on the ground of their contravention of clause (2) of Article 31 and, as regards acts passed within 18 months before the coming into force of the Constitution, they will be saved from being questioned if they have been submitted to the President and have been certified by him.

In this connection see *Sudhindra Nath Datta* v. *Sailendra Nath Mitra* (1) and *the State of Bombay* v. *Heman Santlal Alreja* (2).

There are no provisions similar to clauses (5) and (6) of Article 31 of the Indian Constitution in section 226 of the Constitution of the Union of Burma.

(1) A.I.R. 39 (1952) Cal. 65. (2) A.I.R. 39 (1952) Bom. 16.

The learned trial Judge has not touched upon the question whether or not the sum of K 62,000 was voluntarily accepted by the plaintiffs in full settlement of the amount of compensation due to them. However, it is clear from the evidence of Hiralal (PW 1) who was the then agent of the plaintiffs' company that after he received the payment order for K 62,000 he tried to negotiate with the Permanent Secretary of the War Office for more payment and that he ultimately accepted this sum only under protest. This fact is also made abundantly clear from the letter Exhibit C, dated the 14th February 1952, which was with reference to the letter Exhibit B, dated the 21st August 1951, sanctioning the payment of K 62,000. In these circumstances, we have no doubt whatsoever that the 2nd issue should be answered in the negative.

Regarding the amount of compensation to be given to the plaintiffs it is clear that since sub-section (*3*) of section 5 of the Essential Supplies and Services Act, 1947 is *ultra vires*, this issue is justifiable in a court of law. In this connection it is interesting to note that the War Office had come to the conclusion that the cost price of each of the serviceable engines purchased by the plaintiffs from Messrs. C. Moe and Company was Rs. 242-8-0 by a process which appears to us to be wholly arbitrary. What the War Office said was this.

"(1) Let x be the cost of serviceable engine and $\frac{x}{2}$ be the cost of unserviceable engine and $\frac{x}{4}$ be the cost of serviceable motor-cycle engine and unserviceable motor-cycle engines.

$$\text{Then, } 200x + \frac{509}{2x} + \frac{74}{4x} = \text{Rs. } 1,14,762.$$

The figures 200, 509 and 74 being respectively serviceable engines, unserviceable engines and motor-cycle engines

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purchased by the plaintiffs and Rs. 1,14,762 being the total sum paid.

The result was Rs. 242-8-0.

It has not been explained how the War Office came to the conclusion that the cost of a serviceable engine was double the cost of an unserviceable engine and four times the cost of a motor-cycle engine whether serviceable or unserviceable.

In arriving at what the War Office considered to be a fair compensation 28 per cent was added to the cost in order to cover profit, interest on outlay and incidental charges. We are unable to accept that compensation which had been worked out on the above principle is either fair or equitable.

[Their Lordships then proceeded to discuss the evidence.]

Allowing a profit of 25 per cent on each engine we would consider that compensation at the rate of K 500 per engine for the 200 serviceable engines seized by the War Office would be fair and equitable.

In the result, the appeal succeeds in part. The judgment and decree of the trial Court dismissing the plaintiff-appellants' suit will be set aside and instead, there will be a decree for K 1,00,000 less K 62,000 = K 38,000 in favour of the plaintiffs.

As regards costs, we consider that as neither the plaintiffs nor the defendant are fully successful each party should bear its own costs throughout.

U BA THOUNG, J.—I agree.

APPELLATE CIVIL.

Before U Chan Tun Aung and U San Maung, JJ.

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MUN HAIN LONE BROTHERS COMPANY, LTD. (APPELLANTS)

v.

THE BOMBAY BURMAH TRADING CORPORATION LTD. (RESPONDENT).*

Urban Rent Control Act—S. 14 (1)—Discretion available under—When exercisable.

Where the Court, in exercise of its discretion available under s. 14 (*1*) of the Urban Rent Control Act, has not made any order as it considers fit or reasonable with reference to a compromise decree in default of which one of the parties invoked the said provision, the Court is fully competent to act thereunder and modify the decree, even if it is a compromise decree.

But where the party who had invoked and obtained the relief under s. 14 of the Urban Rent Control Act failed to carry out one of the conditions under which the relief was granted he cannot again invoke the provisions of s. 14 (*1*) of the Urban Rent Control Act for fresh exercise of the discretion. The second application would amount to reagitating what had already been decided by the Court.

K. S. Abdul Kader v. *Sri Kali Temple Trust*, (1949) B.L.R. (H.C.) 175, followed.

Chandrabhan Singh v. *Kishore Chand Minhas*, (1955) B.L.R. H.C.) 14; *K. A. Elias* v. *U Ba Hin*, (1954) B.L.R. 41, distinguished.

Po Aye for the appellants.

C. C. Khoo and *Than Aung*, for Messrs. Beecheno and Horrocks, for the respondent.

U CHAN TUN AUNG, C.J.—This appeal under section 15 of the Urban Rent Control Act is from the order of the Chief Judge of the Rangoon City Civil Court refusing stay of execution of a decree

* Civil Misc. Appeal No. 15 of 1956 against the decree of the Chief Judge, City Civil Court of Rangoon in Civil Regular Suit No. 172 of 1955, dated the 19th March 1956.

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for ejectment passed against the appellants for their failure to deposit, on the stipulated date, the instalments of arrears of rent in respect of the premises, known as No. 25, Ahlone Strand Road, Rangoon. It appears that the appellants are the lessees of the said premises on which they had erected a saw-mill, and the respondent Company, a lessor thereof. The suit for ejectment and possession was instituted by the respondent Company on the 4th February, 1955, and the appellants by their written statement, dated the 22nd April, 1955, *inter alia* consented to the passing of a decree as prayed for by the respondent Company, and in paragraph 3 thereof they sought " for relief as provided in section 14 of the Urban Rent Control Act ". It also appears that while invoking the aid of section 14 of the Urban Rent Control Act, the appellants requested the Court to pass an order to allow them to pay at once K 3,000·00, and the balance arrears of rent, at K 750·00 per mensem and further that on full payment of the total amount of arrears of rent due, which according to the respondent Company's claim amounted to K 17,250·00, the decree for ejectment to be rescinded. This proposal was resisted by the respondent who in its written objection asked for an unconditional decree for ejectment from the suit land. However, the learned Chief Judge of the City Civil Court by his order, dated 22nd June 1955, now under appeal, directed the appellants to pay K 1,500 monthly towards the arrears of rent due by them, commencing from the 22nd July 1955 and that on their full payment of the arrears of rent due up to the date of the decree, the decree for ejectment to be rescinded. In compliance with that order the appellants paid in the monthly instalment of K 1,500 up to December 1955; but on the next due date, *i.e.*,

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22nd January 1956, the appellants could not pay in time. They, however, tendered the amount due to the respondent's manager only on the 26th January 1956 and the respondent's manager refused payment. The appellants then had the sum deposited in Court on the 27th January 1956. Thereafter, they filed an application asking the Court to allow them to continue the instalments in terms of the original decree. This was resisted strenuously by the respondent Company. The learned Chief Judge of the City Civil Court accepted the objection raised by the respondent holding that on the authority of *K. S. Abdul Kader* v. *Sri Kali Temple Trust* (1) which is a Bench decision of the High Court (U Thein Maung, C.J. and U San Maung, J.) the appellants were not entitled *to again* apply for stay of execution or for variation of the decree for ejectment under section 14 (*1*) of the Urban Rent Control Act. It seems quite obvious to us from the very order of the learned Chief Judge that he had rejected the appellants' application on the ground that he was incompetent to consider again an application of the appellants under section 14 (*1*) of the Urban Rent Control Act, inasmuch as he had already considered their previous application as set out in paragraph 3 of their written statement.

It has now been urged upon us that the learned Chief Judge's order was wrong in that the original decree for ejectment in default of the terms laid down in his order was made on the basis of a compromise petition and not in exercise of the discretion under the provisions of section 14 (*1*) of the Urban Rent Control Act and that therefore he had ample authority, as was laid down in *Chandrabhan Singh* v. *Kishore Chand Minhas* (2) and *K. A. Elias*

(1) (1949) B.L.R. 175. (2) (1955) B.L.R. 14.

v. *U Ba Hin* (1), to consider the subsequent application of the appellants, dated the 20th April 1956, as being one moved under section 14 (*1*) of the Urban Rent Control Act. Further, it was urged that the facts in *Sri Kali Temple Trust* case were quite different from the present case and that the learned Judge should have considered the second application and passed an order as he deemed fit acting under section 14 (*1*) of the Urban Rent Control Act. We regret we cannot accept the submission made. It is abundantly clear that the facts and circumstances obtaining in the above two cases *Chandrabhan Singh* v. *Kishore Chand Minhas* (2) and *K. A. Elias* v. *U Ba Hin* (1) were entirely different from those available in the present case. In our view, the learned Chief Judge of the City Civil Court was quite correct in applying the decision in *Sri Kali Temple Trust case* (3) where the facts available were almost identical to those in the present case. In the two former cases the decrees for ejectment were to be rescinded upon payment of arrears of rent under *a definite compromise* entered into between the parties, and the Court merely gave effect to the compromise decrees. Such compromises were recorded either by filing a petition, or by consent of both the parties before the Court. It cannot therefore be said, in those circumstances, that the Court had at all acted under section 14 (*1*) of the Urban Rent Control Act. The Court was fully competent to deal with any application under section 14 (*1*) of the Act and it had the fullest discretion to pass such order as it thought fit and reasonable. In other words, where the Court, in exercise of its discretion available under section 14 (*1*) of the Urban

(1) (1954) B.L.R. 41. (2) (1955) B.L.R. 14.
(3) (1949) B.L.R. 175.

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Rent Control Act, has not made any order as it considers fit or reasonable with reference to a compromise decree in default of which one of the parties invoked the said provisions, the Court is fully competent to act thereunder and modify the decree, even if it is a compromise decree. In the present case under appeal the appellants no doubt did not contest the main suit, but they definitely, as could be seen from certain extracts of their written statement noted above, not only submitted to a decree for ejectment, but also invoked the relief under section 14 of the Urban Rent Control Act, and in those circumstances the learned Chief Judge passed an order directing them to pay the arrears of rent by instalments, upon full payment of which, the decree for ejectment was to be rescinded. The appellants then defaulted and they again tried to invoke section 14 (*1*) of the Urban Rent Control Act. That is exactly what is disallowed in *K. S. Abdul Kader* v. *Sri Kali Temple Trust* (1). We do not see how a second application lie which would, in fact, amount to reagitating what had been already decided by the Court; and we would respectfully quote with approval the following observations of U Thein Maung, C.J., who delivered the judgment in the aforesaid case:—

"The only question for consideration is whether a tenant who has obtained an order for stay of execution of a decree for his ejectment on a certain condition, can, after he has broken that condition, apply again for stay of execution under section 14 (*1*) of the Act. We are very clearly of the opinion that he cannot. Execution, which was ordered to be stayed on a certain condition, must be allowed to proceed when there is a breach of that condition. The tenant cannot file one application after another and claim a concession upon concession. Otherwise prescription of the condition will be nothing but a farce and the tenant will be able to have execution

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

postponed indefinitely by a series of applications without complying with the conditions prescribed on any of them. *Reductio ad absurdum!*"

The appellants have had the consideration under section 14 (*1*) of the Urban Rent Control Act which was specifically asked for by consenting to a decree, and the learned Chief Judge had, in the exercise of the discretion given thereunder, stayed the execution of the decree for ejectment and allowed them to pay the arrears of rent by monthly instalments; and how can the appellants on their default again invoke the provisions of section 14 (*1*) for fresh exercise of the discretion?

We do not see any merit in this appeal, and it is hereby dismissed with costs. Advocate's fee two gold mohurs.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

Before U Thaung Sein and U Po On, JJ.

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Aug. 28.

N. E. MOHAMED GANI ROWTHER AND THREE OTHERS (APPELLANTS)

v.

AMEENA BI BI (RESPONDENT).*

Civil Procedure Code—O. 21, R. 10—Only holder of decree competent to execute the decree.

Where the Managing Trustee of certain trust property obtained a decree for ejectment of the respondent from the trust property in his personal capacity and died subsequently, and one of the surviving trustees tried to execute the decree.

Held : That under Order 21, Rule 10 of the Civil Procedure Code the decree being granted to the Managing Trustee in his personal capacity, he alone was competent to execute it and that the execution case taken out by one of the surviving trustees of the said trust property to execute that decree was void *ab initio.*

Mahant Singh v. *U Aye and others*, I.L.R. 14 Ran. 336, referred to.

J. R. Chowdhury for the appellants.

Kyaw Htoon for the respondent.

U THAUNG SEIN, J.—This is an appeal by special leave under section 20 of the Union Judiciary Act against the judgment and decree of a single Judge (U San Maung, J.) in Civil Second Appeal No. 20 of 1956 of this Court. The facts involved are simple and undisputed. There is in the town of Syriam a Muslim Durgah which is at present managed by four out of the five original trustees of the property. The four trustees in question are none other than the appellants in this case, *viz.*, N. E. Mohamed Gani

* Civil Special Appeal No. 3 of 1956 against the decree of the High Court of Rangoon in Civil 2nd Appeal No. 20 of 1956, dated the 25th September 1956.

(NOTE.—This case is reported in this issue as its publication in one of the previous issues was overlooked—*Editor.*)

Rowther, A. N. Angaria, Dawood Mader and U Par Tu, while the fifth trustee Abdul Bari Chowdhury died in India on or about April 1944, *i.e.*, during the evacuation period. It appears that there are a number of structures or buildings in the Durgah compound and among these a building which has been described as either a "zayat" or "chilakhana". That "zayat" was occupied by the respondent Ameena Bi Bi and her husband Kabuli Shah (since deceased) in the pre-war period, *i.e.*, prior to 1940, and the trustees sought to eject them by means of a suit in the Township Court of Syriam, *viz.*, Civil Regular Suit No. 21 of 1941. The suit in question was filed by Mr. Abdul Bari Chowdhury who was the managing trustee of the Durgah. A decree was then passed on the 12th December 1941 for the ejectment of the respondent Ameena Bi Bi and her husband and two months later, *i.e.*, on 11th February 1942 execution proceedings were opened against them. But before any effective steps could be taken to eject the respondent and her husband, Japanese Forces invaded Burma and the Courts all over the country were closed down as a result of the British Government's decision to evacuate to India. The closure of the Courts was merely temporary however as the civil Courts were revived during the Japanese regime and a Township Court began to function once again at Syriam. The trustees then decided to seize the opportunity of evicting the respondent and her husband and opened fresh execution proceedings against the latter. But as Mr. Abdul Bari Chowdhury, the decree-holder, had evacuated to India, another trustee, *viz.*, Ko Par Tu (fourth appellant in the appeal) who held a power of attorney from the former filed the application for execution. This led to the opening of Civil Execution Case No. 15 of 1944 in

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the then Township Court of Syriam. To all appearances at the time when he filed the application for execution, Ko Par Tu did not realise that Mr. Abdul Bari Chowdhury had already died in India and that he could no longer act as the agent of the latter. Be that as it may, Civil Execution Case No. 15 of 1944 also proved infructuous as the British Army counter-attacked the Japanese Forces in that year and before long the Japanese Forces were in full retreat. As might be expected, the Courts were closed down and in the confusion which followed all the proceedings of the Township Court of Syriam were either lost or destroyed. Meanwhile, the respondent Ameena Bi Bi and her husband remained in undisturbed occupation of the building in dispute. The trustees were however determined to oust them at all costs but for some unknown reason remained inactive for several years. It was only in 1952 that they decided to take effective steps and instead of executing the decree obtained in Civil Regular Suit No. 21 of 1941, filed a fresh suit for ejectment, *viz.*, Civil Regular Suit No. 12 of 1952. The latter suit was dismissed and the trustees then changed their tactics and applied to the Township Court of Syriam to reconstruct Civil Execution No. 15 of 1944 and to proceed with the execution. After several vicissitudes both in the trial Court and on appeal before the Additional District Court of Hanthawaddy the trustees were able to reconstruct the execution case (Civil Execution No. 15 of 1944). But when an attempt was made to execute the decree, the learned Township Judge held that the execution proceedings were void *ab initio* as Ko Par Tu had no legal authority to act on behalf of his principal Mr. Abdul Bari Chowdhury who was already dead at the time when the application for execution was filed in 1944.

The trustees appealed against this decision to the Additional District Court of Hanthawaddy and met with success as the learned Additional District Judge reversed the order of the Township Court on the ground that even though Mr. Abdul Bari Chowdhury was dead at the time when Ko Par Tu filed the application for execution, the decree could be executed by any of the surviving trustees. In other words, the learned Additional District Judge was of the view that even though Ko Par Tu could not act on behalf of the deceased Mr. Abdul Bari Chowdhury, he was in a position as a trustee to apply for execution of the decree and the application filed in 1944 must be considered as one filed on his own behalf.

The respondent Ameena Bi Bi in turn appealed to the High Court against the order of the learned Additional District Judge. It may be noted that her husband Kabuli Shah died in 1947 and he has thus dropped out of the proceedings. The case then came up before U San Maung, J. who held that as the original decree-holder Mr. Abdul Bari Chowdhury had died before U Par Tu applied for execution in 1944, Civil Execution Case No. 15 of 1944 of the Township Court of Syriam was void *ab initio*. It was also pointed out that even if the surviving trustees could apply afresh for the execution of the decree obtained by Mr. Abdul Bari Chowdhury, their application was "hopelessly time barred". As might be expected, the decree of the learned Additional District Judge was accordingly set aside and the decree of the Township Court of Syriam restored.

On appeal before us it has been urged that U San Maung, J. overlooked the fact that though the decree under consideration was in the name of Mr. Abdul Bari Chowdhury, it was in effect a decree in favour of the Board of Trustees and that the

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surviving trustees were competent to execute it. In this connection our attention was drawn to the provisions of section 76 of the Trusts Act which lay down that where there is a Board of Trustees the death of any trustee does not extinguish the trust and that the trust property passes to the surviving trustee. This section is by no means the solution to the problem before us which is to try and discover the exact nature of the decree obtained by Mr. Abdul Bari Chowdhury. The key to this problem is to be found in the ruling of *Mahanth Singh* v. *U Aye and others* (1) where Braund, J. dealt at some length with the liability of trustees in suits filed by or against them. His exact words are illuminating and we reproduce them below:

"This matter raises in a concrete form a question which I venture to think is the subject of a profound prevailing misconception current in this province and I think it is right, and will be of service to the profession, if I point out wherein, in my view this misconception lies.

There is, in my view, so far as the liability of the contracting parties goes, no difference between a contract to which AB is a party in his capacity as "a trustee" and one to which AB is a party in his personal capacity. In either case the opposite contracting party contracts with AB and with no one else; and, as far as I can see, in the absence of an express or clearly implied term of the contract itself in that behalf, no limitation is to be placed upon AB's personal liability by virtue of his being in fact, and by his being described as, a trustee. In either case he is the contracting person. The only difference is that if he is a trustee he has, or he may have, as between himself and his trust estate, a right of indemnity against the estate if the contract made, or the liability incurred, is one which he has power to make or incur under the terms of the trust instrument under which he is a trustee.

The proposition is to my mind one so elementary that, like other elementary propositions, it is difficult to find

(1) I.L.R. 14 Ran. 336.

authority for it. I think, however, that the point becomes clearer if it is considered what sort of a decree can be passed upon such a contract as I have mentioned. As I understand it, except in the single case to which I will refer in a moment, there is no other decree known to the law except a decree against a person or persons or a corporation. If there is a decree against AB as a contracting party under such a contract as I have mentioned, it must be a decree against AB and I know of no power whatever which could authorise a decree to be passed against AB 'as a trustee' or 'limited to his trust estate.' It would almost seem that it is contended that there can be some form of a decree against 'the trust estate' as opposed to a decree against a person. The single exception which I have mentioned is the one provided for by statute in the case of executors. That is a statutory exception introduced by section 52 of the Code of Civil Procedure which provides for the distinction long known to the English law, drawn in the case of an executor between a judgment against him *de bonis propriis* and *de bonis testatoris.*"

In another place (at page 340) he remarked:

"If a man contracts with a trustee, in my judgment, he contracts with him as an individual and upon no different footing from a contract with any other individual."

That was a case in which the Trustees of the Kyaik-kasan Pagoda were sued by a contractor for the cost of certain works carried out at that pagoda. Braund, J. pointed out that only those Trustees who had signed the contract for the work could be sued as they were personally liable on that contract, though of course they have a right of indemnity against the trust estate.

Applying these principles to the case before us, it is clear that Mr. Abdul Bari Chowdhury, the Managing Trustee, sued for and obtained the decree in his personal capacity. The property involved was trust property but this does not alter the nature of the decree which was granted to Mr. Abdul Bari Chowdhury. Had Mr. Abdul Bari Chowdhury been defeated

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in the suit, it is inconceivable that the decree for costs would have been passed against the trust estate. Needless to say, the costs would have been payable by Mr. Abdul Bari Chowdhury personally but he could insist on the amount being reimbursed to him by the trust estate. In short, the decree under consideration being one granted to Mr. Abdul Bari Chowdhury personally, he alone was competent to excute it *vide* Order XXI, Rule 10 of the Code of Civil Procedure. That Ko Par Tu was incompetent to apply for execution of that decree after the death of Mr. Abdul Bari Chowdhury has not been disputed. Hence, we are in agreement with U San Maung, J. that the so-called Civil Execution Case No. 15 of 1944 of the Township Court of Syriam filed by Ko Par Tu was void *ab initio*. Hence, this appeal must necessarily fail and is dismissed with costs.

U PO ON, J.—I agree.

APPELLATE CIVIL.

Before U Thaung Sein, J.

PHU KYAW WAI (APPELLANT)

v.

AH SEIN AND ANOTHER (RESPONDENTS).*

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July 22.

Civil Procedure Code—O. 1, r. 8.—Representative Suit—Formalities to be complied with—Competency of any member to file suit on behalf of association split into two rival factions.

In a suit filed under Order 1, Rule 8 of the Civil Procedure Code on behalf of an association, notice must be served on all members of the association, whether personally, or if that method is "not reasonably practicable, by public advertisement."

The mere fact that there are two rival factions in the association does not prevent any member of that association from filing a suit on behalf of that association.

Haji Sahib Hameed Labbai v. *S. Mohamad Khather Pil'ai Marakayar*, A.I.R. 1925 (Mad.) 985, referred to.

Hla Nyun, Advocate, for the appellant.

Saw Hla Pru, Advocate, for the respondents.

U THAUNG SEIN, J.—The Phu-Kyaw-Wai Chinese Association of Katha are the owners of a certain site and the building standing thereon in the town of Katha and the first respondent Ah Sein is admittedly the tenant of that association in respect of the premises in question. It appears that Ma Than the deceased wife of the first respondent was also a tenant along with her husband on that land till the date of her death. As the first respondent Ah Sein had fallen into arrears with the rent since the 7th November 1955, one U Law Shi, President

* Civil 2nd Appeal No. 2 of 1958 (Mandalay) appeal against the judgment and decree of the District Judge, Katha, passed in his Civil Appeal No. 7 of 1956.

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of the Association filed Civil Regular Suit No. 4 of 1956 in the Subdivisional Court of Katha for the ejectment of the former from the premises. With regard to the arrears of rent the Association prayed for leave to file a fresh suit for the amount due after the Rent Controller had fixed the standard rent for the premises. In the plaint, U Law Shi made it quite plain that he was suing for and on behalf of the Association and not in his personal capacity.

The first respondent contested the suit mainly on the ground that U Law Shi was not legally competent to sue on behalf of the Association which was said to have been split into two rival factions led by U Law Shi and U Ah Toon respectively. The learned Subdivisional Judge accepted the contention and after remarking that the requirements of Order 1, Rule 8 of the Civil Procedure Code had not been complied with dismissed the suit. An appeal was filed against that decree in the District Court, Katha but without success as the learned District Judge agreed with the trial Court that "U Law Shi (*alias*) Shi Pein Shan has no *locus standi* to file the suit." Hence the present second appeal to the High Court.

Oddly enough, according to the diary entry dated the 2nd June 1956 recorded in the trial proceedings the learned Subdivisional Judge had in fact granted the necessary permission under Order 1, Rule 8 of the Civil Procedure Code to U Law Shi to file the suit on behalf of the Association and for better certainty I reproduce the entry below:

၂-၆-၅၆ ခေါ်တရားလိုနှင့် ရှေနေဦးအုံးဖေလာသည်။
တရားခံများအတွက် ရှေနေ ဦးခင်မောင်လာ၍ ကန့်ကွက်လွှာတင်သည်။

ဖူးကျော်ဝေး အသင်းလူကြီး ရောဘတ်၊ မန်အိသျန်၊ မန်ကြည်ကွမ်း၊ အငွန်းနှင့်ဦးစိန်ချမ်းတို့လာ၍ ယခုအမှုကို ဦးလောရှိက တရားလိုပြုလုပ်၍ စွဲဆိုခြင်းကို သဘောတူကြောင်း လျှောက်လွှာတင်ကြသည်။

သို့အတွက် တရားမကျင့်ထုံးအမိန့်နှိပါတိ ၁၊ နည်းဥပဒေ ဂ အရ ဤအမှုကို ဦးလောရှိအား ဖူးကျော်ဝေး အသင်းကိုယ်စား၊ တရားလိုပြုလုပ်၍ စွဲဆိုခွင့်ပြုလိုက်သည်။

ဦးစွာကောက်ချက်များ ထုတ်ပေးသည်။

အမှုကိုဆိုင်ရန်ချိန်း .... ၂ ၆-၆-၅၆။

သက်သေစာရင်းများ ၃ ရက်အတွင်း တင်ရန်ပြောကြားပြီး။

(ပုံ) ကျော်သိန်း၊
နယ်ပိုင်တရားမတရားသူကြီး၊
ကသာမြို့။

Be that as it may, the learned Subdivisional Judge has not complied fully with the requirements of Order 1, Rule 8 as no notice has been served on all the members of the above association either personally or if that method is "not reasonably practicable by public advertisement." The fact that there are at present two rival factions does not prevent any member of that association from filing a suit on behalf of the association and there is direct authority for this view in *Haji Sahib Hameed Labbai* v. *S. Mohamad Khather Pillai Marakayar* (1) the headnote of which reads:

"The true principle underlying this rule is that the suit should in form be constituted into a representative suit merely to prevent the defendant from being vexed and molested, as he may well be, by similar suits by other persons of the body. For the application of this principle, it is really unnecessary to determine whether or not all the members of the body on whose behalf the suit is sought to be instituted are of the same opinion. The order only means this: that all the members of the body on whose behalf the suit would, on the

(1) (1925) A.I.R. (Mad.) 985.

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passing of the order, be constituted into a representative suit, would be prevented thereafter from instituting any proceedings on the cause of action alleged in the plaint."

The lower Courts were thus clearly wrong in dismissing the appellant-plaintiff's suit on the ground that he had no *locus standi* to institute it. But as the formalities required by Order 1, Rule 8 of the Civil Procedure Code had not been fully complied with, the suit will have to be remanded to the trial Court for necessary action.

Accordingly, the judgments and decrees of both the lower Courts is hereby set aside and the suit will be remanded to the Subdivisional Court of Katha to enable the appellant-plaintiff to apply for necessary permission to sue on behalf of the Phu Kyaw Wai Chinese Association in accordance with Order 1, Rule 8 of the Civil Procedure Code. The trial Court should then issue notice of the institution of the suit in accordance with these provisions and proceed to dispose of it according to law. Costs shall abide by the final decision in the suit.

APPELLATE CIVIL.

Before U Chan Tun Aung, C.J. and U San Maung, J.

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Aug. 4.

TAW PIN AUN (APPELLANT)

v.

TAW CHENG CHYE AND TWO OTHERS (RESPONDENTS).*

Civil Procedure Code—Ss. 92, 99—O. 1, R. 8—Public charitable trust—Relief claimed—Not under s. 92—Necessity to comply with O. 1, R. 8—Failure to do so—A substantial error or defect not saved by s. 99—Aim and object of O. 1, R. 8.

Even where the relief sought in a suit in respect of a public charitable trust does not come within the ambit of s. 92, Civil Procedure Code, the requirements of Order 1, Rule 8 of the Civil Procedure Code must be complied with in bringing the suit. Non-compliance with the provisions of this rule constitutes a substantial error or defect affecting the merits of the case which cannot be saved by s. 99 of the Civil Procedure Code.

Ka i Hassan and others v. *Sagun Balkrishna and others*, (1900) I L.R. 24 Bom. 171 : *Gulba* v. *Basanta and Kishan Lal*, (1910) I.L.R. 32 All. 284 ; *Maulavi Muhammad Fahimul Huq* v. *Jagat Bally Ghosh*, (1923) I.L.R. 2 Pat. 391, distinguished.

Jawahra v. *Akbar Hussain*, (1885) I.L.R. 7 All. 178, referred to.

The aim and object of Order 1, Rule 8 of the Civil Procedure Code is obvious. In order to avoid needless litigation over the same subject-matter in which numerous persons are interested—such as a Public Trust—all persons interested must be joined as parties.

Kyaw Htoon for the appellant.

O. S. Woon for the respondents Nos. 1 and 2.

Choung Po for the respondent No. 3.

U CHAN TUN AUNG, C.J.—The plaintiff-appellant's suit on the Original Side of this Court (before U Shu Maung, J.) was for a declaration (1) that the 1st respondent Taw Cheng Chye was not

* Civil 1st Appeal No. 39 of 1957, against the decree of the Judge on the Original Side of this Court in Civil Regular Suit No. 10 of 1955, dated the 4th March 1957.

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a trustee of a certain public trust and (2) that the sale of certain trust property made by him purporting to be a trustee thereof in favour of the 2nd respondent, who in turn had sold the said property to the 3rd respondent, was null and void. The plaintiff-appellant is said to be interested in the said Trust known as "Taw Koon Trust", not only in his capacity as a grandson of Taw Koon, the original creator of the Trust, but also as one of the beneficiaries thereunder. The parties are not at all in dispute that the properties against the sale of which the plaintiff-appellant sought to impugn form part of the Trust properties which are mostly houses situated in the business quarter of Rangoon, on the Strand Road and 22nd Street. It also appears to be quite settled that the said "Taw Koon Trust" is a *public trust* within the purview of section 92 of the Civil Procedure Code in view of the decision of the late High Court of Judicature at Rangoon in *Taw Chew Kean and others* v. *Taw Kock Tyon and others* (1) and contention to the contrary will be *nihil ad rem*. This is made plain by the very operative clause of the Trust Deed (Exhibit "ဏ") paragraph 2 of which *inter alia*, sets out:

> "The said premises shall be held by the said Trustees and by their successors for the time being of this Trust, upon trust to receive the rents issues and profits thereof and to apply share and dispose of the same in manner following namely:—*Firstly* to pay thereout all charges, outgoings, taxes and expenses of the repairs payable in respect of the said premises being the subject matter of trust aforesaid. *Secondly* to use and spend the balance of the said income rents issues and profits in and upon the objects following that is to say:—(*a*) The maintenance of Tan Nee the wife of the said Transferor according to her station in life until her death (*b*) the maintenance and education of the following.—Taw Kock

(1) (1939) R.L.R. p. 520.

Tyon son of the said Transferor now a minor of the age of 17 years, Taw Phin Sain, son of Taw Kyon a minor of the age of 17 years, Taw Cha Hoy, son of Taw Seong, a minor of the age of 7 years and Taw Hock San, son of Taw Seong a minor of the age of 3 years, until they all shall attain the age of 21 years respectively (*c*) and the balance in and upon such charitable or religious and pious purposes as the said Transferor shall during his life time direct and after his death as to the Trustees for the time being shall seem fit and proper at their absolute discretion, it being understood that charitable purposes shall include the providing of sustenance or support to such members of the family of the said Transferor as may be in indigent or straitened circumstances."

Thus, the income deriving from the trust properties after meeting taxes, expenses, and repairs of the said premises are first to be applied for the maintenance of the settlor's close family members named therein, and the balance to be applied for charitable, religious and pious purposes including the providing of sustenance or support to such members of the family of the said settlor as may be in indigent or straitened circumstances.

The 1st respondent in contesting the plaintiff-appellant's suit merely contented himself by asserting that he was the sole surviving trustee of Taw Koon Trust and that as such he was fully competent to effect the sale of the trust property in question in favour of the 2nd respondent who maintained that he was a *bonâ fide* purchaser of the same for valuable consideration from the 1st respondent. The 3rd respondent who purchased the said property from the 2nd respondent did not, however, contest the suit relying perhaps, upon the success or otherwise of the 2nd respondent's case. We may also note that the trial of the suit on the Original Side more or less proceeded mainly on the consideration of the issues whether the plaintiff-appellant's suit was

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maintainable in view of section 92 of the Civil Procedure Code and whether the 1st respondent was a trustee having the necessary power under the trust deed to sell the suit property to the 2nd respondent. The plaintiff-appellant himself being aware of the alienation made by the 1st respondent of the trust property in question in a mortgage to secure a sum of K 9,000 borrowed by the 1st respondent from one Mr. L. C. Choh, the learned trial Judge came to the conclusion that in those circumstances the plaintiff-appellant did not honestly desire to have the trust properties administered; that he himself being one of the defaulters, the proper course, in respect of the trust which is admittedly a public trust, should be by way of a suit under section 92 of the Civil Procedure Code; and that a suit for bare declaration in the form it was presented was not maintainable; and accordingly dismissed the suit. Hence this appeal.

Before we consider the merits of the appeal, we are, however, confronted with a preliminary legal question of importance which has arisen from the admitted facts; and the question is whether even if it is conceded that the relief sought for by the plaintiff-appellant does not come within the ambit of section 92 of the Civil Procedure Code, yet in view of Order 1, Rule 8 of the Civil Procedure Code the plaintiff-appellant should not obtain the permission of the Court in instituting his suit, especially in view of his claim as one of the beneficiaries under a public trust. Order 1, Rule 8 of the Civil Procedure Code reads:

"Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so

interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service, or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct."

The aim and object of this rule is obvious. In order to avoid needless litigation over the same subject-matter in which numerous persons are interested—such as a Public Trust—all persons interested must be joined as parties. But, exception can be made only after obtaining the permission of the Court and after due service of summons to all interested persons by a public advertisement. Here, in the present case neither the plaintiff-appellant, nor the 1st respondent who are said to be beneficiaries under a Public Trust can seriously contend that if any of them brings a suit in respect of the said Public Trust for purposes other than those enumerated in section 92 of the Civil Procedure Code, they can avoid the requirement of Order 1, Rule 8 of the Civil Procedure Code. From the very terms of the Trust, a relevant portion of which has been set out above, the plaintiff-appellant's right to challenge the alleged transfer in favour of the respondents cannot, but be one in a representative capacity. It seems quite obvious that the object of the Trust—as a charitable Trust—embraces a large section of the public beyond the family members of the creator of the Trust, Taw Koon. It is also quite clear that during the lifetime of Taw Koon, he was to direct upon which charitable or religious purposes the balance of income after providing for some of his family members is to be applied. The choosing of charitable or religious purposes is left to the absolute discretion of the

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trustees. Thus, how can, in these circumstances, the plaintiff-appellant who is only a beneficiary in a very limited sense, bring a suit without complying with the requirements of Order 1, Rule 8 ? We have not the slightest doubt from the very terms of the trust deed and from what has been conceded to by the parties themselves, that the suit in the form the plaintiff-appellant has instituted cannot but be one in the nature of a representative suit as contemplated in Order 1, Rule 8; and such being our view, non-compliance with the aforesaid provisions constitutes a substantial error or defect affecting the very merits of the case which cannot be saved by section 99 of the Civil Procedure Code.

The learned Counsel appearing for the appellant relying upon *Kazi Hassan and others* v. *Sagun Balkrishna and others* (1) and *Maulavi Muhammad Fahimul Huq* v. *Jagat Ballay Ghosh* (2) maintained that a representative suit could be brought by beneficiaries of a trust without complying with the requirements of Order 1, Rule 8 of the Civil Procedure Code. We have carefully examined the facts available in those cases and we must say that they bear no analogy to those in the present case. In both the cases it appears that the beneficiary who filed the suit in question is a beneficiary of a trust in respect of a Mohamedan Waqf, and it was held that under the Mohamedan Law of Waqf, the moment a Waqf is created all rights of property therein vest in God, and every Muslim who derives any benefit under such Waqf is entitled to maintain an action against the *mutawalli* individually without joining other persons. The *mutawalli*, himself has no right in the property belonging to the Waqf inasmuch as the property does not vest in him, and

(1) (1930) I.L.R. 24 Bom. 171. (2) (1923) I.L.R. 2 Pat. 391.

he is not a trustee in the technical sense—*vide* Principles of Mohamedan Law by D. F. Mulla, 14th Edition, section 202. This view of the law is quite settled, and Mahmood, J., in a Full Bench decision of Allahabad High Court in *Jawahra* v. *Akbar Hussain* (1) in re-affirmation thereof observes:—"The property of a Mohamedan Waqf vests in God and the right of a Mohamedan who is entitled to use a mosque to bring a suit for the recovery of property belonging to it is comparable to a right of suit in respect of a private road which many persons have a right to use. Every Mussulman who derives any benefit from such a Waqf is entitled to maintain an action against the *mutawalli* to establish his right thereto or against a trespasser to recover any portion of the Waqf property which has been misappropriated, without joining any other person who may participate with him in the benefit."

Kazi Hassan v. *Sagun Balkrishna* (2) is a suit for a declaration and for recovery of the property for the benefit of certain trust filed by a Mohamedan *in his private capacity* and that suit was also held to be maintainable having special regard to the limited rights of a *mutawalli* under Mohamedan Law in respect of a Waqf property. *Gulba* v. *Basanta and Kishan Lal* (3) was also cited to support the contention that the plaintiff-appellant's suit in its present form was maintainable. We are afraid that the decision in this case does not afford any help to the appellant. There, one of the parties, namely, the defendant, alleged that the *chaupal*, the property in question, did not belong to a certain community, but was the exclusive property of one of the defendants. There was, thus, a clear issue

(1) (1885) I.L.R. 7 All. 178. (2) (1900) I.L.R. 24 Bom. 171.
(3) (1910) I.L.R. 32 All. 234.

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whether the property in suit over which the plaintiff sought to establish his claim, was the community property, or the property of a particular person. Here, in the case under appeal the parties are agreed that the property in suit is a property belonging to a public charitable trust and, as we have already observed, the plaintiff-appellant is only one of the beneficiaries; and even then his interest as a beneficiary is contingent upon satisfaction of the trustee or trustees in charge that he is in indigent or straitened circumstances. In these circumstances, how can the plaintiff-appellant without complying with the requirement of Order 1, Rule 8 institute a suit?

We must therefore, for the reasons stated above, dismiss this appeal and in doing so we may observe that this dismissal shall not in any way prejudice the plaintiff-appellant's right of suit by taking advantage of the provisions of section 92 of the Civil Procedure Code after obtaining the necessary consent of the Attorney-General. There will be no order as to costs in the present appeal.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

Before U Chan Tun Aung, C.J. and U San Maung, J.

H.C. 1958

Aug. 20.

TAN SOON LEE (APPELLANT)

v.

YEO TONG HOE (RESPONDENT).*

Limitation Act—Arts. 106 and 120—Suit for account of a dissolved Partnership and suit for dissolution of partnership and account—Period of limitation for—Existence of relationship of partnership—Mixed question of law and fact—When necessary to determine.

If the suit is for mere account of a dissolved partnership, or in other words, if the suit brought is one *after* the dissolution of the partnership, then the period of limitation for such a suit under Article 106 of the Limitation Act is three years from the date of dissolution.

However, if the suit is not for account only, but for dissolution and account, then the relevant article of the Limitation Act is Article 120, and the period provided is six years from the date when the right to sue accrues.

A. Khorasany v. *C. Acha and four others*, (1928) I.L.R. 6 Ran, 198, followed.

In a suit for dissolution of partnership where limitation is raised and when, in that regard, no express terms are embodied in the agreement of partnership; and where also, abandonment of partnership rights by a partner is pleaded in view of his conduct contrary to the relationship of the partnership, the question as to whether the relationship of partnership exists or not depending as it does on facts and circumstances, and such question being a mixed one of law and fact, a decision must be arrived at by a Court basing upon proper issues, and a careful appraisal of evidence adduced in those regards.

Moung Tha Hnyin v. *Mah Thein Myah and another*, (1901) I.L.R. 28 Cal. (P.C.) p. 53, followed.

L. Shiam Lal v. *Shiam Lal and another*, A.I.R. (1935) All. 1008, referred to.

Ba Shun for Yan Aung for the appellant.

Lim Sein Leong for Tun Aung (1) for the respondent.

U CHAN TUN AUNG, C.J.—In this appeal, we consider that the preliminary decree for dissolution of partnership and for taking of accounts passed by

*Civil 1st Appeal No. 88 of 1956 against the order of the Judge on the Original Side of this Court in Civil Regular Suit No. 86 of 1956.

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U CHAN TUN AUNG, C.J.

the trial Court should be reversed, and the case remanded for trial of issues set out hereafter, in accordance with the provisions of Order 41, Rule 23 of the Civil Procedure Code.

The respondent Yeo Tong Hoe alleged that, in the month of February 1947, he had entered into a partnership in writing with the appellant for the purchase and sale of some 20,000 gross military matches from NAAFI Disposal Board and that contrary to the terms of the said written agreement, the appellant instead of buying the military matches directly from military authorities, bought the matches from one Bee Hwa Him, a Chinese Firm. It was also asserted that the appellant having acted contrary to what was agreed upon in the partnership deed, the respondent filed a suit against the appellant in the Original Side of this Court (*vide* Civil Regular Suit No. 109 of 1948) for recovery of some Rs. 33,000 advanced for forming the said partnership. The respondent's suit was, however, dismissed. He then appealed to the Appellate Side of the High Court without avail. So was his appeal to the Supreme Court. See *Yeo Tong Hoe* v. *Tan Soo Lee* (1).

Now, in the suit from which the present appeal has arisen, the respondent has asserted that the partnership with respect to which previous litigation between him and the appellant had taken place still subsists; and that the appellant has failed to render accounts of the partnership in spite of his notice calling for the same. He therefore asked a judgment and decree (1) for dissolution of the partnership, (2) for taking of accounts, and (3) for appointment of a receiver.

The appellant, on the other hand, raised an important question of limitation by asserting, *inter alia*, that by the respondent's acts and conduct,

(1) (1954) B.L.R. 87 (S.C.).

subsequent to the formation of the alleged partnership, and also by his filing of the suit, namely, Civil Regular Suit No. 109 of 1948 of the High Court, there had been abandonment by him of the interest in the said partnership, and that as such, he should be deemed to have withdrawn from the partnership with effect from the date of the first notice (Exhibit G) given by him, *viz.*, notice dated 29th September 1948. Further, although the appellant has not stated specifically, it was also contended that the partnership, if at all it had existed, was only a partnership at will, and that it had already been dissolved by virtue of the respondent's notice of dissolution conveyed in the Exhibit G notice, dated the 29th September 1948.

Now, it seems to us clear that if the respondent's suit is one for mere account of a dissolved partnership, or in other words, if the suit brought by him is one *after* the dissolution of the partnership, then the period of limitation for such a suit under Article 106 of the Limitation Act, is three years from the date of dissolution. However, if the suit is not for account only, but for dissolution and account, then the relevant article of the Limitation Act is Article 120, and the period provided is six years from the date when the right to sue accrues *vide A. Khorasany* v. *C. Acha and four others* (1).

In view of the pleadings of the parties, and also in view of the question of limitation raised by the appellant, we are of the view that the question as to when and on what date the suit partnership becomes dissolved assumes great importance, and that such a question is always mixed question of law and fact for which a proper trial must be made after adducing evidence therefor. Now, we notice that without

(1) (1923) I.L.R. 6 Ran. 198.

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the parties adducing any evidence in that regard, the learned trial Judge gave a preliminary decree declaring that the partnership shall stand dissolved with effect from 21st May 1952. With due respect, we are unable to appreciate as to how this date has been fixed as the date of dissolution of the partnership. So far as we can comprehend, the learned trial Judge has taken the date of the last notice given by the respondent to the appellant after he had been unsuccessful in Civil Regular Suit No. 109 of 1948 of the High Court and the subsequent appeals therefrom, as the date of dissolution. From the pleadings we find it also difficult to follow whether the respondent, in instituting the suit for dissolution of partnership, is seeking to dissolve the partnership on the basis of partnership at will after giving notice as required under section 43 of the Partnership Act, on any of the grounds set out in section 44 thereof. Assuming that it was, as contended by the appellant, a partnership at will that was sought to be dissolved by the respondent, then the question whether the respondent's notice, dated the 29th September 1948, operates as a notice of dissolution of the partnership as contemplated in section 43 of the Partnership Act assumes great importance, and a definite decision must be given by the trial Court on that point. If it is found that the said notice complies with the requirements of section 43 of the Partnership Act, then the respondent should be deemed to have dissolved the partnership with effect from the date of the said notice, and then he will be entitled to file a suit for accounts effective from the said date only. If, on the other hand, the respondent's suit for dissolution is one based upon such facts and circumstances as are within the contemplation of—for example, clauses (*c*), (*d*), (*f*), and

(*g*) of section 44 of the Partnership Act, then, the date of dissolution must be fixed by the trial Court having regard to proper facts and circumstances available in that regard in view of the appellant's plea of limitation. We are also of the view that in a suit for dissolution of partnership where limitation is raised and when, in that regard, no express terms are embodied in the agreement of partnership; and where also, abandonment of partnership right by a partner is pleaded in view of his conduct contrary to the relationship of the partnership, the question as to whether the relationship of partnership exists or not, depending as it does on facts and circumstances, and such question being, a mixed one of law and fact a decision must be arrived at by a Court basing upon proper issues and a careful appraisal of evidence adduced in those regards. See *Moung Tha Hnyin* v. *Mah Thein Myah and another* (1); *L. Shiam Lal* v. *Shiam Lal and another* (2), *B. Miya Bhai and another* v. *Marian Bee Bee and others* (3), and *Bhagwan Das* v. *Fazal Khan and others* (4). We, however, find that in this case the trial Court has failed to do so.

Their Lordships proceeded to frame issues and remanded the case to the trial Court under O. 41, R. 23, C.P.C., after reversing the preliminary decree passed by the trial Court.

U SAN MAUNG, J.—I agree.

(1) (1901) I.L.R. 28 Cal. (P.C.) p. 53.
(2) A.I.R. (1935) All. 1008.
(3) A.I.R. (1933) Ran. 478.
(4) A.I.R. (1929) Lah. 154.

APPELLATE CIVIL.

Before U Aung Khine and U Ba Thoung, JJ.

H.C. 1958

July 15.

THE SUPERINTENDENT, Government Printing and Stationery, Burma (APPELLANT)

v.

DAW AYE MAY (RESPONDENT).*

Workmen's Compensation—Death of workman from accident on premises of the employer after stoppage of work—Whether accident arose out of and in the course of employment.

While a workman was about to leave the premises of his employer after the gong for the stoppage of work had been struck, a bale of paper which was being unloaded in the premises fell on the workman and injured him. As a result of the injuries received, the workman died subsequently.

Held: That the accident arose out of and in the course of employment of the deceased in the work, and the claim for compensation (by the mother of the deceased) was admissible.

Hla Thin (Government Advocate) for the appellant.

Hla Thein for the respondent.

U AUNG KHINE, J.—This is an appeal by the Superintendent, Government Printing and Stationery, Burma, against the order of the Commissioner under Workmen's Compensation Act, Rangoon, dated the 10th February 1955, passed in his case No. 27 of 1954 awarding K 3,960 to Daw Aye May, the respondent, as compensation for the death of her son Maung Ngwe Kha. The facts of the case in brief are as follows:

Maung Ngwe Kha was a temporary compositor employed at the Government Printing and Stationery office and on the day of accident, 17th July 1954,

* Civil Misc. Appeal No. 22 of 1955, against the order of the Commissioner under Workmen's Compensation Act, Rangoon, in his case No. 27 of 1954, dated the 10th February 1955.

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U AUNG KHINE, J.

which happened to be a Saturday, as he was about to leave the premises of the Government Printing and Stationery office a little after 12 noon, a bale of paper fell on him and he was injured. As a result of the injury sustained, he died on the 9th of August 1954.

The question that has arisen for determination is whether the accident arose out of and in the course of employment of the deceased by the appellant. It was contended that his work terminated on that day at 12 noon and as the accident happened when he was about to leave the premises his employers were not responsible. It must be remembered that the accident happened on the premises of the appellant and that Maung Ngwe Kha had not even returned his workman's disc issued to him on that day. There is a place where these discs had to be returned when the workmen leave the premises each day at the close of their work. It is true that time-gong had been struck for the stoppage of work but this factor should not be taken by itself to decide whether the deceased was or was not still in the course of employment.

Maung Than Tin, one of the witnesses examined in the case deposed that he and the deceased were working together and from the place where they were working they could not see the unloading of the paper bales taking place at the gate. He and the deceased were on their way to return their discs when the accident happened.

It is apparent from the facts obtainable on record that all the workmen had to go out from the premises through this single gate where the unloading work was going on. Therefore it was for the appellant to take all precautions to warn his employees regarding the work that was being carried

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on at the gate unknown and unseen to them. From the fact that the deceased Maung Ngwe Kha had not yet returned his disc and was still on the premises of the appellant when the accident happened, the learned Commissioner was quite justified in holding that the accident arose out of and in the course of employment of the deceased Maung Ngwe Kha in the appellant's work. It is idle for the appellant to say that the death of Maung Ngwe Kha was merely a misfortune that might have befallen any person. It is admitted by the learned Advocate for the appellant that should the claim of the respondent be admissible the sum awarded by the learned Commissioner was correct.

After a careful consideration of all the relevant facts, we are of the opinion that there is no merit in this appeal. In the result the appeal is dismissed with costs. Advocate's fees K 51.

U BA THOUNG, J.—I agree.

APPELLATE CIVIL.

Before U Aung Khine and U Ba Thoung, JJ.

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Aug. 27.

U BA THEIN (APPELLANT)

v.

THE CHAIRMAN, STATE TIMBER BOARD (RESPONDENT).*

Frustration of contract—Impossibility of performance on account of insurgents' activities.

A contract which became impossible of performance on account of insurgents' activities was frustrated.

G. N. Banerji for the appellant.

Hla Thin (Government Advocate) for the respondent.

U BA THOUNG, J.—The appellant sued the defendant in the City Civil Court of Rangoon for recovery of Rs. 4,323-9 due on the contract Exhibit 1. The appellant entered into a contract with the respondent to float down timber by rafts from Hmatgadan and Pyinmagone to Nyaungwaing depot along the Irrawaddy river for the period from 10th June 1948 to 30th November 1948, and floated down 6,853 logs from Hmatgadan and 804 logs from Pyinmagone to Sanywe, in Tharrawaddy district, where the rafts were stopped from going down further as the journey was not safe on account of insurgent activities. After some time as it became impossible to float down the rafts to the terminus at

* Civil 1st Appeal No. 68 of 1955 against the decree of the Second Judge of the City Civil Court of Rangoon in Civil Regular No. 514 of 1952, dated the 27th July 1955.

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U BA THOUNG, J.

Nyaungwaing depot due to the insurgent activities, the logs were taken over by the respondent at Sanywe and the appellant was paid Rs. 14,242-5 as. for floating charges, Rs. 3,448-14 as., as demurrage charges and Rs. 650 as *ex gratia* payment, or in all Rs. 18,341. The appellant claimed Rs. 17,127-12 to which he would be entitled under the contract if the rafts were floated down to the terminus at Nyaungwaing depot, together with a sum of Rs. 5,537 which he alleged to have incurred as expenses for the period he was made to wait at Sanywe before the logs were taken over. He claimed this sum as damages or as waiting charges as provided under the contract for the period between the arrival of the rafts at the terminus and the time they were taken over by the respondent. The respondents contended that the contract had become impossible of performance due to the circumstances beyond their control and that the appellant had been amply compensated by the payments they had made. The following issues were framed by the trial Court:

[Their Lordships then reproduced the issues.]

The trial Court came to a finding on the issues framed that the logs were delivered at Sanywe at the orders of the respondent on account of the insurgent activities beyond their control and that the contract had become impossible of performance. That the appellant could not have incurred as much as Rs. 5,537 and that he was not entitled to claim that amount and that at most all that he might have incurred as expenses would not amount to more than Rs. 1,000 and that he had been fully compensated as maintained by the respondent. It also came to a finding that the appellant was not entitled to the full charges as claimed by him and that he was not entitled to more than what had been paid by the respondent. The suit was accordingly dismissed and hence this appeal.

The question is whether the contract was frustrated as it became impossible of performance on account of insurgent activities. That the contract became impossible of performance on account of insurgent activities cannot be doubted, as there is ample evidence on record as adduced by the respondent that the insurgents along that route from Sanywe downwards to Nyaungwaing had destroyed the rafts of other contractors, and that even a batch of military, sent to attack the insurgents, were repulsed by the insurgents and that one batch of rafts was completely destroyed and looted by the insurgents on reaching the destination at Nyaungwaing. It cannot be denied that about that time, that is the latter part of 1948, there were increased activities of the insurgents in various parts of the country and all available military had to be sent to various parts of Burma in defence of the country against the insurgents. The respondent could therefore hardly expect to get some military

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escorts to convoy these rafts to Nyaungwaing; and under such condition it was impossible to have the rafts floated down to Nyaungwaing, and neither the appellant nor the respondent could have continued to perform the contract. The contract had thus become impossible of performance.

The learned counsel for the appellant contended that under section 56 (clause 3) of the Contract Act the appellant was entitled to compensation for the loss incurred by him for the period of waiting at Sanywe before the logs were taken over.

Even if clause 3 of section 56 of the Contract Act is applicable to this case, we are of the opinion that the appellant had been well compensated by the respondent, he had been paid more than Rs. 1,000 of what he would have earned in full as floating charges under the contract for floating down the logs to the terminus at Nyaungwaing. The full floating charges of the logs right down to the terminus amount to Rs. 17,127-12 as. only and the appellant had been paid Rs. 18,341, *i.e.* more than Rs. 1,000 or so which would amply cover his waiting charges at Sanywe. The appellant had not given a statement of the expenditure incurred by him for waiting at Sanywe, and the learned trial Judge has held that such an expenditure could not come to more than Rs. 1,000. We see no reason to interfere with the judgment and decree of the trial Court, and the appeal is accordingly dismissed with costs.

U AUNG KHINE, J.—I agree.

APPELLATE CIVIL.

Before U Thaung Sein, J.

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U CHIT SWE (APPELLANT)

v.

Aug. 11.

MA THAN AND THREE OTHERS (RESPONDENTS).*

Trade Mark—Acquisition of right of property in—Irrespective of length of user and extent of trade—Not assignable or transferable apart from the business connected with that mark.

A trader acquires a right of property in a distinctive trade mark merely by using it upon and in connection with his goods, irrespective of the length of such user and the extent of his trade.

Gaw Kan Lye v. *Saw Kyone Sting*, (1939) R.L.R. 488, followed.

A trade mark cannot be assigned or transferred except with the business connected with that mark and the document purporting to be a deed of sale of the trade mark did not in fact transfer or assign the trade mark as the business was not transferred along with the mark.

P. K. Bose for the appellant.

K. Singh for the respondents.

U THAUNG SEIN, J.—The parties in these appeals along with one Maung Kyaw Thaung who was a defendant in the original trial Court but did not appeal against the decree of that Court are brothers and sisters, being the children of one U Hla Gyaw who died on the 1st June 1953. Prior to his death U Hla Gyaw was a manufacturer of slippers bearing a trade mark known as "ဇလိုးတောတဲ့" (harp) which is said to be a very popular brand in the market. The appellant U Chit Swe who is the eldest son of the deceased U Hla Gyaw claims that he has acquired the exclusive right to the use of the abovementioned

* Civil 2nd Appeals Nos. $\frac{14}{15}$ of 1958 (Mandalay) against the Judgments and decrees of the District Judge, Mandalay, passed in Civil Appeals Nos. $\frac{30}{14}$ of $\frac{1957}{1958}$, dated the 25th February 1958.

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trade mark on slippers but this claim is strenuously denied by the respondents who assert that "the trade mark is the property of the defendants (respondents) as part of the estate of their parents and they have every right to use it". As might be expected both sides have been using the trade mark in question and eventually the appellant U Chit Swe filed Civil Regular Suit No. 26 of 1955 in the Subdivisional Court of Mandalay for a declaration that he is the owner of the "ဆောင်းဂေါက်" trade mark and for a perpetual injunction to restrain the respondents from using the identical or similar trade mark and for K 200 as damages. The learned Subdivisional Judge decreed the suit in the appellant's favour so far as the respondents Ma Than, Maung Kyaw Thaung and Maung Kyaw Thein were concerned but dismissed the suit as against the minor respondents, *viz.*, Ma San (*alias*) San San and Ma Ahma (*alias*) Ahma Htway. The appellant U Chit Swe appealed to the District Court, Mandalay against the decree in so far as the respondents Ma San (*alias*) San San and Ma Ahma (*alias*) Ahma Htway was concerned while the respondents Ma Than, Maung Kyaw Thein, Ma San and Ma Ahma also preferred an appeal against the same decree. It will be noticed that Maung Kyaw Thaung did not prefer any appeal and it is on this account that he does not feature as a respondent in these second appeals. The two appeals in question were dealt with together and the learned District Judge finally set aside the decree of the Subdivisional Court and dismissed the appellant's suit. The appellant has now come up to the High Court on second appeal and seeks a decree as originally prayed for by him against all the defendants.

It is common ground that the deceased U Hla Gyaw was the owner of the "Saungauk" trade

mark, *i.e.*, he held the exclusive right to the use of that trade mark in respect of slippers, as he had used it for many years before his death and registered his ownership on the 7th March 1928 with the Registrar of Deeds. The appellant's case was that the slipper business carried on by his father U Hla Gyaw was on a small scale and that it was on the verge of collapse two years or so before his death. According to him, U Hla Gyaw was ill during his last two years and could not attend to the business and the appellant was thus requested to carry on the slipper trade with his own capital. He goes on to say that the business was continued by him till his father died on the lst of June 1953. Some evidence was led to prove that shortly before his death U Hla Gyaw orally transferred the " Saungauk " trade mark to the appellant but this point has not been pressed before me. If we are to believe the appellant, the slipper business ceased with the death of U Hla Gyaw but was revived about six months later after he (appellant) had " bought " the rights of his brothers and sisters and stepmother in the " Saungauk " trade mark by means of a registered " sale " deed executed on the 28th January 1954 and filed in the trial record as Exhibit " ခ ". A year or so later he found to his surprise that the first respondent Ma Than had set up a rival slipper business in the name of herself and the other daughters of U Hla Gyaw and that they were utilising the same " Saungauk " trade mark. Immediate action was taken—so says the appellant—to prevent the first respondent Ma Than and her sisters from using the trade mark in question but without result and hence the suit which has given rise to the present appeals.

It should be remembered that the appellant and his sisters and brothers shared the same roof

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with their father up to the date of his death and for several months after his demise. The appellant asserts that after the death of his father, he carried on the slipper business in his own name. On the other hand, the respondents are emphatic that there was no break in the business after the death of their father and that it was continued as the joint concern of the heirs. The appellant who is the eldest son of U Hla Gyaw was said to have managed the business for himself and the other heirs. There is conflicting evidence on the record as to whether there was any break in the business with the death of U Hla Gyaw but whether there was a break or not it is clear that the slipper business was in fact carried on by the appellant after the death of his father. At that time the respondents were sharing the same house with the appellant and to all appearances there was harmony between them for some time. This was followed on the 28th January 1954 by the execution of the Exhibit "ခ" "sale" deed by the brothers and sisters of the appellant and the widow of U Hla Gyaw transferring their rights in the "Saungauk" trade mark to the appellant for a sum of K 1,000. Three of the sisters *viz.* Ma San (*alias*) San San, Ma Ahma (*alias*) Ahma Htway and Hla Hla were minors at the time but Ma San (*alias*) San San signed the deed while the remaining minors were represented by Daw Thet May the widow of U Hla Gyaw. The learned District Judge has held that this deed was not only fraudulent but that there was no consideration and thus invalid. Before going into this question I would stress that there can be no dispute regarding the fact that after the execution of the "sale" deed, the appellant carried on the slipper business and that he used the "Saungauk" trade mark. The respondents who were living in the

same house made no complaint whatsoever against the action of the former. But differences arose between the appellant and his sister some time later and the first respondent Ma Than left the house along with her husband and was followed later by the remaining sisters and brother Maung Kyaw Thein. On the 5th March 1955 *i.e.* fourteen months after the execution of the Exhibit "ခ" sale deed the first respondent Ma Than launched out with her own slipper business and utilised the same "Saungauk" trade mark on the ground that as one of the heirs of U Hla Gyaw she was entitled to the use of the trade mark of her deceased father. If her contention is acceptable then indeed all the seven children of the deceased U Hla Gyaw and his widow Daw Thet May would be equally entitled to use the trade mark in question in respect of slippers. So also the heirs of these children would in due course be entitled to use the same trade mark and before long there might be dozens of persons all utilising the "Saungauk" mark. Even from a common sense point of view such a state of affairs would be intolerable and the trade mark would lose all its value.

The so called "sale" deed Exhibit "ခ" has been assailed by the respondents as an invalid document on various grounds. It is said that the first respondent Ma Than and several other executants were misled into signing it as they were assured by the appellant that it was a document merely enabling the latter to protect the interests of the heirs. Then again, it is alleged that although the document mentions a consideration of K 1,000 for the "sale" of the trade mark to the appellant, no consideration was in fact paid. Furthermore, the document was registered on the day of its execution and thereby indicating—so say the respondents—of its fraudulent

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nature. In addition, it is pointed out that Daw Thet May who was the second wife of U Hla Gyaw and thus the stepmother of the minors Ma San and Ma Ahma was not legally competent to sign the deed on behalf of these minors as she had not been appointed a guardian of the minors in question by any competent Court. Finally it is contended that as minors had also signed the deed it was void. In the first place, it should be remembered that the appellant's suit was not based on the so called "sale" deed alone. The appellant's case is that after the death of his father he used the "Saungauk" trade mark before any other person and thus acquired the exclusive right to it. In the case of *Gaw Kan Lye* v. *Saw Kyone Saing* (1) a Full Bench of the then High Court of Judicature at Rangoon laid down that "a trader acquires a right of property in a distinctive trade mark merely by using it upon or in connection with his goods, irrespective of the length of such user and of the extent of his trade".

There appears to have been some confusion of thought in the lower Courts as to whether a trade mark can be sold apart from the business connected with the production of the goods bearing that mark. In this connection I cannot do better than quote the following observations by Ratanlal in his "Law of Torts" 15th Edition at page 283:

> "Property in a trade mark cannot be acquired until the vendible article is put on the market, for no property can be acquired except through the process of sale, or offering for sale, in the market. There can be no property in a trade-mark apart from the goods of which it has become the symbol."

So also the following passage at page 98 of the "The Law of Trade and Merchandise Marks in

(1) (1939) R.L.R. 488.

India " by S. Venkateswaran, 1937 Edition appear to be most apposite:

" Trade Mark assignable only with goodwill—The right to a trade mark may, in general, treating it as a property, or an accessory of property, be sold and transferred upon a sale or transfer of the manufactory of the goods on which the mark has been used to be affixed, and may be lawfully used by a purchaser. Inasmuch as the Court protects the owner of the mark, he is entitled to authorize another, when he hands over the business to him, to replace that mark on his goods. A trade mark cannot, however, be assigned in gross. It can be assigned only along with the goodwill of the business in which the mark is used. The law does not recognise any right in a trade mark *per se* separate from the goodwill of the business concerned in the goods for which the mark has been used. Consequently an assignment of a trade mark without the business confers no effective right. In has been established since the decision in the *Leather Cloth Co.* v. *American Leather Cloth Co.*, said Mr. Justice Clauson in the Sirup Famel case, that the purchaser of a mark becomes owner of it only if he becomes at the same time the purchaser of the manufactory, or (to put it rather more widely in view of modern developments) the business concerned in the goods to which the mark has been affixed ."

In short, it is clear that a trade mark cannot be assigned or transferred except with the business connected with that mark. That being so, the so called " sale " deed Exhibit " ခ " did not in fact transfer or assign the " Saungauk " trade mark to the appellant as the business connected with it was not transferred along with the mark. In view of this finding there seems to be hardly any necessity to go into the question whether any fraud or deception was practised on the respondents before the deed was executed. However, since the learned counsel for the respondents has argued at some length on this matter perhaps I should deal broadly with it. It will be noticed that of all the executants of the Exhibit

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"ခ" only the first respondent Ma Than has come forward to depose that she was misled into believing that it was a document appointing the appellant as the administrator of the estate of her deceased father and that she signed it on that account. Then again, she asserts that there was no consideration although the document mentions that K 1,000 was paid for the assignment of the trade mark. The evidence on the record leaves no room for doubt that the execution of the Exhibit "ခ" document was carried out in the presence of relatives and elders including a *Pongyi* named U Kethawa (PW 1) the uncle of the deceased U Hla Gyaw. In other words, the document was not signed in any secretive or surreptitious manner. According to the appellant, this document was prepared by U Maung Lat (PW 7) an Advocate, a day or so before it was executed but judging from the evidence of U Maung Lat himself it would appear that it was ready only on the day of the execution. Be that as it may, it is hardly credible that the first respondent Ma Than did not read the document or that she was unaware of the contents at the time when she signed it. With regard to the consideration of K 1,000 once again except for the first respondent Ma Than none of the other executants have come forward to deny that this sum was paid and on the contrary they have deposed that the monies were received from the appellant. Great stress has also been laid by the respondents on the fact that the document was registered immediately after it had been executed. The learned District Judge has remarked that this was unseemly haste and that it casts a cloud of suspicion over the document. I regret, I am unable to share this view as I do not see how it can be held that because a document was registered on the day of its execution, it should be

received with the utmost caution. As far as I can see, the respondents failed to prove that the appellant did in fact practise any fraud or that there was no consideration for the transfer of the trade mark. I have been asked to hold that the consideration was altogether inadequate but I do not think that there is any need to go into this question as I have pointed out already that the "sale" deed did not in fact result in the transfer of the trade mark.

The Exhibit "ခ" "Sale" deed did not transfer or assign the "Saungauk" trade mark to the appellant. But on that ground alone it cannot be deemed to be without some evidentiary value. As stated by the learned counsel for the appellant, this document clearly indicates that the executants admitted the appellant's right to use the "Saungauk" trade mark. It is futile for the first respondent Ma Than to deny that the appellant did in fact use that trade mark after the execution of the Exhibit "ခ" deed. On her own showing, she did not start up her own slipper business till many months after the Exhibit "ခ" deed and only after she had left the appellant's house. That she was aware of the appellant's use of the trade mark after she had left his house is borne out by the evidence of U Tin Maung (DW 3) Secretary of the Slipper Manufacturers Association and an old friend of U Hla Gyaw and his family. According to this witness, the first respondent Ma Than appeared at his house after she had parted from the appellant and consulted him on the prospects of setting up a slipper business with a "Sunlight" trade mark. She was then advised that as a daughter of the late U Hla Gyaw she was clearly entitled to use the "Saungauk" and it was on this advice that she set up a business with that trade mark. In my opinion, the above conduct of the first

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respondent Ma Than was a tacit admission that the appellant was in fact using the "Saungauk" trade mark at the time.

On the whole, there can be no doubt that after the death of U Hla Gyaw, the appellant carried on the slipper business and utilised the "Saungauk" trade mark. It is also clear that the first respondent Ma Than started her business many months after the appellant. By then the appellant had already acquired the right to the use of the "Saungauk" trade mark and the first respondent Ma Than was not entitled to invade that right. The appellant U Chit Swe was thus entitled to succeed in his suit, but it should be noted that his learned counsel has submitted before me that his client does not desire to press for any damages against the respondent. With regard to the minor respondents Ma San (*alias*) San San and Ma Ahma (*alias*) Ma Ahma Htway it has been argued that they were not necessary parties to the suit and that the suit should be dismissed so far as they are concerned. The reply to this is that the names of these respondents appear in the business set up by the first respondent Ma Than. Besides, they were represented in the suit by the first respondent Ma Than who acted as their guardian *ad litem*. I regret therefore that I cannot accept the contention that the suit against these minors should be dismissed.

On the whole both the appeals *i.e.* Civil Second Appeals Nos. 14 and 15 of 1958 are allowed and the judgments and decrees of both the lower Courts are hereby set aside and there will be a decree for the appellant-plaintiff as prayed for except that no damages will be allowed. There will be no order for costs.

APPELLATE CIVIL.

Before U Chan Tun Aung and U Ba Thoung, JJ.

U KO KO GYI (APPELLANT)

v.

DAW KHIN THAUNG (RESPONDENT).*

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July 31.

Civil Procedure Code—Order 5, Rule 15—Service of summons on defendant at a place other than at the place given in summons—Whether good service.

Where summons was served on the mother of the defendant at the residence of the defendant with whom the mother was living and not at the defendant's place of business mentioned in the summons.

Held : That there is no provision of law that a defendant must be served with summons at no other place than the place as given in the summons and that the service of summons was a good service as provided under Order 5, Rule 15 of the Civil Procedure Code.

Hla Pe for the appellant.

Aye Maung for the respondent.

U BA THOUNG, J.—This is an appeal against the order of the 2nd Judge of the City Civil Court, Rangoon, refusing to set aside an *ex parte* decree passed against the appellant. The appellant was sued by the respondent for recovery of K 10,000. The respondent's case is that the appellant who is a diamond broker having his place of business at No. 21, Mogul Street, Rangoon, was entrusted with a pair of diamond ear-rings worth K 10,000 for sale and that the appellant had sold the said pair of diamond ear-rings and had failed to give her the sale proceeds. The suit was filed in the City Civil Court, Rangoon, on the 11th January 1954 and summons was issued to the

* Civil Misc. Appeal No. 21 of 1955 against the decree of the Second Judge, City Civil Court of Rangoon in Civil Regular Suit No. 32 of 1954, dated the 18th April 1955.

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U BA THÓUNG, J.

appellant. The process-server reported to the Court that the summons was served on 14th January 1954 on the appellant's mother at her house No. 94, 123rd Street, Rangoon, as the appellant was absent from the house and as his mother had signed for it and accepted it on behalf of her son; and the Court treated the summons as duly served. On 1st February 1954, the date fixed for hearing of the case, the appellant failed to appear in Court and the case was heard and decided *ex parte* against him. The appellant then applied to the Court to set aside the *ex parte* decree stating in an affidavit that early in January 1954 he became a *phongyi* and resided at Payagale *Kyaung*, Gyogon, and that he was not residing at No. 94, 123rd Street, at the time the summons was served on his mother and her signature obtained on it. He had stated that he came to know about it only on 3rd February 1954 when he visited his mother for the first time after he became a *phongyi* and learnt that his mother's signature was taken on the summons served on her on misrepresentation that it was required in connection with a police advertisement of reward for information that would lead to the discovery of the culprits who had robbed him of his jewelleries in 1953; that when he came to know about this, he made enquiries and learned that an *ex parte* decree had been passed against him in a suit. He had stated that under the aforesaid circumstances he cannot be deemed to have been served with summons in the suit. The learned Judge of the lower Court, after a careful examination of the evidence adduced by both sides, came to a finding that the appellant's mother did receive the summons, that there was a good service, and that the appellant was fully aware of its service, so as to enable him to attend Court and answer the plaintiff's claim;

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and accordingly refused to set aside the *ex parte* decree. Hence this appeal.

It was contended on behalf of the appellant that as the address of the appellant was given in the summons as No. 21, Mogul Street, Rangoon, the summons should have been served on the appellant in person or on his agent empowered to accept service at that address ; but instead as it was served on the appellant's mother at No. 94, 123rd Street, Rangoon, which was not the address given in the summons, it could not be held as a good service. It was also contended that on the date of the alleged service of summons on the appellant's mother at No. 94, 123rd Street, Rangoon, the appellant was residing as a *phongyi* at Payagale *Kyaung*, Gyogon, and not at his mother's house and hence the service of summons on the appellant's mother at her house could not be held as a good service ; and it was further contended that the appellant could not have been aware of the service of summons on his mother and of the suit filed against him.

We cannot accept the contention that as the summons was addressed to the appellant at his place of business at No. 21, Mogul Street, Rangoon, the summons must be served on him personally or on his agent empowered to accept service at that place of address and at no other place, because there is no provision of law that a defendant must be served with summons at no other place than the place as given in the summons. The learned counsel for the appellant also could not quote any authority in support of his contention.

It appears, however, from the evidence of the respondent Daw Khin Thaung that on 13th January 1954 she and her husband went along with the process-server Oosman Gani and the witness Ko Aye

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(RW 3) to serve the summons on the appellant at his place of business at No. 21, Mogul Street, Rangoon; but they found the shop closed, and as the appellant was not there, they arranged to go together to the appellant's house at No. 94, in 123rd Street the next morning. They went there the next morning, on 14th January 1954, and as they got in front of the house the process-server and the witness Ko Aye were told to effect the service; and she learnt later that the summons was served on the appellant's mother at the said house at No. 94, 123rd Street, Rangoon. Her evidence is supported by the evidence of the process-server Oosman Gani and the witness Ko Aye. It is therefore clear that they tried at first to serve the summons on the appellant at the address given in the summons at No. 21, Mogul Street, Rangoon, but as the appellant could not be found there and as the shop was closed, they had to go to his place of residence at No. 94, 123rd Street, Rangoon. The appellant's mother Daw Thein Shwe, in her evidence given on commission, stated that the appellant always lived with her in the same house No. 94, 123rd Street, Rangoon. It is also clear from the evidence of the process-server Oosman Gani (RW 2), supported by the evidence of Ko Aye (RW 3), that when they went to appellant's house and asked for the appellant, the appellant's mother came down from the upper storey of the house, and on being told that they had brought the summons in connection with Daw Khin Thaung's case, the old lady told them that U Ko Ko Gyi was not present at the house and that she is his mother; and she asked them if she could sign for it and take it. They replied that she could, and they handed the summons to her after taking her signature. Thus, the service of summons on the appellant's mother under the aforesaid

circumstances must be held to be a good service as provided under Order 5, Rule 15 of the Civil Procedure Code which reads :

"Where the defendant is absent, and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult member of the family of the defendant who is residing with him."

The contention that the appellant was not aware of the summons served on his mother at their house during his absence on the alleged misrepresentation that it was in connection with an advertisement of a police reward, and that his mother's signature taken on the original summons on such misrepresentation until he visited her for the first time on 3rd February 1954 cannot be accepted also. Firstly, because there is the evidence of the appellant's mother Daw Thein Shwe herself who said that the appellant visited her once or twice a week when he became a *phongyi* and as the appellant became a *phongyi* on 11th January 1954, we cannot believe that the appellant visited his mother for the first time only on 3rd February 1954. Secondly, because it is highly improbable that his mother would not tell the appellant about the service of summons on her soon after she received that summons at her house and when he visited her. There is also the evidence of Mary Young (RW 4) who was the business associate and a close friend of the appellant, that she visited the appellant's mother at her house regularly once a week and that she visited the appellant also at the *phongyi kyaung* once a week, and we cannot believe that she had not informed the appellant about the service of summons on his mother. The appellant's version that his mother received the summons and signed for it on misrepresentation that it was in connection with an advertisement for a police reward is also highly

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improbable. We are convinced from the evidence on record that the appellant was fully aware of the summons served on his mother during his absence from the house and of a suit filed against him long before its hearing date on 1st February 1954.

For the reasons stated we do not consider that there is any merit in this appeal, and it is accordingly dismissed with costs. Advocate's fees K 51.

U CHAN TUN AUNG, C.J.—I agree.

APPELLATE CIVIL

Before U San Maung and U Thaung Sein, JJ.

U KYI (APPELLANT)

v.

DAW MYAING (RESPONDENT).*

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July 9.

Res judicata—*When subsequent suit barred by former suit—Whether "the matter directly and substantially in issue" in the subsequent suit was "directly and substantially in issue" in the former suit.*

The Respondent obtained a decree for ejectment of the Appellant from certain stalls in the Zegyo Bazaar, Mandalay, under s. 11 (*1*) of the Urban Rent Control Act in the Township Court of Mandalay. The decree was confirmed by the District Court and the High Court. Subsequently, on the application of the Appellant, the Mandalay Municipality entered his name in the registers of the Zegyo Bazaar, as the recognised occupant of the sites on which the stalls in question stood. On the strength of this entry in the bazaar registers, the appellant sued the respondent in the Subdivisional Court, Mandalay for a Declaration that he was the registered occupant of the stall sites in dispute, and for an injunction to restrain the Respondent from executing the decree and to direct her to remove her shops from the stall sites. In view of the decision in the previous suit mentioned above, the Subdivisional Judge held that the suit was barred by the principle of *res judicata*. This decision of the Subdivisional Judge was upheld by the District Court and the High Court. On special appeal to the High Court.

Held : That the questions in issue in the suit in the Township Court of Mandalay were whether the appellant was the tenant of the Respondent in respect of the stalls and whether the appellant had fallen into arrears with rent ; and that the contention in the subsequent suit in the Subdivisional Court was that by reason of the fact that he was recognised by the municipality as the occupant of the stall sites in disputes in preference to the respondent, he could not be evicted from those stall sites and that the decree obtained by the appellant against him in the former suit was inoperative.

Held further : That the matter directly and substantially in issue in the above-mentioned two suits being not the same, the subsequent suit was not barred by the principle of *res judicata*.

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* Civil Special Appeal No. 1 of 1957. Appeal against the judgment and decree of Civil 2nd Appeal No. 3 of 1957 of the High Court sitting at Mandalay.

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U KYI v. DAW MYAING.

S. L. Verma for the appellant.

P. K. Bose for the respondent.

U THAUNG SEIN, J.—This is an appeal by special leave under section 20 of the Union Judiciary Act against the decision of a single Judge (U Aung Tha Gyaw, J.) of this Court in Civil Second Appeal No. 3 of 1957. The facts involved are simple and briefly as follows:

In Civil Regular Suit No. 87 of 1951 of the Township Court of Mandalay the respondent Daw Myaing who claimed to be the owner of certain stalls in the Zegyo Bazaar of Mandalay sued the appellant under section 11 (*1*) of the Urban Rent Control Act for the ejectment of the latter from those stalls. The suit was decreed in the respondent's favour and that decree was confirmed on appeal both by the District Court of Mandalay and the High Court. But before the respondent could execute the decree the appellant applied to the Mandalay Municipality for registration of his name in the registers of the Zegyo bazaar as the occupant of the sites on which the stalls in question stand. His application was allowed and the appellant's name was duly entered in the abovementioned registers as the recognised occupant of the disputed stall sites. Armed with that entry, the appellant sued the respondent in Civil Regular Suit No. 99 of 1955 of the Subdivisional Court of Mandalay for a declaration that he is the registered occupant of the stall sites in question and for an injunction to restrain the respondent from executing her decree and to direct her to remove her shops from the stall sites. The learned Subdivisional Judge however refused to entertain the appellant's suit on the ground that it was clearly

barred by the principle of *res judicata* in view of the decision in Civil Regular Suit No. 87 of 1951 of the Township Court of Mandalay. The appellant appealed to the District Court against that decision but without result and a further second appeal to the High Court also failed and hence the present appeal by special leave under section 20 of the Union Judiciary Act.

The only point for decision in the present appeal is whether the appellant's suit in the Subdivisional Court was barred by *res judicata* in view of the decision in Civil Regular Suit No. 87 of 1951 of the Township Court of Mandalay. U Aung Tha Gyaw, J., who decided the Civil Second Appeal was of the view that the suit was barred by *res judicata* for the following reasons :

> " The previous suit for ejectment was founded upon the relationship of landlord and tenant. In the present suit the appellant is seeking to go behind that decree by pleading that by reason of his claim to the right of occupancy having been recognised by the Municipality, such relationship of landlord and tenant has ceased, with retrospective effect so as to nullify the decree passed against him. This claim of the appellant is against the principle of law enunciated in section 11 of the Civil Procedure Code. If any rights were acquired by the appellant in respect of the property in 1952 that fact cannot possibly sustain his claim to set at nought the ejectment decree passed against him in 1951. "

No doubt if " the matter directly or substantially in issue" in the suit under consideration was " directly and substantially in issue " in the former suit *i.e.* Civil Regular Suit No. 87 of 1951, then indeed the principle of *res judicata* will apply and the appellant's suit will have to be dismissed. But a careful examination of the judgments and the pleadings in the two suits does not indicate that the " matter directly or substantially in issue " in the two suits were identical.

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For instance in the former suit (Civil Regular Suit No. 87 of 1951 of the Township Court) the questions at issue were whether the appellant was the tenant of the respondent in respect of the stalls and whether the appellant had fallen into arrears with the rent. In the latter suit, the appellant does not in any way dispute the respondent's ownership of the stalls or that he had been in arrears of rent. But he asserts that after the filing of the previous suit his name had been entered in the registers of the Municipal Zegyo Bazaar as the recognised occupant of the stall sites in preference to the respondent and he cannot therefore be evicted from these sites and on the contrary it is the respondent who will have to be called upon to dismantle the stalls and remove the material thereof. In other words—so says the appellant—the decree obtained by the respondent in the former suit will be inoperative. As to whether these assertions will be accepted or not is a matter for decision by the trial Court. All that we desire to point out at this stage is that we fail to see how it can be said that the "matter directly and substantially in issue" in the abovementioned suits are the same. The learned counsel for the respondent has argued that in effect, the appellant's suit is centred round the stalls built by the respondent and that it is a mere ruse to render the decree in Civil Regular Suit No. 87 of 1951 of Township Court infructuous. We are not concerned however with the motives underlying the appellant's action in filing the suit under consideration. That the stalls built by the respondent have given rise to the suit cannot be gainsaid but the question before us is whether the suit under consideration is barred by the principle of *res judicata*. As pointed out already, the "matter

directly and substantially in issue " in the abovementioned suits are by no means the same and hence we fail to see how the principle of *res judicata* could have been applied. In the result, this appeal is allowed and the judgment and decree of this Court in Civil Second Appeal No. 3 of 1957 and the decrees and judgments of both the lower Courts are hereby set aside and Civil Regular Suit No. 99 of 1955 of the Subdivisional Court, Mandalay, is remanded to the trial Court in accordance with Order 41, Rule 23 of the Civil Procedure Code for disposal according to law. Costs shall abide by the final decision in the suit.

Let a certificate for the refund of Court Fees paid in the memorandum of appeal be issued.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

Before U Chan Tun Aung, C.J. and U Ba Thoung, J.

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Aug. 7.

U ON KIN AND FIVE OTHERS (APPELLANTS)

v.

U SAW HAN (RESPONDENT).*

Defamation—Damages—Quantification of—Discretion of Court—Proper and reasonable exercise of—Excessive damages—Power of appellate Court to re-fix the amount—Greatest moment in a defamation suit—Liability of shareholders of press for defamatory article published by the press.

The quantification of damages as a "solatium" to a plaintiff in a suit for defamation, in so far as the Courts in Burma and India are concerned, is within the discretion of the Court.

Although the fixing of damages is within the discretion of the Court, yet unless a reasonable proportion exists between the sum awarded and the circumstances of the case, the Court would be wanting in the proper and reasonable exercise of its discretion. Exercising of discretion does not mean doing what a Court likes, disregarding the facts and circumstances of the case.

The greatest moment in a defamation suit, especially concerning a person of high social standing, or who holds high official position, is not the quantum of damage, but whether he has fully vindicated his rights.

C.M.G. Ogilvie v. *Punjab Akhbarat and Press Company*, I.L.R. 11 Lah. 45, referred to.

If the amount of damages awarded by the trial Court was so extremely high as to make it entirely unreasonable having regard to the circumstances of the case, the appellate Court has ample power in its discretion to re-fix the amount.

Flint v. *Lowell*, (1935) K.B. 354, referred to.

In the case of an author, printer, publisher and proprietor of a press all of them can be sued jointly for defamation, inasmuch as they are all instrumental in the publication of a defamatory article. So far as the 4th and 5th appellants, who are merely shareholders of the *Bama Khit* press, are concerned, there is no allegation of joint authorship, printing or publication of the defamatory article. In these circumstances there was no justification for impleading them as defendants and also for making them liable for the article complained of.

E Maung and *Mon San Hlaing* for the appellants.

Choung Po for the respondent.

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* Civil 1st Appeal No. 48 of 1955 against the decree of the Judge on the Original Side of this Court in Civil Regular Suit No. 31 of 1954, dated the 7th July 1955.

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U CHAN TUN AUNG, C.J.—This appeal from the judgment and decree of the learned Judge on the Original Side (the late U Thein Maung, J.) has arisen out of a suit instituted by the respondent, U Saw Han who claims a sum of K 2 lakhs as damages against the present appellants for printing and publishing a defamatory article concerning him in the *Bama Khit* (ဗမာ့ခေတ်) newspaper, dated the 14th May 1953, under a caption "၅၀ ကျော်နှင့် ၁၆ နှစ်သမီး သက်ကြားအိုရဲ့သားသတ်ခဏီး". At the trial the 1st defendant-appellant U On Kin was sued in a dual capacity (i) as Editor-in-chief and (ii) as proprietor of the *Bama Khit* newspaper. The 2nd defendant-appellant U Thoung was sued in his capacity as an editor of the said newspaper. The 3rd defendant-appellant U Tin Maung was impleaded alleging to be the printer and publisher; while the 4th and 5th defendant-appellants U Tun Kywe and U Khin Maung Aye were sued as partners and shareholders in the "Bama Khit" concern. We may here observe that in the notice sent to the defendant-appellants concerning the alleged defamatory article, the respondent U Saw Han demanded of them, besides an offer of apology to him, payment of a sum of K 20,000 as damages. But, when he filed the suit before the Court the respondent claimed, as general damages, a sum of K 2 lakhs asserting that there were aggravating circumstances. The trial Judge, however, awarded K 1 lakh as general damages. The article complained of has been set out *in extenso* in the judgment of the original Court and we do not propose to reproduce it here; but the passages alleged to be

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highly defamatory of the respondent are the followings:—

[Their Lordships proceeded to reproduce the passages which were alleged to be highly defamatory.]

The respondent alleges that the above passages when read together, in the context of the whole article are highly defamatory of him in that they are calculated to disparage his moral character and thereby expose him to ridicule, hatred and contempt by his friends, neighbours and business associates. The appellants filed three sets of written statements. The 1st appellant U On Kin in his dual capacity as the editor-in-chief of the *Bama Khit* newspaper and as proprietor thereof (6th appellant), first of all denied that the article in question referred to the respondent; but at the same time asserted that even if the article could be said to have referred to the respondent, the facts contained therein were true, and that they were fair comments made in good faith in the interest of the public. The 2nd appellant U Thoung also filed a similar written statement denying his liability for the publication of the article in question. The 3rd, 4th and 5th appellants also filed a separate written statement and disclaimed liability in the publication of the article complained of.

We may here observe that one significant fact that has probably escaped the attention of the learned trial Judge is that the respondent has never alleged in his plaint how the cause of action as against the

4th and 5th appellants, who are, on his own showing shareholders in the said *Bama Khit* newspaper has arisen, so as to make them liable as joint tort-feasers for the alleged defamatory article printed, edited and published by other appellants, namely, U On Kin, U Thoung and U Tin Maung. Be that as it may, the learned trial Judge, however, awarded K 1 lakh as against all the appellants. We may also note that the learned trial Judge has awarded this somewhat excessive sum on the ground that the article complained of was "wanton, unscrupulous and Malicious" remarking at the same time that the appellants having "abused the ownership of the press, must pay heavy damages for the luxury of the dramatic article which is false and malicious." Probably, the learned Judge was also influenced by the fact that when the appellants were served with notice by the respondent complaining about the publication of the article in question in their newspaper, the appellants again published the said notice in their paper instead of offering amends.

Thus, from the plaint filed it seems clear to us that the amount sought to be recovered by the respondent was only by way of general damages, no special circumstances having been advanced by him for claiming special damages; and that in the events that had taken place prior to the institution of his suit, we are afraid, the respondent could not have claimed any special damages at all, for he had obviously no special circumstances, factual or otherwise, which would entitle him to special damages. He only relied upon such circumstances as (1) the appellants' failure to offer apology, (2) republication of the respondent's notice to the appellants in their newspaper and (3) appellants' persistence in the plea of justification by truth, which he described as aggravating circumstances, in canvassing for a substantial damage. Such

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circumstances, asserted the learned Counsel, exposed malice on the part of the appellants, and in view thereof, the trial Judge was fully justified in awarding a substantial damage to his client. Dr. U E Maung, who appeared for the appellants before us, did not attempt to support the plea of justification that was urged by the appellants at the trial. He contended that although the passages set out above are to a certain extent defamatory of the respondent, and thus entitle him to the award of damages; yet in view of certain circumstances, and in view of the fact that even the witnesses cited by the respondent who are mostly his closest friends, have to concede that they shunned social intercourse with the respondent soon after his marriage with the very young niece of his who was all along living with him before his first wife's death, the attribution of malice, wantonness and unscrupulousness to the appellants, and the awarding of K 1 lakh as against them, as general damages, was entirely unjustified, unreasonable and unprecedented. Now, with reference to the passages complained of, Dr. U E Maung frankly conceded that the passage marked "ခ" လူသားစားကြူးသော ကာမဘိလူး တောင် " is a defamatory statement, inasmuch as the innuendo was that the respondent was a sexually abnormal person. He also conceded that the passage marked "ဃ" was also defamatory of the respondent, in that the respondent was described as one having an uncontrollable sexual desire. The rest of the passages, apart from the caption " ၅၀ ကျော်နှင့် ၁၆ နှစ်သမီး၊ သက်ကြားအိုရဲ့သားသတ်ခဏီး " namely, the passages marked " ဂ ", " ဃ ", " စ ", " ဆ ", " ဇ " and " ဈ ", are, he contended, in the context of events that had admittedly taken place, totally innocuous. The learned Counsel further conceded that the caption might be somewhat defamatory when read in the light of the two passages marked

"ခ" and "ဃ" set out above; but he contended that the age of the respondent being not untrue, nor the fact about his having married to a young niece of his, the caption "သက်ကြားအိုခိုသားသတ်ခဏိး" by itself merely meant to convey to the public the doing of a thing which ought not to be done. We have taken greatest pain to assess the passages complained of in the light of the above submissions and we are inclined to agree with him. We regret we cannot fall in line with the learned trial Judge's conclusion that the passages complained of put the respondent as a vicious, licentious, lustful, wanton and unscrupulous person lacking in all sense of morality. On checking up the evidence we find that the respondent's own witnesses U Hla Shein (PW 1), Daw Saw (PW 6), the present mother-in-law of the respondent, and U Paing (PW 4) appear to support the truth of some events that had taken place before and after the marriage with the respondent's own niece Ma Tin Myint. It is undisputed that during the lifetime of the respondent's wife Daw Aye Nyunt her three nieces Ma Than Myint, Ma Khin Myint and Ma Tin Myint were living with her. It is also factually true that Ma Than Myint, the eldest niece, was married to U Saw Han's younger brother. It is also true that Ma Khin Myint, while staying in U Saw Han's house, eloped with her cousin one Maung Myint Thein. Ma Tin Myint, the youngest niece [daughter of Daw Saw (PW 6)] was eventually given in marriage to the respondent within two months after the death of Daw Aye Nyunt, sister of Daw Saw. It is also an admitted fact that U Saw Han has children with his previous wife Daw Aye Nyunt and they are grown-up children about the age of Ma Tin Myint herself. It is also conceded that some trouble arose over the elopement of Ma Khin Myint with one Maung Myint Thein and a report

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had to be made to the police in connection therewith. These events took place in rapid succession just before the marriage took place between the respondent and Ma Tin Myint. U Paing, *Barrister-at-Law*, who is close friend of U Saw Han, even deposed :

"ဦးစောဟန်သည်၊ မိန်းမသေပြီး ၂ လအတွင်းမှာ လက်ထပ်ခြင်းမှာ စောလွန်းပါသည်၊ ဦးစောဟန်သည်၊ မယားသေပြီး ၂ လအကြာမှာ မိန်းမယူခြင်းကို၊ ကျွန်တော်အမှန်ပြောရလျှင်၊ ကျွန်တော့်စိတ်ထဲမှာ စိတ်ဆိုးပါသည်။ အသက်ငယ်ရွယ်သောသူအားယူခြင်းမှာ လူအပေါ်မှာတည်ပါသည်။ ကျွန်တော်တို့အပေါင်းအသင်းထဲမှာတော့ ရှားပါသည်။ ကိုယ့်အိမ်မှာ သားသမီးလိုနေထိုင်သောတူမကလေးအား ပြန်၍ယူခြင်းမှာအလွန်ပင်နည်းပါသည်။သို့သော် ဗမာမှာများသောအားဖြင့် မိန်းမဘက်ကဆွေမျိုးများကိုပြန်ယူတာများပါသည်။ သို့သော် အဒေါ်သေပြီးနောက်၊ အဒေါ်ယောကျ်ားကို ပြန်ယူတာတော့ ကျွန်တော်သိဝ်မတွေ့ဘူးပါ။ ကျွန်တော်စိတ်ဆိုးခြင်းမှာ၊ မယားသေငှ်း ၂ လအတွင်းမှာ၊ နောက်မယားယူတာကို မယူသင့်ဘူးဟုဆိုပြီး စိတ်ဆိုးခြင်းဖြစ်ပါသည်။"

The reaction of another closest friend of the respondent U Hla Shein (PW 1), is of like nature, for he deposed as follows :—

"ဦးစောဟန်အိမ်နှင့်ကျွန်တော့်အိမ်သည်သိပ်မဝေးပါ။ ဦးစောဟန်သည်၊ ကျွန်တော်နှင့် ၂၅ နှစ်လောက်ကစ၍ ခင်မင်သော်လည်း၊ ၎င်းလက်ထပ်စဉ်အခါက၊ ကျွန်တော်အား မဘိတ်ပါ။ ကျွန်တော်တို့ ဇဋ္ဌဘာသာ မြန်မာလူမျိုးထုံးတမ်းစဉ်လဲ့မှာ၊ မယားသေပြီး ၁ လကြား ၂ လကြားမှာ နောက်မိန်းမယူသည့်အလေ့အထသည် အလွန်ပင်နည်းပါသည်။ သို့သော် ရှိတော့ရှိပါသည်။ မိမိအိမ်တွင် တူမလို သားသမီးလို နေထိုင်သောသူအား လက်ထပ်ခြင်းမျိုးမှာလည်း အလွန်ပင် နည်းပါသည်။ သို့သော် ကျွန်တော် ကြားတော့ကြားဘူးပါသည်။ ကျွန်တော်သည်၊ သတင်းစာကိုမဘတ်မီက အဖြစ်အပျက်အမှန်ကိုမသိပါ။ ငယ်စဉ်ကပင်၊ ကိုယ့်အိမ်မှာနေတဲ့ တူမတယောက်ကို ယူခြင်းနှင့်မယားသေပြီးမကြာခင် နောက်မယားယူသည်ဟုဆိုခဲ့လျှင်၊ အလွန်ဆိုးပါသည်။ ကျွန်တော်သည် ဦးစောဟန်အား ရှက်ကိုးရှက်ကန်းဖြစ်ခြင်းမှာ၊ ကျွန်တော်အထက်ကပြောခဲ့သောအကြောင်းများကြောင့်ဖြစ်ပါသည်။ ဦးစောဟန်အား ကျွန်တော့်ထက် ကျွန်တော့်မိန်းမကပို၍ ရှုံးတမ်းတမ်းဖြစ်နေပါသည်။"

Having regard to these facts and circumstances, we are inclined to agree with the submission of Dr. U E Maung that the article though defamatory of the respondent in certain passages, and in spite of all the attributes of wantoness, maliciousness, unscrupulousness, etc., yet the awarding of a damage of K 1 lakh is not only excessive but also unreasonable and unprecedented. It is submitted that not only the Courts in Burma but also in India such excessive damage was never awarded in a defamation suit. We have looked in vain for a precedent; and we find that the submission of the learned Counsel for the appellants is quite correct. We would, however, like to observe that quantification of damages as a "solatium" to a plaintiff in a suit for defamation, in so far as the Courts in Burma and India are concerned, is within the discretion of the Court. But in England where the trial in such cases is before a jury, the quantification is entirely left to the jury. However, the learned Counsel for the respondent relying upon *C.M.G. Ogilvie* v. *Punjab Akhbarat and Press Company* (1), *Munshi Ram* v. *Mela Ram Wafa and another* (2), *Lajpat Rai* v. *'The Englishman' Ltd.* (3) and *Khair-ud-din* v. *Tara Singh and another* (4) urged upon us that although the fixing of the amount of damage is entirely within the discretion of the Court, yet in assessing it, the conduct of the defendant, the feature of the defamatory words complained of, and the fact that it has been published in a newspaper with wide circulation, such as the appellants', should be taken into consideration and that the trial Judge having apparently taken those circumstances into consideration in fixing the damage it would be improper for us to re-assess the same.

(1) I.L.R. 11 Lah. 45.
(2) A.I.R. (1936) Lah. 23.
(3) I.L.R. 36 Cal. 883.
(4) I.L.R. 7 Lah. 491.

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U CHAN TUN AUNG, C.J.

We regret, we cannot accept this contention. When it was pointed out to the learned Counsel that if the amount of damages awarded by the trial Court was so extremely high as to make it entirely unreasonable having regard to the circumstances of the case, whether the appellate Court could not reverse the decision of the trial Court, he readily conceded that the appellate Court has ample power in its discretion to re-fix the amount. Further, when we enquired from him, on what data the learned trial Judge had arrived at the sum of K 1 lakh when, in fact, his demand notice, dated 15th June 1953, fixed the damages at K 20,000 he submitted that intervening aggravating circumstances already set out above entitled his client the award of a substantial damage. It might be true that those circumstances had arisen, but we do not feel persuaded by the learned Counsel's submission that those very circumstances should, in the circumstances already set out above, entitle his client to such a sum of K 1 lakh as damages. We are of the view that although the fixing of damage, is within the discretion of the Court, yet unless a reasonable proportion exists between the sum awarded and the circumstances of the case, the Court would be wanting in the proper and reasonable exercise of its discretion. Exercising of discretion does not mean doing what a Court likes, disregarding the facts and circumstances of the case.

Now, among the very cases cited by the learned Counsel for the respondent, *e.g.*, *C.M.G. Ogilvie* v. *Punjab Akhbarat and Press Company* (1), it appears that Mr. Ogilvie was a Deputy Commissioner, and the defendant press published a highly defamatory article affecting not only his character but also his

(1) I.L.R. 11 Lah. 45.

official duties as a District Magistrate, and Mr. Ogilvie filed a suit against the proprietor of the press claiming Rs. 15,000 as damages. The trial Court, however, awarded Rs. 100, but on appeal by Mr. Ogilvie to a Bench of the Lahore High Court, Shadi Lal, C.J. and Broadway, J., accepted the appeal and granted him damages amounting to Rs. 2,500 only. It will thus be seen that the greatest moment in a defamation suit, especially concerning a person of high social standing, or who holds high official position, is not the quantum of damage, but whether he has fully vindicated his rights.

The next question we have to consider is the liability of the 4th and 5th appellants. As has been already observed above by us, the respondent has never set out in his plaint what cause of action he had as against these two persons who happened to be, on the respondent's own showing, merely shareholders of the *Bama Khit* press. No assertion was ever made as to how they were responsible, as joint tort-feasers for the publication of the article complained of. We could understand that in the case of an author, printer, publisher and proprietor of a press all of them can be sued jointly for defamation, inasmuch as they are all instrumental in the publication of a defamatory article. Here, so far as the 4th and 5th appellants are concerned there is no such allegation of joint authorship, printing or publication thereof; nor any evidence adduced at the trial in that regard; and in these circumstances we do not see how they could have been held liable. When this was pointed out to the respondent's Counsel he submitted that he could not advance his case more than a bare assertion that they are shareholders in the *Bama Khit* press. He also submitted that if the appeal

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is allowed in their favour, they should not be awarded costs. The learned Counsel for these two appellants, however, contended that they had taken the stand all along not only at the trial but in appeal that there was no cause of action against them and their plea of non-liability has been expressly stated so in their written statement. We find that that is correct. In these circumstances, we really do not see what justification there was in impleading them as defendants and also in making them liable for the article complained of. Therefore having regard to all the facts and circumstances of the case, and also even accepting the existence of certain aggravating circumstances set out above, we are not at all persuaded to the view that the respondent is entitled to such an excessive damage as K 1 lakh. We agree that the respondent is a man of high social standing having been in the Civil Service holding a first-class official position; yet we are of the view that in instituting the suit for defamation against the appellant press, its publishers and printers he is motivated more by a desire to vindicate his right rather than to make a pecuniary gain out of it. We have not the slightest doubt that he has fully vindicated his right, as we are in complete agreement with the learned trial Judge, in so far as the defamatory aspect of certain passages complained of is concerned, although, with respect, we differ from him in the quantification of the damages awarded. The amount awarded, as has been observed above, is unprecedented and extremely high so as to make it an entirely erroneous estimate; and that he has erred in so doing. It is one of such cases in which we feel that we should interfere on the principle laid down by Greer, L.J., in *Flint* v. *Lowell* (1) wherein he said "that the Court of Appeal would not reverse the

(1) (1935) 1.K.B. 354.

decision of the trial Judge on the question of the amount of damages, unless it is satisfied either that the Judge acted on some wrong principle of law or that the amount awarded was so extremely large * * * * as to make it an entirely erroneous estimate of damage." (NOTE.—The underlining is by us.)

In the result, therefore, this appeal must be allowed partially; and we would accordingly modify the judgment and decree of the trial Court as follows: The plaintiff in the case shall be entitled to damages of K 3,000 with costs thereon as against the 1st, 2nd and 3rd defendants, and his claim as against the 4th and 5th defendants shall be dismissed with costs; the amount of costs shall be fixed on the claim of K 3,000 and not on K 2 lakhs as claimed by the plaintiff.

The 4th and 5th defendant-appellants having succeeded in this appeal, they are entitled to costs (one set) as against the plaintiff-respondent calculated on K 3,000.

The plaintiff-respondent will be entitled to costs (one set) of this appeal as against the 1st, 2nd and 3rd defendant-appellants on the basis of claim of K 3,000.

U BA THOUNG, J.—I agree.

APPELLATE CIVIL.

Before U Aung Khine and U Ba Thoung, JJ.

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Aug. 18.

U PO MIN AND ONE (APPELLANTS)

v.

LIM BOON KYUN (RESPONDENT).*

Transfer of Property Act—S. 41—Reasonable care—Protection afforded by—Right of person in possession despite failure to renew lease—Trust Act, s. 90.

A together with his brother B, now deceased, received equal shares in a piece of leasehold land belonging to their father on his death. Before his death B sold his share, *viz.* the suit land to the Respondent in 1941. The original lease expired in 1944 and in 1948 A applied for and obtained a renewal of the original lease in the name of his father without the knowledge of the Respondent. In 1952 he sold the suit land already sold by his deceased brother B to the Respondent to the Appellants in the name of his deceased father as the vendor. Before the purchase of the suit land the Appellants made two insertions, one in English and the other in Burmese newspapers about the intended purchase of the suit land and calling for objections from persons claiming to have any interest in the property, but made no search in the Registration office.

Held : That A had sold the land over which he had no legal title.

Held also : That even assuming that A had acquired a valid lease which was issued in the name of his father the right title and interest of the Respondent remained unimpaired and that whatever advantages A had obtained by getting the renewal of the lease he must hold it for the benefit of the Respondent. *Faizer Rahman* v. *Maimuna Khatun*, 17 C.W.N. 1233, referred to.

Held also : That the Respondent having been in constructive possession of the land in dispute his right over it remained good as against all other persons even though he had not applied for the renewal of the original lease.

Ma Pwa Zon and two v. *Ma Pan I and one*, I.L.R. 5 Ran. 145, followed.

Held further : That under s. 41 of the Transfer of Property Act a transferee must of necessity inquire into the title and if he omits to do that he would not be protected by this section and that the insertions in the newspapers alone would not absolve the Appellants to institute searches in the Registration office to get the exact particulars of the land.

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* Civil 1st Appeal No. 51 of 1955 against the decree of the Second Judge, City Civil Court of Rangoon in Civil Regular No. 1333 of 1953, dated the 28th June 1955.

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Ba Hpu for the appellants.

Aung Min (1) for the respondent.

U AUNG KHINE, J.—This appeal arises out of Civil Regular No. 1333 of 1953 in the Rangoon City Civil Court in which the plaintiff-respondent Lim Boon Kyun obtained a decree for partition and possession of a half-share in the plots of land known as Lots Nos. 303 and 304 in Block No. X-2, Myoma West Circle, Rangoon, against the defendants (1) Tan Say Moh (*a*) Tan Byan Soo, (2) U Po Hmin and (3) Maung Tin Win. Tan Say Moh did not appear to contest the suit. This is an appeal by the 2nd and 3rd defendants U Po Hmin and Maung Tin Win.

The facts of the case are simple and they are briefly these. The original owner of the suit land was Tan Teong Sin who obtained a 30 years' lease of the same on 11th September 1914. On 18th October 1919 he sold the land to one Tan Byan Soo. On the death of Tan Byan Soo his two sons, Tan Say Moh, the 1st defendant and Tan Say Kee, now deceased, received equal shares in the land and on 29th October 1941 Tan Say Kee sold his share to the plaintiff Lim Boon Kyun. At the time of the sale there was a building standing on the land and there is evidence to show that the plaintiff collected and received rents from certain rooms allotted to him in the building. During the war the building was destroyed and the suit land remained vacant. The original lease expired on 10th September 1944. Tan Say Moh in the name of Tan Byan Soo in the year 1948 applied for and obtained a renewal of the original lease unknown to the plaintiff. Then on 29th July 1952 U Po Hmin and his son Maung Tin Win, the 2nd and 3rd defendants, as per Exhibit 2 purchased

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the suit land alleged to be from Tan Byan Soo. It is not in dispute now that the real vendor is no other than the 1st defendant Tan Say Moh.

The question which calls for determination now is whether by their purchase on 29th July 1952 the appellants had acquired also the right, title and interest of that portion of land which was purchased by the respondent from Tan Say Kee on 29th October 1941.

It is strongly stressed by the learned Advocate for the appellants that the plaintiff-respondent had no longer any legal title in the land at the time he filed his suit as the original lease had already expired on 10th September 1944 and as he had not applied for renewal of the same, the right, title and interest in the land he had acquired from Tan Say Kee had become extinct.

We have stated in the outline of the case earlier that there is evidence to show that the plaintiff-respondent had on divers occasions collected rents of certain rooms in the building standing on the land before the building was destroyed. The lower Court accepted that evidence and we see no sufficient ground to come to a different conclusion. This in turn would mean that the plaintiff-respondent was in constructive possession of the portion of the land that he had purchased from Tan Say Kee. Even though he had not applied for the renewal of the lease issued in 1914, his right over the land remained good as against all other persons. In *Maung Naw* v. *(1) Ma Shwe Hmut and (2) Maung Pein* (1) it was held that mere previous possession is sufficient to support a claim for possession against one who has dispossessed the plaintiff when the defendant has no title himself. The contention of the learned Advocate for, the

(1) 8 L.B.R. 227.

appellants could only prevail if the dispute had been one between the respondent and the authorities creating the lease. The principle enunciated in *Maung Naw* v. *Ma Shwe Hmut and Maung Pein* (1) was followed in the case of *Ma Pwa Zon and two* v. *Ma Pan I and one* (2).

It appears to us that the appellants had been duped to pay for that half portion of land over which their vendor Tan Say Moh had no right, title or interest. We are convinced that the sale effected on 29th July 1952 was not free from the taint of fraud in the sense that firstly, Tan Say Moh represented himself to be Tan Byan Soo and secondly, he purported to sell that portion of land over which he had no legal title.

Next, it is contended that as the appellants had purchased the suit land from the ostensible owner for value they should not be made to forego the portion of land which is now claimed by the plaintiff-respondent. Section 41 of the Transfer of Property Act reads :

> "Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it : provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

We have now to look into the question as to whether the appellants had taken reasonable care to ascertain that the vendor had power to make the transfer. A transferee must of necessity inquire into the title and if he omits to do that he would not be protected by this section. But for their wilful abstention from making a search in the Registration Office, the

(1) 8 L.B.R. 227. (2) I.L.R. Ran. Series, Vol. 5, p. 154.

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appellants would have discovered the sale of half share of the suit land by Tan Say Kee to the respondent in the year 1941. It is true that they had made two insertions, one in English and the other in Burmese newspapers to state that they were purchasing from U Byan Soo of Latter Street the suit land and at the same time calling for objections from persons claiming to have any interest in the suit property. We would point out that these insertions in newspapers alone would not absolve the appellants to institute searches in the Registration Office to get the exact particulars of the land.

Now, the person who obtained the renewal of the lease in 1948 was Tan Say Moh and the lease was issued in the name of Tan Byan Soo. Tan Say Moh was at the time a co-owner of the suit land with the plaintiff-respondent. Even assuming that he had acquired a valid lease, we consider that the right, title and interest of the plaintiff-respondent still remain unimpaired. Section 90 of the Trusts Act reads :

> " Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained. * * * * * "

In *Faizer Rahman* v. *Maimuna Khatun* (1) it was held that where a revenue sale is caused by the default of a co-owner and the property is afterwards purchased at that revenue sale by that co-owner there may be such relations between the defaulter and his co-owner as would make it right for the Court to treat such a sale as made for the benefit of both.

(1) 17 C.W.N. p. 1233.

An analogy can be drawn in this case to show that whatever advantages Tan Say Moh had obtained by getting the renewal of the lease he must hold it for the benefit of the plaintiff-respondent as well. For the reasons stated above, the appeal must fail and accordingly we dismiss the same with costs.

U BA THOUNG, J.—I agree.

APPELLATE CIVIL.

Before U Thaung Sein, J.

H.C. 1958

Aug. 7.

U PO THI AND ONE (APPELLANTS)

v.

U KYAW SINT AND ONE (RESPONDENTS).*

Urban Rent Control Act—Orders passed by Courts subordinate to District Court in suits for recovery of possession under—S. 15—District Court—Power to entertain appeals from—Civil Procedure Code—S. 104, Order XLIII, s. 2 (2), s. 47.

Where a District Court, purporting to act under s. 15, Urban Rent Control Act, entertained and allowed an appeal from an order of a Township Court which directed the suit under s. 11 (*1*) (*d*) of the Urban Rent Control Act for the recovery of possession of certain premises to proceed on the merits after holding that the permit granted by the Rent Controller under s. 14 (*A*) of the Act was valid.

Held: That there is nothing in s. 15 of the Act to suggest that all orders passed by Courts subordinate to the District Court in suits for the recovery of possession of any premises to which this Act applies shall be appealable to the District Courts concerned.

Held also: That if any such order falls within the ambit of s. 104 or Order XLIII or comes within the definition of a "decree" in s. 2 (2) read with s. 47 of the Civil Procedure Code, then clearly an appeal will lie to the District Court.

Haw Lim On v. *Ma Aye May*, (1951) B.L.R. (S.C.) 68, explained.

Held further: That in the present case the order was not a "decree" as defined in s. 2 (2) read with s. 47 of the Civil Procedure Code and that the District Court was not competent to entertain the appeal.

Hla Nyunt for the appellants.

P. K. Bose for the respondents.

U THAUNG SEIN, J.—The present appellants U Po Thi and Daw Ngwe Su sued the respondents Maung Kyaw Sint and U San in Civil Regular Suit No. 22 of 1956 of the Township Court of Myingyan

* Civil 2nd Appeal No. 7 of 1958 against the judgment and decree of the District Judge, Myingyan, in Civil Appeal No. 9 of 1957, dated the 5th November 1957.

for the possession of a certain house site situated in the town of Myingyan. Judging from the recitals in the plaint, the suit was obviously one under section 11 (*l*) (*d*) of the Urban Rent Control Act and the appellants attached a permit granted to them by the Rent Controller under section 14 (*A*) of that Act enabling them to file the suit.

The respondents contested the suit and raised a preliminary objection saying that the permit granted by the Rent Controller was invalid and that the Township Court had no jurisdiction to entertain the suit. The learned Township Judge did not frame any specific issue on the point raised by the respondents, but learned counsel for both sides were given ample opportunities for arguing the matter and by an order dated the 16th August 1957, it was held that the permit issued by the Rent Controller was a valid one and that the suit would proceed on the merits. The respondents then went up on appeal to the District Court, Myingyan, and the learned District Judge set aside the above order and dismissed the appellants' suit. Hence the present second appeal to the High Court.

The first question which arises for determination is whether the learned District Judge had any jurisdiction to entertain an appeal against the order of the learned Township Judge under consideration. According to him section 15 of the Urban Rent Control Act has invested District Courts with jurisdiction to entertain such appeals but this is not supported by the section itself which reads—

"15. An appeal on law and fact shall lie to the High Court of Judicature at Rangoon from any decree or order made by any Judge of the Rangoon City Civil Court or any Judge of the District Courts outside Rangoon in any suit or application or proceeding arising out of such suit or application for

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the recovery of possession of any premises to which this Act applies or for the ejectment of a tenant therefrom."

There is nothing in this section to suggest that all orders passed by Courts subordinate to the District Court in suits for "the recovery of possession of any premises to which this Act applies", shall be appealable to the District Court concerned. But if any such order falls within the ambit of section 104, or Order XLIII or comes within the definition of a "decree" in section 2 (*2*) read with section 47 of the Civil Procedure Code, then clearly an appeal will lie to the District Court. The learned District Judge, Myingyan has also referred to the ruling in *Haw Lim On* v. *Ma Aye May* (1) as authority for the view that all orders whatsoever passed by Courts subordinate to the District Court in suits of the abovementioned nature, are appealable to the District Court. A careful reading of that ruling will reveal that the Supreme Court did not lay down any such proposition of law as stated by the learned District Judge, Myingyan. The facts of that case are set out in the headnote as follows :

"Respondent against whom a decree for ejectment had been passed by the First Assistant Judge of Bassein applied under s. 14 (*1*) of the Urban Rent Control Act, 1948 to have the decree discharged or rescinded. The application was dismissed. An appeal was preferred to the District Court of Bassein and was dismissed on the ground that appeal lay to the High Court. When appeal was preferred to the High Court, the High Court allowed the appeal and directed the District Court to proceed to hear the appeal."

At page 70 of the ruling the Supreme Court pointed out that "The test then for the purposes of this case is whether the order which was passed by the First Assistant Judge in the proceedings out of which the

(1) (1951) B.L.R. (S.C.) 68.

appeal to this Court arises, will be appealable under the provisions of the Civil Procedure Code or other relevant enactments." It was then held that "the rejection of the respondents' application will fall within the meaning of" a determination of any question within section 47 of the Civil Procedure Code for the purposes of section 2 (2) of the Code "and thus appealable to the District Court. In the present case, the order of the learned Township Judge, Myingyan was not a "decree" as defined in section 2 (2) read with section 47 of the Civil Procedure Code and I fail to see how the learned District Judge was able to entertain an appeal against it. Accordingly, this appeal is allowed and the judgment and decree of the District Court of Myingyan are hereby set aside and the suit will be remanded to the Township Court, Myingyan for disposal according to law. Costs shall abide by the final decision in the suit.

APPELLATE CIVIL.

Before U Thaung Sein, J.

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July 31.

U SAN CHEIN (APPELLANT)

v.

DAW MA (RESPONDENT).*

Costs awarded against a number of defendants or respondents—Absence of indication of proportion in which costs shall be borne by different defendants or respondents—Liability of defendants or respondents to pay costs jointly and severally.

Where costs are awarded against several defendants or several respondents without indicating the proportion in which these costs shall be borne by the different defendants or different respondents, the defendants or respondents as the case may be are jointly and severally liable for costs, and the order for costs may be executed against any one of them.

The Midnapur Zemindary Co. Ltd. v. *Madan Marwari and others*, A.I.R. (1923) Pat. 215, referred to.

S. Ramiah Pillay v. *K. M. Abdul Kader*, (1954) B.L.R. 245, followed.

Tha Kyaw for the appellant.

B. M. Sarkar for the respondent.

U THAUNG SEIN, J.—The short point for decision in this appeal is whether a decree-holder who has obtained a decree against several judgment-debtors for the payment of costs is entitled to execute that decree against any one of the judgment-debtors or whether the decree should be executed against all the judgment-debtors jointly. The facts involved are simple and as follows. The respondent Daw Ma obtained a decree against the appellant U San Chein and two others for the payment of K 100 as costs in Civil Regular Suit No. 71 of 1953 of the Subdivisional Court of Mandalay, and sought to execute that decree

* Civil 2nd Appeal No. 26 of 1958 (Mandalay) against the judgment and decree of the District Judge, Mandalay passed in Civil Appeal No. 4 of 1958.

against the appellant U San Chein alone. The appellant objected to the execution on the ground that the "accepted rule is that three defendants are liable for the costs jointly and severally." The learned Subdivisional Judge refused to accept this contention and proceeded to execute the decree against the appellant alone. An appeal was lodged in the District Court, Mandalay against the order of the Subdivisional Judge but without result and hence the present second appeal to the High Court.

Amusingly enough, the learned counsel for the appellant who had contested the execution in the Subdivisional Court on the ground the three judgment-debtors were "jointly and severally" liable for the satisfaction of the decree now strenuously contends that the decree cannot be executed against his client alone as the judgment-debtors are "jointly" but not "severally" liable to pay up the costs. There is a complete answer to this contention in *The Midnapur Zemindary Co., Ltd.* v. *Madan Marwari and others* (1) the headnote of which reads—

> "If costs are awarded against a number of defendants or a number of respondents without indicating the proportion in which these costs shall be borne by the different respondents, such an order is always taken to mean that the respondents or the defendants as the case may be, are jointly and severally liable for the costs, and the order for costs may be executed against any one of them, who will have a right of contribution against others in a case of this nature."

A similar view is also to be found in *S. Ramiah Pillay* v. *K. M. Abdul Kader* (2). Both these cases were relied upon by the learned District Judge with whose judgment I am in entire agreement.

Accordingly, this appeal fails and is dismissed with costs.

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(1) (1923) A.I.R. Pat. 215. (2) (1954) B.L.R. 245.

APPELLATE CIVIL.

Before U Ba Nyunt, J.

H.C. 1958

Aug. 7.

U SAN WIN (APPELLANT)

v.

DAW AYE KYI AND ONE (RESPONDENTS).*

Suit for money on an agreement—Money consisting of arrears of rent collected and arrears of rent due—Urban Rent Control Act—S. 16—Not applicable.

Where in a suit for the recovery of a certain sum of money due on a written agreement, it was contended that the sum of money due and payable on the suit document being arrears of rent collected from other tenants and the arrears of rent due by the defendant and that the suit was not maintainable in law in the absence of a certificate of Rent Controller certifying the standard rent of the premises under s. 16 of the Urban Rent Control Act.

Held : That the moment the amount of rents collected and the arrears of rent due were agreed to be treated as a debt and a written agreement to that effect and for payment thereof was signed, the relationship between the parties became that of the debtor and creditor in respect of the sum involved in the document, and that the provisions of s. 16 of the Urban Rent Control Act will not come into play in so far as the suit on the said document is concerned.

Kyaw Htoon for the appellant.

Maung Maung for the respondents.

U BA NYUNT, J.—In Civil Regular Suit No. 9 of 1955 of the Subdivisional Court of Pegu, the respondents instituted a suit for recovery of a certain sum of money due on a written agreement. After hearing the evidence the trial Court gave a decree in favour of the respondents. On appeal to the District Court of Pegu, the judgment and the decree of the trial Court were confirmed. Hence this appeal.

The contention raised in this appeal is that the sum of money due and payable on the suit document

* Civil 2nd Appeal No. 30 of 1957 against the decree of the District Court of Pegu in Civil Appeal No. 8 of 1956, dated the 9th February 1957.

being the arrears of rent collected by the appellant from the other tenants of the respondents together with the arrears of rent due and payable by him on his own account, the suit is not maintainable in law in the absence of a certificate of Rent Controller certifying the standard rent of the premises under section 16 of the Urban Rent Control Act.

However in the course of his arguments the learned Advocate for the appellant has frankly conceded that the moment the amount of rents collected by the appellant and the arrears of rent due by him on his own account were agreed to be treated as a debt and a written agreement to that effect and for payment thereof was signed by the appellant, the relationship of the appellant and the respondents became that of the debtor and the creditors in respect of the sum involved in the document. That being so, the provisions of section 16 of the Urban Rent Control Act will not come into play in so far as the suit on the said document is concerned. Under these circumstances the appeal fails and must be dismissed with costs.

APPELLATE CIVIL.

Before U Aung Khine and U Choon Foung, JJ.

H.C. 1958

Aug. 1.

V. NATH SINGH (APPELLANT)

v.

MA KHIN TINT AND TWO OTHERS (RESPONDENTS)*.

Workmen's Compensation Act—S. 2 (n)—*Workman*—S. 12 (1)—*Liability for payment of compensation*—*Quasi-penal statute*—*To be construed strictly.*

Where the owner of a cinema hall entered into a contract with an electrical contractor for the installation of electric fittings in his cinema hall and the latter for the performance of his contract engaged workmen, one of whom died as a result of an accident while engaged in wiring work.

Held: That the deceased was a workman within the meaning of s. 2 (*n*) of the Workmen's Compensation Aet and that the work of installing electric fittings ordinarily being not the business of the owner of the cinema hall, he was not liable under s. 12 (*1*) of the Workmen's Compensation Act to compensate the deceased's family.

Rabia Mahomed Tahir v. *G.I.P. Railways*, A.I.R. (1929) Bom. 179; *Bai Kokilabai* v. *Messrs. Keshavlal Mangaldas & Co.*, I.L.R. (1942) Bom. 139, referred to.

The Workmen's Compensation Act is a quasi-penal statute and it has to be construed not with sympathetic leniency but strictly.

Bombay Burmah Trading Corporation Limited v. *Ma E Nyun*, I. L. R. 14 Ran. 753, followed.

Ba Swe for the appellant.

Tin Hla for the respondents.

U AUNG KHINE, J.—The appellant Mr. V. Nath Singh constructed a cinema hall under the name of "Green Palace" in Yenangyaung and for the purpose of installing electric fittings therein, he engaged the 3rd respondent U Ngwe Mya, a Government Registered Contractor on the following terms:—

(i) Mr. Nath Singh was to supply all the materials required.

* Civil Misc. Appeal No. 1 of 1957 against the order of the Commissioner, Workmen's Compensation (Oilfield), Yenangyaung, in Workmen's Compensation Proceeding No. 1 of 1956, dated the 5th November 1956.

(ii) The payment to be made to U Ngwe Mya according to the number of points and plugs fixed.

U Ngwe Mya took on the work and he was assisted by several workmen including the deceased U Shwe Phone (*a*) U Shwe Po, a First Grade certificated electrician. It is not disputed that these men were all recruited by U Ngwe Mya. Payment was received from time to time for the work done and according to U Ngwe Mya it was shared equally amongst the workmen including himself; but according to Ko Aung Tun (PW 1) U Ngwe Mya took half of the receipts and only the remaining half was shared equally amongst the workmen. Work began some time in the month of *Waso* 1317 B.E. and it was in the month of *Thadingyut* that the fatal accident occurred. The deceased U Shwe Phone while actually engaged in the wiring work fell through the ceiling of the hall to the ground and he was killed on the spot.

It is clear from the above outline that the deceased was a workman within the meaning of section 2 (*n*) of the Workmen's Compensation Act and that he was engaged not by Mr. Nath Singh but by U Ngwe Mya. The statement of U Shwe Phone's daughter, Ma Khin Shein, shows that her father was engaged by U Ngwe Mya.

The lower Court, however, by a curious reasoning held that the deceased was a workman of the appellant Mr. Nath Singh and not that of U Ngwe Mya and that U Ngwe Mya was not a contractor but a workman himself.

We feel that we cannot endorse this finding for the following reasons. U Ngwe Mya was entrusted with the entire work of installing electric

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U AUNG KHINE, J.

fittings and the appellant was entirely divorced from such work. It is true that he supplied the necessary materials for the work and from time to time paid out the charges made. The appellant also did not recruit any men for the work and did not bother himself to find out whom U Ngwe Mya had engaged and on what terms. On these facts we must take the view that U Ngwe Mya took the contract from Mr. Nath Singh to do the work assigned to him, although we regret to note that there was no written document accompanying the agreement.

Our finding that U Ngwe Mya was a contractor of Mr. Nath Singh and that the deceased U Shwe Phone was his own workman will not absolve Mr. Nath Singh from liability unless he can show that the provisions of section 12 (*1*) of the Act have in this case no application to him. The learned Advocate appearing for him cited the case of *Rabia Mahomed Tahir* v. *G.I.P. Railway* (1) in support of the theory that the work the deceased was engaged in was neither for the purpose of his client's trade or business nor was it a work which is ordinarily part of his client's trade or business. In that case a workman recruited by a contractor engaged in the construction of pillars to carry an electric cable for the railway was killed by a running train while actually doing the work of the contractor. It was held that this work formed no part of the ordinary work of the Railway Company whose primary business was to carry passengers and goods. In this case it was stated by the learned Commissioner that the wiring work was done in the cinema hall to enable the appellant to screen pictures and for that reason he must be held liable under section 12 (*1*) of the Act.

(1) A.I.R (1929) Bom. 179.

As stated in the case of *Bai Kokilabai* v. *Messrs. Keshavlal Mangaldas & Co.* (1), the question which arises under section 12 (*1*) is normally a pure question of fact. The most important question for decision in this case is whether U Ngwe Mya was engaged in the work which was ordinarily part of the trade or business of the appellant. The installation of electric fixtures ordinarily is not the business of the appellant and we are again unable to accept the finding which had been arrived at by the learned Commissioner by stretching the point that as the work was being done to enable the appellant to run his business he must be considered liable to compensate the deceased's family under section 12 (*1*) of the Act.

We have every sympathy for the dependants of the deceased; but as pointed out in the *Bombay Burmah Trading Corporation Limited* v. *Ma E Nyun* (2), the Workmen's Compensation Act is a quasi-penal statute and therefore it has to be construed not with sympathetic leniency but strictly. The question involved in this case can only be answered by reference to the facts obtained on record as to the nature of the principal's business. It is obvious in this case that the principal's business is not connected with the installation of electric fittings.

In the result the appeal is allowed and we dismiss the application for compensation. There will be no order as to costs.

U CHOON FOUNG, J.—I agree.

(1) I.L.R. (1942) Bom. 139.

(2) I.L.R. (14) Ran. 753.

တရားမအယူခံ

တရားဝန်ကြီး ဦးဘညွန့် ရှေတော်တွင်

†၁၉၅၀

ဇူလိုင်လ ၁၀။

ဦးပွေး (အယူခံတရားလို)

နှင့်

ဦးထွန်းစိန် ပါ ၉ ဦး (အယူခံတရားခံများ)*

တရားခံတဦး၏ အမှုတွင်သက်သေခံခွင့်။ ချေလွှာတွင် တရားလိုစွဲသည့်အတိုင်း မှန်သည်ဟု ဝန်ခံထားက၊ သက်သေခံခွင့် ရှိ မရှိ။ သက်သေခံရန် ခွင့်တောင်းနိုင်ခြင်း၊ တရားလို ကလည်း သက်သေအဖြစ် ပြနိုင်ခြင်း၊ သက်သေမခံသော်လည်း အမှုကို မထိခိုက်နိုင်ခြင်း။

သံလျင်မြို့၊ နယ်ပိုင်တရားမတရားသူကြီးရုံးတော်၌ အယူခံတရားလိုက၊ အယူခံ တရားခံများအပေါ်တွင် အချင်းဖြစ် အိမ်သည် ကွယ်လွန်သူ ဒေါ်ရွှေယုပိုင်မဟုတ်၊ အယူခံတရားလို သာလျှင် ပိုင်ဆိုင်ကြောင်း အတိအလင်းကျည်ပေးပါရန် တရားစွဲဆိုခဲ့ရာ၊ အယူခံတရားခံ အမှတ် ၁ နှင့် ၃ တို့က ချေလွှာတင်သွင်း၍ ထုချေပြီး၊ အယူခံတရားခံ အမှတ် ၂ ကမူ။ အယူခံတရားလိုစွဲဆိုသည့်အတိုင်း၊ မှန်ပါသည်ဟု ဝန်ခံဖြောင့်ဆိုချက်တင်သွင်းလေသည်။

အမှုစစ်ဆေးသော ရုံးတော်မှ အယူခံတရားလို၏အမှုကို တရားစရိတ်နှင့်တကွ ပလပ်ခဲ့လေသည်။ ထို့နောက် ဟံသာဝတီခရိုင် တရားမတရားသူကြီးရုံးတော်တွင် အယူခံတရားလိုက အယူခံခဲ့ရာ၊ ၎င်းရုံးတော်က အယူခံမှုကို တရားစရိတ်နှင့်တကွ ပလပ်ခဲ့လေသည်။

အမှုစစ်ဆေးသော ရုံးတော်တွင်၊ ၂ တရားခံမည်နှင့်ကို၊ စစ်ဆေးခွင့် ပေးသင့် မပေးသင့်ကို အငြင်းဖြစ်ခဲ့ရာ တဘက်နှစ်ချက်ရှေ့နေကြီးများ၏ လျောက်လဲချက်များကို ကြားနာပြီးနောက်၊ အမှုစစ်ဆေးသော ပညာရှိတရားသူကြီးက ၂ တရားခံသည် တရားလို၏အဆိုလွှာတွင် ပါရှိသောစကားရပ်များအားလုံး မှန်ပါသည်ဟု ခြွင်းချက်မရှိ ဝန်ခံထားပြီး ဖြစ်သည့် အလျောက်၊ ၎င်းသည် တရားခံတယောက်အနေဖြင့် သက်သေခံရန် ခွင့်မပြုနိုင်ဟု အမိန့် ချမှတ်ခဲ့လေသည်။

ဤရုံးတော်တွင်၊ အယူခံတရားလိုက အယူခံရာဝယ် အဆိုပါအမိန့်ကို ချမှတ်ခြင်းအား ဖြင့် အမှုစစ်ဆေးသော ပညာရှိတရားသူကြီးသည်၊ မိမိရရှိသည့် စီရင်ခွင့်အာဏာကို တရား ဥပဒေနှင့်ညီညွတ်စွာမ ဆောင်ရွက်ဟု အယူခံတရားလိုဘက်မှလိုက်ပါဆောင်ရွက်သောပညာ

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* ၁၉၅၇ ခုနှစ်၊ တရားမဒုတိယအယူခံမှု အမှတ် ၃၁။

† ၁၉၅၅ ခုနှစ်၊ တရားမအယူခံမှုအမှတ် ၆ တွင် ဟံသာဝတီခရိုင် တရားမတရားသူကြီးရုံးတော်၏ ချမှတ်သော ၂၀-၂-၅၇ နေ့စွဲပါ ဒီကရီကိုအယူခံဝင်မှု။

ရှိ ရွှေနေကြီးက လျှောက်ထားလေသည်။ ဤလျှောက်ထားချက်ကို ဤရုံးတော်က လက်မခံနိုင်၊ အဘယ်ကြောင့်ဆိုသော် အယူခံတရားလိုသည်၊ ၂ တရားခံမည္သူ့အား ၎င်း၏ သက်သေအဖြစ်ဖြင့် စစ်ဆေးနိုင်ပါလျက်၊ ဤသို့ စစ်ဆေးခြင်းမပြုခဲ့ပေ၊ ယင်းကဲ့သို့ စစ်ဆေးရန်လည်း အားမထုတ်ခဲ့ပေ၊ ထို့အပြင် ၂ တရားခံမည္သူ့က တရားခံ တယောက်အနေဖြင့် သက်သေခံလိုလျှင် တရားလိုနှင့် တရားလိုပြသက်သေများကို စစ်ဆေးပြီး အခြားတရားခံများကို စစ်မေးခြင်းမပြုခဲ့ သက်သေခံရန်အတွက် ခွင့်တောင်းဆိုနိုင်ပေသည်။ ၂ တရားခံလည်း ၎င်း၏ချေလွှာအတိုင်း သက်သေခံစေကာမူ၊ အယူခံတရားခံများဘက်မှ တင်ပြသော သက်သေခံချက်များက ပိုမိုခိုင်လုံနေသည့်အတွက် ၂ တရားခံသည် တရားခံ တယောက်အနေဖြင့် သက်သေခံခွင့်မရရှိခြင်းကြောင့် အယူခံ တရားလို စွဲဆိုသောအမှုတွင် အကျိုးပျက်စီးစေရန် အကြောင်းမရှိရေ။

၁၉၅၀
ဦးပွေး
နှင့်
ဦးထွန်းစိန် ပါ ၉ ဦး။
တရားဝန်ကြီး ဦးဘညွန့်။

အယူခံတရားလိုအတွက်။ ။ဦးခင်မောင်ညွန့်။

အယူခံတရားခံအဘွက်။ ။ဦးဘိုးအေး။

တရားဝန်ကြီး ဦးဘညွန့်။ ။သံလျှင်မြို့၊ နယ်ပိုင်တရားမတရားသူကြီး ရုံးတော်၊ ၁၉၅၃ ခုနှစ်၊ တရားမကြီးမှုအမှတ် ၈ ၌၊ အယူခံတရားလိုက အယူခံတရားခံများအပေါ်တွင် အချင်းဖြစ်အိမ်သည် ကွယ်လွန်သူဒေါ်ရွှေယုပိုင်မဟုတ် အယူခံတရားလိုသာလျှင် ပိုင်ဆိုင်ကြောင်း အစီအလင်း ကျေညာပေးပါရန် တရားစွဲဆိုခဲ့လေသည်။ ယင်းကဲ့သို့ တရားစွဲဆိုရခြင်းမှာ၊ အယူခံတရားခံအမှတ် ၁ က အချင်းဖြစ်အိမ်သည် ကွယ်လွန်သူ ၎င်း၏ မိခင် ဒေါ်ရွှေယုပိုင် ပစ္စည်းဖြစ်သည်ဆိုရှိ၊ အမွေခွဲဝေလိုမှု တရားစွဲဆိုသောကြောင့် ဖြစ်လေသည်။

အယူခံတရားလို၏အဆိုလွှာတွင်၊ အယူခံတရားလိုသည် ဒေါက်တာဦးညိုထံမှ မြေ ၄၄·၅ ကေကို သီးစားလုပ်ရှိ၊ ၎င်း၏ မရီးတော်သူ ဒေါ်ရွှေယုနှင့် ၎င်း၏သားသမီးများကို ကြည့်ရှုစောင့်ရှောက်ပြီး၊ ငွေများစုဆောင်းမိသောအခါ အချင်းဖြစ်မြေယာကို ဦးဘိုးထွန်းထံမှ ဝယ်ယူပြီး ၎င်းမြေယာပေါ်တွင် အချင်းဖြစ်အိမ်ကို လက်သမားဆရာအဖြစ်အယူခံတရားခံအမှတ် ၁ ကိုငှါး၍၊ လက်သမားခ ငွေ ၃၀၀ အကုန်အကျခံပြီးဆောက်လုပ်ခဲ့ကြောင်း ဖေါ်ပြထားလေသည်။

အယူခံတရားခံ အမှတ် ၁ နှင့် ၃ တို့က ချေလွှာတင်သွင်း၍ဆုချေကြသည်မှာအယူခံတရားလိုကို ဒေါ်ရွှေယုက ကြည့်ရှုစောင့်ရှောက်ထား၍ အချင်းဖြစ် မြေယာကို ဒေါ်ရွှေယုက ဦးဘိုးထွန်းထံမှ ဝယ်ယူပြီး အချင်းဖြစ်အိမ်ကို ဆောက်လုပ်ကြောင်းဖြစ်လေသည်။ အယူခံတရားခံအမှတ် ၂ ကမူ၊ အယူခံ တရားလိုစွဲဆိုသည့်အတိုင်း မှန်ပါသည်ဟု ဝန်ခံဖြောင့်ဆိုချက်တင်သွင်းလေသည်။

၁၉၅၈

ဦးမွေး နှင့် ဦးထွန်းစိန် ပါ ၉ ဦး။

တရားဝန်ကြီး ဦးဘညွန့်။

အမှုစစ်ဆေးသော ရုံးတော်မှ၊ မူလအိမ်မြေယာဝိုင်ရှင် ဦးဘိုးထွန်းထံမှ ဒေါ်ရွှေယုကဝယ်သည်မှာ ထင်ရှားကြောင်းနှင့် အချင်းဖြစ်အိမ်ကို ဆောက်လုပ်ရန်အတွက်၊ အယူခံတရားခံအမှတ် ၁ အား လက်သမားအဖြစ်ဖြင့် အခကြေးငွေ ၃၀၀ ပေးပြီး ငှါးရမ်းသုမှာ ဒေါ်ရွှေယုပင်ဖြစ်သည်ဟုယူဆပြီး၊ အယူခံတရားလို၏အမှုကို တရားစရိတ်နှင့်တကွ ပလပ်ခဲ့လေသည်။

ထိုနောက် ဟံသာဝတီခရိုင် တရားမတရားသူကြီးရုံးတော်၊ ၁၉၅၅ ခုနှစ်၊ တရားမအယူခံမှုအမှတ် ၆ တွင် အယူခံတရားလိုက အယူခံခဲ့ရာ အဆိုပါရုံးတော်က ပညာရှိအောက်ရုံးတရားသူကြီး၏ ဆုံးဖြတ်ချက်ကို ပယ်ဖျက်ရန် အကြောင်းမပေါ်ပေါက်ဟု ဖေါ်ပြ၍၊ အယူခံမှုကို တရားစရိတ်နှင့်တကွ ပလပ်ခဲ့လေသည်။ ထို့ကြောင့် အယူခံတရားလိုက ဤရုံးတော်တွင် အယူခံမှုကို တင်ဆက်ခြင်း ဖြစ်လေသည်။

ဤရုံးတော်တွင် အယူခံတရားလိုဘက်မှ လိုက်ပါဆောင်ရွက်သော ပညာရှိရှေနေကြီးကလျောက်ထားရာတွင်၊ အောက်ရုံးနှစ်ရုံးမှ တညီ တညွတ်တည်း ယူဆဆုံးဖြတ်ထားသည့် အကြောင်းအရာများနှင့် ပတ်သက်၍၊ ယုံကြည်ထိုက်မယုံကြည်ထိုက် စသော အချက် အလက်များကို တင်ပြရန် မဖြစ်နိုင်သည့် အလျောက်၊ အမှုစစ်ဆေးသောရုံးတော်တွင် ဒုတိယ တရားခံဖြစ်သူ မည္ဆန်က သက်သေခံရန် ရုံးတော်သို့ခွင့်တောင်းပါလျက် သက်သေခံရန် ခွင့်မပေးခဲ့ခြင်းသည်၊ အမှုစစ်ဆေးသော ပညာရှိတရားသူကြီးက မိမိရရှိသည့် စီရင်ခွင့်အာဏာကို တရားဥပဒေနှင့် ညီညွတ်စွာမဆောင်ရွက်ခြင်းဖြစ်သည်ဟု လျောက်ထားလေသည်။

အမှုစစ်ဆေးသော ရုံးတော်၏ မှတ်တမ်းများနှင့် သက်သေခံချက်များကို လေ့လာကြည့်ရှုသည့်အခါ ၆-၄-၅၄ နေ့တွင် တရားလို ဘက်မှ တင်ပြသော သက်သေများအား စစ်ပြီး၍ ၇-၄-၅၄ နေ့တွင် တရားခံနှင့် တရားခံပြသက်သေများကို စစ်ဆေးရန်ချိန်းဆိုခဲ့လေသည်။ ထို့နောက် ပညာရှိ တရားသူကြီးသည် ၁ တရားခံ ဦးထွန်းစိန်နှင့် ၎င်း၏သက်သေ ဦးဘတင် (ခံပြ-၁) တို့ကို ၅-၅-၅၄ နေ့တွင် စစ်ဆေး၍ ဦးဘိုးယွန်း (ခံပြ-၂) ကို ၁၀-၉-၅၄ နေ့တွင် စစ်ဆေးပြီး ၃ တရားခံ မလှကြိုးနှင့် ဒေါ်နှင်းနွယ် (ခံပြ-၃) တို့ကို ၂၆-၁၁-၅၄ နေ့တွင် စစ်ဆေးခဲ့လေသည်။ ထို့နောက် ပညာရှိတရားသူကြီးသည် ဦးအေး (ခံပြ-၄) ကို ၂၄-၃-၅၅ နေ့တွင်စစ်ဆေးလေသည်။ ထိုနေ့မှာပင် ၂ တရားခံ မည္ဆန်ကို စစ်ဆေးခွင့် ပေးသင့်မပေးသင့်ကို လျောက်လဲချက်ပေးရန် ၂၉-၃-၅၅ နေ့သို့ ချိန်းဆိုခဲ့လေသည်။ ချိန်းဆိုထားသော ၂၉-၃-၅၅ နေ့တွင် ပညာရှိရှေနေကြီး

များ၏ လျောက်လဲချက်ကို ကြားနာပြီး ၃၀-၃-၅၅ နေ့တွင် ၂ တရားခံသည် တရားလို၏အဆိုလွှာဘွင်ပါရှိသော စကားရပ်များအားလုံး မှန်ပါသည်ဟု ခြင်းချက်မရှိ ဝန်ခံထားပြီးဖြစ်သည့်အလျောက်၊ ၎င်းသည် တရားခံ တယောက်အနေဖြင့် သက်သေခံရန်ခွင့်မပြုနိုင်ဟု အမိန့်ချမှတ်ခဲ့လေသည်။ ထိုအမိန့်ကို ချမှတ်ခြင်းအားဖြင့် အမှုစစ်ဆေးသော ပညာရှိ တရားသူကြီးသည် မိမိရရှိသည့် စီရင်ခွင့်အာဏာကို တရားဥပဒေနှင့်ညီညွတ်စွာ မဆောင်ရွက်ဟု အယူခံတရားလိုဘက်မှ လိုက်ပါဆောင်ရွက်သော ပညာရှိ ရွှေနေကြီး၏ လျောက်ထားချက်ကို ကျွန်ုပ် လက်မခံနိုင်။ အဘယ်ကြောင့်ဆိုသော် အယူခံတရားလိုသည်၊ ၂ တရားခံမည်သူ့အား၎င်း၏သက်သေအဖြစ်ဖြင့် စစ်ဆေးနိုင်ပါလျက် ဤကဲ့သို့စစ်ဆေးခြင်းမပြုခဲ့ပေ။ ယင်းကဲ့သို့ စစ်ဆေးရန်လည်း အားမထုတ်ခဲ့ပေ။ ထို့ပြင် ၂ တရားခံမည်သူ့က၊ တရားခံတယောက်အနေဖြင့် သက်သေခံလိုလျှင် တရားလိုနှင့် တရားလိုပြသက်သေများကို စစ်ဆေးပြီး အခြားတရားခံများကို စစ်မေးခြင်းမပြုမီ၊ ၎င်းသက်သေခံရန်အတွက် ခွင့်တောင်းဆိုနိုင်ပေသည်။ ယခုမူ တရားခံများနှင့် ၎င်းတို့၏ သက်သေများ စစ်မေးပြီး မှသာလျှင်၊ ၎င်းက သက်သေခံလိုကြောင်း လျောက်ထားသည့် လက္ခဏာ ပေါ်လွင်လျက် ရှိပေသည်။ **ဟာရီဘီဘီ နှင့် အိဝ် (ချ်)၊ အိဝ် (ချ်)၊ ဆာဈူလ်တန် မဟာမက်ခန်နှင့် အများ** တို့အမှုတွင် အောက်ပါအတိုင်း တရားဝန်ကြီးရပ်ဆယ် (လ်) ကရေးသားထားလေသည်။

ဒေါ်ပွေး နှင့် ဦးထွန်းဖိန် ပါ ၉ ဦး။ ၁၉၅၈

တရားဝန်ကြီး ဦးဘညွန့်။

" For these reasons, it seems to me that I must rule that in this case the plaintiff and such of the defendants as support the plaintiff's case wholly or in part, must address the Court and call their evidence in the first place, and then, following the words of section 180 of the Code, the other party, namely the persons opposed to the plaintiff's case and that of the other defendants supporting her, must address the Court and call their evidence ; and so the case must be proceeded with in a proper, legal and consistent manner."

အဆိုပါတရားဝန်ကြီး ရပ်ဆယ် (လ်) ၏ ရေးသားဖော်ပြချက်ကို လက်ခံအတည်ပြု၍၊ ဤအမှုတွင်လည်း တရားလိုနှင့် ၎င်း၏ သက်သေများစစ်ဆေးပြီး အခြားတရားခံများကို စစ်မေးခြင်းမပြုမီ ၂ တရားခံက သက်သေ ခံလိုကြောင်း လျောက်ထားသင့်ပေသည်။ ယခု အယူခံဝင်သော အမှုတွင် ၂ တရားခံသည် ၎င်း၏ချေလွှာအတိုင်း သက်သေခံစေကာမူ၊ အယူခံတရားခံများဘက်မှ တင်ပြသော သက်သေခံချက်များက ပိုမိုခိုင်လုံနေသည်ကို ကျွန်ုပ် တွေ့ရှိရသည့်အတွက်

(1) 32 Bom. 599 at 602.

၁၉၅၀

ဦးပွေး
နှင့်
ဦးထွန်းစိန် ပါ
၉ ဦး။

တရားဝန်ကြီး
ဦးဘညွန့်။

၂. တရားခံသည် တရားခံတယောက်အနေဖြင့် သက်သေခံခွင့် မရရှိခြင်းကြောင့် အယူခံ တရားလိုစွဲဆိုသောအမှုတွင် အကျိုးပျက်စီးစေရန် အကြောင်းမရှိပေ။ ထို့ပြင် *Smt. Viranbai* နှင့် *Parmanand Jhangaldas and others* (1) တို့အမှုတွင် အောက်ပါအတိုင်း စီရင်ဆုံးဖြတ်ထားလေသည်။

"Where a person should have been the first witness to go into the witness-box, but did not do so and desires to go into the witness-box at a late stage and the Court in its discretion refuses to allow him at that stage there is no irregularity in the procedure adopted."

အထက်တွင်ဖော်ပြခဲ့ပြီးသော အချက် အလက်များနှင့် အောက်ရုံး နှစ်ရုံးမှ တညီတညွတ်တည်း စီရင်ဆုံးဖြတ်ထားခြင်းတို့ကိုဆောက်ချင့်၍၊ ဤအယူခံမှုကို တရားစရိတ်နှင့်တကွ ကျွန်ုပ်လည်လိုက်သည်။

(1) A.I.R. (1938) Sind 206.

တရားမအယူခံ

တရားလွှတ်တော်ဝန်ကြီးချုပ် ဦးချန်ထွန်းအောင်

နှင့်

တရားလွှတ်တော်ဝန်ကြီး ဦးစံမောင်တို့ရှေ့၌

ဦးဘိုးရွက် (အယူခံတရားလို)

နှင့်

မငွေ (အယူခံတရားခံ) *

† ၁၉၅၀ ခြေဂုတ်လ ၁၁ ရက်။

သီးခြားသက်သာခွင့်အက်ဥပဒေ ပုဒ်မ ၄၂၊ ခြွင်းချက်ပြဋ္ဌာန်းထားသော ပိတ်ပင်ချက်၊ မည်သည့်အခါမတိုက်ဆိုင်။

တရားမကျင့်ထုံးဥပဒေ ပုဒ်မ ၉၉ ၏တားမြစ်ချက်၊ အယူခံရုံးတော်ကလွှယ်ကူစွာဖြင့် မပယ်ဖျက်သင့်သောအောက်ရုံးတော်မှ ဆုံးဖြတ်ခဲ့သောအချက်များ၊ မူလအမှုကိုတိုက်ရိုက်စစ်ဆေးကြားနာသောတရားသူကြီး၏ ယူဆချက်တို့ကို အထူးလေးစားရန်၊ အထူးလေးနက်သောအကြောင်းမရှိဘဲ မပယ်ဖျက်နိုင်။

ဆုံးဖြတ်ချက်။ ။အယူခံတရားခံက၊ အယူခံတရားလိုအပေါ်တွင် ၎င်းတို့နှစ်ဦးနာမည်ဖြင့် National Bank of India Ltd. ဘဏ်တိုက်တွင် ရှိနေသော ငွေသည်၊ ၎င်းတဦးတည်းပိုင်ငွေဖြစ်ကြောင်းသီးခြားသက်သာခွင့်အက်ဥပဒေ ပုဒ်မ ၄၂ အရ၊ မြွက်ဆိုပြဋ္ဌာန်းသောဒီကရီတခုချမှတ်ပေးရန်တရားစွဲဆိုရာတွင်၊ ဘဏ်တိုက်ကိုတရားခံအဖြစ်မထည့်သွင်းခြင်းသည်၊ အဆိုပါပုဒ်မ ခြွင်းချက်ပြဋ္ဌာန်းထားသောပိတ်ပင်ချက်နှင့်မတိုက်ဆိုင်။

အမှုတွင် တရားခံအဖြစ်ဖြင့်သော်၎င်း၊ တရားလိုအဖြစ်ဖြင့်သော်၎င်း ပူးတွဲထည့်သွင်းသင့်လျက် မပူးတွဲမထည့်သွင်းဘဲ၊ စစ်ဆေးကြားနာခဲ့ပါက၊ ထိုချို့ယွင်းချက်ကြောင့် အမှု၏ထိုက်သင့်ရာ ထိုက်တန်ရာအကျိုးအပြစ်ကို ထိခိုက်ခြင်းမရှိလျှင်၊ အောက်ရုံးမှချမှတ်လိုက်သော ဒီကရီကို အယူခံရာတွင်ပယ်ဖျက်ခြင်း၊ သို့တည်းမဟုတ် အကြီးအကျယ်ပြောင်းလွဲပြင်ဆင်ခြင်း၊ အောက်ရုံးသို့ပြန်ပို့ခြင်းမရှိစေရဟူသောတားမြစ်ချက်ကို၊ တရားမကျင့်ထုံးဥပဒေ ပုဒ်မ ၉၉ တွင်၊ အတိအလင်းပြဋ္ဌာန်းထားသည်၊ သို့အတွက်ကြောင့်၊ ဤအမှုတွင် ဘဏ်တိုက်ကိုတရားခံအဖြစ်ဖြင့် ထည့်သွင်းဝိုးတရားမစွဲဆိုခဲ့ခြင်းမှာ၊ အမှုကိုအကြီးအကျယ်ပြောင်းလွဲပြင်ဆင်ပျက်စီးနိုင်လောက်သောအချက်မဟုတ်။

အောက်ရုံးတော်မှအခြေအနေကိုထောက်ထား၍၊ သင့်တင့်ရာ ချင့်ချိန်ပြီးဆုံးဖြတ်နိုင်သောအာဏာရှိသည့်အလျောက် ဆုံးဖြတ်ခဲ့သောအချက်များကို၊ အယူခံရုံးတော်ကလွှယ်ကူ

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* ၁၉၅၆ ခုနှစ်၊ တရားမ ပဌမအယူခံအမှုအမှတ် ၉၃။

† ၁၉၅၅ ခုနှစ်၊ တရားမကြီးမှုအမှတ် ၄၇ တွင် ရန်ကုန်မြို့၊ တရားလွှတ်တော်မူလဘက်ဌာနရုံးတော်၏ချမှတ်သော ၃-၁၀-၅၆ နေ့စွဲပါ ဒီကရီကိုအယူခံဝင်မှု။

၁၉၅၀

ဦးဘိုးရွှက်
နှင့်
မငွေ။

ဦးချန်ထွန်း
အောင်။

ရွာဖြင့် မပယ်ဖျက်သင့်။ *Jaipal Kunwar and another* v. *Indar Bahadur Singh*, 26 All. 238 ; *Fateh Mohammad Khan* v. *Gurbux Singh and others*, A.I.R. (36) 1949) East Punj. 210 ; *Mt. Tehl Kuar* v. *Amar Nath and others*, A.I.R. (1925) (Lah.2, တို့ကိုရည်ညွှန်းသည်။ *Nawab Humayun Begam* v. *Nawab Shah Mohammad Khan and another*, A.I.R. (30) (1943) (P.C.) 94, ကိုရှင်းပြသည်။

သီးခြားသက်သာခွင့်ဥပဒေပုဒ်မ ၄၂ အရ မြွက်ဆိုပြဋ္ဌာန်းချက်ဒီကရီကို ပေးသော်ငြားသည်၊ အမှု၏အကြောင်းခြင်းရာနှင့် တရားလိုကတောင်းဆိုသော အခွင့်အရေးများ ရသင့်မရသင့်၊ တောင်းဆိုသောပိုင်ဆိုင်ခွင့်၊ ရသင့် မရသင့်ဆိုသောအချက်အလက်များကို၊ ပတ်ဝန်းကျင်အခြေအနေနှင့်ထောက်ထားကြည့်ရှုပြီး၊ သင့်သည်ဟုချင့်ချိန်ရှာဆုံးဖြတ်ခဲ့လျှင်၊ ထိုဆုံးဖြတ်ချက်ကိုသမန်ကာ ရှုန်ကာပေါ့ပေါ့ဆဆယူဆပြီး ပယ်ဖျက်ရန်မသင့်ချေ၊

အောက်ရုံးလွှတ်တော်တရားဝန်ကြီးသည်၊ အယူခံတရားလိုနှင့် အယူခံတရားခံတို့ကို တိုက်ရိုက်စစ်ဆေးကြားနာခဲ့သူ ပုဂ္ဂိုလ်တဦးဖြစ်သည့်အလျောက် မည်သူ၏ပြောဆိုချက်သည် ယုတ္တိယုတ္တာရှိ၍ ယုံကြည်ထိုက်သည် မယုံကြည်ထိုက်သည်ကို ချိန်ဆရာ၌၊ ၎င်းတရားဝန်ကြီး၏ယူဆချက်တို့ကို အထူးလေးစားရပေမည်၊ အမှုအကြောင်းခြင်းရာနှင့်ပတ်သက်၍၊ ၎င်းသာလျှင်တိုက်ရိုက်ကြားနာတွေ့မြင်ခဲ့ရသည့် အလျောက်၊ ၎င်း၏ယူဆချက်များကို၊ အထူးလေးနက်သောအကြောင်းမရှိဘဲ၊ ပယ်မဖျက်နိုင်ချေ၊ *Chinnaya* v. *U Kha*, 14 Ran. 11 ကိုလိုက်နာသည်။

အယူခံတရားလိုအတွက်။ ။မစ္စတာ ဗြိ၊ စံစီဖိုးနှင့် ဦးဖေမြင့်။

အယူခံတရားခံအတွက်။ ။ဦးလှထွန်းဖြူ၊

တရားလွှတ်တော်ဝန်ကြီးချုပ် ဦးချန်ထွန်းအောင်။ ။၎င်တရားလွှတ်တော် မူလဘက်ဌာနရုံးတော်၌၊ အယူခံတရားခံ မငွေသည်၊ အယူခံတရားလို ဦးဘိုးရွှက်အပေါ်တွင်၊ ၎င်းတို့နှစ်ဦးနာမည်ဖြင့် **National Bank of India Ltd.** ဘဏ်တိုက်တွင်ရှိနေသော ငွေ ၃၀,၉၃၄ ကျပ် ၀၅ ပြားသည်၊ ၎င်းတဦးတည်းပိုင်ငွေဖြစ်ကြောင်း မြွက်ဆိုပြဋ္ဌာန်းသော ဒီကရီတခုချမှတ်ပေးရန် တရားစွဲဆိုရာ၊ မူလဘက်ဌာနမှ မငွေစွဲဆိုသည့်အတိုင်း စီရင်ချက်ချမှတ်လိုက်ရာ၊ ထိုစီရင်ချက်ကို မကျေနပ်သဖြင့်၊ အယူခံတရားလို ဦးဘိုးရွှက်က ၎င်အယူခံဘက်ဌာနတွင် အယူခံဝင်သောအမှုဖြစ်လေသည်။

အယူခံတရားခံ မငွေ မူလဘက်ဌာနရုံးတော်၌ တင်သွင်းသောအဆို အရဆိုလျှင်၊ ၁၉၅၁ ခုနှစ်၊ မတ်လလောက်တွင် ၎င်းသည်အယူခံတရားလိုဦးဘိုးရွှက်နှင့်သိကျွမ်းပြီးနောက်၊ အိမ်မက်ကောင်းမက်သည်ကတကြောင်း၊ တနှစ်၌ ပုဇွန်တောင်ဘက်သို့ နတ်အုန်းသီးဝယ်ရန်သွားရာ၊ ၎င်းခေါင်းပေါ်သို့ကျီးတကောင်လာနှားသည်ကတကြောင်း၊ ၎င်နိမိတ်ကောင်းများကို အယူခံတရားလိုအားထုတ်

ဖေါ်ပြောမိသဖြင့် အယူခံတရားလိုက ၃၀ ကြိမ်မြောက်အစိုးရ သိန်းထီကိုစပ်တူ ထိုးရန်အကြံပေးသည့် အလျောက်၊ ငွေ ၀ စီစပ်ပြီး အစိုးရသိန်းထီလက်မှတ်တစောင်ကို၊ ၎င်းတို့နှစ်ဦးနာမည်ပေါင်း၍ "ငွေရွှက်" ဆိုသောအတိုက်ဖြင့်၀ယ်ယူကြသည်။ ထို့နောက် ထိုထီလက်မှတ်သည် ပဌမဆုငွေ တသိန်းဆုကို ပေါက်သဖြင့်၊ အယူခံတရားလိုသည် ၎င်းအား ထိုသိန်းဆုပေါက်သော ငွေကို ထုတ်ယူရန်၊ လွှတ်တော်ရှေနေကြီး ဦးသိန်းဟန်ထံသို့ ခေါ်သွားကြောင်း၊ ၎င်းနောက် ဦးသိန်းဟန်က ၎င်း၏လက်မပုံစံကိုစာရွက်တရွက်ပေါ်တွင် ဖိနှိပ်စေပြီး၊ ထိုထီပေါက်သောဆုငွေတသိန်းကို အယူခံတရားလိုနှင့် ၎င်း၏နာမည်နှစ်ဦးတွဲ၍ အထက်ဖေါ်ပြပါဘဏ်တိုက်တွင် ငွေအပ်နှံထားရန်အကြံပေးသည့်အတိုင်း၊ ၎င်းတို့နှစ်ဦးနာမည်ဖြင့် ထိုဘဏ်တိုက်တွင် ငွေအပ်နှံထားလိုက်ကြောင်း၊ ဘဏ်တိုက်တွင်လည်း ဦးသိန်းဟန်၏အကြံပေးချက်အတိုင်း၊ နှစ်ဦးနာမည် လက်မှတ်ထိုး၍ ချက်စာအုပ်များထုတ်ယူရန်စီမံပြီး၊ ၁၉၅၁ ခုနှစ်၊ မေလ ၁၁ ရက်နေ့မှစ၍၊ အလိုလိုငွေများထုတ်ယူကြကြောင်း၊ ယင်းကဲ့သို့ထုတ်ယူသုံးရာ၌ အယူခံတရားခံလက်၀ယ်သို့ရရှိသောငွေနှင့် နှစ်ဦးသဘောတူ သုံးစွဲကြသောငွေများမှာ အဆိုအရဆိုလျှင်—

(၁) ရွှေ ၃,၀၀၀ ကျပ် ဘိုး။

(၂) ငွေ ၃,၉၀၇ ကျပ် ၅၀ ပြားတန် စိန်နားကပ်တရံ၏အဘိုး။

(၃) ငွေသား ၃,၀၀၀ ကျပ်။

(၄) အယူခံတရားလိုနှင့် အယူခံတရားခံတို့ ၂ ဦး နာမည်ဖြင့်၊ ကြည့်မြင်တိုင်၊ အောင်ချမ်းသာလမ်း၊ အမှတ် ၁၂/၁၄ အိမ်တလုံးကို၀ယ်သော ငွေ ၀,၅၀၀ ကျပ်။

(၅) ငါးထပ်ကြီးဘုရားစောင်းတန်း ပြင်သောအလှူငွေနှင့် အယူခံတရားလို၏ တူများနှင့်အယူခံတရားခံ၏ တူများကို ရှင်ပြုမင်္ဂလာပွဲလုပ်ရာ၌ကုန်ကျသော ငွေ ၅,၀၀၀ ကျပ် နှင့်

(၆) ၁၉၅၁ ခုနှစ်၊ မေလ ၁၅ ရက်နေ့တွင်၊ လွှတ်တော်ရှေနေကြီး ဦးသိန်းဟန်အားပေးသော ရှေနေခငွေ ၄,၀၀၀ ကျပ် တို့ဖြစ်လေသည်။

အထက်ဖေါ်ပြသည့်အတိုင်း အယူခံတရားလိုက ရယူပေးသုံးသော ငွေများကိုတွက်ချက်ကြည့်လိုက်သောအခါ၊ အယူခံတရားခံသည် ၎င်းဝေစု (ဘဏ်ကရသင့်ရထိုက်သောစရိတ်ကိုနုတ်ပြီး) ငွေငါးသောင်းနှီးပါးထဲမှ ငွေ ၁၀,၇၃၇ ကျပ် ၅၀ ပြား သာရရှိသေး၍၊ နောက်ထပ်ရစရာရှိသော ငွေမှာငွေ ၃၁,၂၆၂ ကျပ် ၅၀ ပြားဖြစ်လေရာ၊ National Bank of India Ltd. ဘဏ်တိုက်တွင်ရှိ

၁၉၅၁ ဦးဘိုးရွှက် နှင့် မငွေ။ ဦးချန်ထွန်း အောင်။

၁၉၅၈

ဦးဘိုးရွှက် နှင့် မငွေ။

ဦးချန်ထွန်း အောင်၊

သော ငွေ ၃၀,၉၃၄ ကျပ် ၁၄ ပြားသည်ငင်းတဦးတည်းပိုင်သောငွေများဖြစ်ကြောင်းမြွက်ဆိုပြဋ္ဌာန်းပေးစေလိုမှုဖြင့် တရားစွဲဆိုလေသည်။

အယူခံတရားလိုသည်ကိုစွဲဆိုသောအမှုကိုဆျေပရာ၌၊ ငင်းသည် ၁၉၅၁ ခုနှစ်၊ဧပြီလ ၁၉ ရက်နေ့မတိုင်မီက၊အယူခံတရားခံနှင့်မည်သည့်အခါကမျှမတွေ့ဘူးကြောင်း၊ပဌမဆုငွေတသိန်းပေါက်သော သိန်းထီလက်မှတ် ခ-၃၉၈၁၁၉ သည်လည်း မိမိတဦးတည်းပိုင်သောလက်မှတ်ဖြစ်ကြောင်း၊အယူခံတရားခံနှင့်မည်သို့မျှမသက်ဆိုင်ကြောင်း၊ အယူခံတရားခံကို လွှတ်တော်ရှေ့နေကြီး ဦးသိန်းဟန်၏ အကြံပေးချက်အရ၊ ထီလက်မှတ်၏ အတိတ်မှာ ‘‘ငွေရွှက်’’ ဖြစ်နေသဖြင့် ‘‘ငွေ’’ဆိုသောနာမည်နှင့်ဆီလျော်သော ‘‘မငွေ’’ ဆိုသူမိန်းမဘဦးကိုခေါ်ယူရန်အကြံပေး၍၊ထိုင်းအကြံပေးချက်အတိုင်းအယူခံတရားခံအား တနေရာမှသွားခေါ်ခဲ့ရကြောင်း၊ ငင်းနောက် ထိုမိန်းမနာမည်နှင့် မိမိနာမည်အတူ ပူးတွဲ၍ National Bank of India Ltd. ဘဏ်တိုက်တွင် ငွေစာရင်းဖွင့်ကြောင်း၊ ဤကဲ့သို့ ဘဏ်တိုက်တွင် ငွေစာရင်းဖွင့်ရခြင်းမှာလည်း၊ လွှတ်တော်ရှေ့နေကြီး ဦးသိန်းဟန်အကြံပေးချက်ဖြင့်သာ ပြုလုပ်ရကြောင်း၊တို့နောက်အယူခံတရားခံကလည်ဆယ်ပြီး မိမိသည် အယူခံတရားလို၏ဇနီးဖြစ်သည်ဟု ဆိုကာ၊ဘဏ်တိုက်တွင် ငွေစာရင်းဖွင့်ထားခဲ့ရာ၊ လွှတ်တော်ရှေ့နေကြီး ဦးသိန်းဟန် ကလည်း ထိုမငွေဆိုသောနာမည်ကို မည်သည့်အခါမဆို နောက်နောင်တွင် ဖျက်နိုင်ကြောင်းပြောသဖြင့်၊ နှစ်ဦးနာမည်ဖြင့် ဘဏ်တိုက်တွင် အပ်နှံထားခဲ့ခြင်းဖြစ်ကြောင်း၊ မငွေသည်မကောင်းသောမိန်းမတယောက်ဖြစ်၍၊ မိမိနှင့်ပင်မကင်းရာမကင်းကြောင်းဖြစ်ခဲ့သည့် အလျောက် မေတ္တာသက်ဝင်သဖြင့်၊ ထိုင်းအားရွေ့ ၂၆ ကျပ်သားနှင့် တန်ဘိုးငွေ ၃,၉၀၇ ကျပ် ၅၀ ပြားတန်စိန်နားကပ်တရံလုပ်ပေး၍ နှစ်ဦးအကျိုးကျေးဇူးဖြစ်ထွန်းစေရန်အတွက်၊ စီးပွါးရေးလုပ်ငန်းတခုခုကို လုပ်ကိုင်ဆောင်ရွက်ရန် ငင်းအား ငွေ ၄၀,၀၀၀ ကျပ် ထုတ်ပေးလိုက်ကြောင်း ချေပသည့်အပြင်၊ အယူခံတရားခံ၏အဆိုလွှာတွင်ဖေါ်ပြထားသော နှစ်ဦးနာမည်ဖြင့်ဝယ်သောအိမ်၊ နှစ်ဦးသဘောတူပြုလုပ်ကြသော အလှူနှင့်ရွှေနေခငွေ ပေးသောကိစ္စတို့ကိုလည်း ဟုတ်မှန်ကြောင်း ဝန်ခံထားသည်ကိုတွေ့ရသည်။

ငင်းအဆိုအချေများကို အထောက်အထားပြု၍၊ အမှုကို ကြားနာစစ်ဆေးသော မူလဘက်ဌာန လွှတ်တော်တရားဝန်ကြီးသည်၊ အောက်ပါကောက်နုတ်ချက်သုံးရပ်တို့ကိုထုတ်၍ စစ်ဆေးခဲ့လေသည်။

(၁) တရားလိုနှင့်တရားခံတို့သည်၊ သိန်းဆုပေါက်သော လက်မှတ်တွင် တဦးလျှင်တဝက်စီပိုင်ကြသလော။

(၂) တရားခံသည် မိမိရထိုက်သောဝေစုတဝက်ကို၊ ဘဏ်တိုက်တွင် ထားရှိသည့်ငွေတသိန်းမှ ထုတ်ယူပြီးပြီလော။

(၃) ဘဏ်တိုက်တွင် ကျန်ရှိသောငွေနှင့် စပ်လျဉ်း၍၊ တရားလိုမ တောင်းခံသော ပြဋ္ဌာန်းသော ဒီကရီကို၊ ရုံးတော်ကချမှတ် သင့်သလော။

၁၉၅၈

ဦးဘိုးရွှက် နှင့် မငွေ။

ဦးချန်ထွန်း အောင်၊

ဤကောက်ချက်များကို ဝေဘန်စဉ်းစားခြင်းမပြုဘဲ၊ အယူခံတရားလိုက သီး ခြားသက်သာခွင့်အက်ဥပဒေ ပုဒ်မ ၄၂ အရ၊ National Bank of India Ltd. ဘဏ်တိုက်ကိုလည်း အမှုတွင်တရားခံ အဖြစ်ဖြင့် ထည့်သွင်းစွဲဆိုထိုက် ကြောင်း ကနဦးကန့်ကွက်ချက်အဖြစ်ဖြင့် လျောက်ထားလေသည်။ ထိုကနဦး ကန့်ကွက်ချက်ကို၊ အောက်ရုံးတရားဝန်ကြီးက ၁၉၅၆ ခုနှစ်၊ ဇန္နဝါရီလ ၆ ရက်နေ့စွဲပါအမိန့်ဖြင့်လက်မခံဘဲ၊ အချင်းဖြစ်ပဋိပက္ခမှုသည် အယူခံတရားလိုနှင့် အယူခံ တရားခံတို့နှစ်ဦးနှင့် သက်ဆိုင်သော ကိစ္စသာဖြစ်၍၊ လိုအပ်သောအတိ အလင်းမြွက်ဆိုပြဋ္ဌာန်းချက် စွဲဆိုသောအမှုဌာန၊ ဘဏ်တိုက်ကို တရားခံအဖြစ်ဖြင့် ထည့်သွင်းစွဲဆိုရန်မလိုဟုယူဆခဲ့သည်။

အထက်ဖေါ်ပြပါကောက်ချက်သုံးရပ်နှင့် စပ်လျဉ်း၍၊ အောက်ရုံးတွင်စစ် ဆေးစဉ်ကပေါ်ပေါက်သောနှုတ်သက်သေခံနှင့် စာချုပ်စာတမ်းသက်သေများကို အကိုးအကားပြုပြီးလျှင်၊ ပဌမကောက်ချက်ကိုဖြေဆိုရာ၌၊ အဆိုပါသိန်းဆုပေါက် သောထီလက်မှတ်သည် အယူခံတရားလိုနှင့် အယူခံတရားခံတို့ထက်ဝက်စီပိုင်ဆိုင် ကြသောထီလက်မှတ်ဖြစ်သည်ဟု အဓိန့်ချမှတ်လိုက်သည်။ ဒုတိယကောက်ချက် ကိုဆုံးဖြတ်ရာ၌လည်း အယူခံတရားလိုသည် မိမိရထိုက်သောဝေစုကိုဘဏ်တိုက် မှထုတ်ယူပြီးပြီဟုလည်း အဓိန့်ချမှတ်လိုက်သည်။ ယင်းသို့ကောက်ချက်နှစ်ရပ်ကို ဆုံးဖြတ်လိုက်သည့် အလျောက်၊ တတိယ ကောက်ချက်ကို ဖြေဆိုရာ၌၊ ယခု National Bank of India Ltd. ဘဏ်တိုက်တွင် ကျန်ရှိ နေ သေး သော ငွေသုံးသောင်းကျော်သည်။ အယူခံတရားခံတဦးတည်းသာ ပိုင်ဆိုင်သော ငွေဖြစ် သည့်အလျောက်၊ ၎င်းစွဲဆိုသည့်အတိုင်း မြွက်ဆိုသော ဒီကရီတရပ်ကိုချမှတ်ပေး လိုက်လေသည်။

ကျွန်ုပ်တို့၏ရှေ့တွင်၊ အောက်ရုံးတရားဝန်ကြီး၏ချမှတ်လိုက်သောစီရင်ချက် ကိုပယ်ဖျက်ရန်၊ အထူးသဖြင့် အဓိကထားကာ လျောက်ထားသော အချက် များမှာ—

(၁) အယူခံ တရားခံစွဲဆိုသော အမှုတွင် National Bank of India Ltd. ဘဏ်တိုက်ကို တရားခံအဖြစ်နှင့် ထည့်သွင်းစွဲဆိုခြင်း မရှိသဖြင့်၊

၁၉၅၈

ဦးဘိုးရွက် နှင့် မငွေ။

ဦးချန်ထွန်း အောင်။

ငင်းစွဲဆိုသောအမှုသည် သီးခြားသက်သာခွင့်အက်ဥပဒေပုဒ်မ ၄၂ တွင် ပြဋ္ဌာန်း ချက်နှင့် မကိုက်ညီဘဲဖြစ်နေရာ၊ ရုံးတော်က မြွက်ဆိုသော ဒီကရီကို မပေးထိုက် ကြောင်း၊ အထူးသဖြင့် အယူခံတရားလိုနှင့် အယူခံတရားခံတို့သည် ဘဏ်တိုက် တွင်ထားရှိသောငွေသည် နှစ်ဦးနှစ်ယောက် အတူပိုင်ဆိုင်သောငွေ (Joint Account) ဖြင့် ထားသောငွေဖြစ်သည်နှင့်အမျှ၊ ငွေများကိုထုတ်ယူရာ၌လည်း နှစ်ဦးနှစ်ယောက်စလုံး၏ လက်မှတ်များပါမှသာ ထုတ်ယူနိုင်သည်ဖြစ်၍၊ ဘဏ် တိုက်သည် မြီစား (Debtor) အနေဖြင့် ငင်းတို့နှစ်ဦးအား မြီရှင် (Creditor) အနေဖြင့်ပေးဆပ်ရန် ကြွေးဖြစ်နေသဖြင့်၊ ကဦးတယောက် ထိုကြွေးပေးစေခြင်း အားဖြင့်၊ ငင်းဘဏ်တိုက်သည် မြီစားတာဝန်မလွတ်ကင်းနိုင်ကြောင်း၊ အောက် ရုံးမှချမှတ်လိုက်သော မြွက်ဆိုချက်ဒီကရီသည် ဘဏ်တိုက်အပေါ်တွင် မည်သို့မျှ အတည်မဖြစ်နိုင်ကြောင်း၊ သို့ဖြစ်၍ထိုဒီကရီမျိုးချမှတ်လိုက်ခြင်းသည် အလဟဿ စကားဒီကရီသာဖြစ်နေ၍ ဘာမျှတန်ဘိုးမရှိ၊ ထိုဒီကရီမျိုးကို သီးခြားသက်သာခွင့် အက်ဥပဒေပုဒ်မ ၄၂ တွင် ပြဋ္ဌာန်းထားချက်ကမရည်ရွယ်ကြောင်း။

(၂) သက်သေ အစစ်ခံချက်များကို ထောက်ထားခြင်း အားဖြင့် လည်း၊ အယူခံတရားလို၏ အမှုသာလျှင် မှန်ကန်ကြောင်း၊ အယူခံတရားခံနှင့် ထိစပ်တူထိုးခြင်းဆိုသည်မှာ မဟုတ်ကြောင်း၊ အယူခံတရားလိုတဦးတည်းသာ ပိုင်ဆိုင်သော ထီလက်မှတ်ဖြစ်ကြောင်း၊ ဤအချက်၌ အောက်ရုံးတရားဝန်ကြီး၏ ယူဆချက်သည် သဘာဝမကျကြောင်း၊ သက်သေအစစ်ခံချက်များနှင့်မကိုက်ညီ သဖြင့်၊ ချမှတ်လိုက်သောမြွက်ဆိုသည့်ဒီကရီကို ပယ်ဖျက်သင့်ကြောင်းကိုလည်း လျှောက်ထားလေသည်။

အထက်ပါ (၁) အချက်တွင် ဖေါ်ပြထားသော ဥပဒေအချက်အလက်နှင့် ပတ်သက်၍၊ ကျွန်ုပ်တို့နှောက်မှဖြေရှင်းပေမည်။ (၂) အချက်သည် သက်သေ အစစ်ခံချက်များနှင့် အမှု အကြောင်းခြင်းရာတို့ အပေါ်တွင် တည်ရှိနေသည်နှင့် အမျှ၊ ငင်းကို ပဌမကျွန်ုပ်တို့စဉ်းစားပေမည်။

အောက်ရုံးလွှတ်တော်တရားဝန်ကြီးသည်၊ ထိုအချက်၌ အတော်ပင်အသေး စိတ်၍ဝေဘန်ထားသည်ကိုတွေ့ရပေသည်၊ အယူခံတရားလိုသည် အသက် ၇၀ ကျော်ရှိပြီး၊ မြို့အုပ်အမှုထမ်းအဖြစ်ဖြင့် အတော်ကြာမြင့်စွာအမှုထမ်းခဲ့လေသည်။ အောက်ရုံးလွှတ်တော်တရားဝန်ကြီးမြွက်ဆိုသည့်အတိုင်း၊ ငင်းသည် လောကီရေး ရာတွင် မိမိအသက်နှင့်အမျှအစိုးရအမှုထမ်းအဖြစ်ဖြင့် ထမ်းဆောင်ခဲ့သောသက် တမ်းကိုထောက်ရှုသဖြင့်၊ အမြော်အမြင်ရှိသော လူတယောက်ဟု ယူဆရပေ လိမ့်မည်။ ငင်း၏အဆိုအရဆိုလျှင် " ငွေရွှက် " ဆိုသောအတိတ်နာမည်ကို မိမိ

သဘောအလျောက် မိမိနှစ်သက်ရာထိုဆိုင်မှဝယ်ယူ၍ ထိန်းဆု ပေါက်ပါလျှင်၊ ရွှေနေကြီး ဦးသိန်းဟန်နှင့်ဂင်းမည်သို့ပင်သိကျွမ်းခဲ့သူတယောက် ဖြစ်သော်ငြားလည်း၊ ဦးသိန်းဟန်က ထိုထီလက်မှတ်အတိုက်တွင် ပါသော (ငွေ) ဆိုသော နာမည်ပိုင်းသည် မိန်းမ နာမည်ဖြစ်၍၊ ဂင်း (ငွေ) နာမည် ပါသော မိန်းမ တယောက်ကို သွားခေါ်၍ ငွေထုတ်မှသာ ရမည်ဟု အကြံပေးသည် ဆိုသော ပြောဆိုချက်သည်၊ အလွန် တရာယုတ္တိမရှိ၊ သဘာဝမကျသော ပြောဆိုချက် တရပ်ဖြစ်ပေသည်။ ဤအကြံမျိုးကို ဦးသိန်းဟန်က ပေးမည်ဟုလည်း ကျွန်ုပ်တို့ မထင်ပေ။ လွှတ်တော် ရွှေနေကြီး ဦးသိန်းဟန်ကိုလည်း၊ ထိုအချက်၌ ထိုအကြံ မျိုး ပေးသည် မပေးသည် ဆိုသည်ကိုလည်း အယူခံတရားလိုက သက်သေ မပြချေ။ ဤကဲ့သို့ ဦးသိန်းဟန်ကိုသက်သေမပြခြင်းမှာ၊ ဦးသိန်းဟန်က ဂင်းအား မထောက်ခံဘဲနေမည်ကိုသိရှိသဖြင့် သက်သေမပြဘဲနေကြောင်းမှာ ထင်ရှားပေသည်။ အထူးသဖြင့် အဆိုပါသိန်းဆုပေါက်သောထီလက်မှတ်ကိုကြည့်ရှုစစ်ဆေးသောအခါ "ငွေရွှက်" ဆိုသော အတိုက် နာမည်အောက်တွင်လည်း "ပုဇွန်တောင်" ဟု ရေးသားထားခြင်းမှာ အတော်ပင် ထူးဆန်းပေသည်။ အယူခံတရားခံကဂင်းသည်ရေကျော်တွင်နေသဖြင့်၊ပုဇွန်တောင်ဘက်သို့နတ်အုန်း သီးသွားဝယ်ရာတွင်၊ ကျီးတကောင် ဂင်း၏ခေါင်းပေါ်သို့ လာနားသဖြင့် နိမိတ် ကောင်းသည့်အတွက် ဂင်းထီလက်မှတ်ကိုထိုးသည်ဟုပြောဆိုရာ ပုဇွန်တောင်ဆို သောနေရပ်ပါရှိခြင်းအားဖြင့်၊ ဂင်းပြောဆိုချက်မှာ များစွာယုတ္တိရှိသည်ဟုယူဆ ကာ အောက်ရုံးတရားဝန်ကြီးက မှတ်ချက်တခုချခဲ့သည်။ ဤမှတ်ချက်ချရာ၌ ကျွန်ုပ်တို့သည် အောက်ရုံးတရားဝန်ကြီး၏ ယူဆချက်အတိုင်း ထင်တူထင်မျှပင် သဘောချင်းတိုက်ဆိုင်ပေသည်။ ထိုစဉ်အခါက အယူခံတရားလိုသည် ကြည့်မြင်တိုင်ဘက်ဘွင်နေသူတယောက်ဖြစ်ရာ "ငွေရွှက်" ဆိုသော အတိုက်နှင့် ထီလက်မှတ်ကိုဂင်းတဦးတည်းသာဝယ်သည်ဟုဆိုခဲ့သော်၊ အဘယ်အတွက်ကြောင့် "ပုဇွန်တောင်" ဆိုသောနေရပ်ကို ပေးရသည့်အကြောင်း မည်သို့မျှမပေါ်ပေါက်ချေ။ ဂင်းကိုယ်တိုင်ကလည်း သက်သေအစစ်ခံရာတွင်၊ အဘယ်ကြောင့် ပုဇွန်တောင်ဆိုသောနေရပ်ပေးရသည်ဆိုသည့်အကြောင်းနှင့်ပတ်သက်၍၊ တလုံး တပါဒမျှထွက်ဆိုထားခြင်းမရှိ။ ဂင်းပြင် အယူခံတရားခံသည် အလျဉ်းစာမတတ် သူဖြစ်၍၊ မိမိ၏လက်မှတ်ကိုပင်ထိုးတတ်သူတယောက်မဟုတ်သဖြင့်၊ ဘဏ်တိုက်တွင် "မငွေ" ဆိုသောလက်မှတ် ထိုးတတ်နိုင်အောင် အတော်ပင်ကြိုးစားကျင့်ယူရကြောင်းကို၊ သက်သေအစစ်ခံချက်များတွင် တွေ့ရပေသည်။ ဘဏ်တိုက်တွင်ငွေအပ်နှံထား၍ စာရင်းဖွင့်ရန် ဘဏ်တိုက်သို့ စာရေးသားသော အခါ၌

၁၉၅၈
ဦးဘိုးရွှက် နှင့် မငွေ။
ဦးချန်ထွန်း အောင်။

၁၉၅၀
ဦးဘိုးရွှက်
နှင့်
မင္ဒေ။
ဦးချန်ထွန်း
အောင်။

လည်း၊ လွှတ်တော်ရွေးနေကြိုး ဦးသိန်းဟန်က အင်္ဂလိပ်လိုရေးထားသောစာပေ၌ တွင် အယူခံတရားခံက လက်မပုံစံနှိပ်၍ပေးလိုက်ရကြောင်း ထင်ရှားလေသည်။ ထိုစာတွင် မည်ကဲ့သို့ ရေးသားလိုက်ကြောင်းကို ၎င်းအလျဉ်းပင် မသိရချေ။ "ငွေရွှက်" ဆိုသောလက်မှတ်သည် ၎င်းယောကျ်ားပိုင်သော လက်မှတ်ဟူ၍ သာရေးသားထားသည်ကို တွေ့ရှိရသည်။ ဤအချက်၌ အယူခံတရားလို၏ညွှန်ကြားချက်အတိုင်း၊ လွှတ်တော်ရွေးနေကြိုး ဦးသိန်းဟန်က ရေးလိုက်ဟန်တူပေသည်။ အထူးသဖြင့် ဦးသိန်းဟန်ကဘဏ်တိုက်သို့ရေးလိုက်သော (သက်သေခံအမှတ် ခ) စာတွင်၊ ထိပေါက်သောထီလက်မှတ်နံပါတ် ခ-၃၉၈၈၁၉ သည် "ကျွန်မလက်မှတ်" (my ticket) ဖြစ်ကြောင်း ရေးသားထားသည်ကိုတွေ့ရလေသည်။ အကယ်၍ အယူခံတရားလိုတဦးတည်း လုံးလုံးလျားလျားပိုင်ဆိုင်ခဲ့သော်၊ အယူခံတရားလိုသည် ဘဏ်တိုက်သို့ (သက်သေခံအမှတ် ခ) စာရေးလိုက်ခြင်းကိုမိမိအလျဉ်းမသိရ။ အယူခံတရားခံနှင့် ဦးသိန်းဟန်တို့က မတရားပူးပေါင်းကြံစည်ပြီး အယူခံတရားလိုကိုနစ်နာစေရန် ပြုလုပ်ခဲ့ပါသည်ဟု လျောက်ထားလေသည်။ ဤအချက်မှာလည်း ယုတ္တိယုတ္တာအလျဉ်းမရှိသော လျောက်ထားချက်ပင် ဖြစ်ပေသည်။ အယူခံတရားလိုသည် ၎င်းအား လွှတ်တော်ရွေးနေကြိုး တယောက်က မတရားပြုလုပ်ခဲ့လျှင်၊ ၎င်းရွေးနေကြိုးအား ရာဇဝတ်ကြောင်းဖြင့်သော်၎င်း၊ တရားမကြောင်းဖြင့်သော်၎င်း ယနေ့ထက်တိုင် မည်သို့မျှ အရေးယူခြင်းမရှိသေးသည်ဖြင့်၊ ရွေးနေခင္ဂေ ၄,၀၀၀ ကျပ် ကိုပင် ၎င်းတို့နှစ်ဦးသဘောတူပေးလိုက်ခြင်းအားဖြင့်၊ မိမိစွပ်စွဲသည့်အတိုင်း မဟုတ်ကြောင်း မှာများစွာထင်ရှားစေသည်။

အယူခံ တရားခံက ၎င်း၏ လွှတ်တော်ရွေးနေကြိုး ဦးဘဝင်းထံမှ တဆင့် ၁၉၅၁ ခုနှစ်၊ ဩဂုတ်လ ၃၁ ရက်နေ့စွဲပါသက်သေခံအမှတ် ၈ နှိုတစ်စာကို ပေးသောအခါ၊ အယူခံတရားလိုက ၎င်း၏လွှတ်တော်ရွေးနေကြိုး ဦးဘကြိုးမှ တဆင့် ၁၉၅၁ ခုနှစ်၊ စက်တင်ဘာလ ၃ ရက်နေ့စွဲပါ သက်သေခံအမှတ် ၉

၁၉၅၈
ဦးဘိုးရွှက်
နှင့်
မင်္ဂေ။
ဦးချန်ထွန်း
အောင်။

စာကိုပြန်ကြားရာတွင်၊ အယူခံတရားလိုသည် ၎င်းအား လွှတ်တော်ရွေးနေကြီး ဦးသိန်းဟန်က မတရားပြုလုပ်သည်ဟု တစိုးတစိမျှ ဖေါ်ပြထားခြင်းမရှိသည်ကို တွေ့ရလေသည်။ အယူခံတရားလိုသည် အင်္ဂလိပ်စာကို ကောင်းမွန်စွာတတ်ကျွမ်း သူတပေါက်ဖြစ်လေသည်။ သက်သေခံအမှတ် ခ စာကိုဦးသိန်းဟန်၏ညွှန်ကြား ချက်အရ၊ National Bank of India Ltd. ဘဏ်တိုက်သို့ရေးလိုက်သည်ဟု ဆိုပါက၊ ထိုစာတွင်ပါရှိသော အချက်အလက်များကို ၎င်းမသိဘဲ လည်ဆယ်ပြီး ရေးသည်ဟုဆင်ခြင်မှာ၊ ယုတ္တိယုတ္တာမရှိသောပြောကြားချက်ဖြစ်ပေသည်။ အယူခံ တရားခံသည် အယူခံတရားလိုနှင့်အသုဉ်းမသိသူတယောက်ဖြစ်ပြီး၊ ထိပေါက်ပြီး နောက်မှ ဦးသိန်းဟန်၏အကြံပေးချက်အရ၊ ရဝ်ကွက်တခုမှသွား၍ခေါ်ဆောင် လာကာ၊ ထိပေါက်သည့်မြောက်မြားစွာသောငွေကို ဘဏ်တိုက်တွင် ထိုအညွှတ် မိန်းမနာမည်ဖြင့် ပူးတွဲထားသည့်အပြင်၊ ၎င်းကိုလည်း မြတ်နိုးချစ်ခင်လာသဖြင့် ငွေအမြောက်အမြား ပေးလိုက်ရသည်ဆိုသော ပြောကြားချက်မှာ အလွန်ယုံ ကြည်ရန် ခက်ခဲသည့်ပြောချက်ပင်ဖြစ်ပေသည်။ ထို့ပြင် အယူခံ တရားလိုသည် မရိုးမဖြောင့်သော သဘောဖြင့် ''ငွေရွှက်'' အတိတ်ဖြင့်ပေါက်သော ထီ လက်မှတ်သည်၊ ၎င်းတဦးတည်းပိုင်ဖြစ်သရောင်ရောင်ကို ပေါ်လွင်စေသော ဆန္ဒဖြင့်၊ ထိုဒန္ဒထိုရက်၌ ထီလက်မှတ်နှစ်စောင် ''စိန်ရွှက်'' ''မြရွှက်'' ဟူသောအတိတ်များဖြင့် ဝယ်သေးသည်ဟုဆိုကာ၊ ထိုလက်မှတ်များကိုထုတ် ဖေါ်၍ အောက်ရုံးတွင် သက်သေတင်ပြခဲ့သေးသည်။ ထိုလက်မှတ်များကို ကျွန်ုပ် တို့ကြည့်ရှုစစ်ဆေးသောအခါ၊ ၎င်းလက်မှတ်များသည် ဟန်ဆောင်လက်မှတ် များသာဖြစ်ကြောင်းထင်ရှားနေသည်။ ၎င်းထီလက်မှတ်များကို အယူခံတရားလို သည် နောက်မှဝယ်ယူပြီး၊ အတိတ်ကို ''ထိမ်းမြားမင်္ဂလာပွဲရန်၊ ဦးဘိုးရွှက်'' ''Happy Marriage'' ဟူသောအင်္ဂလိပ်စာဖြင့်၊ နောက်ထပ်ရေးသားခြင်း မှာ အလွန်ထင်ရှားပေသည်။ မင်များမှာလည်း တခြားစီဖြစ်နေသည်ကိုတွေ့ရှိရ သည်။ ဤအချက်အလက်ကိုထောက်ရှုခြင်းအားဖြင့်လည်း၊ အယူခံတရားလိုသည် ''ငွေရွှက်'' ဆိုသောအတိတ်ဖြင့် ထိပေါက်သောလက်မှတ်ကို ၎င်းတဦးတည်း ပိုင်သလိုလို၊ နောက်မှအကြံရှ၍မဟုတ်မမှန်သောချေပချက်ကို အသောက်အထား ဖြစ်စေရန်ပြုလုပ်ခြင်းဖြစ်သည်ဟု ကျွန်ုပ်တို့ယူဆပေသည်။

အောက်ရုံးလွှတ်တော် တရားဝန်ကြီးသည်၊ အယူခံတရားလိုနှင့် အယူခံ တရားခံတို့ကို တိုက်ရိုက်စစ်ဆေးကြားနာခဲ့သူ ပုဂ္ဂိုလ်တဦးဖြစ်သည့်အလျောက်၊ ဤအချက်၌ မည်သူ၏ပြောဆိုချက်သည် ယုတ္တိယုဿာရှိ၍ ယုံကြည်ထိုက်သည် မယုံကြည်ထိုက်သည်ကိုချိန်ဆရာ၌၊ ၎င်းတရားဝန်ကြီး၏ယူဆချက်ကို ကျွန်ုပ်တို့

၁၉၅၀

ဦးဘိုးရွှက်နှင့် မင်္ဂေ။

ဦးချန်ထွန်းအောင်။

အထူးလေးစားရပေမည်။ အမှုအကြောင်းခြင်းရာနှင့်ပတ်သက်၍၊ ၎င်းသာလျှင် တိုက်ရိုက်ကြားနာတွေ့မြင်ခဲ့ရသည့်အလျောက် ၎င်း၏ယူဆချက်များကို ကျွန်ုပ်တို့ အထူးလေးနက်သော အကြောင်းမရှိဘဲ ပယ်မဖျက်နိုင်ချေ။ ***Chinnaya v. U Kha*** * တို့အမှုကိုကြည့်ပါလေ။ ထို့ကြောင့် အောက်ရုံးမှ ချမှတ်လိုက်သည့် အတိုင်း၊ သိန်းဆူပေါက်သောထိလက်မှတ်သည် အယူခံတရားလိုနှင့် အယူခံတရားခံတို့ ထက်ဝက်စီပိုင်ဆိုင်ကြသော သိန်းဆုလက်မှတ်ဖြစ်သည်ဟု ကျွန်ုပ်တို့ ယူဆပေသည်။ အယူခံတရားလိုအတွက် လိုက်ပါဆောင်ရွက်သော လွှတ်တော်ရှေနေကြီး၏ အထက်ပါလျှောက်လဲချက်များကို ကျွန်ုပ်တို့လက်မခံနိုင်ပေ။

အထက်၌ (၁) အချက်တွင် ဖေါ်ပြထားသော ဥပဒေအချက်အလက်နှင့် ပတ်သက်သော လျှောက်ထားချက်ကိုလည်း ကျွန်ုပ်တို့လေးနက်စွာ စဉ်းစားခဲ့သည်။ သီးခြားသက်သာခွင့်အက်ဥပဒေပုဒ်မ ၄၂ အရ တောင်းဆိုသောမြွက်ဆိုပြဋ္ဌာန်းသောဒီကရီကို ရုံးတော်ကပေးရာ၌ သင့်ရာကိုချင့်ချိန်၍ (in its discretion) ပေးရမည်ဟု ပြဋ္ဌာန်းထားသည်ကိုတွေ့ရသည်။ သို့သော် ခြွင်းချက်တွင်၊ တောင်းဆိုသော တရားလိုသည်ပိုင်ဆိုင်ခွင့်ရှိကြောင်း မြွက်ဆိုရုံမျှမက၊ ထပ်မံ၍ သက်သာခွင့်ရနိုင်ရန် တောင်းဆိုနိုင်ခွင့်ရှိလျက်နှင့် မတောင်းဆိုဘဲနေလျှင်၊ ၎င်း မြွက်ဆိုချက်မျိုးကို ရုံးတော်ကချမှတ်မပေးနိုင်ဟုပါရှိလေသည်။ ထိုပြဋ္ဌာန်းချက်ကို အကိုးအကားပြု၍၊ National Bank of India Ltd. ဘဏ်တိုက်ကို တရားခံအဖြစ်နှင့်မထည့်သွင်းဘဲ တရားစွဲခဲ့ခြင်းမှာ မှားယွင်းပါသည်ဟု အယူခံတရားလို ဘက်မှ လျှောက်ထားချက်ကို ကျွန်ုပ်တို့လက်မခံနိုင်ပေ။ သီးခြားသက်သာခွင့် အက်ဥပဒေပုဒ်မ ၄၂ တွင် ပြဋ္ဌာန်းထားချက်ကို သေချာကုန်စွာသုံးသပ်ကြည့်ရှုပါက၊ ရုံးတော်က သင့်ရာကိုချင့်ချိန်၍ မြွက်ဆိုပြဋ္ဌာန်းသောဒီကရီကို ပေးခဲ့လျှင်၊ ထိုကဲ့သို့ပေးခြင်းကို မသင့်ဟူ၍ ကျွန်ုပ်တို့ယူဆရန်မဖြစ်နိုင်ချေ။ ထိုမြွက်ဆိုပြဋ္ဌာန်းချက်ဒီကရီကို ပေးသောရုံးသည်၊ အမှု၏ အကြောင်းခြင်းရာနှင့် တရားလိုက တောင်းဆိုသော အခွင့်အရေးများရသင့်မရသင့်၊ တောင်းဆိုသောပိုင်ဆိုင်ခွင့် ရသင့်မရသင့်ဆိုသော အချက်အလက်များကို၊ ပတ်ဝန်းကျင် အခြေအနေနှင့် ထောက်ထားကြည့်ရှုပြီး၊ သင့်သည်ဟုချင့်ချိန်၍ဆုံးဖြတ်ခဲ့လျှင်၊ ထိုဆုံးဖြတ်ချက်ကို ကျွန်ုပ်တို့ သမန်ကာရှုန်ကာ ပေါ့ပေါ့ဆဆယူဆပြီး ပယ်ဖျက်ရန်မသင့်ချေ။ အယူခံတရားခံရရှိခဲ့သောဒီကရီမှာ၊ အမှုအဖြစ်အပျက် ကြောင်းခြင်းရာများကို ထောက်ထားကြည့်ရှုပြီး စဉ်းစားပါက၊ အလုဟာသဲ အဓိပ္ပါယ်မရှိသော စကား။ ဒီကရီမဟုတ်ကြောင်းမှာ များစွာထင်ရှားသည်။ ဘဏ်တိုက်တွင်ရှိသောငွေသည်

* 14 Ran. 11.

ငင်းဧ၏ဥစ္စာပစ္စည်း၊ ငင်းပိုင်ဆိုင်သော၊ သို့တည်းမဟုတ် ငင်းဆိုင်ရာဆိုင်ခွင့်ရှိ ဒသာပစ္စည်းတရပ်ဖြစ်သည်မှာ ထင်ရှားပေသည်။ စာချုပ်စာတမ်းသက်သေသာ ခကများက ထောက်ခံလျက်ရှိပေသည်။ ဤကဲ့သို့သောအခြေအနေတွင်၊ ငင်းရထိုက်ရခွင့်ရှိသည်ဟု မြွက်ဆိုပြဋ္ဌာန်းသောဒီကရီတရပ်လုံးကို ရုံးတော်တွင်တောင်းဆိုပိုင်ခွင့်မှာ၊ အချည်းနှီးဖြစ်သော တောင်းဆိုပိုင်ခွင့်မျိုး မဟုတ်ပေ။ ငင်းသီးခြားသက်သာခွင့်အက်ဥပဒေပုဒ်မ ၄၂ တွင်ပြဋ္ဌာန်းထားသည့်အလျောက်၊ ရန်ကုန်သော သီးခြား သက်သာခွင့်မျိုးဖြစ်သည်ဟု ကျွန်ုပ်တို့ယုံကြည်ပေသည်။ National Bank of India Ltd. ဘဏ်တိုက်ကိုပင် တရားခံအဖြစ်ဖြင့် မထည့်သွင်းခြင်းသည်၊ အဆိုပါပုဒ်မခြွင်းချက်တွင်ပြဋ္ဌာန်းထားသော ပိတ်ပင်ချက်နှင့် တိုက်ဆိုင်သည်ဆိုသည်မှာလည်း ကျွန်ုပ်တို့လက်မခံနိုင်ပေ။ National Bank of India Ltd. ကိုယ်တိုင်ကပင်လျှင်၊ ငင်းတို့လက်တွင်ရှိသောငွေသည် အယူခံတရားခံ၏ငွေဖြစ်ကြောင်း ကနဦးအစကပင်သိနေခြင်းမှာ၊ သက်သေခံအမှတ် ခ စာကို ငင်းတို့လက်ဝယ်သို့ ရရှိသောအချိန်မှစ၍ဖြစ်ပေသည်။ ထိုမှတဖန် သက်သေခံအမှတ် ဂ စာကိုထိုဘဏ်တိုက်မန်နေဂျာက၊ မြန်မာနိုင်ငံတော်အောင်ဘာလေသိန်းဆုရုံး၊ အုပ်ချုပ်ရေးမှူးထံသို့ ၁၉၅၁ ခုနှစ်၊ ဧပြီလ ၂၀ ရက်နေ့စွဲဖြင့် ရေးသောစာထဲတွင်၊ ပုဇွန်ဘောင် မငွေ၏ ထိလက်မှတ်ဖြစ်ကြောင်းကိုလည်း ဝန်ခံထား၍၊ ငင်း၏ညွှန်ကြားချက်အရ ငွေတသိန်းကိုရလိုကြောင်း ထိလက်မှတ်ဖြင့်ပူးတွဲ၍ပေးလိုက်သော အချက်များကလည်း များစွာထင်ရှားပေသည်၊ ထို အချက်အလက်များကို ထောက်ထား၍သာလျှင်၊ အောက်ရုံးတရားဝန်ကြီးသည် သင့်ရာကိုချင့်ချိန်၍ (in its discretion) အယူခံတရားခံအား ငင်းတောင်းဆိုသောမြွက်ဆိုပြဋ္ဌာန်းချက်ဒီကရီကိုပေးလိုက်ခြင်းဖြစ်ပေသည်။ ထိုကဲ့သို့သင့်ရာကို ချင့်ချိန်၍ပေးလိုက်သော မြွက်ဆိုပြဋ္ဌာန်းချက်ဒီကရီကို၊ ကျွန်ုပ်တို့အယူခံရုံးတော်အနေဖြင့် ပယ်ဖျက်ရန်မသင့်ပေ။ ကျွန်ုပ်တို့အနေနှင့် ထိုအချက်ကိုစဉ်းစားရာ၌လည်း၊ မူလဘက်ဌာနလွှတ်တော်တရားဝန်ကြီး၏ချင့်ချိန်ပြီး ဆုံးဖြတ်လိုက်သော ဆုံးဖြတ်ချက်နှင့် ထပ်တူထပ်မျှပင်ကျွန်ုပ်တို့ထင်မြင်ယူဆပေသည်။ အောက်မူလဘက်ဌာနရုံးတော်မှ အခြေအနေကိုထောက်ထား၍၊ သင့်တင့်ရုံချင့်ချိန်ပြီးဆုံးဖြတ်နိုင်သောအာဏာရှိသည့်အလျောက်၊ ဆုံးဖြတ်ခဲ့သောအချက်များကိုအယူခံရုံးတော်က လွယ်ကူစွာဖြင့်မပယ်ဖျက်သင့်ကြောင်းကို ပရီဗီကောင်ဆယ်အယူခံရုံးတော်မှ ***Jaipal Kunwar and another* v. *Indar Bahadur Singh***** တို့အမှုတွင် အတိအလင်းပြဋ္ဌာန်းထားသည်ကို တွေ့ရပေသည်။ ထိုနည်းတူစွာပင်

၁၉၅၈
ဦးဘိုးရွှက်
နှင့်
မငွေ။
ဦးချန်ထွန်း
အောင်။

* 26 All. 238.

၁၉၅၈

ဦးတိုးရွှက်
နှင့်
မင်္ဂေ။

ဦးချန်ထွန်း
အောင်။

Fateh Mohammad Khan v. *Gurbux Singh and others* † တို့အမှုတွင်လည်း၊ သီးခြားသက်သာခွင့်အက်ဥပဒေပုဒ်မ ၄၂ နှင့်ပတ်သက်၍ ဆုံးဖြတ်ထားသည်ကိုတွေ့ရပေသည်။ *Mt. Tehl Kuar* v *Amar Nath and others* ‡ တို့အမှုကိုလည်းကြည့်ပါလေ။

ထို့ပြင်၊အမှုတွင်တရားခံအဖြစ်ဖြင့်သော်ငင်း၊ တရားလိုအဖြစ်ဖြင့်သော်ငင်း ပူးတွဲထည့်သွင်းသင့်လျက် မပူးတွဲမထည့်သွင်းဘဲ စစ်ဆေးကြားနာခဲ့ပါက၊ ထို ချို့ယွင်းချက်ကြောင့် အမှု၏ထိုက်သင့်ရာထိုက်တန်ရာ အကျိုးအပြစ်ကိုထိခိုက်ခြင်း မရှိလျှင်၊ ထိုအောက်ရုံးမှ ချမှတ်လိုက်သောဒီကရီကို အယူခံရာတွင်၊ ပယ်ဖျက်ခြင်း၊ သို့တည်းမဟုတ် အကြီးအကျယ်ခြုံငင်းလွှဲပြင်ဆင်ခြင်း၊ အောက်ရုံးသို့ ပြန်ပို့ခြင်းမရှိစေရဟူသောတားမြစ်ချက်ကို၊ တရားမကျင့်ထုံးဥပဒေပုဒ်မ ၉၉ တွင်လည်း အတိအလင်းပြဋ္ဌာန်းထားသည်ကိုတွေ့ရှိရသည်။ သို့အတွက်ကြောင့် ယခုအယူခံ တရားလိုဘက်မှ **National Bank of India Ltd.** ဘဏ်တိုက်ကို တရားခံအဖြစ်ဖြင့်ထည့်သွင်းပြီး တရားမစွဲဆိုခဲ့ခြင်းမှာ၊ အမှုကိုအကြီးအကျယ်ပြောင်းလွဲပြင်ဆင်ပျက်စီးနိုင်လောက်သော အချက်မဟုတ်သဖြင့်၊ ဤလျှောက်ထားခြင်းနှင့်ပတ်သက်သော လျှောက်ထားချက်ကို ကျွန်ုပ်တို့လက်မခံနိုင်ချေ။ ဤအချက်၌ အယူခံတရားလိုဘက်မှတင်ပြသော ပရိဗီကောင်စ်ဆယ်မှ *Nawab Humayun Begam* v. *Nawab Shah Mohammad Khan and another* § အမှုတွင်ပင်လျှင်၊ မြင်ဟပြောဆိုထားသည်ကို တွေ့ရပေသည်။ ထိုအမှုတွင်၊ ဤအယူခံမှ၌ ပေါ်ပေါက်နေသောပြဿနာမျိုး အလားတူပင်ပေါ်ပေါက်ခဲ့၍၊ မိန်မသားဖြစ်သူက လင်ယောကျ်ားနှင့်ပူးတွဲ၍ (Joint Account) သွင်းထားသောဘဏ်တိုက်ရှိရွေ့ကို မိမိတဦးတည်းသာပိုင်ဆိုင်ကြောင်း အမှုစွဲဆိုရာတွင်၊ ဘဏ်တိုက်ကိုလည်း တရားခံအဖြစ်နှင့် ထည့်သွင်းစွဲဆိုလေသည်။ သို့ရာတွင်၊ အောက်ရုံး၌စစ်ဆေးရာ၊ ဘဏ်တိုက်ကိုတရားခံအဖြစ် ထည့်သွင်းစွဲဆိုခြင်းမှာ မှားယွင်းသည်ဟုဆိုကာ၊ ဘဏ်တိုက်ကို ထည့်သွင်းစွဲဆိုသောအမှုကို ပယ်ခဲ့သည်။ ဤအချက်ကို အဓိကအချက်တချက်ပြု၍ အယူခံဝင်ရာ၊ အောက်ရုံးမှဘဏ်တိုက်ကို တရားခံအဖြစ်မှ ပယ်ထုတ်လိုက်ခြင်းမှာ အဓိကမှားယွင်းခြင်းမဟုတ်၊ ဘဏ်တိုက်ကိုတရားခံအဖြစ်ဖြင့် ထည့်သွင်း၍စွဲဆိုသည်ဖြစ်စေ၊ မစွဲဆိုသည်ဖြစ်စေ တရားလိုတောင်းဆိုသော သက်သာခွင့်ကို၊ သီးခြားသက်သာခွင့်အက်ဥပဒေပုဒ်မ ၄၂ အရ၊ မိမိပိုင်ဆိုင်ခွင့်ကိုသာ အဓိကထား၍ ဖြေဆိုပြဋ္ဌာန်း

† A.I.R. (36) (1949) East Punj. 210.
‡ A.I.R. (1925) Lah. 2.
§ A.I.R. (30) (1943) (P.C.) 94

သောဒိကရိကိုရလိုသဖြင့်၊ ဘဏ်တိုက်ကိုပူးတွဲ၍ အမှုတွင်တရားခံအဖြစ်ထည့်သွင်းခြင်းဖြင့် ထူးခြားမည်မဟုတ်ဟု ပရီဗီကောင်ဆယ် တရားဝန်ကြီးများက မှတ်ချက်ချထားသည်ကို တွေ့ရသည်။ (စာမျက်နှာ ၉၅ တွင် ကြည့်ပါလေ။) သို့အတွက်၊ ထိုဥပဒေအချက်၌ အောက်ရုံးတရားဝန်ကြီးသည် မှားယွင်းဆုံးဖြတ်ချက်ချလိုက်သည်ဟု ကျွန်ုပ်တို့မယူဆနိုင်ချေ။

၁၉၅၀

ဦးဘိုးရွက် နှင့် မင်္ဂေး၊ ဦးချန်ထွန်း အောင်။

အထက်ပါအကြောင်းခြင်းရာများကိုထောက်ထား၍၊ ဤအယူခံမှုတွင်မူလဘက်ဌာနရုံးတော်မှ ချမှတ်လိုက်သော တရားဝန်ကြီး၏အစီရင်ခံချက်နှင့် ဒီကရီကို ပယ်ဖျက်ရန်၊ လုံခလောက်သောအကြောင်းအချက် ဘာမျှမရှိသဖြင့်၊ ဤအယူခံကို တရားစရိတ်နှင့်တကွ ကျွန်ုပ်တို့ပလပ်လိုက်သည်။

APPELLATE CIVIL.

Before U Choon Foung, J.

H.C. 1958

Sept. 2.

A. R. NIZAMI (APPELLANT)

v.

DAW KHIN KHIN (RESPONDENT).*

Civil Procedure Code, O. 22, R. 10—Order made under—Appealable under O. 43, R. 1 (1) of the Code—Not judgment within the meaning of s. 20, Union Judiciary Act—Word "judgment" meaning of.

An order made under Order 22, Rule 10 of the Civil Procedure Code is an order appealable under Order 43, Rule 1 (1) of the Code and is not a judgment within the meaning of s. 20 of the Union Judiciary Act as to require a certificate under that section.

"The word 'judgment' in clause 13 of the Letters Patent is intended to cover an order as well as a decree, but the effect of adjudication must be such as to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding. If it has this effect, the adjudication is a judgment; otherwise not."

P.K.P.V.E. Chidambaram Chettyar and another v. *N. A. Chettyar Firm*, (1928) I.L.R. 6 Ran. 703, followed.

"The word 'judgment' in clause 13 of the Letters Patent means and is a decree in a suit by which the rights of the parties at issue in the suit are determined."

In re Dayabhai Jiwandas and others v. *A.M.M. Murugappa Chettyar*, (1935) I.L.R. 13 Ran. 457, followed.

Ramaswami Chettyar v. *Roy Kannaippa Mudaliar and two others*, 55 Mad. 491; *Appaji Reddiar* v. *Thailammal*, 56 Mad. 689, referred to.

Messrs. R. Jaganathan and *S. A. S. Pillay* for the appellant.

Hone Kyan for *Messrs. Soorma* and *Boon* for the respondent.

U CHOON FOUNG, J.—This is an application under section 20 of the Union Judiciary Act, 1948, for a certificate to appeal against the order dated 22nd August 1958 of this Court passed in the above appeal.

* Civil Misc. Application No. 63 of 1958 against the order of this Court in Civil Misc. Appeal No. 21 of 1956.

In my order dated 22nd August 1958, I allowed the application of Daw Khin Khin to have herself brought on the record as respondent in the above appeal in place of the original respondent Miss Eileen Jeremiah.

The appellant has now applied for a certificate under section 20 of the Union Judiciary Act, 1948, certifying that the said order of mine is a fit one to be taken up on appeal.

In support of his contention, the learned Advocate for the appellant-applicant referred me to the judgment of U San Maung, J., in Civil First Appeal No. 3 of 1956 of this Court, wherein it was held that—

> "the expression 'claim, demands, rights of action or suit whatsoever of the vendor into or upon the said premises' cannot be construed as meaning that the rent due from the defendant in respect of the suit room was also meant to be assigned to the plaintiff" and that "a right of action against the defendant for arrears of rent is a right based upon the contract of the lease and is not a right upon the premises."

The learned Advocate for the respondent Daw Khin Khin contended that this application did not lie inasmuch as the order now under consideration is an appealable order under Order 43, Rule 1 (1) of the Code of Civil Procedure and as the said order, although referred to by the appellant as "judgment", is not in fact a judgment but only an order and that as such it is not a judgment within section 20 of the Union Judiciary Act on the strength of the rule laid down in *P.K.P.V.E. Chidambaram Chettyar and another* v. *N.A. Chettyar Firm* (1).

In *P.K.P.V.E. Chidambaram Chettyar and another* v. *N.A. Chettyar Firm* (1) a Full Bench

(1) 6 Ran. 703.

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(consisting of five Judges) of the former High Court of Judicature at Rangoon has held that "the word 'judgment' in clause 13 of the Letters Patent is intended to cover an order as well as a decree, but the effect of adjudication must be such as to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding. If it has this effect, the adjudication is a judgment; otherwise not."

In re Dayabhai Jiwandas and others v. *A.M.M. Murugappa Chettyar* (1) another Full Bench (consisting of seven Judges) of the same High Court has held that "the word 'judgment' in clause 13 of the Letters Patent means and is a decree in a suit by which the rights of the parties at issue in the suit are determined."

In *Ramaswami Chettyar* v. *Roy Kannaippa Mudaliar and two others* (2) a Bench of the Madras High Court has held that "an order under Order 1, Rule 10 (2) of the Code of Civil Procedure adding a party to a suit is not a 'judgment' within the meaning of clause 15 of the Letters Patent (Madras) and therefore no appeal lies against such an order."

And again in *Appaji Reddiar* v. *Thailammal* (3), another Bench of the Madras High Court has held that "an order directing the respondent in an appeal to be brought on the record as the legal representative of the deceased original appellant is not an appealable order, because it is not a judgment which finally settles the rights of parties but has the effect of allowing litigation which is proceeding to further proceed to a final adjudication."

(1) 13 Ran. 457. (2) 55 Mad. 491.
(3) 56 Mad. 689.

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It must be pointed out that clause 15 of the Letters Patent (Madras) corresponds to clause 13 of the Letters Patent of the former High Court of Judicature at Rangoon, and the latter in turn corresponds to section 20 of the Union Judiciary Act.

My order dated the 22nd August 1958 merely directed that Daw Khin Khin be allowed to be brought on the record as respondent in place of the original respondent Miss Eileen Jeremiah but did not dispose of the suit, the matter for determination then being whether Daw Khin Khin should be brought on the record as respondent in place of the original respondent. It is therefore clear that the order now under consideration is only an order and not a judgment within the meaning of section 20 of the Union Judiciary Act. Moreover, the order under consideration is an order under Rule 10 of Order 22 of the Code of Civil Procedure and as such is an appealable order under Order 43, Rule 1 (1) thereof and requires no certificate under section 20 of the Union Judiciary Act, 1948.

Therefore, the application does not lie and must be dismissed.

Accordingly, the application is dismissed with costs, Advocate's fee K 51.

APPELLATE CIVIL.

Before U Ba Nyunt, J.

H.C. 1958

Oct. 9.

BAN HIN (APPELLANT)

v.

MOHAMED JAMAL (RESPONDENT).*

Specific Relief Act, s. 54—Mandatory Injunction—Grant of—Where there has been an invasion of the right to quiet enjoyment of property—Cost incurred in doing wrongful act—Not to be set off against rent of property.

Where a tenant without the permission of his landlord and inspite of the landlord's protests constructed a substantial building of his own on the land belonging to his landlord.

Held : That the tenant had clearly invaded the right of the landlord to the quiet enjoyment of his premises and that the landlord was entitled to a mandatory injunction.

Kehari Singh v. *Holasi and others*, A.I.R. (1914) All. 285 ; *Chhedi Manjhi and others* v. *Mahipal Bahadur Singh and others*, A.I.R. (1951) Pat. 600 ; *Murarilal* v. *Balkisan and another*, A.I.R. (1926) Nag. 416, referred to.

Ram Kissen Joydoyal v. *Pooran Mull and others*, I.L.R. 47 Cal. 733 ; *Sardari Mal* v. *Hirde Nath and others*, I.L.R. 6 Lah. 384 ; *Ramanadhan* v. *Zamindar of Ramnad and others*, I.L.R. 16 Mad. 407 ; *Surendra Narain Singh* v. *Hari Mohan Misser*, I.L.R. 31 Cal. 174, distinguished

Held also : That it would be a dangerous doctrine to allow the tenant to set off the cost of the new building so constructed against the rents due for a good number of years

Shelfer v. *City of London Electric Lighting Company*, (1895) 1 Ch. Div. 287, referred to.

L. Dawson v. *Princess Rounac Zamani Begum*, I.L.R. 6 Ran. 456 at 460.

Kyaw Myint for the appellant.

N. R. Majumdar for the respondent.

U BA NYUNT, J.—In Civil Regular Suit No. 17 of 1955 of the Township Court of Toungoo, the

* Civil 2nd Appeal No. 14 of 1958 against the decree of the District Court of Toungoo in Civil Appeal No. 27 of 1956, dated the 7th January 1958.

respondent instituted a suit under section 54 of the Specific Relief Act for a perpetual injunction preventing the appellant to ever build on the land and for a mandatory injunction ordering the structure already constructed to be dismantled. The respondent further alleged that there existed no standard for ascertainment of the actual damage caused to him and submitted that pecuniary compensation would not afford adequate relief. It was also contended that the appellant had no right to do the repairs and in any case he had gone beyond his rights in constructing a substantially new building.

The facts which have given rise to the present litigation are as follows:

The respondent is the owner of a building consisting of five rooms and its site and the appellant has been occupying the two eastern rooms of the said building as a tenant of the respondent.

On 1st July 1954 the respondent applied to the Assistant Controller of Rents, Toungoo, under section 11 (*d*) and (*f*) of the Urban Rent Control Act for a certificate to eject the appellant on the ground that he wished to erect a two-storeyed pucca building on the premises for his own personal residence. The appellant at that time objected to the application on the ground that the building needed no repairs and was in a habitable state. The respondent's application was dismissed. Later, that is, on 19th April 1955 the appellant filed an application under section 10-A of the Urban Rent Control Act praying that the appellant be allowed to make the necessary repairs to the rooms, as considerable damage would be done to his goods by the advent of the monsoon. After several adjournments, the case was put off for 20th July 1955 as the

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then Assistant Controller of Rents U Kyaw Gaung was on the eve of transfer to Insein. In the meantime, that is, on 11th July 1955 at the back of the respondent the appellant filed a fresh application presumably under section 10-A (*3*) of the Urban Rent Control Act to allow him to make the necessary repairs and submitted an estimated cost of Kyats 6,000. U Kyaw Gaung visited the premises on the following day *i.e.* 12th July 1955 and passed an order on 14th July 1955 that is, two days later, granting the application of the appellant. Thereupon the appellant started substituting the old posts of the building with new posts. He further displaced the mat walling with wooden wallings and finally replaced the *inbet* roof with C.I. sheets.

Soon after the respondent became aware of this, he made a protest to the appellant failing which he moved the Assistant Controller of Rents who succeeded U Kyaw Gaung under section 21-A to review the previous order granting permission to the appellant to do the repairs. On 20th July 1955 notice was issued to the appellant to stay work and to appear before the Assistant Rent Controller, on 27th July 1955. The appellant, however, continued the work and on 4th August 1955 he appeared before the Assistant Controller of Rents and moved the Court to dismiss his application as he did not need any further permission since the building had already been constructed. The application was accordingly dismissed.

The defence was that he had merely repaired the old building under an order from the Assistant Controller of Rents that he was not liable in any way and that the suit did not lie.

The trial Court framed altogether eight issues of which two issues were important. The trial Court

held (1) that the appellant obtained a valid permission from the Assistant Controller of Rents to repair the said rooms and (2) that the portion of the respondent's old building was replaced by the appellant's new building. Then the suit was dismissed. On appeal, however, the judgment of the trial Court was set aside, the District Judge holding *inter alia* (1) that the original building was entirely replaced by a new building, (2) that there was no valid permission from the Rent Controller to repair the rooms, (3) that the acts of the appellant is a clear invasion of the right of the respondent to the quiet enjoyment of his property, (4) that there exists no standard for ascertainment of the actual damages caused by the invasion of the appellant and (5) that the respondent is entitled to the mandatory injunction claimed for. Hence this appeal.

It is contended in this appeal (1) that there was no diversion to any different use of the premises within the meaning of section 108 of the Transfer of Property Act, (2) the grant of mandatory injunction is wrong in law in the circumstances of the case, (3) that pecuniary compensation could afford an adequate relief and (4) that the respondent's suit is barred by section 56 (i) of the Specific Relief Act as he can obtain equally efficacious relief by other usual mode of proceeding.

In support of his contentions the learned Advocate for the appellant has cited the case of *Ram Kissen Joydoyal* v. *Pooran Mull and others* (1) where it was held that—

> "The injunction claimed should not be granted in view of the provisions of clause (1) of section 56, which laid down that an injunction could not be granted when equally efficacious relief could certainly be obtained by

(1) I.L.R 47 Cal. 733.

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any other usual mode of proceeding (except in case of breach of trust.)"

That was a suit for declaration that a certain contract entered into between the plaintiffs and the defendants was not binding on the plaintiffs, inasmuch as they did not enter into such a contract, and that they were accordingly entitled to an injunction to restrain arbitration, which arbitration clause was alleged to have been contained in the contract. Thus the facts of that case are different from those of the suit under appeal. The next case of *Sardari Mal* v. *Hirde Nath and others* (1) relied on by the learned Advocate for the appellant also relates to an agreement for sale of a certain plot of land, which land was subsequently agreed to be sold to another person. In the case of *Ramanadhan* v. *Zamindar of Ramnad and others* (2) cited by the learned Advocate for the appellant perpetual injunction sought for was granted to demolish a dwelling house which had been erected on agricultural land for purposes not connected with agriculture, and to restrain the defendant from altering the character of the land. It is submitted in this appeal that the character of the premises is not altered. The case of *Surendra Narain Singh* v. *Hari Mohan Misser* (3) also relates to the grant of a permanent injunction restraining the tenant from erecting a factory for manufacture of indigo cakes on the land let out for agricultural purposes.

On the other hand the learned Advocate for the respondent has cited the case of *Kehari Singh* v. *Holasi and others* (4) where it was held that—

"That the zamindar could get the structures demolished but could not eject the tenants from the land."

(1) I.L.R. 6 Lah. 384.
(2) I.L.R. 16 Mad. 407.
(3) I.L.R. 31 Cal. 174.
(4) A.I.R. (1914) All. 285.

under the following circumstances:—

> "The plaintiff was the zamindar of the abadi site in dispute. The defendants were tenants and were in possession of the dispute land as such. They built certain structures on the land without the permission of the zamindar. There was no custom in the village under which a tenant could erect new buildings within his jote without the permission of the zamindar."

In the case of *Municipal Committee, Montgomery* v. *Master Sant Singh* (1) it was held that—

> "The question whether an 'equally efficacious relief' can 'certainly' be obtained by 'any other usual mode of proceeding' is a question of fact to be determined in each case on its own circumstances, and no hard and fast rule can be laid down in the matter."

The next case quoted on behalf of the respondent is that of *Chhedi Manjhi and others* v. *Mahipal Bahadur Singh and others* (2) where it was held that—

> "Where a tenant erects a permanent structure on the land for non-agricultural purposes, and during the continuance of the lease, the lessor objects to their erection and there is no waiver or acquiescence on the part of the lessor, then s. 108 (*p*) must operate and the landlord is entitled to ask for removal of the permanent structures."

The last case relied on by the learned Advocate for the respondent is that of *Murarilal* v. *Balkisan and another* (3) where it was held that—

> "If the defendant has acted in a high-handed and unfair manner, the plaintiff is entitled to an injunction. Mere delay is no bar to a legal remedy, unless it amounts to a waiver or an abandonment of the rights sought to be enforced, or to acquiescence in the act complained of; and where there is a vested right or interest in any party,

(1) A.I.R. (1940) Lah. 377 (F.B.). (2) A.I.R. (1951) Pat. 600.
(3) A.I.R. (1926) Nag. 416.

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he cannot waive or abandon that right except by an act equivalent to an agreement or a license. Where there is no evidence of these, the Court will grant a mandatory injunction."

In the suit under appeal it is manifestly clear from the record of the proceedings that the appellant has acted in a high-handed and unfair manner in having a new two-storeyed building of his own completely constructed in replacement of the old one-storeyed building of which he is merely a tenant and inspite of the fact that the order to stay work was issued by the Assistant Controller of Rents, who succeeded U Kyaw Gaung. The order of U Kyaw Gaung allowing the appellant to make repairs to the estimated cost of K 6,000 to the old building worth about K 1,000 especially at the back of the respondent is plainly wrong. It appears that the total amount of costs in erecting the new structure was K 12,000. Be that as it may, I think it would be a dangerous doctrine to allow a tenant to construct a substantial building of his own on the land belonging to his landlord without the landlord's permission and inspite of his protest and to allow the tenant to set off the costs of the new building so constructed against the nominal rents due for a good number of years. In the present case the appellant has clearly invaded the right of the respondent to the quiet enjoyment of his premises. In the case of *Shelfer* v. *City of London Electric Lighting Company* (1) referred to in the case of *L. Dawson* v. *Princess Rounac Zamani Begum* (2) it was held that—

"when one person has committed a wrongful act thereby invading the rights of another he cannot in ordinary circumstances ask the Court to sanction his

(1) (1895) 1 Ch. Div., 287. (2) 6 Ran. 456 at 460.

wrongful act and allow him to pay monetary compensation to the person whose right has been infringed. In such a case if the act complained of is a continuing wrong, the person wronged is ordinarily entitled to an injunction against the person who has injured him."

In view of the circumstances obtaining in the suit under appeal and in the light of the authorities quoted above, I confirm the judgment and the decree of the lower Appellate Court. The appeal, therefore stands dismissed with costs.

APPELLATE CIVIL.

Before U Ba Thoung, J.

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Oct. 6.

BASIL P. MARTIN (APPELLANT)

v.

MOHAMED AYOOB (RESPONDENT).*

Civil Procedure Code, O 17, R. 2—Disposal of part-heard case in the absence of one of the parties comes under—O. 9, R. 3 provides for setting aside of ex parte *decrees passed under O. 17, R. 3—Application.*

The disposal of a part-heard case in the absence of one of the parties on the date to which the case has been adjourned for further hearing is one made under Order 17, Rule 2 of the Civil Procedure Code and an application to set aside an *ex parte* decree made thereunder is maintainable under Order 9, Rule 3 of the Code.

Order 17, Rule 3 of the Code applies only to cases where the parties are present and have not satisfied the Court as to the existence of any adequate reason for their not having done what they were directed to do.

Prativadi Bhayankaram Vichamma v. *Kamisetti Sree Ramulu*, I.L.R. 41 Mad. 286, referred to.

Ko Tha Lin Bwin and another v. *Ko Hla Kye*, I.L.R. 8 Ran. 169, followed.

Panna Lal Marwari v. *Bishen Dei*, I.L.R. (1946) All. 833; *Sitalprasad* v. *Sukya*, I.L.R. (1948) Nag. 462, distinguished.

S. T. Leong for the appellant.

J. R. Chowdhury for the respondent.

U BA THOUNG, J.—This appeal has arisen out of Civil Regular Suit No. 997 of 1954 of the City Civil Court, Rangoon, where the respondent sued the appellant for recovery of a sum of K 1,380 alleged to have been taken by the appellant as a temporary loan. There is another suit, *i.e.*, Civil Regular Suit No. 1023 of 1954 filed by the respondent against the appellant in the same Court for recovery

* Civil Misc. Appeal No. 22 of 1958 against the decree of the 3rd Judge, City Civil Court of Rangoon in Civil Regular Suit No. 997 of 1954, dated the 4th April 1958.

of another sum of K 2,990 alleged to have been borrowed from him by the appellant, by mortgaging a jeep car and giving an undertaking in writing to repay both the loans within nine months. These two cases were taken side by side for hearing. The plaintiff-respondent and the defendant-appellant have been examined in the present case, whereas in the other case, *i.e.*, Civil Regular Suit No. 1023 of 1954 the plaintiff-respondent and his two witnesses and the defendant-appellant have been examined; and it appears from the diary orders that several adjournments were taken by the appellant for producing his evidence; and finally both the cases were put down for hearing on 1st February 1957. On that day when the cases were called, neither the appellant nor his lawyer appeared in Court, and the trial Judge after hearing the respondent's lawyer, fixed both the cases for passing of orders on 13th February 1957. Later on that day, *i.e.*, 1st February 1957, the appellant's lawyer Mr. Williams appeared in Court and submitted that he did not make his appearance earlier as he was given to understand by the appellant that he himself would appear; and that he had just received a letter from the appellant at Calcutta saying that he was unavoidably detained there on account of unforeseen business circumstances, and requesting him to ask for another date for hearing of the two cases. Mr. Williams accordingly prayed to the Court to set sside the orders passed earlier fixing the two cases for passing of judgments on 13th February 1957, and he applied to the Court to give a fresh date for hearing of the cases. The learned trial Judge directed Mr. Williams to file a proper application in writing, and on the next day, *i.e.*, 2nd February 1957 Mr. Williams filed an application supported by an affidavit about his client's inability

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to attend Court on 1st February 1957 on account of his absence in Calcutta which was unavoidable. The learned Judge did not pass any order on that application ; but on 13th February 1957 as originally fixed by him for passing of orders, he passed judgments in both the cases giving a decree in favour of the plaintiff-respondent. Then on 28th February 1957 the appellant's lawyer (Mr. S. T. Leong who was subsequently engaged by the appellant) filed an application under Order 9, Rule 13 of the Civil Procedure Code to set aside the *ex parte* decree passed against the appellant on 13th February 1957. The learned trial Judge rejected the application by his order dated 4th April 1958 on the ground that he considered that the *ex parte* decree passed in the case was under Order 17, Rule 3 of the Civil Procedure Code, and hence an application of the appellant made under Order 9, Rule 13 did not lie. Hence this appeal against the order of the lower Court dated 4th April 1958.

It was contended on behalf of the appellant that the *ex parte* decree was passed in the case under Order 17, Rule 2 of the Civil Procedure Code and not under Order 17, Rule 3 and hence he could make his application, to set aside the *ex parte* decree, under Order 9, Rule 13.

I am inclined to agree with the learned Counsel for the appellant that the *ex parte* decree passed in the case on 13th February 1957 was under Order 17, Rule 2 of the Civil Procedure Code. On the day fixed for hearing of the case, *i.e.*, on 1st February 1957, neither the appellant-defendant nor his lawyer was present in Court when the cases were called, as the appellant was unavoidably detained in India on account of unforeseen business circumstances, and his lawyer was also absent, as he was under the impression

that his client the appellant-defendant himself would make his appearance in Court. All these facts are supported by affidavits, and I think a sufficient reason has been made out by the appellant for being absent from Court on 1st February 1957. [See the case of *U Ngwe* v. *Bama Tagun Co.* (1)]. Under these circumstances I am of the view that the *ex parte* decree passed in the case on 13th February 1957 came within Order 17, Rule 2 of the Civil Procedure Code and it could be set aside under Order 9, Rule 13 of the Code, for I think that Rule 3 of Order 17 applies only to cases where the parties are present and have not satisfied the Court as to the existence of any adequate reason for their not having done what they were directed to do. I am fortified in this view by the Full Bench decision of the Madras High Court in the case of *Prativadi Bhavankaram Pichamma* v. *Kamisethi Sree Ramalu* (2) where it was held:

> "Where, at a close of the plaintiff's case, an adjournment was granted to the defendant to enable him to produce his evidence and he failed to appear at the adjourned hearing, and the Court proceeded to pass a decree against him.
>
> Held, that the case came within Order XVII, Rule 2, and the decree could be set aside under Order IX, Rule 13."

The above Full Bench decision of the Madras High Court was followed with approval by the late High Court of Rangoon in the case of *Ko Tha Lin Bwin and another* v. *Ko Hla Kye* (3) where it was held:

> "When a case is called on, the hearing being peremptory, and the defendant is absent and the Court resolves to proceed against him *ex parte*, it acts under Order XVII, Rule 2 of the Civil Procedure Code. The

(1) (1951) B.L.R. 134. (2) I.L.R. 41 Mad. 286
(3) I.L.R. 8 Ran. 168.

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defendant has a right to present an application under the provisions of Order IX, Rule 13 for a re-opening of the case. Even where a Court proceeds to decide a suit under Rule 3 of Order XVII, in a party's absence, he has the right to apply under Order IX, Rule 13 and if he can satisfy the Court that he was prevented by due cause from appearing, he can argue that the decision to proceed under Rule 3 was wrong."

The learned Counsel for the respondent contended that the trial Judge, in passing an *ex parte* decree against the appellant on 13th February 1957, had acted under Order XVII, Rule 3 of the Civil Procedure Code. In support of his contention he has relied on the following cases:—*Panna Lal Marwari* v. *Bishen Dei* (1) and *Sitalprasad* v. *Sukya* (2). The facts in these two cases are, however, different from the facts in the present case. In the first case, the facts are these. On an application by the plaintiff, time was granted to him to file his documentary evidence on the date fixed for final hearing. He failed to produce the evidence on that date and he himself was absent. His Counsel applied for an adjournment which was refused. He then stated that he had no instructions. The suit was dismissed for default of plaintiff; it was held that the only provision in the Code under which the dismissal of the suit could, in these circumstances, take place was Rule 3 of Order XVII of the Civil Procedure Code. It was held further that the decision of the trial Court was open to appeal. In the second case the facts are somewhat similar to the first case. There the plaintiff's lawyer applied for an adjournment on the ground that the plaintiff and his witnesses were ill and were consequently absent. The defendant opposed the adjournment and the Court refused to adjourn the case. Thereupon the plaintiff's

(1) I.L.R. (1946) All. 833. (2) I.L.R. (1948) Nag. 462.

lawyer retired from the case on the ground that he was unable to proceed with the case for want of instructions from the plaintiff. It was held that the lower Court had proceeded under Order XVII, Rule 3 of the Civil Procedure Code.

In both the above cases Counsel for both parties were present in Court when the case was called, but in the present case there was an entire absence of the appellant-defendant and his Counsel in Court when the cases were called, under the circumstances as explained by them, and the trial Judge proceeded with the hearing of the case *ex parte* and after hearing the respondent's Counsel, fixed a date for passing of judgment and he passed judgment *ex parte* on the day fixed. The facts in the present case are therefore different from the facts in the cases relied upon by the learned Counsel for the respondent.

For the reasons stated the appeal is allowed. The order of the lower Court dated 4th April 1958 as well as its judgment and decree passed against the appellant on 13th February 1957 in Civil Regular Suit No. 997 of 1954 are set aside, and the case is to be restored to its file, and the trial proceeded from the stage as it stood on 1st February 1957, and the case tried according to its merits. The appellant is however, directed to pay costs to the respondent incurred by him in the lower Court for which I fix the Advocate's fee at K 85, and it is to be paid before the suit is restored to its file and within one month from to-day. There will be no order as to costs in this appeal.

CIVIL REVISION.

Before U Ba Nyunt, J.

H.C. 1958

Oct. 1.

DAW KHIN KYI AND FIVE OTHERS (APPLICANTS)

v.

L. E. SAY (RESPONDENT).*

Civil Procedure Code, s. 10—Stay of suit—Ground for—Whether Court can order stay of suit suo moto.

The applicants obtained a decree for ejectment of the respondent from the suit premises for breach of a term of tenancy. The respondent then appealed. During the pendency of the appeal the applicants brought a suit against the respondent in the same Court for the recovery of compensation for use and occupation of the suit premises. Despite the fact that there was no application for stay of the suit, the trial Court purporting to act under s. 10 of the Civil Procedure Code stayed the suit pending the decision of the appeal.

Held: That where the substantial matter in issue in a suit subsequently filed is substantially in issue in the suit under appeal, the subsequent suit must be stayed under s. 10 of the Civil Procedure Code.

Madan Gopal Bagla v. *The Chettyar Firm of S.P.K.A.A.M. and another*, 12 Ran. 687, followed.

Ramchandram Pillai v. *Neelambal Achi*, A.I.R. (1923) Mad. 88, referred to.

Held also: That as the substantial matter in issue in the suit under appeal was whether there had been a breach of a term of tenancy and as the substantial matter in issue in the suit under revision is whether compensation should be awarded for use and occupation of the suit premises, the substantial matter in issue in the former is not substantially in issue in the latter and that therefore the order for stay of the suit should not have been made.

Ma Kho U and others v. *Maung Ba Sein and another*, 6 Ran. 775, followed.

Hathi Ram v. *Hazi Mohammad*, A.I.R. (1954) All. 141, referred to.

Obiter: In appropriate cases the Courts are bound to stay a subsequent suit if a former suit is pending irrespective of whether a party makes an application for stay or not.

Maung Thit Maung v. *Maung Tin and three others*, (1949) B.L.R. 64 (H.C.), followed.

* Civil Revision No. 33 of 1958 against the order of the 2nd Judge, City Civil Court of Rangoon in Civil Regular Suit No. 1100 of 1954, dated the 22nd August 1956.

Meer Sulaiman for *Messrs. Soorma* and *Boon* for the applicants.

T. P. Wan for the respondent.

U BA NYUNT, J.—In Civil Regular Suit No. 1100 of 1954 of the Court of the Second Judge, Rangoon City Civil Court, the applicants filed a suit for ejectment of the respondent from the ground floor of house No. 119/121, Latter Street, Rangoon, for breach of a term of tenancy. The suit was decreed as prayed for on 22nd August 1956. The respondent filed an appeal against the said decree and the said appeal is now pending before this High Court for orders.

The respondent has paid to the applicants K 330 as compensation for use and occupation of the suit premises for the period commencing from 1st August to 31st October 1954 and thereafter the respondent refused to continue such payment.

In Civil Regular Suit No. 1252 of 1957 the applicants filed a suit for recovery of a sum of K 3,960 as compensation for use and occupation for the period commencing from 1st November 1954 to 31st October 1957. The respondent filed a written statement stating *inter alia* that the suit was premature in view of the fact that the Civil First Appeal No. 67 of 1956 referred to above was still pending in this High Court.

After hearing arguments of the learned Advocates for the parties, the learned Judge of the trial Court purporting to act under section 10 of the Code of Civil Procedure ordered the stay of suit pending disposal of the appeal referred to above. Hence this application for revision.

It is contended on behalf of the applicants that the provisions of section 10 of the Code of Civil

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Procedure are not applicable to the case as the relief claimed in the two suits are entirely different and that the respondent having already paid compensation for three months is estopped from raising any objection to such payment in the present case. It is further contended that the suit should not have been stayed without any application by the respondent in the case. In support of his contentions the learned Advocate for the applicants has cited the case of *Ma Kho U and others* v. *Maung Ba Sein and another* (1) where it was held that—

> "that a suit cannot be stayed under s. 10 of the Civil Procedure Code if the subject matter of the second suit was different from that of the first suit notwithstanding that there is a common issue in both the suits. So also if the second suit relates to mesne profits which accrued subsequently to the institution of the prior suit which related to title and possession of the land, the second suit cannot be stayed."

He also cited the case of *Mansata Film Distributors, Calcutta* v. *Sorab Merwanji Modi* (2) where it was held that—

> "However wide the powers of the Court may be under S. 151 they do not extend to the Court granting a relief under its inherent jurisdiction, when the same relief can be granted by another Court under the express provisions of the Code.
>
> It is erroneous to suggest that when a party has a right under S. 10 to have the suit stayed, he has also a remedy under S. 151 to invoke the inherent jurisdiction of the Court."

He has next quoted the case of *Hathi Ram* v. *Hazi Mohammad* (3) where it was held that—

> "The words 'matter in issue' in S. 10, Civil P.C. mean the entire matter in controversy and not one of several issues in the case."

(1) 6 Ran. 775. (2) A.I.R. (1955) Bom. 266.
(3) A.I.R. (1954) All. 141.

The last case relied on by the learned Advocate for the applicants is the case of *Haji Habib Pirmohamed* v. *Sein Moh Co.* (1) where it was held that—

> " A suit for recovery of arrears of rent is governed by Article 110 of the Limitation Act, and in a suit of this nature the period of limitation begins from the date on which such 'arrears become due'.
>
> S. 14 (*1*) of the Limitation Act requires that such a former proceeding must be founded upon the same cause of action as in the present suit. The cause of action set up by the plaintiff in the former suit was a license whereas in the present suit the cause of action alleged is one of tenancy.
>
> The two claims are inconsistent and are founded on different causes of action and the plea of exclusion of time under s. 14 of the Limitation Act cannot be sustained."

The learned Advocate for the respondent has argued that the case of *Mansata Film Distributors, Calcutta* v. *Sorab Merwanji Modi* (2) lends support to his case in that a party has a right under section 10 to have the suit stayed. He has also cited the case of *Ramchandram Pillai* v. *Neelambal Achi* (3) where it was held that—

> " High Court will revise an order refusing to stay a suit when the same question is in issue between the parties in two different suits."

I am of the view that where the substantial matter in issue in a suit subsequently filed is substantially in issue in the suit under appeal, the subsequent suit must be stayed under section 10 of the Code of Civil Procedure. My view is supported by the case of *Madan Gopal Bagla* v. *The Chettyar*

(1) (1955) B.L.R. 273 (H.C.). (2) A.I.R. (1955) Bom. 266.
(3) A.I.R. (1923) Mad. 88.

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Firm of S.P.K.A.A.M. and another (1) where it was observed at page 688 as follows:

> " Notwithstanding the pending appeal to His Majesty in Council the appellant filed a suit against the two respondent firms for subsequent rent in respect of the same premises upon the same ground as that on which the claims in the earlier suits were based. It is obvious that the substantial matter in issue in the present suit is substantially in issue in the appeal now before His Majesty in Council; and in these circumstances the first respondent applied under section 10 of the Civil Procedure Code for an order staying the hearing of the present suit pending the determination of the appeal to His Majesty in Council, and an order in that sense has been passed by my brother Shaw, J. . . . . ."

But the question now is whether the substantial matter in issue in the suit now under revision is substantially in issue in the appeal before this High Court. To my mind it is not. The reason is obvious. In the suit under appeal the substantial matter in issue was whether the respondent had committed the breach of a term of tenancy as complained of. In the suit under revision the substantial matter in issue is whether the respondent is due to pay to the applicants the sum of K 3,960 as compensation for use and occupation of the suit premises. The fact that the respondent has paid to the applicants K 330 as compensation for the use and occupation of the said premises for the period commencing from 1st August to 31st October 1954 is not denied. It cannot be doubted that if the suit under revision were decreed and the amount due paid, the respondent would be absolved from further liability to pay either as compensation or as rent for the period covered by the suit. There is also no doubt that in appropriate cases the Courts are bound

(1) 12 Ran. 687.

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U BA NYUNT, J.

to stay a subsequent suit if a former suit is pending irrespective of whether a party makes an application for stay or not. See the case of *Maung Thit Maung* v. *Maung Tin and three others* (1). But the circumstances obtaining in the case under revision do not warrant stay of the suit under section 10 of the Code of Civil Procedure. That being my view of the law, I must allow this application with costs and set aside the order of the trial Court directing the stay of the suit. The trial Court will now proceed with the case according to law. Advocate's fees K 34.

(1) (1949) B.L.R. 64 (H.C.).

CIVIL REVISION.

Before U Aung Khine, J.

H.C. 1958

Sept. 23.

DAW MA GAUK (APPLICANT)

v.

U AH YAUNG (RESPONDENT). *

Civil Procedure Code, O. 43—Appeals from orders—O. 41, R. 1—Not complied with—Copy of order appealed from filed subsequently, but within time—Appeal in order.

Where a memorandum of appeal was filed without complying with the provisions of Order 41, Rule 1 of the Civil Procedure Code by omitting to file a certified copy of the order appealed from.

Held : That there was no proper presentation of the appeal.

But where the certified copy of the order appealed from was filed subsequently within the period of limitation.

Held : That the filing of the certified copy of the order appealed from, though belated, had the effect of validating the appeal as from the date it was filed.

Sein Hock for the applicant.

Dutt for the respondent.

U AUNG KHINE, J.—The applicant Daw Ma Gauk in Civil Regular Suit No. 4 of 1958 of the Subdivisional Judge, Akyab, filed a suit for an injunction valued at K 1,200 to restrain the respondent U Ah Yaung from further carrying out the work of construction he had started of a house and also to remove the structure already erected on a piece of land leased to U Ah Yaung.

On the day the suit was filed the learned trial Judge issued an *ad interim* injunction restraining U Ah Yaung from continuing with the construction of the building. After this order was passed, it was

* Civil Revision No. 24 of 1958 against the order of the District Court of Akyab in Civil Appeal No. 6 of 1958, dated the 21st May 1958.

discovered that U Ah Yaung continued with the construction of the house and a report was made to tne learned Subdivisional Judge regarding this and the learned Subdivisional Judge issued a warrant of attachment of both immoveable and moveable properties belonging to U Ah Yaung on the ground that he had disobeyed the order of the Court. U Ah Yaung preferred an appeal before the District Court, Akyab in Civil Appeal No. 6 of 1958 stating—

(1) that the learned Subdivisional Judge had gone wrong in issuing a temporary injunction without reasonable, sufficient and lawful cause.

(2) that the learned Subdivisional Judge was not justified in holding that the service of temporary injunction on the appellant's (U Ah Yaung's) son amounted to service on the appellant himself.

(3) that the learned Subdivisional Judge had erred in holding that the appellant had disobeyed the order regarding the temporary injuction.

(4) that the learned Subdivisional Judge was wrong in ordering the attachment of the defendant's properties.

It would appear that these respective orders were passed on different dates. At the time when the memorandum of appeal was filed in Court, the orders relevant to the appeal did not accompany the memorandum.

A preliminary objection was taken by the applicant in the District Court that the appeal before it was incompetent, invalid and not legally maintainable inasmuch as no copy or copies of the orders appealed from accompanied the memorandum of

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appeal. The only question that came up for decision then was as to whether the appeal before the District Court was valid or not.

Order XLIII, Rule 2 of the Code of Civil Procedure clearly lays down that the rules of Order XLI shall apply so far as may be, to appeals from orders. Order XLI, Rule 1 reads :

> "Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the appellate Court dispenses therewith) of the judgment on which it is founded."

Therefore, it is clear that the memorandum of appeal presented before the District Court should have been accompanied by a copy of the order or orders appealed from. However, in this case no formal order or decree had been drawn up and therefore strictly speaking, no copy of the decree appealed from as contemplated in Rule 1 of Order XLI could have been filed by the appellant. But when an objection was raised by the applicant in the District Court, the respondent U Ah Yaung did realize that at least a copy or copies of the orders appealed from should have been filed together with the memorandum of appeal. This mistake was rectified by him by the filing of the copy of the order within the period of limitation. The filing of the certified copy of the order appealed from, though belated, had the effect of validating the appeal as from the date it was filed. The position would have been otherwise if this copy was produced after the expiration of the period of limitation. All that can be said now in respect of the appeal before the learned District Judge is that there was no proper

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U AUNG KHINE, J.

presentation of the appeal. Since the appellant U Ah Yaung had taken steps to file the necessary order before the appeal time had run out, I am of the opinion that the appeal before the District Court was quite in order.

At the present juncture we are not concerned as to whether the appellant in the District Court had gone wrong in appealing against different orders passed on different dates in one appeal only and also as to whether all the orders appealed against are appealable or not. These questions must be decided by the District Judge himself.

For these reasons the application is dismissed with costs. Advocate's fees K 34.

CIVIL REVISION.

Before U San Maung, J.

H.C. 1958

Sept. 4.

DAW MA MA (*a*) MARIAM BI BI (APPLICANT)

v.

U NANDA THARA (RESPONDENT).*

Vinasaya Act, s. 15—Scope—S. 31 (1)—Religious gifts—Not necessary to be in writing or to be registered, s. 15 (4) read with s. 9, Civil Procedure Code bars jurisdiction of civil Court.

The contention that as between a layman and a Buddhist monk s. 15 of the Vinasaya Act of 1949 will only be applicable in respect of lands which are admittedly religious lands cannot be allowed to prevail for the phrase "ကျောင်းအား လှူဒါန်းအပ်သော လယ်ယာဝတ္ထုကဲ့မြ" appearing in the explanation to sub-s. (*2*) of s. 15 of the Vinasaya Act is wide enough to cover the dispute as to whether or not a certain piece of paddy land or garden land has or has not been given to a monk as a religious gift.

S. 31 (*1*) of the Vinasaya Act merely says that religious gifts when reduced to writing may be registered under the Act, if they conform to the rules of Vinaya. It does not say that every religious gift to be valid must be in writing and registered under s. 31 of the Act.

S. 15 (*4*) of the Vinasaya Act read with s. 9 of the Civil Procedure Code bars the jurisdiction of a civil Court.

P. N. Ghosh for the applicant.

Than Maung for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 6 of 1954 of the Township Court of Insein, the plaintiff Daw Ma Ma who is the applicant in the present application for revision, sued the defendant-respondent U Nanda Thara, a Burmese Buddhist monk, for his ejectment from the land known as Holding No. 52 of 1952-53, Kanbe, Insein Township, and a dwelling hut situated thereon. The plaintiff's case was that this land and building were inherited

* Civil Revision No. 20 of 1958 against the order of the District Court of Insein in Civil Appeal No. 4 of 1957, dated the 18th January 1958.

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U SAN MAUNG, J.

by her from her mother and that during the year 1947 the plaintiff had, at the request of the defendant, permitted him to stay at the hut on the suit land on a temporary basis, as the defendant was unable to return to his native place of Zingyaik owing to disruption of communications. When during the year 1951, the plaintiff requested the defendant for vacating the premises in suit he refused to do so and hence she had to file the present suit against him.

The defendant U Nanda Thara in his written statement contended *inter alia* that the suit properties had been given to him by way of religious gift as his *poggalika* property and that according to the rules of Vinaya by which he was governed he became the absolute owner thereof. Furthermore, civil Courts had no jurisdiction as the suit could only be instituted in a Court established under the Vinasaya Act of 1949. To this written statement the plaintiff replied that she being a Burmese Muslim the only valid gift that could be made by her was by a registered deed under the Transfer of Property Act.

Subsequently, the learned Township Judge, Insein, who tried the case, by an order purporting to be under Order 7, Rule 11 (*d*) of the Civil Procedure Code rejected the plaint on the 11th November 1954 on the ground that the suit was one cognizable by the Courts established under Vinasaya Act, 1949. On appeal by the plaintiff Daw Ma Ma to the District Court of Insein against the rejection of her plaint, which was a decree as defined in section 2 (*2*) of the Civil Procedure Code, the learned District Judge, Insein, by his judgment dated the 15th of November 1955 in Civil Appeal No. 2 of 1955 set aside the order of the Township Court

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U SAN MAUNG, J.

rejecting the plaint and remanded the proceedings to the trial Court for action in accordance with law. In doing so, the learned District Judge pointed out that there was nothing in the plaint to indicate that the plaint was barred by any law.

After the suit was remanded to the Township Court, the learned Township Judge who was the successor to the Judge who had previously dealt with the case framed several issues, one of which related to the plea that the suit was one cognizable only by the Courts established under the Vinasaya Act of 1949. The learned Judge came to the conclusion that as the dispute centred round the question whether or not the suit land and building had been given by the plaintiff to the defendant as a *poggalika* gift which under the Burmese ecclesiastical law could be effected orally, the dispute was one of those evisaged in sub-section (*2*) of section 15 of the Vinasaya Act and the jurisdiction of Civil Courts to entertain such dispute is expressly barred by sub-section (*4*) of section 15 read with section 9 of the Civil Procedure Code. On the merits also the learned Judge came to the conclusion that the plaintiff Daw Ma Ma did make a religious gift to the defendant U Nanda Thara of the properties in suit. Accordingly, the learned Judge passed an order under Order 7, Rule 10 of the Civil Procedure Code directing the return of the plaint to the plaintiff for the purpose of being presented to the Court in which the suit should have been instituted.

This order being appealable under Order 43, Rule 1 of the Civil Procedure Code, the plaintiff again appealed to the District Court of Insein and the learned District Judge by his order in Civil Appeal No. 4 of 1957, now sought to be revised, dismissed the appeal on the ground that the

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plaintiff's suit was not cognizable by civil Courts *vide* section 15 (*4*) of the Vinasaya Act read with section 9 of the Civil Procedure Code. In coming to this conclusion, the learned District Judge relied upon the explanation to sub-section (*2*) of section 15 of the Vinasaya Act that the dispute was one of those envisaged by section 15 of the Act. He also relied upon the two reported decisions of the Nainggandaw Vinasaya Htana of Mandalay and Rangoon, which are the supreme appellate authorities for Upper Burma and Lower Burma, for the conclusion that a dispute between layman on the one hand and Buddhist monk on the other as to whether or not certain garden lands had been given as religious gifts was a dispute within the ambit of section 15 of the Vinasaya Act of 1949.

The support of the present application for revision by the plaintiff Daw Ma Ma, the learned Advocate for the applicant contended, firstly, that as between a layman and a Buddhist monk section 15 of the Vinasaya Act of 1949 will only be applicable in respect of lands which are admittedly religious lands. In my opinion, however, this contention cannot be allowed to prevail for the phrase "တော်းဘဝး လှူဒါန်းအပ်သော လယ်ယာဝတ္ထုကဏ္ဍ" appearing in the explanation to sub-section (*2*) of section 15 of the Vinasaya Act is wide enough to cover the dispute as to whether or not a certain piece of paddy land or garden land has or has not been given to a monk as a religious gift.

The next point urged in favour of the applicant is that the provision of section 31 of the Vinasaya Act of 1949 requires, that even religious gifts must be registered as prescribed in that section to be valid in law. However, section 31 (*1*) of the Vinasaya Act merely says that religious gifts when

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reduced to writing may be registered under the Act, if they conform to the rules of Vinaya. It does not say that every religious gift to be valid must be in writing and registered under section 31 of the Act.

The last point urged in favour of the applicant is that she being a Burmese Muslim is not competent to make a gift either oral or documentary to a non-Mohamedan in the manner alleged by the defendant-respondent, that is to say by *ye-set-cha* ceremony. This however is a point which can be raised before the Vinasaya Court in which she makes her claim and not in a civil Court whose jurisdiction has been barred by section 15 (*4*) of the Vinasaya Act read with section 9 of the Civil Procedure Code.

For these reasons the application for revision fails and is dismissed with costs; Advocate's fees two gold mohurs.

CIVIL REVISION

Before U San Maung, J.

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DAW NYUN HLAING (APPLICANT)

v.

Sept. 8.

DAW KHIN CHIT AND FIVE OTHERS (RESPONDENTS).*

Civil Procedure Code—Order 1, Rule 8—Suit for recovery of possession of property entrusted by "Aphwe" (association) filed by president and committee members of the "Aphwe" only—Should have been brought as a representative suit under.

Where only the Respondents as president and committee members of an "Aphwe" (association) filed a suit for the recovery of cups and trophies, alleged to have been won by the said "Aphwe" and entrusted to the applicant by the whole "Aphwe" for safe custody.

Held: That the suit should have been brought as a representative suit under Order 1, Rule 8 of the Civil Procedure Code as the alleged entrustment was made by the whole "Aphwe" collectively.

Kumaravelu Chettiar and others v. *Ramaswami Ayyar and others*, 60 I.A. 278 at 290; *Ma Gyi and others* v. *Pat Lon*, A.I.R. (1917) L.B. 36, followed.

Maulu and others v. *Ghanaya and others*, I.L.R. 15 Lah. 807, referred to.

Ba Shun for the applicant.

T. P. Wan for the respondents.

U SAN MAUNG, J.—In Civil Small Cause Suit No. 1866 of 1954 of the City Civil Court of Rangoon, the plaintiffs Daw Khin Chit and five others who are the respondents in the present application for revision sued the defendant-applicant Daw Nyun Hlaing for the recovery of certain cups and trophies mentioned in the plaint which the plaintiffs valued at K 318. Their case was that they were the members of an association known as Nyein Chan-ye-Nyi-Nyut-ye Thayoke-pya *Aphwe* which went round

* Civil Revision No. 87 of 1955 against the decree of the City Civil Court of Rangoon in Civil Small Cause Suit No. 1866 of 1954.

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the city of Rangoon during the *Thingyan* of 1954 shouting peace slogans. They also went round to the various pandals for the purpose of competing for the prizes offered by the organizers of these pandals. The defendant-applicant Daw Nyun Hlaing was allowed by the *Aphwe* to accompany them as a songstress. On the last day of *Thingyan*, namely, the 16th of April 1954, after the *Aphwe* had been given prizes by the various pandals the members of the whole *Aphwe* rested at the defendant-applicant's house at about 11 p.m. It was then decided to entrust the prizes to Daw Nyun Hlaing for safe custody. However, when on the 25th of May 1954, the plaintiff-respondents as President and Committee Members of the *Aphwe* demanded the return of the cups and trophies from the defendant-applicant, she refused to hand them over and hence a suit had to be filed for the recovery thereof.

The defendant-applicant by her written statement denied that the cups and trophies in question were won by the plaintiff-respondents' *Aphwe* as claimed by them. On the contrary, she said that they were won by the *Thudhamma Sari* Aphwe led by her with headquarters at her own residence in No. 7, Link Road, Shwegondaing. There was no such entrustment by the Nyein Chan-ye-Nyi-Nyut-ye Thayoke-pya *Aphwe* as claimed by the plaintiffs and therefore the suit as against her should be dismissed.

The learned trial Judge after examining the witnesses cited by both parties came to the conclusion that the plaintiffs' story was true and accordingly decreed the suit with costs.

In the present application for revision by the defendant-applicant one of the grounds urged by her Advocate is that the respondents' suit should have been dismissed as it should have been brought as a

representative suit under Order 1, Rule 8 of the Civil Procedure Code. The learned Advocate for the plaintiff-respondents then filed an application for permission to bring a representative suit as provided for in Order 1, Rule 8 and to allow amendment of the plaint for this purpose. This application was, however, dismissed by my order dated the 28th of June 1958 because I held that to allow amendment at this stage of the proceedings would be to take away from the defendant-applicant a right which had accrued to her by the lapse of time, the cause of action in this case having arisen on the 25th of May 1954.

The question now for consideration is whether in spite of the dismissal of application for the amendment of the plaint, the judgment and decree granted to the plaintiff-respondents' by the City Civil Court can be allowed to stand. If the plaintiffs could have brought the present suit in their own rights the fact that they could also have brought a representative suit as contemplated by Order 1, Rule 8 of the Civil Procedure Code but did not do so would not have non-suited them. In this connection, the observations of their Lordships of the Privy Council in *Kumaravelu Chettiar and others* v. *Ramaswami Ayyar and others* (1) are apposite:

> " Their Lordships bear in mind that section 30 (corresponding to Order 1, Rule 8) is an enabling enactment. It in no way debars a member of a community from maintaining a suit in his own right, although the act complained of may also be injurious to the whole community."

However, in the case now under consideration the plaintiffs had no individual right of suit as against the defendant Daw Nyun Hlaing. The cups and

(1) 60. I.A. 278 at 290.

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trophies were alleged to have been entrusted to Daw Nyun Hlaing by the whole *Aphwe* on the night of the 16th of April 1954 and not by any individual. This is clear not only from paragraph 4 of the plaint but from the statement on oath of Daw Khin Chit. If the plaintiffs' case had been that the *Aphwe* had on a prior occasion entrusted the cups and trophies either to Daw Khin Chit or any one or other of the plaintiffs and that in turn Daw Khin Chit or anyone else had on the night of the 16th April entrusted them in turn to Daw Nyun Hlaing, Daw Khin Chit or the other persons so making the entrustment would have an individual right of action as against Daw Nyun Hlaing. As the case now stands the entrustment being by the whole *Aphwe* collectively the proper suit which should have been filed was one under Order 1, Rule 8 of the Civil Procedure Code. For this reason the plaintiffs' suit should have been dismissed. [See *Ma Gyi and others* v. *Pat Lon* (1) and *Maulu and others* v. *Ghanaya and others* (2).]

For these reasons I would in revision set aside the judgment and decree of the trial Court and direct that the plaintiff-respondent's suit be dismissed.

As regards costs as the defendant-applicant succeeds only on a point of law which was taken for the first time in this Court, I would direct that each party should bear its own costs throughout.

(1) A.I.R. (1917) L.B. 36. (2) I.L R. 15 Lah. 807.

APPELLATE CIVIL.

Before U San Maung, J.

DAW SEIN CHIT (APPELLANT)

v.

DAW THEIN MAY (RESPONDENT).*

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Sept. 19.

Civil Procedure Code, s. 151—Inherent Powers of Court—Urban Rent Control Act, s. 14 (1)—Rescission of decree.

Where payment of the last instalment payable under the decree in a suit for arrears of house rent was defaulted not wilfully but due to wrong information supplied by a clerk of the Court and in consequence the decree-holder applied for and obtained a decree for ejectment of the judgment-debtor.

Held: That there is nothing to prevent the Court, in exercise of its inherent power, to make such orders as may be necessary for the ends of justice and that the omission to pay the last instalment being due to the wrong information furnished by the clerk the Court has an inherent power to accept payment of the last instalment, which remains unpaid and then to rescind the ejectment decree as provided for in s. 14 (*1*) of the Urban Rent Control Act.

Jalil Hogs v. *N. C. Behara*, Special Civil Second Appeal No. 9 of 1958 of High Court.

In re V. K. P. Chockalingam Ambalam v. *Maung Tin and others*, 14 Ran. 173 (F.B.), followed.

Hukum Chand Boid v. *Kamalanand Singh*, (1906) I.L.R. 33 Cal. 927 at 931, referred to.

Jaganathan for the appellant.

Mohamed Cassim for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 285 of 1952 of the City Civil Court, Rangoon, the plaintiff Daw Thein May, who is the respondent in the present appeal, sued the defendant-appellant Daw Sein Chit for her ejectment from Room No. 2 in house No. 143, 47th Street, Rangoon, for non-payment of arrears of rent which amounted to Rs. 420 at the date of the suit. On the 25th March

* Civil Misc. Appeal No. 12 of 1958 against the decree of the 4th Judge, City Civil Court, Rangoon, in Civil Execution Case No. 1146 of 1952, dated the 20th January 1958.

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1952 the defendant confessed judgment and a decree for ejectment was passed with costs. The formal decree which was drawn up subsequently shows that the costs payable by the defendant to the plaintiff was Rs. 47-12. The defendant subsequently made an application under section 14 (*1*) of the Urban Rent Control Act and in pursuance thereof the learned 4th Judge of the City Civil Court passed an order, dated the 20th May 1952, the relevant portion of which reads:

> "Applicant is directed to pay the arrears of rent due from 1-4-51 to end of April 1952 and costs of suit by monthly instalments of Rupees eighty (Rs. 80) until satisfaction. Payment to commence on or before the 7th of every month from June 1952."

The defendant then paid six instalments of Rs. 80 to the total of Rs. 480 and in Voucher No. 304, dated the 4th November 1952, there appears an entry to the effect that it was in respect of the last instalment.

Subsequently, the plaintiff discovered that part of the costs ordered to be paid remained unpaid as the total amount payable by instalments under the order, dated the 20th May 1952, was 13 months' Rent at the rate of Rs. 35 per month and costs of Rs. 47-12 to the total of Rs. 502-12. The application for execution of the ejectment decree was filed on the 8th December 1952, and on notice being issued to the defendant Daw Sein Chit to show cause why she should not be ejected from the premises, she filed an affidavit to the effect that when on the 4th November 1952 she went to pay the sum of Rs. 80 she was told by the clerk who wrote out the voucher that that instalment was the last which she would have to pay. Believing, him, she had stopped paying and that therefore the default was due to her being misled by the statement of the clerk. This explanation was, however, rejected by the learned 4th Judge of the City Civil Court by

his order, dated the 3rd February 1953, whereby the application for the execution of the ejectment decree was granted to the plaintiff.

The defendant appealed to this Court and by my order, dated the 12th July 1956, in Civil Miscellaneous Appeal No. 13 of 1953, I set aside the order of the learned trial Judge directing the ejectment to proceed. I also ordered that there should be an enquiry with a view to consider whether there is any truth in the allegation made by the defendant that she had been misled into thinking that the amount already deposited by her covered not only the arrears of rent but also the costs which she had to pay. In the enquiry that followed two persons gave evidence, namely, U Tun Tin, husband of the defendant Daw Sein Chit, and U Hla Maung, Bailiff of the City Civil Court. According to U Tun Tin, it was, in fact, he and not his wife Daw Sein Chit, who went to the City Civil Court on the 4th November 1952 to pay the sum of Rs. 80. This money was accepted by a person whom he could not now identify. That person also told him that the instalment which he was paying on that day was the last which he would have to pay. On return home he told his wife as to what had happened. When cross-examined, this witness said that he could not remember who actually signed on the voucher paying in the money into Court and he could not also remember whether the clerk concerned entered in the voucher that it was in respect of the last instalment.

The Bailiff U Hla Maung said that on voucher No. 304 relating to the payment of Rs. 80 in respect of Civil Regular Suit No. 285 of 1952 there is an entry to the effect that it was in respect of the final instalment. This voucher was in the handwriting of the clerk in charge of the execution proceedings. In

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the relevant register also there is an entry to the effect that the payment of Rs. 80 was in respect of the last instalment. This register, he had to attest before returning it to the clerk concerned. However, when cross-examined, this witness said that on voucher No. 304 relating to the payment of Rs. 80 in respect of Civil Regular Suit No. 285 of 1952 the name of the payer was shown as one Maung San Shin. The same Maung San Shin paid in money in respect of two other vouchers, namely, Nos. 302 and 303, relating to Civil Regular Suits No. 286 of 1952 and No. 287 of 1952 respectively. The defendants in these cases were respectively Daw Thein Yi and U Shwe Hlay.

The learned trial Judge in rejecting the defendant's story that she had been misled by the clerk concerned into thinking that she had no further payment to make gave the following reasons :—

(1) Whereas in Daw Sein Chit's affidavit it was stated that it was she who actually went to the City Civil Court to make the payment it now transpired that it was not she but her husband U Tun Tin.

(2) It was not the duty of the clerk concerned to tell the person making payment that the payment was in respect of the last instalment. On the contrary, it was the duty of the person paying in the money to tell the clerk what the payment was for.

(3) Whereas U Tun Tin said that he went to make the payment the payer's name appearing on voucher No. 304 was Maung San Shin.

In my opinion, if Daw Sein Chit had meant to tell a deliberate lie when she stated in her affidavit

that it was she who went to the City Civil Court to make the payment, there was nothing to prevent her from giving evidence in Court to the same effect. As it is, U Tun Tin's story that it was he who actually went to the City Civil Court and what his wife knew about the matter was merely hearsay, is probably correct. Secondly, the fact that voucher No. 304 was in the handwriting of the clerk in charge of the execution proceedings and the relevant register shows that the payment was in respect of the last instalment, is in strong corroboration of U Tun Tin's story that the information in question was given to him by the clerk concerned. Without making enquiries from the clerk, U Tun Tin could not have known what was the amount of the costs awarded in the case. Furthermore, it is improbable that the clerk in charge of the execution proceedings whose duty it is to see whether or not there has been full or partial satisfaction of the decree, would have made such entries both in the voucher and in the relevant register unless he thought that the amount paid in was sufficient to cover what was ordered by the Court. The mistake was, therefore, undoubtedly that of the clerk concerned. In this connection, it is not surprising that U Tun Tin was unable to identify this clerk who, according to the Bailiff, was still in service. The payment was made on the 4th November 1952, while U Tun Tin was giving evidence only on the 18th December 1957, more than five years later.

Thirdly, the fact that the name of Maung San Shin appears on voucher No. 304 as the payer of the amount is not sufficient to discredit U Tun Tin. He was not cross-examined on this point and it is apparent that the clerk in charge of the execution proceedings had deputed somebody to actually pay

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in the money. This conclusion finds support in the fact that in respect of vouchers Nos. 302 and 303 also which were for two totally different cases, Maung San Shin was the payer.

On the question of probability it is most improbable that Daw Sein Chit who had confessed judgment and who had been paying regular instalments of Rs. 80 per mensem for six months, would have wilfully defaulted for a mere sum of Rs. 22-12 and thus taken the risk of being ejected from the premises. Furthermore, there is nothing in the cross-examination for her husband U Tun Tin to suggest that his wife was in arrears in respect of the current rent. Whereas the decree for ejectment was passed on the 25th March 1952 we are now nearing the end of 1958.

For these reasons, I accept the defendant Daw Sein Chit's contention that she or rather her husband through whom the last payment of Rs. 80 was made, has been misled by the clerk concerned into thinking that she would have no further instalment to pay in respect of the order, dated the 20th May 1952.

It has been held by this Court in *Jalil Hogs* v. *N. C. Behara* (1) *that section 148 of the Civil Procedure Code which allows the Court to enlarge the time granted for the doing of any act prescribed or allowed by the Code of Civil Procedure is inapplicable to enlarge the time granted by the Court under section 14 *(1)* of the Urban Rent Control Act. However, there is nothing to prevent the Court, in exercise of its inherent power, to make such orders as may be necessary for the ends of justice and in *re V. K. P. Chockalingam Ambalam* v. *Maung Tin and others* (2) it has been held that section 151 of

(1) Special Civil Appeal No. 9 of 1958 of High Court. (2) 14 Ran. 173 (F.B.).
* Reported in this issue at p. 500.

the Civil Procedure Code does not confer any powers but only indicates that there is a power inherent in every Court to make such orders as may be necessary for the ends of justice. In coming to this conclusion the Full Bench quoted with approval the following observation of Woodroffe, J. in *Hukum Chand Boid* v. *Kamalanand Singh* (1) :—

> "To act according to equity, justice and good conscience, though in the exercise of such power it must be careful to see that its decision is based on sound general principles, and is not in conflict with them or the intentions of the Legislature . . . The Court has, therefore, in many cases, where the circumstances require it, acted upon the assumption of the possession of an inherent power to act *ex debito justitiae*, and to do that real and substantial justice for the administration of which it alone exists."

Therefore, the City Civil Court has an inherent power to accept the sum of Rs. 22-12 which remains unpaid by the defendant in pursuance of the order, dated the 20th May 1952, and upon such payment being made, to rescind the ejectment decree as provided for in section 14 (*1*) of the Urban Rent Control Act. Consequently, I would in this appeal, which is also maintainable under section 15 of the Urban Rent Control Act, direct the 4th Judge of the City Civil Court to accept the sum of Rs. 22-12 if paid by the defendant within two weeks of the date of the receipt of this order in the City Civil Court and on such payment being made to rescind ejectment decree, dated the 25th March 1952. Each party must bear its own costs throughout, including the costs so far incurred of the execution proceedings by which the plaintiff sought to eject the defendant in pursuance of the ejectment decree, dated the 25th March 1952.

(1) (1906) I.L.R. 33 Cal. 927 at 931.

APPELLATE CIVIL.

Before U Chan Tun Aung, C.J. and U San Maung, J.

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Sept, 22.

DAW YIN (APPELLANT)

v.

MAUNG KYAW AND TWO OTHERS (RESPONDENTS).*

Equitable mortgage by deposit of title deeds—Creation of—Thing of vital importance in—Purpose of deposit—Securing of debt antecedently due—Subsequent deposit of one of title deeds—Mere possession of title deeds by creditor not enough to presume intention of creating equitable mortgage.

What is of vital importance in the creation of an equitable mortgage by deposit of title deeds is the handing over of the title deeds by the debtor to the creditor or his agent which may be contemporaneous or may be later, with the intention that the title deeds so handed over shall be security for the loan taken.

The purpose of the deposit of title deeds is to secure the repayment of the loan.

A debt antecedently due can be effectively secured by a subsequent deposit of title deeds.

The deposit of a title deed made subsequent to the deposit of other title deeds, so long as the deposit was made with the intention of securing the loan already taken would be quite sufficient for creation of an equitable mortgage.

The headnotes in the case of *Ma Ohn Kyi and five others* v. *Daw Hnin Nwe and three others* reported in 1953 Burma Law Reports page 322 (H.C.) are misleading and must be read omitting the words "at the time of the loan".

The intention of creating equitable mortgage cannot be presumed from mere possession of the title deeds by the creditor, because mere possession of deeds is not enough, without evidence as to the manner in which the possession originated so as to infer the contract of loan or mortgage.

Heng Moh & Co v. *Lim Saw Yean and others*, I.L.R. 1 Ran. 545, followed.

A. B. Miller v. *Babu Madho Das*, I.L.R. XIX (1897) All. 76 (P.C.), referred to.

Mon San Hlaing for the appellant.

Aye Maung for the respondents.

* Civil 1st Appeal No. 42 of 1956 against the decree of the Chief Judge of the City Civil Court of Rangoon in Civil Regular Suit No. 549 of 1956.

H.C. 1958

DAW YIN v. MAUNG KYAW AND TWO OTHERS.

U CHAN TUN AUNG, C.J.—This appeal raises a question whether there was an equitable mortgage by deposit of title deeds in favour of the appellant Daw Yin in respect of a lease-hold land, being No. 357 in Block 22 × 2 (Fifth Class Lot) Myoma West Circle, measuring 21′ 8″ × 50′ together with one-storeyed building standing thereon known as No. 33, Morton Street, Rangoon. Claiming to be an equitable mortgagee of the said property for securing the principal sum of K 5,000 loaned out to the 1st respondent's wife, Ma Kyaw Sein (since deceased) on the promissory note dated the 12th May 1949 (Exhibit ϖ) the appellant Daw Yin filed a suit for a preliminary mortgage decree as against the present respondents who are the heirs and legal representatives of Ma Kyaw Sein. Maung Kyaw, the 1st respondent was, at the relevant time, husband of Ma Kyaw Sein. The 2nd and the 3rd respondents, Ma Kyin Kyin and Ma Yin Yin, minors are said to be the adoptive daughters of Ma Kyaw Sein and Maung Kyaw.

The respondents denied the claim *in toto*. Maung Kyaw, the 1st respondent, asserted that his deceased wife Ma Kyaw Sein could not have effected an equitable mortgage of the said property on the said date, *i.e.*, 12th of May 1949, inasmuch as he was in possession of the title deeds in question up till the 19th of March 1950 when Ma Kyaw Sein took them away when she ran away with her paramour, one Maung Maung. Here, we may observe that the truth of the 1st respondent's assertion of Ma Kyaw Sein having run away with her paramour Maung Maung has been fully borne out by his successful criminal prosecution of Maung Maung on the charge of adultery, and a civil suit for divorce both of which proceedings were initiated by him in the District

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U CHAN TUN AUNG, C.J.

Magistrate's Court, Rangoon, and in the City Civil Court, Rangoon (*vide*, Criminal Regular Trial No. 416 of 1950 of the District Magistrate, Rangoon and Civil Regular Suit No. 312 of 1951 of the Rangoon City Civil Court). We found that Maung Maung was convicted of the offence of adultery and was fined K 350 or in default to suffer four months' rigorous imprisonment. The 1st respondent further asserted that the appellant's suit was a collusive one with Maung Maung. The trial Judge (the Chief Judge of the City Civil Court, Rangoon) framed five issues; and we need only consider, for purposes of this appeal, the following two:—

(1) Did Ma Kyaw Sein the deceased take a loan for K 5,000 from the plaintiff on the 12th day of May, 1949 and execute a promissory note for the said amount with interest of the rate of 1% per mensem ?

(2) Did Ma Kyaw Sein the deceased, create a mortgage by deposit of title deeds of the property mentioned in paragraph 5 (*f*) of the plaint as security for the due payment of the said loan ?

The trial Judge found that K 5,000 was taken as a loan by Ma Kyaw Sein from the appellant on Exhibit (ဝ) promissory note executed by her on the 12th of May 1949. He further held, on the testimony of U Ba Kyaing, the Hand-writing Expert (Criminal Investigation Department) a common witness cited by both the parties, that the stamps affixed on the exhibit promissory note having borne some previous writings, or in other words, the exhibit promissory note being affixed with used stamps, it was inadmissible in evidence, under the provisions of

section 2 (*11*) of the Stamp Act, as the same was not deemed to have been properly stamped. The effect of this finding is that although the appellant has proved the factum of loan, yet her right to recover the said loan on the strength of the document Exhibit (ဣ) as a negotiable instrument was debarred. With the exclusion of the said promissory note from consideration the factum of deposit of title deeds as recorded therein was also rejected by the trial Judge. The learned trial Judge further holds the view that even if the appellant were allowed to rely upon Exhibit (ဣ) yet, he was not prepared to accept that the appellant, and her sole witness, Lal Khan, were, in view of a certain remarkable circumstance to which we shall hereafter refer, speaking the truth when both of them stated categorically that the three documents listed on Exhibit (ဣ) promissory note were deposited by Ma Kyaw Sein on the day when she executed the said promissory note, *i.e.*, 12th May 1949.

The three documents listed on the promissory note are :

(1) Sale Deed dated the 23rd September 1948 between Mrs. G. Nowrojee Jeejeebhoy as Vendor of the one part and Ma Kyaw Sein (deceased) of the other part in respect of leasehold land known as 31/33, Morton Street, Rangoon also known as V. Class Lot Nos. 356/357 in Block 22 × 2 in Myoma West Circle measuring 21′ 8″ × 50′ or thereabouts (Exhibit ခ).

(2) A Special Power of Attorney dated the 31st August 1948 in favour of Mr. K. Jeejeebhoy of 44, 36th Street for sale of the said property granted by the principal Mrs. G. Nowrojee Jeejeebhoy

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of No. 11, Curzon Lane, New Delhi (Exhibit ၀).

(3) A true copy of the lease deed dated the 22nd August 1940, in respect of the aforesaid land issued to Mrs. G. N. Jeejeebhoy, Exhibit (၀၀) together with a certified copy of the site plan.

But, in any event a remarkable circumstance which has an important bearing upon appellant's suit and for which the appellant has not been able to give any satisfactory explanation whatsoever led the trial Judge to conclude that on the 12th May 1949, there was no deposit of all the three documents of title mentioned above by Ma Kyaw Sein; and hence, there was no equitable mortgage. The circumstance alluded to is this :—On a reference being made to Civil Regular No. 991 of 1948 of the City Civil Court of Rangoon, a suit in which Ma Kyaw Sein as plaintiff sought for the ejectment and possession of the very land now said to be the subject-matter of the equitable mortgage, and upon which the appellant herself has relied, the same having been called for at her instance, it was found that only the documents —Exhibit (၁) and Exhibit (၀၀) listed above as items 1 and 3 respectively were returned by the Court to Ma Kyaw Sein's Pleader U Ba Kan on 6th May 1949. But, the Special Power of Attorney, Exhibit (၀) (Item No. 2 above) which is also a relevant document of title, inasmuch as the subject-matter of the mortgage was conveyed to Ma Kyaw Sein by way of an out-right sale only by virtue of the said Special Power of Attorney given to Mr. K. Jeejeebhoy by his principal Mrs. G. Nowrojee Jeejeebhoy, was found to have been returned to Ma Kyaw Sein or her lawyer only on the 14th of June 1949. These facts are fully borne

out by the relevant diary entries in the said suit. The trial Judge found that the documents of title said to have been deposited as security on the 12th May 1949 as specifically alleged by the appellant in her plaint could not have been true at all. The appellant was thus non-suited. Now, in appeal this finding has been challenged, on the ground that even if the said power-of-attorney (Exhibit ၆) was not deposited on the date as alleged by the appellant in her plaint, yet there was every possibility of Ma Kyaw Sein having made it over to the appellant on a later date, and that by such act an equitable mortgage was created in appellant's favour. We are unable to accept this contention. The appellant has probably been driven to this contention quite contrary to what she has asserted in her plaint only as an afterthought; and also because the very proceeding which she relied upon, namely, Civil Regular No. 991 of 1948 revealed, perhaps quite unexpectedly, that relevant title deeds were returned by Court to Ma Kyaw Sein on two different dates, *viz.*, one set Exhibits (ခ) and (ဆ) on 6th May 1949 and Exhibit (၆) on 14th June 1949.

We have carefully assessed Daw Yin's evidence in that regard and also the evidence given by her witness Lal Khan who was said to be present at the time of the issuance of the loan by the execution of the promissory note Exhibit (က) and the deposit of title deeds noted thereunder. Both of them stated that on the day when the promissory note was executed, namely the 12th May 1949, the three documents were also made over by Ma Kyaw Sein. Here is what Daw Yin says:

"မကျော့စိန်အား ၁၉၄၉ ခုမေလ ၁၂ ရက်နေ့၌ ကျမကငွေ ၅,၀၀၀ ထုတ်ချေးလိုက်ပါသည်။ ၎င်းနောက် သက်သေခံအမှတ် က၊ ညွှန်မံစာချုပ်ကို မကျော့စိန်ကိုယ်တိုင် တံဆိပ်ခေါင်းပေါ်၌ လက်မှတ်ရေးထိုးပါသည်။ ၎င်းလက်

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မှတ်အောက်တွင် ၁၅-၅-၄၉ ခု၊ ရက်စွဲကိုလည်း ၎င်းကိုယ်တိုင်ပင် ရေးပါသည်။ အာမခံစာရင်းလို ဩဒိမံအောက်၌ ရေးထားပြီး လက်မှတ်မှာလည်း မကျော့စိန်ကိုယ်တိုင်၏ လက်မှတ်ဖြစ်ပါသည်။ တံဆိပ်ခေါင်းဘေးမှ လက်မပုံစံနှင့် အောက်မှ လက်မပုံစံ ၂ ခုစလုံးမှာလည်း ၎င်းကိုယ်တိုင် နှိုင်းထားသော လက်ပုံစံများဖြစ်ပါသည်။ ဌေတိုးမှာ ၁၀၀ လျှင် ၃ တိုးနှုန်း ချေးပါသည်။ ဩဒိမံနှင့်အတူတကွ၊ သက်သေခံ ခ၊ အိမ်ဘရောင်းအဝယ်ပြုသော ရေစစ်ရီ စာချုပ်တစောင်၊ ကိုယ်စားလှယ်လွှဲအပ်သည့် စာချုပ်တစောင်၊ သက်သေခံ အမှတ် စ၊ မြေဂရံ သက်သေခံအမှတ် ဆ တို့ကို အပေါင်အဖြစ်နှင့်အတူတကွ၊ ပေးအပ်ထားပါသည်။''

Lal Khan (PW 1) said to be present at the time of the making of the loan states:

ဒေါ်ရင်အိမ်သို့ရောက်သောအခါ မကျော့စိန်ဆိုသူနှင့် ကျန်တော်တွေ့ပါသည်။ ၎င်းက တံဆိပ်ခေါင်း ၄ လုံးကို ဒေါ်ရင်အားပေး၍ ဒေါ်ရင်က သက်သေခံ က၊ စာရွက်ပေါ်၌ ကပ်လိုက်ပါသည်။ *

ထိုစာချုပ်ကို လက်မှတ်ထိုးပြီး မြေဂရံတခု၊ အရောင်းအဝယ် စာချုပ်တခုနှင့် ကိုယ်စားလှယ်ပဝါတခု စာချုပ် ၃ ခုကိုလည်း၊ မကျော့စိန်က ဒေါ်ရင်အား ပေးပါသည်။ ကျန်တော်ပြောသော စာချုပ် ၃ ခုမှာ သက်သေခံ ခ၊စ နှင့် ဆ တို့ဖြစ်ပါသည်။ ဒေါ်ရင်က မကျော့စိန်အား ထိုနေ့က ၅,၀၀၀ ပေးသည်ကိုလည်း မြင်ပါသည်။

To our mind, these persons are obviously telling falsehood. Had it been appellant's case that only two documents, the said deed and the lease deed (Exhibits ခ and ဆ), were deposited on the day of the issuance of the loan, and not the Special Power of Attorney (Exhibit စ), because it was still in the custody of the Court and that the same was handed over to her only on a later date, the appellant would have specifically asserted that fact in her plaint. But that is not her case; and indeed, if she has set out that fact in her plaint her claim for an equitable mortgage decree would have been

sustainable, inasmuch as, a subsequent deposit of one of the title deeds, so long as the deposit was made with the intention of securing the loan already taken would, in our view, be quite sufficient for creation of an equitable mortgage. The purpose of the deposit of title deeds is to secure the repayment of the loan and a debt antecedently due can be effectively secured by a subsequent deposit of title deeds. However, in paragraphs 4 and 5 of appellant's plaint she specifically alleges that the depositing of the three documents in question took place on the 12th May 1949 when the loan was issued to Ma Kyaw Sein. In other words, her assertion is that the deposit of the three deeds and the issue of the loan were contemporaneous; and it was on the strength of that assertion she asked for a preliminary mortgage decree. How can the plaintiff now, make a total departure from her original assertion and obtain a preliminary mortgage decree? The principle of debarring a party to a civil suit from playing fast and loose with its pleadings, and the prejudicial effect of such inconsistency is well enshrined in the Supreme Court's decision of *A.S.P.S.K.R. Karuppan Chettyar and one* v. *A. Chokkalingam Chettiar* (1) wherein Sir Ba U (C.J.), after referring to several authorities on the point observes, at page 53, as follows :

> "We agree that a party should be allowed to win or lose only on a case as set out in his pleadings. It is not the function of a trial or an appellate Court to make out a case different from the one set out by a party in his pleadings and decide the suit hereon : . . ."

[See also *Daw Pu* v. *Ko Don* (2)]

Incidentally, we may also observe here that the headnotes in the case of *Ma Ohn Kyi and five others*

(1) (1949) B.L.R 46 (S.C.). (2) (1955) B.L.R. 33 (H.C.)

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v. *Daw Hnin Nwe and three others* (1) with reference to the creation of an equitable mortgage by delivery of title deeds to the creditor or his agent is somewhat misleading. The headnotes read :

> " Unless there is delivery of title deeds to the creditor or his agent at the time of the loan, it would not constitute, even if other ingredients of clause (*f*) of section 58 of the Transfer of Property Act are satisfied, a mortgage by deposit of title deeds, and it would not be possible to hold that the loan was secured as the charge became effective only with the deposit of title-deeds."
>
> (NOTE.—The underlining is by us.)

On a reference to the body of the judgment which was delivered by a Bench of which I was a member, nowhere could I find the dictum of the Bench that the delivery of the relevant title deeds to the creditor or his agent must be made *at the time of the loan.* What the Bench observed at page 324 was merely as follows :

> " It will be observed that under clause (*f*) of section 58 of the Transfer of Property Act actual delivery of title deeds is also essential in order to constitute a mortgage by deposit of title-deeds, and it would not be possible to hold that the loan was secured as the charge became effective only with the deposit of title-deeds."

Therefore, the headnotes in the said case must be read omitting the words " at the time of the loan".

What is of vital importance in the creation of an equitable mortgage by deposit of title deeds, in our view, is the handing over of the title deeds by the debtor to the creditor or his agent which may be contemporaneous or may be later, with the intention that the title deeds so handed over shall be security for the loan taken. There are authoritative decisions which lay down that intention of creating equitable

(1) (1953) B.L.R. 322 (H.C.).

mortgage cannot be presumed from mere possession of the title deeds by the creditor, because mere possession of deeds is not enough, without evidence as to the manner in which the possession originated so as to infer the contract of loan or mortgage [See *Heng Moh & Co.* v. *Lim Saw Yean and others* (1)]. [See also *A. B. Miller* v. *Babu Madho Das* (2).]

Such being our view, we are in complete agreement with the conclusion of the learned trial Judge that the appellant has not satisfactorily proved that there was an equitable mortgage by deposit of title deeds in her favour. Thus there is no merit in this appeal, and it is hereby dismissed with costs. Since this appeal has been canvassed solely on that ground we do not propose to consider the other points, namely, the admissibility in evidence of the Exhibit (ဝ) promissory note in the light of the expert testimony of U Ba Kyaing.

U SAN MAUNG, J.—I agree.

(1) 1 Ran. 545. (2) I.L.R. XIX (1897) All. 76. (P.C.).

APPELLATE CIVIL.

Before U Chan Tun Aung, C.J. and U San Maung, J.

H.C. 1958

Sept. 15.

JALIL HOGS (APPELLANT)

v.

N. C. BEHARA (deceased) (RESPONDENT).*

Urban Rent Control Act, 1948, s. 14(1)—Order made under—S. 148, C.P.C. not applicable—Rescission of decree for ejectment.

An order passed under s. 14 (*1*) of the Urban Rent Control Act, 1948, directing stay of execution of the ejectment decree and permitting payment of arrears of rent by monthly instalments being not for the doing of any act prescribed or allowed by the Civil Procedure Code, s. 148 of the Code has no application to it.

An order for the rescission of a decree for ejectment on the due payment of arrears of rent or mesne profits is a thing quite unknown to the Civil Procedure Code.

Syed Qazi Muhammad Afzal v. *Lachman Singh*, 5 Pat. 306 ; *R.M.P.R.M.M. Subramaniam Chettiar* v. *K. S. Subbiah Ayyar*, Mad. L.J. Vol. LXV, p. 538, distinguished.

B. C. Guhu for the appellant.

Nil for the respondent.

U SAN MAUNG, J.—This is an appeal under section 20 of the Union Judiciary Act against the judgment and decree of U Aung Khine, J. of this Court in Civil Miscellaneous Appeal No. 25 of 1954. The facts which have been set out fully in the judgment under appeal are briefly these :

N. C. Behara (deceased), now represented by his legal representatives Brahmanand Behara and Vivekanand Behara, was the plaintiff in Civil Regular Suit No. 1496 of 1952 of the City Civil Court, Rangoon, while the appellant Jalil Hogs was the

* Special Civil Appeal No. 9 of 1958 against the order of the High Court in Civil Misc. Appeal No. 25 of 1954, dated the 29th August 1957.

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U SAN MAUNG, J.

defendant, the suit being one under section 11 (*l*) (*a*) of the Urban Rent Control Act. A decree for ejectment was passed in favour of N. C. Behara on the defendant-appellant confessing judgment and in a subsequent application under section 14 (*l*) of the Urban Rent Control Act, the appellant Jalil Hogs made an offer to pay up the arrears of rent due to the plaintiff by monthly instalments of K 15. On the 13th of August 1953 the learned 4th Judge of the City Civil Court passed an order purporting to be under section 14 (*l*) of the Urban Rent Control Act for stay of execution and for payment of the arrears of rent by monthly instalments of K 50 with effect from the 7th of September 1953. The defendant-appellant, however, defaulted payment of the monthly instalment due in the month of November so that on the 9th December 1953 the plaintiff applied for and was granted permission to execute the ejectment decree. The defendant-appellant Jalil Hogs then applied to the Court to set aside the order directing the execution of the ejectment decree and to allow him to continue payment of the instalments as originally ordered by the Court. He explained that his default during the month of November was due to the fact that he had to incur heavy expenditure on his medical treatment because of an illness. The learned 4th Judge of the City Civil Court however dismissed the application relying upon the decision of this Court in *K. S. Abdul Kader* v. *Sri Kali Temple Trust* (1).

On appeal by the defendant-appellant to this Court, it was urged that the learned Judge of the City Civil Court had erred in applying the principle enunciated in *K. S. Abdul Kader* v. *Sri Kali Temple Trust* (1) as the second application filed by the

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

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U SAN MAUNG, J.

defendant was not one under section 14 (*1*) of the Urban Rent Control Act but under section 148 of the Civil Procedure Code. The learned single Judge on the Appellate Side (U Aung Khine, J.) however rejected this contention and dismissed the appeal with costs. Hence the present appeal.

In our opinion there is no merit whatsoever in the contention raised by the learned Advocate for the defendant-appellant. In the case of *M. E. O. Khan* v. *M. H. Ismail* (1) it was held that the provision of section 148 of the Civil Procedure Code was inapplicable to extend the time granted by the Court for the payment of arrears of rent, etc., under section 14 (*3*) of the Urban Rent Control Act of 1946 as substituted by Burma Act XXVI of 1947, on the order was one which had the force of a decree. It was not however considered in that case whether section 148 of the Civil Procedure Code was in terms applicable at all to an order under section 14 (*3*) of the Urban Rent Control Act of 1946.

Now, section 148 of the Civil Procedure Code reads—

> " Where any period is fixed or granted by the Court for the doing of any act *prescribed or allowed by this Code*, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

It is clear therefrom that the granting of the time by the Court must be for the doing of any act prescribed or allowed by the Civil Procedure Code.

In the case under consideration, the order passed was one under section 14 (*1*) of the Urban Rent Control Act, 1948 and this order was not for the doing of any act prescribed or allowed by the Civil Procedure Code. In fact, the order for the rescission

(1) (1948) B.L.R. 799. (H.C.).

of a decree for ejectment on the due payment of arrears of rent or mesne profits is a thing quite unknown to the Civil Procedure Code.

The following two cases cited by the learned Advocate for the appellant are distinguishable from the present. In *Syed Qazi Muhammad Afzal* v. *Lachman Singh* (1) it was held that the Court had power under section 148 of the Civil Procedure Code, 1908, to extend the time prescribed for payment of costs on the withdrawal of a suit with permission to institute a fresh one, because such an order for payment of costs was one which the Court was entitled to make under the Civil Procedure Code.

In *R.M.P.R.M.M. Subramaniam Chettiar* v. *K. S. Subbiah Ayyar* (2) where the plaintiff, a mortgagee, brought a suit against the lessee of the mortgagor and obtained a decree to recover possession and mesne profits from the defendant and the defendant appealed and applied for stay of execution, it was held that the order staying delivery of possession during the pendency of appeal on the appellant paying the full rent due to the respondent on a particular date each year, was an order under section 151 of the Civil Procedure Code, so that the Court was competent to grant an extension of time under section 148 of the Code.

For these reasons, we consider that there is no merit in this appeal and the same is therefore dismissed summarily.

U CHAN TUN AUNG, C.J.—I agree.

(1) 5 Pat. 306. (2) Mad. L.J. Vol. LXV, p. 538.

APPELLATE CIVIL.

Before U Aung Khine and U Ba Thoung, JJ.

H.C. 1958

Sept. 26.

LOUNG E SAY (*a*) LEONG E KYAIN (APPELLANT)

v.

DAW KHIN KYI AND FIVE OTHERS (RESPONDENTS).*

Transfer of Property Act, s. 108 (p)—*Permanent structure.*

Partitions made in a building which are secured by means of screws and which are detachable and moveable are not permanent structures within the meaning of s. 108 (*p*) of the Transfer of Property Act.

T. P. Wan for the appellant.

T. K. Boon for *Messrs. Foucar* and *Soorma,* for the respondents.

U BA THOUNG, J.—The respondents sued the appellant for ejectment from the ground floor of their house No. 119/121, Latter Street, Rangoon, on the ground that the appellant had committed breach of obligation of tenancy in respect of the suit premises, by removing, re-erecting and/or altering the positions of the partitions, without their knowledge and consent. The appellant contended that he had only repaired and re-painted the old partitions, and that the partitions are not permanent structures, and hence his action was not inconsistent with the provisions of the Urban Rent Control Act, whereas the actions of the respondents were in contravention of the provisions and principles of the said Act, as they were instituting this suit in order to force him out of the premises which he had been occupying as a tenant for the last 8 or 9

* Civil 1st Appeal No. 67 of 1956 against the decree of the 2nd Judge, City Civil Court of Rangoon in Civil Regular Suit No. 1100 of 1954, dated the 22nd August 1956.

years. He had also asked the respondents to prove that he had been served with a notice of termination of tenancy.

The following issues were framed by the trial Court :—

(1) Did the defendant remove and re-erect partitions of the ground floor of the suit premises in a new position or whether the defendant merely repaired the old partitions ?

(2) Has the defendant committed breach of obligation of his tenancy with respect to the partitions ?

(3) If so, is the obligation consistent with the provisions of the Urban Rent Control Act ?

(4) Was a notice sent to the defendant as stated in para. 4 of the plaint ?

(5) Are the plaintiffs entitled to eject the defendant from the suit premises ?

The learned trial Judge held that the appellant had removed the old partitions and had put up new ones in altered positions, thereby committing breach of obligation of the tenancy under section 108 (*p*) of the Transfer of Property Act, and that the obligation was consistent with the provisions of the Urban Rent Control Act. He had also held that due notice had been served on the appellant; and accordingly a decree for ejectment was passed against the appellant. Hence this appeal.

It was strenuously argued by the learned Counsel for the appellant that the partitions put up by the appellant are not permanent fixtures, and that section 108 (*p*) of the Transfer of Property Act is not applicable to this case.

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LOUNG E SAY (a) LEONG E KYAIN v. DAW KHIN KYI AND FIVE OTHERS.

U BA THOUNG, J.

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."

and "Rights and Liabilities of the Lessee" under section 108 (*p*) reads:

> "He must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes."

We are to consider in this case, as to whether the partitions put up by the appellant on the suit premises, could be taken as permanent structures for agricultural purposes. Obviously they are not meant for agricultural purposes, and the question whether they are permanent structures or not could be answered by the evidence of Kaseong (DW 1) and Mr. S. S. Segue (DW 2).

Kaseong (DW 1), who constructed the partitions for the appellant, gave evidence to the effect that they are not permanent structures for they are standing on the floor without being nailed up to the rafter or onto the floor, but fixed tightly between the floor and beneath the rafter, and that they could be removed without damaging the partition itself or to the building as they were only fixed up with screws. He is corroborated by Mr. S. S. Segue (DW 2), a licensed Surveyor and Engineer, who inspected the premises and gave evidence that he could definitely say that the partitions are not permanent structures, and that they are detachable and moveable and are not against the regulations of the Municipal Corporation. On the evidence of these two witnesses, we hold that the partitions put up by the appellant are not permanent

structures, and that the learned trial Judge was wrong in holding that they are permanent structures merely because of the intention of the appellant in putting up these partitions to use them permanently either for the purpose of his bedroom or for the purpose of his business. Therefore it cannot be said that section 108 (*p*) of the Transfer of Property Act applies to this case. Section 108 (*m*) of the Transfer of Property Act cannot apply to this case, as the suit premises is in as good condition as it was before for the first respondent herself, at the conclusion of her evidence had stated that it had improved since the fixing up of a new partition by the appellant; and section 108 (*o*) also cannot apply, as the action of the appellant in pulling down the old partitions and in putting up the new partitions, had not done any damage to the respondents' building. As regards the old partitions, the first respondent could not say if they were already in existence on the premises at the time the appellant came in as a tenant; but on the other hand there is evidence to show that they were put up by the appellant himself; and so section 108 (*o*) of the Transfer of Property Act cannot apply. We are of the opinion that the action of the appellant in this case had not affected the proprietory rights of the owners of the premises, and that the appellant had not committed breach of obligation of his tenancy by removing old partitions and putting up new ones, neither of which are permanent fixtures. The case of *Maung Khin Maung* v. *Daw Hla Yin and one* (1) is not applicable to this case.

For the reasons stated we set aside the judgment aud decree of the trial Court and dismiss the plaintiffs-respondents' suit with costs throughout.

U AUNG KHINE, J.—I agree.

(1) (1948) B.L.R., p. 481.

APPELLATE CRIMINAL.

Before U Po On, J.

H.C. 1958

Oct. 3.

MAUNG HAN KYI AND ONE (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

Criminal Procedure Code, s. 403—Plea of autrefois acquit—*Whether a person acquitted of charge af rape can be subsequently tried and convicted for abduction committed in the course of same transaction—Penal Code ss. 366 and 376—Distinct offences.*

The appellants, who were alleged to have abducted and ravished two girls, had previously been acquitted on a charge of rape under s. 376 of the Penal Code. They were subsequently tried and convicted for the offence of abduction under s. 366 of the Penal Code. On appeal it is contended that the subsequent trial for abduction was barred under the provisions of s. 403, Criminal Procedure Code in view of the acquittal in the previous trial on a charge of rape.

Held: That abduction and rape are two distinct offences and that as a charge under s. 366 of the Penal Code involves different elements and different questions of fact from a charge under s. 376 of the Penal Code, the plea of *autrefois acquit* is not open to the appellants.

Chit Hlaing Maung v. *Emperor*, A.I.R. (1930) Ran. 360; *Yeok Kuk* v. *Emperor*, I.L.R. 6 Ran. 386; *Abdul Hamid* v. *King-Emperor*, 14 Ran. 24; *Hakim and two others* v. *Union of Burma*, (1949) B.L.R. 112 (S.C.), followed.

Emperor v. *Sakharan Genu*, 3 Cr. L.J. 240; *Ghulam Mohammed* v. *The Crown*, 7. Lah. 484, referred to.

Aye Maung for the appellants.

Ba Kyaing (Government Advocate) for the respondent.

U PO ON, J.—On the 26th August 1957 at about 8 p.m. four *lusoes* attacked the house of Maung Kyaw Thein (PW 2) and made away with them some jewelleries and clothings worth in all about K 323.

* Criminal Appeal No. 137 of 1958 from the order of the 1st Additional Special Power Magistrate of Wakema in Criminal Regular Trial No. 204 of 1957, dated the 15th March 1958.

When they retreated, they took away Maung Kyaw Thein's wife Ma Than Khin (PW 3) in a boat. On reaching the other side of the river they fell in with four girls catching prawns. Two of the *lusoes* took away by force two of those girls Ma Khin Nyunt (PW 5) and Ma Bwint (PW 6) in a boat. Ma Than Khin was, however, brought in another boat by the other *lusoes*. They let off Ma Than Khin at the mouth of the Yegyaw creek. But the two *lusoes* who brought Ma Khin Nyunt (PW 5) and Ma Bwint (PW 6) took them to the foreshore. There one *lusoe* raped Ma Khin Nyunt and the other *lusoe* raped Ma Bwint before they let the girls go. Ma Khin Nyunt returned home by herself in a boat. Ma Bwint, on the other hand, returned home on foot.

On the following morning both the girls made a report to Maung Tin Maung (PW 9) who referred them to the Police Station. The girls did not go, as they were probably afraid.

Maung Kyaw Thein (PW 2) on the other hand, went to Kyaikpi Police Station and reported about the commission of robbery in his house.

U Tun Yin (PW 11) took up the investigation of Maung Kyaw Thein's case. As he learnt from Ma Than Khin (PW 3) about the abduction of Ma Khin Nyunt and Ma Bwint by *lusoes*, he examined those two girls.

He first sent up the two accused, Han Kyi and Kyaw Hlaing under section 366/376/114 of the Penal Code for abducting and raping Ma Khin Nyunt and Ma Bwint.

The 2nd Additional Magistrate, Moulmeingyun, charged both the accused under section 376, Penal Code. At the end of the trial he acquitted them.

Two days later U Tun Yin (PW 11) again sent up the two accused for trial. On this occasion he

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put them up for trial for the robbery committed in Maung Kyaw Thein's house.

The 1st Additional Magistrate, Wakema, who tried the second case convicted both the accused not only under section 392 (1), Penal Code, for the robbery committed in Maung Kyaw Thein's house but also under section 366 (2), Penal Code, for abducting the two girls Ma Khin Nyunt and Ma Bwint.

[After discussing the evidence His Lordship proceeded to observe as follows :]

I, therefore, consider that the convictions of the accused persons are correct.

The sentences are by no means excessive.

But one point more. It was argued by the learned counsel for the accused that as the 2nd Additional Magistrate, Moulmeingyun, had acquitted the accused of the charge of rape, the trial of the accused for the offence of abduction should be held to have been barred under the provisions of section 403 of the Code of Criminal Procedure. Reliance was placed on *Chit Hlaing Maung* v. *Emperor* (1) where it was held :

> " Where a person has been acquitted of the charge of abduction, he cannot be subsequently prosecuted for the alleged rape of the female involved in the abduction prosecution during the abduction in question. On the grounds of public policy too, non-success in a prosecution for abduction, ought not to entitle the prosecutrix to bring further evidence to support a rape alleged to have been committed during the pendency of the abduction, even when further evidence is relied upon. "

It was observed in that case by Cunliffe, J., that " the test of the success of the plea of ' autrefois

(1) A.I.R. (1930) Ran. 360.

acquit' lies in the similarity of the offences under consideration." The same view was held by him in *Yeok Kuk* v. *Emperor* (1).

However, Cunliffe, J., went so far as to say in these two cases that only distinct offences could be considered to defeat the plea of "autrefois acquit".

In *Abdul Hamid* v. *King-Emperor* (2) it was laid down as:

> "The test is not so much whether the facts are the same in both trials as whether the acquittal on the first charge necessarily involves acquittal on the second charge."

The Supreme Court observed in *Hakim and two others* v. *The Union of Burma* (3) as:

> "The opinion of Cunliffe, J. in *Yeok Kuk* v. *King-Emperor*, I.L.R. 6 Ran. 386 regarding the definition of distinct offence is too broad though on the facts of that case the case was correctly decided. The test is not whether the offences were connected but whether they are distinct offences."

Section 403 (2) of the Code of Criminal Procedure also contemplates that—

> "A person acquitted or convicted of any offence, may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (1)."

There cannot be any doubt that abduction and rape are two distinct offences. The offence of abduction was complete as soon as the accused took away the two girls with the intention provided in section 366, Penal Code. In other words, the charge under section 366, Penal Code, involves different elements and different questions of fact from a charge under section 376, Penal Code. In

(1) 6 Ran. 386. (2) 14 R.L.R. 24.
(3) (1949) B.L.R. (S.C.) 112.

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Emperor v. *Sakharan Genu* (1) it was held that it is not competent to a Judge in appeal to alter a charge under section 376, of the Penal Code, to one under section 366, Penal Code, because a charge under section 366, Penal Code involves different elements and different questions of fact from a charge under section 376, Penal Code. The same observations were made in *Ghulam Mohammed* v. *The Crown* (2).

So, the plea of *autrefois acquit* is not open to the accused.

The appeal is, therefore, dismissed.

(1) 3 Cr.L.J. 240. (2) 7 Lah. 484.

CRIMINAL REVISION.

Before U Choon Foung, J.

MAUNG OO MYINT (APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT).*

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Sept. 2.

Criminal Procedure Code, s. 162 (1)—Procedure—Proviso to—Right of both defence and prosecution to use statement of witness to police—Purpose—Evidence Act—Ss. 145 and 155.

Where the request of the Public Prosecutor to declare a certain witness hostile was refused and the trial Magistrate proceeded to cross-examine the witness on the point on which there was a contradiction between the witness's statement on oath in Court and his statement to the police and allowed the said statement to the police to be admitted in evidence through the Investigating Officer.

Held: That the procedure adopted by both the Public Prosecutor and the trial Magistrate is not in accordance with law; for there is no necessity to have a witness declared hostile for the purpose of confronting him with his statement to the police.

Held also: That under the proviso to s. 162 (1) of the Code of Criminal Procedure, as amended by Act XIII of 1945, both the defence and the prosecution are entitled to use the statement of a witness to the police, if duly proved, for the purpose of contradicting such witness in the manner provided by s. 145 of the Evidence Act or for the purpose of impeaching the credit of such witness in the manner provided by s. 155 of the Evidence Act.

Fazlur Rahman and others v. *The Emperor*, 47 Cr. L.J. 814, referred to.

Wan Hock for the applicant

Ba Thin (3) (Government Advocate) for the respondent.

U CHOON FOUNG, J.—The applicant Maung Oo Myint was sent up by the Tenasserim Police for trial under section 307 of the Penal Code and, in Criminal Regular Trial No. 20 of 1957 of the Court of the 5th Additional Special Power Magistrate,

* Criminal Revision No. 57 (B) of 1958. Review of the order of the Sessions Judge of Mergui in Criminal Revision No. 47 of 1957, dated the 8th day of May 1958.

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Mergui, he was discharged. In Criminal Revision No. 47 of 1957 of the Court of Sessions, Mergui, the learned Sessions Judge, Mergui directed that the applicant be retried. This is an application in revision to set aside the said order of the Sessions Judge.

Briefly put, the case for the prosecution is that on 26th May 1957 at about noon there was an exchange of abusive words between U Hain and Ma Kyay Thwe who is the wife of the applicant. At that juncture, the applicant struck U Hain on the head with a piece of wooden plank. U Hain fell down on the ground and had to be treated in the hospital but he did not die.

The learned Advocate for the applicant did not deny the assault committed by the applicant on U Hain as alleged by the prosecution, but contended that it was done in self defence while U Hain rushed at him (applicant) after picking up a *dah*. He submitted that there was no evidence on record to charge the applicant, that the applicant was rightly discharged by the trial Magistrate and that the order of the learned Sessions Judge for re-trial of the applicant was wrong.

In *Maung Ba Yon* v. *Ma Hla Khin* (1), Dunkley, J., has made the following observation :—

> "It has been repeatedly laid down that a Court of revision should be most reluctant to interfere in a pending case but where upon the alleged facts, there is no justification for the charge against the accused, he should not for a moment be allowed to remain in the position of a person accused of an offence and forced to defend himself against a charge which there is no legal evidence to establish."

The said case relates to an application to quash the charge. However, in my view, the principle

(1) A.I.R. (1933) Ran. 297 at 298.

enunciated in the said case would apply with even greater force to a case such as the present one in which the accused had already been discharged by the trial Court on the evidence before it.

Therefore, the point for determination is, whether there is justification for the charge against the applicant under section 307 of the Penal Code.

The learned trial Judge came to the finding that the accused (the applicant) had no premeditated intention to assault U Hain but did so in exercise of the right of private defence on suddenly seeing the said U Hain rush at his wife Ma Kyay Thwe with a *dah*. On the other hand, the learned Sessions Judge in his order now under revision observed as follows:

> "In discharging the accused the trial Court came to the finding that the respondent had acted in exercise of the right of private defence and that his act in assaulting U Hain with a wooden plank came within the purview of sections 100 and 101 of the Penal Code. But I may say at once that this finding is not at all warranted by the evidence obtaining on record. The only evidence that is available on record regarding the respondent's exercise of the right of private defence is the one given by Maung Po Ni (PW 2). But from his own admission it is quite clear that Maung Po Ni had made a different statement altogether when he was examined by the police and as such it is quite apparent that no undue reliance should be placed on his evidence alone * * * * * *. As against the dubious evidence of Maung Po Ni there is the evidence of other eye witnesses to show that at least there was a *primâ facie* case made out against the respondent."

Bearing in mind the principle quoted above, it will now be necessary to survey the evidence on record with a view to finding out whether there would be justification for the charge against the accused.

From the evidence on record, it would appear that there were six persons present at the time of

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the occurrence and they were (1) Maung Po Shwe, (2) Ma Khin Kyi, (3) Ma Mya Khin, (4) Ma May (PW 5), (5) Maung Po Ni (PW 2) and (6) Ma Chit Nyaung (PW 6). The names of the first two appear in the police charge sheet, but they were not examined by the prosecution. The third (*i.e.*, Ma Mya Khin was not cited as a witness. Thus, the prosecution is left with the remaining three persons, namely, (1) Ma May (PW 5), (2) Maung Po Ni (PW 2) and (3) Ma Chit Nyaung (PW 6).

[His Lordship then proceeded to reproduce the evidence of two witnesses for the prosecution.]

When the next important eye witness Maung Po Ni (PW 2) was examined, the learned Public Prosecutor requested—so it appears from the record—the Court to allow him to declare the witness hostile but the Court refused to do so. However, the learned trial Magistrate himself cross-examined the witness on the point on which there was a contradiction between the witness's statement on oath in Court and his statement to the police and allowed the said statement to the police to be admitted in evidence as Exhibit ဃ through the Investigating Officer U Cassim (PW 7). The procedure adopted by both the learned Public Prosecutor and the learned trial Magistrate is not in accordance with law; for, there is no necessity to have a witness declared hostile for the purpose of confronting him with his statement to the police. Under the proviso to section 162 (1) of the Code of Criminal Procedure, as amended by Act XIII of 1945, both the defence and the prosecution are entitled to use the statement of a witness to the police, if

duly proved, for the purpose of contradicting such witness in the manner provided by section 145 of the Evidence Act or for the purpose of impeaching the credit of such witness in the manner provided by section 155 of the Evidence Act.

In *Fazlur Rahman and others* v. *The Emperor* (1) a Bench of the Calcutta High Court has held that,

> "The whole foundation of this procedure [*i.e.*, the procedure of contradicting a witness under section 162 (2) of the Criminal Procedure Code in the manner provided by section 145 of the Evidence Act] is the principle that a witness who makes inconsistent statements is unreliable."

Therefore, Maung Po Ni (PW 2) must be considered as an unreliable witness. In any case, the learned Public Prosecutor having attempted to discredit his own witness Maung Po Ni (PW 2), the evidence of the latter is of no use to the prosecution.

[Here his Lordship proceeded to reproduce the evidence of a witness for the prosecution.]

From the record it appears that the learned Public Prosecutor requested the Court to declare this witness also as hostile, but the Court refused to do so and yet the statement of this witness to the police was put in in evidence as Exhibit "c" through the Investigating Officer U Cassim (PW 7). This procedure too is not in accordance with law. The witness was not cross-examined on his statement to the police, and there is nothing on record to show that the said statement was used in accordance with the provisions of the proviso to section 162 (1) of the Criminal Procedure Code in the manner provided by section

(1) 47 Cr. L.J. 814.

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145 or section 155 of the Evidence Act. The said statement should not have been allowed to be put in in evidence as an exhibit for the prosecution.

On an analysis of the evidence on record, it will be seen that the only evidence against the accused applicant is that of Ma May (PW 5) and Maung Po Ni (PW 2). However, as pointed out above Maung Po Ni (PW 2) must be considered as an unreliable witness. In any case, his evidence is of no use to the prosecution inasmuch as the learned Public Prosecutor had discredited him. Thus, the prosecution is left with the solitary evidence of Ma May (PW 5). I agree with the learned Advocate for the applicant that Ma May (PW 5) being the daughter of U Hain is not a disinterested and independent witness. In my view, it will not be safe to act on her sole uncorroborated testimony. The learned Advocate for the applicant also submitted that adverse presumption might be drawn from the prosecution not examining the two witnesses (*i.e.*, Maung Po Shwe and Ma Khin Kyi), who were present at the scene of occurrence and whose names appeared in the police charge sheet, and also from the fact that U Hain, who should have been the most important witness, and Ma Mya Khin, who according to the accused's report to the police (Exhibit o) was present at the time of occurrence, were not cited as prosecution witnesses. Ma Mya Khin's name does appear in the police sheet and there is nothing on record to show whether or not she was examined by the police. However, so far as U Hain, Maung Po Shwe and Ma Khin Kyi are concerned, an adverse inference can certainly be drawn in favour of the accused.

On the other hand, from the following evidence it will be seen that the accused acted in exercise of the right of private defence, namely,

[His Lordship then proceeded to reproduce and discuss some of the evidence for the prosecution].

In *The King* v. *Hla Maung* (1), a Bench of the former High Court of Judicature at Rangoon held,

> "Even though the right of private defence under section 97 of the Penal Code be not pleaded or suggested by the accused, yet the matter should be considered, or be put before the Jury, by the Court for consideration and a verdict of not guilty may be properly given."

The above ruling was quoted with approval and followed by this High Court in *Maung Hmat* v. *The Union of Burma* (2) where it has been held,

> "Even though the appellant failed to set up a plea of self defence, nevertheless it is open to the Court to take this question into consideration if the facts warrant it."

Therefore, the trial Court was justified in taking into consideration the question of the accused's right of private defence; and, from the analysis of the evidence set out above, it would appear that he was right in discharging the accused.

The learned Government Advocate also admits that the prosecution would not be able to improve the case which it had already made out in the trial Court and that it would be futile to remand the case for retrial. For the reasons set out above, I agree with the learned Government Advocate and consider that, on the evidence on record, there is no justification for the charge against the accused and that this is not a fit case for remand for the purpose of retrial.

Accordingly, the application is allowed and the order dated the 22nd February 1958 of the Sessions Judge, Mergui, is set aside.

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(1) (1946) R.L.R. 50. (2) (1954) B.L.R. (H.C.) 28.

CRIMINAL REVISION.

Before U Thaung Sein, J.

H.C. 1958

Oct. 1.

MAUNG MYAT AND ONE (APPLICANTS)

v.

THE UNION OF BURMA (AH KYAN) (RESPONDENT).*

Urban Rent Control Act, s. 12 (1)—*Certificate granted under—Legal effect of —Premises—Meaning of.*

Where the respondent in occupation of the ground floor of a building situated within a compound applied for and obtained a "certificate" or permit under s 12 (*1*) of the Urban Rent Control Act from the Rent Controller, he becomes the statutory tenant of the owner of the premises, although the respondent had been permitted to occupy the ground floor of the building by someone other than the owner and the word "premises" referred to in the "certificate" includes the ground floor of the building and the compound in which it is situated.

S. L. Verma for the applicants.

Saw Hla Pru for the respondent.

U THAUNG SEIN, J.—In Criminal Regular Trial No. 278 of 1957 of the Ninth Additional Magistrate, Mandalay, the present applicants U Myat and Maung Thaung Dann were each convicted on two counts under sections 341 and 447 of the Penal Code and sentenced to pay a fine of K 60 for each offence. In addition, the learned trial Magistrate passed an order under section 522 of the Criminal Procedure Code directing the applicants to remove the structures erected by them in the compound of the house occupied by the respondent Ah Kyan and to deliver possession of that compound to the latter. The learned Additional Sessions Judge, Mandalay

* Criminal Revision No. 48-B of 1958 (Mandalay). Review of the order of the 9th Additional Magistrate, Mandalay, passed in Criminal Regular Trial No. 278 of 1957.

has now submitted the proceedings to the High Court with the recommendation that the order of the learned Magistrate under section 522 of the Criminal Procedure Code be set aside.

The facts leading up to the conviction of the applicants were briefly as follows. The first applicant U Myat is the owner of a certain house and the plot of land on which it is situated in Mandalay town, having purchased it from one Ma Htwe (PW 2) the original owner. It appears that after the purchase, Ma Htwe was permitted to continue in residence as a tenant and in due course she brought in the respondent Ah Kyan into the ground floor of the house. Ma Htwe then moved to the upper floor and the respondent Ah Kyan settled down in the ground floor and opened a liquor shop which is apparently frequented by drunkards at all times of the day. The applicant U Myat's trouble seem to have started with the arrival of Ah Kyan in the premises and one of the latter's first acts was to apply to the Rent Controller for a permit under section 12 (*l*) of the Urban Rent Control Act. A " certificate " or permit as prayed for was issued under section 12 (*l*) of the Urban Rent Control Act and he thus became a " statutory tenant " of the applicant U Myat. Armed with that permit, the respondent Ah Kyan has been in occupation and is at present carrying on the business of a vendor of liquor on the premises. The building in question is said to be situated in a fairly spacious compound and a water tap has been set up with benches by Ah Kyan for the conveniences of the drunkards who are in the habit of patronising his liquor shop. To all appearances, the applicant U Myat is bent on ousting the respondent from those premises and attempted to do so by means of a suit in the Additional District

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U THAUNG SEIN, J.

Court for the ejectment of the latter. But unfortunately for him, that suit was dismissed but this was not the end of the dispute between the parties. Matters then came to a head on the 7th December 1957 when the applicant U Myat entered the compound with a group of labourers and not only constructed a small reading club but also set up an additional fence in the compound. The respondent Ah Kyan and Ma Htwe protested in vain and the new fence was erected with the result that the tenants have been cut off from the water tap in the compound. Ah Kyan promptly retaliated with a criminal prosecution and the applicants were eventually convicted and sentenced as stated already.

It has been urged before me that the applicants were illegally convicted as the respondent Ah Kyan was in law and fact the tenant only of the ground floor of the building and not of the compound. In proof of this fact, reliance is placed on the Exhibit I "certificate" issued by the Rent Controller under section 12 (*1*) of the Urban Rent Control Act to the respondent Ah Kyan. All that I propose to say with regard to this argument is that the "certificate" in question refers to "premises" which includes the ground floor of the building and the compound in which it is situated. If it did not include the compound then I cannot understand how the respondent Ah Kyan could have gained egress or ingress to his room except perhaps by leaping into or out of it from the roadway. In short, the respondent Ah Kyan must be deemed to have been the tenant of the ground floor and the compound.

The next question that arises for consideration is whether the applicant U Myat acted under the *bona fide* belief that he had a right to enter the compound.

That he had no *bona fide* is amply borne out by the fact that he acted in the way in which he did after he had failed in the Civil Suit to oust the respondent Ah Kyan. With regard to the order by the learned trial Magistrate under section 522 of the Criminal Procedure Code, the learned Additional Sessions Judge is of the view that there was "no palpable force or show of force or criminal intimidate" on the part of the applicants when they trespassed into the compound. I regret I am unable to share this view as the evidence on record clearly proves that the applicants entered the compound with five or six labourers armed with crowbars and despite the protests by the tenants began to erect a fence. It appears that Ma Htwe (PW 2) even called out for help to her neighbours but the respondent took no notice of her protestations. In my opinion, the applicants acts clearly amounted to "criminal force" as defined in sections 349 and 350 of the Penal Code. On the whole, I am satisfied that the applicants were rightly convicted of offences under sections 341 and 447 of the Penal Code and the order under section 522 was justified. Accordingly, I do not propose to interfere with the order of the learned trial Magistrate and the proceedings should be returned with the above remarks.

APPELLATE CIVIL.

Before U Aung Khine and U Ba Thoung, JJ.

H.C. 1958

Sept. 8.

MESSRS. I. A. G. MOHAMED & SONS (APPELLANTS)

v.

MESSRS. THE EAST ASIATIC CO. LTD. (RESPONDENT).*

Contract Act, s. 62—Novation—Mere variation in one of several clauses in contract could not be regarded as.

Where only one clause regarding shipment out of several clauses in the contract, namely, (i) the quality and the specification of the goods indented, (ii) the price of the goods, (iii) shipment, (iv) packing, (v) assurance and (vi) terms of payment was varied at the request of the party, who now seek to impugn the contract on the ground that due to this variation there had been a novation of contract.

Held: That this variation as to the shipment of the goods could not be regarded as a novation of contract as contemplated in s. 62 of the Contract Act, for it had not made a complete rescission of the contract in this case, as all other clauses in the contract remained unaltered and that it cannot be said that a new contract had been substituted in place of the old one.

"Mere extension of time did not operate so as to rescind the original contract."

Lachminarain Bharcodan v. *Hoare, Miller & Co.*, I.L.R. 41 Cal. 35, referred to.

B. K. Dadachanji for the appellants.

C. A. Soorma and *Myint Soe* for the respondent.

U BA THOUNG, J.—The defendants-appellants contracted to buy from the plaintiffs-respondents 700 cases of "Mustad Deckhead Square Nails" by an Indent Exhibit 1, dated the 7th May 1951. The indented goods were to be shipped from Norway

* Civil 1st Appeal No. 9 of 1956 against the decree of the 2nd Judge, City Civil Court of Rangoon in Civil Regular Suit No. 1463 of 1952, dated the 2nd January 1956.

during January 1952 subject to shipping space being available, but to be shipped not later than January 1952 and also subject to the terms and conditions set out in the Indent. On the 25th October 1951 the defendants-appellants sent a letter (Exhibit 4) to the plaintiffs-respondents requesting them to intimate their suppliers to ship the indented goods in two equal monthly lots commencing with the first lot in January 1952. The plaintiffs-respondents accordingly instructed their suppliers to arrange for shipment of the indented goods in two equal monthly lots as desired by the defendants-appellants, and the plaintiffs-respondents' suppliers shipped the first lot of 350 cases of the indented goods on or about the 21st January 1952. Then when the second lot of the indented goods were ready to be shipped by the suppliers during the month of February 1952, it appeared that no steamer for Rangoon was available at the time for shipment of the second lot, and the plaintiffs-respondents therefore informed about it in their letter (Exhibit 7), dated 14th February 1952, sent to the defendants-appellants, wherein they had also informed the defendants-appellants that their suppliers intended to send the second lot of the indented goods during March 1952, and they had also asked the defendants-appellants to confirm that arrangement immediately. The defendants-appellants, however, did not send a reply (Exhibit 8) to that letter until the 5th March 1952 saying that they would not accept the second lot of the indented goods if their shipment was not made during February 1952. The plaintiffs-respondents replied by their letter (Exhibit 9), dated 13th March 1952 that they could not accept the defendants-appellants' intended refusal of the second lot of the indented goods if shipments could not be made during February 1952, and they

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U BA THOUNG, J.

informed the defendants-appellants that the second lot would be shipped in accordance with the Indent as subsequently amended by the defendants-appellants' letter dated 25th October 1951, and that they would inform them as soon as they received final shipping advice from their Head Office. To this the defendants-appellants replied that they would not accept the second lot of the indented goods. The second lot of 350 cases of the indented goods were shipped from Norway on the 11th March 1952, and on arrival, the defendants-appellants refused to accept delivery and pay for them, with the result that the plaintiffs-respondents after giving due notice to the defendants-appellants, sold the goods and claimed from them K 4,872·53 pyas as damages for breach of contract by filing Civil Regular Suit No. 1463 of 1952 of the City Civil Court, Rangoon. The defendants-appellants contended that there was a novation of contract, and that as time was the essence of the contract in this case they were justified in refusing to accept the goods as they were not shipped in February 1952. They therefore denied any liability to the damages claimed by the plaintiffs-respondents.

The following issues were framed by the trial Court :—

1. Was there a novation of contract as alleged by the defendant ? If so, is clause (2) of the original indent not binding on the parties ?
2. Was there no steamer available for shipment of the second lot of goods to Rangoon during February 1952 ?
3. Are the defendants bound to pay for and take delivery of the second lot of 350

cases of indented goods arrived per M.S. "Temeraire" on the 1st June 1952 and if so, are the defendants liable to pay to the plaintiffs K 4,872·53 by way of damages for breach of contract ?

4. To what amount of damages, if any, is the plaintiff entitled from the defendant ?

The learned trial Judge held that there was no novation of contract as alleged by the defendants-appellants; that no steamer to Rangoon was available for shipment of the second lot of goods during February 1952 and that the defendants-appellants were bound to pay for and take delivery of the second lot of the indented goods, and they were therefore liable to pay to the plaintiffs K 4,872·53 as damages for breach of contract; and a decree for that amount with costs was given in favour of the plaintiffs-respondents. Hence this appeal.

The learned counsel for the defendants-appellants contended firstly that there was a novation of contract; and secondly that even if there was no novation of contract, the defendants-appellants were justified in refusing to accept delivery of the second lot of the indented goods and hence they were not liable to pay any damages to the plaintiffs-respondents.

The learned counsel for the defendants-appellants contended that the clause in the original Indent regarding shipment which reads:— "Shipment: During January 1952 from Norway, subject to space being available, otherwise as soon as possible, but not later than January 1952", was later altered by Exhibits 5 and 6, to have the shipment of the goods in two equal monthly lots, first lot commencing from January 1952; and that this alteration amounts to

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U BA THOUNG, J.

substitution of a new contract in place of the original one, and therefore there was a novation of contract. We are unable to accept this contention. The original Indent (Exhibit 1) was dated 7th May 1951 and it contains several clauses regarding (i) the quality and the specification of the goods indented, (ii) price of the goods, (iii) shipment, (iv) packing (v) assurance and (vi) terms of payment. Out of these several clauses contained in the original Indent, only the clause regarding shipment of the goods was later varied to have the goods shipped in two equal monthly lots with the first lot commencing from January 1952. This variation in the contract was made at the request of the defendants-appellants by their letter (Exhibit 4), dated 25th October 1951, and we do not consider that this variation as to the shipment of the goods could be regarded as a novation of contract as contemplated in section 62 of the Contract Act, for it had not made a complete rescission of the contract in this case, as all the other clauses in the contract remained unaltered. This variation could only be regarded as a new arrangement made, giving an extension of time to ship the goods in two equal monthly lots in January and February 1952 instead of in one entire lot in January 1952, and therefore it cannot be said that a new contract had been substituted in place of the old one. We are fortified in this view by the case of *Lachminarain Bhareodan* v. *Hoare, Miller & Co.* (1) where it was held that a mere extension of time did not operate so as to rescind the original contract.

Under section 62 of the Contract Act the meaning of "Novation" is "that, there being a contract in existence, some new contract is substituted for it either between the same parties or between

(1) I.L.R. 41 Cal 35.

different parties, the consideration mutually being the discharge of the old contract ". That there had not been a discharge of the original contract in this case is quite apparent from the fact that in all the correspondence that passed between the plaintiffs-respondents and the defendants-appellants, *viz.* Exhibits 4 to 10, the parties had always referred to Indent No. 2462, dated 7th May 1951 which is the original Indent. The second arrangement to ship the goods in two equal monthly lots beginning from January 1952 was based on the original indent itself, and all the other terms in the original indent were strictly adhered to by the parties. Therefore it cannot be said that the original contract had been got rid of and substituted by a new contract. We are therefore in agreement with the learned trial Judge that there was no novation of contract in this case.

The learned counsel for the defendants-appellants contended secondly that even if there was no novation of contract in this case, the defendants-appellants were justified in refusing to accept delivery of the second lot of the indented goods. He contended that there is no direct evidence in this case to prove that an attempt was made by the plaintiffs-respondents to secure shipping space in ships going to Rangoon and that no shipping space from Norway was available in February 1952. We do not think that there is any force in this contention. The letter (Exhibit H), dated 4th February 1952 and sent from the plaintiffs-respondents' Head Office at Copenhagen to the plaintiffs-respondents in Rangoon clearly shows that no steamer from Oslo to Rangoon was available during February 1952. On receipt of this letter, the plaintiffs-respondents immediately informed about it

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to the defendants-appellants. It can also be gathered from the letters Exhibits O and P that there was no shipment of goods from Oslo to Rangoon during February 1952.

Besides, if any shipping space was available on any ship leaving direct from Oslo to Rangoon in February 1952, there is no reason why the plaintiffs-respondents' firm would not take it and send the second lot of the remaining 350 cases of the indented goods by that ship, as they were ready for shipment even at the time the first lot was shipped by S.S. "Tai Yang" in January 1952. The letter (Exhibit 9) clearly shows that the entire lot of the 700 cases of the indented goods could have been shipped in January 1952 by S.S. "Tai Yang," and that the only reason why the entire lot of 700 cases were not shipped in January 1952 was, because of the request made by the defendants-appellants to ship them in two equal monthly lots beginning from January 1952. It is therefore clear that if the defendants-appellants had not requested the plaintiffs-respondents to ship the indented goods in two equal monthly lots with the first lot beginning from January 1952, the entire lot of 700 cases of the indented goods would have been shipped by S.S. "Tai Yang" in January 1952. Therefore we cannot accept the contention of the learned counsel for the defendants-appellants that they were justified in refusing to accept delivery of the second lot of 350 cases of the indented goods.

The shipment of the second lot of the indented goods was made on the 11th March 1952, and this shipment was quite in order, as clause 2 of the indent provides "Fourteen days grace to be allowed on all shipment dates". We have held that there was no novation of contract in this case, and

therefore clause 2 of the Indent (Exhibit 1) is still binding. The shipment of the second lot, being made on the 11th March 1952, was well within the 14 days grace allowed under clause 2 of the Indent (Exhibit 1), as under the second arrangement they were to be shipped in February 1952. The defendants-appellants were therefore bound to take delivery of the second lot of the indented goods and pay for them.

Now as regards the resale of these goods on account of the defendants-appellants' refusal to accept them, the evidence on record is quite clear that the resale was made in a proper manner in the normal course of business, and there is nothing to show that the plaintiffs-respondents were acting in collusion with the purchasers to fetch inadequate or low price for these goods, and the learned trial Judge was quite justified in accepting the statement of accounts (Exhibit 18-A) put in by the plaintiffs-respondents, as a true account of what they were entitled to get as damages from the defendants-appellants on account of the latter's refusal to accept the second lot of 350 cases of the indented goods.

In the result the appeal fails and it is dismissed with costs.

U AUNG KHINE, J.—I agree.

APPELLATE CRIMINAL.

Before U Thaung Sein, J.

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Oct. 7.

MRS. KANTA BHAI (APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Burma Immigration (Emergency Provisions) Act, 1947, s. 13 (1)—Prosecution under—For failure to renew stay permit—Impossibility of doing same due to default on the part of the Immigration Department—Legality of conviction under s. 15 (1).

Where the Immigration Department without returning the passport or sending intimation to the applicant regarding her application for a stay permit prosecuted her under s. 13 (*1*) of the Burma Immigration (Emergency Provisions) Act, 1947 for failure to apply for a renewal of her stay permit and obtained a conviction under s. 15 (*1*) of the Act.

Held : That before the applicant could possibly apply for the renewal of her stay permit it was essential for her to know whether such a permit had been issued to her by the Immigration Department, that without the passport it was impossible for the applicant to know whether a stay permit had been issued to her nor was it possible for her to apply for a renewal of that permit and that as the law does not expect anyone to do what is impossible, the conviction was bad in law.

In the matter of U Khin Maung, Higher Grade Pleader as an Advocate for the High Court, (1948) B.L.R. 504, followed.

P. K. Bose for the applicant.

Min Han (Government Advocate) for the respondent.

U THAUNG SEIN, J.—The present applicant Mrs. Kanta Bhai is an Indian lady who has been a resident of Burma for many years since 1939 when she married an Indian merchant of Mandalay. As a foreigner resident in Burma she is of course required to apply for a "stay permit", *i.e.*, permission to stay in Burma, and did so in the year 1954 to an

* Criminal Revision No. 46-B of 1958 (Mandalay). Review of the order of the 4th Additional Magistrate, Mandalay, in Criminal Regular Trial No. 316 of 1957, dated the 24th April 1958.

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Immigration Department Official at Mandalay along with her Indian passport. The papers were then sent down to the Immigration Department at Rangoon in the usual course of official business and unfortunately for the applicant neither the stay permit nor her passport have been returned to her up to date. Meanwhile the applicant and her husband waited anxiously for the passport and stay permit especially as the latter permit is for specified periods only, and must be renewed from time to time. They have waited in vain however and instead of the passport and stay permit being returned to the applicant, the Immigration Department launched out with three prosecutions against the applicant and her husband. The applicant was charged with having failed to apply for a renewal of her stay permit while her husband was alleged to have abetted his wife in the commission of the above offence and in failing to apply for a stay permit in respect of one of their children.

Now, before the applicant could possibly apply for the renewal of her stay permit it was essential for her to know whether such a permit had been issued to her by the Immigration Department. That department had not chosen to either return her passport or to send any intimation to her whether her stay permit had been renewed and I am thus baffled as to how she could have applied for a renewal of a stay permit. It appears that the Immigration Department had, for reasons best known to itself retained the passport of the applicant in which they had endorsed a stay permit valid up to the 30th January 1955. They had also turned a deaf ear to the inquiries by the applicant and her husband both in respect of the passport and stay permit and yet expected the applicant to be aware

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of the fact that a stay permit had been issued. As the applicant is not a soothsayer nor does she possess magical powers it was impossible for her to know the acts of the Immigration Department which were done behind her back. The applicant deserves sympathy for the treatment which she has received at the hands of the Immigration Department and I am astounded that she was ever prosecuted under section 13 (*1*) of the Burma Immigration (Emergency Provisions) Act, 1947. After all, the law does not expect anyone to do what is impossible and if any authority is required for this view reference may be made to *In the matter of U Khin Maung, Higher Grade Pleader as an Advocate for the High Court* (1). In the present case, without the passport it was impossible for the applicant to know whether a stay permit had been issued nor was it possible for her to apply for a renewal of that permit.

The applicant was however convicted of an offence under section 15 (*1*), Burma Immigration (Emergency Provisions) Act, 1947, by the learned Fourth Additional Magistrate and sentenced to pay a fine of K 50 or in default fifteen days rigorous imprisonment. The learned Additional Sessions Judge, Mandalay has submitted these proceedings with a recommendation that the conviction and sentence be set aside. For the reasons given above, I am in entire agreement with the learned Additional Sessions Judge that no case whatsoever was made out against the applicant and she is entitled to an acquittal. Accordingly, the conviction and sentence passed on the applicant Mrs. Kanta Bhai are hereby set aside and she is acquitted. All fines paid by her should be refunded.

(1) (1948) B.I.R. 504.

CRIMINAL REVISION.

Before U Chan Tun Aung, C J.

R. GOPALAN AND ONE (APPLICANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

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Sept. 19.

Criminal Procedure Code, s. 403—Autrefois convict—*Principle inapplicable to trial for distinct offence—S. 561-A—Inherent power of High Court to interfere—When to be exercised—Purpose—When cannot be invoked.*

Under sub-s. 2 of s. 403 of the Criminal Procedure Code, the *autrefois convict* principle does not apply to a trial of a person for a distinct offence for which a separate charge could have been framed against him in a former trial, under s. 235 (*1*) of the Criminal Procedure Code.

The High Court has, under s. 561-A of the Criminal Procedure Code inherent power to interfere with the criminal proceedings of the lower Court at any stage if it is satisfied that any further continuation of such proceedings would palpably be an abuse of the process of law. But this power is exercised by this Court only in exceptional circumstances in order to prevent harassment. And the presence or absence of exceptional circumstances must be tested on sufficient materials, and not on bare assertions by the person concerned.

Where the quashing is sought for on the bare assertions made in the charge sheet without any evidence as yet being led by the prosecution, it will be too premature for the High Court to interfere with the trial. It is well known that this inherent power cannot be invoked for the purpose of doing an act which will directly conflict with any specific provision of law.

Chaman Lal v. ***Emperor***, A.I.R. (1943) Lah. p. 304; ***Emperor*** v. ***Anant Narayan Kulkarni***, A.I.R (1945) Bom. p. 403, distinguished.

Kyaw Min for the applicants.

Tin Maung (Government Advocate), for the respondent.

U CHAN TUN AUNG, C.J.—The two applicants are being prosecuted before the Special Judge (II), (SIAB & BSIA) Rangoon (Criminal Regular Trial

* Criminal Revision No. 72 (B) of 1958. Review of the order of the Special Judge (II), (SIAB & BSIA) of Rangoon in Criminal Regular Trial No. 2 of 1958, dated the 27th February 1958.

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No. 2 of 1958) for the offences under section 24 of the Foreign Exchange Regulation Act, and/or section 468 read with section 120-B of the Penal Code. They are also being prosecuted before the same Judge in Criminal Regular Trial No. 3 of 1958 for the alleged infringement of certain provisions of the Foreign Exchange Regulation Act. However, in a previous trial before the same Judge, *i.e.*, Criminal Regular Trial No. 24 of 1954, the present applicants and one R. Gopalan were convicted and sentenced to certain terms of imprisonment for the offence under section 24 of the Foreign Exchange Regulation Act read with section 120-B of the Penal Code. The two applicants were managers of "Hamsaveni" Company, No. 127, Mogul Street, Rangoon, and as such, they were said to have been concerned in the illegal remittances of several sums of money to India on the strength of some documents of title to goods, such as bills of ladings, transmitted from India from time to time, in their business as Importers. After a lengthy trial, the Judge found that they had contravened the Foreign Exchange Regulation Act, and three bills of lading, bearing Nos. 25, 26 and 15, out of a total of seventeen different numbers, were taken as basis of the charge. Eventually, all the three applicants were as aforesaid convicted and sentenced to suffer 1½ years' rigorous imprisonment on each charge under section 24 of the Foreign Exchange Regulation Act, read with section 120-B of the Penal Code.

Now, in the two proceedings for the quashing of which the present applications have been filed before me, it appears that the prosecution has taken bills of lading, Nos. 16, 20 and 24 (*vide* Criminal Regular Trial No. 2 of 1958) and bills of lading Nos. 17, 18 and 19 (*vide* Criminal Regular Trial No. 3 of 1958), as basis for the fresh prosecutions. So far as

R. Gopalan is concerned (*vide* Criminal Regular Trial No. 4 of 1958), and for whom a separate application for quashing the said proceedings is being canvassed before me, the basis of his prosecution relates to the remittances on bills of lading Nos. 23, 30 and 31. Invoking the principle of *autrefois convict* as enunciated in section 403 of the Criminal Procedure Code, the applicants' counsel contended that that principle should apply in the circumstances obtaining in the present case. But, when it was pointed out to him that under sub-section 2 of section 403 of the Criminal Procedure Code, the *autrefois convict* principle does not apply to a trial of a person for a distinct offence for which a separate charge could have been framed against him in a former trial, under section 235 (*1*) of the Criminal Procedure Code, and that in the present trial with which the applicants are concerned, the offences appertaining to the alleged remittances of foreign exchange having reference as they do, to distinct bills of lading other than those that were referred to in the former trial, *i.e.*, Criminal Regular Trial No. 24 of 1954, the learned counsel readily submitted that he would not press this point, but that he would invoke the exercise of inherent powers by this Court available under section 561-A, Criminal Procedure Code. He argues that the High Court can interfere at any interlocutory stage of a criminal proceeding whenever it finds that there is an abuse of process of the law, or for purpose of securing the ends of justice. It is urged that the second prosecution of the applicants for the remaining bills of lading, by selecting only three of them in each case, is nothing short of an abuse of the process of law in that they amount to undue harassment of the applicants. Putting in another way, it is submitted that though

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section 403 of the Criminal Procedure Code cannot be invoked in this case, yet to avoid undergoing by the applicants the harassment of another trial based upon similar facts, this Court should, in exercise of its inherent power available under section 561-A of the Criminal Procedure, quash the trial proceedings.

In support of this submission, reliance was placed upon *Chaman Lal* v. *Emperor* (1) and *Emperor* v. *Anant Narayan Kulkarni* (2). I am afraid the facts and circumstances obtaining in each of the cases relied upon by the applicants' counsel are entirely different from those available in the present case. The cases cited are authorities only for the facts and circumstances appearing therein. I have not the slightest doubt that this Court has, under section 561-A of the Criminal Procedure Code inherent power to interfere with the criminal proceedings of the lower Court at any stage if it is satisfied that any further continuation of such proceedings would palpably be an abuse of the process of law. But this power is exercised by this Court only in exceptional circumstances in order to prevent harassment. And the presence or absence of exceptional circumstances must be tested on sufficient materials, and not on bare assertions by the person concerned.

Now, in the case before me no evidence has yet been led by the prosecution, and the quashing is being sought for on the bare assertions made in the charge-sheet filed by the B.S.I.; and my reading of it shows that offences relate to distinct bills of lading on different dates, and that it has nothing to do with bills of lading in respect of which the applicants had already been tried and convicted in the former trial. The learned Government Advocate U Tin Maung appearing for the respondent has rightly submitted

(1) A.I.R. (1943) Lah. p. 304. (2) A.I.R. (1945) Bom. p. 403.

that it is too premature for this Court to interfere with the trial of applicants when there are no materials before me except the B.S.I. charges. He further added that if the provisions of section 403 of the Criminal Procedure Code cannot be invoked, then the exercise of inherent power available to the High Court under section 561-A of the Criminal Procedure Code must be exercised with greatest caution, and for extraordinary reasons only. Some authorities were cited in support of his submission, but I need not discuss them as this exceptional remedy can be invoked only to meet cases for which no provision is made by the Criminal Procedure Code. It is well known that this inherent power cannot be invoked for the purpose of doing an act which will directly conflict with any specific provision of law.

For the reasons stated above, I do not see any merits in this application and it is therefore dismissed.

CRIMINAL REVISION.

Before U San Maung, J.

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Oct. 23.

SUBRAMANIAM (APPLICANT) *

v.

SAKRA (RESPONDENT).*

Penal Code, ss. 494 and 497—Liability of person marrying a woman during subsistence of marriage with husband for abetment of bigamy and for adultery for living with her as man and wife.

Where a person marries a married woman during the subsistence of her marriage with her husband and lives with her as man and wife, he can be prosecuted for abetment of bigamy committed by the wife, but not for bigamy punishable under s. 494 of the Penal Code, and also for the offence of adultery, punishable under s. 497 of the Code.

Munir v. ***Emperor***, 27 Cr. L.J., p. 101, referred to.

G. N. Banerji for the applicant.

Ba Thin (3) (Government Advocate) for the respondent.

U SAN MAUNG, J.—On the 14th of February 1957 Subramaniam who is the applicant in the present application for revision filed a direct complaint before the District Magistrate, Insein, against his wife Punaram, her brother Muniyandi and one Sakra for committing offences punishable under section 494 of the Penal Code. His case was that Muniyandi had enticed his wife Punaram away from him with a view that she might be made to enter into a bigamous marriage with Sakra and that in fact such a bigamous marriage was performed on the 10th of February 1957. The complaint was forwarded to the 4th Additional Magistrate, Insein,

* Criminal Revision No. 31 (B) of 1958. Review of the order of the Sessions Judge, Insein, in Criminal Revision No. 13 of 1957, dated the 18th January 1958.

who after examining the witnesses cited by Subramaniam framed a charge against Punaram under section 494 of the Penal Code and against her brother Muniyandi under section 498 of the Penal Code. Sakra was discharged from the case.

Being dissatisfied with the order of the learned 4th Additional Magistrate discharging Sakra, Subramaniam made an application before the Sessions Judge, Insein, to set aside the discharge order and to order further equiry into the case against Sakra. The learned Sessions Judge, however, by his order dated the 18th of January 1958 in his Criminal Revision Case No. 13 of 1957 dismissed the application on the ground that the person whom a married woman has remarried cannot be punished under section 494 of the Penal Code.

In the present application for revision by Subramaniam it is urged that both the Courts below had failed to consider whether or not Sakra should not have been charged under section 497 of the Penal Code as there is evidence on record to show that after the bigamous marriage, Punaram lived with Sakra as his wife.

In my opinion, both the Courts below had failed to realize that Sakra could have been charged for the offence of abetting Punaram in the commission of the offence punishable under section 494 of the Penal Code. In this connection, the observations of Kanhaiya Lal. J. in *Munir* v. *Emperor* (1) are apposite. The learned Judge said—

> "Section 494 of the Indian Penal Code makes the offence of bigamy punishable both as regards a person, having a wife living, marrying another and as regards a wife having her husband living re-marrying in any case in which such re-marriage would be void by reason of

(1) 27 Cr. L.J. p. 101.

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its taking place during the life of such wife or husband. The person to whom the woman is remarried cannot be punished under section 494. He can only be charged with abetment of that offence. Section 109 of Indian Penal Code indicates the punishment which is to be awarded for such abetment."

Furthermore, Sakra can also be prosecuted of the offence punishable under section 497 of the Penal Code since he lived with Punaram as man and wife after the performance of the bigamous marriage by Punaram. However, in my opinion, it would be much more convenient for all concerned if Subramaniam were to file a fresh complaint against Sakra for the above offences. If necessary, the case against Sakra can be tried by the same Magistrate who tried the case against Punaram and Muniyandi. For this reason alone, the application for revision would be dismissed.

APPELLATE CRIMINAL.

Before U Thaung Sein, J.

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THE UNION OF BURMA (APPELLANT)

v.

A. M. SHERAZEE (RESPONDENT).*

Public Property Protection Act, s. 6 (1)—Prosecution under—Possession of teak scantlings and planks, s. 6 (2)—Presumption.

In a prosecution under s. 6 (*1*) of the Public Property Protection Act for possession of teak scantlings and planks it does not necessarily follow that they being teak were Government property and no presumption as provided in s. 6 (*2*) of the Act can be drawn in respect of them.

Min Han (Government Advocate) for the appellant.

S. L. Verma for the respondent.

U THAUNG SEIN, J.—This is an appeal by the Government of the Union of Burma under section 417 of the Criminal Procedure Code against the order of the learned Subdivisional Magistrate, Mandalay acquitting the respondent Mr. A. M. Sherazee of an offence under section 6 (*1*) of the Public Property Protection Act in Criminal Regular Trial No. 48 of 1957 of that Court. I am of course aware that in dealing with an appeal of this nature I must be mindful of the following principles laid down in *The Union of Burma* v. *Maung Pu* (alias) *Thakin Pu* (1)—

> "In exercising the power conferred by sections 417, 418 and 423 of the Code of Criminal Procedure, the High Court should and will always give proper weight

* Criminal Appeal No. 67 of 1957 (Mandalay) against the order of acquittal passed by the Western Subdivisional Magistrate, Mandalay, in Criminal Regular Trial No. 48 of 1957, dated the 27th May 1957.

(1) (1954) B.L.R. 349.

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U THAUNG SEIN, J.

and consideration to such matters as (1) the views of the trial Judge as to the credibility of witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. In short the appeal against an acquittal should only succeed where the order was clearly wrong and involved a miscarriage of justice."

The respondent Mr. Sherazee is a building contractor and the case for the prosecution was that a quantity of illicit teak timber was traced in his possession and that as he was unable to account satisfactorily for that timber he was clearly guilty of an offence under section 6 (*1*) of the Public Property Protection Act, 1947. This section lays down that any person who is found in "unauthorized possession of any Public Property" shall be liable to imprisonment which may extend to seven years or with whipping or with both imprisonment and whipping and shall also be liable to fine. "Public Property" is defined in section 2 (*1*) of the Act as any property whatsoever belonging to the Government of the Union of Burma and section 6 (*2*) of the same Act explicitly lays down that "in any prosecution under sub-section (*1*) the burden of proving that the possession is authorized shall lie on the person in whose possession any such Public Property is found." In short, if the teak timber found in the possession of the respondent Mr. Sherazee is proved to be "Public Property" then the burden of proving that he was authorized to possess it will lie on him. It was thus incumbent on the prosecution to prove in the first instance that the timber traced in the possession of the respondent Mr. Sherazee was

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"Public Property", *i.e.*, property belonging to the Government of the Union of Burma. Admittedly, a quantity of teak scantlings or planks totalling about 7·694 tons and valued at K 8,000 was found in the house of the respondent Mr. Sherazee while they were being converted into door and window frames to be installed in the new police lines erected at the Chanmyathazi quarter and these were seized by U Saw Aung Tun (PW 2) Revenue Assistant under instructions from the Conservator of Forests. According to U Saw Aung Tun the planks in question were handsawn, unseasoned and "green" (သစ်သားစိုများ) timber and he therefore assumed that they were Government property. He is supported in this respect by a Forest Ranger named U Kyi (PW 3) who accompanied U Saw Aung Tun during the search at the respondent Mr. Sherazee's house.

Now, it should be remembered that the prosecution launched against the respondent Mr. Sherazee was not one under the Forest Act and hence the provisions of section 52 of that Act are not applicable. According to that section "when in any proceedings taken under this Act or in consequence of anything done under this Act, a question arises as to whether any forest produce is the property of the Government, such produce shall be presumed to be the property of the Government until the contrary is proved". I would repeat that since the prosecution was not one under the Forest Act, no such presumption arises in the present case and the prosecution are thus not relieved of the responsibility of proving that the timber found in the possession of the respondent Mr. Sherazee was in fact "Public Property", *i.e.*, Government property. From the mere fact that the timber was teak it does not necessarily follow that it is Government property

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though of course I am aware of the provisions of section 30 (*1*) of the Forest Act which lays down that " all standing teak trees wherever situated, except such as have been expressly alienated by Grant or lease made by or on behalf of the Union Government, shall be deemed to be the property of the Government." In the present case, we are dealing not with teak trees but with teak timber which has been converted into planks and hence the above presumption does not apply. After all, Government does allow the extraction of teak trees from the forests on payment of revenue and the logs are freely converted into scantlings and sold to the public by forest licencees. If all teak scantlings and planks were to be presumed to be Government property until the contrary is proved then indeed no one would be safe from prosecution under section 6 (*1*) of the Public Property Protection Act as almost every household owns furniture or fittings of such timber and it would be well nigh impossible to rebut the presumption in sub-section (*2*). The learned Government Advocate has frankly conceded that no such presumption does arise in respect of teak scantlings or timber.

Accepting for the sake of argument that the timber traced in the possession of the respondent Mr. Sherazee was handsawn, this fact alone would not prove that the scantlings were Government property as there is no evidence that they were converted from illicit logs *i.e.*, logs in respect of which Government revenue had not been paid. Next, it has been urged that the timber was unseasoned and hence there is reason to believe that they were converted from illicit teak logs. But in the same breath U Saw Aung Tun (PW 2) admitted that the Government was in the habit of felling

unseasoned teak trees and selling the logs by auction and I quote below his exact words in this respect—

"ကျွန်းခင်းများတွင် ကျဝ်နေသော သစ်ပင်များကို ခုတ်လဲပယ်ရှင်း ပေးရပါသည်။ ပင်ငိုပင်ကျဝ်များကို ခုတ်သည့်အခါ အစိမ်းခုတ်ပစ်ရ သည်ဆိုခြင်း မှန်ပါသည်။ ထိုခုတ်ပစ်သော သစ်များကို သစ်တောဌာနမှ လေလံ တင်ရောင်းချပစ်ရပါသည်။"

This leads on to the allegation that the timber found in the possession of the respondent Mr. Sherazee was "green" (သစ်သားစိမ်းများ). I am not quite certain whether U Saw Aung Tun (PW 2) and U Kyi (PW 3) were serious in their allegations as their statements are not in accord with the definition of "green" teak timber contained in Rule 1 (22) of the Rules under the Forest Act and reproduced at page (57) of the Burma Forest Manual. Besides, even if the timber in question was "green" this alone would not prove that it was illicit timber and thus the property of Government.

That in short was the main evidence led by the prosecution and I need hardly say that no case under section 6 (*1*) of the Public Property Protection Act was made out against the respondent Mr. Sherazee and he was thus rightly acquitted by the trial Magistrate. Accordingly this appeal fails and shall stand dismissed.

APPELLATE CRIMINAL.

Before U Aung Khine, J.

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Oct. 16.

U BA AYE AND THREE OTHERS (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

Criminal Procedure Code, s. 242—Particulars of offence—Omission to state—When illegality, s. 537—To what cases applicable.

The omission to state particulars of offence to an accused person in a summons case as required by s. 242, Criminal Procedure Code amounts to an illegality, where such omission has resulted in the unfair trial of the case and miscarriage of justice.

Whether there has been a miscarriage of justice or not is a question to be gauged by the gravity of the irregularity.

The mandatory provisions of the Code must be fully complied with by the Court in the interest of justice.

It is incumbent upon the Court to make the accused person understand clearly what is the nature of the charge made against him.

S. 537 of the Criminal Procedure Code applies to mere errors of procedure arising out of mere inadvertence and not to substantive errors of law or to cases of disregard or disobedience of the mandatory provisions of law.

The Union of Burma v. *Govindaswamy*, (1949) B.L.R. 662 (H.C.), explained.

Gopal Krishna v. *Matilal*, 54 Cal. 359; *Shadi Ranjan*, 48 Cr.L.J. 92, referred to.

Ba Swe for the appellants.

Ba Pe (Government Advocate) for the respondent.

U AUNG KHINE, J.—Sanction under section 23 (*2*) of the General Sales Tax Act, 1949, was accorded by the Assistant Commissioner of Commercial Taxes, Burma, to the Inspector of Commercial Taxes, General Sales Tax Branch, Central Circle, Rangoon, on 24th March 1954 to prosecute Ba Aye Brothers

* Criminal Appeal No. 130 of 1958 from the order of the 2nd Additional Magistrate of Rangoon in Criminal Regular Trial No. 221 of 1954, dated the 1st April 1958.

and nine others represented by its partners, namely, (1) Daw Khin Aye Than, (2) U Ba Aye, (3) U Ba Aye, (4) Bo Hla Maung, (5) Daw Chit Swe, (6) U Par, (7) U Khin Maung, (8) U Thaung, (9) U Sine Lone, and (10) Daw Kyin Nu, under section 23 (*1*) (*b*) of the General Sales Tax Act, 1949, for contravention of the provisions of section 12 (*1*) thereof. On 1st April 1954 U Soe Than, Inspector of Commercial Taxes, General Sales Tax Branch, filed a written complaint against the said ten persons before the District Magistrate, Rangoon, and the same was forwarded to the 2nd Additional Magistrate, Rangoon, for disposal. Out of the ten persons, only five, namely, U Ba Aye, U Ba Aye, U Par, U Khin Maung and Daw Kyin Nu (2nd, 3rd, 6th, 7th and 10th accused) could be served with summons. It was only on 23rd August 1955 that action under section 512 of the Criminal Procedure Code was taken against the absent accused.

The first witness in the case was examined only on 22nd February 1957, nearly three years after the complaint was filed. By then the three previous presiding Magistrates of the Court had already been transferred and it was the fourth Magistrate who completed the hearing of the prosecution witnessess in the case and shortly afterwards he was succeeded by the fifth Magistrate who recorded the evidence of the defence and passed final orders in the case. He convicted the four appellants, (1) U Ba Aye, (2) U Ba Aye, (3) U Par, and (4) U Khin Maung, under section 23 (*1*) (*b*) of the General Sales Tax Act, 1949, and fined each of them K 150 or in default to suffer one month's simple imprisonment. Accused Daw Kyin Nu was acquitted.

I have given above a summary of the slow progress made in the case so as to show what harm

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has been done in the case by the lack of interest shown by the Court in the case. I notice that adjournment after adjournment was given mechanically and not once did the Court take the initiative to cut short the proceedings. I doubt very much whether the Court realized that it was a summons case it was dealing with, when the case was eventually taken up for hearing. It looks as though the Court took up the case as if it were a warrant case and began examining the prosecution witnesses. The learned Advocate appearing for the prosecution also did not attempt to correct the procedure so adopted. In the course of the appeal when it was pointed out to the Counsel that no formal charges were framed in the lower Court against the appellants the learned Government Advocate who had been equally frantic as the learned Advocate for the appellants in the search for formal charges, informed me that the case must have been tried as a summons case. In that case I regret to note that the trial began with a legal flaw. Section 242 of the Criminal Procedure Code reads :

> "When the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted ; but it shall not be necessary to frame a formal charge."

In a summons case the trial may be said to begin when the accused is brought before the Magistrate. The gist of the offence is that the accused had failed to pay within the time allowed the sum of K 37,205-31 pyas which is the balance of the general sales tax assessed for the year 1951-52 on Ba Aye Brothers and nine others. These particulars of offence were not read out and explained to the accused and it would not be wrong to assume that the accused did not exactly

know what was the nature of the offence alleged against them. It was incumbent upon the Court to make them understand clearly what was the nature of the charge made against them.

Faced with this difficulty, the learned Government Advocate took shelter under the fact that the accused were represented by an Advocate in the lower Court and therefore it could be assumed that the accused knew what the nature of the charge against them was and consequently there was no miscarriage of justice. This is a contention which I am afraid I cannot endorse. My attention has been drawn to certain Indian rulings to show that omission to state to the accused the particulars of offence was a mere irregularity curable under section 537 of the Criminal Procedure Code where there has been no miscarriage of justice from this irregularity. In *the Union of Burma* v. *Govindaswamy* (1) I took the view that mere failure to comply with the mandatory provisions of the Code of Criminal Procedure, regarding trial of cases does not necessarily vitiate a trial. The test to be applied in such a case is to see whether the accused had a fair trial or not. On the other hand, there are numerous decisions which clearly lay down that omission to state to the accused the particulars of offence with which he is charged amounts to an illegality vitiating the trial, and not a mere irregularity curable under section 537 of the Criminal Procedure Code. See *Gopal Krishna* v. *Matilal* (2) and *Shadi Ranjan* (3).

The mandatory provisions of the Code must be fully complied with by the Court in the interest of justice. Section 537 of the Criminal Procedure Code applies to mere errors of procedure arising out of

(1) (1949) B.L.R. 662. (2) 54 Cal. 359.
(3) 48 Cr. L.J. 92.

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mere inadvertence and not to substantive errors of law or to cases of disregard or disobedience of the mandatory provisions of law. Whether there has been a miscarriage of justice or not is a question to be gauged by the gravity of the irregularity. In this case I have shown above that the Court had from the very beginning taken scant interest in the case and this is reflected by the utter disregard shown by it of the mandatory provisions of the statute. Such is the nature of the proceedings before me that I have no alternative but to hold that the error in this instance was a substantive one. This error would not have occurred but for the lack of interest shown by the Court in the proceedings. The accused were put on trial under section 23 *(1)* (*b)* of the General Sales Tax Act. This Act is comparatively a new Act and not all persons are acquainted with the provisions therein. Therefore it was all the more necessary to inform the accused the nature of the charge against them ; failure in that direction in this case makes the trial an unfair one. In these circumstances, I must take the view that there has, in fact, been a miscarriage of justice.

In the result, the convictions and sentences passed on the accused are set aside and it is directed that they be discharged, leaving it open to the Commercial Tax Department to take further action against them, if they are so advised. The fines, if already paid, must be refunded to the appellants.

APPELLATE CIVIL.

Before U Aung Khine and U Ba Thoung, JJ.

U BA SEIN (APPELLANT)

v.

KO TUN AUNG AND TWO OTHERS (RESPONDENTS).*

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Sept. 4.

Letters of Administration—Right to administer estate—Personal right—Death of person granted this right—Abatement of suit on—Right does not survive to his heirs.

Where during the pendency of the appeal from an order granting letters of administration to the plaintiff and before the letters could actually be issued to him the plaintiff died and his legal representatives were brought on record.

Held : That the power granted to a person to administer an estate ceases on his death and this personal right does not survive to his heirs and that the plaintiff's suit for letters of administration must be considered to have abated.

V. San C. Po for the appellant.

G. D. Williams for the respondents.

U AUNG KHINE, J.—The appellant Ko Ba Sein and the 1st respondent U Tun Aung (now deceased) filed rival applications for letters to administer the estate of the deceased Daw Lay, the former as a brother and the latter as the husband in the District Court of Bassein. The two applications were converted into regular suits and heard together. The learned District Judge dismissed Ko Ba Sein's application and granted U Tun Aung the letters of administration he applied for.

However, before letters could actually be issued, all the connected proceedings were called for by this Court in connection with this appeal. Pending

* Civil 1st Appeal No. 40 of 1956 against the decree of the District Court of Bassein in Civil Regular Suit No. 2 of 1955, dated the 28th March 1956.

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U AUNG KHINE, J.

appeal the respondent U Tun Aung died and his legal representatives were brought on record.

The power granted to a person to administer an estate ceases on his death and this personal right does not survive to his heirs. Here, in this case for various reasons the letters had not yet, in fact, been issued to U Tun Aung and therefore it appears to us that U Tun Aung's suit in the lower Court must be considered to have abated. The only result that can flow from this situation is that this appeal must be declared incompetent and accordingly it is dismissed. There will be no order as to costs.

U BA THOUNG, J.—I agree.

APPELLATE CIVIL.

Before U Ba Thoung, J.

U JONE BIN AND ONE (APPELLANTS)

v.

N. B. SEN GUPTA (RESPONDENT).*

H.C. 1958

Sept. 20.

Transfer of Property Act, s. 52—Lis pendis—*Transferee* pendente lite *bound by any legal decision against tranferor—Civil Procedure Code, s. 144—Restitution—Damages and mesne profits recoverable from ejector only and not from his representatives.*

Where after the respondent was ejected from the suit premises by the first appellant in the execution of a decree for ejectment and before the ejectment decree against the respondent was finally adjudicated upon, the lease of the suit premises was made by the first appellant to the second respondent.

Held: That the doctrine of *lis pendis* as embodied in s. 52 of the Transfer of Property Act applies and that the second appellant being a transferee of the suit premises *pendente lite* was bound by any legal decision against his transferor and he could not be allowed to plead that he was not bound by the decision against his transferor, the first appellant, on the ground that he was not a party thereto.

Nishi Kanta Shaha Mondal and others v. *Kumar Promotha Nath Roy and others*, A.I.R. (1 34) Cal. 145, referred to.

Held also: That possession can therefore be recovered from the second appellant also on an application under s. 144, Civil Procedure Code; but that as he was not responsible for the eviction of the respondent from the suit premises, no damages and mesne profits could be recovered from him and that these could only be recovered from the ejector, the first appellant.

Phani Bhusan Dhar v. *Anukul Mukherjee and others*, A.I.R. (1929) Cal. 590; *Sukhan Singh and others* v. *Uma Shankar Misir and others*, A.I.R. (1935) All. 65, referred to.

Ba Shun for the appellants.

N. C. Sen and *G. N. Banerji* for the respondent.

U BA THOUNG, J.—This appeal is connected with Civil Second Appeal No. 97 of 1955. The 1st appellant sued the respondent for ejectment from his house

* Civil 2nd Appeal No. 98 of 1955 against the decree of the District Court of Bassein in Civil Misc. Appeal No. 1 of 1955, dated the 5th October 1956, arising out of the decree dated the 21st July 1955 in Civil Misc. Case No. 1 of 1955 of the Subdivisional Court of Bassein.

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U BA THOUNG, J.

No. 50, Strand Road, Bassein, in Civil Regular Suit No. 7 of 1951 of the Subdivisional Court, Bassein, and obtained a decree. It was incorporated in the decree that if the respondent paid a sum of K 3,330 due as arrears of rent in five equal monthly instalments, the decree was to be rescinded. The respondent appealed against that judgment and decree to the District Court, Bassein, and the District Court, on the 10th September 1951, confirmed the decree for ejectment but the amount of arrears of rent was modified to K 2,840. The appellant then took out execution for recovery of costs and possession of the premises on 22nd September 1951 in Civil Execution Case No. 9 of 1951. On 5th November 1951 the respondent preferred a second appeal to the High Court in Civil Second Appeal No. 87 of 1951 against the judgment and decree of the District Court, but his appeal was dismissed. On 14th January 1953 the Subdivisional Court, Bassein, directed the issue of warrant of ejectment on the application made by the 1st appellant U Jone Bin; but before the warrant of ejectment could be executed, the respondent applied to the Subdivisional Court saying that he would pay the arrears of rent as ordered by the High Court and prayed for withdrawal of the warrant of ejectment. His application was, however, rejected by the then Subdivisional Judge on 31st January 1953, and an order was passed to proceed with the execution of the decree for ejectment. The respondent was forcibly evicted on 1st February 1953, and on 3rd Feburary 1953 the first appellant leased out the premises to the second appellant. In the meantime the respondent appealed against that order of the Subdivisional Judge to the District Court, and the District Court set aside the Subdivisional Judge's order of 31st January 1953 and directed that fresh

dates for payment of the instalments be imposed and that undisturbed possession of the premises be given to the respondent. The first appellant then appealed to the High Court in Civil Second Appeal No. 27 of 1953 against the order of the District Court. The High Court not only confirmed the decision of the District Court but fresh dates for payment of the instalments were fixed as the original dates for payment of instalments had lapsed ; and the High Court ordered that the ejectment decree be rescinded if the instalments were paid accordingly and that the first appellant could proceed with his execution if any instalment was defaulted by the respondent. The respondent, then paid two instalments in conformity with the High Court's judgment, and he applied again in the Subdivisional Court, under section 144 and/or section 151 of the Civil Procedure Code, for restitution of the suit premises to him and for damages, compensation and mesne profits, against both the appellants. The first appellant contended that the respondent was not entitled to restitution either under section 144 or 151 of the Civil Procedure Code ; and the second appellant contended that since he had obtained the suit premises as a monthly tenant from the first appellant, he was neither liable to restore the premises to the respondent nor was he liable to pay any damages or compensation. The learned Subdivisional Judge, by exercising the inherent powers of the Court under section 151 of the Civil Procedure Code passed an order for restitution of the premises on 21st July 1955 as against the first appellant only, and he rejected the respondent's claim for damages, etc., and for restitution as against the second appellant. The first appellant then preferred an appeal against that order to the District Court of Bassein in Civil Miscellaneous Appeal No. 3 of 1955,

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and the learned District Judge held that the respondent's application for restitution could be made under section 144, Civil Procedure Code, and that as against the second appellant also, he has held that the second appellant being a transferee of the suit premises *pendente lite* he was bound by any legal decision against his transferor, and that he could not be allowed to plead that he was not bound by the verdict against his transferor on the ground that he was not a party thereto; that the second appellant being a representative of its lessor, the first appellant, section 144, Civil Procedure Code, applies and that he was also liable to restore the suit premises to the respondent. Accordingly the learned District Judge confirmed the order of the Subdivisional Judge directing the first appellant to restore the premises to the respondent. As against the second appellant he had set aside the order of the Subdivisional Judge dismissing the application of the respondent for restitution and for damages, and he directed the second appellant also to restore possession of the suit premises to the respondent. The lower Court was also directed to hold an inquiry according to law for the purpose of granting damages, etc., as may be appropriate as against the first appellant. Hence this appeal.

I have already stated my reasons in the connected appeal in Civil Second Appeal No. 97 of 1955 that section 144 of the Civil Procedure Code applies to the application of the respondent for restitution of the suit premises, and that the Subdivisional Court need not even invoke the inherent powers under section 151, Civil Procedure Code in ordering the restoration of the suit premises; and the reasons given in that appeal apply to this appeal also.

The only question to be considered in this appeal is whether an order for restitution of the suit premises

and for payment of damages, etc., as claimed by the respondent, should be passed against the second appellant also, as the latter had contended that he had obtained the suit premises as a monthly tenant of the first appellant and that he was neither liable to restore the premises to the respondent nor liable to pay any damages, etc. I have stated earlier that the respondent was forcibly evicted on 1st February 1953 and that on 3rd February 1953 the first appellant had leased out the suit premises to the second appellant. It is therefore clear that the lease of the suit premises was made by the first appellant to the second appellant and that the latter had taken possession of the same, before the ejectment decree against the respondent was finally adjudicated upon; and there cannot be any doubt that the doctrine of *lis pendis* as embodied in section 52 of the Transfer of Property Act applies. A transferee *pendente lite* is bound by any legal decision against his transferor and he cannot also be allowed to plead that he was not bound by the decision against his transferor on the ground that he was not a party thereto. Possession can therefore be recovered from the second appellant also on an application under section 144, Civil Procedure Code; but as he was not responsible for the eviction of the respondent from the suit premises, no damages or mesne profits could be recovered from him. The damages and mesne profits could only be recovered from the ejector, the first appellant. I am fortified in this view by the case of *Phani Bhusan Dhar* v. *Anukul Mukherjee and others* (1) which is on all fours to the present case. In that case A brought a suit against P for ejectment. The suit was decreed and P was dispossessed in execution of decree. The

(1) A.I.R. (1929) Cal. 590.

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decree was finally reversed. But in the meantime A granted a lease of property to third persons. P made an application under section 144 against A and third persons. It was held: "that he was entitled to recover possession as against all including the third persons, and to mesne profits for the period he was kept out of possession from A, and not from third persons for they were not responsible for depriving P of his possession of property."

The learned counsel for the appellant has referred to me the case of *Rajjabali Khan Talukdar* v. *Faku Bibi* (1). In that case one Rajjabali had instituted a suit for possession against the defendant and obtained an *ex parte* decree. He executed certain sub-leases in favour of third persons. Subsequently the *ex parte* decree was set aside, and Rajjabali's suit was eventually dismissed. The successful defendant applied for restitution against the sub-lessees let into possession by Rajjabali. The learned Judges held:

> "That the sub-leases were created by Rajjabali in favour of the opposite parties Nos. 13 to 23, not under the decree nor as a direct or immediate consequence of it, and, as the said defendants were strangers to the litigation and were in no sense the legal representatives of Rajjabali, no order of restitution should have been made against them."

The view expressed by the learned Judges in the above case was not accepted in the case of *Sukhan Singh and others* v. *Uma Shankar Misir and others* (2) where it was held that—

> "Section 144 makes it imperative, where a decree passed by the Court of first instance is reversed on appeal, that the Court should place the winning party in the position which he or she would have occupied but for such decree. The winning party is entitled to have her

(1) I.L.R. 58 Cal. 1070. (2) A.I.R. (1935) All. 65.

> land restored to her free from all encumbrances, including any tenancy that might have been created in the meantime by the party who was successful in the first Court but eventually was found to have no title to the land. Restitution under section 144 can be claimed not only against the opposite party, but also his representatives or persons deriving title from him."

I am respectfully of the same view as expressed in the case of *Sukhan Singh and others* v. *Uma Shankar Misir and others* (1) that restitution under section 144 can be claimed not only against the opposite party, but also his representatives or persons deriving title from him. The order of the Subdivisional Judge of 31st January 1953 was reversed on appeal, and it is imperative that the Court should place the respondent who is the winning party in the same position which he would have occupied but for the erroneous order of the Subdivisional Judge. The third party Taik Gwan and Company (second appellant) took the benefit through the first appellant U Jone Bin through an erroneous order of the Subdivisional Judge, and that order has been set aside on appeal. The second appellant Taik Gwan and Company is only a representative of the first appellant U Jone Bin. In the commentaries under section 47 of the Civil Procedure Code, (D. F. Mulla's Civil Procedure Code, 12th Edition, Volume I, page 186), under the heading "Representatives", the learned Author Sir Dinshaw F. Mulla had stated "The term 'representatives' in this section includes not only 'legal representative' in the sense of heirs, executors or administrators, but also 'representative in interest' that is, any transferee of the decree-holder's interest, or any transferee of the judgment-debtor's interest, who so far as such interest is

(1) A.I.R. (1935) All. 65.

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concerned is bound by the decree". Several authorities have been quoted in support of this statement. In the present case the second appellant is only a transferee of the first appellant's interest which the latter had obtained under the erroneous order of the Subdivisional Judge, and when that order is reversed on appeal, he is bound by that order. In the case of *Nishi Kanta Shaha Mondal and others* v. *Kumar Promotha Nath Roy and others* (1) it was held:—

> "That a lessee inducted on the land by the judgment-debtor pending litigation is a representative of his judgment-debtor within the meaning of section 47 and is bound by the decree passed against the judgment-debtor."

For the reasons stated I uphold the judgment and decree of the lower appellate Court. The appeal is dismissed with costs. Advocate's fees fixed at K 85 as against the first appellant. There will be no order as to costs as against the second appellant.

(1) A.I.R. (1934) Cal. 145.

APPELLATE CIVIL.

Before U San Maung, J.

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U NYI (APPELLANT)

v.

Sept. 5.

U HLA BAW (RESPONDENT).*

*Tenancy Disposal Act, 1953—Exemption from operation of—Question of fact—Jurisdiction of special Tribunals created under the Act arises on determination of—Jurisdiction of civil court to consider the correctness of decision on question—Question of exemption of land from operation of the Act—Civil court to determine—Civil Procedure Code, s. 11—*Res judicata.

In Civil Regular Suit No. 10 of 1956 of the Subdivisional Court of Moulmein the Respondent obtained a declaration against the Appellant and two others that the 22 acres of paddy land belonging to him having been cultivated by him as owner agriculturist was exempted from the operation of the Disposal of Tenancies Act. Inspite of this declaration the Appellant entered into possession of the suit land and the Respondent, therefore, filed a suit for possession of the land in question together with standing crops thereon against the Appellant in Civil Regular Suit No. 30 of 1956 of the same Court. In this suit the Appellant contended that the decree passed in Civil Regular Suit No. 10 of 1956 of this Court was a nullity in view of s. 8 of the Disposal of Tenancies Act, 1953. This section provides that the orders passed by the authorities empowered by the President under s. 4 of the Act could not be questioned in a court of law. The court accepted this contention and dismissed the suit.

On appeal by the Respondent the District Court of Amherst set aside the judgment and decree of the Subdivisional Court of Moulmein and passed a decree as prayed for by the Respondent on the ground that civil courts have jurisdiction to consider whether a Village Agricultural Committee or a District Agricultural Committee has jurisdiction to deal with a matter which it has decided and that therefore a suit for a declaration that the Disposal of Tenancies Act is not applicable to a particular piece of land in view of the proviso to s. 3 of the Act, is maintainable in law. The lower appellate Court also held that the issue whether the particular land in suit was not so exempt was *res judicata* in view of the decision in the previous suit.

Held: That the question whether a certain piece of land is or is not exempt from the operation of the Disposal of Tenancies Act, because it comes within proviso (*a*) to s. 3 thereof is a fact upon the determination of which the jurisdiction of the special Tribunals created under the Disposal of Tenancies Act arises. Therefore, civil courts have jurisdiction to consider whether or

* Civil 2nd Appeal No. 10 of 1958 against the decree of the District Court of Amherst in Civil Appeal No. 26 of 1957.

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not the question has been correctly decided so as to give jurisdiction to the special Tribunals created by the Act in the absence of anything in the Act to show that such special Tribunals have exclusive jurisdiction to determine this matter.

Maung Chaw v. *Ma Aye Ma and three others*, (1955) B.L.R. 89 (H.C.), followed.

Chandmal Jaskaran v. *Chhaganlal Pratap*, (1951) A.I.R. Madhya Bharat 63; *In the State of Bombay* v. *The Maharashtra Sugar Mills Ltd.*, (1951) A.I.R. Bom. 68, referred to.

Held also: That it is for the civil court to determine whether or not the land in suit is exempted from the operation of the Disposal of Tenancies Act.

Sardar Mohammad Nawaz Khan v. *Bhagata Nand*, 65 I.A. 301, referred to.

Held further: That regarding the question of *res judicata* the Appellant was undoubtedly bound by the declaration in the former suit.

Mon San Hlaing for the appellant.

S. A. A. Pillay for the respondent.

U SAN MAUNG, J.—This is an appeal against the judgment and decree of the District Court of Amherst in Civil Appeal No. 26 of 1957 reversing the judgment and decree of the Subdivisional Court of Moulmein in dismissing the plaintiff-respondent U Hla Baw's suit in Civil Suit No. 30 of 1956 of that Court. The facts giving rise to the present litigation are briefly as follows:—

In Civil Regular Suit No. 10 of 1956 of the Subdivisional Court of Moulmein the present respondent U Hla Baw as plaintiff sued: (1) Maung Nyi, the present appellant, (2) U Aung Tin, President of the Ba Ta La Sa of Chaungzon and (3) the Tenancy Disposal Committee of Nyaunglan village by its Chairman U Lu Thit for a declaration that he being a person whose principal means of livelihood is agricultural, the 22 acres of land in suit which he owned was exempt from the operation of the Disposal of Tenancies Act of 1953 in view of the proviso (*a*) to section 3 of the Act. His case was that in the year 1954-55 owing to indisposition he had allowed the

defendant Maung Nyi to cultivate the land for one season only; that in the ensuing year, namely, 1955-56, Maung Nyi taking advantage of this fact applied to the Nyaunglan Tenancy Disposal Committee to let the said land to him as a tenant and that this was done in spite of his objections; that even in that year he himself cultivated the land although the same had been allotted to Maung Nyi by the Tenancy Disposal Committee of Nyaunglan and that for the current year, namely, 1956-57, he had been served with a notice by the defendant U Aung Tin as President of the Ba Ta La Sa, Chaungzon, not to work the land as it was to be allotted to Maung Nyi by the Tenancy Disposal Committee of Nyaunglan.

All the defendants in that case filed written statements. Maung Nyi said that he intended to work the land for the current year because he had obtained the necessary permission from both the Village Tenancy Disposal Committee and the Town Security Committee. U Aung Tin said that Maung Nyi had been given the necessary permission to work the land by the Village, District and Divisional Tenancy Disposal Committees. The attitude of the Nyaunglan Tenancy Disposal Committee, however, was that the land had not yet been allotted either to the plaintiff or to Maung Nyi. The case proceeded *ex parte* as none of the defendants appeared subsequently to contest the same and after examining the witnesses cited by the plaintiff U Hla Baw, an *ex parte* decree was passed declaring that the plaintiff was the owner of 22 acres of paddy land which had been cultivated by him as his principal means of subsistence in his capacity as owner agriculturist and that therefore the land was exempted from the operation of the Disposal of Tenancies Act. In coming to this

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conclusion the learned Subdivisional Judge (U Maung Maung Lwin) relied upon the observation of the Supreme Court in *Maung Wein and three others* v. *The District Agricultural Committee of Tharrawaddy and three others* (1) where it was held that under the provision of section 3, proviso (*a*) of the Disposal of Tenancies Act, owners of land are entitled as of right to remain in possession when it is proved that they are engaged in the cultivation of the land with their own hands as their principal means of subsistence, and that neither the Village Agricultural Committee nor the District Agricultural Committee on appeal have the power under the said proviso to dislodge the owner.

It would appear that in spite of this declaration the defendant Maung Nyi entered into possession of the suit land apparently with the permission of the Nyaunglan Village Tenancy Disposal Committee. U Hla Baw therefore had to file another suit, this time for possession of the suit land together with the standing crops thereon. In this suit, namely, Civil Regular Suit No. 30 of 1956 of the Subdivisional Court of Moulmein, the plaintiff U Hla Baw averred that he had obtained a declaration in the previous suit in the manner already set out above and that in spite of this declaration the defendant Maung Nyi had forcibly entered upon the land and planted paddy thereon. The defendant U Nyi by his written statement contended, *inter alia*, that the decree passed in Civil Regular Suit No. 10 of 1956 of the Subdivisional Court of Moulmein was a nullity in view of section 8 of the Disposal of Tenancies Act, 1953. This section provides that the orders passed by the authorities empowered by the President under section 4 of Act could not be questioned in a court

(1) (1951) B.L.R. 222.

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of law. The Village Tenancy Disposal Committee and authorities higher to that Committee are undoubtedly those contemplated by section 8 of the Act.

The learned Subdivisional Judge, Moulmein (U Myint Kyi Dwe) who tried this case accepted this plea and dismissed the plaintiff's suit with costs. On appeal by the plaintiff U Hla Baw to the District Court of Amherst, the learned District Judge relying upon the ruling in the case of *Maung Chaw* v. *Ma Aye Ma and three others* (1) held that Civil Courts had jurisdiction to consider whether a Village Agricultural Committee or a District Agricultural Committee has jurisdiction to deal with a matter which it has decided and that therefore a suit for a declaration that the Disposal of Tenancies Act is not applicable to a particular piece of land in view of the proviso to section 3 of the Act, is maintainable in law. Furthermore, the learned District Judge held that the issue whether the particular land in suit was or was not so exempt was *res judicata* in view of the decision in the previous suit. In the result, the judgment and decree of the Subdivisional Court, Moulmein, dismissing the plaintiff U Hla Baw's suit was set aside and instead, there was a decree as prayed for by the plaintiff with costs in both Courts. Hence, the present appeal by the defendant-appellant Maung Nyi under clause (*d*) of section 100 of the Civil Procedure Code.

Now, apart from the fact that I am bound by the decision of a Bench of this Court in *Maung Chaw* v. *Ma Aye Ma and three others* (1) relied upon by the learned District Judge, nothing that has been canvassed before me by the learned Advocate for the defendant-appellant has convinced me that the decision in the above case is incorrect. The sheet

(1) (1955) B.L.R. 89 (H.C.).

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anchor of the learned Advocate's argument is the decision of the Supreme Court of India in *Rai Brij Raj Krishna and another* v. *Messrs. S. K. Shaw and Brothers* (1). There it was held that where the Bihar Buildings (Lease, Rent and Eviction) Control Act of 1947 had entrusted the Controller with a jurisdiction which included the jurisdiction to determine whether there was non-payment of rent or not as well as the jurisdiction, on finding that there was non-payment of rent, to order eviction of a tenant, the order of the Controller could not be questioned in a Civil Court even it the Controller wrongly decided the question of non-payment of rent and ordered the eviction of the tenant.

However, it is clear that under section 18 (3) of the Act the order of the Controller was final subject only to the decision of the Commissioner and such order was not liable to be questioned in any court of law whether in a suit or other proceeding by way of appeal and revision. In these circumstances it could be considered that the question whether or not there was non-payment of rent for the purpose of ejectment under the Act was within the exclusive jurisdiction of the Controller. In this connection the observations of a Bench of the High Court of Madhya Bharat in *Chandmal Jaskaran* v. *Chhaganlal Pratap* (2) are apposite. The learned Judges said :

> " This general principle cannot be better stated than as put by the Privy Council in *Colonial Bank Australarian* v. *William* (3). Their Lordships stated in this case that where an order of a quasi-judicial authority is objected to before a Court, it has to be seen whether the objection relates ' to defect of jurisdiction, founded on the character and constitution of the tribunal, the nature of the subject-matter of the inquiry, or the absence of

(1) A.I.R. (1951)(S.C.). 115. (2) (1951) A.I.R. Madhya Bharat 63.
(3) L.R. 5 P.C. 417.

some preliminary proceedings which was necessary to give jurisdiction to it.'

If any of these things is established, the order is *coram non judice* and void. If, however, 'the objection rests solely on the ground that the tribunal has erroneously found a fact which it was competent to try, the objection cannot be entertained.'

In view of these Privy Council decisions with which we are in respectful agreement, it is not necessary to examine the large number of cases referred to by Mr. Samvatsar on behalf of the appellant, to point out the distinction between an erroneous decision and a decision that is a nullity and stress the principle that so long as a body constituted by Statute acts within its powers, its orders, whether right or wrong, cannot be challenged except in the manner and to the extent prescribed in the Statute, and the Courts of the ordinary jurisdiction cannot question them ."

In the State of Bombay v. *The Maharashtra Sugar Mills Ltd.* (1) a Bench of the Bombay High Court held that "when there is a collateral fact upon the determination of which the jurisdiction of a Tribunal arises, if the Tribunal decides the collateral facts erroneously and assumes jurisdiction, the superior Court can always correct the decision of the inferior Court and that the fact must be such as is necessary to decide in order to assume jurisdiction."

In *Sardar Mohammad Nawaz Khan* v. *Bhagata Nand* (2) where the mahant of a shrine filed a suit for declaration that he was not liable to pay *haq buha* (door tax) which was a customary village-cess, on the ground that he did not belong to the class of persons from whom such a tax could be demanded their Lordships of the the Privy Council observed :

"On the first point, their Lordships are of opinion that the appellant's contention is right, but they will preface their decison by stating that had the suit brought in the civil court been a suit to declare that *haq buha*

(1) (1951) A.I.R. Bom. 68. (2) 65 I A. 301.

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was not a village-cess within the meaning of the Act of 1887, and that the Revenue courts had not jurisdiction in respect thereof, such a suit could not have been regarded as incompetent. On principle it is for the civil court to determine in the last resort the limits of the powers of a court of special jurisdiction, and no statutory provision to the contrary has been drawn to their Lordships' attention in the present case."

In the case now under consideration, the question whether a certain piece of land is or is not exempt from the operation of the Disposal of Tenancies Act, because it comes within proviso (*a*) to section 3 thereof is a fact upon the determination of which the jurisdiction of the Tribunals created under the Disposal of Tenancies Act arises. Therefore, civil courts have jurisdiction to consider whether or not the question has been correctly decided so as to give jurisdiction to the special Tribunals created by the Act in the absence of anything in the Act to show that such special Tribunals have exclusive jurisdiction to determine this matter. In these circumstances, the observations of the Privy Council in *Sardar Mohammad Nawaz Khan*'s case (1) are very apposite and it is for the civil court to determine whether or not the land in suit is exempted from the operation of the Disposal of Tenancies Act.

Regarding the question of *res judicata* the defendant-appellant is undoubtedly bound by the declaration in the former suit that the plaintiff-respondent was a person whose principal means of livelihood was cultivation and that the 22 acres of paddy land was in his possession as owner agriculturist and that therefore it was exempt from the operation of the Disposal of Tenancies Act.

In the result, the appeal fails and is dismissed with costs, Advocate's fee three gold mohurs.

(1) 65 I.A 301.

APPELLATE CIVIL.

Before U Po On, J.

H.C. 1958

Oct. 14.

U SAW HLA MAUNG (APPELLANT)

v.

U OHN SHWE (RESPONDENT).*

Urban Rent Control Act, s. 14 (1)—"Arrears of rent"—Expression—Includes rent accumulated up to time of decree—Limitation Act—Applicability of—In determining arrears of rent.

The expression "arrears of rent" occurring in s. 14 (*1*) of the Urban Rent Control Act should cover not only the rent mentioned in the notice given under s. 11 (*1*) of the Act, but also the subsequent accumulation of rent up to the time the decree was passed.

Komoruddin v. *Daw Hla Thein*, (1958 B.L.R., 8 H.C.) C.M.A. No. 1 of 1956 of High Court, Rangoon, followed.

In a suit for ejectment for non-payment of rent the plaintiff is not entitled to a decree for payment of those arrears of rent, the claim for which is barred by the law of limitation.

~~Aung Min (2)~~ for the appellant. Tun Lwin (3).

~~S.K.N. Aiyar~~ for the respondent. U. Kyaw (1).

U PO ON, J.—U Ohn Shwe, the respondent, got a decree to evict U Saw Hla Maung, the appellant, from the lst floor of the house known as House No. 83, Judah Ezekiel Street, Rangoon, on account of the non-payment of the rent from the 1st January 1948.

The suit took over three years to get it finally decided.

When the respondent took out an execution to evict the appellant from the room, the latter made an application to the Court for permission to pay the arrears of rent by K 30 per month and for rescission of the decree under section 14 (*1*) of the Urban Rent Control Act.

* Civil Misc. Appeal No. 20 of 1958 against the order of the 3rd Judge of the City Civil Court, Rangoon, in Civil Regular Suit No. 649 of 1954, dated the 10th May 1957.

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The respondent objected on the ground that a monthly instalment of K 30 was too little for the sum of K 7,260 being the rent due for 121 months (*i.e.*, from 1st January 1948 to the date of application for rescission of the decree).

The lower Court held that though the rent due might be for (121) months, the respondent could not get in view of the law of limitation more than the rent for those three years prior to the date of suit and for those three years from the date of suit to the date of decree; and consequently, it directed the appellant to pay K 4,320 being the arrears of rent for six years by monthly instalment of K 350.

The appellant now has brought this appeal contending that the lower Court has no jurisdiction to order the payment of rent for those three years from the date of suit to the date of decree and that the rate of monthly instalment directed to be paid was exorbitant.

The respondent, on the other hand, contended in his cross-objection that as the "arrears of rent" in section 14 (*1*) of the Urban Rent Control Act should be interpreted as all the rent due by the tenant to the landlord, the lower Court was wrong in taking into consideration the law of limitation in interpreting the meaning of "arrears of rent".

With regard to the contention of the appellant that the lower Court has no jurisdiction to order the payment of the rent for the period from the date of suit to the date of decree, a complete answer will be found in *Komoruddin* v. *Daw Hla Thein* (1). I am bound by this ruling, as it is a case decided by a Bench of this Court. The law laid down there is as follows:

> ". . . . An objection was filed on behalf of the appellant stating that the decree-holder was not entitled

(1) Civil. Misc. Appeal No. 1 of 1956. (1958) B.L.R. 8 H.C., followed.

in law to claim anything more than the arrears of rent as mentioned in the notice sent and that the decree-holder was only entitled to the arrears of rent up to 31st July 1953. The objection was overruled on the ground that no authority had been furnished by the appellant for the Court to take the view as submitted by him. On the other hand, the decree-holder filed a certified copy of the Judgment in Civil Miscellaneous Appeal No. 4 of 1953 of this Court in *G. C. Mukarjee* v. *A.K.M. Peer Mohamed* (a) *U Ohn Gaing* in which an opinion was expressed *obiter* by U San Maung, J. that the term "arrears of rent" occurring in section 14 (*1*) seems wide enough to include the "arrears outstanding against the judgment-debtor at the time payment by instalment or otherwise of such arrears of rent was ordered as a condition precedent to the rescission of the ejectment decree. We are entirely in accord with this expression of opinion as it would be hardly fair to the respondent that she should be driven to another suit against the appellant for the arrears of rent that had been accumulated since the filing of the suit and the passing of a consent decree.

There has been no previous decision in this Court to define what 'arrears of rent' exactly means: whether it covers only the rent as claimed in the notice sent to the defendant by the plaintiff under section 11 (*1*) of the Act or whether it also covers the rent which accrued subsequent to the filing of the suit up to the date of the decree. It is our considered opinion that the reasonable view that should be taken in a case like this is to treat the arrears of rent not only the amount as mentioned in the notice but also the subsequent accumulation of rent up to the time the decree was passed."

Section 3 of the Limitation Act contemplates that:

"Subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made after the period of limitation prescribed therefor by the First Schedule shall be dismissed, although limitation has not been set up as a defence.

Explanation.—A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer; in the

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case of a pauper, when his application for leave to sue as a pauper is made ; and, in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator."

This section is also a complete answer to the contention of the respondent that he is entitled to get the rent due for 121 months. In other words, he can get only that arrears of rent for the period which is within the period prescribed by the law of limitation, because the claim for the rent which is barred by the law of limitation is not a legal claim that can be recognized by the Court of law.

One point more. It may be that the rate of monthly instalment ordered to be paid is too much for the appellant who is getting K 212.50 per month. As the rent due is K 4,320 it will take twelve years to pay it, if the Court orders the appellant to pay it by monthly instalment of K 30. It will be very unfair to the respondent, if he has to wait for 12 years to get his rent fully paid up. On the other hand, the appellant will not be able to pay K 350 per month, as he is getting K 212·50 per month only. But the fault lies with him, as he did not pay the house rent regularly. I do not think that the respondent should suffer for the fault of the appellant.

The appeal of the appellant and the cross-objection of the respondent are therefore dismissed. No costs.

CRIMINAL REVISION.

Before U San Maung, J.

U SEIN BWINT AND ONE (APPLICANTS)

v.

U BA THAN (RESPONDENT).*

H.C. 1958

Oct. 23.

Amalgamation of complaints against two sets of accused—Trial of two sets of accused in one trial for offences committed on different dates—Legality.

Where two complaints, one against five accused and another against two of the said five accused for similar offences alleged to have been committed two months after the first offences complained of, were amalgamated and the two sets of accused were tried in one trial.

Held : That there is no provision of law by which the said two complaints could be amalgamated and the accused mentioned therein tried together in the same case and that the proceedings was void *ab initio.*

Osman Mistry and another v. *Atul Krishna Ghosh and another*, A.I.R. (1949) Cal. 632, referred to.

N. R. Majumdar for the applicants.

Ba Thin (3) (Government Advocate) for the respondent.

U SAN MAUNG, J.—On the 7th May 1958 U Ba Than, a retired Police Officer, filed two criminal complaints before the District Magistrate of Toungoo. In one complaint he charged U Sein Bwint, his wife Ma Mya May, his son Maung Mya Han and his daughters Ma Khin Hla and Ma Ni of having committed offences punishable under sections 379,324 read with section 511 and section 448 of the Penal

* Criminal Revision No. 117 (B) of 1958. Review of the order of the 2nd Additional (Special Power) Magistrate of Toungoo, in Criminal Summary Trial No. 66 of 1958, dated the 7th July 1958 on the recommendation of the Sessions Judge, Toungoo, made in Criminal Revision No. 59 of 1958, on the 14th August 1958.

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Code for alleged criminal trespass, theft and attempt to commit hurt with dangerous weapon. The offence was said to have been committed at 3 p.m. on the 3rd March 1958 when the accused tried to gather the fruits from the cocoanut tree alleged to be in the complainant's possession. In the second complaint, U Ba Than charged U Sein Bwint and his son Maung Mya Han of having committed offences punishable under sections 379, 426 and 500 of the Penal Code in connection with the same cocoanut tree on the 3rd May 1958 at 11 p.m. Both the complaints were forwarded to the 2nd Additional (Special Power) Magistrate U Thein Pe for disposal and the learned Magistrate after the examination of the complainant U Ba Than on oath amalgamated them in the same proceedings, namely, Criminal Regular No. 66 of 1958, and directed that summonses should be issued against the accused persons for alleged offences under sections 379 and 477 of the Penal Code. In the diary entry dated the 8th May 1958 the learned Magistrate observed that the offences alleged in the two complaints occurred at the same time, which is a very glaring mistake as the first complaint related to the offences alleged to have been committed on the 3rd March 1958 at 3 p.m. and the second complaint related to the offences alleged to have been committed on the 3rd May 1958. The case was tried summarily and the accused U Sein Bwint and Maung Mya Han were convicted of offences punishable under sections 379 and 504 of the Penal Code, while the other accused, namely, Ma Mya May, Ma Khin Hla and Ma Ni, were acquitted.

U Sein Bwint and Maung Mya Han then filed an application for revision before the Sessions Judge of Toungoo and the learned Sessions Judge by his order

of reference in Criminal Revision Case No. 59 of 1958 has recommended to this Court either to set aside the convictions and sentences on them and order a re-trial or to set aside the convictions and sentences on them under section 379 of the Penal Code. The learned Sessions Judge in making this recommendation observed that the trial was void *ab initio* and that at any event U Sein Bwint and Maung Mya Han could not be convicted of the offences punishable under section 379 of the Penal Code as they were acting under a *bonâ fide* claim of right.

In my opinion, the convictions and sentences on the two accused U Sein Bwint and Maung Mya Han under sections 379 and 504 of the Penal Code should be set aside and a re-trial ordered as the proceedings against them was void *ab initio.* Persons accused of more than one offence of the same kind within the meaning of section 234 committed by them jointly within the period of 12 months may be charged and tried together as provided for in clause (*c*) of section 239 of the Criminal Procedure Code; but there is no provision of law by which the two present complaints could be amalgamated and the accused mentionad therein tried together in the same case. As already observed in respect of the first complaint summonses were issued not only against U Sein Bwint and Maung Mya Han but also against Ma Mya May, Ma Khin Hla and Ma Ni for alleged offence under sections 379 and 447 of the Penal Code, while in respect of the second complaint summonses were issued against U Sein Bwint and Maung Mya Han for the same offences. Therefore, the five accused in the one case and two accused in the other could not be tried together in the same proceedings.

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In *Osman Mistry and another* v. *Atul Krishna Ghosh and another* (1) an offence was committed by three persons. Six days later a second offence punishable under the same section of the Penal Code was committed by these three persons along with three more persons. The two cases were separately started but the Magistrate subsequently amalgamated the cases and tried the accused jointly for the two offences. It was held that the trial was illegal as the accused persons in the two cases could not be charged and tried together under any of the provisions of the Code of Criminal Procedure.

For these reasons, I would set aside the convictions and sentences on the accused U Sein Bwint and Maung Mya Han under sections 379 and 504 of the Penal Code and direct that the cases against them be retried by some other Magistrate other than the 2nd Additional (Special Power) Magistrate U Thein Pe, as may be selected by the learned District Magistrate, Toungoo.

(1) A.I.R. 1949) Cal. 632.

CIVIL REFERENCE.

Before U Aung Khine, U Po On and U Ba Nyunt, JJ.

U THAN HTAY (APPLICANT)

v.

MYINT MYINT YEE (*a*) DOROTHY KE (RESPONDENT).*

H.C. 1958

Oct. 20.

Burma Divorce Act, s. 17—Duty of Court to go into facts before passing decree for dissolution of marriage—Confirmation of decree for dissolution—Objection to—Where filed.

Where the wife and her paramour admitted adultery alleged by the husband and where the husband declared that there was no collusion between the parties to obtain a dissolution of the marriage, such admissions and declarations ordinarily would not absolve the Court from its duty to go into the facts of the case to see whether circumstances exist to justify passing of a decree for dissolution of marriage.

All objections against confirmation of the decree for dissolution of marriage must be made in the High Court and not before the Court which passes the decree.

Ba Aye for the applicant.

Nil for the respondent.

Gangooly (Government Advocate) as *Amicus Curiae*.

U PO ON, J.—This is a reference made by the District Judge, Taunggyi, under section 17 of the Burma Divorce Act asking the Court to confirm the decree for dissolution of marriage at the instance of the applicant U Than Htay. The decree for dissolution of marriage in this case was made on 24th December 1955 and ordinarily it should have come up for confirmation after the expiry of time limited

* Civil Reference No. 4 of 1957. Reference made by the District Judge, Taunggyi, under s. 17 of the Burma Divorce Act, for confirmation of the decree *nisi* for dissolution of marriage passed in Civil Regular No. 1 of 1955, dated the 7th January 1957.

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by the Act, *i.e.*, 6 weeks after the order was pronounced. Further time had been wasted by the lower Court in matters arising out of the proceedings which were no longer within its province for determination. In all these cases any objection against confirmation by parties interested must be made in this Court and not before the Court which passes the decree. These procedural defects, however, in our opinion, do not affect the merits of the case.

The ground on which the dissolution of marriage was sought is adultery. It is the case of the applicant that his wife Myint Myint Yee (*a*) Dorothy Ke had on divers occasions committed adultery in his own house with the co-respondent Sao Tun Gyaw. Both Myint Myint Yee and Sao Tun Gyaw admitted the allegation made and needless to say, provided there is no collusion between the parties this is a valid ground for divorce. A reading of the judgment of the lower Court shows that the order for dissolution of the marriage was based merely on the admission of the wife and her paramour coupled with the declaration of the applicant that there was no collusion between the parties to obtain a dissolution of the marriage. Such admissions and declarations ordinarily would not absolve the Court from its duty to go into the facts of the case to see whether circumstances exist to justify passing of a decree for dissolution of marriage.

The parties are Christians and their marriage was duly solemnized in the presence of Reverend U Ba Te on 26th April 1946 as per Exhibit "ဣ". Four children—three daughters and one son—were born to them and they are still alive and at present are living together with the applicant. The wife has now left the protection of the applicant and is living elsewhere.

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The parties belong to a higher rung of social status; their recorded statements, in our view, have a ring of truth and as such are worthy of acceptance. There is no reason why they should break up their family ties, especially after four children had been born to them unless what the applicant alleges is absolutely true.

Accordingly, we confirm the decree for dissolution of marriage granted by the District Judge. There will be no order as to costs.

ရာဇဝတ်အယူခံ

တရားလွှတ်တော် တရားဝန်ကြီးချုပ် ဦးချန်ထွန်းအောင်၊ တရားလွှတ်တော် ဝန်ကြီး ဦးစံမောင်နှင့် တရားလွှတ်တော်ဝန်ကြီး ဦးဘသောင်းတို့ရှေ့၌

† ၁၉၅၈ အောက်တိုဘာ လ ၂၄ ရက်။

ချစ်လှိုင်၊ ထွန်းဝိုင်း၊ သိန်းအောင် ပါ ၂ ၂ ဦး (အယူခံ တရားလိုများ)

နှင့်

ပြည်ထောင်စုမြန်မာနိုင်ငံတော် (အယူခံတရားခံ)။*

ရာဇဝတ်ကျင့်ထုံး ပုဒ်မ ၃၄၂ (၁)အရ၊ တရားခံတဦး၏ ကျမ်းဖြင့်အစစ်ခံချက်၊ အခြားတရားခံများအပေါ်တွင် အသုံးပြုခြင်း၊ ပုဒ်မ ၂၁၅ (၁) ပြဋ္ဌာန်းချက်၊ ပုဒ်မ ၁၆၂ (၁) ရဲအရာရှိထံ၌ ရေးသားထားသော အစစ်ခံချက်ကို သုံးခြင်းနှင့်သုံးစွဲနည်း၊ တားမြစ်ချက်၊ အမှုဖွင့်ထည့်သွင်းစဉ်းစားနိုင်ခြင်း။

ပြဿနာထီးတပ်သားများဟု ဆိုသောသူများ။

နိုင်ငံတော်သမတ၏ ၁၉၅၀ ခုနှစ်၊ ဇူလိုင်လ ၃၀ ရက်နေ့တွင် ထုတ်ပြန်သော လွှတ်ငြိမ်းချမ်းသာခွင့်အမိန့်၊ အပိုဒ် (၃) "လက်နက်ကိုင်တော်လှန်မှု၊ သောင်းကျန်းမှုတို့ ပယောက်ရန်၊ နှိမ်နင်းရန် လုပ်ကိုင်ဆောင်ရွက်ရာ၌" ဆိုသောစကား၏အဓိပ္ပါယ်။ မည်သည့် အခါ ကျူးလွန်သောပြစ်မှုကိုသာ လွှတ်ငြိမ်းခွင့်ပြုခြင်း၊ ဖြောင့်ချက်၊ အသုံးပြုခြင်း၊ Confession—Whether statement amounts to—Tests to determine.

ဆုံးဖြတ်ချက်။ ။တရားခံတယောက်၏ ရုံးတော်တွင် ကျမ်းဖြင့်အစစ်ခံချက်ကို၊ အခြားတရားခံများအပေါ်တွင်၊ တရားလိုဘက်မှ စွဲချက်တင်နိုင်သော အခြားခိုင်လုံသောစွပ်စွဲချက်မရှိပါက၊ ရာဇဝတ်ကျင့်ထုံး ပုဒ်မ ၃၄၂ (၁)အရ၊ ထိုတရားခံ၏ ကျမ်းဖြင့်အစစ်ခံသော အစစ်ခံချက်ကို၊ အကြီးအကားပြု၍ အပြစ်မပေးနိုင်၊ ထိုကျမ်းကျိန်အစစ်ခံချက်မှာလည်း၊ အခြားပေါ်လွင်သော သက်သေခံချက်များ၏ အထောက်အထားအနေနှင့်သာသုံးနိုင်သည်။

တနေ့တည်းတွင် ၃ နေရာ၌ ကျူးလွန်သောပြစ်မှုများသည် တခုနှင့်တခုဆက်တည်းဖြစ်ပြီး၊ တခုတည်းသော ပြဿနာဆောင်ရွက်မှုမှပေါ်ပေါက်လာသော၊ တဆက်တည်းသော ပြဿနာများဖြစ်သော်၊ ယင်းသို့ကျူးလွန်သောအမှုများကို အမှုတမှုတည်းတွင် စီရင်စစ်ဆေးနိုင်ကြောင်း၊ ရာဇဝတ်ကျင့်ထုံး ပုဒ်မ ၂၁၅ (၁)က အတိအလင်းပြဋ္ဌာန်းထားသည်။

သက်သေတဦးတယောက်သည်၊ ရဲအရာရှိထံ၌ ရေးသားထားသော အစစ်ခံချက်ဟုခ

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* ၁၉၅၀ ခုနှစ်၊ ရာဇဝတ်အယူခံမှုအမှတ် ၁၄၇၊ ၁၄၀ နှင့် ၁၆၂။ ၁၉၅၁ ခုနှစ်၊ ရာဇဝတ်စောဒက အမှုအမှတ် ၀။

† ၁၉၅၇ ခုနှစ်၊ ရာဇဝတ်ကြီးမှုအမှတ် (၂)တွင် ချမှတ်သော ၁၉၅၀ ခုနှစ်၊ မေလ ၂၀ ရက် နေ့စွဲပါ အထူးရာဇဝတ်ခုံရုံးတော် တရားသူကြီးများ၏အမိန့်ကိုအယူခံမှု။

ပေးထားသော် ထိုအစစ်ခံချက်သည် ထိုသက်သေ ရုံးရှေ့တွင်၊ အစစ်ခံသော ထွက်ချက်နှင့် ဖိလာဖြစ်နေလျှင်၊ ထိုသက်သေအစစ်ခံချက်၏ တန်ရာတန်ဘိုးကို ပျက်စီးစေလိုသောသဘော ဖြင့် တရားလိုဘက်ကသော်၎င်း၊ တရားခံဘက်ကသော်၎င်း အဆိုပါ ရဲအရာရှိရှေ့တွင် အစစ်ခံခဲ့သော အစစ်ခံချက်ဖြင့် သက်သေခံအက်ဥပဒေပုဒ်မ ၁၄၅ ၎င် ပြဋ္ဌာန်းထားသည့်အတိုင်း သုံးနိုင်ပေသည်။ ဤသို့သုံးစွဲနည်းမှာ၊ ၎င်း၏ သက်ဆိုင်ရာရဲအစစ်ခံချက်ကို ကောက်နုတ်၍ မိတ္တူတင်သွင်းခြင်းဖြင့်သာ အသုံးပြုနိုင်ပေသည်။ သို့သော် ထိုသက်သေ၏ ရဲအရာရှိခရှ အစစ်ခံချက်သည်၊ အမှုစစ်ဆေးသော ရုံးတော်က အမှုတွင် ထည့်သွင်းစဉ်းစားနိုင်သော သက်သေ အစစ်ခံချက်မဟုတ်၊ ထိုသက်သေ၏အစစ်ခံချက်ကို ယုံကြည်ထိုက်၊မယုံကြည်ထိုက်၊ သို့တည်း မဟုတ်၊ တန်ဘိုးမည်၍မည်မျှရှိသည်ကို ချိန်ဆနိုင်ရာသာဖြစ်သည်၊ သို့ရာတွင် ထိုသက်သေကို မေးခွန်းထုတ်ရာ၌ ရဲအရာရှိထံတွင်၊ ၎င်မည်သော်အစစ်ခံချက်များပြုလုပ်ခဲ့ပါသလား၊ အစစ်ခံခဲ့သော ကောက်နုတ်ချက်ကိုဖတ်ပြ၍ မေးမြန်းသောအခါ၊ ထိုအတိုင်းအစစ်ခံခဲ့ပါသည်ဟု ထွက်ဆိုလျှင် ထို့ပြင်၊ ထိုအစစ်ခံချက်သည်၊ ယခု ရုံးရှေ့တွင်ထွက်ဆိုသော အစစ်ခံချက်နှင့် ကွဲလွဲနေပါလျက် မည်သည့်အစစ်ခံချက်က မှန်သနည်းဟုမေးမြန်းသောအခါ၊ သက်သေက ရဲအရာရှိထံတွင် အစစ်ခံခဲ့သောအစစ်ခံချက်သည် မှန်ပါသည်ဟုထွက်ဆိုလျှင်၊ ထိုမှန်သည်ဆိုသော ရဲအစစ်ခံချက်သည် ရာဇဝတ်ကျင့်ထုံး ဥပဒေပုဒ်မ ၁၆၂ တွင် တားမြစ်ထားသော ရဲအစစ်ခံချက်မဟုတ်တော့ဘဲ၊ ထိုသက်သေက ရုံးရှေ့ကိုယ်တိုင်အစစ်ခံသော အစစ်ခံချက် အခြေသို့ရောက်နေ၍ ၎င်အစစ်ခံချက်များကို ရုံးတော်ကအမှုစစ်ဆေးရာ၌ ထည့်သွင်းစဉ်းစား နိုင်ပေသည်။ ဘဇေပါဝ ဦးနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံ (1950) B.L.R. 178 (H.C.) လိုက်နာသည်။

၁၉၅၈
ချစ်လိုင်၊ ထွန်းဝိုင်း၊ သိန်းအောင် ပါ ၂ ၂ ဦး နှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်။

ပြစ်ဒေတိုးတပ်သားဆိုသောသူများမှာ၊ ကြည်းတပ်သားလည်းမဟုတ်၊ ရေတပ်သား လည်းမဟုတ်၊ လေတပ်သားလည်းမဟုတ်၊ ရဲအမှုထမ်းများလည်းမဟုတ်၊ သို့သော် ၎င်းတို့ကို အရံရဲ (Special Reserve Police)အဖြစ်ဖြင့် ရဲအက်ဥပဒေ (Police Act)အရ၊ နောက် များမကြာမီတွင် ခွဲစည်းရန်ရည်ရွယ်ထားသောသူများဖြစ်ကြောင်း၊ ထိုသူများမှာ ကြည်းတပ်၊ ရေတပ်၊ လေတပ်သားမဟုတ်စေကာမူ၊ ထိုတပ်သားများ၏ အခွင့်အာဏာအရ ဆောင်ရွက် သောသူများဟု မှတ်ယူနိုင်ပေသည်။

နိုင်ငံတော်သမတ၏ ၁၉၅၀ ခုနှစ်၊ ဇူလိုင်လ ၃၀ ရက်နေ့တွင် ထုတ်ပြန်သော လွတ်ငြိမ်းချမ်းသာခွင့်အမိန့်၊ အပိုဒ် ၃ နှင့်စပ်လျဉ်း၍၊ လက်နက်ကိုင်တော်လှန်မှု၊ သောင်း ကျန်းမှုတို့ ပပျောက်ရန်၊နှိမ်နင်းရန် လုပ်ကိုင်ဆောင်ရွက်ရာ၌၊ ကျူးလွန်ခဲ့သောပြစ်မှုဆိုရာတွင် တကယ်တိုက်ခိုက်နေသည့်အချိန်အခါအတွင်း၊ တကယ်စင်စစ် တိုက်နေစဉ်အတွင်း (in the course of actual operation)ကိုသာ ဆိုလိုသည်။ တိုက်ခိုက်နေစဉ်မဟုတ်ဘဲ၊ တိုက်ပွဲနှင့် မဆိုင်သည့် ပြင်ပကျူးလွန်မှုများသည်၊ လွတ်ငြိမ်းချမ်းသာခွင့်နှင့်အကျုံးမဝင်၊ ဥပမာ ရွာတရွာ၌ သောင်းကျန်းမှုနှိမ်နင်းရန် ဆောင်ရွက်နေသော ကြည်းတပ်၊ ရေတပ်၊ လေတပ် သား တဦးတယောက်သည်၊ သို့တည်းမဟုတ် ၎င်းတို့၏အခွင့်အာဏာအရဆောင်ရွက် သောသူများသည်၊ ထိုသို့နှိမ်နင်းနေစဉ်အတွင်း (during actual operation) ရွာထဲ၌မီးရှို့ ခြင်း၊ လူသတ်ခြင်း၊ ဓါးပြတိုက်ခြင်း၊ မုဒိမ်းမှုပြုခြင်း ကျူးလွန်ပါက ထိုကျူးလွန်ခြင်းတို့သည်

၁၉၅၈

ချစ်လှိုင်၊ ထွန်းဝိုင်း၊ သိန်းအောင် ပါ ၂၂ ဦး နှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်။

လွှတ်ငြိမ်းချမ်းသာခွင့်အတွင်းသို့ ကျရောက်နေသည်ဟုယူဆရပေမည်။ သို့သော် ထိုတိုက်ပွဲရပ်စဲ၍ တိုက်ပွဲမှအပြန်တွင်သော်၎င်း၊ တိုက်ပွဲနေရာသို့ထွက်ခွါသွားစဉ် တနေရာ၌ရပ်နားနေစဉ်သော်၎င်း၊ ကျူးလွန်သောပြစ်မှုမျိုးမှာ ဤလွှတ်ငြိမ်းချမ်းသာခွင့်အတွင်းသို့ ကျရောက်သော ရာဇဝတ်မှုမျိုးမဟုတ်၊ လွှတ်ငြိမ်းချမ်းသာခွင့်အမိန့်၊ အပိုဒ် ၃ တွင် ပြဋ္ဌာန်းသော လွှတ်ငြိမ်းချမ်းသာခွင့်သည် ကြည်းတပ်၊ လေတပ်၊ ရေတပ်၊ ပြည်သူ့ဝန်ထမ်းမြို့ပြဆိုင်ရာ အမှုထမ်း၊ သို့တည်းမဟုတ် ၎င်းတို့၏အခွင့်အာဏာအရ၊ ဆောင်ရွက်သောသူများတို့သည် လက်နက်ကိုင်တော်လှန်နေသောသူပုန်များ၊ သို့တည်းမဟုတ် သောင်းကျန်းမှုများကို နှိမ်နင်းရန် တိုက်ခိုက်နေစဉ် ကျူးလွန်သော မည်သည့်ပြစ်မှုကိုမဆို လွှတ်ငြိမ်းချမ်းသာခွင့်ရနိုင်သည်။ နှိမ်နင်းနေစဉ်၊ သို့တည်းမဟုတ် ဆောင်ရွက်နေစဉ်ဆိုသည်မှာ နှိမ်နင်းဆောင်ရွက်ရာ၌ ဟူသောအဓိပ္ပါယ်နှင့် ထပ်တူမျှဖြစ်သည်။ သို့အတွက်ကြောင့် (in the course of actual operation)တွင် ကျူးလွန်သောပြစ်မှုကိုသာ လွှတ်ငြိမ်းခွင့်ပြုကြောင်း ပေါ်လွင်နေသည်။ ဥပမာပြုပေဦးအံ့၊ လက်နက်ကိုင်တပ်သားတဦးတယောက်သည် သောင်းကျန်းမှုနှိမ်နင်းရန်အတွက် မိမိတပ်နှင့်အတူထွက်လာပြီး ထိုတပ်သည် တနေရာ၌ရပ်နားနေစဉ် ထိုတပ်သားသည် အနီးအနားရှိ ရွာထဲသို့သွား၍ ဓါးပြမှုသော်၎င်း၊ မုဒိမ်းမှုသော်၎င်း ကျူးလွန်လျှင် ထိုကဲ့သို့ကျူးလွန်သောပြစ်မှုသည် သောင်းကျန်းမှုပပျောက်ရန် နှိမ်နင်းလုပ်ကိုင်ရာ၌ ကျူးလွန်သော ပြစ်မှုမဟုတ်ကြောင်းမှာ များစွာထင်ရှားပေသည်။ ထိုနည်းတူစွာ တိုက်ပွဲနှင့်မဆိုင်ဘဲ၊ တိုက်ပွဲအပြီးပြန်ရာလမ်းတွင်၎င်း၊ တိုက်ပွဲဖြစ်နေရာနှင့် အလျဉ်းမသက်ဆိုင်ဘဲ၊ ပြင်ပနေရာ၌ ကျူးလွန်သောပြစ်မှုများ အကျုံးမဝင်ကြောင်းမှာလည်း ထင်ရှားပေသည်။

ဖြောင့်ချက်ပေးသူ၏ဖြောင့်ချက်ကို၊ မိမိနှင့်အတူအစစ်ခံရသော သက်ဆိုင်သောတရားခံတဦးအပေါ်တွင်၊ သက်သေခံချက်အဖြစ်ဖြင့် တိုက်ရိုက်မသုံးနိုင်ပေ။ သို့သော် သက်ဆိုင်သော တရားခံ အပေါ်တွင် အခြားသက်သေခံများရှိ၍၊ ထိုသက်သေခံချက် ရှိသည်နှင့်အမျှ၊ အနည်းငယ်သံသယရှိနေပါက အဆိုပါဖြောင့်ချက်ပေးသူတရားခံ၏ဖြောင့်ချက်ကို၊ သက်ဆိုင်ရာ တရားခံများ အပြစ်ရှိ မရှိ ဆုံးဖြတ်ရာ၌ အထောက်အထားအကူအညီအဖြစ်ဖြင့်သာ ထည့်သွင်းစဉ်းစားနိုင်ကြောင်းသာ ဖြစ်ပေသည်။ ပြည်ထောင်စုမြန်မာနိုင်ငံနှင့် အလှ ပါ ၃ ဦး အမှု၊ ၁၉၅၇ ခု၊ ရာဇဝတ်အယူခံမှုအမှတ် ၂၄၀၊ (1958) B.L.R. 29 လိုက်နာသည်။

One of the tests to determine whether a statement amounts to a confession is whether the statement by itself is sufficient for the conviction of its maker of the offence for which he is tried jointly with those against whom the statement is sought to be given—*Per* U SAN MAUNG, J.

***Tan Chit Lye* v. *The Union of Burma*, (1950) B.L.R. 172 (S.C.), followed**

အယူခံတရားလိုများအတွက်။ ။မစ္စတာ စီစီခူးနှင့် ဦးသန်းအောင်။

အယူခံတရားခံအတွက်။ ။မစ္စတာ ဂန်ဂူလီနှင့် ဦးချစ် အစိုးရရှေ့နေကြီးများ။

ရုံးတော်သဟာယအဖြစ်။ ။နိုင်ငံတော် ရှေ့နေချုပ်ကြီး။

[အမှု၏အဖြစ်အပျက်နှင့်သက်သေခံချက်များကို ဖေါ်ပြပြီး၊ တရားဝန်ကြီးချုပ်က ဆက်လက်၍ မြွက်ဆိုသည်မှာအောက်ပါအတိုင်းဖြစ်လေသည်]။

၁၉၅၈

ချစ်လှိုင်၊ ထွန်းဝိုင်း၊ သိန်းအောင် ပါ ၂၂ ဦး နှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်။

ဦးချန်ထွန်းအောင်။

တရားဝန်ကြီးချုပ်ဦးချန်ထွန်းအောင်။ ။အထက်၌ ကျွန်ုပ်တို့အကျဉ်းချုပ်အားဖြင့်ဖေါ်ပြခဲ့သည့်အတိုင်း၊ ဤအမှုတွင်အထူးစဉ်းစားရန်အချက်မှာအမှု၏အမှန်အဖြစ်အပျက်မှာ၊ တရားလိုတက်မှ သက်သေအသီးသီးတို့ ထွက်ဆိုသွားသည့်အတိုင်းဖြစ်သလော၊ သို့တည်းမဟုတ်အယူခံတရားလိုများချေပသည့်အတိုင်းဖြစ်ပျက်သည်လော၊ အောက်ခုံရုံးတော်မှယူဆသည့်အတိုင်း တရားလိုဘက်မှ စွပ်စွဲပြောဆိုသော အဖြစ်အပျက်များမှန်ပါက၊ တရားခံဘက်မှ ပြောဆိုသောအဖြစ်အပျက်မှာမမှန်နိုင်။ ထိုနည်းတူစွာပင်၊ တရားခံဘက်မှပြောဆိုသော အဖြစ်အပျက်သည်မှန်ပါက၊ တရားလိုများပြောဆိုသော အဖြစ်အပျက်သည် မမှန်ကန်နိုင်ပေ။

ဤကိစ္စနှင့်ပတ်သက်၍ နှစ်ဦးနှစ်ဘက်က အဖြစ်အပျက်များကို ပြောဆိုရာ၌၊ မည်သူ့ဘက်မှ ပြောဆိုချက်များ မှန်ကန်သည်ကို ကျွန်ုပ်တို့သေချာစွာ ချိန်ဆကြည့်ရှုသောအခါ၊ တရားလိုဘက်မှ ပြောဆိုသော အဖြစ်အပျက်မှာ မှန်ကန်သည်ဟု ကျွန်ုပ်တို့ သဘောရပေသည်။ ထို့ကဲ့သို့ သဘောရခြင်းမှာလည်း၊ အောက်ခုံရုံးတော်မှ ဖေါ်ပြသည့်အတိုင်း အယူခံတရားလို ချစ်လှိုင်၏ထွက်ချက်များကို၊ ဖြင့်ပျက်သောနေရာကိုအထောက်အထားပြုရှိသော်ငင်း၊ အောင်ကြီးသာစက်လေပေါ်တွင် တွေ့ရှိသောအကြောင်းချင်းရာများကို ထောက်ရှုရှိသော်ငင်း၊ ငပုတ်ချောင်းသည် သေးငယ်သောချောင်းကလေးဖြစ်သည်ကို ကြည့်ရှုခြင်းအားဖြင့်သော်ငင်း၊ အောင်ကြီးသာစက်လေသည် အတော်ပင်ကြီးသော စက်လေဖြစ်သည့်အလျောက်၊ ထိုချောင်းကလေးထဲမှ အယူခံတရားလို ချစ်လှိုင်ပြောသည့်အတိုင်း၊ ဦးလှည့်ပြီးထွက်ပြေးရာ မဖြစ်နိုင်ခြင်းကိုငင်း၊ ထိုစက်လေပေါ်မှလူများရေထဲသို့ခုန်ဆင်းပြီး၊ ငင်းတို့ကိုယ် ငင်းတို့သတ်သေဘိသကဲ့သို့ ထွက်ဆိုထားချက်ကို ထောက်ရှုရှိသော်ငင်း၊ သက်သေ ဦးဘထူးပြောသည့်အတိုင်း၊ ပဲဖြင့်ဆွဲထုတ်ခဲ့ခြင်းကို အထောက်အထားပြုမှုငင်း၊ အောင်ကြီးသာစက်လေကို နောက်ဆုံးတွေ့သောနေရာသည်၊ ပင်လယ်ရေကြောင်း အပြင်ဘက်၊ ကော့ဒွေးကျွန်းအနီး၊ ဆတ်ကျွန်း၏အနောက်မြောက်ဘက် ပင်လယ်ကူးသင်္ဘောများ သွားလာသည့် ခရီးလမ်း ၉၊ ၁၀ မိုင်လောက်ကို အထောက် အထား ပြုရှိငင်း၊ ဗိုလ်ကြီးမောင်မောင်သန်း၏ အစစ်ခံချက်အရ၊ တိုက်ပွဲမဖြစ်ကြောင်း သိရှိရခြင်းဖြင့်သော်ငင်း၊ သက်သေခံပြမြေပုံများကိုထောက်ရှုခြင်းအားဖြင့်သော်ငင်း၊ သိန်းသန်းစက်မလှ်ရှိသော်ငင်း၊ အောင်ကြီးသာစက်လေဘေးဖို့သော်ငင်း၊ သေနတ်ဒဏ်ရာ

၁၉၅၈

ချစ်လှိုင်၊ ထွန်းဝိုင်း၊ သိန်းအောင် ပါ ၂ ဦးနှင့် မြည်ထောင်စု မြန်မာနိုင်ငံတော်။

ဦးချုန်ထွန်းအောင်။

ဒဏ်ချက်များ အလျဉ်းမတွေ့ရခြင်းကိုထောက်ရှုခြင်း၊ ဖြောင့်ချက်ပေးထားသော အယူခံတရားလို ငွေစိန်၏ထွက်ဆိုချက်ကို အထောက်အထားပြုခြင်း၊ တရားလို ဘက်မှဖေါ်ပြသောအမှု၏ အဖြစ်အပျက်သည်သာ မှန်ကန်သည်ဟု ကျွန်ုပ်တို့ဆုံးဖြတ်ရပေလိမ့်မည်။

သို့သော်၊ ကျွန်ုပ်တို့၏ရှေ့မှောက်တွင်၊ အယူခံတရားလိုများအတွက် လိုက်ပါဆောင်ရွက်သော လွှတ်တော်ရှေ့နေကြီး (အထူးသဖြင့် အယူခံတရားလို ချစ်လှိုင်နှင့် ထွန်းဝိုင်းတို့အတွက်) က လျှောက်လဲသည်မှာ—

၁။ ရာဇသတ်ကြီး ပုဒ်မ ၃၉၆ အရ၊ လုယက်မှု ကျူးလွန်သည်ဆိုခြင်းမှာ မဟုတ်ကြောင်းမမှန်ကြောင်း။ မည်သည့်ပစ္စည်းမျှလုယူကြောင်းမပေါ်လွင်ကြောင်း။ အထူးသဖြင့်အလင်း (လိုပြ ၁) ပဌမတိုင်ချက်ပို့လုပ်သည့်အခါ၊ ဤအချက်မပါကြောင်း။

၂။ တရားလိုပြ သက်သေများ၏ ထွက်ချက်အရဆိုလျှင်၊ အဖြစ်အပျက်မှာ သုံးဌာနဖြစ်ကြောင်း၊ ၎င်းသုံးဌာနမှာ (၁) ဆီတောင်အိုင်ရွာတွင်ဖြစ်ပျက်သောအဖြစ်အပျက်၊ (၂) ငပုတ်ချောင်းထဲတွင် ဖြစ်ပျက်သော အဖြစ်အပျက်၊ (၃) အောင်ကြီးသာစက်လှေကို ပင်လယ်ရေကြောင်းတွင် နစ်မြုပ်သည့် အဖြစ်အပျက်၊ ထိုအဖြစ်အပျက်များသည် တဆက်တည်းမဟုတ်၊ လုယက်သည်ဆိုသော စွပ်စွဲချက်မှာ၊ ဆီတောင်အိုင်ရွာတွင်ဖြစ်၍၊ ထိုလုယက်မှု အဖြစ်အပျက်နှင့် အောင်ကြီးသာစက်လှေပေါ်မှ သိမ်းဆည်းသော ကော်ပတ်ထုပ် များနှင့် မသက်ဆိုင်ပေ။ ကော်ပတ်ထုပ်များ သိမ်းဆည်းခြင်းမှာ ရန်သူပစ္စည်းများဖြစ်၍သိမ်းဆည်းခြင်းမျှသာဖြစ်ကြောင်း၊ ထိုပစ္စည်းများသည် သေသူ အဟောက်ပိုင်ပစ္စည်းများ ဖြစ်ကြောင်း အလျဉ်းမပေါ်ပေါက်ကြောင်း။

၃။ တရားလိုပြသက်သေများ၊ အထူးသဖြင့် ဦးဘထူးနှင့် ဦးဘကြီး ထွက်ချက်ကို မယုံကြည်ထိုက်ကြောင်း၊ ပ၊မ၊ည၊တ၊ အမတ်ဗိုလ်ထွန်းစိန်က တမင်သက်သက်ဆော်သြ၍၊ ၎င်းတို့အပေါ် မတရားသက်သက်စွပ်စွဲပါကြောင်း။

၄။ အယူခံ တရားလို ငွေစိန်၏ ဖြောင့်ချက်အရဆိုလျှင်၊ သေသူ အဟောက်တို့ လူစုသည် ကွန်မြူနစ်များနှင့် ဆက်သွယ်နေကြောင်း ပေါ်လွင်ပါသည်။ သို့အတွက်ကြောင့်၊ ပြုစောထီး

တပ်သားများ ဖြစ်သည့် အလျောက်၊ ကာကွယ်ရေးနှင့် သက်ဆိုင်သည့် တာဝန် ဝတ္တရားများ ဆောင်ရွက်ရာတွင်၊ ပြုလုပ်သော အဖြစ်အပျက်များဖြစ်၍၊ အကယ်၍ တရားလို ဘက်မှ စွပ်စွဲချက် ဟုတ်မှန်စေကာမူ၊ ကွန်မြူနစ်များနှင့် ဆက်သွယ်နေသူများကို နှိမ်နင်းခြင်းဖြစ်သဖြင့်၊ ၎င်းတို့သည် ထားပြမှု၊ လူသတ်မှုမကျူးလွန်ကြောင်း၊ အထူးသဖြင့် နိုင်ငံတော်သမတ က၊ ၁၉၅၈ ခု၊ ဇူလိုင်လ ၃၀ ရက်နေ့တွင် ထုတ်ပြန်ကျေညာလိုက်သော လွှတ်ငြိမ်းချမ်းသာခွင့် အမိန့် အပိုဒ် (၃) ကို အကိုးအကားပြု၍၊ မိမိ၏အမှုသည်များသည် ကင်းလွတ်ခွင့်ရထိုက်ကြောင်းလျောက်ထားလေသည်။

၁၉၅၈
ချစ်လှိုင်၊ ထွန်းဝိုင်း၊ သိန်းအောင် ပါ ၂၂ ဦး နှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံတော်။
ဦးချန်ထွန်းအောင်။

အကိုးအကားပြုသော နိုင်ငံတော်သမတ ကျေညာလိုက်သော လွှတ်ငြိမ်းချမ်းသာခွင့်အမိန့် အပိုဒ် (၃) မှာ၊ အောက်ပါအတိုင်းဖြစ်သည်။

"တဖက်တွင် လက်နက်စွဲကိုင် တော်လှန်ပုန်ကန်သူများ၊ သောင်းကျန်းသူများ၊ မတရားအသင်းဝင်များအား လုံးဝလွှတ်ငြိမ်းချမ်းသာခွင့် ပေးသည့်နည်းတူ၊ ဘဖက်၌လည်း၊ ၎င်းတို့ကို နှိမ်နင်းရာ၌သော်၎င်း၊ နိုင်ငံတော်အတွင်း ငြိမ်ဝပ်ပိပြားရေး တည်မြဲစေရန် အတွက်သော်၎င်း၊ ပြည်ထောင်စု မြန်မာနိုင်ငံတော်၏ ကာကွယ်ရေး အတွက် သော်၎င်း လုပ်ကိုင်ဆောင်ရွက်ကြရသော ကြည်းတပ်သားဖြစ်စေ၊ လေတပ်သားဖြစ်စေ၊ ရေတပ်သားဖြစ်စေ၊ မြို့ပြဆိုင်ရာ အမှုထမ်း အရာထမ်းများဖြင့်စေ ထိုသို့အမှုထမ်းရွက်သူ၏ အခွင့်အာဏာအရ၊ အခြားဆောင်ရွက်သူဖြစ်စေ၊ လက်နက်ကိုင်တော်လှန်မှု၊ သောင်းကျန်းမှုတို့ပပျောက်ရန်၊ နှိမ်နင်းရန် လုပ်ကိုင်ဆောင်ရွက်ရာ၌ ကျူးလွန်ခဲ့သော မည်သည့်ရာဇဝတ်ပြစ်မှု အတွက်မဆို၊ လုံးဝလွှတ်ငြိမ်းချမ်းသာခွင့်ရှိစေရမည်။"

၅။ အထူးသဖြင့်၊ အယူခံတရားလို သိန်းအောင်၊ မောင်ကြင်၊ အုံးတင်၊ မောင်ရှိ၊ စောဖေ၊ လှတင်၊ တင်ငွေ့၊ ထိန်ရွှေ၊ သင်းဖေ၊ သန်းရွှေ၊ စံတင်တို့အပေါ်တွင်၊ အမှုနှင့်ပတ်သက်၍ တရားလိုဘက်မှ မည်သည့် သက်သေမျှ မပြနိုင်။ အယူခံတရားလို ချစ်လှိုင်၏ အစီရင်ခံစာ သက်သေခံ အမှတ် (၈-ခ) အရ၊ ၎င်းတို့တိုက်ပွဲဆင်နွှဲပါဝင်သော အချက်တခုသာရှိ၍၊ ၎င်းတို့ကို ထိုအချက်တခုဖြင့် အပြစ်မပေးထိုက်ကြောင်း၊ ထိုအယူခံတရားလိုများအပေါ်တွင်၊ အောက်ခုံရုံး

၁၉၅၈

ချစ်လှိုင်၊ ထွန်းဝိုင်း၊ သိန်းအောင် ပါ ၂၂ ဦး နှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်။

ဦးချန်ထွန်းအောင်။

တော်သည် စွဲချက်မတင်ထိုက်ဘဲ တရားရှင်လွှတ်ရမည်သာ ဖြစ်ကြောင်း။

ထို့နည်းတူ အယူခံတရားလို ဘိုအန်နှင့် အယူခံတရားလို ချစ်သိန်းတို့မှာလည်း၊ သက်သေခံအမှတ် (၈-ခ) တပ်သားစာရင်းတွင်သာနာခံမည်ပါ၍၊ အယူခံတရားလို ငွေစိန်၏ဖြောင့်ချက်ပုခုတည်းသောရှိပြီး၊ ၎င်းအယူခံတရားလို ငွေစိန်၏ဖြောင့်ဆိုချက်မှာလည်း၊ သက်သေခံဥပဒေပုဒ်မ (၃၀) အရဆိုလျှင်၊ အခြားအထောက်အခံသက်သေမရှိပါ။ လုံးဝမစဉ်းစားနိုင်ပါကြောင်း။ ထိုနည်းတူစွာ၊ ဘဖေပါ ၁ ဦးနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော် (1) အမှုစီရင်ထုံးကို အကိုးအကားပြု၍၊ အယူခံတရားလိုငွေစိန်၏ ရုံးတော်တွင်ကျမ်းဖြင့်အစစ်ခံသော အစစ်ခံချက်မှာလည်း၊ ၎င်းအယူခံတရားလိုများအပေါ်တွင်၊ တရားလိုဘက်မှ စွဲချက်တင်နိုင်သော အခြားခိုင်လုံသောစွပ်စွဲချက်မရှိပါက၊ ရာဇဝတ်ကျင့်ထုံးပုဒ်မ ၃၄၂ (၁) အရ၊ ထိုဖြောင့်ဆိုသူ၏ကျမ်းဖြင့် အစစ်ခံသောအစစ်ခံချက်ကို အကိုးအကားပြု၍ အပြစ်မပေးနိုင်ကြောင်း၊ ထိုကျမ်းကျိန်အစစ်ခံချက်မှာလည်း၊ အခြားပေါ်လွင်သော သက်သေခံချက်များ၏ အထောက်အထားအနေနှင့်သာ သုံးနိုင်ကြောင်း လျှောက်ထားလေသည်။ ဤလျှောက်ထားချက်များမှာ အတော်ပင် လေးနက်သော လျှောက်ထားချက်များဖြစ်သည်။ အယူခံ တရားလို ချစ်လှိုင်၊ အယူခံတရားလို ထွန်းဝိုင်းနှင့်အခြားအယူခံတရားလိုများ၏အမှုကိုမစဉ်းစားမီ၊ ဤအယူခံတရားလိုများ၏အမှု စဉ်းစားသောအခါ၊ ၎င်းတို့အတွက် လိုက်ပါဆောင်ရွက်သော လွှတ်တော်ရှေ့နေကြီး၏ ပြောချက်အတိုင်းပင်ဖြစ်နေသည်ကို ကျွန်ုပ်တို့တွေ့ရှိရသည်။ ထိုအတိုင်းပင် ဟုတ်မှန်ကြောင်းကိုလည်း အယူခံတရားခံအတွက် လိုက်ပါဆောင်ရွက်သော အစိုးရရှေ့နေကြီးကလည်းဝန်ခံလေသည်။ သက်သေခံအမှတ် (၈-ခ) တပ်သားစာရင်းမှာ၊ သက်သေခံအဖြစ် စာင်သွင်းနိုင်သည်ဟု ယူဆနိုင်စေကာမူ၊ ၎င်းတန်ဘိုးမှာ ဘာမျှမရှိပေ။ အယူခံတရားလို ချစ်လှိုင်က အဖြစ်အပျက်ပြောပြစေကာမူ၊ ၎င်းကထည့်သွင်းရေးသားခြင်းဖြင့် ထိုတပ်သားများသည်၊ တရားလိုဘက်မှစွပ်စွဲသည့်အတိုင်း၊ မါးပြတိုက်မှု၊ လူသတ်မှုကျူးလွန်သည်ဟု မဆိုနိုင်ပေ။ ထိုအယူခံတရားလိုများကလည်း၊ ၎င်းတို့ကိုစစ်ဆေးရာတွင် ပြောသည့်အခါ၊ တပ်သားများသာ ဖြစ်ကြောင်း၊ တိုက်ပွဲ ထွက်ရကြောင်း၊ သို့သော် အယူခံတရားလိုဘက်မှပြောသည့်အတိုင်း၊ လုယက်မှုကျူးလွန်ခြင်းကိုမည်သည့်အခါမျှ ဖြောင့်ဆိုခြင်းမပြုသည်သာမက၊ ငြင်းကွယ်ထားသည်ကို တွေ့ရသည်။ သို့အတွက်ကြောင့်၊ ထိုအယူခံတရားလိုများအားမှားယွင်း၍၊ အောက်

(1) (1950) B.L.R. p. 178 (H.C.).

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ချစ်လိုင်၊ ထွန်းဝိုင်း၊ သိန်းအောင် ပါ၊ ၂ ဦးနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်။

ဦးချုန်ထွန်းအောင်။

ခုံရုံးတော်မှ စွဲချက်တင်ခြင်းမှာ ထင်ရှားပေသည်။ ထိုစွဲချက်တင်ပြီးမှ အခြားအထောက်အခံသက်သေဘာမျှမရှိဘဲ အပြစ်ပေးလိုက်ခြင်းမှာ၊ ကျွန်ုပ်တို့ ယူဆသည့်အတိုင်းဆိုလျှင်၊ မှားယွင်းပြီးအပြစ်ပေးချက်ဟု ယူဆရပေလိမ့်မည်။ အယူခံတရားလို ဘိုအန်နှင့် အယူခံတရားလို ချစ်သိန်းတို့နှစ်အမှုမှာလည်း၊ ဤအတိုင်းပင်ဖြစ်ပေသည်။ ဘဖေ ပါ ၁ ဦးနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံ (1) အမှု စာမျက်နှာ ၁၀၆ တွင် အတိအလင်း၊ ဤရုံးတော်မှ ဆုံးဖြတ်ထားသည့်အတိုင်းဆိုလျှင်၊ ဖြောင့်ချက်ပေးထားသော အယူခံတရားလို ငွေစိန်က၊ အယူခံတရားလို ဘိုအန်နှင့် အယူခံတရားလိုချစ်သိန်းတို့သည် ၎င်းတို့နှင့်အတူပါသည်ဟု ထွက်ဆို အစစ်ခံစေကာမူ၊ ထိုအစစ်ခံချက်မှာ စွဲချက်တင်ပြီးနောက်မှ ၎င်းသေအဖြစ်ဖြင့် အယူခံတရားလို ငွေစိန်က အစစ်ခံသောအခါ၌သာ ပေါ်လွင်ပေသည်။ စွဲချက်မတင်မီကဆိုလျှင် ဖြောင့်ဆိုသူအယူခံတရားလိုငွေစိန်၏ထွက်ချက်တွင် ဤသို့မဟုတ်ပေ။ ထိုဖြောင့်ချက်မှာလည်း အခြားအထောက်အခံ သက်သေခံချက်မရှိ။ သို့ဖြစ်၍၊ ဤအယူခံတရားလိုနှစ်ဦးအပေါ်တွင် မည်သို့မျှအသုံးမပြုနိုင်ပေ။ ဤဥပဒေပြဿနာအချက်မှာ ကျွန်ုပ်တို့မကြာခဏချမှတ်ခဲ့သော အချက်ဖြစ်သည်။ အထူးသဖြင့် ဤရုံးတော်မှ နောက်ဆုံးချမှတ်သော ၁၉၅၇ ခု၊ ရာဇဝတ်အယူခံမှုအမှတ် ၂၄၈ [ပြည်ထောင်စုမြန်မာနိုင်ငံနှင့်အလှ ပါ ၃ ဦးအမှု] (2) ကထင်ရှားပေသည်။ ဖြောင့်ချက်ပေးသူ၏ ဖြောင့်ချက်ကို၊ မိမိနှင့်အတူ အစစ်ခံရသော သက်ဆိုင်သည့်တရားခံတဦးအပေါ်တွင် သက်သေခံချက်အဖြစ်ဖြင့် တိုက်ရိုက်မသုံးနိုင်ပေ။ သို့သော် သက်ဆိုင်သောတရားခံအပေါ်တွင် အခြားသက်သေခံချက်များရှိ၍၊ ထိုသက်သေခံချက် ရှိသည်နှင့်အမျှ အနည်းငယ်သံသယ ရှိနေပါက၊ အဆိုပါ ဖြောင့်ချက်ပေးသူတရားခံ၏ဖြောင့်ဆိုချက်ကို၊ သက်ဆိုင်ရာ တရားခံများအပြစ်ရှိမရှိဆုံးဖြတ်ရာ၌ အထောက်အထားအကူအညီအဖြစ်ဖြင့်သာ ထည့်သွင်းစဉ်းစားနိုင်ကြောင်းသာဖြစ်ပေသည်။ အယူခံတရားလို ဘိုအန်နှင့်ချစ်သိန်းတို့အပေါ်တွင် ပြောဆိုခဲ့သည့်အတိုင်း၊ ၎င်းတို့ကိုစွဲချက်မတင်မီက၊ အယူခံတရားလို ငွေစိန်၏ ဖြောင့်ချက်တခုတည်းသာ၊ ၎င်းတို့အပေါ်ရှိ၍၊ ၎င်းတို့ ပြစ်မှုကျူးလွန်ကြောင်း အခြားထောက်ခံချက်အလျဉ်းမရှိ။ ၎င်းတို့အားတရားရှင်လွှတ်လိုက်သော အခြေအနေပင်ရှိခဲ့သည်။ ထိုစဉ်အခါက ၎င်းတို့သည် ထိုစွဲချက်ဖျက်သိမ်းရန် စောဒကဝင်ခဲ့သော်၊ ဖျက်သိမ်းရန်အခြေအနေရှိလေသည်။ သို့သော်အထူးခုံရုံးတော်က ၎င်းတို့ကို မှားယွင်းပြီးစွဲချက်တင်ရာ၊ နောက်မှငွေစိန်ကျမ်းကျိန်ပြီး အစစ်ခံသော အစစ်ခံချက်ကိုအသုံးပြု၍၊ ၎င်းတို့အား တိုက်ခိုက်ရာတွင် ပါဝင်သည်ဟု ယူဆပြီး

(2) (1958) B.L.R. 29.

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ချစ်လှိုင်ထွန်း ဝိုင်းသိန်း အောင် ပါ ၂၂ ဦး နှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံ တော် ဦးချန်ထွန်း အောင်။

အပြစ်ပေးလိုက်ခြင်းမှာ၊ ဘဖေ ပါ ၁ ဦးနှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံ (1) စီရင်ထုံးဖြင့် ဖိလာဖြစ်နေသည်မှာ ထင်ရှားသည်၊ သို့အတွက်ကြောင့်၊ ထိုအပူခံတရားလိုများအား အပြစ်ဒဏ်ပေးလိုက်ခြင်းမှာလည်း မှားယွင်းသည်ဟု ကျွန်ုပ်တို့ ယူဆသည်။ သို့ဖြစ်၍ ဆိုခဲ့သော သက်သေခံအမှတ် (ဏ-၁) တပ်သားစာရင်း တွင်ပါသည့်တပ်သားများနှင့် ယခုဖေါ်ပြပါ အယူခံတရားလို ဘိုအန်နှင့်ချစ်သိန်း တို့သည်၊ ထိုဆိတောင်အိုင် ဓါးပြတိုက်ရာတွင် ပါဝင်သူများဟု ယူဆဘွယ်ရာ အလွန်ခဲယဉ်း၍၎င်းတို့အပေါ် အပြစ်ပေးထားခြင်းမှာ မှားယွင်းသည်ဟု ကျွန်ုပ်တို့ ယူဆရပေမည်။

အယူခံ တရားလိုများအဘွက် လိုက်ပါ ဆောင်ရွက်သော လွှတ်တော် ရှေ့နေကြီးက၊ အထက်ဖေါ်ပြပါအချက်အလက်များအပြင် ကုန်ရှိသောအယူခံ တရားလိုများအနက်၊ အထူးသဖြင့် အယူခံတရားလိုချစ်လှိုင်နှင့် ထွန်းဝိုင်းတို့ အပေါ်တွင်၊ ခရိုင်ဝန်ဥက္ကဋ္ဌဖြစ်သော မြို့တော်ကာကွယ်ရေးအဖွဲ့ဝင်တပ်ပေါင်းစုမှူး ဗိုလ်ကြီးမောင်မောင်သန်း (ယူပြု ၃) ၏ အစစ်ခံချက်ကို အကိုးအကားပြုပြီး၊ အောက်ခုံရုံးတော်မှ အပြစ်ဒဏ်ပေးလိုက်ခြင်းမှာ၊ များစွာနစ်နာပါကြောင်း၊ အထူးသဖြင့် ဗိုလ်ကြီးမောင်မောင်သန်း၏ ရုံးတော်ရှေ့အစစ်ခံချက်နှင့် ဤအစစ်ခံ ချက်ကိုသုံးစွဲလိုက်ခြင်းမှာ၊ မိမိအမှုသည်များ များစွာနစ်နာပါကြောင်း၊ ရာဇဝတ် ကျင့်ထုံးဥပဒေပုဒ်မ ၁၆၂ တားမြစ်ချက်ကိုဖိလာဖြစ်ပါကြောင်း လျှောက်ထား လေသည်။

အထက်ပါလျှောက်ထားချက်များကို ကျွန်ုပ်တို့ဂရုတစိုက် စဉ်းစားခဲ့သည်။ အထူးသဖြင့် ရာဇသတ်ပုဒ်မ ၃၉၆ အရ၊ ဓါးပြမှုကျူးလွန်ကြောင်း မထင်ရှား ပါဟုဆိုခြင်းကို ကျွန်ုပ်တို့လက်မခံနိုင်ပေ။ ဆိတောင်အိုင် အဖြစ်အပျက်နှင့် အောင်ကြီးသာစက်လေ့ အဖြစ်အပျက်တို့သည် တခုနှင့်တခု မသက်ဆိုင်သည့် အချက်မှာ မဟုတ်နိုင်ပေ။ အချင်းဖြစ်သည့်နေ့မှာ ၂၂-၅-၅၇ ခု နေ့ဖြစ်၍ ထိုနေ့တွင်ပင် ၃ နေရာ၌ ကျူးလွန်သောပြစ်မှုများသည် ရာဇဝတ်ကျင့်ထုံးဥပဒေ ပုဒ်မ ၂၃၅ (၁) ပြဋ္ဌာန်းထားချက်အရ၊ တခုနှင့်တခုတဆက်တည်းဖြစ်ပြီး၊ တခု တည်းသော ပြုလုပ်ဆောင်ရွက်မှုမှ ပေါ်ပေါက်လာသော တဆက်တည်းသောပြု လုပ်ချက်များဖြစ်ပေသည် ယင်းသို့ကျူးလွန်သောအမှုများကို အမှုတမှုတည်းတွင် စီရင်စစ်ဆေးနိုင်ကြောင်း အတိအလင်းပြဋ္ဌာန်းထားသည်။ တရားလိုဘက်မှရွေး ချယ်ထားသည့်ကျူးလွန်မှုများမှာ (အောင်ကြီးသာ) စက်လေ့ပေါ်မှ လုယူသော ရာဘာထုပ်များ၊ ငွေတသောင်းခန်းလောက်ရှိသော ငွေစက္ကူများ၊ စားနပ်ရိက္ခာ များနှင့် မိန်းမသားဖြစ်သော သေသူမကြောင်ပွါးထံမှ လက်စွပ်တကွင်းလုယူခြင်း

ပေါ်လွင်နေသည့်အလျောက်၊ မည်သူ့ဝိုင်ပစ္စည်းကိုမည်သူလုယူကြောင်းမထင်ရှားပါ၍၊ ခါးပြတိုက်မှုကို မကျူးလွန်ပါဆိုသောလျှောက်ထားချက်များကို ကျွန်ုပ်တို့လက်မခံနိုင်ပေ။ (အောင်ကြီးသာ) စက်လေ့ကြီး ပစင်းလုံးကိုပင် ဝိုင်ရှင်၏သဘောတူညီချက်မရဘဲ၊ တနေရာမှတနေရာသို့ အတင်းခြိမ်းချောက်ပြီးယူသွားသည့်အပြင်၊ ၎င်းစက်လေ့ပေါ်တွင်ရှိ ရာဘာထုပ်များ၊ စက်ဆီများ၊ စားနပ်ရိက္ခာများနှင့် လေ့ပေါ်တွင်ပါလူများတို့ကို သတ်ဖြတ်ပြီးလုယူခြင်းမှာ၊ ရာဇသတ်ပုဒ်မ ၃၉၆ တွင်ပြဋ္ဌာန်းထားသော အပြစ်ဒဏ်အတွင်းသို့ ကျရောက်ကြောင်းမှာ ကျွန်ုပ်တို့ ယုံမှားသံသယ အလျဉ်းမရှိနိုင်ပေ။ ဦးဘထူး (လိုပြ ၂)၊ ဦးဘကြီး (လိုပြ ၃) နှင့်ဖြောင့်ချက်ပေးသူ အယူခံတရားလိုဒွေစိန်တို့၏ ထွက်ချက်ကိုမယုံကြည်ထိုက်ပါဆိုသော လျှောက်ထားချက်မှာလည်း၊ ကျွန်ုပ်တို့အထက်၌ အသေးစိတ်ဖော်ပြသော ပတ်ဝန်းကျင်အခြေအနေအရသော်၎င်း၊ အောက်ခုံရုံးတော်၏ စီရင်ချက်တွင်အသေးစိတ်ဖော်ပြထားသော အချက်အလက်များနှင့်၎င်းခုံရုံးတော်အဖွဲ့ဝင်လူကြီးများကိုယ်တိုင် အချင်းဖြစ်နေရာသို့ သွားရောက် ကြည့်ရှုစစ်ဆေးပြီး (သိန်းသန်း) စက်လေ့နှင့် (အောင်ကြီးသာ) စက်လေ့ပေါ်တွင်၊ မည်သူမျှမငြင်းဆန်နိုင်ဘဲ အလိုအလျောက် ပေါ်ပေါက်နေသော သက်သေသာဓကများကို ထောက်ထားကြည့်ရှုခြင်းဖြင့်၎င်း၊ (အောင်ကြီးသာ) စက်လေ့ကြီး နောက်ဆုံးကော့ဒွေးကျွန်းနားတွင် ရောက်ရှိနေသည့်အချက်ကိုဝင်း၊ ဦးဘထူး (လိုပြ ၂) နှင့် လွန်းတင် (လိုပြ ၄) တို့ အသက်ဘေးမှ လွတ်မြောက်အောင် အသုံးပြုရသည့် (စတော်) လေ့ကလေး၏ အခြေအနေကို ထောက်ရှုခြင်းအားဖြင့်၎င်း လက်မခံနိုင်ပေ။ (ပ-မ-ည-တ) ပါလီမန်အမတ် မိုလ်ထွန်းစိန်ဆိုသူ၏ ပယောဂကြောင့်၊ ထိုမျက်မြင် သက်သေများတို့သည် အယူခံတရားလိုများ အပေါ်တွင် မတရားထွက်ဆိုထားပါသည်ဟုလျှောက်ထားရာ၌လည်း၊ ၎င်းသက်သေများတို့၏ အဝင်ခံချက်အသေးစိတ်ကို ဘက်ရှုခြင်းအားဖြင့်၊ ထိုစွပ်စွဲချက်အတိုင်းမဖြစ်နိုင်ခြင်းမှာများစွာထင်ရှားပေသည်။ (သိန်းသန်း) စက်လေ့၏ပဲ့ကိုင် ဦးဘကြီး (လိုပြ ၃) ကိုယ်ဘိုင်ကပင်လျှင်၊ အယူခံတရားလိုများအပေါ်တွင် ထိရောက်စွာထွက်ဆိုထားချက်ကိုလည်း မတရားထွက်ဆိုထားသည်ဟု ကျွန်ုပ်တို့မယူဆနိုင်ပေ။ ဦးဘထူး (လိုပြ ၂) ၏ထွက်ချက်ကို အချို့သောနေရာများတွင် ထောက်ခံထားသည်ကို တွေ့ရမည်သည်။ ၎င်းတို့ထွက်ချက်တွင် ကွဲလွဲချက်များရှိသင့်သလောက်ရှိသော်လည်း၊ ထိုကွဲလွဲချက်များမှာ အဓိကကွဲလွဲချက်များမဟုတ်၊ အချို့သောနေရာများတွင် ရိုးသားစွာထွက်ဆိုထားသည်ကို တွေ့ရပေသည်။ ဥပမာ၊ ဦးဘကြီးနှင့် ဦးဘထူးတို့၏ထွက်ချက်များတွင်၊ ၎င်းတို့သည်အယူခံတရားလိုများအားလုံးတို့ကို

၁၉၅၈

ချစ်လှိုင်၊ထွန်းခိုင်း၊သိန်းအောင်ပါ ၂၂ ဦးနှင့် မြို့ထောင်စုမြန်မာနိုင်ငံတော်

ဦးချန်ထွန်းအောင်။

၁၉၅၀

ချစ်လှိုင်၊ထွန်းဝိုင်း၊သိန်းအောင် ပါ ၂၂ ဦးနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်

ဦးချန်ထွန်းအောင်။

မြင်လျှင် မှတ်မိနိုင်သည်ဟုထွက်ဆိုထားသော်လည်း၊ အချို့သောအယူခံတရားလိုများကိုသာလျှင်၊ အောင်ကြီးသာစက်လေ့ကို တိုက်ခိုက်ရာတွင် ပါဝင်သည်ဟု ထွက်ဆိုခဲ့လေသည်။ ပါ၊သိမန်အမတ် ဗိုလ်ထွန်းစိန်၏ တိုက်တွန်းချက်အရ၊ မတရားသက်သက်ထွက်ဆိုရသည်ဟုဆိုလျှင်၊ ၎င်းတို့၌သို့ထွက်ဆိုရန်အကြောင်းမရှိ၊ နောက်ထပ်ဥပမာပြပေအုံ့။ သက်သေဦးဘထူးသည်အချင်းဖြစ်အကြောင်းအရာကို ခရေစေ့တွင်းကျအစမှအဆုံးတိုင်အောင် သိရှိသော်ငြားလည်း၊ အယူခံတရားလိုချစ်လှိုင်နှင့်ထွန်းဝိုင်းတို့အပေါ်တွင်သာ တိုက်ရိုက်ထွက်ဆိုထားသည်ကို တွေ့ရသည်။ အခြားအယူခံတရားလိုပါသည် မပါသည်ကိုမပြောဆိုခဲ့၊ ထိုနည်းတူစွာ၊ သက်သေဦးဘကြီးကလည်း၊ အယူခံတရားလိုချစ်လှိုင်၊ ထွန်းဝိုင်း၊ ကြည်တင်၊ အေးညိမ်း၊ မောင်သွေးနှင့်ဖြောင့်ချက်ပေးသူ အယူခံတရားလို ဌေးစိန်အပေါ်တွင် သာထိုတိုက်ခိုက်မှုတွင် ပါဝင်ကြောင်းကိုသာ ထွက်ဆိုသည်။ အခြားအယူခံတရားလိုများအပေါ်ဘာမျှထွက်ဆိုခြင်းမရှိ၊ ဖြောင့်ဆိုသူအယူခံတရားလိုဌေးစိန်၏ ထွက်ချက်မှာလည်း၊ အယူခံတရားလိုချစ်လှိုင်၊ ထွန်းဝိုင်း၊ ကြည်တင်၊ ဘဖေ၊ မလာဇာ (ခေါ်) တင်ဆွေတို့အပေါ်တွင်သာ၊ အချင်းဖြစ်ရာတွင်ပါဝင်ကြောင်းကိုထွက်ဆိုသည်။ အခြားအယူခံတရားလိုများအပေါ်တွင် ပါဝင်သည်ဟုဘာမျှထွက်ဆိုခြင်းမရှိ။ သို့တွက်ကြောင့်၊ ထိုသက်သေများထွက်ချက်ကိုမယုံကြည်ထိုက်ဟုကျွန်ုပ်တို့မယူဆနိုင်ပေ။

နိုင်ငံတော်သမတ၏ ၁၉၅၀ ခုနှစ်၊ ဇူလိုင်လ ၃၀ ရက်နေ့တွင် ထုတ်ပြန်သော လွတ်ငြိမ်းချမ်းသာခွင့်အမိန့်၊ အပိုဒ် ၃ နှင့်စပ်လျဉ်း၍ ကျွန်ုပ်တို့ သေချာစွာစဉ်းစားခဲ့ပေသည်။ ထိုအမိန့်နှင့်ပတ်သက်၍ အထက်ဖေါ်ပြပါပြဋ္ဌာန်းချက်အပိုဒ် ၃ သည် မည်သို့သောအမှုမျိုးတွင် အကျုံးဝင်သည်၊မဝင်သည်ကို စဉ်းစားရမည့် အချက်ပင်ဖြစ်ပေသည်။ အယူခံတရားလိုများက အချင်းဖြစ်သည့်အရပ်သို့သွားရောက်ပြီးတိုက်ပွဲဖြစ်ရခြင်းမှာ၊ သက်သေခံအမှတ် ၇၊ မြိတ်အရှေ့ပိုင်းစစ်ဆင်ရေးအခိန့်အရ သွားရောက်တိုက်ခိုက်ခြင်းဖြစ်၍၊ ထိုသို့တိုက်ခိုက်ရာဝယ်၊ အကယ်၍ တရားလိုဘက်မှ စွပ်စွဲပြောဆိုသည့်အတိုင်း အယူခံတရားလိုများ ဖြစ်ကြသော ပြွစောထီးတပ်သား ခေါင်းဆောင်နှင့် နောက်လိုက်နောက်ပါများတို့သည် လိုသည်ထက် ပိုမိုရှုပ်ပြစ်မှုများကျူးလွန်ခဲ့ပါက၊ ထိုပြစ်မှုများသည် အထက်ဖေါ်ပြပါလွတ်ငြိမ်းချမ်းသာခွင့်အတွင်းသို့ကျရောက်သဖြင့်၊ ပြစ်မှုမဖြစ်နိုင်ကြောင်းလျောက်ထားလေသည်။ သက်သေခံအမှတ် ၇၊ မြိတ်အရှေ့ပိုင်း ပြွစောထီး စစ်ဆင်ရေးအမိန့်သည် ၁၉၅၇ ခုနှစ်၊ မေလ ၉ ရက်နေ့တွင်၊ မြိတ်တပ်ပေါင်းစုမှူးကိုယ်စား၊ ဗိုလ်ရွှေအေးက ထုတ်လိုက်သောအမိန့်ဖြစ်သည်။ ထိုအမိန့်အပိုဒ် ၄၊ နည်းဥပဒေး

အပိုဒ်ငယ် (ခ) တွင် အောက်ပါအတိုင်း စစ်ဆင်ရေးအမိန့် ပေးထားသည်ကို တွေ့ရပေသည်။

၁၉၅၈

ချစ်လှိုင်၊ထွန်းဝိုင်း၊သိန်းအောင် ပါ ၂၂ ဦး နှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော် ဦးချန်ထွန်းအောင်။

[တရားဝန်ကြီးချုပ်က ၎င်းအပိုဒ်ကို ဖော်ပြပြီးနောက် ဆက်လက်မြွက်ဆိုသည်မှာ]

ထိုအမိန့်အရဆိုလျှင်၊ တမူတ်နှင့်မရမ်းပင်ချောင်း၊ သစ်ရာဝတြိဂံနယ်မြေအတွင်း တိုက်ခိုက်ရမည်ဟုသာ အမိန့်ရှိသည်၊ မည်သူ့ကို တိုက်ခိုက်ရမည်ကို အသျှင်းမပါရှိပေ။ ထိုနေရာကို ကျွန်ုပ်တို့လည်း အစိုးရထုတ်ပေးထားသော မြေပုံ No. 95 $\frac{L}{10}$ (သက်သေခံအမှတ် ၂-ဂ (၂) နှင့် စစ်ဆေးကြည့်ရှုသောအခါ၊ ဆီတောင်အိုင်၏ အရှေ့ဘက်တဝိုက်လောက်တွင် တိုက်ခိုက်ရန် ပေါ်လွင်နေပေသည်။ ယခုအမှုအဖြစ်အပျက်မှာကား ဤကဲ့သို့မဟုတ်၊ ဘုတ်ချောင်းထဲမှစဖြစ်၍၊ ဆီတောင်အိုင်၏ အနောက်ဘက်ရှိ ဆတ်ကျွန်းဦးသော်ငင်း၊ ဆီတောင်အိုင်မှ အနောက်ဘက်သို့ မိုင် ၁၀ မိုင်လောက်ကွာဝေးသော ပင်လယ်ရေကြောင်းပေါ်တွင်ဖြစ်ပျက်နေသော အဖြစ်အပျက်များ ပေါ်လွင်နေသည်နှင့်အမျှ၊ စစ်ဆင်ရေးအမိန့်အရ လုပ်ကိုင်ဆောင်ရွက်သည်ဆိုခြင်းမှာ မဟုတ်နိုင်ကြောင်း ထင်ရှားနေပေသည်။ ထို့ပြင်၊ နိုင်ငံတော်ကွန်ဆေနချုပ်ကြီးအားအထက်ဖော်ပြပါလွတ်ငြိမ်းချမ်းသာခွင့် အမိန့်နှင့်ပတ်သက်၍ မိမိမည်သို့ အဓိပ္ပါယ်ကောက်ယူမည်။ မည်သည့်မှုခင်းမျိုးတွင် လွတ်ငြိမ်းချမ်းသာခွင့်ရမည်။ မည်သို့သော ရာဇဝတ် ပြစ်မှုများနှင့် အကျုံးဝင်မည်စသော အချက်များနှင့်ပတ်သက်၍ လျော်ကန်သဲကွဲကို ကြားနာလိုသဖြင့်၊ ကျွန်ုပ်တို့ ဆင့်ခေါ်သောအခါ နိုင်ငံတော် ကွန်ဆေနချုပ်ကြီးကိုယ်တိုင် လာရောက်လျှောက်လဲချက်ပေးလေသည်။ ထိုအတွက် ကျွန်ုပ်တို့အထူးကျေးဇူးတင်ကြောင်း မှတ်တမ်းတင်လိုက်သည်။ ယခုအမှုတွင် ပြုစောထီးတပ်သားများဟုဆိုသောသူများမှာ၊ စင်စစ်သော်ကား ၎င်းတို့သည် ဤရုံးတော်မှခေါ်စစ်ဆေးသော မြို့တခရိုင်ဝန် ဦးဇော်၏ ထွက်ချက်အရဆိုလျှင်၊ ကြည်းတပ်သားလည်းမဟုတ်၊ ရေတပ်သားလည်းမဟုတ်၊ လေတပ်သားလည်းမဟုတ်၊ ရဲအမှုထမ်းများလည်းမဟုတ်။ သို့သော် ၎င်းတို့ကို အရံရဲ (Special Reserve Police) အဖြစ်ဖြင့်ရဲအက်ဥပဒေ (Police Act) အရ၊နောက်များမကြာမီတွင်ဖွဲ့စည်းရန်ရည်ရွယ်ထားသော သူများဖြစ်ကြောင်း သိရသည်။ ၎င်းတို့၏ လက်မပုံစံနှင့် ကိုယ်ပိုင်လက်မှတ် (Identity Card) များကို ထုတ်ပေးထားကြောင်း၊ ၎င်းတို့ကို ရဲရံပို့ငွေသဲမှ လခများကိုလည်း ပေးထားရကြောင်း စသည့်အချက်များလည်း ပေါ်လွင်နေသည့် ထိုသူများမှာ ကြည်းတပ်၊ ရေတပ်၊ လေတပ်သားများမဟုတ်

၁၉၅၀
ချစ်လှိုင်၊ထွန်းဝိုင်း၊သိန်းအောင်ပါ ၂၂ ဦးနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်
ဦးချုန်ထွန်းအောင်။

စေကာမူ၊ ထိုတပ်သားများ၏ အခွင့်အာဏာအရ ဆောင်ရွက်သော သူများဟုမှတ်ယူနိုင်ပေသည်။သို့အတွက်ကြောင့်"ထိုသူများကျူးလွန်ခဲ့သောပြစ်မှုများသည် လက်နက်ကိုင်တော်လှန်မှု၊ သောင်းကျန်းမှုတို့ပပျောက်ရန်၊ နှိမ်နင်းရန်လုပ်ကိုင်ဆောင်ရွက်ရာ၌ ကျူးလွန်ခဲ့သောပြစ်မှု ဟုတ်သည်မဟုတ်သည်ဆိုသော အချက်ပင်ဖြစ်ပေသည်။ နိုင်ငံတော်ရှေ့နေချုပ်ကြီး၏ အဓိပ္ပါယ်ကောက်ယူချက်မှာ၊ ဤသို့ဖြစ်၏၊ လက်နက်ကိုင်တော်လှန်မှု၊ သောင်းကျန်းမှုတို့ပပျောက်ရန်၊ နှိမ်နင်းရန် လုပ်ကိုင်ဆောင်ရွက်ရာ၌ ကျူးလွန်ခဲ့သောပြစ်မှုဆိုရာတွင် . တကယ်တိုက်ခိုက်နေသည့်အချိန်အခါအတွင်း၊ တကယ်စင်စစ် တိုက်နေစဉ်အတွင်း (in the course of actual operation) ကိုသာ ဆိုလိုပါသည်။ ကိုက်ခိုက်နေစဉ် မဟုတ်ဘဲ၊ တိုက်ပွဲနှင့်မဆိုင်သည့် ပြင်ပကျူးလွန်မှုများသည်၊ ၎င်းလွတ်ငြိမ်းချမ်းသာခွင့်နှင့် အကျုံးမဝင်ပါဟု ပြောဆိုသည်။ ဥပမာ-ရွာတရွာ၌ သောင်းကျန်းမှုနှိမ်နင်းရန် ဆောင်ရွက်နေသော ကြည်းတပ်၊ ရေတပ်၊ လေတပ်သား တဦးတယောက်သည်၊ သို့တည်းမဟုတ် ၎င်းတို့၏အခွင့်အာဏာအရ ဆောင်ရွက်သောသူများသည်၊ ထိုသို့နှိမ်နင်းနေစဉ်အတွင်း (during actual operation) ရွာထဲ၌မီးရှို့ခြင်း၊ လူသတ်ခြင်း၊ ဓါးပြတိုက်ခြင်း၊ မုဒိမ်းမှုပြုခြင်းကျူးလွန်ပါက၊ ထိုကျူးလွန်ခြင်းတို့သည်၊ ဤလွတ်ငြိမ်းချမ်းသာခွင့်အတွင်းသို့ကျရောက်နေသည်ဟု ယူဆရပေမည်။ သို့သော် ထိုတိုက်ပွဲရပ်စဲ၍ တိုက်ပွဲမှအပြန်တွင်သော်၎င်း၊ တိုက်ပွဲနေရာသို့ထွက်ခွါသွားစဉ် တနေရာ၌ ရပ်နားနေစဉ်သော်၎င်း၊ ကျူးလွန်သော ပြစ်မှုမျိုးမှာ၊ ဤလွတ်ငြိမ်းချမ်းသာခွင့်အတွင်းသို့ ကျရောက်သောရာဇဝတ်မှုမျိုး မဟုတ်ပါဟု လျောက်ထားပြောဆိုလေသည်။ ဤယူဆချက်အတိုင်းဆိုလျှင် အပိုဒ် ၃ တွင် ပြဋ္ဌာန်းထားသော လွတ်ငြိမ်းချမ်းသာခွင့်သည်၊ ကြည်းတပ်၊ လေတပ်၊ ရေတပ်၊ ပြည်သူ့ဝန်ထမ်း မြို့ပြဆိုင်ရာ အမှုထမ်း၊ သို့တည်းမဟုတ်၎င်းတို့၏ အခွင့်အာဏာအရဆောင်ရွက်သော သူများတို့သည် . လက်နက်ကိုင်တော်လှန်နေသော သူပုန်များ၊ သို့တည်းမဟုတ် သောင်းကျန်းမှုများကို နှိမ်နင်းရန် တိုက်ခိုက်နေစဉ်၊ ကျူးလွန်သောမည်သည့်ပြစ်မှုကိုမဆို လွတ်ငြိမ်းချမ်းသာခွင့်ရနိုင်သည်။ နှိမ်နင်းနေစဉ်၊ သို့တည်းမဟုတ် ဆောင်ရွက်နေစဉ်ဆိုသည်မှာ၊ နှိမ်နင်းဆောင်ရွက်ရာ၌ ဟူသောအဓိပ္ပါယ်နှင့် ထပ်တူထပ်မျှဖြစ်ကြောင်း၊ သို့အတွက်ကြောင့် (in the course of actual operation) တွင်ကျူးလွန်သောပြစ်မှုကိုသာ လွတ်ငြိမ်းခွင့်ပြုကြောင်း ပေါ်လွင်နေသည်။ နိုင်ငံတော်ရှေ့နေချုပ်ကြီး အဓိပ္ပါယ်ကောက်ယူချက်သည်ကျွန်ုပ်တို့အဓိပ္ပါယ်ယူဆချက်နှင့်ထပ်တူထပ်မျှပင်ဖြစ်သည်။ သို့ဖြစ်၍၊ ကျွန်ုပ်တို့ ထိုအဓိပ္ပါယ်ယူဆချက်ကို လုံးဝသဘောတူပေသည်။

၁၉၅၈

ချစ်လှိုင်၊ထွန်းဝိုင်း၊သိန်းအောင်ပါ ၂၂ ဦးနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်

ဦးချန်ထွန်းအောင်။

ဥပမာပြုပေဦးအံ့၊ လက်နက်ကိုင်တပ်သား တဦးတယောက်သည်၊ သောင်းကျန်းမှုခွင့်မခန်းရန်အတွက် မိမိတပ်နှင့်အတူထွက်လာပြီး၊ ထိုတပ်သည် တနေရာ၌ ရပ်နားနေစဉ်၊ထိုတပ်သားသည်အနီးအနားရှိ ရွာထဲသို့သွား၍ ခါးပြုမှသော်၎င်း၊ မုဒိမ်းမှုသော်၎င်း၊ ကျူးလွန်လျှင်၊ ထိုကဲ့သို့ကျူးလွန်သော ပြစ်မှုသည် သောင်းကျန်းမှု ပပျောက်ရန် နှိမ်နင်းလုပ်ကိုင်ရာ၌ ကျူးလွန်သောပြစ်မှုမဟုတ်ကြောင်းမှာ များစွာထင်ရှားပေသည်။ ထိုနည်းတူစွာ တိုက်ပွဲနှင့်မဆိုင်ဘဲ၊ တိုက်ပွဲအပြီးပြုန်ရာ လမ်းတွင်၎င်း၊ တိုက်ပွဲဖြစ်နေရာနှင့် အလျဉ်းမသက်ဆိုင်ဘဲ ပြင်ပနေရာ၌ ကျူးလွန်သောပြစ်မှုများ အကျုံးမဝင်ကြောင်းမှာလည်း ထင်ရှားပေသည်။'' ထိုယူဆချက်အတိုင်း၊ ကျွန်ုပ်တို့သည် ဤအယူခံမှုနှင့်ပတ်သက်၍ သုံးသပ်ကြည့်ရှု စစ်ဆေးသောအခါ၊ အယူခံတရားလိုများအား အပ်နှင်းလိုက်သော စစ်ဆင်ရေးအမိန့်သည်၊ အထက်ဖေါ်ပြပါ သက်သေခံအမှတ် ၇ အရ သတ်မှတ်ထားသော တြိဂံနယ်မြေအတွင်းသာဖြစ်ပေသည်။ ဗိုလ်ကြီးမောင်မောင်သန်းကိုယ်တိုင် ထိုအတိုင်း ပင်ဝန်ခံထားလေသည်။ သို့သော် အဖြစ်အပျက်အကြောင်းအရာတို့ကို ကျွန်ုပ်တို့သေချာစွာ မျက်မြင်သက်သေများ၏ထွက်ချက်အရ သုံးသပ်ကြည့်ရှုသောအခါ၊ တိုက်ခိုက်လုယူသည်ဟုဆိုသော ရာဘာထုပ်၊ ဓရွ ငွေ၊ စားနပ်ရိက္ခာများတို့သည်၊ တြိဂံနယ်မြေအတွင်းမဟုတ်ဘဲ၊ ပြင်ပနေရာတွင် ဖြစ်နေသည့်အပြင်၊ ဗိုလ်ကြီးမောင်မောင်သန်းကိုယ်တိုင်ကပင် ထိုနေ့ ထိုရက် ထိုအချိန်တွင် မိမိစုံစမ်းသိရှိရသည့်အလျောက် ရန်သူများနှင့် တိုက်ပွဲမဖြစ်ကြောင်း သိရပါသည်ဟု အတိအလင်းထွက်ဆိုထားပေသည်။ ထို့ပြင် အယူခံတရားလိုချစ်လှိုင်ကိုယ်တိုင် တိုက်ပွဲဖြစ်သည်ဟု အစီရင်ခံထားသော အစီရင်ခံစာ (သက်သေခံအမှတ် ၈) နှင့် ၂၀-၅-၅၇ နေ့စွဲဖြင့် တင်သွင်းသောအစီရင်ခံစာ (သက်သေခံအမှတ် ၆) တို့မှာ တခုနှင့်တခုများစွာဇီလာဖြစ်နေသည်ကိုတွေ့ရှိရပေသည်။ တိုက်ပွဲနှင့်ပတ်သက်၍၊ ၂၂-၅-၅၇ နေ့စွဲဖြင့် တင်သွင်းသောအစီရင်ခံစာ (သက်သေခံအမှတ် ၈) တွင် အယူခံတရားလို မောင်ချစ်လှိုင်က မိမိကိုယ်တိုင်လက်မှတ်ရေးထိုး၍ အောက်ပါအတိုင်း အစီရင်ခံထားလေသည်။

[ၾင်းအစီရင်ခံစာကိုဖေါ်ပြပြီးနောက် ဆက်လက်မြွက်ဆိုသည်မှာ]

ထိုအစီရင်ခံစာအတိုင်းဆိုလျှင် (အောင်ကြီးသာ) စက်လေနှင့် ၾင်းတို့သည်၊ ၀င်လယ်ပြင်တွင်တိုက်ပွဲဖြစ်ရာ (အောင်ကြီးသာ) စက်လေသည်အလို အလျောက်နစ်မြုပ်သွားကြောင်းပေါ်လွင်နေသည်။ သို့သော် ၂၀-၅-၅၇ နေ့စွဲဖြင့် အစီရင်ခံစာ (သက်သေခံအမှတ် ၆) ကို စစ်ဆေးကြည့်ရှုသောအခါ၊ ထိုအဖြစ်အပျက်များအတိုင်းမဟုတ်ဘဲ၊ များစွာကွဲလွဲနေသည်ကိုတွေ့ရသည့်ပြင်

၁၉၅၈

ချစ်လှိုင်၊ထွန်းထိုင်းသိန်းအောင်ပါ ၂၂ ဦးနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော် —— ဦးချန်ထွန်းအောင်။

အယူခံတရားလိုချစ်လှိုင်၏ ရုံးရှေ့ကိုယ်တိုင်အစစ်ခံချက်နှင့်လည်း ဖိလာဖြစ်နေသည်။ အယူခံတရားလိုချစ်လှိုင်ကိုယ်တိုင် ရုံးတွင်ကျမ်းကိုင်အစစ်ခံသည့်အခါ (အောင်ကြီးသာ) စက်လေ့မှာအလိုအလျောက်နှစ်မြုပ်သွားခြင်းမဟုတ်၊ ၎င်း၏အမိန့်အရဖေါက်ထွင်းပြီး နှစ်မြုပ်ပစ်လိုက်ခြင်းမှာ အလွန်တရာ ထင်ရှားနေပေသည်။ ထို့ပြင် (အောင်ကြီးသာ) စက်လေ့ပေါ်တွင်တွေ့ရှိသော ဒဏ်ရာဒဏ်ချက်များကလည်း အယူခံတရားလိုချစ်လှိုင်၏ထွက်ချက်ကိုမထောက်ခံဘဲ၊ တရားလိုဘက်မှမျက်မြင်သက်သေများ၏ ထွက်ချက်များကို ထောက်ခံထားသည်ကိုတွေ့ရပေသည်။ အထူးသဖြင့်အယူခံတရားလိုများပြောဆိုသည့်အတိုင်း အဖြစ်အပျက်မဟုတ်ကြောင်းမှာ၊ ဗိုလ်ကြီးမောင်မောင်သန်းကိုယ်တိုင် လိုက်လံစစ်ဆေးကြည့်ရှုသောအခါ၌၊ မဟုတ်ကြောင်းတွေ့ရှိရသည့်အပြင်၊ မြိတ်ခရိုင်လုံခြုံရေးဦးစီးအရာကပင်လျှင်၊ မိမိတို့၏အစည်းအဝေးမှတ်တမ်းဆုံးဖြတ်ချက် (သက်သေခံအမှတ်ယ) များကထင်ရှားနေပေသည်။ အထူးသဖြင့်၊ ဗိုလ်ကြီးမောင်မောင်သန်း (လိုပြ ၄၃) ၏အောက်ပါထွက်ချက်များတို့သည်၊ တရားလိုများစွပ်စွဲထားသည့်အတိုင်းအဖြစ်အပျက်မှာ မှန်ကန်နေကြောင်း ထောက်ခံထားသည်ကို တွေ့ရှိရပေသည်။

[ဗိုလ်ကြီးမောင်မောင်သန်း၏ ထွက်ချက်များကို ဖေါ်ပြသည်။ စာမျက်နှာ ၂၂၁ မှ ၂၂၃ အထိကြည့်ပါ]။

အထက်ပါအစစ်ခံချက်အရဆိုလျှင်၊ အယူခံတရားလိုများတို့သည် မည်သို့ပင်သက်ဆိုင်ရာလုံခြုံရေးဦးစီးအဖွဲ့မှတပ်စုမှူးက သောင်းကျန်းသူများကိုနှိမ်နင်းရန်အတွက် တိုက်ကင်းထွက်ရန်အမိန့်အခွင့်ပေးလိုက်စေကာမူ၊ ထိုအခွင့်ပေးသည့်နယ်နိမိတ်အတွင်းမဟုတ်ဘဲလိုသည်ထဲက ပိုမိုကျူးလွန်ခဲ့ကြောင်းကို၊ ဗိုလ်ကြီးမောင်မောင်သန်းကိုယ်တိုင်ကပင်လျှင် ဝန်ခံထားသည်ကိုတွေ့ရမေသည်။ ၎င်းဗိုလ်ကြီးမောင်မောင်သန်း၏ အစစ်ခံချက်နှင့်ပတ်သက်၍၊ ရာဇဝတ်ကျင့်ထုံးဥပဒေပုဒ်မ ၁၆၂ (၁) အရအငြင်းပွားခဲ့သော ကိစ္စမှာလည်း၊ ထိပုဒ်မက တားမြစ်သော ရဲအစစ်ခံချက်မှာ၊ ရဲအရာရှိထံတွင်သက်သေကဲ့ခဲ့သော အစစ်ခံချက်မှသာဖြစ်သည်။ ဥပမာ သက်သေတဦးတယောက်သည် ရဲအရာရှိထံ၌ ရေးသားထားသော အစစ်ခံချက်တခုပေးထားသော်၊ ထိုအစစ်ခံချက်သည် ထိုသက်သေရုံးရှေ့တွင် အစစ်ခံသောထွက်ချက်နှင့် ဖိလာဖြစ်နေလျှင်၊ ထိုသက်သေအစစ်ခံချက်၏တန်ရာတန်ဘိုးကိုပျက်စီးစေလိုသောသဘောဖြင့် တရားလိုဘက်ကသော်၎င်း၊ တရားခံဘက်ကသော်၎င်း၊ အဆိုပါရဲအရာရှိရှေ့တွင်အစစ်ခံခဲ့သောအစစ်ခံချက်ဖြင့် သက်သေခံအက်ဥပဒေပုဒ်မ ၁၄၅ တွင် ပြဋ္ဌာန်းထားသည့်အတိုင်း သုံးနိုင်ဖေသည်။

၁၉၅၈
ချစ်လှိုင်၊ထွန်းဝိုင်း၊ သိန်းဇာဝင် ပါ ၂၂ ဦး နှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော် ဦးချန်ထွန်းအောင်။

ဤသို့သုံးစွဲနည်းမှာ ၎င်း၏သက်ဆိုင်ရာရဲအစစ်ခံချက်ကို ကောက်နုတ်၍ မိတ္တူတင်သွင်းခြင်းဖြင့်သာ အသုံးပြုနိုင်ပေသည်။ သို့သော်ထိုသက်သေ၏ရဲအရာရှိ၌ အစစ်ခံချက်သည် အမှုစစ်ဆေးသောရုံးတော်ကအမှုတွင် ထည့်သွင်းစဉ်းစားနိုင်သောသက်သေအစစ်ခံချက်မဟုတ်။ ထိုသက်သေ၏အစစ်ခံချက်ကိုယုံကြည်ထိုက်မယုံကြည်ထိုက်၊ သို့တည်းမဟုတ် တန်ဘိုးမည်ရွေမည်မျှရှိသည်ကို ချိန်ဆနိုင်ရန်သာဖြစ်သည်။ သို့ရာတွင် ထိုသက်သေကို မေးခွန်းထုတ်ရာ၌ ရဲအရာရှိထံတွင်၊ ဤမည်သောအစစ်ခံချက်များပြုလုပ်ခဲ့ပါသလားဟု အစစ်ခံခဲ့သော ကောက်နုတ်ချက်ကိုဖတ်ပြ၍မေးမြန်းသောအခါ၊ ထိုအတိုင်းအစစ်ခံခဲ့ပါသည်ဟုထွက်ဆိုလျှင်၊ ထို့ပြင်ထိုအစစ်ခံချက်သည် ယခုရုံးရှေ့တွင်ထွက်ဆိုသောအစစ်ခံချက်နှင့် ကွဲလွဲနေပါလျက်၊ မည်သည့်အစစ်ခံချက်ကမှန်သနည်းဟုမေးမြန်းသောအခါ သက်သေကရဲအရာရှိထံတွင်အစစ်ခံခဲ့သော အစစ်ခံချက်သည်မှန်ပါသည်ဟုထွက်ဆိုလျှင်၊ ထိုမှန်သည်ဟုဆိုသော ရဲအစစ်ခံချက်သည် ရာဇဝတ်ကျင့်ထုံးဥပဒေပုဒ်မ ၁၆၂ တွင်တားမြစ်ထားသော ရဲအစစ်ခံချက်မဟုတ်တော့ဘဲ၊ ထိုသက်သေကရုံးရှေ့ကိုယ်တိုင်အစစ်ခံသောအစစ်ခံချက် အခြေသို့ရောက်နေ၍၊ ဤအစစ်ခံချက်များကိုရုံးတော်ကအမှုစစ်ဆေးရာ၌ ထည့်သွင်းစဉ်းစားနိုင်ပေသည်။ထိုနည်းအတိုင်းသက်သေဗိုလ်ကြီးမောင်မောင်သန်း၏ ရဲအစစ်ခံချက်နှင့်ပတ်သက်၍၊ ကျွန်ုပ်တို့သုံးသပ်ကြည့်ရှုသောအခါ၊ အောက်ခုံရုံးတော်မှငင်းအစစ်ခံချက်များသည် ရာဇဝတ်ကျင့်ထုံးဥပဒေပုဒ်မ ၁၆၂ (၁) တွင်တားမြစ်ထားသော ရဲအစစ်ခံချက်များဖြစ်၍ အသုံးမပြုနိုင်ဟုချမှတ်ထားခြင်းမှာ မှားယွင်းပေသည်။ ဗိုလ်ကြီးမောင်မောင်သန်းသည် ရဲအရာရှိ၌တွင်အစစ်ခံခဲ့သောအစစ်ခံချက်နှင့်ပတ်သက်၍ အောက်ရုံးအမှုတွဲအပိုင်း (၂) စာမျက်နှာ ၂၁၅ နှင့် ၂၁၆ တွင်အောက်ပါအတိုင်းဖြေဆိုထားလေသည်။

[ငင်းနောက် ဗိုလ်ကြီးမောင်မောင်သန်း၏ထွက်ချက်များကိုဖော်ပြသွားသည်]။

ဖော်ပြပါပဌမမေးခွန်း၏အဖြေသည် ဗိုလ်ကြီးမောင်မောင်သန်း၏ သက်ဆိုင်သောရဲအစစ်ခံချက်ကို ရေးမှတ်ထားသည့်ရဲအရာရှိက ထိုအတိုင်းအစစ်ခံခဲ့ကြောင်းကောက်နုတ်ချက်မိတ္တူတခုပြုပြီးတင်သွင်းမှသာလျှင်၊ ထိုသက်သေခံချက်ကိုအသုံးပြုနိုင်ပေမည်။ ယခုမှာ ထိုမေးခွန်းတွင်ပါသော ကောက်နုတ်ချက်အတိုင်းရေးသားထားသောသက်ဆိုင်သည့် ရဲအရာရှိကသက်သေခံချက်မရှိသဖြင့်၊ ထိုအဖြေနှင့်ပတ်သက်သော ရဲအစစ်ခံချက်သည် သက်သေခံမဝင်ပေ။ သို့ဖြစ်၍ အထက်ပါမေးခွန်းများနှင့် အဖြေများအနက်၊ ပဌမအမေးအဖြေမှလွဲ၍ ကျန်မေး

၁၉၅၈

ချစ်လှိုင်၊ထွန်းဝိုင်း၊သိန်းအောင် ၀၊ ၂၂ ဦးနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်

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ဦးချန်ထွန်းအောင်။

ခွန်းများ၏ ဖြေများကိုထောက်ရှုလိုက်ပါက၊ မိုလ်ကြီးမောင်မောင်သန်း၏ ရဲအစစ်ခံချက်သည် ရာဇဝတ်ကျင့်ထုံးပုဒ်မ ၁၆၂ တွင်ပါရှိသော တားမြစ်ချက်နှင့် အကျုံးမဝင်ဘဲ၊ မိမိဝန်ခံထားသည့်အတိုင်း၊ ထိုအသီးသီး မေးထားသောမေးခွန်းနှင့်အဖြေများတွင်ပါရှိသည့်အချက်အလက်များတို့သည် သက်သေခံဝင်သော အချက်များဖြစ်သဖြင့်၊ အမှုတွင်ထည့်သွင်းနိုင်သောအချက်များ ဖြစ်ပေသည်ဟု ကျွန်ုပ်တို့ထင်မြင်ပေသည်။ သို့အတွက်ကြောင့် မိုလ်ကြီးမောင်မောင်သန်း၏အစစ်ခံချက်ကိုကျွန်ုပ်တို့သည်အမှုနှင့်သက်ဆိုင်သလောက် ထည့်သွင်းစဉ်းစားနိုင်သည်၊ ထိုအချက်များသည် လုံးလုံးလျားလျား ရဲအစစ်ခံချက်များဖြစ်သည်ဟု ဆိုကာ မပယ်ရှားနိုင်။

အထက်ပါအကြောင်းချင်းရာများကို ရှိရှုစဉ်းစားပြီး၊ နိုင်ငံတော်သမတ ပြဋ္ဌာန်းထားသောလွှတ်တော်မိန်းချမ်းသာခွင့်အမိန့်အဝိဒ် ၃ ၏အဓိပ္ပါယ်ကိုနိုင်ငံတော် ရှေနေချုပ်ကြီးယူဆသော အဓိပ္ပါယ်အတိုင်း ကျွန်ုပ်တို့ကလည်း ယူဆသဖြင့်၊ အယူခံတရားလိုများတို့ကျူးလွန်ခဲ့သောပြစ်မှုသည် သောင်းကျန်းမှု ပပျောက်ရန် နှိမ်နင်းရာ၌ ကျူးလွန်သောပြစ်မှုမျိုးမဟုတ်ဘဲ၊ သတ်မှတ်ချက်မှ ကျော်လွန်၍ ကျူးလွန်သောပြစ်မှုများဖြစ်ကြောင်း ထင်ရှားနေပေသည်။ လူသတ်ပြီး၊ ဓါးပြမှု ကျူးလွန်ခြင်းမှာလည်း မျက်မြင်သက်သေများ၏ ထွက်ချက်အရငင်း၊ ထိုတချိန်တည်းတိုက်ခိုက်ရာတွင် ဆိတောင်အိုင်ရွာသားများဖြစ်သူနေထူးအုံ၊ ကျော်ရှိန်၊ မအေး၊ လွဲခင် တို့၏ထွက်ချက်အရသော်ငင်း၊ အမှုတွင်ပြောင့်ဆိုချက်ပေးထားသောအယူခံတရားလိုဒွေစိန်၏ ထွက်ချက်အရသော်ငင်း၊ ထင်ရှားနေသည်ကို တွေ့ရပေသည်။ အယူခံတရားလိုအချို့တို့သည် တိုက်ပွဲတွင်ပါဝင်သည်ဟုဆိုထားသည်ကို တွေ့ရပေသည်။ သို့သော်အယူခံတရားလိုချစ်လှိုင်နှင့် ထွန်းဝိုင်းတို့ကမူ ငိုက်ယူလာသောရာဘာထုပ်များကို မိုလ်ကြီးမောင်မောင်သန်းအမိန့်အရဆိုင်ရာ သို့ချက်ခြင်းမအပ်နိုင်ခြင်းမှာ၊ ၎င်းတို့ကိုင်ဆောင်ပြီး ထွက်နေသည့် အတွက်ကြောင့်ဖြစ်ကြောင်းသက်သေများပြသည်။ သို့သော် ထိုသက်သေ အစစ်ခံချက်များမှာ အလျဉ်းယုတ္တိမရှိသည်ကိုတွေ့ရပေသည်။ တချားခံပြ သက်သေများက၊ အယူခံတရားလိုမောင်ချစ်လှိုင်သည် ဆိတောင်အိုင်မှအပြန်၊ ကွဲကူးရောက်ရောက် ချင်းတပ်သားများနှင့် တိုက်ကင်းထွက်သွားသည်ဟု ထောက်ခံချက်ဆိုထားချက်မှာ၊ မရေမရာမတိမကျသောထွက်ချက်များဖြစ်ပေသည်။ အထူးသဖြင့်သက်သေရန်ဖြေ (ခံပြ ၁၅)၊ ဦးဟုန်ကြင် (ခံပြ ၁၆)၊ ဦးတင် (ခံပြ ၁၇) နှင့်မောင်စံတင် (ခံပြ ၁၈) တို့သည်တိကျပြတ်သားသောနေ့စွဲကို မပေးနိုင်ဘဲ၊ အယူခံတရားလိုချစ်လှိုင်သည် ထိုစဉ်အခါကငင်းတို့နှင့်တွေ့လိုက်ကြောင်း၊ မရန်းပင်ချောင်း

တိုက်ပွဲဖြစ်သည့်နေ့ရက်ကိုမသိကြောင်း၊ တိုက်ပွဲဖြစ်သည်ကိုသာ ကြားရကြောင်း ထွက်ဆိုထားသည်ကိုသာတွေ့ရပေသည်။

၁၉၅၈

ချစ်လှိုင်၊ထွန်းဖိုင်း၊သိန်းအောင် ပါ ၂၂ ဦး နှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်

ဦးချန်ထွန်းအောင်။

အယူခံတရားလိုထွန်းဝိုင်းမှာလည်း၊ မြိတ်အနောက်ပိုင်း ကာကွယ်ရေးတပ်သားတယောက်သာဖြစ်၍၊ သက်သေခံအမှတ် ၇ စစ်ဆင်ရေးအမိန့်အရဆိုလျှင်၊ ၎င်းအမိန့်မှာ မြိတ်အရှေ့ပိုင်းမြို့စောထီးတပ်သားများကိုသာ ပေးသောအမိန့်ဖြစ်သောကြောင့်၊ မည်သည့်အတွက်ကြောင့်၎င်းသည် ဓါဓိန့်ခွင့်မသက်ဆိုင်သော ဖေ၊ ပြပါတမုတ်၊ မရမ်းပင်ချောင်း၊ သစ်ရာဝတြိဂံနယ်မြေအတွင်း တိုက်ခိုက်ရန်ပါသွားခြင်းကိုအကြောင်းမပြနိုင်ပေ။ ဤအချက်မှာလည်း အယူခံတရားလိုများချေပထားသည့်အချက်ကိုများစွာပျက်ပြယ်စေသော အချက်ပင်ဖြစ်ပေသည်။ သို့အတွက်ကြောင့်အယူခံတရားလိုများဘက်မှ လျှောက်ထားသော အချက်အလက်များကို ကျွန်ုပ်တို့လက်မခံနိုင်ပေ။ အယူခံတရားလိုများတို့သည် ကွန်မြူနစ်များ နှိမ်နင်းရန် ပဂျောက်ရန်တိုက်ပွဲဆင်နွှဲသောအမိန့်ရရှိစေကာမူ၊ ထိုအမိန့်ထက်ကျော်လွန်ကာ မတရားဓါးပြတိုက်၍ (အောင်ကြီးသာ) စက်လေ့ပေါ်မှပစ္စည်းများကို တိုက်ယူသည့်အပြင် အနိုးအနာရှိရှာသူရှာသားများထံမှတိုက်ခိုက်လုယူသော ပြစ်မှုများကိုကျူးလွန်ခြင်းမှာ များစွာထင်ရှားနေပေသည်။ အယူခံတရားလို အသီးသီးကတင်ပြသော တရားခံပြသက်သေများတို့မှာ၊ တရားလိုဘက်မှပြသည့် အဓိကဖြစ်သောသက်သေ ဦးဘထူး (လိုပြ ၂)၊ မောင်လွန်းတင် (လိုပြ ၄)၊ ဗိုလ်ကြီးမောင်မောင်သန်း (လိုပြ ၄၃)၊ (သိန်းသန်း) စက်လေ့ပဲ့ကိုင် ဦးဘကြီး (လိုပြ ၃)၊ ဆိတောင်ဘိုင်ရွာမှသက်သေမောင်ကျော်ရှိန် (လိုပြ ၂၅)၊နေထူးအုံ (လိုပြ ၂၀)၊မောင်လွှဲခင် (လိုပြ ၂၉)၊မအေဉ် (လိုပြ ၂၇) နှင့် မခင်အေး (လိုပြ ၂၃) တို့၏ တိကျပြတ်သားစွာစွပ်စွဲထားချက်များကို လုံလောက်စွာချေပနိုင်ခွင်းမပြုနိုင်ချေ။ ထို့ပြင်တရားလိုဘက်မှ စွပ်စွဲသော အချက်အလက်များနှင့် တရားခံဘက်မှချေပသောအချက်အလက်များမှာ လုံးဝဖိလာဖြစ်နေသည်ကိုတွေ့ရပေသည်။ တရားလိုဘက်မှပြောဆိုချက်များမှန်ပါက တရားခံများဘက်မှပြောဆိုချက်များမမှန်နိုင်။ တဘက်၏ပြောဆိုချက်သာလျှင်မှန်လိမ့်မည်။ ကျွန်ုပ်တို့သည် အထက်ကဝေဖန်ခဲ့သည့်အတိုင်း တရားလိုဘက်မှ သက်သေအသီးသီးတို့ထွက်ဆိုထားသောအစစ်ခံချက်များကိုအမှုတွင် ပေါ်ပေါက်နေသော ပတ်ဝန်းကျင်အခြေအနေ၊ (သိန်းသန်း) စက်လေ့နှင့် (အောင်ကြီးသာ) စက်လေ့တို့၏အခြေအနေ၊ (အောင်ကြီးသာ) စက်လေ့ကြီးကိုပြန်ပို့သည့်နေရာ၏ အခြေအနေ၊ (အောင်ကြီးသာ) စက်လေ့ကြီးပေါ်တွင်ဖေါက်ထွင်းထားသောနေရာများ၏အခြေအနေ၊ ထိုစက်လေ့ပေါ်မှအသက်ချမ်းသာရာရပြီး (စတော်) လှေကလေးနှင့်

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ချစ်လှိုင်၊ထွန်းဝိုင်း၊သိန်းအောင် ပါ ၂၂ ဦးနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်

ဦးချန်ထွန်းအောင်။

ထွက်ပြေးလာရသောသူ ၂ ယောက်၊ဦးဘထူးနှင့်မောင်လွန်းတင်တို့၏ထွက်ချက်၊ ခုံရုံးအသွဲ့ဝင်လူကြီးများကိုယ်တိုင် အချင်းဖြစ်နေရာသို့သွား၍ တွေ့ရှိသောအချက်အလက်များမှတ်တမ်းတို့ကို ပူးတွဲဘတ်ရှုကြည့်သောအခါ၊ တရားလိုမှထွက်ဆို သောအဓိကသက်သေများ၏ ထွက်ချက်တို့သည် မှန်ကန်သောထွက်ချက်များဖြစ် ကြောင်းပေါ်လွင်ထင်ရှားပေသည်။ အထူးသဖြင့် သက်သေခံအမှတ် ၂-ဂ (၂) မြေပုံကိုစစ်ဆေးကြည့်ရှုပါက၊ အယူခံတရားလိုများပြောသည့် အဖြစ်အပျက်မှာ မဟုတ်နိုင်ပေ။ (အောင်ကြီးသာ) စက်လှေသည်ငင်းတို့၏ ပြောဆိုချက်အရဆို လျှင်၊ ဆတ်ကျန်းနား ကိုက် ၁၀၀-၂၀၀ လောက်တွင်နစ်မြုပ်သည်ဟု ဆိုသည်။ သို့သော် (အောင်ကြီးသာ) စက်လှေနစ်မြုပ်သည့်နေရာမှာ၊ ဆတ်ကျန်းအ နောက်ဘက် ပင်လယ်ရေကြောင်းတွင် မိုင်ပေါင်း ၁၀ မိုင်လောက်၌ပျက်စီး၍ ငင်း၏မြောက်ဘက် ကော့ဒွေးကျန်းနားတွင် သောင်တင်နေခြင်းကိုထောက်ရှု ခြင်းအားဖြင့်ငင်း၊ တရားလိုဘက်မှအထူးသဖြင့် သက်သေဦးဘထူး (လိုပြ ၂)၊ ဦးဘကြီး (လိုပြ ၃) နှင့်မောင်လွန်းတင် (လိုပြ ၄) တို့၏ထွက်ချက်နှင့်ဖြောင့် ဆိုသူအယူခံတရားလို ငွေ၄်နှ၏ ထွက်ဆုံက်ကို ထည့်သွင်းစဉ်းစားခြင်းဖြင့်ငင်း၊ တရားလိုဘက်ကတင်ပြသောအချက်အလက်များနှင့် ကိုက်ညီနေသည်ကို တွေ့ရ သဖြင့်၊ တရားလိုဘက်မှ သက်သေများထွက်ဆိုသည့်အတိုင်း အယူခံတရားလို ချစ်လှိုင်နှင့်ထွန်းဝိုင်းတို့ခေါင်းဆောင်သော ပြွှစောထီးတပ်သားများအချို့သည်၊ ကွန်ပြွှနစ်များကို နှိမ်နင်းရန်တိုက်ကင်းလှည့်မည်ဟု ဆိုကာ၊ အခွင့်ကောင်းယူ၍ တိုက်ကင်းဖြစ်ပွါးခြင်းမရှိဘဲ၊ မိမိတို့၏ဝိသမလောဘတိုက်တွန်းချက်အရ၊ ကွန်ပြွှ နစ်များနှင့်ဆက်ဆံကြောင်း သက်သေခံချက် အလျဉ်းမပေါ်ပေါက်သော ရွာသူ ရွာသားများ၏ကိုယ်ပိုင်ပစ္စည်းများ၊ အတောက်နှင့်မကြင်ပွါးတို့ပိုင်သော ရာဘာ ထုပ်များ၊ ငင်းတို့ကိုတင်ဆောင်လာသည့် (အောင်ကြီးသာ) စက်လှေကြီးကို လုံးဝပျောက်စေလိုသောသဘောဖြင့်၊ စက်လှေပေါ်မှလူများအားလုံး (ဦးဘထူး နှင့် လွန်းတင်တို့မှအပ) သတ်ဖြတ်၍ စက်လှေကိုနှစ်မြုပ်လိုက်ခြင်းမှာ၊ တရားလို ဘက်မှစွပ်စွဲထားသည့်အတိုင်း ထင်ရှားနေသည်ဟုကျွန်ုပ်တို့ယူဆပေသည်။ ၎င်းအ ချက်တွင်အောက်ခုံရုံးတော်ယူဆချက်များသည် မှန်ကန်သည်ဟုယူဆသည်။

အယူခံတရားလိုတို့သည် ပြွှစောထီးကာကွယ်ရေးတပ်သားများ ဖြစ်သဖြင့်၊ စစ်ဥပဒေအရသော်၎င်း၊ အရံရဲဥပဒေအရသော်၎င်း၊ ခန့်အပ်ခြင်းမပြုရသေး သော်ငြားလည်း၊ ဆိုင်ရာတပ်မတော်မှအာဏာပိုင်သူ၏ အခွင့်အာဏာအရ၊ တိုက်ကင်းထွက်စဉ်ရှိသည့်အခွင့်အရေးအာဏာကို လိုသည်ထက်ပို၍ ပြုလုပ်ခဲ့ ခြင်းဖြစ်သဖြင့်၊ ရာဇဝတ်မှုကျူးလွန်ရန်လည်း မတရားစိတ်မရှိသဖြင့်၊ အသိုးသီး

၁၉၅၀ ခု၊ ချစ်လှိုင်၊ထွန်းဝိုင်း၊သိန်းအောင် ပါ ၂၂ ဦးနှင့် မြည်ထောင်စု မြန်မာနိုင်ငံတော် — ဦးချန်ထွန်းအောင်။

ကျူးလွန်ခဲ့သောအမှုများသည် ရာဇဝတ်မမြောက်ဟုအယူခံ တရားလိုများ၏ လွှတ်တော်ရှေ့နေကြီးက ထပ်လောင်း၍လျှောက်ထားသည်။ ထိုလျှောက်ထား ချက်ကို ကျွန်ုပ်တို့လက်ခံနိုင်ရန်အကြောင်းဘာမျှမရှိ။ နိုင်ငံတော်သမတ၏ လွတ် ငြိမ်းချမ်းသာခွင့်အမိန့်တွင် သက်ဆိုင်သောအပိုဒ်၏အဓိပ္ပါယ်သည် နိုင်ငံတော် ရှေ့နေချုပ်ကြီးအဓိပ္ပါယ်ကောက်ယူချက်အတိုင်းပင်ဖြစ်သည်။ လက်နက်ကိုင်တော်လှန်မှု၊ သောင်းကျန်းမှုပပျောက်ရန် နှိမ်နင်းရန်လုပ်ကိုင်ဆောင်ရွက်ရာ၌ ကျူးလွန်သောရာဇဝတ်ပြစ်မှုများကိုသာ၊ လွတ်ငြိမ်းချမ်းသာခွင့်ရှိစေရမည်ဟု အတိအလင်းပြဋ္ဌာန်းထားသည့်အလျောက်၊ ယင်းသို့လုပ်ကိုင်ဆောင်ရွက်ရာ၌မဟုတ်ဘဲ၊ လိုသည်ထက်ပိုမိုသောဆောင်ရွက်မှုများ၊ သို့မဟုတ်တိုက်ပွဲနှင့်မဆိုင်သောပြုလုပ်မှုများတို့သည်၊ ထိုအမိန့်နှင့်မသက်ဆိုင်ကြောင်းမှာ များစွာထင်ရှားနေပေသည်။

ဤအယူခံမှုဌာနေ၊ပေါက်နေသောအဖြစ်အပျက်များမှာလည်း၊ ကျွန်ုပ်တို့အထက်၌အသေးစိတ်ဝေဖန်ခဲ့သည့်အတိုင်း၊ တိုက်ကင်းလှည့်ရန်အဓိန် ပေးလိုက်သော ကြိုဂံနယ်မြေတွင်မဟုတ်ဘဲ၊ အခြားသောနေရာများ၌ကျူးလွန်ကြကြောင်း ထင်ရှားနေသည့်အလျောက်၊ကျွန်ုပ်တို့သည် အယူခံတရားလို မောင်သိန်းအောင်၊ မောင်ကြင်၊ အုံးတင်၊ ဗိုလ်အုံ၊ မောင်ရှိ၊ စောဖေ၊ ချစ်သိန်း၊ လှတင်၊ တင်ငွေ၊ ထိန်ရွှေ၊ သင်းဖေ၊သိန်းရွှေနှင့်စံတင်တို့မှအပ၊ ကျန်အခြားအယူခံတရားလိုများဖြစ်ကြသောချစ်လှိုင်၊ ထွန်းဝိုင်း၊ ကျော်သန်း၊ မောင်ရှိန်၊ ကြည်တင်၊ တင်မြင့်၊ အေးငြိမ်း၊ဘဖေ၊ မတ်လာဇာ၊ မောင်သွေးနှင့်ဖြောင့်ဆိုချက်ပေးထားသော အယူခံတရားလိုငွေစိန်တို့၏ အယူခံများကို ကျွန်ုပ်တို့လက်ခံနိုင်စရာအကြောင်း ဘာမျှမပြောင်သဖြင့်၊ ၎င်းတို့၏အယူခံများကိုပလပ်ရပေမည်။ အခြားအယူခံတရားလို ဘဉ ယောက်၊ သိန်းအောင်၊ မောင်ကြင်၊ အုံးတင်၊ မောင်ရှိ၊ စောဖေ၊ လှတင်၊ တင်ငွေ၊ ထိန်ရွှေ၊ သင်းဖေ၊ သန်းရွှေ၊ စံတင်၊ ဗိုလ်အုံ၊ ချစ်သိန်း တို့၏အယူခံကို လက်ခံ၍၊ ၎င်းတို့အပေါ်၌ ချမှတ်လိုက်သောတသက်တကျွန်း ထောင်ဒဏ်ကို ပယ်ဖျက်ပြီး၊ ၎င်းတို့အားဤအမှုနှင့်ပတ်သက်၍တရားသေလွှတ်လိုက်သည်။

အယူခံတရားလိုငွေစိန်အပေါ်တွင် ပေးလိုက်သောအပြစ်ဒဏ်မှာ၊ တသက်တကျွန်းထောင်ဒဏ်ဖြစ်သည်။ ၎င်းသည်ကိုယ်တိုင်အမှု၏ အကြောင်းအရာအစုံအလင်ကို၊ တရားသူကြီးတဦးရှေ့တွင်ဖြောင့်ဆိုချက်ပေးသည့်အပြင်၊ သေချာတပ်အပ်စွာအသေးစိတ်ဖေါ်ပြ၍၊ ၎င်းနှင့်အဇ္ဈတ္တပြုတိုက်မှုကြီးတွင်ပါဝင်သောသူများကိုလည်း၊ ရုံးရှေ့ကျင်းကျိန်အစစ်ခံသောအခါ ဖေါ်ပြထားသည်ကိုတွေ့ရသည်။ ၎င်းကိုယ်တိုင်ကကြောက်ရွံ့သဖြင့် တိုက်ရာတွင် လိုက်သွားရပါသည်ဟုဆိုသော်လည်း၊ ဘိုက်ခိုက်သည့်နေရာတွင် အစမှအဆုံးတိုင်ပါဝင်သည်ကို တွေ့ရသည်။

၁၉၅၁
ချစ်လှိုင်၊ထွန်းဝိုင်း၊သိန်းအောင် ပါ ၂၂ ဦးနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်
ဦးချန်ထွန်းအောင်။

ကြောက်ရွံ့သဖြင့်လိုက်သွားရပါသည် ဆိုသောစကားမှာ အပြစ်ဒဏ်လျော့ပေါ့သက်သာအောင်ပြောဆိုသောစကားဖြစ်သည်။ သို့အတွက်ကြောင့် ၎င်းအားအောက်ခုံရုံးတော်မှချမှတ်လိုက်သော တသက်တကျွန်းထောင်ဒဏ်ကို ပယ်ဖျက်၍၊ ထိုပြစ်ဒဏ်အစားအလုပ်ကြမ်းနှင့် ထောင်ဒဏ် ၇ နှစ်သာ့ကျခံစေရန် အမိန့်ချမှတ်လိုက်သည်။

အယူခံတရားလို ချစ်လှိုင်နှင့် ထွန်းဝိုင်းတို့၏အယူခံကိုလက်မခံနိုင်၍ပလပ်ပြီး၎င်းတို့အပေါ်တွင် ရာဇသတ်ပုဒ်မ ၃၉၆ အရအပြစ်ရှိသည်ဟု ယူဆပြီး၊အောက်ခုံရုံးတော်မှချမှတ်လိုက်သောသေဒဏ်ကိုအတည်ပြုလိုက်သည်။

အယူခံတရားလို ကျော်သန်း၊ ကြည်တင်၊ တင်မြင့်၊ အေးငြိမ်း၊ ဘဖေ၊ မတ်လာဇာ၊ မောင်ရှိန်နှင့် မောင်သွေတို့၏အယူခံကိုလည်း၊ အောက်ခုံရုံးတော်မှ၎င်းတို့အပေါ် ချမှတ်လိုက်သော ပြစ်ဒဏ်တသက်တကျွန်း ထောင်ဒဏ်ကိုပယ်ဖျက်ရန်အကြောင်းဘာမျှမရှိသဖြင့်၊ ကျွန်ုပ်တို့ပလပ်လိုက်သည်။

U SAN MAUNG, J.—I would like to add a few remarks to the judgment just pronounced by the learned Chief Justice with whose conclusions I am entirely in agreement.

In the first place, I would like to point out that the so-called confession of Ngwe Sein, Exhibit "တ", is not a real confession at all. What Ngwe Sein really said was that he went along with Chit Hlaing and party, more or less, under duress for the purpose of pointing out Sittaung-aing Village and the houses of some of the persons residing therein. He did not know with what intention Chit Hlaing went there and took no part whatsoever in the dacoity and the murders which actually took place under the direction of Chit Hlaing. All he had to do was to keep *kin* duty near the *phongyi-kyaung* while Chit Hlaing

went about Sittaung-aing arresting several persons during the first visit to that village.

ခရာဝ

ရန်လိုင်၊ ထွန်း
ဦး။ သိန်း
အောင် ပါ
၂၂ ဦး
နှင့်
ပြည်ထောင်စု
မြန်မာနိုင်ငံ
တော်

ဦးစံမောင်။

As observed by the Supreme Court in *Tan Chit Lye* v. *The Union of Burma* (1), a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession.

In order to be admissible under section 30 of the Evidence Act as against Ngwe Sein's co-accused in the case, the inherent quality of the statement made by Ngwe Sein must be that of a confession, and one of the tests to determine whether a statement amounts to a confession is whether the statement by itself is sufficient for the conviction of its maker of the offence for which he is being tried jointly with those against whom that statement is sought to be given.

Ngwe Sein's so-called confession having failed to satisfy this test, it cannot be used against the appellants Bo An, Chit Thein, Kyi Tin, Ba Pe, and Matha Za whose names he had mentioned therein.

In fact, Ngwe Sein's so-called confession is no more than a statement made by him to a Magistrate under section 164 of the Criminal Procedure Code. Such a statement cannot be treated as substantive evidence of the facts stated therein, and can be used only to corroborate or contradict his story when Ngwe Sein gave evidence on oath which he did on behalf of his own defence after charges were framed against him.

Regarding Exhibit "ဏ-ဝ" which is the list given by the appellant Chit Hlaing to his superior

(1) (1950) B.L.R. 172 (S.C.).

၁၉၅၀
ချစ်ဖိုင်၊ ထွန်း
ဖိုင်း သိန်း
အောင် ပါ
၂၂ ဦး
နှင့်
ပြည်ထောင်စု
မြန်မာနိုင်ငံ
တော်
ဦးစံမောင်။

authorities in respect of the persons who had accompanied him when he set out on his "fighting patrol" it is also not substantive evidence of the facts stated therein. It can only be used for the purpose of corroborating or contradicting Chit Hlaing when he give evidence on oath, which he did on behalf of his own defence when charges were framed against him.

Consequently, as regards the appellants against whom there were only Exhibit "ဏ-၁" and Ngwe Sein's so-called confession on record, there was no evidence on which the Tribunal could have framed charges against them. They were the appellants Thein Aung, Maung Kyin, Ohn Tin, Bo An, Maung Shi, Saw Pe, Chit Thein, Hla Htin, Tin Ngwe, Htain Shwe, Thin Pe, Than Shwe and Saw Tin. They should have been discharged at the early stage of the proceedings. Consequently, Ngwe Sein's evidence against them should not be taken into consideration bearing in mind the principles laid down in *Ba Pe*'s case (1) relied upon by the learned Chief Justice. As against other appellants whose convictions are being confirmed there is ample evidence to show that they did take part in the dacoity in the course of of which murder was committed. It is my firm conviction that the murder was deliberately planned and perpetrated with a view that the dacoities might never be brought home against the appellants on the maxim "Dead men tell no tales". It is indeed fortunate for the administration of justice that some of the men who were thought to be dead live to tell the tale of the atrocities which took place. Regarding the application of the Presidential proclamation for amnesty, I am of the opinion that what Chit Hlaing and his confederates had done was

(1) (1950) B.L.R. 178 (H.C.).

such a violent departure from what Captain Maung Maung Than was said to have directed them to do, that it could not be regarded to have been done in the course of the duty assigned to them. In fact, they were merely told to go on " fighting patrol " and incidentally to capture contraband rubber if it could be found. What they have done was to have committed wholesale dacoities and cold-blooded murders of innocent persons under the cloak of the authority said to have been given to them.

For these reasons, I agree in the order proposed by the learned Chief Justice.

၁၉၅၀

ချစ်လိုင်၊ ထွန်းဝိုင်း၊ သိန်းအောင် ပါ ၂၂ ဦး နှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံတော်

ဦးစံမောင်း

တရားဝန်ကြီး ဦးဘသောင်း။ ။ပညာရှိတရားဝန်ကြီးချုပ်နှင့် တရားဝန်ကြီး ဦးစံမောင်တို့ ချမှတ်ခဲ့သည့်စီရင်ချက်နှင့် အမိန့်တို့ကို ကျွန်ုပ်သဘောတူပါသည်။ နိုင်ငံတော်သမတ၏ ၁၉၅၀ ခုနှစ်၊ ဇူလိုင်လ ၃၀ ရက်နေ့တွင် ထုတ်ပြန်သော လွတ်ငြိမ်းချမ်းသာခွင့် အမိန့်အမှိတ် ၃ ကိုရည်ညွှန်း၍ ကျွန်ုပ် အနည်းငယ်ထပ်လောင်းပြီးပြောဆိုလိုသည်မှာ၊ ၎င်းအမိန့်အမှိတ် ၃ နှင့်စပ်လျဉ်း၍ မည်သို့သောအမှုမျိုးသည် ၎င်းအမိန့်အမှိတ် ၃ အတွင်းသို့ သက်ရောက်သည်၊ မသက်ရောက်သည်ကို စဉ်းစားဆုံးဖြတ်ရာ၌ အောက်ပါ အဓိကအချက်တို့ကို စဉ်းစားသင့်သည်။

(၁) ပြစ်မှုကျူးလွန်ခဲ့သောသူသည် မြန်မာနိုင်ငံတော်၏ ကြည်းတပ်၊ ရေတပ်၊ လေတပ်သားများဟုတ် မဟုတ်၊ထိုသို့မဟုတ်သော်ငြားလည်း ၎င်းတပ်သားများ၏ အခွင့်အာဏာအရ၊ ဆောင်ရွက်သောသူ ဟုတ် မဟုတ်။

(၂) ထိုသူသည် လက်နက်ကိုင် တော်လှန်မှု၊ သောင်းကျန်းမှုတို့ ပမျောက်ရန်သော်၎င်း၊ နှိမ်နင်းရန်သော်၎င်း လုပ်ကိုင်ဆောင်ရွက်ဘိရာ သက်ဆိုင်ရာမှ အမိန့်အာဏာရရှိသည်၊မရရှိသည်။

(၃) ထိုသို့အာဏာရရှိပြီး၍ လက်နက်ကိုင်တော်လှန်မှု၊သောင်းကျန်းမှုတို့ပမျောက်ရန် သော်၎င်း၊ နှိမ်နင်းရန်သော်၎င်း၊ လုပ်ကိုင်ဆောင်ရွက်ရာတွင် တကယ်စင်စစ် တိုက်ခိုက်နေသည့် အချိန်

၁၉၅၈

ချစ်လှိုင်၊ ထွန်းဝိုင်း သိန်းအောင် ပါ ၂၂ ဦး နှင့် မြည်ထောင်စု မြန်မာနိုင်ငံတော်

ဦးဘသောင်း။

ကာလအတွင်းမှာသာလျှင် ပြစ်မှုကျူးလွန်ခြင်း ဖြစ်သည်။ သို့မဟုတ် တကယ်စင်စစ် တိုက်ခိုက်နေစဉ်အတွင်းမဟုတ်ဘဲ၊ သောင်းကျန်းမှု နှိမ်နင်းဘို့ရာ သော်၎င်း၊ သောင်းကျန်းမှု ပပျောက်ဘို့ရာသော်၎င်း၊ ဆောင်ရွက်တိုက်ခိုက်ရန် အသွားတွင်ဖြစ်စေ၊ ရပ်နားနေသည့်အခိုက်တွင်ဖြစ်စေ၊ တိုက်ခိုက်ပြီး အပြန်တွင်ဖြစ်စေ ပြစ်မှုကျူးလွန်ခဲ့ခြင်း ဖြစ်သည်ဟူသော အချက်များပင် ဖြစ်သည်။ ဤအချက်များနှင့် စပ်လျဉ်း၍ အမှုတွင် ပေါ်ပေါက်သော အကြောင်းအချင်းအရာများနှင့် သက်သေခံချက်များအပေါ်၌သာလျှင် မူတည်ခြင်းကြောင့် ၎င်းတို့ကို တိကျသေချာစွာ စဉ်းစားဝေဖန်ပြီးမှ ဆုံးဖြတ်ချက်ပေးသင့်သည်ဟု ကျွန်ုပ်ယူဆသည်။

ရာဇဝတ်အယူခံ

တရားလွှတ်တော် တရားဝန်ကြီးချုပ် ဦးဆုန်ထွန်းအောင်နှင့် တရားလွှတ်တော် ဝန်ကြီး ဦးစံမောင်တို့ရှေ့၌

မောင်တင်အောင် (အယူခံ တရားလို)

ပြည်ထောင်စုမြန်မာနိုင်ငံ

နှင့်

ပြည်ထောင်စုမြန်မာနိုင်ငံ

မောင်တင်အောင် (အယူခံတရားခံ)။*

† ၁၉၅၈ စက်တင်ဘာလ ၁၆ ရက်။

ရာဇသတ်ကြီးပုဒ်မ ၃၀၀၊ ခြွင်းချက်အဝိုဒ် (၁)၊ လူအများရှေ့၌ ဆဲရေးတိုင်းထွာခြင်း၊ ခြွင်းချက်အတွင်းသို့ ကျရောက်သည့် အကြောင်းချင်းရာများ လုံးဝမရှိ၊

ဆုံးဖြတ်ချက်၊ ။လူအများရှေ့၌ သော်၎င်း၊ မိန်းကလေးရှေ့၌ သော်၎င်း "ခွေး" နှင့်ရိုင်းဆိုခြင်းမှာ အယူခံတရားလိုနှင့် ပတ်သက်၍ အလွန်ဆုံးဆဲရေးတိုင်းထွာသော စကားလုံးမျှသာဖြစ်ပေသည်။ ထိုစကားလုံးများသည် အယူခံတရားလိုကို ရုတ်တရက် အကြီးအကျယ် မိမိကိုယ်ကို မိမိမချုပ်ကိုင်နိုင်လောက်အောင် ဒေါသဖြစ်စေသည်ဟု မည်သည့်နည်းနှင့်မျှ မယူဆနိုင်၊ ရာဇသတ်ပုဒ်မ ၃၀၀၊ ခြွင်းချက် ၁ အတွင်းသို့ ကျရောက်သည့်အကြောင်းချင်းရာများ လုံးဝမရှိ။

အယူခံတရားလိုအတွက်၊ ဦးဘိုးဘ။

အယူခံတရားခံအတွက်၊ ဦးချစ် (အစိုးရရှေ့နေကြီး)။

တရားဝန်ကြီးချုပ်ဦးချုန်ထွန်းအောင်။ ။အယူခံတရားလို မောင်တင်အောင်အပေါ်တွင်၊ ရာဇသတ်ကြီးပုဒ်မ ၃၀၂ အရ၊ မောင်ချစ်စိန်ဆိုသူအား မိုင်ဖယ်သေနတ်နှင့် ပစ်သတ်မှုနှင့် ပတ်သက်၍ ပြစ်မှုထင်ရှားသည်ဟု ယူဆပြီး

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* ၁၉၅၈ ခုနှစ်၊ ရာဇဝတ် အယူခံ/စောဒက မှုအမှတ် ၂၀၄/၁၂။

† ၁၉၅၈ ခုနှစ်၊ ရာဇဝတ်ကြီးမှုအမှတ် ၃ တွင်ချမှတ်သော ၁၉၅၈ ခုနှစ်၊ ဩဂုတ် လ ၂ ရက်နေ့စွဲပါ မကွေးမြို့၊ ပဌမ အထူးတရားသူကြီး (စက်ရှင် တရားသူကြီး) ၏ အမိန့်ကို အယူခံမှု။

၁၉၅၁

မောင်တင်အောင် ပြည်ထောင်စု မြန်မာနိုင်ငံ နှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံ မောင်တင်အောင်။

ဦးချန်ထွန်း အောင်။

မကွေးမြို့၊ ပဌမ အထူးတရားသူကြီးက သေဒဏ်ကျခံစေရန် အမိန့်ချမှတ်လိုက်သဖြင့်၊ ၎င်းအမိန့်ကိုအယူခံဝင်ခြင်းဖြစ်သည်။

အမှုအဖြစ်အပျက်မှာ သေသူ မောင်ချစ်စိန်နှင့် အယူခံတရားလို မောင်တင်အောင် တို့သည် အချင်းဖြစ်ပွါးသော အချိန်၌ တောင်တွင်းကြီးမြို့တွင် ပြုစောထီးကာကွယ်ရေးတပ်သားများ ဖြစ်ကြသည်။ ၁၉၅၈ ခုနှစ်၊ ဇန်နဝါရီလ ၇ ရက်နေ့တွင် ၎င်းတို့သည် ဆထုံရွာနားရှိ မီးရထားတံတားကို အခြားစစ်ရဲတပ်သားများနှင့်အတူစောင့်ရှောက်ရန် စစ်ရဲတပ်ကြပ် မောင်ထွန်းမြ (လိုပြ ၂) ဦးစီး၍ ဝတ္တရားကျရောက်လေသည်။ ထိုသို့ ဝတ္တရားကျရောက်သည့်အလျောက် ထိုနေ့ညနေ ၃ နာရီလောက်တွင် ၎င်းတို့သည် ဆထုံမီးရထားတံတားနားရှိ ကျောင်းကုန်းရွာအနီးတွင်ရှိလေ၏။ ထိုနေ့ညနေ ၃ နာရီလောက်အချိန်တွင် မခင်ပု (လိုပြ ၄) ဆိုသော မိန်းကလေးတယောက်သည် တောင်တွင်းကြီးသို့ ပြန်ရန် အတွက် မီးရထားကို ၎င်းဆထုံတံတားအနီးရှိ ကျောင်းကုန်းရွာမှ စောင့်ဆိုင်းနေလေသည်။ ဤသို့ စောင့်ဆိုင်းနေခိုက် အယူခံတရားလို မောင်တင်အောင်သည် သေနတ်ကိုလွယ်လျက် မခင်ပုအား စကားလာပြောလေသည်။ စကားပြောနေစဉ် သေသူမောင်ချစ်စိန်လည်း ထိုနေရာသို့ ရောက်လာပြီး ဝင်၍စကားပြောလေသည်။ ထိုအချိန်၌ မီးရထားကို လာစောင့်နေသော အခြားသူများလည်းရှိကြ၏။ သေသူမောင်ချစ်စိန်သည်မခင်ပုအား ဆေးလိပ်သောက်ရန် ဆေးလိပ်ကိုတည်ရာ၊ မခင်ပုက မသောက်လိုဘူးဟု ငြင်းပယ်သော်လည်း သောက်ပါဟု ဆိုကာ ဆေးလိပ်မီးညှိပြီး အတင်းပေးလေသည်။ မခင်ပုကလည်း ထိုမီးညှိပေးသော ဆေးလိပ်ကိုသောက်နေစဉ် အယူခံတရားလို မောင်တင်အောင်က ထိုဆေးလိပ်ကို တောင်းသောက်သဖြင့် မခင်ပုက လှမ်းပေးလိုက်သောအခါ သေသူ မောင်ချစ်စိန်က အယူခံတရားလို မောင်တင်အောင်ကို "လူတယ်တာကွ" ဟုပြောလိုက်သည်၊ မခင်ပုလည်း ၎င်း၏အမေက ကျောင်းကုန်းရွာမှ ခေါ်သဖြင့် အိမ်သို့ပြန်သွားရာ၊ အိမ်ပေါက်ဝလောက် ရောက်သောအခါ၌ မီးရထားလမ်းဘက်ဆီမှ သေနတ်သံတချက် ကြားလိုက်ရလေသည်။ ရွာသူရွာသားများလည်း ထိတ်လန့်ကြသဖြင့် ဟိုပြေးဒီပြေးဖြစ်နေရာမှ မခင်ပုလည်း မီးရထားလမ်းဘက်ဆီသို့ပြန်လာရာ မောင်ချစ်စိန်မှာ သေနတ်ဒဏ်ရာဖြင့် မီးရထားလမ်းဘေးတွင် လဲနေသည်ကို တွေ့ရလေသည်။ မခင်ပုက ၎င်းအားမေးကြည့်ရာ မောင်တင်အောင်က ၎င်းကို သေနတ်နှင့်ပစ်သွားကြောင်း ပြောပြလေသည်။

အချင်းဖြစ်အချိန်၌ မီးရထားကို စောင့်နေသူ အခြားသက်သေများလည်း ရှိကြသည်။ ၎င်းတို့မှာ မောင်ပု (လိုပြ ၅) နှင့် မောင်ပုတ်ကလေး (လိုပြ ၁၂)၊

ကိုဖြစ်ကြသည်။ ၎င်းတို့၏ ထွက်ချက်အရဆိုလျှင် မောင်ပု (လိုပြ ၅) က သေသူ မောင်ချစ်စိန်သည်၊ မခင်ပုနှင့် စကားပြောနေစဉ် အယူခံတရားလို မောင်တင်အောင်လည်း အနီးအနားဦ၌ရှိနေကြောင်း။ မောင်ချစ်စိန်ကို အယူခံတရားလိုက သေနတ်နှင့်ပစ်လိုက်သဖြင့် မောင်ချစ်စိန် သေနတ်ထိမှန်ပြီး လဲသွားသည်ကိုလည်း မြင်လိုက်ရကြောင်း၊ ထို့နောက် အယူခံတရားလို မောင်တင်အောင်သည် သေနတ်ကိုင်၍ ထွက်သွားကြောင်း၊ မောင်ချစ်စိန်၊ ဟ မခင်ပုကို ဆေးလိပ်တည်သဖြင့် ထိုဆေးလိပ်ကို မခင်ပုထံမှ အယူခံတရားလိုက ယူ၍သောက်ရာ မောင်ချစ်စိန်က "ခွေးတယ်တာမဟုတ်ဘူး၊ လူတယ်တာကွ" ဟု ပြန်ပြောလိုက်သည်ကိုလည်း ကြားရကြောင်း ထွက်ဆိုသည်။

၁၉၅၈

မောင်တင်အောင်၊ ပြည်ထောင်စုမြန်မာနိုင်ငံနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံ၊ မောင်တင်အောင်၊ ဦးချန်ထွန်းအောင်။

မောင်ပုတ်ကလေး (လိုပြ ၁၂) ကလည်း ၎င်းမိုးရထားကို စောင့်နေစဉ် မိမိအနောက်မှ သေနတ်သံတချက်ကြား၍ လှည့်ကြည့်လိုက်ရာ လူတယောက် သေနတ်ထိမှန်ပြီး လဲကျသွားကြောင်း၊ သေနတ်နှင့်ပစ်လိုက်သော သူမှာလည်း သေနတ်ကိုကိုင်လျက် မြောက်ဘက်သို့ ထွက်ပြေးသွားသည်ကို မြင်ကြောင်း ထွက်ဆိုထားလေသည်။

ဆထုံမိုးရထားတံတားကို ဦးစီးစောင့်ကြပ်ရသော စစ်ရဲတပ်ရင်း (၉) မှ တပ်ကြပ် မောင်ထွန်းမြ (လိုပြ ၂) ကလည်း အချင်းဖြစ်နေ့ ညနေ ၃ နာရီအချိန် လောက်တွင် မိမိတို့စောင့်ကြပ်နေသောနေရာ တောင်ဘက်မှ သေနတ်ပစ်သံ တချက်ကြားသဖြင့် ထွက်ပြီးကြည့်ရာ အယူခံတရားလို မောင်တင်အောင်သည် ရိုင်ဖယ်သေနတ်လွယ်ပြီး မိမိအနားသို့ရောက်လာသဖြင့် မိမိက "သေနတ်ပစ်သံကြားတယ်၊ မင်းဘယ်ကလာသလဲ" ဟု မေးသောအခါ မောင်တင်အောင်က မောင်ချစ်စိန်ကို သေနတ်နှင့်ပစ်ပြီး လာခဲ့ကြောင်း ဝန်ခံပြောဆိုသဖြင့် မောင်တင်အောင်ကို ကြိုးနှင့်ချည်ပြီး၊ ၎င်းကိုင်ဆောင်သော သေနတ်ကို သိမ်းလိုက်ကြောင်း။ အချင်းဖြစ်နေရာသို့ ရောက်သွားသောအခါ မောင်ချစ်စိန်မှာလည်း သေနတ်ဒဏ်ရာဖြင့် လဲနေသည်ကို တွေ့ကြောင်း၊ ၎င်းအားမေးကြည့်ရာ အယူခံတရားလို မောင်တင်အောင်က သေနတ်နှင့်ပစ်ကြောင်း ပြောသည်ဟု ထွက်ဆိုထားသည်ကို တွေ့ရသည်။

သေသူ မောင်ချစ်စိန်ကိုလည်း အချင်းဖြစ်နေရာမှ တောင်တွင်းကြီးဆေးရုံသို့ပို့လိုက်ရာ ဆေးရုံတွင်ပင် ၎င်း၏ပဌမတိုင်ချက်ကို ဆိုင်ရာရဲဒရာနာက စစ်ဆေးပြီးယူလေသည်။ ထိုပဌမတိုင်ချက်ထဲတွင်လည်း အယူခံတရားလို မောင်တင်အောင်က ၎င်းကို မခင်ပုက ဆေးလိပ်တည်ရာမှ စကားများပြီး သေနတ်နှင့်ပစ်ကြောင်းကို ကိုယ်တိုင်တိုင်ချက်ပြုလုပ်ထားသည့်အပြင် အချင်းဖြစ်နေ့ ညနေ ၅ နာရီအချိန်

၁၉၅၈

မောင်တင်အောင်၊ ပြည်ထောင်စုမြန်မာနိုင်ငံနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံ မောင်တင်အောင်။

ဦးချန်ထွန်းအောင်။

လောက်တွင် တောင်တွင်းကြီးမြို့၊ ဒုတိယရာဘက် ရာဇဝတ်တရားသူကြီး ထံ၌ လည်း သေတမ်းစစ်ချက် (သက်သေခံအမှတ် ၈) တခုပြုလုပ်ရာတွင် မခင်ပုကို ဆေးလိပ်တည်ရာမှ အချင်းချင်းစကားများကြပြီး အယူခံတရားလိုက ၎င်းအား သေနတ်နှင့် ပစ်ကြောင်းကို တိုက်ဆိုင်သားစွာ အစစ်ခံထားသည်ကို တွေ့ရသည်။

မောင်ချစ်စိန်မှာ ထိုနေ့ည ဂ နာရီလောက်တွင် ဆေးရုံ၌ပင် သေဆုံးသွား လေသည်။ ၎င်းရရှိသော ဒဏ်ရာများကို စစ်ဆေးသော ဆရာဝန် ဟာဘန်းဆင်း (လိုပြ ၉) ၏ ထွက်ချက်အရဆိုလျှင် သေသူသည် ကိုယ့်အနီးမှကပ်၍ ပစ်လိုက်သဖြင့် ဝမ်းပိုက်ပိုင်း ထုတ်ချင်းပေါ်က်ထွက်သွားသော သေနတ်ဒဏ်ရာကို ရရှိသည့်အလျောက်၊ ထိုဒဏ်ရာမှာလည်း မုချသေရမည့်ဒဏ်ရာဖြစ်ကြောင်း ထွက်ဆိုထားသည်ကို တွေ့ရသည်။

၎င်အချက်အလက်များကို ထောက်ထား၍ အယူခံတရားလိုအား ရာဇသတ် ကြီးပုဒ်မ ၃၀၂ အရ၊ အောက်ရုံး၌ စွဲချက်တင်ပြီး၊ ၎င်းအား စစ်ဆေးမေးမြန်း သည့်အခါ သေသူ မောင်ချစ်စိန်အား သေနတ်နှင့် တမင်သက်သက် မပစ်ရ ကြောင်း၊ အချင်းမဖြစ်မီညနေ ၃ နာရီလောက်အချိန်တွင် မိမိနှင့် သေသူမောင် ချစ်စိန်တို့သည် ပြုစောထီးတပ်သားများ ဖြစ်ကြသည့်အလျောက် မီးရထား တံတားကို ဝတ္တရားအတိုင်းစောင့်ရှောက်နေရာ သေသူမောင်ချစ်စိန်ထံမှဆေးလိပ် မီးတောင်းသည့်အခါ သေသူက ၎င်းအားလူအများရှေ့တွင် မအေ နှမနှင့်ဆဲရေး တိုင်းထွာကြောင်း၊ မခင်ပုဆိုသော မိန်းကလေးကို သေသူမောင်ချစ်စိန်က ဆေး လိပ်တည်နေစဉ် မိမိက မောင်ချစ်စိန်ထံတွင် ဆေးလိပ်တောင်းရာ မောင်ချစ်စိန် က မိမိကိုဆဲရေးကြောင်း၊သေသူသေနတ်မှန်သည့်ကိစ္စမှာ မိမိတွင်ရှိသောသေနတ် ကို မိမိပုခုံးပေါ်သို့ ပြန်ထမ်းလိုက်သောအခါ မတော်တဆ ကျည်ဆံထွက်သွား သဖြင့် မောင်ချစ်စိန်အား ထိမှန်ခြင်းဖြစ်ကြောင်း၊ သို့ထိမှန်သွဲ့းသဖြင့် ၎င်း၏ အကြီးအကဲဖြစ်သူ ဗိုလ်ထွန်းမြကိုပြေး၍ ပြောကြောင်း စသည်တို့ဖြင့် ချေပထား လေသည်။ သို့သော် ၎င်း၏ထွက်ဆိုချက်ကို ထောက်ခံသော သက်သေ တဦး တယောက်မျှမရှိသဖြင့် ၎င်းချေပချက်ကို အောက်ရုံးက လက်မခံခဲ့ချေ။

သေသူ မောင်ချစ်စိန်သည် ၎င်း၏ ရှေ့အနီးမှကပ်၍ပစ်လိုက်သော ရိုင်ဖယ် သေနတ်ဒဏ်ရာရရှိ၍ သေကြောင်းမှာ ၎င်း၏အလောင်းကို စစ်ဆေးသောဆရာ ဝန်၏ ထွက်ချက်ဖြင့် ထင်ရှားပေသည်။ ထိုထွက်ချက်နှင့် မခင်ပု၊ မောင်ပု၊ မောင်ပုတ်ကလေးတို့၏ ထွက်ချက်အပြင်၊ အခြားတရားလိုပြ သက်သေများတို့၏ ထွက်ချက်များကို သေသူမောင်ချစ်စိန်ကိုယ်ကိုင် ပြုလုပ်သွားသော ပဌမတိုင်ချက်

နှင့် သေတမ်းစစ်ချက်ဖြင့် သုံးသပ်စဉ်းစားစစ်ဆေးကြည့်ရှုသောအခါ ကျွန်ုပ်တို့၏စိတ်တွင် သေသူအား အယူခံတရားလို မောင်တင်အောင်က သေနတ်နှင့် ပစ်လိုက်၍သေရခြင်းမှာ အနည်းငယ်မျှ သံသယမရှိပေ။ အယူခံတရားလိုက မိမိသေနတ်ကိုပုခုံးပေါ်သို့ ပြန်ထမ်းလိုက်သဖြင့် ကျည်ဆံမတော်တဆ ထွက်သွားကာ သေသူအား ထိမှန်သည်ဆိုသည်မှာအလျဉ်းမဟုတ်နိုင်ချေ။ ထောက်ခံသည့် သက်သေလည်းမရှိ၊ မိမိတို့ကို အုပ်ချုပ်သော စစ်ရဲတပ်ရင်း (၉)မှ တပ်ကြပ်ဗိုလ်ထွန်းမြကို မတော်တဆ ကျည်ဆံထွက်သွားကြောင်း ပြောပြသည်ဟု ဆိုရာ၌လည်း ဗိုလ်ထွန်းမြက ဤကဲ့သို့မပြောရကြောင်း၊ သေသူမောင်ချစ်စိန်ကို ၎င်းက သေနတ်နှင့်ပစ်ခဲ့ကြောင်း ဝန်ခံသည့်အပြင်၊ မောင်ချစ်စိန်ကို အချင်းဖြစ်နေရာသို့ သွား၍စစ်ဆေးသောအခါ၌ သူကြီးဦးမင်းသောင်း (လိုပြ ၃) ရှေ့တွင် မခင်ပုကို ဆေးလိပ်တည်ရာမှ အယူခံတရားလိုက ဆေးလိပ်ကို ဆွဲသောက်သဖြင့် သေသူက အယူခံတရားလိုအား "ငါလူကိုတယ်တာ၊ မင်းကိုတယ်တာမဟုတ်ဘူး" ဟု ပြောလိုက်ရာမှ အယူခံတရားလိုက သေနတ်နှင့်ပစ်ကြောင်း ပြောပြထားသည်ဟု အစစ်ခံထားသဖြင့် မတော်တဆ သေနတ်ကျည်ဆံထွက်၍ ထိမှန်သည်ဆိုသည်မှာ အလျဉ်းမဖြစ်နိုင်ပေ။ သေသူ မောင်ချစ်စိန်အား တမင်သက်သက်ပစ်လိုက်သည်ဟုသာ ကျွန်ုပ်တို့ယူဆရပေမည်။

၁၉၅၈
မောင်တင်အောင် ပြည်ထောင်စုမြန်မာနိုင်ငံနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံ မောင်တင်အောင်။
ဦးချန်ထွန်းအောင်။

ကျွန်ုပ်တို့ရှေ့ဝယ်တွင် အယူခံတရားလိုအတွက် လိုက်ပါဆောင်ရွက်သော ပညာရှိလွှတ်တော် ရှေနေကြီးက တရားလိုဘက်မှ စွပ်စွဲသည့် အဖြစ်အပျက်များကို မှန်ကန်သည်ဟုယူဆပါက အယူခံတရားလိုသည် ရုတ်တရက် အကြီးအကျယ် ဒေါသထွက်အောင် ပြုခြင်းကိုခံရသဖြင့် မိမိကိုယ်ကို မိမိမချုပ်တီးနိုင်သည့်အတွက်ကြောင့် သေသူမောင်ချစ်စိန်ကို သေနတ်နှင့်ပစ်ရမည်ကြောင်း၊ သို့အတွက် ရာဇသတ်ပုဒ်မ ၃၀၀၊ ခြွင်းချက်အပိုဒ် (၁) အရ၊ ၎င်းကျူးလွန်သောအမှုမှာ သေဒဏ်ထိုက်သင့်သော လူသတ်မှုမမည်တဲ့ လူသေမှုသာဖြစ်ကြောင်း လျှောက်ထားလေသည်။ အထူးသဖြင့်မီးရထားဘူတာရုံတွင် လူအများရှေ့၌သော်၎င်း၊ မိန်းကလေးဖြစ်သူ မခင်ပု၏ ရှေ့၌သော်၎င်း "ခွေး" နှင့်နှိုင်းဆိုခြင်းမှာ ရုတ်ဖွယ်ရာဖြစ်၍ ဒေါသအလျောက် သေနတ်နှင့်ပစ်လိုက်ရကြောင်းကို အဓိကထားကာ လျှောက်ထားလေသည်။ ဤလျှောက်ထားချက်ကို ကျွန်ုပ်တို့လက်မခံနိုင်ပေ။ ရာဇသတ်ကြီးပုဒ်မ ၃၀၀၊ ခြွင်းချက်အပိုဒ် (၁)၏ ပြဋ္ဌာန်းချက်မှာ ယခုအမှုတွင် ဖြစ်ပေါ်နေသော အဖြစ်အပျက်အခြေအနေမျိုးနှင့် အကျုံးမဝင်ပေ။ သေသူမောင်ချစ်စိန်က အကယ်၍ အဆိုပါစကားလုံးများကို သုံးလိုက်သည်ဆိုစေကာမူ၊ အယူခံတရားလိုနှင့်ပတ်သက်၍ အလွန်ဆုံး ဆဲရေးတိုင်းထွာသော စကားလုံးမျှသာ

၁၉၅၈

မောင်တင်အောင် ပြည်ထောင်စုမြန်မာနိုင်ငံနှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံ မောင်တင်အောင်၊ ဦးချန်ထွန်းအောင်၊

ဖြစ်ပေသည်။ ထိုစကားလုံးများသည် အယူခံတရားလိုကို ရုတ်တရက် အကြီးအကျယ် မိမိကိုယ်ကို မိမိမချုပ်တီး နိုင်လောက်အောင် ဒေါသဖြစ်စေသည်ဟု ကျွန်ုပ်တို့ မည်သည့်နည်းနှင့်မျှ မယူဆနိုင်။ သေသူ မောင်ချစ်စိန်၏ သေတမံးစစ်ချက်နှင့် ပဌမတိုင်ချက်တွင် အထူးသဖြင့် ထွက်ဆိုထားသော ထွက်ချက်တခုမှာ အယူခံတရားလိုသည် ထိုစဉ်အခါက အရက်မူးနေသည်ဟု ပါရှိလေသည်။ ထိုအချက်သည် အယူခံတရားလိုကို များစွာနှစ်နာစေသော အချက်တချက်ဖြစ်ပေသည်။ အရက်အနည်းငယ် မူးသောကြောင့်ပင် မပြောပလောက်သော ဆဲရေးတိုင်းထွာပြောဆိုမှုကြောင့် မောင်ချစ်စိန်အား သေနတ်နှင့်ပစ်ရခြင်းမှာ သဘောလိုသော အကြံအစည်ဖြင့် ပစ်လိုက်သည်ဟု ကျွန်ုပ်တို့ ယူဆရပေမည်။ သို့ဖြစ်၍ အဆိုပါ ဥပဒေခြွင်းချက်အတွင်းသို့ ကျရောက်သည့် အကြောင်းချင်းရာများလုံးဝမရှိသဖြင့် အယူခံတရားလိုအတွက် လိုက်ပါဆောင်ရွက်သော လွှတ်တော်ရွေးနေကြီး၏ လျှောက်ထားချက်ကို ကျွန်ုပ်တို့ လုံးဝလက်မခံနိုင်ပေ။

အထက်ဖေါ်ပြပါ အချက်အလက်များကို အထောက်အထားပြု၍ အယူခံတရားလိုအား အောက်ရုံးမှ ရာဇသတ်ကြီးပုဒ်မ ၃၀၂ အရ၊ ပြစ်မှုထင်ရှားသည့် အလျောက် ၎င်းအား သေဒဏ်ကျခံစေရန် ချမှတ်လိုက်သော အမိန့်ကို ပယ်ဖျက်ရန်လုံလောက်သော အကြောင်းဘာမျှမရှိသဖြင့် ဤအယူခံကို ကျွန်ုပ်တို့ပလပ်လိုက်သည်။ ရာဇဝတ်ကျင့်ထုံး ဥပဒေပုဒ်မ ၃၇၆ (က) အရလည်း သေဒဏ်ကို အတည်ပြုလိုက်သည်။

တရားဝန်ကြီး ဦးစံမောင်။ ။ကျွန်ုပ်သဘောတူပါသည်။

CRIMINAL REVISION.

Before U Po On, J.

H.C. 1958

ABDUL RAHIM AND ONE (APPLICANTS)

v.

Dec. 16.

K. MADHA SAHIB AND ONE (RESPONDENTS).*

Criminal Procedure Code (Act V of 1898)—Chapter XX—Summons Case—Trial of—As a warrant case—No provision for discharging accused in—Order of discharge—Order of acquittal in law—Bars subsequent prosecution for same offence under s. 403.

Where in a prosecution under s. 447 of the Penal Code the applicants were released under an order described as an order of discharge and purported to be made under s. 253 of the Criminal Procedure Code and the applicants were again prosecuted for the same offence subsequently.

Held: That there is no provision for discharging an accused in a summons case and that the order made therein and described as an order of discharge was in law an order of acquittal, as which it bars the subsequent prosecution under s. 403 of the Criminal Procedure Code.

Held also: That a summons case is a summons case and that it is not converted into a warrant case by being tried as a warrant case.

Thetharappa Pillai v. *Venkatrama Aiyar*, (1910) Cr.L.J. (Vol. II) 350; *Mahmud and others* v. *Mir Hassan Shah*, (1951) Cr.L.J. (Vol. 52) 480, referred to.

V. San C. Po for the applicants.

Gangooly (Government Advocate) for the respondents.

U PO ON, J.—This revision case raises an interesting point of law.

In Criminal Regular No. 31 of 1957 of the Court of 3rd Additional Magistrate, Bassein, the applicants were prosecuted by the complainants, K. Madha Sahib and Ali Ahmed for trespass under section 447, Penal Code. The Magistrate tried the case as a warrant

* Criminal Revision No. 116 (B) of 1958. Review of the order of the 7th Additional Magistrate, Bassein, in Criminal Regular Trial No. 132 of 1957, dated the 11th March 1957.

H.C. 1958

ABDUL RAHIM AND ONE v. K. MADHA SAHIB AND ONE.

U PO ON, J.

case, though the case under section 447, Penal Code, is a summons case. Finally, he passed an order of discharge purporting to be under section 253, Criminal Procedure Code.

About eight months later, the applicants were again prosecuted by the same complainants on the matter already dealt with by the 3rd Additional Magistrate, Bassein. This time the case was taken up by the 7th Additional Magistrate, Bassein.

The applicants pleaded that they could not be tried again, as they had been let off by the 3rd Additional Magistrate on the matter in question.

The Magistrate, however, turned down their plea on the ground that they were discharged but not acquitted in the previous case. He then went on with the trial. At the end of the trial he convicted both the applicants.

Thereupon, the applicants took up their matter to the Court of Sessions, Bassein, in revision. The learned Additional Sessions Judge, Bassein, held the view that as the case under section 447, Penal Code, is a summons case, the order of discharge made by the 3rd Additional Magistrate, Bassein, should be taken as an order of acquittal, though the Magistrate followed the procedure prescribed for the trial of warrant case.

A summons case is a summons case. It cannot be taken as a warrant case simply because the Magistrate tries it as a warrant case. So, if the Magistrate trying a summons case, whatever procedure he adopts, finds no case made out against the accused and lets him go unconditionally, he acquits him, though he may style his order an order of discharge and tacks on to it the number of some section of the Criminal Procedure Code which deals with discharges. The accused is, nonetheless, in law acquitted, for the

Criminal Procedure Code contemplates no other order in summons cases. My view is well fortified by the ruling of Madras High Court in *Thetharappa Pillai* v. *Vencatrama Aiyar* (1).

The Court of Judicial Commissioner, Peshawar, also held the same view as the Madras High Court in *Mahmud and others* v. *Mir Hassan Shah* (2). The headnote of the case runs as follows:

> "There is no provision for discharging the accused in summons cases.
>
> Cases under section 71, Punjab Minor Canals Act, are summons cases and the Magistrate is not competent to follow the procedure of a warrant case in trying such cases. Where, in such a case, the Magistrate after following the procedure in a warrant case, discharges the accused, the order of discharge should be taken as an order of acquittal under section 245, and the District Magistrate is incompetent to set it aside in revision."

Under the circumstances the second case against the applicants is barred under section 403, Criminal Procedure Code.

The result is that the convictions and sentences imposed on the applicants by the 7th Additional Magistrate, Bassein, are set aside, and the fines, if paid, should be refunded to them.

(1) (1910) Vol. II, Cr. L. J. 350. (2) (1951) Vol. 52, Cr. L. J. 480.

CIVIL REFERENCE.

Before U Chan Tun Aung, C.J., U San Maung and U Ba Thoung, JJ.

H.C. 1958

Mar. 18.

KO BA YIN (*a*) ALI MOHAMED MUSA AND ONE (APPLICANTS)

v.

KO THEIN AND ONE (By their agent Mulla Ba Maung) (RESPONDENTS).*

Urban Rent Control Act—Fixation of standard rent—No retrospective effect—S. 9 (1)—Specific prohibition in—Two kinds—S. 19—Two parts in—S. 5 (1) read with provisos—True construction to be put on—S. 16—No bar to grant of decree at contractual rate—S. 11 (1) (a)—Notice under—Demand for rent in respect of period before fixation of standard rent—At what rate.

The Urban Rent Control Act of 1948 in its present form does not have any specific provisions, whereby the Controller is given powers to fix standard rent with retrospective effect.

The fixation of standard rent by the Controller is effective only from the date of his order fixing that rent.

There is a specific provision of law in s. 9 (*1*) of the Act which prevents the fixation of the standard rent being retrospective in effect where the standard rent is more than the contractual rent.

There are two kinds of fixation of standard rent, namely, one by the Controller under s. 19 and the other by clause (II) of the definition of standard rent occurring in s. 2 (*f*).

S. 19 of the Act is in two parts :

Sub-s. (*1*) requires the Controller, on application, to grant a certificate certifying the standard rent already fixed by the Act, namely, under clause (II) of the definition of standard rent or the standard rent as fixed by him under sub-s. (*2*).

Sub-s. (2) enables the Controller to fix the standard rent.

Upon a true construction of s. 5 (*1*) of the Urban Rent Control Act read with the provisos thereto it seems clear that what has been made irrecoverable is the amount which has been increased over and above the standard rent

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* Civil Reference No. 20 of 1957. Reference made by the Hon'ble Justice U San Maung under Rule 25 of the Appellate Side Rules of Procedure (Civil), High Court Rules and Orders Manual for decision by a Bench or Full Bench of this Court, dated the 5th September 1957 in Civil Second Appeal No. 36 of 1955 of this Court.

after the standard rent has been fixed by the Controller under s. 19 (2) or by clause (11) of the definition.

All that s. 16 says is that no civil Court shall accept a plaint in any suit for the recovery of rent which became due after the commencement of the Urban Rent Control Act, 1948, unless a certificate issued by the Controller certifying the standard rent of the premises has been attached to the plaint. Where, the certificate is merely in respect of the standard rent fixed by clause (11) of the definition, the standard rent is effective from the date of coming into force of the Urban Rent Control Act of 1948. However, on the other hand, where the certificate is in respect of the standard rent fixed by the Controller under sub-s. (2) of s. 19, in the absence of any express provisions in s. 16 prohibiting civil Courts from giving a decree at the contractual rate for the period prior to the date of fixation of the standard rent, civil Courts will not be justified to refuse to give a decree at the contractual rate merely because s. 16 requires the plaint to be accompanied by a certificate of the Controller certifying the standard rent.

When a landlord gives notice under clause (a) of sub-s. (1) of s. 11 of the Urban Rent Control Act in respect of the period before the fixation of the standard rent rent should be demanded at the contractual rate.

Daw Thein Nu v. *Mr. Saw Kyin Tsong* (a) *U Saw Maung Aye*, Special Civil First Appeal No. 75 of 1947 of the High Court; *Ko Than Nyunt* v. *Maung Khin Myint*, (1951) B.L.R. 124, overruled.

S. I. Abowath and five others v. *T. H. Khan*, (1950) B.L.R. 308 (H.C.); *S. L. Barua* v. *S. M. Abowath*, (1950) B.L.R. 404 (H.C.); *Ko Tin* v. *Ko Kyin Thein and one*, (1952) B.L.R. 37, approved.

Sobha Rani Roy v. *S. N. Guha Roy*, A.I.R. (36) (1949) Cal. 681, referred to.

Ba Shun for the applicants.

G. N. Banerji for the respondents.

U SAN MAUNG, J.—The question which has been referred for the opinion of the Full Bench is as follows:

> "At what rate should the rent be demanded from a tenant in a notice sent under clause (*a*) of sub-section (*1*) of section 11 of the Urban Rent Control Act in respect of the period before the fixation of the standard rent by the Rent Controller?"

This question arose directly before a Bench of this Court composed of U Tun Byu and U Aung Tha Gyaw, JJ., in *Daw Thein Nu* v. *Mr. Saw Kyin Tsong* (a) *U Saw Maung Aye* (1). There the learned

(1) Special Civil First Appeal No. 75 of 1947 of the High Court.

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Judges held that the implication which arose under the provisions of section 16 of the Urban Rent Control Act, 1946, as amended, was that no rent which was in excess of the standard rent fixed by the Controller of Rents could be claimed after the Urban Rent Control Act, 1946, came into force in respect of the rent which became due after that Act came into force and that therefore any demand for payment of arrears of rent which was in excess of the standard rent would not be a demand for rent lawfully due. Section 16 of the Urban Rent Control Act, 1946, as amended, which was, in terms, similar to section 16 of the Urban Rent Control Act, 1948, reads:

> "No Civil Court shall accept a plaint in any suit for the recovery of rent which became due after the enactment of this Act in respect of any premises to which this Act may apply, unless a certificate issued by the Controller certifying the standard rent of the premises has been attached to the plaint."

In a subsequent case, namely, *S. I. Abowath and five others* v. *T. H. Khan* (1), the question arose as to whether or not the fixation of the standard rent by the Controller had retrospective effect so as to give the landlord a right to claim rent at a rate higher than the contractual rent for the period prior to the fixation of the standard rent. A Bench of the High Court consisting of U Tun Byu, C.J. and U On Pe, J., in answering this question in the negative observed as follows:

> "It appears to us that until the Controller of Rents issues a certificate fixing the standard rent nothing could be said to have been done or to have occurred by which it might be said that the original contract of lease which the parties have agreed upon had been altered, so far as the rate at which the rent is to be paid is concerned. It

(1) (1950) B.L.R. 308 (H.C.).

> will be wrong on our part to give effect to the contention which has been urged on behalf of the appellants unless there is clear provision in the Urban Rent Control Act, 1946, to indicate that the contractual rent, which the parties have agreed upon should be deemed to have been modified, in a case like the one under consideration with effect from the date of the commencement of the Urban Rent Control Act."

Following these observations another Bench of this Court consisting of U On Pe and U San Maung, JJ., held in the case *S. L. Barua* v. *S. M. Abowath* (1) that in the absence of any standard rent being fixed by the Controller under section 19 of the Urban Rent Control Act or under the terms of clause (II) of the definition of standard rent occurring in section 2 (*f*) the contractual rent was the rent lawfully due for the purpose of the notice to be given under section 11(*1*)(*a*) of the Urban Rent Control Act. It was therein pointed out that the contractual rent may be varied not only by the fixation of the standard rent by the Rent Controller under section 19 but also by the fixation of the standard rent by clause (II) of the definition relating thereto.

In *Ko Than Nyunt* v. *Maung Khin Myint* (2) it was held that where the tenant paid rent for four months at the contract rate and the standard rent was later fixed by the Rent Controller at a lower rate, the tenant was entitled to deduct from future rent the sum paid in excess during those four months as any sum in excess of the standard rent fixed by the Controller should be deemed to be irrecoverable by the landord under section 5 (*1*) of the Urban Rent Control Act, 1948, read with proviso (*a*) thereto. This decision was, however, not brought to the notice of a single Judge of this Court (U San

(1) (1950) B.L.R. 404 (H.C.) approved. (2) (1951) B.L.R. 124, overruled.

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Maung, J.) who decided in *Ko Tin* v. *Ko Kyin Thein and one* (1) that until the Controller of Rents issues a certificate fixing the standard rent the original contract of lease cannot be said to be altered in any way and that therefore a notice of demand under section 11 (*1*)(*a*) of the Urban Rent Control Act, at the contractual rate for the period prior to the fixation of the standard rent by the Controller is valid in law. In coming to this decision the learned Judge relied upon the language of section 5 (*1*) of the Urban Rent Control Act, 1948, and the fact that there were two kinds of fixation of standard rent, namely, one by the Controller under section 19 and the other by clause (II) of the definition of standard rent occurring in section 2 (*f*).

The present reference was made to set at rest the doubts which have been caused by the aforesaid conflicting decisions.

Now, standard rent has been defined in clause (*f*) of section 2 as follows:

"(*f*) 'Standard rent' in relation to any premises means—

(I) in the cases specified in section 19 the rent fixed by the Controller, subject to any order of the Chief Judge of the City Civil Court of Rangoon in respect of the City of Rangoon or to any order of the Judge prescribed under section 22, in respect of any other urban area;

(II) in all other cases—

(*a*) the rent at which the premises were let on the first day of September 1939;

(*b*) where the premises were not let on the first day of September 1939, the rent at which they were let before that date;

(1) (1952) B.L.R. 37, approved.

(c) where the premises were first let after the first day of September 1939 and before the first day of January 1941 the rent at which they were first let ;

(d) where the premises were let on the first day of September 1939 on a lease providing for a periodical increase of rent—

(i) during the currency of the lease the rent so provided for from time to time, and

(ii) after the expiry of the lease the rent payable during the last period of the lease ;

(e) where the premises were let under a lease for a period of five years or upwards commencing on or before the first day of September 1934, which has expired after the first day of September 1939, the rent fixed by such lease for the period containing the first day of September 1939 : Provided the President may prescribe generally or in the case of any urban area or of any class of premises that the standard rent as defined in sub-clauses (a), (b), (c), (d) (ii) and (e) shall be increased by an amount not exceeding 25 per centum if he considers that such increase is justified by prevailing economic conditions : "

Section 19 of the Act is in two parts. Sub-section (1) reads :

" The Controller shall, on application made to him by any landlord or tenant, grant a certificate certifying the standard rent of any premises leased or rented by such landlord or tenant, as the case may be. "

It is clear therefrom that what the Controller has to do, on application under sub-section (1), is to grant a certificate certifying the standard rent already fixed by the Act, namely, under clause (II) of the definition of standard rent or the standard rent fixed by him under sub-section (2).

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Sub-section (*2*) which enables the Controller to fix the standard rent, reads :

" In any of the following cases the Controller shall, on application made to him by a landlord or tenant, or may of his own motion, fix the standard rent at such amount as having regard to the provisions of this Act and the circumstances of the case he deems just—

(*a*) where by reason of any premises having been let at one time as a whole and at another time in parts, or where a tenant has sub-let a part of any premises let to him or where for any reason any difficulty arises in giving effect to this Act;

(*b*) where in the case of any premises let furnished or of any premises let at an inclusive charge for board and lodging it is necessary to distinguish for the purpose of giving effect to this Act the amount payable as rent from the amount payable as hire of furniture or charge for board and attendance;

(*c*) where any premises have been or are let rent free or at a nominal rent or for some consideration in addition to rent;

(*d*) where the rent paid on the first day of September 1939, or, where the premises were not let on that date, the rent at which they were last let before that date, was in the opinion of the Controller unduly low;

(*e*) where there has been a change in the condition of any premises or an increased expenditure in maintenance and repairs owing to increased cost of building materials or an increase in the Municipal rates, cesses or taxes in respect of any premises subsequent to the first day of September 1939;

NOTE.—The City of Rangoon is exempted from the operation of such portion of this clause as relates to an increase in the Municipal rates, cesses or taxes in respect of any premises subsequent to the 1st September 1939, *vide* Notification No. 391, dated 28th December 1948.

(*f*) where any premises are let for the first time after the first day of January 1941;

(*g*) where for the reason that the condition of the premises has deteriorated since the first day of September 1939 or for any other sufficient reasons the rent, at which the premises were let on the first day of September 1939 or at which the premises for the first time let after that date is in the opinion of the Controller excessive or not just and fair."

(The provisos have not been reproduced.)

It is clear therefrom that what the Controller has normally to do is to fix the standard rent of premises which have been let for the first time after the 1st of January 1941 [clause (*f*)] or where the premises have been let at a nominal rent or for some consideration in addition to rent [clause (*c*)] or where the rent paid on the first day of September 1939 was unduly low [clause (*d*)] or where there have been changes in the condition of the premises, etc., either for better or for worse [clauses (*e*) and (*g*)].

Now, where the Controller fixes a standard rent under clauses (*c*), (*d*) and (*f*) and thereby increases the rent of any premises, such increase is only recoverable on the expiry of one month after the landlord has served on the tenant a notice in writing of his intention to increase the rent accompanied by a certificate from the Controller fixing the standard rent, *vide* sub-section (*1*) of section 9 of the Urban Rent Control Act, 1948. There is thus a specific provision of law which prevents the fixation of the standard rent being retrospective in effect where the standard rent is more than the contractual rent. On the other hand, the Act is silent as to whether or not the fixation of standard rent by the Controller under sub-section (2) of section 19 will have retrospective effect where the standard rent is less than the contractual rent.

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As already observed above, the learned Judges who decided the case of *Daw Thein Nu* v. *Mr. Saw Kyin Tsong* (a) *U Saw Maung Aye* (1) considered that such a retrospective effect must be given by implication from the language of section 16 of the Urban Rent Control Act, 1946, corresponding to section 16 of the present Act. However, with due respect, such an implication cannot be read into the provisions of this section. All that it says, *inter alia*, is that no civil Court shall accept a plaint in any suit for the recovery of rent which became due after the commencement of the Urban Rent Control Act, 1948, unless a certificate issued by the Controller certifying the standard rent of the premises has been attached to the plaint. Where, as pointed out above, the certificate is merely in respect of the standard rent fixed by clause (II) of the definition, the standard rent is effective from the date of the coming into force of the Urban Rent Control Act of 1948. However, on the other hand, where the certificate is in respect of the standard rent fixed by the Controller under sub-section (2) of section 19, in the absence of any express provisions in section 16 prohibiting civil Courts from giving a decree at the contractual rate for the period prior to the date of the fixation of the standard rent, civil Courts will not be justified to refuse to give a decree at the contractual rate merely because section 16 requires the plaint to be accompanied by a certificate of the Controller certifying the standard rent.

The solution to the problem now facing us seems to lie, in our opinion, in the interpretation of section 5 of the Urban Rent Control Act which reads:

"5. (1) Subject to the provisions of this Act, where the rent of any premises has been or is hereafter during

(1) Special Civil First Appeal No. 75 of 1947 of the High Court.

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the continuance of this Act increased above the standard rent, the amount by which such increased rent exceeds the standard rent shall, notwithstanding any agreement to the contrary, be irrecoverable :

Provided that nothing in this section shall apply—

(*a*) to any rent which became due before the commencement of this Act ; "

[Provisos (*b*) and (*c*) have not been reproduced as they are not useful for the purpose in hand.]

Two divergent views have been expressed by this Court regarding this matter. In *S. L. Barua* v. *S. M. Abowath* (1), U On Pe and U San Maung, JJ., said :

> "Now, section 5 (*1*) of the Urban Rent Control Act, 1948, provides that subject to the provisions of the Act, where the rent of any premises has been increased prior to the date on which the Act came into force or is increased during the continuance of the Act, above the standard rent, the amount by which such increased rent exceeds the standard rent shall, notwithstanding any agreement to the contrary, be irrecoverable. Therefore, where the standard rent has been fixed by the Controller of Rents under section 19 of the Urban Rent Control Act, or is fixed by law under clause (II) of the definition of 'standard rent' occurring in section 2 (*f*), any rent in excess of the standard rent is a rent which is not lawfully due. In the absence of any standard rent having been fixed under section 19 of the Urban Rent Control Act, or under clause (II) of the definition, the contractual rent must be deemed to be the lawful rent, as it cannot be said to exceed the 'standard rent' which is non-existent. "

It is apparent from this observation that the Bench held that section 5 (*1*) of the Urban Rent Control Act would be only applicable to cases where the rent has been increased above the standard rent after the

(1) (1950) B.L.R. 404 (H.C.) approved.

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standard rent has been fixed either by the Controller under section 19 (2) or by clause (II) of the definition. This point was made clearer by a single Judge of this Court (U San Maung, J.) in *Ko Tin* v. *Kyin Thein and one* (1) where it was observed :

> " It may perhaps be asked of what use is section 17 of the Urban Rent Control Act, if the fixation of the standard rent has no retrospective effect. However, as pointed out by us in *S. L. Barua* v. *S. M. Abowath* (2) the contractual rent remains the lawful rent in the absence of any standard rent having been fixed by the Controller under section 19 or the Urban Control Act itself in cases coming under clause (II) of the definition of standard rent given in section 2 of the Act. There may be cases where a tenant may have been paying more than the standard rent fixed under clause (II) of the definition or where he has been compelled to pay or through ignorance had been paying rent in excess of the standard rent fixed by the Controller under section 19 of the Act. In such cases, section 17 (*1*) of the Urban Rent Control Act could be resorted to. "

The contra view as expressed in *Ko Than Nyunt* v. *Maung Khin Myint* (3) is as follows :

> " The point which falls for consideration in this appeal is whether the defendant-appellant Ko Than Nyunt can claim deduction in the circumstances of this case as contended for on his behalf. It has been contended on behalf of the plaintiff-respondent Maung Khin Myint that the provisions of section 17 (*1*) of the Urban Rent Control Act, 1948, cannot apply to the circumstances of this case in view of the provisions of section 5 which reads as follows :—
>
> '5. (1) Subject to the provisions of this Act, where the rent of any premises has been or is hereafter during the continuance of this Act, increased above the standard rent, the amount by which such increased rent exceeds the

(1) (1952) B.L.R. 37, approved. (2) (1950) B.L.R 404 (H.C.), approved. (3) (1951) B.L.R. 124, overruled.

standard rent shall, notwithstanding any agreement to the contrary, be irrecoverable :

Provided that nothing in this section shall apply—

(*a*) to any rent which became due before the commencement of this Act ;

(*b*) to any periodical increment of rent accruing under any agreement entered into before the first day of September 1939 ; or

(*c*) to rent payable under any lease entered into before the first day of September 1939 which has not expired on the said date.'

It has been urged on behalf of the plaintiff-respondent that the words 'being a sum which is by reason of the provisions of this Act, irrecoverable' in section 17 (*1*) should be construed to mean only that sum of money which was specified as irrecoverable under the main provisions of section 5 (*1*). We regret that we are unable to accept this contention. The proviso (*a*) to section 5 (*1*) indicates by implication that a landlord cannot recover any rent which is in excess of the standard rent after the commencement of this Act. In other words, if rents were due in excess of the standard rent for the months subsequent to the commencement of the Urban Rent Control Act, it cannot, by implication, be recovered, and this excess of rent would be the amount which had been rendered irrecoverable by implication under the proviso (*a*) to section 5 (*1*) of the Urban Rent Control Act. It follows therefore that the excess of rent paid over and above the standard rent could be considered as a sum irrecoverable by reasons of the provisions of the Urban Rent Control Act, 1948."

Now, what is the true construction to be put on section 5 (*1*) of the Urban Rent Control Act read with the provisos thereto ? It seems clear to us that what has been made irrecoverable is the amount which has been increased over and above the standard rent after the standard rent has been fixed by the Controller under section 19 (*2*) or by clause

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(II) of the definition. A few illustrations will make this point clear.

(1) Suppose a house was let for a sum of Rs. 50 per mensem on the 1st of September 1939. Subsequently, in the year 1945 the rent was raised, by consent of both parties, from Rs. 50 per mensem to Rs. 75 per mensem. On the coming into force of the Urban Rent Control Act, 1948, on the 17th January 1948 the standard rent of the house will be automatically fixed at Rs. 50 per mensem by clause (II) (A) of the definition. Suppose now a suit is filed by the landlord for recovery of arrears of rent for the period prior to the 17th January 1948 as well as subsequent to that date. For the period subsequent to the 17th January 1948 the landlord will be able to recover rent only at the rate of Rs. 50 per mensem as the excess Rs. 25 would be irrecoverable under the main provisions of section 5 (*1*) as the amount which has been increased above the standard rent. For the period prior to the 17th January 1948 he can recover the arrears of rent at the rate of Rs. 75 per mensem, being saved by proviso (*a*) which reads:

'Provided that nothing in this section shall apply to any rent which became due before the commencement of this Act.'

(2) Suppose a house which was built only in the year 1941 was let for a sum of Rs. 50 per mensem in that year. The rent was increased by mutual consent to Rs. 75

per mensem in the year 1945. On the 17th January 1948 on the coming into force of the Urban Rent Control Act the contractual rent of Rs. 75 per mensem will still be lawful rent as clause (II) of the definition of standard rent will not apply. In January 1951 the Rent Controller fixes the standard rent of this house under sub-section (2) of section 19 at Rs. 50 per mensem. Suppose there were arrears of rent both prior and subsequent to January 1951, the month in which the standard rent was fixed. The main provisions of section 5 (1) will not apply to make the sum of Rs. 25, which was over and above the standard rent of Rs. 50, irrecoverable for the period prior to January 1951 as this was not due to any increase above the standard rent which was non-existent prior to January 1951. If the main provisions do not apply, the provisos thereto also will not apply.

(3) Suppose in the house referred to in example (2) a new tenant, who was ignorant of the fixation of the standard rent by the Controller in January 1951, came to occupy in the year 1952 and the landlord made him pay rent at the rate of Rs. 75 per mensem. Here there has been an increase above the standard rent after its fixation by the Controller under section 19 (2), and section 5 (1) will render the increase irrecoverable. If the landlord had been exacting rent at the rate of Rs. 75 per mensem, the tenant on

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discovering that the standard rent had been fixed at Rs. 50 can have recourse to the provisions of section 17 or section 18.

As pointed out by Maxwell on the Interpretation of Statutes at page 162 of the 10th Edition, "The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together is to prevail." In the case now under consideration proviso (*a*) to section 5 (*1*) has, in our opinion, been put in to soften the blow on an innocent landlord who otherwise would not be able to recover rent due at the contractual rate for the period before the Urban Rent Control Act, 1948, came into force where the contractual rate exceeded the standard rent as fixed by clause (II) of the definition. In this connection, the decision of a single Judge of the Calcutta High Court in *Sobha Rani Roy* v. *S. N. Guha Roy*.(1) seems apposite. This decision rests upon the interpretation of section 3 (*1*) of the Calcutta Rent Ordinance, 1946, which reads:

> "Subject to the provisions of this Ordinance, where the rent of any premises has been or is hereafter, during the continuance of this Ordinance, increased so as to exceed the standard rent, the amount of such excess shall, notwithstanding any agreement to the contrary, be irrecoverable:
>
> Provided that nothing in sub-section (*1*) shall apply—
> (*a*) to any rent which accrued due before the date of the commencement of this Ordinance."

Sen, J. observed:

> "The power of refund is given in section 9 of the said Ordinance which says that where any sum has been

(1) A.I.R. (36) (1949) Cal. 681.

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paid on account of rent being a sum which is by reason of the provisions of Ordinance irrecoverable the Controller may on application to him direct a refund of such sum. Section 3 of the aforesaid Ordinance expressly lays down that where rent is increased so as to exceed the standard rent, such excess shall be irrecoverable. Thus before it can be said that a sum is irrecoverable it must be proved that there was an increase. There is no other provision in the Ordinance which makes any sum paid in excess of the standard rent irrecoverable. The amount paid by Mr. Guha Roy, it is true, is in excess of the standard rent fixed, but there was no increase of rent. The rent remained the same from the very inception. Payment in excess of the standard rent, therefore, was not due to any increase of rent and consequently it does not come within the ambit of section 3 of the Ordinance. Now, section 9 of the Ordinance allows a refund only when the amount paid on account of rent is made irrecoverable by the provisions of the Ordinance. As section 3 of the Ordinance has no application, the amount paid by Mr. Guha Roy is not an amount made irrecoverable by the provisions of the Ordinance. Therefore, there can be no order of refund."

With due respect, we are of the opinion that the law in this regard has been correctly laid down in the case cited above. It seems to us from a perusal of the Calcutta Rent Ordinance, 1946, that our own Urban Rent Control Act, 1948, was modelled, more or less, on the lines of that Ordinance. There is no specific provision either in that Ordinance or in our Act giving retrospective effect to the fixation of standard rent by the Rent Controller. The Calcutta Rent Ordinance, 1946, was replaced by the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948. In section 10 the Controller was given power to fix the standard rent with retrospective effect. The section reads:

"In every case in which the Controller fixes the standard rent, or in fixing the standard rent allows any

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increase in the rate of rent payable, in respect of any premises, he shall appoint a date from which the standard rent so fixed or the increase so allowed shall be deemed to have effect and such date may be any date anterior to the date of any order of the Controller under this section *if the Controller deems such anterior fixation of the date just and proper in the circumstances of the case* but shall not be subsequent to the date on which the application under section 9 is made."

Thus, by an express provision of statute the fixation of standard rent by the Controller must be with effect from the date of the application or an even earlier date.

In the West Bengal Premises Rent Control Act, 1950, which replaced the 1948 Act there is a specific provision in the statute itself giving retrospective effect to the fixation of standard rent by the Controller. It reads:

"17. (1) Such portion of rent as exceeds the standard rent determined according to the provisions of this Act shall be irrecoverable from the month of the tenancy next after the month in which this Act comes into force whether the said rent was fixed by agreement, or by proceeding under the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948."

From a consideration of the aforesaid provision it seems clear to us that where the West Bengal Legislature intended to give retrospective effect to the standard rent as fixed by the Controller specific provisions relating thereto had to be made in the relevant Act. Such specific provisions are lacking in the Urban Rent Control Act of 1948.

For these reasons we consider that the views expressed by the learned Judges of this Court in *Daw Thein Nu* v. *Mr. Saw Kyin Tsong* (a) *U Saw*

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Maung Aye (1) and *Ko Than Nyunt* v. *Maung Khin Myint* (2) whereby the fixation of the standard rent by the Controller under section 19 (2) of the Urban Rent Control Act, 1948, was deemed to have retrospective effect are wrong and, with great respect, we must dissent from them. These views must therefore be considered as overruled.

In regard to the question referred to the Full Bench for opinion, we are of the opinion that whereas the fixation of standard rent by the Controller is effective only from the date of his order fixing that rent, when the landlord gives a notice under clause (*a*) of sub-section (*1*) of section 11 of the Urban Rent Control Act in respect of the period before the fixation of the standard rent rent should be demanded at the contractual rate. The question referred to us will therefore be answered accordingly.

U BA THOUNG, J.—I agree.

U CHAN TUN AUNG, C.J.—I fully concur with my learned brother U San Maung, J. that the question referred to us must be answered in the sense indicated by him.

Our Urban Rent Control Act of 1948 in its present form does not have any specific provisions, whereby the Controller is given powers to fix standard rent with retrospective effect just as those to be found in section 10 of West Bengal Premises Rent Control (Temporary Provisions) Act, 1948 and section 17 (*1*) of the West Bengal Premises Rent Control Act, 1950. To my mind, the learned Judges, who decided *Daw Thein Nu* v. *Mr. Saw Kyin Tsong* (a) *U Saw Maung Aye* (1) and *Ko Than Nyunt* v. *Maung Khin Myint* (2), with due respect, failed to

(1) Special Civil First Appeal No. 75 of 1947 of the High Court.
(2) (1951) B.L.R. 124, overruled.

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appreciate correctly the definition of standard rent given in clause (*f*) (I) and (II) of section 2 of the Urban Rent Control Act, and the power of fixing standard rent conferred upon the Rent Controller by section 19, which is in two parts. In the matter of fixing standard rent when due regard is given to the definition of standard rent in clause (*f*) (I) and (II) of section 2, what the Controller can do under section 19 on application for standard rent is to grant a certificate under sub-section (*1*) of section 19, certifying (i) the standard rent already fixed by the Act, *i.e.*, standard rent as defined in sub-clause (II) of the definition of standard rent above referred to; or (ii) the standard rent fixed by him having regard to the provisions of the Act, and the circumstances of the case as set out in sub-section (*2*) of section 19. With due respect, I cannot subscribe to the view expressed by the learned Judges, who decided *the case of Daw Thein Nu* (1) that from the language of section 16 of the Urban Rent Control Act, 1946, corresponding to section 16 of the present Act, that the Controller's order, fixing the standard rent must be given retrospective effect by implication. The aforesaid two decisions, namely, *Daw Thein Nu* v. *Mr. Saw Kyin Tsong* (a) *U Saw Maung Aye* (1) and *Ko Than Nyunt* v. *Maung Khin Myint* (2) must therefore be considered as overruled.

(1) Special Civil First Appeal No. 75 of 1947 of the High Court
(2) (1951) B.L.R. 124, overruled.

APPELLATE CIVIL.

Before U Thaung Sein, J.

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Nov. 13.

KRISHNA MOHAN (APPELLANT)

v.

MAUNG SHWE AND THREE OTHERS (RESPONDENTS).*

Evidence Act, s. 41—Judgments in rem—Civil Procedure Code, s. 11—Res judicata—*Explanation VI not confined to cases covered by O. 1, R. 8.*

A filed a suit against B in the Township Court of Mandalay and obtained a decree for removal of obstruction over the right of way over B's land which adjoined A's land as well as a perpetual injunction against B from obstructing that right. Subsequently, C, D and E along with another, who died later, claiming the land in dispute in the previous suit to be a religious land and themselves to be trustees thereof sued A in the same Court for a permanent injunction to restrain him from making use of that land for going to and from his house to the main road. A contended that the judgment in the previous suit filed by him operated as a bar to the subsequent suit on the principles of *res judicata*. The Township Court refused to accept his plea and decreed the suit. On appeal the District Court of Mandalay set aside the decree on the ground that the decision in the previous suit by A acted as a bar to the subsequent suit and that the right of passage acquired by A was an easement available "against all the world".

Held: That the wordings of s. 41 of the Evidence Act clearly lay down that the only judgments which may be regarded as judgments in *rem* are those passed by a competent Court in the exercise of probate, matrimonial or insolvency jurisdiction and that the Township Court of Mandalay did not purport to exercise any such jurisdiction at the time when the previous suit was decided.

Held further: That Explanation VI of s. 11 of the Civil Procedure Code is not confined to cases covered by Order 1, rule 8 of the Code, but would include any litigation in which, apart from the rules altogether, parties are entitled to represent interested persons other than themselves and that since C, D, E and the deceased person were interested in the same manner as B, *i.e.*, to prevent the right of passage over the suit land, which was litigated in the former suit the subsequent suit filed by them was barred by the principles of *res judicata*.

Saw Hla Pru for the appellant.

P. K. Bose for the respondents.

U THAUNG SEIN, J.—The present appellant (Krishna Mohan) along with the second, third and

* Civil 2nd Appeal No. 16 of 1958 (Mandalay) against the judgment and decree of the Additional District Judge, Mandalay, in Civil Appeal No. 12 of 1957, dated the 8th January 1958.

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fourth respondents (Soondi, Bo Kay and Vishnu Devan) and one Saya Han (since deceased) are Ponnas who claim to be the trustees of a certain plot of religious land which is said to be held in veneration by some sections of the Ponna Community of Mandalay town. Adjacent to that land is a plot owned by the first respondent Maung Shwe who asserts that he has acquired a right of passage over the land in question to a public roadway. That right was disputed by the appellant and his abovementioned associates and a suit was filed by them against the first respondent in the Township Court of Mandalay for a permanent injunction to restrain him from "passing to and fro, from his house to the main road". The main defence set up by the first respondent Maung Shwe was to the effect that a right of way over the suit land has been in existence for the past thirty years and that this fact was clearly established in Civil Regular Suit No. 111 of 1951 of the Township Court of Mandalay. It may be noted that in the abovementioned suit, the first respondent obtained a decree against one Gokul Mohan (*alias*) Maung Hla for the removal of the obstruction erected over the right of way as well as a perpetual injunction restraining the latter from obstructing that right. The first respondent went on to plead that the suit under consideration was clearly barred by the principles of *res judicata*. The learned Township Judge, did not accept this contention and decreed the suit in the appellant's favour but on appeal the Additional District Court, Mandalay set aside that decree and dismissed the suit on the ground that the decision in Civil Regular Suit No. 111 of 1951 acted as a bar to the subsequent suit and that the right of passage acquired by the first respondent was an easement available "against all

the world" *vide* section 41 of the Evidence Act and section 26 of the Limitation Act. The appellant has now come up on second appeal but as far as I can see from the memorandum of appeal, the only ground put forward is that the learned Additional District Judge "erred in reversing the trial Court judgment".

The learned Additional District Judge has apparently overlooked the wording of section 41 of the Evidence Act which clearly lay down that the only judgments which may be regarded as judgments in *rem* are those passed by a competent Court in the exercise of probate, matrimonial or insolvency jurisdiction. The Township Court of Mandalay did not purport to exercise any such jurisdiction at the time when the previous suit, *viz.*, Civil Regular Suit No. 111 of 1951 was decided. The question then arises whether the suit under appeal was barred by the principles of *res judicata*, in view of the decision in the previous suit. The answer to this is to be found in Explanation VI of Section 11 of the Civil Procedure Code which reads—

> "Where person litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

That this explanation is not confined to representative suits under Order I, rule 8 has been expressed by Mulla in his "Code of Civil Procedure" 12th Edition at page 67 on the following terms:—

> "Explanation VI is not confined to cases covered by Order I, rule 8 but would include any litigation in which, apart from the rules altogether, parties are entitled to represent interested persons other than themselves."

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There are numerous rulings in support of this view but I do not propose to burden this judgment by citing them in detail.

Now, admittedly Civil Regular Suit No. 111 of 1951 was between the first respondent Maung Shwe and one Gokul Mohan who claimed to be the owner of the land in suit. It is not clear how he could have been the owner of the land which is shown in the map as religious land. Be that as it may, the land being religious property he obviously defended the suit both for himself and other Ponnas who were necessarily interested in it. In the suit under appeal Gokul Mohan is not a party as he could not possibly sue in the face of the decree in the former suit. The appellant Krishna Mohan and other co-plaintiffs are self styled " trustees " of the suit land but are in fact nothing more than persons who were interested in the same manner as Gokul Mohan *i.e.*, to prevent the right of passage over the suit land. No trustees have been appointed for the land and the appellant and his associates have no right to style themselves as " trustees ". Since they were persons who were interested in the right which was litigated in Civil Regular Suit No. 111 of 1951 they are barred by the principles of *res judicata* from filing the subsequent suit. That being so their suit was bound to fail and the learned Additional District Judge was correct in setting aside the decree of the trial Court.

Accordingly, this appeal also fails and dismissed. There will be no order for costs as the subject-matter of the litigation is religious land.

APPELLATE CRIMINAL.

Before U Thaung Sein, J.

H.C. 1958

KYAW SEIN (APPLICANT)

v.

Nov. 12.

UNION OF BURMA (MAUNG SEIN) (RESPONDENT).*

Criminal Procedure Code, s. 526—Transfer of criminal case—Stay of proceedings—Conduct of trying Magistrate.

Although with the deletion of sub-ss. 8 to 10 of s. 526 of the Criminal Procedure Code by the Code of Criminal Procedure (Amendment) Act, 1945 (Burma Act No. XIII of 1945), a Magistrate is no longer bound to stay a case merely because a party expresses a desire to apply to the High Court for the transfer of the case, he should await the result of the application for transfer of the case, where such an application has been filed and admitted by the High Court.

It is necessary to avoid not only any partiality on the part of a Magistrate, but any circumstances that might lead to a reasonable apprehension of a partiality in the mind of an accused person; that is to say, it is desirable not only that justice should be done but that it should be manifest to all the world that justice is being done.

Mya Sein for the applicant.

Saw Hla Pru for the respondent.

U THAUNG SEIN, J.—This is an application under section 526 of the Criminal Procedure Code for the transfer of Criminal Regular Trials 85 and 86 of 1958 which are cross cases from the file of the learned Township Magistrate, Kin-u to any other competent Magistrate at Shwebo. A similar application was filed before the learned District Magistrate, Shwebo under section 528 of the Criminal Procedure Code but was summarily rejected by means of the

* Criminal Misc. Application No. 5 of 1958 (Mandalay). Application for transfer of Criminal Regular Trial No. 86 of 1958 of the Township Magistrate, Kin-u, Shwebo District.

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following brief endorsement on the reverse of the application :—

လျှောက်ထားချက် ရုံးပြောင်းစစ်ဆေးခွင့်ပြုလောက်အောင် အချက်များမရှိ၊ လျှောက်လွှာကို ပယ်လိုက်သည်။

It appears that the learned District Magistrate did not deem fit to hear any of the parties involved or their pleaders before passing the order which he did.

The main ground urged before me in support of the application is that the learned trial Magistrate displayed bias or prejudice against the present applicant Maung Kyaw Sein who is the complainant and accused respectively in Criminal Regular Trials Nos. 85 and 86 of 1958. It may be noted that during the pendency of the present application in the High Court, the learned trial Magistrate proceeded with the trial of the cases in question and Criminal Regular Trial No. 85 of 1958 in which the applicant Maung Kyaw Sein is the complainant has been disposed of and the two accused discharged. As proof of the bias and prejudice against him by the learned trial Magistrate, the applicant, relies on the fact that despite a pending application in the High Court for the transfer of the cases, the Magistrate refused to stay the proceedings before him, and on the contrary proceeded to deal with them with unseemly haste. That the learned Magistrate paid no heed to the fact that the present application for transfer had been admitted by the High Court is borne out by the diary entries on the proceedings. No doubt sub-sections 8 to 10 of section 526 of the Criminal Procedure Code have been deleted by The Code of Criminal Procedure (Amendment) Act, 1945 (Burma Act No. XIII of 1945), and a Magistrate is no longer bound to stay a case merely because a party expresses a desire to apply to the High Court

for the transfer of the case in question. But where such an application has been filed and admitted by the High Court, the Magistrate concerned should await the result of that application. In the present case, instead of staying the proceedings, the learned trial Magistrate speeded up the trial and but for a timely telegram from the High Court might have disposed of it. Add to all this that when the applicant applied for time to engage a lawyer to conduct his case he was allowed only one day for the purpose. I understand that there are very few lawyers in Kin-U and the applicant was thus put to great trouble in searching for a competent lawyer.

The question is whether the above facts were sufficient to rouse in the applicant's mind a reasonble apprehension that he was not likely to get a fair and impartial trial before the learned Township Magistrate of Kin-U. In this connection I would repeat the oft-quoted maxim that " it is necessary to avoid not only any partiality on the part of a Magistrate, but any circumstances that might lead to a reasonable apprehension of a partiality in the mind of an accused person ; that is to say, it is desirable not only that justice should be done but that it should be manifest to all the world that justice is being done ". In the present case, I do not think that the applicant can be blamed for being under the impression that the learned trial Magistrate was biased against him after the latter had refused to stay the proceedings despite the admission of the transfer application by the High Court. It is most unfortunate that such an impression has been created in the mind of the applicant and I feel certain that he is mistaken as the learned Magistrate could not possibly be nursing any prejudice against him. But while that impression lasts it would be most improper for the learned

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Township Magistrate, Kin-U to handle the case. Accordingly, the present application is allowed and I direct that Criminal Regular Trial No. 86 of 1958 of the Township Magistrate, Kin-U be transferred to any other competent Magistrate at Shwebo to be selected by the learned District Magistrate, Shwebo.

APPELLATE CRIMINAL.

Before U Thaung Sein, J.

MANDAT HMYAR AND TWO OTHERS (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

H.C. 1958

Nov. 5.

Criminal Procedure Code, s. 530 (p)—Irregularity which vitiates proceedings—S. 342—Examination of accused—Purpose of—Improper examination.

Where a District Magistrate, who is also invested with the powers of a Sessions Judge, tried a murder case punishable under s. 302 of the Penal Code in the exercise of the powers as a District Magistrate and not as a Sessions Judge, the proceedings were void *ab initio*, *vide* s. 530 (*p*) of the Criminal Procedure Code.

S 342 of the Criminal Procedure Code empowers a Court at any stage of a criminal proceeding to examine an accused person but only "for the purpose of enabling the accused to explain any circumstances appearing against him." Such an examination cannot be conducted in the form o cross-examination not with a view to fill up gaps in the prosecution evidence not to inveigle the accused into admitting the offence with which he has been charged.

Nil for the appellants.

Min Han (Government Advocate) for the respondent.

U THAUNG SEIN, J.—These three appeals which have arisen out of the same trial have been heard together and the present judgment will cover all the cases.

The three appellants Mandat Hmyar, Nyun Maung and Myint Maung were sent up for trial before the learned District Magistrate, Eastern Shan States (U Htun Lu) charged under section 302 of the Penal Code with the murder of an Indian named

* Criminal Appeals Nos. 71, 72 and 73 of 1958 (Mandalay) against the conviction and sentence passed by the District Magistrate, Eastern Shan States, Loimwe, in Criminal Regular Trial No. 5 of 1957, dated the 21st September 1957.

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Kuba Jan Singh. It appears that the learned District Magistrate U Htun Lu is also the Resident of the Eastern Shan States and as such is invested with the powers of a Sessions Judge but unfortunately, in the present case he chose to try it in the exercise of the powers as a District Magistrate and not as a Sessions Judge. As District Magistrates are not empowered to try cases of murder under section 302 of the Penal Code, the proceedings in which the three appellants were tried and convicted were thus void *ab initio vide* section 530 (*p*) of the Criminal Procedure Code and there is no other alternative but to order a retrial.

So far as the facts of the case are concerned, I must of course refrain from offering any comments so as to avoid any prejudice to the appellants during their retrial. But I would like to draw the attention of the next trial Judge to the following unsatisfactory features with regard to the procedure adopted in the trial before the learned District Magistrate, Eastern Shan States and trust that these errors and defects will not be repeated. For instance, it is clearly laid down in section 25 of the Evidence Act that "no confession made to a police officer shall be proved as against a person accused of any offence"; but I note that the learned District Magistrate, Eastern Shan States is apparently unaware of this provision and freely discussed the so called confessions said to have been made by the appellants to the Police Station Officer, Soa On Kya (PW 1). Then again, section 342 of the Criminal Procedure Code empowers a Court at any stage of a criminal proceeding to examine an accused person but only "for the purpose of enabling the accused to explain any circumstances appearing in evidence against him." Such an examination cannot be conducted in the

form of a cross-examination nor with a view to fill up gaps in the prosecution evidence nor to inveigle the accused into admitting the offence with which he has been charged. All that I propose to say with regard to the examination of the appellants as carried out by the learned District Magistrate, Eastern Shan States, is that they are not in accordance with the provisions of section 342 of the Criminal Procedure Code.

According to the judgment of the trial Court, the appellants are said to have confessed before Soa Kun Tha, Special Power Magistrate, Loilem but the confessional records were not produced nor was the Magistrate examined and I am thus at a loss to understand how the learned District Magistrate, Eastern Shan States was aware of their contents or able to place any reliance on them.

On the whole, the convictions and sentences passed on the three appellants Mandat Hmyar, Nyun Maung and Myint Maung are hereby set aside and I direct that they be retried by the learned Additional Sessions Judge, Lashio.

CRIMINAL REVISION.

Before U San Maung, J.

H.C. 1958

Nov. 6.

MAUNG MYINT (APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT) *

Criminal Procedure Code, s. 337 (3)—Approver—Detention of.

Where the accused to whom pardon is tendered is already on bail, there is no necessity for him to be remanded to custody thereafter but that if he is not on bail, the Magistrate is bound by the provisions of sub-s. (3) of s. 337 of the Criminal Procedure Code to retain the approver in custody until the termination of the trial.

Haji Ali Mahomed v. *Emperor*, 33 Cr. L. J. 906, referred to.

Tin Hla for the applicant.

Ba Thin (3) (Government Advocate) for the respondent.

U SAN MAUNG, J.—Maung Myint, one of the four accused in Criminal Regular Trial No. 5 of 1958 of the Additional Sessions Judge, Hanthawaddy and Insein, sitting as a Special Judge, became an approver in the case when a conditional pardon was granted by the District Magistrate, Rangoon, and accepted by him. He was in custody at that time but was subsequently released on bail on the ground of ill-health. The bail was, however, cancelled by the learned Special Judge on receipt of intimation from the police that there was a danger of Maung Myint absconding during the pendency of the trial and that he was also likely to be intimidated by the other accused in the case. The learned Special Judge, in passing the order cancelling the bail, observed that

* Criminal Revision No. 135 (B) of 1958. Review of the order of the Additional Sessions Judge of Rangoon in Criminal Regular Trial No. 5 of 1958, dated the 7th October 1958.

Maung Myint appeared to be quite in good health and that the reason for allowing him bail no longer existed.

In this application for revision against the order of the learned Special Judge it is urged that it was highly improper for the learned Special Judge to have cancelled the bail without considering the medical evidence on record merely because the police considered that Maung Myint should be in custody.

Therefore, in order to find out whether Maung Myint's condition was such that it was imperative that he should be hospitalised I have asked the Government Physician to examine him and to give evidence regarding his condition. Dr. Ronald Lwin, Civil Surgeon (East), was accordingly deputed to examine Maung Myint in jail and to give evidence before this Court. In giving evidence, Dr. Ronald Lwin said that Maung Myint seemed to be well nourished and nothing abnormal was detected by his physical examination. The medical witness also did not think that it was imperative that Maung Myint should be removed to the General Hospital for treatment.

While in course of argument the learned Advocate for Maung Myint admitted that when Maung Myint was on bail he was undergoing treatment not as an indoor patient at the hospital but as an outdoor patient at a private dispensary. Therefore, in my opinion, the learned Special Judge was quite justified in having cancelled the bail on the ground that Maung Myint appeared to be in good state of health. In *Haji Ali Mahomed* v. *Emperor* (1) it was observed by the learned Judicial Commissioners of Sind that if the accused to whom pardon is tendered is already on bail, there is no necessity for him to be

(1) 33 Cr. L.J. 906.

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remanded to custody thereafter but that if he is not on bail, the Magistrate is bound by the provisions of sub-section (3) of section 337 of the Criminal Procedure Code to retain the approver in custody until the termination of the trial. These observations are apposite to the case now under consideration.

For these reasons, the application for revision must be dismissed.

APPELLATE CIVIL.

Before U San Maung, Senior Judge and U Thaung Sein, J.

MAUNG OHN SHWE (APPELLANT)

v.

DAW MA (RESPONDENT).*

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Dec. 12.

Workmen's Compensation Act, s. 10 (1)—Proviso—Interests of minors involved —Liberal construction to be adopted—Purpose of Act.

Where the application for payment of compensation under the Workmen's Compensation Act to the minor children of the employee, who died as a result of injuries received in the course of employment, was filed a few days after the period of 12 months prescribed by s. 10 of the Act by the widowed mother of the deceased, the delay being due to the mistaken belief that Government was taking necessary action for the purpose of giving compensation and where the Commissioner for Workmen's Compensation condoned the delay under the last proviso to s. 10 (*1*) of the Act, admitted the application and decided the claim.

Held: That as the interests of the minors are, in fact, involved in this case a more liberal construction of the relevant proviso to s. 10 (*1*) should be adopted so as to be in conformity with the purpose of the Workmen's Compensation Act which was to give relief to the injured workmen and that in admitting the claim made in this case the Commissioner was not exercising the discretion unjudicially.

The Consolidated Tin Mines of Burma, Ltd. v. *Maung Tun E*, 9 Ran. 118; *Roles* v. *Pascall & Sons*, (1911) 1 K.B. 982; *Abdul Matin* v. *Bidesi Rajwar and another*, A.I.R. (1939) Pat. 181; *Munshi & Co.* v. *Tukaram Teli*, A.I.R. (1948) Bom. 44, referred to.

Mya Sein for the appellant.

S. L. Verma for the respondent.

U SAN MAUNG, J.—This is an appeal under section 30 of the Workmen's Compensation Act, the appellant being Maung Ohn Shwe, a truck owner of Tha-phan-gaing, Katha, against whom an order was

* Civil Misc. Appeal No. 3 of 1957 (Mandalay) against the decree of the Commissioner for Workmen's Compensation, Katha, in General Enquiry Case No. 1 of 1956, dated the 2nd September 1957.

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passed by the Commissioner for Workmen's Compensation, Katha, for the payment of K 3,600 as compensation to the three minor children of the deceased Maung Tha Nu, namely, Maung Tin Win, age 12, Swe Swe Win, age 9, and Maung Toe Win, age 6. The respondent in the case is Daw Ma, a Broker of Taung-yat Quarter, Katha, who is the grandmother of the three minors in whose favour the award was made. On 27th February 1956 Daw Ma filed a formal application before the Deputy Commissioner, Katha, who was *ex-officio* Commissioner for Workmen's Compensation, for the payment of K 3,000 as compensation for the death of her son Maung Tha Nu on the 21st February 1955 owing to injuries received in course of his employment as a spare-man in the lorry owned and driven by Maung Ohn Shwe. In that application Daw Ma described herself as a dependant of the deceased, being his widowed mother. The Commissioner for Workmen's Compensation then sent the application of Daw Ma to the Subdivisional Officer, Katha, for the examination of the applicant and her witnesses as provided for in Rule 20 of the Workmen's Compensation Rules, 1924. In course of the examination Daw Ma stated that the deceased Maung Tha Nu had three children living and that these children were being brought up by her, Maung Tha Nu's wife being dead. She also stated that Maung Tha Nu was engaged by the appellant Maung Ohn Shwe as a spare-man at a monthly salary of K 100 and that Maung Tha Nu died as a result of the injury received in trying to detach the trailer from the truck as instructed by Maung Ohn Shwe who was then driving the truck. The witnesses cited by Daw Ma gave evidence as to the manner in which Maung Tha Nu received his

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injury. It seems that while Maung Tha Nu was trying to detach the trailer from the truck as instructed by Maung Ohn Shwe, Maung Ohn Shwe inadvertently drove the truck on the reverse gear and Maung Tha Nu was wedged in between the truck and the trailer. He was taken to hospital but as he was beyond medical aid he was taken back home where he died on the 21st February 1955, about two days after the accident.

As a result of the enquiry made by the Subdivisional Officer, Katha, the Commissioner for Workmen's Compensation issued a notice to the appellant to show cause why he should not deposit compensation on account of the death of his employee Maung Tha Nu. The appellant then filed a written statement in which he contended, *inter alia*, that Maung Tha Nu had a wife Ma Than living and that besides her, there were his children by his first wife, who were the dependants as defined in the Workmen's Compensation Act. He also contended that Maung Tha Nu was not his employee as defined in the Act, that he did not die as a result of the injury received in course of his employment by the appellant, that Daw Ma had no *locus standi* to file an application for compensation, and that in any event the death having taken place on the 21st February 1955, the application which was filed on the 27th February 1956, was beyond the limitation of 12 months prescribed in section 10 of the Act.

The learned Commissioner for Workmen's Compensation then issued a notice to Ma Than who was said to be a wife of Maung Tha Nu and whose address was given as Myitkyina. However, since nobody knew her exact address, a substituted notice was sent and Ma Than did not appear to be made a party to the proceedings. In fact, even if she was

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a legal wife of Maung Tha Nu at the time of his death, she seemed to have taken no interest whatsoever in this matter.

The Commissioner for Workmen's Compensation examined a number of witnesses cited by the appellant and thereafter by his judgment, dated the 2nd September 1957, now sought to be appealed against, came to the finding (1) that Maung Tha Nu was an employee of the appellant Maung Ohn Shwe as defined in the Workmen's Compensation Act, (2) that Maung Tha Nu died as a result of the injury received in the course of his employment, and (3) that the three children of Maung Tha Nu were entitled to compensation to the extent of K 3,600. As regards the contention that the application was barred by limitation, the learned Commissioner said that the claim may be admitted and decided in view of the last proviso to sub-section (*1*) of section 10 of the Act, which reads—

> "Provided further that Commissioner may admit and decide any claim to compensation in any case, notwithstanding that the notice has not been given or the claim has not been instituted, in due time as provided in this sub-section, if he is satisfied that the failure so to give the notice or institute the claim, as the case may be, was due to sufficient cause."

In this connection, he considered that Daw Ma by her own showing was, in fact, making the claim not for herself but for her grand-children Maung Tin Win, Swe Swe Win and Maung Toe Win, who were the minor children of Maung Tha Nu, that she was under a misapprehension that the proceedings before the Township Magistrate, Katha, which were really inquest proceedings, would result in an award of compensation for the death of her son, and that when no compensation was forthcoming she had

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to spend considerable time making enquiries as to how she should proceed to make a claim.

In this appeal by the appellant Maung Ohn Shwe, although several grounds were taken, as for instance, that Daw Ma had no *locus standi* to file an application for compensation when there was a widow and children of the deceased living, that Maung Tha Nu was not an employee of the appellant as defined in the Act, and that he did not die as a result of the injury received in course of his employment, the only ground which was argued was that the learned Commissioner for Workmen's Compensation was wrong in having admitted and decided the claim which was instituted beyond the period of 12 months prescribed in section 10 (*1*) of the Act. In support of this contention the learned Advocate for the appellant has relied upon the rulings in the following two cases. In *The Consolidated Tin Mines of Burma, Ltd.* v. *Maung Tun E* (1) the workman who was a cooly employed at a tin mine, was injured as a result of an explosion on the 1st April 1929. He admittedly instituted no proceedings under the Workmen's Compensation Act until the 29th April 1930, more than a year after the accident, when he sent to the employers a lawyer's letter. The formal claim for compensation was not instituted before the Commissioner until the 5th May 1930, although the period of limitation prescribed was six months. The cause alleged by the employee for his failure to institute the claim within the period was that he did not know the rules about the Workmen's Compensation Act but the Commissioner, holding that such ignorance was "sufficient cause", awarded the employee a sum of Rs. 2,100 as compensation. The employers appealed to the late High Court and it

(1) 9 Ran. 118.

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was held by Heald and Mya Bu, JJ., that the fact that the employee was illiterate and ignorant of the provisions of the Workmen's Compensation Act was not sufficient cause within the meaning of the proviso to section 10 of the Act for extending the time in his favour. In coming to this conclusion the learned Judges relied upon the observation of the Master of the Rolls in the case of *Roles* v. *Pascall & Sons* (1) where he said " In my opinion we should be in fact really repealing the six months' period of limitation, which is distinctly imposed by the Act, if we were to say that any person could escape from that and bring his claim at any time afterwards if he could prove that he had never heard of the existence of the Act or did not know anything about its contents." In *Abdul Matin* v. *Bidesi Rajwar and another* (2) a Bench of the Patna High Court also relying upon the case of *Roles* v. *Pascall & Sons* (1), held that ignorance of the rules or the law on the part of the workman cannot be any reasonable cause within the meaning of the proviso to section 10 of the Workmen's Compensation Act for admitting the claim beyond the period of limitation of six months prescribed therein. The claim in this case was also by the employee himself for injury received in course of his employment.

The learned Advocate for the respondent Daw Ma has, however, cited a case where a more liberal construction of the relevant proviso to section 10 has been given. In *Munshi & Co.* v. *Tukaram Teli* (3) the employee was injured as a result of an explosion at the Prince's Dock at the time of the Bombay Explosion of 14th April 1944. After the explosion the Government of India set up a Claims

(1) (1911) 1 K.B. 982. (2) A.I.R. (1939) Pat. 181.
(3) A.I.R. (1948) Bom. 44.

Commission and the applicant who appeared before that Commission, was awarded by them Rs. 2,280 in respect of his injury subject to a deduction of the amount awarded to him in the proceedings under the Workmen's Compensation Act. The claim to the Commissioner for Workmen's Compensation which should have been made within a year of the date on which the injury was received, was not made till the 26th April 1945. The applicant, however, stated in his application that he had been under the impression that he would receive all his compensation from the Court of the Claims Commissioner, but that he was afterwards given to understand that he was entitled to receive compensation under the Workmen's Compensation Act in the first instance and then would receive additional compensation from the Claims Commissioner. This explanation was accepted by the Commissioner for Workmen's Compensation and, in his discretion, the Commissioner treated the application as being within time by making use of the proviso to section 10 of the Act. The employers appealed to a Bench of the Bombay High Court. In dismissing the appeal the learned Judges of the Bombay High Court made the following observation :—

> "The argument is that beyond the statement of the applicant that he misunderstood his rights, there is nothing by which he could show cause justifying his application being made out of time. Ignorance of the law is no excuse; and it is argued that the very form of the application made by the Workman before the Claims Commissioner shows that the possibility of compensation being available under the Workmen's Compensation Act had to be taken into account by the Commissioner. We fully agree with the appellant's learned advocate that there was no real justification for the applicant's misunderstanding his legal rights; and so far as the

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record of the case goes there is nothing to show how it was that he came to misunderstand them. But it cannot be doubted that he did misunderstand his position, since otherwise he would certainly have made his claim to the Commissioner for Workmen's Compensation at the same time as he made it to the Claims Commissioner; and we cannot feel that the learned Commissioner was wrong in finding in his discretion that the applicant had justified the late presentation of his application. There is, as I say, very little on the record. But there is, at any rate verification by affirmation of what the applicant stated in his application; and, if the learned Commissioner thought fit to act upon that material, we cannot say that he was not justified in doing so. That the applicant genuinely did misunderstand his position is clear from the fact that he gave 'no' as the answer to the question on his claims form as to his right to compensation under the Workmen's Compensation Act. We are unable to find that the discretion of the Commissioner was exercised unjudicially, and in that respect we do not propose to interfere."

Here, it is clear that although the strict application of the maxim "Ignorance of the law is no excuse" would have led to a different result, the learned Judges of the Bombay High Court construed the law liberally in conformity with the purpose of the Act which was to give relief to injured workmen.

In the present case although the application made was by Daw Ma, the widowed mother of the deceased Maung Tha Nu, it was, in fact, for the benefit of the minor children of the deceased. The widowed mother was misled into thinking that government was taking necessary action for the purpose of giving compensation and this was the reason for the delay of seven days in making her application. As the interests of the minors are, in fact, involved in this case a more liberal construction than is given in *The Consolidated Tin Mines of*

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Burma, Ltd. v. *Maung Tun E* (1) and *Abdul Matin* v. *Bidesi Rajwar and another* (2) should, in our opinion, be adopted so as to be in conformity with the purpose for which the Workmen's Compensation Act had been enacted. Adopting the words of the learned Judges of the Bombay High Court in *Munshi & Co.* v. *Tukaram Teli* (3) we also are in this case unable to find that the discretion of the Commissioner was exercised unjudicially when he admitted the present claim a few days after the period of 12 months prescribed by section 10 of the Act.

For these reasons, the appeal fails and must be dismissed. There will be no order as to costs of this appeal.

(1) 9 Ran. 118. (2) A.I.R. (1959) Pat. 181.
(3) A.I.R. (1948) Bom. 44.

APPELLATE CIVIL.

Before U Thaung Sein, J.

H.C. 1958

Nov. 6.

MAUNG SHEIN AND FIVE OTHERS (APPELLANTS)

v.

U SAN HLA (DECEASED) by his legal representative Ma Than and eighteen others (RESPONDENTS).*

Civil Procedure Code, s. 11—Res judicata—*Previous proceedings before a body of persons which has no Civil Judicial powers cannot amount to a "former suit"—Orders passed in such proceedings cannot bar suit brought subsequently on the principles of* res judicata.

In a dispute for the possession of a piece of land referred by parties to the suit to the office of the A.F.P.F.L., Meiktila, two "lugyis" who were deputed by that office to look into that matter gave a certain decision. Subsequently, the respondents filed a suit in respect of the same subject matter in the Township Court of Meiktila and obtained a decree, which was upheld by the District Court. For the first time in the second appeal before the High Court it was urged on behalf of the appellants that the decision given by the two "lugyis" who were deputed by the office of the A.F.P.F.L. was a bar to the suit by the respondents under s. 11 of the Civil Procedure Code.

Held: That the office of the A.F.P.F.L. not having Civil Judicial powers, the proceedings before it was not a "former suit" between the parties and that any decision made therein was no bar to the subsequent suit on the principles of *res judicata*.

Tha Kyaw for the appellants.

S. L. Verma for the respondents Nos. 2 to 7 and 17 to 19.

Nil for the other respondents.

U THAUNG SEIN, J.—This appeal is the outcome of a dispute between the respondents and the appellants over the possession of a certain plot of land which culminated in a suit in the Township Court of Meiktila. The learned Township Judge

* Civil 2nd Appeal No. 43 of 1957 (Mandalay) against the judgment and decree of the District Judge, Meiktila in Civil Appeal No. 13 of 1956 dated the 30th April 1957.

decreed the suit in favour of the respondents who were the plaintiffs and directed the appellants to deliver possession of the land provided the former paid to the latter a sum of K 525 which was said to be an outstanding mortgage debt in respect of that land. An appeal was filed in the District Court of Meiktila against the judgment and decree of the trial Court but without success and hence the present second appeal to the High Court.

So far as the findings of fact are concerned these cannot be reagitated in the present appeal as the lower appellate Court confirmed the judgment and decree of the trial Court. The learned counsel for the appellants has not therefore ventured to dispute any of the findings of fact arrived at by either of the lower Courts and has urged only one ground in support of the appeal, *viz.*, that the suit was barred by the principles of *res judicata* under section 11 of the Civil Procedure Code in view of the fact that the parties had referred the matter to arbitration some years prior to the filing of the suit and that an award had been pronounced by the arbitrators. It may be noted however that this ground was not put forward either in the trial Court or the lower appellate Court. Be that as it may, the following findings arrived at by the two lower Courts are no longer in dispute :—

The suit land was admittedly the property of one U Tha Dun (deceased) the father of the respondents and it devolved on the respondents after his death. It appears that U Tha Dun purported to create a mortgage of the land with U No and Daw Sar Po (both deceased) who were the ancestors of the appellants but owing to lack of a registered deed the transaction was invalid. However, the appellants continued to retain possession of the suit land on the strength of this invalid mortgage. In

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other words, the respondents were able to establish their title to the land while the appellants failed to prove any right, title or interest in it. But certain sums of monies had in fact been advanced to the respondents in consequence of the invalid mortgage and when an attempt was made by them to recover possession of the land there was strong opposition by the appellants. For reasons best known to themselves, the parties then chose to take their dispute to the office of A.F.P.F.L., Meiktila rather than the Civil Courts and an attempt was made by that office to settle the matter amicably. Two *lugyis* named U Kaung Nyein and U Chit were accordingly deputed to look into the matter and they held that a sum of K 525 was due and payable by the respondents to the appellants and that a proper mortgage deed should be drawn up and signed by the parties. No formal award was written or pronounced and the parties drew up and signed a document which though referred to in the judgment of the trial Court and apparently admitted as an exhibit was nevertheless filed at page 38 of the process file of the trial record. A glance at that document will reveal that it was nothing more than a memorandum of the fact that a sum of K 525 was due and payable by the respondents in respect of the previous invalid mortgage by their father U Tha Dun. Great stress has been laid by the learned counsel for the appellants on this document which according to him was an award by the arbitrators and furthermore that this "award" was a bar to the suit filed by the respondents *vide* section 11 of the Civil Procedure Code. The learned counsel goes on to argue that the only remedy open to the respondents was to sue for the enforcement of that ward. If that be so then indeed the learned Township Judge, Meiktila has in fact enforced the

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award by directing the appellants to deliver possession of the land only on receipt of K 525 from the respondents. Now, section 11 of the Civil Procedure Code lays down that "no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties." In the present case, I do not see how it can be held that the proceedings in the office of the A.F.P.F.L., Meiktila in respect of the suit land was a "former suit" between the parties. After all, that office has no Civil Judicial powers nor is there any clear indication of the exact nature of the matters which were in dispute between the parties at the time. All that appears to have happened was that at the intervention of certain *lugyis* the respondents agreed to pay the appellants K 525 in respect of a previous invalid mortgage. Then again, the document in question (at page 38 of the trial record) cannot possibly be termed an arbitration award. Looked at from any angle therefore I fail to see how it can possibly be held that the suit under consideration was barred by the principles of *res judicata*.

On the whole, this appeal is without merits and is accordingly dismissed. No costs were allowed to either party in the lower Courts and there will be no order for costs in this Court also.

CRIMINAL REVISION.

Before U Aung Khine, J.

H.C. 1958

Dec. 19.

PONNA AND THREE OTHERS (APPLICANTS)

v.

KUPUSWAMY AND FIVE OTHERS (RESPONDENTS).*

Democratisation Act—Village Court—No power to revise its own orders.

A Village Court tried and fined the applicants for an offence. The fines were paid. Subsequently the Village Court again tried the applicants for the same offence and ordered them to pay fines in sums differing from those which the applicants had paid under the previous order of the Village Court, the explanation for making the subsequent order being that the new order was found to be necessary as its previous order was discovered to be incomplete and to contain a number of omissions. Being aggrieved with this action on the part of the Village Court, the applicants filed a revision application before the District Magistrate, Hanthawaddy, who, however, refused to interfere.

Held: A Village Court has no power to revise its own orders; the procedure was highly incorrect, and thus vitiated the whole proceedings.

J. R. Chowdhury for the applicants.

Hla Thin (Government Advocate) for the respondents.

U AUNG KHINE, J.—This criminal revision application arises out of criminal case No. 6 of 1957 of the Village Court of Kanaung Ywama. It is alleged that the four applicants Ponna, Hmakan, Valu and Doraswamy were charged with having, with malicious intent, demolished a *mandat* built for the purpose of worship by other villagers. The case was tried before the Village Court and according to the applicants each of them was fined K 15 on the 2nd August 1957. Time was allowed to them to pay up the fine and they did so within the time allowed. Thereafter, these applicants were again sent for to appear before the Village Court for the second time

* Criminal Revision No. 52 (B) of 1958.

Review of the order of the Village Court of Kanaung Ywama, dated the $\frac{2nd}{9th}$ day of $\frac{August\ 1957}{May\ 1958}$ passed in their Criminal Case No. 6 of 1957.

for the same offence for which they had been previously tried and convicted. Being aggrieved with this action on the part of the Village Court, a revision application was filed before the Court of the District Magistrate, Hanthawaddy.

The learned District Magistrate refused to interfere and hence their application before this Court.

The original proceedings have been sent for and carefully scrutinized. There is a judgment dated the 2nd of August 1957 in which the four applicants were found guilty and that they were each directed to pay a fine but the amount of the fine imposed is not shown in the body of the judgment. Then again, in the judgment dated the 9th May 1958, the original order was superseded and a fresh order passed by which the four applicants were directed to pay a fine of K 10 each and another accused Kasi, as a leader, was fined K 30. It was also mentioned in the body of the judgment that the order written on 2nd August 1957 was incomplete and contained a number of omissions and therefore the original judgment was amended and a new order passed.

A mere reading of the Village Court proceedings shows that it is full of irregularities, for one thing the Village Court had no power to revise its own orders. The procedure in that Court was highly incorrect and as such I would say that the whole proceedings had been vitiated.

In the result I would set aside both the two judgments, the one dated the 2nd August 1957 in which the fines imposed on the accused were not mentioned and the second one dated the 9th May 1958 which superseded the order passed on the 2nd of August 1957 and direct that the applicants be acquitted so far as this case is concerned.

CIVIL REVISION.

Before U Ba Nyunt, J.

H.C 1958

Nov. 20.

RAM OUDH MISSIK (APPLICANT)

v.

RAM PRASAD (RESPONDENT).*

Unstamped document—Admissibility of—Collateral purpose and collateral matter—Distinction between.

The admissibility of an unstamped document for the proof of any fact turns upon the distinction between a collateral purpose and a collateral matter.

A collateral purpose is any matter the proof of which depends upon proof of the transaction whereas a collateral matter is any matter the proof of which does not depend upon proof of the transaction.

An acknowledgment of a liability is a collateral purpose because the proof of the acknowledgment must depend upon proof of the transaction which has to be acknowledged. But proof of payments which have been made and which are endorsed on the promissory note is a collateral matter and the endorsements would be receivable in evidence.

J. N. Ezekiel v. *E. Mordecai and another*, (1937) R.L.R. 127, followed.

Tun Lwin for the applicant.

M. Ahmed for the respondent.

U BA NYUNT, J.—In Small Cause Suit No. 1640 of 1956, the applicant instituted a suit for recovery of K 745·75 due as loans against the respondent. It was mentioned in the plaint that two promissory notes were executed for the the said loans. The respondent denied having taken the said loans and averred that the suit was falsely instituted at the instigation of Ram Singh and Jaganath who were on bad terms with the respondent.

On 16th December 1957 the applicant filed an application before the trial Court to send the letter

* Civil Revision No. 36 of 1958, against the order of 2nd Judge, City Civil Court, Rangoon in Civil Small Cause Suit No. 1640 of 1956, dated the 26th May 1958.

written by the respondent and the two documents (promissory notes) to Thumb Impression and Handwriting Expert for verification, as the respondent has denied the signatures and the thumb impressions appearing on the said documents. The application was objected to by the respondent with the result that the applicant's application was dismissed. Hence this application for revision.

It is contended in this application that the said promissory notes can be used for the purpose of proving a collateral matter namely proof of payments of money which have been made and which are endorsed on the said documents. The learned Advocate for the applicant has argued that the case of *J. N. Ezekiel* v. *E. Mordecai and others* (1) relied on by the trial Court is favourable to his case. True it is that the admissibility of an unstamped document for the proof of any fact turns upon the distinction between a collateral purpose and a collateral matter. A collateral purpose is any matter the proof of which depends upon proof of the transaction whereas a collateral matter is any matter the proof of which does not depend upon proof of the transaction. For example, an acknowledgment of liability is a collateral purpose because the proof of an acknowledgment must depend upon proof of the transaction which has to be acknowledged. But proof of payments which have been made and which are endorsed on the promissory note is a collateral matter and the endorsements would be receivable in evidence. In the present case, however, payment has not been pleaded and there cannot be any endorsement on the said promissory notes. The said documents support this view. In his application dated the 16th December 1957 the applicant has stated that the said

(1) (1937) R.L.R. 127.

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RAM OUDH MISSIR v. RAM PRASAD.

U BA NYUNT, J.

documents were required to be used as part of evidence (collateral evidence) in the suit. It appears to me that if said documents are allowed to be used as part of evidence as sought for by the applicant it would in effect amount to allowing suits to be brought upon the said documents themselves. That would be directly contrary to the plain provisions of section 35 of the Stamp Act. That being my view of the law, I think it right to hold that the application fails and must be dismissed. The application therefore stands dismissed. I make no order as to costs of this application.

APPELLATE CIVIL.

Before U Po On, J.

T. KUTTI KAKA (APPELLANT)

v.

SAW BA KHWE AND ONE (RESPONDENTS).*

H.C. 1958

Dec. 16.

Urban Rent Control Act, s. 11 (e)—"Give effect to"—Meaning of the words in.

The words "give effect to" in sub-s. (*e*) of s. 11 of the Urban Rent Control Act mean "make or become operative" and not "complete".

Ba Shun for the appellant.

Ba Thaw for the respondents.

U PO ON, J.—This case and Civil Miscellaneous No. 6 of 1957 of this Court will be dealt with in this order.

On the 8th June 1954 a compromise decree was passed in the suit brought by the respondents to eject the appellant from a room in the groundfloor of the building known as No. 187, Lower Main Road, Moulmein.

In pursuance of the terms of the compromise decree a bond was executed by the respondents wherein they undertook to re-instate the appellant in the room after re-erection of the building which should be given effect within nine months from the date of vacation of the room by the appellant.

On the 15th September 1955 the appellant applied to the trial Court that—

(1) he might be given such compensation as the Court thinks fit;

(2) that he might be placed in possession of the premises; and

*Civil Misc. Appeal No. 5 of 1957 against the order of the District Court of Amherst in Civil Appeal No. 10 of 1956, dated the 12th October 1956.

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U PO ON, J.

(3) that the bond executed by the respondents be forfeited to the Government, as the respondents had failed to re-instate him in the premises within nine months prescribed under section 11 (*e*) of the Urban Rent Control Act.

In their written objection the respondents gave several reasons why the building could not be completed within nine months from the date of vacation of the premises by the appellant. They further contended that the appellant had forfeited his right to be re-instated in the building, as he himself had violated the terms of the compromise decree.

The learned Judge of the Township Court, Moulmein, disallowed the appellant's prayer for compensation and for forfeiture of the bond. On the other hand, he gave an extension of time to enable the respondents to complete the construction of the building and re-instate the appellant therein.

Against this order the respondents made an appeal to the District Court, Amherst.

The District Court set aside the order of the Township Court holding that the appellant was not entitled to be placed in possession of the room, as he himself had broken the conditions of the bond.

Hence, the present appeal.

The whole case stands on the interpretation of the compromise decree and of section 11 (*e*) of the Urban Rent Control Act under which the suit was brought and the bond in question was executed.

Section 11 (*e*) of the Urban Rent Control Act runs as follows:

> " the building or a part thereof to which this Act applies is reasonably and *bonâ fide* required by the landlord for re-erection or essential, major and structural repairs

and the landlord executes a bond in such amount as the Court may deem reasonable that the said premises will be used for such repairs or re-erection, that he will give effect to such purpose within such period not exceeding nine months from the date of vacation of the premises by the tenant, as the Court may prescribe, and that he will, if so desired by the tenant, reinstate the tenant displaced from the premises on completion of such repairs or re-erection ;"

There are two conditions in this section. The first condition is that the landlord would have to give effect to repairs or re-erection of the building within nine months from the date of vacation of the premises by the tenant. The second condition is that he will have, if so desired by the tenant, to reinstate the tenant displaced from the premises on completion of such repairs or re-erection. The words "give effect to" mean "make or become operative". They do not mean "complete". The Legislature would have used the word "complete" instead of "give effect to" if its intention was that the repairs or re-erection must at all costs be completed within nine months from the date of vacation of the premises by the tenant. This view of mine is supported by the phrase "on completion of such repairs or re-erection" in section 11 (*e*) itself.

Be that as it may, the decree contemplates that the respondents had "to execute a bond for re-instatement of the defendant in the premises *after re-erection of the building* in accordance with law". So, the decree itself is clear that the respondents had to place the appellant in possession of the building only after the building had been re-erected. Now, when the application was made to the Court by the appellant to re-instate him in the premises, there was only a vacant ground at the place on which the building formerly stood.

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The law is clear that the cause of action must be antecedent to the institution of the suit. In other words, a suit must always be regarded as having relation to the legal obligations previous to the institution of the suit. In this case no building had been put up on the land when the appellant applied to the Court that he would be placed in possession of it. The decree itself is clear that the appellant could get possession of the room only after the re-erection of the building. No Court also can direct a person to perform a thing which is impossible of performance. The application was therefore premature.

The result is that the appeal is dismissed with costs.

APPELLATE CIVIL.

Before U San Maung, Senior Judge and U Ba Thoung, J.

U IN LYAUNG (*a*) ENG LEONG AND ONE (APPLICANTS)

v.

WHEELOCK-MARDEN & CO. LTD. AND TWO OTHERS (RESPONDENTS). *

H.C. 1958

Dec. 15.

Union Judiciary Act, s. 5—Order refusing leave to amend plaint—Merely interlocutory and not final order.

In order that s. 5 of the Union Judiciary Act may be applicable, the subject-matter of the appeal must be either "a judgment or a decree or a final order of the High Court."

There is no definition of "final order" in the Union Judiciary Act.

An order refusing leave to amend the plaint is neither a judgment nor a decree nor a final order, but it is an interlocutory order which can only be made a ground of objection in the memorandum of appeal against the decree in a suit.

Maung Sin v. *Maung Byaung and others*, (1938) R.L.R. 330; *Ma Hla Yi* v. *Ma Than Sein and two*, (1953) B.L.R. 55 (S.C.), followed.

Tun Tin for the applicants.

K. R. Venkatram for the respondents.

U SAN MAUNG, J.—In Civil Regular Suit No. 18 of 1956 of the Original Side of this Court the plaintiffs U In Lyaung and U Kyaw Khin who are the applicants in the present application for a certificate under section 5 of the Union Judiciary Act, sued the defendant-respondents: (1) Messrs. Wheelock Marden & Co. Ltd. of Hongkong, (2) the Board of Management for the Port of Rangoon and (3) Mr. Fenton, Pilot in the employment of the aforesaid Board for the recovery of K 30,000 as damages for

* Civil Misc. Application No. 3 of 1958 against the order of the High Court (Original Side) of Rangoon in Civil Regular Suit No. 18 of 1956 for a certificate under s. 5 of the Union Judiciary Act.

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U IN LYAUNG (a) ENG LEONG AND ONE v. WHEELOCK MARDEN & CO. LTD. AND TWO OTHERS.

U SAN MAUNG, J

the sinking of their motor-boat "NGWE HMYAR" in a collision between that boat and S. S. "ANTO", a steamer belonging to the 1st defendant. The collision took place on the 1st September 1955 while the plaintiffs' motor-boat was berthed alongside the Sawpit Lane Pontoon in the Hlaing River and the plaintiffs sought to fasten the liability on the defendants by averring in their plaint—

> "That the plaintiffs' motor-boat 'NGWE HMYAR' was collided and sunk due to rash and negligent acts either on the part of the crew of the steamer S.S. 'ANTO' belonging to Messrs. Wheelock Marden & Co. Ltd., (the 1st defendant), or the Pilot (the 3rd defendant), employed by the Board of Management (Commissioners) for the Port of Rangoon (the 2nd defendant) who piloted the steamer S. S. 'ANTO' when it collided with the plaintiffs' motor-boat 'NGWE HMYAR.'"

Subsequently, the plaintiffs by an application sought to amend the plaint by making the 2nd defendants personally liable for the collision on the ground that they were negligent by their failure to give sufficient directions or instructions to their pilots who were employed by them in the Port of Rangoon. The amendment was, however, disallowed by the learned Judge on the Original Side, namely, U Shu Maung, J., on the ground firstly, that by the proposed amendment the plaintiffs had sought to introduce an entirely new cause of action as against the 2nd defendants on the ground that they were personally liable for their negligence instead of being only vicariously liable for the negligence of their employee, the 3rd defendant Mr. Fenton and, secondly, that the proposed amendment was sought at a time when the suit as against the 2nd defendants on the new cause of action would be barred by limitation in view of certain provisions of the Rangoon Port Act.

By the present application which is purported to be under section 5 of the Union Judiciary Act, the plaintiffs seek to agitate the matter in the Supreme Court on a certificate that the appeal involves some substantial questions of law. In order that section 5 of the Union Judiciary Act may be applicable, the subject-matter of the appeal must be either "a judgment or a decree or a final order of the High Court." The order now sought to be appealed against not being a judgment or a decree it must be a final order before the provisions of section 5 of the Union Judiciary Act can be invoked.

Now, there is no definition of "final order" in the Union Judiciary Act of 1948. Not a single authority has been cited by the learned Advocate for the applicants to show that an order refusing leave to amend the plaint in a suit is a final order within the ambit of section 5. In *Maung Sin* v. *Maung Byaung and others* (1), it was pointed out that an order is final if it finally disposes of the rights of the parties in the suit so that where the appellate Court had finally determined that the plaintiff had a good and subsisting cause of action and that all that remained was to work out subsidiary questions consequent upon the final determination of the defendant's liability, the order was in substance and effect a final order though the *quantum* of the rights or liability remained to be ascertained. In *Ma Hla Yi* v. *Ma Than Sein and two* (2) it was pointed out that "a decision on a cardinal point in issue by itself does not make the order a 'final order' but the test is whether the rights of the parties in the suit are finally disposed of by the decision." In coming to this decision the learned Judges of the Supreme Court

(1) (1938) R.L.R. 330. (2) (1953) B.L.R. 55 (S.C.).

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relied upon *U Nyo* v. *Ma Pwa Thin* (1), *Abdul Rahman* v. *D. K. Cassim* (2) besides *Maung Sin* v. *Maung Byaung* (3) cited above. However, as pointed out by the Supreme Court the authorities relate to pending suits and the orders involved were orders of the appellate Court remanding the suits to the trial Court for trial on the merits. None of the orders involved in these cases was in the nature of the order now under consideration.

To our mind, an order refusing leave to amend the plaint has in the past been regarded as merely interlocutory and as already observed above no authority to the contrary has been cited before us. Therefore, such an order can only be made a ground of objection in the memorandum of appeal against the decree in a suit as section 105(1) of the Civil Procedure Code enacts:

> ". . . Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

For these reasons the application for a certificate under section 5 of the Union Judiciary Act must be dismissed.

U BA THOUNG, J.—I agree.

(1) I.L.R. 10 Ran. 335. (2) I.L.R. 11 Ran. 58.
(3) (1938) R.L.R. 330.

APPELLATE CIVIL.

Before U San Maung, Senior Judge and U Thaung Sein, J.

U MAUNG (APPELLANT)

v.

TAN KUT HTAI AND ONE (RESPONDENTS).*

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Dec. 11.

Companies Act, s. 4—Unregistered company—S. 4 (4)—Meaning of word "every" in—Joint and several liability of individual members—Contract Act, s. 43—Choice of defendants—Right of plaintiff.

Where a suit for the recovery of the price of goods supplied to an unregistered Company carrying on business in contravention of s. 4 of the Companies Act brought against only two out of 39 shareholders of the company was dismissed on the ground that only two out of the 39 shareholders could not be chosen and held personally liable.

Held: That the meaning of the word "every" in s. 4 (4) of the Companies Act is "each and every" and that the liability of the individual members of the unregistered Company in respect of liabilities by that Company in the course of its business is joint and several.

Appa Dada v. *Ramkrishna Vasudeo*, I.L.R. 53 Bom. 652, referred to.

Held further: That the unregistered Company being in fact nothing more than a partnership firm s. 43 of the Contract Act allows a plaintiff suing on a contract made with such a firm to select any of the partners against whom he wishes to proceed and to omit those against whom he desires no relief. In other words the liability of the members of such a partnership is clearly joint and several.

Lukmidas Khimji v. *Purshotam Haridas, Oodhowji Wallji and Goculdas Jewraz*, 1 L.R. 6 Bom. 70, referred to.

S. L. Verma for the appellant.

P. K. Bose and *K. R. Murti* for the respondents.

U THAUNG SEIN, J.—The main point for decision in this appeal and Civil First Appeals Nos. 9 to 13 of 1957 is What is the extent of liability of individual members of an unregistered company which has been carrying on business in contravention of section 4 of

* Civil 1st Appeal No. 8 of 1957 (Mandalay) against the order of the District Judge, Myitkyina, in Civil Regular Suit No. 2 of 1954, dated the 30th August 1957.

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U MAUNG v. TAN KUT HTAI AND ONE.

THAUNG SEIN, J.

the Companies Act, in respect of debts incurred by that Company? The facts involved are not in dispute and may put briefly as follows. In or about 1951 a Company known as the "Hock Kong Company" was formed at Bhamo with 39 shareholders including the first and second respondents for the purpose of constructing a Cinema hall known as the Zeyathiri Hall and for running a cinema business therein. For reasons best known to the shareholders the provisions of section 4 of the Companies Act were ignored and the "Company" in question began to function and resorted to borrowing monies and obtaining goods and building materials on credit. The appellant U Maung a timber trader then supplied several items of timber on credit to the Hock Kong Company at the instance of Dr. Tan Kyi Lin (second respondent) the then Managing Director of the Company. Payments were received from time to time towards the price of the timber sold and delivered but a balance of K 6,956 remained unpaid and the appellant U Maung was eventually compelled to file a suit for the recovery of this amount. According to the original plaint, the suit was against the "Hock Kong Company" respresented by the first respondent Tan Kut Htai, the Managing Director and Dr. Tan Kyi Lin (second respondent) an ex-Managing Director of the same company. This plaint was later amended when it was discovered that "Hock Kong Company" had not been registered in accordance with the Companies Act and the appellant U Maung sued the two respondents in their personal capacities as members of the Hock Kong Company. Of the two defendants, the second respondent Dr. Tan Kyi Lin admitted the appellant's claim while the first respondent denied all liability

for the amount claimed. The suit then went to trial and the learned District Judge, Bhamo held that the timbers were sold and delivered to the Hock Kong Company as alleged by the appellant and that a balance of K 6,956 was still outstanding against that company. However, with regard to the liability of the two respondents for this outstanding, the learned District Judge held that "only these two defendants (respondents) out of the 39 shareholders cannot be chosen and held personally liable to the plaintiff" and the suit was dismissed.

On appeal it has been strenuously urged that the learned District Judge erred in holding that all the 39 shareholders of the Hock Kong Company are collectively and jointly liable for the amount claimed and that the suit should have been filed against all these shareholders and not against any two of them. In support of this view reliance is placed on the wording of section 4 (*4*) of the Companies Act itself and the rulings in *Appa Dada* v. *Ramkrishna Vasudeo* (1) and *Lukmidas Khimji* v. *Purshotam Haridas, Oodhowji Wallji and Goculdas Jewraz* (2). Sub-section (*4*) of section 4 of the Companies Act was inserted in 1936 by the Indian Companies (Amendment) Act, 1936 and reads as follows :

> "Every member of a Company, association or partnership carrying on business in contravention of this section shall be personally liable for all liabilities incurred in such business."

The question then arises as to the meaning of the term "every" occurring in that section. According to the learned counsel for the appellant this term refers to the members of the Company both jointly and severally. There is however no definition of it

(1) I.L.R. 53 Bom. 652. (2) I.L.R. 6 Bom. 70.

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in the Companies Act while The Oxford Concise Dictionary defines it as—

"Every—Each, All"

and Chambers Twentieth Century Dictionary as—

"Every—Each one of a member: all taken separately."

It should be remembered that section 4 of the Companies Act in force in Burma is in essence identical to section 11 of the Companies Act, 1956 of India and the consequences which members or shareholders of unregistered Companies must face is expressed by Sethna in his "Indian Company Law—Sixth Edition 1956" at pages 60 and 62 as follows :

> "If an association, requiring compulsory registration under Section 11 of the Companies Act, is not registered under the Act (or is not formed by an Act of Parliament or some other Indian Law or by Royal Charter or Letters Patent), it becomes an 'illegal' body and gets no recognition at law. None of the provisions of the Partnership Act apply to such an association for it is not a valid partnership, and it does not get any benefits or protection afforded by the Companies Act, inasmuch as it is not registered as a company under the Act. The law does not recognize such an association; it cannot enter into any valid agreements and it cannot be wound up under the Act.
>
> * * * *
>
> The 'illegal' association cannot sue outsiders on agreements made between it and outsiders or for debts due to it by outsiders. But an outsider can sue each and every member of the unregistered association. Under Section 11, every member of a company, association or partnership carrying on business in contravention of this section shall be personally liable for all liabilities incurred in such business. The legislature has, by declaring that every member of an unregistered association shall be personally liable to an unlimited extent for all the liabilities incurred in the business of such association, brought into existence a very effective remedy for

> preventing the formation, and putting an end to the existence, of large and unregistered associations."

These views are based on numerous rulings and we do not propose to burden this judgment by citing or discussing them in detail except to say that the learned author relied upon *Appa Dada* v. *Ramkrishna Vasudeo* (1) as authority for the proposition that "an outsider can sue each and every member of the unregistered association." So also K. M. Ghosh in his "Indian Company Law—Tenth Edition 1956" relies on the same ruling and expresses the identical view as the above in these words :

> "The illegality of a company does not protect its members from being sued by a stranger who was not aware of all the facts which made it an illegal association. Unless the person dealing with such an association is *particeps criminis*, there can be no *turpis causa* to bring him within the operation of the rule *ex turpis causa non oritur actio*. In the case of an illegal association a suit can be brought against some members of the association, as the liability is joint and several under s. 43 of the Contract Act."

Then again, the Hock Kong Company was in fact nothing more than a partnership firm and section 43 of the Contract Act allows a plaintiff suing on a contract made with such a firm to select any of the partners against whom he wishes to proceed and to omit those against whom he desires no relief. In other words, the liability of the members of such a partnership is clearly joint and several and there is direct authority for this view in *Lukmidas Khimji* v. *Purshotam Haridas, Oodhowji Wallji and Goculdas Jewraz* (2) the headnote of which reads—

> "In a suit brought upon a contract made by a firm the plaintiff may select as defendants those partners of the firm against whom he wishes to proceed, allowing

(1) I.L.R. 53 Bom. 652. (2) I.L.R. 6 Bom. 70.

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right of suit against those whom he does not make defendants to be barred."

On the whole, we are convinced that the liability of individual members of an unregistered Company in respect of liabilities incurred by that Company in course of its business is joint and several. Hence this appeal must be allowed and the judgment and decree of the District Court, Myitkyina are hereby set aside and the appellant's suit will be decreed as prayed for with costs.

U SAN MAUNG, J.—I agree.

APPELLATE CRIMINAL

Before U San Maung, J.

U THAN PE (APPLICANT)

v.

THE UNION OF BURMA (U TUN MYAING) (RESPONDENT).*

H.C. 1958

Nov. 22,

Criminal Procedure Code, s. 145—Omission to state grounds for being satisfied—Not an illegality, s. 146—Action taken under—At initial stage of proceedings—Erroneous—When such action should be taken—Finding of fact by a subordinate Magistrate—When High Court will interfere with—Practice.

Where the Subdivisional Magistrate came to a finding that he was satisfied that there was a dispute likely to cause a breach of the peace, but omitted to state the grounds for being satisfied that such a dispute existed as required by s. 145 of the Criminal Procedure Code and at the same time purporting to act under s. 146 of the Code directed attachment of the subject-matter in dispute.

Held: That the omission of the Magistrate to state the grounds that he was satisfied of the existence of a dispute likely to cause a breach of the peace is not an illegality sufficient to vitiate the whole proceedings.

Maung Pu v. *Maung Chit Pyu*, 5 Ran. 129, followed.

Kapoor Chand and another v. *Suraj Prasad*, (1933) I.L.R. 55 All. 301, referred to

Nga Po Tin v. *Nga Po Saung and one*, 1 Ran. 53, distinguished.

Held also: That the action taken by the Subdivisional Magistrate under s. 146 of the Criminal Procedure Code at the initial stage of the proceedings is erroneous and that action as contemplated by s. 146 of the Code is to be taken by the Magistrate after he has made the enquiry envisaged in sub-s. (*4*) of s. 145 of the Code.

Held further: That it is not the practice of the High Court to interfere with the finding of fact of a subordinate Magistrate unless it is demonstrated to be grossly perverse.

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* Criminal Revision No. 85 (B) of 1958. Review of the order of the Subdivisional Magistrate, Pegu, in Criminal Misc. No. 1 of 1957, dated the 6th December 1957.

H.C. 1958

U THAN PE v. THE UNION OF BURMA (U TUN MYAING).

W. Kyin Htone for the applicant.

U Chit (Government Advocate) and *Tun Maung* for the respondents.

U SAN MAUNG, J.—On the 1st of January 1957 the Police Station Officer, Waw, sent a report to the Subdivisional Magistrate, Pegu, through the Subdivisional Police Officer and the Township Magistrate, for necessary action under section 145 of the Criminal Procedure Code. The Police Station Officer stated in that report that because of a dispute between one U Than Pe and U Tun Myaing, both residents of Pegu, regarding the ownership of a rice-mill which was nearing completion at Naungpataya village there were frequent disputes between the workers employed by both these persons and there were cross-complaints of criminal trespass agrinst one party by the other. He also said that unless prompt action is taken under the preventive section of the Criminal Procedure Code a dangerous situation was likely to arise. This report reached the Subdivisional Magistrate on the 3rd of January 1957 on which date he opened Criminal Miscellaneous Case No. 1 of 1957 of his Court and stated in the diary order that action under section 145 of the Criminal Procedure Code was necessary as recommended by the Police Station Officer, Waw, in order to prevent disputes likely to cause a breach of the peace. He accordingly directed notices be issued to both U Than Pe and U Tun Myaing and at the same time directed attachment of the subject-matter in dispute. In so attaching he purported to act under section 146 of the Criminal Procedure Code.

The Subdivisional Magistrate then held an enquiry into the matter and after recording

voluminous evidence adduced by both parties to the dispute came to the conclusion that the rice-mill was actually in the possession of U Tun Myaing through his employees. He accordingly directed restoration of the possession of the mill to U Tun Myaing.

Being aggrieved with the order of the learned Subdivisional Magistrate, U Than Pe filed an application before the Sessions Judge, Pegu, for revision of the order of that Magistrate. One of the grounds urged before the learned Sessions Judge was that the learned Subdivisional Magistrate acted without jurisdiction in issuing notices to U Tun Myaing and U Than Pe and in attaching the property in dispute because he did not make an order in writing stating the grounds for being satisfied that a dispute likely to cause a breach of the peace existed. The learned Sessions Judge, however, for reasons given in his order dated the 23rd May 1958, in Criminal Revision No. 429 of 1957 rejected this contention. He also came to the conclusion that there was ample evidence to enable the learned Subdivisional Magistrate to come to the conclusion that the mill was in the possession of U Than Myaing through his employees. The application for revision was accordingly dismissed. In the present application before this Court by the applicant U Than Pe it has been urged that there has been no preliminary finding by the learned Subdivisional Magistrate that he was satisfied that a dispute likely to cause a breach of the peace existed and that therefore the learned Magistrate's proceedings were void *ab initio*. However, as I have already stated above, by his diary order, dated the 3rd January 1957, the learned Magistrate did come to a finding that there was a dispute likely to cause a breach of the peace. The only thing he omitted to do as required by law was

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U SAN MAUNG, J.

to state the grounds for being satisfied that such a dispute existed. In *Nga Po Tin* v. *Nga Po Saung and one* (1) it was held that where a Magistrate without recording a preliminary finding that he was satisfied that a dispute concerning certain land likely to cause a breach of the peace existed, cabled upon the parties to put in statements of their rights to the land, in the absence of a preliminary finding the Magistrate was not justified in taking any action under section 145 of the Criminal Procedure Code. This case is distinguishable from the present as there is a finding to the effect that there was a dispute likely to cause a breach of the peace. The case of *Maung Pu* v. *Maung Chit Pyu* (2) is more apposite. There it was held that the mere omission of a Magistrate to state the grounds in his initial order that he is satisfied of the existence of a dispute likely to cause a breach of the peace, is not such an illegality as to vitiate the whole proceedings, provided grounds for such belief do exist and the enquiry by the Magistrate has been duly made. The matter was, however, exhaustively discussed by a Full Bench of the Allahabad High Court in *Kapoor Chand and another* v. *Suraj Prasad* (3) where the learned Judges observed—

> " Now, if he read section 145 in the light afforded by the sections quoted above, we see that if the Magistrate is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists, he is seised of jurisdiction to take action and he is empowered by the Code to act in a particular way. If this view be correct, the jurisdiction of the Magistrate arises from the fact that he has received certain information and that he is satisfied as to the truth of that information. The jurisdiction of the Magistrate *does*

(1) 1 Ran. 53. (2) 5 Ran. 129.
(3) (1933) I.L.R. 55 All. 301.

not depend on how he proceeds. There are two things, one is the authority conferred on him to act and the other is how he is to act. If he has jurisdiction, he is not deprived of jurisdiction merely because his procedure is erroneous or defective."

The contrary view taken by a single Judge of the same High Court in *Banka Singh* v. *Gokul* (1) was *pro tanto* overruled. See also *Wazir Mahton and others* v. *Badri Mahton and another* (2) and *Swaminatha Pillai* v. *Raghvachariar and others* (3).

From the papers relating to the police enquiry into the complaints made to the police by either party to the case it is evident that the fears of the Police Station Officer, Waw, that a dangerous situation was likely to arise were not entirely groundless. Each party in dispute was by force or by threat of force trying to oust the other from the possession of the mill premises. Therefore there was ample ground by which the learned Subdivisional Magistrate could have come to a finding that a dispute likely to cause a breach of the peace existed.

Regarding the facts of the case, it is clear that the dispute centered around the question whether or not title to the mill was really meant to be conveyed by U Than Pe to U Tun Myaing when he executed registered deed of sale of the half-completed mill on the 7th May 1956. In that deed U Than Pe averred that he was the sole owner of the mill which was in the process of construction and that it was being sold to U Tun Myaing and his wife Ma Kyin Mya for a sum of K 20,000. U Than Pe now contends that what purported to be a sale was merely a mortgage, that

(1) 49 All. 325. (2) 51 Cr. L.J. 1365.
(3) A.I.R. (1947) Mad. 161.

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U SAN MAUNG, J.

he did not receive K 20,000 in cash, and that U Tun Myaing was to have purchased for him the necessary engines, boilers and other accessories for the purpose of completing the mill. A number of witnesses were cited by both the parties in the case. According to U Than Pe and his witnesses, the mill belonged to U Than Pe and his co-sharers and even after the alleged sale U Than Pe continued to be in possession of the mill which he completed with the help of the workers employed by him. According to U Tun Myaing and his witnesses, however, the persons originally employed by U Than Pe became the employees of U Tun Myaing and the Mill was, subsequently to the date of conveyance, in the possession of U Tun Myaing through his employees, some of whom were employed only after the date of the conveyance.

The learned Subdivisional Magistrate had taken great care to discuss the evidence of these witnesses and I am not at present prepared to say whether his conclusions are or are not correct. I do not consider that there is any ground for interference with his order. It is not the practice of the High Court to interfere with the finding of fact of a subordinate Magistrate unless it is demonstrated to be grossly perverse. Such is not the case under consideration.

Regarding the action taken by the learned Subdivisional Magistrate under section 146 of the Criminal Procedure Code at the initial stage of the proceedings, it is undoubtedly erroneous. What section 146 contemplates is the action to be taken by the Magistrate after he has made the enquiry envisaged in sub-section (4) of section 145 of the Criminal Procedure Code. The action which the learned Subdivisional Magistrate might, however,

have taken during the enquiry is provided for in the second proviso to sub-section (4) which reads :

> " Provided also that, if the Magistrate considers the case one of emergency, he may at any time attach the subject of dispute pending his decision under this section. "

However, since the Subdivisional Magistrate had declared that U Tun Myaing was in possession of the mill premises and had ordered restoration of these premises to him, his order under section 146 of the Criminal Procedure Code calls for no interference. The application for revision is accordingly dismissed.

CRIMINAL REVISION.

Before U Thaung Sein, J.

H.C. 1958

Nov. 12.

UNION OF BURMA (APPLICANT)

v.

MA AYE (RESPONDENT).*

Criminal Procedure Code, s. 190 (1) (c)—Addition of a person as a co-accused—Not taking cognizance of offence under—Cognizance of offence different from prosecution of offender—Power of Magistrate taking cognizance of offence.

The addition of a person as a co-accused does not amount to taking cognizance of an offence under s. 190 (1)(*c*) of the Criminal Procedure Code. There is a difference between cognizance of an offence and the prosecution of an offender. When a case is sent up before a Magistrate by the police, cognizance is taken under s. 190 (1) (*b*) of the Criminal Procedure Code of the offence charged and not necessarily of the offender whose name is mentioned by the police in the charge sheet. When a Magistrate takes cognizance of an offence he is empowered to summon all persons against whom there appears to be any reason for their prosecution. In other words, once a Magistrate takes cognizance of an offence he may add any number of co-accused against whom there is reasonable evidence to connect them with the offence under investigation.

Min Han (Government Advocate) for the applicant.

Nil for the respondent.

U THAUNG SEIN, J.—The learned Sessions Judge, [redacted] has submitted the proceedings in Criminal Regular Trial No. [redacted] of 1957 of the learned Headquarters Magistrate, [redacted] with a recommendation that it be quashed for the following reasons. The case was one sent up by the police against an accused named Ma Yi charged with an offence under section 380 of the Penal Code. But in the course of the trial the learned Headquarters Magistrate, [redacted] added the respondent Ma Aye as a co-accused and eventually convicted her of an offence under section

* Criminal Revision No. 41/B of 1958 (Mandalay). Review of the order of the Headquarters Magistrate, [redacted] in Criminal Regular Trial No. 85 of 1579, dated the 17th March 1958.

380/109, Penal Code and bound her down under section 562 of the Criminal Procedure Code. According to the learned Sessions Judge, [redacted], the addition of the respondent as a co-accused by the learned trial Magistrate amounted to taking cognizance of an offence under section 190 (1) (*c*) of the Criminal Procedure Code and hence the proceedings were void *vide* section 530 (*k*) as the learned Magistrate has not been empowered under sub-section (*c*).

As far as I can see the learned Sessions Judge has overlooked the difference between cognizance of an offence and the prosecution of an offender. When the case under consideration was sent up before the learned Headquarters Magistrate, [redacted] by the police, cognizance was taken under section 190 (1) (*b*) of the Criminal Procedure of the offence charged and not necessarily of the offender whose name was mentioned by the police in the charge sheet. There are numerous rulings which clearly lay down that when a Magistrate takes cognizance of an offence he is empowered to summon all persons against whom there appears to be any reason for their prosecution. In other words, once a Magistrate takes cognizance of an offence he may add any number of co-accused against whom there is reasonable evidence to connect them with the offence under investigation. I do not propose to cite the rulings in detail as these can be traced in any annotated edition of the Criminal Procedure Code. However the following annotation at page 555 of Mitra's "Code of Criminal Procedure" 11th Edition appears to be most apposite :—

> "Complaint against some persons—Cognizance against others: Where a complaint is made against some persons and the Magistrate takes cognizance of the

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offence, it is the duty of the Magistrate to deal with the evidence brought before him, and to see that justice is done in regard to any other person who might be proved by the evidence to be concerned in the offence. When once a Magistrate has taken cognizance of an offence, he is competent to take proceedings against all who from the evidence appear to be offenders. His power is not limited only with regard to the persons mentioned in the complaint or Police report."

In the present case, the learned Headquarters Magistrate, Maung Maung was obviously acting under section 190 (1) (*b*) and not sub-section (*c*), Criminal Procedure Code when he added the accused Ma Aye in the case and hence I see no reason to quash the proceedings. Return the proceedings to the lower Court with these remarks.

APPELLATE CIVIL.

Before U Aung Khine and U Po On, JJ.

H.C. 1958

THE UNION OF BURMA (APPELLANT)

v.

Dec. 22.

P. JAMES (RESPONDENT).*

Arbitration Act, s. 34—Proceedings—Taking steps in—Stay of.

Where a party to the suit applied for stay of proceedings under s. 34 of the Arbitration Act after taking two adjournments to file a written statement.

Held: That the application for adjournment to file a written statement was taking a step in the proceedings and by implication amounted to a submission to Court's jurisdiction and that therefore the application for stay of proceedings under s. 34 of the Arbitration Act could not be entertained.

The Karnani Industrial Bank, Ltd. v. *Satya Niranjan Shaw and others*, 28 C.W.N. 771; *U. K. Banerji* v. *Governor-General of India in Council*, I.L.R. (1950) Cal. Vol. II, p. 561, referred to.

Gangooly (Government Advocate) for the appellant.

Ba Shun for the respondent.

U AUNG KHINE, J.—The respondent P. James filed a suit against the appellant, Government of the Union of Burma, by its Director of Procurement, War Office, Rangoon, for recovery of K 5,779 as damages for alleged breach of contract in the Court of the Additional District Judge, Mandalay. The suit was filed on 28th May 1955 and after two adjournments had been given by Court at the instance of the appellant, an application under section 34 of the Arbitration Act was made to Court on behalf of the appellant on 25th August 1955. It was stated in the application that the terms of the contract

* Civil Misc. Appeal No. 33 of 1956 against the order of the Additional District Court of Mandalay in Civil Regular Suit No. 10 of 1955, dated the 12th June 1956.

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U AUNG KHINE, J.

contained a clause by which it was agreed between the parties that any dispute arising out of the contract should be referred to the Director of Supplies and Transport and his decision as the sole arbitrator shall be final and binding on the parties. This application was eventually rejected by the learned Additional District Judge in his diary order dated 12th June 1956, but no reasons were assigned as to why he considered section 34 of the Arbitration Act to be inapplicable.

In the application under section 34 of the Arbitration Act, it was mentioned that the appellant had not yet filed any written statement nor had taken any other steps in the said proceedings. It is true that no written statement on that date had yet been presented to Court but it would not be true to say that the appellant had not taken any other steps in the said proceedings.

A reference to the diary entry of 29th June 1955 shows that the Public Prosecutor, Mandalay, on behalf of the appellant mentioned to Court that he was awaiting instructions from the office of the Attorney-General and he asked for time to file a written statement. Then again according to the diary entry on 29th July 1955 it will be seen that the Public Prosecutor, after showing the Court a telegram from the Attorney-General to him, asked for further time to enable him to file his written statement.

In *The Karnani Industrial Bank, Ltd.* v. *Satya Niranjan Shaw and others* (1), it was held that a verbal prayer by Defendant's Counsel for further time to file a written statement in reply to Court's question is "taking a step in the proceedings", within the meaning of section 19 of the Indian

(1) 28 C.W.N. p. 771.

Arbitration Act. The present section 34 is the equivalent of section 19 of the old Arbitration Act. This view was endorsed in the case of *U. K. Banerji* v. *Governor-General of India in Council* (1). With great respect we are in entire agreement with the views expressed in the above two cases.

The Public Prosecutor, Mandalay, in asking for two adjournments to enable him to file a written statement in the suit had by implication submitted to the Court's jurisdiction and therefore the appellant would no longer be entitled to request a stay of proceedings under section 34 of the Arbitration Act.

In these circumstances, we find that there is no merit in this appeal and accordingly it is dismissed with costs; Advocate's fees K 51.

(1) I.L.R. (1950) Cal. Vol., II, p. 561.