BURMA LAW REPORTS

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Containing cases determined by the

Supreme Court of the Union of Burma







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NAMES OF THE JUDGES AND LAW OFFICERS OF THE UNION

SUPREME COURT

Hon'ble *Agga Maha Thray Sithu* SIR BA' U, Kt., M.A. (Cantab.), *Barrister-at-Law*, Chief Justice of the Union.

PUISNE JUDGES

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Hon'ble JUSTICE *Thado Thiri Thudhamma* U THEIN MAUNG, M.A., LL.B. (Cantab.), *Barrister-at-Law.*

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ACQUITTAL BY MAGISTRATE—*Subsequent proceedings under s. 167 (8), Sea Customs Act for confiscation before Collector of Customs—Jurisdiction of Collector—Judicial—When writ of prohibition lies—Criminal Procedure Code, s. 5 (2) and s. 182 (1), Sea Customs Act—No inconsistency between—S. 403 (1), Criminal Procedure Code—Offence—S. 26, General Clauses Act and s. 2 (42).* The applicant was tried before the Subdivisional Magistrate, Insein, for an offence under s. 24 (*1*) of the Foreign Exchange Regulation Act for attempting to export money without the requisite permit from the Controller of Foreign Exchange. And, during the pendency of the trial the Collector of Customs, Rangoon, took proceedings under s. 167 (*8*) of the Sea Customs Act against applicant for confiscation and imposition of a penalty, but the proceedings were stayed by the Collector pending the decision of the Subdivisional Magistrate. The Subdivisional Magistrate acquitted the applicant. In spite of such acquittal, the Collector decided to proceed with proceedings before him. The applicant moved the Supreme Court. *Held:* That the acquittal was a bar to the continuation of the proceedings before the Collector of Customs. The Collector of Customs when he imposes fines and penalties under the Sea Customs Act exercises a judicial function. He is for the time being a Judge bound to act in his individual judgment. In such proceedings it is not competent for him to take legal advice nor for others to give legal advice. Where there is another remedy open to an applicant he is not entitled to a writ of Mandamus; but where an inferior judicial tribunal is found to be usurping a jurisdiction not properly vested in it, a writ of prohibition clearly lies. *Ranchhoddas Jethabhai & Co. v. The Secretary to the Union Government, Ministry of Judicial Affairs and two,* B.L.R. (1950) (S.C.) 68, referred to and followed. A Criminal Court proceeds on allegations of fact in a complaint to determine whether such facts would constitute an offence. When the facts alleged constitute offence both under s. 24 (*1*) of the Foreign Exchange Regulation Act and s. 167 (*8*) of the Sea Customs Act then on proof of such facts the Magistrate is bound to convict the accused under both the Acts even though the complaint mentions only Foreign Exchange Regulation Act. When the accused was acquitted by the Magistrate, such acquittal would be a complete answer under s. 403 (1) of the Code of Criminal Procedure to a trial for an offence under s. 167 (*8*) of the Sea Customs Act. S. 1 of the Criminal Procedure Code in enacting "nothing in the Code affecting any special or local law or special jurisdiction or power conferred," etc., has qualified the words by the phrase "in the absence of any specific provision to the contrary." There is specific provision to the contrary in s. 5 (2) of the Code. The proceedings before the Magistrate and before the Collector of Customs are not different. There is no inconsistency between s. 5. (2) of the Code of Criminal Procedure and s. 182 (*1*) of the Sea Customs Act as there are no express words in the latter abrogating the jurisdiction of the ordinary criminal courts; consequently the contention that the Customs Authority had exclusive jurisdiction to try the offence under s. 182 (*1*) of the Sea Customs Act is not tenable. Nor can the jurisdiction, which the Magistrate had, come to an end because notice was given of proceedings before the Collector of Customs. The Criminal Court once seized of jurisdiction cannot have that jurisdiction taken away lightly and there is no warrant for such taking away in the Sea Customs Act. Both in India and in Burma the word "offences" is used and not "Crimes" as in England. "Offence"

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is described in s. 2 (42) of the General Clauses Act. In England it is possible to define "offence" as meaning any act which is not a "crime" in some limited cases. *Madhowji Thawor* v. *Yar Hussain Hydor Dasti and another*, (1926) A.I.R Sind 40; *Reg.* v. *Tyler*, (1891) 2 Q.B.D. 588, referred to and distinguished. There is also no warrant for grouping offences under s. 167 of the Sea Customs Act into criminal acts and non-criminal class.

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Industrial Arbitration a dispute between the Burma Oil Company Ltd. and the Oil Refinery Workers, Syriam and the Court by its award directed the Company to investigate the possibilities of river transport of crude oil to Syriam within three months and mentioned that the arbitration court would reconsider the question of retrenchment of employees thereafter. *Held :* That the court acted arbitrarily and without jurisdiction in directing such investigation and they allowed their judgment regarding reasonableness or otherwise of the proposed retrenchment to be influenced by extraneous and irrelevant considerations. In the ordinary course the Company for many years before the war used to get crude oil for refinement at Syriam through their pipe-line and their present plan for rehabilitation is in accordance with the said course. The operation of the pipe-line is the essential link in that plan. The direction to investigate the possibilities of river transport implies that the ordinary course of such business should be altered for the time being and the court of Industrial Arbitration had no authority to direct such alteration or to decide in what manner the Company should carry on their business.

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BUDDHIST LAW—S. *13, Burma Laws Act, 1898—Meaning of Buddhist Law—Desertion by couple—Whether divorce automatic after a specified period—Authority of* Manugye. *Held :* That Buddhist Law within the meaning of s. 13 of the Burma Laws Act means the *Dhammathats* and collection of precedents. *U Pe* v. *U Maung Maung Kha*, (1932) I.L.R. 10 Ran. 261 P.C., followed. The view expressed in the Full Bench case of *Ma Nyun* v. *Maung San Thein* reported in I.L.R. (1927) 5 Ran. 537 that where a Burmese Buddhist husband deserts his wife and for three years neither contributes to her maintenance nor has any communication with her the marriage is automatically dissolved is incorrect. Such conduct on the part of the husband evidences his desire for dissolution of the marriage bond ; and cannot in itself suffice to dissolve the bond created by mutual consent of the husband and wife. For that bond to be dissolved it is necessary that the wife reciprocates the desire ; and the reciprocation may be express or by conduct clearly pointing in that direction. *Thein Pe* v. *U Pet*, (1906) 3 L.B.R. 75 ; *Ma Saw Kin* v. *Maung Tun Aung Gyaw*, (1928) 6 Ran. 79 ; *Dr. Tha Mya* v *Ma Khin Pu and another*, Civil 1st Appeal No. 37 of 1940—(1940) R.L.R. 807 ; *Ma Ka U* v. *Po Saw*. 4 B.L.R. 340 ; *Daw Kyin Hmon* v. *Daw Mya* Gale, A.I.R. (1936) Ran. 247 ; *Maung Thein Maung* v. *Ma Kywe*, (1935) 13 Ran. 412 ; *Ma Hnin Zan* v. *Ma Myaing*, (1935) 13 Ran. 487 ; *Tan Ma Shwe Zin* v. *Koo Soo Chong* (1939) R.L.R. 548 at 563; *Ma Yin Mya* v. *Tan Yauk Pu*, (1927) 5 Ran. 406 ; *Selections from the records of the* Hluttaw, p. 24 and Civil Regular No. 12 of the Judicial Commissioner, Upper Burma, dated 25th September 1892 ; *U Pe* v. *U Maung Maung Kha*, (1932) 10 Ran. 261, referred to. *Ma Nyun* v. *Maung San Thein*, (1927) 5 Ran. 537 ; *U Thein* v. *Ma Khin Nyunt*, (1948) B.L.R. 108. over-ruled. Remarks in 8 L.B.R., dissented from. The *Manugye Dhammathat* is not the paramount authority in the body of the *Dhammathats* as enunciated by the Privy Council in *Ma Hnin Bwin* v. *U Shwe Gon*, (1914) 8 L.B.R. 1, followed by the High Court of Judicature at Rangoon in *Ma Nyun* v. *Maung San Thein*, (1927) 5 Ran. 537.

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BURMA MUNICIPAL ACT, ss. 79 AND 201—*Validity of decree or order passed by Court of competent jurisdiction—Applicability to quasi-judicial officials—Subsequent assessment by Municipal Committee under s. 79 (1) of the Municipal Act—Writ of certiorari—Interference by.* The Finance Sub-Committee of Moulmein Municipality recommended to the Municipal Committee that applicant's damaged Mill should be assessed at 50 per cent of the rental value. This recommendation was accepted by the Municipal Committee. The applicant appealed to the Deputy Commissioner, who treating the decision as decision of Assessment Sub-Committee entertained the appeal under s. 79 (2) of the Burma Municipal Act and set aside the order. Subsequently the Municipal Committee passed a resolution to recover arrears of tax on the basis of the original decision at 50 per cent of the rental value. The applicant appealed to the Commissioner who held that no appeal lay to him. The applicant applied to the Supreme Court for a direction in the nature of certiorari. *Held :* Though the Commissioner was wrong in not entertaining the appeal, directions in the nature of certiorari

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are discretionary and the Court will be slow to interfere if the result of an irregularity of an inferior tribunal has been to promote substantial justice between the parties. Though the Deputy Commissioner exercised jurisdiction under s. 79 (*1*) of the Municipal Act the applicants never took the preliminary steps which could enable them to exercise the right of appeal. Therefore this Court should not exercise it now. The decree or order passed by a Court of competent jurisdiction will not be declared void or a nullity unless the same has been set aside in proceedings by way of review, revision or appeal, and this applies in relation to a tribunal exercising judicial or quasi-judicial functions as to a Court. The Court has jurisdiction to decide wrong as well as right. *S. A. Nathan* v. *R. S. Samson*, 9 Ran. 480 at 490, referred to and applied. *Makajan* v. *Narhari*, (1901) 27 I.A. 216, followed. The proceedings by the Municipal Committee by way of re-assessment must be treated as a fresh decision under s. 79 (*1*) of the Act and this is so even though the Committee did not think it was acting under the said provisions.

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BURMESE BUDDHIST LAW—*Re-marriage of mother—Estate to be divided is the estate held by mother at the re-marriage—Share of inheritance claimed and given—Such heir debarred from claiming further inheritance.* On re-marriage of mother a son claimed from his mother and step-father property with which to set himself up independently. He was given property and cash which was not less than half the estate brought by mother to the second marriage. Demand was not for a gift but for a share. *Held* : That on the re-marriage of a parent the estate to be divided is the estate held by the parent at the time of re-marriage. *Held further* : That it is settled law that when on re-marriage of one parent, the *atet* child or children sought and obtained a share from the parent re-marrying, that child or children have no further claim in the estate of that parent. *Ma On Thin* v. *Ma Ngwe Yin and another*, 7 Ran. 398, followed.

DAW YU AND OTHERS *v.* MAUNG KHIN AND OTHERS ... 236

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CERTIORARI, WRIT OF—INTERFERENCE IN MUNICIPAL ASSESSMENT ... 176

CERTIORARI—*Order of Controller of Immigration directing applicant to leave country—Burma Immigration (Emergency Provisions) Act, s. 4—Foreigners' Act, s. 3.* The applicant was granted permission to enter Burma and work as an Assistant Editor of a Chinese paper for four years, the manager and publisher thereof guaranteeing that the applicant would so work. Before the expiry of the time so fixed, the applicant resigned the post and worked as a teacher ; whereupon the guarantors withdrew their guarantee. The Controller of Immigration, acting under orders of the Foreign Office, cancelled the applicant's Stay Permit and ordered him to leave the country. *Held* : That what the Controller had done was merely to carry out the order of the Government. Every country which extends its hospitality to an alien can withdraw it and send him back to his own country. Every Power has the right to refuse to permit an alien to enter the State and, if it permits an alien to enter, to annex what

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conditions it pleases to such permission and expel or deport him from the State at pleasure. This principle is propounded and followed by English and American Courts and is in conformity with the practice of every sovereign State. This principle is to be found embodied in s. 3 of the Foreigners' Act whereby the President may order any foreigner to remove himself from the Union of Burma. Without such power the position of the State will be almost intolerable. Government was perfectly within its rights in cancelling the permit for breach of condition. *The King* v. *Secretary of State for Home Affairs*, (1917) 1 K.B. 922 ; *Attorney-General for Canada* v. *Cain*, (1906) A.C. 542 at 546 ; *Mahler* v. *Eby*, 264 U.S. 32, referred to.

KYI CHUNG YORK *v.* THE CONTROLLER OF IMMIGRATION, BURMA 197

CERTIORARI—*Lessee building a house on leased land and letting it out to tenants—Application for fixation of fair rent under s. 19 (2) (g) of Urban Rent Control Act—Assistant Controller fixing standard rent at contract rate. Held :* Before the third provisio to s. 19 (2) (g) of the Urban Rent Control Act can operate, it is necessary that the Controller of Rents should be satisfied that the rent fixed for the first time after 1st September 1939, when the premises were first let was excessive or not just or fair.

U SEIN LIN AND ANOTHER *v.* THE ASSISTANT JUDGE, TAUNGDWINGYI AND TWO OTHERS 214

CERTIORARI—*Urban Rent Control Act, s. 16-AA (4), 16-AA (2)—Decision based on misconception of facts and wrong assumption of law.* Where the Controller of Rents purporting to act under the Urben Rent Control Act, s. 16-AA (4) and 16-AA (2) held that the applicant had vacated a room and failed to give notice thereof and that the unauthorized occupant was liable to be evicted therefrom and there was no legal evidence of the room having been vacated. *Held :* That the order itself contains a statement of what led to the decision. It is "a speaking order" and the Supreme Court can inquire into the correctness of the decision by certiorari. *Rex* v. *Northumberland Compensation Appeal Tribunal Ex-Parte Shaw*, (1951) 1 K.B. 711, referred to.

DR. R. C. DAS *v.* THE CONTROLLER OF RENTS, RANGOON ... 225

CERTIORARI—*S. 14, Limitation Act—Supreme Court Rules, Order 21, Rule 8—Sufficient cause—Local Authorities (Suspension) Act, 1946 and Rules 3 (1), 7 and 8—Bye-law 4 of Hanthawaddy District Council made in pursuance of s. 80 (1) of Rural Self-Government Act—Failure to advertise in conspicuous places in the market of increase of rate—Bye-law superseded—Revision and enhancement af rates—Judicial or quasi-judicial act.* An order for increase of rates of stall rent in Kayan Market was passed and auction sale of the right to collect stall rent at enhanced rates was held. The applicant being aggrieved filed an appeal to the Commissioner as provided for by s. 80 (1) of Rural Self-Government Act and on the dismissal of the appeal revision was filed to the President. *Held :* That time thus occupied in these proceedings may be excluded under s 14 of the Limitation Act read with Order 28, Rule 3 of the Supreme Court Rules. Under Rule 3 (1) of Local Authorities (Suspension) Rules, 1946 all the existing rules and bye-laws under the Rural Self-Government Act shall apply unless they are superseded.

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Bye-law 4 of Hanthawaddy District Council Public Market Bye-laws provides that the rates of daily fees shall be fixed and be subject to the revision by the District Council and they shall be publicly advertised in conspicuous places in the market. When there was not public advertisement in the market this rule was not complied with. Rule 7 of the Local Authorities (Suspension) Rules, 1946 supersedes Bye-law 4 of the Hanthawaddy District Council Public Market Bye-law. It provides that if it is considered that the collection of the rates or taxes should be superseded or amended, proposals for the same should be forwarded to Government through the Deputy Commissioner and the Commissioner. As this rule applied and no reference was made to Government, the order of enhancement was bad. Revision and enhancement of rates of stall rent is judicial or quasi-judicial act and therefore amenable to the jurisdiction of the Supreme Court. As regards auction of stalls or collection of stall rent at revised or enhanced rates they are executive acts in respect of which applications for the writs of cetiorari and prohibition are absolutely incompetent. *U Hlwe* (a) *A.E. Madari* v. *U Tun Ohn and one*, (1948) B.L.R. 541 at 559-560, referred to.

U PE AND ANOTHER *v.* THE HON'BLE MINISTER FOR HEALTH AND LOCAL GOVERNMENT AND OTHERS 228

CERTIORARI—*S. 167 (8) of the Sea Customs Act—S. 3 (2) of Import Trade Control Act, 1947—Proceedings before the Collector under the above Act quashed.* Applicant's shop was raided by the Police and part of the stock of uncut synthetic stone were seized and they were later returned. Later Custom Officials went and seized some synthetic stones and the Applicant was called upon to show cause why penalty should not be imposed under s. 167 (*8*) of the Sea Customs Act read with s. 3 (2) of the Import Trade Control (Temporary) Act, 1947 on the ground that these stones were reported to have been imported into Burma without import licence and without payment of duty. On an application to quash the proceedings. *Held :* That s. 167 (*8*) of Sea Customs Act provides of imposition of penalty upon persons concerned in import and export of prohibited goods and the burden of proof under that section is on the accuser to prove his accusation against the accused and unless and until the accuser can prove his allegation the accused must be let off. Procedure adopted by the Collector is the very antithesis of the one contemplated in s. 167 (*8*) of Sea Customs Act and is a breach of the cardinal rule of criminal jurisprudence. *S. S. Ananda* v. *Collector of Customs*, B.L.R. (1951) (S.C.) 28, distinguished.

KANTILAL GORDHANDAS SHAH *v.* THE ASSISTANT COLLECTOR OF CUSTOMS (PREVENTIVE) 244

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CODE OF CRIMINAL PROCEDURE—*S. 423 (1), s. 439 (1)—Conviction under s. 4 (1), High Treason Act.—Conviction and sentence of death passed by the High Court under s. 3 (1) of the High Treason Act—Procedure to be followed.* Under s. 423 (1) (b) in an appeal from a conviction the Appellate Court can do any of the following things :—

(1) Alter the finding and maintain the sentence.
(2) Alter the finding and reduce the sentence.
(3) Reduce the sentence without altering the finding. But this does not mean that the Court can alter the finding and retain the sentence passed which would be illegal according to the finding. What the section provides for is maintenance of a sentence which can legally be passed for the offence for which the finding is altered. When the accused is tried on a charge for a major offence but is convicted for a minor offence, and there is an appeal, the High Court can open a Revision proceeding and call upon the accused to show cause why the acquittal of the major charge should not be set aside and a re-trial ordered. If the explanation is not satisfactory, the High Court then in exercise of its appellate jurisdiction must get rid of the order of conviction for a minor offence by setting it aside. The High Court then in exercise of its revisionary jurisdiction must set aside the order of acquittal and under sub-s. 4 of s. 439 of the Criminal Procedure Code order the retrial of the case, but the High Court in its revisional power cannot convert an acquittal into one of conviction. *Kishan Singh* v. *The King-Emperor*, 50 All. 721, (P.C.), followed. *Bawa Singh* v. *The Crown*, 23 Lah. 129, dissented from. *In re Bali Reddi*, 37 Mad. 119, referred to.

TUN BIN *v.* THE UNION OF BURMA 148

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DIRECTION IN THE NATURE OF CERTIORARI—*Quashing of the order of the Collector imposing a Stamp Duty—Direction in the nature of mandamus to direct Financial Commissioner to send a case to the High Court under s. 57 (1) of the Stamp Act.* A deed of sale

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was executed in favour of Ma Khin Pu on the 18th March 1947; on the 29th June 1950 she executed a Deed described as a Deed of Disclaimer and Relinquishment in respect of the same property in favour of the Applicant. When the document was presented for registration the Sub-Registrar sent it to the Collector under ss. 33 and 36 of the Stamp Act and the Collector ordered payment of deficit stamp fee under s. 40 of the Stamp Act. Applicant filed a revision to the Financial Commissioner under s. 56 of the Act and the application was rejected. Thereafter the Applicant filed an application to the Financial Commissioner asking him to state a case and refer it to the High Court under s. 57 of the Act and the application was rejected. The Applicant then filed an application for direction in the nature of certiorari. *Held*: That the Collector and the Financial Commissioner had jurisdiction to decide under what article of the Stamp Act the document should have been stamped and in passing the orders in question they have not exceeded their jurisdiction in any way. A writ of certiorari will not lie if the authority whose order is impugned by means of the writ has jurisdiction to deal with the matter and dealt with it, even though the Supreme Court might not agree with the said authority on questions either of law or fact or of both. *Gwan Kee* v. *The Union of Burma*, (1949) B.L.R. 151 (S.C.) The writ of mandamus cannot be demanded *Ex Debito Justitiae*. It is issued only in the discretion of the Court and the Court will not issue it unless under any law for the time being in force it is clearly incumbent on a person holding a public office to do or to forbear from doing a specific act. S. 57 of the Stamp Act gives discretion to the Financial Commissioner in the matter. It is not incumbent on him to state a case and refer it to the High Court. Therefore application for writ of mandamus does not lie. *The Queen* v. *Garland*, (1870) L R. 5 Q.B. 272; *The Queen* v. *Church Wardens of All Saints, Wigan*, (1876) 1 A.C 620, referred to.

NOOR MOHAMED *v.* THE FINANCIAL COMMISSIONER (COMMERCE), BURMA AND ONE 94

DISPOSAL OF TENANCIES ACT, S. 3, PROVISO (a)—*Rights of owner to remain in possession—Whether can be dislodged by Village Agricultural Committee or District Agricultural Committee.* Where the owners applied to the Village Agricultural Committee to cultivate their land which is just over 10 acres for the season, 1950-51 and were allowed to do so but the old tenants applied for permission to work the same land which was granted by the new Village Agricultural Committee and which was confirmed in appeal and the owner applied for a writ of certiorari to quash the said proceedings. *Held*: That under the provision of s. 3, proviso (*a*) of the Disposal of Tenancies Act the owners of the 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. Neither the Village Agricultural Committee nor the District Agricultural Committee on appeal have power under the said proviso to dislodge the owner.

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LEASE AND LICENCE—*Difference between—Test, exclusive right of occupation.* Where the parties entered into an agreement whereby the Appellant was allotted a floor space 17' x 5' and agreed to pay " a guaranteed monthly commission " of Rs. 100 as consideration and the Appellant constructed fixtures and show cases on the space allotted to him with exclusive right of occupation in that area. *Held:* That the Appellant was a lessee and not a licensee. The circumstances leading to the execution of the document, the fixtures put up thereafter by the

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Appellant and the fact that a specified space was allotted for business purposes with exclusive right of occupation to the Appellant leads only to the conclusion that the Appellant was a lessee. *S. R. Raju* v. *The Assistant Controller of Rents, Rangoon and others*, (1950) B.L.R. (S.C.) 10, referred to and applied.

GURBACHAN SINGH BINDRA *v.* JOS. E. FERNANDO ... 255

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MONEY LENDERS ACT, 1945, S. 12—*Correct interpretation. Held :* That under s. 12 of the Burma Money Lenders Act prohibition is against a decree for the aggregate of the principal of the original loan and such sum towards arrears of interest which together with any interest already paid exceeds the amount of the principal. In other words, s. 12 bars the Court against granting a decree for arrears of interest in excess of a figure which, with the interest already paid, adds up to the amount of the principal. If the interest already paid exceeds the limit under s. 12 of the Act, all that the Court can do is to refuse a decree for interest without affecting however the claim for repayment of the original loan. Under that section the Court has no power to reduce the amount of principal, but the Court may reopen the transaction and grant relief to debtor in respect of interest payable prior to the suit under s. 13 of the Act.

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PENAL CODE—*Offence under ss. 121, 122 (1) as amended by Act 20 of 1950—High Treason—Exculpation of offence—S. 94 excludes offence against State punishable with death. Held :* No statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover, 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. *Pakala Narayan Swami* v. *The King-Emperor*, (1941) R.L.R. 789 at 798, approved and followed. The claim in exculpation made by the accused in his confession that he did not willingly join the insurgents, but was forced to become of their company by threats of death, even if it be true, is not sustainable in relation to an offence against the

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State punishable with death ; s. 94 of the Penal Code excludes the plea of compulsion by apprehension of instant death in excuse of the offence against State punishable with death.

CHIT TIN (*a*) SU THI AND ONE *v.* THE UNION OF BURMA ... 142

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PUBLIC ORDER (PRESERVATION) ACT, 1947, s. 5 (2)—*Report by Police Inspector and detention by Deputy Commissioner thereon—Detention on reasonable suspicion—Detaining first and seeking materials in support later—Practice condemned. Held :* That a detention under s. 5 (2) proviso (ii) of the Public Order (Preservation) Act on reasonable suspicion cannot be for any period in excess of two months and this period is permitted by the Act to enable investigation into the activities of the person detained. Where the Deputy Commissioner took action eight months later after being addressed by the Applicant and the earlier order was cancelled and a fresh order of detention was passed, on " being satisfied " with the necessity therefor without enquiry of all available evidence or without any examination whatever by the Deputy Commissioner, the detention is illegal. Reasonable satisfaction of the necessity to direct detention is the basis of the exercise of powers under s. 5-A of the Public Order (Preservation) Act. There must be known to the authority such reasonable grounds before he can validly exercise the power. *Tinza Maw Naing* v. *Commissioner of Police and one*, B.L.R. (1950) (S.C.) 17 ; *Nakhuda Ali* v. *M. F. De S. Jawaratne*, 54 C.W.N. 883, referred to and followed. The practice of directing detention first for an indefinite period and later to seek materials in support of the order of detention, followed by the Deputy Commissioner, cannot be too highly deprecated. As there were no materials at the time of the order of detention on which the authority could be reasonably satisfied, the detention order is illegal.

U ZAN *v.* THE DEPUTY COMMISSIONER, INSEIN AND ANOTHER 188

PUBLIC PROPERTY PROTECTION ACT, 1947, s. 2—*Cash whether public property—Rule of* ejusdem generis *in construction of Statutes—Conditions for application. Held :* Cash issued to a Village Headman for agricultural loans is public property within the meaning of s. 2 of the Public Property Protection Act, 1947. The doctrine of *ejusdem generis* must be applied with caution in connection with the construction of Statutes. Where in an act of Parliament there are strong reasons from the history and circumstances connected with its passing and from the structure of the Act itself, to indicate the real meaning of the Legislature, this

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doctrine has no application. The specified thing must possess some common and dominant feature so that the genus can be ascertained ; but there is no authority for the proposition that the rule must be applied whenever a common and dominant feature can be found in the specified things. *Attorney-General* v. *Brown*, (1920) 1 K.B. 773, applied. *Mohamed Hussein* v. *The Union of Burma*, Criminal Misc. Application No. 115 of 1948, over-ruled. S. S. *Meghnild* v. *Mc Intyre Bros. & Co.*, (1920) 3 K.B.; *The King* v. *U Saw Hla Pru and one*, (1947) R.L.R. 83 at 85-87, referred to.

KO TIN *v.* THE CHAIRMAN, PUBLIC PROPERTY PROTECTION BOARD AND ONE 183

QUO WARRANTO—*City of Rangoon Municipal Act, Rule 251, Chapter IX, Schedule I—Standing Committee—Appointment of Chairman—Meeting attended by eight members—Chairman adjourning election of Chairman—Date to be announced later, remaining members electing a Chairman—Validity*—Quo warranto *proceedings—Nature and scope. Held :* Proceedings in the nature of *quo warranto* will lie for usurping any office whether created by charter or by the Crown with the consent of Parliament, provided the office be of a public nature, and a substantive office and not one held at the will and pleasure of others. *Rex* v. *Spayer and Cassel*, (1916) 1 K.B. 595, referred to. *Darley* v. *The Queen*, 12 Ch. and F. 537 at 541, followed. The said remedy is available to private persons within the limits mentioned and subject to the discretion of the Court to refuse or grant it. The Court in exercising its discretion will consider the facts and circumstances and the consequences likely to follow. *The Queen* v. *Cousins*, (1873) L.R. 8 Q.B.D. 216; *The Queen* v. *Ward*, (1873) L.R. 8 Q.B.D. 210 at 215, referred to. In the present case the term of the Chairman of a Standing Committee of the Municipal Corporation of Rangoon expired at midnight on the 20th March 1951. A meeting of the Standing Committee was called on the 20th March 1951 to elect a Chairman for the next year. Out of eleven members, eight were present (three forming a quorum). The Chairman adjourned the meeting announcing that the date for next meeting would be announced later in consultation with the Commissioner. Six out of the eleven members protested against adjournment. The Chairman and other four members then left the meeting. On the advice of the legal adviser of the Corporation who was present at the meeting, the remaining six members held a meeting and elected the first Respondent as Chairman for the next year. *Held :* The election of the Chairman was legal. The Chairman of the Standing Committee had full discretion to adjourn the meeting of the 20th March, but Rule 9 of Chapter IX provides that in adjourning the meeting the Chairman " shall fix such time and place for an adjourned meeting as he shall think fit. " Without such fixation of time and place of the next meeting a mere adjournment to a date which the Chairman proposed to announce later after consulting with the Commissioner of the Corporation is not a lawful exercise of the power of adjournment under Rule 9. The Chairman would have ceased to function after the 20th March, so no one could fix a date for the adjourned meeting. It is to provide for such consequence that the rule requires that the adjourned meeting shall be at a fixed time and place. No practice however consistent, can override the plain provisions of law.

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REQUISITIONING (EMERGENCY PROVISIONS) ACT, 1947—*Meaning of requisition—Property occupied by tenant—Purchaser moving government to requisition—Requisitioning Act whether applicable—Constitution of Burma, ss. 13 and 23 (4)—If Requisitioning Act repugnant to—Compensation to owner—Tenant if owner—Urban Rent Control Act, s. 32—Possession of government—Meaning of the words possession, requisition, public servant—Defence of Burma Rules, 1940, Rule 2 (9) and Rule 2 (10)—Motive in requisitioning, relevancy of.* Applicant was a monthly tenant of premises since 1946. In 1950 the 2nd Respondent, an Officer in the Medical Service of the Government of Burma purchased the premises. The Collector of Rangoon made an order on the 16th January 1951 requisitioning the premises and followed it up on 31st January 1951 calling on the applicant to vacate, warning him that on failure to vacate an order authorising his removal would be issued. Upon an application for an appropriate direction under s. 25 of the Constitution of Burma it was contended that the Requisitioning Act is repugnant to the Constitution ; that the requisitioning was not in good faith ; that the Act did not apply to property in the possession of a tenant ; that there had been discrimination in that government servants had been preferred as against ordinary citizens and that it is not in public interest ; that depriving a tenant of his property would amount to limitation or expropriation of private property and that the Urban Rent Control Act can be invoked only to property in actual possession of Government. *Held :* Negativing the contentions :—S. 2 (1) of the Requisitioning Act empowers the President by order in writing to requisition any land, building, etc. A tenant in possession is not exempted from having the property requisitioned. Provisions of s. 2 cannot be narrowed down and the absence of specific provision for payment of compensation can amount to no more than a casual omission. *Held :* (i) That the Requisitioning Act is not repugnant to s. 13 or s. 23 (4) of the Constitution. No arbitrary discrimination as contemplated by s. 13 is perpetrated when Government provides accommodation to a person charged with the performance of public duties in preference to a person not so charged. The requisitioning does not also amount to limitation of private property within the meaning of s. 23 (4) of the Constitution. A tenant has a right in property to the extent of his terms and he is the owner of an interest in the property. When s. 6 of the Requisitioning Act provides machinery for assessment and payment of compensation to the owner it satisfies different and concurring estates in the property. *Held also :* That s. 32 of the Urban Rent Control Act providing for prohibition against termination of a monthly lease on notice does not extend to premises which have come into the possession of Government. Possession in this section is not restricted to physical possession ; so to read it would unduly restrict that term and make s 32 a futility. *Minister of Agriculture and Fisheries* v. *Mathews*, (1950) 1 K.B. 148 ; *The Steaua Romana* v. *The Oltenia*, (1944) 43 at 48, referred to. The word "Requisition" is not a term of art and does not connote the same state of things in every

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particular case. It may mean hiring or may involve taking over of absolute dominion. It is so used in Rule 2 (*10*) of the Requisitioning Act to the extent that the property is placed at the disposal of Government. The Requisitioning Authority may well come within the meaning of landlord under s. 2 (*c*) of the Urban Rent Control Act. The word "public servant" is not defined in the Requisitioning Act ; it is a re-enactment of the Defence of Burma Rule, 1940. Rule 2 (9) of the said Rules defines the term as including public servant according to the Penal Code and any servant of any local authority or Railway Administration. The test is whether his pay comes out of the National funds and the office must be public in the strict sense of the term, namely, an office in the discharge of public duties. *The Broadmayne*, (1916) 64 ; *Ismail Mohamed* v. *The King*, (1941) R.L.R. 536 ; *In re Nirams*, (1891) 1 Q.B.D. 594, referred to. An exercise of a lawful statutory right cannot be vitiated by any improper or ulterior motive. *Allen* v. *Flood*, (1898) A.C. 1, referred to.

CHARLES R. MANASSEH *v.* THE COLLECTOR OF RANGOON AND ANOTHER 201

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SALE OF GOODS ACT, S. 20 251

SALE OF MOTOR CAR—*Payment of Rs. 10,000 out of Rs. 14,000 purchase price—Delivery of the Car—Forfeiture of Rs. 10,000 for failure to pay the balance—S. 20 of Sale of Goods Act.* Appellant sold a motor car to the Respondents for Rs. 14,500 and delivered the car to the Respondents and received Rs. 10,000 as part-price. The sale agreement provided that if the balance Rs. 4,500 was not paid by 30th April, the sum of Rs. 10,000 will be forfeited and the car will be returned to the Appellant. The Respondents failed to pay Rs. 4,500 on due date and the Appellant filed a suit for possession of the car. *Held :* That under the contract between the parties the property in the car passed to the Respondents. The clause relating to forfeiture of Rs. 10,000 was a penalty clause and High Court was justified in granting relief against forfeiture. *John H. Kilmer* v. *British Columbia Orchard Lands Ltd.*, (1913) A.C. 319 ; *Steedman* v. *Drinkle and others*, (1915) A.I.R. (P.C.) 94 ; *Bhimji Dalal* v. *The Bombay Trust Corporation Ltd.*, (1930) I.L.R. 54 Bom. 381. followed.

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SINO-BURMESE BUDDHIST—*Law governing—Chinese Customary Law - Custom—Power to make will by Sino-Burmese Buddhist—Evidence Act. Held : Prima facie* a Buddhist in Burma, irrespective of what his nationality is, and irrespective of whence he came is governed by the Burmese Buddhist Law, *i.e.*, by the

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Dhammathats and the precedents in the matter of marriage, inheritance and succession unless he can prove that he is governed by a custom which has the force of law in Burma and which is opposed to the Burmese Buddhist Law. *Tan Ma Shwe Zin* v. *Koo Soo Chong*, (1939) R.L.R. 548 (P.C.); *Dr. Tha Mya* v. *Daw Khin Pu*, B.L.R. (1951) (S.C.) 108, followed. If a Chinese Buddhist is *primâ facie* governed by the Burmese Buddhist Law, there is all the more reason why a Sino-Burmese Buddhist should be governed by the Burmese Buddhist Law. His ways, manners and modes of life are the same as the Burmese and he is a citizen of the Union of Burma by birth. Therefore unless and until he can prove that he is subject to a custom which has the force of law in Burma and that custom is opposed to the provisions of Burmese Buddhist Law, he is governed by Burmese Buddhist Law. The custom alleged must be ancient, certain and reasonable. *Ma Yin Mya* v. *Tan Yauk Pu*, (1927) 5 Ran. 406 (F.B.); *Abdurahim Haji Ismail Mithu* v. *Halimabi*, 43 I.A. 35, followed. *Fone Lan* v. *Ma Gyi*, 2 L.B.R. 95 at 97, over-ruled. Chinese Customary Law being foreign law should be proved according to sections 38 and 45 of Evidence Act. *Maung Po Maung* v. *Ma Pyit Ya*, 1 Ran. 161 at 169, followed.

DAW THIKE (*a*) WONG MA THIKE *v.* CYOUNG AH LIN ... 133

SPECIAL LEAVE—WHEN APPLICATION TO BE ENTERTAINED ... 81

————————, WHEN GRANTED IN CRIMINAL CASES 98

STAMP ACT, ss. 33, 36, 40, 56 AND 57 94

STANDING ORDER FOR THE STATE AND STATE PARTNERED MILLS ... 57

SUFFICIENT CAUSE 228

SUPREME COURT BENCH CONSTITUTED WITH TWO JUDGES FROM THE HIGH COURT—*S. 146, Burma Constitution—Interpretion of—Principles guiding—General Clauses Act, s. 12* (2)*—Constitution Act, s. 222* (3)*—Review of Supreme Court judgment—Order 10, Rule 3, Order 28, Rule 4, Supreme Court Rules—Grounds for review.* Civil Appeal No. 11 of 1949 was first heard by the Supreme Court on 25th September 1950. The Chief Justice was absent owing to illness. The other Judge of the Supreme Court on duty was disqualified having dealt with the matter as a Judge on the Original Side in the High Court. The Acting Chief Justice applying s. 146 of the Constitution invited two Judges from the High Court to form a Bench. The Chief Justice resumed office on 1st August 1950 but was not well enough to hear the appeal. The Court was constituted later with the same three Judges who passed judgment. Upon an objection that a Bench of the Supreme Court cannot in law be constituted with two Judges invited from the High Court or in the alternative that such a Bench could not be constituted when the Chief Justice had resumed charge. *Held:* That the objections were untenable. In interpreting the Constitution the provisions must not be cut down by a narrow and technical construction but must be given a large, liberal and comprehensive spirit, considering the magnitude of the subjects involved. The construction most beneficial to the widest possible amplitude of its powers must be adopted and changing circumstances must also be taken into account. *Edwards* v. *Attorney-General for Canada*, (1930) A.C.

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124 at 136 ; *St. Catherine's Milling and Lumber Co.* v. *The Queen*, (1888) 14 A.C. 46 at 50 ; *British Coal Corporation* v. *The King*, (1935) A.C. 500 at 518 ; *James* v. *Commonwealth of Australia*, (1936) A.C. 578 at 614, referred to and approved. A Constitution of a Government is a living and organic thing, which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat*. Re. *The Central Provinces and Berar Act No. XIV of 1938*, (1939) F.C.R. Vol. I, 18 at 37, referred to. Such construction ought to avoid absurdity or inconsistency, but must be interpreted in such a way as to make it most beneficial to the widest possible amplitude of its powers. *U Htwe* v. *U Tun Ohn*, (1948) B.L.R. 541 at 553, referred to. S. 146 (1) of the Constitution not merely refers to "a vacancy" but also of "Vacancies" in order to enable Judges from the High Court being requested to attend to constitute a quorum. It also contemplates the possibility of the Chief Justice and the Acting Chief Justice being absent from the Court. The Constitution does not provide for appointment of acting Judges to the Court. The result of accepting the appellant's contention would lead to hearing of appeals being kept pending indefinitely in cases of two vacancies, till the President with the approval of the Parliament appoints additional members of the Supreme Court. This would lead to an impossible situation and the maxim *lex non cogit ad impossibilia* becomes appropriate and applicable. Even though the Chief Justice may not have been on leave s. 446 of the Constitution contemplates absence through illness from a session of the Court. A right of review should be strictly construed. Doubt should not be thrown upon the finality of the decision of the Supreme Tribunal of the country. These principles are covered by Order 10, Rule 3 and Order 26, Rule 4 of the Supreme Court Rules. *Venkata Narasimha Appa Row* v. *The Court of Awards*, 13 I.A. 155 at 158-59, referred to. The grounds taken for review were either fully argued previously or could have been so argued, the parties being represented by very senior counsel. A new point involving mixed questions of law and fact not taken before the court could not be a foundation for a review.

AJAM MOHAMED LOOVA WALLA *v.* EBRAHIM DAWJEE JEEWA 73

SUPREME COURT RULES, ORDER. 10, RULE 3 AND ORDER 28, RULE 4 73

————————————, ORDER 21, RULE 8 228

TENANCY DISPOSAL ACT, RULES 3 (*a*), 8 AND 9—*Decision by Village Committee—Appeal beyond time to the District Land Committee—Decision of the District Land Committee modifying Village Committee's decision—Review allowed by District Land Committee Held :* That a District Land Committee cannot entertain an appeal under Rule 8 (1) beyond the 15 days provided by Rule 8 (1) of the Tenancy Disposal Rules, 1949. The District Land Committee has no jurisdiction to entertain an application for review, review being excluded by Rule 8 (3) of the Disposal of Tenancy Rules, 1949. A District Land Committee has no original jurisdiction. Accordingly if on appeal to it from an order of what purported to be a Village Land Committee—it found that the Committee was not lawfully constituted, it should refer the dispute to the Village Land Committee constituted in accordance with law for disposal. Where an owner of the land not exceeding 50 acres in area has been cultivating the same with his own hands he cannot be ousted from the possesison of that

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land—proviso (*a*) to s. 3 of the Tenancy Disposal Act, 1948 operates to exclude the jurisdiction of any Tenancies Disposal Authority.

U PO KYAW *v.* THE DISTRICT LAND COMMITTEE, PEGU AND ONE 88

TENANTS ERECTING PERMANENT STRUCTURES WITHOUT INTERFERENCE BY LESSORS 193

TRADE DISPUTE 57

THE TRADE DISPUTES ACT, s. 2 (*j*), (*k*), ss. (*9*), 7 (*5*), 10 (*1*), 14 (*b*) AND 20—*Jurisdiction of Industrial Court Whether reinstatement of discharged workmen permissible—Principles underlying writ of prohibition and certiorari—Jurisdiction of Courts—Sense in which the term "trade dispute" "employee" is used—Comparison of Burmese Act with English and Indian Acts—Jurisdiction of Industrial Court to be exercised judicially—Framing of issues by Industrial Court—Rules of natural justice if infringed by non-framing of issue—The effect of reference to Industrial Court on notices to workmen—Principle of* Lis Pendens *doctrine applicable—Contribution to Provident Fund—Nature of—Extraneous consideration taken into account—Effect.* Applicant-Companies operated Burma Oil Fields. Prior to 1942 the Oil fields were connected to Syriam by pipe lines. The main pipe lines were wrecked or destroyed under the Denial Scheme. After re-occupation the Companies started rehabilitation and went on till rebellion broke out. On 30th October 1948 the Applicants wrote to the Minister for Industry that they proposed to make reduction of staff as a consequence of the rebellion. The Oil fields were occupied in February 1949 by rebels and the occupation continued till June 1949. In July 1949 the Companies closed their works in Yenangyaung and withdrew to Chauk. When it became clear that neither the British Government nor the Government of Burma could guarantee rehabilitation expenditure, the Applicants served notice on 2,432 employees at Chauk terminating their services from the 16th and 17th January 1950. The matter went before the Industrial Tribunal who made an award. The Companies objected to the Award on five grounds, *viz.*:—(i) That the Industrial Court had no jurisdiction after the termination of service by notice; (ii) That the Industrial Court acted illegally in holding that the Companies acted illegally in discharging the workmen on the 16th and 17th January 1950; (iii) The Court acted illegally in directing the Companies to make it a term of service so as to include discharge allowance; (iv) The Court acted illegally in directing travelling allowance to be paid for transporting the workers back to their home; and (v) The Court acted illegally in directing the Award of discharge allowance and cost of living allowance to the discharged workmen of Yenangyaung. *Held:* (1) The principles on which directions in the nature of a writ of prohibition or certiorari will be issued by the Supreme Court are laid down in *UHtwe*'s case; these writ deal with question of jurisdiction. Jurisdiction is used in the said ruling in both senses—in the narrow sense, it means territorial or pecuniary jurisdiction and in the wider sense the authority of a Court to do a certain thing according to law. *U Htwe* v. *U Tun Ohn and one*, (1948) B.L.R. 541, followed. *U Pit* v. *Thegôn Village and Agricultural Committee and two*

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others, (1948) B.L.R. 759, referred to. Unless there is a Trade Dispute, the Industrial Court has no jurisdiction to entertain a reference under s. 9. It is a condition precedent to the assumption of jurisdiction. The terms "Trade Dispute" and "Workmen" are defined in s. 2 (*j*) and (*k*). The workmen paid off on the 16th and 17th January 1950 are undoubtedly workmen under s. 2 (*k*) of the Act. In dealing with the question of discharge of workmen, the Court was not exceeding its jurisdiction or interfering with the running of an industry. The Court of Industrial Arbitration has power to order reinstatement. The Trade Disputes Act in Burma is more or less the same as the Indian Act and different in certain respects from the English Act. *Crowther's case*, L.R. (1948) 1 K.B.D. 424, distinguished. *Western India Automobile Association Case*, (1949) II. F.C.R., p. 321, followed. The jurisdiction regarding reinstatement of workmen is to be exercised judicially and not arbitrarily or capriciously. If the industry affected is not in a position to run as it is designed to run, and to employ labour to maximum capacity, the Industrial Court would not exercise its jurisdiction judicially if it directed reinstatement of discharged men. This is the effect of s. 11 of the Trade Disputes Act. (2) The Industrial Courts are not governed by the procedure prescribed for ordinary Courts of Law, but only by rules prescribed by themselves as provided in s. 15 of the Act. Such rules of procedure do not contain any rule relating to the framing of issues. The object of framing issues is to draw the attention of disputants to the points in dispute. If the parties knew what the dispute was and lead evidence thereon they cannot be prejudiced if no issue is framed. If neither party is prejudiced the trial is not vitiated. Failure to frame an issue does not in any case affect the jurisdiction of the Court. The principles underlying, *The Queen* v. *The Mayor and Town Council of Wigan*, (1885) 14 Q.B.D. 908; *Finch* v. *Oakes*, (1885) 1 Ch. D. 409; *Glossop* v. *Glossop*, (1907) 1 Ch. D. 370; *Halsbury's Laws of England*, 2nd Ed., Vol. 22, p. 247—249, have no application when a dispute is taken out of the hands of the parties by the State before the day fixed for the discharge and is referred to an Industrial Court. The notice did not take effect on the dates therein; on the day reference was made it put a stop to the running of the notice. The object of the Act could not be nullified by terminating the contract of service before a reference was ordered or before the Tribunal considered it. *Crowther's case*, L.R. (1948) 1 K.B. 424, *Observations of Lord Goddard, L.J.*, followed. Further the principle underlying the rule of *Lis Pendens* is applicable to the case. When a Court of Law gets seized of a dispute nothing can be done in respect thereof till the determination thereof by Court. (3) What is awarded in the present case to the workmen is compensation for having their career cut short in their prime of life. A provision for Provident Fund cannot be treated as a substitute for such compensation. In making this Award the Industrial Court did not exceed its jurisdiction. (4) In awarding travelling allowance the Industrial Court infringed rules of natural justice and failed to exercise its discretion judicially. They were influenced more by political and economic considerations than by justice of the claim and in arriving at the particular decision. The decision is also vitiated by the fact that the Company's advocates were not given full hearing. (5) The grant of discharge allowance to the Yenangyaung workmen was also without jurisdiction. They were discharged in July 1949 and the dispute arose only after their discharge. The discharged work-

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men are not workmen within s. 2 (*k*) of the Act. The discharge made in July 1949 had nothing to do with the alleged dispute in January 1948 relied upon in their behalf.

THE BURMAH OIL CO. (BURMA CONCESSION) LTD. AND TWO OTHERS *v.* THE COURT OF INDUSTRIAL ARBITRATION, BURMA AND TWO OTHERS 1

TRADE-MARK—*Special Leave—Trade-mark—Distinctive features—S. 478, Penal Code.* The principle on which special leave in criminal matter will be given by the Supreme Court is laid down in *U Saw and four others* v. *The Union of Burma*, (1948) B.L.R. 249 at 252. *Held:* That in Burma there is no Law or Statute establishing Registration of Trade Marks and no authorities exist from which an exclusive right to a particular Trade Mark could be obtained The right to Trade Marks in Burma are therefore dependent upon the general principles of Commercial Law. The right which a manufacturer has in his Trade Mark is the exclusive right to use it for the purpose of indicating where, or by whom or at what manufactory, the article to which it is affixed was manufactured. As soon, therefore, as a Trade Mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes, to that extent, the exclusive property of the firm and no one else has a right to copy it, or even to appropriate any part of it, if by such appropriation unwary purchasers may be induced to believe that they are getting goods which were made by the firm to whom the Trade Mark belongs. *Thomas Somerville* v. *Paolo Schembri*, (1887) L.R. 12 A.C. 453 at pp. 456-457, applied; *Wotherspoon* v. *Currie*, L.R. 5 H.L. 508 ; *Johnston & Co.* v. *Orr Ewing Co.*, 7 A.C. 219; *Leather Cloth Co. Ltd.* v. *American Leather Cloth Co.*, 11 H.L.C. pp 533-534, followed. S. 478 of the Penal Code defines Trade Mark as a mark used for denoting that goods are the manufacture or merchandise of a particular person. This implies that the mark must be " distinctive " in the sense of being " adapted to distinguish the goods of the proprietor of a trade-mark from those of other persons." If a mark merely describes the quality or the origin of an article, or is such as is commonly used in the trade to denote goods of a particular kind, such a descriptive mark would obviously not be a distinctive mark Where therefore a mark or phrase merely describes the quality or origin of an article such as ' Custard Powder ", " Malted Milk " or " Gripe Water," it is not capable of distinguishing the goods of one maker from those of others ; but a mark is distinctive where it points to the goods of a particular person as for instance in the cases of " Lifebuoy " soap, " Wincarnis", or " Three Nuns " tobacco. *Loke Nath Sen* v. *Ashwini Kumar De*, (1938) I.L.R. 1 Cal. 665 at pp. 667-668 ; *Gaw Kau Lye* v. *Saw Kyone Saing*, (1939) R.L.R. 488 at pp. 501, 502, followed. The words " Moulana (M) Beedy" is a distinctive mark as distinguished from being merely descriptive. A Trade Mark need not indicate to the public the actual ownership of the goods in question. A Trade Mark merely guarantees to the purchaser that the goods on which the mark is applied emanate from the same source of trade as the goods that had hitherto borne the same Trade Mark. It is not necessary for the Public to know the specific source of the article or the name of the manufacturer. The words " Moulana " is distinctive in that it distinguishes a beedy manufactured by the Company from other beedies. It is therefore a Trade Mark within the purview of

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s. 478. The mere fact that a customer can get "Moulana Beedy" by asking for it by name is not at all inconsistent with the label being a Trade Mark. *The Yorkshire Relish case Powell* v. *The Birmingham Vinegar Brewery Co. Ltd.*, 14 R.P.C. 720 ; *Edge & Sons, Ltd.* v. *Nicholls & Sons, Ltd.*, 28 R.P.C. 582 ; *Dunhill* v. *Bartlett & Bickley*, 39 R.P.C. 426 ; *Wotherspoon* v. *Currie*, (1870) L.R.V. English & Irish Appeals 508 at p. 514, followed. *J. Petley & Son* v. *S. Ah Kyun*, 2 L.B.R. 159, distinguished.

T. C. MOHAMED *v.* A. KUNJALAM AND TWO OTHERS ... 98

UNION JUDICIARY ACT, s. 6—*Application for Special leave when to be entertained. Held :* In the absence of any special circumstance such as want of jurisdiction or doing of a great and irreparable injury or involving a question of great public or private importance, special leave should not as a rule be granted In this case the Trial Court gave an *ad interim* injunction which was set aside by the Appellate Court and it is clear that the order was one which was passed during the pendency of a regular suit and that what is involved is whether discretion on sound judicial principles has been exercised by the High Court in reversing the order of the City Civil Court. As the High Court was right in thinking that the injury caused cannot be considered to be irreparable, the application for Special Leave was refused.

J. HUIE *v.* L. K. AIYAVOO NAIDU AND FOUR OTHERS ... 81

UNION JUDICIARY ACT, s. 6—*New case in special appeal—Tenants erecting permanent structures without interference by lessors—Estoppel. Held :* Where in the Trial Court and appeal the Applicant did not plead that the land in question was primarily used as a house site, it is not open on an application for special leave to urge a new ground or to evade the lack of success in the Courts below by devising a new case never set up, when it should have been set up. *Nathu Piraji Marwadi* v. *Umedmal Eadumal*, (1909) I.L.R. 33 Bom. 35, referred to. *Held further :* That the law has been settled since 1899 that Lessors are not estopped in equity from bringing ejectment by reason of tenants having erected permanent structures upon the land leased to the knowledge and without interference by the lessors. *Lala Beni and another* v. *Kundan Lall and others*, 26 I.A. 58, referred to. A building put up five years ago with mere thatched roofing and mat walling cannot now be said to be a substantial structure.

KO TUN SEIN AND TWO OTHERS *v.* KO WA NAH 193

URBAN RENT CONTROL ACT, s. 11 (*1*) (*f*) AND s. 14 (*a*)—*Premises—S. 2* (d)—*Construction of Statutes—Principles applicable Held :* S. 11 (*1*) (*f*) of the Urban Rent Control Act provides that no order or decree for the recovery of possession of any premises to which the Urban Rent Control Act applies shall be made unless a building or part thereof is reasonably and *bonâ fide* required by the owner for occupation by himself. As a supplement to this provision s. 14-A of the Act bars a suit for ejectment or recovery of possession on the grounds specified in s. 11 (*1*) (*f*) except with the permission of the Controller of Rents in writing. S. 11 (*1*) (*f*) read with the definition of premises given in s (2) (*d*) clearly indicates that such portion only of the building as is necessary for the *bonâ fide* residential purposes of the landlord may be recovered by him by ejectment of the tenant. The Urban Rent Control Act was enacted to solve the housing problem consequent upon the scarcity of residential and other

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buildings after the second World War. The normal rights of the owners have been restricted in various ways ; and to the incidence of the contractual relation are superimposed many terms never in the contemplation of the parties. The integrity of the contractual relationship is consequently affected by the Act. In interpreting Statutes such construction of a Statute shall be made as shall suppress the mischief and advance the remedy. The construction must not be strained. So construed it was open to the landlord to break up the integrity of the tenancy by giving notice to quit with reference to a portion of the entire premises covered by a single lease and the suit was not liable to be defeated on this ground. *Harihar Banerji* v. *Ramashashi Roy*, (1919) I.L.R. 46 Cal. 458 ; *Ram Kanie Mandal and others* v. *Gunesh Chunder Sen and others*, (1921) 33 Cal. L.J. 275 ; *Bodadoja and others* v. *Ajijuddin Sircar and others* A.I.R. (1929) Cal. 651, relied on. *T. H. Khan* v. *Yusoof Abowath and others*, (1947) R.L.R. 354, applied. *Maxwell on Interpretation of Statutes*, 8th Edn. 61.

MRS. CONSTANCE MINOO WRITER v. A. M. KHAN ... 169

URBAN RENT CONTROL ACT—*S. 12*—Bonâ fide *occupation—Finding of fact by Rent Controller—Application for writ of certiorari—If can be questioned.* Where a person already in possession entered into an agreement with the applicant under which she was permitted to occupy a portion of the premises for a period and the said person applied to the Controller of Rents, Rangoon for a permit under s. 12 of the Urban Rent Control Act and the Controller after careful consideration of the evidence adduced before him granted a permit to occupy the premises as statutory tenant under s. 12 of the Urban Rent Control Act *Held :* That the Controller having found that the 2nd Respondent was lawfully in occupation prior to the agreement, he was entitled to grant her a permit.

CHUNILAL DALABHAJI v. THE ASSISTANT CONTROLLER OF RENTS, RANGOON AND OTHERS 241

URBAN RENT CONTROL ACT, 1946—*Application for rescinding ejectment decree—Closed—Similar fresh application—Urban Rent Control Act, 1948 coming into force before disposal—Ss. 11* (f) *and 13* (c)—*Appeal against order to District Court whether competent—Leave under s. 14-A.* The Respondent obtained a decree for ejectment on 16th December 1946 when the Urban Rent Control Act, 1946 was in force. He applied for execution the next day praying for ejectment and claiming payment of arrears of rent. The judgment-debtor paid arrears and applied to have ejectment decree rescinded. Both applications were closed. A fresh application was made for rescission of the decree later. On 17th January 1948 the Urban Rent Control Act, 1948 came into force and the previous Act was repealed. On 15th February 1948, the Respondent claimed he reasonably and *bonâ fide* required the premises for occupation by himself. This contention was upheld by the District Court of Mandalay on appeal. The High Court on second appeal varied the decree but on special appeal a Bench of the High Court restored the District Judge's Order. Upon appeal to the Supreme Court by Special Leave, it was contended that the Controller's certificate under s. 14-A was necessary to initiate a proceeding by a landlord for recovery of possession on any of the grounds mentioned in s. 11 (*f*). *Held :* That under s. 14 (2) of the Act the Court on an application for rescission must decide whether the order or

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decree sought to be rescinded would not have been made or given if the provision of s. 11 were in force at the time. The Act of 1948 in s. 11 (*f*) and (*c*) allows the landlord to sue for ejectment if the premises are reasonably and *bonâ fide* required by him for occupation by himself. Consequently the decision of the High Court was affirmed.

DAW HLA MAY *v.* U KO YIN 63

URBAN RENT CONTROL ACT, 1948—*Application under s. 14* (1)—*Appeal to District Court—Jurisdiction of Assistant Judge in administering—Code of Civil Procedure, ss. 47, 104 and Order 43.* 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. On appeal to the Supreme Court against this order. *Held:* That the appeal lay to the District Court. The Urban Rent Control Act, 1948 by s. 15 provides for an appeal on law and on fact from any decree or order made by any Judge of the District Courts outside Rangoon. It cannot be deemed to have excluded any right of appeal from other courts. *The Rangoon Botataung Co. Ltd.* v. *The Collector of Rangoon*, 6 L.B.R. 150 (P.C.), referred to. S. 15 of the Urban Rent Control Act, 1948 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 ; and an order would not be appealable unless it falls within s. 47 or s. 104 or Order 43 of the Code of Civil Procedure. The Urban Rent Control Act, 1948 by s. 15 gives the right of appeal from all orders. The test in such cases is whether the order will be appealable under the provisions of the Code of Civil Procedure or other relevant enactments. The order in question in this case falls within s. 47 (1) of the Code of Civil Procedure as relating to the execution, discharge or satisfaction of a decree and a determination of such a question is a decree under s. 2 (2) of the Code of Civil Procedure. The appeal to the District Court was therefore competent.

HAW LIM ON *v.* MA AYE MAY 69

URBAN RENT CONTROL ACT, S. 14-B—*Scope of Urban Rent Control Act—Disputed tenancy whether can be decided by the Rent Controller. Held:* That a dispute as to whether a person is a tenant for four rooms or whether he is a tenant for only one room and the tenants of other three rooms are tenants of the landlord can be decided only by a Civil Court and the Rent Controller has no jurisdiction to decide such a question. Where an application is made to the Rent Controller for leave to deposit the rent of all four rooms, tenancy of which is disputed, the Rent Controller has no jurisdiction to determine even for the restricted purpose of s. 14-B of the Urban Rent Control Act whether a person claiming to be a tenant is a tenant or not. S. 14-B (*1*) and (*2*) authorise the Rent Controller to receive deposit from a person who claims to be a tenant, and he will then give notice of the deposit to the landlord. It is for the landlord to withdraw or refrain from withdrawing the deposit. No enquiry is contemplated by the Act. He has authority

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and is bound to accept deposit of rent ; but he may not call upon the owner of the premises or the alleged landlord to show cause why deposit of rent should not be permitted.

DAW NGWE TIN *v.* THE CONTROLLER OF RENTS AND ONE ... 85

URBAN RENT CONTROL ACT, s. 16-A—*Order under—Application for review by a co-tenant of grant of permission to assign tenancy—Dismissal by Controller—Certiorari and mandamus if permissible. Held :* Under s. 21-A of the Urban Rent Control Act, 1948 the Controller of Rents may review any order made by him and the provisions of the Code of Civil Procedure, Order 47 would apply to such review. Any person considering himself aggrieved by an order may apply for review under Order 47, Rule 1 of the Code of Civil Procedure ; but the Controller's order is not binding upon any person not a party to the proceedings. As the present applicant is not bound by the said order, he is not an aggrieved person who can apply for review thereof. *Kupparakutti Adammeera* v. *Esoof and one*, (1948) B.L.R. 421, referred to.

M. R. DAS *v.* C. R. DAS AND THREE OTHERS ... 211

URBAN RENT CONTROL ACT, 1948—*S. 16-AA* (1) (b), 2 (b) *and* (3) *and s. 2* (c)—*Premises to be vacated or likely to be vacated—"Landlord" Difference between s. 16-AA* (1) (b) *and s. 16-A* (2)—*16-AA* (4) *when applicable. Held :* That s. 16-AA (*1*) (*b*) of the Urban Rent Control Act applies to a case in which a Landlord receives any information that any residential premises of which he is the landlord are likely to be vacated or have been vacated. The section has no application to a case where the owner had not let out the premises at all and the premises were occupied by trespassers against whom he obtained an ejectment decree and owing to execution of the decree the trespassers-judgment-debtors vacated the premises and the owner received the information about the vacating by trespassers. The owner in this case was not a landlord within the meaning of s. 2 (*c*) of the Act and he could not receive any information as landlord of such vacating. The particulars which the landlord is required by sub-s. 3 of s. 16-AA (*1*) (*b*) to supply the Controller of Rents are the same as those which he is required by s. 16-A (2) of the Act to supply when the landlord proposes to let non-residential premises to a tenant. In the present case the house was not a rented house at all and the applicant was not a landlord and consequently the Controller of Rents had no jurisdiction to direct that the premises should be let at all.

SOONIRAM RAMESHWAR *v.* THE CONTROLLER OF RENTS, RANGOON AND THREE OTHERS 43

URBAN RENT CONTROL ACT, s. 16-AA (4), s. 16-AA (2) 225

———————————, s. 19 (2) (g) 214

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WRIT OF PROHIBITION—WHEN LIES 28

SUPREME COURT

THE BURMA OIL Co. (BURMA CONCESSION) LTD. AND TWO OTHERS (APPLICANTS)

v.

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

† S.C. 1950.

Oct.18.

The Trade Disputes Act, s. 2 (j), (k), s. 9, 7 (5), 10 (1), 14 (b) and 20—Jurisdiction of Industrial Court—Whether reinstatement of discharged workmen permissible—Principles underlying writs of prohibition and certiorari—Jurisdiction of Courts—Sense in which the term is used "trade dispute", "employee"—Comparison of Burmese Act with English and Indian Acts—Jurisdiction of Industrial Court to be exercised judicially—Framing of issues by Industrial Court—Rules of natural justice if infringed by non-framing of issue—The effect of reference to Industrial Court on notices to workmen—Principle of Lis Pendens *doctrine applicable—Contribution to Provident Fund—Nature of—Extraneous considerations taken into account—Effect.*

Applicant-Companies operated Burma Oil Fields. Prior to 1942 the Oil fields were connected to Syriam by pipeline. The main pipelines were wrecked or destroyed under the Denial Scheme. After re-occupation the Companies started rehabilitation and went on till rebellion broke out. On 30th October 1948 the Applicants wrote to the Minister for Industry that they proposed to make reduction of staff as a consequence of the rebellion. The Oil fields were occupied in February 1949 by rebels and the occupation continued till June 1949. In July 1949 the Companies closed their works in Yenangyaung and withdrew to Chauk. When it became clear that neither the British Government nor the Government of Burma could guarantee rehabilitation expenditure, the Applicants served notice on 2,432 employees at Chauk terminating their services from the 16th and 17th January 1950. The matter went before the Industrial Tribunal who made an Award. The Companies objected to the Award on five grounds, *viz* :—

(i) That the Industrial Court had no jurisdiction after the termination of service by notice ;

(ii) That the Industrial Court acted illegally in holding that the Companies acted illegally in discharging the workmen on the 16th and 17th January 1950 ;

(iii) The Court acted illegally in directing the Companies to make it a term of service so as to include discharge allowance ;

(iv) The Court acted illegally in directing travelling allowance to be paid for transporting the workers back to their home ; and

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* Civil Misc. Application No. 43 of 1950.

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

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(v) The Court acted illegally in directing the Award of discharge allowance and cost of living allowance to the discharged workmen of Yenangyaung.

Held : (1) The principles on which directions in the nature of a writ of prohibition or certiorari will be issued by the Supreme Court are laid down in U Htwe's case ; these writs deal with question of jurisdiction. Jurisdiction is used in the said ruling in both senses—in the narrow sense, it means territorial or pecuniary jurisdiction and in the wider sense the authority of a Court to do a certain thing according to law.

U Htwe v. *U Tun Ohn and one*, (1948) B.L.R. 541, followed.

U Hit v. *Thègon Village and Agricultural Committee and two others*, (1948) B.L.R., 759, referred to.

Unless there is a Trade Dispute, the Industrial Court has no jurisdiction to entertain a reference under s. 9. It is a condition precedent to the assumption of jurisdiction. The terms "Trade Dispute" and "Workmen" are defined in s. 2 (*j*) and (*k*). The workmen paid off on the 16th and 17th January 1950 are undoubtedly workmen under s. 2 (*k*) of the Act. In dealing with the question of discharge of workmen, the Court was not exceeding its jurisdiction or interfering with the running of an industry. The Court of Industrial Arbitration has power to order reinstatement. The Trade Disputes Act in Burma is more or less the same as the Indian Act and different in certain respects from the English Act.

Crowther's Case, L.R. (1948) 1 K.B.D. 424, distinguished.

Western India Automobile Association's Case, (1949) XI. F.C.R. p. 321, followed.

The jurisdiction regarding reinstatement of workmen is to be exercised judicially and not arbitrarily or capriciously. If the industry affected is not in a position to run as it is designed to run, and to employ labour to maximum capacity, the Industrial Court would not exercise its jurisdiction judicially if it directed reinstatement of discharged men. This is the effect of s. 11 of the Trade Disputes Act.

(2) The Industrial Courts are not governed by the procedure prescribed for ordinary Courts of Law, but only by rules prescribed by themselves as provided in s. 15 of the Act. Such rules of procedure do not contain any rule relating to the framing of issues. The object of framing issues is to draw the attention of disputants to the points in dispute. If the parties knew what the dispute was and lead evidence thereon they cannot be prejudiced if no issue is framed. If neither party is prejudiced the trial is not vitiated. Failure to frame an issue does not in any case affect the jurisdiction of the Court.

The principles underlying, *The Queen* v. *The Mayor and Town Council of Wigan*, (1885) 14 Q.B.D. 908 ; *Finch* v. *Oakes*, (1896) 1 Ch. D. 409 ; *Glossop* v. *Glossop*, (1907) 1 Ch. D. 370; *Halsbury's Laws of England*, 2nd Ed., Vol. 22, p. 247—249,

have no application when a dispute is taken out of the hands of the parties by the State before the day fixed for the discharge and is referred to an Industrial Court. The notice did not take effect on the dates therein ; on the

day reference was made it put a stop to the running of the notice. The object of the Act could not be nullified by terminating the contract of service before a reference was ordered or before the Tribunal considered it.

Crowther's Case, L.R., (1948) 1. K.B.D. 424, distinguished.

Observations of Lord Goddard, L.C.J., followed.

Further the principle underlying the rule of *Lis Pendens* is applicable to the case. When a Court of Law gets seized of a dispute nothing can be done in respect thereof till the determination thereof by Court.

(3) What is awarded in the present case to the workmen is compensation for having their career cut short in their prime of life. A provision for Provident Fund cannot be treated as a substitute for such compensation. In making this Award the Industrial Court did not exceed its jurisdiction.

(4) In awarding travelling allowance the Industrial Court infringed rules of natural justice and failed to exercise its discretion judicially. They were influenced more by political and economic considerations than by justice of the claim in arriving at the particular decision. The decision is also vitiated by the fact that the Company's advocates were not given full hearing.

(5) The grant of discharge allowance to the Yenangyaung workmen was also without jurisdiction. They were discharged in July 1949 and the dispute arose only after their discharge. The discharged workmen are not workmen within s. 2 (*k*) of the Act. The discharge made in July 1949 had nothing to do with the alleged dispute in January 1948 relied upon in their behalf.

E. C. V. Foucar for the applicants.

Chan Htoon (Attorney-General) with *U Ba Sein* (Government Advocate) for the respondent No. 1.

Yan Aung for the respondents Nos. 2 and 3.

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

SIR BA U.—This is an application for the issue of a writ of certiorari. It arises out of a dispute between the three applicants and their employees. The three applicants are three British Companies carrying on oil winning and refining industry in Burma for a good number of years. The areas where they operate are known as the Burma Oilfields comprising mainly the areas of and around Chauk, Lanywa and Yenangyaung. Prior to 1942 the oilfields were connected to Syriam

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near Rangoon by a pipeline, generally referred to as the " Main Pipeline ", through which natural petroleum was pumped to the Oil Refinery at Syriam. But when the World War broke out in the East and when the Japanese were about to over-run Burma in 1942, the properties of the three applicant Companies in the oilfields and the Main Pipeline were wrecked or destroyed so as to deny their use to the Japanese. On the re-occupation of Burma by His Britannic Majesty's Forces in 1945 and on the overthrow of the Japanese armies, the Oil Companies returned to Burma and on the 1st January 1946 resumed possession of their properties in the oilfields and elsewhere and started the work of rehabilitation. A sum of Rs. 8,58,00,000 or (£ 6,434,000) according to the applicants was spent on the work of rehabilitation from 1946 to September 1949. The work of rehabilitation to a large extent has been carried out in the oilfields during those years but the repair to the Main Pipeline could not be carried out completely owing to the state of unrest prevailing, especially in the areas through which the Pipeline runs. The unrest started in or about March or April 1948 and it soon degenerated into an armed rebellion against the lawfully constituted government. In these circumstances the three Oil Companies wrote a letter on the 30th October 1948 to the Hon'ble Minister for Industry and Mines stating *inter alia* as follows :

" Conditions in Central Burma have not improved, and it is not possible to feel any reasonable certainty that conditions will become and remain satisfactory in the near future. We are at present physically unable due to these conditions to repair, or even to prevent further damage to the Main Pipeline, without which we could not transport crude oil in quantity from the Fields to Syriam. My Directors have therefore reluctantly decided that we must postpone the reconstruction of the main refinery at Syriam, and confine our efforts meanwhile to

producing at the Fields such quantity of crude oil as can be refined without using the pipeline to the extent that its products can be distributed to places of consumption by the means and routes that are open to us from time to time.

This unfortunately means a large reduction in the employment available for both British and Asiatic personnel. The reduction in Asiatic employment at Syriam will initially be from 5,200 to 2,100, with a further reduction to 1,400 to follow within 12 months. At the Fields the exact reduction will depend upon the quantity of products which can be transported under present conditions, which we are still investigating, but provisionally we expect it to be from 6,200 to 4,300. We very much regret this unavoidable fall in employment, and hope that at some future date conditions may be such as to allow us to resume full reconstruction.

We propose to make the initial reductions mentioned above on 30th November 1948."

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On receipt of the letter the Hon'ble Prime Minister asked the Oil Companies to communicate to him as soon as possible the outline of a proposal by which the Union Government could provide the remainder of the finance required to complete the reconstruction of the Oilfields, the Main Pipeline and the Refinery at Syriam without interruption. In exchange for such contribution, the Union Government was to acquire a corresponding share in the Burma oil winning and refining industry. The Union Government requested that while the proposal for a Joint Venture was under consideration, the retrenchment of labour force should be postponed. The retrenchment was accordingly postponed.

In order to finance their share in the Joint Venture the Union Government applied to His Britannic Majesty's Government for a loan. While the loan was under consideration, His Britannic Majesty's Government guaranteed to the Oil Companies their

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continued rehabilitation expenditure including payment of such labour as was then said to be surplus to their requirements.

In the meanwhile the political situation became worse. The rebel forces began to occupy the Oilfields in February 1949 and remained in occupation thereof till June 1949 when they were driven out by the forces of the Union Government. About a month later, that is in July 1949, the Oil Companies closed down their works in Yenangyaung, paid off their workmen numbering over 2,000 and withdrew to Chauk. Two months later, that is on 25th September 1949, a meeting of all Oilfields workers under the auspices of two labour organizations, namely, the respondents 2 and 3, Oilfields All Employees Association, and United Labour Front Action Organization, was held at Chauk. At that meeting a number of resolutions relating to the reduction of the labour force, payment of gratuity, increased wages for night shift workmen and increased number of holidays was put forward. Copies of these resolutions were sent to the Oil Companies and the Union Government. As a result thereof the Union Government appointed a committee called Oilfields Enquiry Committee on the 25th November 1949 to hold an enquiry into conditions in the oil winning industry and to make recommendations on or before the 25th January 1950 for the maximum volume of labour employable in that industry.

While the enquiry was going on, the Union Government was informed by His Britannic Majesty's Government that it could not accommodate the Union Government with a loan asked for acquiring an interest in the oil industry. At the same time His Britannic Majesty's Government informed the Oil Companies that it withdrew the guarantee given previously. Whereupon the Companies on the 5th January 1950

communicated to the Workers' Union their intention to effect retrenchment. On the 7th January 1950 the Oil Companies served notices on 2,432 of their employees at Chauk terminating their services with effect from the 16th and 17th January 1950. On the following day, that is on the 8th January, a mass meeting of the employees of the Oil Companies was held at which 11 demands were put forward. Copies of these demands were at once sent to the Union Government and the Oil Companies. On the 11th January the Union Government in its Ministry of Public Works and Labour, treating these demands as being matters in trade dispute, forwarded them for determination to the Court of Industrial Arbitration. On the 16th and 17th January the workmen who had been served with notices of discharge on the 7th January were paid off. In spite of their discharge some of the discharged workmen evidently attempted to attend to work along with those who were still retained by the Companies in their service, but they were not allowed to. Leaving out what is not essential for the purpose of this case, the demands made by the workmen at their mass meeting held on the 8th January are as follows :

"(1) The Companies concerned should totally abstain from taking the measures of retrenchment of which notice was given by them to the workers on the 7th January 1950 on the ground that the present conditions in the country are such that they could no longer continue to operate.

(2) The notice of retrenchment issued by the Burma Oil Company (Burma Concession) Limited on the 7th January 1950 should be withdrawn immediately without any conditions whatsoever for such withdrawal.

(3) * * * *

(4) No further retrenchment should be made by the Companies while the question of retrenchment is under protest by the workers.

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(5) In case the Companies either dismiss, discharge, retrench, or terminate the services of any of their workers, they should pay every such worker a discharge allowance equivalent to three months' wages *plus* Cost of Living Allowance as compensation for the abrupt and premature termination of their services and payment of such allowance should be included as one of the terms of employment by the Companies.

(6) * * * *

(7) * * * *

(8) * * * *

(9) * * * *

(10) The Companies should pay the actual travelling expenses up to their respective native places and subsistence allowance at the rate of Rs. 10 *per diem* to those workers and their families from foreign countries and distant areas, and payment of such expenses and allowance should be included as one of the terms of employment by the Companies.

(11) The Companies should grant the following privileges to those workers who are suddenly and unexpectedly discharged or retrenched by the Companies due to closing down of their oil-winning operations at Yenangyaung :—

(*a*) Payment of gratuity calculated at the rate of one month's pay for each completed year of service to every workman ;

(*b*) Payment of discharge allowance equivalent to three months' wages *plus* Cost of Living Allowance to every workman for the premature termination of their services."

To these demands the Oil Companies replied that their decision to discharge or retrench their workmen and to decide the nature or the scope of their undertaking and labour requirements thereof at any time was a matter entirely for their determination and for nobody else and that therefore the matter was not within the jurisdiction of the Industrial Court nor could it give rise to any dispute within the meaning of the Trade Disputes Act. The Oil Companies further submitted that their existing Rules of Service relating to payment to be made to workmen discharged were fair and

reasonable and should not be interfered with by the Industrial Court in the absence of any good grounds.

Dealing first with the question of jurisdiction the Court of Industrial Arbitration observed:

"As we understand the position, it is not open to an employer to act arbitrarily in discharging his workmen. The workers can raise a dispute about the matter and if such a dispute arises and is referred to the Industrial Court, then this Court is competent to go into the merits of the Case."

Dealing with the question of discharges effected on the 16th and 17th January, the Court observed that the grounds given by the Oil Companies for reduction of their labour force were reasonable and that therefore it would not order reinstatement though it had ample power to do so, if and when necessary. Though the grounds for reduction of the labour force, as given by the Oil Companies, were held to be reasonable the Court said:

"We feel it our duty to state that it is our view that the Company was wrong in discharging workers on 16th and 17th January, despite the reference of the dispute to this Court. Section 14-B of the Trade Disputes Act is perfectly clear on the point. The fact that a notice of discharge had been issued does not in our view mean that the men had in fact been discharged. We are therefore of the view that the discharges on 16th and 17th January were illegal. We, therefore, direct that the men discharged on 16th and 17th should be treated as on duty until the date of this Award and should be paid their full wages and Cost of Living Allowance for this period."

Treating the men paid off by the Companies on the 16th and 17th January as being still in the employ of their Companies till the date of the Award, the Court said:

"So long as there is no social security scheme in the country, and private industries exist, the employers must, within

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reasonable limits, shoulder the responsibility for relief in cases of involuntary unemployment. In deciding the measure of relief consideration has undoubtedly to be given to the past services of the employees, the condition of the industry, the reasons for retrenchment, and the period of the resultant unemployment. We therefore hold that it be made a term of service of the Company's workmen that if any worker, who has had at least two years' service, is retrenched he should be paid a discharge allowanceequivalent to two months' wages *plus* Cost of Living Allowance."

In addition to the discharge allowance the Court also awarded travelling allowance subject to the maximum amount equivalent to one month's pay *plus* Cost of Living Allowance to those workmen whose homes are more than 50 miles away from Chauk and who have at least two years' service.

In dealing with the case of the discharged workmen of Yenangyaung the Court said that they should be paid discharge allowance in the same way as the discharged workers of Chauk.

These are the circumstances under which the application for the issue of a writ of Certiorari was filed.

In *U Htwe (alias) A. E. Madari* v. *U Tun Ohn and one* (1) this Court has laid down the principles on which directions in the nature of a writ of Prohibition and/or a writ of Certiorari will be issued by this Court. In laying down the principles this Court said:

"As these two writs (writ of Prohibition and writ of Certiorari) deal with questions of jurisdiction, they are frequently sought after together. They sometimes overlap. Prohibition is used as a preventive, whereas Certiorari is used as a cure. The former is asked for at an earlier stage of a proceeding so as to prevent an inferior Court from usurping a jurisdiction with which it is not entrusted, or to prevent it from acting in excess of the jurisdiction entrusted therewith. Certiorari is asked for when a

(1) (1948) B.L.R. p. 541.

proceeding is concluded, so that any mischief or injustice resulting therein may be redressed."

Reading this portion of the judgment only, as it stands, it may create an impression that the writ of Prohibition and the writ of Certiorari deal only with the questions of jurisdiction used in a narrow or limited sense, such as the territorial or pecuniary jurisdiction of a Court. That this is not so is made plain by what follows later in the case. The Court observed:

"Under section 133 of the Constitution, justice throughout the Union shall be administered in Courts established by the Constitution or by law and by Judges appointed in accordance therewith. The proviso to this section is section 150 of the Constitution. Under section 150, any person or a body of persons though not a Judge or a Court in the strict sense of the term, can be invested with power to exercise limited functions of a judicial nature. When so invested, that person or body of persons, when determining questions affecting the rights of the citizens of the Union, must do so, as provided by section 16, according to law. If it did not, it would at once render itself amenable to the jurisdiction of this Court, as provided in section 25. Therefore, when Atkin L.J. used the phrase 'having the duty to act judicially' we must in relation to the Constitution construe it as 'having the duty to act according to law'.....Such being the state of the law, if we paraphrase the text as laid down by Atkin L.J. we get it as follows: There must be a person or a body of persons (first) 'having legal authority', (secondly) 'to determine questions affecting the rights of subjects' and (thirdly) 'having the duty to act according to law', (fourthly) 'act in excess of his or their legal authority'."

The word "jurisdiction" is therefore used in both the narrower and the wider sense. When used in the narrower sense it means territorial or pecuniary jurisdiction of a Court. When used in the wider sense it means the authority of a Court to do a certain thing according to law. That this is so is made quite plain

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in *U Pit* v. *Thègon Village Agricultural Committee and two others* (1) wherein this Court said :

" Nor can they (quasi-judicial bodies) act contrary to the provisions of the statute or rules. In addition to this limitation on their powers there is also another limitation within which these committees as quasi-judicial bodies must act. In all their proceedings they must comply with the requirements of rules of 'natural justice '.....It is a rule of universal application and therefore of natural justice that no man can be a judge in his own cause. A person who has an interest in the matter arising for decision cannot constitute himself a judge at the hearing. Natural justice also requires that those entrusted with the power of adjudicating upon any dispute must act in good faith and give the parties an opportunity of being heard and stating their case and their view point. "

Now, turning to the submission made by the learned counsel for the Oil Companies, we have the case presented to us for our consideration in five different aspects, namely, (1) that the Industrial Court had no jurisdiction to entertain the reference and give adjudication thereon ; (2) that, even if it had jurisdiction to entertain the reference, it acted illegally in holding that the petitioners (Oil Companies) were wrong in discharging the workmen on the 16th and 17th January and that therefore they (Oil Companies) should pay full wages and Cost of Living Allowance until the date of the award ; (3) that the Industrial Court acted illegally and without jurisdiction in awarding that it be made a term of service of the 1st petitioner's workmen that any workmen who had at least two years' service, if retrenched, should be paid discharge allowance equivalent to two months' wages *plus* Cost of Living Allowance ; (4) that the Industrial Court acted illegally and without jurisdiction in directing the Oil Companies to pay all retrenched workmen

(1) (1948) B.L.R. 759.

whose homes are more than 50 miles away from Chauk and who have had at least two years' service their travelling expenses to their homes by surface transport equivalent to one month's wages *plus* Cost of Living Allowance; and (5) that the Industrial Court acted illegally and without jurisdiction in awarding the payment of discharge allowance equivalent to two months' wages *plus* Cost of Living Allowance to the discharged workmen of Yenangyaung.

In support of the first point the learned counsel for the Oil Companies submits that the main question before the Industrial Court was whether or not large scale retrenchment should be carried out and whether it was necessary. Such a question, according to the learned counsel, was one which the Industrial Court had no jurisdiction to decide. By way of illustration he gave the case of a lawyer and said: "Here is a lawyer who employs several clerks and who after several years of practice at the Bar wishes to retire. His clerks cannot tell him not to retire but to work on so that they may get their salaries". With due respect to the learned counsel for the Oil Companies we are of opinion that the question of jurisdiction to entertain a reference made under section 9 of the Trade Disputes Act and the question of jurisdiction of the Industrial Court to give the kind of relief asked for have been mixed up. Unless there is a trade dispute the Industrial Court has no jurisdiction to entertain a reference made under section 9 of the Trade Disputes Act. The existence of a trade dispute is a condition precedent to the assumption of jurisdiction by the Industrial Court.

What is meant by a trade dispute is explained in section 2 (*j*), as amended up to date, in these terms:

"'Trade dispute' means any dispute or difference between employers and employees, or between employers and workmen,

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or between workmen and workmen, which is connected with the employment or non-employment, or the terms of employment or service, including pension, gratuity, bonus and allowance, or with conditions of labour, of any person."

Now what is clear is that if there is dispute, the dispute must be between employers and employees or workmen.

The term "employee" is not explained but the term "workman" is explained in section 2 (*k*) as follows:

"'Workman' means any person employed, whether for wages or not, in any trade or industry to do any skilled or unskilled manual or clerical work and includes, for the purpose of proceedings under this act in relation to a trade dispute, a workman discharged or dismissed during the dispute but does not include any person employed in the naval, military or air service of the Union of Burma."

Here in the present case nearly 2,500 workmen were served at Chauk with notices on the 7th January that their services would be terminated on the 16th and 17th January. On the 8th January the workmen called a meeting and protested against the proposed retrenchment and on the 11th January the reference under section 9 was made. The workmen served with notices on the 7th January were paid off on the 16th and 17th January. The workmen thus paid off were undoubtedly workmen within the meaning of section 2 (*k*). The question, as raised by the learned counsel for the Oil Companies by giving an example of a lawyer wishing to retire from practice, is in reality a question whether the Industrial Court has jurisdiction to grant the kind of relief asked for. In dealing with such a question the Industrial Court may in some cases have to go into the question of running an industry. By so doing the Industrial Court cannot be

said to be interfering with the running of an industry. Such a question has in a way been dealt with both in England and India. In England in *Crowther's case* (1) Lord Goddard L.C.J. and Humphreys J. held that the National Arbitration Tribunal had no jurisdiction to give an award directing reinstatement of discharged or retrenched workers. On the other hand in India the Federal Court held in *Western India Automobile Association's Case* (2) that the Court of Industrial Tribunal had jurisdiction to order reinstatement. Thus there appears to be a difference of judicial opinion but in reality it is not so. It must be remembered that the decision of Lord Goddard and Humphreys J. was given with reference to an English Act ; whereas the decision of the Federal Court was given with reference to an Indian Act and the two Acts are different in some essential matters. Our Act, the Trade Disputes Act, is more or less the same as the Indian Act. In our view, with due respect, the decision of the Federal Court that the Court of Industrial Arbitration has jurisdiction to order reinstatement, where necessary, is correct. If the frame and the scope of the Trade Disputes Act is examined, it will be found that the whole object of the Act is to prevent an outbreak of industrial unrest by providing some machinery to effect settlement of industrial disputes so that neither the peace of the country shall be in danger nor any portion of the public shall suffer any unnecessary hardship. This is quite plain from section 9 of the Trade Disputes Act.

The machinery provided for the settlement of trade disputes is fourfold in nature, namely, (1) Board of Conciliation, (2) Conciliation Officer, (3) Court of Enquiry, and (4) Court of Industrial Arbitration. For

(1) (1948) 1 K.B.D. 424. (2) (1949) Vol. XI F.C.R. 321.

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the purpose of this case we need not consider the Court of Enquiry. The functions of the Board of Conciliation and the Conciliation Officer are in general to use their good offices with both the employer and the employees and bring about the settlement of disputes between them. If no settlement is arrived at amicably, they are to report to the appointing authority with their views and recommendations on points of disputes. In the case of the Court of Industrial Arbitration it has to settle the dispute in the best manner as it thinks fit and proper : *See* section 10 of the Act. What then is clear is that the dispute should be first settled by consent, if possible ; if not, by an independent and impartial body. If the dispute is in respect of the reduction of labour force, the retrenched workmen by consent of the parties to the dispute can be reinstated ; similarly, if the dispute is in respect of the employment of, say for instance, non-Union workmen, the said non-Union workmen can by consent of the parties be discharged. What can thus be done by consent can similarly be done by a Court of Industrial Arbitration. The agreement of the parties and the award of the Court of Industrial Arbitration can be put into effect, in the case of the former, under section 7 (5), and in the case of the latter, under section 20 of the Trade Disputes Act. We are therefore clearly of opinion that the Industrial Court has jurisdiction to give an award directing either discharge or reinstatement of workmen. Such jurisdiction is not to be exercised arbitrarily or capriciously but judicially. The machinery provided for the settlement of trade disputes pre-supposes that the industry affected is in a position to be run as it is designed to be run, that is to say, the industry has such financial resources, materials and other necessary facilities as to be able to employ labour to its maximum capacity. But, on the other

hand, if the industry affected is not in a position to be run as it is designed to be run, either for want of financial resources or materials, or for some sufficient reasons and that therefore it is not in a position to employ labour to its maximum capacity, then the Industrial Court would not be exercising its jurisdiction judicially if it were to direct reinstatement of discharged or retrenched workmen. This is to be deduced from section 11 of the Trade Disputes Act. We are therefore clearly of opinion that by directing reinstatement because the reasons for discharges are not sufficient or by accepting discharges as the reasons therefor are sufficient, the Court of Industrial Arbitration does not interfere with the running of an industry as contended by the learned counsel for the Oil Companies.

This brings us to the second submission made by the learned counsel for the Companies. The submission is that the Industrial Court should have first framed an issue as to whether the Company's discharge of workmen on the 16th and 17th January was in infringement of section 14-B of the Trade Disputes Act, and, having framed an issue thereon, the Industrial Court should have heard him. The Industrial Court, according to the learned counsel, did neither and that therefore the Industrial Court infringed the Rule of Natural Justice.

What must be remembered is that Industrial Courts are not governed by the rules of procedure prescribed for ordinary Courts of law. Industrial Courts are governed by such rules of procedure as are prescribed by themselves : *See* section 15 of the Trade Disputes Act. The rules of procedure prescribed by the Industrial Court, a copy of which has been shown to us, do not contain any rule relating to the framing of issues but we are given to understand by the learned counsel for the Companies that the invariable

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practice of the Industrial Court is to frame issues in every proceeding referred to it under section 9 of the Trade Disputes Act. Be that as it may, what is to be remembered is that even in an ordinary Court of law the omission to frame an issue is not necessarily fatal to the trial of a suit. The object of framing issues is to focus the points of dispute so as to draw the attention of the disputants thereto, in order that they may be able to lead evidence and plead. When the parties know what the dispute between them is and lead evidence thereon and plead thereto, neither party is likely to be prejudiced if no issue is framed. If neither party is prejudiced, the trial, as pointed out above, is not vitiated. Here in the present case, not only the parties knew what the main dispute between them was but we find that issues were in fact framed and issue No. 1 was wide enough to cover the point now under discussion. And the learned counsel for the Companies did, in fact, touch upon it though it is true, in connection with another matter. In any case, the failure to frame an issue in a proceeding such as this does not affect the jurisdiction of the Industrial Court. The learned counsel, however, contends that even though this part of the award of the Industrial Court may not be vitiated for failure to frame a necessary issue, it is vitiated inasmuch as the Industrial Court acted illegally in holding that the workmen paid off on the 16th and 17th January should still be held to be in the service of the Companies up to the date of the award. According to the learned counsel, if an employer gives notice to his workmen that their services will be terminated on a certain date, he (employer) cannot recall or withdraw the notice and the employees cannot also refuse to accept the notice and that therefore the employees cease to be in the service of the employer on the date fixed. In support of this submission the learned counsel

refers us to the cases of *The Queen* v. *The Mayor and Town Council of Wigan* (1); *Finch* v. *Oakes* (2) *Glossop* v. *Glossop* (3) and *Halsbury's Laws of England* (4).

What is overlooked by the learned counsel is that there was no intervention by a third party between the employer and the employees in those cases. Here in the present case the dispute between the employers and the employees was taken out of their hands by the State before the date fixed for the discharge of the workmen and referred for determination to the Industrial Court. Now, what was the effect of the reference to the Industrial Court on the notice given by the Companies to their workmen? Did the notice keep on running and take effect on the date fixed therein or did the running of the notice stop on the day the reference was made and keep the parties in *status quo*? No authority, having a direct bearing on this point, has been brought to our notice. But the observations of Lord Goddard L.C.J. in Crowther's Case quoted above, are apposite to the matter in hand. The learned Justice said :

"It was submitted by Sir William McNair that, as at the date of the reference, due notice had been given to the workmen to terminate their employment and their employment had thereby been terminated, there could be no trade dispute to refer, because there could not be a dispute or difference or any subject between these employers and workmen as the workmen were not in the service of the employers, and he reinforced this argument by reference to the definition of 'workman' which, he submitted, contemplated an existing contract of service so, as he put it, that there could be some contract on which the reference could 'bite'. I cannot agree with that submission. If effect were given to it, it would mean that any employer, or indeed, any

(1) (1885) 14 Q.B.D. 908.
(2) (1896) 1 Ch. D. 409.
(3) (1907) 1 Ch. D. 370.
(4) 2nd Ed., Vol. 22, p. 247—249.

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workman, could nullify the whole provisions of the order and the object of the regulation under which it was made, by terminating the contract of service before a reference was ordered or even after the matter was referred, but before the tribunal considered it."

We respectfully agree with these observations. As pointed out by the Lord Chief Justice, if we were to accept the contention of the learned counsel for the Companies that the workmen ceased to be in the employ of the Companies after the 16th and 17th January because of the notice and that therefore there was no trade dispute within the meaning of the Trade Disputes Act it would amount to nullifying the whole Act. Besides, there is also the Rule of *Lis Pendens* to consider. The rule may not be applicable directly in this case but the principle deducible therefrom, is in our opinion applicable. It is of general application in that as soon as a Court of law gets seizin of a dispute nothing can be done in respect thereof till the determination of the dispute, or, if anything is to be done, it can only be done with the leave of the Court. Therefore, as soon as the reference was made, it put a stop to the running of the notice and kept the parties in *status quo* till the date of the award.

The learned counsel for the Companies endeavours to meet this aspect of the case by submitting that because of the reference made to the Industrial Court, if the parties were to be kept in *status quo* till the giving of the award, it would mean not only inflicting great hardship to the Companies but would also mean doing great injustice to them in that they would have to continue paying the workmen till the date of the award though there was no work for them, and that the workmen would also be in a happy position of accepting employment elsewhere.

In so submitting the learned counsel overlooks the other side of the question. If, for instance, the discharges were made not because there was no work but because of victimization, from which date were the discharged workmen to be reinstated? Were they to be reinstated with effect from the date of the discharge or from the date of the award? If they were to be reinstated with effect from the date of the award, it would mean doing great injustice to them. If the discharged workmen were to accept employment elsewhere during the pendency of the reference, it would undoubtedly be taken into account by the Industrial Court when directing reinstatement. Section 2 (*j*) read with section 10 (*1*) of the Trade Disputes Act is of such wide amplitude as to embrace such matters as are mentioned by the learned counsel for the Companies within the jurisdiction of the Industrial Court. The award in so far as it deals with this point must therefore be confirmed.

Now, dealing with that part of the award directing that it be made a term of service that retrenched workmen with two years' service should be paid discharge allowance equivalent to two months' wages *plus* Cost of Living Allowance, the learned counsel for the Companies points out the inconsistency of the Industrial Court in giving the award in this case on this point and the award given three days earlier in the Syriam case. In the Syriam case the Industrial Court held that superannuated personnel who were discharged should not be given gratuity. The learned counsel further submits that the ground on which the discharged allowance was given was also improper inasmuch as the Industrial Court said that because the State had made no provision by way of social service it was the duty of the employers to help the employees.

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That, according to the learned counsel, amounts to failure on the part of the Industrial Court to exercise the discretion vested in it judicially. Further, the learned counsel states that employees of the Company could have joined the Provident Fund if they wanted to and that, in fact, 70 per cent of the lowest paid workmen did join the Provident Fund maintained by the Companies.

Now, what must be borne in mind is that this case and the Syriam case are entirely different in so far as the payment of discharged allowance is concerned. In the Syriam case, according to the learned counsel himself, what was awarded was that the superannuated men need not under the circumstances of the case be given any gratuity. In this case what is awarded is what we may call compensation for having their career cut short in the prime of life. It is true that the Industrial Court observed that the employers should help their workmen as the State had not made any provision by way of social service. If the payment of discharge allowance was based only on this consideration, the contention of the learned counsel for the Companies must be accepted that the Industrial Court failed to exercise its discretion judicially in that it took extraneous matters into consideration. But on reference to the award we find that the payment of discharge allowance was not based mainly on the above consideration but also on the consideration that the workmen should have compensation for having their career cut short in the prime of life. This, in our opinion is exercising discretion judicially. It is true that there is the Provident Fund maintained by the Companies but what has to be remembered is that the Provident Fund is a fund by joining which the workmen can effect a saving of their wages for the purpose of making provision for their old age, since

they get no pension when they are superannuated. It is not to be treated as a substitute for compensation for having one's career cut short in the prime of one's life. If discharge allowance is to be paid, the learned counsel for the Companies contends that as according to law a general hiring may be terminated at any time by a month's notice or payment of a month's wages, discharge allowance should be made equivalent to one month's wages and not to two months' wages. It must be remembered that how and under what circumstances the services of an employee can be terminated depend upon the terms of the contract between him and the employer. In the absence of such a contract it depends upon the usage, of the service to which the employee belongs. If there is no usage, then the service is terminable by giving reasonable notice. What is meant by reasonable notice depends upon the circumstances of each case. In the present case there are no materials on the record for the determination of this fact. But, in fact, no materials are necessary, since, as we have pointed out above, payment of discharge allowance is to be treated as compensation for having one's career cut short in the prime of life. We are therefore satisfied on this point also that the Industrial Court did not exceed its jurisdiction by directing that it be made a term of service that if workmen with two years' service are discharged they should get two months' wages *plus* Cost of Living Allowance. We may note that the learned counsel for the Companies has very frankly admitted that if the workmen served with notices on the 7th January were to be treated as still in service of the Companies at the date of the award they would, along with those who are still in the service of the Companies, get the benefit of this part of the award.

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Dealing with the question of the payment of travelling allowance, we must at once say that this part of the award cannot be supported.

In awarding travelling allowance the Industrial Court not only infringed the Rule of Natural Justice but failed to exercise its discretion judicially. In *U Htwe's Case* (1) this Court observed :

"If the tribunal has exercised a discretion entrusted to it *bona fide*, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the Courts cannot interfere. In other words, a Tribunal entrusted with the exercise of quasi-judicial functions, would not be acting according to law, if it acted arbitrarily or illegally or was influenced by extraneous or irrelevant considerations."

In awarding travelling allowance the Industrial Court observed :

"We are not unaware that this is not the normal practice in respect of men who are engaged at the place of work, and not at their homes. Where retrenchment is effected, the circumstances generally are abnormal. From the national point of view it would be helpful to the economy of the country, if unemployed workmen can be dispersed to their homes where they can be absorbed in the economic life of the country. In respect of workers who are not Burma citizens, it is advisable that they should be helped, if they so desire, to leave the country so that they may avoid distress in a foreign country."

From these observations what is clear to our mind is that the Industrial Court was influenced in their judgment more by political and economic considerations than by the justice of the claim. What is worse still is this. In the course of his address to the Industrial Court the learned counsel for the Companies first dealt with the question of jurisdiction and then with the questions of the effect of the notice and the terms and conditions of service, and when he was

(1) (1948) B.L.R. p. 541.

about to deal with the question of travelling allowance and the claims of the Yenangyaung workmen, he was stopped by the Chairman of the Tribunal who said that it was for the other side (meaning the workmen) to satisfy the Tribunal of the justice of their claims; whereupon the learned counsel for the Companies stopped his address. This was not only not giving a hearing but actually leading the learned counsel for the Companies into the belief that the Tribunal would reject the claim for travelling allowance and the claim of the Yenangyaung workmen. In these circumstances we are clearly of the opinion that the Industrial Court acted not only in excess of its jurisdiction but illegally in awarding travelling allowance. This part of the award is accordingly quashed.

What has been said above in connection with the payment of travelling allowance is equally applicable to that part of the award which deals with the payment of discharge allowance to the Yenangyaung workmen. Further, the most important question to consider in their case is—were they workmen within the meaning of section 2(*k*) of the Trade Disputes Act. As pointed out above, they were discharged suddenly in July 1949 after paying them their wages and in addition one month's wages in lieu of notice. The dispute with the Company arose only after their discharge. The discharged workmen could not in these circumstances, in our opinion, be workmen within the meaning of section 2 (*k*) of the Trade Disputes Act even though a trade dispute can be raised on their behalf by other workmen who are still in the service of the Companies. They have not also been ordered by the Industrial Court to be reinstated. On the contrary what the Industrial Court says is that the grounds for their discharge, or to use the language of the Industrial Courts, for the reduction of the respondent's labour

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force, are reasonable. In these circumstances we are not satisfied that the Yenangyaung workmen are entitled to have the payment of discharge allowance made a term of their service. If they are not, then they are not entitled to payment of discharge allowance.

The learned Attorney-General on behalf of the Industrial Court, however, contends that the Yenangyaung workmen are workmen within the meaning of section 2 (*k*) in view of the fact that there was already a dispute between the Companies and the workmen as as far back as January 1948. In support thereof the learned Attorney-General draws our attention to the evidence of Thakin Khin Zaw and Mr. Maxwell Lefroy. What their evidence shows is that the main demand of the Yenangyaung workmen was for payment of gratuity. But nothing evidently came of the damand and the workmen also dropped the matter later. The discharge that was made in July 1949 had nothing whatsoever to do with the alleged dispute in January 1948. For all these reasons we are of opinion that the Industrial Court acted in excess of its jurisdiction in directing the Companies to pay discharge allowance to the retrenched Yenangyaung workmen. We accordingly quash that part of the award.

To sum up, we confirm that part of the award dealing with the questions of jurisdiction, directing payment of wages and Cost of Living Allowance up to the date of the award to the workmen at Chauk served with notices of discharge on the 7th January 1950, and directing the payment of discharge allowance equivalent to two months' wages *plus* Cost of Living Allowance being made a term of service of those workmen who are still in the service of the Company and those served with notices of discharge. But we quash that part of the award directing payment of

travelling allowance and the payment of discharge allowance to the Yenangyaung workmen.

As both sides are each partially successful we make no order as to costs.

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Aug. 28.

SHYAM SUNDER ANANDA (APPLICANT)

v.

THE COLLECTOR OF CUSTOMS, RANGOON (RESPONDENT). *

Acquittal by Magistrate—Subsequent proceedings under s. 167 (8), Sea Customs Act for confiscation before Collector of Customs—Jurisdiction of Collector—Judicial—When writ of prohibition lies—Criminal Procedure Code, s. 5 (2) and s. 182 (1), Sea Customs Act—No inconsistency between—S. 403 (1), Criminal Procedure Code—Offence—S. 26, General Clauses Act and s. 2 (42).

The applicant was tried before the Subdivisional Magistrate, Insein, for an offence under s. 24 (*1*) of the Foreign Exchange Regulation Act for attempting to export money without the requisite permit from the Controller of Foreign Exchange. And, during the pendency of the trial the Collector of Customs, Rangoon, took proceedings under s. 167 (*8*) of the Sea Customs Act against applicant for confiscation and imposition of a penalty, but the proceedings were stayed by the Collector pending the decision of the Subdivisional Magistrate. The Subdivisional Magistrate acquitted the applicant. In spite of such acquittal, the Collector decided to proceed with proceedings before him. The applicant moved the Supreme Court.

Held : That the acquittal was a bar to the continuation of the proceedings before the Collector of Customs.

The Collector of Customs when he imposes fines and penalties under the Sea Customs Act exercises a judicial function. He is for the time being a Judge bound to act in his individual judgment. In such proceedings it is not competent for him to take legal advice nor for others to give legal advice.

Where there is another remedy open to an applicant he is not entitled to a writ of Mandamus ; but where an inferior judicial tribunal is found to be usurping a jurisdiction not properly vested in it, a writ of prohibition clearly lies.

Ranchhoddas Jethabhai & Co. v. *The Secretary to the Union Government, Ministry of Judicial Affairs and two,* B.L.R. (1950) S.C. 68, referred to and followed.

A Criminal Court proceeds on allegations of fact in a complaint to determine whether such facts would constitute an offence. When the facts alleged constitute offence both under s. 24 (*1*) of the Foreign Exchange Regulation Act and s. 167 (*8*) of the Sea Customs Act, then on proof of such facts the

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* Civil Misc. Application No. 37 of 1950.

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

Magistrate is bound to convict the accused under both the Acts even though the complaint mentions only Foreign Exchange Regulation Act. When the accused was acquitted by the Magistrate, such acquittal would be a complete answer under s. 403 (*1*) of the Code of Criminal Procedure to a trial for an offence under s. 167 (*8*) of the Sea Customs Act.

S. 1 of the Criminal Procedure Code in enacting "nothing in the Code affecting any special or local law or special jurisdiction or power conferred," etc., has qualified the words by the phrase "in the absence of any specific provision to the contrary." There is specific provision to the contrary in s. 5 (*2*) of the Code.

The proceedings before the Magistrate and before the Collector of Customs are not different. There is no inconsistency between s. 5 (*2*) of the Code of Criminal Procedure and s. 182 (*1*) of the Sea Customs Act as there are no express words in the latter abrogating the jurisdiction of the ordinary criminal courts; consequently the contention that the Customs Authority had exclusive jurisdiction to try the offence under s. 182 (*1*) of the Sea Customs Act is not tenable. Nor can the jurisdiction, which the Magistrate had, come to an end because notice was given of proceedings before the Collector of Customs. The Criminal Court once seized of jurisdiction cannot have that jurisdiction taken away lightly and there is no warrant for such taking away in the Sea Customs Act.

Both in India and in Burma the word "offences" is used and not "Crimes" as in England. "Offence" is described in s. 2 (*42*) of the General Clauses Act. In England it is possible to define "offence" as meaning any act which is not a "crime" in some limited cases.

Madhowji Thawor v. *Yar Hussain Hydor Dasti and another*, (1926) A.I.R. Sindh 40; *Reg* v. *Tyler*, (1891) 2 Q.B.D. 588, referred to and distinguished.

There is also no warrant for grouping offences under s. 167 of the Sea Customs Act into criminal acts and non-criminal class.

Kyaw Min for the applicant.

Chan Htoon (Attorney-General) with
Ba Sein (Government Advocate) } for the respondent.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The applicant seeks directions in the nature of prohibition in respect of proceedings initiated by the Collector of Customs, Rangoon, purporting to act under section 182 (*1*) of the Sea Customs Act.

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On the 13th November 1949 a search was made on the person of the applicant at Mingaladon Airport and in an attache case carried by him was found Burma notes of the denomination of one hundred rupees to the total value of Rs. 1,12,000. The search was conducted at about 11 a.m. and the applicant was, at the time of the search, at the airport for the purpose of travelling that afternoon to India. On a report of the seizure being made, U Than Ohn, Chief Inspector, Preventive Service Customs, lodged a written complaint before the District Magistrate, Insein, on the 15th November 1949 charging the applicant with an offence under section 24 (*1*) of the Foreign Exchange Regulation Act " for attempting to export out of the Union of Burma a sum of Rs. 1,12,000 without the requisite export permit from the Controller of Foreign Exchange, Union of Burma."

The complaint set out the facts as reported to U Than Ohn by the Preventive Officers who made the search. Cognisance was taken of the complaint by the Subdivisional Magistrate of Insein who was then exercising jurisdiction as the presiding officer of an inferior Military Court, Insein having been placed under military administration at the time. The learned Subdivisional Magistrate ultimately acquitted the applicant, holding that " the money seized was not brought by the accused for the purpose of smuggling it out of Burma. " The learned Magistrate came to the conclusion that " the money seized belonged to accused's brother Chunnu Lal who had brought it to the Aerodrome for Customs formalities " in view of his contemplated departure for Bangkok on the next day. This order of acquittal was sought to be reviewed before the Superior Military Court of Insein in Criminal Revision No. 170 of 1950 but the review application did not succeed, with the result that the acquittal of the applicant stands.

In the complaint which U Than Ohn made before the District Magistrate, Insein, on the 15th November 1949 it was stated that " action for confiscation of the money under Sea Customs Act is being taken. " This foreshadowed the proceedings of the Collector of Customs, Rangoon, in respect of which the present application for prohibition is made. The proceedings begin with a notice dated the 21st November 1949 calling upon the applicant to show cause why under section 167 (*8*) of the Sea Customs Act the notes to the value of Rs. 1,12,000 seized from the applicant should not be confiscated and a penalty imposed upon him. Further action by the Collector of Customs under this notice was stayed pending the trial before the criminal Court. When ultimately the order of acquittal by the Subdivisional Magistrate was confirmed on review by the Superior Military Court of Insein, the Collector of Customs decided to proceed further and pressed for objections to the notice of the 21st November from the applicant. On this the learned counsel for the applicant, who acted also as his counsel before the criminal Court, claimed before the Collector that his client having been tried and acquitted in respect of the seizure from his possession of the Burma notes at the Mingaladon Airport is not liable to have action taken against him in respect of the same notes by the Collector of Customs under section 182 (*1*) of the Sea Customs Act. The Collector of Customs refused to accept this contention with the result that the present application was filed for directions in the nature of prohibition.

Before us the proceedings of the Collector of Customs, who purported to act in exercise of the powers granted to him under section 182 (*1*) of the Sea Customs Act, have been challenged as being in excess of his jurisdiction. It is contended on behalf of the applicant

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that the provisions of section 403 of the Code of Criminal Procedure apply and that the applicant having been tried and acquitted by the Subdivisional Magistrate of Insein in respect of the finding of these Burma notes from the attache case he was carrying, a further proceeding of a criminal nature on the same facts is barred.

The proceedings of the Collector of Customs are before us and we find that in holding that the previous acquittal by a criminal Court does not oust the Collector's jurisdiction to take action for an offence under section 167 (*8*) of the Sea Customs Act, the Collector had the benefit of legal advice which, at his seeking the Attorney-General's Office had given him. We notice that the Collector of Customs sought legal opinion from the Attorney-General's by a note of the 6th April 1950 and the Attorney-General's Department tendered its opinion by a note of the 6th May 1950. That as late as the 6th April 1950 the Collector of Customs should have sought legal opinion from the Office of the Attorney-General in a matter of this nature is of some surprise to us, for as far back as the 30th January 1950 in *Ranchhoddas Jethabhai & Co.* v. *The Secretary to the Union Government, Ministry of Judicial Affairs and two* (1), where the Collector of Customs was one of the respondents, this Court had in the clearest terms stated :

"It has also to be borne in mind that the Collector of Customs when he imposes fines and penalties under the relevant provisions of the Sea Customs Act is exercising a judicial function and the exercise of a judicial function is individual . . . . He is for the time being a judge bound to act in his individual judgment, subject, of course, to control by other authorities exercising judicial functions to whom he may be subordinate."

(1) B.L.R. (1950) S.C. 68.

More surprising it is that the Attorney-General's Department, in the face of this clear enunciation, had seen fit to give legal advice to a person who has to act in a judicial capacity. Of the nature of the actual advice given we shall have to say more later.

We have heard the learned counsel for the applicant and the learned Attorney-General on behalf of the respondent at length and we feel bound to say that the Collector of Customs, Rangoon, had been badly advised both in initiating the proceedings sought to be prohibited and in rejecting the claim on behalf of the applicant that his acquittal by a competent criminal Court is a bar to further action by the Collector of Customs under section 182 (*1*) of the Sea Customs Act.

The learned Attorney-General, at the close of his arguments, raised what really is a preliminary objection to the application for directions in the nature of prohibition ; and this objection should, in our opinion, be considered first. He says that the application should be rejected as other remedies are open to the applicant, who should have exhausted these remedies before coming to this Court. It is suggested that the applicant should have appealed under section 188 of the Sea Customs Act to the Chief Customs authority against the decision of the Collector of Customs and that, if still aggrieved by the decision on appeal, he should seek to have that decision revised by the President under section 192 of the Act. The learned Attorney-General's contention might have greater cogency if the application here had been for directions in the nature of mandamus, for mandamus does not issue if there is another and more effective remedy available to the applicant. *Ranchhoddas Jethabhai*'s Case (1) also does not assist the respondent ; there the President's jurisdiction to act in revision was

(1) B.L.R. (1950) S.C. 68.

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affirmed by the Court, and this Court refused to anticipate the decision by the President in revision. Here, the jurisdiction of the Collector of Customs is being challenged, and where an inferior judicial tribunal is found to be usurping a jurisdiction not properly vested in it, prohibition clearly lies.

It has been strenuously contended by the learned Attorney-General that by the complaint in writing before the District Magistrate, Insein, of the 15th November 1949, the Magistrate of the Inferior Military Court was invited to take cognisance only under section 24 (*1*) of the Foreign Exchange Regulation Act and that that Court's jurisdiction would extend no further than had been circumscribed by the reference to that particular provision in the complaint. For this statement *ex-cathedra*, the learned Attorney-General has not been able to adduce support either on first principles or by authority. We can find no warrant for the proposition that a complainant can restrict the Court's jurisdiction in the manner suggested by the learned Attorney-General.

Except where the President's sanction or the sanction of some other authority is a condition precedent to the exercise of jurisdiction by a criminal Court such Court may take cognisance, in the words of section 190 (1) (*a*) of the Code of Criminal Procedure, "of any offence upon receiving a complaint of facts which constitute such offence". The complaint states facts and to such facts stated in the complaint the Court applies its mind to the suspected commission of an offence, that is to say, the Court proceeds on the allegation of fact to determine whether the facts are as alleged and whether these facts would constitute an act (which of course includes a series of acts) which is made punishable by any law for the time being in force. Clearly on the complaint, the acts attributed to the

applicant would constitute an offence under section 167 (*8*) of the Sea Customs Act. But the Subdivisional Magistrate has held that the facts alleged in the complaint had not been established. If the learned Magistrate had found the facts alleged in the complaint to be established it would have been his duty, unless there is any legal bar to his so doing, to convict the applicant of an offence under section 167 (*8*) of the Sea Customs Act. In the absence of such a legal bar it would appear that section 403 (1) of the Code of Criminal Procedure would be a complete answer in the proceedings of the nature contemplated by the Collector of Customs.

The learned Attorney-General sought to surmount this difficulty by contesting the competency of the criminal Court to try such offences as are specified in section 182 of the Sea Customs Act as cognizable by the Custom authorities. He claims that section 182 should be read together with section 187 and that, if so read, two mutually exclusive jurisdictions, one jurisdiction in respect of certain offences and the other in respect of the remaining offences under the Sea Customs Act, would become apparent. He has asked the Court to read the two sections together as in either section the permissive " may " is used. There may be a certain amount of cogency in the learned Attorney-General's argument if in section 187 of the Act the word " summarily " does not appear. As the two sections now stand, the contrast is not between two jurisdictions, that of the Custom authorities and that of the ordinary criminal Courts, but between two classes of offences, one triable summarily and the other cognizable indifferently by a Magistrate conducting his trial in a regular manner and the Custom authorities.

There can be no inconsistency between section 5 (*2*) of the Code of Criminal Procedure and section 182 (*1*)

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of the Sea Customs Act. The following principle enunciated in *The King* v. *Carlile* (1) appears to be apposite in this case :

" Where the offence was antecedently punishable by a common law proceeding, and a statute prescribes a particular remedy by a summary proceeding then either method may be pursued, and the prosecutor is at liberty to proceed either at common law or in the method prescribed by the statute ; because there the sanction is cumulative, and does not exclude the common law punishment. The present case seems to me clearly to fall within the rule laid down by Lord Mansfield, and the distinction there laid down is, I apprehend, well-founded, and grounded, too, on good authority. If a statute makes that felony which was a misdemeanor at the common law, we know that the misdemeanor is merged in the felony ; and it cannot be proceeded as a misdemeanor afterwards ; but I believe many instances will be found in which prosecutions at the common law are constantly carried on against certain offences, although there are statutes enacting particular punishment for those offences, and providing that a particular course of proceeding shall be adopted, in order to bring them within their operation. I take the principle to be perfectly clear, and to have been long established ; and, therefore, I am of opinion, that the argument now addressed to us ought not to prevail, and that there is no ground for arresting this judgment. "

In O'Flaherty v. *M'Dowell* (2) Lord Brougham said :

" I entirely go along with Lord Clare in the case of *Hayden* v. *Carroll* (3 Ridgw. Parl. Cas. 545), when he says that if there be two affirmative statutes, and ' the provisions in the subsequent affirmative statute are not contrariant, ' as he terms it, to those of the prior affirmative statute (those provisions in the prior statute) not so contradicted by the subsequent statute must stand. But it is equally clear that, without the provisions of the subsequent statute being in direct positive contradiction, or as he would call it, ' contrariant ' to the prior statute, they may be so entirely inconsistent and incompatible with its provisions that they will operate just as entirely against the subsistence of that prior statute as if they had been what his lordship calls contrariant."

(1) (1819) 106 E.R. 621 at 622. (2) (1857) 10 E.R., H.L., 1248 at 1257.

In the absence of express words in the Sea Customs Act abrogating the jurisdiction of the ordinary criminal Courts to try all offences except such as are specifically excluded from their cognisance, we must reject the learned Attorney-General's contention that section 182 (*1*) and 187 of the Sea Customs Act can be regarded as authority for granting exclusive jurisdiction to the Custom authorities to try offences coming within the provisions of section 182 (*1*) of the Act.

But the learned Attorney-General has another string to his bow. He says that even if the jurisdiction of the Custom authorities be not exclusive it is they who must set the law in motion and that they can choose whether action in respect of offences covered by section 182 (*1*) of the Act shall be taken before the ordinary criminal Courts or before themselves and that accordingly, when in the complaint of the 15th November 1949 the Chief Inspector indicated to the District Magistrate, Insein, that the Custom authorities were contemplating action in respect of offences under the Sea Customs Act, the moment the Collector of Customs on the 27th November 1949 directed notice to issue to the applicant to show cause against action under section 182 (*1*) of the Act, the jurisdiction, which till then the Magistrate had, came to an end. This contention is more ingenious than convincing. An initial jurisdiction defeasible in certain contingencies is not we deem beyond contemplation; but we would need more than a mere *ipse dixit* even of the learned Attorney-General to be satisfied that legal position here is as he contends it to be. The criminal Court once seized of jurisdiction cannot have the jurisdiction taken away lightly and we are satisfied that there is nothing in the Act to justify the view that the jurisdiction was defeasible at the will of the Custom authorities.

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The Office of the learned Attorney-General in advising the Collector of Customs by its note, earlier referred to in our judgment, relied on the case of *Madhowji Thawor* v. *Yar Hussain Hydor Dasti and another* (1) as authority for the proposition that the use of the expressions "offences" and "penalty" in section 167 of the Sea Customs Act in respect of acts or omissions as specified in that section is not itself sufficient to show that such acts or omissions are crimes and whether they are crimes or not would depend on the ordinary criminal law of the land. The learned Additional Judicial Commissioner gave as his authority for this, the dictum of Bowen L.J. in *Reg* v. *Tyler* (2). With great respect to the Additional Judicial Commissioner of Sindh and the learned Attorney-General before us following him, we must say they fail to appreciate that both in India and in this country we do not speak of "crimes" but of "offences." A "crime" is nowhere defined in our statutes but an "offence" has been defined in several places. The General Clauses Act in section 2 (42) defines an offence as "an act or omission made punishable by any law for the time being in force." The Code of Criminal Procedure in section 4 (1) (0) after repeating the same definition goes on to state that "it also includes any act in respect of which a complaint may be made under section 20 of the Cattle-trespass Act." The English case on which the learned Additional Judicial Commissioner and the learned Attorney-General have so strongly leaned relates to the interpretation of the words "criminal cause or matter" appearing in the Judicature Act, 1925, section 31 (*1*) (*a*). It is a matter of some interest that in England it has been found possible, though for limited purposes of a particular Act, to define "offence" as meaning any act which is

(1) (1926) A.I.R. Sindh 40. (2) (1891) 2 Q.B.D. 588.

not a " crime " and yet is punishable on indictment or summary conviction : *See* the Prevention of Crimes Act, 1871, section 5.

On the slender foundations of the Sindh case and the dictum of Bowen L.J. relied upon in that case, the learned Attorney-General has elaborated a distinction between two classes of offences created by section 167 of the Sea Customs Act ; one class in which he would include the offences defined in section 167 (*8*) which he claims to be non-criminal and therefore not cognizable by the criminal Courts ; the other group he claims to be criminal and therefore within the cognisance of the ordinary criminal Courts of the land. But even the Sindh decision at page 41 of the report says :

" Whether the export of goods in contravention of section 167, clause (8), is a crime or not would, therefore, depend on the ordinary criminal law of the land. It is not necessary to pursue this point any further as the goods have been exported under permits. "

In seeking to group the offence created by section 167 of the Sea Customs Act into criminal and non-criminal classes, the learned Attorney-General at first placed all the offences defined by section 167 except those appearing in sub-numbers 26, 72, 74, 75 and 76 within the non-criminal group and the rest in the criminal group. But when it was pointed out to him that offences bearing sub-numbers 23, 26 and 77 are clearly intended to be tried before a magistrate and not triable otherwise, he attempted another method of grouping which, though very ingenious, is devoid entirely of authority and left it to the arbitrary exercise of discretion of whoever has to interpret the Act. He says where the punishment bears some relation to the property in respect of which a Customs offence has been

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committed, that offence would be non-criminal and cognisable solely by the Custom authorities. Other offences he is prepared to concede as cognisable by criminal Courts. This test cannot however but make absolute nonsense of section 182 (*1*) of the Act in view of offences defined in sub-numbers 21, 22, 23, 24, 25 and 30. What the learned Attorney-General is attempting to do here is not to seek to interpret an Act of the Legislature as it stands but to torture the words of the Act into certain preconceived notions of what the Legislature should, in his opinion, have intended.

The Collector of Customs was also advised by the Attorney-General's Office, relying on a decision of 1922 of the Bombay High Court, that Customs officers in exercising their powers under section 182 of the Sea Customs Act " must proceed according to general principles which are not necessarily legal for the purpose of arriving at a conclusion when enquiries are instituted under the Sea Customs Act." We cannot understand why the Attorney-General's Office found it necessary to travel so far afield when they have or should have before them the decision of this Court in *Ranchhoddas Jethabhai & Co.*'s Case (1) which subsequent to the tender of the said advice has been re-affirmed in *Abdul Gaffar* v. *U Kyaw Nyun and one* (2). But in view of the conclusions we have arrived at in this case it is not necessary to pursue this point more closely.

We find then that on the 15th November 1949 the Subdivisional Magistrate of Insein having taken cognisance on a written complaint of the facts would be competent to convict or acquit the applicant of any offence such facts would constitute under the Sea Customs Act or under the Foreign Exchange Regulation Act ; that the seizin which the Magistrate had was not

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

taken away from him by the Custom authorities initiating proceedings which are sought before us to be prohibited ; and that whilst it would have been competent for the Custom authorities to have taken action under section 182 (*1*) of the Sea Customs Act in respect of an offence under section 167 (*8*) of the Act if the matter had not been made the subject of a criminal prosecution, the provisions of section 403 (1) of the Code of Criminal Procedure effectively operates to bar the proceedings before the Custom authorities once the applicant had been tried and acquitted on the same facts by the Subdivisional Magistrate. The contention on behalf of the respondent that by section 1 of the Code of Criminal Procedure " nothing herein contained shall effect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time in force " overlooks the qualification " in the absence of any specific provision to the contrary. " There is a specific provision to the contrary in section 5 (*2*) of the Code and as we have already said there is no inconsistency between section 5 (*2*) and section 182 (*1*) of the Sea Customs Act.

Section 186 of the Sea Customs Act clearly does not support the learned Attorney-General's thesis that the Act intended to set up a special jurisdiction so as to exclude the application of section 403 of the Code of Criminal Procedure. The express enactment of a provision barring the operation of section 403 of the Code of Criminal Procedure or of section 26 of the General Clauses Act in the special case of a previous award by an officer of Customs of confiscation, penalty or increased rate of duty is not without significance. To argue from this special provision, as the learned Attorney-General does, that the operation of section 403 of the Code of Criminal Procedure is equally excluded

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where a criminal Court has previously recorded an acquittal is to commit an *ignoratio clenchi*.

In the result we direct the Collector of Customs, Rangoon, to refrain from proceeding further in the matter of action against the applicant under section 167 (*8*) of the Sea Customs Act in respect of Burma notes of the denomination of one hundred rupees to the value of Rs. 1,12,000 seized from the attache case which the applicant was carrying at the Mingaladon Airport at or about 11 a.m. on the 13th November 1949. There will be no order for costs.

SUPREME COURT.

SOONIRAM RAMESHWAR (APPLICANT,

v.

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

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July 27.

Urban Rent Control Act, 1948—S. 16-AA (1) (b), *2* (b) *and* (3) *and s. 2* (c)—*Premises to be vacated or likely to be vacated—"Landlord" Difference between s. 16-AA* (1) (b) *and s. 16-A* (2)—*16-AA* (4) *when applicable.*

Held: That s. 16-AA (1) (*b*) of the Urban Rent Control Act applies to a case in which a Landlord receives any information that any residential premises of which he is the landlord are likely to be vacated or have been vacated. The section has no application to a case where the owner had not let out the premises at all, and the premises were occupied by trespassers against whom he obtained an ejectment decree and owing to execution of the decree the trespassers-judgment-debtors vacated the permises and the owner received the information about the vacating by trespassers. The owner in this case was not a landlord within the meaning of s. 2 (*c*) of the Act and he could not receive any information as landlord of such vacating.

The particulars which the landlord is required by sub-section 3 of s. 16-AA (1) (*b*) to supply to the Controller of Rents are the same as those which he is required by s. 16-A (*2*) of the Act to supply when the landlord proposes to let non-residential premises to a tenant. In the present case the house was not a rented house at all and the applicant was not a landlord and consequently the Controller of Rents had no jurisdiction to direct that the premises should be let at all.

Kyaw Myint and G. N. Banerji for the applicant.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE THEIN MAUNG.—This is an application to quash the proceedings of the Controller of Rents, Rangoon culminating in an order dated the 30th May, 1950 by which the applicant was directed under section 16-AA (*4*) of the Urban Rent Control Act, 1948 to let

* Civil Misc. Application No. 39 of 1950.

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

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House No. 109, Morton Street, Rangoon to the respondents Nos. 2, 3 and 4 jointly.

The applicant who is the owner of the said house got a decree in the High Court, Rangoon for ejectment therefrom of all trespassers, including the 4th respondent; and he was given possession thereof by the Bailiff of the High Court in execution of the said decree on the 29th April 1950.

The 4th respondent gave notice on the 10th April 1950 to the Controller of Rents that the house was a *rented* house and that he and his family would vacate "the half portion of the southern upper flat thereof on the 18th April 1950." Thereupon the Controller of Rents sent a notice to the applicant drawing his attention to section 16-AA (*1*)(*b*), 2 (*b*) and (*3*) of the Urban Rent Control Act, 1948. The applicant replied that the premises were required for his own use and that no action under the said section was necessary.

The Controller of Rents issued another notice to the applicant on the 28th April 1950 insisting upon intimation required by the said enactment being sent to him; and the applicant filed with him an application dated the 9th May 1950 repeating that he did not propose to let out the house and that he wanted to occupy the house for his own use as his bungalow, where he used to live, had been requisitioned by Government.

The learned Advocate for the applicant requested the Controller of Rents to treat the application as intimation under the said enactment; but the latter refused to do so for want of particulars and the applicant had to furnish further particulars in what is described as his Written Objection on the 25th May 1950.

The Controller of Rents then overruled the objection that the said enactment was not applicable and proceeded to hold an inquiry as to whether the

applicant wanted to occupy the house for his own use and occupation in good faith. The applicant and his advocate did not take part in the inquiry as in their opinion the enactment was not applicable and the question of good faith did not arise.

Ultimately the Controller of Rents held that the applicant did not require the house for his own use and occupation and directed him to let the house to the said respondents. Hence the present application.

The principal, if not the sole, question for decision in this case is whether section 16-AA (*1*) (*b*) and (*4*) of the Urban Rent Control Act, 1948 are applicable or not. Section 16-AA (*1*) (*b*) applies to a case in which a landlord receives information that any residential premises, of which he is the landlord, are likely to be vacated or have been vacated. In the present case the applicant, who is the owner of the premises, has not let them out at all; they were occupied by the 4th respondent and other trespassers during his absence from Burma on account of the last war and he has regained possession in execution of a decree for their ejectment therefrom. So he was not a landlord who received information within the meaning of the said clause. He might have been a landlord if the said trespassers had obtained the permission of the Controller of Rents to continue in occupation of the premises under section 12 (*1*) of the Urban Rent Control Act, 1948; but they never obtained such permission at all. He may be a landlord also if and when he proposes to let the premises to a tenant, as "landlord" according to section 2 (*c*) of the Act includes any person who would receive rent or be entitled to receive rent if the premises were let to a tenant; but he has informed the Controller of Rents that he did not propose to let the premises to any tenant and that he wanted them for his own use

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and occupation as the house ; which used to be his residence before the war, had been requisitioned by Government. He has also stated that he put three durwans in charge of the premises on the 29th April 1950 immediately after he had obtained delivery of possession in execution of the decree for ejectment of the 4th respondent and other trespassers therefrom, that he began the painting and repairs on the very next day to make the premises suitable for his own use and occupation, and that by the time he filed his objection with the Controller of Rents he had spent Rs. 5,000 for a part of the necessary repairs and painting ; and these allegations of fact have not been challenged by the respondents at all.

In interpreting section 16-AA (*1*) (*b*) of the Act we cannot but take into consideration the fact that the particulars which the landlord is required by sub-section (*3*) thereof to supply in his intimation to the Controller of Rents are the same as those which are required by section 16-A (*2*) of the Act, *i.e.*, the same as those which must be supplied by the landlord who proposes to let his non-residential premises to a tenant.

We accordingly hold that the applicant is not a landlord in respect of the premises in question and that section 16-AA (*1*) (*b*) of the Act is not applicable.

With reference to section 16-AA (*4*) of the Act it is applicable only to the case in which the Controller of Rents has received information otherwise than by intimation under sub-section (*1*) and it will enable him in such a case to direct the landlord to let the premises to a person or persons specified in his direction. In the present case the Controller of Rents did receive information from the 4th respondent that a portion of the premises was about to be vacant ; and he must have issued the first notice to the applicant as the

4th respondent had informed him that the house was "a rented house". However, the house was not a rented house at all and the applicant, as we have stated above, is not a landlord in respect thereof.

We accordingly hold that section 16-AA (*1*) (*b*) and (*4*) of the Act do not apply and that the Controller of Rents has no jurisdiction to direct that the said premises should be let at all.

The proceedings before the Controller of Rents culminating in the said order are quashed. There will however be no order as to costs as the applicant himself is not free from blame for failure to appear before the Controller of Rents.

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Oct. 18.

THE BURMA OIL COMPANY LTD. (APPLICANT)

v.

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

Application for direction in the nature of certiorari—The Court of Industrial Arbitration passing an award directing the B.O.C. to investigate the possibilities of river transport—Whether according to law.

Where the President referred to the Court of Industrial Arbitration a dispute between the Burma Oil Company Ltd. and the Oil Refinery Workers, Syriam and the Court by its award directed the Company to investigate the possibilities of river transport of crude oil to Syriam within three months and mentioned that the arbitration court would reconsider the question of retrenchment of employees thereafter.

Held: That the court acted arbitrarily and without jurisdiction in directing such investigation and they allowed their judgment regarding reasonableness or otherwise of the proposed retrenchment to be influenced by extraneous and irrelevant considerations.

In the ordinary course the Company for many years before the war used to get crude oil for refinement at Syriam through their pipe-line and their present plan for rehabilitation is in accordance with the said course. The operation of the pipe-line is the essential link in that plan. The direction to investigate the possibilities of river transport implies that the ordinary course of such business should be altered for the time being and the court of Industrial Arbitration had no authority to direct such alteration or to decide in what manner the Company should carry on their business.

E. C. V. Foucar for the applicant.

Chan Htoon (Attorney-General) for the 1st respondent.

T. P. Wan for the 2nd respondent.

The judgment of the Court was delivered by

MR. JUSTICE THEIN MAUNG.—This is an application for a writ of certiorari to quash the

* Civil Misc. Application No. 44 of 1950.

† *Present:* SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG AND U AUNG THA GYAW, J.

award made by the first respondents in their Case No. 4 of 1950.

The dispute which has been referred by the President to the first respondents arose as the petitioners proposed to suspend rehabilitation of their refinery at Syriam and to retrench the labour force employed thereon and the second respondent made certain demands in connection with their proposal to do so.

The demands are as follow :—

(1) That the Company should totally abstain from taking measures of retrenchment of over 3,000 out of over 4,000 workpeople who are at present in the Company's employ.

(2) That in case the Company either dismiss, discharge, retrench or otherwise terminate the services of any of their workpeople, they should pay every such worker a discharge allowance equivalent to three months' wages *plus* Cost of Living Allowance as compensation for the abrupt and premature termination of their services and payment of such allowance should be included as one of the terms of employment by the Company.

(3) That the Company should pay to every worker who resigns or is discharged before a completion of one year's service or before he could enjoy his earned leave a sum of money in lieu of such leave earned by him, and such payment should be included as one of the terms of employment by the Company.

(4) That the Company should not deduct the following holidays from the 17 annual

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holidays at present granted to the workpeople and such holidays should be granted as paid holidays to the workers :—

Independence Day.
Resistence Day.
May Day.
Martyrs' Day.
National Day.

(5) That in case the Company discharge or retrench any of the workers who have come to work under them from foreign countries or distant places, the Company should pay actual travelling expenses up to their respective native places and subsistence allowance at the rate of Rs. 10 *per diem* to such workers and their families, and payment of such expenses and allowance should be included as one of the terms of employment by the Company.

The first respondents have by their award, dated the 31st May 1950—

(*a*) rejected the demands Nos. (3) and (4) ; and

(*b*) directed with reference to the demands Nos. (2) and (5)—

(i) that in the case of retrenchment workers, who have had at least two years' service, should be paid two months' wages *plus* cost of living allowance as discharge allowance in addition to notice pay, if any ;

(ii) that retrenched workers, who have had at least two years' service and whose homes are more than 50 miles away from Syriam should be paid travelling allowance by

surface transport to their homes, subject to a maximum amount of equivalent to one month's wage *plus* cost of living allowance ; and

(iii) that these should be made terms of service of the petitioners' workmen.

The directions in respect of the discharge allowance must be upheld and the direction for payment of travelling allowance must be quashed for the reasons which we have given in our judgment in *The Burma Oil Company (Burma Concession) Ltd. and two others* v. *The Court of Industrial Arbitration, Burma and two others* (Civil Misc. Application No. 43 of 1950 which was heard together with this case).

With reference to the demand No. (1), the first respondents have held that the proposed reduction of the labour force is not reasonable as the petitioners have made no attempt to investigate an alternative method of supplying the refinery with crude oil and directed that the present labour force should be kept employed on rehabilitation work for at least three months more. They have also added :

> "During that period the Company can investigate the possibilities of river transport. If at the end of that period, there does not appear to be any prospect either of repairing the pipe-line or of arranging for river transport, we shall be prepared to reconsider the question of retrenchment at Syriam."

The learned Advocate for the petitioners has urged that this part of the award should be quashed as the first respondents were influenced by extraneous and irrelevant considerations in holding that the proposed reduction of the labour force was not reasonable and have acted arbitrarily and without jurisdiction in directing them to investigate the possibilities of river transport.

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Their case as stated by their general manager, Mr. R. S. Carey, in his affidavit before the first respondents is as follows : For many years before the last War they used to get crude oil for their refinery at Syriam from the oilfields at Yenangyaung and Chauk through their pipe-line. The refinery was destroyed and completely denied to the enemy in February, 1942. The pipe-line also was demolished or otherwise wrecked in places by the petitioners about the same time for the purpose of denial to the enemy ; and it suffered further damage during the period of the War and the ensuing period of unrest. The work of rehabilitating the refinery and the work of repairing the pipe-line were taken in hand together in the year 1946 as the usefulness of the refinery depends entirely upon the production of crude oil at the oilfields and its reception at Syriam through the pipe-line ; and from 1946 up to the end of September, 1949 they have spent a sum of Rs. 5,15,02,000 in rehabilitating the refinery and installations connected therewith. In 1948 further repair of the pipe-line became impossible on account of what is generally referred to as a rebellion ; and working conditions on the oilfields themselves were such that the work of rehabilitating there had ceased. Under these circumstances they decided to postpone the reconstruction of the main refinery at Syriam and to confine their efforts in the meanwhile to producing at the oilfields only such quantity of crude oil as can be refined without using the pipe-line.

It also appears from the same affidavit and the evidence of Mr. T. G. C. Murray, Manager, that although the petitioners' original plan was to put up a 10,000-barrel refinery they may ultimately have to put up only a 3,000-barrel one under what is described as the Modified Joint Venture.

With reference to the pipe-line, the first respondents themselves have stated in their award :

" As at present, the refinery at Syriam would be entirely dependent on the pipe-line. The pipe-line passes through areas which are at places as far away as about 20 miles from road or railway. Even though organised insurgence may come to an end it is not unlikely that anti-social elements may operate in areas away from principal means of communication for some time more. "

The above extract indicates that the first respondents themselves would have decided that the proposal to postpone rehabilitation of the refinery and to retrench the labour force employed thereon was reasonable, if they had confined themselves to consideration of the ordinary course of the petitioners' business. They have decided that it was not reasonable simply because " the Company had made no attempt to investigate an alternative method of supplying the refinery with crude oil ", *i.e.*, " The possibilities of river transport. "

Their award itself contains an extract in which, Mr. Carey has explained why the petitioners did not investigate the possibilities of river transport. He stated :

" If the interest engaged in river haulage foresees probable business in providing the capital cost of flotilla, then it must be presumed they would of their own initiative contemplate such expenditure and initiate enquiries for patronage/business. Accordingly the Oil Companies themselves do not propose to investigate river transport of crude oil. I repeat it would be premature seriously to consider capital expenditure at this time. "

Besides, it is fairly clear from the evidence of Mr. J. M. Macnaughten that the Inland Waterways Transport Board has not got the necessary flats and

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special towing crafts and that it would take the Board from two to three years to have them made.

Under the circumstances of the case it would appear that the Board has not made "inquiries for patronage/business" as they have not got the necessary flotilla and are not prepared to provide the capital cost of a flotilla which will be very costly and which will be required only so long as the petitioners have not repaired their pipe-line. There is a good deal of force in the contention of the learned Advocate for the petitioners that the first respondents themselves should, if they had any doubt in the matter at all, have examined a witness from the Board under section 16 of the Act.

Be that as it may, the ordinary course of the petitioners' business for many years before the war was to get crude oil for refinement at Syriam through their pipe-line from the oilfields. Their present plan for rehabilitation is in accordance with the said course of business; and according to Mr. Murray the operation of the pipe-line is the most essential link in that plan. The direction to investigate the possibilities of river transport contains the implication that they must alter the ordinary course of their business for the time being and use river transport if it be found feasible; and we are of the opinion that the first respondents have no authority to direct alteration of the ordinary course of the petitioners' business or to decide in what manner they should carry on their business.

We accordingly hold—

(1) that the first respondents have not acted according to law inasmuch as they have allowed their judgment regarding reasonableness or otherwise of the proposed retrenchment to be influenced by extraneous

and irrelevant considerations regarding the possibilities of river transport ; and

(2) that they have acted arbitrarily and without jurisdiction in directing the petitioner to investigate the possibilities of river transport.

The award is quashed so far as it decides that the proposed retrenchment is unreasonable, requires the petitioners to investigate the possibilities of river transport and directs that payment of travelling allowance on retrenchment should be made a term of service. However, the rest of the award will stand ; and there will be no order for costs.

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Oct. 18.

STEEL BROTHERS & Co. LTD. (APPLICANT)

v.

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

Application for writ of certiorari—Trade dispute—Award of gratuity—Whether a trade dispute—Judicial discretion—No gratuity in Standing Order for the State and "State-partnered" mills if conclusive.

When the applicant published a notice to close in April 1949 their business as Saw Millers and in anticipation of such threatened closing-down the Workers' Union made demands for gratuities which were met in part and on a reference to the Industrial Court an award was passed raising the scale of such gratuities and this was challenged by an application to the Supreme Court for a writ of certiorari and prohibition.

Held: That an Industrial Court must necessarily substitute its discretion for that of the employers or the employees or both whenever occasion arises in all matters within its jurisdiction. Industrial Arbitration may involve the extension of an existing agreement or the making of a new one, or in general the creation of new obligation or modification of old ones.

Western India Automobile Association v. *Industrial Tribunal, Bombay and others*, (1949) F.C.R. 321 at 345, referred to.

The fact that in the Standing Order for the State and State-partnered Mills there is no provision for payment of gratuity had been taken into account by the court and it considered and concluded that the Standing Orders cannot be regarded as final on the subject. It had jurisdiction to direct such payments and in making the award it did not exceed its jurisdiction.

E. C. V. Foucar for the applicant.

Chan Htoon (Attorney-General) for the respondents 1 and 3.

Yan Aung for the respondent 2.

The judgment of the Court was delivered by

MR. JUSTICE THEIN MAUNG.—This is an application for a writ of certiorari to quash the award dated the

* Civil Misc. Application No. 46 of 1950.

† *Present:* SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE THEIN MAUNG AND U AUNG THA GYAW, J.

29th May, 1950, made by the first respondents in their Case No. 3 of 1949.

The dispute which has been referred by the President to them under section 9 of the Trade Disputes Act, 1929, arose as the petitioners published a warning notice that their business as saw millers would have to be closed early in April, 1949 and the Workers' Union, which is the second respondent, has made certain demands in anticipation of the threatened closing down of the mill.

The demands are for :—

"(1) Grant of a compassionate allowance equivalent to thre months' wages *plus* Cost of Living Allowance to al employees who are paid on monthly basis, irrespective of the length of service, in case the mill is to be closed temporarily due to shortage of logs.

(2) Grant of a gratuity equivalent to a month's wages *plus* Cost of Living Allowance for each year of service, in addition to the compassionate allowance referred to in demand (1) above, in case the undertaking is to be closed down indefinitely."

The petitioners raised a preliminary objection before the first respondents that the demands did not constitute a trade dispute within the purview of the Trade Disputes Act; and on the said objection being overruled by the first respondents they applied to this Court for writs of Certiorari and Prohibition prohibiting the first respondents from proceeding any further in the matter. (*See* Civil Misc. Application No. 72 of 1919 in this Court.)

The said application was dismissed as Mr. Foucar, the learned Advocate for the petitioners, (1) frankly conceded that all the workers could not be said to have had their employment terminated before the demands were presented and that there were 180 workers in the saw mills and in the office still in employment when

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the demands were presented, (2) did not contend that claims made on behalf of such workers for payments contingent on later termination of their services would not amount to a trade dispute and (3) agreed that they could be terms of employment in respect of such workers. (*See* the judgment of this Court on the said application.)

At the further hearing of the dispute before the first respondents Mr. Foucar informed them that he did not wish to raise any technical issue as to whether the discharge notice had been issued to some of the workmen prior to the presentation of the demands; and the first respondents have found as a matter of fact that the demands were presented to the petitioners before the issue of the discharge notice.

The first respondents have ultimately made an award directing—

(1) that retrenched employees who have had at least two years' service and who have not been absorbed in other departments of the petitioner company should be paid a compassionate allowance equivalent to two months' wages and cost of living allowance and that any payment made in lieu of notice should not be adjusted against such allowance;

(2) (*a*) that those with over 30 years' service should be paid gratuity at the rate of one month's basic pay for each year of service;

(*b*) that those with services between 10 and 29 years and also those with under 10 years' service but with some pre-war service, should be paid half month's basic pay for each year of service; and

(*c*) that payments of gratuity already made (to some of the employees and on a smaller scale) could be adjusted against what is directed to be paid as gratuity; and

(3) that payments under award be made directly by the petitioners to all workers who apply for such payment within one month of such application in order that there might not be any delay pending negotiations

between the petitioners and the third respondent (the State Timber Board) in regard to the respective shares of their liability for the period during which they were partners under the terms of the Waight Agreement.

The learned Advocate for the petitioners has contended that the first respondents acted entirely without jurisdiction in awarding to retrenched employees a Compassionate Allowance equivalent to two months' wages and Cost of Living Allowance inasmuch as the first respondents entirely disregarded the ordinary law applicable to the discharge of an employee by an employer and to the payment of wages in such case in lieu of notice. However, this contention fails for the reasons set out in our judgment in the *Burma Oil Company (Burma Concession) Ltd. and two others* v. *The Court of Industrial Arbitration, Burma and two others*, Civil Misc. Application No. 43 of 1950, which was heard together with this application.

The learned Advocate for the petitioners has conceded that the claim for gratuity may be a trade dispute ; but he has contended at the same time that the petitioners having announced their willingness to pay gratuities to some workmen on certain scales, the first respondents should not have interfered with their discretion in the matter. However, it appears from the affidavit of Mr. H. W. Grey of the petitioners company in Civil Misc. Application No. 72 of 1949 that the announcement was made only after receipt of the demands and that the gratuities offered by them were not acceptable to the Union. He stated therein :

"The Petitioners had always, although the Rules of Service agreed with the 2nd Respondents so recently as July/August 1948 included no such provision, paid generous gratuities to its long

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service employees and on receipt of the demands, the Petitioner-Company announced (without admission of liability) certain gratuities based upon the length of service and varying from one-eighth month's basic pay to half month's basic pay for each year of service. These gratuities were not accepted by the Union although all employees have since been paid and have drawn gratuities on the above scale."

Since the Union did not accept the gratuities and had the dispute referred to the first respondents, workmen must have received payment thereof subsequently under protest and without prejudice as stated by Maung Ohn Sein, the Secretary of the Union in his affidavit in the said case.

The first respondents have actually taken into consideration the fact that the petitioners have paid gratuities on the following scale:—

(1) Over 30 years' service	...	½ month's basic pay for each year of service
(2) 20 to 29 years' service	...	¼ month's basic pay for each year of service.
(3) 10 to 19 years' service	...	⅛ month's basic pay for each year of service.

They have come to the conclusion that the gratuity paid by the petitioners is not adequate, after due consideration. They have actually rejected the demand for gratuities in respect of postwar recruits on the ground that gratuity necessarily implies long service. They have also graduated the scales of gratuities for other employees carefully with due regard to the length of their service; and there is nothing to show that they have not exercised their discretion in the matter judicially. With reference to the contention that they should not have substituted their discretion for that of the petitioners, an Industrial Court must necessarily substitute its

discretion for that of the employers or the employees or both, whenever occasion arises in connection with matters within its jurisdiction inasmuch as industrial arbitration may involve the extension of an existing agreement or the making of a new one, or in general the creation of new obligation or modification of old ones. [*See* Labour Disputes and Collective Bargaining by Ludwig Teller, Volume 1, cited with approval in *Western India Automobile Association* v. *Industrial Tribunal, Bombay and others*, (1949) F.C.R. 321 at 345.]

The first respondents had their attention drawn to the fact that the Standing Order for the State and "State-partnered" mills do not contain any provision for payment of gratuity; after due consideration thereof they have come to the conclusion that the Standing Orders cannot be regarded as the last word on the subject; and we are of the opinion that their conclusion is right inasmuch as the petitioners have always paid gratuities to their long service employees although the rules of service contain no provision for payment thereof and their learned Advocate has admitted that the Standing Orders cannot be conclusive even in a trade dispute raised by employees in the State and "State-partnered" mills.

The learned Advocate for the petitioners has contended that the first respondents have no jurisdiction to direct that payments to the employees should, in the first instance, be made by the petitioners. However, (1) the employees were recruited and are to be discharged by the petitioners, (2) the third respondent (The State Timber Board) has to share the liability only for the period during which it was their partner, (3) the said period is definite and the learned Attorney-General has admitted the liability of his client, the third respondent, and (4) the learned

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Advocate for the petitioners has to admit that there really is nothing to be fought out between them. So the matter is one which can be adjusted easily between them; and we are of the opinion that the first respondents have not exceeded their jurisdiction in directing that payments should, in the first instance, be made by the petitioners.

The application is dismissed. The second respondent is entitled to its costs. Advocate's fee ten gold mohurs.

SUPREME COURT.

DAW HLA MAY (APPELLANT)

v.

U KO YIN (RESPONDENT).*

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Nov. 29.

Urban Rent Control Act, 1946—Application for rescinding ejectment decree—Closed—Similar fresh application—Urban Rent Control Act, 1948 coming into force before disposal,—Ss. 11 (f) *and 13* (c)*—Appeal against order to District Court whether competent—Leave under s. 14-A.*

The Respondent obtained a decree for ejectment on 16th December 1946 when the Urban Rent Control Act, 1946 was in force. He applied for execution the next day praying for ejectment and claiming payment of arrears of rent. The judgment-debtor paid arrears and applied to have ejectment decree rescinded. Both applications were closed. A fresh application was made for rescission of the decree later. On 17th January 1948 the Urban Rent Control Act, 1948 came into force and the previous Act was repealed. On 15th February 1948, the Respondent claimed he reasonably and *bona fide* required the premises for occupation by himself. This contention was upheld by the District Court of Mandalay on appeal. The High Court on second appeal varied the decree but on special appeal a Bench of the High Court restored the District Judge's Order. Upon appeal to the Supreme Court by Special Leave, it was contended that the Controller's certificate under s. 14-A was necessary to initiate a proceeding by a landlord for recovery of possession on any of the grounds mentioned in s. 11 (*f*).

Held : That under s. 14 (2) of the Act the Court on an application for rescission must decide whether the order or decree sought to be rescinded would not have been made or given if the provision of s. 11 were in force at the time. The Act of 1948 in s. 11 (*f*) and (*c*) allows the landlord to sue for ejectment if the premises are reasonably and *bona fide* required by him for occupation by himself. Consequently the decision of the High Court was affirmed.

Dr. Ba Han for the appellant.

Messrs. Basu and *Venkatram* for the respondent.

The judgment of the Court was delivered by

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* Civil Appeal No. 4 of 1950 being appeal against the decree and judgment of the High Court in Civil 1st Appeal No. 1/49, dated the 25th August 1949.

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

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MR. JUSTICE E MAUNG.—The two issues of importance which the learned counsel for the parties desire to canvass before us do not arise for consideration as the appeal must be dismissed on a short point. The essential facts are that the respondent obtained a decree for ejectment and arrears of rent against the appellant on the 16th December 1946 in Civil Suit No. 16 of 1946 of the 1st Assistant Judge, Mandalay. At the time, the Urban Rent Control Act of 1946 was in force. On the day following the making of the decree the respondent applied for execution in Civil Execution No. 15 of 1946, the remedies sought in execution being for ejectment and payment of the arrears of rent decreed in the suit. The appellant paid into Court the arrears of rent decreed and made an application under section 14 of the Urban Rent Control Act of 1946 to have the decree for ejectment rescinded. Neither the respondent nor the appellant proceeded with their applications for execution of the decree of ejectment or for rescission of the decree, with the result that the proceedings in both applications were closed. On the 3rd May 1947 the appellant made a fresh application for rescission of the decree, again under section 14 of the Urban Rent Control Act of 1946. Objections were filed on behalf of the respondent and for one reason or another the case dragged on till 1948. On the 17th January 1948 the Urban Rent Control Act of 1946 was repealed and replaced by the Urban Rent Control Act of 1948. The Act of 1948 in sections 11 (*f*) and 13 (*c*) allows the landlord to sue for ejectment if the premises "are reasonably and *bona fide* required by the landlord for occupation by himself or by any member of his family or for the occupation of any person for whose benefit the premises are held."

Obviously in view of this new enactment the respondent on the 25th February 1948 filed a document

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before the Assistant Judge of Mandalay which may reasonably be read either as an application for ejectment of the respondent in execution of the decree of the 16th December 1946 or as additional objections to the granting of the appellant's petition of the 3rd of May 1947 for rescission of that decree. The Assistant Judge on this took evidence and holding that the respondent reasonably and *bona fide* required the premises for occupation by himself rejected the appellant's application for rescission.

An appeal was preferred against this order of the Assistant Judge but the District Court of Mandalay dismissed the appeal affirming the trial Court's findings that the respondent reasonably and *bona fide* required the premises for his own residence. A single Judge of the High Court having varied the decree on appeal to the High Court, a Bench of the High Court before which, by leave of the learned Judge, Special Civil Appeal No. 1 of 1949 was heard directed "that the order of the District Court of Mandalay upholding that of the 1st Assistant Judge's Court of Mandalay dismissing the respondent Daw Hla May's application to rescind the decree for ejectment passed in Civil Suit No. 16 of 1946 of the said 1st Assistant Judge's Court on the 16th December 1946 be restored." It is against this decree of the High Court that an appeal with the special leave of this Court has been preferred.

Before us Dr. Ba Han for the appellant contended that the document exhibited by the respondent before the 1st Assistant Judge of Mandalay on the 25th February 1948 could not be acted upon by the Court in the absence of a certificate from the Controller under section 14-A of the Rent Control Act of 1948. He says that this document was intended to initiate a proceeding by a landlord for recovery of possession of the premises against a tenant on the grounds specified

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in clause (*f*) of section 11 of the Act and that in the absence of a certificate from the Controller the Court had no jurisdiction to determine the issue whether the premises are reasonably and *bona fide* required by the landlord for his residence. But when it was pointed out to him that the document is also reasonably capable of being treated as an objection made to the appellant's application for rescission of the decree, that the Courts below had in fact treated the document in that sense and that section 14 (*2*) of the Act clearly indicates that the Court on an application for rescission must decide whether the order or decree sought to be rescinded "would not have been made or given if the provisions of section 11 were in force or applicable thereto at the time when the order or decree was made", the learned counsel frankly admitted that he could not contest the competence of the 1st Assistant Judge to reject the appellant's application for rescission on the grounds taken by that learned Judge. The decision of this Court in *Tai Chaun & Co.* v. *Chan Seng Cheong* (1) is clearly in point. But Dr. Ba Han informs us that his client apprehends that the order of the Assistant Judge, which has been restored on appeal by a Bench of the High Court, may be interpreted as meaning more than it had decided. We see no grounds, however, for this apprehension. The decree of the High Court which we have reproduced earlier is quite specific.

In this view of the case the appeal must be dismissed. The point which the learned counsel for the respondent desires to take before us, namely, that an order to rescind the decree on an application under section 14 of the Urban Rent Control Act of 1946 or 1948, other than by a Judge of the Rangoon City Civil Court or by a District Judge is not

(1) (1949) B.L.R. (S.C.) 86.

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appealable does not arise here for consideration as in any event we must uphold the decision of the Assistant Judge of Mandalay. Similarly also, of the point taken by the learned counsel for the appellant that an application for execution of a decree for ejectment in the circumstances of this case would not be competent under section 14-A of the Urban Rent Control Act of 1948.

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

SUPREME COURT.

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Nov. 29.

HAW LIM ON (APPELLANT)

v

MA AYE MAY (RESPONDENT). *

Urban Rent Control Act, 1948—Application under s. 14 (1)—Appeal to District Court—Jurisdiction of Assistant Judge in administering—Code of Civil Procedure, ss. 47, 104 and Order 43.

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. On appeal to the Supreme Court against this order.

Held : That the appeal lay to the District Court. The Urban Rent Control Act, 1948 by s. 15 provides for an appeal on law and on fact from any decree or order made by any Judge of the District Courts outside Rangoon. It cannot be deemed to have excluded any right of appeal from other courts.

The Rangoon Botataung Co. Ltd. v. *The Collector of Rangoon*, 6.L.B.R. 150 (P.C.), referred to.

S. 15 of the Urban Rent Control Act, 1948 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 ; and an order would not be appealable unless it falls within s. 47 or s. 104 or Order 43 of the Code of Civil Procedure. The Urban Rent Control Act, 1948 by s. 15 gives the right of appeal from all orders. The test in such cases is whether the order will be appealable under the provisions of the Code of Civil Procedure or other relevant enactments. The order in question in this case falls within s. 47 (1) of the Code of Civil Procedure as relating to the execution, discharge or satisfaction of a decree and a determination of such a question is a decree under s. 2 (2) of the Code of Civil Procedure. The appeal to the District Court was therefore competent.

Chaung Po for the appellant.

N. C. Sen for the respondent.

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* Civil Appeal No. 8 of 1950 being appeal against decree and judgment of the High Court, dated 25th January 1950 in Civil Revision No. 64 of 1949.

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

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The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The short point that arises for determination in this appeal is of general importance but does not appear to us to offer any difficulty in its solution.

The respondent against whom a decree for ejectment had been passed in Civil Suit No. 14 of 1948 of the Court of the 1st Assistant Judge of Bassein made an application under section 14 (*1*) of the Urban Rent Control Act of 1948 to have that decree either discharged or rescinded. The application was rejected and the respondent preferred an appeal to the District Court of Bassein. The District Court dismissed the appeal holding that an appeal from the order of the 1st Assistant Judge of Bassein will lie, if at all, to the High Court. On the respondent applying to the High Court in revision against the rejection of her appeal by the District Court, the High Court in Civil Revision No. 64 of 1949, following an earlier decision of the High Court in *U Ko Yin* v. *Daw Hla May* (1), directed the District Court of Bassein to proceed with the appeal before it according to law. It is against this order of the High Court that the present appeal has been preferred to this Court by the appellant.

The learned counsel for the appellant relies on the decision of the Privy Council in *The Rangoon Botataung Co. Ltd.* v. *The Collector of Rangoon* (2) and contends that the Urban Rent Control Act having in section 15 thereof made a specific provision for an appeal on law and on fact from "any decree or order made by any Judge of the Rangoon City Civil Court or any Judge of the District Courts outside Rangoon" must be deemed to have excluded any right of appeal from a decree or orders of Courts other than the

(1) Spl. Civil Appeal No. 1 of 1949. (2) 6 L.B.R. 150.

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Courts therein mentioned. But we are clearly of opinion that the Privy Council's decision does not support the learned counsel's case, for at page 152 of the report appears the following passage:—

> "Their Lordships cannot accept the agument or suggestion that when once the claimant is admitted to the High Court he has all the rights of an ordinary suitor, including the right to carry an award made in an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree of the High Court made in the course of its ordinary jurisdiction."

It must be remembered that an Assistant Judge in administering the Urban Rent Control Act, does so in the course of his ordinary jurisdiction as a Judge. To accept the learned counsel's contention would lead to this absurd result that whereas a decree for ejectment made by an Assistant Judge or a Subordinate Judge will not be appealable, a similar dercee made by a District Judge will be appealable.

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. The test then for the purposes of this case is whether the order which was passed by the 1st Assistant Judge in the proceedings out of which the

appeal to this Court arises, will be appealable under the provisions of the Civil Procedure Code or other relevant enactments.

In the present case the decree made in Civil Suit No. 14 of 1948 was sought to be executed by the appellant who was the decree-holder therein, in C.E. No. 14 of 1948, by delivery of possession to him. The respondent against whom the decree was made applied to the same Court, as she had the right to do, under section 14 (*1*) of the Act. Under the provisions of the Act on such an application by the judgment debtor to stay or suspend execution of such order or decree or postpone the date of delivery of possession for such period or periods and subject to such conditions, as the Court thinks fit, in regard to payment by the tenant, the Court can discharge or rescind the order or decree. It was this relief which the respondent sought and which she was denied by the trial Court. Clearly questions of this nature fall within the meaning of "relating to the execution or discharge or satisfaction of the decree" in section 47 (1) of the Civil Procedure Code. That being so, the rejection of the respondent's 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.

We hold therefore that the appeal to the District Court was competent and that the High Court was right in remanding the proceedings to the District Court for disposal in accordance with law.

The appeal is accordingly dismissed with costs. Advocate's fees ten gold mohurs.

SUPREME COURT.

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Dec. 18.

AJAM MOHAMED LOOVA WALLA (APPLICANT)

v.

EBRAHIM DAWJEE JEEWA (RESPONDENT).*

Supreme Court Bench constituted with two Judges from the High Court—S. 146, Burma Constitution—Interpretation of—Principles guiding—General Clauses Act, s. 12 (2)—Constitution Act, s. 222 (3)—Review of Supreme Court judgment—Order 10, Rule 3, Order 28, Rule 4, Supreme Court Rules—Grounds for review.

Civil Appeal No. 11 of 1949 was first heard by the Supreme Court on 25th September 1950. The Chief Justice was absent owing to illness. The other Judge of the Supreme Court on duty was disqualified having dealt with the matter as a Judge on the Original Side in the High Court. The Acting Chief Justice applying s. 146 of the Constitution invited two Judges from the High Court to form a Bench. The Chief Justice resumed office on 1st August 1950 but was not well enough to hear the appeal. The Court was constituted later with the same three Judges who passed judgment. Upon an objection that a Bench of the Supreme Court cannot in law be constituted with two Judges invited from the High Court or in the alternative that such a Bench could not be constituted when the Chief Justice had resumed charge.

Held : That the objections were untenable. In interpreting the Constitution the provisions must not be cut down by a narrow and technical construction but must be given a large, liberal and comprehensive spirit, considering the magnitude of the subjects involved. The construction most beneficial to the widest possible amplitude of its powers must be adopted and changing circumstances must also be taken into account.

Edwards v. *Attorney-General for Canada*, (1930) A.C. 124 at 136; *St. Catherine's Milling and Lumber Co.* v. *The Queen*, (1888) 14 A.C. 46 at 50; *British Coal Corporation* v. *The King*, (1935) A.C. 500 at 518; *James* v. *Commonwealth of Australia*, (1936) A.C. 578 at 614, referred to and approved.

A Constitution of a Government is a living and organic thing, which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat*.

Re. The Central Provinces and Berar Act No. XIV of 1938 (1939) F.C.R., Vol. I, 18 at 37, referred to.

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* Civil Misc. Application No. 82 of 1950 being application for review of judgment passed in Civil Appeal No. 11 of 1949 of the Court.

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

Such construction ought to avoid absurdity or inconsistency, but must be interpreted in such a way as to make it most beneficial to the widest possible amplitude of its powers.

U Htwe v. U *Tun Ohn*, (1948) B.L.R. 541 at 553, referred to.

S. 146 (*1*) of the Constitution not merely refers to " a vacancy " but also of " Vacancies " in order to enable Judges from the High Court being requested to attend to constitute a quorum. It also contemplates the possibility of the Chief Justice and the Acting Chief Justice being absent from the Court. The Constitution does not provide for appointment of acting Judges to the Court. The result of accepting the appellant's contention would lead to hearing of appeals being kept pending indefinitely in cases of two vacancies, till the President with the approval of the Parliament appoints additional members of the Supreme Court. This would lead to an impossible situation and the maxim *lex non cogit ad impossibilia* becomes appropriate and applicable. Even though the Chief Justice may not have been on leave s. 146 of the Constitution contemplates absence through illness from a session of the Court.

A right of review should be stricily construed. Doubt should not be thrown upon the finality of the decision of the Supreme Tribunal of the country. These principles are covered by Order 10, Rule 3 and Order 26, Rule 4 of the Supreme Court Rules.

Venkata Narasimha Appa Rew v. *The Court of Awards*, 13 I.A. 155 at 158-59, referred to.

The grounds taken for review were either fully argued previously or could have been so argued, the parties being represented by very senior counsel. A new point involving mixed questions of law and fact not taken before the court could not be a foundation for a review.

J. B. Sanyal for the applicant.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—This is an application for review of judgment in the appeal preferred by the respondent to this Court in Civil Appeal No. 11 of 1949. That appeal was heard in three stages and three judgments were delivered following the different hearings. When the appeal was first heard resulting in the judgment of the 25th July 1950 the Chief Justice of the Union was absent from the Court on leave owing to his illness and the Court was presided over by the Acting Chief Justice. Mr. Justice Thein Maung,

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the only other Judge of this Court then on duty, having, as a Judge on the Original Side of the High Court of Judicature at Rangoon, heard the suit out of which the appeal arose, was disqualified from hearing the appeal and the Acting Chief Justice, applying the provisions of section 146 of the Constitution, invited Mr. Justice On Pe and Mr. Justice Thaung Sein of the High Court to sit with him to hear the appeal

Following the judgment of the 25th July 1950 it became necessary to hear counsel further and the subsequent hearings took place on the 2nd and 16th August 1950. The Chief Justice of the Union resumed office on the forenoon of the 1st August 1950 but he was not sufficiently recovered yet to undertake the arduous hearing involved in the appeal and the Court was constituted under his directions with the same three Judges who heard the appeal in the first instance. In the result the judgment of the Original Side of the High Court of Judicature was restored.

At the hearing of the appeal the parties were represented by very senior counsel and no suggestion whatsoever was made that the bench hearing the appeal had been improperly constituted. However, the applicant, now advised by another learned counsel, has challenged the constitution of the bench which had determined the appeal. It is claimed on behalf of the applicant that a bench of the Supreme Court cannot in law be constituted, in any circumstance, with two Judges invited from the High Court. In the alternative it is claimed that when the Chief Justice of the Union has resumed charge of the Court, even if he happens then to be unable from illness to sit on the bench, a bench of this Court cannot be constituted under section 146 of the Constitution.

We have heard Mr. J. B. Sanyal at length on his challenge of the constitution of the bench hearing the appeal out of which this application has arisen and we see no substance in this contention. As the matter, however, is one of general importance we are giving our reasons at some length for rejecting the application.

Certain principles which have been laid down by the Privy Council in England and other Judicial tribunals on the interpretation of the Constitution are worthy of notice. We are in full accord with these principles which we now proceed to state.

In *Edwards* v. *Attorney-General for Canada* (1) the Privy said :

"Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs. 'The Privy Council, indeed, has laid down that Courts of law must treat the provisions of this British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes ; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British Colony' : *see* Clement's Canadian Constitution, 3rd ed., p. 347.

The learned author of that treatise quotes from the argument of Mr. Mowat and Mr. Edward Blake before the Privy Council in *St. Catherine's Milling and Lumber Co.* v. *The Queen* (2). 'That Act should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words'."

(1) (1930) A.C. 124 at 136. (2) (1888) 14 A.C. 46 at 50.

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In *British Coal Corporation* v. *The King* (1) the Privy Council said :

" Indeed, in interpreting the constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted."

In *James* v. *Commonwealth of Australia* (2) the Privy Council said :

" It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning."

In *Re. The Central Provinces and Berar Act No. XIV of 1938* (3) of the Federal Court in India, Gwyer C.J. said in respect of the Indian Constitution of 1935 :

" I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it ; but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interest of any legal or constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors. A Federal Court will not strengthen, but only derogate from, its position, if it seeks to do anything but declare the law ; but it may rightly reflect that a constitution of Government is a living and organic thing, which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat.*"

This Court in *U Htwe* v. *U Tun Ohn* (4) summarised the principles thus :

" In the case of the interpretation of a Constitution, we must interpret it not only to avoid absurdity or inconsistency, but we

(1) (1935) A.C. 500 at 518.
(2) (1936) A.C. 578 at 614.
(3) (1939) F.C.R. Vol. I, 18 at 37.
(4) (1948) B.L.R. 541 at 553.

must interpret it in such a way as to make it most beneficial to the widest possible amplitude of its powers."

It is then in the light of these principles that section 146 of the Constitution should, in our opinion, be interpreted. Mr. Sanyal contends that section 146 (1) of the Constitution clearly contemplates only one Judge of the High Court being requested to attend at the sittings of the Supreme Court. He says that there is no room for the application of section 222 (3) of the Constitution which would attract in other circumstances the provisions of section 12 (2) of the General Clauses Act. He claims that from the context the contrary intention appears for the exclusion of that provision of the General Clauses Act. We are not satisfied that a contrary intention is apparent as claimed by the learned counsel. In the first place section 146 (1) of the Constitution speaks not merely of "a vacancy" but also of "vacancies" in the Supreme Court which can give rise to quorum not being possible of the Judges of the Court available to hold a session of the Court. It also contemplates the possibility of not merely the Chief Justice but also the Acting Chief Justice of the Union being absent from the Court at any one time. The Constitution also does not provide for the appointment of Acting Judges to the Court as in the case of the High Court.

It has happened here more than once in the past that out of the three Judges of this Court two Judges, because of the part they had taken as Judges of the High Court of Judicature at Rangoon at an earlier stage of the proceedings which resulted in an appeal to this Court, became disqualified to hear and determine the appeal. To accept the learned counsel's contention before us that in such circumstances only one Judge of the High Court may be requested to attend at the sittings of the Court to hear and determine

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such appeal would lead to the absurd result that the appeal would have to be kept pending indefinitely till such time as the President with the approval of the Parliament appoints additional members of the Supreme Court or until the present Judges are replaced by new Judges appointed in consonance with the Constitution. The maxim *Lex non cogit ad impossibilia* is not inappropriate to the relevant provisions of the Constitution.

The alternative plea that the Chief Justice not being on leave after 1st August 1950 the Court held without him as a member thereof would be incompetent, is clearly without substance. Section 146 of the Constitution refers to the "absence through illness or on leave or in the discharge of other duties assigned by statute or otherwise" in relation to any Judge of the Court. The Chief Justice may not have been on leave but he was absent through illness from "a session of the Court" within the meaning of section 146 of the Constitution.

We hold therefore that the Court was duly constituted to hear and determine the appeal out of which the present application has arisen.

Mr. Sanyal further contends that assuming the Court to have been validly convened, this Court can in proper cases review its own judgment. He has cited several cases before us relating to the practice of the Privy Council. None of these go further than the case of *Venkata Narasimha Appa Row* v. *The Court of Awards* (1) where the following passage appears :—

"No authority has been cited to their Lordships which can warrant them in granting a rehearing under such circumstances as these. It is quite true that there may be exceptional circumstances which will warrant this Board, even after their advice

(1) 13 I.A. 155 at 158 and 159.

has been acted upon by Her Majesty in Council, in allowing a case to be re-heard at the instance of one of the parties. The cases in which that may be competently done are explained by Lord Brougham in the case of *Rajunder Narain Rae* v. *Bijai Govind Sing* (1). His Lordship properly describes this privilege, when allowed, not as a right, but as an indulgence. At page 134 of the first volume of Moure's Reports, his Lordship says : 'It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of the last resort, where, by some accident, without any blame, the party has not been heard, and an order has been inadvertently made as if the party had been heard. Even before report, whilst the decision of the board is not yet *res judicata*, great caution has been observed in permitting the rehearing of appeals. In the last case to which we were referred, that of *Hebbert* v. *Purchas* (2), where a litigant alleged, before report and approval, that he had been disabled by want of means from appearing and maintaining his case, the Lord Chancellor said : 'Having carefully weighed the arguments, and considering the great public mischief which would arise on any doubt being thrown on the finality of the decisions of the Judicial Committee, their Lordships are of opinion that expediency requires that the prayer of the petitions should not be acceded to, and that they should be refused.' There is a salutary maxim which ought to be observed by all Courts of last resort—*Interest reipublicae ut sit finis litium*. Its strict observance may occasionally entail hardship upon individual litigants but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this."

These are principles similar to those in Order X, Rule 3 and Order 28, Rule 4 of the Rules of this Court.

The grounds taken in the present application for a rehearing have been either fully argued at the previous hearing of the appeal or could have then been pressed before the Court by counsel appearing

(1) 2 Moore's Ind. Ap. Ca. ; S.C. 1 Moo. P.C. 117. (2) 7 Moo. P.C. 458.

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for the applicant. It was alleged in the application before us that the Court assumed certain facts to be established without sufficient examination of the evidence on record. It is also contended that from certain facts found established the Court was not justified in drawing certain inferences or that certain facts had not been given such weight as the learned counsel for the applicant thinks should have been given by the Court which disposed of the appeal. Further, a new point of mixed law and fact which never was taken before the Court is sought to be taken now in support of the application for the rehearing of the appeal.

Obviously such matters as these cannot form a foundation for a review application even under the Civil Procedure Code. It follows therefore that where the applicant, to succeed in his application for rehearing, has to bring his case within the principles stated in Order 10, Rule 3 or Order 28, Rule 4 he cannot possibly succeed. The present application for a rehearing is clearly without merits and is dismissed.

SUPREME COURT.

J. HUIE (APPLICANT)

v.

L. K. AIYAVOO NAIDU AND FOUR OTHERS (RESPONDENTS).*

†S.C. 1950

Dec. 18.

Union Judiciary Act, s. 6—Application for Special leave when to be entertained.

Held : In the absence of any special circumstance such as want of jurisdiction or doing of a great and irreparable injury or involving a question of great public or private importance, special leave should not as a rule be granted.

In this case the Trial Court gave an *ad interim* injunction which was set aside by the Appellate Court, and it is clear that the order was one which was passed during the pendency of a regular suit and that what is involved is whether discretion on sound judicial principles has been exercised by the High Court in reversing the order of the City Civil Court. As the High Court was right in thinking that the injury caused cannot be considered to be irreparable, the application for Special Leave was refused

Chan Htoon for the applicant.

Dr. Ba Han, *Nyun Han* and *Tin Thein* } for the respondent 4.

V. S. Venkatram *Burjorjee* } for the respondent 5.

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

SIR BA U.—This is an application for special leave to appeal from an order passed by the High Court in exercise of its appellate jurisdiction. It arises in this way. The applicant, J. Huie, is the proprietor of a

* Civil Misc. Application No. 65 of 1950.

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

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picture hall known as the "Gaiety Cinema" situated in Phayre Street, Rangoon. On the 20th April 1950 he filed a suit, Civil Regular No. 451 of 1950, in the Rangoon City Civil Court against the five respondents in respect of a Tamil talkie picture called "Mohini". His case is as follows : The 1st respondent L. K. Aiyavoo Naidu carries on business as a film distributor in Madras in the name of "Jayalakshmi Pictures". On the 11th November 1949 he secured a lease in the name of his manager, the 2nd respondent A. V. Nataraja Mudaliar, of the right of exhibiting, distributing or otherwise exploiting four Tamil talkie pictures known as "Valaikkari", "Abimanyu" "Mohini" and "Kanjan", in Rangoon and in other places in the Union of Burma from their producers "Jupiter Pictures Ltd.", Madras, for three years from the date of handing over the picture prints to him. On the following day, that is the 12th November 1949, the 1st respondent sub-leased the right of exhibiting the said four pictures in Rangoon and other place in the Union of Burma to the applicant. But when the 2nd respondent received the aforesaid four pictures from the distributors, instead of handing them over to the applicant, he sub-leased them to the 3rd respondent A.R.S. Kaliappa Chettyar who is a distributor of films in Madras. The 3rd respondent in turn sub-leased the pictures to the 4th respondent S. Nadesan Pillay who carries on film distributing business in Rangoon under the name and style of the "General Film Service". In pursuance of such sub-lease the 4th respondent obtained possession of the print of the picture "Mohini" at Rangoon on the 2nd April 1950 and when he was about to exhibit it at the cinema of the 5th respondent, the applicant filed the suit, Civil Regular No. 451 of 1950, in the Rangoon City Civil Court asking for declaration of his right to the

picture, for possession thereof and for perpetual injunction restraining the defendants (now respondents) from exhibiting it either in Rangoon or elsewhere in the Union of Burma.

The suit was instituted on the 20th April 1950. On the same day the applicant filed an application supported by an affidavit praying for an *ad interim* injunction. *Ad interim* injunction was granted *ex parte* against the 4th and 5th respondents and notices both in respect of the suit and the application for injunction were directed to be issued to the other three respondents who were and are residents of Madras. The 5th of June 1950 was fixed for the return of the notices. Five days later the 4th and 5th respondents filed an application praying for the discharge of the order of *ad interim* injunction passed *ex parte* against them. The hearing of the said application was fixed on the same date as the hearing of the application filed by the applicant, that is, the 5th June 1950.

In the meantime the remaining three pictures arrived in Burma and in respect of these three pictures two separate suits similar to the first suit were filed by the applicant and similar reliefs as in the first suit were asked for. The applicant also applied for *ad interim* injunction in both the cases and this was duly granted.

The 4th and 5th respondents appealed to the High Court against the order of *ad interim* injunction granted in the aforesaid suits in three separate appeals. The three appeals were heard together and one order was passed in respect thereof setting aside the order of *ad interim* injunction passed by the Rangoon City Civil Court. The present application is for special leave to appeal from the said order of the High Court.

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Whether the order in question is a final order or not within the meaning of section 6 of the Union Judiciary Act was not canvassed before us. Nor was this question canvassed in Civil Appeal No. 15 of 1948 of this Court, which was cited in the course of the hearing of this case. We do not, therefore, propose to go into it. Whatever the nature of the order may be, what is clear is that it was passed during the pendency of a regular suit. The question is whether special leave should be granted in a case of this kind.

In the absence of special circumstances, such as the want of jurisdiction or doing of a great and irreparable injury or involving a question of great public or private importance, special leave should not as a rule be granted. In the present case no special circumstances such as those mentioned above arise. What is involved is whether discretion on sound judicial principles has been exercised by the High Court in reversing the order of the City Civil Court. We have no doubt in our minds that it has. On going through the proceedings as presented in the Trial Court, we agree with the High Court in thinking that the injury, if there be any, likely to be occasioned to the applicant cannot be considered to be irreparable.

The application is dismissed with costs, ten gold mohurs. The temporary injunction issued by this Court is discharged.

SUPREME COURT.

DAW NGWE TIN (APPLICANT)

v.

THE CONTROLLER OF RENTS AND ONE (RESPONDENTS).*

† S.C. 1950

Dec. 18.

Urban Rent Control Act, s.14-B— Scope of Urban Rent Control Act— Disputed tenancy whether can be decided by the Rent Controller.

Held : That a dispute as to whether a person is a tenant for four rooms or whether he is a tenant for only one room and the tenants of other three rooms are tenants of the landlord can be decided only by a civil court and the Rent Controller has no jurisdiction to decide such a question.

Where an application is made to the Rent Controller for leave to deposit the rent of all four rooms, tenancy of which is disputed, the Rent Controller has no jurisdiction to determine even for the restricted purpose of s. 14-B of the Urban Rent Control Act whether a person claiming to be a tenant is a tenant or not.

S. 14-B (*1*) and (*2*) authorise the Rent Controller to receive deposit from a person who claims to be a tenant, and he will then give notice of the deposit to the landlord. It is for the landlord to withdraw or refrain from withdrawing the deposit. No enquiry is contemplated by the Act. He has authority and is bound to accept deposit of rent ; but he may not call upon the owner of the premises or the alleged landlord to show cause why deposit of rent should not be permitted.

Dr. Ba Han for the applicant.

Ba Sein (Government Advocate) for the 1st respondent.

Kyaw Min for the 2nd respondent.

The judgment of the Court was delivered by

Mr. JUSTICE E MAUNG.—This application is the outcome of a dispute over the tenancy of four rooms comprising House No. 53/55 in 53rd Street, Rangoon. The applicant admittedly is the owner of that house. The 2nd respondent claims that he has been and still

* Civil Misc. Application No. 72 of 1950 being application for directions in the nature of certiorari.

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

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is a tenant of all the four rooms in the house, a claim which the applicant disputes. The applicant's case is that she is in occupation of one room herself, that the 2nd respondent is a tenant in respect of only one room and that the other two rooms are occupied by her own tenants.

These are matters which only a Court of civil judicature has jurisdiction to determine. The Urban Rent Control Act of 1948 provides no machinery whereby the Controller of Rent or any authority other than a Civil Court may determine the points of dispute in this case.

On the 22nd February 1950 the 2nd respondent applied to the Controller of Rents, Rangoon, in his proceedings No. 49D of 1949-50 praying "that the above money amounting to Rs. 2,000 may be accepted as deposit of rent at Rs. 200 per mensem for the ten months April 1949 to January 1950". The amount of Rs. 200 per mensem was arrived at on the basis of the 2nd respondent's claim of being a tenant of all four rooms, the standard rent in respect of each room being Rs. 50 per mensem. On this application being filed the Controller directed the issue of notice to the applicant before us "to show cause why the deposit of rent should not be permitted."

It is clear to us that it was the issue of this notice, not contemplated under section 14-B of the Urban Rent Control Act or in the scheme of the Act, that has been the cause of all this trouble resulting in the application to us. Naturally the applicant before us on being called upon to show cause challenged the claim of the 2nd respondent to be a tenant of the four rooms. Naturally, again, when there were these conflicting claims before the Controller he thought it necessary to come to some finding on the matters in issue. But it is clear from the order which is sought

to be quashed in these proceedings that the Controller did realise that his decision on the disputed issues would not be in any way binding on either party. Unfortunately, however, the order was not so clear as could be expected. In one place the learned Controller said: "The dispute as to the tenancy is a matter to be properly decided by a competent Civil Court. But for the purposes of section 14-B of the Urban Rent Control Act without prejudice to the proper decision of the Civil Court I must deem the applicant to be a tenant in respect of the whole house in the circumstances explained above." The learned counsel for the applicant before us claims, and rightly too in our opinion, that the Controller has no jurisdiction to determine even for the restricted purpose of section 14-B of the Urban Rent Control Act whether a person claiming to be a tenant is a tenant or not.

Section 14-B of the Rent Control Act is quite clear. Remembering that it is not for the Rent Controller to decide the question of a disputed tenancy when a deposit is sought to be made by a person who claims to be a tenant all that should be done under section 14-B (*1*) and (*2*) is to receive the deposit and then to cause a notice of the receipt of the deposit to be served on the landlord. It is then for the landlord to withdraw or to refrain from withdrawing the deposit. No enquiry is contemplated by the Act. An enquiry, as the Controller of Rents realised in this case, would not be fruitful in determining the rights of the parties.

In these circumstances we uphold the action of the Controller of Rents in accepting the deposit of Rs. 2,000 made by the 2nd respondent but we quash that part of his proceedings in No. 49D of 1949-50 relating to issue of notice to the applicant to show cause why the deposit of rent should not be permitted. There will be no order as to costs.

SUPREME COURT.

†S.C. 1950

Dec. 22.

U PO KYAW (APPLICANT)

v.

THE DISTRICT LAND COMMITTEE, PEGU AND ONE (RESPONDENTS).*

Tenancy Disposal Act, Rules 3 (a), *8 and 9—Decision by Village Committee—Appeal beyond time to the District Land Committee—Decision of the District Land Cammittee modifying Village Committee's decision—Review allowed by District Land Committee.*

Held : That a District Land Committee cannot entertain an appeal under Rule 8 (1) beyond the 15 days provided by Rule 8 (1) of the Tenancy Disposal Rules, 1949.

The District Land Committee has no jurisdiction to entertain an application for review, review being excluded by Rule 8 (3) of the Disposal of Tenancy Rules. 1949.

A District Land Committee has no original jurisdiction. Accordingly if on appeal to it from an order of what purported to be a Village Land Committee it found that the Committee was not lawfully constituted, it should refer the dispute to the Village Land Committee constituted in accordance with law for disposal.

Where an owner of the land not exceeding 50 acres in area has been cultivating the same with his own hands he cannot be ousted from the possession of that land—proviso (a) to s. 3 of The Tenancy Disposal Act, 1948 operates to exclude the jurisdiction of any Tenancies Disposal Authority.

Ba Gyan for the applicant.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The applicant is the owner of two holdings of paddy land measuring altogether 15·21 acres, situate in Payagale village jurisdiction, Pegu District. These holdings appear to have been allotted for the year 1949-50 by the Land Committee

* Civil Misc. Application No. 86 of 1950 being application for directions in the nature of certiorari.

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

concerned acting under the Disposal of Tenancies Act, 1948, to the 2nd respondent.

Some time in June 1950 the applicant applied to the Payagale Village Land Committee for permission to cultivate these holdings as an owner-cultivator as his principal means of subsistence. The meeting of the Board held on the 18th June 1950, when the applicant's request came up for consideration, was attended by four members out of ten and was presided over by the Chairman U Tun Sein. It is not quite clear how the discussions at that meeting went but the result was that the Chairman informed the applicant and the 2nd respondent Maung Hla Maung that for the year 1950-51 these two holdings were to be cultivated by the applicant.

This decision was not acceptable to the 2nd respondent and he applied to the Township Officer, Pegu, requesting for relief. The Township Officer referred the application back to the Village Committee for further consideration. One of the grounds taken by the 2nd respondent in objection to the Village Committee's decision of the 18th June 1950 was that only four members out of ten were present on the day the allotment of the two holdings for cultivation for the agricultural season of 1950-51 was considered and that the Committee should have deferred the consideration of the matter till the other members could have attended. On the reference by the Township Officer the Board met again on the 19th July 1950 when all ten members attended and after the examination of the parties the Committee decided to affirm the decision made earlier at the meeting of the Committee on the 18th June 1950. The decision was a majority decision, seven members being in favour of allowing the applicant to cultivate the two holdings on the ground that an owner who is an agriculturist has a right under the Disposal of

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Tenancies Act to cultivate with his own hands and as his principal means of subsistence an area not in excess of 50 acres. Three members who were for alloting the holdings to the 2nd respondent took the view that as an old tenant the 2nd respondent is entitled under the instructions issued by the Ministry of Agriculture to have the tenancy of the holdings for the year 1950-51.

The 2nd respondent appealed to the District Land Committee, Pegu. The appeal was preferred on the 11th August 1950 and was set down for hearing on the 28th August 1950. Apparently the fact that the appeal was preferred out of time was not noticed in the office of the District Land Committee. Under Rule 8 (1) of the Disposal of Tenancies Rules, 1949, an appeal to the District Land Committee must be made within 15 days of the making of the order complained of, provided also notice of the intention to appeal has been given within three days of the making of the said order to the Committee exercising original jurisdiction. The appeal in the present case was preferred on the 24th day after the making of the order complained of.

There is no provision in the Rules under which the appellate authority may extend the period provided for an appeal. This is only to be expected as the agricultural season is a short one and expedition in the settlement of disputes relating to the allotment of tenancies is essential if holdings are to be effectively cultivated by the person or persons to whom they are allotted.

The appeal, therefore, to the District Land Committee made beyond the 15 days provided by Rule 8 (1) above referred to could not have been acted upon by that Committee and on that ground alone the proceedings of the District Land Committee, Pegu, are liable to be quashed as being in excess of its powers.

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On the day fixed for the hearing of the appeal, it appears from the proceedings placed before us, that the full committee did not meet; instead a sub-committee of the District Land Committee met and the appeal was heard by this Sub-Committee which decided to allow the applicant to continue cultivating 10·21 acres and to allot to the 2nd respondent 5 acres. It is not quite clear from the proceedings but from the diary entries of the 1st September 1950 it would appear that the decision of the Sub-Committee was adopted by the full Committee and the parties were given notice of the decision thus adopted by the full Committee. The wording of the subsequent resolution of the 9th October 1950 of the District Land Committee, to which we shall refer later, also supports the view that the Sub-Committee's decision was adopted by the full Committee before announcing the same to the parties.

On the 26th September 1950 the 2nd respondent filed an application before the District Land Committee, Pegu, for review of the decision of that Committee. On this application the District Land Committee on the 9th October 1950 decided to revoke its previous decision and to allot to the 2nd respondent all 15·21 acres. Apart from the legality or otherwise of entertaining a review application the District Land Committee apparently did not realise that what it was doing was not to allot a tenancy of an agricultural holding for a person to cultivate but was granting the 2nd respondent the holdings with the fruit of the labour by the applicant in respect of 10·11 acres for the major portion of the agricultural season. By 9th October 1950 the applicant would in the normal course, have completed the ploughing and planting and transplanting of paddy on these holdings and all that remains to be done thereafter would be to collect the fruits. We can see nowhere in the Disposal of

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Tenancies Act a power in this sense invested in Tenancies Disposal Committees.

It is also clear to us that a power of review is excluded by Rule 8 (3) of the Disposal of Tenancies Rules, 1949. As we have already said, it is also clear to us that the District Land Committee had no jurisdiction to entertain an appeal preferred beyond 15 days of the making of the order complained of. The 2nd respondent, apparently realising that if his petition of the 11th August 1950 to the District Land Committee is treated as an appeal it is out of time, has claimed in this affidavit before us that the Village Committee which allotted the holdings to the applicant in June and July 1950 was not a body duly constituted in accordance with the instructions issued by the Government of the Union and that he was therefore not challenging its orders by way of an appeal when he addressed himself to the District Land Committee on the 11th August 1950.

On the materials on record it does not appear that the 2nd respondent challenged the constitution of the Village Committee before the District Land Committee. Moreover, in trying to get over the time bar the 2nd respondent is faced with the bar under Rule 9 of the Disposal of Tenancies Rules, 1949. If the original allotments of June and July 1950 were by a body not competent to make them, then the District Land Committee's duty under Rule 9 was clearly to refer the matter to a duly constituted Village Committee and not to deal with it by exercise of original jurisdiction. Further, if on the 11th August 1950 there had been no adjudication by any authority competent to allot tenancies the applicant on that date, having already been in possession of 15·21 acres of his own land which he was actually working with his own hands as his principal means of subsistence, could not be ousted as

proviso (*a*) to section 3 of the Disposal of Tenancies Act would operate to exclude the jurisdiction of any Tenancies Disposal Authority.

In these circumstances the proceedings of the District Land Committee allotting to the 2nd respondent, in the first instance 5 acres and later 15·21 acres, of the applicant's land must be and are hereby quashed with costs. Advocate's fees five gold mohurs.

SUPREME COURT.

† S.C. 1950

Dec. 18.

NOOR MOHAMED (APPLICANT)

v.

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

Direction in the nature of certiorari—Quashing of the order of the Collector imposing a Stamp Duty—Direction in the nature of Mandamus to direct Financial Commissioner to send a case to the High Court under s. 57 (1) of the Stamp Act.

A deed of sale was executed in favour of Ma Khin Pu on the 18th March 1947; on the 29th June 1950 she executed a Deed described as a Deed of Disclaimer and Relinquishment in respect of the same property in favour of the Applicant. When the document was presented for registration the Sub-Registrar sent it to the Collector under ss. 33 and 36 of the Stamp Act and the Collector ordered payment of deficit stamp fee under s. 40 of the Stamp Act. Applicant filed a Revision to the Financial Commissioner under s. 56 of the Act and the Application was rejected. Thereafter the Applicant filed an application to the Financial Commissioner asking him to state a case and refer it to the High Court under s. 57 of the Act and the application was rejected. The Applicant then filed an application for direction in the nature of certiorari.

Held: That the Collector and the Financial Commissioner had jurisdiction to decide under what article of the Stamp Act the document should have been stamped and in passing the orders in question they have not exceeded their jurisdiction in any way

A writ of certiorari will not lie if the authority whose order is impugned by means of the writ has jurisdiction to deal with the matter and dealt with it, even though the Supreme Court might not agree with the said authority on questions either of law or fact or of both.

Mr. Gwan Kee v. *The Union of Burma*, (1949) B.L.R. 151 (S.C.), followed.

The writ of mandamus cannot be demanded *Ex Debito Justitiae*. It is issued only in the discretion of the Court and the Court will not issue it unless, under any law for the time being in force it is clearly incumbent on a person holding a public office to do or to forebear from doing a specific act. Section 57 of the Stamp Act gives discretion to the Financial Commissioner in the matter. It is not incumbent on him to state a case and refer it to the High Court. Therefore application for writ of mandamus does not lie.

The Queen v. *Garland*, (1870) L.R. 5 Q.B. 272; *The Queen* v. *Church Wardens of All Saints, Wigan*, (1876) 1 A.C. 620, referred to.

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* Civil Misc. Application No. 92 of 1950 being application under section 25 of the Constitution for directions in the nature of certiorari and mandamus.

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

P. B. Sen for the applicant.

The judgment of the Court was delivered by

MR. JUSTICE THEIN MAUNG.—This is an application for a writ of certiorari and/or a writ of mandamus. The writ of certiorari is to quash the order of the Collector of Rangoon imposing a deficit duty on a document, calling upon the present applicant to pay the deficit duty and a penalty and calling upon one Ma Khin Pu to show cause why she should not be prosecuted under section 62 of the Burma Stamp Act. The writ of mandamus is to direct the Financial Commissioner (Commerce), Burma, to state a case and refer it to the High Court under section 57, sub-section (*1*) of the Stamp Act.

The circumstances under which the application is made are as follows: Ma Khin Pu, who bought some immoveable property in Rangoon by a registered deed dated the 18th March 1949, executed what purports to be a deed of disclaimer and relinquishment, dated the 29th June 1950, in respect of the same property whereby she disclaimed and relinquished whatever right, title or interest she had therein in favour of the applicant. When this document was presented for registration the Sub-Registrar of Deeds, Rangoon, impounded it and sent it to the Collector under sections 33 and 38 of the Stamp Act; and the latter passed the said order under section 40 of the Stamp Act. The applicant then applied to the Financial Commissioner (Commerce), Burma, for revision of the said order under section 56 of the Act; and sometime after the latter had rejected his application and confirmed the order of the Collector the applicant filed an application asking him to state a case and refer it to the High Court under section 57 of the Act. That application also has been rejected

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on the ground that there is no necessity to make a reference as the case is clear.

The applicant's case is that he had to purchase the said immoveable property in the name of Ma Khin Pu to get over the Transfer of Immoveable Property (Restriction) Act, 1947, which prohibits transfer of immoveable property to foreigners, that Ma Khin Pu never had any right, title or interest in the property in spite of the sale deed having been in her favour, that the Collector and the Financial Commissioner are wrong in holding that the deed of disclaimer and relinquishment is really a deed of conveyance by which Ma Khin Pu's right, title and interest in the property are transferred to the applicant and that the Financial Commissioner should have stated the case and referred it to the High Court inasmuch as a difficult question of law is involved.

However the Collector and the Financial Commissioner have jurisdiction to decide under what article of the Stamp Act the document should have been stamped and to pass the orders in question, and they have not exceeded their jurisdiction in any way at all.

So the application for a writ of certiorari must be dismissed in accordance with the following observation of this Court in *Gwan Kee* v. *The Union of Burma* (1):

"As has been pointed out by this Court on several occasions, the writ of certiorari deals with the question of want of jurisdiction or excess of jurisdiction. If the authority, whose order is impugned by means of the writ of certiorari, had jurisdiction to deal with a certain matter and dealt with it, this Court would not interfere even though it might not agree with the said authority on questions either of law or fact or of both."

The application for a writ of mandamus also must be dismissed. The writ cannot be demanded *Ex Debito*

(1) (1949) B.L.R. 151 (S.C.).

Justitiae. It is issued only in the discretion of the Court [*See* the observations of Cockburn C.J., in *The Queen* v. *Garland* (1) and also of Lord Chelmsford in *The Queen* v. *Church Wardens of All Saints, Wigan* (2)] ; and the Court will not issue it unless, under any law for the time being in force it is clearly incumbent on a person holding a public office to do or to forbear from doing a specific act. [Compare Proviso (b) to section 45 of the Specific Relief Act.] In the present case section 57, sub-section (*1*) merely provides "The Financial Commissioner may state any case referred to him under section 56, sub-section (*2*) or otherwise coming to his notice and refer such case with his own opinion thereon to the High Court." The sub-section gives him a discretion in the matter and it is not incumbent on him thereunder to state a case and refer it to the High Court. Moreover, the application to state the case and refer it to the High Court was belated inasmuch as it was filed only after the Financial Commissioner had passed final orders confirming the order of the Collector.

(1) (1870) L.R. 5 Q.B. 272. (2) (1876) 1 A.C. 620.

SUPREME COURT.

† S.C. 1950

Dec. 19.

T. C. MOHAMED (APPLICANT)

v.

A. KUNJALAM AND TWO OTHERS (RESPONDENTS).*

Special leave—Trade-mark—Distinctive features—S. 478, Penal Code.

The principle on which special leave in criminal matter will be given by the Supreme Court is laid down in *U Saw and four others* v. *The Union of Burma*, (1948) B.L.R. 249 at 252, followed.

Held : That in Burma there is no Law or Statute establishing Registration of Trade Marks and no authorities exist from which an exclusive right to a particular Trade Mark could be obtained. The right to Trade Marks in Burma are therefore dependent upon the general principles of Commercial Law.

The right which a manufacturer has in his Trade Mark is the exclusive right to use it for the purpose of indicating where, or by whom or at what manufactory, the article to which it is affixed was manufactured. As soon, therefore, as a Trade Mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes, to that extent, the exclusive property of the firm and no one else has a right to copy it, or even to appropriate any part of it, if by such appropriation unwary purchasers may be induced to believe that they are getting goods which were made by the firm to whom the Trade Mark belongs.

Thomas Somerville v. *Paolo Schembri*, (1887) L.R. 12 A.C. 453 at 456-457, applied.

Wotherspoon v. *Currie*, L.R. 5 H.L. 508; *Johnston & Co* v. *Orr Ewing & Co.*, 7 A.C. 219 ; *Leather Cloth Co., Ltd.* v. *American Leather Cloth Co.*, 11 H.L.C. pp. 533-534, followed.

S. 478 of the Penal Code defines Trade Mark as a mark used for denoting that goods are the manufacture for merchandise of a particular person. This implies that the mark must be 'distinctive' in the sense of being "adapted to distinguish the goods of the proprietor of a trade-mark from those of other persons." If a mark merely describes the quality or the origin of an article, or is such as is commonly used in the trade to denote goods of a particular kind, such a descriptive mark would obviously not be a distinctive mark.

Where therefore a mark or phrase merely describes the quality or origin of an article such as "Custard Powder", "Malted Milk" or "Gripe Water", it is not capable of distinguishing the goods of one maker from those of others ;

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* Criminal Appeal No. 1 of 1950 being appeal against the judgment of the Appellate Side, High Court, in Criminal Revision No. 45-B of 1949, dated the 11th November 1949.

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

but a mark is distinctive where it points to the goods of a particular person as for instance in the cases of "Lifebuoy" soap, "Wincarnis", or "Three Nuns" tobacco.

Loke Nath Sen v. *Ashwini Kumar De*, (1938) I.L.R. 1 Cal. 665 at pp. 667-668, distinguished.

Gaw Kan Lye v. *Saw Kyone Saing*, (1939) R.L.R. 488 at pp. 501-502, followed.

The words "Moulana (M) Beedy" is a distinctive mark as distinguished from being merely descriptive.

A Trade Mark need not indicate to the public the actual ownership of the goods in question. A Trade Mark merely guarantees to the Purchaser that the goods on which the mark is applied emanate from the same source of trade as the goods that had hitherto borne the same Trade Mark. It is not necessary for the public to know the specific source of the article or the name of the manufacturer.

The word "Moulana" is distinctive in that it distinguishes a beedy manufactured by the Company from other beedies. It is therefore a Trade Mark within the purview of s. 478. The mere fact that a customer can get "Moulana Beedy" by asking for it by name is not at all inconsistent with the label being a Trade Mark.

The Yorkshire Relish Case, *Powell* v. *The Birmingham Vinegar Brewery Co., Ltd.*, 14 R.P.C. 720; *Edge & Sons, Ltd.* v. *Nicholls & Sons, Ltd.*, 28 R.P.C., 582; *Dunhill* v. *Bartlett & Bickley*, 39 R.P.C. 426; *Wotherspoon* v. *Currie*, L.R. 5 H.L. 508; *J. Petley & Son* v. *S. Ah Kyun*, 2 L.B.R. 159, distinguished.

Dr. Ba Han for the applicant.

J. R. Chowdhury for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE THEIN MAUNG.—Moulana Beedy Company, of which the appellant T. C. Mohamed is the Manager, has been carrying on the business of manufacturing and selling beedies for a considerable number of years. Labels with the words "Moulana (M) Beedy" printed in English on them have appeared on all the beedies manufactured for sale by the Company. In or about the year 1934 the Company registered the label as its trade-mark for beedies manufactured by it. The Company registered it again as its trade-mark for Beedies on the 1st November 1944, *i.e.*, during the period of Japanese occupation, and again on the

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26th February 1946, *i.e.*, after the liberation of Burma by the British Forces ; and it has been admitted by the first two respondents that the Company's Beedies have been fairly popular in the market as Moulana Beedies.

The first two respondents were employed as Beedy rollers by the Company some time in 1947-48 ; and a few months after they ceased to be employed by the Company they together with the 3rd respondent started manufacturing beedies and selling them with labels which are of the same size as those of the Company and which have the words " Moulavi (M) Beedy " printed on them.

Thereupon T. C. Mohamed prosecuted them as well as the 3rd respondent for counterfeiting the trade-mark of the Company and for selling their beedies with the counterfeit trade-mark. The learned Eastern Sub-divisional Magistrate of Rangoon convicted them of an offence under section 483 of the Penal Code and fined them Rs. 100 each. However, the High Court in Criminal Revision No. 45-B of 1949 set aside their conviction and sentences on the ground that the label with the words " Moulana (M) Beedy " printed on it is not a trade-mark but only a part of the " get up " of the Company's Beedies.

T. C. Mohamed has asked for special leave under section 6 of the Union Judiciary Act, 1948 to appeal from the said order of acquittal and he has been granted special leave to do so in view of the following observations of this Court in *U Saw and four others* v. *The Union of Burma* (1) :—

" It would perhaps be sufficient for the purposes of the present case to say that if the application for special leave raises questions of great and general importance which are likely to occur often and which questions, if not rightly answered, would interrupt the due and orderly administration of justice or divert

(1) (1948) B.L.R. 249 at p. 252.

the administration of justice into a new and erroneous course, creating a wrong precedent for the future, this Court would interfere by way of an appeal by special leave in criminal matters."

In Burma we have not got any Act like the English Trade Marks Registration Act, 1875, the English Trade Marks Act, 1905 or the Indian Trade Marks Act, 1940. So there is no system for registration of trade-marks and there is no provision for any statutory title to trade-marks. The following remarks of their Lordships of the Privy Council in *Thomas Somerville* v. *Paolo Schembri* (1) in connection with trade-marks in Malta apply with equal force to trade-marks in Burma :—

"In Malta there is no law or statute establishing the registration of trade-marks, and no authority exists from whom an exclusive right to a particular trade-mark can be obtained. The rights of the parties to this cause are therefore dependent upon the general principles of the commercial law, some of which are referred to in the judgment of the Court of Commerce. These principles have been very fully illustrated and explained by the House of Lords in the *Leather Cloth Co., Ltd.* v. *American Leather Cloth Co.* (2); *Wotherspoon* v. *Currie* (3); *Johnston & Co.* v. *Orr Ewing & Co.* (4), all of which were cases which arose before the passing of the first British Trades Mark Registration Act in the year 1875.

In the first of these cases, the interest which a merchant or manufacturer has in the trade-mark which he uses was thus defined by *Lord Cranwoth* (5) : 'The right which a manufacturer has in his trade-mark is the exclusive right to use it for the purpose of indicating where, or by whom, or at what manufactory, the article to which it is affixed was manufactured.' As soon, therefore, as a trade-mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes, to that extent, the exclusive property of the firm ; and no one else has a right to copy it, or even to appropriate any part of it, if by

(1) (1887) L.R. 12 A.C. 453 at p. 456-457.
(2) 11 H.L.C. 538.
(3) L.R. 5 H.L. 508.
(4) 7 A.C. 219.
(5) 11 H.L.C. pp. 533-534.

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such appropriation unwary purchasers may be induced to believe that they are getting goods which were made by the firm to whom the trade-mark belongs."

Unlike the corresponding section in the Indian Penal Code, section 478 of our Penal Code defines a trade-mark only as a mark used for denoting that goods are the manufacture for merchandise of a particular person. In the words of Biswas J., in *Loke Nath Sen* v. *Ashwini Kumar De* (1):

"This implies that the mark must be 'distinctive' in the sense of being 'adapted to distinguish the goods of the proprietor of a trade-mark from those of other persons.' If a mark merely describes the quality or origin of an article, or is such as is commonly used in the trade to denote goods of a particular kind, such a descriptive mark would obviously not be a distinctive mark."

As regards the difference between a mark which is distinctive and one which is merely descriptive, a Full Bench of the late High Court of Judicature at Rangoon has held in *Gaw Kan Lye* v. *Saw Kyone Saing* (2):

"Where a mark or phrase merely describes the quality or origin of an article such as 'Custard Powder', 'Malted Milk' or 'Gripe Water', it is not capable of distinguishing the goods of one maker from those of others; but a mark is distinctive where it points to the goods of a particular person as for instance in the cases of 'Lifebuoy' soap, 'Wincarnis', or 'Three Nuns' tobacco."

The question as to whether the Company's labels with the words "Moulana (M) Beedy" printed on it is distinctive or merely descriptive, *i.e.*, as to whether it is a mark used for denoting that beedies are the manufacture or merchandise of the Company, must be decided in the light of the above rulings and observations.

(1) (1938) I.L.R. 1 Cal. 665 at pp. 667-668. (2) (1939) R.L.R. 488 at pp. 501-502.

The words "Moulana (M) Beedy" cannot merely describe the quality or origin of the article like the words "Painkiller", "Malted Milk" and "Madras Curry Powder." Far from contending that the word "Moulana" denotes a particular quality, the first respondent has actually stated in the course of his evidence that Kunjamon and Mohamed Kutty (proprietors of the Moulana Beedy Co.) are the proprietors of Moulana beedies, that the labels bear the names of the makers, that retailers would mention the name of the brand when they bought and that they could read the labels if they wanted "to know the name". The second respondent also has stated in the course of his evidence "The customers asked for beedies by names of the brands. . . . . They can recognize the beedies by seeing the labels."

C. H. Poker (D.W.1), says "The customer mentions the name when he buys beedy. The customer reads the label when he buys it. . . . . I have known the proprietor of Moulana Beedy for the last six years."

The second respondent and C. H. Poker have further stated that Moulana Beedy is the only beedy which has been advertised in the cinemas and on advertising motor vans.

It is fairly obvious from the above that the label with the word "Moulana" has been generally regarded as a brand, which is indicative of the beedy having been manufactured by the Moulana Beedy Company; and this must have been so, having regard to the number of years for which the Company has used the label, to the manner in which it has advertised its beedies and to the names of the proprietors having been prominent on the bigger labels for packets of 25 and 500 beedies.

As a matter of law, it will not make any difference even if customers did not actually know the name of

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the Company. Venkateswaran has pointed out at page 81 of his Trade and Merchandise Marks in India :

"It is well-settled law that a trade-mark need not indicate to the public the actual ownership of the goods in question. A trade-mark merely guarantees to the purchaser that the goods on which the mark is applied emanate from the same source of trade as the goods that had hitherto borne the same trade-mark. The public need not, therefore, know the specific source of the articles bearing the trade-mark in question, and indeed, do not often care to know the name of the particular manufacturer of the goods. It is sufficient if they identify the goods on which the mark is applied with a single source, and are able by means of the mark, to distinguish the goods emanating from this source from goods emanating from other sources. This principle of law is well illustrated by the *Yorkshire Relish* case (1) ; *Edge & Sons, Ltd.* v. *Nicholls & Sons, Ltd.* (2) and *Dunhill* v. *Bartlett & Bickley* (3)."

His statement of the law is supported also by the following observation of the Lord Chancellor in *Wotherspoon* v. *Currie* (4):

"Therefore the name 'Currie' ought to be distinct, as I believe it is, and the name of the article again, if it has acquired a name, should not, by any honest manufacturer, be put upon his goods if a previous manufacturer has, by applying it to his goods, acquired the sole use of the name. I mean the use in this sense, that his goods have acquired by that description a name in the market, so that whenever that designation is used he is understood to be the maker, where people know who the maker is at all—or if people have been pleased with an article, it should be recognized at once by the designation of the article, although the customers may not know the name of the manufacturer."

Since the label with the word "Moulana" is distinctive in the sense that it distinguishes a beedy manufactured by the Company from other beedies, it

(1) Powell *v.* The Birmingham Vinegar Brewery Co., Ltd., 14 R.P.C. 720.
(2) 28 R.P.C. 582.
(3) 39 R.P.C. 426.
(4) (1872) L.R. 5 English and Irish Appeals 508 at p. 514.

is a trade-mark within the purview of section 478 of the Penal Code ; the mere fact that a customer can get Moulana Beedy by asking for it by name is not at all inconsistent with the label being a trade-mark.

The present case is distinguishable from *Loke Nath Sen* v. *Ashwini Kumar De* (1) where Biswas J., held that there was no trade-mark in the picture of a swan holding a closed umbrella between its beaks, as the article itself was known in the market as Ashwini Chhata and not by the name of the picture. There the learned Judge observed " All this evidence may be good evidence of a trade-mark in the name Ashwini Chhata but not in the design." Here in the present case the article is labelled Moulana Beedy and it is admittedly known in the market by that name.

It is more like the case of *Gaw Kan Lye* v. *Saw Kyone Saing* (2) where the trade-mark on rice bags was the outline of a small sailing vessel described as a paddy boat and customers bought the rice by the name or description of " Boat Mark Rice."

It is also distinguishable from *J. Petley & Son* v. *S. Ah Kyun* (3). There the complainant, who was a vendor of ground coffee, affixed on each of his tin boxes a paper label with a picture of a railway engine and carriages. He also pasted an orange coloured paper band over the lid and round each box vertically ; and on this, on the portion crossing the lid a facsimile of his signature was printed. The accused sold ground coffee in similar tin boxes with labels on which a picture of a steamer was printed. He also pasted on his boxes pinkish bands with facsimiles of his signature in the same position as that in which the complainant's facsimile signature appeared on his boxes. The

(1) (1938) I.L.R. 1 Cal. 665 at pp. 667-668.
(2) (1939) R.L.R. 488 at pp. 501-502.
(3) 2.L.B.R. 159.

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complaint was of the use of the pinkish band with the facsimile of the accused's signature. Fox O.C.J., observed in that case :

"On the complainant's boxes the chief trade-mark is the picture of a railway train. They may also have a trade-mark in the facsimile signature of the elder complainant, but that trade-mark could not reasonably be held to be infringed by the use of a signature of another person of a very different name : consequently a prosecution based on the use of what purports to be a facsimile of the accused's name could not succeed.

The matter resolves itself into whether the band round the boxes vertically can constitute a trade-mark as defined in the Indian Penal Code. In my opinion it cannot. The band is merely a part of the 'get up' of the boxes, and although in a civil suit a trader who imitates the 'get up' of the packages in which another trader sells his goods may be restrained by injunction from so doing, the 'get up' does not constitute a trade-mark. The Indian Penal Code deals only with trade-marks proper, and not with cases of the description referred to in Chapter VIII of Mr. Sebastian's work on Trade-marks under the heading 'Cases analogous to those of Trade-mark."

The present case is distinguishable, inasmuch as the complaint is not of the use of any label at all but of the use of a label with the words "Moulavi (M) Beedy" printed on it, on the ground that it is a colourable imitation of the Company's lable with the words "Moulana (M) Beedy" on it. Fox O.C.J., himself has observed in that case "they may also have a trade-mark in the facsimile signature" ; and in the present case we have found that the Company has a trade-mark in the words "Moulana (M) Beedy."

Some manufacturers of beedies might have recently got the notion, as stated by the learned Judge of the High Court, that a beedy is not complete without a wrapper or paper band which with certain lettering and colouring is called label ; but the Company has been using the label with the words "Moulana (M)

Beedy" for many years and the recent practice of other manufacturers cannot by any means have the effect of reducing what was the Company's trade-mark to a mere part of the "get up."

Incidentally the first respondent himself has stated in the course of his evidence "some beedies have labels, some have no labels. . . . . Almost all the beedies with (M) (on their labels) started after I left Moulana Beedy Company."

The judgment of the High Court in Criminal Revision No. 45-B of 1949 which was passed on the preliminary ground that the Company's label was not a trade-mark is set aside and the case is remanded to the High Court for disposal on the merits, on the basis of the Company having a trade-mark in the label.

SUPREME COURT.

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Mar. 19.

DR. THA MYA (APPELLANT)

v.

DAW KHIN PU (RESPONDENT).*

Buddhist Law—S. 13, Burma Laws Act, 1898—Meaning of Buddhist Law—Desertion by couple—Whether divorce automatic after a specified period—Authority of Manugye.

Held: That Buddhist Law within the meaning of s. 13 of the Burma Laws Act means the *Dhammathats* and collection of precedents.

U Pe v. *U Maung Maung Kha*, (1932) I.L.R. 10 Ran. 261 (P.C.) followed.

The view expressed in the Full Bench case of *Ma Nyunt* v. *Maung San Thein* reported in I.L.R., (1927) 5 Ran. 537 that where a Burmese Buddhist husband deserts his wife and for three years neither contributes to her maintenance nor has any communication with her the marriage is automatically dissolved is incorrect. Such conduct on the part of the husband evidences his desire for dissolution of the marriage bond; and cannot in itself suffice to dissolve the bond created by mutual consent of the husband and wife. For that bond to be dissolved it is necessary that the wife reciprocates the desire; and the reciprocation may be express or by conduct clearly pointing in that direction.

Thein Pe v. *U Pet*, (1906) 3 L.B.R. 75; *Ma Saw Kin* v. *Maung Tun Aung Gyaw*, (1928) 6 Ran. 79; *Civil 1st Appeal No. 37 of 1940*, (1940) R.L.R. 807; *Ma Ka U* v. *Po Saw*, 4 B.L.R. 340; *Daw Kyin Hmon* v. *Daw Mya Gale*, A.I.R. (1936) Ran. 247; *Maung Thein Maung* v. *Ma Kywe*, (1935) 13 Ran 412; *Ma Hnin Zan* v. *Ma Myaing*, (1935) 13 Ran. 487; *Tan Ma Shwe Zin* v. *Koo Soo Chong*, (1939) R.L.R. 548 at 563; *Ma Yin Mya* v. *Tan Yauk Pu*, (1927) 5 Ran. 406; Selections from the records of the *Hluttaw*, p. 24 and Civil Regular No. 12 of the Judicial Commissioner, Upper Burma, dated 25th September 1892; *U Pe* v. *U Maung Maung Kha*, (1932) 10 Ran. 261, referred to.

Ma Nyun v. *Maung San Thein*, (1927) 5 Ran. 537; *U Thein* v. *Ma Khin Nyunt*, (1948) B.L.R. 108, over-ruled.

Remarks in 8 L.B.R., dissented from.

The *Manugye Dhammathat* is not the paramount authority in the body of *Dhammathats* as enunciated by the Privy Council in *Ma Hnin Bwin* v. *U Shwe Gon*, (1914) 8 L.B.R. 1, followed by the High Court of Judicature at Rangoon in *Ma Nyun* v. *Maung San Thein*, (1927) 5 Ran. 537.

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* Civil Appeal No. 1 of 1950 against the decree of the High Court, Appellate Side in Civil 1st Appeal No. 76 of 1948.

† *Present:* The Hon'ble SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and U THAUNG SEIN, J.

P. K. Basu for the appellant.

D. N. Dutt for the respondent.

Chan Htoon (Attorney-General) *Amicus Curae.*

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—This appeal raises directly a problem of major importance in Buddhist Law on which a Full Bench of the Chief Court of Lower Burma in *Thein Pe* v. *U Pet* (1) and a Full Bench of the High Court of Judicature at Rangoon in *Ma Nyun* v. *Maung San Thein* (2) had been at issue. The Privy Council in *Ma Saw Kin* v. *Maung Tun Aung Gyaw* (3) noted the conflict but did not then find it necessary to attempt a solution.

The essential facts in the case are not in dispute. The appellant, then a widower with children, married the respondent, a spinster, on the 21st July 1937. A child was born to them on the 27th April 1938, the parties then being resident at Insein, where the appellant was a Civil Surgeon in the service of the Government; on the 26th June 1938, the wife went away to Thônze to her parents taking her child with her; and on the 27th April 1939, she applied for leave to sue her husband in *forma pauperis* for her maintenance and that of her child. Leave to sue was granted to her on the 6th July 1939; and in August 1939, the husband took another wife, with whom he has been living since.

There is a slight conflict of testimony on how and why the wife failed to rejoin her husband. It has been admitted that she went to her parents with her husband's consent and approval and there was no question then of her leaving her husband for good.

(1) (1906) 3 L.B.R. 75. (2) (1927) 5 Ran. 537.
(3) (1928) 6 Ran. 79.

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But while the husband claims that his wife wilfully and without excuse refused to rejoin him in spite of repeated requests so to do, the wife's case is that she "sent a letter that if he really wanted me to take as a wife *bona fide*, I was prepared to come back and to send a car, "and that there was no response to this letter. On this point, the wife was not cross examined at all.

The wife's suit for maintenance was registered as Civil Suit No. 8 of 1939 in the District Court of Insein and a decree in favour of the wife was made by that Court. The High Court of Judicature at Rangoon in *Civil 1st Appeal No. 37 of 1940*, (1) affirmed the decree with a variation, of the nature of which it is not necessary to enter into here. This decree the wife succeeded in enforcing till the 1st of March 1942; thereafter the occupation of Burma by Japanese Military Forces supervened; and clearly under the impression that a pre-occupation decree could not be enforced in the Courts functioning during the military occupation, the wife did not seek enforcement of the decree till August 1946, when in Civil Execution Case 3 of 1946 of the District Court of Insein, she sought to recover the arrears of maintenance.

In parenthesis, it may be stated that it was not the wife alone who harboured the delusion that pre-occupation decrees could not be enforced during military occupation of the country; for, the husband by a letter of the 16th November 1943, sent to the wife through his advocate, sought to impress upon her that a pre-occupation decree was abrogated by the country coming under hostile occupation.

The proceedings in execution of 1947 were contested by the appellant without success; and on the 25th March 1947, the appellant instituted the suit out of

(1) (1940) R.L.R. 807.

which this appeal has arisen. In the suit, the appellant sought to have it declared that the respondent had ceased to be the appellant's wife and that, with the cessation of her status as his wife, she had lost the right to maintenance. As a consequential relief, he claimed an injunction to restrain the respondent from seeking to take advantage of the decree granted to her in 1939.

The appellant's suit was decreed by the Court of first instance; but the High Court on appeal by the respondent set aside the decree and dismissed the suit. It is from this decree on appeal of the High Court that this appeal was laid in this Court.

The appellant's suit has as its very root and foundation the rule enunciated in *Ma Nyun* v. *Maung San Thein* (1) of the "automatic" nature of the dissolution of marital status consequent on desertion for the prescribed period coupled with lack of maintenance by the husband of the wife during that period; but the appellant and the learned counsel, who in the Court of first instance settled his pleadings, appeared unable to decide for themselves whether it was the appellant who deserted the respondent or *vice versa* and also when the desertion by whomsoever it was committed took place. Hence, the Court was indifferently offered a choice of three cases.

Two of these cases based on desertion alleged against the respondent may be dismissed shortly. The first is that the respondent must be deemed to have deserted the appellant as from 26th June 1938, when she went away to Thônze; and the second is that the respondent deserted the appellant as from 16th November 1943, when she, ignoring the offer made by the appellant through his advocate, failed to resume cohabitation with the appellant. Both alternatives have been rejected by the High Court;

(1) (1927) 5 Ran. 537.

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and though, before us, the appellant's learned counsel has said all that can be possibly said in support of these alternative cases, we can see no justification to differ from the High Court.

As has been noticed earlier, the wife went to her parents with the consent and approval of the appellant and it does not appear that the relations between the husband and wife then, though not too cordial, can be said to be inimical. In April 1939 the wife initiated proceedings in maintenance and in August 1939 the husband took to himself another wife. Buddhist Law allows a wife to refuse to cohabit with a husband who without her consent takes a second wife: See *Ma Ka U* v. *Po Saw* (1) and *Daw Kyin Hmon* v. *Daw Mya Gale* (2). The wife's failure to accept the offer of a home with the appellant coupled as it was with a warning, as already noticed, that the pre-occupation decree in her favour had been abrogated by hostile occupation clearly cannot place her in default.

The third line of attack in the plaint has more substance. The appellant claims in this behalf that he must be taken to have deserted his wife when she initiated the proceedings in maintenance, which she pursued with success. This would put the date of his desertion at the 27th April 1939; and it is not in dispute that between 1st March 1942 and 25th March 1947, the appellant did not contribute at all to the maintenance of the respondent or her child. While it may be that the letter of 16th November 1943 written under instructions from the appellant effected a break in the period of absence of communication between husband and wife, there can be no doubt that for at least three continuous years prior to the institution of the suit under appeal, there had been no communication at all between the parties.

(1) 4 B.L.R. 340. (2) A.I.R. (1936) Ran. 247.

The trial Court accepted the appellant's claim that he must be deemed to have deserted the respondent as from the 27th April 1939, when the respondent found it necessary to resort to action at law to enforce her right to maintenance. Applying, then, the dictum of Gledhill J., in *U Thein* v. *Ma Khin Nyunt* (1) that if the husband is compelled under the order of a Court to put the wife in funds for her maintenance, he does not "contribute towards her maintenance in the sense in which that word is used" in *Manugye*, Book V, section 17, the trial Court ignored the payments to the 1st March 1942 under the decree of 1939; and, bound as it is by the Full Bench decision in *Ma Nyun* v. *Maung San Thein* (2), the trial Court, on these findings, declared the marriage dissolved as from the 27th April 1942. In the event, a decree was granted to the appellant.

The validity of the rule enunciated in *Ma Nyun* v. *Maung San Thein* (2) as also of the dicta of Gledhill J., in *U Thein* v. *Ma Khin Nyunt* (1) being doubted by the Divisional Bench of the High Court before which the respondent's appeal was heard, a reference was made to a Full Bench composed of Thein Maung C.J., Tun Byu, San Maung, Aung Tha Gyaw and Bo Gyi JJ., and the Full Bench ruled, *inter alia*, that money received by the wife for her maintenance, whether the husband was constrained to pay the same by reason of a decree or an order of a Court or whether the funds were realised by execution of a decree or order for payment of maintenance, is contribution by the husband within the meaning of *Manugye*, Book V, section 17.

This ruling was not seriously canvassed at the hearing of the appeal. Clearly, learned counsel considered the question to be one of academic interest only; and we are satisfied that a decision on this issue

(1) (1948) B.L.R. 108. (2) (1927) 5 Ran. 537.

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will not affect the result in the appeal. The decision of the High Court on the major issue, however, has been thoroughly discussed before us by learned counsel on both sides; and the learned Attorney-General, at our invitation, has attended the hearing and has given us the benefit of his learning.

On the major issue, the High Court has said :

" In the case of desertion and failure to give maintenance or to have any communication for the prescribed period, the marriage is not dissolved automatically. Desertion by either party for the prescribed period merely renders the marriage voidable at the will of the deserted spouse. The marriage tie is not dissolved without an act of volition on the part of the deserted spouse showing his or her intention to determine the marriage relation, or in the words of U May Oung, without conduct revealing a desire for a divorce on the part of the deserted party. "

With this may be contrasted the answer propounded by the Full Bench of the High Court of Judicature at Rangoon in *Ma Nyun* v. *Maung San Thein* (1), where the question referred was :

" Where a Burmese Buddhist husband deserts his wife and for three years neither contributes to her maintenance nor has any communication with her, is the marriage automatically dissolved on the expiration of three years from the date of desertion or is some further and expressed act of volition on the part of one party to the marriage necessary to effect such dissolution ? "

Maung Ba J., with whom Rutledge C.J., Carr, Mya Bu and Brown JJ., concurred, answered the reference " that the marriage is automatically dissolved on the expiration of three years from the date of desertion and no further expressed act of volition is necessary. "

The Full Bench of the High Court in its judgment under review in this appeal appears fully alive to the

(1) (1927) 5 Ran. 537.

danger inherent in the principle of "an act of volition" of it contemplating "the idea of a woman whilst married to one man having the right to marry another." Hence, in propounding its answer, the High Court sought to equate "an act of volition" with "conduct revealing a desire for a divorce on the part of the deserted party." With this amplification the High Court was in general concurrence with the majority view in *Thein Pe*'s case.

In arriving at these opposing views, the Chief Court of Lower Burma and the High Court of Judicature at Rangoon start from a common point, namely section 13 (*1*) of the Burma Laws Act, 1898. This statutory provision, a re-enactment of similar provisions in earlier Acts of 1872, 1875 and 1889, reads :

"Where in any suit or proceeding, it is necessary for any Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Buddhist Law in cases where the parties are Buddhist, shall form the rules of decision, except in so far as such law has, by legislative enactment, been altered or abolished or is opposed to any custom having the force of law."

Adamson C.J., in *Thein Pe*'s case expressed himself as :

"In determining questions that come within the purview of section 13 of the Burma Laws Act, 1898, it should never be forgotten that the texts of the *Dhammathats* are not the sole guide. Those form the rule of decision only in so far as they are not opposed to any custom sharing the force of law."

Irwin J., followed the learned Chief Justice and said :

"I think I have shown enough authority for holding that the Buddhist Law for which we have to seek is not the *Dhammathats* pure and simple, but on the contrary that it is a customary law,

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or in other words it is the body of customs observed by the Burmese Buddhists and that the *Dhammathats* form one of the most important sources of information about that body of customs."

Ranged against them was Fox J., who expressed the view that :

"The general rules of Buddhist Law applicable to Burmese Buddhists are, I understand, those laid down in the *Dhammathats*. By these laws Burmese Buddhists profess to be and desire to be governed in matters of marriage, inheritance and succession. I cannot call to my mind any instance of any Burmese Buddhist claiming any right in such matters based on any custom opposed to the laws contained in the *Dhammathats*. The latter are regarded, as far as I can judge, as the fountains of the laws governing them."

The learned Judge later in the same judgment said :

"There being no custom relating to the matter in question proved, the decision must, in my opinion, rest upon the proper construction of the texts in the *Dhammathats* connected with the matter involved in the reference."

The strongest exponent of the theory of living usage predominating over the directions in the *Dhammathats* in the corpus of Buddhist Law, perhaps, has been Page C.J. Thus, the learned Chief Justice in *Maung Thein Maung* v. *Ma Kywe* (1) said :

"But the value and the sanction of the common or customary law is that it can be moulded to conform to the ever changing habits and circumstances of a people as one generation succeeds another ; and it has become necessary for the Courts in Burma from time to time in recent years to restate the common law of Burma in the light of new conditions of life that have come into being, discarding as obsolete ancient rules that no longer accord with the outlook or the habits of the people, and remodelling the ancient law to meet the exigencies of modern life."

(1) (1935) 13 Ran. 412.

This view was reflected in the statement of Mya Bu J., in the same case that :

"It would be dangerous to give weight to the written texts in the *Dhammathats* where they are opposed to the prevailing custom."

Again, in *Ma Hnin Zan* v. *Ma Myaing* (1), we find Page C.J., stating :

"Now the *Dhammathats* are not the sole repository of Burmese customary law, which is also to be ascertained from decided cases and the prevailing customs and practice of Burma."

And also, later in the same case :

"The Court is not only at liberty but is bound to decide the case in accordance with the Burmese customary law as it obtains to-day, rather than to perpetuate the outworn shibboleths of bygone ages, notwithstanding that some sanction for their continuance may be found in extracts from the *Manugye Dhammathat*. Burmans are not to be doomed to live for ever under the rulings and customs by which they were governed in the days of King Alaungpra."

For a correct appreciation of the true nature of "Buddhist Law" within the meaning of section 13 of the Burma Laws Act, 1898, it is necessary to bear in mind the history of and the avowed policy underlying the line of legislation ending in Burma with the Burma Laws Act of 1898. The provisions made by Warren Hastings in 1772 and later incorporated in section 15 of Regulation IV of 1793 disclose the germs of the rule in section 13 of the Burma Laws Act. Referring to sub-section (*1*) of that section, the Privy Council in *Tan Ma Shwe Zin* v. *Koo Soo Chong* (2) said :

"It is doubtless true of the provisions made for Buddhists, Hindus and Mahomedans by the sub-section, as it was of the parallel provisions for Hindus and Mahomedans previously in

(1) (1935) 13 Ran. 487. (2) (1939) Ran. 548 at 563.

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force in Bengal, that the general intention of the Legislature is that persons coming within these classes should be governed by their own law. That is the intention which has always been attributed to Regulation IV of 1793 and to the Civil Courts Act which took its place. It was never, perhaps, better stated than by Sir William Jones advocating the passing of such a Regulation. 'Nothing could be more obviously just than to determine private contests according to those laws, which the parties themselves has ever considered as the rules of their conduct and engagements in civil life.'"

In Burma, when a Civil Code of the Province of Pegu (then a Commissioner's Province) was sanctioned in two parts by resolutions of "His Honour the President in Council" of the 4th November 1859 and 17th January 1860, Civil Code of the Province of Pegu, Part II, section 1 stated :

"The Courts of Pegu have always professed to administer Burmese Law, when the litigants belong to that race in all cases of marriage, seduction and adultery, divorce, adoption, inheritance, immoveable property."

It was out of this scheme of administration of civil justice that Act VII of 1872, Act XVII of 1875, Act XI of 1889 and the Burma Laws Act, 1898 developed enunciating the rule that the Buddhist Law shall form the rule of decision on any question regarding succession, inheritance, marriage or caste or any religious usage or institution where the parties are Buddhists, with a saving in favour of any enactment altering or abolishing any rule of Buddhist Law and of any custom having the force of law.

Maung Ba J., in *Ma Yin Mya* v. *Tan Yauk Pu* (1) has put it :

"We have, however, a number of law books entitled *Dhammathats* which are primarily intended to apply to Burmans.

(1) (1927) 5 Ran. 406.

The religion of that race is Buddhism which was also the State religion when the Burmese Monarch was on the throne. So the *Dhammathats* intended for the Burmese Buddhists have come to be known as the Burmese Buddhist Law or the Buddhist Law."

For the matter in hand, it would be idle to speculate with the Learned Judge how far the term "Buddhist Law" is a misnomer. Suffice it to record that in the same case, Rutledge C.J., said :

"Though its remote origin is the Hindu Law of Manu, the connection between the Buddhist religion and Burmese Buddhist Law is very apparent."

It is clear, then, that when the Act of 1898 and its predecessors speak of "the Buddhist Law", it is such body of laws, as, but for Burma coming under British rule, would have continued to guide the decision of questions specified in the Acts.

What, then, was this body of laws? Light is thrown on this problem by Letters Patent appointing a Judge in the days of the Burmese Kings, which may, with advantage, be reproduced in its translations :

"The Royal command of His Most Glorious and Excellent Majesty, Ruler of Land and Water, Lord of the Royal Saddan Elephant, Master of numerous other white elephants, Possessor of the Setkya Weapons, Lord of Life and Death, and Mighty Fountain of Justice.

Whereas we are graciously pleased hereby to appoint and ordain Mahathihathu a Judge, and whereas the said appointment is due to his having heretofore carried out the duties entrusted to him with loyalty and true allegiance combined with rectitude and uprightness, now we have confidence that he will always, to whatever post he may be appointed, carry out his duties with the same integrity and diligence, and therefore we do hereby ordain and appoint our said trusty servant to be a Judge.

Now, with respect to the office of a Judge it is on this wise : In the kingdom of which we are the Sovereign Ruler, our numerous subjects must not be permitted one to oppress another, and the

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Judges must admonish and chastise, repress and judge. In case of dispute they must, in accordance with the *Dhammathats*, inquire into the cause of the people and decide between them, and for this purpose they are appointed to the Courts of Judges. If in a law suit or dispute any of our subjects apply to a Judge, the Judge shall decide the matter with the *Manu Dhammathat* in his hands; if the required rule is not to be found therein, then let him take in hand the four volumes of the Mano Sara Shwe-Min; and if he cannot find the point there, let him follow in his decision the precedents of the decisions of Kaingza Manuraja in the reign of our royal ancestor. If the case be of a trivial nature and not of sufficient importance for judicial determination, although a complaint be laid by the parties in their ignorance or folly, he should not inquire into or decide the case, but should merely explain the matter and instruct them.

Bearing these things in mind the Judge must refrain from following in the way of the three kinds of corrupt gifts, and the four kinds of falsehoods, and he must give judgment in accordance with the rules and precedents of the ancient *Dhammathats* and with justice and equity (1)."

With the Letters Patent may be usefully compared a relevant passage from the Royal edicts of 1146 B.E. (1784 A.D.):

"တောင်သူတောင်သား၊ တရားမှန် စကားမှန် မသိ၊ အရိုးအရာ၊ ခိုးမှု ရိုးမှု၊ အရှုပ်အလှန် အစီရင်ခံလျှင်၊ မနုမနော ရွေမျှဉ်းမမှတ်၊ ရာဇသတ်။ ဖြတ်ထုံး။ ဖြတ်နည်း။ စီရင်ထုံး အစောင် အစောင်လာရှိသည်ကိုထောက်၍၊ ဤသို့ဆိုရမည်။ သို့အစီရင်ခံရမည်။ ဆင်ခြေဆင်လက် သို့လောင်းရမည်။ မောင်တို့စကားအရိုးအရာဖြစ်သည်။ အစီရင်ခံရမည်ဆိုရခြင်း။"

"If the unlettered peasant, through ignorance of law, should, in relation to hereditary office or appanage or theft or rapine or in respect of other legal claims, raise inappropriate pleas, instruct him what to plead, how to present his petition and to support them by appropriate argument, having due regard to the *Manu Dhammathat*, the *Mano Dhammathat*, the *Shwe Myin Dhammathat*, Royal edicts, ancient precedents and judicial decision."

(1) Selections from the records of the *Hluttaw*, p. 24 and Civil Circular No. 12 of the Judicial Commissioner, Upper Burma of the 25th September 1892.

It would appear, then, that the *Dhammathats* and collection of precedents (ရွတ်ထုံး၊ ဖြတ်နည်း၊ စီရင်ထုံး) contain in respect of matters specified in section 13 (*1*) of the Burma Laws Act, 1898, the body of laws described as "the Buddhist Law." Custom, where it forms the rule of decision, does so not as a part of the Buddhist Law but in spite of and over-riding the rules of Buddhist Law.

The relation between the Buddhist Law and Custom having the force of law and over-riding the rules of the Buddhist Law has a parallel in the relation between the original concept of English Common Law, as the general and common custom of the realm and particular customs——*legem et consuetudinem regni* of the early royal writs.

What the Privy Council has said in *U Pe* v. *U Maung Maung Kha* (1) may be repeated here with profit:

> "The *Dhammathats* are a body of authority, consisting of many texts, sometimes contradictory but yet in their entirety forming what may be called the institutional Buddhist Law."

Now, of this body of authority, the History of *Pitakas* record 175 texts as having been at one time in existence in palm leaf manuscripts; but at the present day, only 36 of them are extant and extracts from them have been collected in the two volumes of Kinwun Mingyi's Digest of the Burmese Buddhist Law.

These 36 texts of *Dhammathats* still extant, the Courts in this country had, prior to the decision of the Privy Council in *Ma Hnin Bwin* v. *U Shwe Gon* (2), felt themselves not only free but bound to collate in order that judgment on any subject covered by them may be determined by the best balance which can be

(1) (1932) 10 Ran. 261. (2) (1914) 8 L.B.R. 1.

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framed as a result. *Manugye*, though the best known of the texts, it being the only text existing in print in its entirety in both the Burmese and the English languages, and ever regarded as of high authority was till *Ma Hnin Bwin*'s case not regarded as of paramount rank in the body of *Dhammathats*.

Sir John Jardine, writing late in 1882, said :

"The *Manu Kyay* appears to me fuller than most of the *Dhammathats*. But in the present dearth of learning, it is as difficult to appraise its authority as to determine its age or the name of the author. Maung Tet Too, after instituting inquiries at Mandalay, discovered no clue to those secrets. Dr. Richardson mentions none. No Pali edition is known and it is probably a compilation made from other *Dhammathats*. Several Burmese Judges have spoken to me of the *Manoo Wonnana*, the *Manoo Thara Shwe Myin* and the *Manoo Thaya Paka Thani* as being authorities superior to the *Manu Kyay*."

In the History of *Pitakas*, Mainkaing Myosa, who was the Royal librarian in the reigns of the last two Kings of Burma states of the *Manugye* that it is the work of Bhummazeya Mahathiri Uttamazeya Thinkyan, Minister of the Moat at Shwebo in the reign of Alaungpra, the founder of the capital city of Shwebo in 1115 B.E., and is an expansion in plain Burmese prose of the ten volumes of the *Manu Dhammathat* into eighteen volumes of the text.

Kinwun Mingyi's Digest follows the History of *Pitakas* specifically citing that authority in regard to the authorship of the *Manugye*, noticing also that neither the name of the author nor the year of the completion of the work of the *Dhammathat* is mentioned in the work itself.

A little over a year after Sir John Jardine had professed inability, in spite of researches at Mandalay, to trace the authorship and date of the *Manugye*,

Dr. Forchammer in the Jardine Prize Essay on the sources and development of Burmese Law stated :

" In the year 1756 Alompra requested Mahasiriuttamajaya, the Minister of Military works, to compile a code comprising the customary law and usages in force in his dominions ; he wrote the well known *Manu Kyay*, which has been translated into English by Dr. Richardson ; this law book is written in plain Burmese with very little Pali intermixed."

The learned Professor did not state his authority for the claim that the compilation of the *Manugye* was at the request of the King ; instead he let the validity of the claim to be inferred from what he considered to be the practice of the Burmese and Talaing Kings :

" A Burmese or Talaing ruler, after having abolished all existing hereditary institutions, would proceed to compile a new code of law and bestow his benefits upon individuals of his own choosing. In minor matters he would allow the different nationalities and religious bodies of his dominion to be governed by their own laws and customs."

It was apparently on the authority of Dr. Forchammer that in *Ma Hnin Bwin*'s case (1) the Privy Council said :

" There can be little doubt that in the middle of the 18th century of the Christian Era, the conquest and subjugation of the country by Alaungpra was accompanied by a serious attempt by him and his high functionaries of State to place the jurisprudence of his country in a position of fresh and settled authority. One of his Ministers, supposed to be a Judge, issued under the Royal authority one *Dhammathat* in prose, known briefly as the *Dhamma*. Another, 'in charge of the Moat of the City of Shwebol (?),' and taken by Dr. Forchammer to have been Alaungpra's Minister of war, compiled in prose the *Manugye* or *Manu Kyay Dhammathat*, and it is this document last mentioned which was issued by Royal authority in 1756, and which obtained the commanding position which it seems to have occupied for a succeeding period of 170 years."

(1) (1914) 8 L.B.R. 1.

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On this view the Privy Council held that where the *Manugye* is clear on any point in dispute, "the other *Dhammathats* do not require to be appealed to to clear up any ambiguity."

It is difficult to find in Dr. Forchammer's Essay definite indications of materials on which to found the conclusion that a new ruler would proceed to compile a new code of law. Indeed, so far as relate to what may be shortly described as civil law, materials extant point in the contrary direction. The innate conservatism of the people and the high respect in which Kings and common people held ancient traditions would not favour revolutionary innovations. Copies of the Royal edicts of Thalunmintara who came to the throne at Ava in 991 B.E. (1629 A.D.) and of Bodawpaya, earlier referred to in this judgment, are still available; and these edicts enjoined Judges and the common people to enforce and respect the dictates of ancient *Dhammathats*. Dr. Forchammer himself at page 91 of his Essay noticed this:

"Every great Burmese or Taling monarch endeavoured to preserve existing laws (but not hereditary institutions) and to enact and enforce new ones suitable to the customs and usages of the people for whom they were intended."

The Manusara *Dhammathat*, also known as Kaingza Shwe Myin, which Dr. Forchammer at pages 90 and 105 of his Essay confounded with Mahayazath (cited as Yazathat in Kinwun Mingyi's Digest) was prepared in 991 B.E. (1629 A.D.)

The text is in Pali and two passages from the text may be quoted here. The opening passage of the text which is divided into 10 volumes or chapters reads:

"အာဒိကပ္ပနရိန္ဒေန၊ဟိတကာမေန ဝိမတာ၊မဟာသမတာရာဇေန ပဝတ္တိတော ယော ဝိနိစ္ဆယော၊ တထောရာဇာ နုကမ္မေန၊ ပတ္တရိတ္တာ မဟိတလေ၊ ဗျူမံဓိရာဇ ကာလသို့၊

အပရန္တေဇနပ္ပဒေၚသောစဒေဝါ နမိန္ဒောစတာပသောစတယောဇနာဝတသသုဂ္ဂဟတ္ထာယ သစေ သုဒ္ဓါမာဝဓာ၊ တထောရာမည္ဥ ဒေသေ၊ အနုဂ္ဂတေ ဝိနိဋ္ဌယေ၊ တသ သုဂ္ဂဟတ္ထာယ၊ တမ္ဗောဟာရေ နဒ္ဓိတော။ တထောရာမည္ဥ ဘာသယ ဥပရာဇေန ယာစိတော၊ သေတ နာဂိန္ဒဘူကာလေ တသောရသော နဝဓိမတာ၊ မဂ္ဂသတ္တံ ဝိစာရေသိ ဗုဒ္ဓစော သောတိ နာမကော။ ဟိတတ္ထိကောမဟာထေရော။"

"In the beginning, King Mahasamata, who ruled over the original inhabitants of the world and who was possessed of wisdom enabling him to accomplish all that he undertook, longed for laws to regulate the settlement of all disputes. To him was accorded these laws ; and in the reigns of his decendants, these laws spread over the face of the earth. Later when Byumandi ruled over Pagan, three eminent persons namely, King Byumandi, the king of Davas and the Rishi prepared, for the benefit of posterity who could thereby ascertain the laws, a *Dhammathat* in Pali concisely recording these laws. When later this *Dhammathat* reached the country of Mons, the holy priest who resided in the Royal Monastery, for the better understanding of the contents of the *Dhammathat*, translated it into the Mon language. Later, in the reign of the Glorious Ruler, the Lord of White Elephants (Dhammaceti, cir. 1473 A.D.), Mahathero Buddhaghosa, at the request of the Crown Prince, replete with all desirable qualities mental and physical, and having in view he good of the community prepared from the Mon text a new version of the *Dhammathat*."

The third volume or chapter of this text ends with,

"အနန္တဒ္ဓဇရဟုညေန မဟန္တရာဇသိရိနာ သော ဘန္တေ ယောဟိတံ နေတိနာနာ နဂရဝါသိနံ အာယာစိတံ ဂရုန္တေန တောင်ဘိလာဒ္ဓါန ဝါသိကံ သိက်ကာတ္တာကဒ္ဓဒေသန သဟေဝ မနုရာဇိနာ သောဓိတံ ဓမ္မသတ္တာယ မယာကိုင်ဂါမသာမိနာ။"

"The great and glorious monarch, who has bestowed on his people living in divers towns and villages the blessings of prosperity and whose power is limitless, having entreated the revered Royal Mentor, residing in Taungpila, I, Manuraja, Judge and Lord of Kaing Village, under the guidance of the revered Royal Mentor have herein revised the *Dhammathat* translated by Buddhaghos."

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It may be remarked here that the manuscript of this text, then in the library of Kinwun Mingyi at the Court of the Burmese King, was not available to Dr. Forchammer, when he wrote his Essay and he was led into error at page 105 that Vannadhamma Shwemyin of Woona Dhamma Kyaw Din, cited in Kinwun Mingyi's Digest as Vannadhamma, is only the Wagaru and the Maharaja *Dhammathat* (or the Mahayazathat of the Digest) more fully developed with additional materials from the *Manugye*. Having thus erroneously attributed to the *Manugye* the materials in Woona Dhama Kyaw Din's works which Dr. Forchammer failed to trace in the Wagaru or the Mahayazathat, the learned Professor was led to magnify the influence of the *Manugye* on the legal literature of Burma and its authority. A close comparison of the text of Manusara *Dhammathat* of Kaingza with Woona Dhamma Kyaw Din's Vannanadhamma reveals that the latter faithfully follows and is a commentary on the former. Vannadhamma is in the direct line of descent from the original Wagaru, though the translation of Buddhaghosa, from which Kaingza Manuraja, under the direction of Taungpila Sayadaw and at the request of King Thalun Mintara prepared the Pali text in 991 B.E. (1629 A.D.) of the Manusara or Kaingza Shwemyin *Dhammathat*.

Enough has been said to establish that the *Manugye* is not of the paramount authority in the body of *Dhammathats*, to which position, following the Privy Council in *Ma Hnin Bwin*'s case (1), the learned Judges composing the Full Bench hearing the appeal of *Ma Nyun* v. *Maung San Thein* (2) have elevated it.

An examination of all the relevant texts from the *Dhammathats* must therefore be undertaken before the point at issue can be correctly determined. A word of caution, here, seems necessary. *Dhammathats* are

(1) (1914) 8 L.B.R. 1. (2) (1927) 5 Ran. 537.

not statutory enactments and the principle of equitable construction, which is discountenanced in interpreting legislative enactments cannot be excluded when seeking the meaning of the texts in the *Dhammathats*.

Coming, now, to the specific question arising in this appeal, it cannot be doubted that the *Dhammathat* rules relating to desertion have their origin in the Hindu Law.

Manu Samhita, in Chapter IX, has :

"*Section 76.*—For eight years a wife shall wait for a husband, absent in a distant country for prosecuting an object of virtue ; for six years shall she abide her time for a husband, absent in a distant country for study or for achieving fame ; and three years for a husband absent on a visit to a co-wife in a distant country.

Section 77.—A husband shall wait one year for a hostile wife ; after the lapse of a year, if her hostile feelings still continue, he shall take back what he might have given her and marry a second wife."

Hindu Law, not recognising the right of the wife to take another husband, commentators add that, at the lapse of the periods prescribed in section 75, "the wife shall go to her husband." The Burmese law givers saw no obstacle to the wife marrying again and logically provided that the wife shall be free to marry again at the end of the periods prescribed.

The close resemblance between the *Dhammathat* texts collected at sections 245, 246, 247 and 249 of the second volume of the Digest and section 76 of the Manu Samhita cannot be accidental. Equally so is the close similarity between section 77 of the Manu Samhita and the Vilasa, the *Dhammathat* Kyaw and the Vannana texts at section 312 of the Digest.

The Sonda text at section 312 of the Digest makes it obligatory for the husband to have the wife who deserted him to be requested by several persons to

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change her mind before he can take advantage of her default စကပ်ဝင်ရ၊ တနှစ်ပတ်လုံး။ တိုင်တု၊ တည်စေဦး။ does not mean " let him continue to cohabit with her for a year " as rendered in the official translations. It is more correctly " let her retain her status as a wife for a year. "

The Wagaru text at section 312 of the Digest has been more correctly rendered at section 46, Chapter III of Dr. Forchammer's translation of the *Dhammathat* :

> " If a husband and wife through anger live in separate quarters of the same place, the matrimonial tie is cut between them after the expiration of three years "

In a sense similar to this are text from the Myingun, the Manuyin, the Rasi, the Vicchedani, the Panam, the Kungyalinga, the Warulinga, the Kyetyo and the Kyannet *Dhammathats* collected at section 395 of the Digest.

Clearly, these texts do not imply an automatic dissolution of the marriage relation, regardless of the volition of the parties thereto. Of the husband and wife, who in anger separated and though living within reach of each other in the same place remained hostile for three years, a fair inference arises that both parties do not desire the continuance of the marriage relation.

The Dhammavinicchaya (or Dhamma as cited in the Digest), coeval with the *Manugye*, has in its text at section 312 of the Digest a provision not consistent with the view of automatic dissolution of marriage. If the husband, after a quarrel, leaves the wife and fails in his duty of maintaining the wife for three years, it is the wife who may exercise to option to treat the marriage dissolved ; where the wife leaves the husband and the husband thereafter for a year fails to maintain the wife, the clear inference to be drawn again is that both parties are firmly determined to cut the tie. In either case it is not the unilateral action of either spouse but

the consensus of both spouses that determines the marital relation. In the same sense is the Rajabala text and the Manucittara text.

The second Rasi text, the first Manuvanna text and the Kyannet text refuse to make the dissolution of marriage depend upon the husband or the wife, in anger or after a quarrel or from loss of affection for the other spouse, leaving the other. They make the mutual consent of parties (evidenced, it may be, by partition of their assets and liabilities or otherwise) a *sine qua non* for the dissolution of marriage.

Even Manu text makes the dissolution dependent, not on the unilateral action of either spouse but, on both spouses continuing to act for three years as if they mutually desire the marriage to be dissolved. This text is of interest, for the author of the *Dhammathat*, who described himself as သိက္ခာသုံးဝါရ ကေတုဇ မည်သော ငါအနုထေရ်သည် (I, Ketuja, a junior *thera* of three *was*) said, after a reference to the *Manugye* which is mainly in plain Burmese prose with very little Pali intermixed :

" ဘာသန္တရံ ပဇဟိတ္ဝာဝဏ္ဏပုဗ္ဗေ အမူလကံဒါလသမံဝိရစိဿတမ္မော ဟာရဝိရဉ္ဇန် ပသိသိတေန သာဇနဉ္ဉ မူလဘာသာ ဘိစာတေန သုဒ္ဓမာဓလာဝိနာမနုသတ္တံသုမေါတ္တံ။ "

" Abandoning, then, the vernacular of unlettered peasants, which like unto the boundary post sunk in sand lacks stability, I shall in the interest of perspicuity prepare this *Manu Dhammathat* in the original language of Magadha, esteemed of all righteous persons."

It is a matter for conjecture, in those circumstances, if corrupt texts have not crept into the manuscripts from which are reproduced the *Manugye* in section 312 of the Digest and Dr. Richardson's edition of the *Dhammathat*. Except on this hypothesis, the concluding provisions of the passage, interdicting

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accusation of adultery against a wife who marries again before the expiration of the period prescribed for the dissolution of marriage is difficult to appreciate.

It is, however, not necessary to pursue this inquiry further for the purpose of this appeal. *Manugye* stands alone in the body of *Dhammathats* rendering unnecessary the volition of the deserted spouse to effect dissolution of marital tie. It is against all principles of equity and good sense that the wrong-doer should be enabled to found on his own wrongful act a right against an innocent party. The Royal Rescript of the first King of Amarapura (1146 B.E. 1784 A.D.) reproduced at sections 255 and 303 of the Digest discloses clearly the attitude of the King and his people, some thirty years after the production of *Manugye*, on marital relations. Said the King :

> " the bond of union between husband and wife is very sacred and it should not be lightly severed, and
>
> if either the husband or the wife desires to separate from the other against whom no fault can be imputed, but simply because there is no love between them, decision shall be made against the party wishing the separation, who shall also undergo corporeal punishment."

Appeal was made in *Ma Nyun* v. *Maung San Thein* (1) to the texts at section 301 of the Digest in support of the theory that Buddhist Law countenances automatic dissolution of marriage. The text from the Kaingza Shwemyin, specifically relied upon, and the other texts in the section are not apposite to the problem. The incorrect translation in the official publication and the reading of the texts isolated for their context have, if we may say so, led Maung Ba J., into the error of thinking that those texts are relevant.

These texts relate to an entirely different situation and deal with the case of a daughter, whose parents have

(1) (1927) 5 Ran. 537

engaged to give her in marriage to ပရဒေသီ a stranger who comes from a distant place to trade.

The relevant passage in its entirety reads :

" အကြင်ပရဒေသီသည် အချုပ်အတည်းမရှိဘဲ၊ အသွင်းအမျှားပေးခဲ့၍ သူသမီးကိုနေစားသော်၊ ထိုပရဒေသီသည်သွားခဲ့သော်၊ သမီးကိုမိဘပိုင်လေ၏။ အချုပ်အတည်းဆိုခဲ့၍ ကျေးကျွန်ဥစ္စာပစ္စည်း ရေဆန်စသည်တို့ကို ထိုသမီး၏မိဘတို့မှောက်ထားခဲ့၍သွားလေသော်ကား ထိုသမီးကိုမယူပိုင်ပလေဟူ၏။ ထိုပရဒေသီကိုသုံးနှစ်စေ့အောင်ငန့်နေရာချေ၏။ သုံးနှစ်လွန်၍မရောက်သော်ကား၊ ထိုသမီးသည်လင်နေပိုင်လေ၏။ ယင်းသို့မဟုတ်တုံ၊ ထိုပရဒေသီသည်သုံးနှစ်အတွင်းတွင်သေခဲ့၍၊ ထိုပရဒေသီ၏ညီသည် ရောက်လပ်၍ ထိုအိမ်ကိုတက်လပ်သည်ရှိသော်ကား၊ ထိုသမီး၌တင်သော ကြွေးမြီဥစ္စာတို့ကို ဆပ်ပြီးဆပ်မှတက်၍နေရာ၏ဟုဆို၏။ "

" Where a stranger-trader on payment of bridal presents to the parents but without making definite engagement cohabited with the daughter and later goes away, the daughter comes again at the disposal of the parents ; but if he goes away, having made a definite engagement to return and having placed before the parents property, slaves, food, etc., for the daughter's maintenance, the parents are not entitled to resume her. She shall wait his return for three years. If he fails then to come back she is at liberty to take a husband. But if that stranger dies within these three years and his younger brother shall come to the house of the daughter, he can have her to wife only if and when he has discharged all her debts and liabilities."

It is not pertinent to investigate here how far, within historical times, this and similar provisions were live law ; but they point clearly to the influence of Hindu legal literature. Manu Samhita, Chapter IX, section 79 has :

" If the bethrothed husband of a girl happen to die after he has paid the marriage duty to her guardian, she should be married to a younger brother of the deceased."

To conclude the examination of Burmese legal literature, it must be stated that the Attasankhepa nowhere gives recognition to the rule of automatic dissolution of marriage.

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From what preceded, it is clear to us that it is incorrect to say with the Full Bench in *Ma Nyun*'s case (1) that, where a Buddhist husband deserts his wife and for three years neither contributes to her maintenance nor has any communication with her, the marriage is automatically dissolved. Such conduct on the part of the husband evidences his desire for dissolution of the marriage bond; and cannot in itself suffice to dissolve the bond created by mutual consent of the husband and the wife. For that bond to be dissolved, it is necessary that the wife reciprocates the desire; and the reciprocation may be express or by conduct clearly pointing in that direction.

Applying these principles to the appeal before us, we must and do hold that the appellant's claim that the respondent was no longer his wife at the date of the suit fails. It has not been pleaded by him that the respondent either by word or conduct evinced any desire to have the marriage bond dissolved. On the contrary, the respondent has taken every opportunity to assert the subsistence of the bond.

The appeal therefore fails and is dismissed with costs; Advocate's fees thirty gold mohurs.

(1) (1927) 5 Ran. 537.

SUPREME COURT.

DAW THIKE (*a*) WONG MA THIKE (APPELLANT) † S.C. 1951

v. *May 3.*

CYOUNG AH LIN (RESPONDENT).*

Sino-Burmese Buddhist—Law governing—Chinese Customary Law—Custom—Power to make will by Sino-Burmese Buddhist—Evidence Act.

Held : Primâ facie a Buddhist in Burma, irrespective of what his nationality is, and irrespective of whence he came is governed by the Burmese Buddhist Law, *i.e.*, by the *Dhammathats* and the precedents in the matter of marriage, inheritance and succession unless he can prove that he is governed by a custom which has the force of law in Burma and which is opposed to the Burmese Buddhist Law.

Tan Ma Shwe Zin v. *Koo Soo Chong*, (1939) R.L.R. 548 (P.C.); *Dr. Tha Mya* v. *Daw Khin Pu*, B.L.R. (1951) (S.C.) 108, followed.

If a Chinese Buddhist is *primâ facie* governed by the Burmese Buddhist Law there is all the more reason why a Sino-Burmese Buddhist should be governed by the Burmese Buddhist Law. His ways, manners and modes of life are the same as the Burmese and he is a citizen of the Union of Burma by birth. Therefore unless and until he can prove that he is subject to a custom which has the force of law in Burma and that custom is opposed to the provisions of Burmese Buddhist Law, he is governed by Burmese Buddhist Law. The custom alleged must be ancient, certain and reasonable.

Ma Yin Mya v. *Tan Yauk Pu*, (1927) 5 Ran. 406 (F.B.); *Abdurahim Haji Ismail Mithu* v. *Halimabai*, 43 I.A. 35, followed.

Fone Lan v. *Ma Gyi*, 2 L.B.R. 95 at 97, over-ruled.

Chinese Customary Law being foreign law should be proved according to ss. 38 and 45 of Evidence Act.

Maung Po Maung v. *Ma Pyit Ya*, 1 Ran. 161 at 169, followed.

T. K. Boon for the appellant.

Saw Hla Pru for the respondent.

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* Civil Appeal No. 19 of 1949 against the decree and order of the Appellant Side, High Court in Civil 1st Appeal No. 42 of 1948.

† *Present :* The Hon'ble SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and U THAUNG SEIN, J.

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

SIR BA U.—The question involved in this case is of great importance to the Sino-Burmese community. A Sino-Burman is the issue of a marriage between a Chinaman and a Burmese woman, or else an issue of a marriage between the children of Chinamen and Burmese women. The question is whether a Sino-Burmese Buddhist has testamentary power. It is submitted that he has. A long series of decisions of the late Chief Court of Lower Burma and the late High Court of Judicature is quoted to show that succession to the estate of a Chinese Buddhist who was domiciled and died in Burma is governed by Chinese Customary Law, and that under the said law a Chinese Buddhist has testamentary power. It therefore follows therefrom, according to the learned counsel for the appellant, that a Sino-Burmese Buddhist also has testamentary power inasmuch as he conforms to the manners and customs of his paternal ancestors, and that in accordance with the custom of their paternal ancestors the Sino-Burmese Buddhists have been disposing of their estate by will.

The controversy as to what law should be applied in the matter of marriage or inheritance or succession to the estate of Chinese Buddhists raged for over 50 years in this country. The controversy was set at rest, if it could be said to be set at rest at all, by a decision of the Privy Council in *Tan Ma Shwe Zin* v. *Koo Soo Chong* (1), the head-note of which is in the following terms :—

" *Primâ facie*, inheritance to the estate of a Chinaman who was domiciled in Burma and was a Buddhist is governed by the Buddhist law of Burma and the burden of proving any special

(1) (1939) R. L.R. 548 at 563.

custom or usage varying the ordinary Buddhist rules of inheritance is on the person asserting the variance."

We respectfully agree with this interpretation of section 13 of the Burma Laws Act, which, *inter alia*, runs as follows :

"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 :—

(*a*) the Buddhist Law in cases where the parties are Buddhists,

(*b*) the Mohamedan Law in cases where the parties are Mohamedans, and

(*c*) the Hindu Law in cases where the parties are Hindus,

shall form the rule of decision, except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law."

The controversy was with regard to the words 'Buddhist law', as used therein. The Judges who held that succession to the estate of a Chinese Buddhist should be governed by Chinese Customary Law said, to use the words of Sir Charles Fox, as used in *Fone Lan* v. *Ma Gyi* (1), "in the case of Hindus and Mohamedans the Courts of India in questions of marriage, succession and inheritance administer the personal law applicable to the parties. On such matters there is no such thing as a general Hindu Law or a general Mohamedan Law applicable universally to every Hindu or Mohamedan. There are different schools of law and different commentaries by which Hindus and Mohamedans are governed, and there are also customary laws often divergent from the laws laid down in commentaries. * * * * * In India, as

1) 2 L.B.R. 95 at 97.

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in this province, each individual of the Hindu or Mohamedan faith is accorded the personal law applicable to him in matters of marriage, succession or inheritance. * * * * * In regard to Mohamedans of the Sunni sect, the Hanifeea Code is applied, whilst in the case of Mohamedans of Shia sect, the Imameera Code is followed. * * * * On consideration of what the Hindu and Mohamedan Laws are composed of, I take it that when in section 13 of the Burma Laws Act, 1898, the Legislature uses the words 'Mohamedan Law' and 'Hindu Law', it means the laws applicable to such Mohamedan and Hindu parties, whencesoever such laws may be derived. * * * * If the terms 'Hindu Law' and 'Mohamedan Law' in section 13 of the Act must be read as above, I think the terms 'Buddhist Law' in the section must be read in the same way, namely, as meaning the law of succession, inheritance, marriage, etc., applicable to the Buddhist parties in the case."

The Chinese Customary Law was thus according to those learned Judges the Buddhist law within the meaning of section 13 of the Burma Laws Act as applicable to the Chinese Buddhists in this country. They gathered the said Chinese Customary Law from such books as "Notes and Commentaries on Chinese Criminal Law" by Alabaster, "Comparative Chinese Family Law" by Parker, "China in Law and Commerce" by Jernigan, and Broadbent's "Mollendorpt". In one case the learned Judges even sought the opinion of the Judges of the Supreme Court of Hongkong as to what law was applicable in the case of a Chinese Buddhist in the matter of marriage, succession or inheritance.

In doing what they did the learned Judges entirely overlooked the use of the definite article "the" before the words "Buddhist Law", "Mohamedan Law" and

'Hindu Law". And, further, they entirely ignored the Law of Evidence. By using the definite article "the", what the object of the Legislature is is quite clear, and the object is that the Courts should apply only such Hindu Law to the Hindus, such Mohamedan Law to the Mohamedans, and such Buddhist Law to the Buddhists, as is well-known to the Courts and to the people in the country in the matter of marriage, inheritance, succession, etc. The Legislature never intended that the Courts should go roving about all over the world in search of law that would be applicable to parties in proceedings before them. But that is exactly, with due respect we say it, what the learned Judges who applied Chinese Customary Law to the Chinese Buddhist of Burma did.

We agree that there is no such thing as the "Hindu Law" which applies universally to all Hindus, and, similarly, there is no such thing as the Mohamedan Law which applies universally to all Mohamedans. Both the "Hindu Law" and the "Mohamedan Law" have different schools of thought. All these different schools of thought, whether in "Hindu Law" or in "Mohamedan Law" are well-known to the Courts and the people of the country. They are of indigenous growth and not imported from outside. They were in existence not only at the time when the Burma Laws Act was enacted, but, in 1772 when the first enactment dealing with the subject in question was passed by Warren Hastings. Therefore, when the Legislature said that in the case of the Hindus the Hindu Law, and in the case of the Mohamedans the Mohamedan Law should apply, it meant that the Courts should apply such branch of the Hindu Law or such branch of the Mohamedan Law as was already in existence in the country and as would be applicable to the parties in proceedings before them.

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DAW THIKE (a) WONG MA THIKE. v. CYOUNG AH LIN.

In the case of the Buddhist Law it has no different schools of law as in the case of Hindu Law or Mohamedan Law. There is only one Buddhist Law that is known to the Courts and the people of the country, and the law that is known to them, as explained by this Court in the case of *Dr. Tha Mya* v. *Daw Khin Pu* (1), is contained in the *Dhammathats* and the Collection of Precedents. Therefore, *prima-facie* a Buddhist in Burma, irrespective of what his nationality is and irrespective of whence he came, is governed by the *Dhammathats* and the Precedents in the matter of marriage, inheritance and succession unless he can prove that he is governed by a custom which has the force of law and which is opposed to the Burmese Buddhist Law.

Besides, the alleged Chinese Customary Law relied on by some of the Judges of the late Chief Court and the late High Court of Judicature, being a foreign law, should have been proved in accordance with the provisions of sections 38 and 45 of the Evidence Act; but it was not so proved. This is quite obvious from the observations of Heald J., in the case *Maung Po Maung* v. *Ma Pyit Ya* (2).

The foundation on which the case for the application of Chinese Customary Law to Chinese Buddhists in Burma has been so elaborately built up is thus gone.

The next question is whether the said Chinese Customary Law is now in force in China. We can take judicial notice of the change of Government in China, and under the new Government almost all the old laws have been replaced by new ones. If it is no longer in force in China, we cannot see how it can be applied here.

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(1) B.L.R. (1951) (S.C.) 108. (2) 1 Ran. 161 at 169.

The last point that requires very careful consideration is whether a foreign Buddhist can bring his personal law into this country and, if he can, whether it should be allowed to prevail to the detriment of the people of this country if it is in conflict with the law of the land.

All these points were noticed by Sir Guy Rutledge in his judgment given in *Ma Yin Mya* v. *Tan Yauk Pu* (1) where the learned Chief Justice said :

"The only Buddhist Law, however, in my opinion, of which the Courts of this province have ever taken cognisance is Burmese Buddhist Law. And for a foreign Buddhist to escape from the application of Burmese Buddhist Law, he must show that he is subject to a custom having the force of law in this country and that that custom is opposed to the provisions of Burmese Buddhist Law applicable to the case."

And the learned Chief Justice further added :

"The effect of our Courts applying Chinese Customary Law to a Chino-Burman marriage is to deprive a Burmese woman of practically all rights and in most cases brand her children as illegitimate. China has for a good many years been in a state of revolution, but when order and unity are once more established, I do not think that any publicist would prophesy that the ancient customs which used to govern the inheritance and marriage among the Chinese will be re-established. Again, it must not be lost sight of that Chinamen have come and settled in Burma in growing numbers since the first occupation of the country. And more than any other race, they have inter-married and joined in the social and religious life of the people of the country, so that the third generation so far as belief and manner of life are concerned are much more Burmese than Chinese. To apply without enquiry the ancient Customary Law of China to these people seems to be unwise and impolitic unless we are forced to do so of necessity.

(1) (1927) 5 Ran. 406.

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In my opinion, not only are we not forced to do so, but the principles of International Law and the words of the Burma Laws Act forbid us to do so."

These observations of the learned Chief Justice are in line with what was observed by the Privy Council in *Abdurahim Haji Ismail Mithu* v. *Halimabai* (1), where in dealing with the case of the Memans, who are Mohamedans by religion but subject to Hindu Law in the matter of inheritance and succession, their Lordships said:

"Where a Hindu family migrate from one part of India to another, *primâ facie* they carry with them their personal law, and if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrate to another country, and, being Mohamedans, settle among Mohamedans, the presumption that they have accepted the law of the people whom they have joined seems to their Lordships to be one that should be much more readily made."

We accept these observations as laying down the correct principle of law. Therefore, if a Chinese Buddhist is *primâ facie* governed by the Burmese Buddhist Law, there is all the more reason why a Sino-Burmese Buddhist should be governed by the Burmese Buddhist Law. His ways, manners and mode of life are the same as the Burmese and he is a citizen of the Union of Burma by birth. Therefore, until and unless he can prove that he is subject to a custom which has the force of law in this country, and that that custom is opposed to the provisions of Burmese Buddhist Law, he is governed by the Burmese Buddhist Law. The custom which has the force of law must be, as pointed out by the learned

(1) 43 I.A. 35.

Chief Justice of the High Court, ancient, certain and reasonable. In the present case there is not only no evidence to prove such a custom, but in fact the appellant has not even pleaded it.

The appeal therefore fails and is dismissed with costs; twenty gold mohurs as Advocate's fees.

SUPREME COURT.

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May 9

CHIT TIN (*a*) SU THI AND ONE (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

Penal Code—Offence under ss. 121, 122 (1) as amended by Act 20 of 1950—High Treason—Exculpation of offence—S. 94 excludes offence against State punishable with death.

Held: No statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover 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.

Pakala Narayan Swami v. *The King-Emperor*, (1941) R.L.R. 789 at 798, approved and followed.

The claim in exculpation made by the accused in his confession that he did not willingly join the insurgents, but was forced to become of their company by threats of death, even if it be true, is not sustainable in relation to an offence against the State punishable with death; s. 94 of the Penal Code excludes the plea of compulsion by apprehension of instant death in excuse of the offence against State punishable with death.

Ba Gyan for the appellants.

L. Choon Foung (Government Advocate) for the respondent.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The joint trial before the 1st Special Judge, Tavoy, in Criminal Regular Trial No. 5 of 1950, of Chit Tin (*a*) Su Thi and Kyaw Win, appellants respectively in Criminal Appeals 2 and 3 of

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* Criminal Appeals Nos. 2 and 3 of 1951 against the judgment, dated 31st January 1951 in Criminal Appeal No. 22 of 1951 passed by the High Court on the Appellate Side.

† *Present:* The Hon'ble SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E MAUNG and MR. JUSTICE TUEIN MAUNG.

1951, of this Court, arose out of incidents which occurred on the morning of 10th May 1950 at adjacent villages of Yange and Kamyaing in Tavoy Township.

These two villages were about three furlongs apart, and since 1st January 1950, the Police Force of Winwa area, the normal station having in August 1949 been burnt down by insurgents, made Yange its headquarters. The Police Force was at the relevant date represented by the Police Station Officer Maung Po Kyin (P.W. 1) and ten Police Constables ; and it was being assisted by a band of irregulars or " Pyaukkyas " under the leadership of Maung Saw U (P.W. 2).

There is overwhelming evidence that these two villages were attacked by a band of persons, variously estimated between 60 and 100, armed with weapons of modern warfare early in the morning of the 10th May 1950. The attack was simultaneous on the two villages ; and in the course of the attack a house in Yange was burnt down by the attackers. A villager, Maung Lin Pe (P.W. 8) received a gunshot wound in the back and another villager, by name Ba Thi, was taken away by the attackers and his subsequent fate is unknown. One of the attacking party was left dead at the place of battle.

It is difficult to escape the conclusion that the attacking party in these circumstances committed the offence of High Treason as defined by section 121 of the Penal Code.

U Ba Gyan, learned counsel for the appellants, sought, however, to raise a defence on a point of law founded on section 97 of the Constitution. The contention that " Pyaukkyas " are an illegal force under section 97 (1) of the Constitution and that accordingly an attack launched against them cannot in law be an act of waging war against the State,

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ingenious and deserving of closer examination in an appropriate case, does not call for consideration here.

The attack here was launched on the villages of Yange and Kamyaing, one of which is the headquarters of the Police Force of Winwa area. It is merely incidental that a party of " Pyaukkyas " was stationed in these villages acting in aid of the Police Force. The attack on the peaceful citizens of the village and the Police Force was launched in furtherance of warlike activities directed against the lawful Government of the Union ; and the mere fact that part of the defence of the villages was being undertaken by " Pyaukkyas " would not affect the liability of those taking part in the attack.

If, therefore the complicity of the appellants in the attack is established, their conviction, and the sentence passed on each of them, must be affirmed. It is necessary, then, to examine the appellants' part in the attack on the two villages.

Against Kyaw Win, the prosecution relies on the testimony of Saw U (P.W. 2), Than Shwe (P.W. 9), Yunut (P.W. 19) and on a statement (Exhibit K) claimed to amount to a confession by Kyaw Win.

Saw U, the leader of the Pyaukkyas, states that at about 1 p.m. on the day of the attack, Kyaw Win was handed over to him by a villager of Kamyaing who claimed that Kyaw Win was captured in the fight. Than Shwe and Yunut state that when the attackers were on the run, after being repulsed by the defenders of Kamyaing village, they saw Kyaw Win, with a dah in his hand, coming in the direction of the village. At that time Kyaw Win and they were about a furlong out of the village and the attacking party had reached a distance of about three furlongs from the village. They then called upon Kyaw Win to throw down his dah, which he did ; and they took him into custody.

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CHIT TIN (*a*) SU THI AND ONE *v.* THE UNION OF BURMA.

Had the matter rested there, it is clear that there is no legal evidence on which to found the conviction of Kyaw Win under section 121 of the Penal Code. But, does the so-called confession of Kyaw Win take the case against him any further ?

We are satisfied that it does not. In the so-called confession, Kyaw Win claimed, *inter alia*, that he did not accompany the attacking party, when it proceeded to Yange-Kamyaing villages and that he, together with 10 other persons, kept behind at Kanbyin village, whence after the fight at Yange-Kamyaing, he having no heart to be with the insurgents at all, went towards Kamyaing and was arrested on the way.

We are in full agreement with their Lordships of the Privy Council, where in *Pakala Narayan Swami* v. *The King-Emperor* (1) they said :

> " No statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover 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, *e.g.*, an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession."

The so-called confession should never have been admitted in evidence. Excluding, then, this document, there is no legal evidence on which to base the conviction of Kyaw Win, whose conviction and the sentence passed on him must be and are hereby set aside.

We direct that Kyaw Win, as far as this case is concerned, be set at liberty forthwith.

(1) (1941) R.L.R. 789 at 798.

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Chit Tin's case, however, is different ; and his own confession (Exhibit J) justifies his conviction. In that confession he admits that he together with 70 other persons armed with two brens, 3 tommy guns, 5 sten guns, 2 mortars and the rest with a rifle each came from Sonsin village in the evening of the 9th May 1950 to attack Yange-Kamyaing villages. They left Sonsin at about 6 p.m. arriving near Yange-Kamyaing about 1 a.m. the next morning. At dawn, an attack on these villages was launched with heavy arms from an adjacent jungle, to which the defenders of the village replied. When the attacking party broke up, the appellant lost his way and got into Yange village by mistake, where he was captured.

This is a clear admission of the offence of waging war against the State ; and when examined at the trial under section 342 of the Code of Criminal Procedure, he affirmed the substantial correctness of the record of confession. He, then, merely desired to amend that statement by claiming that he was not armed with a rifle in the course of the attack on the villages.

The claim, in exculpation made by Chit Tin in his confession, that he did not willingly join the insurgents but was forced to become of their company by threats of death may be true, but in relation to an offence against the State punishable with death, section 94 of the Penal Code excludes the plea of compulsion by apprehension of instant death in excuse of the offence.

We, therefore, hold that Chit Tin (*a*) Su Thi has been rightly convicted of the offence of High Treason punishable under section 122 (1) of the Penal Code.

We agree with the High Court and the trial Court that the part taken by the appellant Chin Tin (*a*) Su Thi was not a major one. The evidence of Maung Aye (P.W. 4) who took the appellant into

custody, lends support to the claim of the appellant that he was not a willing participant in the attack on the village. When Maung Aye first saw the appellant, the latter with the butt of his rifle grounded was standing immobile, and when told to surrender, he made no attempt to resist or evade arrest. It is to be hoped that these circumstances will be taken into consideration in proper quarters.

As a Court of Justice, our duty is plain. We dismiss the appeal of the Appellant Chit Tin (*a*) Su Thi.

SUPREME COURT.

†S.C. 1951

May 22.

TUN BIN (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Code of Criminal Procedure—S. 423 (1), s. 439 (1)—Conviction under s. 4 (1), High Treason Act—Conviction and sentence of death passed by the High Court under s. 3 (1) of the High Treason Act—Procedure to be followed.

Under s. 423 (1) (*b*) in an appeal from a conviction the Appellate Court can do any of the following things :—

(1) Alter the finding and maintain the sentence.

(2) Alter the finding and reduce the sentence.

(3) Reduce the sentence without altering the finding.

But this does not mean that the Court can alter the finding and retain the sentence passed which would be illegal according to the finding. What the section provides for is maintenance of a sentence which can legally be passed for the offence for which the finding is altered.

When the accused is tried on a charge for a major offence but is convicted for a minor offence, and there is an appeal, the High Court can open a Revision proceeding and call upon the accused to show cause why the acquittal of the major charge should not be set aside and a re-trial ordered. If the explanation is not satisfactory, the High Court then in exercise of its appellate jurisdiction must get rid of the order of conviction for a minor offence by setting it aside. The High Court then in exercise of its revisionary jurisdiction must set aside the order of acquittal and under sub-s. 4 of s. 439 of the Criminal Procedure Code order the re-trial of the case, but the High Court in its revisional power cannot convert an acquittal into one of conviction.

Kishan Singh v. *The King-Emperor*, 50 All. 722, (P.C.), followed.

Bawa Singh v. *The Crown*, 23 Lah. 129, dissented from.

In Re. Bali Reddi, 37 Mad. 119, referred to.

Ba Gyan for the appellant.

Kyaw (Government Advocate) for the respondent.

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* Criminal Appeal No. 1 of 1951 against the sentence of death passed by the High Court, Rangoon, in its Criminal Revision No. 148 (A) of 1950 on the 22nd January 1951.

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

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

SIR BA U.—By our order dated the 12th March we set aside the conviction and sentence of death passed by the High Court under section 3 (*1*) of the High Treason Act, and restored the conviction and sentence of transportation for life passed under section 4 (*1*) of the aforesaid Act by the Trial Court. We said that we would give our reasons in full later. We now proceed to do so.

The Appeal is by special leave. The facts which give rise to the grant of special leave to appeal are these. On the morning of the 28th May 1949 a force of about 1,000 insurgents attacked the village of Nyaunglun in the Yamèthin District. The village was defended by the Village Defence Force consisting of about 30 or 40 men. The Defence Force put up a stout and valiant defence, but in view of the smallness of their numbers they had to give way and retreat to Tatkôn. The appellant was seen among the insurgents with a gun and setting fire to a liquor shop. About 8 months later he was captured at a detention Camp of the insurgents.

On these facts he was sent up for trial under the High Treason Act and charged under section 3 (*1*) of the said Act but was found guilty under section 4 (*1*) of the same Act and sentenced to transportation for life.

On appeal the High Court opened a revision proceeding and called upon the appellant to show cause why the conviction should not be altered to one under section 3 (*1*) of the High Treason Act and the sentence enhanced to one of death.

The appellant showed cause, but his explanation was not accepted. The finding was altered to one

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under section 3 (*1*) of the High Treason Act and the sentence was enhanced to one of death.

The question that calls for determination is whether the High Court is competent to convert a finding of acquittal into one of conviction and enhance the sentence in exercise of its revisionary power.

This question was mooted from time to time for several years by various High Courts in India and Burma before the Second World War. And the opinions given thereon were often divergent until the decision of the Privy Council in *Kishan Singh* v. *The King-Emperor* (1).

In that case the accused was tried on a charge of murder under section 302 of the Penal Code but he was found guilty under section 304 and sentenced to five years' rigorous imprisonment. The accused did not appeal but the Local Government filed an application for revision in the High Court, praying for the conviction of the accused under section 302 and enhancement of the sentence. The High Court allowed the application, convicting the accused under section 302 and enhancing the sentence to death.

On these facts the Privy Council said :

"Their Lordships are of opinion that in view of the provision contained in section 439, sub-section 4—that nothing in that section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction—the learned Judges of the High Court, who were dealing only with the application for revision, had no jurisdiction to convert the learned trial judge's finding of acquittal on a charge of murder into one of conviction of murder."

Relying on these observations what is now submitted is that if the High Court sits as a Court of Revision only, it has no power to alter a finding

(1) 50 All. 722.

of acquittal into one of conviction and enhance a sentence, but if there is an appeal by a convicted person against his conviction and sentence, the High Court, sitting first as a Court of Appeal, can alter the conviction for a minor offence to a conviction for a major offence in exercise of the power given by section 423 (1) (*b*) (2) of the Criminal Procedure Code and then, sitting later as a Court of Revision, can enhance the sentence under the provisions of section 439, Clause (1) of the Criminal Procedure Code.

In support of the submission the decision of a Full Bench of the Lahore High Court given in *Bawa Singh* v. *The Crown* (1), is cited.

The judgment of Dalip Singh J., which is the leading judgment delivered in that case, if read just casually, will be found to be attractive and plausible but, when examined closely, it will be found, we say it with respect, to be full of fallacies. The learned Judge made great play with the word "alter" used in Clause (1) (*b*) (2) of section 423 of the Criminal Procedure Code. According to the learned Judge, if an accused person appeals from his conviction for one offence, the High Court can alter the conviction into one for another offence if on the finding of facts the High Court comes to the conclusion that the accused is guilty of the other offence. The learned Judge said :

> "It would thus seem that if a man is convicted under section 325 and appeals therefrom, the Court should be able to change the finding from section 325 to section 326 or section 304, Part I, or Part II."

Now, what is meant by the use of the words "the Court should be able." It looks as if the learned

(1) 23 Lah. 129.

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Judge was not sure whether the High Court had power to alter a finding, and if the High Court did not have such a power, the learned Judge thought that the ends of Justice would be defeated. That this is what was in the mind of the learned Judge would become quite apparent from what he said in the latter part of his judgment. There the learned Judge said :

"Under sections 236, 237 and 238 it is possible for a man in the trial Court to be charged alternatively with theft and criminal misappropriation. If the trial Court finds that the man was in possession, it would acquit him of theft and find him guilty for criminal misappropriation only. If now the convict appeals and the appellate Court comes to the conclusion that the convict was not in possession, it could not convict him of criminal misappropriation on its finding that he was not in possession of the property misappropriated. But it could not convict him of theft on the ground that rightly or wrongly he had been acquitted of theft and therefore section 423 gave the appellate Court no power to alter the finding of criminal misappropriation into one of theft, because such an alteration would involve a reversal of the acquittal of the charge of theft. Similarly if a man were charged under section 325 and the trial Court held that he was guilty under section 325 because of grave and sudden provocation, then there would be an acquittal of the charge under section 325. If now the convict appealed and the appellate Court came to the conclusion that in law the facts found did not amount to grave and sudden provocation, it could not convict the accused under section 335, nor could it convict him under section 325, for this would involve a reversal of the verdict of acquittal of the charge under section 325. In both these cases it would seem that the appellate Court would have to acquit the man altogether, though actually it found him guilty of having committed all the acts necessary for the purpose of finding him guilty either for theft or for causing grevious hurt. It is impossible to think that the Legislature seriously contemplated such a contingency in its anxiety to avoid the reversal of an acquittal."

In his anxiety to prevent the ends of justice from being defeated, as he thought it would be, if the words of section 423 (1) (*b*) (2) were given their natural

meaning, the learned Judge put a strained construction thereon without realising that by so doing he first broke the Canon of Interpretation of Statutes and, secondly, he disregarded some of the provisions of the Code of Criminal Procedure. The cardinal rule for the construction of Acts is that where the language of an Act is clear and explicit, we must give effect to it whatever may be the consequences, for in that case the words of the statute speak the intention of the Legislature.

Now, section 423 (1) (*b*) (2) says :

" The Court may in an appeal from a conviction alter the finding, maintaining the sentence, or with or without altering the finding, reduce the sentence."

What it means is that the High Court in an appeal from a conviction can do one of the following three things:—

(1) Alter the finding and maintain the sentence.

(2) Alter the finding and reduce the sentence.

(3) Reduce the sentence without altering the finding.

If, for instance, as in the Lahore case cited above, a man was tried on a charge of murder under section 302 but found guilty under section 304 (1) and sentenced to six years' rigorous imprisonment and in an appeal the High Court alters the finding from one under section 304 (1) to one under section 302 and maintains the sentence of six years' rigorous imprisonment, which it must do or else it must reduce it, the sentence so maintained becomes an illegal sentence from the moment it is maintained inasmuch as the sentence prescribed for section 302 is death or transportation for life. What section 423 (1) (*b*) (2) provides for is the maintenance of a sentence which

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can legally be passed for the offence for which the finding is altered.

This aspect of the case was evidently not noticed by Dalip Singh J. There is also another point not noticed by the same learned Judge and the point is this. When a charge is framed against an accused, a finding either of acquittal or conviction must be recorded. This is an elementary principle of law. If it however sometimes happens that a finding is not expressly recorded, it has to be inferred from the circumstances of the case. Take, for instance, the same Lahore case mentioned above. No express finding was recorded in respect of the murder charge, but, in view of his conviction for a minor offence the inference is that the accused was acquitted of the murder charge. This is a view in accord with those of the High Courts in India and Burma and also of the Privy Council. See *Kishan Singh*'s case (1).

Therefore, without first getting rid of the order of acquittal in respect of the murder charge it would not be competent for the High Court to alter a finding to one of guilty in respect thereof. If the High Court did that, it would mean two orders, one of acquittal passed by the trial Court and the other passed by the High Court, existing side by side.

This would reduce the administration of Criminal Justice to a farce. The learned Judge, Dalip Singh J., evidently saw this point for he observed :

> "In the case contemplated in section 423 (*b*) it is obvious that there is no question of a complete acquittal, for the appeal is against a conviction and in this case, therefore, there is no necessity to annul or set aside any finding that the man is innocent or not guilty of anything at all."

This, we say it with respect, is a case of pure sophistry. There is no such thing as complete acquittal or partial

(1) 50 All. 722.

acquittal in the Code of Criminal Procedure. What is there is "acquit, discharge or convict." On the facts found an accused person must either be guilty or not guilty of a particular offence. If not guilty he must be acquitted of that particular offence. If guilty he must be convicted of that offence. This is exactly what the Privy Council said in *Kishan Singh*'s case (1).

There the Privy Council said:

"Their Lordships, however, do think it necessary to say that if the learned Judges of the High Court of Madras intended to hold that the prohibition in section 439, sub-section (4), refers only to a case where the trial has ended in a complete acquittal of the accused in respect of all charges or offences, and not to a case such as the present, where the accused has been acquitted of the charge of murder, and convicted of the minor offence of culpable homicide not amounting to murder, their Lordships are unable to agree with that part of their decision. The words of the sub-section are clear, and there can be no doubt as to their meaning. There is no justification for the qualification which the learned Judges in the cited case [*In Re. Bali Reddi* (2)] attached to the sub-section."

As regards the argument that if the High Court has no power to alter a finding of conviction for one offence to one of conviction for another offence in respect of which there has been an acquittal, recorded either expressly or impliedly by the trial Court, there will be a failure of justice, all we can say is that there is no substance in it. Take the illustration given by Dalip Singh J., himself. An accused is charged with theft and, in the alternative, with criminal misappropriation. He is found guilty of criminal misappropriation and acquitted of theft. On appeal the High Court finds that the accused is guilty of theft and not of criminal misappropriation. The conviction of

(1) 50 All. 722. (2) 37 Mad. 119.

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the accused for criminal misappropriation must in these circumstances be set aside. But the High Court cannot convict him of theft because the accused has been acquitted of that offence by the trial Court. The accused must therefore be let off, according to Dalip Singh J., although he is guilty of an offence, if the High Court cannot make use of section 423 (*b*) in the way indicated by the said learned Judge. If the question is pondered over more deeply than this, it will be noticed that the accused cannot get off easily like this. The Government can appeal against the order of acquittal for theft. If the Government does not appeal, the High Court itself in exercise of its revisionary power may set the order of acquittal aside and send the case back for re-trial. This will of course involve some delay and expense but there will be no failure of justice involved.

To sum up, in cases such as the one now under appeal, the correct procedure to adopt is in our opinion this. When the accused tried on a charge for a major offence such as murder under section 302 but convicted for a minor offence such as culpable homicide not amounting to murder under section 304, appeals, the High Court can open a revision proceeding, calling upon the accused to show cause why the acquittal of the major charge should not be set aside and a re-trial ordered. If the explanation is not satisfactory, the High Court then first in exercise of its appellate jurisdiction must get rid of the order of conviction for a minor offence by setting it aside. The High Court then in exercise of its revisionary jurisdiction must set aside the order of acquittal and under sub-section (4) of section 439 of the Criminal Procedure Code order the re-trial of the case.

The procedure adopted by the High Court in this case was not the same as the procedure adopted by the

Lahore High Court but, in fact, was the very procedure which the Privy Council said was not warranted by law. The High Court first dismissed the appeal by the appellant from a conviction for a minor offence in exercise of its appellate jurisdiction and then in exercise of its revisionary jurisdiction altered the conviction for a major offence and enhanced the sentence. We had in these circumstances no other alternative than to pass the order which we did.

SUPREME COURT.

†S.C. 1951

Jan. 9.

DAW CHO (APPELLANT)

v.

U GANNI AND OTHERS (RESPONDENTS).*

Admission—S. 31 of Evidence Act—Presumption against person not giving evidence in support—Decision of Court could not rest on suspicion—Attestation how far creates estoppel.

Held : S. 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.

Rani Chandra Kunwar v. *Chaudhri Narpet Singh and others*, (1907) L.R. 34 I.A. 27, followed.

Presumptions are necessarily made against a person who will not subject himself to examination, when a *primâ facie* case is established against him and by his own evidence he might have to answer it. The true object to be achieved can only be furthered with propriety by the testimony of the party who, personally knowing the whole circumstances of the case, can dispel the suspicions attaching to it.

Nawab Syud Allee Shah v. *Mussamut Amanee Begum*, 19 W.R. 149 ; *Sardar Gurbakhsh Singh* v. *Gurdial Singh and another* A.I.R. (1927) (P.C.) 230, followed.

It is essential to take care that a decision of the Court rests not upon suspicion but upon legal grounds established by legal testimony.

Sreeman Chunder Day v. *Gopaulchunder Chuckerbutty and others*, 11 Moore's I.A. 28.

Mere attestation of a deed by itself does not estop a man from denying anything excepting that he has witnessed the execution of the deed. It confesses neither directly nor by implication any knowledge of the contents of the document. Attestation may take place in such circumstances as would show that the witness did in fact know the contents of the document ; but no such knowledge ought to be inferred from the mere fact of attestation.

Pandurang Krishanaji v. *Markandeya Tukaram*, (1922) I.L.R. 49 Cal. 334 ; *Banga Chandra Dhur Biswas* v. *Jagat Kishore Chowdhuri*, (1916) I.L.R. 44 Cal. 186 ; L.R. 43 I.A. 249, followed.

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* Civil Appeal No. 16 of 1949 being appeal against the decree of the High Court in Civil 1st Appeal No. 43 of 1948, dated 2nd February 1948.

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

P. K. Basu for the appellant.

Zeya for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE THEIN MAUNG.—This is an appeal, with a certificate under section 5 of the Union Judiciary Act, 1948, from the decree of the High Court reversing a part of the decree of the District Court of Myaungmya.

The District Court decreed the plaintiff-appellant's suit for recovery of possession of a house (together with its site), a Bioscope Hall (without its site) and a piece of leasehold land together with the latrine standing thereon, ordered that an enquiry be made as to the amount of mesne profits for the said properties from the 2nd March, 1944 and dismissed her claim for recovery of possession of the site of the Bioscope Hall, " the film projector machine, engine, accessories and other properties in the Bioscope Hall ". On appeal the High Court has set the decree aside in so far as the Bioscope Hall, the leasehold land, the latrine and mesne profits for them are concerned and dismissed the plaintiff-appellant's cross-objection regarding the site of the Bioscope Hall, the film projector machine, engine, accessories and other properties therein.

It has also granted a certificate under section 5 of the Union Judiciary Act, 1948 on the grounds that although the value of the properties in respect of which it has reversed the decree of the District Court is Rs. 6,500 only, the amount of mesne profits which it has denied to the plaintiff-appellant would approximately be Rs. 5,900 and that the amount or value of the subject-matter still in dispute in this appeal is not less than ten thousand rupees.

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The learned Advocate for the plaintiff-appellant has not pressed the appeal so far as her claim to recover possession of the site of the Bioscope Hall, the film projector machine, engine, accessories and other properties in the Bioscope Hall is concerned as there are concurrent findings of fact against her.

However, he has strenuously contended that the decision of the High Court in respect of the Bioscope Hall, the leasehold land and the latrine thereon is erroneous ; and in support of this contention he has relied mainly on (1) Maung Maung Gale having obtained the municipal permit to build the Bioscope Hall on a joint application with the owner of the land, (2) Exhibit G which is a certified copy of the first respondent's own evidence in *Moy Wa Kyu and one* v. *U Ganni* (the first respondent), Civil Suit No. 19 of 1941 in the Township Court of Myaungmya, (3) the first respondent's failure to give evidence in the present case and (4) Exhibit S which is a certified copy of the lease of the land on which the latrine has been built.

Exhibit G contains an admission by the first respondent of Maung Maung Gale, the deceased husband of the plaintiff-appellant having been the owner of the Bioscope Hall ; there is no express explanation of the first respondent's failure to give evidence and Exhibit S shows that the then Governor of Burma granted a ten-year lease of the land to Maung Maung Gale on the 25th February, 1938.

With reference to the said admission the learned Advocate has invited our attention to *Rani Chandra Kunwar* v. *Chaudhri Narpet Singh and others* (1). As section 31 of the Evidence Act merely provides

(1) (1907) L.R. 34 I.A. 27.

that admissions are not conclusive proof of the matters admitted and as there is no question of estoppel at all in this appeal. At page 35 of the said ruling their Lordships of the Privy Council observed :

" No doubt, in a case such as this, where the defendant is not a party to the deeds, and there is therefore no estoppel, the party making the admission may give evidence to rebut this presumption, but unless and until that is satisfactorily done, the fact admitted must be taken to be established. The law upon the point is clear."

With reference to the first respondent's failure to give evidence, he has invited our attention to *Nawab Syud Allee Shah* v. *Mussamut Amanee Begum* (1) *and Sardar Gurbakhsh Singh* v. *Gurdial Singh and another* (2). In the first case their Lordships observed :

" Presumptions are necessarily made against persons who will not subject themselves to examination when a *primâ facie* case is made against them, and when by their own evidence they might have answered it."

They also observed in the second case :

" The true object to be achieved by a Court of justice can only be furthered with propriety by the testimony of the party who personally knowing the whole circumstances of the case can dispel the suspicions attaching to it."

With regard to the respondent's case that Maung Maung Gale was only a benamidar, he has invited our attention to *Sreeman Chunder Day* v. *Gopaulchunder Chuckerbutty and others* (3) at 44 of which their Lordships of the Privy Council observed :

" In matters of this description it is essential to take care that the decision of the Court rests not upon suspicion, but upon legal grounds, established by legal testimony."

(1) 19 W.R. 149. (2) A.I.R. (1927) (P.C.) 230.
(3) 11 Moore's I.A. 28.

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DAW CHO v. U GANNI AND OTHERS.

So the evidence in this case and the facts and circumstances established thereby must be examined in the light of the above contentions and observations to see if the presumption raised by the said admission has been rebutted in spite of the first respondent's failure to give evidence and if the decison that Maung Maung Gale really had no proprietary interest in the properties "rests not upon suspicion but upon legal grounds established by legal testimony."

Maung Maung Gale's father U Tin, was a clerk first in the Subdivisional Office and then under a local pleader; but he was an invalid for about 15 years before his death. A few years after he became an invalid, he and his family consisting of his wife Daw Mya Ywet (the third respondent) and his sons Maung Maung Gyi and Maung Maung Gale moved into the house of, and lived with, the first respondent, whose wife, since deceased, was Daw Mya Ywet's own sister. At that time Maung Maung Gale was about ten years old and his mother Daw Mya Ywet was a bazaar seller. U Tin died in the first respondent's house without leaving any property at all when Maung Maung Gale was about eighteen years old; and after U Tin's death the first respondent had to maintain Maung Maung Gale and his mother who had no work and to pay for his education till he passed the Anglo-Vernacular Tenth Standard Examination. Sometime after passing the said examination Maung Maung Gale became a teacher in the local National School but he continued to live in the same house with his mother, the first respondent and the first respondent's daughther (Ma Bi Bi, the second respondent) till he married the plaintiff-appellant. He married her on the 31st October, 1939 when he was about 31 years of age; and after the marriage he lived with her separately from his mother and the

other respondents till his death, *i.e.*, till the 2nd March, 1944.

He was first elected to be a member of the local Municipal Committee in 1936-37 and he retained his seat thereon till his death.

On the 29th November, 1937 he and Ah Hton Shoke, the then owner of the site for the Bioscope Hall applied to the local Municipal Committee for permission to erect a theatre hall thereon. The Public Works Sub-Committee thereof actually rejected the application and permission was granted only at the full meeting of the Municipal Committee on the 15th December, 1937 by a majority of 7 to 4. (*See* Exhibits B1, B2 and T.) The building was completed on the 16th May, 1938 and it has been assessed to Municipal Taxes with effect from the 1st July 1938 in the names of Wa Tan, Wa Kyu and Maung Maung Gale. (*See* Exhibit T, M and U.) Wa Tan and Wa Kyu are Ah Hton Shoke's sons and according to the registered deed Exhibit 73 Ah Hton Shoke, who was a co-owner of the said land transferred his right, title and interest therein to them.

On the 25th February 1938, *i.e.*, while the Theatre Hall was being constructed Maung Maung Gale obtained a ten-year lease of the land on which the latrine now stands. (*See* Exhibit S.) Wah Hein (P.W. 13), who is a brother of Wa Tan and Wa Kyu, has deposed that at first his father Ah Hton Shoke and Maung Maung Gale agreed to build a bioscope hall as partners and that Ah Hton Shoke had to retire as his children would not agree to the partnership; and the second respondent has produced Exhibit 71, dated the 22nd May 1938 as the draft of an agreement of partnership for the same purpose between Wa Tan and Wa Kyu on the one part and the first respondent on the other part.

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On the 24th September 1938, *i.e.*, shortly after the alleged agreements of partnership had fallen through and shortly after the completion of the building the first respondent took a ten-year lease of the site of the Bioscope Hall from Wa Kyu and Wa Tan by the registered deed Exhibit 72 covenanting therein (1) to demolish the Hall and take away the materials if he could not pay the ground rents and (2) to make the first offer to the lessors if he wanted to lease or sell the Hall before the expiry of the lease ; and this document appears to have been attested by Maung Maung Gale, Ah Hton Shoke and others.

In Civil Regular Suit No. 19 of 1941 in the Township Court of Myaungmya, Wa Kyu and Wa Tan sued the first respondent for recovery of rents for the land. The first respondent then confessed judgment, applied for permission to pay the decretal amount by instalments and made the statement in Exhibit G in support of the said application.

Maung Maung Gale having obtained permission to build the Hall jointly with Ah Hton Shoke, his having obtained a lease of the land for the latrine in his own name and the first respondent having deposed that he (Maung Maung Gale) was the owner of the Hall are strong pieces of evidence against the respondents. However they have produced evidence not only to prove the special relationship between Maung Maung Gale and themselves and the circumstances under which the properties were acquired but also to prove that he never had any proprietary interest in them at all.

It is common ground that U Than was the carpenter and Basa Meah was the mason who constructed the Hall ; and U Po Hnyin, Pensioner (D.W. 18) has stated that he engaged both of them at the instance of the first respondent and that he himself

laid the foundation stone of the Hall for the first respondent. U Than (P.W. 4) says that he was engaged by Maung Maung Gale ; but he has added "I was paid partly by Maung Gale and partly by Ganni * * * I do not know for whom Maung Gale engaged me. I cannot say if Maung Gale made payments for himself or for Ganni (the first respondent)". Basa Meah also says he was engaged by Maung Maung Gale ; but he also has added "I was given advances in Po Hnyin's house. I do not know if Maung Gale engaged me for himself or for others. Ganni sometimes gave me money when I was given chits by Maung Gale. Besides, S. A. Khan (P.W. 9), has deposed "from the time of erection till now I used to see Ganni (the first respondent) at the Hall together with Ma Bi Bi (the second respondent)."

As regards building materials there is no evidence whatsoever of Maung Maung Gale having purchased or paid for any part thereof. On the other hand there is overwhelming evidence—both oral and documentary —of the first respondent having purchased and paid for them. (*See* the evidence of U Po Mya (D.W. 5), Maung Nyun (D.W. 10), M. A. Khan (D.W. 12), Esoof-Mamsa (D.W. 17), U Po Hnyin (D.W. 13) and Exhibits 1 to 11, 74 and 92.)

As regards the film projector machine, engine, accessories, furniture and other properties in the Hall both the District Court and the High Court have found that the first respondent is their owner and that Maung Maung Gale never had any proprietary interest in them ; the learned Advocate for the plaintiff-appellant has not pressed the appeal about them and there is no reason whatsoever for interference with the concurrent finding of fact.

As regards the municipal taxes on the building and land tax for the site of the latrine there is no evidence

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whatsoever of Maung Maung Gale having paid them at all. On the other hand U Tin (D.W. 6), who has been Ward Headman of the locality since 1936 has deposed that he had collected them from the first two respondents before Maung Maung Gale's death, that the appellant has paid the land tax for the site for the latrine only after his death ; and his evidence is supported by Exhibits 87 and 88 which are tax receipts for 1942-43.

As regards rents and profits of the Hall also, there is no evidence whatsoever, apart from the appellant's bare assertion of Maung Maung Gale having ever enjoyed them at all ; and the appellant has admitted that she herself did not take part in the business connected with Bioscope Hall, although she had married him about four and a half years before his death. She has also stated that the second respondent used to bring films from Rangoon after the evacuation of the British, that bills for such films used to be issued in her name and that some of these bills have been produced by the respondents. She has not given the reference to these bills ; and as a matter of fact Exhibits 18 to 67 and 79 to 86 show that the second respondent has hired films from Rangoon and exhibited them in the Bioscope Hall since May, 1940, *i.e.*, about one year and nine months before the said evacuation. Besides, Ko San Mya (D.W. 16) has deposed that he hired the Hall ten or twelve times before the Japanese invasion of Burma from Maung Gale and the first two respondents and paid the hire to the first two respondents. Ma San Yin (D.W. 14) also has given evidence of her having hired the Hall from the second respondent by Exhibit 91 dated the 3rd November 1943.

As regards income-tax also there is no evidence whatsoever of Maung Maung Gale having ever been

assessed to income-tax in respect of the Bioscope Hall. In fact the appellant herself has admitted that he was not assessed to income-tax in respect thereof and that she had heard of the second respondent having been assessed thereto; and Exhibit 89 shows that the second respondent was assessed to income-tax in respect of the Bioscope Hall for the year 1943-44 by an order dated the 26th December 1943, *i.e.*, before the death of Maung Maung Gale.

Moreover the facts that the first respondent got a lease of the site of the Bioscope Hall shortly after the agreement for a partnership with the owners thereof fell through and shortly after the Bioscope Hall had been built and that Maung Maung Gale himself attested the lease, Exhibit 72, with Ah Hton Shoke and others are highly significant. The learned Advocate for the appellant does not dispute Maung Maung Gale's signature on the said Exhibit; but he has invited our attention to *Pandurang Krishanaji* v. *Markandeya Tukaram* (1) where their Lordships of the Privy Council observed:

"Before their Lordships consider the circumstances in which that attestation took place, they think it is desirable to emphasize once more that attestation of a deed by itself estops a man from denying nothing whatever excepting that he has witnessed the execution of the deed. It conveys, neither directly nor by implication, any knowledge of the contents of the document, and it ought not to be put forward alone for the purpose of establishing that a man consented to the transaction which the document effects. It is, of course, possible, as was pointed out by their Lordships in the case of *Banga Chandra Dhur Biswas* v. *Jagat Kishore Chowdhuri* (2) that an attestation may take place in circumstances which would show that the witness did in fact know of the contents of the document, but no such knowledge ought to be inferred from the mere fact of the attestation."

(1) (1922) I.L.R. 49 Cal. 334.
(2) (1916) I.L.R. 44 Cal. 186; L.R. 43 I.A. 249.

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However, the circumstances were such that Maung Maung Gale must have known at least that the first respondent was getting a lease of the land on which the Bioscope Hall had been built. In fact the appellant's own case which she has failed to establish, is that the first respondent got the lease for Maung Maung Gale. If Maung Maung Gale had built the Bioscope Hall at his own expense and if he had been the owner thereof he would have obtained or at least tried to obtain the lease himself especially in view of the fact that the rent was only Rs. 60 per mensem.

All the above facts indicate that Maung Maung Gale never had any proprietary interest in the Bioscope Hall; and that the first respondent made a false statement in Exhibit G just to gain an immediate advantage of having to pay the decretal amount in that suit by instalments; and they become conclusive when they are taken collectively against the background of the special relationship between Maung Maung Gale on the one part and the first two respondents on the other part.

We are satisfied on the evidence before us (1) that applications for the municipal permit and for a lease of the site of the latrine were made in the name of Maung Maung Gale just to ensure their success as he then was a member of the Municipal Committee and therefore a man of some influence in the locality and (2) that the presumption raised by the first respondent admission in Exhibit G has been rebutted by legal evidence, *inter alia*, of the conduct of all the parties concerned in respect of the Bioscope Hall both before and after the admission.

The appeal is dismissed. However, there will be no order for costs in this Court as the first respondent has not only made a false statement in Exhibit G but also failed to give evidence in the present case.

SUPREME COURT

MRS. CONSTANCE MINOO WRITER (APPELLANT)

v.

A. M. KHAN (RESPONDENT).*

†S.C. 1951.

Jan. 15.

Urban Rent Control Act, s. 11 (1) (f) and s. 14 (a)—Premises—S. 2 (d)—Construction of Statutes—Principles applicable.

Held: S. 11 (*1*) (*f*) of the Urban Rent Control Act provides that no order or decree for the recovery of possession of any premises to which the Urban Rent Control Act applies shall be made unless a building or part thereof is reasonably and *bonâ fide* required by the owner for occupation by himself. As a supplement to this provision s. 14-A of the Act bars a suit for ejectment or recovery of possession on the grounds specified in s. 11 (*1*) (*f*) except with the permission of the Controller of Rents in writing.

S. 11 (*1*) (*f*) read with the definition of premises given in s. (2) (*d*) clearly indicates that such portion only of the building as is necessary for the *bonâ fide* residential purposes of the landlord may be recovered by him by ejectment of the tenant.

The Urban Rent Control Act was enacted to solve the housing problem consequent upon the scarcity of residential and other buildings after the second World War. The normal rights of the owners have been restricted in various ways; and to the incidence of the contractual relation are superimposed many terms never in the contemplation of the parties. The integrity of the contractual relationship is consequently affected by the Act.

In interpreting Statutes such construction of a Statute shall be made as shall suppress the mischief and advance the remedy. The construction must not be strained. So construed it was open to the landlord to break up the integrity of the tenancy by giving notice to quit with reference to a portion of the entire premises covered by a single lease and the suit was not liable to be defeated on this ground.

Harihar Banerji v. *Ramashashi Roy*, (1919) I.L.R. 46 Cal 458; *Ram Kanie Mandal and others* v. *Gunesh Chunder Sen and others*, (1921) 33 Cal. L.J. 275; *Bodardoja and others* v. *Ajijuddin Sircar and others* A.I.R. (1929) Cal. 651, relied on.

T. H. Khan v. *Yusof Abowath and others*, (1947) R.L.R. 354, applied.

Maxwell on Interpretation of Statutes, 8th Edn. 61.

V. S. Venkatram for the appellant.

K. R. Venkatram for the respondent.

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* Civil Appeal No. 9 of 1950 being appeal against the judgment and decree passed in Civil 1st Appeal No. 17 of 1949.

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

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MRS. CONSTANCE MINOO WRITER v. A. M. KHAN.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The relevant facts of the case lie within a narrow compass and are not in dispute. The appellant is the owner of a house comprised of two flats each of which was intended to be occupied independently of the other, and there are two motor garages attached to the house. Prior to 1942 the appellant occupied the upper flat and the lower flat was let to a tenant. Later the respondent became the tenant of the upper flat on a rent of Rs. 230 per mensem. In December 1945 he took a lease of the lower flat as well, the rent for both flats being agreed at Rs. 450 per mensem. Later by consent of the parties the rent was reduced to Rs. 250 per mensem.

In 1948 the appellant, who had been living with her husband and children in her mother-in-law's house, desired to resume occupation of her own house and applied to the Controller of Rents, Rangoon, for a certificate under section 14-A of the Urban Rent Control Act in respect of the entire building as a preliminary to an action for ejectment of the respondent. The Controller, however, after an enquiry, considered that one flat should suffice the needs of the appellant and granted her permission to institute a suit for ejectment of the respondent from "either the upper floor or the ground floor" of the house in question. A notice on behalf of the appellant calling upon the respondent "to quit and deliver up possession of the upper floor of the house known as No. 172, Bigandet Street, Rangoon, together with the western garage and the adjoining store-room on the ground floor" followed the grant of the permission by the Controller of Rents and in due course the appellant instituted a suit for ejectment in the City Civil Court,

Rangoon. The learned 2nd Judge of the Court granted the appellant a decree for ejectment in respect of the upper floor only of the house, rejecting her claim for the garage and the store-room on the ground floor on the ground that these buildings were not included in the permit granted to her by the Rent Controller under section 14-A (3) of the Urban Rent Control Act.

Against this decree the respondent appealed and a Bench of the High Court allowed the appeal and dismissed the appellant's suit.

The appellant was granted by this Court special leave to appeal under the provisions of section 6 of the Union Judiciary Act as the dispute between the parties involves questions of general importance on the effect of the Urban Rent Control Act on the contractual relationship between landlord and tenant supplemented by the provisions of the Transfer of Property Act regulating such relationship.

The hearing, both before the Judge of first instance and the Appellate Bench of the High Court, proceeded on the footing that the lease of the house, comprising of two flats, was created by a single contract. The facts as disclosed on the record and summarised earlier in this judgment do not appear to support this view of the transaction. However, it is only before us and in the concise statement of facts submitted by the respondent that the full story of the tenancy was set out for the first time and set out by the respondent alone. In the lower Courts the appellant and the respondent proceeded as if the lease of the two flats was by a single transaction in December 1945. We shall, in disposing of this appeal, therefore, proceed on the basis that the two flats came into the occupation of the respondent as the result of a single lease made in December 1945.

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Chief Justice U Thein Maung (as he then was) of the High Court, with whom Mr. Justice San Maung agreed, took the view that the notice to quit preliminary to the suit for ejectment is ineffective in law. Reliance was placed on the decision of the Privy Council in *Harihar Banerji* v. *Ramashashi Roy* (1) and on the decisions of the Calcutta High Court in *Ram Kanie Mandal and others* v. *Gunesh Chunder Sen and others* (2) and *Bodardoja and others* v. *Ajijuddin Sircar and others* (3) for the proposition that a landlord cannot break up a tenure and that a notice for a fraction of the holding is ineffective.

To the abstract principle that a landlord may not break up the tenure no exception can be taken. The principle is the natural corollary to the fact that a lease is a grant arising out of a contract and the contractual relationship between the landlord and the tenant must be regulated by the Transfer of Property Act read together with such relevant portions of the Contract Act : *See* section 4 of the Transfer of Property Act. But a contract which was entire in its inception may have its integrity broken either by a subsequent agreement of the parties or by operation of law.

The Bench of the High Court, applying a decision of the High Court of Judicature at Rangoon in *T. H. Khan* v. *Dawood Yusoof Abowath and others* (4), came to the conclusion that nothing in the Urban Rent Control Act has affected the integrity of the lease granted by the appellant to the respondent in December 1945. The Hon'ble Judges in their judgment under appeal said :

"It will thus be seen (1) that section 11 (*1*) requires the landlord to have complied with the requirements of the Transfer of Property Act and (2) that section 14-A (*1*) prescribes a further

(1) (1919) I.L.R. 46 Cal. 458.
(2) (1921) 33 Cal. L.J. 275.
(3) A.I.R. (1929) Cal. 651.
(4) (1947) R.L.R. 354.

condition that the landlord must have obtained the Controller's permission in writing. There is no provision in the Act authorising the Controller to break up a tenancy: nor is there any provision in the Act declaring that the Transfer of Property Act shall not apply to a tenancy which has been broken up by him."

The argument in the judgment winds up thus :

"So the fact that the Controller has granted his permission in respect of one flat only cannot affect section 106 of the Transfer of Property Act according to which a tenancy must be terminated, if at all, as a whole."

In *T. H. Khan*'s case it was conceded at page 358 of the report that though Acts must be construed so as to avoid unnecessary repugnancy "where there is an inevitable conflict, the provisions of the Urban Rent Control Act, 1946, must prevail." (The Urban Rent Control Act, 1946 has since been replaced by the Urban Rent Control Act, 1948). Section 11 (*1*) (*f*) of the Urban Rent Control Act, leaving out words redundant for our purpose, reads :

"Notwithstanding anything contained in the Transfer of Property Act or the Contract Act or the Rangoon City Civil Court Act no order or decree for the recovery of possession of any premises to which this Act applies or for the ejectment of a tenant therefrom shall be made or given unless the building or a part thereof to which the Act applies is reasonably and *bonâ fide* required by the owner for occupation by himself exclusively for residential purpose, etc."

As a supplement to this provision section 14-A bars a suit for ejectment or recovery of possession on the grounds specified in section 11 (*1*) (*f*) except with the permission of the Controller of Rents in writing to institute such suit or proceeding.

The word "premises" has been defined in section 2 (*d*) of the Act as meaning, among others, "any building or part of a building let or occupied or

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intended to be let or occupied separately for any purpose whatever, etc."

Taking the Urban Rent Control Act as a whole what emerges clearly is that it was enacted to solve the housing problem consequent on the scarcity of residential and other buildings after the ravages of the Second World War. The normal rights of the owner to eject his tenant from the premises in the latter's occupation have been restricted ; the landlord may not sue for/or recover anything more than the standard rent fixed by the Controller of Rents, whatever the terms of the agreement may have been ; and to the incidence of the contractual relation are superimposed many terms never in the contemplation of the parties when making the contract of lease. It is idle to insist that the integrity of the contractual relationship between the landlord and the tenant remains unaffected by the Urban Rent Control Act.

As we have said, section 11 (*1*) (*j*) clearly indicates that such portion only of the building as is necessary for the *bonâ fide* residential purposes of the landlord may be recovered by him in ejectment of the tenant. The definition of the term "premises," clearly indicates that for the purposes of this Act, the unit is such part of the tenancy as may be let or occupied or intended to be let or occupied separately. As *Maxwell in his Interpretation of Statutes* (1) states :

"It is said to be the duty of the Judge to make such construction of a statute as shall suppress the mischief and advance the remedy Even where the usual meaning of the language falls short of the whole object of the Legislature, a more extended meaning may be attributed to the words, if they are fairly susceptible of it. The construction must not, of course, be strained to include cases plainly omitted from the natural meaning of the words."

(1) 8th Edn. p. 61.

The present is a much stronger case. To accept the construction sought to be placed on the Act on behalf of the respondent, and which found favour with the Appellate Bench of the High Court, would be to nullify the intention of the Legislature clearly indicated throughout the whole of the Act.

Certain further technical objections to the form of the notice, which were taken in the pleadings, were not pressed before us and we need not consider them.

In the result we set aside the judgment and decree of the Appellate Bench of the High Court and restore the decree of the City Civil Court with costs throughout. Advocate's fees ten gold mohurs.

SUPREME COURT

† S.C. 1951

Jan. 22

CASSIM JEEWA AND ANOTHER (APPLICANTS)

v.

THE MOULMEIN MUNICIPALITY (RESPONDENT).*

Burma Municipal Act, ss. 79 and 201—Validity of decree or order passed by Court of competent jurisdiction—Applicability to quasi-judicial officials—Subsequent assessment by Municipal Committee under s. 79 (1) of the Municipal Act—Writ of certiorari—Interference by.

The Finance Sub-Committee of Moulmein Municipality recommended to the Municipal Committee that applicant's damaged Mill should be assessed at 50 per cent of the rental value. This recommendation was accepted by the Municipal Committee. The applicant appealed to the Deputy Commissioner who treating the decision as decision of Assessment Sub-Committee entertained the appeal under s. 79 (2) of the Burma Municipal Act and set aside the order. Subsequently the Municipal Committee passed a resolution to recover arrears of tax on the basis of the original decision at 50 per cent of the rental value. The applicant appealed to the Commissioner who held that no appeal lay to him. The applicant applied to the Supreme Court for a direction in the nature of certiorari.

Held : Though the Commissioner was wrong in not entertaining the appeal, directions in the nature of certiorari are discretionary and the Court will be slow to interfere if the result of an irregularity of an inferior tribunal has been to promote substantial justice between the parties. Though the Deputy Commissioner exercised jurisdiction under s. 79 (*1*) of the Municipal Act the applicants never took the preliminary steps which could enable them to exercise the right of appeal. Therefore this Court should not exercise it now.

The decree or order passed by a Court of competent jurisdiction will not be declared void or a nullity unless the same has been set aside in proceedings by way of review, revision or appeal, and this applies in relation to a tribunal exercising judicial or quasi-judicial functions as to a Court.

The Court has jurisdiction to decide wrong as well as right.

S. A. Nathan v. *S. R. Samson*, 9 Ran. 480 at 490, referred to and applied.

Makajan v. *Narhari*, (1901) 27 I.A. 216, followed.

The proceedings by the Municipal Committee by way of re-assessment must be treated as a fresh decision under section 79 (*1*) of the Act and this is so even though the Committee did not think it was acting under the said provisions.

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* Civil Misc. Application No. 73 of 1950 being an application under section 25 of the Constitution of Burma for directions in the nature of certiorari.

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

P. K. Basu for the applicant.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The applicants are the owners of a rice mill in Moulmein known as the Mupun Rice Mill which, before 1943, was apparently in working order. But in 1943 and since then, serious damage was caused to the mill by bombing and looting during the Japanese occupation of Burma. When in 1945 Moulmein was re-occupied by the forces of the lawful government, it is not disputed that the engine required extensive repairs and that the godowns attached to the mill shed were damaged and that the premises were overgrown with shrubs and weeds. It appears that certain residential bungalows formed part of the premises; one of them was requisitioned by the Civil Affairs Service for 7 months from April to October 1946; and the owners were paid a rent of Rs. 378 in respect thereof for that period.

In the financial year 1945-46 the Moulmein Municipality, under the provisions of section 76 of the Municipal Act, had an assessment list of buildings and land within the municipality prepared and the annual rental value of the Mupun Rice Mill was estimated at Rs. 16,000 and the amount of tax was assessed thereon at Rs. 520 per quarter. This assessment was not challenged by the applicants till 5th February 1947 when the 2nd applicant stating "that the mill and the godowns are in a state of disrepair owing to bombing" requested the respondent-Committee "to remit the taxes for the same". It was in this letter that the applicants stated that one bungalow was occupied by the Civil Affairs Service for 7 months for which they received a rent of Rs. 378 in all and that apart from that occupation the mill

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CASSIM JEEWA AND ANOTHER v. THE MOULMEIN MUNICIPALITY.

and other accessory buildings were not occupied by any one. This letter was followed by similar requests for remission on the 12th March 1947 and 2nd April 1947 in respect of different quarterly demands, ending with the second quarter 1946-47. These requests for remission were placed before the Finance Sub-Committee of the Moulmein Municipality on the 31st April 1947 and the Sub-Committee decided to recommend to the full Committee to assess the mill "at 50 per cent of its assessed rental value with effect from 2nd quarter of 1945-46 to 3rd quarter of 1946-47." This recommendation of the Sub-Committee was accepted by the full Committee on the 12th May 1947.

An appeal was preferred by the applicants against this decision of the Municipal Committee and on the 16th January 1948, the Deputy Commissioner, Amherst District, treating the appeal as against the order of the Municipal Assessment Sub-Committee, informed the applicants "The order of the Moulmein Municipality to assess your rice mill at Mupun Quarter, Moulmein, as an occupied factory under Instruction 27 is set aside. It should be assessed as an unoccupied one under the Bye-laws of Municipality."

The appellate powers of the Commissioner of a division or the Deputy Commissioner of a district in respect of proceedings of a Municipal Committee are defined in sections 79 and 201 of the Municipal Act. Section 201 has no application whatsoever to the facts of the present case. If, as the Deputy Commissioner contemplated in his order of the 16th January 1948, the decison challenged before him by the applicants was one made by the Assessment Sub-Committee, an appeal would lie to him under section 79 (2) of the Act. And it was on this basis that the Deputy Commissioner entertained the appeal and passed his orders. We shall have to make some comments later

on the correctness of the assumption, but rightly or wrongly the Deputy Commissioner, having assumed that the appeal before him was one against an order falling within section 79 (*1*) of the Municipal Act and having exercised a jurisdiction which section 79 (*2*) has vested in him, that decision would appear to us to be binding as far as the parties thereto are concerned.

A decision of a Full Bench of the late High Court of Judicature at Rangoon in *S. A. Nathan* v. *S. R. Samson* (1) would appear to be apposite in this connection. What was said by Page C.J., in relation to a Court will apply equally to a tribunal exercising judicial or quasi-judicial functions.

The learned Chief Justice there said :

> "I will assume for the purpose in hand that any decree passed by a Court without inherent jurisdiction,—whether the want of jurisdiction has been waived by the parties or not,—will be declared in proceedings taken by way of appeal, revision review, or otherwise as prescribed by law, to have been *coram non judice* and *ab initio* void and a nullity. But, in my opinion, a subsisting decree passed by a duly constituted Court that has not been set aside in proceedings by way of appeal, revision, review, or otherwise is not to be treated as a mere nullity, but is binding and conclusive against the parties thereto duly impleaded in the suit."

We find it not impossible to appreciate the difficulty which the Municipal Committee entertained to understand how the decision in January 1948 made by the Deputy Commissioner could be effective in law to set aside the assessment made as far back as 1945-46. In any event, on the decision being communicated to the respondent-Committee it protested against what it considered to be an incorrect decision and requested the Deputy Commissioner to rescind the same. The

(1) 9 Ran. 480 at 490.

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Deputy Commissioner—rightly in our opinion—informed the respondents that he was not competent to review or rescind his own decision. But the Deputy Commissioner did not stop there. He added, what appears to us a gratuitous suggestion, that "it is left to the Municipality to still assess the mill though not at the full rental value," and that the Committee "may proceed with whatever course of action it deems justified and if the assessee feels himself aggrieved he can then appeal again to the Deputy Commissioner or the Commissioner."

The result of this reference to the Deputy Commissioner was that the Municipality felt itself at large and when on the 24th April 1948 the applicants applied for re-assessment of the premises as on a rice mill in a state of disrepair, it decided to reaffirm its previous decision and to recover arrears on that basis. Against this decision the applicants appealed to the Commissioner, Tenasserim Division, who rejected the appeal on the ground that neither the Commissioner nor the Deputy Commissioner has jurisdiction to entertain the appeal.

The applicants have come before us seeking for directions in the nature of certiorari to quash the proceedings of the Commissioner, Tenasserim Division, and of the respondent Municipality rejecting their application to re-assess the premises in question in terms of the appellate order of the Deputy Commissioner, Amherst, of January 1948. In so far as the learned counsel for the applicants contends that the decision of the Deputy Commissioner, Amherst, made in January 1948 is binding between the parties, we feel that the claim must be accepted. It matters not, for this purpose, whether the decision was correct or erroneous in law and on the facts. Section 79 (2) of the Municipal Act vests the Deputy Commissioner

with appellate jurisdiction in respect of assessment of municipal tax. It was in exercise of that jurisdiction that the Deputy Commissioner had purported to set aside the assessment ; and as the Privy Council rightly said in *Markajin* v. *Narhari* (1) :

" It (the lower Court) made a sad mistake it is true ; but a Court has jurisdiction to decide wrong as well as right."

As was pointed out by Page C.J., in the Full Bench judgment of the High Court of Judicature at Rangoon earlier cited, even an incorrect decision not in excess of the inherent jurisdiction of the tribunal requires to be set aside in due course of law to cease to be operative and till thus set aside remains binding on the parties thereto.

The position then in law is clear. The assessment of 1945-46 has been vacated by the appellate order of the Deputy Commissioner, Amherst, of January 1948. What follows thereafter at the meeting of the respondent-Committee on the 17th May 1948 must be regarded in the contemplation of law to be by way of re-assessment of the premises in substitution of the previous assessment which had been vacated by the appellate authority. The decision must be treated as a fresh decision under section 79 (*1*) of the Municipal Act. It is true that the Committee did not think that it was acting under the provisions of section 79 (*1*) of the Act but it is clear that in law the proceedings taken by it were in fact in pursuance of that sub-section. That being so, the appeal to the Commissioner, Tenasserim Division, clearly was competent under the provisions of section 79 (*1*) of the Act, and the Commissioner erred in declining jurisdiction to entertain the appeal.

(1) (1901) 27 I.A. 216.

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CASSIM JEEWA AND ANOTHER v. THE MOULMEIN MUNICIPALITY.

Normally, on a finding such as this, an order quashing the proceedings of the Commissioner would follow. But directions in the nature of certiorari are discretionary. This Court will be slow to interfere by way of such directions if the result of an irregularity of an inferior tribunal has been to promote substantial justice between the parties as in this case. In the present case, while, as we have already said, the Deputy Commissioner exercised jurisdiction which the Municipal Act under section 79 (*1*) has vested in him, it is clear that the applicants never took the preliminary steps which could enable them to exercise the right of appeal under that provision. Moreover, the applicants prior to preferring their appeal to the Deputy Commissioner had been applying repeatedly for remission of the municipal tax by applications which would fall under section 5 of the Municipal Act. It was against the rejection of these applications that the applicants appealed before the Deputy Commissioner. It cannot therefore be said that substantial justice has not been done by the Commissioner, Tenasserim Division, in rejecting, though on grounds which we do not consider sufficient, the appeal of the applicants.

In these circumstances we dismiss the application. The respondent has not been represented before us and there will be no order for costs.

SUPREME COURT.

KO TIN (APPLICANT)

v.

THE CHAIRMAN, PUBLIC PROPERTY PROTECTION BOARD, AND ONE (RESPONDENTS).*

† S.C. 1951

Feb. 26.

Public Property Protection Act, 1947, s. 2—Cash whether public property—Rule of ejusdem generis *in construction of Statutes—Conditions for application.*

Held: Cash issued to a Village Headman for agricultural loans is public property within the meaning of s. 2 of the Public Property Protection Act, 1947.

The doctrine of *ejusdem generis* must be applied with caution in connection with the construction of Statutes. Where in an act of Parliament there are strong reasons from the history and circumstances connected with its passing and from the structure of the Act itself, to indicate the real meaning of the Legislature, this doctrine has no application.

The specified things must possess some common and dominant feature so that the genus can be ascertained; but there is no authority for the proposition that the rule must be applied whenever a common and dominant feature can be found in the specified things.

Attorney-General v. *Brown*, (1920) 1 (K.B.) 773, applied.

Mohamed Hussein v. *The Union of Burma*, Criminal Misc. Application No. 115 of 1948, over-ruled.

S. S. Magnhild v. *McIntyre Bros. & Co.*, (1920) 3 (K.B.); *The King* v. *U Saw Hla Pru and one*, (1947) R.L.R. 83 at 86-87, referred to.

S. T. Leong for the applicant.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE THEIN MAUNG.—This is an application for a writ of *habeas corpus* by a village headman who has been detained under section 7 (3) and (5) of the

*Criminal Misc. Application No. 34 of 1951 being application for directions in the nature of *habeas corpus* in respect of Ko Tin.

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

S.C. 1951

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Public Property Protection Act, 1947 in connection with cash issued by the Government for agricultural loans; and the only question that has been raised by the learned Advocate for the applicant is whether such cash is "public property" within the purview of the Act.

He has contended that although it would ordinarily be regarded as public property, it is not public property for the purposes of the Act as the Act contains a special definition of public property.

The relevant part of section 2 of the Act reads:

> "2. In this Act unless there is anything repugnant in the subject or context,—
>
> (i) 'Public property' means any store or equipment or any other property whatsoever belonging to, or consigned to, or intended for the use of the army, naval or air forces serving in Burma or belonging to, or consigned to, or intended for the use of, the Government of Burma or any local authority, or any Board or Body constituted under any law."

So the learned Advocate has contended that the doctrine of *ejusdem generis* should be applied and that the words "any other property whatsoever" should be held to mean any other property in the same category as store or equipment; and in support of his contention he has invited our attention to *Attorney-General* v. *Brown* (1) and *Mohamed Hussein* v. *The Union of Burma* (2).

In *Attorney-General* v. *Brown* (1) the meaning of the words "any other goods" in section 43 of the Customs Consolidation Act, 1876, which provides "The importation of arms, ammunition, gunpowder or any other goods may be prohibited by Proclamation or Order in Council," was held to have been

(1) (1920) 1 (K. B.) 773. (2) Cr. Misc. Appln. No. 115 of 1948 of the High Court

restricted to things of the same class as those previously specified. However, Sankey J., who decided that case, observed :

"Although therefore the doctrine of *ejusdem generis* is to be applied with caution, where in an Act of Parliament there are strong reasons (*a*) from the history and circumstances connected with its passing, (*b*) from the structure of the Act itself, to indicate the real meaning of the Legislature, in my view the doctrine of *ejusdem generis* is one which not only can, but ought to, be applied. Further than that, in this particular case it may be urged that there is evidence in the section itself that the meaning of the general words is to be restricted."

In the present case there is nothing in (1) the history and circumstances connected with the passing of the Act and (2) the structure of the Act itself to indicate that the Legislature intended to restrict the meaning of the words "or any other property whatsoever". In fact the circumstances under which the Act had to be passed, the structure of the Act itself and the use of the word "whatsoever" indicate the contrary, *i.e.*, that the intention of the Legislature is to protect not only stores, equipment and the like but all properties.

In *Mohamed Hussein* v. *The Union of Burma* (1), U Aung Tha Gyaw J., held that old wooden crosses already used in a military cemetery were not covered by the general words "any other property whatsoever". However, in doing so, the learned Judge has, on the authority of an extract from the judgment of Mc Cardie J., in *S. S. Magnhild* v. *Mc Intyre Bros. & Co.*, (2) which was quoted by U Ba U J., (now the Chief Justice of the Union) in *The King* v. *U Saw Hla Pru and one* (3), proceeded on the assumption that the sole test (as to whether the rule of

(1) Cr. Misc. Appln. No. 115 of 1948 of the High Court. (2) (1920) 3 (K.B.).
(3) (1947) R.L.R. 83 at 86-87.

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ejusdem generis is to be applied) is whether the specified things which precede the general words can be placed under some common category.

The said extract reads :

"But the rule of *ejusdem generis* cannot be applied at all unless there be some broad test for the ascertainment of genus. So far as I can see the only test seems to be whether the specified things which precede the general words can be placed under some common category. By this I understand that the specified things must possess some common and dominant feature."

Read as a whole, the extract merely means that the rule of *ejusdem generis* cannot be applied at all unless the specified things possess some common and dominant feature and the genus can, for that reason, be ascertained. It is not an authority for the proposition that the rule must be applied whenever a common and dominant feature can be found in the specified things which precede the general words.

As a matter of fact U Ba U J., himself refused to apply the rule of *ejusdem generis* in *The King* v. *U Saw Hla Pru and one* (1) stating :

"This intention of the Legislature would clearly be defeated if we were to restrict the meaning of the words, 'or otherwise', as used in section 124-A by the words that precede them."

This is in accordance with the following extract from page 344 of *Maxwell on Interpretation of Statutes*, 9th Edition :—

"The general object of the Act, also, sometimes requires that the final generic word shall not be restricted in meaning by its predecessors."

(1) (1947) R.L.R. 83 at 86-87.

In short the present case is distinguishable from *Attorney-General* v. *Brown* (1) inasmuch as a narrower construction under the rule of *ejusdem generis* will restrict the effect instead of promoting the object of the Act; and the decision in *Mohamed Hussein* v. *The Union of Burma* (2) cannot be accepted as correct inasmuch as the rule of *ejusdem generis* was applied therein without regard to the intention of the Legislature and the object of the Act.

We accordingly hold that cash belonging to Government is public property within the purview of the Act and dismiss the application.

(1) (1920) 1 (K.B.) 773. (2) Cr. Misc. Appln. No. 115 of 1948 of the High Court.

SUPREME COURT.

† S.C. 1951

July 12.

U ZAN (APPLICANT)

v.

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

Public Order (Preservation) Act, 1947, s. 5 (2)—Report by Police Inspector and detention by Deputy Commissioner thereon—Detention on reasonable suspicion—Detaining first and seeking materials in support later—Practice condemned.

Held: That a detention under s. 5 (2) proviso (ii) of the Public Order (Preservation) Act on reasonable suspicion cannot be for any period in excess of two months and this period is permitted by the Act to enable investigation into the activities of the person detained.

Where the Deputy Commissioner took action eight months later after being addressed by the Applicant and the earlier order was cancelled and a fresh order of detention was passed, on "being satisfied" with the necessity therefor without enquiry of all available evidence or without any examination whatever by the Deputy Commissioner, the detention is illegal. Reasonable satisfaction of the necessity to direct detention is the basis of the exercise of powers under s. 5-A of the Public Order (Preservation) Act. There must be known to the authority such reasonable grounds before he can validly exercise the power.

Tinza Maw Naing v. *Commissioner of Police and one*, B.L.R. (1950) (S.C.) 17 ; *Nakhuda Ali* v. *M. F. De S. Jawaratne*, 54 C.W.N. 883, referred to and followed.

The practice of directing detention first for an indefinite period and later to seek materials in support of the order of detention, followed by the Deputy Commissioner, cannot be too highly deprecated. As there were no materials at the time of the order of detention on which the authority could be reasonably satisfied, the detention order is illegal.

Kyaw Myint for the applicant.

L. Choon Foung (Government Advocate) for the respondents.

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* Criminal Misc. Application No. 86 of 1951 being application for directions in the nature of *habeas corpus*.

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

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—At the close of the hearing on the 9th July 1951 we directed the release of the applicant, promising to give our reasons for the order of release later.

The applicant was taken into preventive custody by U Ohn Pe, Inspector of Police, on the 14th June 1949 in exercise of the powers under section 5 (2) of the Public Order (Preservation) Act, 1947. U Ohn Pe then submitted on the 16th June 1949 a report of the arrest to U Hla Tin, the then Deputy Commissioner, Insein. In the report it was stated of the applicant :

> " This individual U Zan is Retired E.A.C. and father-in-law of Saw Ba U Gyi. He is a member of KNDO Administration, and legal advisor. His house was Headquarters of KNDO War Office. "

The report then proceeded to recite the names of nine persons with whom the applicant was alleged to have been associated.

Of the nine persons, one is Saw Belly whose detention under section 5-A of the Public Order (Preservation) Act we quashed at the same time we quashed the detention of the present applicant. Two other persons, namely U Shwe Sein and Saw Po Tu, who were alleged to have been associated with the applicant as members of the KNDO administration, had been released from detention some time previously. Two at least of the remaining persons named in the list had been sent up for trial and had been either acquitted or discharged. Of the rest, nothing appears on the record of any action taken against them and the learned Government Advocate also could not assist us with any information.

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On this report, and obviously without any examination of the materials—if such materials did exist—on which the Inspector of Police based his report, U Hla Tin passed an order of detention in the following terms :—

"I hereby direct the following person whom I reasonably suspect of having acted, of acting, of being about to act—in any manner calculated to disturb, or to assist a disturbance of the public tranquillity, to be detained in the Central Jail, Insein, for an indefinite period till further orders."

A detention on reasonable suspicion cannot be for any period in excess of two months : *see* section 5, sub-section (2), proviso (ii) of the Public Order (Preservation) Act. The two months detention obviously is permitted by the Act to enable the officer who is investigating into the activities of the person detained to complete his enquiries. But in this case, having on suspicion ordered the detention for an indefinite period of the applicant, the necessity for further enquiries appear to have been lost sight of altogether. Some eight months later the applicant moved the Deputy Commissioner for an order of release, complaining, not unnaturally, that since he had been in custody for over eight months it should be possible by then for the authorities to say whether they had been able to collect tangible evidence against him if further action is to be taken. When this application reached the present Deputy Commissioner, it apparently occurred to him that the detention for eight months on reasonable suspicion was not in accordance with law. He took action then to formally regularise the detention by cancelling the earlier order of detention on "reasonable suspicion" and substituting therefor a fresh order of detention on "being satisfied" of the necessity to take action under the Act.

In formally regularising the detention in this manner, it does not appear to have struck the learned Deputy Commissioner that he was in fact issuing an order of detention of the "rubber stamp" variety without judging for himself whether the materials before him were such as to justify his being reasonably satisfied of the necessity to direct the detention of the applicant. Bishop Ah Mya, U Ba, retired District Superintendent of Police, Mr. Dinanath, a leading merchant of Rangoon, Mr. Ba Maung Chain and Saya Ba Than, who made their affidavits in support of the present application, were all available to the Deputy Commissioner for examination. And they were clearly persons who had personal knowledge of the events they speak to. No attempt whatsoever was made by the Deputy Commissioner to examine for himself whether the facts were as claimed by U Ohn Pe in his original report to U Hla Tin.

It was only on the 19th April 1951, about two years after the applicant had been in custody, and shortly after the summons of this Court calling upon the Deputy Commissioner, Insein, to justify the detention of the applicant, reached the Deputy Commissioner that the detention proceedings show his having received a detailed but unauthenticated note of the illegal activities alleged against the applicant. It is apparently from this note that the Deputy Commissioner obtained his materials for the affidavit seeking to justify the detention of the applicant.

In *Tinza Maw Naing* v. *Commissioner of Police and one* (1) this Court had said "reasonable satisfaction of the necessity to direct detention is the basis of the exercise of powers under section 5-A of the Public Order (Preservation) Act." We note that in *Nakhuda Ali* v. *M. F. De S. Jawaratne* (2) the Privy

(1) B.L.R. (1950) (S.C.) 17. (2) 54 C.W.N. 883.

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Council had independently arrived at conclusions very much on the lines of the decision of this Court in *Tinza Maw Naing*'s case and said in regard to a power of cancellation to be exercised on "reasonable grounds to believe" under a Ceylon Regulation that "there must in fact exist such reasonable grounds, known to the Controller, before he can validly exercise the power of cancellation."

The practice of directing detention of a person for an indefinite period first and only later to seek materials in support of the order of detention is one not in accordance with law and cannot be too highly deprecated. That practice has been followed by the Deputy Commissioner in the present case.

It is clear then that at the time the order of detention, whether it be that of U Hla Tin or that of the present Deputy Commissioner U Tin U, was made there was no material before either officer on which they could be "reasonably satisfied" of the necessity to take action under section 5-A of the Public Order (Preservation) Act against the applicant.

SUPREME COURT.

KO TUN SEIN AND TWO OTHERS (APPLICANTS)

v.

KO WA NAH (RESPONDENT).*

†S.C. 1951

July 24.

Union Judiciary Act, s. 6—New case in special appeal—Tenants erecting permanent structures without interference by lessors—Estoppel.

Held: Where in the Trial Court and appeal the Applicant did not plead that the land in question was primarily used as a house site, it is not open on an application for special leave to urge a new ground or to evade the lack of success in the Courts below by devising a new case never set up when it should have been set up.

Nathu Piraji Marwadi v. *Umedmal Eadumal*, (1909) I.L.R. 33 Bom. 35, referred to.

Held further: That the law has been settled since 1899 that Lessors are not estopped in equity from bringing ejectment by reason of tenants having erected permanent structures upon the land leased to the knowledge and without interference by the Lessors.

Lala Beni Ram and another v. *Kundan Lall and others*, 26 I.A. 58, referred to.

A building put up five years ago with mere thatched roofing and mat walling cannot now be said to be a substantial structure.

Dr. Ba Han for the applicants.

Aung Min (1) for the respondent.

The judgment of the Court was delivered by

MR. JUSTICE THEIN MAUNG.—This is an application under section 6 of the Union Judiciary Act, 1948 for special leave to appeal from the judgment and decree of the High Court in Civil 1st Appeal No. 39 of 1950.

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* Civil Misc. Application No. 3 of 1951, being application under section 6 of the Union Judiciary Act, 1948 for special leave to appeal.

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

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KO TUN SEIN AND TWO OTHERS v. KO WA NAH.

The learned Advocate for the petitioners has urged that special leave should be granted on two grounds, *viz* :

(1) That the case does not fall within the purview of section 11 (*1*) (*d*) of the Urban Rent Control Act, 1948 as " the respondent had failed to make out a case in the Trial Court that the land in question was primarily used as a house (sic ? house site) and was subsequently let to a tenant " ; and

(2) That " the appellants having built a substantial and permanent building on the premises at a considerable cost, with the consent and or acquiescence of the respondent's predecessor-in-title, the law of estoppel as provided in section 115 of the Evidence Act operates against the respondent in favour of the appellants. "

With reference to the first ground the petitioners have not pleaded in the Trial Court and the High Court that the land in question had not been primarily used as a house site and the Courts must check the tendency of defeated litigants to evade their defeat by devising a new case which was never set up when it should have been set up. [See *Nathu Piraji Marwadi* v. *Umedmal Eadumal*, (1).]

In those Courts they merely pleaded that section 11 (*1*) (*d*) of the Urban Rent Control Act, 1948 was applicable only where the land was *bona fide* required for construction of a building to be let to tenants—and not where the land was required for construction of a building for the use of the owner. This plea forms a part of the first ground of appeal in the memorandum of appeal in this Court also. However, the learned Advocate for the petitioners has not mentioned it in the course of his argument ; and he appears to have abandoned it as both the Lower Courts have held that

(1) (1909) I.L.R 33 Bom. 35.

the clause does not place any restriction on the purpose for which a building might be constructed and as the wording of the clause is so clear.

With reference to the second ground, the law has been settled as long ago as 1899 by Their Lordships of the Privy Council who held in *Lala Beni Ram and another* v. *Kundan Lall and others* (1), that " the lessors are not estopped in equity from bringing ejectment by reason of their tenants having erected permanent structures upon the land leased in the knowledge of and without interference by the lessors." They have stated in the course of their judgment therein :

" If there be one point settled in the equity law of England, it is that, in circumstances similar to those of the present case, the mere erection by the tenant of permanent structures upon the land let to him, in the knowledge of and without interference by his lessor, will not suffice to raise the equitable right against the latter which has been affirmed by the Courts below. It must also be kept in view that in Indian law the maxim ' Quicquid inaedificatur solo, solo cedit, ' has no application to the present case. The rule established in India is that of section 108 of the Transfer of Property Act, which provides that ' the lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth, provided he leaves the property in the state in which he received it. "

Besides, the petitioners' building does not appear to oe so substantial as they claim it to be since it is a building constructed in February, 1946 with mere thatched roofing and mat walling.

The learned Advocate for the petitioners has also contended, though it is not in the grounds of appeal, that there was " a verbal agreement to execute a registered deed of lease of the leasehold land in dispute agreeing not to disturb petitioners in their

(1) 26 I.A. 58.

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possession so long as the building erected thereon of petitioners stands " and that the respondent's suit should have been stayed to enable petitioners to file a suit for specific performance thereof. However, the existence of such an agreement was not pleaded in the lower Courts.

It has been mentioned for the first time in connection with the present litigation only in their reply to the respondent's objection in this Court ; and their suit for specific performance (which by the way has been dismissed) was filed only after the High Court had passed the judgment and decree under appeal.

So we cannot allow them to set up, at this stage and for the purpose of the present application, a new case which was never set up when it should have been set up ; and we cannot go into the connected questions as to (1) whether there has been part performance of the alleged agreement and (2) what must be the legal consequences of part performance (if any) thereof.

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

SUPREME COURT.

† S.C. 1951

July 30.

KYI CHUNG YORK (APPLICANT)

v.

THE CONTROLLER OF IMMIGRATION, BURMA (RESPONDENT).*

Certiorari—Order of Controller of Immigratoin directing applicant to leave country—Burma Immigration (Emergency Provisions) Act, s.4—Foreigners' Act, s. 3.

The applicant was granted permission to enter Burma and work as an Assistant Editor of a Chinese paper for four years, the manager and publisher thereof guaranteeing that the applicant would so work. Before the expiry of the time so fixed, the applicant resigned the post and worked as a teacher; whereupon the guarantors withdrew their guarantee. The Controller of Immigration, acting under orders of the Foreign Office, cancelled the applicant's Stay Permit and ordered him to leave the country.

Held: That what the Controller had done was merely to carry out the order of the Government. Every country which extends its hospitality to an alien can withdraw it and send him back to his own country. Every Power has the right to refuse to permit an alien to enter the State and, if it permits an alien to enter, to annex what conditions it pleases to such permission and expel or deport him from the State at pleasure. This principle is propounded and followed by English and American Courts and is in conformity with the practice of every sovereign State. This principle is to be found embodied in s. 3 of the Foreigners' Act whereby the President may order any foreigner to remove himself from the Union of Burma. Without such power the position of the State will be almost intolerable. Government was perfectly within its rights in cancelling the permit for breach of condition.

The King v. *Secretary of State for Home Affairs*, (1917) 1 K.B. 922; *Attorney-General for Canada* v. *Cain*, (1906) A.C. 542 at 546; *Mahler* v. *Eby*, 264 U.S. 32, referred to.

Choung Po for the applicant.

L. Choon Foung (Government Advocate) for the respondent.

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

SIR BA U.—This application is of a two-fold nature: one is for the issue of a writ of certiorari to have

* Civil Misc. Application No. 93 of 1950 being application for directions in the nature of certiorari and prohibition.

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

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the order of the Controller of Immigration directing the applicant to leave this country brought up to this Court and quashed and the other is to prohibit the Controller from putting the order into effect.

The application must be dismissed. It is in our opinion clearly misconceived both in law and on facts.

The applicant is a Chinese national. In or about the end of the year 1948, an application on behalf of the applicant to enter this country and work as an Assistant Editor of a Chinese Newspaper called the "China Commercial Times" was made. The manager and the publisher of the paper, Mr. S. Huie and Mr. Ah Fong, gave their guarantee that the applicant, if allowed to enter and stay in this country, would work as an Assistant Editor of the "China Commercial Times." On their guarantee permission, as applied for, was granted by the Controller of Immigration. The period of the applicant's stay in the country was fixed for 4 years with effect from the 10th January 1949. In July 1950 the applicant resigned the post of Assistant Editor of the "China Commercial Times" and worked as a science teacher in the Chinese School in Kemmendine; whereupon the two guarantors withdrew their guarantee. On their withdrawal of the guarantee the Controller of Immigration cancelled the applicant's stay-permit and ordered him to leave the country.

These facts are not in dispute. What is clear from these undisputed facts is that the applicant clearly committed a breach of the condition on which he was allowed to stay in this country. He has thereby rendered himself liable to expulsion under order of the President within the meaning of section 4 of the Burma Immigration (Emergency Provisions) Act, 1947. That is exactly what the Controller of Immigration says in his affidavit. He says that when he gave permission to the applicant to enter and stay in this

country, he did it under orders of the Foreign Office. And when he cancelled the stay-permit of the applicant and ordered him to leave this country, he did it under orders of the Foreign Office. In other words, what the Controller has done in this case is merely to carry out the order of the Government. In the case of *The King* v. *Secretary of State for Home Affairs* (1) the Attorney-General, Sir F. E. Smith, who subsequently became the Lord Chancellor of England in the name of the Earl of Birkenhead said in the course of his submission to the Court: "Every country which extends its hospitality to an alien can terminate the hospitality, and can do so by sending the alien back to his own country. Any other country might refuse to receive him."

This submission apparently found favour with Lord Justice Swinfen Eady who in the course of his judgment said:

"A Secretary of State is not required to justify in a Court of Law his reasons for making a deportation order in the case of an alien. In the event of it being disputed that the subject of a deportation order is an alien, the matter must be determined by the Court, and unless it be proved that the person is an alien the order must be quashed as made without jurisdiction; but I am not aware of any other ground upon which such an order can be quashed."

Similarly, Lord Atkinson, delivering a judgment on behalf of the Board in *Attorney-General for Canada* v. *Cain* (2) said:

"One of the rights possessed by the Supreme power in every state is the right to refuse to permit an alien to enter that state, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the state, at pleasure, even a friendly alien,

(1) (1917) 1 K.B. 922. (2) (1906) A.C. 542 at 546.

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especially if it considers his presence in the state opposed to its peace, order, and good government or to its social or material interest."

The Supreme Court of America adopted the same view as the English Courts in the matter of an expulsion of aliens from its country. In *Mahler* v. *Eby* (1) quoted by M. R. Konvitz in his book called "The Alien and the Asiatic in American Law", Chief Justice Taft said that the sovereign power to deport is limited only by treaty obligations. The principle thus enunciated and propounded by the English and American Courts is now in conformity with the practice followed by every sovereign state, as is to be found in every standard book on International Law. The principle thus asserted, claimed and followed by the Comity of Nations is found embodied in section 3 of the Foreigners' Act which says:

> "The President may, by writing, order any foreigner to remove himself from the Union of Burma, or to remove himself therefrom by a particular route to be specified in the order."

If such a power is not to be had, the position will become almost intolerable. Every non-citizen is thus liable to be expelled from the Union of Burma if he is found committing a breach of the condition on which he is allowed to stay in this country or if he is found abusing the hospitality extended to him by Government.

In expelling the applicant from this country the Government acted within its rights. The application is dismissed and the rule *nisi* is discharged.

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(1) 264 U.S. 32.

SUPREME COURT.

CHARLES R. MANASSEH (APPLICANT)

v.

THE COLLECTOR OF RANGOON AND ANOTHER (RESPONDENTS). *

†S.C. 1951

July 30.

Requisitioning (Emergency Provisions) Act, 1947—Meaning of requisition—Property occupied by tenant—Purchaser moving government to requisition—Requisitioning Act whether applicable—Constitution of Burma, ss. 13 and 23 (4)—If Requisitioning Act repugnant to—Compensation to owner—Tenant if owner—Urban Rent Control Act, s. 32—Possession of government—Meaning of the words possession, requisition, public servant—Defence of Burma Rules, 1940, Rule 2 (9) and Rule 2 (10)—Motive in requisitioning, relevancy of.

Applicant was a monthly tenant of premises since 1946. In 1950 the 2nd Respondent, an Officer in the Medical Service of the Government of Burma, purchased the premises. The Collector of Rangoon made an order on the 16th January 1951 requisitioning the premises and followed it up on 31st January 1951 calling on the applicant to vacate, warning him that on failure to vacate an order authorising his removal would be issued. Upon an application for an appropriate direction under s. 25 of the Constitution of Burma it was contended that the Requisitioning Act is repugnant to the Constitution ; that the requisitioning was not in good faith ; that the Act did not apply to property in the possession of a tenant ; that there had been discrimination in that government servants had been preferred as against ordinary citizens and that it is not in public interest ; that depriving a tenant of his property would amount to limitation or expropriation of private property and that the Urban Rent Control Act can be invoked only to property in actual possession of Government.

Held : Negativing the contentions :—

S. 2 (*1*) of the Requisitioning Act empowers the President by order in writing to requisition any land, building, etc. A tenant in possession is not exempted from having the property requisitioned. Provisions of s. 2 cannot be narrowed down and the absence of specific provision for payment of compensation can amount to no more than a casual omission.

Held : (i) That the Requisitioning Act is not repugnant to ss. 13 or 23 (4) of the Constitution. No arbitrary discrimination as contemplated by s. 13 is perpetrated when Government provides accommodation to a person charged with the performance of public duties in preference to a person not so charged.

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* Civil Misc. Application No. 12 of 1951 being an application under section 25 of the Constitution of Burma.

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

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The requisitioning does not also amount to limitation of private property within the meaning of s. 23(4) of the Constitution. A tenant has a rgiht in property to the extent of his terms and he is the owner of an interest in the property. When s. 6 of the Requisitioning Act provides machinery for assessment and payment of compensation to the owner it satisfies different and concurring estates in the property.

Held also: That s. 32 of the Urban Rent Control Act providing for prohibition against termination of a monthly lease on notice does not extend to premises which have come into the possession of Government. Possession in this section is not restricted to physical possession: so to read it would unduly restrict that term and make s. 32 a futility.

Minister of Agriculture and Fisheries v. *Mathews*, (1950) 1 K.B. 148; *The Steaua Romana* v. *The Oltenia*, (1944) P. 43 at 48, referred to.

The word "Requisition" is not a term of art and does not connote the same state of things in every particular case. It may mean hiring or may involve taking over of absolute dominion. It is so used in Rule 2 (10), of the Requisitioning Act to the extent that the property is placed at the disposal of Government. The Requisitioning Authority may well come within the meaning of landlord under s. 2 (*c*) of the Urban Rent Control Act.

The word "public servant" is not defined in the Requisitioning Act; it is a re-enactment of the Defence of Burma Rules, 1940. Rule 2 (9) of the said Rules defines the term as including public servant according to the Penal Code and any servant of any local authority or Railway Administration. The test is whether his pay comes out of the National funds and the office must be public in the strict sense of the term, namely, an office in the discharge of public duties.

The Broadmayne, (1916) P. 64; *Ismail Mohamed* v. *The King*, (1941) R.L.R. 536; *In Re. Nirams*, (1891) 1 Q.B.D. 594, referred to.

An exercise of a lawful statutory right cannot be vitiated by any improper or ulterior motive.

Allen v. *Flood*, (1898) A.C. 1, referred to.

P. K. Basu for the applicant.

L. Choon Foung (Government Advocate) for the 1st respondent.

Choung Po for the 2nd respondent.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The applicant seeks directions in the nature of mandamus to ensure forbearance of the 1st respondent from requisitioning the premises in the occupation of the applicant.

The applicant's occupation on a monthly tenancy from the then owner, one Sagarmal Tibrewalla, began in 1946. In 1950, the premises were purchased by the 2nd respondent, an officer in the Medical Services of the Government of the Union, holding the rank of an Assistant Surgeon. Following the purchase and on the 16th January 1951, the 1st respondent made an order under section 2 of the Requisitioning (Emergency Provisions) Act, 1947 in respect of these premises; and this order was followed up by a further order calling upon the applicant to give up possession of the premises by the 31st January 1951. This later order, after drawing the applicant's attention to the penal provisions of section 2 (*4*) of the Act, winds up with the warning that, if the applicant "fails to vacate by the 31st January 1951 at the latest, an order authorising his removal therefrom will be issued and legal action will also be taken against him, if necessary, under the Act."

The applicant claims that it is incumbent upon the 1st respondent, who is a person holding a public office, to forbear from interfering with his right of occupation as a tenant except in due course of law; and that the Requisitioning Act from which the 1st respondent derives his powers either is not applicable to the premises in the occupation of a tenant or, if it purports to be so applicable, is repugnant to the Constitution.

It is, in the alternative, said by the applicant that if the Act is not repugnant to the Constitution, the power of requisitioning, in the present case, has not been exercised in good faith or for the purposes permissible under the Act; and that he is entitled to have directions issued to the 1st respondent to forbear from proceeding further in pursuance of such an order. On this aspect of the case, the applicant's allegations are

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that the 2nd respondent, after his purchase of the house from the previous owner, finding it impossible because of the Urban Rent Control Act to evict the applicant, used " his influence with the Government " to obtain by the requisitioning order, under challenge, the ejectment of the applicant. It is conceded by the respondents that, if and when the applicant vacates the premises as a result of the requisitioning proceedings, the premises are intended for the occupation of the 2nd respondent.

By section 2, sub-section (*1*) of the Requisitioning Act, the scope of requisitioning power is defined in very general terms. The sub-section reads :

" The President may by order in writing requisition any land, building, part of a building, or other premises, together with any fixtures, fittings, furniture or other things therein, or any water-supply system connected or pertaining to such land or premises. . . . . "

Two restrictions only are placed on this general power by the provisos following the operative part of the section. Neither proviso relates to property in the possession of a tenant. But Mr. Basu seeks to infer, what he considers to be, the true intention of the legislature by a reference to section 6 of the Act. Section 6 provides machinery for assessment and payment of compensation to the owner of the property to be requisitioned. There is, he says, no corresponding provision anywhere in the act in relation to the tenant whose occupation must necessarily be disturbed as the result of requisitioning. From this we are asked to hold that, since the legislature cannot be presumed to intend an injustice, the Act was not intended to extend to property in the possession of a tenant in contradistinction to the property in possession of the owner.

We cannot accept the proposition that the very clear provisions of section 2 of the Act can be narrowed down for the reasons and in the manner suggested by the learned counsel for the applicant. The absence of specific provisions for payment of compensation to a tenant in occupation could have been at the most a mere *casus omissus.*

If we hold, as we do, that the Act extends to property in the occupation of a tenant as well, the learned counsel's contention that the Act is repugnant to the Constitution remains to be considered. The attack on the constitutionality of the Act is based on the conflict which the learned counsel claims to exist between the Act and the provisions of sections 13 and 23 (4) of the Constitution.

Section 13 of the Constitution provides that "there shall not be any arbitrary discrimination between one citizen or class of citizens and another". The provision of the Requisitioning Act authorising the requisitioning of private property for the use of a public servant is claimed to be a breach of this provision in the Constitution. We cannot accept the contention that in enabling the Government to provide accommodation to a person who is charged with the performance of public duties in preference to a person not so charged any arbitrary discrimination as contemplated by this section of the Constitution is perpetrated.

Section 23 (4) of the Constitution reads :

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

Mr. Basu's contention on this aspect of the case is that the requisitioning of property for the use of "public servants and persons whose work or duty is connected

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with the Government" is not covered by the condition "if the public interest so requires". With respect, this contention lacks substance and what we have already said of the relation between section 13 of the Constitution and the Act would be sufficient to dispose of this objection.

The further point taken on behalf of the applicant that the right of a tenant, as in this case, of residential premises is "private property", that the requisitioning of the premises of which as a tenant he is in occupation would amount to limitation or expropriation of that "private property" and that as such the limitation or expropriation cannot be lawfully made except in accordance with law which must of necessity prescribe in each case and to what extent the owner of the private property is to be compensated, requires a little more careful consideration.

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

A further objection to the validity of the requisitioning order is taken by reliance on the provisions of the Urban Rent Control Act. Thus it is said that while ordinarily a tenant from month to month would cease to have any interest in the premises of which he is a tenant on due notice being given of the termination of his tenure, such termination is prohibited by the Urban Rent Control Act. But to this contention section 32 of the Urban Rent Control Act appears to provide a short and complete answer. The prohibition against termination of a monthly lease of residential and other premises on usual notice does not extend "to any premises which have or may come into the possession of the Government as a result of proceedings under the Land Requisition Act or the Defence of Burma Act or otherwise." It is impossible to read the term "possession" in a restricted sense as meaning "physical possession" for so to restrict that term would reduce the provisions of the second part of section 32 to a futility. It is impossible to conceive of the provisions of the Urban Rent Control Act being applied to any premises, whether privately owned or at the disposal of the Government, so long as they are in the actual physical possession of the owner or the Government.

Much learning has been expended at the hearing on the question whether the first part of section 32 of the Urban Rent Control Act will also operate to exclude the special privileges granted to tenants where Government requisitions premises in their occupation. The answer turns on the true nature of the power of requisition and whether after requisitioning the Government can in law be regarded as the landlord of the person in occupation of the premises. Mr. Basu

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relies on certain dicta of Cassels J., in *Minister of Agriculture and Fisheries* v. *Mathews* (1) and maintains that the relation of landlord and tenant cannot arise between the Government and the person in occupation. But that decision turns on the wording of the English Defence Regulations of 1939 and the matter is not *pari materia*. In *The Steaua Romana* v. *The Oltenia* (2), Lord Merriman P, in relation to the requisitioning of a ship said :

> ". . . the word 'requisition' is not a term of art, and, as Pickford L.J. explained in *The Broadmayne* (3), does not connote the same state of things in every particular case. Requisitioning may be, and usually is, nothing more than a hiring of the ship which does not take the property in the ship out of the owner, though the owner has no alternative whether he will accept the proposition of hiring or not, or it may involve a taking over of the absolute dominion of the vessel, though this may not be ascertained in any given case until the terms are finally settled."

Light is thrown on the meaning of the word "requisition" as used in the Requisitioning Act by the expired provisions of the Defence of Burma Rules. Rule 2 (10) defined "requisition" to mean in relation to any property to take possession of the property or to require the property to be placed at the disposal of the requisitioning authority. It is not necessary to decide the point for the purposes of this case but it does seem to us to be a tenable proposition that the requisitioning authority, being entitled to have the property placed at its disposal, would be entitled to receive rent in respect of the premises in preference to the owner to whom compensation become payable or had been paid.

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(1) (1950) 1 K.B. 148. (2) (1944) P. 43 at 48.
(3) (1916) P. 64.

To that extent at least it seems that the requisitioning authority may well come within the meaning of a landlord under section 2 (*c*) of the Urban Rent Control Act.

The purpose of the requisitioning being admittedly to provide accommodation to the 2nd respondent, his claim to be a public servant within the meaning of the second proviso of section 2 of the Requisitioning Act has been challenged at the Bar. The Act does not define the term "public servant" but it must be remembered that the Act is a re-enactment of certain provisions of the Defence of Burma Rules, 1940, relating to requisition of property and in those Rules the term "public servant" has been defined in Rule 2 (9) as "including any public servant as defined in the Penal Code and any servant of any local authority or railway administration". The intention of the legislature is therefore clear when in this Act the term "public servant" is used. It is of interest to mention that in *Ismail Mohamed* v. *The King* (1) the Head Clerk of the Controller of Prices has been held to be a public servant within the meaning of the Defence of Burma Rules 2 (9). The test adopted in that case is the same as the test which had been applied in *In Re. Nirams* (2), namely, "the pay must come out of national and not out of local funds, and the office must be public in the strict sense of that term", namely, an office in discharge of public duties.

It is not necessary for us to examine in detail the applicant's claim that the requisitioning was not in good faith, the same having been brought about through the 2nd respondent's "influence with the Government". The respondents have not admitted this allegation and even if the applicant's allegations is established we do not see that it would be of any

(1) (1941) R. L.R. 536. (2) (1891) 1 Q.B.D. 594.

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relevance in the present case. No exercise of a lawful right can be vitiated by any improper or ulterior motive. See *Allen* v. *Flood* (1).

We cannot, with the applicant, anticipate from the warning in the further order of the 1st respondent that "an order authorising his removal" from the premises requisitioned that the 1st respondent will take any action not in accordance with law.

The application therefore fails and is rejected with costs, ten gold mohurs.

(1) (1898 A.C. 1.

SUPREME COURT.

M. R. DAS (APPLICANT)

v.

C. R. DAS AND THREE OTHERS (RESPONDENTS).*

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July 30.

Urban Rent Control Act, s. 16-A—Order under—Application for review by a co-tenant of grant of permission to assign tenancy—Dismissal by Controller—Certiorari and mandamus if permissible.

Held : Under s. 21-A of the Urban Rent Control Act, 1948 the Controller of Rents may review any order made by him and the provisions of the Code of Civil Procedure, Order 47 would apply to such review. Any person considering himself aggrieved by an order may apply for review under Order 47, Rule 1 of the Code of Civil Procedure ; but the Controller's order is not binding upon any person not a party to the proceedings. As the present applicant is not bound by the said order, he is not an aggrieved person who can apply for review thereof.

Kuptarakulti Adammeera v. *Esoof and one*, (1948) B.L.R. 421, referred to.

P. K. Basu
G. N. Banerji } for the applicant.

Dutt for the respondents Nos. 1 and 2.

Ba Sein for the respondents Nos. 3 and 4.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—This is an application for writs of certiorari and mandamus in respect of the 4th respondent's order by which he dismissed the present applicant's application to review an order of his predecessor in office.

The order, that was sought to be reviewed, was passed under section 16-A of the Urban Rent Control

* Civil Misc. Application No. 18 of 1951 being an application under section 25 of the Constitution of Burma for directions in the nature of certiorari and mandamus.

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

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Act, 1948 granting permission to the 1st respondent to assign to the 2nd respondent his tenancy of certain premises of which the 3rd respondent is the owner.

The present applicant applied for review of the said order claiming that he was a joint tenant of the premises with the 1st respondent and that the latter had deliberately suppressed this fact in his application for the permit.

The 4th respondent (Controller of Rents) dismissed his application on the ground that he had no right to apply for a review inasmuch as (1) he was not a party to the proceedings under section 16-A of the Urban Rent Control Act, 1948 and (2) he was not, for that very reason, bound by the said order.

Section 21-A of the Urban Rent Control Act, 1948 provides :

"The Controller may review any order made or deemed to be made by him under this Act and the provisions of Order 47 of the First Schedule to the Code of Civil Procedure shall, so far as may be, apply to such review."

Order 47, Rule 1 of the Code of Civil Procedure does provide that any person considering himself aggrieved by an order may apply for review. However, as a general rule an order is not binding on any person who is not a party to the proceedings ; and there does not appear to be any special reason why the said order should be binding on the present applicant at all.

The learned Advocate for the first two respondents submits that the said order cannot be binding on the present applicant ; and as a matter of fact his own learned Advocate is of the same view although he apprehends that the High Court might be construed to have decided to the contrary in *Kupparakutti Adammeera* v. *Esoof and one* (1).

(1) (1948) B.L.R. 421.

Adammeera's case, in which the plaintiff-appellant merely relied on the Controller of Rents having reviewed and cancelled the original order without pleading that it could not in any case be binding on him—was decided before the enactment of section 21-A; and the High Court merely decided that the original order must stand as the Controller of Rents then had no power to review and cancel it as he did.

The Controller of Rents is right in holding that the present applicant is not bound by the said order and that he is not an aggrieved person who can apply for review thereof.

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

SUPREME COURT.

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July 30.

U SEIN LIN AND ANOTHER (APPLICANTS)

v.

THE ASSISTANT JUDGE, TAUNGDWINGYI AND TWO OTHERS (RESPONDENTS).*

Certiorari—Lessee building a house on leased land and letting it out to tenants—Application for fixation of fair rent under s. 19 (2)(g) of the Urban Rent Control Act—Assistant Controller fixing standard rent at contract rate.

Held: Before the third proviso to s. 19 (2)(g) of the Urban Rent Control Act can operate, it is necessary that the Controller of Rents should be satisfied that the rent fixed for the first time after 1st September 1939 when the premises were first let was excessive or not just or fa ir.

Hla Pe for the applicants.

Tin for the 3rd respondent.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The applicants leased a piece of free-hold land belonging to the 3rd respondent in October 1946 on the agreed rental of Rs. 15 per mensem. Having leased the land, the applicants built a house on it, as found by the Assistant Controller of Rents, at a cost of Rs. 500 and let it out to tenants at a rent of Rs. 50 per mensem. For two years following the lease from the 3rd respondent the applicants continued to pay the contract rate in respect of the land. Then suddenly it seems to have occurred to them that they had been paying rent at a higher rate than they should have and applied to the Assistant Rent Controller to fix the standard rent under the

* Civil Misc. Application No. 24 of 1951 being application under ion 25 of the Constitution of the Union of Burma for directions in the ure of certiorari.

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

provisions of section 19 of the Urban Rent Control Act. The Assistant Controller considered the contract rate as fair and fixed the standard rent of the land at the same figure.

Proceedings in revision before the Assistant Judge of Taungdwingyi having failed the applicants have come to us to have the assessment of the standard rent of the land made by the Assistant Rent Controller of Taungdwingyi quashed.

The learned counsel for the applicants relied on the provisions of section 19 (2)(*g*) read together with the third proviso thereto, of the Urban Rent Control Act. We are clearly of the opinion that these provisions cannot help him. Before the third proviso can operate it is necessary that the Controller should be satisfied that the rent fixed when the premises were for the first time let after 1st September 1939 was excessive or not just and fair. In this case after taking into consideration all the circumstances, the Assistant Controller came to the view, and in our opinion rightly, that the rent fixed for the first time after September 1939, that is in October 1946, was neither excessive nor unjust.

In these circumstances the application fails and must be dismissed with costs; Advocate's fee three gold mohurs.

SUPREME COURT.

†S.C. 1951

July 30

U HTUN TIN (APPLICANT)

v.

U BA TUN AND TWO OTHERS (RESPONDENTS).*

Quo warranto—*City of Rangoon Municipal Act, Rule 251, Chapter IX, Schedule 1—Standing Committee—Appointment of Chairman—Meeting attended by eight members—Chairman adjourning election of Chairman—Date to be announced later; remaining members electing a Chairman—Validity*—Quo warranto *proceedings—Nature and scope.*

Held : Proceedings in the nature of *quo warranto* will lie for usurping any office whether created by charter or by the Crown with the consent of Parliament, provided the office be of a public nature, and a substantive office and not one held at the will and pleasure of others.

Rex v. *Speyer and Cassel*, (1916) 1 K.B. 595, referred to.

Darby v. *The Queen*, 12 Ch. and F. 537 at 541, followed.

The said remedy is available to private persons within the limits mentioned and subject to the discretion of the Court to refuse or grant it. The Court in exercising its discretion will consider the facts and circumstances and the consequences likely to follow.

The Queen v. *Cousins*, (1873) L.R. 8 Q.B.D. 216 ; *The Queen* v. *Ward*, (1873) L.R. 8 Q.B.D. 210 at 215, referred to.

In the present case the term of the Chairman of a Standing Committee of the Municipal Corporation of Rangoon expired at midnight on the 20th March 1951. A meeting of the Standing Committee was called on the 20th March 1951 to elect a Chairman for the next year. Out of eleven members, eight were present (three forming a quorum). The Chairman adjourned the meeting announcing that the date for next meeting would be announced later in consultation with the Commissioner.

Six out of the eleven members protested against the adjournment. The Chairman and other four members then left the meeting. On the advice of the legal adviser of the Corporation who was present at the meeting, the remaining six members held a meeting and elected the first Respondent as Chairman for the next year.

Held : The election of the Chairman was legal.

The Chairman of the Standing Committee had full discretion to adjourn the meeting of the 20th March, but Rule 9 of Chapter IX provides that

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*Civil Misc. Application No. 20 of 1951 being application under section 25 of the Constitution of Burma for directions in the nature of *quo warranto* and/or certiorari and/or prohibition and/or mandamus.

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

in adjourning the meeting the Chairman "shall fix such time and place for an adjourned meeting as he shall think fit." Without such fixation of time and place of the next meeting a mere adjournment to a date which the Chairman proposed to announce later after consulting with the Commissioner of the Corporation is not a lawful exercise of the power of adjournment under Rule 9. The Chairman would have ceased to function after the 20th March, no one could fix a date for the adjourned meeting. It is to provide for such consequence that the rule requires that the adjourned meeting shall be at a fixed time and place.

No practice however consistent, can override the plain provisions of law.

Woon for the applicant.

Tun Aung for the respondent 1.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—This application for directions in the nature of *quo warranto* was laid to test the right of the 1st respondent to the office of the Chairman, the Public Health and Markets Committee of the Municipal Corporation of the City of Rangoon, to which office he claims to have been duly elected on the 20th March 1951.

The Public Health and Markets Committee is a Standing Committee of the Corporation constituted under Rule 25, Chapter IX, Schedule 1 of the City of Rangoon Municipal Act. It is composed of 12 councillors of the Corporation elected at the first meeting of the Corporation held after General Elections. Rule 26 requires that the Standing Committee "shall appoint a Chairman from among its members who will hold office for one year but shall be eligible for re-appointment."

The meeting convened for the 20th March 1951 was attended by eight members. Three members excused themselves from attendance; and it is said that one member appointed by the President had been removed by the President from his office as a Councillor of the Corporation.

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The applicant who had been elected as the Chairman of the Standing Committee on the 21st March 1950 presided at the meeting, as was his right. The first business arranged for the day was the election of the Chairman for the succeeding year; but before the same could be taken up for consideration, the applicant stating that he considered the attendance inadequate for the transaction of business of such importance as the election of the Chairman for the succeeding year declared the meeting adjourned to a date which he proposed, after consultation with the Commissioner of the Corporation, to announce later. Amidst protests from the members that, under Rule 29, three members constituted a quorum for transaction of business at a meeting of the Standing Committee, the applicant accompanied by another member departed from the place of meeting.

Six members who remained behind refused to accept the declaration of adjournment made by the applicant as effective and considered themselves competent to proceed with the business of electing a Chairman for the succeeding year. It may be stated that this view was shared and supported by the Legal Adviser to the Corporation. The result of the proceedings after the applicant departed from the place of meeting was that the 1st respondent was elected to the office of the Chairman for the succeeding year by the votes of all six members remaining.

The nature and scope of proceedings in *quo warranto* have been exhaustively considered in *Rex* v. *Spayer and Cassel* (1). Lord Reading C.J., accepted the conclusions arrived at by Tindal C.J., in *Darley* v. *The Queen* (2) that:

"This proceeding in the nature of *quo warranto* will lie for usurping any office whether created by charter alone, or by the

(1) (1916) 1 K.B. 595. (2) 12 Ch. and F. 537 at 541.

Crown with the consent of Parliament, provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others."

The learned Lord Chief Justice added that the information in the nature of *quo warranto* "is a remedy available to private persons within the limits stated by Tindal C.J., and subject always to the discretion of the Court to refuse or grant it."

The Court, in exercising its discretion to refuse or grant the application for directions in the nature of *quo warranto*, can and will take into consideration the facts and circumstances of the case, and the consequences which would be likely to follow should the application be granted. This in *The Queen* v. *Cousins* (1), Blackburn J., said of the Courts discretion to refuse the application :—

"The rule always acted upon is that if the right person has been elected, and it is not shown that any one else had been kept out, nor the result of the election in any way effected, the Court will not allow the writ to issue."

Similarly, in *The Queen* v. *Ward* (2), Blackburn J., delivering the Judgment of the Court, said :

"We think, therefore, that seeing that the mistake committed here has produced no result whatever ; that the same persons have been elected who would have been elected if the election had been conducted with the most scrupulous regularity, and that the defendant's title, if bad at all, is only bad as I may say on special demurrer ; we ought in the exercise of our discretion, to refuse leave to disturb the peace of this district by filing this information."

In the case before us, the applicant's term of office as the Chairman, which is for one year from the

(1) (1873) L.R. 8 Q.B.D. 216. (2) (1873) L.R. 8 Q.B.D. 210 at p. 215.

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21st March 1950, expired at midnight on the 20th March 1951 : *see* sections 2 (65) and 20 of the General Clauses Act. The vacancy caused by the removal of one member could not have been filled before the 3rd April 1951, when, under Rule 1, Chapter IX, Schedule 1 of the City of Rangoon Municipal Act, the Corporation would next meet to transact business. Till then the membership of the Standing Committee would be eleven ; six members have voted for the 1st respondent ; and the other five cannot rightly claim that they had been denied the opportunity of exercising their choice of the Chairman. *Primâ facie*, the result would not have been different at an election held at any time in March 1951 ; and Rule 28 requires one meeting at least a month for each Standing Committee.

Moreover, we are not satisfied that the view taken by the respondent and his five colleagues on the Standing Committee, supported as it is by the Legal Adviser of the Corporation, on the effect of the declaration of adjournment by the applicant is incorrect. True it is that Rule 9, Chapter IX read with Rule 30 granted the applicant as the Chairman of the Standing Committee on the 20th March 1951 full discretion to adjourn the meeting of that day ; but that Rule requires also that the Chairman in adjourning the meeting, "shall fix such time and place for the adjourned meeting as he shall think fit." An adjournment without fixing the time and place for the adjourned meeting cannot be said to be in lawful exercise of the powers under Rule 9.

The deadlock that would follow from an adjournment without fixing the time and place for the adjourned meeting is well illustrated in this case ; and we have no doubt that such a consequence was present to the framers of the Rule in inserting a mandatory provision requiring the time and place of the adjourned meeting

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to be fixed when adjourning a meeting. After midnight of the 20th March 1951, the applicant having ceased, by efflux of time, to be the Chairman of the Standing Committee would not be competent to fix a date for the adjourned meeting ; and there would be no other person who could have fixed the date.

The learned counsel for the applicant states that the practice in the Corporation has consistently been that till the next Chairman is elected, the outgoing Chairman continued to exercise the privileges of a Chairman. That may or may not be so, as a matter of practice. But no practice however consistent can override the plain provisions of Law.

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

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July 31.

MAUNG WEIN AND THREE OTHERS (APPLICANTS)

v.

THE DISTRICT AGRICULTURAL COMMITTEE OF THARRAWADDY AND THREE OTHERS (RESPONDENTS). *

Disposal of Tenancies Act, s. 3, proviso (a)—*Rights of owner to remain in possession—Whether can be dislodged by Village Agricultural Committee or District Agricultural Committee.*

Where the owners applied to the Village Agricultural Committee to cultivate their land which is just over 10 acres for the season, 1950-51 and were allowed to do so but the old tenants applied for permission to work the same land which was granted by the new Village Agricultural Committee and which was confirmed in appeal and the owner applied for a writ of certiorari to quash the said proceedings :

Held : That under the provision of s. 3, proviso (*a*) of the Disposal of Tenancies Act the owners of the 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. Neither the Village Agricultural Committee nor the District Agricultural Committee on appeal have power under the said proviso to dislodge the owner.

Tun I for the applicants.

Ba Sein (Government Advocate) for the respondents 1 and 2.

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

SIR BA U.—The facts of the case, when properly sorted out, appear to be quite simple.

In 1947 the applicants bought a piece of land situate in Sha-daw-yo East Kwin No. 9, now known as holding No. 5 of 1949-50. At the time of the purchase

* Civil Misc. Application No. 4 of 1951 being an application for directions in the nature of certiorari.

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

the land was in the occupation of two tenants, the 3rd and 4th respondents Ko Po Thway and Ma E Sein. These two tenants were alleged by the new owners of the land as having defaulted in the payment of rent due for 1947-48 and the new owners were accordingly allowed by the Pebingon Village Agricultural Committee to work the land for the year 1948-49. But the following year (1949-50) the owners could not work the land owing to insurgent activities and the former tenants, respondents 3 and 4, worked the land instead, apparently without getting permission from anybody. After the insurgents had been driven out of that area, the owners applied to the Pebingon Village Agricultural Committee for permission to cultivate the land for the agricultural year 1950-51. They were allowed to do so but the old tenants attempted to interfere with them in the cultivation of the land with the result that the matter had to be taken up to the Deputy Commissioner. Under the orders of the Deputy Commissioner, the Headquarters Assistant and the Subdivisional Officer inquired into the matter one after the other and submitted their reports in favour of the owners. In the meantime the old Village Agricultural Committee was dissolved and a new one was constituted. To the new committee the old tenants, the respondents 3 and 4, applied for permission to work the land. Permission was granted. By that time the land had been ploughed and the crops had been sown by the owners, the applicants. An appeal was accordingly launched by the owners to the District Agricultural Committee but the committee confirmed the order passed by the new Village Agricultural Committee.

In so doing, the District Agricultural Committee overlooked the provisions of section 3, proviso (*a*) of the Disposal of Tenancies Act. Under the said provisions

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the applicants, who are the owners of the land, are entitled as of right to remain in possession. Neither the Village Agricultural Committee nor the District Agricultural Committee have power under the said provisions to dislodge the applicants from the possession of their land when it is proved that they are engaged in the cultivation of the said land with their own hands for their principal means of subsistence and when the land is one measuring just over 10 acres.

For all these reasons the rule *nisi* is made absolute and the order of the District Agricultural Committee is quashed. It follows that the order of the Village Agricultural Committee is also quashed as it has been merged with that of the District Agricultural Committee. Advocate's fee is five gold mohurs.

SUPREME COURT.

DR. R. C. DAS (APPLICANT)

v.

THE CONTROLLER OF RENTS, RANGOON (RESPONDENT).*

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Aug. 1.

Certiorari—Urban Rent Control Act, ss. 16-AA (4), 16-AA (2)—Decision based on misconception of facts and wrong assumption of law.

Where the Controller of Rents purporting to act under the Urban Rent Control Act, ss. 16-AA (4) and 16-AA (2) held that the applicant had vacated a room and failed to give notice thereof and that the unauthorized occupant was liable to be evicted therefrom and there was no legal evidence of the room having been vacated.

Held : That the order itself contains a statement of what led to the decision. It is " a speaking order " and the Supreme Court can inquire into the correctness of the decision by certiorari.

Rex v. *Northumberland Compensation Appeal Tribunal Ex Parte Shaw*, (1951) 1 K.B. 711, referred to.

G. D. Williams for the applicant.

Ba Sein for the respondent.

The judgment of the Court was delivered by

MR. JUSTICE THEIN MAUNG.—This is an application for a writ of certiorari to quash the respondent's order wherein he held (1) that the applicant had vacated room No. 5 in House No. 177—179, Lewis Street, Rangoon, (2) that he had failed to give notice of his having done so as required by section 16-AA of the Urban Rent Control Act, 1948 and (3) that the unauthorized occupant of the premises, whoever he might be, was liable to be evicted therefrom under

* Civil Misc. Application No. 26 of 1951 being an application for directions in the nature of certiorari.

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

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sub-section (4) of section 16-AA of the Act read with sub-section (2) of section 16-BB thereof.

The respondent has observed in the course of the said order :

"Das (the applicant) admitted that he had vacated the room and had gone to reside with his wife in another room held by him in the ground floor of an adjoining building. Whether he had left the room as a temporary measure or not, the fact remains that he had vacated the room and after about a week or so later, during which renovation and repairs to the room were effected, it was occupied by S. V. Tata who is admittedly an authorised occupant."

However, if the applicant's statement to him be read as a whole, as it should have been, it will be seen that the applicant's case was (1) that he was just temporarily accommodating S. V. Tata in the said room (2) that he had not vacated it altogether and that as a matter of fact, his two sons were living with S. V. Tata during his temporary stay there and (3) that repairs and improvements were being made by him at his own expense.

The respondent appears to have misread the applicant's statement and to have overlooked the part wherein he stated that his two sons were still living in the room.

Apart from the alleged admission of the applicant, the respondent had no legal evidence whatsoever of the applicant having vacated the room or of his having assigned the tenancy to S. V. Tata or of the repairs and improvements having been made by S. V. Tata at all.

Furthermore, the respondent appears to have proceeded on the wrong assumption that it was for the applicant to prove that he had not vacated the room at all.

The respondent's order contains a statement of what led him to the decision. So it is a " speaking order " and this Court can inquire by certiorari into the correctness of the decision. [Cp. *Rex* v. *Northumberland Compensation Appeal Tribunal Ex Parte Shaw* (1951) (1).]

The decision is erroneous inasmuch as it is based on—

(*a*) a misconception of facts as to vacation of the premises and

(*b*) a wrong assumption of law as to the burden of proof.

The application is allowed with costs ; Advocate's fee three gold mohurs. The respondent's order is quashed ; and its being quashed will have the effect of nullifying further proceedings before him culminating in the allotment of the said room to a third party, which has been kept in abeyance during the pendency of this application.

(1) (1951) 1 K.B. 711.

SUPREME COURT.

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Aug. 13.

U PE AND ANOTHER (APPLICANTS)

v.

THE HON'BLE MINISTER FOR HEALTH AND LOCAL GOVERNMENT AND OTHERS (RESPONDENTS).*

Direction in the nature of certiorari—S. 14, Limitation Act—Supreme Court Rules, Order 21, Rule 8—Sufficient cause—Local Authorities (Suspension) Act, 1946 and Rules 3 (1), 7 and 8—Bye-law 4 of Hanthawaddy District Council made in pursuance of s. 80 (1) of Rural Self-Government Act—Failure to advertise in conspicuous places in the market of increase of rate—Bye-law superseded—Revision and enhancement of rates—Judicial or quasi-judicial act.

An order for increase of rates of stall rent in Kayan Market was passed and auction sale of the right to collect stall rent at enhanced rates was held. The applicant being aggrieved filed an appeal to the Commissioner as provided for by s. 80 (1) of Rural Self-Government Act and on the dismissal of the appeal revision was filed to the President.

Held: That time thus occupied in these proceedings may be excluded under s. 14 of the Limitation Act read with Order 28, Rule 3 of the Supreme Court Rules.

Under Rule 3 (1) of Local Authorities (Suspension) Rules, 1946 all the existing rules and bye-laws under the Rural Self-Government Act shall apply unless they are superseded.

Bye-law 4 of Hanthawaddy District Council Public Market bye-laws provides that the rates of daily fees shall be fixed and be subject to the revision by the District Council and they shall be publicly advertised in conspicuous places in the market. When there was no public advertisement in the market this rule was not complied with.

Rule 7 of the Local Authorities (Suspension) Rules, 1946 supersedes Bye-law 4 of the Hanthawaddy District Council Public Market Bye-law. It provides that if it is considered that the collection of the rates or taxes should be superseded or amended, proposals for the same should be forwarded to Government through the Deputy Commissioner and the Commissioner. As this rule applied and no reference was made to Government, the order of enhancement was bad.

Revision and enhancement of rates of stall rent is judicial or quasi-judicial act and therefore amenable to the jurisdiction of the Supreme Court.

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* Civil Misc. Application No. 25 of 1951 being an application under section 25 of the Constitution of the Union of Burma for directions in the nature of certiorari and prohibition.

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

As regards auction of stalls or collection of stall rent at revised or enhanced rates they are executive acts in respect of which applications for the wrtts of certiorari and prohibition are absolutely incompetent.

U Htwe (a) *A. E. Madari* v. *U Tun Ohn and one*, (1948) B.L.R. 541 at 559-560, referred to.

Ba Gyan for the applicants.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE THEIN MAUNG.—This is an application for writs of certiorari and prohibition in respect of (1) the order of the third respondent, who is the Officer-in-Charge of the Hanthawaddy District Council, enhancing the rates of stall rents in Kayan Market and (2) the auction sale by him of the lease of the right to collect stall rents at the enhanced rates.

The 3rd respondent has been appointed to be the Officer-in-Charge under section 4 of the Local Authorities (Suspension) Act, 1946 ; and subject to the limitations imposed by Rules framed under section 12 of the Act he has been invested with all the rights, privileges, duties, powers and functions which were previously vested in or exercisable by the District Council. [*See* Notification No. 209, dated the 30th July 1946 of the Local Government (Administrative Branch).]

He revised the said rates and directed that the enhanced rates should come into force on the 1st October 1950 by his order dated the 1st August 1950 ; and he sold the said lease by auction on the 11th September 1950.

So the application for the writs which was filed only on 3rd April 1951 is *primâ facie* time-barred under Order 21, Rule 8 of the Supreme Court Rules which requires such applications to be filed " within

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three calendar months after the order, record, proceeding or act, of which complaint is made, shall have been had, made or done."

However, the learned Advocate for the applicants has applied for extension of time under Order 28 of the Supreme Court Rules read with section 14 of the Limitation Act on the following grounds :—

(1) That under section 61 of the Rural Self-Government Act, it is the duty of the Commissioner, Pegu Division (the second respondent) and the President (who is represented by the first respondent) to see that the proceedings of the Officer-in-Charge (the third respondent) are in conformity with that Act and with the orders and rules in force thereunder ;

(2) That the applicants have accordingly applied first to the Commissioner and then to the President to set aside the said order and sale ;

(3) That the Commissioner and the President passed orders rejecting their applications on the 29th January, 1951 and the 21st March, 1951 respectively ;

(4) That the time during which they had been prosecuting the said proceedings with due diligence might be excluded in computing the period of limitation ; and

(5) That after exclusion of such time, the application will be found to have been filed well within time.

The learned Government Advocate, who appears for the respondents cannot assail any of the said grounds ; and we are of the opinion that this is a fit case for extension of time under Order 28, Rule 3.

To turn now to the merits of the application, Rule 3 (1) of the Local Authorities (Suspension) Rules 1946, made under section 12 of the said Act, provides "In discharging such duties, powers and functions (as are entrusted to persons appointed under section 4 of the Act) the provisions relevant thereto in the Municipal Act, rules and bye-laws or the Rural Self-Government Act, rules and bye-laws, as the case may be, shall apply unless a separate provision is made for any such matter in these rules."

So bye-laws of the Hanthawaddy District Council, which have been made in exercise of the powers conferred by section 80 (*1*) of the Rural Self-Government Act will apply except where a separate provision has been made in the said rules.

Bye-law 4 of the Hanthawaddy District Council Public Market Bye-laws provides :

> "The rates of daily fees shall be fixed by the District Council and shall be subject to revision by the Council with effect from the 1st May of each year ; and they shall be publicly advertised in conspicuous places in the market."

If this rule has not been superseded by any separate provision in the Local Authorities (Suspension) Rules, 1946, as contended by the respondents, the revised rates should have been publicly advertised in conspicuous places in the market. While admitting that they have not been so advertised, the respondents claim that they have complied with Bye-law 4 as far as possible by publishing them at the offices of the Township Officer, Kayan, the Deputy Commissioner, Hanthawaddy and the District Council, Hanthawaddy all in Rangoon.

It is true that Kayan was not liberated from insurgent occupation till the 25th August 1950 and that the revised rates could not be advertised in the market at

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Kayan before that date ; but the learned Advocate for the respondents has to admit that they could have been advertised there after the 26th August 1950 and before the auction sale of the lease of the right to collect rents at the revised rates. So the fact remains that the revised rates have not been published at any place in Kayan although there was nothing to prevent their publication in Kayan after the 26th August 1950 ; and under these circumstances we cannot accept the contention that Bye-law 4 has been complied with as far as possible.

The matter does not rest there even. Rule 7 of the Local Authorities (Suspension) Rules, 1946 provides :

" Taxes and rates which were in force in each urban and rural area in the pre-evacuation period shall be assessed and collected by the local authority concerned. If it is considered that the collection of any taxes or rates should be suspended or that the rates should be amended, proposals for the same should be forwarded to Government through the Deputy Commissioner and the Commissioner.

The prescribed procedure in the Acts and rules concerned shall be followed as far as possible in making proposals for the levy of any new taxes or rates."

The learned Government Advocate has contended that the Rule does not apply to stall rents and amendment of the rates of stall rents and that the rule which is really applicable to them is Rule 8. However, Rule 8 provides only for disposal of leases and licenses and it has nothing whatsoever to do with amendment of rates at all. The rates must be amended in accordance with Rule 7 although the lease of the right to collect stall rents at the revised rates can be disposed of under Rule 8.

So Rule 7 must be deemed to have superseded Bye-law 4 of the Hanthawaddy District Council

Public Market Bye-law in so far as it has provided " If it is considered . . . that the rates should be amended, proposals for the same should be forwarded to Government through the Deputy Commissioner and Commissioner "; and since it is admitted that the Officer-in-Charge has not submitted proposals for amendment of the said rates, he must be held to have exceeded his jurisdiction in enhancing them. Supersession of Bye-law 4 and provision of an additional safeguard appears to have been necessitated by the facts that persons appointed under section 4 of the Local Authorities (Suspension) Act, 1946 are Government Officers and not elected representatives of the people and that they are to carry on the functions of local authorities only till such time as elections can be held.

With reference to the question as to whether revision and enhancement of the rates of stall rents is a judicial or quasi-judicial act in respect of which a writ of certiorari may be issued, Rule 21 of the Burma Rural Self-Government Rules, 1936 must be read together with Rule 20 of the same. They read :

" D. STANDARDIZATION OF STALL RENTS, ETC.

20. Standard rents, charges and fees for the right to occupy, and expose goods or livestock for sale in, any shop, stall or stand in a District Council market and for any other right in connection with the bringing or exposure of goods or livestock for sale in the market shall be fixed by the Council with due regard to the position, size and construction of each shop, stall or stand, the nature and value of the goods or livestock permitted to be brought or exposed for sale and the value of the right conceded in connection with the bringing and exposing of the goods or livestock for sale.

21. Save as provided in Rule 22 below, such standard rents, charges and fees shall be subject to revision annually, or at the end of the lease in cases where the right of collection has

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been leased for a term longer than one year, and the rate fixed after such revision shall be published in the market not later than the issue of the notice prescribed in Rule 14 above and in any case before the 1st of March in each year."

Having regard to (1) the detailed provision of Rule 20 as to the factors to be taken into consideration in fixing rents and (2) the provision in section 61 of the Rural Self-Government Act that the President and Commissioner must see that the proceedings of District Councils are in conformity with the Act and with the orders and rules in force thereunder, there can be no doubt of the fixing of rents being a judicial or a quasi-judicial act.

This Court has already observed in *U Htwe (alias) A. E. Madari* v. *U Tun Ohn and one* (1) :

"It may, therefore, be fairly argued that, since the Administrator has to fix these rates of taxation in his discretion, he should be treated as an administrative officer, performing an administrative duty imposed on him by statute for the benefit of the community. His act is, therefore, more of a mechanical rather than of a judicial nature and is, therefore, not open to scrutiny or examination by this Court. The answer is that, a discretion which is demonstrably groundless or exercised in ignorance or at random, is not, in the eyes of the law, a discretion at all, but mere caprice. It must be the exercise of his faculties by a reasonable man, resulting in such action as a reasonable man might have adopted, though not necessarily that which another impartial critic would have adopted."

Since the fixation of rents is a judicial or quasi-judicial act, revision and enhancement of rents also must *a fortiori* be such an act.

We accordingly hold that in revising and enhancing the rates of stall rents as he did the Officer-in-Charge has exceeded his jurisdiction in performing a judicial or quasi-judicial act.

(1) (1948) B.L.R. 541 at pp. 559-560.

As regards the auction sale of the lease of the right to collect stall rents at the revised and enhanced rates, it is a purely executive act in respect of which the application for the writs of certiorari and prohibition is absolutely incompetent.

The order of the Officer-in-Charge revising and enhancing the rates of stall rents is quashed ; but there will be no order for costs.

SUPREME COURT.

†S.C. 1951

Aug. 13.

DAW YU AND OTHERS (APPELLANTS)

v.

MAUNG KHIN AND OTHERS (RESPONDENTS). *

Burmese Buddhist law—Re-marriage of mother—Estate to be divided is the estate held by mother at the re-marriage—Share of inheritance claimed and given—Such heir debarred from claiming further inheritance.

On re-marriage of mother a son claimed from his mother and step-father property with which to set himself up independently. He was given property and cash which was not less than half the estate brought by mother to the second marriage. Demand was not for a gift but for a share.

Held: That on the re-marriage of a parent the estate to be divided is the estate held by the parent at the time of re-marriage.

Held further: That it is settled law that when on re-marriage of one parent, the *atet* child or children sought and obtained a share from the parent re-marrying, that child or children have no further claim in the estate of that parent.

Ma On Thin v. *Ma Ngwe Yin and another*, 7 Ran. 398, followed.

Chan Htoon (Advocate-General) for the appellants.

Aung Min (2) for the respondents 1 and 2.

Zeya for the respondents 3 to 7.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The essential points in this appeal lie within a very narrow compass. U Shwe Kyu, a Burmese Buddhist, died in 1880 leaving his widow Daw The Nu, and a son Maung Tun Hla. The son was then about 4 years old. Daw The Nu, about three years after the death of U Shwe Kyu, married U San Gyaw and by her second marriage she had five children. U San Gyaw died in 1918 and Daw The Nu, survived him for 19 years. When she died in 1937 her

* Civil Appeal No. 4 of 1949 against the judgment and decree, dated the 18th May 1948 in Civil 1st Appeal No. 57 of 1947 of the High Court.

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

atet child Maung Tun Hla, together with two daughters and a son of the second marriage, survived her.

The suit out of which this appeal arises is in essence a claim for administration on behalf of the *atet* child Maung Tun Hla of the estate left by Daw The Nu. Many pleas were raised in defence but the most important plea and on which this appeal can be decided is the plea that in 1902, when Maung Tun Hla was about 30 years of age, there was a partition between Maung Tun Hla on the one hand and his step-father and mother on the other.

The rule is well settled that on the re-marriage of one parent after the death of the other, the child or children of the first marriage are entitled to claim partition against the parent re-marrying and the step-parent. The share that would fall to the children of the first marriage when there is more than one child of such marriage has been with unanimity held to be a half of such estate as became divisible. But where the issue of the first marriage consists only of a single child there has been a conflict of judicial authority. Certain decisions of the High Court of Judicature at Rangoon would grant such a child a fourth while certain other decisions would give him a half share. That conflict, however, it is not necessary to settle in the present case for reasons which will become apparent later.

Then again, there has been a conflict of judicial authority on the nature of the estate which became divisible on such a re-marriage. One line of decisions makes the joint estate of the parents the estate which become divisible on the re-marriage of one parent. Another line of decisions makes the estate held by the surviving parent at the moment of his or her re-marriage so divisible. For the purpose of this case, this conflict also does not require to be set at rest.

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The trial Court and the High Court in appeal granted the plaintiff a preliminary decree for administration. The trial Court came to the conclusion "that U Tun Hla did not receive any share from U San Gyaw and Daw The Nu in full satisfaction of his right to the estate as alleged by the defence". The learned trial Judge, however, did not come to a specific finding on the defence plea that in 1902 U Tun Hla, on leaving Daw The Nu and U San Gyaw with whom he had till then been living, was given at his request a large paddy boat worth about Rs. 3,000, a house-site worth about Rs. 1,000 and a sum of Rs. 3,000. The omission to come to a definite finding on this allegation was due to the learned Judge taking the view that even if such property had been given to U Tun Hla in 1902, their value was so much out of proportion to the estate then held by U San Gyaw and Daw The Nu that in law he cannot be deemed to have accepted it in full satisfaction of his claim as an *atet* child.

The High Court on appeal held as established that when U Tun Hla left the house of Daw The Nu and U San Gyaw he was given a boat and a sum of Rs. 3,000. Though the learned Judges did not specifically say so, it is clear from their judgment that they accepted the substantial truth of the testimony given by U Thaw Da, a brother of Daw The Nu, and also the testimony given by U Shwe Hla, who was at one time serving as a boatman of U San Gyaw and Daw The Nu. However, with great respect, the learned Judges of the High Court appear to have misdirected themselves on a radical point of law, just as the learned trial Judge had. The learned Judges said :

"U San Gyaw and Daw The Nu were worth about 40 or 50 thousand rupees at that time and the value of properties given to U Tun Hla to enable him to set up his own business was a small

fraction of this amount. How can it be said that it represented U Tun Hla's share of inheritance especially when it is an admitted fact that not an acre of land was given to him when U San Gyaw and Daw The Nu owned no less than 400 or 500 acres of paddy land ?"

The learned Judges of the trial Court and of the High Court overlooked the fact that the extent of the joint estate of the second marriage of the parent is entirely irrelevant. It is the estate held by the parent at a period not later than his or her re-marriage that has to be taken into consideration for the purposes of partition on re-marriage.

If therefore the learned Judges had not misdirected themselves on this cardinal question of law they would have realised that the share that was given to U Tun Hla in 1902 was not less than half the joint estate of U Shwe Kyu and Daw The Nu or the estate held by Daw The Nu when she married U San Gyaw. The plaintiffs themselves claim in their plaint that Daw The Nu, when she re-married after the death of U Shwe Kyu, was in possession of about 90 acres of paddy land, houses and some cattle. The entire body of evidence on this point came from the defence. According to the defence witnesses there were two houses and two paddy boats in addition to the 90 acres of paddy land but no cattle. Now in 1902, 90 acres of paddy land could not have been worth anything like Rs. 9,000 ; Rs. 4,000 or Rs. 5,000 would be the nearer valuation.

Accordingly, we have in this case the following facts established. U Tun Hla made a claim from his mother and step-father of property with which he could set himself up independently. He was given property and cash which would be of a value not less than half the estate that his mother brought to the second marriage. It was clearly on the evidence not

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a voluntary gift. It was on U Tun Hla's demand that the step-father acceded to the request for a share.

The law is now well settled that when on a re-marriage of one parent, the *alet* child or children sought and obtained a share from the parent re-marrying that child or children have no further claim in the estate of that parent. See *Ma On Thin* v. *Ma Ngwe Yin and another* (1).

The appeal therefore must be allowed. The preliminary decree of the trial Court and the appellate decree of the High Court affirming the decree of the trial Court, are set aside and the plaintiffs' suit dismissed. The 1st and 2nd respondents will pay the costs of the appellants throughout.

(1) 7 Ran. 398.

SUPREME COURT.

CHUNILAL DALABHAJI (APPLICANT)

v.

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

†S.C. 1951

Aug. 13.

Urban Rent Control Act—S. 12—Bonâ fide *occupation—Finding of fact by Rent Controller—Application for writ of certiorari—If can be questioned.*

Where a person already in possession entered into an agreement with the applicant under which she was permitted to occupy a portion of the premises for a period and the said person applied to the Controller of Rents, Rangoon for a permit under s. 12 of the Urban Rent Control Act and the Controller after careful consideration of the evidence adduced before him granted a permit to occupy the premises as statutory tenant under s. 12 of the Urban Rent Control Act.

Held : That the Controller having found that the 2nd Respondent was lawfully in occupation prior to the agreement, he was entitled to grant her a permit.

Dr. Ba Han and *E Maung* for the applicant.

Kyaw (Government Advocate) for the respondent No. 1.

P. K. Basu and *G. D. Williams* for the respondent No. 2.

N. R. Burjorjee for the respondent No. 3.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—This application must be dismissed. The essential facts lie within a very narrow compass and only a short point of law arises for consideration.

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* Civil Misc. Application No. 31 of 1951 being an application in the nature of certiorari.

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

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CHUNILAL DALABHAJI v. THE ASSISTANT CONTROLLER OF RENTS, RANGOON AND OTHERS.

The 2nd respondent had been in occupation of a portion of the ground floor of a building known as No. 107, Mogul Street, Rangoon, for some time previous to 28th July 1950. How she came into occupation originally is not a matter of importance in this case. On the 28th July 1950 she entered into an agreement with the applicant under which she was permitted to continue to occupy a portion of the premises for the period ending with 31st October 1950. The transaction which resulted in this agreement has been described by the learned counsel for the applicant as a license and the learned counsel for the 2nd respondent has not challenged this description. It is unnecessary for us to consider for the purposes of this case whether the transaction can be rightly described as a license but what clearly emerges is that this transaction is not one by way of tenancy and that by this agreement the 2nd respondent did not become a tenant of the applicant.

On 10th November 1950, the period stipulated for occupation by the 2nd respondent in the agreement of 28th July 1950 having expired, the 2nd respondent applied to the Controller of Rents, Rangoon, for a permit under section 12 of the Urban Rent Control Act. Her petition was opposed by the applicant, and evidence was led before the Controller on behalf of both the applicant and the 2nd respondent. The learned Controller, after a careful consideration of the evidence adduced before him, both oral and documentary, granted the 2nd respondent a permit to continue to occupy the premises as a statutory tenant under section 12 of the Urban Rent Control Act.

This decision of the Rent Controller has been sought to be quashed by the applicant on the ground that the 2nd respondent is not in law a person who is entitled to the benefits of section 12 of the Act. The

learned counsel for the applicant seeks to read section 12 as granting the right to obtain a permit only to a person in "*bonâ fide* occupation" of premises in respect of which the permit is sought. Thus read, the learned counsel claims, unless the occupation originated *bonâ fide*, that is in circumstances implying the absence of fraud or unfair dealing, the Controller of Rents has no jurisdiction to grant a permit.

It is not necessary to examine the cogency of this reading of the Act for, assuming for the purpose of argument that the learned counsel's reading of the section was the correct one, we are satisfied that the application fails in any event. The Controller, as said earlier, examined witnesses and on such oral testimony, as also on documents filed before him, came to a finding on the facts that the original occupation before 28th July 1950 by the 2nd respondent was a lawful occupation and far from the agreement of the 28th July 1950 being brought about by fraud or unfair dealing on the part of 2nd respondent, the 2nd respondent was "actuated by fear and excitement into entering upon the said agreement."

These findings of facts made on materials before the Controller must, for the purpose of the present application, be accepted. Accepting them, the basis of the applicant's contention that the 2nd respondent having got into occupation other than *bonâ fide* is not entitled to make an application under section 12 of the Urban Rent Control Act, is gone.

Accordingly we dismiss this application with costs in favour of the 2nd respondent. Advocate's fees five gold mohurs.

SUPREME COURT.

†S.C. 1951

Aug. 13.

KANTILAL GORDHANDAS SHAH (APPLICANT)

v.

THE ASSISTANT COLLECTOR OF CUSTOMS (PREVENTIVE) (RESPONDENT). *

Direction in the nature of certiorari—S. 167 (8) of the Sea Customs Act—S. 3 (2) of Import Trade Control Act, 1947—Proceedings before the Collector under the above Act quashed.

Applicant's shop was raided by the Police and part of the stock of uncut synthetic stones were seized and they were later returned. Later Custom Officials went and seized some synthetic stones and the Applicant was called upon to show cause why penalty should not be imposed under s. 167 (*8*) of the Sea Customs Act read with s. 3 (*2*) of the Import Trade Control (Temporary) Act, 1947 on the ground that these stones were reported to have been imported into Burma without import licence and without payment of duty. On an application to quash the proceedings :

Held : That s. 167 (*8*) of Sea Customs Act provides for imposition for penalty upon persons concerned in import and export of prohibited goods and the burden of proof under that section is on the accuser to prove his accusation against the accused and unless and until the accuser can prove his allegation the accused must be let off. Procedure adopted by the Collector is the very antithesis of the one contemplated in s. 167 (*8*) of Sea Customs Act and is a breach of the cardinal rule of criminal jurisprudence.

S. S. Ananda v. *Collector of Customs*, B.L.R. (1951) S.C. 28, distinguished.

Kyaw Myint for the applicant.

Ba Sein (Government Advocate) for the respondent.

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

SIR BA U.—The applicant in this case is a partner in a firm called Messrs. Burma Jewellers, which deals in the purchase and sale of synthetic stones, both rough and polished, at its shop at No. 62, 29th Street, Rangoon.

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* Civil Misc. Application No. 32 of 1951 an application under section 25 of the Constitution of Burma for directions in the nature of certiorari and/or prohibition and/or mandamus.

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

On the 4th February 1951, the shop was raided by the police and a part of the stock of uncut synthetic stones were seized on suspicion that they were stolen property. But the stones seized were soon returned to the applicant when the applicant produced all relevant purchase vouchers. Not long after the applicant was summoned to appear before U Han Thein, Superintendent of the Public Property Protection Police and questioned with regard to his stock of synthetic stones. The applicant again produced all relevant vouchers and account books and no more was heard about the matter. But on the 14th March 1951 the Customs officials appeared on the scene. On that day U Hla Pe, Inspector of Customs, accompanied by four civil police officers raided the shop and seized some rough and polished synthetic stones kept in biscuit and cigarette tins and took them away from the shop. Four days later, that is on the 18th March 1951, hearing nothing from the Custom officials the applicant sent a letter through his lawyer to the Collector of Customs asking for information as to why his shop had been raided and his stones seized. In reply thereto a note headed "Memorandum" was sent on the 20th March 1951. The note is in the following terms :—

"Mr. K. G. Shah is called upon to show cause why a penalty should not be imposed under section 167 (*8*) of the Sea Customs Act, read with section 3 (*2*) of I.T.C. Act, 1947 [Import Trade Control (Temporary) Act] on the grounds set out below :—

Acting on information received, the officers of the Detective Department, Rangoon City Police with the assistance of Inspector U Hla Pe of the Rangoon Customs who was deputed by me raided your premises at 62, 29th Street, Rangoon, and found in your possession the following synthetic stones, rough and polished—(properties described).

These stones are reported to have been imported into Burma without Import Licence and payment of duty."

S.C. 1951

KANTILAL GORDHANDAS SHAH v. THE ASSISTANT COLLECTOR OF CUSTOMS (PREVENTIVE).

The present application is to quash the proceedings resulting in the issue of this note. The note as it stands—putting it into popular language—means this: "You prove your innocence or else I punish you". This is a breach of the cardinal rule of criminal jurisprudence under which we live. It is, in fact, almost a shock to those of us who have been trained and bred in the tradition and belief that under our law everybody is presumed to be innocent until his guilt is proved. The Assistant Collector of Customs, who has been dealing with this case, may plead ignorance of this rule but he cannot plead ignorance of the plain provisions of section 167 (*8*) of the Sea Customs Act because it is on these very provisions that he relies. The section reads, *inter alia*, as follows :

> "If any goods, the importation or exportation of which is for the time being prohibited or restricted by or under Chapter IV of this Act, be imported into or exported from the Union of Burma contrary to such prohibition or restriction, any person concerned in such offence shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees."

According to the section the burden is on the accuser to prove his accusation against the accused and until and unless the accuser can prove his allegation, the accused must be let off. But the procedure adopted in this case is the very antithesis of the one contemplated by the above section. In consequence thereof a grave miscarriage of justice is likely to ensue unless this Court intervenes.

The question is what form our intervention should take ? The prayer is for the issue of a writ of certiorari or prohibition or mandamus : certiorari to quash the proceedings ; prohibition to restrain the respondent from proceeding further with the case and mandamus

to direct the respondent to return the stones which are under seizure.

The writ of prohibition, in the circumstances of the case, is, in our opinion, not appropriate. It is true that in the case of *S. S. Ananda* v. *Collector of Customs* (1) we issued a writ of prohibition but the facts of that case are entirely different from the facts of this case. In that case the Collector had no jurisdiction whatsoever to take up the case against Ananda so long as his acquittal by a Criminal Court of competent jurisdiction stood. In this case it is not that the Collector had no jurisdiction. He has. But the procedure resulting in the issue of the order calling upon the applicant to show cause why he (applicant) should not be penalised, if not quashed, is likely to and, in fact, will result in a grave miscarriage of justice. Therefore the appropriate writ is, in our opinion, a writ of certiorari quashing the order directing the applicant to show cause why a penalty should not be imposed upon the applicant. The writ of mandamus is also not necessary and for that very reason no notice was issued in respect thereof by the learned Judge in Chambers.

For all these reasons we quash the order issued by the Assistant Collector of Customs calling on the applicant to show cause why a penalty should not be imposed upon him.

(1) B.L.R. (1951) S.C. 28.

SUPREME COURT.

† S.C. 1951

Aug. 20.

MA E KHIN (APPELLANT)

v.

MA AHMA HPYU (RESPONDENT).*

Money Lenders Act, 1945, s. 12—Correct interpretation.

Held: That under s. 12 of the Burma Money Lenders Act prohibition is against a decree for the aggregate of the principal of the original loan and such sum towards arrears of interest which together with any interest already paid exceeds the amount of the principal. In other words, s. 12 bars the Court against granting a decree for arrears of interest in excess of a figure which, with the interest already paid, adds up to the amount of the principal. If the interest already paid exceeds the limit under s. 12 of the Act, all that the Court can do is to refuse a decree for interest without affecting however the claim for repayment of the original loan. Under that section Court has no power to reduce the amount of principal, but Court may re-open the transaction and grant relief to debtor in respect of interest payable prior to the suit under s. 13 of the Act.

V. S. Venkatram for the appellant.

Tun Sein and *Kyaw U* for the respondent.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—This appeal involves a short point on the interpretation of section 12 of the Money Lenders Act of 1945.

The appellant sued for the recovery of a sum of Rs. 11,000, being the principal sum lent on a mortgage bond. In the plaint presented to the trial Court on 13th January 1941 it was stated that the loan was taken and a registered mortgage bond was executed by the respondent on 1st December 1930, the principal sum

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* Civil Appeal No. 2 of 1950 against the decree of the High Court, Rangoon, in Civil 1st Appeal No. 89 of 1948.

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

being Rs. 11,000 repayable on demand and bearing interest at Rs. 2 per cent per month till the date of realization. It was also alleged in the plaint that interest had been received up to the month of March 1938 and that the appellant waived all arrears of interest thereafter.

The trial Court granted a preliminary decree to the appellant in the sum of Rs. 12,358-12-0 inclusive, of costs of the suit. An appeal was preferred against that decree by the respondent to the High Court of Judicature at Rangoon. But because of the intervention of the war, the appeal could not be disposed of by the appellate Court till the 1st March 1949. Before it could do so the trial and appellate proceedings, which during the occupation of the country by the enemy had been destroyed, had to be reconstructed.

The High Court modified the preliminary mortgage decree of the trial Court by granting to the appellant a preliminary mortgage decree in the sum of Rs. 6,548-8-0 instead. In so modifying the trial decree, the High Court read section 12 of the Money Lenders Act to mean " that no Court shall grant a decree in respect of any loan advanced, for a total sum which exceed twice the amount of the loan advanced and that any interest already paid should be taken into consideration for the purpose of such calculation ". Having read section 12 in this sense and on the admission in the plaint that interest up to March 1938 had been paid towards the loan, the High Court held that the appellant is not entitled to a decree in any sum in excess of Rs. 22,000, double the principal sum, less the sum already received by the appellant by way of interest ; the learned Judges on the materials on the record thought it reasonable to assume that the appellant had already received Rs. 15,840 by way of interest.

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MA E KHIN v. MA AHMA HPYU.

It is clear to us, however, that the reading by the High Court of section 12 of the Act is not correct. Section 12 deals with two things. The prohibition is against a decree for the aggregate of the principal of the original loan and such sum towards arrears of interest which, together with any interest already paid, exceeds the amount of the principal. In other words, section 12 bars the Court against granting a decree for arrears of interest in excess of a figure which, with interest already paid, adds up to the amount of the principal. If interest already paid exceeds the limit under section 12 of the Act, all that the Court can do is to refuse a decree for interest, without affecting however the claim for repayment of the original loan. It is only in exercise of powers under section 13 that the Court may re-open the transaction and grant relief to the debtor in respect of interest payable prior to the suit.

The judgment of this Court is that the appellate decree of the High Court is set aside. The amount declared to be due to the appellant by the trial Court in the suit is affirmed subject, however, to the right of the respondent to seek relief if so advised under section 13 of the Money Lenders Act. Either party, if aggrieved with the decision of the trial Court in exercise of the powers under section 13 of the Act will have her remedy by way of appeal in the ordinary course. There will be no order for costs in this appeal.

SUPREME COURT.

U BA HLA (APPELLANT)

v.

KO HAN TUN AND ANOTHER (RESPONDENTS).*

† S.C. 1951

Aug. 20.

Sale of Motor Car—Payment of Rs. 10,000 out of Rs. 14,000 purchase price—Delivery of the Car—Forfeiture of Rs. 10,000 for failure to pay the balance —S. 20 of Sale of Goods Act.

Appellant sold a motor car to the Respondents for Rs. 14,500 and delivered the car to the Respondents and received Rs. 10,000 as part-price. The sale agreement provided that if the balance Rs. 4,500 was not paid by 30th April, the sum of Rs. 10,000 will be forfeited and the car will be returned to the Appellant. The Respondents failed to pay Rs. 4,500 on due date and the Appellant filed a suit for possession of the car.

Held : That under the contract between the parties the property in the car passed to the Respondents. The clause relating to forfeiture of Rs. 10,000 was a penalty clause and High Court was justified in granting relief against forfeiture.

John H. Kilmer v. *British Columbia Orchard Lands Ltd.*, (1913) A.C. 319 ; *Steedman* v. *Drinkle and others*, (1915) A.I.R. (P.C.) 94 ; *Bhimji Dalal* v. *The Bombay Trust Corporation Ltd.*, (1930) I.L.R. 54 Bom. 381. followed.

Kyaw Myint for the appellant.

The judgment of the Court was delivered by

MR. JUSTICE THEIN MAUNG.—The principal question for consideration in this appeal is whether the property in the car passed when Exhibit A and Exhibit I, both dated the 9th April 1949, were executed by the respondents and the appellant respectively.

Exhibit A reads :

" We the undersigned Ko Han Tun and Ko Kan Nyunt of the Youth Trading Company, No. 67, 11th Street, Rangoon have this day the 9th of April 1949, bought from U Ba Hla, Sole Proprietor of Messrs. Khyn Company, No. 218, Creek Street, Rangoon, one

* Civil Appeal at No. 12 of 1950 against the judgment and decree of the High Court, Rangoon, in Civil 1st Appeal No. 50 of 1949.

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

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U BA HLA v. KO HAN TUN AND ANOTHER.

Oldsmobile Car, Registered No. R.D. 404 for Rs. 14,500 (Rupees fourteen thousand five hundred only) out of which paying an advance of Rs. 10,000 (Rupees ten thousand only); the undersigned have also agreed to accept the transfer of all the necessary documents, sale deeds, insurance policy, etc., only on our final payment of the remaining Rs. 4,500 (Rupees four thousand five hundred only) on or before the 30th April 1949, failing which we shall forfeit our advance of Rs. 10,000 (Rupees ten thousand only) and return the Oldsmobile Car, Registered No. R.D. 404 to U Ba Hla, Sole Proprietor of Messrs. Khyn Company, No. 218, Creek Street, Rangoon."

Exhibit I reads:

"Received from Ko Kan Nyunt and Ko Han Tun, No. 69, 11th Street, Rangoon, the sum of Rs. 10,000 (Rupees ten thousand only) on account of an Oldsmobile Car, R.D. 404 sold for Rs. 14,500."

Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

For the purpose of ascertaining the intention of the parties, regard must be had to the terms of the contract, the conduct of the parties and the circumstances of the case; and unless a different intention appears therefrom, the intention must be ascertained under section 20 of the Sale of Goods Act. (*See* section 19 thereof.)

Section 20 provides:

"Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed."

So the question resolves itself into one as to whether a different intention—*i.e.*, the intention that

the property in the car should not pass till the remaining sum of Rs. 4,500 was paid—appears from the terms of the said documents, the conduct of the parties and the surrounding circumstances of the case; and this question must be decided on Exhibits A and I only as no other evidence has been led by either side.

The learned Advocate for the appellant has submitted that the different intention does appear from the fact that the respondents agreed to accept the transfer of all the necessary documents, sale deeds, insurance policy, etc., only on their final payment of the remaining sum of Rs. 4,500.

However, this agreement is quite consistent with the intention that the property in the car should pass on execution of Exhibits A and I when Rs. 10,000, *i.e.*, about two-thirds of the price was paid and the car was delivered. It merely gives the appellants the right to retain certain documents till the remaining sum of Rs. 4,500 is paid; and the mere fact that they are given this right cannot have the legal effect of postponing the passing of the property in the car. In fact, the existence of this agreement militates against the view that the passing of the property in the car was intended to be postponed. If the property in the car itself was not intended to be passed then, there would not have been any necessity for the appellants to make any stipulation for retention of the documents at all.

So we are of the opinion that the High Court is right in holding that the property in the car passed on execution of Exhibits A and I.

The learned Advocate for the appellants had further contended that even if the property in the car had passed they were entitled to a decree for return of the car by way of specific performance of the agreement as the respondents failed to pay Rs. 4,500 in time. He

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U BA HLA v. KO HAN TUN AND ANOTHER.

has also added that the respondents, who got possession of the car after making necessary payments under the decree of the High Court, have sold it to a third party and that, under the changed circumstances of the case, the appellants can only claim damages for breach of contract.

In connection with this aspect of the case, we need only say that the High Court has awarded the appellants damages in the sum of Rs. 4,500 with interest at 1½ per cent per mensem and all costs of garage and other incidental charges.

The real complaint of the appellants is that the Clause for forfeiture of Rs. 10,000 has been held by the High Court to be a penalty Clause; but this decision is supported, *inter alia* by the ruling in *John H. Kilner* v. *British Columbia Orchard Lands Ltd.* (1); *Steedman* v. *Drinkle and others* (2); and *Bhimji Dalal* v. *The Bombay Trust Corporation Ltd.* (3), and we are satisfied that it is correct. Besides, even if the said Clause be not regarded as a penalty Clause, the result will be the same since the fact that the appellant has already received payment of Rs. 10,000 from the respondents can and must be taken into consideration in assessing damages for the breach of contract.

The appeal fails, but it is dismissed without costs as it was heard *ex parte*.

(1) (1913) A.C. 319. (2) (1915) A.I.R. (P.C.) 94.
(3) (1930) I.L.R. 54 Bom. 381.

SUPREME COURT.

GURBACHAN SINGH BINDRA (APPELLANT)

v.

JOS. E. FERNANDO (RESPONDENT).*

†S.C. 1951

Aug. 27.

Lease and license—Difference between—Test, exclusive right of occupation.

Where the parties entered into an agreement whereby the Appellant was allotted a floor space 17' × 5' and agreed to pay "a guaranteed monthly commission" of Rs. 100 as consideration and the Appellant constructed fixtures and show cases on the space allotted to him with exclusive right of occupation in that area.

Held: That the Appellant was a lessee and not a licensee. The circumstances leading to the execution of the document, the fixtures put up thereafter by the Appellant and the fact that a specified space was allotted for business purposes with exclusive right of occupation to the Appellant leads only to the conclusion that the Appellant was a lessee.

S. R. Raju v. *The Assistant Controller of Rents, Rangoon and others*, (1950) B.L.R. (S.C.) 10, referred to and applied.

K. R. Venkatram for the appellant.

R. Jaganathan for the respondent.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The respondent is a tenant of the premises known as 217, Sule Pagoda Road. Some months before 1st May 1947 the respondent rented a portion of the premises to one Harbhajan Singh on a monthly rental of Rs. 100. The payment of the sums for February, March and April 1947 were recorded in the respondent's own account books as payment of rent and he admits in his evidence at the trial "I think that Harbhajan Singh

* Civil Appeal No. 7 of 1950 against the decree of the High Court, Rangoon, in Civil 1st Appeal No. 49 of 1949.

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

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GURBACHAN SINGH BINDRA v. JOS. E. FERNANDO.

paid me as rent". On the 28th April 1947 the respondent wrote to the appellant:

" . . . Mr. Harbhajan Singh Kanuja is willing to transfer the rights of occupancy if all the rents which he has paid up to date to our firm, *viz.*, Rs. 300 (Rupees Three hundred) is refunded to him in full. If this could be complied by you, please call at this firm at 9-30 a.m. on Thursday, the 1st May 1947 with the money and the writer will see the transaction put through. Of course you will have to sign an agreement as that of Mr. Harbhajan Singh Khanuja regarding terms, etc."

The appellant admitted at the trial that he had been warned by his landlord that he could not sublet the premises in view of the Urban Rent Control Act. It was in these circumstances that the transaction between the parties found a record in Exhibit A. Under this agreement the respondent agreed to allot to the appellant a floor space measuring 17 feet in length and 5 feet in width along the northern side of the show room, reserving to the respondent therein a floor space of 4 feet in length and 22 inches in width. The appellant was under the agreement to pay "a guaranteed monthly commission" of Rs. 100 to the respondent as consideration for the allotment of the space. On the space allotted to the appellant had been constructed teak-wood fixtures and two show cases for the purpose of the appellant's business in the sale of radio goods and service of radio instruments.

On 30th November 1948, the respondent instituted the suit out of which the present appeal has arisen. In the plaint, after reciting the agreement Exhibit A and its contents, the respondent claimed that in entering the agreement the appellant was only a licensee of a portion of the premises allotted to him "inasmuch as he is to conduct his business not freely but with certain restrictions imposed on him." The respondent's prayer in the plaint was for recovery

of possession of the portion of the premises allotted to the appellant in consequence of the transaction evidenced by Exhibit A.

The trial Court and the High Court in appeal held that the document Exhibit A granted merely a license to the appellant to enter upon the premises in the possession of the respondent. The distinction between a lease and a license has been considered by this Court in *S. R. Raju* v. *The Assistant Controller of Rents, Rangoon and others* (1); and we do not understand the High Court to have enunciated the principle in any way differently. The High Court accepted that the crucial test is whether the instrument gives an exclusive right of occupation and not whether the occupation was subject to reservation or restriction of the purpose for which that occupation may be used. If exclusive right of occupation is given by the instrument it is a lease.

In this case it is impossible to escape the conclusion, from all the circumstances leading to the execution of the document Exhibit A and from the fixtures put up thereafter by the appellant, taken together with the fact that the agreement was to allot a specified space to the use of the appellant for his business purposes, that an exclusive right or occupation in that specified area was intended to be given and was in fact given by the respondent to the appellant.

Once we hold, as we do, that Exhibit A document purports to grant exclusive right of occupation to the appellant of the floor space measuring 17 feet by 5 feet less 4 feet by 22 inches, the respondent's case that the appellant was a mere licensee necessarily fails.

We allow the appeal. The decrees of the trial Court and of the High Court are set aside and the respondent's suit is dismissed with costs throughout. Advocate's fees in this Court ten gold mohurs.

(1) B.L.R. (1950) S.C. 10.

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HIGH COURT

1951

Containing cases determined by the High Court at Rangoon

Rai Bahadur P. K. BASU (*Advocate*), EDITOR
U BA SEIN (*Advocate*), REPORTER.

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NAMES OF THE JUDGES AND LAW OFFICERS OF THE UNION

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Hon'ble U SI BU, B.A., B.L. (Acting from 3rd June 1951 to 2nd July 1951 and from 11th July 1951).

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SUCCESSION ACT.

TRANSFER OF IMMOVEABLE PROPERTY (RESTRICTION) ACT, 1947.

——————— PROPERTY ACT.

UNION OF BURMA ADAPTATION (LAWS) ORDER, 1948.

——— CITIZENSHIP ACT.

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URBAN RENT CONTROL ACT.

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ADDITION OF PERSON IN POSSESSION AS PARTY 410

ADJUSTMENT OF DECREE, APPLICATION FOR RECORDING 89

ADMINISTRATION SUIT—*Property jointly acquired by Buddhist couple—Mortgage by one of them—Proper decree.* A house was jointly acquired during the coverture of U Ba Nyein and Ma Aye Kyi. The Respondent claimed the property as the property of their father U Ba Nyein and after his death their mother married again and they claimed two-thirds share on the principle of *Nissaya* and *Nissita*. The house had been mortgaged during the lifetime of the husband once by the wife who redeemed the mortgage. *Held:* That the Respondents stepped into the shoes of the husband. He was burdened with the liability, for the mortgage, for one half of which he was clearly liable. The proper decree in favour of the Respondents would be for one-half share subject to the payment of half the debt as the liability must be considered to have passed to them.

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ADMINISTRATION SUIT—*Addition of person in possession as party—Necessary parties in administration suit—Whether a suit should be dismissed against an unnecessary party or he should be struck off—Code of Civil Procedure, Order 1, Rule 10. Held:* That 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. A person outside the family cannot be joined as a party although he may be in possession of a part of the estate; the proper course then is for the representatives of the estates to file a separate suit for the recovery of such properties. In the case of Burmese Buddhist administration suit should be filed when division or inheritance is claimed from another heir. When a person who is not a necessary party in the administration suit, is added, he should be struck off from the suit under Order 1, Rule 10 of the Code of Civil Procedure and suit should not be dismissed as against him and the defendant struck off should not be granted *ad valorem* costs. *Ah Kyan Sin and one* v. *Yeo Ah Gwan and others*, A.I.R. (1937) Ran. 497; *Ma Thin On and others* v. *Ma Ngwe Hmon and others*, A.I.R. (1936) Ran. 13; *Maung Ba Tu* v. *Ma Thet Su and others*, 5 Ran. 785, followed. *Sher Ali* v. *Jagmohan Ram and another*, 53 All. 466; *Ramji Pandey* v. *Alaf Khan*, 3 Pat 859, distinguished.

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APPELLATE COURT WHETHER CAN GIVE RELIEF UNDER S. 12, MONEY LENDERS ACT IN SPITE OF PLEA NOT TAKEN UP 300

APPLICATION FOR BAIL—*Considerations governing—S. 498, Criminal Procedure Code. Held:* In applications for bail the court is concerned with the questions as to whether on the materials placed before it there are reasonable grounds for believing that the applicants have been guilty of the offences charged. Under s. 498 of the Criminal Procedure Code the High Court has unfettered powers in granting bail to persons charged with non-bailable offences punishable with death or transportation for life but the grant of bail in such case is to be made not as a general rule but only in exceptional cases *Emperor* v. *Joglekab*, 55 All. 115, referred to.

U HLA MYINT AND TWO OTHERS *v.* THE UNION OF BURMA 56

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——— SECURITY FOR COSTS AGAINST A DECREE-HOLDER WHO IS RESIDENT OUTSIDE BURMA, WHETHER LIES 152

ARBITRATION ACT, SS. 14 (2), 17, 33 AND 39 (1)—*Objection to the award—Notice about the filing of the award. Held:* Where arbitrator made his award and Court passed a decree in accordance with the award no appeal lies against such decree under s. 39 (*1*) of the Arbitration Act but the Court may in proper cases treat the appeal as an application for revision. Where arbitrator filed his award in Court and the Court failed to issue notice about the filing of the award to the parties and it was proved that the arbitrator when he filed the award had given notice about the signing and filing of the award to the parties and parties had filed objections in Court the award cannot be set aside simply owing to the failure of the Court to issue formal notice. Under s. 33 of the Arbitration Act read with Article 158 of Limitation Act as amended by the Third Schedule of the Arbitration Act a party has 30 days for filing an application to set aside an award or to get an award remitted for reconsideration and only when that period has expired, the Court can under s. 17 of the Arbitration Act make a decree, in terms of the award. Where the Court passed a decree before such period expired the decree should be set aside.

RAMANAND *v.* U. N. MENON 192

ARBITRATION ACT, SS. 14, 15, 16 AND 17 284

ARMS (TEMPORARY AMENDMENT) ACT, 1949, S. 19-A 202

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——— BY OFFICER APPOINTED BY REGISTRAR OF CO-OPERATIVE SOCIETIES, WHETHER CAN BE CHALLENGED IN COURT OF LAW ... 284

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BROKER FOR SALE OF LAND—*Remuneration—When entitled to.* **P** acted as agent of Mrs. **K** for the sale of her land to the American Embassy but he did not act as Mrs. **K's** sole or only agent for the sale of the said land nor did he bring the Head of the Embassy or any accredited agent of the Embassy into contact with Mrs. **K**; nor did he do anything substantial for the sale of the land. The sale was subsequently put through by one **S**. **P** then sued Mrs. **K** for recovery of Rs. 7,000 for services rendered in connection with the sale of her land to the American Embassy or in the alternative for a breach of contract in preventing him from completing the sale. *Held:* An agent is not entitled to any brokerage or remuneration unless he has done substantially something which can be treated as the effective cause of the subsequent sale. *James T. Burchell* v. *Gowrie and Block House Collieries Ltd.*, (1910) A.C. 614 at 625, relied on. *Coles* v. *Enoch*, (1939) 1 K.B. 614; *S. Dutt* v. *Nritya Nath Mitter*, 50 Cal. 878, referred to.

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BURDEN OF PROOF OF GUILT ALWAYS ON PROSECUTION 289

———————MISAPPREHENSION OF LOWER COURT ... 341

BURDEN OF PROOF—*S. 102 of Evidence Act. Held:* Where in a document the executant has admitted the receipt of consideration and if he alleges in a suit that he did not receive the consideration, the burden of proof is on him or her to prove the non-receipt of the consideration. *Ram Chand* v. *Chhunni Mal*, (1925) I.L.R. 6 Lah. 470; *Mrs. M. Johnstone* v. *Gopal Singh and others*, A.I.R. (1931) Lah. 319 at 328, followed. Where the burden of proof has been mis-placed and case has been decided wrongly the High Court can interfere in revision. *Rasu* v. *Kattara*, (1924) I.L.R. 2 Ran. 202, followed.

U SHWE YA AND ONE *v.* SITAREE 222

BURMA CO-OPERATIVE SOCIETIES ACT, S. 15—*Award by Officer appointed by Registrar, Co-operative Societies Rule 15—Award made by such arbitrator—Arbitration Act, ss. 14, 15, 16 and 17—Whether such award could be challenged in a Court of Law under the Arbitration Act.* Where an award has been made by an Officer appointed by the Deputy Registrar of the Co-operative Society in the exercise of powers under Rule 15 of the Burma Co-operative Societies Rules directing payment of a sum of money. *Held:* That Rule 15, sub-clause (3) authorized the Registrar to appoint an arbitrator and sub-rule (4) provide that such an award shall be enforceable as a decree of a Court having local jurisdiction in the matter. *Held further:* That this Rule 15 is inconsistent with the provisions of ss. 14, 15, 16 and 17 of the Arbitration Act. It is not contemplated by Rule 15 that an award is to be filed in Court or the Court would have the power to modify or remit the award under the Arbitration. S. 32 of the Arbitration Act does not apply to an award made under Rule 15 of the Burma Co-operative Societies Rules and such award cannot be challenged in Civil Court. *Nanda Kishore Gowswami* v. *Ball Co-operative Credit Society, Limited*, (1943) Vol. II, Cal. Series, 431 at 434, followed.

DAW OHN SEIN *v.* SHINSAWBU CONCO LIMITED 284

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BURMA DIVORCE ACT, SS. 12, 13, 14 AND 17—*Divorce on admission not allowed—Duty of the Court indicated. Held:* That provisions of ss. 12, 13, 14 and 17 of the Burma Divorce Act indicate clearly that it is not proper in a case for a dissolution of marriage under the Act to grant a decree *nisi* on the mere admission of the parties. The Judge must first ascertain whether, on the facts of the case he has jurisdiction to entertain it for the purpose of pronouncing a decree *nisi* and in ascertaining whether the Court has jurisdiction, the Court will have to ascertain what the domicile of the parties are. Even though there be a statement that there is no collusion or connivance between the parties such statement will not absolve the Court from its duty of ascertaining whether in the circumstances of a particular case there was no collusion or connivance between them. The Court will then ascertain whether it is a proper case where a decree *nisi* ought to be granted.

REVEREND CHIT PE *v.* MA KHIN SEIN AND ONE ... 131

CARRIER, LIABILITY OF—*Doctrine of* res ipsa loquitur *meaning and application—Position in law of carrier—Whether can contract out of liability for accident by a condition.* Plaintiff's wife was a passenger in a Dove aircraft which crashed into the Gulf of Martaban on the 19th March 1949 and she lost her life. Plaintiff claimed damages for himself and his children under the Fatal Accidents Act and the defendants denied that they were common carriers, that there was any negligence and that under the conditions printed on the back of the Ticket they were absolved from liability. *Held:* That a carrier of passengers, even a common carrier, is not liable unless he has been negligent. *Readhead* v. *The Midland Railway Company*, (1868-69) 4 Q.B. 379, referred to. The doctrine of *res ipsa loquitur* (the thing speaks for itself) is not a proposition of law but only a figure of speech meaning that any other view except liability of the defendant is inconsistent on mere proof of facts. It is also used in the sense that on mere proof of certain facts an inference of negligence might be drawn reasonably. The plaintiff himself admitted that he was unable to connect the accident with the particulars furnished by him and the defendant's theory about the accident did not require examination. The doctrine *res ipsa loquitur* cannot be invoked in the circumstances and the death has not been proved as due to any negligence. *Held also:* That a carrier of passengers is in law neither an insurer nor precluded from making any special contract with its passengers. *Easson* v. *London and North Eastern Railway Company*, (1944) 1.K.B. 421 at 425; *Luditt and others* v. *Ginger Coote Airways Limited*, (1947) A.C. 233 at 245, referred to. It is open to a carrier to make a special contract excluding liability and if the deceased before the death had by a valid contract excluded himself from the Fatal Accidents Act his representatives cannot maintain an action under that Act. The conditions in the notice are printed at the back but attention is called to them on the face of the ticket and reasonable step had been taken to bring the conditions to the notice of the intending passengers. The defendants are absolved from liability by reason of the said conditions. *Thompson* v. *London, Midland and Scottish Railway Company*, (1930) 1.K.B. 41; *Penton* v. *Southern Railway*, (1931) 2 K.B. 103, followed.

U HLA PE *v.* THE BOARD OF DIRECTORS, UNION OF BURMA AIRWAYS 347

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CAUSE OF ACTION—*Whether acknowledgment of account stated gives a fresh cause of action. Held :* That acknowledgment of account stated which was not a mutual account does not in itself constitute a fresh contract. *Kenkani and two others* v. *Maung Po Yin*, 1 L.B.R. 190 ; *Ganga Prasad* v. *Ram Dayal*, (1901) 23 All. 502, followed. But where the accounts have been settled and agreed upon between two parties, and one of the parties has promised to pay the amount, a suit can be filed on such promise. *Maung Chit U* v. *Maung Pya*, I.L.R. 6 Ran 538, followed.

BISWANATH CHOWBY AND ONE *v.* JANAW 219

CERTIFICATE OF CITIZENSHIP OBTAINED DURING PENDENCY OF SUIT—EFFECT 197

CITY CIVIL COURT ACT, S. 17 394

CIVIL PROCEDURE CODE, s. 2 (12) 404

CIVIL PROCEDURE CODE, s. 24—*Transfer of suits—Considerations governing. Held :* Suits relating to the same transaction and involving common questions of fact should be heard by the same Judge. *Vithoba* v. *Karim*, A.I.R. (1932), Nag. 49 ; *Soroj Bashini Debi* v. *Girija Prashad Bhattacharjee*, A.I.R. (1926) Cal. 326 ; *Tirath Ram* v. *Harbhajan Singh*, A.I.R. (1933) Lah. 1033 ; *Inayat Ullah Khan* v. *Nisar Ahmed Khan*, I.L.R. (1922) All., Vol. 44 at p. 279, referred to. The fact that a party has the choice of the forum does not deprive the High Court of its inherent jurisdiction and powers of general superintendence over all inferior courts—Such power cannot be limited by any action taken earlier. *The Hindustan Assurance and Mutual Benefit Society Ltd.* v. *Rai Mulraj and others*, I.C., Vol. XXVII, (1915) at p. 455 ; *Tula Ram and one* v. *Harjiwan Das and others*, I.L.R. (1883) All. (Vol. 3) 61 ; *Sheo Nandan Lal and others* v. *Mangal Chand*, A.I.R. (1927) Pat. 333, referred to.

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CIVIL PROCEDURE CODE, S. 100, CLAUSES (A) TO (C) 469

CIVIL PROCEDURE CODE, s. 100—*Finding of fact when final—Questions of law and fact—What are—Evidence Act, ss. 101 and 102—Burden of proof—Misapprehension of Lower Court.* Plaintiff sued the defendant Maung Sein for cancellation of a Registered Sale Deed on the ground that she and her husband had purchased from the previous owner during Japanese regime and that subsequent sale by the owner to the defendant was collusive and without consideration. The trial Court decreed the suit and the decree was confirmed on appeal by the District Court. *On Second Appeal, Held :* That no second appeal lies under s. 100 of the Code of Civil Procedure except on the grounds mentioned therein and where there is no error or defect in procedure the finding of the first Appellate Court on the question of fact is final, if there was evidence before that Court. *Mussummat Durga Choudhrain* v. *Jawahir Singh Choudhri*, 17 I.A. 123, followed. What are questions of law and questions of fact are sometimes difficult to disentangle. When the allocation of *onus* of proof is one of the most vital question between the parties, it is the duty of the Court to rectify the mistake made by the Lower Appellate Court. *Nafar Chandra Pal Chowdhury* v. *Shukur Sheik*, 46 Cal. 189 (P.C.) ; *Madho Ram* v. *Nandu Mal*, 1 Lah. 429 ; *Ganga Ram* v. *Rulia and others*, 1 Lah. 249, referred to. The question of *onus* of proof is a question of law rendering a second appeal competent. The fundamental principles relating

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to the burden of proof are embodied in ss. 101 and 102 of the Evidence Act. As the genuineness of the document Exhibit 2 in favour of the defendant was proved, the Lower Appellate Court was entirely wrong in dismissing the appeal under misapprehension as to the burden of proof, which lay upon him to disprove consideration.

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CIVIL PROCEDURE CODE, S. 115 IF APPLICABLE TO RENT REFERENCE PROCEEDINGS 368

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———————, ORDER 32, RULE 15 489

———————, ORDER 41, RULE 11(1) 463

———————, ORDER 41, RULE 27 197

CODE OF CIVIL PROCEDURE, S. 10 AND S. 151—*Held :* That s. 10 of the Code of Civil Procedure provides for stay of suit pending hearing of another Civil Suit. There is no provision for stay of a civil suit pending criminal trials. S. 151 of the Code of Civil Procedure cannot be invoked to stay a suit which cannot be legally stayed otherwise. *Lakshmi Insurance Co. Ltd.* v. *B. K. Kaula and another*, (1940) A.I.R. Lah. 85, referred to.

SUNDERMAL RANGLAL *v.* JHABARMAL BAJAJ AND OTHERS ... 316

CODE OF CIVIL PROCEDURE, S. 12—*Foreign judgment—Production of decree copy but not judgment of foreign Court—Maintainability—Article 60, Limitation Act.* A suit was filed upon a foreign judgment and only copy of a decree of the foreign Court was produced. The claim according to the decree was for amount due on a deposit letter and the suit was dismissed on the ground that the claim in the foreign Court was barred by limitation. *On Appeal, Held :* Article 60, Limitation Act is applicable to the claim in question and the matter of limitation hinges on whether there was a demand for payment of the money more than three years prior to suit. The fact that the defendant failed to enter appearance in the foreign Court would go to show that there was no such demand and if there was no demand beyond three years, the judgment was correct. The said judgment cannot be said to be founded upon breach of the law in force in Burma. The suit to recover moneys in deposit is not an illegal claim. The general rule is that a Court which entertains a suit on a foreign judgment cannot enquire into the merits of the original action or the propriety of the decision. *Baijnath Karnani* v. *Vallabhadas Damani*, A.I.R. (1932) Mad. 661 ; *Brijlal Ramjidass and another* v. *Govindram Gorhandas Seksaria and others*, A.I.R. (1947) (P.C.) 192 ; *Ganga Prasad and another* v. *Ganesh Lal and others*, 56 All. 119, referred to.

S.P.S.N. KASIVISVANATHAN CHETTIAR *v.* S.S. KRISHNAPPA CHETTIAR AND OTHERS 399

CODE OF CIVIL PROCEDURE, S. 47, ORDER 21, RULE 2—*An application for recording an adjustment of the decree. Held :* Where an application for execution has been filed and the judgment-debtor

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files an application to record an adjustment of the decree, the court is bound to hold an enquiry to find out as to whether the decree has been adjusted or not. *Chandi Charan Chakravarti* v. *Panchanan Pandit*, (1930) I.L.R. Pat., Vol. 9, 521 ; *L. Madho Lal and one* v. *L. Duli Chand and one*, (1933), A.I.R. All. 429 at 431 ; *Maung Tin* v. *Ma Mi*, (1927) I.L.R. 5 Ran. 833 at 834, followed.

MOHAMED ABDUL KADER *v.* C. M. A. ISMAIL 89

CODE OF CIVIL PROCEDURE, s. 115—*Revision whether lies against an erroneous order regarding Court-fees. Held by the Full Bench :* That an order demanding Court-fees erroneously from the defendant on the ground that the claim for adjustment made in the written statement is tantamount to claim for set off is not open to revision by the High Court under s. 115 of the Code of Civil Procedure. *Amir Hassan Khan* v. *Sheo Baksh Singh*, (1885) 11 Cal. Series, 6 at 8 ; 11 I.A. 176 ; *Balakrishna Udayar* v. *Vasudeva Aiyar*, (1917) I.A. 261 at 267 ; *U Ba Thwin* v. *Maung Ba Shein*, (1932) 10 Ran. 517 ; *K.N.S. P.K.N.K. Firm* v. *U Ba Chit*, (1935) A.I.R. Ran. 158 ; *Maung Ba Han* v. *S.M.A.R.M. Firm*, (1934) A.I.R Ran. 230; *S.C. Das* v. *A.B. Datta*, (1934) A.I.R. (Ran. 233 ; *Shew Prosad Bunghshidhur* v. *Ram Chunder Haribux*, (1941) 41 Cal 323 at 337-338 ; *Devidas Maroti Boke* v. *Nilkanthrao Narayanrao Deshmukh*, (1936) A.I.R. Nag. 157 at 159 ; *Keshelal* v. *Lamanrao*, (1940) I.L.R. Nag. 659 at 668 ; *Badri Nath* v. *Ram Chandra*, (1939) I.L.R. 14 Luck. 442 ; *Gupta & Co.* v. *Kirpu Ram Brothers*, (1935) 57 All. 17 at 22 (F.B.) ; *Man Lal* v. *Durga Prasad*, (1924) 3 Pat. 930 at 940 ; *Mahant Ram Bhusan Dass* v. *Bachu Rai*, (1935) 14 Pat. 220 at 222-223 ; *Haridas Nath Roy* v. *Ram Chandra Burna Sarma*, (1921) 48 Cal. 138 at 149-150 ; *Mohamed Chooloo and others* v. *Abdul Hamid Khan and others*, (1933) 11 Ran. 36 at 38, followed. *Ramkhelawan Sahu* v. *Bir Surendra Sahi*, (1937) 16 Pat. 766 at 777, not followed. *Rami Kulandaivelu Nachiar and another* v. *Indran Ramaswami Pandia Thamyan*, (1928) 51 Mad 664 at 669-670 ; *Shailendranath Kundu* v. *Surendrandia Sarkar*, (1935) 62 Cal. 417 at 418, distinguished. *Malkirjun Bin Shidramappa Pasare* v. *Narhari Bin Shivappa*, 27 I.A. 216 at 225 ; *Balakrishna Udayar* v. *Vasudeva Aiyar*, (1917) 24 I.A. 261 at 267 ; *Pakala Narayan Swami* v. *The King-Emperor*, (1936) I.L.R. 18 Pat. 234 ; *Bhagchand Lagasusa and others* v. *Secretary of State for India*, 54 I.A. 338 at 357 ; *Mohandar Singh and another* v. *The King*, 51 Cr. L.J. 1483 at 1484 ; *Nandamani* v. *Hari Krishna Bhima Deo*, A.I.R. (1939) Pat. 564 ; *Dhari Jena* v. *Gauranga Charay Sahu*, A.I.R. (1940) Pat. 89, followed.

MA THAN YIN *v.* TAN KEAT KHANG (*a*) TAN KEIT SEIN 161

CODE OF CIVIL PROCEDURE—S. *141, Order 25, Rule 1—Application for security for costs against a decree-holder who is resident outside Burma—Whether such application lies. Held :* That Order 25, Rule 1 has no application to the Execution Proceedings against a decree-holder. S. 141 of the Code of Civil Procedure does not apply to Execution Proceedings. *Hiralal Ramsukh* v. *Monghibai Chimnaji*, A.I.R. (1938) Bom. 510, referred to. *Ma Than Sein and others* v. *Ma Hla Yi*, (1941) R.L.R. 246 ; *Suraj Kuar* v. *Sant Singh and one*, 28 A.I.R. (1941) All. 219, followed.

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CODE OF CIVIL PROCEDURE, ORDER 9, RULE 9—*Sufficient cause. Held:* That Court exist so that people who have cases can have those cases heard and determined. It should never be the intention of Courts that a man should be deprived of a hearing unless there has been something equivalent to mis-conduct or gross negligence on his part or something which cannot be put right, as far as the other side is concerned, by making the man to blame pay for it. Even if a person is rude or disrespectful to Court that would not be sufficient to deprive him of benefit of the provisions of Order 9, Rule 9 of the Code of Civil Procedure. Where a medical certificate is produced showing that a party was advised rest and it was proved that he flew to Hongkong that fact alone does not prove that the medical certificate was untrue. Where a party has to be absent on very important personal business transaction that may be a sufficient cause for non-appearance. *U Aung Gyi* v. *The Government of Burma*, (1940) Ran. 512, distinguished. *R. A. Arunachela Ayyar* v. *C. Subbaramiah*, 46 Mad. 60 at 63; followed.

U NGWE *v.* BAMA TAGUN COMPANY AND ONE 134

CODE OF CIVIL PROCEDURE, ORDER 14, RULE 2—*Preliminary issue—When must be decided. Held:* That under Rule 2 if the Court is of the opinion that the case or any part of it may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. In deciding the question as to whether the Court should grant or refuse a prayer to try a preliminary issue on a point of law, some harmony is to be observed between the general principle that it is undesirable to try a case piece-meal and the specific and wholesome provisions of Order 14, Rule 2 of the Code of Civil Procedure which have been enacted for the purpose of preventing the injustice of a party being able to force his opponent to go at great length into evidence when the simple decision on a point of law might render the investigation of the facts unnecessary. *Janki Das and another* v. *Kalu Ram and another*, A.I.R. (1936) Pat. 250, followed.

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CODE OF CIVIL PROCEDURE, ORDER 20,—*Judgment written by predecessor and pronounced by succeeding judge—Appeal heard by the same judge as District Judge—Competency.* Where arguments were heard by one Judge who prepared the judgment and left it to be pronounced by his successor, and that successor delivered the judgment under Order 20, Rule 2, Code of Civil Procedure and subsequently the same Judge became District and Sessions Judge and in that capacity decided the appeal also. *Held by the Full Bench:* That he was not competent to hear the appeal. The language used in Order 20, Rule 2, Code of Civil Procedure is that a Judge may pronounce a judgment written but not pronounced by his predecessor. This power is discretionary, and whether a Judge should exercise such discretion is a matter depending on the facts of each case. Pronouncing a judgment is part of the trial, and if the Judge is in doubt as to the correctness of such judgment, he can either proceed under Order 18, Rule 15, Code of Civil Procedure or hear the case *de novo*. *Baker Nicols* v. *Baker*, L.R. 44 Ch. D. 262 at 270; *Hargulal* v. *Abdul Gany Hajee Ishaq and another*, (1936-37) 14 Ran. Series, 136 at 142-43,

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referred to and followed. It is essential that everything which might engender suspicion and distrust of a Tribunal should be cleared away and there must be a feeling of confidence in the administration of justice. It is also important that a Judge should appear to be impartial and without any pre-conceived idea of what his decision should be. The question, in such cases is not whether in fact the Judge was or was not biased, but that there should be no room for suspicion that a Judge is biased. *Loburi Domini and others* v. *The Assam Railway and Trading Co. Ltd. and The Secretary of State for India in Council*, (1884) 10 Cal. Series, 915 at 917-18 ; *Sergeant and others* v. *Dale*, L.R. (1876-77) 2 Q.B.D. 558 at 567 ; *Allinson* v. *General Council of Medical Education and Registration*, L.R. (1894) 1 Q.B.D. 750 at 758-59, referred to

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CONSTRUCTION OF STATUTES 226

CONTRACT ACT, s. 63—*Remission of a portion of claim—Whether requires consideration. Held* : Under s. 63 of the Contract Act, a dispensation or a remission by a promisee of the performance of the whole or any part of a promise made to him need not be supported by consideration. A unilateral act on the part of the promisee absolves the promissor from his obligation under the contract. *A.K.A.C.T.A.L. Cheltyar* v. *A.K.R.M.M.K. Firm and others*, (1938) R.L.R. 600 ; *Jitendra Chandra Ray Chaudhuri* v. *S. N. Banerjee*, I.L.R. (1943) Cal., Vol.I. 101, followed. *Balasundra Vaker and one* v. *Ranganatha Iyer and others*, I.L.R. (1930) 53 Mad. 127 ; *Ramaswami and others* v. *Gurukar Rudrappa*, A.I.R. (1939) Mad. 688, distinguished.

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CONTRACT ACT, s. 65 275

———————. s. 178 312

CONTRACT OF SALE ON BEHALF OF MINOR—*Advance paid—Recovery of—S. 65 of the Contract Act whether applicable—Whether purchaser could advance in equity.* Where a sum of Rs. 5,000 in Japanese Currency was paid by the agent appointed by a Hindu minor's mother as guardian in pursuance of an alleged agreement to purchase land and the suit was filed for return of the said money amongst other claims. *Held* : That the agreement of purchase of land entered on behalf of the minor is void *ab initio*. *Mahori Bibee* v. *Dharmodas Ghose*, (1903) 30 Cal. Series, 539 at 548 ; *Limbaji Ravji Hajare* v. *Rahi Kom Ravji Hajare and others*, (1925) 49 Bom. Series, 576, followed. Ss. 64 and 65 of the Contract Act are not applicable to a claim for refund of the advance as these sections start from the basis of there being a contract between the competent parties. The Court however on equitable principle direct the refund of the advance money when the alleged purchaser can plead no equity in his favour. The Court ought to be most chary to act against the interest of the minor and his interests should not be jeopardised for a technical error in drafting the plaint. Leave should therefore

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be granted to amend the plaint even at a late stage. *Kham Gul and another* v. *Lakha Singh and another*, A.I.R. (1928) Lah. 609 ; *Manmatha Kumar Saha* v. *Exchange Loan Co. Ltd.*, A.I.R. (1936) Cal. 567 ; *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark*, 9 Lah. Series, 701, referred to. *Ma Shwe Myat* v. *Maung Mo Hnaung*, I.L.R. 48 Cal. 832 at 835, followed and applied.

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CRIMINAL PROCEDURE, CODE, SS. 256 (2) AND 342 (1) (*a*), (*b*) AND (*c*)—*Examination of accused after defence witnesses—If irregularity vitiating trial—Duty of accused in criminal case—Burden of proof of guilt always on prosecution.* Where defence witnesses had been examined in a murder case and subsequently the accused was examined and it was contended that s. 256 (2) of the Criminal Procedure Code had not been complied with and the same amounted to a serious defect in procedure so as to vitiate the trial. *Held :* That the mere fact that the imperative statutory rule of procedure has been broken is not enough to vitiate the trial or proceeding. The Court should consider the gravity of the irregularity and whether the irregularity has caused injustice to the accused. The irregularity in examining the accused after the defence witnesses has not prejudiced the accused and it is not such serious defect in procedure as to vitiate the trial. *Kallu* v. *Bashir Uddin*, (1931) 53 All. 172 at 178, referred to. *Abdul Rahman* v. *King-Emperor*, (1927) 5 Ran. 53 at 69, followed. *Held further :* That an accused person owes no duty to anybody and the burden of proving his guilt remains throughout the trial with the prosecution who must prove such guilt beyond all reasonable doubt.

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CRIMINAL PROCEDURE CODE, SS. 367, 421 AND 424—*Failure to write proper judgment. Held :* Although s. 421 of the Criminal Procedure Code gives the Appellate Court power to dismiss an appeal summarily that power must be exercised with judicial discretion. Appeals in which complicated questions of law and fact are involved should not be disposed of in a summary manner. *Kailish Chandra Chakraborty* v. *King-Emperor*, 19 C.L.J. 228, referred to. And even though the Court is not bound to write a judgment when an appeal is dismissed summarily, yet as there is a possibility of the order being challenged by an application in revision it is advisable that the Appellate Court should briefly record its reasons for such dismissal to show that it had applied its mind to the evidence on the record, and to the

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Memorandum of Appeal. *Held further :* If the Court had admitted the appeal it would have been bound to embody in its judgment the point or points for determination, the decisions thereon and the reasons therefor. Where the order of the learned Judge does not show that he has read the copy of the judgment or considered the points raised in the Memorandum of Appeal he exercises his discretion improperly, the High Court will go into the merits of the case and give its own decision instead of remanding the case. *Nga Ba Myit* v. *King-Emperor*, 19 C.L.J. 316 ; *Nga Sein* v. *King-Emperor*, (1906) U.B.R. 2nd Qr. 49 ; *Lal Behari* v. *King-Emperor*, 38 All. 393 ; *Guru Bari Behari* v. *King-Emperor*, 19 C.L.J. 156 ; *Ram Kan Pandit* v. *King-Emperor*, 19 C.L.J. 304, referred to.

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CRIMINAL PROCEDURE CODE, s. 403—*Arms Temporary Amendment Act, 1949, s. 19-A—Conviction under s. 19-A of the Arms Act—Subsequent trial for offence under s. 122 (1) of the Penal Code—Whether conviction in the previous case bars subsequent action. Held :* Where a person has been convicted under s. 19-A of the Arms Act, as amended by Arms (Temporary Amendment) Act in an earlier trial and was sentenced to transportation for life, he could still be tried and convicted for an offence under s. 122 of the Penal Code. S. 403 (2) read with Illustration (*b*) attached to that section allows a trial for a distinct offence. The point for consideration is not whether the offence in the subsequent trial arose out of the same transaction in which the offence for which he was tried in the previous trial arose, but whether it could be said that the conviction or acquittal in the former trial necessarily or impliedly involved also a conviction or acquittal of the charge made in the subsequent trial. *Ram Sahay Ram* v. *Emperor* : (1921) 48 Cal. Series, 81 at 83 ; *R.* v. *Barron*, (1914) 2 K.B. 570 ; *Abdul Hamid* v. *King-Emperor*, (1936-37) 14 Ran. Series, 24 at 28, followed. The question as to whether a particular trial is barred by reason of previous prosecution ending in conviction or acquittal is a question to be determined on facts and circumstances of a particular case. *Jitendra Nath Gupta and one* v. *Emperor*, A.I.R. (1937) Cal. 99 at 113, followed. Judged by the above test it is clear that the conviction for offence under the Arms Act did not imply conviction under s. 122 of the Penal Code,

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DEBT SETTLEMENT BOARD ACT 72 OF 1947—*Act 14 of 1951, s. 4-A (2)—Application under—Duty of executing Civil Court—Proof of application for scaling down. Held :* Although a Debt Settlement Board was to have been established under Act 72 of 1947 nothing has been done therein ; but for purposes of ss. 26 and 28 of the said Act an application made by a debtor to the Deputy Commissioner under s. 4 (*a*) (*1*) of the Act 14 of 1951 shall be deemed to be an application made to a Board and sub-s. 1 of s. 4-A authorises the Deputy Commissioner or other officer named to receive applications for scaling down of debts presented by the debtor residing within the jurisdiction. Where such an application has

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been made to a Board, any suit, appeal or other proceeding pending before a Civil Court in respect of a debt for the settlement of which an application has been made, shall be stayed under s. 26 of the Act 72 of 1947. The Civil Court could not thereafter make an enquiry whether the applicants are *bonâ fide* agriculturists.

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DISPOSAL OF EXHIBITS—*Order for return of jewellery—Conviction for breach of trust—Opportunity to owner to be given—Contract Act, s. 178—Sale of Goods Act, s. 2* (9). Where a broker entrusted by owner with authority to sell certain jewellery gave it to another person who in his turn pledged it in a pawn shop and upon conviction of the broker for criminal breach of trust the Magistrate made an order for return of the jewellery to the owner without notice to pawnee and the Additional Sessions Judge cancelled the said order and directed the same to be returned to the pawn shop owner. *Held :* That unless the order of the trial Magistrate can be said to be clearly wrong on the face of the record it ought to be sustained. Where opportunity is not given to the pawn shop owner or to the original owner to be heard before the orders for the return of the jewellery were passed, that fact would amount to serious irregularities. The pledge in the present case was made by (P.W.3) and not by the original broker. There was also nothing to show that the jewelleries were in fact pledged in her name. There is consequently no material on record that the pledged jewellery must be considered to have been a pledge made by a broker. ***Held further :*** That under s. 178 of the Contract Act a mercantile agent acting in the ordinary course of business can pledge goods in his possession with the consent of the owner and a broker in jewellery given for sale comes within the definition of mercantile agent as defined in s. 2 (9) of the Sale of Goods Act. *Sulaiman* v. *Ma Ywet*, (1934) A.I.R. Ran. 198, referred to.

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EMERGENCY PROVISIONS ORDINANCE, 1948, S. 3 AND S. 3 (1), HIGH TREASON ACT, 1948—*The offences under. Held :* The juxtaposition of the words "ကြံ" (intention) and "ရန်" (object) in s. 3, Emergency Provisions Act, 1948 shows that an act contrary to the provisions of the section must have been done with the object and intention of delaying or defeating the operations of the Police Force or the Armed Forces keeping the peace in Burma. *Held further :* That in order to constitute an offence

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under s. 3. (*1*) of the High Treason Act, 1948 the purpose and intention must be of a general public nature as contra-distinct from a private one such as theft or robbery. *Ba Maung* v. *The Union of Burma*, (1950) B.L.R. 131 ; *Maung Joker* v. *The Union of Burma*, (1950) B.L.R. 300, followed.

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ESSENTIAL SUPPLIES AND SERVICES ACT, 1947—*S.3—Notification No.92 of 1947 requiring permission to take gold to Arakan—If* ultra vires *—Effect of publication—Notice to all persons—Criminal Procedure Code, s. 342* (1) (b)*—Evidence of accused under—Can be used against accused—"Shall be liable to confiscation" —Meaning.* Applicant was tried and convicted under s. 8, sub-s. (*1*) of the Essential Supplies and Services Act, 1947, for taking 15 bars of Chinese gold from Rangoon to Akyab by plane without having a necessary permit as required by Notification No. 92, dated the 23rd September 1947. She was sentenced to a fine of Rs. 600 or in default to undergo 9 months' rigorous imprisonment. The gold was ordered to be confiscated. Her appeal was dismissed. In revision it was *inter alia* urged that the above Notification was *ultra vires* of s. 3. of the Essential Supplies and Services Act, 1947, that as the Applicant was not aware of the said Notification, she should be released under s. 562, Criminal Procedure Code, that the admission made by the Applicant in the course of the evidence given under s. 342, Criminal Procedure Code should be taken, if taken at all, as a whole and that the expression "shall be liable to confiscation" did not mean that the Court had no option but to order confiscation. *Held :* That Notification No. 92 of 1947 is not *ultra vires* of s. 3 of the Essential Supplies and Services Act though it does not contain such formula as "it appears to the Governor (now President) for maintaining Supplies and Services essential to the life of the country and therefore movement of gold from Rangoon to Arakan is prohibited." One has to take the language as one finds it, although, of course, one has to look at the Act as a whole and construe it so as to give effect to what appears from the language of the whole Act to be the intention of the legislature. *Emperor* v. *Mohamed Kassam Panwall*, I.L.R. (1942) Bom. 107, relied on. It is not necessary for the prosecution to prove actual communication of a notification to the alleged offenders. Once publication had been made the persons affected by the order are to be deemed to have been informed, it is not open to him to show that he was not actually informed. *Debi Prosad* v. *Emperor*, A.I.R. (1947) All. 191, relied on. Evidence given by an accused person under s. 342 (*1*)(*b*) of the Criminal Procedure Code can be used against him. *Nazi Ahmed* v. *Emperor*, 63 I.A. 372 ; *The King* v. *San Min*, (1939) Ran. 97, relied on. The words "shall be liable to confiscation," when used in connection with contraband, mean that the contraband is to be compulsorily confiscated. *The Union of Burma* v. *Maung Chit Swe*, (1950) B.L.R 278; *Durga Das Khanna* v. *Emperor*, A.I.R. (1944) Lah. 33 at 42 ; *Bo Yan Naing's Case*, B.L.R. (1950) S.C. 17; *Motichand Balubhai* v. *District Magistrate, Surat*, A.I.R. (1945) Bom. 385; Re. *Chinnayan Rowther*, (*a*) *Sahul Hamid*, (1945), Mad. 76 ; *Bhutnath Choudhury* v. *Emperor*, (1948) Cal. 289 ; *M Gokildas* v. *Emperor*, 51 Bom. L.R. 158, referred to.

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EVIDENCE ACT, SS. 65-A AND 85—*Presumption—Power-of-attorney registered in India—Whether presumption of authenticity applicable to Burma—S. 2* (50), *General Clauses Act Held :* The presumption as to authenticity arising in connection with powers-of-attorney executed before and authenticated by the authorities mentioned in s. 85 of the Evidence Act will not necessarily arise in regard to documents registered outside Burma. Under s. 2, Clause 50 of the General Clauses Act, "registered" with reference to a document means registered according to the law in force in Burma. In the case of powers-of-attorney executed and authenticated as mentioned under s. 85 of the Evidence Act, proof of execution must be dispensed with ; in the case of powers-of-attorney not so executed and authenticated legal proof must be given. *In the goods of A. J. Primrose*, 16 Cal. 776, referred to. Where the substituted power-of-attorney was produced but the original power authorising such substitution was not produced and it was claimed that the holder of the original power, being resident-outside, was not compellable to produce the original power, such a plea is not available ; the substitute cannot place himself in a better position than the holder and the original power must be proved unless such proof is to be dispensed with under s. 85 of the Evidence Act. *Sladen* (deceased) 21 Mad. 492, distinguished.

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EXECUTION, STAY OF—*Terms and conditions imposed by Judge—Successor-in-office not competent to cancel and substitute new terms and conditions—Defaulter not entitled to make fresh application for stay. Held :* However laudable the object may be in imposing fresh terms and conditions, a successor-in-office cannot arrogate to himself the functions of a Court sitting in appeal or in revision on the order passed by his predecessor. *Held also :* Having failed to comply with the terms imposed upon him a defaulter is not entitled to make a fresh application for stay of execution. *K. S. Abdul Kader* v. *Sri Kali Temple Trust*, (1949) B.L.R. 175, followed.

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FOREIGN EXCHANGE REGULATION ACT, 1947, S. 4 (*4*), S. (1), CLAUSE 5 (*b*)—*Whether Controller or Deputy Controller bound to issue permit for remittance of money—Mandamus—If lies—S. 45-A, Specific Relief Act.* Under the scheme of the Foreign Exchange Regulation Act, 1947 final authority in respect of remittance of money outside Burma is the Controller or Deputy Controller or an Assistant Controller appointed under s. 3. The provisions of s. 6 of the said Act read with other provisions prohibit remittance

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of money to persons resident out of Burma and clearly include the contingency of a person in Burma remitting money to himself outside Burma. In the present case application was made for permit to remit money to himself and his wife and it comes within the mischief of s. 6 (*1*) (*v*) (*b*). Burma currency is legal tender in Burma alone. The Government of Burma has to husband its holdings in foreign exchange to secure currency stability and economic security and applicant was not entitled to call upon the Government of Burma to part with a portion of the foreign exchange in consideration of Burma currency. The applicant therefore does not come within the purview of s. 45 of the Specific Relief Act. There is no mandatory provision in the Foreign Exchange Regulation Act which makes it incumbent upon the authorities to permit remittance of money abroad. As the Deputy Controller in the present case considered the application in the case according to certain principles formulated for guidance and acted *bonâ fide* and not arbitrarily no application for mandamus can lie.

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FOREIGNER—*Written statement through agent claiming exemption from jurisdiction—Point decided against him—Injunction to restrain a foreign decree whether could be granted.* A obtained a degree against B in Rangoon City Civil Court and took a copy of the said decree to India and obtained another decree on the same in an Indian Court and B then filed a suit for mandatory injunction against A restraining him from executing the decree in his favour in India. A appeared through his agent and contested the jurisdiction of the Court and also claimed that no injunction could be issued against him. The trial Judge in Rangoon answered both the points in favour of the present plaintiff and dismissed the suit. *On appeal, Held :* That when a defendant was served with process by a foreign Court he had alternative of doing nothing or appearing in Court and contesting the claim. If he did not appear the Court might give a judgment against him but unless he has some property within the jurisdiction of the Court the decree could not be executed against him. But if the defendant appeared through agent and contested the suit on merit and also questioned the jurisdiction of the Court, be really submits to the jurisdiction of the Court. Once the suit is decided on merits he cannot challenge the decision on the ground of want of jurisdiction. The fact that he appeared through agent does not make any difference. *Harris* v. *Taylor*, (1915) 2 K.B.D. 580 at 587-588, 592 ; *Rama Ayyar* v. *Krishna Satter*, (1916) I.L.R. 39 Mad. 773 ; *T. Sundaram Pillai* v. *Kaniaswami Pillai*, (1941) A.I.R. Mad. 387 ; A. Janoo Hassan Sait by his authorised agent *Dada Beg Muhammad* v. *M. Ş. N. Mahomed Ohuthu*, (1924) I.L.R. 47 Mad. 877 at 880, followed Where a defendant is residing in a foreign country and has obtained a decree there it is not in the interest of justice that he should be restrained from executing the decree he has obtained in the foreign court by a permanent injunction even though the decree that he has obtained is on the basis of a judgment obtained in Burma. *The Carr Iron Company Proprietors* v. *James Maclaren Henry Dawson, E. H. Tibbats Stainton*, (1855) 5 H.L.C. 416 at 442 ; *Vulcan Iron Works* v. *Bishumbhur Prosad*, (1909) I.L.R. 36 Cal. 233 at 237 ; *Jumna Dass* v. *Harcharan Dass*, (1911) I.L.R. 38 Cal. 405 at 407, followed.

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HIGH TREASON ACT, 1948, s. 3 (1) 28

HINDU LAW—*Karta—Partnership arrangement between karta and strangers—Whether family becomes Partner—Karta when aged. Held :* Where the Managing member of a joint family enters into a partnership with a stranger the other members of the family do not *ipso facto* become partners in the business. *Lachhman Das* v. *Commissioner of Income-tax*, A.I.R. (1948) (P.C.) 8 ; *Sokkanadha Vannimunder* v. *Sokkanadha Vannimundar and others*, 28 Mad. 344 at 345-346 ; *Samalbhai Nathubhai* v. *Someshwar, Mangal and Harkisan*, I.L.R. 5 Bom. 38 ; *Grande Gangayya* v. *Grande Venkatramiah*, 41 Mad. 454 at 456-457 ; *Ramanathan Chetty* v. *Yegappa Chetty*, (1916) 30 M.L.J. 241 ; *Vadilal* v. *Shah Khushal*, (1903) I.L.R. 27 Bom. 157 ; *Daiva Ammal and others* v. *Selvaramanuja Nayakar and others*, A.I.R. (1936) Mad. 479 ; *P.K.P.S. Pichappa Chettiar and others* v. *Chokalingam Pillai and others*, A.I.R. (1934) (P.C.) 192, followed. But for the purpose of forming partnership with a stranger effected through the medium of its karta a Joint Hindu Family is regarded as a unit capable of being represented by its manager because the Hindu Joint Family is a legal unit which can be represented by its karta. *Maharaj Kishen* v. *Hargobind and Basheshar Lal*, 49 Punjab Record Judl. 377 ; *Narain Das and others* v. *Ralli Brothers*, 50 Punjab Record Judl. 270 at 271 ; *Moti Ram* v. *Muhammad Abdul Jalia*, 46 All. 509 at 510 ; *Mewa Ram* v. *Ram Gopal and Heti Lal and others*, 48 All. 395 at 396 ; *Gauri Shankar* v. *Keshab Deo and others*, (1929) All. 148 ; *Kharider Kapra Co., Ltd.* v. *Daya Kishan and others*, 43 All. 116, referred to. It is a question of fact in each case whether the partnership is—(*a*) between the karta in his individual capacity utilizing his own separate property and a stranger, or (*b*) between the karta acting for the benefit of the family by using the joint family property and the stranger, and (*c*) where the karta acting as agent of the family and the stranger. In the first case the family is not interested in the partnership. In the second case, the family property is affected by the partnership of the karta with the stranger, but the family as such is not a partner in the partnership. In the third case, the family itself, as a unit and not the karta, is the partner. *Annamalai Chetty* v. *Murugesa Chetty*, (1903) I.L.R. 26 Mad. 544 at 545 distinguished.

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LAND ACQUISITION ACT—*Ss. 4, 5-A, 6, 9 and 11—Power of the Collector to release lands—S. 23* (1)*—Meaning of the word "market-value" —When to be computed—Principle on which appeals are allowed. Held :* In view of the clear wordings of ss. 4, 5-A, 6, 9 and 11 of the Land Acquisition Act neither the Collector nor the Judge sitting on the Original Side was competent, to reduce or limit or over-ride the decision of the Government as to the necessity or otherwise of acquisition of any portion of land. The Collector's duty is confined to marking out the boundaries and Collector and Court are authorized to decide only the quantum of compensation payable to the owner for land taken over by Government but neither can release any portion of the land acquired. Market-value of a land is the price that an owner willing and not obliged to sell might reasonably expect to obtain from a willing purchaser with whom he was bargaining for sale and purchase of the land, and such value should be the value at the time of the declaration under s. 4 of the Land Acquisition Act. Potential value of the land acquired should be taken into consideration in assessing market-value. The Collector should generally visit the land personally before fixing the market-value. In appeals involving the question of valuation in land acquisition cases, the decree complained of will not be interfered with unless some erroneous principle has been invoked or some piece of evidence over-looked or has been misapplied. *Re. an Arbitration between Lucas and the Chesterfield Gas and Water Board*, (1909) 1 K.B. 16 at 29-30 ; *Cedars Rapids Manufacturing & Power Co.* v. *Lacoste*, (1914) A.C. 569 ; *Fraser and others* v. *City of Fraserville*, (1917) A.C. 187 ; *Swift & Co.* v. *Board of Trade*, (1925) A.C. 520 ; *Reddiar and San Chein* v. *Secretary of State for India in Council and the Special Collector of Rangoon*, I.L.R. 5 Ran. 799 ; *Premchand Burral and another* v. *The Collector of Calcutta*, I.L.R. 2 Cal. 103 ; *R. B. Lalal Narsingh Das* v. *Secretary of State for India*, (1925) A.I.R. (P.C.) 91 ; *Ma Sein and others* v. *Collector of Rangoon*, I.L.R. 7 Ran. 227 ; *Government of Bombay* v. *Merwan Mondigar Aga*, I.L.R. 48 Bom. 190 ; *Pribhu Diyal* v. *Secretary of State*, (1931) A.I.R. Lah. 364 ; *Maung Bow Khin* v. *Special Collector, Maubin*, (1935), A.I.R. Ran. 157 ; *Sri Raja Vyricherla Narayana Gajapatiraju Bahadur Garu* v. *The Revenue Divisional Officer, Vizagapatam*, (1939) I.L.R. Mad. 532 at 548 ; *Mohini Mohan Banerjee and others* v. *Secretary of State*, (1921) A.I.R. Cal. 193 ; *The Collector* v. *The Manager, Kurla Estate*, (1926) A.I.R. Bom. 223 ; *Maung Po Ni and one* v. *Ma Shwe Kyi and others*, I.L.R. 2 Ran. 397 ; *Kanto Prashad Hazari* v. *Jagat Chandra Dutta and others*, I.L.R. 23 Cal. 335 ; *Atmaram Bhagwant Ghadgay* v. *Collector of Nagpur*, (1929) A.I.R. (P.C.) 92, referred to and followed.

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LANDLORD AND TENANT—*Landlord removing roof—Rights and liabilities of parties—Non-roofing by Landlord breach of duty—Derogation from grant—Transfer of Property Act, s. 108 (f).* Appellant occupied a portion of a house belonging to the respondent on payment of a *Salami* and a monthly rent. The agreement provided that no repairs or alterations should be made to the house by the tenant without the consent of the respondent. The respondent was directed by the Bassein Municipality to remove the *Dhani* and bamboo roofings from his house. In compliance with the order the respondent removed the *Dhani* and bamboo roofings and put in corrugated iron sheets on one portion of the house but not on the portion occupied by the Appellant. Respondent undertook to re-roof the portion of the house occupied by the Appellant provided the Appellant vacated the premises and surrendered the lease. The Appellant refused to do so and instead re-roofed the house and claimed the cost from the respondent. In a Cross-Suit the respondent sued for ejectment of the Appellant and recovery of arrears of rent due. Both suits were dismissed on appeal to the District Court. Appellant alone appealed. *Held:* It is elementary that for a tenant to enjoy a property of the nature let out to the Appellant in this case some kind of a roof is an absolute necessity. As the Appellant was in any circumstances entitled to a roof of some sort in his part of the building, the failure of the respondent to put up one in conformity with the Building Bye-laws of the municipality was a clear breach of his legal duty which he owed to his tenant. A grantor having given a thing with one hand is not to take away the means of enjoying it with the other. *Birminghan, Dudley and District Banking Co.* v. *Rose*, 38 Ch. D. 295, 313; *Harmer* v. *Humbil (Nigeria) Tin Areas, Ltd.*, 1 Ch. D. 200 at 226, relied on. *Bijoi Chandra Singh* v. *Howrah Amta Light Rly. Co. Ltd.*, A.I.R. (1923) Cal. 524, referred to.

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LIMITATION ACT, ARTICLE 181. *Application for final decree—Loss of record—Reconstruction of record—Application filed beyond time—Courts (Emergency Provisions) Act, 1943, s. 7—Limitation Act, s. 4. Held:* Article 181 of Limitation Act applies to an application for final decree in a mortgage suit for sale of the property. The facts that an application for the reconstruction had to be filed and that record had to be reconstructed are no grounds for not filing the application within the time fixed by Article 181 of the Limitation Act. *Amlook Chand Parrack* v. *Sarat Chunder Mukerjee*, (1911) 38 Cal. 913 at 921; *Jesinglal Kalidas Shah* v. *Gandadhar Mahadeo Karandikar and others*, A.I.R. (1938) Bom. 354; *Ramanathan Chetty* v. *Alagappa Chetty and others*, (1930) 53 Mad. 378 at 385[5]; *Premomal Daomal* v. *Khudabux and others*, A.I.R. (1937) Sind 273 at 277; *Mitsui Bussan Kaishah Ltd.* v. *Firm of Tolaram Bhagwandas*, A.I.R. (1921) Sind 166; *Sakar Chand Narsidas* v. *Yacub*, A.I.R. (1923) Sind 14; *M.A.L.M. Chettyar Firm* v. *Maung Po Hmyin and others*, (1935) 13 Ran. 325 at 328; *Hoe Shwe Fong* v. *E. I. Attia*, (1949) B.L.R. 394 at 395. followed. S. 7 of Courts (Emergency Provisions) Act. 1943 provides that the Civil Courts in Burma will be deemed to be closed from the

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8th of December 1941 until 31st March 1947 which was the date fixed under s. 7 of the Act and s. 4 of the Limitation Act simply prescribes that where the period of limitation expires on a day when the Court is closed the suit, appeal or application may be instituted or preferred or made on the day when the Court reopens. And s. 7 of Courts (Emergency Provisions) Act, 1943 does not purport to revive a right which has already become extinct or interfere with a vested right. It does not extend the period of limitation or the time for payment of the decretal amount into Court by judgment-debtor. There is no general discretion apart from the statutory discretion given under s. 5 of the Act for extending the period of limitation. *Maqbul Ahmad and others* v. *Pratap Narain Singh and others*, I.L.R. 57 All. 242 (P.C.) ; *Reid* v. *Reid*, (1886) 31 Ch. D. 402 at 408, followed.

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LUNATIC—SUIT ON BEHALF OF A LUNATIC—*When can be filed—Revision against interlocutory order—S. 115, Code of Civil Procedure—Order 32, Rule 15—Alternative claim in the same suit as a person of sound mind and a person of unsound mind—Not maintainable. Held :* Before a suit on behalf of a lunatic can be instituted by his next friend, the lunatic must either be a person who has been adjudged to be of unsound mind or a person who, though not so adjudged, is found by the Court on enquiry by reason of unsoundness of mind or mental infirmity to be incapable of protecting his interests when suing. Otherwise a suit by a person posing himself as the next friend of the lunatic and on his behalf is not competent. It is open to a person to file a suit as a person of unsound mind through an agent or to have a suit filed on that person's behalf by next friend under Order 32, Rule 15 of the Code of Civil Procedure in which event there must be an allegation in the plaint that the plaintiff is a person of unsound mind. The plea in the alternative in the same suit is untenable. *Maung Kya Yan and another* v. *Maung Tha E*, A.I.R. (1936) Ran. 121, followed. *Nirendra Lall Bhattacharyya and one* v. *Bepin Chandra Bhattacharyya and others*, A.I.R. (1935) Cal. 224; *Maung San Bwin* v. *Maung Nyi*, 3 Ran. 239, referred to. The Court will revise an interlocutory order when irremediable injury will be done and a miscarriage of justice will ensue. *Mohamed Chootoo and others* v. *Abdul Hamid Khan and others*, 11 Ran. 36, followed.

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MAHOMEDAN LAW—*Essentials of Marriage—Maintenance. Held :* Where in a suit for maintenance the husband denies the marriage, the marriage must be proved. In Mahomedan Law there are certain formal requirements of marriage. Words of proposal and acceptance must be uttered by the contracting parties or their agents in each other's presence and hearing and in the presence and hearing of two male or one male and two female witnesses who must be adult Muslims and the whole transaction must be completed in one sitting. If this is not done there is not valid marriage. *Anklemannessa Bibi* v. *Mahomed Hatem*, 31 Cal. 849 ; *Jagu Bibi* v. *Mesel Shaik*, 63 Cal. 415 ; *Maung Kyi and others* v. *Ma Shwe Baw*, 7 Ran. 777, followed.

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Mesne PROFITS—*Meaning of—Whether it includes interest—S. 2 (12) of the Code of Civil Procedure—Grant of interest. Held:* That in view of the definition of *mesne* profits in s. 2 (12) of the Code of Civil Procedure it is clear *mesne* profits mean not only those profits which a person in wrongful possession of the property actually received or might with due diligence have received but also interest on such profits. When a preliminary decree grants *mesne* profits to the plaintiff it is not open to the Court at a later stage of the proceedings to say that the plaintiff is not entitled to any interest on the profits which the person in wrongful possession of the property actually received or might with ordinary diligence have received therefrom. *V. C. K. P. Menon* v. *V. C. K. R. Menon*, 54 Mad. 955 (F.B.) at 960-961, followed.

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MONEY LENDERS ACT, S. 12—*Constitution of the Union of Burma, s. 23 (4)—"Property" whether includes debts and choses in action—Pleas under s. 12, Money Lenders Act not taken—Whether appellate Court can give relief—Admission by advocate—Binding nature on client. Held:* At the time the Constitution of the Union of Burma came into force a debt was regarded as a piece of property capable of being transferred by law and capable of being expropriated. The term property in s. 23 (4) of the Constitution is not confined only to corporeal or tangible property but also includes incorporeal or intangible property such as debts and other choses in action. *Halsbury's Law of England* (Vol. 25), 189—194; *Imperial Bank of India* v. *Bengal National Bank*, 59 Cal. 377 (P.C.), referred to. Sections of the Constitution should not be interpreted in a narrow and technical manner but should always have a large, liberal and comprehensive interpretation. *U Htwe* (a) *A. E. Madari* v. *U Tun Ohn and one*, (1948) B.L.R. 541, followed. The Usurious Loans' Act and the Money Lenders Act had never been considered *ultra vires* of the Legislature under the Government of Burma Act, 1935. "There is no difference between the said provisions of the Government of Burma Act, 1935, s. 145 (2) and s. 23 (4) of the Constitution. *Held also:* That it is a matter of general principle that the determination in a case must be founded upon a case either to be found in the pleadings or involve in or consistent therewith. This principle does not exclude the application of s. 12 of the Money Lenders Act on appeal. This section prohibits all Courts from passing a decree for a sum greater than the principal of the orginal loan and arrears of interest which exceeds such principal taken together with any interest already paid. The duty cast upon the Courts is that provisions of the section are applied in proper cases though the parties may not have raised the plea. *P. T. Christensen* v. *K. Suthi*, 5 L.B.R. 76; *Ma Htwe* v. *Maung Lun*, 8 L.B.R. 334 (F.B.); *Haji Chit and five others* v. *Haji Kyaw*, 3 U.B.R. 20; *Shivabasava* v. *Sangappa*, 29 Bom. 1. (P.C.); *The Official Trustee of Bengal* v. *Krishna Chandra*

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Mozumdar and others, 12 Cal. 239 (P.C.) ; *Harendra Kumar Bose and another* v. *Khemada Kinkar Roy and others* A.I.R. (1927) Cal. 86, referred to. The terms of the Usurious Loans' Act, 1918 have been applied even in favour of a defendant who had confessed judgment. *S.P.R.M. Firm* v. *Maung Po Kya and others*, 1 Ran. 580, referred to. There is no reason therefore why the Money Lenders Act should not be applied in proper cases in favour of a defendant who had failed to invoke the same. An admission of fact by counsel is binding on the client and when once a fact is admitted proof of the same need not be furnished. A compromise by counsel without knowledge or instructions of the client stands on a different footing. *Shepherd* v. *Robinson*, (1919) 1 K.B. 474, distinguished.

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MORTGAGE DOCUMENT INVALID—*Whether suit for money lies—S. 49, Registration Act.* By Exhibit A the owners purported to create a mortgage of a godown and things attached thereto for Rs. 600. They undertook to pay this amount by instalments from December 1948. Upon a contention whether the personal liability could be enforced when the mortgage is invalid: *Held:* In s. 49 of the Registration Act, 1908 the language employed in previous corresponding sections has been changed; under the old section no instrument like the one in question "could be received in evidence or shall be acted upon in Civil Proceedings." The effect of the amendment is that the transaction cannot affect immoveable property. "Affect" is a compendious term for expressing the longer phrase "purporting or operating to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether invested or contingent." *Saraswathamma* v. *Paddayya*, (1923) 46 Mad. 349 at 359, referred to. The personal covenant to pay a loan, if it can be separated from the mortgage, is not a matter which affects such immoveable property in any way. *Captain C. R. Smith* v. *Mrs. Heptonstall*, (1938) R.L.R. at 11, distinguished. The object of the legislature in enacting s. 49, Registration Act was to shut out evidence of a document affecting an interest in land unless it should have been registered. *Lachmipat Singh Dugar* v. *Mirza Khairat Ali*, (1869) 4 Bengal Law Reports 18 (F.B.) ; *Ulfatunnissa* v. *Hussein Khan*, (1883) 4 Cal. Series, 520 at 525, referred to. In the present case it is possible to separate the obligation from the interest in the immoveable property. The suit is for recovery of the debt and not for enforcement of lien. The document was tendered to establish that the loan had been made, not for proving a transaction affecting the property. *Sheodial and another* v. *Prag Dat Misra and another*, (1880) 3 All. 228 at 233, referred to. *Maung Ba* v. *Maung Tha Kyu and another*, (1939) R.L.R. 39 ; *Bhabi Dutt* v. *Ramalalbyamal*, A.I.R. (1934) Ran. 303, distinguished.

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PRESS (EMERGENCY POWERS) ACT, s. 4 (*1*) (*d*)—*Whether a political party is a class or section within the meaning of s. 4* (1) (d)—*Principles on which the matter should be decided—Interpretation of Statute—Duty of Judge—Meaning of the word "Government"—Constitution of Burma. Held:* In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication, and the language of Statutes is to be interpreted according to the recognized canons of construction laid down and the Judges are not entitled to read words into an Act of Parliament unless clear reasons are to be found within the four corners of the Act itself. *Solomon* v. *Solomon*, (1897) A.C. 22 at 38 ; *Cox* v. *Hakes*, (1890) 15 A.C. 506 at 528 ; *Vickers* v. *Evans*, (1910) 79 L.J.K.B. 955, followed. The duty of the Judge is to endeavour to apply the law correctly as he finds it, and in a liberal spirit and without any bias. It is not the province of a Judge to inquire into the wisdom of the legislature. He is to administer the law as he finds it and he is not to be influenced by his own personal conceptions of propriety, or non-propriety, of the piece of legislation that comes for consideration before him. The Court should not give rigid definition of words not defined by Legislature. The Socialist Party in Burma has large representatives in the Parliament of the Union of Burma and has numerous members or adherents in different parts of the country and it is not that class of political party which is likely to disappear or become defunct when any of its leaders leaves it or dies. It follows certain political ideology which is different from the ideologies followed by other parties in the country. It is a well-known political organization with three of its members in the present Cabinet of Ministers its members form an ascertainable portion of the residents of Burma. Therefore the Socialist Party is a section of persons resident in Burma within the meaning of s. 4 (*1*) (*d*) of Press (Emergency Powers) Act. *Raj Pal* v. *The*

Crown, (1922) 3 Lah. 405 at 413 ; "*Janaskti*" *of Sylhet and others*, (1932) A.I.R. Cal. 649 ; *Emperor* v. *Miss Manniben L. Kara*, (1933) 57 Bom. 253 at 259 ; *Kamal Sircar* v. *Emperor*, (1937) A.I.R. Cal. 691 at 694 ; *King-Emperor* v. *Benomali Maharana*, (1943) 22 Pat. Series, 48 at 53 ; *Emperor* v. *Miss Manniben*, I.L.R. (1933) 57 Bom. 253 ; *Re.* "*The Co-operative Capital Press*," *Lahore*, (1949) A.I.R. Lah. 218 at 228 ; *Annie Besant* v. *Advocate-General, Madras*, (1918-19) 46 I.A. 176 at 195-196 ; 43 Mad. 146, referred to. *Narayan Vasudev Phadke* v. *Emperor*, (1940) A.I.R. Bom. 379 at 381 ; *In the Matter of* "*Nawai Waqf Daily*," *Lahore* v. *Crown*, (1947) 28 Lah. Series, 497 at 514 and 561-562 ; "*Daily Zamindar*," *Lahore* v. *Emperor*, (1947) A.I.R. Lah. 340 ; "*The Zamindar*," *Newspaper, Lahore*, (1934) A.I.R. Lah. 219 at 226, view of some judges dissented from. *In the Matter of* "*Jang-i-Azadi*", *Lahore*, (1948) A.I.R. Lah. 6, referred to. The intention of the author for the purposes of the present case is entirely immaterial. In considering the question it is the duty of the Court to have regard to the surrounding circumstances ; for instance, the context in which the words appear, the persons to whom the words were addressed, the political atmosphere in which the words were delivered, and the place where they were published. "*Nawai Waqf Daily*," *Lahore* v. *The Crown*, (1947) 28 Lah. Series, 497 at 514 and 561-562 ; *Re.* "*Anandabazar Patrika*," (1933) 60 Cal. 408 ; *In the Matter of* "*The Sun Press*" *Limited*, (1935) 13 Ran. 98 ; *In Re.* "*Saptah*" *and In Re. Benoy Kumar*, (1949-50) 54 C.W.N. 334 ; *S. N. S. Mudaliar* v. *The Secretary of State for India-in-Council*, (1932) 10 Ran. 165 at 169, followed. Honest or legitimate criticism in a democratic country is not only desirable but it may be regarded as a source of strength in the healthy growth of a democracy. It is in the interest of the public and of the Government, that a writer or a critic should be free to write on all subjects or topics so long as he does it temperately though he may use strong or severe expressions here and there. Every free man has an undoubted right to lay what sentiments he pleases before the public, to forbid this is to destroy the freedom of the Press. One political organization is entitled to criticise and even attack another political organization but such criticism and attack must be legitimate and not prohibited by law. *Annie Beasant* v. *Advocate-General of Madras*, (1918-19) 46 I.A. 176 at 195-196 ; 43 Mad. 146 ; *Ma Khin Than* v. *The Commissioner of Police, Rangoon and one*, (1949) B.L.R. 13 at 16, followed. The general effect of the article in question must be considered to be one which tends indirectly at least to create a feeling of hatred or contempt against the Socialist Party in Burma. Under s. 114 read with s. 56 of the Constitution the Cabinet of which the Prime Minister is the head constitutes the Government for the purpose of s. 4 (*1*) of the Press (Emergency Powers) Act. The article was not directed against the Ministry as a whole, *Per* U AUNG THA GYAW, J.—That the words "class or section" in s. 4 (*1*) (*d*) of the Press (Emergency Powers) Act do not include any political party like the Socialist Party in Burma. Read in the light of the principles laid down in decided cases referred to the article does not come within the provisions of s. 4 (*1*) (*d*) of the Press (Emergency Powers) Act. Read as a whole in a liberal and detached spirit, what an ordinary reader would understand is that predominant political party in the country was going to assume complete control of the Government machinery and that certain unfavourable and undesirable consequences were likely to happen if such an eventuality took place. *In the Matter of the Indian Companies Act VII of 1913 and of the Traders' Bank*

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Ltd., Lahore, (36) A.I.R. (1949) Lah. 48 ; *In the Matter of "The Co-operative Capital Press," Lahore,* (1949) A.I.R. Lah. 218 at 227 ; *Annie Besant* v. *Advocate-General of Madras,* (1920) I.L.R. 43 Mad. 146 at 163-164 ; 46 I.A. 176 ; *Raj Pal* v. *The Crown,* (1927) 3 Lah. 405 at 413 ; 28 Cr.L.J. 721 ; *Jaswant Rai,* 5 Cr.L.J. 439 ; *Chamupati,* 13 Lah. 152 (S.B) ; *Munshi Singh,* 10 Luck, 712 ; *In Re. Jonnalagadda Ramlinagaya,* (1937) Mad. 14 ; *Manohar Damodar Patil and another* v. *The Government of Bombay,* (1950) Cr.L.J. Bom. 829 ; *Katragadda Rajagopalu Rao* v. *The Province of Madra,* (1949) I.L.R. Mad. 149 at 157 ; *"Co-operative Capital Press," Lahore,* (1947) I.L.R. 28 Lah. 497 ; *Emperor* v. *Miss Manniben,* I.L.R. (1933) 57 Bom. 253 ; *In the Matter of the Newspaper "The Daily Pratab",* 51 Cr.L.J. East Pun. 725 at 727 ; *"Co-operative Capital Press," Lahore,* (1934) A.I.R. Lah. 219 at 225 ; *Urdu Daily Newspaper "Pratab", New Delhi* v. *"The Crown,* A.I.R. 36 (1949) East Pun. 305 ; *In the Matter of "Jang-i-Azadi", Lahore,* A.I.R. 35 (1948) Lah. 6 ; *S. Gurbakhsh Singh* v. *Emperor,* 34 A.I.R. (1947) Lah. 361 ; *Mrs. Annie Besant* v. *Emperor,* (1916), I.L.R. 39 Mad. 1085 ; *Manomohan Ghose* v. *Emperor,* (1911) I.L.R. 38 Cal. 253, followed.

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SECOND APPEAL UNDER CIVIL PROCEDURE CODE, s. 100, CLAUSES (*a*) TO (*c*). *Held :* Where the question before the Court was whether there has been a material alteration of a promissory note by change of figure "1" and word "one" to figure "3" and word "three" and on evidence on record both the Courts found in favour of a party, such finding is one of fact, the matter cannot be agitated in second appeal in the High Court. If there is no evidence at all or the Courts fail to appreciate or determine the real question of fact, the matter will be one of law. *Damusa and another* v. *Abdul Samad and others*, A.I.R. (1919) (P.C.) 29 ; *Sheik Rahmat Illahi* v. *Mohammad Hayat Khan and others*, A.I.R. (1943) (P.C.) 208 ; *Mussamut Khoob Conwur and others* v. *Baboo Moodharain Singh and others*, 9 Moore's I.A. 1 ; *Petambers Manik-Jee* v. *Motee Chund Manik-Jee*, 1 Moore's I.A. 423 ; *Mt. Anupa Bai* v. *Bhagwant Singh and others*, (1938) Nag. 470, distinguished.

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SPECIAL JUDGES ACT, 1946, s. 2-A—*Special Judges (Second Amendment) Act, 1947, s. 2 and s. 4 of Courts Act, 1945. Held by the Full Bench :* Where a Magistrate, who has also been appointed a Special Judge, tries a warrant case as a Magistrate in a case in which a Magistrate has power to try and the sentence passed is a sentence which a Magistrate could properly inflict, it cannot be presumed that he has tried the case as a Special Judge, merely because he follows the procedure prescribed for warrant cases. In a case tried in Rangoon, where an appeal lies, it lies to the High Court under sub-s. (2) of s. 4 of the Courts Act, 1945 and not to the Court of Sessions. *San Tin* v. *The King*, Criminal Appeal No. 682 of 1946, High Court, Rangoon, distinguished. *Maung Chit* v. *The King*, Criminal Appeal No. 157 of 1946, High Court, Rangoon ; *Nadar Alam Khan* v. *Emperor*, A.I.R. (1935) Peshawar 108 at 109 ; *Ramachandra Ganesh Khadkikar* v. *Emperor*, A.I.R. (1933) Bom. 58 ; *The Union of Burma* v. *Bet Kai and five others*, (1949) B.L.R. 107, referred to

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SPECIFIC RELIEF ACT—S. 42—*Suit for bare declaration that order of the Rent Controller assigning the tenancy void—Whether such suit lies—Jurisdiction of the Civil Court—If ousted. Held :* That where a tenant sub-let a room to a sub-tenant and the sub-tenant failed to pay the rent and the tenant gave notice determining the sub-tenancy and thereafter the sub-tenant applied to the Rent Controller for assignment of tenancy to him and the Rent Controller passed an order assigning the tenancy without any notice to the tenant, the tenant is entitled to file a suit for declaration that the order is void and not binding on him. Under such circumstances, a suit for bare declaration lies. Unless the jurisdiction of the Civil Court has been explicitly or by necessary implication, excluded, a Civil Court was entitled to entertain a suit concerning the Civil right of a litigant. The Urban Rent Control Act does not exclude the jurisdiction of the Civil Court. *Secretary of State* v. *Mask & Co.*, A.I.R. (1940) (P.C.) 105, followed.

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SUIT FOR MALICIOUS PROSECUTION—*Meaning of the word "prosecution"—Whether suit for malicious prosecution lie if defendant files an application under s. 145 of the Criminal Procedure Code and obtains an attachment. Essential points to be proved in a suit for malicious prosecution. Held :* The word "prosecution" in a suit for malicious prosecution should not be interpreted in a narrow and restricted sense in which it is used in the Code of Criminal Procedure. It is not essential that the original proceedings should have been of such a nature as to render the persons against whom it was taken liable to be arrested, fined or imprisoned. Where there has been deliberate abuse of the process of the criminal court and salutary provisions framed by the legislature to secure the prevention of offences have been utilised maliciously and without reasonable and probable cause for the harassment of the plaintiff who has thereby suffered damage in reputation and property an action for malicious prosecution or malicious abuse of judicial process is maintainable. *C. H. Crowdy* v. *L. O. Reilly*, (1912-13) 17 C.W.N. 554 ; *Bishun Persad Narain Singh and another* v. *Paulman Singh and others*, (1914-15) 19 C.W.N. 935 ; *Jagdeo* v. *Dwarka*, (1947) I.L.R. 26 Pat. 68 ; *Mohamed Amin* v. *Jogendra Kumar Bannerjee and others*, (1946-47) 74 I.A. 193, followed. In a suit for malicious prosecution the following points should be proved :—(1) that the plaintiff was prosecuted by the defendant, (2) that the proceedings complained of terminated in favour of the plaintiff, (3) that the prosecution was instituted without reasonable and probable cause, (4) it was due to malicious intention of the defendant and not with a mere intention of carrying the law into effect. *Balbhaddar Singh* v. *Badri Sah*, 1 Luck. 215 ; *U Soe* v. *Maung Ngwe Tha and others*, (1927) I.L.R. 5 Ran. 705, followed.

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SUIT FOR SPECIFIC PERFORMANCE AGAINST PARTY TO AGREEMENT—*Impleading of purchasers with notice of such agreement—Whether misjoinder—Specific Relief Act, s. 27* (b). Petitioner sued for specific preformance of contract to sell a house against the 1st Respondent who was party to the agreement and Respondents 2, 3 and 4 as purchasers with notice of the agreement The District Judge recorded a finding that the suit was bad for misjoinder of the subsequent purchasers and that plaintiff should elect to proceed with one claim in his suit. Upon revision—*Held :* That a person with knowledge of a previous contract to sell purchases property, the purchase is voidable at the option of the prior promisee and the contract can be enforced specifically against the subsequent purchaser. The proper decree in a suit

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for specific performance of a contract to sell land when the same has been sold to a third party subsequent to the contract with plaintiff, is to direct the subsequent purchaser to execute a conveyance to the plaintiff. Under s. 27 of the Specific Relief Act a contract can be specifically enforced not only against the parties to the contract and the parties claiming under them by subsequent title but also against persons claiming under a title which might have been displaced by the defendant. Consequently the facts in the present case do not warrant institution of a separate suit and the suit as framed was competent. *T. Rangayya Reddy* v. *V. R. Subramania Aiyar and others*, 60 Mad. 365 ; *Nitai Lal Dutta* v. *Gobinda Bhushan Sen and others*, A.I.R. (1936) Pat. 142, distinguished. *Gullipilli Ramulu and others* v. *Kokku Venkatasubba Rao and others*, A.I.R. (1944) 31 Mad. 554 ; *Kali Charan Singh and another* v. *Janak Deo Singh and others*, A.I.R. (1932) All. 694 ; *Kanshi Ram and another* v. *Ishwardas and another*, A.I.R. (1923) Lah. 108 ; *Shanmukha Madan and others* v. *Arunachala Chettyar and others*, A.I.R, (1922) Mad. 332 ; *Gaurishankar and others* v. *Ibrahim Ali*, A.I.R. (1929) Nag. 298, referred to.

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TEMPORARY INJUNCTIONS—*Granting of injunction* ex parte—*Principles governing—Deviation from ordinary course—Irremediable injury to be made out.* Three suits were filed in the City Civil Court by the respondent, John Huie, against the two appellants, S. Nadesan Pillay and K. M. Chidambaram Chettyar and three others, who are foreigners living in Madras for declaration of title to four Tamil Talkie Pictures, for their possession and for injunction restraining the appellants from exhibiting the said Pictures either in Rangoon or anywhere in the Union of Burma. Together with the institution of suits applications for issue of *ad interim* injunctions were filed and the application in each of the three suits was granted *ex parte* as prayed. *Held :* That sufficient materials must be before the Court to justify the grant of *ad interim* injunction *ex parte*. Such materials as would justify the Court in granting an *ad interim* injunction *ex parte* are (1) the alleged existence of a *bonâ fide* dispute as to title to a property, (2) that such property in dispute is in danger of being wasted, damaged, or alienated by any party in the suit, (3) that such danger or such threat of danger should be immediate, and (4) that any consequent injury likely to be occasioned to the parties disputing the title would be irreparable and not capable of being compensated by damages.

S. NADESAN PILLAY AND ONE *v.* JOHN HUIE 71

TENANT ENTITLED TO DEDUCT AMOUNT OVER-PAID 131

TRANSFER OF IMMOVEABLE PROPERTY (RESTRICTION) ACT, 1947, SS. 3 AND 5—*Union Citizenship Act, 1948, s. 6* (2)—*Purchase of immoveable property by a foreigner who had not yet obtained a certificate at the date of purchase—Effect of subsequent grant of certificate—Code of Civil Procedure, Order 41, Rule 27 Admission of document. Held :* Where the plaintiffs purchased immoveable property on the 23rd March 1949 before they obtained certificate of Citizenship under the Union Citizenship Act of 1948, but obtained such certificate during the pendency of the suit which mentioned that he was a citizen of Burma from

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4th January 1948, the subsequent grant of certificate would have retrospective effect and would validate the sale on the 23rd March 1949. Where a certificate was not produced by a party and which was granted after institution of the suit, the Court would receive that certificate under Order 41, Rule 27 of the Code of Civil Procedure if the Court thought that such certificate was necessary to enable it to pronounce its judgment.

MAUNG TIN AND ONE *v.* U PO NYAN AND ONE 97

TRANSFER OF IMMOVEABLE PROPERTY (RESTRICTION) ACT, 1947 ss. 3 AND 5—*"Foreigner"—Union of Burma Adaptation (Laws) Order, 1948—Bailiff conducting auction is "person" under General Clauses Act—Order 21, Rule 90 of the Code of Civil Procedure whether applies to illegal Sales. 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 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. *Khiarajmal* v. *Daim*, (1905) 32 Cal. 296 at 312, cited and relied on. The Bailiff who conducts the auction in a High Court sale is a "person" as defined in the General Clauses Act. He could not sell immoveable property to a "foreigner" in contravention of that Act. *Chan Eu Ghai* v. *Lim Hock Seng* (a) *Chin Huat*, (1949) B.L.R. 647, relied on. Order 21, Rule 90 of the Code of Civil Procedure does not apply to an illegal sale, and the sale to a foreigner is void *ab initio*.

P.R.P.L. RAMASWAMY CHETTIAR AND OTHERS *v.* MA AYE AND ANOTHER 320

TRANSFER OF PROPERTY ACT, s. 108 (*f*) 77

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——— CITIZENSHIP ACT, s. 6 (*2*) 197

UNION CITIZENSHIP ACT, 1948, s. 9 (*2*)—*Application by a minor of foreign nationality for citizenship whether maintainable. Held :* That a person who has not attained the age of majority is not competent to act and cannot therefore make an election to become a citizen of the Union inasmuch as such election would in effect operate to divest him of his present foreign nationality.

THE HON'BLE MINISTER IN CHARGE OF JUDICIAL AFFAIRS OF THE UNION OF BURMA *v.* AH TUN 121

UNION JUDICIARY ACT, 1948, s. 5—*Valuation for the purpose of appeal—Modification of the judgment of the trial court whether such modification can be called affirmance of the decision.* In a suit for recovery of Rs. 34,471 a decree for Rs. 32,271 was passed in the trial Court and in appeal this sum was reduced to Rs. 19,771. The plaintiff applied for leave to appeal to the Supreme Court, and the question arose whether the judgment of the trial Court was affirmed by the judgment of the Appellate Court. *Held :* That this was not a case of affirming of a judgment within the meaning of s. 5 of the Union Judiciary Act. *Kumar Purnendu Nath Tagore and others* v. *Sree Sree Radhakanta Jew*, (1949-50) 54 C.W.N. 528 at 539 ; *Abdur Samad Ansari and one* v. *Mt. Aisha Bibi and others*, A.I.R. (35) (1948) Oudh 76 at 77 ;

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Nathu Lal v. *Raghubir Singh and others*, (1932) 54 All. 146 at 149; *Raja Brajasundar Deb and others* v. *Raja Rajendra Narayan Bhanj Deo*, (28) A.I.R. (1941) Pat, 269 at 276; *Annapurnabai and one* v. *Ruprao*, 51 Cal. 969, followed.

A. C. AKHOON AND ONE *v.* A. HABIB 95

URBAN RENT CONTROL ACT HOW FAR EXCLUDES JURISDICTION OF CIVIL COURTS 156

URBAN RENT CONTROL ACT, s. 2 (*d*)—*Premises—Ejectment of occupant—S. 11* (1) *whether applies to permissive occupation—S. 17, City Civil Court Act—Application under—Appeal. Held :* That s. 2 (*d*) of the Urban Rent Control Act defines premises. S. 11 of the same Act refers in every one of its clauses to "tenants". None of these clauses apply to a person merely in permissive occupation of the building. By the amendment of the definition of "premises" under s. 2 (*d*), all persons in occupation of premises do not come within the ambit of s. 11; otherwise s. 13 providing for ejectment of persons permitted to occupy premises under s. 12 would be redundant and therefore this could not have been in the contemplation of the Legislature. The mention of the Rangoon City Civil Court Act in s. 11 (*1*) of the Urban Rent Control Act does not affect the provision of s. 17 (*1*) of the former Act. No appeal lies against the order under this section. *Saw Chain Poon* v. *Tan Choo Keng and three others*, (1947) R.L.R. 23, followed. In special circumstances, in the ends of justice, a Memorandum of appeal can be converted into one of revision.

ABDUL HAMEED *v.* S. A. ABDUL HAMEED 394

URBAN RENT CONTROL ACT, ss. 5 and 17—*Contracted rent greater than the Standard Rent fixed later—Whether tenant entitled to deduct the amount over-paid in paying subsequent rent. Held :* Where the tenant paid rent for four months at the contract rate and the Standard Rent was later fixed at a lower rate, the tenant was entitled to deduct from future rent the sum paid in excess during those four months. Any sum in excess of the Standard Rent payable after the Urban Rent Control Act has come into force shall be considered irrecoverable by the landlord. S. 17 (*1*) of the Act should be given a liberal interpretation.

KO THAN NYUNT *v.* MAUNG KHIN MYINT 124

URBAN RENT CONTROL ACT, ss. 10 and 17—*Rangoon Municipal Act, s.* 80. *Held :* That where standard rent had been fixed and a tenant had paid to the landlord more than the standard rent he is entitled to deduct the excess paid within six months from the rent due. Under s. 80 of the City of Rangoon Municipal Act taxes are payable not only for the house but also for the land and if the defendant erects a house on a land belonging to his landlord it will have to be ascertained what proportion of the Taxes are for the land and what portion for the building.

W. K. G. PILLAI *v.* BALTHAZAR & SON, LTD. 100

URBAN RENT CONTROL ACT.—*S. 11* (1) (a)—*Notice under—Whether must reach addressee—"Sent"—General Clauses Act*, s. 27—*Held :* S. 11 (*1*) (*a*) of the Urban Rent Control Act provides that a written demand for payment of rent must be sent to the tenant by registered post and not complied with for three weeks. Neither under s. 106 nor s. 100 (g) of the Transfer of Property Act is it stated that the notice should reach or be received

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by the addressee. Under s. 11 (*1*) (*a*) of the Urban Rent Control Act all that the law requires is that a notice be sent and non-compliance for three weeks thereafter. *L. C. de Souza, Cawnpore*, A.I.R (1932) All. 374, referred to. *K. M. Modi* v. *Mohamed Siddique and another*, (1947) R.L.R. 423 at 461-463, followed. Under s. 27 of the General Clauses Act there is a rebuttable presumption that a notice properly addressed and sent by registered post reached the addressee in proper time. Even if in a notice to a tenant 40 months' rent be demanded when claim for four months has become time-barred, the demand is not illegal. Rights as to part may be barred but they are not extinguished and will be held to be actually due.

NAGESWAR RAO MULLAIYA *v.* DUNGARMULL MAHADEV MOLCHAND ... 482

URBAN RENT CONTROL ACT, s. 11 (*1*) (*b*)—*Owner requiring premises for* bonâ fide *erecting a building*. *Held :* That where the previous owner has allowed a person to construct a permanent substantial building on the land without granting him any lease or any right over the land and then sells the land to another person and the purchaser requires the land *bonâ fide* for erecting a building, he is entitled to eject the defendant. The fact that the defendant has built a permanent substantial structure is no ground for not passing a decree. No title to the land of the value of more than Rs. 100 can be created without a registered deed. *Kanhaiya Lal and another* v. *Abdulla*, (1936) A.I.R. All. 385, referred to

KO WA NAH *v.* KO TUN SEIN AND TWO OTHERS ... 188

URBAN RENT CONTROL ACT, s. 16—*Failure to attach certificate with plaint—Claim for recovery of rent*. *Held :* That the wordings of s. 16 of the Act is imperative and the Civil Courts have no jurisdiction to entertain a plaint for recovery of rent unless it is accompanied by a certificate of Standard Rent granted by the Controller of Rents. In the absence of such certificate the plaint should be rejected. *Woodward* v. *Sarsons and Sadler*, (1874-75) L.R. 10 C.P.C. 733 at 746 ; *Barker* v. *Palmer*, (1881-82) L.R. 8 Q.B.D. 9 at 11, referred to.

KANAMA *v.* HUSSEIN BUKSH KHAN 128

URBAN RENT CONTROL ACT, 1948, ss. 19 (*1*), 22 (*1*) AND 5—*Decision under—If revisable by High Court under s. 115 of the Code of Civil Procedure*. When by an Act of Legislature a new authority is constituted for determining questions which are the creations of the Act and a Judge or Presiding Officer of the Court as distinct from the Court is directed to perform such functions it must be presumed, in the absence of express enactment or necessary implication, the intenion of the legislature was that the Judge or Presiding Officer is a *persona designata*. Decision under s. 22 of the Urban Rent Control Act fixing Standard Rent upon a reference from the Rent Controller is not subject to revision by the High Court under s. 115 of the Code of Civil Procedure. *Mahomed Ebrahim Moolla* v. *S. R. Jandass*, 11 L.B.R. 387 ; *K. A. M. Mohideen* v. *Bukshi Ram*, I.L.R. 3 Ran 410 : *H. D. Chatterjee* v. *L. B. Tribedi*, A.I.R. (1922) Cal. 427 ; *Naranarayan Mandal* v. *Aghorechandra Ganguli*, I.L.R. 63 Cal. 136 ; *C. K. Ramaswami Goundan* v. *Muthu Velappa Goundan and others*, A.I.R. (1933) Mad. 192 ; *Shah Chaturbhuj* v. *Shah Manji Ram*, A.I.R. (1938) All. 456 ; *K. Parthasaradhi Naidu Garu* v. *C. Koteswara Rao Garu and another*, A.I.R. (1924) Mad. 561 ; *Thakin Aye Maung* v. *The Hon'ble Justice U Aung Tha Gyaw and others*, (1949) B.L.R. 188.

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(S.C.) ; *The Municipal Corporation of Rangoon* v. *M. A. Shakur*, I.L.R. 3 Ran. 560 ; *H. A. Aziz* v. *Kilyoboy*, I.L.R 4 Ran. 304 ; *U Ba Pe and another* v. *U Ba Shwe and others*, I.L.R. 11 Ran. 1, referred to.

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U HLA SAUNG AND OTHERS *v.* U SEIN THANT
U PHAN NGA AND OTHERS ... 368

USUFRUCTUARY MORTGAGE INVALID FOR WANT OF REGISTRATION—*Whether plaintiff can sue for money lent and advanced. Held :* Though a loan *primâ facie* involves a personal liability and such liability is not displaced by the mere fact that a security has been given for the repayment of the loan with interest but the nature and terms of such security may negative any personal liability on the part of the borrower. *Ram Narayan Singh* v. *Adhindra Nath Mukerje*, (1917) 44 Cal. 388 at 400, followed. An usufructuary mortgagee cannot maintain a suit for a personal decree in the absence of a specific covenant. *Gafalasami* v. *Arunachella*, (1892) 15 Mad. Series, 304, followed. In India a mortgage does not necessarily import a personal obligation to repay. *F. H. Pell* v. *M. Gregory*, (1925) 52 Cal. 828 at 843, 844, followed. *Maung Kyi* v. *Ma Ma Gale*, (1919-20) 10 L.B.R. 54, distinguished.

NANA MEAH *v.* SIDDIQUE AHMED 105

VALUATION FOR THE PURPOSE OF APPEAL TO THE SUPREME COURT 95

WAIVER OF RIGHTS—*Right to address Court under the provisions of Order 41, Rule 11 (1) of the Code of Civil Procedure—Whether can be waived. Held :* Where a rule has been enacted solely for the protection of a class of persons and their estates, and not upon grounds of public policy or interest of the public generally, then the person in whose favour the rule operates may by his conduct debar himself from the right of insisting upon its enforcement. Thus where an advocate engaged by a party had the right of being heard, waived that right and filed written argument, then his client cannot make failure to hear the advocate a ground of appeal. The right to be heard has been waived. *Sashi Bhusan Prasad Singh* v. *Dalip Narain Singh and others*, A.I.R.(1936) Pat. 75 ; *Burmalnandan Prasad* v. *The United Refineries Ltd. and others*, 11 Ran. 79 ; *Raja Shyam Sunder Singh and others* v. *Kiluram Agarwala and others*, A.I.R. (1938) (P.C.) 230, referred to.

DAW CHI v. MAUNG CHET 463

WILLS—PROOF OF EXECUTION AND ATTESTATION—*Principles involved*—Onus—*Letters of administration with Will annexed—Grant of —S. 232, Succession Act. Held :* That under s. 232 of the Succession Act a residuary legatee may be admitted to prove the will and Letters of Administration with Will annexed may be granted to him to the whole estate or the unadministered part. The principles involved with reference to proof of due execution and attestation of Wills are well settled. The *onus* lies in every case upon the party propounding the Will and he must satisfy the conscience of the Court that the Will is the last will of a free and capable Testator. If a party writes or prepares a Will, under which he takes a benefit, the Court must be judicially satisfied that the Will expresses the true intention of the deceased and the Court must be vigilant and jealous in examining the evidence in support of the same. *Barry* v. *Butlin*, (1838), 2 Moore's

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(P.C.) 480 ; *Tyrrel* v. *Painton and another*, (1894) L.R. Probate Division 151 ; *William Robins* v. *National Trust Co. Ltd. and others*, A.I.R. (1927) (P.C.) 66 ; *Eusoof Ahmed Sema* v. *Ismail Ahmed Sema and others*, A.I.R. (1938) Ran. 322 ; *Jarat Kumari Dassi* v. *Bissessur Dutt*, 39 Cal. 245 ; *Harmes and another* v. *Hinkson*, A.I.R. (1946) (P.C.) 156 ; *Parker and another* v. *Felgate and Tilly*, (1883) L.R. 8 Probate Division 171, referred to. Where a testator is of sound mind and gives instructions for a Will and accepts the instrument drawn in pursuance thereof at the time of signature he must be deemed to be of sound mind when it is accepted. *Perera and other* v. *Perera and another*, (1901) A.C. 354, referred to and followed.

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WRITTEN STATEMENT FILED BY FOREIGNER THROUGH AGENT CLAIMING EXEMPTION FROM JURISDICTION OF COURT. EFFECT OF 211

G.U.B.C.P.O.—No. 3, H.C.R., 2-4-55—1,750 —IT.

FULL BENCH (APPELLATE CRIMINAL).

Before U Tun Byu, Chief Justice, U Ou Pe and U Bo Gyi, JJ.

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THE UNION OF BURMA (APPLICANT)

v.

Dec. 23

MA AH MA (RESPONDENT).*

Special Judges Act, 1946, s. 2-A—Special Judges (Second Amendment) Act, 1947, s. 2 and s. 4 of Courts Act, 1945.

Held by the Full Bench : Where a Magistrate, who has also been appointed a Special Judge, tries a warrant case as a Magistrate in a case in which a Magistrate has power to try and the sentence passed is a sentence which a Magistrate could properly inflict, it cannot be presumed that he has tried the case as a Special Judge, merely because he follows the procedure prescribed for warrant cases. In a case tried in Rangoon, where an appeal lies, it lies to the High Court under sub- s. (2) of s. 4 of the Courts Act, 1945 and not to the Court of Sessions.

San Tin v. *The King*, Criminal Appeal No. 682 of 1946, High Court, Rangoon, distinguished.

Maung Chit v. *The King*, Criminal Appeal No. 157 of 1946, High Court, Rangoon ; *Nadar Alam Khan* v. *Emperor*, A.I.R. (1935) Peshawar 108 at 109 ; *Ramachandra Ganesh Khadkikar* v. *Emperor*, A.I.R. (1933) Bom. 58 ; *The Union of Burma* v. *Bet Kai and five others*, (1949) B.L.R. 107, referred to.

The following is the order of reference made by U San Maung, J, to a Full Bench:—

U SAN MAUNG, J.—Criminal Appeal No. 454 of this Court is an appeal by one Ma Ah Ma against the conviction and sentence of 6 months' rigorous imprisonment under section 457 (2) read with section 109 of the Penal Code by U Hla Maung (5) who has described himself as the 2nd Additional Magistrate, Rangoon in the trial of Criminal Regular No. 16 of 1950 of his Court. The

* Criminal Reference No. 28 of 1950 arising out of an appeal from the order of the 2nd Additional Magistrate, Rangoon, dated 19th September 1950 passed in Criminal Regular Trial No. 16 of 1950.

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U SAN MAUNG, J.

appeal first came up for admission before U Thaung Sein J. who gave an adjournment for the purpose of ascertaining whether U Hla Maung has been appointed a Special Judge under the Special Judges Act, 1946. Subsequently, the case came up for admission before U Aung Tha Gyaw J. to whom it was pointed out by U Kyaw Thaung, Advocate for the appellant, that U Hla Maung has been appointed a Special Judge and that therefore the appeal from his sentence would lie to the Sessions Judge, Hanthawaddy, notwithstanding the fact that in trying the case against the appellant Ma Ah Ma and others, he described himself as the 2nd Additional Magistrate, Rangoon. However, U Aung Tha Gyaw J. decided that since U Hla Maung was performing the duties of a Magistrate within the City of Rangoon, the appeal from the sentence passed by him would lie to the High Court and not to the Court of Session notwithstanding the fact that he had been appointed a Special Judge before he became Additional Magistrate of Rangoon. In coming to this decision, U Aung Tha Gyaw J. apparently relied upon the provisons of sub-seciton (2) of section 4 of the Courts Act, 1945, which reads :

"Notwithstanding anything contained in the Code of Criminal Procedure, all appeals which lie under that Code to the Court of Session from the sentences or orders of Courts or Magistrates exercising jurisdiction in the City of Rangoon shall lie to the High Court and not to the Court of Session."

He has obviously overlooked the instructions contained in General Letter No. 23 of 1946 of the High Court of Judicature at Rangoon which was based upon the judgment of Pakenham-Walsh J, in Criminal Appeal No. 157 of 1946 of the High Court of Judicature at Rangoon. In that case it was held that where a Special Judge who is also a Magistrate follows the procedure prescribed for the trial of a case by a Special Judge (namely Warrant-case Procedure) his description of himself as a Magistrate must be ignored and it must be held that he tried the case as a Special Judge. This decision was never dissented from since it was given on the 23rd of July 1946, and it has been expressly followed by U Thaung Sein J. in Criminal Appeal No. 196 of 1950 of this Court. Therein U Thaung Sein J. passed the following orders :—

"The District Magistrate who convicted the appellants in this case was U Hlaing Bwa, who was also appointed as a Special

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Judge. The procedure adopted at the trial of the appellants was according to the 'warrant-case' procedure. It has been laid down in the case of *Maung Chit* v. *The King* (Criminal Appeal No. 157 of 1946 of the High Court of Judicature at Rangoon) that where a Special Judge, who is also a Magistrate, tries a case according to the Warrant-case Procedure, he shall be deemed to be a Special Judge even though he may designate himself as a Magistrate. This ruling was brought to the notice of Special Judges and Magistrates in General Letter No. 23 of 1946. Applying the principles laid down in the above case to the one under appeal, it is clear that U Hlaing Bwa must be deemed to have tried the case as a Special Judge and not as District Magistrate. That being so, under section 6 (*2*) of the Special Judges Act, this appeal will lie to the Court of Sessions, Hanthawaddy. The Sessions Judge of Hanthawaddy is also the Sessions Judge of Rangoon Town District. No appeal, therefore, lies to the High Court in the present case and I accordingly direct that the memorandum of appeal be forwarded to the Sessions Judge, Hanthawaddy, for disposal."

It would thus appear that on an important matter like the present, there is divergent opinion between two Hon'ble Judges of this High Court. Therefore I would submit this case to his Lordship the Chief Justice for constitution of a Bench or Full Bench for a decision on the following question :—

"When a Magistrate who is also a Special Judge in Rangoon, follows the procedure prescribed for the trial of a case by a Special Judge namely (Warrant-case Procedure) does an appeal from a sentence passed by him lie to the High Court under sub-section (*2*) of section 4 of the Courts Act, 1945, or to the Court of Sessions under section 2-A of the Special Judges Act, 1946, as inserted by section 2 of the Special Judges (Second Amendment) Act, 1947, where the sentence passed is one of imprisonment for a term not exceeding four years?"

It has been ascertained that the Special Judges' powers have never been withdrawn from U Hla Maung, who therefore remains a Special Judge.

Kyaw Thaung for the applicant.

Mya Thein (Government Advocate) for the respondent.

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U TUN BYU, C.J.—The respondent Ma Ah Ma was sent up with other co-accused in connection with the loss of tyres from the R.T.B. Workshop in Ahlone Quarter, and she was convicted in Criminal Trial No. 16 of 1950 of the Court of the 2nd Additional Magistrate, Rangoon under section 457 (2), read with section 109, of the Penal Code, and was sentenced to suffer six months' rigorous imprisonment. Ma Ah Ma appealed to the High Court in Criminal Appeal No. 454 of 1950 against the conviction and sentence passed upon her by the 2nd Additional Magistrate, Rangoon. The appeal was first placed for admission before U Thaung Sein J., who adjourned the hearing for admission for the purpose of ascertaining whether U Hla Maung, 2nd Additional Magistrate, Rangoon, has also been appointed a Special Judge under the Special Judges Act, 1946. It is clear that U Hla Maung has been appointed a Special Judge and that his appointment as a Special Judge has not been withdrawn or cancelled when he was appointed the 2nd Additional Magistrate, Rangoon, in the place vacated by U Ba Thaik.

The appeal was next placed for admission before U Aung Tha Gyaw J., who held in the diary order, dated the 17th October 1950, that U Hla Maung, although he has been appointed a Special Judge, was performing the duties of a Magistrate when he tried the Criminal Regular Trial No. 16 of 1950, in which Ma Ah Ma was sentenced to six months' rigorous imprisonment, and that the appeal would, in that circumstance, lie to the High Court in view of the provisions of section 4 (2) of the Courts Act, 1945, and not to the Court of Session, Hanthawaddy. U Thaung Sein J., has however in an earlier case, *viz.*, in Criminal Appeal No. 176 of 1950, followed the view, which was the contrary view, held by

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Pakenham-Walsh J., in an earlier case. The present appeal came for final hearing before U San Maung J., who referred the following question for consideration, namely—

"When a Magistrate who is also a Special Judge in Rangoon, follows the procedure prescribed for the trial of a case by a Special Judge namely (Warrant-case Procedure) does an appeal from a sentence passed by him lie to the High Court under sub-section (2) of section 4 of the Courts Act, 1945, or to the Court of Session under section 2-A of the Special Judges Act, 1946, as inserted by section 2 of the Special Judges (Second Amendment) Act, 1947, where the sentence passed is one of imprisonment for a term not exceeding four years ?"

Pakenham-Walsh J., in the case of *San Tin* v. *The King* (1), held that where a Magistrate, who was also appointed as a Special Judge, tried a case in accordance with the procedure for a warrant case, which was also the procedure prescribed for the trial before a Special Judge, the Magistrate should be presumed to have acted under his higher powers, namely as a Special Judge, although he might have designated himself in the records of the case as a Magistrate when trying the case. Pakenham-Walsh J. has also expressed a similar view in another unreported case, which came before him earlier, namely, in the case of *Maung Chit* v. *The King* (2). The reasons for coming to the conclusion which Pakenham-Walsh J. adopted have been set out more fully in the subsequent case of *San Tin* v. *The King* (1), where he observed :

"I consider that a Special Judge, when he follows the procedure prescribed for the trial of a case by a Special Judge, cannot divest himself of the powers conferred upon him as a Special Judge. If when trying a case, which he could have tried

(1) Criminal Appeal No. 682 of 1946 of the High Court of Judicature at Rangoon.

(2) Criminal Appeal No. 157 of 1946 of the High Court of Judicature at Rangoon.

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U TUN BYU, C.J.

as a Special Judge he chooses to describe himself as a Magistrate, such a description will be ignored and he will be deemed to have tried the case as a Special Judge."

The learned Judge followed the reasoning set out in the case of *Nadar Alam Khan* v. *Emperor* (1) where it was stated :

> " We are unable to find any provision in the statutory law of this country recognizing dual and separable positions of a First Class Magistrate specially empowered under section 30, Criminal Procedure Code. In our view once he has been specially empowered under section 30 by the Local Government, he can necessarily, when acting as a Magistrate, exercise the powers mentioned in section 34 ; he cannot at will divest himself of the powers conferred upon him and he cannot by any action of his own, become a First Class Magistrate not empowered under section 30, Criminal Procedure Code. Far less by an unintentional failure or even by a habitual failure to describe himself as being so empowered, can he divest himself of his powers."

In the above case, Nadar was convicted under section 326 of the Penal Code and sentenced to three years' rigorous imprisonment and to pay a fine of Rs. 50. The Magistrate did not in that case sign himself as a Magistrate especially empowered under section 30 of the Code of Criminal Procedure. It is clear that the Magistrate could not, in that case, have imposed the sentence which he did, unless he had acted as a Magistrate, who had been especially empowered under section 30 of the Code of Criminal Procedure, and that, in my opinion, was a circumstance which could be taken into consideration for the purpose of ascertaining whether the Magistrate could be said to have acted, in the special circumstances of that case, as a Magistrate who had been empowered under section 30 of the Code of Criminal Procedure. That was therefore a case where the Magistrate could be

(1) A.I.R. (1935) Peshawar 108 at 109.

considered to have exercised his special powers when he imposed the sentence, in that he could impose those sentences only if he were exercising his special powers. I do not see anything strange, improper or unreasonable in considering the act of the Magistrate, in acting in the manner which he did, that he should be presumed to have acted under the powers which he actually possessed, when to do otherwise would make his act illegal. It is difficult to understand how it can be laid down, and it will not be proper to lay down, any hard or fast rule that a case, which was tried by a Magistrate, who was also a Special Judge, in accordance with the procedure prescribed for warrant cases, should always be considered to have been tried by a Special Judge, without considering the special circumstances of the case in which the trial took place. It is clear that when the question is whether the inference, which has been drawn in any particular case, is right or not, the inference, which is to be drawn, is not an irrebuttable presumption of law, and the answer must depend on the peculiar circumstances and facts of each case. Pakenham-Walsh J., apparently realized this, as the learned Judge, in the case of *San Tin* v. *The King* (1), also observed as follows :

" In my opinion, speaking very generally, the circumstances under which a trial takes place rather than the presiding officer's own description of himself determine the capacity in which he tries the case."

The nature of the presumption which was to be drawn in the case of *San Tin* v. *The King* (1) was not in the nature of an irrebuttable presumption of law; and thus the decision in *San Tin* v. *The King* (1) cannot be considered to have been laid down as an inflexible rule of law, which must be applied without considering

(1) Criminal Appeal No. 682 of 1946 of the High Court of Judicature at Rangoon.

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the peculiar circumstances of each case which comes before the Court. San Tin was in that case convicted of an offence under section 395 of the Penal Code, which was then punishable with death, and he could not therefore have been tried by a Special Power Magistrate. That was accordingly a case where it might be presumed that the Magistrate trying the case intended to try it under the powers he possessed, namely, as a Special Judge. Moreover, the record of the case shows that the Magistrate, at least in three places, had described himself as Special Judge. That was clearly a case where it might properly be said that the learned Magistrate purported to try the case as a Special Judge and not as a Magistrate.

In the earlier case of *Maung Chit* v. *The King* (1) too, Maung Chit could not have been tried by a Magistrate with special powers for an offence under section 395 of the Penal Code, which was then punishable with death. It also appears that the Magistrate also occasionally described himself as Special Judge in the case diary of the trial record. There were therfore circumstances on which it might properly be presumed that the learned Magistrate in that case purported to try it also as a Special Judge.

U Hla Maung, it is true, was appointed generally as a Special Judge before he was transferred to Rangoon, and his appointment as a Special Judge has not been cancelled. There are four Magistrates who have been trying cases allotted to Special Judges in Rangoon in their capacity as Special Judges. The general procedure, which has been adopted, where a Special Judge is appointed as a Magistrate in Rangoon is to cancel his previous appointment as a Special Judge ; and if the Magistrate is required to also try

(1) Criminal Appeal No. 157 of 1946 of the High Court of Judicature at Rangoon.

cases as a Special Judge in Rangoon, he is again appointed as a Special Judge under a fresh notification. No notification has, however, been issued to cancel the earlier appointment of U Hla Maung as a Special Judge when he resumed the duties of a Magistrate in Rangoon, but this circumstance does not necessarily indicate that U Hla Maung could properly be presumed to have tried the case in question as a Special Judge, especially when the procedure which has been adopted in respect of Magistrates who are also required to act as Special Judges in Rangoon area is to reappoint them as Special Judges for Rangoon area, and in view of the fact that U Hla Maung had not purported to try any case as a Special Judge after he was appointed the Second Additional Magistrate in Rangoon; nor is there anything in the record of Criminal Regular Trial No. 16 of 1950, in which Ma Ah Ma was tried, to show that U Hla Maung had at any time signed himself as a Special Judge. The fact that the procedure in warrant cases had been followed by U Hla Maung in trying the Criminal Regular Trial No. 16 of 1950 cannot, in my opinion, be properly said to indicate that he was trying it as a Special Judge, as the warrant procedure is the normal procedure which the Magistrates follow when they try warrant cases. There is also the fact that the offence for which Ma Ah Ma and other accused were sent up in the Criminal Regular Trial No. 16 of 1950 under section 457 (2) of the Penal Code is an offence which is triable by a Magistrate of a First or Second Class Power, without being especially empowered under section 30 of the Code of Criminal Procedure. It is only consistent with good reason that where the record of the case shows throughout and consistently that it was being dealt with by a Magistrate, and the offence was of a nature which the Magistrate

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concerned could try and the punishment inflicted was also a punishment which the Magistrate could impose, it should be held that it was a case which was tried by the person concerned in his capacity as Magistrate, and not as Special Judge, although the Magistrate who tried the case had also been appointed a Special Judge.

The case of *Ramachandra Ganesh Khadkikar* v. *Emperor* (1) which came before Beaumont C.J., and two other Judges, was also brought to the notice of Pakenham-Walsh J., in the case of *Sun Tin* v. *The King* (2); and with respect to Pakenham-Walsh J., if the facts of the Bombay case are read with the very short judgment which was delivered, it purported, in my opinion, to lay down that where a case was tried in the Court of a First Class Magistrate, and the Magistrate purported to act throughout only as a First Class Magistrate, it should not be presumed that he acted or purported to act as a Special Power Magistrate. It will not be necessary for me to express any opinion on the correctness of the decision arrived at in *Ramachandra Ganesh Khadkikar* v. *Emperor* (1), so far as this reference is concerned, as a person, who acts as a Magistrate and as a Special Judge is acting, in my opinion, in two distinct capacities. A Special Judge is appointed under a different law, and he is invested with higher powers. He is moreover placed under the supervision of a Sessions Judge, and not under the District Magistrate.

It seems to me to be clear that the inference which is to be drawn in such matter must depend on the circumstances of each case; and, for the reasons that have been set out above, the answer to the question propounded is that where a Magistrate, who has also

(1) A.I.R. (1933) Bom. 58.

(2) Criminal Appeal No. 682 of 1946 of the High Court of Judicature at Rangoon.

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been appointed a Special Judge, tries a warrant case as a Magistrate in a case which a Magistrate has power to try and the sentence passed is a sentence which a Magistrate could properly inflict, he cannot be presumed to have tried the case as a Special Judge by merely following the procedure prescribed for a warrant case in the Code of Criminal Procedure, and the appeal will in Rangoon, in a case where an appeal lies, lie to the High Court under sub-section (2) of section 4 of the Courts Act, 1945, and not to the Court of Session.

U ON PE, J.—I agree with the Chief Justice.

U BO GYI, J.—A difference of opinion having arisen as to whether the venue of appeal from the decision of U Hla Maung who designates himself as the 2nd Additional Magistrate, Rangoon, in his Criminal Regular Trial No. 16 of 1950 where sentences of imprisonment less than four years have been passed is the High Court or the Sessions Court of Hanthawaddy, the present reference has been made by U San Maung J., in these terms:

"When a Magistrate who is also a Special Judge in Rangoon, follows the procedure prescribed for the trial of a case by a Special Judge namely (Warrant-case Procedure) does an appeal from a sentence passed by him lie to the High Court under sub-section (2) of section 4 of the Courts Act, 1945, or to the Court of Session under section 2-A of the Special Judges Act, 1946, as inserted by section 2 of the Special Judges (Second Amendment) Act, 1947, where the sentence passed is one of imprisonment for a term not exceeding four years."

U Hla Maung before his transfer to Rangoon was appointed a Special Judge under the Special Judges Act, 1943, without the territorial limits of his jurisdiction being defined and his appointment as Special Judge has not been cancelled. The determination of the question which has been propounded depends

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upon whether the decision of Pakenham-Walsh J., in Criminal Appeals Nos. 157—160 of 1946 which was later reiterated by him in Criminal Appeal No. 682 of 1946 of the late High Court of Judicature at Rangoon should be followed. There Pakenham-Walsh J., held that, the powers of a Special Judge being higher than those of a Magistrate, when a person who is invested with the powers of a Magistrate as well as a Special Judge tries a case he must be deemed to try it in the exercise of the higher powers and that when such a person follows the procedure prescribed for the trial of a case by a Special Judge (this was assumed to be practically the same as the Warrant-case Procedure), he will be deemed to have tried the case as a Special Judge, although he has chosen to describe himself as a Magistrate. In other words, as the High Court General Letter No. 23 of 1946 which explains the effect of the above decisions say, "it is the procedure adopted by a Special Judge in the trial of a case, and not the manner in which he designates himself that determines whether he tries it as a Special Judge or as a Magistrate."

Now, section 5 of the Special Judges Act, 1946, prescribes the procedure of Special Judges and sub-section (*1*) of section 5 runs:

> "A Special Judge may take cognizance of offences without the accused being committed for trial, and in trying accused persons shall follow the procedure prescribed by the Code for the trial of warrant cases by Magistrates:
>
> Provided that a Special Judge may refuse to summon any witness if satisfied that the evidence of such witness will not be material, and shall not be bound to adjourn a trial for any purpose whatsoever, unless such adjournment is, in his opinion, necessary in the interests of justice."

A cursory perusal of the provisions of sub-section (*1*) of section 5 of the Special Judges Act, 1946, shows

that although Special Judges in trying accused persons are enjoined to follow the procedure prescribed by the Code of Criminal Procedure for the trial of warrant-cases by Magistrates, the procedure prescribed therein is not identically the same as that prescribed by the Code of Criminal Procedure for such trials, the important difference being the drastic powers given to a Special Judge by the Proviso to sub-section (*1*) of section 5 of the Act. To mention but a single instance, while under section 257 (*1*) of the Code of Criminal Procedure the Magistrate is bound to issue process on the application of an accused person, after he has entered upon his defence, for compelling the attendance of any witness for the purpose of examination or cross examination unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice, nevertheless under the Proviso to section 5 (*1*) of the Special Judges Act, 1946, a Special Judge may refuse to summon any witness if satisfied that the evidence of such witness will not be material. In these circumstances, the procedure prescribed for Special Judges is in reality an adaptation from the procedure regulating the trial of warrant-cases by Magistrates and is materially different from the latter. For, if a Magistrate in trying a warrant-case under the Code of Criminal Procedure refuses to summon a witness in the circumstances envisaged in the Proviso to section 5 (*1*) of the Special Judges Act, 1946, the trial will be vitiated. On the other hand, the Special Judges Act, 1946, is an emergency measure necessitated by the conditions obtaining in the country during the post-war period and to meet these conditions effectively Special Judges must be armed with certain drastic powers. This material difference between the procedures respectively followed by Special Judges

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and by Magistrates cuts the ground from under the decisions cited above. Apart from the doubtful validity of the process of deducing from the fact of the Special Judges following the "Warrant-case Procedure" the converse proposition that a Magistrate *cum* Special Judge's powers who follows the Warrant-case Procedure must be deemed to have tried the case as a Special Judge, the basis of the inference disappears when it is seen that the two procedures are materially different.

Besides, if the reasoning in those decisions is followed to its logical conclusion, it will lead to unlooked-for results. The High Court General Letter No. 23 of 1946 in explaining the effect of the decisions states that in some circumstances a Special Judge who is also a Magistrate can make use of certain of his magisterial powers. For instance, the General Letter says, he can as a Magistrate try cases summarily. Now, under section 262 of the Code of Criminal Procedure, a Magistrate in trying a warrant-case summarily is bound to follow the procedure prescribed for warrant-cases; and since the effect of the decisions under review, as explained in the General Letter, is that when a Magistrate who is also a Special Judge follows the procedure prescribed for warrant-cases he will be deemed to have tried the case as a Special Judge, we shall have a legal curiosity of a Special Judge trying a case summarily, which is hot contemplated either by the Special Judges Act or the Code of Criminal Procedure.

The crux of the question in my opinion is whether U Hla Maung *qua* Magistrate is a different personality from U Hla Maung *qua* Special Judge. I see no reason in principle why U Hla Maung cannot be regarded as exercising criminal powers in a dual capacity. Under section 6 of the Code of Criminal Procedure, as amended, besides the four classes of Criminal Courts in the Union of Burma there may be other Courts

such as the High Court and Courts constituted under any law other than the Criminal Procedure Code. It is clear therefore that the Court of a Magistrate constituted under the Code of Criminal Procedure is distinct from the Court of a Special Judge constituted under the Special Judges Act. A Magistrate who is also a Special Judge can therefore as Magistrate preside over the Court of the Magistrate and as Special Judge preside over the Court of the Special Judge. But when he has started trying a case in the capacity of a Magistrate he must finish it as Magistrate. Similarly, if he has started a case as Special Judge he must conclude it as Special Judge.

Again looking at the question in another aspect, the jurisdiction and powers of a Special Judge are distinct from those of a Magistrate, so much so that, as U San Maung J., has held in *The Union of Burma* v. *Bet Kai and five others* (1), a Special Judge in taking cognizance of an offence cannot make use of the evidence recorded by a Magistrate who has taken cognizance of the offence and heard the case in part and from whose file the case was transferred to his own. It is clear that the powers of U Hla Maung as a Magistrate have not on his appointment as Special Judge merged in the powers of a Special Judge. For one thing, their jurisdiction and powers are distinct and different and, furthermore, a Magistrate besides trying cases has to perform multifarious duties which a Special Judge does not, and cannot be called upon to, perform.

The contention that a Magistrate who has been appointed Special Judge cannot at will divest himself of the powers of the Special Judge must readily be conceded ; for only the authority that has conferred the powers can withdraw them. However, be that as

(1) (1949) B.L.R. 107.

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it may, when a Magistrate who is also a Special Judge tries a case *qua* Magistrate he is not divesting himself of the powers of a Special Judge but is merely refraining from exercising his powers as such. Since, as mentioned before, the Court of a Magistrate is distinct from the Court of a Special Judge I can see no reason why such a Magistrate presiding over the Court of the Magistrate cannot refrain from exercising the powers of a Special Judge. On the contrary, he cannot in such circumstances exercise his powers as a Special Judge.

Of the authorities canvassed before us, the Special Bench ruling in *Ramachandra Ganesh Khadkikar* v. *Emperor* (1) seems to be in point in that there also a First Class Magistrate who had been invested with enhanced powers of a Special Magistrate under an emergency measure designated in the Report as the Emergency Powers Ordinance, 1932, purported to try an offence against the Ordinance as a Magistrate of the First Class describing himself as such. In awarding punishment, however, he added to a sentence of imprisonment a fine of Rs. 1,500, whereas as a Magistrate of the First Class he was only entitled to impose a fine not exceeding Rs. 1,000. It was held by the Special Bench led by Beaumont C.J., as he then was, that the trial being by a First Class Magistrate, and not by a Special Magistrate, the fine of Rs. 1,500 was in excess of the sum which he was entitled to impose.

My answer to the question propounded, therefore, is that when a Magistrate who is also a Special Judge in Rangoon tries, or purports to try, a case *qua* Magistrate and passes an appealable sentence, an appeal from the sentence lies under sub-section (2) of section 4 of the Courts Act, 1945, to the High Court.

(1) A.I.R. (1933) Bom. 58.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice and U San Maung, J.

S. SAMUEL (APPELLANT)

v.

KR. S. ANNAMALAY CHETTYAR AND ANOTHER (RESPONDENTS).*

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July 7.

S. 63, Contract Act—Remission of a portion of claim—Whether requires consideration.

Held : Under s. 63 of the Contract Act, a dispensation or a remission by a promisee of the performance of the whole or any part of a promise made to him need not be supported by consideration. A unilateral act on the part of the promisee absolves the promissory from his obligation under the contract.

A.K.A.C.T.A.L. Chettyar v. *A.K.R.M.M.K. Firm and others*, (1938) R.L.R. 660 ; *Jitendra Chandra Ray Chaudhuri* v. *S. N. Banerjee*, I.L.R.(1943) Cal. Vol. 1, 101, followed.

Balasundra Vaker and one v. *Ranganatha Iyer and others*, I.L.R. (1930) 53 Mad. 127 ; *Ramaswami and others* v. *Gurukar Rudrappa*, A.I.R. (1939) Mad. 688, distinguished.

Ba Tu for the appellant.

Tun I for the 2nd respondent.

U TUN BYU, C.J.—The appellant S. Samuel obtained a decree for the payment of a sum of Rs. 2,715-13-4, with costs, against the first respondent KR. SM. Annamalay Chettyar in Civil Regular No. 2696 of 1947 of the Rangoon City Civil Court. S. Samuel next applied in Civil Execution Case No. 787 of 1948 for the issue of a prohibitory order upon the second respondent Daw Gun, directing her to withhold further payment of the money which she still owed to the first respondent Annamalay Chettyar

* Civil Misc. Appeal No. 2 of 1950 against the order of the 3rd Judge, City Civil Court, Rangoon in Civil Misc. No. 37 of 1949.

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for a motor boat "*Ye-nat-tha-mi*", which she purchased from the latter; and the prohibitory order was said to have been duly served upon Daw Gun, the second respondent. S. Samuel further applied in Civil Miscellaneous No. 37 of 1949 to the Court to direct Daw Gun to deposit a sum of Rs. 3,153-1-4, which Daw Gun was said to have still owed his judgment-debtor Annamalay Chettyar in respect of the sale of the motor boat.

Daw Gun at first denied that she had anything more to pay to Annamalay Chettyar in respect of the sale of the motor boat to her. She, however, admitted in her written objection of 17th May, 1949 that she still owed a sum of Rs. 200 to Annamalay Chettyar in respect of the sale of the motor boat. The learned Third Judge of the Rangoon City Civil Court found, in his order, dated the 5th December 1949, that Daw Gun still owed Rs. 625 to Annamalay Chettyar in respect of the sale of the motor boat to her; and Daw Gun was directed, under Order XXI, Rule 63 (C) (2), of the Code of Civil Procedure to deposit the said sum of Rs. 625 in Court.

The most convenient way of approaching this appeal will be to first consider whether any settlement of Annamalay Chettyar's claim in respect of the sale of the motor boat was arrived at between Daw Gun and Annamalay Chettyar, as alleged by Daw Gun in her written objection of 17th May 1949. According to Daw Gun, after Thakin Than Maung, Secretary of the Motor Boat Owners' Association, intervened in the dispute which had arisen between her and Annamalay Chettyar, Annamalay Chettyar agreed to accept a sum of Rs. 1,000 in satisfaction of what she still owed to him in respect of the sale of the motor boat, that she subsequently paid Rs. 375 towards the said sum of Rs. 1,000 and that she also made further payments to

Annamalay Chettyar, leaving only a sum of Rs. 200 still due by her. Annamalay Chettyar does not deny that Thakin Than Maung intervened in the dispute which had arisen between Daw Gun and himself, but he denied that he agreed to accept a sum of Rs. 1,000 in settlement of the claim he still had against Daw Gun in respect of the sale of the motor boat to her.

Thakin Than Maung, who was examined as a witness on behalf of Daw Gun, in effect stated that at Daw Gun's request he intervened and suggested to Annamalay Chettyar to accept a sum of Rs. 1,000 for the balance price of the motor boat, which Daw Gun still owed him, and that Annamalay Chettyar agreed to accept Rs. 1,000 in satisfaction of his claim against her in respect of the sale of the motor boat. It has, however, been argued on behalf of the appellant S. Samuel that we ought not to accept either the evidence of Daw Gun or the statement of Thakin Than Maung in this respect, as it was not likely that Annamalay Chettyar would accept a payment of Rs. 1,000 for the balance money which Daw Gun still owed him, because in accordance with Daw Gun's written objection, Daw Gun must have still owed about Rs. 5,000, at the time the alleged settlement was arrived at, to Annamalay Chettyar and that there was nothing to indicate why Annamalay Chettyar should have consented to accept a much smaller sum than what was still due to him. We must say that the written objection of Daw Gun of 17th May 1949, has not been very well drafted. This written objection was drafted in English and, in the absence of anything on the record to suggest that Daw Gun could read English language, we consider that it will be more proper if her written objection is read in the light of other evidence and circumstances appearing in this

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case, and only then we shall be able to ascertain what is the true solution to the matter under consideration.

The Exhibit II receipt, dated the 17th September 1948, was the receipt which Annamalay Chettyar gave to Daw Gun for the sum of Rs. 375 which he received from her. Exhibit II was signed by Annamalay Chettyar himself. It has not, and it could not, be disputed that Exhibit II contains a genuine receipt of Annamalay Chettyar in view of the lawyer's notice, dated the 12th July 1949, which was sent to Annamalay Chettyar on behalf of Daw Gun Annamalay Chettyar, however, denied that he wrote the expression "Rs. 1,000" which appears in Exhibit II receipt. According to him, the expression "Rs. 1,000" had been substituted for the words "towards the balance price" which he said, were originally in Exhibit II. We are unable to accept his statement in this respect. Annamalay Chettyar has written in Exhibit B to indicate what those words were in Tamil character, and Exhibit B shows us what space those words would occupy. It appears to us to be clear, when Exhibit B and Exhibit II are examined, that the expression "towards the balance price" in Exhibit B will occupy a more extensive space than the space which is occupied by the expression "Rs. 1,000". It has not, moreover, been suggested that any of the writing or stroke appearing before or after "Rs. 1,000" in Exhibit II had in any way been tampered with. It has, however, been submitted on behalf of the appellant that the outward appearance of the expression "Rs. 1,000" in Exhibit II suggests that that expression in Exhibit II had been tampered with, but we are unable to accede to this suggestion. It must be remembered that the figure "375" has the same appearance as the expression "Rs. 1,000" and it has not been contended that the figure "375" has in any

way been tampered with. A casual glance at Exhibit II reveals clearly that the appearance of the expression "Rs. 1,000" is similar in appearance to the figure "375". We ought also to add that the expression "being money due" at the end of Exhibit II appears to us to be significant, in that it reads more appropriately with the expression "Rs. 1,000", which precedes it. It will be convenient here to reproduce Exhibit II, which has been translated as follows :

"Siva's Omnipresence. 17th September 1948 : Credit Daw Gun Rs. 375, rupees three hundred and seventy-five only, received on several occasions up to this date, towards Rs. 1,000, being the money due in respect of a motor launch agreement.

(Sd.) KR. SM. ANNAMALAI CHETTYAR,—17-9-48."

If Exhibit II is accepted as genuine, and in our opinion, it should be so accepted, it becomes clear that Annamalay Chettyar must have consented to accept Rs. 1,000 in settlement of the balance price of the motor boat, which was still due to him at that time, as deposed to by Thakin Than Maung, in view of the fact that Exhibit II shows clearly that the amount which remained due to Annamalay Chettyar, before the sum of Rs. 375 was paid to him, was only a sum of Rs. 1,000. Thus Exhibit II can be said to indicate clearly that a settlement was arrived at between Daw Gun and Annamalay Chettyar, as deposed to by Daw Gun and Thakin Than Maung.

The question which next arises is whether the agreement to receive a sum of Rs. 1,000 is binding upon Annamalay Chettyar in law. It has been argued on his behalf that the agreement was merely a *nudum pactum*, for which Annamalay Chettyar received no consideration ; and reliance was for this purpose,

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placed upon the case of *Balasundra Vaker and one* v. *Ranganatha Iyer and others* (1) which was followed in *Ramaswami and others* v. *Gurukar Rudrappa* (2).

The first paragraph of the headnote in *A.K.A.C.T A.L. Chettyar* v. *A:K.R.M.M.K. Firm and others* (3) however reads as follows :

" Under section 63 of the Contract Act a dispensation or a remission by a promisee of the performance of the whole or any part of a promise made to him does not require to be supported by consideration, and there need not be a proposal of the dispensation or remission which is accepted."

The view expressed in *A.K.A.C.T.A.L. Chettyar* v. *A.K.R.M.M.K. Firm and others* (3), appears to us, to be more reasonable and, if we may say so, correct. The third paragraph of the headnote in *Jitendra Chandra Ray Chaudhuri* v. *S. N. Banerjee* (4) also reads as follows :

" A promisee can by a unilateral act of grace on his part absolve the promisor of his obligation under a contract. No agreement or fresh consideration is necessary where there is a dispensation or remission of the performance of the promise either wholly or in part or when the promisee has granted an indulgence to the promisor by way of extending the time for performance or when any other thing has been accepted as fully satisfaction by the promisee."

In the present case now under appeal, Daw Gun had also paid a sum of Rs. 375 towards the agreement to pay a sum of Rs. 1,000 in full satisfaction of the claim which Annamalay Chettyar had against her in respect of the sale of the motor boat ; and the agreement which had been arrived at between them

(1) I.L.R. (1930) 53 Mad. p. 127.
(2) A.I.R. (1939) Mad. p. 688.
(3) (1938) R.L.R. p. 660.
(4) I.L.R. (1943) Cal. Vol. I, at p. 101

must, therefore, be considered to be binding upon them. In view of the finding which we have arrived at, this appeal must be dismissed, with costs. Advocate's fees five gold mohurs.

U SAN MAUNG, J.—I agree.

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APPELLATE CIVIL.

Before U On Pe, J.

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Nov. 10.

O. S. MOHIYUDDIN SAHIB (APPLICANT)

v.

YUSUF ABDUL RAZAK (RESPONDENT).*

S. 24 of the Code of Civil Procedure—Transfer of suits—Considerations governing.

Held: Suits relating to the same transaction and involving common questions of fact should be heard by the same Judge

Vithoba v. *Karim*, A.I.R. (1932) Nag. 49; *Soroj Bashini Debi* v. *Girija Prashad Bhattacharjee*, A.I.R. (1926) Cal. 326; *Tirath Ram* v. *Harbhajan Singh*, A.I.R. (1933) Lah. 1033; *Inayat Ullah Khan* v. *Nisar Ahmed Khan*, I.L.R. (1922) All. Vol. 44 at p. 279, referred to.

The fact that a party has the choice of the forum does not deprive the High Court of its inherent jurisdiction and powers of general superintendence over all inferior courts. Such power cannot be limited by any action taken earlier.

The Hindustan Assurance and Mutual Benefit Society Ltd. v. *Rai Mulraj and others*, (1915) I.C., Vol. XXVII, p. 455; *Tula Ram and one* v. *Harjiwan Das and others*, I.L.R. (1883) All. (Vol. 3)61; *Sheo Nandan Lal and others* v. *Mangal Chand*, A.I.R. (1927) Pat. 333, referred to.

Tun I for the applicant.

Thein Moung for the respondent.

U ON PE, J.—This is an application for setting aside the order of the District Court, Amherst, in Civil Miscellaneous Case No. 3 of 1950 refusing to transfer Civil Regular Suit No. 47 of 1949 of the Court of the Subordinate Judge, Moulmein to be tried along with his Civil Regular Suit No. 1 of 1950.

The District Court in refusing the transfer of the case has taken the view that " the fundamental issues in the two suits are different from each other and that

* Civil Misc. Application No. 7 of 1950 being application under section 24 of the Civil Procedure Code for transfer of Civil Regular No. 47 of 1949 of the Court of the Subordinate Judge, Moulmein to the District Court, Amherst to be tried along with Civil Regular No. 1 of 1950.

the two suits are different although there may be some points common to both suits." It is necessary, therefore, to consider whether the so-called fundamental issues are of such a nature as would justify the Court to refuse to hear the two suits together because of circumstances contemplated in section 24 of the Civil Procedure Code. Civil Regular Suit No. 47 of 1949 of the Court of the Subordinate Judge, Moulmein, is an ejectment suit of the defendant (the applicant in this case) from a house No. 82, Lower Main Road, Moulmein. Civil Regular Suit No. 1 of 1950 of the District Court, Amherst is one for specific performance of a contract of sale and for possession of the same property, and the defendant in that suit is the plaintiff in the suit in the Subordinate Judge's Court. However, the defendant in the suit in the Subordinate Judge's Court and the plaintiff in the suit in the District Court are different persons.

On the pleading in the suit before the Subordinate Judge, one of the issues framed, which appears to be the most important one, is : " Has the plaintiff sold out the suit premises to Momin Bi Bi ? If so, does he cease to be a landlord ?" This is an issue to meet the main defence raised in that suit, namely, that the suit does not lie as the relationship of landlord and tenant has ceased by an act of the plaintiff, and that he has no *locus standi*. In the case before the District Court, on the pleading the most important issue appears to be this, " whether there was a condition precedent to the sale to rent the ground floor of the suit premises to the defendant, as alleged in paragraph 2 (7) of the written statement." The determination of each of these two issues must necessarily touch the question of title of the suit property as to whether the title in the property has passed from the seller to the buyer or not under the alleged sale.

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In the course of the hearing of each of the cases the exhibit agreement of sale filed in Civil Regular Suit No. 1 of 1950 of the District Court, will also be a material document to be exhibited in the suit before the Subordinate Court, Moulmein. The question of title will, therefore, be a common point of both law and fact in both the suits, and it appears to me that there is much force in the argument of the applicant that the one suit is dependent on the success or failure of the other suit and that the two suits are interdependent to one another. The principle to be followed in matters relating to transfer of civil suits coming within the ambit of section 24 of the Civil Procedure Code has been laid down in *Vithoba* v. *Karim* (1), as follows:

"Suits relating to same transaction and involving common questions of fact and desirable to be heard by one Judge, can be transferred to one Court."

The same principle is laid down in *Soroj Bashini Debi* v. *Girija Prashad Bhattacharjee* (2), *Tirath Ram* v. *Harbhajan Singh* (3), and *Inayat-Ullah Khan* v. *Nisar Ahmed Khan* (4). It is thus clear to me that there ought to be an order that the two suits in question should be heard together as they relate to the same subject matter involving common questions of fact and is desirable to be heard by one Judge in the interests of all the parties.

It has been urged by the counsel for respondent that his client has the choice of the forum relying on the cases of *The Hindustan Assurance and Mutual Benefit Society Ltd.* v. *Rai Mulraj and others* (5), and *Tula Ram and one* v. *Harjiwan Das and others* (6)

(1) A.I.R. (1932), Nag. p. 49.
(2) A.I.R. (1926) Cal. 326.
(3) A.I.R. (1933) Lah. 1033.
(4) I.L.R. (1922) 44 All. 279.
(5) I.C. Vol. XXVII, (1915) p. 45
(6) I.L.R. (1883) Vol. 3, 61.

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But it must be remembered that the High Court has an inherent jurisdiction and the general power of superintendence over all inferior courts, and that power is not limited by any course taken by the District Court—*See* the case of *Sheo Nandan Lal and others* v. *Mangal Chand* (1).

There will, therefore, be an order directing transfer of the case pending before the Subordinate Judge to the District Court, Amherst, to be heard along with Civil Regular Suit No. 1 of 1950 of the District Court. Advocate's fees 3 gold mohurs.

(1) A.I.R. (1927) Pat. 333.

CRIMINAL REVISION.

Before U Bo Gyi, J.

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Sept. 18.

THE UNION OF BURMA (APPLICANT)

v.

SAW STANLEY BA KYU (RESPONDENT).*

S. 3, Emergency Provisions Ordinance, 1948 and s. 3 (1), High Treason Act, 1948—The offences under.

Held: The juxtaposition of the words "ကြံ" (intention) and "ရွယ်" (object) in s. 3, Emergency Provisions Act, 1948 shows that an act contrary to the provisions of the section must have been done with the object and intention of delaying or defeating the operations of the Police Force or the Armed Forces keeping the peace in Burma.

Held further: That in order to constitute an offence under s. 3 (*1*) of the High Treason Act, 1948 the purpose and intention must be of a general public nature as contra-distinct from a private one such as theft or robbery.

Ba Maung v. *The Union of Burma*, (1950), B.L.R. 131 ; *Maung Joker* v. *The Union of Burma*, (1950), B.L.R. 300, followed.

U Kyaw (Government Advocate) for the applicant.

Khin Maung for the respondent.

U Bo Gyi, J.—Accused Saw Stanley Ba Kyu, aged 34, has been convicted under section 3 of the Emergency Provisions Ordinance, 1948, for participating in the raid on the Burma Air Force armoury at the Burma Air Force Station Headquarters, Mingaladon, on the 1st February 1949, when a large number of heavily armed Karens described as KNDO's looted a considerable amount of arms and ammunition besides other things from the said armoury.

The facts are that on the morning in question about 10 a.m. the late Chief of Air Staff S. J. Khin otherwise known as Thura Khin, who was then Wing Commander

* Criminal Review No. 292 of 1950 being review of the order of the 3rd Judge, Superior Military Court of Insein, dated 28th August 1950 passed in Criminal Regular Trial No. 38 of 1949.

of the Burma Air Force was approaching the Burma Air Force Headquarters, in a jeep when he saw 20 to 30 jeeps, trucks and other vehicles coming from the north along the Prome Road and driving into the compound of the Burma Air Force Headquarters. He went into the compound to investigate and met 70 to 80 KNDO's in uniform and about an equal number of men in plain clothes. Most of the men were armed. S. J. Khin was surrounded by the KNDO's. At this juncture Bo Maung Maung Soe, Sergeant Tun Yi and Gunner Ko Ko Gyi (p.ws. 1, 2 and 6) joined him. According to Sergeant Tun Yi, while S. J. Khin was instructing Sergeant Khin Toe Maung who was on duty at the Burma Air Force Station Headquarters not to do anything, a Karen, armed with a pistol, got out of one of the trucks and aiming the pistol at S. J. Khin from in front told him, "We have occupied your Force." S. J. Khin retorted that he was commanding his men and told him not to interfere. "At that critical period", Sergeant Tun Yi continues, "a Karen in plain clothes came out of a civilian truck and talked to the man aiming the pistol at S. J. Khin in Karen"; and the man with the pistol went off towards the armoury. The Karen in plain clothes who saved the situation was identified by Sergeant Tun Yi as the accused before the Court. The accused then talked with S. J. Khin and, when asked about the aim and object of the raid, replied that KNDO's wanted arms and ammunition because the *sitwundans* were pillaging and burning Karen villages. The Karens then took away all the arms and ammunition they found in the armoury as well as other articles they could lay hands on. The list of arms and ammunition looted from the armoury is the Exhibit G.

The above story and evidence for the prosecution is admitted by the accused in his evidence before the

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trial Court and also before me. His defence is that he was forced by three KNDO's to join in the raid at the point of guns. He examines his near relations and family friends to substantiate his story, and their evidence, which is highly interested, is not free from defects. The learned trial Judge has adequately dealt with it and I agree with him in his view that the defence evidence is not worthy of credence. On the other hand, the evidence of S. J. Khin, which I see no reason to distrust, clearly shows that the accused during the raid talked freely and moved about freely ; and the evidence relative to the whole episode leaves one with the impression that the accused was an entirely free agent.

The next question that falls to be determined is as to the offence of which the accused can be held guilty on the facts which have been proved. The learned Government Advocate frankly admits that the facts cannot be brought within the ambit of section 3 of the Emergency Provisions Ordinance, 1948, and I am inclined to agree with his view of the law. Section 3 of the Ordinance runs—

မည်သူမဆို၊ နိုင်ငံတော် ငြိမ်ဝပ်ပိပြားရေးကို ထိန်းသိမ်းဆောင်ရွက်ရန် တာဝန်ဝတ်တရားကို ဆောင်ရွက်နေသည့် နိုင်ငံတော်လက်နက်ကိုင်စစ်တပ်အစည်းအရုံးများ၏။ သို့တည်းမဟုတ် ရာဇဝတ်အမှုထမ်း အဖဲ့များ၏ ဆောင်ရွက်မှုအောင်မြင်ရေးကို နှောင့်နှေးစေရန် သော်၎င်း၊ ပျက်ပြားစေရန်သော်၎င်း၊ အကြောင်းရှိသည့် အမှုတရပ်ရပ်ကို ကြံရွယ်၍ ပြုမူဆောင်ရွက်လျှင်၊ ထိုသူအား သေဒဏ်၊ သို့တည်းမဟုတ် တသက်တကျွန်းဒဏ် ထိုက်သင့်စေရမည်။

The juxtaposition of words "ကြံ" (intention) and "ရွယ်" (object) would seem to show that the act contrary to the provisions of the section must have been done with the object and intention of delaying or defeating the operations of the Police Force or the Armed Forces keeping the peace of the Union of Burma. If it were otherwise, a thief who steals a wheel of a motor truck

in which troops are travelling to quell a riot and thus delays their movement would be liable to the punishment of death or transportation for life although he had had no intention to delay or defeat the operations of the troops and only stole the wheel to feed him and his family with the proceeds of the sale thereof. Here in this case the expressed object of the raid was to procure arms and ammunition. That the object was not to delay or defeat the operations of the Burma Air Force seems clear from the fact that the raiders left some 20 planes in the compound intact.

At the same time, however, I find myself unable to accede to the learned Government Advocate's contention that I should on the evidence alter the conviction to one under section 3 (*1*) of the High Treason Act, 1948. For one thing, there is an insurmountable procedural difficulty in the way of the course suggested because an offence under section 3 (*1*) of the High Treason Act is a graver offence than the one of which the accused has been convicted inasmuch as while in respect of the latter offence the Court is given the option of imposing the sentence of death or transportation for life, the former offence must be punished with death, and death only. Again, the prosecution have in this case concentrated on the proof of facts which they thought fell within the purview of section 3 of the Emergency Provisions Ordinance, with the result that no facts have been proved such as are required under section 3 of the High Treason Act, 1948. It has been held by a Bench of the High Court in *Ba Maung* v. *The Union of Burma* (1) that "in order to constitute an offence under the High Treason Act, 1948, the purpose and intention must be of a general public nature as contradistinct from a private one such as theft or robbery." To the same effect is the Bench

(1) (1950) B.L.R. 131.

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decision in *Maung Joker* v. *The Union of Burma* (1). In the present case no evidence has been led as to the nature and activities of the KNDO organization at the material time, and in a case involving an offence of such gravity as High Treason I feel that I should not take judicial notice of the nature and activities of the organization at the time of the present occurrence. The proved facts of the case, while they may perhaps sustain an inference that the purpose and intention of the raid was to obtain arms and ammunition to raise the standard of rebellion against the Government by law established, are nevertheless on the materials available equally consistent with the view that the venture was undertaken just to rob the armoury of arms and ammunition for purposes of defence as the raiders professed. The accused is entitled to the benefit of the view more favourable to him.

Now, the accused has had ample notice of the facts which the prosecution sought to prove against him and he availed himself of the opportunity to meet those facts. In these circumstances and in view of the decision in *Ba Maung*'s case (2), I can see no legal difficulty in the way of altering the conviction to one under section 395 of the Penal Code and I alter the conviction accordingly.

As regards the sentence, although I must take a very serious view of the raid and would have imposed the extreme penalty on the leader or leaders, there are circumstances in accused's favour which I find myself unable to overlook. First, the accused was not in uniform and was not armed. He had on a singlet and a longyi and was the driver of one of the motor trucks. He did not go near the armoury at all. Secondly, while on the other hand the prosecution have not adduced any evidence to show that the accused was a

(1) (1950) B.L.R. 300. (2) (1950) B.L.R. 131.

member of the KNDO or other organization, U Po Pe (d.w. 7), Assistant Secretary to the Ministry for Karen Affairs, states that, so far as he knows, the accused is of a quiet temperament and does not belong to any organization. The learned trial Judge apparently accepted the 6th defence witness Saya U Chit Ngwe's evidence that during the KNDO occupation of Insein the accused remained at home attending on his sick wife whose ailment was intermittent. This circumstance would seem to indicate that the accused was not a member of the KNDO organization and that his participation in the armoury raid was his single lapse. Last but not least, I take account of the fact that but for his tactful intervention a tragic fate would probably have overtaken the members of the Burma Air Force who had been caught unawares. Knowing full well the high spirits and reckless courage of Thura Khin I feel that if the accused had not intervened in the way he did, words would have led to blows and many valuable lives would have been lost. I accordingly set aside the sentence of death, and direct that the accused be sentenced to transportation for life.

(FULL BENCH (APPELLATE CIVIL).

Before U Tun Byu, Chief Justice, U Ohn Pe and U San Maung, JJ.

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Aug. 25.

DAW LAY AND THREE OTHERS (APPLICANTS)

v.

U MAUNG GYI (RESPONDENT).*

Order 20, Rule 2, Code of Civil Procedure—Judgment written by predecessor and pronounced by succeeding judge—Appeal heard by the same judge as District judge—Competency.

Where arguments were heard by one Judge who prepared the judgment and left it to be pronounced by his successor, and that successor delivered the judgment under Order 20, Rule 2, Code of Civil Procedure and subsequently the same Judge became District and Sessions Judge and in that capacity decided the appeal also.

Held by the Full Bench : That he was not competent to hear the appeal. The language used in Order 20, Rule 2, Code of Civil Procedure is that a Judge may pronounce a judgment written but not pronounced by his predecessor. This power is discretionary, and whether a Judge should exercise such discretion is a matter depending on the facts of each case. Pronouncing a judgment is part of the trial, and if the Judge is in doubt as to the correctness of such judgment, he can either proceed under Order 18, Rule 15, Code of Civil Procedure or hear the case *de novo*.

Baker Nicols v. *Baker*, L.R. 44 Ch. D. 262 at 270 ; ***Hargulal*** v. ***Abdul Gany Hajee Ishaq and another***, (1936-37) 14 Ran. Series, 136 at 142-143, referred to and followed.

It is essential that everything which might engender suspicion and distrust of a Tribunal should be cleared away and there must be a feeling of confidence in the administration of justice. It is also important that a Judge should appear to be impartial and without any pre-conceived idea of what his decision should be. The question, in such cases is not whether in fact the Judge was or was not biased, but that there should be no room for suspicion that a Judge is biased.

Loburi Domini and others v. *The Assam Railway and Trading Co. Ltd. and The Secretary of State for India in Council*, (1884) 10 Cal. Series, 915 at 917-918 ; *Sergeant and others* v. *Dale*, L.R. (1876-77) 2 Q.B.D. 558 at 567 ; *Allinson* v. *General Council of Medical Education and Registration*, L.R. (1894) 1 Q.B.D. 750 at 758-759, referred to.

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* Civil Reference No. 8 of 1950 arising out of reference made under Rule 25 of the Appellate Side Rules of Procedure (Civil), as published in the High Court (General) Notification No. 4, dated the 27th May 1949.

G. N. Banerjee for the applicants.

Hla Gyaw for the respondent.

The judgment of the Full Bench was delivered by

U TUN BYU, C.J.—The Plaintiff-respondent U Maung Gyi instituted a suit for possession of certain pieces of land mentioned in the plaint against the defendant-appellants Daw Lay and three others in the Court of the Assistant Judge, Sagaing, in Civil Regular Suit No. 16 of 1948. The case was first heard by U Maung Gyi, B.A.,B.L., and when U Maung Gyi, B.A.,B.L., was transferred, U Aye, B.A.,B.L., who succeeded him, continued with the hearing of the case from the stage left off by his predecessor. U Aye also heard the arguments and wrote out the judgment before he was transferred, which he left with the record of the case to be pronounced by his successor U Kyar Nyunt, B.A.,B.L. U Kyar Nyunt delivered the judgment written by his predecessor U Aye, which he had a right to do under Order 20, Rule 2, of the Code of Civil Procedure ; and the judgment was in favour of the plaintiff-respondent U Maung Gyi.

The defendant-appellants appealed against the judgment and decree passed by U Kyar Nyunt to the Court of the District Judge, Sagaing. U Kyar Nyunt, who delivered the judgment and decree passed in Civil Regular Suit No. 16 of 1948, was afterwards transferred as a District and Sessions Judge to Sagaing District. He heard the appeal filed against the judgment and decree passed in Civil Regular Suit No. 16 of 1948, which he dismissed with costs. The defendant-appellants next filed an appeal in the High Court against the judgment and decree passed by U Kyar Nyunt as District Judge in Civil Appeal No. 1 of 1949 of the District Court of Sagaing ; and one

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of the grounds on which the appeal was preferred reads :

"That the learned District Judge of Sagaing was not competent to hear the appeal, *viz.*, Civil Appeal No. 1 of 1949 of the District Court of Sagaing, in view of the fact that the judgment under appeal was passed by him when he was 1st Assistant Judge, Sagaing. The judgment and decree of the lower Appellate Court was liable to be set aside in law as it has been passed without jurisdiction."

The question which has been referred to for decision is as follows :

"Is a Judge, who has pronounced a judgment, written by his predecessor under Order 20, Rule 2, of the Code of Civil Procedure, competent to deal with the appeal against that judgment as a Judge of the Appellate Court?"

Thus, the question, which has been propounded for consideration in this reference, is quite comprehensive and not merely confined to the particular facts of this case. It will therefore not be necessary to consider, for the purpose of this reference, what is the effect of the case diary, dated the 26th December, 1948, made by U Aye, the predecessor of U Kyar Nyunt, or what effect it must have produced on the mind of U Kyar Nyunt who delivered the judgment written by his predecessor U Aye.

Order 20, Rule 2, of the Code of Civil Procedure reads :

"A Judge may pronounce a judgment written but not pronounced by his predecessor."

The word 'may' in Order 20, Rule 2, of the Code of Civil Procedure implies that U Kyar Nyunt who succeeded U Aye was not bound to deliver the judgment written by U Aye, if he did not think it fit to do so. In other words, Rule 2 of Order 20 allows U Kyar Nyunt to exercise his own discretion whether

he should pronounce the judgment written by his predecessor or not ; and it is therefore only proper to presume that U Kyar Nyunt must have read and thought over the judgment written by his predecessor before he delivered it, because it would be only reasonable to presume that a Judge would refer to the relevant provisions of the Code of Civil Procedure, *i.e.*, Rule 2 of Order 20, before he delivered the judgment which was written by his predecessor. Lord Cotton L.J. in *Re Baker Nicols* v. *Baker* (1) observed :

"I think that great misconception is caused by saying that in some cases 'may' means 'must'. It never can mean 'must', so long as the English language retains its meaning ; but it gives a power, and then it may be a question in what cases, where a Judge has a power given him by the word 'may', it becomes his duty to exercise it."

It appears to us to be clear that the power given to a Judge to pronounce a judgment written by his predecessor under Rule 2 of Order 20 of the Code of Civil Procedure, is discretionary, and whether the Judge concerned will or will not exercise it will depend on the facts of each case, and this discretion is to be exercised judicially, in accordance with the circumstances of each case. Pronouncing a judgment is clearly a part of a trial, and it is performed by a Judge of the Court in which the proceeding is heard. In *Hargulal* v. *Abdul Gany Hajee Ishaq and another* (2) Page C.J , also observed as follows :

"It has to be borne in mind, of course, that under Order 20, Rule 2, it is not necessarily incumbent upon the successor of the Judge who wrote the judgment after he had ceased to be a Judge of the Court in which the trial was held to pronounce the judgment that had been written by his predecessor. He has a discretion in the matter, and if he is in doubt as to the correctness of the judgment that has been written by his predecessor he

(1) L.R. 44. Ch. D. 262, 270. (2) (1936-37) 14 Ran. Series, 136 at 142-143.

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ought either to act in accordance with the provisions of Order 18, Rule 15 or to hear the case *de novo*."

It is possible that U Kyar Nyunt might not have given any serious reflection to the judgment written by his predecessor before he deliverd it in Court and was therefore not likely to be much influenced by his previous conduct in delivering the judgment of his predecessor, but it is of importance in the interest of justice that a Judge should appear to be impartial and without any pre-conceived idea of what his decision should be. It was observed in *Loburi Domini and others* v. *The Assam Railway and Trading Co. Ltd. and the Secretary of State for India in Council* (1) as follows :

"The jealousy of the law which forbids any Judge to try a cause in which he is a party or personally interested, or to adjudicate upon any proceeding connected with or arising out of such cause (*see* s. 25 of Act VI of 1871, which embodies this principle), does not rightly reflect any unworthy suspicion upon an individual Judge, while it secures and upholds one of the great pillars of judicial purity."

Lush J., in *Sergeant and others* v. *Dale* (2) also observed as follows :

"One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security."

We think we also ought to reproduce the observation of Lord Esher, M.R., in *Allinson* v. *General Council of Medical Education and Registration* (3) which reads :

"If his relation is such that by no possibility he can be biased, then it seems clear that there is no objection to his

(1) (1884) 10 Cal. Series, 915 at 917-918 (2) L.R. (1876-77) 2 Q.B.D. 558 at 567.
(3) L.R. (1894) 1 Q.B.D., 750 at 758-759.

acting. The question is not, whether in fact he was or was not biased. The Court cannot inquire into that. There is something between these two propositions. In the administration of justice, whether by a recognised legal Court or by persons who, although not a legal public Court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position that he might be suspected of being biased. To use the language of Mellor J., in *Reg* v. *Allan* (1), " It is highly desirable that justice should be administered by persons who cannot be suspected of improper motives.' "

The observations made in the cases of *Loburi Domini and others* v. *The Assam Railway and Trading Co. Ltd. and the Secretary of State for India in Council* (2), *Sergeant and others* v. *Dale* (3) and *Allinson* v. *General Council of Medical Education and Registration* (4) are weighty and salutary, and it seems to us to be only proper in the interest of pure administration of justice that a Judge who pronounced a judgment which was written by his predecessor, as allowed under Rule 2 of Order 20 of the Code of Civil Procedure, ought not to hear the appeal which has been preferred against that judgment; and a Judge should be above all suspicion of being biased. Our answer to the question propounded is in the negative.

(1) 4 B and S. 915 at 926.
(2) (1884) 10 Cal. Series, 915 at 917-918.
(3) L.R. (1876-77) 2 Q.B.D. 558 at 567.
(4) L.R. (1894) Q.B.D. 750 at 758-759.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice, and U On Pe, J.

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Aug. 25.

MRS. K. M. KERWICK (APPELLANT)

v.

P. D. PATEL (RESPONDENT).*

Broker for sale of land—Remuneration—When entitled to.

P acted as an agent of Mrs. K for the sale of her land to the American Embassy but he did not act as Mrs. K's sole or only agent for the sale of the said land nor did he bring the Head of the Embassy or any accredited agent of the Embassy into contact with Mrs. K ; nor did he do anything substantial for the sale of the land.

The sale was subsequently put through by one S. P then sued Mrs. K for recovery of Rs. 7,000 for services rendered in connection with the sale of her land to the American Embassy or in the alternative for a breach of contract in preventing him from completing the sale.

Held : An agent is not entitled to any brokerage or remuneration unless he has done substantially something which can be treated as the effective cause of the subsequent sale.

James T. Burchell v. *Gowrie and Block House Collieries Ltd.*, (1910) A.C. 614 at 625, relied on.

Coles v. *Enoch*, (1939) 1 K.B. 614; *S. Dutt* v. *Nityanath Mitter*, 50 Cal. 878, referred to.

C. A. Soorma for the appellant.

Kyaw Myint for the respondent.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The defendant-appellant Mrs. K. M. Kerwick owned a piece of land on the side of Victoria Lake known as the lake land, which was sold subsequently to the American Embassy. The plaintiff-respondent P. D. Patel instituted a suit, known as Civil Regular No. 277 of 1949 of the City Civil

* Civil 1st Appeal No. 16 of 1950 against the decree of the Chief Judge, City Civil Court, Rangoon in Civil Regular No. 277 of 1949, dated 21st February 1950.

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MRS. K. M. KERWICK v. P. D. PATEL.

U TUN BYU, C.J.

Court, Rangoon, against the defendant-appellant Mrs. K. M. Kerwick, for the recovery of a sum of Rs. 7,500 for the services he was alleged to have rendered in connection with the sale of the lake land to the American Embassy, and in the alternative for a breach of contract in preventing him from completing the sale of the lake land to the American Embassy.

Mrs. K. M. Kerwick, in effect, denied that P. D. Patel was entitled to receive any brokerage from her in connection with the sale of the lake land to the American Embassy. She also denied that there was any contract to employ P. D. Patel as her exclusive or only agent or broker in connection with the sale of her lake land to the American Embassy or that she had committed any breach of contract. She moreover alleged that P. D. Patel did not take any further step or action to obtain sale for her lake land after 5th May 1947; and it might be mentioned at once that the American Embassy, in effect, decided to purchase Mrs. Kerwick's lake land on or about 19th January, 1948, that is about 7 months after P. D. Patel was alleged to have done nothing more to bring about the sale of the lake land with the American Embassy. The learned Chief Judge, City Civil Court, Rangoon, gave a judgment and decree in favour of the plaintiff-respondent P. D. Patel. Mrs. Kerwick now appeals against the said judgment and decree.

It will be necessary to ascertain for the purpose of this appeal the circumstances under which P. D. Patel was asked to negotiate for the sale of the lake land with the American Embassy and the services that he was said to have rendered in connection with that negotiation; and this will involve the consideration whether P. D. Patel had been made an exclusive or only agent or broker for Mrs. Kerwick for the purpose of negotiating the sale of the lake land with the American

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Embassy. We might also mention that the sale of the lake land, which was effected on or about the 18th January, 1948, was made in fact through one C. Stephens, a broker.

It will be more convenient to consider first, what are the circumstances under which P. D. Patel came to negotiate with the American Embassy for the sale of Mrs. Kerwick's lake land. P. D. Patel in giving evidence as to what led him to negotiate for the sale of the lake land with one Mr. Packer of the American Embassy, stated as follows :

" It was then that Mr. Oehme said why I would not sell the defendant's land to the American Consul-General. He said thus 'You will do a favour to Mrs. Kerwick and also earn a good brokerage.' I asked him which was the land and he said it was 'the Lake Land.' I did not then know where it was situated. He gave me the particulars of the land. I then asked him the lowest price that Mrs. Kerwick wanted and the brokerage that she was prepared to give me. He said that she would be satisfied with whatever she paid for it. I asked him the said price and the persons from whom she bought it and he said she bought it for Rs. 1½ lakhs from Messrs. Foucar & Co., and that I would be paid the usual brokerage. On my further enquiry he said he would give me the usual brokerage of Rs. 5 per cent. Soon after that, I do not now remember the exact date, I saw the American Consul-General Mr. Packer at his office and interested him in this land."

It will be observed that there is nothing in the above statement of P. D. Patel to show that C. N. Oehme informed him that he was to act exclusively or solely for Mrs. Kerwick in connection with the sale of her lake land to the American Embassy. P. D. Patel proceeded in his evidence to speak about the visit which he made to the lake land in the company of Mr. Packer and C. N. Oehme. He did not mention in his evidence that C. N. Oehme ever told him at any

time during the visit to the lake land that he was to be Mrs. Kerwick's only or exclusive agent for the purpose of negotiating the sale of the lake land to the American Embassy. P. D. Patel did not also mention in his evidence that, when he met Mr. Kerwick at Kalaw some time in May, 1947, he told her that he should be her only or exclusive agent or broker for negotiating for the sale of her lake land with the American Embassy. He, it appears, met Mrs. Kerwick at Kalaw for the second time in August, 1947 and to use his own words what he said to Mrs. Kerwick on that occasion was as follows:

"She then asked me the result of the negotiations for the lake land, and I told her that we were waiting for the reply from the building expert in U.S.A. I then returned to Rangoon."

The conversation, which P. D. Patel had with Mrs. Kerwick on his second visit to her at Kalaw, turned more on Minto Mansion land which Mrs. Kerwick was also anxious to sell.

After his second visit to Kalaw in August, 1947, where he also met Mrs. Kerwick, P. D. Patel did not appear to be in touch with the American Embassy till about the 4th December, 1947, which he ought to have done if he really desired to have the sale of the lake land effected through him. If P. D. Patel entertained any prospect of concluding the sale of the lake land with the American Embassy, one would also have expected him to endeavour to find out when Mr. Acly, who was to succeed Mr. Packer, would arrive in Rangoon. He apparently made no attempt to find out when Mr. Acly was to arrive in Rangoon, nor did he attempt to see Mr. Packer again after his second visit to Kalaw in August, 1947, although Mr. Packer remained in Rangoon until Mr. Acly, his successor, arrived. He,

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it appears, met Mr. Acly for the first time only on 4th December, 1947, when he was informed by Mr. Acly that one C. Stephens, a broker, had been negotiating with the American Embassy for the sale of the lake land. Thus it is clear that, after his interview with Mr. Acly on 4th December, 1947, P. D. Patel knew that the American Embassy was negotiating for the sale of the lake land through C. Stephens, and not through him. It was with this knowledge that P. D. Patel wrote, on the same day and after his interview with Mr. Acly, to Mrs. Kerwick, and in his letter, Exhibit 4, he accused her of imparting the name of the proposed buyer of the lake land to C. Stephens, a matter which Mrs. Kerwick denied at once. P. D. Patel did not mention in that letter that he had been informed by C. N. Oehme that he was to act as her only broker or agent for the purpose of negotiating the sale of her lake land to the American Embassy, and this omission is significant in view of the fact that P. D. Patel had been a lawyer for many years and was a gentleman who was not unaccustomed to litigation, and in that he must have realised or surmised, after his interview with Mr. Acly, that the American Embassy was not ready or willing to negotiate the purchase of the lake land through him. We ought to mention that there is not a word in the correspondence that had passed between P. D. Patel and his lawyer on the one side and Mrs. Kerwick and her lawyer on the other to show that P. D. Patel ever alleged that he had been appointed or made a sole or only broker or agent for the purpose of negotiating the sale of the lake land with the American Embassy. We might add that P. D. Patel also omitted to allege in his plaint that he had been appointed or made a sole agent or broker to negotiate for the sale of the lake land with the American Embassy. These omissions appear to us to

be astonishing, and they militate against the truth of the belated suggestion of P. D. Patel that he had been made a sole or exclusive agent for the purpose of negotiating for the sale of the lake land to the American Embassy. We cannot in the circumstances of this case accept his statement on this point without independent or clear supporting evidence, of which we must say we see none, especially in view of the lawyer's Exhibit K letter, dated 12th March, 1948, sent on behalf of Mrs. Kerwick to the Advocate who was then acting on behalf of P. D. Patel, and the relevant portion of this letter reads :

" It is significant that in your letter you gave no particulars of the alleged agreement with Mr. Patel ; nor do you even state the rate of the brokerage that he claims.

Any suit your client files will most certainly be contested."

A reply was sent on behalf of P. D. Patel to the above letter, and, although the reply was quite long, it did not mention anywhere about P. D. Patel having been appointed a sole agent or broker for Mrs. Kerwick. Over and above this, P. D. Patel when he was allowed to give further evidence in Court for the second time gave answers which clearly militate against his subsequent belated suggestion that he had been made a sole or exclusive agent of Mrs. Kerwick for negotiating for the sale of her lake land with the American Embassy. The answers, with the questions put to him, read :

" *Q.* Is it your case that you were engaged by the defendant to sell this land through you and that the defendant should not engage any other person to do so ?

A. There was no stipulation that the defendant should not engage other brokers to sell this land. In fact there was no discussion on this matter.

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Q. Was there a stipulation in the agreement between you and Mr. Kerwick that if she sold her land in suit in question through some other broker you would still be entitled to full brokerage ?

A. As such a question did not arise there was no discussion about it. As such a question did not arise I did not stipulate with Mrs. Kerwick that if she had engaged any other broker simultaneously with me I would not have done the work."

P. D. Patel in his answers to subsequent questions endeavoured to extricate himself from the effect of the above statements, but we are unable to give any weight to his subsequent statements, belated as they were and made by a gentleman who had been a practising advocate for very many years and who was not unaccustomed to litigation.

It has been urged on behalf of the respondent that the Exhibit 12 letter, dated 21st December, 1947, suggests that P. D. Patel must have been appointed a sole or exclusive agent or broker to negotiate for the sale of the lake land with the American Embassy and that C. Stephens would not have been asked, in effect to withhold his negotiation for the sale of the lake land with the American Embassy if P. D. Patel had not been made her sole or exclusive agent or broker to sell the lake land to the American Embassy. We are unable to see any real force in this contention, particularly in view of what Mrs. Kerwick stated towards the end of that letter, which reads :

" It is of course understood I am free to accept offers from other sources and I do not bind myself in any way."

If the implication which was attempted to be placed on behalf of the respondent is correct, we would have expected him to have adopted that attitude long before he was allowed to be examined for the second time in the City Civil Court. It is only reasonable in the circumstances of this case to conclude that neither

C. N. Oehme nor Mrs. Kerwick held out to or informed P. D. Patel that he was to be Mrs. Kerwick's sole or exclusive agent or broker for the purpose of negotiating for the sale of her lake land with the American Embassy.

In dealing with the question whether the respondent is entitled to claim any brokerage from Mrs. Kerwick in connection with the sale of her lake land to the American Embassy, which was affected through C. Stephens, a broker, in January, 1948, it will have to be remembered that when P. D. Patel met Mrs. Kerwick on the second occasion at Kalaw in August, 1947, he merely told her in connection with the negotiation which he conducted for the sale of her lake land that the American Embassy was waiting for the arrival of the building expert from U.S.A. He did not tell her on that occasion that the sale was practically concluded except for the arrival of the building expert from U.S.A. or that the American Embassy were likely to buy her lake land as soon as the building expert arrived in Burma. It has however been submitted on behalf of the respondent that the Court ought to bear in mind that Mrs. Kerwick had not come forward to give evidence in this case, but we are unable to see anything in this case which will indicate that her absence in Court has materially prejudiced the case for the respondent. It was not alleged by P D. Patel any where that Mrs. Kerwick had personally appointed him her sole or exclusive agent for the purpose of negotiating for the sale of her lake land with the American Embassy, and she apparently saw P. D. Patel only twice, and that was at Kalaw.

According to P. D. Patel, he went and saw Mr. Usher of the American Embassy after his return from Kalaw in August, 1947, and that he asked Mr. Usher to leave a note behind in connection with his negotiation for the sale of the lands with the

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American Embassy. There is nothing on the record to support P. D. Patel on this point. His Exhibit Y letter, dated 21st September, 1947, to Mr. Usher reads as follows :

"I have now returned from Kalaw and shall be pleased to know how the position stands.

I would like to have a little discussion with you in respect of Minto Mansions. Any day any time after 23rd September will suit me."

It will be observed that no mention was made of the lake land in that letter, and thus there is nothing in the correspondence to suggest that P. D. Patel continued to negotiate for the sale of the lake land after his return from Kalaw in August, 1947.

It does not appear that Mr. Packer informed his successor Mr. Acly anything about P. D. Patel's negotiation for the sale of the lake land to the American Embassy, which we would have expected him to do if the American Embassy had not ceased to have anything to do further with P. D. Patel in connection with his attempt to sell the lake land to the American Embassy, especially in view of the last paragraph of his letter sent to Mr. Packer on the 14th August, 1947, which reads :

"Be good enough to leave a suitable note to your sucessor as I would like to put through this transaction both to the satisfaction of the Consulate-General, and the owners of the property."

This letter also militates against the suggestion that the American Embassy was willing to purchase the lake land subject to the approval by the building expert who was to arrive from U.S.A. The evidence also shows that Mr. Packer went along with Mr. Acly and C. Stephens to inspect the lake land before Mr. Packer left Burma. This incident also militates against

the suggestion that the American Embassy contemplated to purchase the lake land through P. D. Patel. It is only proper, in the circumstances, to assume that the American Embassy had not decided at any time to purchase the lake land through P. D. Patel, whether before or after Mr. Packer left Burma ; and this is also supported by the fact that Mr. Packer, before he left Burma, returned the plan of the lake land to P. D. Patel, *vide* Exhibit A (1). This explains why P. D. Patel remained inactive or did not do anything in connection with his negotiation for the sale of the lake land between the end of August, 1947, and the 4th December, 1948. The last paragraph of the letter which P. D. Patel sent to Mr. Acly on the 4th December 1947, reads :

" As regards Rangoon, I shall be very glad to give all help and assistance and I feel sure that I shall not fail you with 40 years connection in Burma provided I know your requirements. As regards lake land—I am sending you a copy of the plan which I originally gave to Mr. Packer and which he returned to me before his departure. As far as I remember it is Plot 32. You can keep the copy as I have a spare one. I can show you other land accessible from Kokine Road."

The Exhibit 1 letter which P. D. Patel wrote to C. N. Oehme shows that as early as May, 1947, P. D. Patel had not been able to make any real progress with the American Embassy for the sale of the lake land, and the relevant portion of the letter reads :

" I have seen the American Consul-General and given him your price of Rs. 1,00,000. He has made notes of all particulars but my impression is that he was not keen. However leave to luck and I shall do the best."

P. D. Patel in his letter to C. N. Oehme, dated the 1st August, 1947, did not mention anything about the lake land, and neither did he mention about the lake

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land in his letter of the 14th August, 1947. Thus it is clear that P. D. Patel had not been able to interest Mr. Packer or any one in the American Embassy in his negotiation for the sale of the lake land to the American Embassy up to the time of his second visit to Kalaw in August, 1947. The letters, Exhibits X and Y, which P. D. Patel sent to Mr. Usher on the 20th August and 20th September, 1947, respectively also suggest that he was concerned in negotiating for the sale of lands other than the lake land to the American Embassy. It does not therefore appear that P. D. Patel did anything more to advance his negotiation for the sale of the lake land after he wrote his letter Exhibit 1, dated 19th May, 1947, to C. N. Oehme. Moreover, the last paragraph of Exhibit A(1) letter, dated 4th December, 1947, appears to us to be significant in that it suggests that P. D. Patel had not been successful to any extent in his attempt to negotiate for the sale of the lake land with either Mr. Acly or Mr. Usher because if it were so, we would have expected him to have stated it in that letter, especially if he had conducted the negotiation to the stage which he alleged, namely, that the American Embassy was willing to purchase the lake land, subject to the approval of the building expert who was to have arrived from U.S.A. There is also nothing in the correspondence, nor had P. D. Patel alleged in his evidence, that he made any attempt at any time to discover when the building expert from U.S.A. was to arrive, an omission which also militates against the suggestion that the American Embassy had in effect agreed with him to buy the lake land through him, subject to the approval of building expert from U.S.A. It seems to us that something must have occurred to make the American Embassy again interested in the lake land ; and we do not think it will be wrong to assume that it must have been C. Stephens

who had awakened a new interest in the American Embassy after the arrival of Mr. Acly in Rangoon because C. Stephens went along with Mr. Acly and Mr. Packer to inspect the lake land. Exhibit 4 letter, dated 4th December, 1947, is also important. P. D. Patel did not even insinuate in that letter that he had practically succeeded in negotiating for the sale of her land to the American Embassy, or that any one from the American Embassy had told him that they were willing to buy the land subject to the approval of the building expert who was to arrive from U.S.A. There is also nothing on the record to suggest that the building expert, who arrived from U.S.A., inspected the lake land or that he was consulted by the American Embassy for the purchase of the lake land. It appears to us that if P. D. Patel could have accused Mrs. Kerwick of divulging the name of the purchaser to C. Stephens, he would not have also hesitated in his letters, either to her or to C. N. Oehme, to state that he had been made a sole or exclusive agent or broker for negotiating the sale of the lake land to the American Embassy or that he had in effect practically succeeded in negotiating for the sale of the lake land subject to the approval of the building expert from U.S.A. On 23rd January, 1948, P. D. Patel wrote a letter to Mrs. Kerwick, the second paragraph of which reads :

"I hear enough, I know enough and I have no time to waste over any further correspondence in view of your unfair and untenable attitude after substantial work is done."

He has not stated what the substantial work that he had done was, and we are unable in this case to see that he had done anything which would effectively have brought about the sale of the lake land to the American Embassy except for the intervention of another broker, C. Stephens. We are therefore unable

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to see how P. D. Patel can claim any brokerage from Mrs. Kerwick for the sale of the lake land to the American Embassy made in January, 1948.

It has also been contended on behalf of the respondent that Mrs. Kerwick, in employing C. Stephens to negotiate for the sale of the land with the American Embassy, had in effect prevented the respondent from completing the sale of the lake land to the American Embassy. We, however, cannot accede to this contention. P. D. Patel wrote to Mrs. Kerwick on the 4th December, 1947, complaining against her allowing C. Stephens to negotiate for the sale of the lake land with the American Embassy, and Mrs. Kerwick wrote, after the receipt of P. D. Patel's letter, to C. Stephens on the 9th December, 1947, withdrawing her permission to negotiate for the sale of the lake land with the American Embassy. She also wrote on the same day to P. D. Patel, and it will be convenient here to reproduce a portion of her Exhibit H, which reads :

"Mr. Stephens has worked for me for many years and when he returned to Burma and informed me he had restarted his business I naturally put my properties in his hands for sale. When he told me he had approached the American Consul in connection with the lake land, I then told him that you had already approached them and taken the Consul-General over the land and they already had all the particulars. I am writing to Mr. Stephens and will tell him that you are still dealing with the American Consul in connection with this land and not to interfere. At the same time it must be clearly understood that this does not bind me from accepting any other offer through Mr. Stephens or any other party meantime. I cannot leave the matter in your hands indefinitely and I am free to accept the best offer for the land from any person who may bring it to me whether the purchasers are the American people or any other person."

It will be observed that P. D. Patel was given an opportunity to continue his negotiation with the

American Embassy for the sale of the lake land, but there is no evidence to show what P. D. Patel did after that date to renew his negotiation for the sale of the lake land. P. D. Patel has not stated in his evidence to indicate what effort he made to renew his negotiation with the American Embassy after the 9th December, 1947. A portion of Mrs. Kerwick's Exhibit J letter, dated the 9th January, 1948, reads as follows :

" I object to being bullied in this manner in order for you to get some brokerage. I have distinctly told you that I do not bind myself to sell only through you irrespective of who the purchaser may be, the American Consul or any other party. I dislike unpleasantness. I do not see why I should lose a sale if the American people do not purchase my land through you. This is what your letter amounts to. If you approached them first and they fail, for reasons known to themselves, to act through you that is their business and why should I pay you brokerage in such a case. In the event of the business being done through you may I remind you that up-to-date you have not quoted your brokerage although I have asked you. Why should all brokers keep off the American Embassy because you have approached them. As I have already mentioned if you have been appointed their broker what have you to fear ? But if they will not do the business through you why should I suffer ? "

There is not sufficient evidence in this case to prove that Mrs. Kerwick or C. N. Oehme had, in effect prevented P. D. Patel from completing the sale of the lake land with the American Embassy, or that in asking C. Stephens to proceed with his negotiation with the American Embassy Mrs. Kerwick had in effect prevented P. D. Patel from completing the sale with the American Embassy. The decision in *Coles* v. *Enoch* (1) does not assist the respondent's case, as " There was no break in the chain of causation, and no *novus actus interveniens* " in that case, whereas in the present case now under appeal, Mr. Packer of the American Embassy

(1) (1939) 1 K.B. 614.

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returned the plan of the lake land to P. D. Patel before his successor Mr. Acly left Burma. The evidence on the whole suggests that the American Embassy must have severed their negotiation for the purchase of the lake land through P. D. Patel before C. Stephens began to negotiate with the American Embassy for the sale of Mrs. Kerwick's lake land and that this was so is supported by the fact that P. D. Patel did not attempt to see Mr. Packer again after the plan of the lake land was returned to him.

In *James T. Burchell* v. *Gowrie and Block House Collieries, Ltd.* (1) it was observed :

" . . . . . if an agent such as Burchell was brings a person into relation with his principal as an intending purchaser, the agent has done the most effective, and, possibly, the most laborious and expensive, part of his work, and that if the principal takes advantage of that work, and, behind the back of the agent and unknown to him, sells to the purchaser thus brought into touch with him on terms which the agent theretofore advised the principal not to accept, the agent's act may still well be the effective cause of the sale.

There can be no real difference between such a cases and those cases where the principal sells to the purchaser introduced by the agent at a price below the limit given to the agent."

There is no evidence in the present case however, to prove that P. D. Patel obtained any definite offer from the American Embassy or that the American Embassy ever expressed any intention to purchase the lake land through P. D. Patel whether for one and a half lakhs or otherwise. On the other hand, P. D. Patel's letter written in July, 1947, to C. N. Oehme indicated definitely that the American Embassy was not keen to buy the lake land through him.

In *Satchidananda Dutt* v. *Nritya Nath Mitter* (2), which was also relied on behalf of the respondent, the second paragraph of the headnote reads as follows :

(1) (1910) A.C. 614 at 625. (2) (1923) 50 Cal. Series 878.

"Where the remuneration of an agent is payable upon the performance by him of a definite undertaking, he is entitled to be paid that remuneration as soon as he has substantially done all that he undertook to do, even if the principal acquires no benefit from his services, and except where there is an express agreement or special custom to the contrary, even if the transaction in respect of which the remuneration is claimed falls through provided that it does not fall through in consequence of any act or default of the agent."

In the present case, however, P. D. Patel has failed to prove that he obtained an offer of Rs. 1½ lakhs for the purchase of the lake land from the American Embassy. The evidence also do not show that he had substantially done all that he was required to do or should have done for the purpose of affecting a sale. It cannot also be said in the case now under appeal that P. D. Patel's action in taking Mr. Packer to see the lake land in April, 1947 was "the effective cause of the subsequent sale" which was effected in January, 1948. The appeal is therefore allowed, with costs in both Courts.

APPELLATE CRIMINAL.

Before U Aung Tha Gyaw and U Thaung Sein, JJ.

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Aug. 18.

U HLA MYINT AND TWO OTHERS (APPLICANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

Application for bail—Considerations governing—S. 498, Criminal Procedure Code.

Held: In applications for bail the court is concerned with the questions as to whether on the materials placed before it there are reasonable grounds for believing that the applicants have been guilty of the offences charged. Under s. 498 of the Criminal Procedure Code the High Court has unfettered powers in granting bail to persons charged with non-bailable offences punishable with death or transportation for life but the grant of bail in such case is to be made not as a general rule but only in exceptional cases.

Emperor v. *Joglekab*, 55 All. 115, referred to.

Thein Maung
Ba Tu
Kyaw Myint } for the applicants.

The judgment of the Bench was delivered by

U AUNG THA GYAW, J.—These are applications presented on behalf of U Hla Myint, lately Treasury Officer, Katha, Boh Sein U, Company Commander, 8th Battalion, U.M.P., Shwebo (under suspension) and Mr. J. S. Wiltshire, retired Deputy Commissioner, for their release on bail during the pendency of the trial before the Special Tribunal sitting at Rangoon on charges brought against them under sections 204, 409 and 120 (*b*) of the Penal Code. They had made similar applications to the Special Tribunal at the beginning of the trial but without success.

* Criminal Misc. Application Nos. 13, 14 and 15 of 1950 being appeal from the order of the Special Tribunal of Rangoon, dated 15th September 1950 passed in Special Trial No. 3 of 1950.

The Tribunal has since examined 10 witnesses for the prosecution including one Pe Thein, an approver in the case. It is now admitted that this Pe Thein has implicated both the applicants U Hla Myint and Boh Sein U as being directly and actively concerned in the misappropriation of Government money. It is stated that the applicant Mr. Wiltshire has not been so implicated by the approver.

Whether the evidence of the approver will merit reliance in considering the guilt or innocence of the applicants is a matter for the Special Tribunal to determine at the conclusion of the trial. In this matter before us, we are mainly concerned with the question in the same way as the Special Tribunal was concerned when the application was made before it—as to whether on the materials placed before us, there are reasonable grounds for believing that the applicants have been guilty of the offences with which they stand charged. Under section 498 of the Code, this Court undoubtedly has unfettered powers to exercise its discretion in the matter of granting bail in respect of persons charged with non-bailable offences punishable with death or transportation for life but as pointed out by Their Lordships of the Allahabad High Court in *Emperor* v. *Joglekab* (1):

> " In cases where there are reasonable grounds for believing that the accused have been guilty of offences punishable with death or transportation for life, the grant of bail by the Sessions Judge or the High Court, as the case may be, though having undoubted powers under section 498, is to be made not as a general rule but only in exceptional cases."

The two applicants, U Hla Myint and Boh Sein U are said to have both been implicated by the approver in his evidence given on oath before the Special

(1) 55 All. 115.

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Tribunal and in the face of this evidence it will not be proper for this Court to exercise its discretion in the applicants' favour in the matter of enlarging them on bail, during the pendency of the trial. We have been addressed at some length regarding the intrinsic unworthiness of the approver's evidence given in Court in regard to the alleged complicity of these applicants in the crime. This, however, is a matter which could properly be agitated before the Special Tribunal itself. This being the case, the applications of U Hla Myint and Boh Sein U will be rejected.

Regarding the application made on behalf of Mr. J. S. Wiltshire it is admitted that the approver who in the ordinary course must be regarded as the principal witness in the case has not given any evidence implicating the applicants, either in the alleged conspiracy or in the actual commission of the crime and this fact, in our view, is a special circumstance which must be considered in his favour in the matter of granting him the bail applied for. Although 10 witnesses have been examined in the case there are not as yet reasonable grounds for believing that this applicant is guilty of the offence with which he is charged. Apart from this fact which is the principal consideration in the matter, other facts of subsidiary nature also stand out in his favour. He has retired from the service of the State and there apparently is no danger of his abscondence if released on bail or of any of the witnesses being tampered with. For these reasons this applicant will be released on bail with two sureties of Rs. 5,000 to the satisfaction of the trial Court.

CRIMINAL REVISION.

Before U On Pe, J.

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DAW E SEIN (APPLICANT)

v.

Sept. 1.

THE UNION OF BURMA (RESPONDENT).*

Essential Supplies and Services Act, 1947—S. 3—Notification No. 92 of 1947 requiring permission to take Gold to Arakan—If ultra vires—*Effect of publication—Notice to all persons—Criminal Procedure Code, S. 342* (1) (b)—*Evidence of accused under—Can be used against accused—"Shall be liable to confiscation"—Meaning.*

Applicant was tried and convicted under s. 8, sub-s. (*1*) of the Essential Supplies and Services Act, 1947, for taking 15 bars of Chinese Gold from Rangoon to Akyab by plane without having a necessary permit as required by Notification No. 92, dated the 23rd September 1947. She was sentenced to a fine of Rs. 600 or in default to undergo 9 months' rigorous imprisonment. The Gold was ordered to be confiscated. Her appeal was dismissed. In revision it was *inter alia* urged that the above Notification was *ultra vires* of s. 3 of the Essential Supplies and Services Act, 1947, that as the Applicant was not aware of the said Notification, she should be released under s. 562, Criminal Procedure Code, that the admission made by the Applicant in the course of the evidence given under s. 342, Criminal Procedure Code should be taken, if taken at all, as a whole and that the expression "shall be liable to confiscation" did not mean that the Court had no option but to order confiscation.

Held: That Notification No. 92 of 1947 is not *ultra vires* of s. 3 of the Essential Supplies and Services Act though it does not contain such formula as 'it appears to the Governor (now President) for maintaining Supplies and Services essential to the life of the country and therefore movement of Gold from Rangoon to Arakan is prohibited.' One has to take the language as one finds it, although, of course, one has to look at the Act as a whole and construe it so as to give effect to what appears from the language of the whole Act to be the intention of the Legislature.

Emperor v. *Mohamad Kassam Panwall*, (1942) Bom. 107, relied on.

It is not necessary for the prosecution to prove actual communication of a notification to the alleged offenders. Once publication had been made the persons affected by the order are to be deemed to have been informed, it is not open to him to show that he was not actually informed.

Debi Prasad v. *Emperor* A.I.R (1947) All. 191, relied on.

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* Criminal Revision No. 64-B of 1949 being review of th order of the Second Special Judge of Akyab, dated 10th June 1949 passed in Criminal Special Trial No. 12 of 1949.

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Evidence given by an accused person under s. 342 (*1*) (*b*) of the Criminal Procedure Code can be used against him.

Nazi Ahmed v. *Emperor*, 63 I.A. 372 ; *The King* v. San Min, (1939) Ran. 97, relied on.

The words 'shall be liable to confiscation,' when used in connection with contraband, mean that the contraband is to be compulsorily confiscated.

The Union of Burma v. *Maung Chit Swe*, Cr. Rev. No. 17-A of 1950 ; *Durga Das Khanna* v. *Emperor*, A.I.R. (1944) Lah. 33 at 42 ; *Bo Yan Naing*'s Case, Cr. Misc. Application No. 426 of 1946 of Supreme Court ; *Motichand Balubhai* v. *District Magistrate, Surat*, A.I.R. (1945) Bom. 385 ; Re. *Chinnayan Rowther* (a) *Sahul Hamid*, (1945) I.L.R. Mad. 76 ; *Bhutnath Choudhury* v. *Emperor*, I.L.R. (1948) Cal. 289 ; *M. Gokuldas* v. *Emperor*, 51 Bom. L.R. 158 referred to.

Tun Sein for the applicant.

Choon Foung (Government Advocate) for the respondent.

U ON PE, J.—The applicant Daw E Sein was convicted by the Second Special Judge, Akyab, for having contravened the order contained in Notification No. 92, dated the 23rd September, 1947, published in the *Burma Gazette* of the 27th September, 1947, which is an offence punishable under section 8, subsection (1) of the Essential Supplies and Services Act, 1947, and sentenced to a fine of Rs. 600 or in default to undergo 9 months' rigorous imprisonment with an order confiscating the exhibits 15 bars of Chinese gold which were found from her possession without a necessary permit issued by the Commerce and Supplies Department at the Akyab aerodrome. The gold ordered to be confiscated weighs 230 tolas, 6 annas, 1 ywe and is said to be worth Rs. 40,000.

This order was affirmed by the Sessions Judge, Arakan. She now files this application in revision to set aside the conviction and sentence on the grounds set out therein. Before I come to discuss these grounds, some of the facts leading to the prosecution which have

been set out in *extenso* in the judgments of the lower Courts may be narrated. The case for the prosecution is that the applicant on the 29th May, 1948, brought to the Akyab aerodrome exhibit gold bars by air from Rangoon without the necessary permit. At the aerodrome Daw E Sein was asked by Custom authorities to declare whether she had anything which was contraband to which she replied that she had no contraband except her personal belongings. After the said belongings were checked her baggage was passed. All the while, there was lying in a truck, which was then at the parking area, a bag, which U Hla Sein, the Manager of the Burma Trading Corporation, which chartered the plane carrying Daw E Sein, brought from the plane and handed over to the driver of the truck. The driver first tried to place the bag under the seat near his seat but as the cover of the seat did not fit squarely he took out the bag and placed it in the compartment under the seat of the body of the truck. All this was seen by U San Gyaw U, Inspector of Police (Special Branch), who received information that a woman would be bringing gold from Rangoon and who was watching the arrival of the plane from Rangoon at the aerodrome. U San Gyaw U pointed out the place where the bag was and it was taken out from under the seat in the body of the truck by Mr. Rosaria, a Customs Officer who found from the bag the following articles :—

"A pair of gum-boots for children ; some child's hats, a Htami and gold wrapped in that Htami."

It may be mentioned that U Hla Sein is no other than a son of the applicant Daw E Sein's sister and he figured earlier in the case as a co-accused but the case against him was withdrawn, for which the

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learned Sessions Judge had passed adverse remarks against those responsible for the improper action taken in withdrawing the case against U Hla Sein. The remarks, I must say, were deservedly made and are well in accord with the principle laid down in the case of *The Union of Burma* v. *Maung Chit Shwe* (1).

The applicant's case is that she had been carrying on this trade of buying gold and selling it in Arakan after making the same into jewellery and that she was not aware of the latest order of the Governor, prohibiting movement of gold from Rangoon to any place in Arakan. The lower Courts, after giving cogent reasons, which I have no hesitation to accept, rejected her story. Thus, there are concurrent findings on facts and unless those findings are radically wrong resulting in miscarriage of justice, it will not be proper for this Court to consider those questions of facts again. At the outset, I might mention that the learned Counsel for the applicant has submitted that if the offence committed is found proved, it is a mere technical one and that the question of sentence should be reconsidered by this Court. This view of the case, as submitted by the learned Counsel, must be said to be a right view in the face of the concurrent findings of fact.

The grounds set out in the application centre round Notification No. 92 and section 3 of the Essential Supplies and Services Act. Notification No. 92 is marked as Exhibit A and may be reproduced as follows :

" In exercise of the powers conferred by section 3 (*1*) of the Essential Supplies and Services Act (Burma Act XLVII) of 1947 and all other powers thereunto enabling, the Governor is pleased to prohibit, subject to the following exceptions, the movement of gold, silver and quinine from Rangoon by sea or air to any port

(1) Criminal Revision No. 17 (a) of 1950 of this Court.

or place within the Arakan Division except on a permit issued by the Commerce and Supply Department :—

"Exceptions :

(1) Gold and silver jewellery and ornaments for personal use in quantities which the Collector of Customs deems to be reasonable according to status of the person ;

(2) quinine for personal use ; and

(3) current silver coins limited up to Rs. 50."

The learned Counsel for the applicant has taken great pains to place before the Court several aspects of the case which may be more conveniently reproduced in the form of issues as suggested by him.

(1) Whether the Governor's order in Notification No. 92 of 1947 is *ultra vires* of section 3 of the Essential Supplies and Services Act, 1947, and as such invalid and without jurisdiction

(2) Whether subjective or objective interpretation should be applied to the order of the Governor in Notification No. 92 of 1947 as to whether it must be deemed to have appeared to the Governor to be so expedient ?

(3) Whether the conviction is illegal in the absence of proof of *mens rea* in such cases, *i.e.*, under Essential Supplies and Services Act, 1947 ?

(4) Whether the expression "shall be liable to confiscation" means that the Court has no alternative but to compulsorily confiscate the Exhibit gold, because this provision occurs in a separate sub-section of section 8 of the Essential Supplies and Services Act, 1947 ?

(5) Whether the ignorance of the order of the Governor, is not sufficient ground to release the accused under section 562 (1) of the Criminal Procedure Code ?

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(6) Whether the admission of the accused, while giving evidence under the latest amendment of the Code of Criminal Procedure has to be or not to be taken as a whole ?

The learned Counsel for the applicant first took up the point that the order restricting movement of the gold in question is *ultra vires* of the Constitution, relying on sections 13 to 18 of the Constitution, but he has rightly not pressed this point. As regards the contention that the prosecution case has failed to prove *mens rea* in this case, I do not see any substance in it, as from the findings of the lower Courts it is clear that the contraband was found in circumstances which were not consistent with innocence. Nothing could be a better proof of a guilty mind than the manner the applicant declared to the Customs authorities as regards the gold in question which was evidently hidden. As regards the contention that the admission of the accused has either to be taken as a whole or not at all, it has been rightly rejected as she was giving evidence on oath under the amended section 342 of the Criminal Procedure Code and under sub-section (1)(*b*) such evidence could be used against her. See *Nazi Ahmed* v. *Emperor* (1) and *The King* v. *San Min* (2). As regards the contention based on ignorance of the order of the Governor, I cannot do better than quote the view held in *Debi Prasad* v. *Emperor* (3), though in connection with Rule 119 of the Defence of India Rules. There this observation has been made :

"It is not necessary for the prosecution to prove actual information, that is, actual communication, to the alleged offenders. Once publication had been made the persons affected

(1) 63 I. A. 372. (2) (1939) R.L.R. 97.
(3) A.I.R. (1947) All. 191.

by the order are to be deemed to have been informed and when a person is deemed to have been informed, it is not open to him to show that he was not actually informed."

Apart from this the way the gold was wrapped in the Htamein clearly indicates that she was contravening the provisions of the order in question.

Now, we come to the most important of the contentions raised in the case that Notification No. 92 in question is *ultra vires* on the ground that it is contrary to and in violation of the law laid down in section 3 of the Essential Supplies and Services Act. It has been urged that the order does not contain any express finding and recital such as "it appears to the Governor for maintaining supplies and services essential to the life of the country and therefore movement of gold from Rangoon to Arakan is prohibited." It has been held in *Emperor* v. *Mohamed Kassam Panwall* (1) that "one has to take the language as one finds it, although, of course, one has to look at the Act as a whole and construe it so as to give effect to what appears from the language of the whole Act to be the intention of the legislature." The order, as it stands, does not need any amplification for the purpose for which it is made and, in my view, there is no substance in this contention. The next ground urged is that gold has not been declared as being essential to the life of the community either in the said Notification No. 92 or in a separate notification. There is no force in this contention for it does not appear to require a declaration to be made for the purpose of restricting its movement. The last ground to be met is that it is not shown that restricting movement of gold in the particular manner appears *personally* to the Governor to be so expedient. It must

(1) I.L.R. (1942) Bom. 107.

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be said that argument on this point will widen the discussion by considerations not necessarily involved in the decision of the point in controversy and I do not think it is necessary to interpret the Act and the rule more than it is necessary to gather the real intention of the policy of the Act from which has sprung the particular rule in question. After all, what is of importance is that the Act must not fail to lay down the principle or policy and the rules are merely procedural provision by which the intention of the substantive provision of the Act is carried out. Various cases have been cited showing instances where rules have exceeded the limits imposed by the Act and instances where rules made are beyond the power of rule making authority, in which decisions have been made that those rules cannot have the force of law. The order in question as contained in Notification No. 92 in my view cannot be said to fall into either of the categories. It is an order the accuracy of which must be presumed, as, under section 114 of the Evidence Act, official Acts must be presumed to have been regularly performed. It has been strenuously argued that, there being nothing to show that the Governor has satisfied himself personally the notification is *ultra vires*. On this point the reasoning of Harries C.J., in *Harkishan Das on behalf of Durga Das Khanna* v. *Emperor* (1) may, with approval, be followed in interpreting the *Governor's satisfaction* :

"It may be argued that where it is recited as a fact that the Governor is satisfied, it must mean that the Governor was personally satisfied and that a distinction must be drawn between the use of the word 'Governor' in the recital and the use of that word in the ordering portions of the orders. If I were satisfied that these orders were drafted with the exactitude and precision practised by equity draftsmen, I might accede to this argument ;

(1) A.I.R. (1944) Lah. 33 at 42.

but experience has shown us that such accurate drafting cannot be expected in such orders of the executive authority. That being so, I am not prepared to presume that the phrase 'the Governor of the Punjab is satisfied' means that the Governor satisfied himself personally."

This shows that it is possible that the matter contained in the order is within the scope of ministerial responsibility as in the case of many executive measures. See *Debi Prasad* v. *Emperor* (1). In this view of the case, the Governor's personal satisfaction need not be determined to test the validity of the order, unlike the cases in which liberty of a subject is involved. In my opinion, the question as to whether subjective or objective test is to be applied to determine the Governor's *personal satisfaction* does not arise in this case as regularity attaches to the order in question. Cases have been cited where, because the Governor's *personal satisfaction* is not proved, the orders made are held to be without authority. These orders relate to liberty of subjects and it is an established principle that when liberty of subject is involved the law will jealously guard it and allow every legitimate point to be placed before the court. *Bo Yan Naing*'s case (2) is a case in point. There Their Lordships of the Supreme Court have made the following observation for applying the objective test to determine whether the Commissioner of Police "is satisfied" or not of the necessity to act :—

"A few words in explanation of the test we have just propounded. The notion of reasonableness must be presumed in the exercise of such grave powers as interference with the fundamental right of personal liberty which the Constitution has assured to each citizen. If authority for what appears to be an obvious

(1) A.I.R. (1947) All. 191.

(2) Criminal Misc. Application No. 426 of 1949 of the Supreme Court of the Union of Burma.

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proposition is needed, we have the authority of Lord Wright in *Liversidge*'s case (1), strongly leaned upon by the learned Attorney-General."

Bo Yan Naing's case and other cases where liberty of a subject is involved are distinguishable, in the matter of applying subjective or objective test regarding Governor's *satisfaction*, from this case where liberty of the subject is not in issue. The learned Counsel for the applicant cited the case of *Motichand Balubhai* v. *District Magistrate, Surat* (2) to show that even in the matter of evicting a tenant the District Magistrate, when acting under Rule 81(2) (*bb*) (ii) of the Defence of India Rules, has to be satisfied, that it is necessary or expedient to make the kind of the order that he contemplates "for securing the defence of British India or the efficient prosecution of the war, or for maintaining the supplies and services essential to the life of the community". In that case when the order was sought by the tenant from the District Magistrate alleging that his landlord was seeking to evict him without any proper ground, the landlord had already instituted a suit in the Court of First Class Subordinate Judge of Surat for arrears of rent and for possession. So when the District Magistrate took action under the Defence of India Rules he was dealing with a matter within ordinary jurisdiction of the civil Courts and his order, therefore, was held to be *ultra vires*. The circumstances there are different from those in this case and the two cases are therefore distinguishable. In the result, I hold that the order contained in Notification No. 92 is not *ultra vires* of the Essential Supplies and Services Act.

Now, I come to the question of sentence. It has been urged that if this Court is not prepared to see eye-

(1) (1942) A.C. 206. (2) A.I.R. (1945) (Bom), 385.

to eye with the contentions raised in many of the grounds urged, the offence is at the most a technical one and that the fine of Rs. 600 imposed will be a sufficient punishment and that the gold confiscated should be restored to the applicant. The question is whether I should disturb the sentence passed as regards the confiscation of the exhibit gold bars. Section 8 (*1*) of the Essential Supplies and Services Act, 1947, lays down that "the contraband under the Act shall be liable to confiscation besides imprisonment or fine". It is contended that the words "shall be liable to confiscation" do not convey the same meaning as "shall be confiscated". I cannot accept this view. When the words "shall be liable to confiscation" are used in connection with a contraband, they always convey one meaning and that is, the contraband is to be compulsorily confiscated. This is a logical interpretation and is justified whenever the disposal of a contraband is under consideration. I have been quoted a passage from the judgment of one of the Judges of this late High Court to this effect:

> "The Court should not allow litigants to take advantage of legal technicalities and commit what is practically robbery by process of law."

That dictum is one which would be wise guidance when a Court is faced with two litigants one of whom is trying to acquire a share which is more than his due but I do not see how this would help the Court in dealing with one who has been tried for an offence. Next, it is urged that the Court should administer justice with a broad view, and that the fact of the applicant being a first offender coupled with the fact of the possibility of her being unaware of the notification in question should be taken into account in mitigation of the sentence particularly relating to

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the return of the gold bars. On the other hand, the growth of a class of people who are not afraid to dodge the restrictive measures as a short-cut to make money has to be discouraged and this explains heavy penalty measures that legislature has found necessary to adopt. As regards the plea on the ground of one being a first offender, I do not think this plea is justified, for one will never be even a first offender in these cases as long as one is not detected. It is unfortunate that the exhibit gold bars are of some considerable value but the principle a Court should follow should not be variegated by the value of the contrabands seized. If the contrabands were opium, the question of restoration would never have been raised. In my view, the contraband in this case should be subject to similar treatment as other smuggled goods (rice moved out without a permit, for instance, is so described in *Re Chinnayan Rowther* (*a*) *Sahul Hamid* (1) and the Court should not be influenced by its value. *See* also *Bhutnath Choudhury* v. *Emperor* (2) and *M. Gokuldas* v. *Emperor* (3). The result is that this application in revision fails and must be dismissed. The stay order in respect of the gold bars will be dissolved and the fine, if not paid, will be realised.

(1) (1945) I.L.R Mad. 76. (2) (1948) Cal. 289.
(3) 51 Bom. L.R. 158.

APPELLATE CIVIL.

Before U Aung Tha Gyaw and U Thaung Sein, JJ.

S. NADESAN PILLAY AND ONE (APPELLANTS)
v.
JOHN HUIE (RESPONDENT).*

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Aug. 25.

Temporary injunctions—Granting of injunction ex parte—*Principles governing—Deviation from ordinary course—Irremediable injury to be made out.*

Three suits were filed in the City Civil Court by the Respondent, John Huie, against the two appellants, S. Nadesan Pillay and K. M. Chidambaram Chettyar and three others, who are Foreigners living in Madras for declaration of title to four Tamil Talkie Pictures, for their possession and for injunction restraining the appellants from exhibiting the said Pictures either in Rangoon or anywhere in the Union of Burma. Together with the institution of suits applications for issue of *ad interim* injunctions were filed and the application in each of the three suits was granted *ex parte* as prayed.

Held : That sufficient materials must be before the Court to justify the grant of *ad interim* injunction *ex parte*.

Such materials as would justify the Court in granting an *ad interim* injunction *ex parte* are (1) the alleged existence of a *bona fide* dispute as to title to a property, (2) that such property in dispute is in danger of being wasted, damaged, or alienated by any party in the suit, (3) that such danger or such threat of danger should be immediate, and (4) that any consequent injury likely to be occasioned to the parties disputing the title would be irreparable and not capable of being compensated by damages.

V. S. Venkatram and *Sein Tun* for the appellants.

Kyaw Myint and *Myint Toon* for the respondent.

The judgment of the Court was delivered by

U AUNG THA GYAW, J.—These are three appeals from the orders of the Chief Judge of the City Civil Court directing issue of *ad interim* injunctions

* Civil Misc. Appeals Nos. 13, 18 and 19 of 1950, against the order of the Chief Judge, City Civil Court, Rangoon in Civil Regular Nos. 451, 545 and 628 of 1950, dated 20th April 1950, 12th May 1950 and 2nd June 1950 respectively.

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against the appellants restraining them from exhibiting four Tamil Talkie Pictures, namely, Mohini, Velaikkari, Abimanyu and Kanjan, alleged to have been released by Messrs. Jupiter Pictures Circuit, Madras and received by the appellants at Rangoon between the 2nd April and 19th May 1950. The suits during the pendency of which the said *ad interim* orders of injunction were applied for and issued, were for declaration of title to the said pictures, for their possession and for injunction, and they have been brought against the two appellants and three others who are foreigners living in Madras. In view of this latter fact the order of *ad interim* injunction applied for and issued *ex parte* on the 20th April, 1950 in respect of the film Mohini was couched in the following term :—

" I am satisfied from the affidavit that a temporary injunction should be issued at once. Issue temporary injunction on the 4th and 5th respondents who are in Burma. Also issue notices on them to show cause why the injunction should not continue. Injunction need not be issued on the other respondents as they are not residing within the jurisdiction of this Court, but notices may be issued on them as usual. "

and the 5th of June was fixed as the date on which the notices issued to those living in India were to be returned. The orders passed in respect of the remaining films make no reference whatever to any supporting affidavit and the 1st defendent has also been included within the scope of the injunction so ordered.

The justice and propriety of the orders passed in the terms above set out have now been called in question in these appeals. While it is admitted that the principles governing the exercise of judicial discretion in the matter of granting *ad interim* injunctions are well established, it has been disputed on the appellants' behalf that the facts set out both in the

plaints and the affidavits made in support of the respondent's applications for injunction do not afford sufficient and reasonable grounds for the grant of this extraordinary relief by the Court.

As between the appellants and the respondent no allegation of any existence and breach of contact has been alleged in the plaints and in the affidavits filed along with them. Nor have any particulars been given of the manner in which the first three defendants had conspired to commit the alleged fraud against the respondent. No serious allegations have been made against the 4th and the 5th defendants who received the films in Rangoon on hire from the 3rd defendant. What particular injury was likely to be caused to the respondent by the two appellants' conduct in Rangoon in respect of the four films now in their possession has not also been declared and assessed to justify the application of the law contained in Order 39, Rule (1) or (2) of the Civil Procedure Code. Allegations of fraud and collusion have only been made against the first three defendants in the suit, who, however, are permanently residing in Madras. In this state of the pleadings, it is urged that there are no sufficient materials before the Court to justify the grant of *ad interim* injunctions without first hearing the objections raised on the appellants' behalf.

Such materials as would justify the Court in granting an *ad interim* injunction are (1) the alleged existence of a *bona fide* dispute as to title to a property, (2) that such property in dispute is in danger of being wasted, damaged or alienated by any party in the suit, (3) that such danger or such threat of danger should be immediate, and (4) that any consequent injury likely to be occasioned to the parties disputing the title would be irreparable and not capable of being compensated by damages.

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Besides these, there may also be other factors concerning the actual or threatened violation of a right, which, considered in the light of the special circumstances obtaining in a particular case, would justify the grant of this form of preventive relief.

In the cases before us the orders of *ad interim* injunction were made *ex parte* notices being directed to be issued to the opposite parties to show cause against the same some six or seven weeks after they were made. The learned Counsel for the appellants has thus rightly pointed out that under the particular terms in which the orders in question were passed undue hardship was occasioned to the appellants for the reason that, by attempting to serve notices on those parties who were living in a foreign country and could not, therefore, be affected by the Court's orders, a prompt opportunity was denied to the appellants to present their side of the case to the Court. The 4th and the 5th defendants are living in Rangoon and they were the parties who were immediately affected by the orders passed *ex parte* by the Court, and no cause for complaint could have arisen had they been permitted to show cause against the Court's *ex parte* orders within a reasonable time.

Although the power of the Court to issue such an *ex parte* order is not in doubt, the law enjoins the exercise of the greatest care in the use of this power. See *Hari Pandurang and another* v. *Secretary of State for India* (1) "Such an injunction on the application of one party, and without previously giving to the person to be affected by it the opportunity of contesting the propriety of its issuing, is a deviation from the ordinary course of justice, which nothing, but the existence of some

(1) (1903) I.L.R. 27 Bom. 424 at 451.

imminent danger to property if it be not so granted, can justify. A case, therefore, of irremediable mischief impending must the made out." *See* Woodroffe on Injunction, Fifth Edition, at page 135.

Reverting to the facts of the case to see whether the principles of law set out above can support the orders now complained against, it is noticed that in the possession of the two appellants there have remained now for four months four Tamil Talkie Pictures awaiting their exhibition in Rangoon and other parts of Burma. The appellants obtained them under a contract of hire entered into with some party or parties living in Madras. The plaintiff-respondent, also a film exhibitor in Rangoon, lays claim to these four pictures as having been hired to him by one of the aforesaid parties living in India. Admitting that the plaintiff-respondent has a claim of title to these films and that in the event of his success to the claim so made the value of the said films would be appreciably diminished if an injunction be not granted forthwith, the question still remains as to whether the injury likely to be occasioned to the respondent by the preview of these films in the appellants' picture house and for their benefit, could at all be estimated in terms of money compensation. Having regard to the control of this cinema business by the revenue authorities for purposes of taxation, an answer to this question must be found in the affirmative, and clearly therefore the injury likely to be occasioned to the respondent cannot be considered to be irreparable.

This being the case, it is difficult to concede that the *ex parte* orders of injunction can be further supported on the possible ground of injury to the prestige of the respondent in his particular trade.

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These appeals will accordingly be accepted and the *ex parte* orders of injunction passed in the three cases will be set aside ; Advocate's fee five gold mohurs in each case.

APPELLATE CIVIL.

Before U Aung Tha Gyaw, J.

N. B. SEN GUPTA (APPELLANT)

v.

U JONE BIN (RESPONDENT).*

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Sept. 19.

Landlord and tenant—Landlord removing roof—Rights and liabilities of parties— Non-roofing by Landlord breach of duty—Derogation from grant—Transfer of Property Act, s. 108 (f).

Appellant occupied a portion of a house belonging to the Respondent on payment of a *Salami* and a monthly rent. The agreement provided that no repairs or alterations should be made to the house by the tenant without the consent of the Respondent. The Respondent was directed by the Bassein Municipality to remove the *Dhani* and bamboo roofings from his house. In compliance with the order the Respondent removed the *Dhani* and bamboo roofings and put in corrugated iron sheets on one portion of the house but not on the portion occupied by the Appellant. Respondent undertook to re-roof the portion of the house occupied by the Appellant provided the Appellant vacated the premises and surrendered the lease. The Appellant refused to do so and instead re-roofed the house and claimed the cost from the Respondent In a Cross-Suit the Respondent sued for ejectment of the Appellant and recovery of arrears of rent due. Both suits were dismissed on appeal to the District Court. Appellant alone appealed.

Held : It is elementary that for a tenant to enjoy a property of the nature let out to the Appellant in this case some kind of a roof is an absolute necessity. As the Appellant was in any circumstance entitled to a roof of some sort in his part of the building, the failure of the Respondent to put up one in conformity with the Building Bye-laws of the Municipality was a clear breach of his legal duty which he owed to his tenant.

A grantor having given a thing with one hand is not to take away the means of enjoying it with the other.

Birmingham, Dudley and District Banking Co. v. *Ross*, 38 Ch. D. 295, 313 ; *Harmer* v. *Humbil (Nigeria) Tin Areas, Ltd.*, 1 Ch. D. 200 at 226, relied on.

Bijoi Chandra Singh v. *Howrah Amta Light Rly. Co. Ltd.*, A.I.R. (1923) Cal. 524, referred to.

P. K. Basu for the appellant.

Dr. Ba Han for the respondent.

* Civil 2nd Appeal No. 4 of 1950, against the decree of the District Court of Bassein passed in Civil Appeal No. 12 and No. 14 of 1949, dated, the 15th November 1949.

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U AUNG THA GYAW, J.—The appellant in this case occupies the southern half of a tenement-building known as No. 50, Strand Road, Bassein, of which he became a tenant on the 1st August 1944 under a written agreement. This agreement sets out the initial payment of a *salami* of Rs. 1,500, the agreed monthly rental of Rs. 90 and the undertaking given by the appellant not to make fresh repairs and alterations to the premises without the consent of the owner of the building.

Nearly two years later, on the 1st February 1946, some time after the British reoccupation of Bassein, the Deputy Commissioner of Bassein, served a notice upon the respondent Mr. Jone Bin requiring him "to dismantle his building constructed of inflammable materials" and to reconstruct the same in accordance with Municipal Building Bye-laws. On the 20th February 1946, apparently in answer to an application made by Mr. Jone Bin for retention of his building, the Deputy Commissioner informed him that the bamboo and *Dhani* portions of his building must be removed and that suitable substitutes and alterations be made in their places.

Evidently in compliance with the orders of the Municipal authorities conveyed to him in these letters, the respondent caused the dismantling of the *Dhani* and bamboo roofings on both the southern and the northern halves of this building. Thereafter he replaced the roofing on the northern half by corrugated iron sheets, but took no steps whatsoever to make any similar repairs to the southern portion of the building occupied by the appellant. The appellant called upon the respondent to carry out the repairs on his half portion of the building but was repeatedly informed that to enable the repairs to be carried out he must vacate the premises and surrender the lease. This alternative,

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U AUNG THA GYAW, J.

the appellant refused to carry out and on the respondent's failure to make the necessary repairs to the roof, the appellant himself re-roofed his portion of the building and claimed the cost of repairs so undertaken by him from the respondent.

The differences which arose between the parties in this manner resulted in the two cross-suits brought before the Assistant Judge, Bassein ; the respondent sued for ejectment of the appellant on the ground that he failed to pay the monthly rent due under the terms of the tenancy bond executed by him and that he had also committed a breach of one of the terms which provided that he could not undertake any repairs to the building without the consent of the owner ; the appellant, on the other hand, sued the respondent for payment of the cost of repairs to the building undertaken by him and also for an ascertained sum of damages caused to his shop goods by the respondent's failure to replace the roofing which he removed under the orders of the Municipal authorities.

The learned Assistant Judge granted a decree for ejectment which on appeal was set aside. As regards the cross-claim for cost of repairs and damages, he granted a decree for Rs. 290 after adjusting the rent payable by the appellant to the respondent. On appeal to the District Court the appellant's suit was wholly dismissed.

It has now been contended in this appeal that the monthly tenancy taken by the appellant was in respect of a habitable room in the southern half of building No. 50, Strand Road, Bassein ; that it was the duty of the landlord, as the owner of the room, to keep it in such condition as would ensure quiet enjoyment and that no damage was caused to the tenant, that the removal of the roof amounted to an interruption of such enjoyment and had in fact exposed the goods belonging

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to the tenant to the damaging effect of the sun and rain and that the landlord had committed a breach of this covenant of quiet enjoyment by his failure to take reasonable care to prevent such damage.

Reliance for the appellant is placed upon section 108 (*c*) of the Transfer of Property Act. It is claimed that the failure of the lessor (the respondent) to carry out the repairs to the roof constituted what is known in law as derogation from his grant. It is claimed that the lessor having removed the roofing and failed to replace the same, is liable, in damages for the loss occasioned to the tenant, as such conduct amounted to an interference with the latter's use and enjoyment of the premises let out to him.

In the circumstances shown in this case, it is claimed that the landlord was under a legal duty to effect immediate repairs to the roof and that his failure to do so entitled the tenant to do the repairs himself and claim the cost from the landlord. Section 108 (*f*) of the Transfer of Property Act has been relied on in support of this contention.

For the respondent it has been put forward that the property at the time the appellant entered into occupation was a bomb-blasted half of the house, that at the time he did so, he gave an undertaking that he would not carry out any repairs to the property without the consent of the owner, that any subsequent repairs which the appellant undertook was contrary to the wishes of the respondent and against the orders of the Municipal authorities and that, in consequence, the appellant was not entitled to make any claim for the cost incurred by him on his (respondent's) account. It is contended on behalf of the respondent that, in the absence of a contract, the lessor is not bound to keep the property in proper repair and that the appellant having carried out the repairs without the consent of

the owner, contrary to the terms of his written undertaking, has no claim either for the cost of repairs or for any damage which he might have sustained as a result of his own wrong.

To be able to appreciate the legal position of the parties and the points involved in the dispute, it is necessary to recount briefly the broad facts of the case, as can be gathered from the evidence on the record so far as they appear relevant to the consideration of the points in issue between the parties. It appears from the evidence of the respondent Mr. Jone Bin that he let out the southern half of the building known as No. 50, Strand Road, Bassein, to the appellant for a monthly rental of Rs. 90 under a written document filed in the trial Court as Exhibit A ; that this building was partially destroyed by bombing during the war ; that for the occupation of the southern half of the building the appellant had to pay a *Salami* of Rs. 1,500 ; that the same portion of the building let out to the appellant was previously let out to a Chinaman, who had occupied it before the building was bombed on a monthly rental of Rs. 60 *plus* Municipal taxes ; and that this previous tenant was also permitted to make some repairs to the house for his residence after the premises were damaged and the *Dhani* roofing to the room was made by that Chinese tenant.

Maung Mu (DW 1) also occupied one of the rooms of the same building and at the time he entered into occupation there was a *Dhani* roof. The witness left the premises about a month after the reoccupation of the British which took place early in 1945 and the premises vacated by him was occupied by the present Chinese tenant.

Maung Htwa (PW 3), the man who wrote the document, Exhibit A, also found a *Dhani* roofing of some sort on both halves of the building known as No. 50,

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Strand Road, Bassein, and the habitable nature of the portion of the premises let out to the appellant is clear from the fact that the appellant had to pay a *Salami* of Rs.1,500 to the respondent before he was permitted to take on the monthly tenancy of the same. The allegation that the appellant entered into a bomb-blasted building without any roof at all in order to live there and carry on his business can hardly be a correct version of the facts. If the premises were not habitable and had no roof at the time the appellant entered into occupation, it is difficult to understand why he should agree to put in the clause in the agreement Exhibit A, that he would make no further repairs and alterations to the property without the consent of the owner.

Starting, then, from this proved fact that a habitable portion of the building was let out to the appellant by the respondent in August 1944, there next comes the stage which opens after the reoccupation of the Bassein Town by the Britsh authorities in 1945. In February 1946, the respondent was told to dismantle and remove the inflammable bamboo and *Dhani* roofing of his building and to reconstruct the same in accordance with Municipal Building Bye-laws. On the representation made by the respondent, the terms of this notice were modified to the extent of requiring him to make suitable alterations to his building after removing the *Dhani* and bamboo structures which the Municipal authorities considered too dangerous to the security of other valuable properties situated in the immediate neighbourhood. Thus accommodated, the respondent removed the whole roofing of the building and replaced the roofing on the northern half of the building by corrugated iron sheets but did not make any similar repairs to the half of the building occupied by the appellant, and in consequence, on the 2nd May 1946, the appellant having failed to induce the respondent to

replace the roofing on his half of the building, applied to the Municipal authorities for permission to undertake the necessary repairs himself as the rainy season was approaching and pointing out that the properties lying in his house might suffer damage if repairs were not undertaken in time. The Municipal authorities, however, did not feel that they could allow the appellant to carry out the repairs without the consent of the owner, and accordingly informed the appellant of their views in the matter. The appellant, considering that the matter could brook no further delay, took the affairs into his own hands and made the necessary repairs himself and incurred the expenditure set out by him in his statement of claim.

The question now is to consider whether in the circumstances set out above, rights and liabilities of the parties have arisen in the manner sought to be made out by the appellant on the one hand and denied by the respondent on the other. There is no doubt that the appellant obtained a lease of half of the building with some sort of a roof built partly by himself and partly by a previous tenant. Owing, perhaps, either to the non-existence of the Municipal authorities or to the non-enforcement of the Municipal Building Bye-laws during the priod of the Japanese occupation, the *Dhani* roofing put up in the building was not objected to and it was in this condition that the appellant was permitted to enter into occupation of his half of the building. It is elementary that for a tenant to enjoy a property of the nature let out to the appellant in this case some kind of a roof is an absolute necessity. The roof which was built on the building was of bamboo and *Dhani* and it was against the Building Bye-laws of the Bassein Municipality that such materials should have been used in the area in which the building in suit was. It was the duty of the owner of the building to conform to

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the Municipal Bye-laws when putting up any repairs to his premises. When the Municipal authorities, after the reoccupation, informed the respondent that he must dismantle the bamboo and *Dhani* structure from the building, he was merely told what his legal duty was in respect of his property in the particular area in which it happened to be situated. That the *Dhani* roofing was dismantled under the orders of the Municipal authorities, is not a justifiable cause for denying the appellant a new roof in place of the old one so removed. As the appellant was in any circumstance entitled to a roof of some sort in his part of the building, the failure of the respondent to put up one in conformity with the Building Bye-laws of the Municipality was a clear breach of his legal duty which he owed to his tenant.

A *Salami* of Rs. 1,500 in 1944 might be of little value but still it seems unthinkable that the appellant should have taken the premises under the terms set out in the agreement unless the same was habitable and could reasonably serve the dual purposes of his shelter from rain and sun and the carrying on of his particular trade. Now, to permit the appellant to occupy half of the building and then deny him a roof would clearly amount to what is described as derogation from the lessor's grant. In the words of Bower L.J. " A granter having given a thing with one hand is not to take away the means of enjoying it with the other". [*Birmingham, Dudley and District Banking Co.* v. *Ross* (1) quoted by Younger L.J. in *Harmer* v. *Humbil (Nigeria) Tin Areas, Limited* (2).] In order to constitute a breach of covenant of quiet enjoyment in a lease of land, it is sufficient that the lessee's ordinary and lawful enjoyment of the demised land be-

(1) 38 Ch. D. 295, 313. (2) (1921) 1 Ch. D. 200 at 226.

substantially interfered with by the act of the lessor or those lawfully claiming under him, although neither the title to the land nor the possession of the land be otherwise affected. [*Sanderson* v. *The Mayor of Berwick upon Tweed—L.R., Q.B.Div. (13) 1883-84-547.*] This principle of law is thus well settled by authority and appears to have been clearly embodied in section 108 (*c*) of the Transfer of Property Act. There can therefore be no question that the respondent is liable in damages for any injury caused to the appellant by reason of his failure to provide a substitute in place of the *Dhani* roofing removed by him from the premises. As regards the quantum of damages allowed to the appellant by the trial Court, the lower appellate Court held the view that there was no proof of any such damage in consideration of the fact that the roofing was removed as early as the 13th of March 1946, at least three months before the rainy season started.

It was possible that the appellant had suffered personal inconvenience on account of the absence of a roof over his head but he had made no specific claim for damages on that score. The date of the removal of the roof cannot have an important bearing on the proof of damage sustained by the appellant. It is shown in the evidence that the appellant kept a grocery shop and if by reason of his inability to take adequate measures to protect his properties from rain and sun consequent upon the removal of the roof, he can hardly be blamed for permitting the damage to his properties to take place. It is not shown that he had any alternative place to store his goods during the rains and if, inspite of whatever steps he had taken to alleviate the loss and inconvenience resulting from the absence of the roof over his shop, any damage was caused to him, the responsibility therefore must rest with the respondent. But as remarked by the learned Judge of

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the lower appellate Court, the properties sold in his shop of which entries had been found in his account-book consisted largely of coal-tar, earth-oil, kerosene oil, etc., and it is difficult to come to any definite conclusion that any serious damage was caused to these properties by their exposure to rain and sun inside the appellant's shop. This being the case, I agree with the learned Judge of the lower appellate Court that the appellant was not entitled to any damages claimed on this account.

The next claim made on the appellant's behalf, and rejected by the lower appellate Court, is in respect of the expenses incurred by the appellant in putting up the roofing over his portion of the premises. The letter, Exhibit D, permitted the respondent to make suitable alterations or re-constructions to his building in place of the *Dhani* and bamboo structures which were considered inflammable materials, and the presence of which in the locality was considered to be a contravention of the Municipal Bye-laws. The letter of the 2nd May, 1946, addressed by the appellant to the Municipal authorities throws some light on what took place after the respondent was asked by the Municipal authorities to conform to the Municipal Bye-laws. The respondent appeared to have dismantled the *Dhani* roofing on both halves of the building and replaced the roof on that other half of the building not occupied by the appellant. The appellant complained that, by the respondent's failure to extend the repairs to the half of the building occupied by him, considerable damage was likely to be caused to his properties during the approaching rainy season and that the respondent had turned a deaf ear to the appellant's request to carry out the said repairs. Although the appellant expressed his desire to carry out the repairs himself, the Municipal authorities would not permit him to

do so in view of the antagonistic attitude adopted by the respondent to the proposal. These matters in disagreement between the parties were referred to in the appellant's letter, Exhibit 2, addressed to the respondent on the 16th November, 1946. The rains had passed but the appellant had not been provided with a roof. Accordingly, he gave notice that he would carry out the repairs himself. To this communication the respondent made reply drawing attention to the pendency of an ejectment suit brought against the appellant and to the clause in the written agreement prohibiting the appellant from making any repairs without the landlord's consent. Matters dragged on and during the following rains in 1947 the appellant carried out the repairs himself over which he appears to have spent, according to his letter, Exhibit 2, a sum of Rs. 1,365-11-0. This claim admitted by the trial Court as duly proved was rejected by the lower appellate Court. The receipts and vouchers Exhibits 18 to 65 would appear to support this claim. These items of expenditure have been copied and entered in his account book Exhibit 15. Though the entries may appear to be fresh and made for the purposes of this case, the receipts and vouchers coupled with the evidence of the persons who sold the materials and made the repairs would be sufficient proof of the fact that the expenditure was incurred as claimed.

Consequently, the only claim permissible in the circumstances would seem to be the one relating to this expenditure incurred by the appellant over the making of the repairs to the roofing. The lessee, under section 108(*f*) of the Transfer of Property Act, is entitled to remedy the breach of covenant in respect of the repairs himself after giving reasonable notice to the lessor and recover the amount expended by

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him together with interest. *Bijoi Chandra Singh* v. *Howrah Amta Light Railway Co. Ltd.* (1). It is pleaded on the respondent's behalf that the terms of the agreement do not provide that the respondent was to keep the property in proper repairs and that the lessor was not therefore bound to make the repairs. It is true that the agreement mentions that the tenant was not to make any new repairs or alterations without the landlord's consent but this term of the agreement cannot apply to the unforeseen circumstances of this case where in view of the action taken by the Municipal authorities to bring the condition of the building into conformity with the Building Bye-laws, the landlord was required to dismantle the roofing with which he originally provided the tenant in the beginning of the tenancy. Having complied with the lawful order of the local Municipal authority the respondent was in law bound, within the meaning of section 108 (*f*) of the Transfer of Property Act, to undertake the repairs necessary to bring the property back to that state which would restore to the lessee his original right of quiet enjoyment of the property let out to him.

Accordingly the appellant would appear to be entitled to be reimbursed the expenses he had incurred for making the repairs to the roof on his part of the building, *i.e.*, Rs. 1,365-11-0, but as he has in his plaint appropriated this sum towards the rent due by him, it does not appear that he is entitled to any monetary relief in this case. The appeal will in the result be dismissed but each party will bear his own costs in this and in the Courts below.

(1) A.I.R. (1923) Cal. 524.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice and U On Pe, J.

MOHAMED ABDUL KADER (APPELLANT)

v.

C. M. A. ISMAIL (RESPONDENT).*

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Nov. 15.

Code of Civil Procedure, s. 47, Order 21, Rule 2—An application for recording an adjustment of the decree.

Held: Where an application for execution has been filed and the judgment-debtor files an application to record an adjustment of the decree, the court is bound to hold an enquiry to find out as to whether the decree has been adjusted or not.

Chandi Charan Chakravarti v. *Panchanan Pandit*, (1930) I.L.R. Pat. Vol. 9, 521 ; *L. Madho Lal and one* v. *L. Duli Chand and one*, (1933), A.I.R. All. 429 at 431 ; *Maung Tin* v. *Ma Mi*, (1927) I.L.R. 5 Ran. 833 at 834, followed.

R. K. Roy for the appellant.

C. A. Soorma for the respondent.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—A consent decree was passed on the 23rd January, 1950 against the appellant judgment-debtor Mohamed Abdul Kader, who was the defendant in the suit known as Civil Regular No. 871 of 1949 of the City Civil Court, Rangoon, which was instituted by the respondent decree-holder C. M. A. Ismail. The effect of this consent decree was, *inter alia*, that the appellant judgment-debtor was to pay a sum of Rs. 400 on the 15th February, 1950 towards the arrears of rent due by him, that he was to pay Rs. 1,000 on the 1st March, 1950, and that the balance sum due by him, together with the costs of the suit, was to be paid by monthly instalments of Rs. 400,

*Civil Misc. Appeal No. 20 of 1950 against the order of the 2nd Judge, City Civil Court, Rangoon, in Civil Execution No. 205 of 1950, dated the 18th May 1950.

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beginning from 4th April, 1950 and that in case of default, the respondent decree-holder C. M. A. Ismail was to have liberty to execute the decree which had been passed in his favour.

Subsequently on the 7th March, 1950 the respondent decree-holder applied for the execution of the consent decree passed against the appellant judgment-debtor Mohamed Abdul Kader. His application for execution, which was known as Civil Execution No. 205 of 1950, was granted, and he was able to obtain possession of the premises for which Civil Regular No. 871 of 1949 was instituted. It is said that C. M. A. Ismail obtained possession of the premises in question on or about the 22nd March, 1950.

On or about the 28th March, 1950, that is after the Civil Execution Case No. 205 of 1950 had been concluded, the appellant judgment-debtor Mohamed Abdul Kader applied that he might be allowed to deposit the sum of Rs. 1,800 in Court in accordance with what the parties were alleged to have agreed to after the consent decree was passed. He also asked for the consent decree to be rescinded. Paragraph 2 of his application and the prayer contained therein read as follows :

" 2. That the petitioner being unable to pay up the 1st and 2nd instalments in term of the aforesaid order of the Court, approached the decree-holder through his agent for acceptance of the total arrears of Rs. 1,800 in a lump sum to be paid on the due date of 14th April 1950 in Court. The decree-holder agreed to such arrangement. Relying on the assurance of the decree-holder the petitioner did not approach this Hon'ble Court for extension of time.

* * * *

Wherefore, the petitioner prays that an enquiry be held as to the allegations in this petition and after due enquiry, the amount of Rs. 1,800 be allowed to be deposited and necessary order be passed for rescission of the decree."

C. M. A. Ismail, the respondent decree-holder, however denied that there was any agreement to adjust the consent decree, and he also contended that the application which Mohamed Abdul Kader filed on the 28th March, 1950 was not maintainable in law. The application of Mohamed Abdul Kader was dismissed with costs by the learned 2nd Judge, City Civil Court, Rangoon, on the 10th May, 1950, and according to the learned 2nd Judge, even if there had been an adjustment of the consent decree, as alleged by the appellant judgment-debtor, it would not have been of any avail to the latter in that the consent decree, which the respondent decree-holder obtained, had already been executed.

The application of the appellant judgment-debtor, dated the 28th March, 1950, it might be mentioned, did not indicate under what provisions of law it was purported to have been made. The effect of the prayer in that application appears, however to be clear, namely, that the appellant judgment-debtor was asking the Court to record the adjustment which, according to him, the parties had arrived at after the consent decree was passed ; otherwise, it is difficult to conceive how the appellant judgment-debtor could have asked the Court to rescind the consent decree and allow him to deposit the sum of Rs. 1,800 in Court. It seems to be obvious that the appellant judgment-debtor would be allowed to deposit the sum of Rs. 1,800 only after the adjustment, if any, had been recorded. It is the duty of the Court in such a case to examine the real nature and effect of the application, more especially as it does not specify the provisions of law under which it was purported to have been made. The application of the appellant judgment-debtor could thus be clearly and properly considered as an application to record the adjustment which was alleged to have been arrived at

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by the parties, as indicated in paragraph 2 of the application.

The head-note in *Chandi Charan Chakravarti* v. *Panchanan Pandit* (1), reads as follows :

" Where a judgment-debtor contests an application for execution on the ground of a payment which had been made less than 90 days previously, it is not only permissible but incumbent upon the court to treat the petition of objection as an application under Order 21, Rule 2 (2), Code of Civil Procedure, 1908, and, if the application succeeds, the bar imposed by sub-rule (3) will not come into operation."

It has, however, been urged on behalf of the respondent decree-holder that the appellant judgment-debtor could not in law be allowed to treat his application, dated the 28th March, 1950 as an application under the provisions of Order 21, Rule 2 (2) of the Court of Civil Procedure, after the execution proceedings had concluded and after the respondent decree-holder had obtained possession of the premises for which his suit in Civil Regular No. 871 of 1949 was instituted. It appears to us that an application to record an adjustment under Order 21 Rule 2 (2) of the Code of Civil Procedure can properly be considered to be a matter which falls within the provisions of section 47 of the Code of Civil Procedure in that a decision which is passed on such an application relates to the satisfaction or discharge of the decree. In *L. Madho Lal and one* v. *L. Duli Chand and one* (2), Mukerji J. observed :

" Section 47 is applicable in execution proceedings as much after an order has been passed declaring the decree satisfied as before an order has been made to that effect. Where a decree has been held to have been discharged and one of the parties comes to the Court on the ground that the order has been wrongly

(1) (1930) I.L.R. Pat. Series, Vol. 9, 521.
(2) (1933) A.I.R. All. 429, 431.

passed and should be reviewed or reconsidered, the case would fall under section 47, Civil Procedure Code. This is clear on the language of the section itself."

And we respectfully agree with the above observation. We are accordingly of opinion that an application under Order 21, Rule 2 (2) of the Civil Procedure Code can also be made, even if the decree has been executed, if it is made within the period allowed under the Limitation Act. The view which we now adopt is also consistent with the provisions of Article 174 of Schedule II to the Limitation Act, which allows a judgment-debtor 90 days within which he might apply under Order 21, Rule 2 (2) of the Civil Procedure Code for an adjustment to be recorded. We do not think it will be just or proper to whittle down the right given to a judgment-debtor under Article 174 unless there are clear provisions of law to justify such action.

Carr J., in *Maung Tin* v. *Ma Mi* (1) observed :

"If we read sub-rules (2) and (3) of Rule 2 independently of one another there is a conflict between them. A literal interpretation of sub-rule (3) would clearly have the effect of depriving the judgment-debtor of the right given to him by sub-rule (2). Obviously this cannot be allowed. So long as the judgment-debtor applies under sub-rule (2) within the time allowed for him to do so he has the right to have his application heard."

Carr J., we may with respect say, stated the law correctly. The appellant judgment-debtor Mohamed Abdul Kader could not therefore be said to have been precluded, in the circumstances of the present case, by reason of the provisions of Order 21, Rule 2, sub-rule (3), from asking the Court to have an enquiry instituted under the provisions of sub-rule (2) of Rule 2 of Order 21 of the Civil Procedure Code.

(1) (1927) I.L.R. 5 Ran. Series, 833 at 834.

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The order of the learned 2nd Judge, Rangoon City Civil Court, will accordingly be set aside with costs, so far as this appeal is concerned. The costs in the Rangoon City Civil Court will be decided by the learned Judge who will re-hear the matter in dispute after the records are returned to the Rangoon City Civil Court.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice and U On Pe, J.

A. C. AKHOON AND ONE (APPLICANTS)

v.

A. HABIB (RESPONDENT).*

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Nov. 20.

Union Judiciary Act, 1948, s. 5—Valuation for the purpose of appeal—Modification of the judgment of the Trial Court whether such modification can be called affirmance of the decision.

In a suit for recovery of Rs. 34,471 a decree for Rs. 32,271 was passed in the Trial Court and in appeal this sum was reduced to Rs. 19,771. The plaintiff applied for leave to appeal to the Supreme Court, and the question arose whether the judgment of the Trial Court was affirmed by the judgment of the Appellate Court.

Held : That this was not a case of affirming of a judgment within the meaning of s. 5 of the Union Judiciary Act.

Kumar Purnendu Nath Tagore and others v. *Sree Sree Radhakanta Jew*, (1949-50) 54 C.W.N. 538 at 539 ; *Abdur Samad Ansari and one* v. *Mt. Aisha Bibi and others*, A.I.R. (35) (1948) Oudh 76 at 77; *Nathu Lal* v. *Raghubir Singh and others*, (1932) 54 All. 146 at 149 ; *Raja Brajasundar Deb and others* v. *Raja Rajendra Narayan Bhanj Deo*, 28 A.I.R. (1941) Pat. 269 at 276 ; *Annapurnabai and one* v. *Rutrao*, 51 Cal. 969, followed.

M. M. Rafi for the applicants.

R. K. Roy for the respondent.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The suit which A. Habib, the respondent, instituted against the applicants A. C. Akhoon and Dawood on the Original Side was for the recovery of a sum of Rs. 34,471, which was said to have been due to him in respect of goods that were said to have been sold to the applicants. The decree was passed in favour of A. Habib for a sum of

* Civil Misc. Application No. 15 of 1950 being application under section 5 of the Union Judiciary Act, 1948 for leave to appeal to the Supreme Court against judgment and decree in Civil 1st Appeal No. 54 of 1949, dated 7th July 1950.

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Rs. 32,271 with cost. The applicants, against whom the decree was passed in Civil Regular No. 115 of 1948, appealed against it in Civil 1st Appeal No. 54 of 1949. The sum awarded to A. Habib on the Original Side was reduced to the sum of Rs 19,771 only. In other words, the amount which A. Habib obtained in his favour on the Original Side was reduced by a sum of Rs. 14,700. This is, therefore, a case where the value of the subject-matter in dispute in the court of first instance and on appeal was not less than Rs. 10,000. It is also a case where the subject-matter in dispute before the Supreme Court will also be not less than Rs. 10,000. It is accordingly a case which falls within clause (*b*) of section 5 of the Union Judiciary Act, 1948.

The question which falls for consideration is whether the decree passed on the Appellate Side of the High Court can be considered to be a decree which affirms the decision passed on the Original Side. The answer must, in our opinion, be in the negative.

There were until recently conflicting decisions in the courts in India in this matter. In *Kumar Purnendu Nath Tagore and others* v. *Sree Sree Radhakanta Jew* (1) the decree of the trial Court was varied by a decree of the appellate Court, and it was there observed as follows:

"Whether such a decree as exists in this case is a decree of affirmance has been the subject of much litigation. Undoubtedly, the earlier view of this Court was that it was a decree of affirmance, though in fact the actual decree had been varied. Other Courts have held a different view. However, the later practice of this Court is to treat a decree of this kind as a decree not of affirmance but a decree varying the decree of the trial Court. Sitting elsewhere I have followed this later practice of

(1) (1949-50) 54 C.W.N. 538 at 539.

this Court and we are of opinion that the decree in this case cannot be said to be a decree affirming the decree or decision of the Court below, and that being so the proposed appellants are entitled to appeal as of right."

In *Abdur Samad Ansari and one* v. *Mt. Aisha Bibi and others* (1) the question which was referred to the Full Bench was :

"Where the main appeal against the decision of the trial Court fails but the decision is partly modified on cross objection and there is no substantial question of law, does the appellate decree vary the decision of the trial Court as contemplated by section 110, Civil Procedure Code so as to entitle the appellant to go up to His Majesty in Council."

and it was observed as follows :

"Where an appeal is sought to be preferred against a decree which varies the decision of the Court immediately below whether the variance is brought about at the instance of the appellant or at the instance of the respondent it cannot be said that the appellate decree affirms the decision of the first Court. The section does not conceive of the decree as partly affirming and partly varying the original decision. The Legislature appears to have envisaged an appellate decree either as upholding that decision or as varying or modifytng it and if an appeal is permissible, it is against the decree as a whole and not against the finding or adjudications on the controversies involved in the suit."

Sulaiman A.C.J. observed in *Nathu Lal* v. *Raghubir Singh and others* (2) as follows :

"The language used in section 110 of the Code of Civil Procedure is simple and makes it clear that if the decree appealed from affirms the decision of the court below there would be no right of appeal unless a substantial question of law is involved. There is no reason why we should introduce new words in the section and say that the expression 'affirms the

(1) A.I.R. (35) (1948) Oudh 76 at 77. (2) (1932) 54 All 146 at 149.

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decision of the court below' necessarily means 'affirms the decision substantially' or means 'affirms the decision on grounds other than costs'. If the decree of the court below has been varied, no matter to what extent, the decree cannot be one of affirmance."

In *Raja Brajasundar Deb and others* v. *Raja Rajendra Narayan Bhanj Deo* (1) Harries C.J. also observed :

"In the present case the proposed appellants have to appeal against the decree as a whole, and they will have a right to do so if that decree as a whole does not affirm the decision of the Court below. The appeal is not confined to such part of the decree as affirms a part of the decision of the Court below but is preferred against the decree as a whole. Clearly the decree as a whole does not affirm the decision of the Court below taken as a whole, and that being so, the appellants, in my view, are entitled to appeal as of right without showing that a substantial question of law is involved. In my view this case is concluded by the decision in *Annapurnabai and other* v. *Ruprao* (2), as explained by the earlier decisions of this Court to which I have made reference."

It will perhaps also be convenient to refer to the case decided by the Privy Council in *Annapurnabai and one* v. *Ruprao* (2) where the value of the subject-matter of the suit exceeded Rs. 10,000 and the value of the proposed appeal was said to have exceeded Rs. 10,000. There the appellate Court did not affirm the decree of the trial Court and it was held that it was a case which came within the provisions of section 110 of the Code of Civil Procedure, which, in substance, are the same as section 5 of the Union Judiciary Act, 1948.

We are also unable to see any good reason why we ought not to follow the ordinary rule of interpretation and give to the words in section 5 of the Union Judiciary Act, 1948, a meaning which those words

(1) (28) A.I.R. (1941) Pat. 269 at 276. (2) 51 Cal. 969.

ordinarily bear. This is, therefore a case which, in our opinion, falls entirely within the provisions of clause (*b*) of section 5 of the Union Judiciary Act, 1948, and the necessary certificate will accordingly be issued. There will be no costs awarded in this application.

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A. C. AKHOON AND ONE v. A. HABIB.

U TUN BYU, C.J.

APPELLATE CIVIL

Before U Tun Byu, Chief Justice and U On Pe, J.

H.C. 1950

Nov. 28.

W. K. G. PILLAI (APPELLANT)

v.

BALTHAZAR & SONS, LTD. (RESPONDENTS).*

Urban Rent Control Act, ss. 10 and 17—Rangoon Municipal Act, s. 80.

Held: That where standard rent had been fixed and a tenant had paid to the landlord more than the standard rent he is entitled to deduct the excess paid within six months from the rent due.

Under s. 80 of the City of Rangoon Municipal Act taxes are payable not only for the house but also for the land and if the defendant erects a house on a land belonging to his landlord it will have to be ascertained what proportion of the Taxes are for the land and what portion for the building.

Myint Toon for the respondents.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—Messrs. Balthazar & Sons Ltd., the respondent, instituted a suit for the recovery of a sum of Rs. 600 as arrears of rent due for the vacant land in question which is situated at No. 123, Sule Pagoda Road, Rangoon, at the rate of Rs. 100 per month and it was said that the arrears were for the months of July to December 1949. The defendant-appellant, W. K. G. Pillai, appeared personally and filed a written statement wherein he claimed to be allowed to deduct what he alleged was the excess amount he had paid for the rent of the previous six months, namely, at Rs. 27 per month. The learned 2nd Judge before whom the matter came allowed the defendant-appellant a deduction of Rs. 5 per month for the excess amount he had paid in respect of the rent for the previous six months but dismissed his claim to deduct the sum of Rs. 22

* Civil 1st Appeal No. 55 of 1950 against the decree of the 2nd Judge, City Civil Court, Rangoon in Case No. 169 of 1950.

per month which the defendant-appellant paid towards taxes due to the Corporation. The defendant-appellant, who appeared in person, has argued his own case and his contention that he was not excluded from claiming the deduction by reason of the provisions of section 10 of the Urban Rent Control Act, 1948, must, in our opinion, be accepted. The relevant portion of section 10 reads as follows :

"It shall not be lawful for any person in consideration of the grant, renewal or continuance of a tenancy of any premises to require the payment of any fine, premium or any other sum in addition to the rent or to demand any advance in excess of one month's rent."

The words "any other sum in addition to the rent" ought, in our opinion, be given the wide meaning which they convey, and this is strengthened by the fact that the word "like" between the word "other" and the word "sum" in section 10 had been deleted subsequently by an Act passed in 1948 known as the Urban Rent Control (Amendment) Act, 1948. It is also a general rule of construction that a word appearing in a statute ought to be given its ordinary meaning in the absence of anything in the context to indicate to the contrary or in any other provisions of law which will indicate a contrary intention. We are unable to see anything in the Urban Rent Control Act, 1948, or in any other provisions of law by which we ought to give a more restrictive meaning to the expression 'any other sum' appearing in existing section 10 of the Urban Rent Control Act.

Section 17 (*1*) of the Urban Rent Control Act reads as follows :

"17 (*1*) Where any sum has after the commencement of this Act been paid on account of rent, being a sum which is by

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U TUN BYU, C.J.

reason of the provisions of this Act irrecoverable, such sum shall at any time within a period of six months after the date of payment be recoverable by the tenant by whom it was paid from the landlord who received the payment and may without prejudice to any other method of recovery be deducted by such tenant from any rent payable within six months by him to such landlord."

The contention of the defendant-appellant is that he is entitled to claim deduction for the excess amount he has paid under the last portion of sub-section (*1*) of section 17 of the Urban Rent Control Act. It seems to us to be clear that section 17 (*1*) allows a tenant to deduct from any rent payable by him, within six months of the excess payment made by him, and if this interpretation is correct, as it appears to us to be, it follows then, that the defendant-appellant can claim deduction for the excess payments which he made from the rent due by him in July, 1949, in so far as the excess payments made by him in February, March, April and May of that year were concerned although in doing so there would still be a small sum to be recovered by him in respect of the excess amount paid by him in those four months. This small remaining sum, with the excess payments made by him in June and July 1949, could, for the reasons we have already stated, be deducted from the rent payable by him for the month of August 1949; and his claim for deduction, even in respect of the last two excess payments, must accordingly be considered to be within time as contemplated in section 17 (*1*) of the Urban Rent Control Act.

It has, however, been contended on behalf of Messrs. Balthazar & Sons, Ltd. that the defendant-appellant is not entitled to deduct anything from the amounts which he paid for the Corporation taxes in that those taxes were taxes which were levied and

payable only in respect of the building which the defendant-appellant was alleged to have erected on the land and in that they were taxes which were not leviable on the land itself. The relevant portion of section 80 of the City of Rangoon Municipal Act reads :

"80 (1) The following taxes shall, subject to the limitations hereinafter provided, be levied on buildings and lands, and shall be called Property Taxes, namely :—

(a) a general tax of not more than twelve per cent of their annual value, to which may be added a fire brigade tax at such percentage not exceeding two per cent of their annual value as will, in the opinion of the Corporation, suffice to provide for the expenses necessary for fulfilling the duties of the Corporation.

....."

It will thus be observed that the taxes are levied not merely on the buildings but also in respect of the lands on which the buildings are constructed. At least this is what appears from section 80 of the City of Rangoon Municipal Act. It will accordingly be necessary to have evidence as to whether the Corporation taxes were levied both on buildings and lands and if so, what is the proportionate amount of the taxes so far as this case is concerned, which can be reasonably said to be attributed to the land only; and if this is ascertained, the defendant-appellant should be allowed to deduct that portion of the Corporation taxes attributable to the land from the rent payable by him. In this respect, it will probably be necessary to consider whether the general tax, conservancy tax or water-tax is or is not leviable if there is no building on the land in question, and if these taxes are leviable without any building on the land, whether in that circumstance, the defendant-appellant will not be entitled to claim deduction of the entire amount of Rs. 22 per month as claimed by him.

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U TUN BYU, C.J.

The judgment and decree of the learned 2nd Judge of the Rangoon City Civil Court, in so far as the balance sum of Rs. 132 with costs is concerned are modified, and the proceedings of the lower Court will be sent back for decision on the points indicated above. Each party ought to be allowed to adduce fresh evidence, if desired. Costs in the lower Court in respect of the additional or balance sum will be left to be decided by the learned Judge who will re-hear the case for that purpose, after the proceedings is sent back to him. So far as costs in this Court are concerned, we think, in fairness, the defendant-appellant ought to be allowed his costs because the point on which the case is sent back for decision was a point which apparently was not pressed before the learned 2nd Judge, nor did he deal with it at all in his judgment. No issue was framed on it; and in the circumstance, the defendant-appellant, W. K. G. Pillai, will be entitled to his costs so far as this appeal is concerned. He has succeeded in so far as the main and important point which was decided against him by the learned 2nd Judge of the Rangoon City Civil Court. The appeal is allowed in the sense indicated above.

APPELLATE CIVIL

Before U Tun Byu, Chief Justice and U On Pe, J.

NANA MEAH (APPELLANT)

v.

SIDDIQUE AHMED (RESPONDENT).*

H.C. 1950

Dec. 7.

Usufructuary Mortgage invalid for want of registration—Whether plaintiff can sue for money lent and advanced.

Held: Though a loan *prima facie* involves a personal liability and such liability is not displaced by the mere fact that a security has been given for the repayment of the loan with interest but the nature and terms of such security may negative any personal liability on the part of the borrower.

Rani Narayan Singh v. *Adhindra Nath Mukerji*, (1917) 44 Cal. 388 at 400, followed.

An usufructuary mortgagee cannot maintain a suit for a personal decree in the absence of a specific covenant.

Gopalasami v. *Arunachella*, (1892) 15 Mad. Series, 304, followed.

In India a mortgage does not necessarily import a personal obligation to repay

F. H. Pell v. *M. Gregory*, (1925) 52 Cal. 828 at 843-844, followed.

Maung Kyi v. *Ma Ma Gale*, (1919-20) 10 L.B.R. 54, distinguished.

Po Aye for the appellant.

U. L. Das for the respondent.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The plaintiff-appellant Nana Meah instituted a suit against the defendant-respondent Siddique Ahmed for the recovery of a sum of Rs. 550, as money lent to the latter on the 12th January, 1949. It appears that a mortgage deed, dated the 12th January, 1949, was executed in respect of that loan, but it was not registered. This explains why

*Civil 1st Appeal No. 45 of 1950 against the decree of the 2nd Judge, City Civil Court, Rangoon in Case No. 906 of 1949, dated the 5th June 1950.

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U TUN BYU, C.J.

Nana Meah based his claim on what was said to be the original cause of action, as money lent, and why he refrained from referring to the mortgage deed in the body of the plaint, although he mentioned it as a document which he relied upon towards the end of the plaint.

The case of Siddique Ahmed is that he borrowed a sum of Rs. 550 on a mortgage which was said to have been executed on the 12th January, 1949, and it was alleged, in effect, that it was in the nature of a usufructuary mortgage. The issues that were framed were—

"1. Whether there had been a usufructuary mortgage as alleged by the defendant? If so, is the suit in its present form maintainable?

2. To what amount, if any, is the plaintiff entitled?"

The learned 2nd Judge, City Civil Court, Rangoon, found that "the loan was taken in the form of a usufructuary mortgage". He held that the suit, which Nana Meah instituted, which was for money lent, was not maintainable; and he dismissed it with costs.

The question which arises in this appeal is, can Nana Meah, in the circumstances of this case, base his claim on what has been called the original cause of action for money lent. The effect of paragraphs 1, 3 and 4 of the amended written statement filed by Siddique Ahmed is that he borrowed a sum of Rs. 550 on a mortgage which was effected on the 12th January, 1949, that the mortgaged property was made over to Nana Meah who had collected rents due on that property, that if accounts were gone into it would be discovered that Nana Meah had collected more rents from the mortgaged property than what was due to him on the mortgage debt and that Nana Meah should have instituted his suit in the form of a mortgage suit.

Paragraph 1 of the Reply to the written statement was—

"1. With reference to paragraph 1 of the amended written statement, the plaintiff admits that the defendant borrowed from him the sum of Rs. 550 on 12th January 1949 on a mortgage in his favour but state that the said mortgage was not registered as required by law. The plaintiff denies that his plaint is neither vague nor not clear as alleged therein. The document relied upon by the plaintiff at the foot of the plaint clearly shows in bold letters that the said unregistered mortgage was mentioned as document relied upon by the plaintiff.

That by reasons of the said mortgage being not registered the plaintiff filed the above suit against the defendant upon the original cause of action for money lent and advanced to the defendant."

It is thus clear that Nana Meah, the plaintiff-appellant, himself admitted that the sum of Rs. 550, which Siddique Ahmed borrowed, was advanced on a mortgage deed effected on the 12th January, 1949, and that it was unregistered.

The learned 2nd Judge, City Civil Court, found that the sum of Rs. 550 was made under a usufructuary mortgage, and this finding is, in our opinion, correct. We are unable to see anything on the record, which will suggest that there was a covenant for a personal liability to repay in the mortgage deed, dated the 12th January, 1949. It was also not suggested before us that there was any specific provision in the mortgage deed, imposing a personal liability to repay, expressly or otherwise, the money borrowed. Thus the mortgage, which was effected on the 12th January, 1949, must be considered to be a simple usufructuary mortgage.

Lord Parker observed in *Ram Narayan Singh* v. *Adhindra Nath Mukherji* (1)—

"In considering this question it must be borne in mind (i) that a loan *prima facie* involves such a personal liability;

(1) (1917) 44 Cal. p. 388 at 400.

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(ii) that such a liability is not displaced by the mere fact that security is given for the repayment of the loan with interest; but (iii) that the nature and terms of such security may negative any personal liability on the part of the borrower.'

A loan might ordinarily be said to involve a personal liability to repay the loan so taken, but, in the absence of any indication to the contrary, we are of opinion that it cannot be assumed that there is an implied personal liability in a usufructuary mortgage to repay the loan so advanced, because the mortgagee in the case of a usufructuary mortgage looks only to the rents and profits of the mortgaged property and to the mortgaged property to repay himself. A mortgagee cannot therefore in the case of a usufructuary mortgage maintain a suit for a personal decree in the absence of an express covenant imposing personal liability on the mortgagor; and this was what was held in the case of *Gopalasami* v. *Arunachella* (1).

In *F. H. Pell* v. *M. Gregory* (2) Rankin J., as he then was, observed:

> "In India a mortgage does not necessarily import a personal obligation to repay. *Prima facie* this obligation is present in simple mortgages, and of course, in English mortgages. *Prima facie* it is not present in mortgages by conditional sale and in usufructuary mortgages."

We are unable in the case now under appeal to find anything which will lead us to or suggest an inference that there must have been an implied personal liability to repay also. We do not think it will be right or proper in the circumstances of the present case to regard the unregistered mortgage deed merely as a record of an earlier transaction of a loan of Rs. 550. No rulings have been cited before us to indicate that a mortgagee has been granted a personal decree against

(1) (1892) 15 Mad. Series, p. 304. (2) (1925) 52 Cal. Series, p. 828 at 843-844.

the mortgagor in a suit based on a usufructuary mortgage.

The case of *Maung Kyi* v. *Ma Ma Gale* (1) has been referred to on behalf of the plaintiff-appellant, where it was held—

> "that where money is lent and at the same time a promissory note is given therefor, the creditor is not debarred from suing for the money lent as on the original contract of loan, if the promissory note cannot be proved."

The circumstances, which give rise to the execution of a promissory note, do not appear to us to be quite the same as those which exist when a usufructuary mortgage is executed. In the latter case the mortgagee looks wholly, in the absence of a personal covenant to repay, to the rents and profits of the mortgaged property and to the mortgaged property for the repayment of the loan. It is difficult to see, in the case of a loan for which a promissory note is given, how it could be said that the creditor was merely looking upon the promissory note for the repayment of the loan advanced by him because the promissory note cannot in itself be regarded as affording adequate protection to the creditor for the return of the money advanced by him.

The appeal is accordingly dismissed with costs.

(1) (1919-20), 10 L.B.R. 54.

CIVIL REVISION.

Before U On Pe, J.

H.C. 1950

Nov. 30.

IBRAHIM MOHAMED AND ONE (APPLICANTS)

v.

MAUNG HLA PE (*a*) ABDUL RAZAK (RESPONDENT).*

Code of Civil Procedure, Order 14, Rule 2—Preliminary issue—When must be decided.

Held: That under Rule 2 if the Court is of the opinion that the case or any part of it may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. In deciding the question as to whether the Court should grant or refuse a prayer to try a preliminary issue on a point of law, some harmony is to be observed between the general principle that it is undesirable to try a case piece-meal and the specific and wholesome provisions of Order 14, Rule 2 of the Code of Civil Procedure which have been enacted for the purpose of preventing the injustice of a party being able to force his opponent to go at great length into evidence when the simple decision on a point of law might render the investigation of the facts unnecessary.

Janki Das and another v. *Kalu Ram and another*, A.I.R. (1936) Pat. 250, followed.

P. B. Sen for the applicants

Hla Pe for the respondent.

U ON PE, J.—This is an application to revise an interlocutory order passed in Civil Regular No. 1 of 1949 of the District Court at Hanthawaddy which is a suit for possession of some lands and for eviction and removal of the respondent and of other persons therefrom. The interlocutory order in question was passed on a preliminary issue of law which was agreed to be heard preliminary to other issues which were 12 in number and framed on 24th March, 1950. The

* Civil Revision No. 33 of 1950 against the order of the District Court, Hanthawaddy in Civil Regular Suit No. 1 of 1949, dated the 21st July 1950.

preliminary issue is issue No. 1 in the case and reads as follows : " Does the written statement disclose in law a defence to the Petitioners' claim in this suit "? The issue was heard on 9th June 1950 and 7th July 1950, when the Court reserved orders on 21st July 1950. On that date, the interlocutory order, which is a diary entry made on 21st July 1950 was made and reads : "Issue No. 1 would be decided together with other issues ". It is against this order, that this revision application has been made on the ground that the learned Judge failed to exercise jurisdiction in not deciding the preliminary issue of law which goes to the very root of the case and that by not deciding the issue, has ignored the mandatory Provision of Order 14, Rule 2, Civil Procedure Code.

There is a good deal of force in the contention raised. The least the learned Judge should have done, if he was not disposing the case on the merits of that issue, was to give reasons why he did not do so and his order thereby would have become more explicit. Having made the issue in question a preliminary one which is sufficient indication that the parties in the case as well as the Court itself were treating the issue as one of law, on which the case may be disposed of, the Court should have determined that issue. It is quite possible that the issue may be one which taken by itself would not dispose of the case altogether. In any case the Diary Order as recorded, is not the kind of Order which is contemplated to be passed under Order 14, Rule 2 of Civil Procedure Code. The object of Order 14, Rule 2 of Civil Procedure Code is clear and reads as follows :

" Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the

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IBRAHIM MOHAMED AND ONE v. MAUNG HLA PE (a) ABDUL RAZAK.

U ON PE, J.

settlement of the issues of fact until after the issues of law have been determined ".

In *Janki Das and another* v. *Kalu Ram and another* (1) the following observation has been made :—

" In deciding the question as to whether the Court should grant or refuse a prayer to try a preliminary issue on a point of law, some harmony is to be observed between the general principle that it is undesirable to try cases piece-meal and the specific and wholesome provisions of Order 14, Rule 2, Civil Procedure Code, which is for the purpose of preventing the injustice of a party being able to force his opponent to go at great length into evidence when the simple decision of a point of law might render the investigation of the facts unnecessary."

I am quite satisfied that the Diary Order made in the case is one which is not in compliance with the clear provision of law and the High Court should interfere with that Order. I accordingly direct that the Trial Judge who ever he is will try this Preliminary Issue of law again and determine the same according to law. The applicants are awarded costs three gold mohurs.

(1) A.I.R. (1936) Pat. p. 250.

APPELLATE CRIMINAL.

Before U San Maung, J.

U BA PE (APPLICANT)

v.

MA SAW YIN (RESPONDENT).*

H.C. 1950

Dec. 6.

Mahomedan Law—Essentials of Marriage—Maintenance.

Held: Where in a suit for maintenance the husband denies the marriage the marriage must be proved. In Mahomedan Law there are certain formal requirements of marriage. Words of proposal and acceptance must be uttered by the contracting parties or their agents in each other's presence and hearing and in the presence and hearing of two male or one male and two female witnesses who must be adult Muslims and the whole transaction must be completed in one sitting. If this is not done there is no valid marriage.

Anklemannessa Bibi v. *Mahomed Hatem*, 31 Cal. 849; *Jogu Bibi* v. *Mesel Shaikh*, 63 Cal. 415; *Maung Kyi and others* v. *Ma Shwe Baw*, 7 Ran. 777, followed.

P. K. Basu for the applicant.

U SAN MAUNG, J.—In Criminal Miscellaneous No. 7 of 1948 of the Subdivisional Magistrate, Yamèthin, the respondent Ma Saw Yin made an application under section 488 of the Criminal Procedure Code for an order directing the applicant U Ba Pe to pay a sum of Rs. 10 per mensem as maintenence to her as his wife and Rs. 15 per month for her infant daughter Ma Than E as his child. The applicant denied that Ma Saw Yin was his wife and also denied the paternity of Ma Than E. The learned Subdivisional Magistrate on the evidence before him came to the conclusion that U Ba Pe had married Ma Saw Yin according to the Mahomedan rites and that Ma Than E was born during the coverture of U Ba Pe and Ma Saw Yin. He accordingly ordered U Ba Pe to pay Ma Saw Yin Rs. 10 per month for her maintenance and Rs. 15 per month for the maintenance

* Criminal Revision No. 6-B of 1949 being review of the order of the Sessions Judge, Meiktila, dated 3rd November 1949 passed in Criminal Appeal No. 112Y of 1948.

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U BA PE v. MA SAW YIN.

U SAN MAUNG, J.

of Ma Than E. As against the decision of the Subdivisional Magistrate, Yamèthin, U Ba Pe appealed to the Sessions Judge, Meiktila but the learned Sessions Judge confirmed the order of the Subdivisional Magistrate and dismissed the appeal. Hence this application for revision of the order of the Courts below.

One of the main grounds for revision is that on the evidence on record it has not been established that the essentials for the validity of a marriage under the Mahomedan Law have been complied with and in support of this contention, the learned Advocate for the applicant has cited the cases of *Anklemannessa Bibi* v. *Mahomed Hatem* (1); *Jogu Bibi* v. *Mesel Shaikh* (2) and *Maung Kyi and others* v. *Ma Shwe Baw* (3). In the first of these three cases, the Bench of the Calcutta High Court observed :

"The second contention advanced on behalf of the appellant relates to the merits of the case, and we are of opinion that the appellant is entitled to succeed on this ground. The learned Subordinate Judge has found that the plaintiffs did marry the defendant No. 1 in *nika* form, but he has not found whether the formal requirements of a Mahomedan marriage have been complied with; as pointed out in Wilson's Digest of Anglo-Mahomedan Law, 2nd Edition, page 133, although neither writing nor any religious ceremony is necessary to the validity of a marriage contract, 'words of proposal and acceptance must be uttered by the contracting parties or their agents in each other's presence and hearing and in the presence and hearing of two male or one male and two female witnesses, who must be sane and adult Moslems, and the whole transaction must be completed at one meeting:' *See* also Amir Ali's Mahomedan Law, Vol. II, page 283."

In *Jogu Bi Bi* v. *Mesel Shaikh* (2) also it was held that it is essential in a Mahomedan marriage that the proposal and acceptance should both be expressed at

(1) 31 Cal. 849. (2) 63 Cal. 415. (3) 7 Ran. 777.

the same meeting and that a proposal made at one meeting and an acceptance made at another meeting do not constitute a valid marriage. This decision was followed by the late High Court of Judicature at Rangoon in *Maung Kyi and others* v. *Ma Shwe Baw* (1) but Brown J., who decided this case also held that in the absence of direct proof, marriage between a husband and wife can be presumed from a long course of cohabitation and living together as husband and wife and from acknowledgement of the children as the legal children.

I have perused the evidence of Ma Saw Yin and her witnesses and I must say that nowhere in their evidence it is stated that the formal requirement of the Mahomedan Law have been complied with. All that they could say was that there was a marriage and that *nika* was read by a Moulvi. The Moulvi himself was not cited by Ma Saw Yin but he was produced as a witness by U Ba Pe. He stated that what he actually read was not *nika* but only Koran Sheriff, the usual sacred recitation made after a funeral. Considering that not very long before this alleged marriage the first child begotten of Ma Saw Yin by U Ba Pe out of wedlock had died, it is difficult to reject the Moulvi's evidence as totally untrue. Furthermore, in the application filed by Ma Saw Yin before the Subdivisional Magistrate, Yamèthin, she stated that she and U Ba Pe who were Mahomedans by religion had lived together as husband and wife *by mutual consent.* This fact tends to corroborate the defence story that there was no formal marriage between U Ba Pe and Ma Saw Yin at all. Therefore the order of the Subdivisional Magistrate, Yamèthin, relating to the payment of Rs. 10 to Ma Saw Yin as the wife of U Ba Pe cannot be sustained and it is

(1) 7 Ran. 777.

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accordingly set aside. As regards the child Ma Than E, I have no sufficient reason to think that both the lower Courts were wrong in coming to the conclusion that she was the child of U Ba Pe and Ma Saw Yin. It is an admitted fact that U Ba Pe kept Ma Saw Yin as his mistress and that a child was born to them prior to the birth of Ma Than E. This child died and there is nothing to disbelieve that part of Ma Saw Yin's story that U Ba Pe continued to cohabit with her after the death of their first child. It is not the practice of the High Court acting as a Court of revision to interfere with the finding of fact in a criminal case unless it can be demonstrated that the finding is wrong or that there is no admissible evidence on record to support it. In the present case, it cannot be said that the finding of the Subdivisional Magistrate, Yamèthin, that Ma Than E was the child of U Ba Pe is either wrong or that there is no admissible evidence on record to support such a finding. For these reasons the application of U Ba Pe in so far as it relates to that part of the Subdivisional Magistrate's order awarding a sum of Rs. 15 per month to Ma Saw Yin for the maintenance of Ma Than E is dismissed.

There will be no order as to costs in this Court.

APPELLATE CRIMINAL.

Before U Aung Tha Gyaw, J.

K. N. CHOPRA (*a*) MAUNG KO AND ANOTHER (APPLICANTS)

v.

THE UNION OF BURMA (RESPONDENTS). *

H.C. 1950

Nov. 16.

Criminal Procedure Code, ss. 367, 421 and 424—Failure to write proper judgment.

Held : Although s. 421 of the Criminal Procedure Code gives the Appellate Court power to dismiss an appeal summarily that power must be exercised with judicial discretion. Appeals in which complicated questions of law and fact are involved should not be disposed of in a summary manner.

Kailish Chandra Chakraborty v. *King-Emperor*, 19 C.L.J. 228, referred to.

And even though the Court is not bound to write a judgment when an appeal is dismissed summarily, yet as there is a possibility of the order being challenged by an application in revision it is advisable that the Appellate Court should briefly record its reasons for such dismissal to show that it had applied its mind to the evidence on the record, and to the Memorandum of Appeal.

Held further : If the Court had admitted the appeal it would have been bound to embody in its judgment the point or points for determination, the decisions thereon and the reasons therefor.

Where the order of the learned Judge does not show that he has read the copy of the judgment or considered the points raised in the Memorandum of Appeal he exercises his discretion improperly, the High Court will go into the merits of the case and give its own decision instead of remanding the case.

Nga Ba Myit v. *King-Emperor*, 19 C.L.J. 316 ; *Nga Sein* v. *King-Emperor*, (1906) U.B.R. 2nd Qr. 49 ; *Lal Behari* v. *King-Emperor*, 38 All. 395 ; *Guru Bari Behari* v. *King-Emperor*, 19 C.L.J. 151 ; *Ram Kan Pandit* v. *King-Emperor*, 19 C.L.J. 304, referred to.

Dr. Ba Han for the applicants.

Kyaw (Government Advocate) for the respondents.

* Criminal Revision Nos. 84-B and 88-B of 1950 being review of the order of Headquarter Magistrate (S.P.), Sagaing, dated the 28th August 1950 passed in Criminal Regular Trial No. 3 of 1950.

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K. N. CHOPRA (*a*) MAUNG KO AND ANOTHER. v. THE UNION OF BURMA.

U AUNG THA GYAW, J.—These are applications in revision filed by the applicants K. N. Chopra (*a*) Maung Ko, a Contractor, and Maung Ba Thein, the Sub-Assistant Engineer in the employ of the District Council, Sagaing, seeking interference with the conviction and sentences passed upon them by the Headquarters Magistrate, Sagaing, in his Criminal Regular Trial No. 3 of 1950 for the alleged offence of cheating the said District Council by dishonestly inducing that body to pay out to the 1st applicant Chopra (*a*) Maung Ko, a sum of Rs. 6,089 as being due for repairs undertaken by him on the Saye-Kyauksè Road under a contract.

The 2nd applicant Maung Ba Thein was also convicted of an offence under section 197 of the Penal Code for signing an alleged certificate required by law to be signed knowing or believing that such certificate is false in regard to the satisfactory repair of the said Saye-Kyauksè Road.

The applicants were each sentenced to undergo 1½ years' rigorous imprisonment, the sentences passed upon the 2nd applicant on the two separate counts being ordered to run concurrently.

The applicants in the first instance lodged their appeals in the Sessions Court at Sagaing. In dismissing their appeals summarily, the learned Sessions Judge passed his order in the following terms :—

"I have read the memoranda of appeals, the evidence and the relevant documentary exhibits in the proceedings and I consider that there is no sufficient ground for interfering. Both the appeals are summarily dismissed."

It has now been contended that this judgment of the lower appellate Court did not conform to the requirements of law provided in sections 367 and 424 of the Code and that on a fair and impartial estimate of

the evidence adduced in the case no criminal charge of either cheating or of making a false certificate was made out against the applicants.

Considering that the prosecution is in respect of offences relating to wasteful expenditure of public money alleged to have been committed by a public servant and his accomplices, it was highly desirable that the appellate Court should satisfy itself as to the legality of the convictions against which the appeals were preferred before it. Although under section 421 of the Code the appellate Court has power to dismiss an appeal summarily, that power must be exercised with judicial discretion ; and appeals in cases which are complicated both in law and fact should not be disposed of in a summary manner. [See *Kailish Chandra Chakraborty* v. *King-Emperor* (1)]. It may further be pointed out that an appellate Court in rejecting an appeal summarily under section 421 of the Code is not bound to write a judgment, but nevertheless, in view of the possibility of the order being challenged by an application in revision, it is advisable that the appellate Court should briefly record its reasons for such dismissal to show that it has applied its mind to the consideration of the evidence on the record and of the pleadings raised by the accused both in the Court below and in the memorandum of appeal. [*See* the cases of *Nga Ba Myit* v. *King-Emperor* (2) ; *Nga Sein* v. *King-Emperor* (3) ; and *Lal Behari* v. *King-Emperor* (4).]

Had their appeals been heard and disposed of in the manner which the importance of the charges brought against the appellants would certainly justify, then the provisions of section 424 read with section 367 of the Code of Criminal Procedure would render

(1) 19 C.L.J. 228.
(2) 19 C.L.J. 316.
(3) (1906) U.B.R. 2nd Qtr. 49.
(4) 38 All. 393.

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K. N. CHOPRA (*a*) MAUNG KO AND ANOTHER. *v.* THE UNION OF BURMA.

U AUNG THA GYAW, J.

it necessary for the appellate judgment to embody, *inter alia* the point or points for determination, the decisions thereon and the reasons therefor.

Unfortunately the appeals preferred by the two applicants were summarily dismissed under the provisions of section 421 of the Code, but even under this section the appellate Court was bound to read the copy of the judgment received along with the memorandum of appeal and in the order of dismissal passed by the learned Sessions Judge, there is no mention of the fact that the judgment of the trial Court had been perused by him. This defect coupled with the wrong exercise of discretion in not admitting the appeal and hear it on the merits would thus justify the High Court either to go into the case on its own account and examine the evidence or remand the appeal to the lower appellate Court to be admitted and heard. [See *Guru Bari Behari* v. *King-Emperor* (1) ; *Ram Kan Pandit* v. *King-Emperor* (2).]

Regard being had however to the circumstances in which the proceedings were originally initiated and the trouble and expense to which the two applicants have so far been put, it does not appear to be expedient in the interests of justice that a remand should be ordered in this case for a proper hearing of the appeal on it merits.

The learned Judge then discussed the evidence and acquitted the applicants.

(1) 19 C.L.J. 151. (2) 19 C.L.J. 304.

CIVIL REFERENCE.

Before U Tun Byu, Chief Justice, and U On Pe, J.

THE HON'BLE MINISTER-IN-CHARGE OF JUDICIAL AFFAIRS OF THE UNION OF BURMA (APPLICANT)

v.

AH TUN (RESPONDENT).*

H.C 1950
Dec. 9.

Union Citizenship Act, 1948, s. 9 (2)—Application by a minor of foreign nationality for citizenship whether maintainable.

Held : That a person who has not attained the age of majority is not competent to act and cannot therefore make an election to become a citizen of the Union inasmuch as such election would in effect operate to divest him of his present foreign nationality.

Choon Foung (Government Advocate) for the applicant.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—This reference first came before this Court on the 7th November, 1950, and, in pursuance of our order of that date, the records of the lower Court were sent back for further evidence to be recorded for the purpose indicated in our order of the 7th November, 1950. It is now clear from the further evidence which has been recorded that Ah Tun and Win Khwan are one and the same person, being the youngest son of Ma Ah Pein ; and Ah Tun is accordingly the same person who was mentioned as Win Khwan in the certificate of naturalization, which was issued to his mother Ma Ah Pein. The law in this connection is

* Civil Reference No. 14 of 1950 being reference made by the Attorney General, Burma under section 8 (2) of the Union Citizenship (Election) Act, 1948.

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THE HON'BLE MINISTER-IN-CHARGE OF JUDICIAL AFFAIRS OF THE UNION OF BURMA. v. AH TUN.

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embodied in section 9 (2) of the Union Citizenship Act, 1948 (Act No. LXVI of 1948), which reads as follows :

"(2) The minor children whose names are so included in the certificate shall be deemed to have become citizens of the Union as from the date of the certificate, provided however that any child so included may, within one year of attaining his majority, make a declaration of alienage and he shall thereupon cease to be a citizen of the Union."

The question which we still have to consider in this case is whether this reference ought to be accepted and the order passed by the 1st Subordinate Judge, Akyab, dated the 8th March, 1950, in Miscellaneous Case No. 60 of 1949, should be set aside. It has been contended by the learned Government Advocate, who appears in this reference, that as Ah Tun, the applicant in Civil Miscellaneous Case No. 60 of 1949, was a minor at the time he filed his application for grant of a certificate of citizenship to him, it should have been rejected in that the minor had no status to apply for a certificate of citizenship on the date the application was made. In Civil Reference No. 12 of 1949 we observed as follows :

"It might be said generally that a person who has not attained the age of majority is not competent to act, and this principle has been embodied in section 11 of the Contract Act. The election by Panjanathan to become a citizen of the Union would in effect as indicated earlier, operate to divest him of his present foreign nationality, and as he is still a minor it could be said that he would be unable to appreciate fully the implication which would or might arise, if he were to be permitted to renounce his present foreign national status. Thus it could in the circumstances of this case be said that there is good reason for us to hold that Panjanathan could not on the general principle of law be held to be a person who is capable of applying for a certificate of citizenship."

In any case as the minor had no status to apply at the time he filed his application for grant of a certificate to him, his application ought, from the outset, to have been returned to him. For these reasons the order of the 1st Subordinate Judge, Akyab, dated the 8th March, 1950, recommending for the issue of a certificate of citizenship to the respondent Ah Tun, is hereby set aside. There will be no costs so far as this reference is concerned. Ah Tun made his application probably in ignorance of section 9 (*2*) of the Union Citizenship Act, 1948.

APPELLATE CIVIL

Before U Tun Byu, Chief Justice, and U On Pe, J.

H.C. 1950

Dec. 11.

KO THAN NYUNT (APPELLANT)

v.

MAUNG KHIN MYINT (RESPONDENT).*

Urban Rent Control Act, ss. 5 and 17—Contracted rent greater than the Standard Rent fixed later—Whether tenant entitled to deduct the amount over-paid in paying subsequent rent.

Held : Where the tenant paid rent for four months at the contract rate and the standard rent was later fixed at a lower rate, the tenant was entitled to deduct from future rent the sum paid in excess during those four months. Any sum in excess of the standard rent payable after the Urban Rent Control Act has come into force shall be considered irrecoverable by the landlord S. 17 (*1*) of the Act should be given a liberal interpretation.

Ba Thawl for the appellant.

C. H. Chan for the respondent.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The plaintiff-respondent Maung Khin Myint filed a suit against the defendant-appellant Ko Than Nyunt for ejectment for non-payment of arrears of rents for the months of July, August and September 1949. It appears that the defendant-appellant had paid rents for the months of March, April, May and June, 1949 at the rate of Rs. 30 per month, and that the standard rent which had been fixed by the Controller of Rents was Rs. 22-8-0 per month in respect of the premises concerned. The plaintiff-respondent sent a notice to the defendant-appellant Ko Than Nyunt, dated the 10th October, 1949, demanding payment for the rents due for July, August and September, 1949, at the rate of Rs. 22-8-0 as fixed by the Rent

* Civil 1st Appeal No. 52 of 1950 against the decree of the 4th Judge, City Civil Court of Rangoon in Civil Regular No. 940 of 1949.

Controller; and the defendant-appellant replied through his lawyer to the effect that all that was due from him as rent for the months of July, August and September, 1949 was Rs. 37-8-0, because he was entitled to deduct from the rents due for these three months the sum of Rs. 30 which he had paid in excess towards the rents of the months of March, April, May and June, 1949. The learned 4th Judge held that section 17 of the Urban Rent Control Act, 1948 was not applicable to the case in view of the provisions of section 5, and he accordingly gave a decree for ejectment with costs against the defendant-appellant Ko Than Nyunt.

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 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."

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U TUN BYU, C.J.

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. Moreover, section 16 makes it clear that no Court, to which this Act applies, can entertain a suit for the recovery of rent unless it is accompanied by a certificate of the Rent Controller certifying what the standard rent of the premises is; and when the provision of section 16 is read with section 24 which allows that a person who knowingly receives any money in excess of the standard rent to be punished, it seems to us to be clear that any sum of money in excess of the standard rent payable after the Act has come into force, should be considered as irrecoverable. In any case it appears to us that the words "being a sum which is by reason of the provisions of this Act irrecoverable" in section 17 (*1*) of the Urban Rent Control Act should be given a more liberal construction than what has been contended on

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behalf of the plaintiff-respondent Maung Khin Myint. To read otherwise would appear to us to make the Rent Control Act less comprehensive; and it appears to us to be only proper that a tenant should be allowed to deduct the sum that he had paid in excess of the standard rent from the rents due by him in subsequent months if it was made within the time allowed in section 17 (*1*). So far as this case is concerned the claim to deduct the excess rents paid for the months of March, April, May and June, 1949 were made within six months, as allowed under the provisions of section 17 (*1*).

The appeal will in the circumstances be allowed as it could not for the reasons we have stated be said that there was any fault on the part of the defendant-appellant to pay the rents for the months of July, August and September to the plaintiff-respondent Maung Khin Myint. It is clear from the correspondence which passed in this case that the defendant-appellant Ko Than Nyunt attempted to pay the amount which was due to him legally under law and that this was refused by the plaintiff-respondent Maung Khin Myint.

The appeal is allowed and the decree and judgment of the 4th Judge passed in Civil Regular No. 940 of 1949 of the City Civil Court, Rangoon, will be set aside with costs.

U ON PE, J.—I agree.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice, and U On Pe, J.

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Dec 11.

KANAMA (APPELLANT)

v.

HUSSEIN BUKSH KHAN (RESPONDENT).*

Urban Rent Control Act, s. 16—Failure to attach certificate with the plaint—Claim for recovery of rent.

Held: That the wordings of s. 16 of the Act is imperative and the Civil Courts have no jurisdiction to entertain a plaint for recovery of rent unless it is accompanied by a certificate of Standard Rent granted by the Controller of Rents. In the absence of such certificate the plaint should be rejected.

Woodward v. *Sarsons and Sadler*, (1874-75) L.R., 10 C.P.C. 733 at 746; *Barker* v. *Palmer*, (1881-82) L.R. 8 Q.B.D. 9 at 11, referred to.

Ba Than for the appellant.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The plaintiff-respondent Hussein Buksh Khan claimed to recover a sum of Rs. 250 as arrears of rent, which was said to be due to him by the defendant-appellant Kanama in respect of the premises at No. 14, Lakshmi Street, Myenigon, Rangoon and his claim as against the defendant-appellant Kanama was decreed with costs.

The record shows that the plaint was filed in the trial Court without the certificate of the Controller of Rents as required under section 16 of the Urban Rent Control Act, 1948; and it was not until the 16th June 1950, *i.e.*, over five months after the plaint was filed, that the certificate of the Controller of Rents was brought on the record of the case. The point which is raised on behalf of Kanama in this appeal, is that the

* Civil 1st Appeal No. 46 of 1950 against the decree of 4th Judge, City Civil Court, Rangoon in Small Causes Suit No. 1113 of 1949, dated the 20th June 1950.

presence of the certificate of the Controller of Rents at the time the plaint was presented is necessary to enable the trial Court to entertain the plaint presented to it and that the learned Fourth Judge, Rangoon City Civil Court, should in that circumstances be considered to have acted without jurisdiction in proceeding with the trial of the case.

Section 16 of the Urban Rent Control Act reads as follows:

"16. No civil Court shall accept a plaint in any suit or allow to be filed any application for distress warrant under section 22 of the Rangoon City Civil Court Act, 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 by the Controller certifying the standard rent of the premises has been attached to the plaint or the application for distress warrant."

The provisions of section 16 of the Urban Rent Control Act, 1948 are clearly mandatory; and it means that no Court has power to entertain a plaint for the recovery of rent in a case to which the Urban Rent Control Act, 1948 applies unless, when it is presented, it is also accompanied with a certificate of the Controller of Rents certifying what the standard rent of the premises concerned is. Section 16 therefore prescribes as a condition precedent that the certificate of the Controller of Rents should be presented with the plaint before the Court entertains it, and this is an indispensable condition for the purpose of giving the Court jurisdiction to deal with the plaint presented to it. In *Woodward* v. *Sarsons and Sadler* (1) Lord Coleridge C.J., observed:

"The general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially."

(1) (1874-75) L.R., 10 C.P.C. 733. at 746.

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and Grove J., in *Barker* v. *Palmer* (1), observed:

"In construing Acts of Parliament, provisions which appear on the face of them obligatory, cannot, without strong reasons given, be held only directory."

U TUN BYU, C.J.

We are, we must say, unable to see anything in the Urban Rent Control Act, 1948, to indicate why the provisions of section 16 should not be considered to be mandatory when the words employed in that section show that they were clearly intended to be mandatory. The object of the Urban Rent Control Act appears to provide relief and protection to the tenants, and it is quite consistent with that object to consider the provisions of section 16 as mandatory, and not merely directory. A failure or neglect to comply with the requirement of section 16, which prescribes what should be done before the plaint can be properly entertained, must therefore be considered to have invalidated the trial, in that the pre-requisite condition required under section 16 had not been conformed to. The appeal is accordingly allowed with costs, and the judgment and decree passed in the Small Cause Suit No. 1113 of 1949 is set aside, with costs.

(1) (1881-82) L.R. 8 Q.B.D. 9 at 11.

CIVIL REFERENCE.

Before U Tun Byu, Chief Justice, U Ou Pe and U Bo Gyi, JJ.

REVEREND CHIT PÈ (APPLICANT)

v.

MA KHIN SEIN AND ONE (RESPONDENTS).*

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Dec. 18.

Burma Divorce Act, ss. 12, 13, 14 and 17—Divorce on admission not allowed—Duty of the Court indicated.

Held: That provisions of ss. 12, 13, 14 and 17 of the Burma Divorce Act indicate clearly that it is not proper in a case for a dissolution of marriage under the Act to grant a *decree nisi* on the mere admission of the parties. The Judge must first ascertain whether, on the facts of the case he has jurisdiction to entertain it for the purpose of pronouncing a *decree nisi* and in ascertaining whether the Court has jurisdiction, the Court will have to ascertain what the domicile of the parties are. Even though there be a statement that there is no collusion or connivance between the parties such statement will not absolve the Court from its duty of ascertaining whether in the circumstances of a particular case there was no collusion or connivance between them. The Court will then ascertain whether it is a proper case where a *decree nisi* ought to be granted.

Tun Maung for the respondent.

The judgment of the Special Bench was delivered by

U TUN BYU, C.J.—This reference is for the confirmation of a *decree nisi* as required under section 17 of the Burma Divorce Act, and we are of opinion that the order for *decree nisi* passed by the District Judge, Mandalay, in Civil Regular Suit No. 5 of 1950 must be set aside in that this is a case where the learned District Judge has obviously misconceived the duties which lay upon the Court and which the Court must consider before the *decree nisi* is accorded. The provisions of sections 12, 13 and 14 of the Burma

* Civil Reference No. 7 of 1950 being a reference made by the District Court, Mandalay, under section 17 of the Burma Divorce Act.

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U TUN BYU, C.J.

Divorce Act indicate clearly that it is not proper in a case for a dissolution of marriage under the Burma Divorce Act to grant a *decree nisi* on the mere admission of the parties. It is obvious that the learned Judge must first ascertain whether, on the facts of the case that come before him, he has jurisdiction to entertain it for the purpose of pronouncing a *decree nisi* and he must also ascertain on the facts whether it is a proper case where a *decree nisi* ought to be accorded. The petition which was filed by Reverend Chit Pe, the husband, does not specify clearly where or when the adultery was exactly committed. There is also nothing in the petition to indicate whether the parties had been properly married under the Christian Marriages Act or otherwise, which would have entitled Reverend Chit Pe to apply for a dissolution of marriage under the Burma Divorce Act.

Paragraph 6 of the petition, it is true, stated that there was no collusion or connivance between Reverend Chit Pe and his wife Ma Khin Sein, but this will not absolve the Court from the duty of ascertaining whether in the circumstances of a particular case it could be said there was no collusion or connivance between the parties. In ascertaining whether the Court has jurisdiction, the Court will also have to ascertain what the domicile of the parties are. It is also not clear from the petition filed before the District Court as to the place where Reverend Chit Pe and his wife Ma Khin Sein last resided together.

This is therefore a case where this Court is clearly not in a position to confirm the *decree nisi* passed by the District Judge dated the 15th May 1950. The certificate of marriage has not also been filed, and if the marriage was solemnized by a Pastor there was nothing to show that the Pastor was the person who was authorized to solemnize the marriage. The *decree*

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nisi passed by the learned District Judge on the 15th May, 1950 is hereby set aside and the lower Court proceeding will be sent back to the Court of the District Judge, Mandalay, for the case to be re-tried in accordance with law by him. The learned District Judge after the record is returned to him should consider, in view of the order passed by this Court, whether he considers it necessary that the petition should be amended and if so, he should afford an opportunity to Reverend Chit Pe to amend his petition for the dissolution of the marriage. There will be no costs so far as this reference is concerned. Costs in the District will be left to be determined by the District Judge after the case is re-heard.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice, and U On Pe, J.

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Dec. 20.

U NGWE (APPELLANT)

v.

BAMA TAGUN COMPANY AND ONE (RESPONDENTS).*

Code of Civil Procedure, Order 9, Rule 9—Sufficient cause.

Held: That Courts exist so that people who have cases can have those cases heard and determined. It should never be the intention of Courts that a man should be deprived of a hearing unless there has been something equivalent to mis-conduct or gross negligence on his part or something which cannot be put right, as far as the other side is concerned, by making the man to blame pay for it.

Even if a person is rude or disrespectful to Court that would not be sufficient to deprive him of benefit of the provisions of Order 9, Rule 9 of the Code of Civil Procedure. Where a medical certificate is produced showing that a party was advised rest and it was proved that he flew to Hongkong that fact alone does not prove that the medical certificate was untrue.

Where a party has to be absent on very important personal business transaction that may be a sufficient cause for non-appearance.

U Aung Gyi v. *The Government of Burma*, (1940) Ran. 512, distinguished.

R. A. Arunachela Ayyar v. *C. Subbaramiah*, 46 Mad. 60 at 63, followed.

Leong for the appellant.

Ba Tun for the respondent 1.

Tun Maung for the respondent 2.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—U Ngwe, the plaintiff-appellant filed a suit for the recovery of a godown and for mesne

* Civil Misc. Appeal No. 23 of 1950 against the order of the City Civil Court, Rangoon in Civil Regular Suit No. 450 of 1950, dated 28th June 1950.

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U TUN BYU, C.J.

profits, which were valued at Rs. 4,000. It appears that the case was ripe for hearing even before the 21st February, 1950 and that U Ngwe and his Advocates asked for adjournment of the hearing even before the 21st February 1950. When the case was called for hearing on the 21st February, 1950, U Ngwe was no longer in Rangoon as he had flown by the B.O.A.C. plane to Hongkong; and to put it in brief, his case was dismissed for default, although he was represented by an Advocate on that day. Subsequently, U Ngwe applied under Order 9, Rule 9 of the Code of Civil Procedure to set aside the order of dismissal of his suit passed on the 21st February, 1950, and the learned 2nd Judge, after setting out his reasons, dismissed the application of U Ngwe with costs.

The question which has to be considered in such a case is whether there is sufficient cause to explain the absence, from Court, of U Ngwe on the 21st February. 1950. It has, in this case, been argued strenuously for the respondents both by U Ba Tun and U Tun Maung that this appeal ought to be dismissed in the circumstances existing in the present case. It has been alleged that the ground which U Ngwe set out earlier through his Advocate was not only inadequate but it was also not correct in that U Ngwe was able, on the 21st February, 1950, to fly to Hongkong and that in any case, he is guilty of a disrespect to the Court. We might say at once that the mere fact that a client might have been guilty of a rude or disrespectful conduct which might make him amenable to the other provisions of law will not in itself be sufficient to deprive him of the benefit of the provisions of Order 9, Rule 9 of the Code of Civil Procedure, if he can bring his case within those provisions. A disrespect to the Court, even in its minor form, must however be deplored and, if

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necessary, punished. As regards the medical certificate we do not see anything on the record which will clearly indicate that U Ngwe did not require rest as indicated in that certificate. The fact that he had flown to Hongkong by the B.O.A.C. plane under circumstances indicated in this case, does not, in our opinion, raise any definite inference that the medical certificate must have been necessarily false or incorrect, because persons of ill-health have also been seen to have flown by plane to other countries and from other countries into Burma.

There is, in this case, no doubt the fact that U Ngwe was absent on the 21st February, 1950 and that he was absent in circumstances of importance as he had to leave for Hongkong in connection with a business transaction valued at about Rs. 1,30,000. It has been urged before us that this application should be dismissed in view of the decision of the Full Bench case of *U Aung Gyi* v. *The Government of Burma* (1). We must say at once that we do not see anything in that case to indicate why an application under Order 9, Rule 9 of the Code of Civil Procedure ought not to be considered in accordance with the circumstances of each case. In the case of *U Aung Gyi* v. *The Government of Burma* (1), it appears there that the Advocate was late by five minutes after his case was called and dismissed by the Court, and he did not make any arrangement whatever for his representation in Court; nor did any one attempt to represent his client in Court at the time the case was called. Thus, the circumstances which existed in that case cannot be said to be the same as those in the case now under appeal in that on the 21st February 1950, there was an Advocate in the Court representing the

(1) (1940) Ran. 512.

plaintiff-appellant, U Ngwe. U Ngwe in his affidavit stated as follows :

"6. I say that after I had sent the medical certificate to my Advocates, I was pressed by the Civil Supplies Department for information regarding the supply of sugar for which I had already paid duty of Rs. 5,200 to the Union Government and the price of Rs. 1,30,000 to the shippers at Hongkong.

7. I say that the sugar was to be shipped from Hongkong not later than the 15th February 1950, but no information was received from the shippers regarding shipment.

8. I say that the amount invested by me in the said sugar deal represented nearly the entire fortune I possessed and I was afraid to lose it."

There is nothing in the reply affidavit which will suggest that the statement contained in those three paragraphs of the affidavit of U Ngwe are not likely to be correct or true. We can therefore in the circumstances of this case say that U Ngwe left Burma on the 21st February, 1950 on an important business transaction, involving almost the whole of his fortune, if not all. Can his absence in that circumstance be considered to be unjustified or insufficient? It appears to us, in the circumstances of this case, that the answer must be in the affirmative, particularly in view of the fact that the value of the suit amounts to no more than about Rs. 4,000. The observation which Schwabe C.J., made in *R. A. Arunachela Ayyar* v. *C. Subbaramiah* (1) is as follows :

"It is not right in cases of this kind that the man should have his case disposed of without being heard. These Courts are here so that people who have cases can have those cases heard and determined, and it should never be the intention of the Court that a man should be deprived of a hearing unless there has been something equivalent to misconduct or gross

(1) 46 Mad. 60 at 63.

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negligence on his part or something which cannot be put right, as far as the other side is concerned, by making the man to blame pay for it."

In the case of *U Aung Gyi* v. *The Government of Burma* (1), it might be said that the Advocate was guilty of gross negligence in not attempting to have some one to represent him there, either by means of his Clerk or by the medium of some other person. It does not appear to us that the plaintiff-appellant can in this case be properly said to have been guilty of a misconduct or gross negligence nor is this a case where the respondents could not have been compensated by means of costs. We are, in the circumstances of this case, of opinion that there is sufficient cause for the absence of the plaintiff-appellant from Court on the 21st February, 1950.

The appeal will be allowed and the order of the learned 2nd Judge dismissing the case of U Ngwe for default as well as the order dismissing his application under Order 9, Rule 9 of the Code of Civil Procedure will be set aside. We, however, think that in this appeal the plaintiff-appellant U Ngwe should pay the costs of the respondents who are represented by different Advocates, with a cost of five gold mohurs each, and that U Ngwe should also pay all the costs of the respondents in the lower Court for what they have already incurred up to this day.

(1) (1940) Ran. 512.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice, and U On Pe, J.

ABDUL MAJID AND FIFTEEN OTHERS (APPELLANTS)

v.

M. KUNDU (RESPONDENT).*

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Jan. 5.

Limitation Act, Article 181—Application for final decree—Loss of record—Reconstruction of record—Application filed beyond time—Courts (Emergency Provisions) Act, 1943, s. 7—Limitation Act, s. 4.

Held : Article 181 of Limitation Act applies to an application for final decree in a mortgage suit for sale of the property. The facts that an application for the reconstruction had to be filed and that record had to be reconstructed are no grounds for not filing the application within the time fixed by Article 181 of the Limitation Act.

Amlook Chand Parrack v. *Sarat Chunder Mukerjee*, (1911) 38 Cal. 913 at 921 ; *Jesinglal Kalidas Shah* v. *Gangadhar Mahadeo Karandikar and others*, A.I.R. (1938) Bom. 354 ; *Ramanathan Chetty* v. *Alagappa Chetty and others*, (1930) 53 Mad. 378 at 385 ; *Premomal Daomal* v. *Khudabux and others*, A.I.R. (1937) Sind 273 at 277 ; *Mitsui Bussan Kaishah Ltd.* v. *Firm of Totaram Bhagwandas*, A.I.R. (1921) Sind 166 ; *Sakarchand Narsidas* v. *Yacub*, A.I.R. (1923) Sind 14 ; *M.A.L.M. Chettiar Firm* v. *Maung Po Hmyin and others*, (1935) 13 Ran. 325 at 328 ; *Hoe Shwe Fong* v. *E. I. Attia*, (1949) B.L.R. 394 at 395, followed.

S. 7 of Courts (Emergency Provisions) Act, 1943 provides that the Civil Courts in Burma will be deemed to be closed from the 8th of December 1941 until 31st March 1947 which was the date fixed under s. 7 of the Act and s 4 of the Limitation Act simply prescribes that where the period of limitation expires on a day when the Court is closed the suit, appeal or application may be instituted or preferred or made on the day when the Court reopens. And s. 7 of Courts (Emergency Provisions) Act, 1943 does not purport to revive a right which has already become extinct or interfere with a vested right. It does not extend the period of limitation or the time for payment of the decretal amount into Court by judgment-debtor.

There is no general discretion apart from the statutory discretion given under s. 5 of the Act for extending the period of limitation.

Maqbul Ahmad and others v. *Pratap Narain Singh and others*, I.L.R. 57 All. 242 (P C.) ; *Reid* v. *Reid*, (1886) 31 Ch. D. 402 at 408, followed.

Hla Pe for the appellants.

P. B. Sen for the respondent.

* Civil 1st Appeal No. 53 of 1949 against the decree of the Original Side of this Court in Civil Regular Suit No. 250 of 1940, dated the 14th July 1949.

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ABDUL MAJID AND FIFTEEN OTHERS v. M. KUNDU.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—M. Kundu, the plaintiff-respondent, instituted a suit against Ahmad Ebrahim in the High Court of Judicature at Rangoon, in Civil Regular Suit No. 250 of 1940, for recovery of a sum of Rs. 10,000 due on a mortgage. The parties subsequently came to a compromise, and a preliminary mortgage decree was drawn up in April 1941.

The records of Civil Regular Suit No. 250 of 1940 were lost during the last Great War. New records have been reconstructed with a copy of the plaint and that of the preliminary mortgage decree passed in April 1941. Ahmad Ebrahim, the defendant, died in 1945. It has been said that when M. Kundu, the decree-holder, applied for the reconstruction of the records of Civil Regular Suit No. 250 of 1940 on or about the 18th March 1947, he did not know about the death of Ahmad Ebrahim and that his death led to considerable delay in the disposal of the application for the reconstruction of the records of Civil Regular Suit No. 250 of 1940, in that the plaintiff-respondent had great difficulties in bringing in all the legal representatives of Ahmad Ebrahim onto the records. The appellants are all the heirs and legal representatives of the deceased Ahmad Ebrahim.

The application of M. Kundu for the reconstruction of the records was allowed on or about the 1st April 1948, and he applied for the passing of a final decree for sale on or about the 8th April 1948, a date which was over one year after the provisions of section 7 of the Courts (Emergency Provisions) Act, 1943, had ceased to be operative. It has been submitted on behalf of the plaintiff-respondent that the Limitation Act does not apply to the case now under appeal, and consequently Article 181 has no

application, and that the respondent-decree-holder can, at any time, apply for the passing of the final mortgage decree for sale. We do not think there is any real substance in this contention, and there is a series of decisions from the various High Courts on this point. Jenkins C.J., observed in *Amlook Chand Parrack* v. *Sarat Chunder Mukerjee* (1):

"One object in view when the present Code was passed was to end, as far as possible, the conflict of decisions which embarrassed the Courts, and among those conflicting decisions were those which dealt with two points :—*First*, whether an application for an order under section 89 of the Transfer of Property Act was an application in execution or not; and *secondly*, whether, if it was not an application in execution, Article 181 constituted a bar on the ground that the application was one not contemplated by the Code of Civil Procedure. And so it is now provided that the application which follows a preliminary decree for sale, is not for an order for sale but for a decree for sale. And with the same end in view the provisions as to mortgage suits have been removed from the Transfer of Property Act to the Civil Procedure Code, so that it is no longer possible to contend that these applications are not under the provisions of the Civil Procedure Code."

It was also held in *Jesinglal Kalidas Shah* v. *Gangadhar Mahadeo Karandika and others* (2) that the Limitation Act applies to an application for a final decree for sale, and there the observation made in *Ramanathan Chetty* v. *Alagappa Chetty and others* (3) was also quoted with approval, which was as follows :

"Before going through some of the cases cited for this proposition I will allude to the special case of mortgage suits. It has no doubt been held that applications for a decree absolute and for a personal decree, under Order 34, Rules 5 and 6 respectively, are subject to Article 181 : the decree-holder must

(1) (1911) 38 Cal. Series, 913 at 921. (2) A.I.R. (1938) Bom. Series, 354.
(3) (1930) 53 Mad. 378 at 385.

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apply within three years. * * * * * * * * * * The rules under the Code made express provision for such applications and the Court has no duty cast upon it in the absence of them."

Davis J.C., in *Premomal Daomal* v. *Khudabux and others* (1) also observed :

" I will take first the argument that Article 181, Limitation Act does not apply, because to hold that an application under Order 34, Rule 5, Civil Procedure Code, is time-barred is tantamount to the extinguishment of rights and liabilities fixed under a preliminary decree and that such rights and liabilities cannot be extinguished. It is of course possible to say that the words of Order 34, Rule 5, Civil Procedure Code, are so explicit and peremptory that no qualification is permitted to be made upon their generality and that whenever an application is made under Order 34, Rule 5, Civil Procedure Code, it must be granted and a final decree must be passed. To hold this would be to give to proceedings in such suits no limitation of time whatever. They could continue indefinitely. There is no reason to suppose that the Limitation Act does not apply to applications under Order 34, Rule 5, Civil Procedure Code, as to other applications, and that being so, I can see no reason to differ from the ruling of this Court reported, not as the learned Judge, Rupchand A.J.C. says in *Mitsui Bussan Kaishah Ltd.* v. *Firm of Totaram Bhagwandas* (2), but in *Sakarchand Narsidas* v. *Yacub* (3) that Article 181, Limitation Act applies."

The observation of Page C.J., in *M.A.L.M. Chettiar Firm* v. *Maung Po Hmyin and others* (4) was as follows :

" Is the application for a final decree in such a case an application to enforce the preliminary decree that has already been passed ? In my opinion it is not ; because in order to be a mode of enforcing the preliminary decree it must, in my opinion, be an application to enforce a right that accrued to the mortgagee under the preliminary decree. In the old form of mortgage

(1) A.I.R. (1937) Sind Series, 273 at 277.
(2) A.I.R. (1921) Sind, 166.
(3) A.I.R. (1923) Sind, 14.
(4) (1935) 13 Ran. Series, 325 at 328.

decree under section 88 of the Transfer of Property Act the decree directed that the property should be sold on default being made by the mortgagor, but under Order 34, Rule 3, of the Code the preliminary decree does not direct that in case of default the property shall be sold nor does any right of sale thereunder accrue to the mortgagee. The right that is given under the preliminary decree to the mortgagee is a right, subject to any order that may be made in respect of redemption, to apply to the Court for a final decree for sale of the property."

It is clear, in our opinion, that the old law which was laid down in the Transfer of Property Act has been altered ; and we shall have to examine the provisions of Order 34 of the Code of Civil Procedure in order to find out what the law at the present really is ; and it will be necessary to conform to the provisions of Order 34, Rule 5, of the Code of Civil Procedure, if the decree-holder desires to have a final decree for sale passed in his favour. Rule 5 (2) clearly requires such application to be made ; and the preliminary mortgage decree, which was drawn up in April 1941, also requires that such application should be made to Court. Thus, Article 181 of the Limitation Act must be considered to apply in the case now under appeal.

The important question, which is involved in this appeal, is whether the application of the decree-holder for passing a final decree for sale under Order 34, Rule 5 can be considered to have been barred by limitation of time in the case now under appeal by reasons of the provisions of Article 181 of the Limitation Act ? Article 181 requires the application for a final decree to be made within three years from the date the right to apply for the final decree arises. It has been argued on behalf of the decree-holder that even if the Limitation Act is applicable to the case now under appeal, the right of the decree-holder could

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not be said to have accrued until the 2nd April 1947, in that the judgment-debtor, Ahmad Ebrahim, should be considered to still have the right under the preliminary mortgage decree in question, read with the provisions of section 7 of the Courts (Emergency Provisions) Act, 1943, to deposit the decretal amount up to the 1st day of April 1947. It will be necessary for this purpose to reproduce the relevant portion of the preliminary mortgage decree passed in April 1940, which reads:

> "It is declared that the amount due to the plaintiff by the defendant is the sum of Rs. 11,270 being the balance of account as shown in the Schedule A hereto and it is further declared that the plaintiff shall be entitled to apply for and obtain a final decree for sale of the property shown in the Schedule B hereto:
>
> Provided that the defendant may apply for and obtain a decree for redemption of the mortgage on payment into Court of the amount so declared to be due on or before the 31st day of December, 1941, and on compliance with all further orders of the Court and on payment of such further sums as the Court may determine to be payable on finally adjusting the account up to the date of payment."

It will be observed that it is contemplated in the preliminary mortgage decree that an application for passing of a final decree for sale will be made as required under Order 35, Rule 5, of the Code of Civil Procedure, and that the right of the decree-holder to apply for the final decree for sale will arise, if the decretal amount required to be paid in under the preliminary mortgage decree is not paid into the Court by the 31st December, 1941; and in fact no payment was made into Court at any time by the judgment-debtor. The 31st day of December, 1941, and the 1st day of January, 1942, fell on the days when the Court was closed, and Ahmad Ebrahim, the judgment-debtor, accordingly had time and opportunity until the

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2nd January, 1942 to pay the decretal amount into Court if he desired to do so—*vide* section 9 of the Burma General Clauses Act. The right of the judgment-debtor to deposit the decretal amount in Court was therefore extinguished on 2nd January, 1942, and M. Kundu, the decree-holder, must in the circumstances be considered to have the right to apply for the passing of a final decree for sale on the 3rd January, 1942.

The question arises, has anything occurred to interfere with or stop the decree-holder from exercising his right to apply for passing the final decree for sale on the 3rd January, 1942? None has been suggested, and we cannot see anything which could be said to have prevented the decree-holder from applying to the High Court for passing the final decree on the 3rd January, 1942. The High Court was functioning on the 3rd January, 1942, and all its offices were opened. No Courts (Emergency Provisions) Act or Ordinance had been passed or promulgated on the 3rd January, 1942, nor was any law passed on the 3rd January, 1942, to the effect as set out in section 7 of the Courts (Emergency Provisions) Act, 1943; and our attention has not been drawn to any such legislation. The judgment-debtor Ahmad Ebrahim must, in those circumstances, be considered to have lost his right to deposit the decretal amount under the preliminary mortgage decree after the 2nd January, 1942, which in effect means that the right of the decree-holder M. Kundu to apply for passing of the final decree for sale under the preliminary mortgage decree arose, in fact, on the 3rd January, 1942. In other words, the period of limitation for applying for the passing of a final decree, so far as M. Kundu is concerned, must, in fact, be considered to have accrued on the 3rd January, 1942. In *Hoe Shwe Fong* v. *E. I. Attia* (1), decided by

(1) (1949) B.L.R. 394 at 395.

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a Bench of this High Court, of which I was a member, it was observed :

" It appears that the right of the appellant Hoe Shwe Fong to apply for a final decree accrued at the end of December 1941, and under Article 181 of the Limitation Act, he would ordinarily have had three years from the end of December 1941, within which he could have made the application—vide *M.A.L.M. Chettiar Firm* v. *Maung Po Hmyin and others* (1) and *Maqbul Ahmad and others* v. *Pratap Narain Singh and others* (2). However, in view of the provisions of section 7 of the Courts (Emergency Provisions) Act, 1943, Hoe Shwe Fong had time up to the 1st of April 1947, within which he could have made the application for a final decree ; "

and the above observation was to the same effect as the observation which U Thein Maung J., expressed when the case first came before him on the Original Side, where he stated as follows :

" So the right to apply for a final decree accrued on the 31st December 1941 and the application should have been made within three years from that date. However, under section 7 of the Courts (Emergency Provisions) Act, 1943, the Civil Courts in British-Burma must be deemed to have been closed within the meaning of section 4 of the Limitation Act from the 8th December 1941 till the 1st April 1947. Under these circumstances the application for a final decree would not have been time-barred if it had been filed on the 1st April 1947, but as a matter of fact the application was not filed till the 5th August 1947. "

It is difficult to appreciate how M. Kundu, the decree-holder, could properly dispute that his right to apply for the passing of the final decree under the compromise mortgage-decree arose, in fact, on 3rd January, 1942 in the circumstances existing in this case ; and we might add here that the circumstances of the

(1) (1935) 13 Ran. 325 at 328

(2) I.L.R. 57 All. Series, 242 (P.C.).

present case are similar in circumstances to the case of *Hoe Shwe Fong* v. *E. I. Attia* (1).

It will be convenient, in order to examine the effect of section 7 of the Courts (Emergency Provisions) Act, 1943, to reproduce it, and it reads :

"7. The Civil Courts of British-Burma shall be deemed to be closed, within the meaning of section 4 of the Limitation Act from the eight day of December 1941 until such date as the Governor may, by notification, prescribe."

We ought also in this connection to reproduce the provisions of section 4 of the Limitation Act, which reads :

"Where the period of limitation prescribed for any suit appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens."

It is only when the provisions of section 7 of the Courts (Emergency Provisions) Act, 1943 are examined in the light of the provisions of section 4 of the Limitation Act that we will be able to ascertain the real scope and effect of section 7 of the Courts (Emergency Provisions) Act, 1943 ; and if section 7 of the Courts (Emergency Provisions) Act, 1943 is read in that light, it becomes clear that it is only the right to which the provisions of section 4 of the Limitation Act applies, which will be effected by the provisions of section 7 of the Courts (Emergency Provisions) Act, 1943. It will not be correct to give to section 7 of the Courts (Emergency Provisions) Act, 1943, a wider construction than it really possesses ; and it cannot, in our opinion, be read independent of section 4 of the Limitation Act. The allusion in section 7 of the Courts (Emergency

(1) (1949) B.L.R. 394 at 395.

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Provisions) Act, 1943, to section 4 of the Limitation Act is against the wider construction which has been attempted to be placed upon it on behalf of the decree-holder. Section 7 of the Courts (Emergency Provisions) Act, 1943 does not, in our opinion, purport to revive a right which had already become extinct on the date the Courts (Emergency Provisions) Act, 1943 was enacted and over which a new right had been created, whether by the act of the parties concerned or through the medium of the Court; and section 7 of the Courts (Emergency Provisions) Act, 1943, should not, in our opinion, be construed to interfere with a vested right, in view, particularly, of the general rule of law that once the period of limitation commences to run, it will continue to run and no subsequent inability would stop it—*vide* section 9 of the Limitation Act. The observation of Lord Bowen L.J., in *Reid* v. *Reid* (1), gives the caution which should be exercised when we are considering what is the retrospective of a statute is—

"Now the particular rule of construction which has been referred to, but which is valuable only when the words of an Act of Parliament are not plain, is embodied in the well-known trite maxim *omnis nova constitutio futuris formam imponere debet non praeteritis*, that is, that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. It seems to me that even in construing an Act which is to a certain extent retrospective, and in construing a section which is to a certain extent retrospective, we ought nevertheless to bear in mind that maxim as applicable whenever we reach the line at which the words of the section cease to be plain. That is a necessary and logical corollary of the general proposition that you ought not to give a larger retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the Legislature meant."

(1) (1886) 31 Chancery Division, 402 at 408.

What the provisions of section 7 of the Courts (Emergency Provisions) Act, 1943, purported to do is nothing more than to extend the right of the decree-holder which had already accrued before that Act was passed, to apply for passing the final decree so far as the present appeal is concerned, up to the 1st April, 1947.

The provisions of section 7 will, moreover, have to be construed very strictly, and if we bear this in mind, it will be observed that by reason of the provisions of section 4 of the Limitation Act, section 7 of the Courts (Emergency Provisions) Act, 1943, will apply only in cases where a suit or appeal has to be filed, or an application has to be made, in Court, and in no other cases. It is not disputed during the arguments before us that it is not necessary to file any application in Court to enable the judgment-debtor to deposit the decretal amount in Court, and in fact the terms of the preliminary mortgage decree expressly allow him to do so at any time up to the 31st December, 1941. It follows that section 7 of the Courts (Emergency Provisions) Act, 1943, will not apply to extend the time for payment of the decretal amount into Court by the judgment-debtor. In other words section 7 of the Courts (Emergency Provisions) Act, 1943 does not apply to extend the time in the present case, for payment of the decretal amount into Court. The right of Ahmed Ebrahim, the judgment-debtor, to pay the decretal amount into Court cannot also be considered to have been enlarged by reason of the provisions of section 7 of the Courts (Emergency Provisions) Act, 1943, in that this right was already extinct and superseded when the Act of 1943 was passed. The application of M. Kundu for passing the final decree, which was not made until 8th April, 1948, must therefore be considered to be barred by limitation of time. This conclusion may appear

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to be hard, so far as the decree-holder is concerned, but a hard case will be no excuse for making a bad law. In *Maqbul Ahmad and others* v. *Pratap Narain Singh and others* (1) Lord Tomlin observed (at page 250) :

"In their Lordships opinion it is impossible to hold that, in a matter which is governed by the Act, an Act which in some limited respects gives the Court a statutory discretion, there can be implied in the Court, outside the limits of the Act, a general discretion to dispense with its provisions. It is to be noted that this view is supported by the fact that section 3 of the Act is peremptory and that the duty of the Court is to notice the Act and give effect to it, even though it is not referred to in the pleadings."

The Act referred to above is the Limitation Act.

The provisions of sub-section (2) of section 17 of the Limitation Act, which was referred to on behalf of the decree-holder, do not apply to the circumstances of the case now under appeal, in that the right of decree-holder to apply for the passing of the final decree arose long before the death of the judgment-debtor Ahmad Ebrahim, who died only in 1945. The fact that the Official Receiver has been appointed Receiver to take possession of the property, which forms the subject of the mortgage in respect of which Civil Regular Suit No. 250 of 1940 was instituted, will not also prevent the period of limitation for applying for passing the final decree running against the decree-holder after the 2nd January, 1942. We are also unable to entertain the suggestion made on behalf of the decree holder that the time spent in pursuing the application for the reconstruction of the records of Civil Regular Suit No. 250 of 1940 or for bringing all the legal representatives of the deceased Ahmad Ebrahim

(1) I.L.R. 57 All. Series, 242 (P.C.).

into the records should be excluded in computing the period of limitation against the decree-holder. U Thein Maung J., observed as follows in the judgment which he passed in Civil Regular Suit No. 250 of 1940 :

" The application for a final decree need not be accompanied by a copy of the preliminary decree. It is not essential for the plaintiff to file an application for reconstruction of the record or the preliminary decree. What is essential for him is to file the application for the final decree within the period which is prescribed by Article 181 of the Limitation Act."

And we respectfully agree with the observation expressed by U Thein Maung J., above.

For the reasons that have been set out above, the appeal will be allowed and the order of the learned Judge on the Original Side, dated the 14th July, 1949, passed in Civil Regular Suit No. 250 of 1940 will be set aside, and the application for passing the final decree filed by the plaintiff-respondent M. Kundu will be dismissed with costs, both in this Court and on the Original Side, Advocate's fees will be five gold mohurs so far as the appeal is concerned and four gold mohurs in connection with the hearing on the Original Side.

CIVIL REVISION.

Before U On Pe, J.

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Dec. 8.

DAW TIN AND ONE (APPLICANTS)

v.

P. P. ANANTHANARAYANA IYER (RESPONDENT).*

Code of Civil Procedure—S. 141, Order 25, Rule 1—Application for security for costs against a decree-holder who is resident outside Burma—Whether such application lies.

Held : That Order 25, Rule 1 has no application to the Execution Proceedings against a decree-holder.

S. 141 of the Code of Civil Procedure does not apply to Execution Proceedings.

Hiralal Ramsukh v. *Monghibai Chimnaji*, A.I.R. (1938) Bom. 510, referred to.

Ma Than Sein and others v. *Ma Hla Yi*, (1941) R.L.R. 246 ; *Suraj Kuar* v. *Sant Singh and one*, 28 A.I.R. (1941) All. 219, followed.

Ba Tu for the applicants.

K. R. Venkatram for the respondent.

U ON PE, J.—This is an application to revise the order of the District Court, Bassein in Civil Miscellaneous No. 11 of 1949 arising out of Civil Miscellaneous No. 9 of 1949 and Civil Execution No. 1 of 1949 of the same Court dated the 20th September, 1919 and dismissing the application for security for costs. In Civil Execution No. 1 of 1949 of that Court, the applicants made an application to the Court to call upon the decree-holder to furnish security for the costs of the execution proceeding on the grounds set

* Civil Revision No 79 of 1949 against the order of the District Court of Bassein in Civil Miscellaneous No. 11 of 1949.

out in the affidavit of the second applicant. One of the grounds reads as follows :

"I say that it is manifestly unjust and unfair that I should be put to the expense, trouble and bother of proving that the Rs. 8,000 did reach the hands of the Agent N. Sundaresa Iyer, without having any possibility or probability of recovering the cost of such proof from P. P. Ananthanarayana Iyer."

P. P. Ananthanarayana Iyer is the decree-holder. The applicants' case in the execution proceeding is that they have satisfied the decree fully by making a subsequent payment of Rs. 8,000 to the Agent, N. Sundaresa Iyer.

The decision of the lower Court is now attacked on the ground that it erred in law in holding that the provisions contained in Order 25, Rule 1, Civil Procedure Code, are applicable to the case and that in not exercising the powers under section 151 of the Civil Procedure Code it has acted illegally. It has been strenuously argued before me by the Counsel for the applicants that the Civil Procedure Code is not exhaustive, and that, where there are circumstances in which, for the ends of justice or to prevent abusive process of the Court, the Court should use its inherent power it should do so. He quotes *Hiralal Ramsukh* v. *Monghibai Chimnaji* (1) where the following head-note appears :—

"Although there is no specific provision either in the Provincial Insolvency Act or the Civil Procedure Code, which provides for an order of security for costs in regard to a revision application made under section 115, Civil Procedure Code, or under section 75, Provincial Insolvency Act, on the ground that the applicant is not residing in British India and has not any immovable property in India, it is competent to the High Court, on an application by the opposite party for security for costs, to

(1) A.I.R. (1938) Bom. 510.

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make an order for security of costs of the nature provided in Order 25, Rule 1 in the exercise of its inherent jurisdiction, under section 151, Civil Procedure Code."

The following passage in the judgment may aptly be quoted :—

"It is well-known that the Code of Civil Procedure is not exhaustive The legislature could not be expected to provide for every order which may be necessary in the interests of justice or to prevent abuse of the process of the Court, or for the proper administration of real and substantial justice by the Courts, and it is for this purpose that section 151 is enacted. It is true that the powers under section 151 have to be exercised sparingly."

By applying this principle to the provisions of Order 25, Rule 1 of the Civil Procedure Code, it may be possible to extend the provisions of Order 25, Rule 1 to all other proceedings in any Court of Civil Jurisdiction as contemplated in section 141 of the Civil Procedure Code. Section 141 reads :

"The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable in all proceedings in any Court of Civil jurisdiction."

This section does not apply to proceedings in execution.

In *Ma Than Sein and others* v. *Ma Hla Yi* (1) it has been held :

The provisions of section 141 of the Code of Civil Procedure do not apply to applications for execution, but only to original matters in the nature of suits such as proceedings in probates, guardianships, divorce and insolvency."

Order 25, Rule 1 lays down specific provisions where, at any stage of the suit, security for costs should be given and by whom. Order 41, Rule 10 lays down

(1) (1941) R.L.R. 246.

specific provisions where the appellate Court may demand from the appellant security for the costs of the appeal, or of the original suit, or of both. No where has it been provided in Civil Procedure Code that security for costs has to be furnished in the Execution Proceedings. In *Suraj Kuar* v. *Sant Singh and another* (1) it has been held as follows :

"When the Legislature has enacted specific provisions for the taking of security from a plaintiff in certain cases and in certain sets of circumstances, no discretion is left in the Court for taking such security in any case or in any set of circumstances other than those specifically provided for. Had the Legislature so intended, it could easily have provided for security to be taken in cases where it appeared to the Court that the plaintiff had been put forward by other persons interested in the suit; or it could have enacted that security might be demanded 'for any other sufficient cause."

It is clear that it is a case in which the High Court should not interfere in revision. Notwithstanding what the learned Judge has interpreted as regards the principle laid down in *Surai Kuar* v. *Sant Singh and another* (1), the application must fail on its own merits. The application is dismissed but there will be no order as to costs.

(1) (28) A.I.R. (1941) All 219.

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Before U On Pe, J.

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Dec. 8.

S. M. AHMED AND ONE (APPLICANTS) *

v.

BAKRIDI (RESPONDENT).*

Specific Relief Act—S. 42—Suit for bare declaration that order of the Rent Controller assigning the tenancy void—Whether such suit lies—Jurisdiction of the Civil Court—If ousted.

Held : That where a tenant sub-let a room to a sub-tenant and the sub-tenant failed to pay the rent and the tenant gave notice determining the sub-tenancy and thereafter the sub-tenant applied to the Rent Controller for assignment of tenancy to him and the Rent Controller passed an order assigning the tenancy without any notice to the tenant, the tenant is entitled to file a suit for declaration that the order is void and not binding on him.

Under such circumstances, a suit for bare declaration lies. Unless the jurisdiction of the Civil Court has been explicitly or by necessary implication, excluded, a Civil Court was entitled to entertain a suit concerning the Civil right of a litigant. The Urban Rent Control Act does not exclude the jurisdiction of the Civil Court.

Secretary of State v. *Mask & Co.*, A.I.R. (1940) (P.C.) 105, followed.

G. N. Banerji for the applicants.

Aung Min for the respondent.

U ON PE, J.—This is an application to revise the judgment and decree of the learned 4th Judge of the City Civil Court, Rangoon in Civil Regular No. 212 of 1949 of the Court, in which declaration was given that the order of the Rent Controller, Rangoon, passed in Rent Proceedings No. $\frac{1\text{-W}}{210}$ of 1948 for sub-letting and assigning the tenancy in respect of a stall at No. 275, Fraser Street, Rangoon, in favour of the second applicant was *ultra vires* and therefore void. The

* Civil Revision No. 1 of 1950 against the decree of the 4th Judge of City Civil Court of Rangoon in Civil Regular No. 212 of 1949.

circumstances leading to the institution of the declaratory suit by the respondent are these: The respondent was the lessee of stall No. 275, Fraser Street, and he let it to the first applicant who therefore became his sub-tenant on a monthly tenancy. The latter fell into arrears in payment of rent from 1st February 1948 to November 1948, which resulted in the respondent giving a notice dated the 19th November 1948 asking to quit, vacate and give up peaceful possession of the stall by the end of December 1948. To that notice, a reply through a lawyer dated the 26th November 1948 was given, which *inter alia*, says as follows: "That since my client had been permitted to occupy the stall in question by the Rent Controller, City of Rangoon, as tenant of landlord with the latter's consent (*vide* Rent Proceedings No. 531W 1948-49) your notice needs no specific answer." In the Rent Proceeding No. 1W-210 of 1948, 1st applicant S. M. Ahmed applied for permission to be given to him to sub-let the stall to 2nd respondent B. S. Mohamed Eusoof on 24th December 1948, and the Rent Controller passed the following order dated the 10th January 1949 :—

"Issue permit. Assign tenancy from 1st January 1949 on production of rent receipt for December 1948."

The respondent applied by his petition dated the 17th February 1949 to the Rent Controller to inquire into the matter and cancel the permit issued to B. S. Mohamed Eusoof. That petition was rejected by the Rent Controller on 24th February 1949. The respondent thus instituted the suit Civil Regular No. 212 of 1949 asking for declaration that the order of the Rent Controller passed in Rent Proceedings

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No. $\frac{1\text{-W}}{210}$ of 1948 allowing the 1st applicant to sub-let to the 2nd applicant the stall in question was void, illegal and not at all binding. The learned 4th Judge decreed the suit as prayed.

The respondent's case is that the tenancy granted by him to the 1st applicant had been duly determined by him by a notice to quit and that only after the determination of the tenancy, the order of the Rent Controller allowing the 2nd applicant to become the sub-tenant of the 1st applicant was passed. The order, it is urged, is therefore illegal and has no legal effect as the same was made when there was no relationship of landlord and tenant, between the respondent and the 1st applicant and as the same was made without issuing a notice to the respondent as required under the Urban Rent Control Act. The lower Court held that the tenancy between the respondent and the 1st applicant had been duly terminated under the Transfer of Property Act and that as no notice was issued to the respondent, the landlord, under section 19-A (1) of the Urban Rent Control Act, the order of the Controller was made without jurisdiction and gave the declaration sought for.

Before me it has been urged that the lower Court erred in law in entertaining a suit for bare declaration without prayer for consequential relief by way of possession of the stall in question and that it also erred in questioning the validity of the order of the Rent Controller passed under section 16-A of the Urban Rent Control Act, 1948. A good many authorities have been cited to show that a mere declaration cannot be asked for when a further relief could be claimed. These cases, however, are easily distinguishable from the present case, which in my view, is one where nothing more is required to be done for the

purpose of securing to the plaintiff-respondent all the rights that he possessed in respect of the stall. The right of the respondent in this case is merely that of a tenant which need not necessarily be one of possession. That right could be one of merely collecting rent from a sub-tenant, as was the case between the respondent and the 1st applicant, so that further relief to get actual possession would not be necessary. It would be wrong to think that only a party in physical possession of property can bring a mere declaratory suit under section 42 of the Specific Relief Act. That section says nothing of the sort, but it speaks only of a possible consequential relief. As a landlord the respondent will have a claim either for rent or for damages for use and occupation, and if he were to ask for recovery of such rent or damages as further relief that would be misjoining causes of action in this suit. The lower Court is quite right in holding that a simple declaratory suit lies.

The next contention is that Civil Courts have no jurisdiction to question the order of the Rent Controller. Authorities have been cited showing that decisions and orders passed under Special Acts cannot be questioned in Civil Courts, and it is urged that order passed by the Rent Controller under section 16-A of the Urban Rent Control Act cannot be questioned in a Civil Court. On the question of the exclusion of the jurisdiction of Civil Courts, Lord Thankerton has made the following observation in *Secretary of State* v. *Mask & Co.* (1) : "It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred but such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases

(1) A.I.R. (1940) (P.C.) 105.

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where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure." That was a case where section 188 of the Sea Customs Act, 1878 was under consideration as to whether the finality clause was not so worded as to exclude the jurisdiction of the Civil Courts. That section provides that every order passed in appeal under this section shall, subject to the power of revision conferred by section 191, be final. It was held in that case that "a precise and self-contained code of appeal is provided in regard to obligations which are created by the statute itself, and it enables the appeal to be carried to the supreme head of the executive government;" and the Subordinate Judge's order dismissing the suit on the ground of want of jurisdiction was upheld. Applying this principle, I am of the opinion that in the circumstances of the present case, the jurisdiction of the Civil Court is not ousted to question the validity of the Rent Controller. As regards the finding of the lower Court on the question of lack of notice under section 19 A (*1*) of the Urban Rent Control Act, I am in agreement with the decision arrived at on the question that the provision regarding issue of notice is mandatory. The result is that this application must be dismissed with costs—Advocate's fee three gold mohurs.

G.U.B.C.P.O.—No. 49, H.C.R., 20-1-54—1,740—II.

FULL BENCH (CIVIL REFERENCE).

Before U Tun Byu, Chief Justice, U Ohn Pe and U Bo Gyi, JJ.

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MA THAN YIN (APPLICANT)

v.

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TAN KEAT KHANG (*a*) TAN KEIT SEIN (RESPONDENT).*

Code of Civil Procedure—S. 115—Revision whether lies against an erroneous order regarding Court-fees.

Held by the Full Bench: That an order demanding Court Fees erroneously from the defendant on the ground that the claim for adjustment made in the written statement is tantamount to claim for set off is not open to revision by the High Court under s. 115 of the Code of Civil Procedure.

Amir Hassan Khan v. *Sheo Baksh Singh*, (1885) 11 Cal. Series, 6 at 8; 11 I.A. 276; *Balakrishna Udayar* v. *Vasudeva Aiyar*, (1917) I.A. 261 at 267; *U Ba Thwin* v. *Maung Ba Shein*, (1932) 10 *Ran.* 517; *K.N.S.P.K.N.K. Firm* v. *U Ba Chit*, (1935) A.I.R. Ran. 158; *Maung Ba Han* v. *S.M.A.R.M. Firm*, (1934) A.I.R. Ran. 230; *S. C. Das.* v. *A. B. Datta*, (1934) A.I.R. Ran. 233; *Shew Prosad Bunghshidhur* v. *Ram Chunder Haribux*, (1914) 41 Cal. 323 at 337-338; *Devidas Maroti Boke* v. *Nilkanthrao Narayanrao Deshmukh*, (1936) A.I.R. Nag. 157 at 159; *Kesholal* v. *Laxmanrao*, (1940) I.L.R. Nag. 659 at 668; *Badri Nath* v. *Ram Chandra*, (1939) I.L.R. 14 Luck. 442; *Gupta & Co.* v. *Kirpa Ram Brothers*, (1935) 57 All. 17 at 22 (F.B.); *Mani Lal* v. *Durga Prasad*, (1924) 3 Pat. 930 at 940; *Mahant Ram Bhusan Dass* v. *Bachu Rai*, (1935) 14 Pat. 220 at 222-223; *Hariday Nath Roy* v. *Ram Chandra Barna Sarma*, (1921) 48 Cal. 138 at 149-150; *Mohamed Chootoo and others* v. *Abdul Hamid Khan and others*, (1933) 11 Ran. 36 at 38, followed.

Ramkhelawan Sahu v. *Bir Surendra Sahi*, (1937) 16 Pat. 766 at 777, not followed.

Rani Kulandaivelu Nachiar and another v. *Indran Ramaswami Pandia Thalayan*, (1928) 51 Mad. 664 at 669-670; *Shailendranath Kundu* v. *Surendranath Sarkar*, (1935) 62 Cal. 417 at 418, distinguished.

Malkarjun Bin Shidramappa Pasare v. *Narhari Bin Shivappa*, 27 I.A. 216 at 225; *Balakrishna Udayar* v. *Vasudeva Aiyar*, (1917) 24 I.A. 261 at 267; *Pakala Narayan Swami* v. *The King-Emperor*, (1936) I.L.R. 18 Pat. 234; *Bhagchand Dagadusa and others* v. *Secretary of State for India*, 54 I.A. 338 at 357; *Mohindar Singh and another* v. *The King*, 51 Cr. L.J. 1483 at 1484 *Nandamani* v. *Hari Krishna Bhima Deo*, A.I.R. (1939) Pat. 564; *Dhari Jena* v. *Gauranga Charan Sahu*, A.I.R. (1940) Pat. 89, followed.

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* Civil Reference No. 12 of 1950 being reference made by Justice U SAN MAUNG under Rule 25 of the Appellate Side Rules of Procedure (Civil).

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MA THAN YIN v. TAN KEAT KHANG (a) TAN KEIT SEIN.

The following order of reference was made by U San Maung J., in Civil Revision No. 9 of 1950 :—

"In Civil Regular Suit No. 1 of 1949 of the District Court of Pyapôn the plaintiff-respondent Tan Keat Khang sued the defendant-applicant Ma Than Yin and seven others as heirs and legal representatives of the late Tan Shu Yon for the recovery of Rs. 13,500 being house rent collected by Tan Shu Yon as an agent of the plaintiff. One of the defences raised by the defendants, of whom the applicant Ma Than Yin was one, was to the effect that one of the two houses entrusted to Tan Shu Yon was completely burnt down in the year 1935, that therefore the deceased Tan Shu Yon built a new one on the said site at a cost of Rs. 14,149-3-6 and that this cost should be adjusted against the rent collected by Tan Shu Yon. On this pleading an issue was raised as to whether this claim amounted to a claim for set off which required payment of Court-fees. This issue was decided by the learned District Judge in the affirmative and the defendant Ma Than Yin being aggrieved thereby has now filed this application for revision of the learned District Judge's order.

A preliminary objection was raised by the learned Advocate for the respondent to the maintainability of the application under section 115 of the Civil Procedure Code. The learned Advocate has cited the case of *Gupta & Co.* v. *Kirpa Ram Brothers* (1) in support of his preliminary objection and he has referred me to the case of *U Sein Shan and three others* v. *Daw Kya Bwint and seven others* (2) where the learned Chief Justice of this Court followed this decision and held that such an application for revision did not lie. On the other hand, the learned Advocate for the applicant has referred me to the case of *Ramkhelawan Sahu* v. *Bir Surendra Sahi* (3) to the contrary and this is the decision which was dissented from by the learned Chief Justice in *U Sein Shan*'s case (2). As the question involved is of general interest I have pondered over the matter and have come to the conclusion that the question deserves further consideration.

There is great weight of authority in support of the proposition that an order demanding improper Court-fee, if unfavourable to the plaintiff, is open to revision by the High Court under

(1) (1935) 57 All. 17 at 22 (F.B.).

(2) Civil Revision No. 38 of 1949 of the High Court, Rangoon.

(3) (1937) 16 Pat. 766 at 777.

section 115 of the Civil Procedure Code. In *Vithal Krishna* v. *Balkrishna Janardan and others* (1) it was held that a decision of a subordinate Court on a question of valuation, determining the amount of a Court-fee, is, notwithstanding its declared finality, subject to revision by the High Court under section 622 of the Civil Procedure Code, 1882 (corresponding to section 115 of the present Code). In *Rani Kulandaivelu Nachiar and another* v. *Indran Ramaswami Pandia Thalavan* (2) it was held that where the lower Court passed an order directing the plaintiff to pay additional Court-fees on an erroneous view of the Court-fee payable, and refused to proceed with the suit unless such sum was paid, the High Court will entertain a revision petition to set aside the order, although an appeal would lie later on on the consequential order that might be passed by the lower Court if the additional stamp duty was not paid. In this case the learned Judges observed :

> 'It seems to us that, while Courts would not generally interfere in revision where an equally efficacious remedy is open to the party, they have in several cases interfered where the remedy by way of appeal would entail unnecessary hardships on the party, involve multiplicity of proceedings or would not give the party as complete and efficacious a relief as interference with an interlocutory order and the case satisfied the the requirements of section 115, Civil Procedure Code. In the present case the plaintiff will have to pay an additional stamp duty of over Rs. 1,000 and then raise the question in appeal from the decree which the Subordinate Judge may pass as to the stamp duty leviable or refuse to pay the stamp duty ordered which would entail the necessary consequence of getting the suit dismissed and then appeal to the High Court. The appeal will have to be stamped with the full stamp duty and if the lower Court was wrong, they would have to apply for a refund and get it later on. It may be that the party is not able to pay the additional stamp duty required in which case he will have to file the appeal as a pauper. It is difficult to see why if the case is one of declining to exercise jurisdiction and the requirement of

(1) 10 Bom. 610 F.B. (2) (1928) 51 Mad. 664 at 669-670.

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section 115 are otherwise satisfied, the High Court should decline to interfere when by timely interference it will save a great deal of unnecessary hardship. We think the mere fact an appeal would lie later on consequential orders passed by the Subordinate Judge if the stamp is not paid, is no ground for refusing to entertain the petition to revise the order demanding an erroneous Court-fee and declining to proceed with the suit unless the sum erroneously demanded is paid.'

In *Shailendranath Kundu* v. *Surendranath Sarkar* (1) where a similar preliminary objection was raised the learned Judges observed :

'A question was raised on the side of the opposite party in the Rule that the case was not one, in which the revisional jurisdiction of the Court could be allowed to be invoked in favour of the plaintiff-petitioner in this Court. We are not at all impressed with the view presented before us on behalf of the opposite party—that, because there was the right of appeal by the plaintiff in the suit, after his plaint has been rejected on not complying with the Court's order in the matter of payment of deficit Court-fees, the Court should not interfere in revision, if we were convinced that the order directing the payment of additional Court-fees was not supportable under the law and was passed in the illegal exercise of jurisdiction by the Court below.'

In *Lakshmi Narain Rai* v. *Dip Narain Rai* (2) it was held that a revision against the order of the Munsif demanding the payment of an *ad valorem* Court-fee on the plaint was maintainable as the determination of the question whether an additional Court-fee should be paid or not marked the termination of a definite stage of the suit and settled the controversy between the parties on the particular point and that the order, therefore, amounted to a 'case decided' within the meaning of section 115 of the Civil Procedure Code and the order directing payment of an additional Court-fee was really an order declining to exercise the jurisdiction of entertaining the suit unless the payment was made. Further, on the question of there being another remedy open to the applicant it was doubtful whether in all the circumstances the applicant would have another remedy as, if he paid additional

(1) (1935) 62 Cal. 417 at 418. (2) 55 All. 274.

Court-fee and was successful in his suit and the other side did not appeal, the applicant would have no remedy for the excess payment, although he might fail to recover his costs from the defendant. This decision of a Bench of the Allahabad High Court was over-ruled by a Full Bench of the High Court in *Gupta & Co.* v. *Kirpa Ram Brothers* (1), the case relied upon by the learned Chief Justice in *U Sein Shan's* case (2). One of the grounds upon which the Full Bench over-ruled the decision in the previous case was that the order of a Court as regards payment of Court-fees was only an interlocutory order which could not be revised. The other ground was that the Court below had jurisdiction to decide the question regarding the payment of Court-fees and that even an erroneous decision of the point of law would not furnish a ground for revision.

However, this High Court has persistently held that an interlocutory order is in suitable cases open to revision. See *L. P. R. Chettyar Firm* v. *R. K. Bannerjee* (*O.R.*) (3) where Otter, J., dissented from the decision of a Full Bench of the Allahabad High Court in *Buddhu Lal and another* v. *Mewa Ram* (4) and held that the expression 'case which had been decided' in section 115 of the Civil Procedure Code is wide enough to include an interlocutory order and even though there may be an appeal from the final decree, that consideration will not prevent in a proper case interference in revision. Therefore the first ground upon which the Full Bench of the Allahabad High Court in *Gupta & Co.* v. *Kirpa Ram Brothers* (1) over-ruled the previous Allahabad case must be regarded as unsustainable. As regards the second ground that an erroneous decision on a point of law would not furnish a ground for revision, there is sufficient authority for the proposition that in suitable cases an erroneous decision on a point of law would furnish a ground for revision. In *Mohamed Chootoo and others* v. *Abdul Hamid Khan and others* (5) Page C.J., observed :

> 'In my opinion the High Court has jurisdiction under section 115 to revise an interlocutory order passed by a Subordinate Court from which no appeal lies to the High Court. But, as I ventured to point

(1) (1935) 57 All. 17 at 22 (F.B.).
(2) Civil Revision No. 38 of 1949 of the High Court, Rangoon.
(3) 9 Ran. 71.
(4) 43 All. 564.
(5) (1933) 11 Ran. 36 at 38.

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out in *Salam Chand Kannyram* v. *Bhagwan Das Chilhama* (1), in my opinion, it is only when irremediable injury will be done, and a miscarriage of justice inevitably will ensue if the Court holds its hand, that the Court ought to intervene in current litigation, and disturb the normal progress of a case by revising an interlocutory order that has been passed by a subordinate Court.'

Therefore, the question now resolves into this, is an interlocutory order relating to the payment of Court-fees such as would result in irremediable injury and a miscarriage of justice if the High Court hold its hand. The decision in *Ramkhelawan Sahu* v. *Bir Surendra Sahi* (2) proceeded on the ground that in deciding the question of Court-fee the Court decides an issue not as between the plaintiff and the defendant, but decides an issue as between the plaintiff and the Crown and that if the decision be adverse to the plaintiff it amounts to a decision to refuse to exercise its jurisdiction to try the issue and as such subject to the revisional jurisdiction of the High Court. It is certainly a matter for consideration whether this view of the question is really sound. However, what commends more to my mind is the alternative view expressed in *Lakshmi Narain Rai* v. *Dip Narain Rai* (3) that it is doubtful whether in all circumstances of the case the applicant who comes before the High Court to have the order of the Subordinate Court regarding Court-fees revised would have another remedy. If he paid the additional Court-fee and was successful in his suit and the other side did not appeal he would have no remedy for the excess payment, although he might fail to recover his costs from the other side. Take the present case as a specific instance and assume that the Court-fees demanded from Ma Than Yin is really not payable. If Ma Than Yin fails to pay the necessary Court-fees upon her written statement, her defence relating to the claim for adjustment of the sum of Rs. 14,148-3-6 would be struck off, in which case she could later appeal or agitate this question if the suit is decreed against her. However, if she pays the Court-fees and subsequently wins her case in the lower Court, she would have no remedy whatsoever in regard to the

(1) 53 Cal. 767 at 775. (2) (1937) 16 Pat. 766 at 777.
(3) 55 All. 274.

Court-fees paid by her if the other side did not appeal and is also not in a position to pay her costs. For these reasons I consider that the following question of law should be referred for decision of a Bench of two Judges or of a Full Bench as my Lord the Chief Justice may direct :—

> Is an order demanding improper Court-fee from a defendant on the ground that the claim for adjustment made in the written statement is tantamount to a claim for set off, open to revision by the High Court under section 115 of the Civil Procedure Code ?

The reference is made accordingly as provided for in Rule 25 of the Appellate Side Rules of Procedure (Civil) as published in the High Court (General) Notification No. 4, dated the 27th May, 1949."

P. N. Ghosh for the appellant.

T. Wan Hock for the respondent.

The judgment was delivered by

U TUN BYU, C.J.—The plaintiff-respondent Tan Keat Khang *alias* Tan Keit Sein, claims to recover a sum of Rs. 13,500 with reasonable interest thereon, from the date of the suit up to the date of payment, from the defendant-respondent Ma Than Yin and seven other persons who are said to be the heirs and legal representatives of one Tan Shu Yon who died in December, 1946. Tan Shu Yon was placed in charge of two houses in Pyapôn, which were said to belong to the plaintiff-respondent ; and he was said to have collected rents from the two houses, and after allowing for the taxes paid and the cost of the repairs incurred in respect of those two houses, a sum of Rs. 13,500 was said to be left remaining with Tan Shu Yon as balance of the rents collected by him. Ma Than Yin and five other defendants filed a common written statement wherein

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they alleged *inter alia* that one of the houses, which was known as Ah Choon shop, was burnt down in 1935, that Tan Shu Yon rebuilt a new house on the same site at a cost of Rs. 14,148-3-6 and that the rents received from the two houses had been used partly in paying taxes and partly in repayment of the sum of Rs. 14,148-3-6, which Tan Shu Yon spent in rebuilding the new house. These defendants accordingly denied that any money was due to the plaintiff-respondent by the estate of the deceased Tan Shu Yon. Certain preliminary issues were framed, one of which was :

"9. Whether the sum of Rs. 14,148-3-6 mentioned in paragraphs 9 and 10 of the written statement amounts to a set-off and requires Court-fees ?"

The learned District Judge, Pyapôn, after hearing the arguments of the Advocates for both sides, held, so far as this issue is concerned, that Court-fee was payable.

Ma Than Yin, the defendant-applicant, next filed an application in revision in the High Court to set aside the decision of the learned Distrist Judge, ordering payment of the Court-fee in respect of the sum of Rs. 14,148-3.6. The learned Judge before whom the revision case came for hearing referred the following question for decision :—

"Is an order demanding improper Court-fee from a defendant on the ground that the claim for adjustment made in the written statement is tantamount to a claim for set-off, open to revision by the High Court under section 115 of Civil Procedure Code ?"

It has not been suggested before us that the learned District Judge, in deciding the question as to whether Court-fee was payable or not in respect of

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the sum of Rs. 14,148-3-6, had acted perversely; and as the question about the payment of Court-fee, which the learned District judge decided, was a question which he had jurisdiction to decide, we are of opinion that the words "Is an order demanding improper Court-fee" in the first line of the question propounded for reference should be amended so as to read as "Is an order demanding Court-fee erroneously", and we propose to consider the question propounded in the sense as amended by us.

The answer to the question under reference will depend on what is the true meaning of section 115 of the Code of Civil Procedure. There have been numerous decisions in the different High Courts in India relating to the scope and meaning to be placed upon the provisions of section 115 of the Code of Civil Procedure, but unfortunately those decisions are not uniform. The relevant portion of section 115 of the Code of Civil Procedure reads:

"115. The High Court may call for the record of any case which has been decided by any Court subordinate to the High Court and in which no appeal lies thereto, and if such subordinate Court appears—

(*a*) to have exercised a jurisdiction not vested in it by law, or

(*b*) to have failed to exercise a jurisdiction so vested, or

(*c*) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

* * * * "

It will be observed that the wording of section 115 indicates clearly that the power of revision under section 115 is somewhat restricted, and that it can properly be exercised only in cases in which no appeal lies to the High Court, and only when they can be brought within the ambit of one of the three

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clauses set out above. It will accordingly be necessary to enquire as to what is the exact scope of Clauses (*a*), (*b*) and (*c*) of section 115 of the Code of Civil Procedure, and it appears to us that the best mode of approaching this matter will be to first consider what the Privy Council has said about them.

Sir B. Peacock, in delivering the judgment of their Lordships of the Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh* (1), observed :

" The question then is, did the judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity.

It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case, and even if they decided wrongly they did not exercise their jurisdiction illegally or with material irregularity."

In *Balakrishna Udayar* v. *Vasudeva Aiyar* (2) Lord Atkinson, in delivering the judgment of their Lordships of the Privy Council, also observed as follows :

" As to the preliminary objection, section 115 of the Civil Procedure Code enables the High Court, in a case in which no appeal lies, to call for the record of any case if the Court by which the case was decided appears to have acted in the exercise of a jurisdiction not vested in it by law, or to have failed to have exercised a jurisdiction vested in it or to have exercised its jurisdiction illegally or with material irregularity, and further enables it to pass such an order in the case as the Court may think fit.

It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal

(1) (1885) 11 Cal. Series, 6 at 8 ; 11 I.A. p. 276.
(2) (1917) I.A. 261 at 267.

assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

It thus becomes clear that section 115 of the Civil Procedure does not apply to any wrong conclusion, whether in law or on fact, where the question of jurisdiction is not also involved. In other words, where a Court had jurisdiction to decide a question which came before it and did decide it, it could not be said that the Court was acting without jurisdiction or that it was acting illegally or with material irregularity in the exercise of its jurisdiction merely because its decision was wrong on a point of law or on fact.

The headnote in *U Ba Thwin* v. *Maung Ba Shein* (1) which came before a Special Bench of three judges, reads:

"Under rules made pursuant to the provisions of the Burma Rural Self-Government Act (IV of 1921) the District Judge passed orders relating to the validity of the election of certain persons as members of the District Council of Myingyan. The District Judge had jurisdiction to pass them and under Rule 39 they were final.

Held: Dismissing the application, that, assuming the District Judge was acting as a Court subordinate to the High Court within section 115 of the Civil Procedure Code, the orders were open to revision only if the District Judge was acting without jurisdiction."

Dunkley J., also observed in *K.N.S.P.K.N.K. Firm* v. *U Ba Chit* (2) as follows:

"Where a Court has jurisdiction to determine a question, it cannot be said that it has acted in the exercise of its jurisdiction illegally or with material irregularity because it has come to an erroneous decision, whether that decision be on a question of fact or even on a point of law."

(1) (1932) 10 Ran. p. 517.

(2) (1935) A.I.R. Ran. p. 158.

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Dunkley J., we might add, expressed the same opinion in two earlier cases of *Maung Ba Han* v. *S. M.A.R.M. Firm* (1) and *S. C. Das* v. *A. B. Datta* (2), where the decision of the Privy Council in the case of *Amir Hassan Khan* v. *Sheo Baksh Singh* (3) was also referred to. It will thus be observed that the decisions of the High Court of Rangoon, which have been referred to above, are also to the same effect as the decisions of of the Privy Council.

The observation of Jenkin C.J., in *Shew Prosad Bunghshidhur* v. *Ram Chunder Haribux* (4) is to the same effect—

> "But how can it be fairly said that the Court failed to exercise a jurisdiction vested in it by law? It dealt with the matter; it was prepared to exercise its jurisdiction, but the learned Judge considered as a matter of law that there was no relationship of landlord and tenant. The Court was entitled to come to that conclusion even if it was erroneous, and if it did come to that conclusion it cannot be said that the Court has failed to exercise a jurisdiction vested in it by law.
>
> In so far as it is suggested that the Court acted in the exercise of its jurisdiction with material irregularity, I confess I am unable to follow the argument.
>
> It was suggested before us in the course of argument that the Court acted in the exercise of its jurisdiction *illegally* in so far as it came to an erroneous conclusion of law. That, however, is a contention which is not made in the application. But even if it had been made it could not have succeeded and I am unable to see any kind of ground on which it can be said that Mr. Dobbin acted in the exercise of his jurisdiction illegally or with material irregularity within the meaning of section 115. It appears to me that section 115 can only be called in aid when the failure of justice (if any) has been due to one or other of the faults of procedure indicated in that section. If there was an error

(1) (1934) A.I.R. Ran. p. 230.
(2) (1934) A.I.R. Ran. p. 233.
(3) (1885) 11 Cal. Series, p. 6 at 8; 11 I.A. p. 276.
(4) (1914) 41 Cal. p. 323 at 337-338.

committed by Mr. Dobbin, it was an error of law and not of procedure, and in my opinion Mr. Justice Fletcher had no power to interfere."

In *Devidas Maroti Boke* v. *Nilkanthrao Narayanrao Deshmukh* (1) it was also stated as follows :

" So there can be no question that the Court had jurisdiction to decide, as it did, and the only question is whether it acted illegally, or with material irregularity, within the meaning of section 115 (*c*), Civil Procedure Code. Here also I am clear, the matter is circumscribed by the decision of their Lordships of the Privy Council in *Balakrishna Udayar* v. *Vasudeva Aiyar* (2). Even Clause (*c*) cannot be invoked when the question of jurisdiction is not involved ; or at least a question of procedure, as explained by Sir Lawrence Jenkins in *Shew Prosad Bunghshidhur* v. *Ram Chunder Haribux* (3) at page 338 ; for example, proceeding in the absence of a necessary party to a suit : 54 Cal. 338 at 344. It must be something independent of the decision itself ; an irregularity or illegality in the manner of arriving at it, not in the conclusion reached."

The observation made in *Kesholal* v. *Laxmanrao* (4) also reads :

" Even if the decision of the lower appellate Court were erroneous that would not be sufficient to enable me to interfere with the decision in revision, see *Devidas* v. *Nilkanthrao* (1). Their Lordships of the Calcutta High Court in *Kali Charan Sirdar* v. *Sarat Chunder Chowdhury*, (1903) I.L.R. 30 Cal. 397 laid down that the High Court cannot interfere (in revision) merely because the lower Court has taken in the exercise of its jurisdiction a mistaken view as to what does or does not constitute misconduct. The scope of revision under section 115 is very limited and nothing has been argued before me which will bring the case for interference within that limited scope."

(1) (1936) A.I.R., Nag. p. 157at 159.
(2) (1917) I.A. p. 261 at 267.
(3) (1914) 41 Cal. p. 323 at 337-338.
(4) I.L.R. (1940) Nag. p. 659 at 668.

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We respectfully agree that the scope of section 115 of the Code of Civil Procedure is narrow and restricted. The later portion of the headnote in *Badri Nath* v. *Ram Chandra* (1) also reads :

" No revision lies against an order refusing permission to an official receiver of the Estate of an insolvent to sue in *forma pauperis* for when a Court has jurisdiction to decide a question and decides it whether rightly or wrongly, there can be no revision under section 115, Civil Procedure Code, as even if the Court decides the question wrongly it does not exercise its jurisdiction illegally or with material irregularity."

It will be observed from the cases referred to above that an error, whether on law or fact, to fall properly within the ambit of section 115 of the Code of Civil Procedure must be such an error as will fall strictly within one of the three clauses of that section. A Court cannot, in deciding, a question of law or fact wrongly, be properly said to have refused to exercise its jurisdiction in a question which came before it, where the question was one over which it clearly had jurisdiction to decide one way or the other. Conflicting decisions have arisen in connection with the provisions of section 115 of the Code of Civil Procedure, if we may be permitted with respect to say so, because Judges have unconsciously allowed themselves to be influenced or persuaded in their consideration of the cases that come before them by the question of hardship, inconvenience, trouble or expense in considering whether a particular case or decision falls within the purview of section 115 of the Code of Civil Procedure, or not. We must be careful not to allow ourselves to be influenced by any of those extraneous considerations in attempting to ascertain what is the true scope and meaning of section 115, because to do otherwise

(1) I.L.R. (1939) 14 Luck. Series, p. 442.

would, likely, lead us to confusion or uncertainty and in that way to induce us to give a much wider construction to section 115 than it really states. If the meaning of section 115 is to be strained beyond what it ordinarily and strictly conveys, we cannot possibly expect to have any semblance of uniformity of decisions in respect of the provisions of section 115, even among Judges of the same High Court.

We of course appreciate the inconvenience which the order of the learned District Judge might cause to Ma Than Yin, but we are unable to allow the circumstance of trouble, hardship, inconvenience or expense to influence us in attempting to express our views as to the true construction of section 115 of the Civil Procedure Code. Nor can we allow the consideration that the question involved is intricate or difficult to influence us in considering as to what is the proper scope and meaning of section 115 of the Code of Civil Procedure. It appears to us to be quite clear that section 115 concerns with jurisdiction and that it cannot properly be read divorced from that consideration. The fact that the learned District Judge had not fully appreciated the difficult or intricate law which he was asked to decide would still, in our opinion, amount only to an error of law as the question was one which was within the jurisdiction of the learned Judge to decide, and which he did decide. We are unable to see how it could properly be said that, because the learned District Judge decided a difficult or intricate point of law erroneously, he had failed to exercise jurisdiction on a question which he had in fact decided after he had heard both parties. It is not alleged before us that the learned District Judge had acted perversely in deciding the question whether Court-fee was payable in respect of the written statement or not.

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The observation of Sulaiman C.J., in the Full Bench case of *Gupta & Co.* v. *Kirpa Ram Brothers* (1) appears to be appropriate, and it reads :

"* * * the Court below has decided the question of the amount of the Court-fees that is payable at a slightly earlier stage, but it is nevertheless a decision on one of the points that may well be in controversy. The Court had jurisdiction to decide this point and if it has taken an erroneous view of the law it has committed no irregularity. I do not think that it can be said that the Court below, having decided this point, is now refusing to exercise jurisdiction to entertain the suit."

Mukerji J., in the same case also observed :

"* * * A Court hearing a suit has jurisdiction to decide whether the Court-fee paid is sufficient or not. It may decide rightly or it may decide wrongly. In either case, the decision is within the competence of the Court, and in this view it cannot be said that in deciding that the Court-fee paid was insufficient the Court exercised a jurisdiction not vested in it by law. The High Court, in revision, does not correct a mere error of law."

It seems to us to be clear from the decisions that have been referred to above that a decision on a question of Court-fee, where no question of jurisdiction is really involved, does not fall within the purview of section 115 of the Code of Civil Procedure. We realise that there are decisions to the effect that the superior Court will interfere in revision in cases where the subordinate Court purports to give itself jurisdiction or refuses to exercise jurisdiction under an erroneous construction of law, but we do not think that those decisions afford any help in considering the question under reference because in the case now under consideration the learned District Judge had from the outset jurisdiction to decide the question of

(1) (1935) 57 All. p. 17 at 22 (F.B.)

Court-fees, which was placed before him, and he was bound in law to decide that question when it was raised before him.

In *Mani Lal* v. *Durga Prasad* (1) it was observed :

" * * * * an improper order demanding unjustifiable Court-fee amounts to telling the plaintiff that the Court will not proceed with the trial of the suit on merits although the plaintiff has, in fact, paid the Court-fee. This will be a refusal to exercise jurisdiction which upon the sufficiently stamped plaint the Court was bound to exercise. * * * * * To deny the power of revision in the Court in such cases would be to allow the subordinate Courts to pass whimsical orders and thereby refuse to try the suit and exercise jurisdiction and there might be no remedy available to the plaintiff as was pointed out by their Lordships of the Judicial Committee in the case of *Balakrishna Udayar* v. *Vasudeva Ayar* (2), though a case of different nature."

With respect, we agree that if the order is really whimsical, which in effect is perverse, it might in very clear cases be implied that the Court had refused to exercise jurisdiction in the matter before it. It is difficult, however, to appreciate how a Court, in deciding a question of Court-fee, which is raised before it and which it has jurisdiction to decide, and where the order passed by it cannot be said to be clearly whimsical or perverse, could strictly be said, even impliedly, to have refused to exercise jurisdiction on the question decided by it, although wrongly. The case of *Mani Lal* v. *Durga Prasad* (1) was followed in a subsequent case of *Mahant Ram Bhusan Dass* v. *Bachu Rai* (3) where it was observed :

" It has been suggested from time to time that the proper course for the plaintiff as to a decision of this character against him is to submit to having his suit dismissed on this ground and then exercising his right of appeal.

(1) (1924) 3 Pat. p. 930 at 940.
(2) (1917) L.A. p. 261 at 267.
(3) (1935) 14 Pat. p. 220 at 222-223.

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There being that remedy by way of appeal the Court should not exercise it in revision. To apply that reasoning in any hard and fast manner seems to me to be taking a very narrow and pedantic view of the law and to accede to it would be to allow a triumph of form over substance."

With respect, we feel that it is difficult to conceive how a Judge could be said to adopt a narrow or pedantic view of the law in attempting to follow strictly what it means and where he did not attempt to give to section 115 of the Code of Civil Procedure a construction wider than what it really conveys, because to do more would be, in effect, to legislate and not to administer the law as it exists. If any real hardships or inconvenience is caused by adopting a construction which the wording of a statute conveys that obviously is a matter for the legislature to correct, and not for the Court to interpose.

It was observed in the Full Bench case of *Ramkhelawan Sahu* v. *Bir Surendra Sahi* (1) :

> "The Court is given power to levy taxes upon certain classes of cases only which are specified in the Act and upon each class at the rate specified in the Act. If the decision of the first Court is to be treated as final in any particular case, it might possibly happen that all the Munsifs might adopt a uniform but entirely erroneous view of the taxation authorised by the Act and the matter could never be remedied by the superior Court, because on the principle that the first Court had the privilege of deciding rightly or wrongly the matter, the matter could never be raised in any case."

We do not think, with respect, such consideration should be allowed to influence us in attempting to decide the question which is raised in this reference as we are likely thereby to give to the provisions of section 115 of the Code of Civil Procedure a wider construction than what it really is. We are also

(1) (1937) 16 Pat. p. 766 at 777.

unable to see how, when a Court decides as to which category a case falls for the purpose of Court-fees, it must be assumed that it had refused to exercise its jurisdiction if the question which it decided was erroneous, although it was a question which the Court had jurisdiction to decide and which it did decide when it was raised before it. The case of *Rani Kulandaivelu Nachiar and another* v. *Indran Ramaswami Pandia Thalavan* (1) is on the same line as the Patna cases, where it was also observed :

" It seems to us that, while Courts would not generally interfere in revision where an equally efficacious remedy is open to the party, they have in several cases interfered where the remedy by way of appeal would entail unnecessary hardships on the party, involve multiplicity of proceedings or would not give the party as complete and efficacious a relief as interference with an interlocutory order, *and* the case satisfied the requirements of section 115, Civil Procedure Code. * * * * * It is difficult to see why if the case is one of declining to exercise jurisdiction *and* the requirements of section 115 are otherwise satisfied, the High Court should decline to interfere when by timely interference it will save a great deal of unnecessary hardship."

We have italicised the word " and," and it will be observed that the Madras High Court also fully appreciated that the requirements of section 115 must be fully complied with before a revision lies against decision on a question of Court-fees, which had been decided by a subordinate Court. The Madras case was referred to in *Ramkhelawan Sahu* v. *Bir Surendra Sahi* (2). In *Shailendranath Kundu* v. *Surendranath Sarkar* (3), it was also observed :

" We are not at all impressed with the view presented before us on behalf of the opposite party—that, because there

(1) (1928) 51 Mad. 664 at 669-670.
(2) (1937) 16 Pat. Series, p. 766 at 777.
(3) (1935) 62 Cal. p. 417 at 418.

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was the right of appeal by the plaintiff in the suit, after his plaint has been rejected on not complying with the Court's order in the matter of payment of deficit Court-fees, this court should not interfere in revision, if we were convinced that the order directing the payment of additional Court-fees was not supportable under the law *and* was passed in the illegal exercise of jurisdiction by the Court below."

The word " and " has been italicised by us. It is thus also clear that the Calcutta High Court also fully appreciated that for an order directing payment of Court-fees to be subject to revision it must also be an order which was passed in the illegal exercise of jurisdiction by the Court making that order and that the mere fact that the order was not in accordance with law will not be sufficient for the purpose of section 115 of the Code of Civil Procedure. If an order wrongly demanding Court-fee or additional Court-fees can be construed to mean that the Court was refusing to exercise its jurisdiction unless the Court-fees were paid, it is difficult to understand how, when a Court wrongly decided to accept inadequate Court-fees, it could not also be argued that in the latter circumstance the Court was wrongly exercising jurisdiction in that no Court ought to accept any application of plaint filed before it unless the proper Court-fee has been paid, and yet in the latter category of cases it has been held in certain cases that no revision lies. It will be appropriate here to reproduce the observation of Mookerjee A.C.J., in *Hariday Nath Roy* v. *Ram Chandra Barna Sarma* (1) :

" There is a clear distinction between the jurisdiction of the Court to try and determine a matter, and the erroneous action of such Court in the exercise of that jurisdiction. The former

(1) (1921) 48 Cal. Series, p. 138 at 149-150.

involves the power to act at all, while the latter involves the authority to act in the particular way in which the Court does act. The boundary between an error of judgment and the usurpation of power is this : the former is reversible by an Appellate Court within certain fixed time and is therefore only voidable, the latter is an absolute nullity. When parties are before the Court and present to it a controversy which the Court has authority to decide, a decision not necessarily correct but appropriate to that question is an exercise of judicial power or jurisdiction. So far as the jurisdiction itself is concerned, it is wholly immaterial whether the decision upon the particular question be correct or incorrect. Were it held that a Court had jurisdiction to render only correct decision, then each time it made an erroneous ruling or decision, the Court would be without jurisdiction and the ruling itself void. Such is not the law, and it matters not what may be the particular question presented for adjudication, whether it relates to the jurisdiction of the Court itself or affects substantive rights of the parties litigating, it cannot be held that the ruling or decision itself is without jurisdiction or is beyond the jurisdiction of the Court. The decision may be erroneous, but it cannot be held to be void for want of jurisdiction. A Court may have the right and power to determine the status of a thing and yet may exercise its authority erroneously ; after jurisdiction attaches in any case, all that follows is exercise of jurisdiction, and the continuance of jurisdiction is not dependent upon the correctness of the determination."

Moreover, where a party can appeal from a decree passed against him after an interlocutory order was passed, and if it can also raise the point about the payment of the Court-fee in the memorandum of appeal, can it be properly said that the party aggrieved is without remedy. The answer must, in our opinion, be in the negative. We cannot also properly allow ourselves to be influenced by any consideration of trouble, hardship, inconvenience or expense, which the order might cause, and that is a matter which a litigant has often to meet with during the course of litigation. It appears to be obvious that if the question as to whether a Court-fee is payable or not can be

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reagitated in an appeal from a decree, which was passed subsequently, it cannot strictly be said to be a case where the party aggrieved was left without any remedy to redress the injustice done to him. The contention that a wrong order can lead to much waste of time, money or labour does not, in our opinion, really help us in construing what is strictly a question of law, as to the real scope and meaning of section 115 of the Code of Civil Procedure. We are accordingly of opinion that the mere fact that a subordinate Court decides a question of law or fact, or both, wrongly, unless it also involves a question of jurisdiction, will not bring the case within the ambit of section 115 of the Code of Civil Procedure.

It is true that it has been repeatedly held, so far as the Courts in Burma are concerned, that the High Court has power to entertain in revision in interlocutory orders, subject to certain restrictions ; and Page C.J., in *Mohamed Chootoo and others* v. *Abdul Hamid Khan and others* (1) stated :

" In my opinion the High Court has jurisdiction under section 115 to revise an interlocutory order passed by a Subordinate Court from which no appeal lies to the High Court. But, as I ventured to point out in *Salam Chand Kannyram* v. *Bhagwan Das Chilhuma*, (1926) I.L.R. 53 Cal. 767 at 775 ' in my opinion, it is only when *irremediable* injury will be done, and a miscarriage of justice inevitably will ensue if the Court holds its hand, that the Court ought to intervene in current litigation, and disturb the normal progress of a case by revising an interlocutory order that has been passed by a subordinate Court. '

In my opinion the Court ought not to grant the application now under consideration. *Non constant* that when the case is heard by the District Court the plaintiff will succeed. On the other hand, if the plaintiff's suit is dismissed the order rejecting the application for amendment now under consideration can be challenged in an appeal from the decree. "

(1) (1933) 11 Ran. p. 36 at 38.

The word "irremediable" has been italicised by us, and we do not think we ought to go beyond what is stated in the above observation. The decision about the payment of Court-fee in the case now under reference is however a matter which can be raised in appeal after the decree is passed. There is also nothing on the record to suggest that Ma Than Yin cannot afford to appeal, or that the estate of Tan Shu Yon is not solvent. Moreover, each case should be considered in its own circumstances. The answer to the question propounded for reference, in the sense as amended by us will therefore be in the negative.

U ON PE, J.—I have had the advantage of reading the judgment of the learned Chief Justice and it appears to me clear that the reference, as amended, by substitution of the words "Is an order demanding Court-fee erroneously" in the place of the words "Is an order demanding improper Court-fee," should be answered in the negative.

U BO GYI, J.—The answer to the question propounded would seem to depend upon whether the language of section 115 of the Code of Civil Procedure is to be construed in its ordinary and natural sense or whether it should be given an extended meaning. It is conceded by applicant's learned Advocate that the order of the District Court of Pyapôn directing payment of Court-fee on the written statement in its Civil Regular No. 1 of 1949, which order is the subject of the present reference, may fall, if at all, only within Clause (*b*) of section 115 of the Code of Civil Procedure. It is not contended, indeed it cannot in the circumstances of the case be contended, that there has been an illegal or irregular exercise of jurisdiction within the meaning of Clause (*c*) of section 115 of the Code. The most that

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can be said of the order of the District Court is that it is wrong in law.

Now, merely because an erroneous decision has been arrived at is no ground for holding that the Court, in coming to the decision it did, exercised its jurisdiction illegally or with material irregularity. However sad the mistake, " a Court has jurisdiction to decide wrong as well as right "—*Malkarjun Bin Shidramappa Pasare* v. *Narhari Bin Shivappa* (1) ; and decisions regarding matters of law or fact, where no question of jurisdiction is involved, do not fall within the terms of section 115 of the Code of Civil Procedure—*Balakrishna Udayar* v. *Vasudeva Aiyar* (2). *Prima facie*, therefore, the District Court in passing order on the issue of Court-fee cannot be held to have failed to exercise a jurisdiction vested in it by law ; for the Court did in the exercise of its jurisdiction adjudicate on the issue which had come up for determination.

It is urged in these circumstances that since the erroneous decision on the question of Court-fee would be followed by a consequential order striking off the written statement in whole or in part, as the case might require, unless the Court-fee was paid, it should be held in anticipation of such an order that the Court refused to exercise a jurisdiction vested in it by law. To hold so would, in my opinion, be to do violence to the language of section 115, Clause (*b*), of the Civil Procedure Code inasmuch as the Court has not passed a consequential order and before that event takes place it cannot, on the plain meaning of section 115, Clause (*b*) of the Code, be said that the Court has refused to adjudicate on the claim or defence and thus has refused to exercise the jurisdiction vested in it by law. Whether such a consequential order, when passed, would come within Clause (*b*) of section 115 of the Code

(1) 27 I.A. 216. at p. 225. (2) (1917) I.A. 261 at p. 267.

does not under the terms of reference fall to be determined in this case.

In Maxwell on Interpretation of Statutes, Ninth Edition, the importance of interpreting statutes in their plain and natural meaning is emphasized in the following passage occurring at page 5 :—

" In construing wills and, indeed, statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnancy or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further. "

This commonsense rule of interpretation has been approved by the Privy Council in *Pakala Narayan Swami* v. *The King-Emperor* (1), where their Lordships further observed that when the meaning of words is plain it is not the duty of the Courts to busy themselves with the supposed intentions of the legislature. And in *Bhagchand Dagadusa and others* v. *Secretary of State for India* (2) the Privy Court in speaking of the Code of Civil Procedure said : " The Act, albeit a Procedure Code, must be read in accordance with the natural meaning of its words."

Considerations of hardship that might be entailed on the party against whom an adverse decision has been given on the question of Court-fee have been canvassed before us. On this question, I cannot do better than quote again Maxwell on Interpretation of Statutes where referring to the abovementioned rule of interpretation the learned author says at page 5:

" It had been stated by Lord Cranworth (when Chancellor) as ' a Cardinal Rule, ' from which, if we depart, we should launch into a sea of difficulties not easy to fathom ; "

(1) (1939) I.L.R. 18 Pat. 234. (2) 54 I.A. 338 at 357.

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Again, at page 214 of the treatise the learned author, on the strength of eminent authorities, mentions the following propositions :—

" It is to be borne in mind that the injustice and hardship which the Legislature is presumed not to intend is not merely such as may occur in individual and exceptional cases only. Laws are *made adea quae frequentius accidunt*, and individual hardship not infrequently results from enactments of general advantage. The argument of hardship has been said to be always a dangerous one to listen to. It is apt to introduce bad law and has occasionally led to the erroneous interpretation of statutes. The Court ought not to be influenced or governed by any notions of hardship. It must look hardships in the face rather than break down the rules of law, and if, in all cases of ordinary occurrence, the law, in its natural construction, is not inconsistent, or unreasonable, or unjust, that construction is not to be departed from merely because it may operate with hardship or injustice in some particular case."

Besides, the undesirability of straining the language of a statute to meet the supposed justice of a hard case is stressed by their Lordships of the Privy Council in *Mohindar Singh and another* v. *The King* (1) where it was observed :

" They fully appreciate the importance of avoiding so far as the words and context fairly and reasonably permit, a construction which would lead to anomalous or patently unreasonable results. On the other hand it is to be remembered that the desirability of avoiding such results must not be allowed to give to the language used a meaning which it cannot fairly and reasonably bear. If the Legislature has used language which leads to such results it is for the Court to give effect. The function of the Court is interpretation, not legislation. The limits thus imposed on the Court prevent the twisting of words and phrases into a sense that they cannot fairly and reasonably bear."

(1) 51 Cr. L.J. 1483 at 1484.

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In *Nandamani* v. *Hari Krishna Bhima Deo* (1) and *Dhari Jena* v. *Gaurange Charna Sahu* (2) Harries C.J., and Rowland J., did not allow themselves, rightly as I respectfully think, to be influenced in their decisions by the fact that it was a very hard case that confronted them and the learned Judges refused to interfere in revision where the Court had no power so to do.

I am of the opinion therefore that the order of the District Court which is the subject of the present reference is not open to revision by the High Court under section 115 of the Code of Civil Procedure, and I answer the question accordingly.

(1) A.I.R. (1939) Pat. 564. (2) A.I.R. (1940) Pat. 89.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice, and U On Pe, J.

H.C. 1951

Dec. 11.

KO WA NAH (APPELLANT)

v.

KO TUN SEIN AND TWO OTHERS (RESPONDENTS).*

Urban Rent Control Act, s. 11 (1) (b)—Owner requiring premises for bona fide erecting a building.

Held : That where the previous owner has allowed a person to construct a permanent substantial building on the land without granting him any lease or any right over the land and then sells the land to another person and the purchaser requires the land *bona fide* for erecting a building, he is entitled to eject the defendant. The fact that the defendant has built a permanent substantial structure is no ground for not passing a decree. No title to the land of the value of more than Rs. 100 can be created without a registered deed.

Kanhaiya Lal and another v. *Abdulla,* (1936) A.I.R. All. 385, referred to.

Aung Min (1) for the appellant.

Tun I for the respondents.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The plaintiff-appellant Ko Wa Nah instituted a suit for ejectment of the three defendant-respondents under Clauses (*a*) and (*d*) of section 11 (*1*) of the Urban Rent Control Act, 1948. The learned Registrar, who first heard the case, framed seven issues and, after he had recorded his finding on these issues, decreed the plaintiff-appellant's suit for the ejectment of the defendant-respondents under Clause (*a*) of section 11 (*1*) of the Urban Rent Control Act, 1948, but he dismissed the claim of the plaintiff-appellant to eject the defendant-respondents Ko Tun Sein, Daw Tin Hla and Daw Hla Khin under Clause (*d*) of section 11 (*1*).

* Civil 1st Appeal No. 39 of 1950 against the decree of the Registrar, City Civil Court, Rangoon in Civil Regular No. 950 of 1949.

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It has been contended in this appeal before us that the learned Registrar was wrong in not allowing the claim of the plaintiff-appellant to eject the defendant-respondents under Clause (*d*) of section 11 (*1*). We might mention that the defendant-respondents have also filed cross-objection in the present appeal. We are unable, however, to see any real substance in any of the grounds that had been set out in the cross-objection.

It has been urged before us in this appeal that Clause (*d*) of section 11 (*1*) of the Urban Rent Control Act, 1948 will not help the plaintiff-appellant, in that he desires to construct a building for himself and not for the purpose of letting it. There is, in our opinion, no substance in this contention. Clause (*d*) appears to us to be clear, in that it also allows the owner of land to have back the possession of the land which had been let out to a tenant if he requires it *bôna fide* for erecting a building or buildings thereon, and no restriction is placed on the purpose for which a building might be constructed, so far as Clause (*d*) is concerned.

It has also been urged on behalf of the defendant-respondent that the plaintiff-appellant should not, on equitable grounds, be allowed to eject the defendant-respondents from the land in question, in that the defendant-respondents had been allowed by the previous owner of the land in question to construct a permanent substantial building on the land in question, which was worth about Rs. 4,000 or Rs. 5,000; and certain rulings had been cited for this purpose, but we do not propose, so far as this appeal is concerned, to refer to the English cases that had been cited before us. It is clear in this country that no equitable doctrine can be allowed to prevail over any specific provisions of law concerned. It is clear from the provisions of the

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Transfer of Property Act that the tenancy in question cannot, in law, be considered to be anything more than a monthly tenancy; and it could not, in that circumstance, be said that there was a tenancy existing between the plaintiff-appellant and the defendant-respondents, allowing the latter to occupy the land so long as the building stands on the land. A photograph of the building in question has been filed in this case, and we are unable from the photograph to agree with the contention that the building, as shown in that photograph, is a permanent and substantial building, in that Exhibit 3, which has been filed in this case, shows that it has thatched roofing, and the evidence also shows that it has mat wallings. It is true that the value of the building has been estimated to be over Rs. 4,000, but it is common knowledge that the prices of building materials are very high at the present. It is said that the building was constructed in February 1946, and it is therefore clear that the defendant-respondents have now been in occupation of the building for over four years. In that circumstances, we are unable to see how, on any equitable consideration, the defendant-respondents can claim to remain in the building in question for a very much longer period, if the Court were to come to the conclusion that this is a case where a decree ought also to have been given to the plaintiff-appellant to eject the defendant-respondents from the land in question under Clause (*d*) of section 11 (*1*) of the Urban Rent Control Act, 1948; and we must say so far as this point is concerned, that we agree with the learned Registrar in his finding that this is a case where the plaintiff-appellant Ko Wa Nah can be said to require the land in question reasonably and *bôna fide* for the erection of a building thereon.

Reliance was placed by the learned Advocate who appears for the defendant-respondents on the case of

Kanhaiya Lal and another v. *Abdulla* (1) for the purpose of indicating that where a permanent building had been constructed by the defendant on the land, which had been let out to him for erecting a building, he had a right to remain in the building so constructed as long as it stood there. This case, must however, be read in the peculiar circumstances of its own case, in that that case occurred at a place where apparently the registration law was not in force.

The judgment and decree passed by the learned Registrar, Rangoon City Civil Court, in his Civil Regular No. 950 of 1949, dated the 25th May 1950, will be modified, and the plaintiff-appellant Ko Wa Nah will be granted a decree also for the ejectment of the defendant-respondents Ko Tun Sein, Daw Tin Hla and Daw Hla Khin under Clause (*d*) of section 11 (*1*) of the Urban Rent Control Act, 1948; and the plaintiff-appellant will execute a bond with one surety for a sum of Rs. 5,000 (Rupees five thousand only) that he will erect a building thereon within a period of one year from the date of the vacation of the land in question by the defendant-respondents and that he will, if the building which is to be constructed is to be used for the purpose of letting after it is constructed, give the defendant-respondents the first option for occupying the same. We will not, however, be doing any real injustice to the plaintiff-appellant if we allow the defendant-respondents a further period of three months from the date of this judgment, during which they are to vacate from the land in question and remove anything standing thereon belonging to them. The appeal is allowed in the sense indicated above with costs.

(1) (1936) A.I.R. All. 385.

APPELLATE CIVIL

Before U Tun Byu, Chief Justice, and U San Maung, J.

H.C. 1951

Jan. 17.

RAMANAND (APPELLANT)

v.

U. N. MENON (RESPONDENT).*

Arbitration Act, ss. 14 (2), 17, 33 and 39 (1)—Objection to the award—Notice about the filing of the award.

Held: Where arbitrator made his award and Court passed a decree in accordance with the Award no appeal lies against such decree under s. 39 (*1*) of the Arbitration Act but the Court may in proper cases treat the appeal as an application for Revision.

Where Arbitrator filed his award in Court and the Court failed to issue notice about the filing of the award to the parties and it was proved that the Arbitrator when he filed the award had given notice about the signing and filing of the award to the parties and parties had filed objections in Court the award cannot be set aside simply owing to the failure of the Court to issue formal notice.

Under s. 33 of the Arbitration Act read with Article 158 of Limitation Act as amended by the Third Schedule of the Arbitration Act a party has 30 days for filing an application to set aside an award or to get an award remitted for reconsideration and only when that period has expired, the Court can under s. 17 of the Arbitration Act make a decree, in terms of the award. Where the Court passed a decree before such period expired the decree should be set aside.

H. Subramanyam for the appellant.

P. N. Ghosh for the respondent.

U TUN BYU, C.J.—U. N. Menon, the plaintiff-respondent claims in Civil Regular No. 24 of 1949 of the Rangoon City Civil Court to recover a sum of Rs. 6,816 which was alleged to be due on a promissory note which was executed on the 31st January 1947, with the interest due thereon, which was said to

* Civil Misc. Appeal No. 6 of 1950 against the order of the Chief Judge, City Civil Court of Rangoon in Civil Regular No. 24 of 1949, dated 16th February 1950.

amount to Rs. 765 and, in the alternative, he claims the above sum as money due to him by the appellant defendant. The plaintiff-respondent sets out in his amended plaint the circumstances under which the pronote was said to have been executed. Ramanand, the appellant-defendant denied, *inter alia*, the execution of the said promissory note, and he also stated in paragraph 4 of his written statement the circumstances which were alleged by him to have taken place between him and U. N. Menon. The parties later agreed to have their dispute settled by the mediation of V. R. Pillay, Higher Grade Pleader, and he was accordingly appointed to mediate between the parties. He was, however, unable to bring about any settlement between the parties. Subsequently, the parties filed a petition in Court in September 1949, whereby they agreed to refer their dispute to arbitration of a sole arbitrator, namely, the said V. R. Pillay; and the relevant portion of the order passed in this connection reads:

"..... it is ordered that the following matter in dispute arising in this suit, namely:—

'Whether the defendant owes to the plaintiff a sum of Rs. 7,581 due on a promissory note or alternatively as money due.'

be referred for the determination of Mr. V. R. Pillay, Advocate.

The arbitrator is hereby required to make his award . . . . . on the 2nd day of November 1949."

The arbitrator filed his award in Court on the 18th January 1950, whereby Ramanand was directed to pay a sum of Rs. 7,518 to U. N. Menon; and each party was directed to bear its own costs. Both U. N. Menon and Ramanand filed objections against the award of the arbitrator; and Ramanand in his objection asked

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for the award to be remitted to the arbitrator for reconsideration. On the 16th February 1950, that is, in less than a month from the date on which the award was filed the learned Chief Judge of the Rangoon City Civil Court passed his order accepting the award and directing the decree to be drawn in accordance with the award, wherein he also observed as follows:

> "Objections have been filed both by the defendant and the plaintiff against this decision and today when they are to be heard the learned counsel for the defendant withdraws his objection stating frankly that he cannot support his objection."

Ramanand next filed the present appeal to set aside the said order of the learned Chief Judge, Rangoon City Civil Court. It appears to us to be clear that no appeal lies in the present case in view of the provisions of section 39 (*1*) of the Arbitration Act, 1944 in that this is not a case which can properly be brought within any of the clauses mentioned in section 39 (*1*) of the Act. We have accordingly been asked to consider the present appeal as an application for revision, and we, in the circumstances of this case, allow this appeal to be treated as an application for revision.

It is clear, in view of the observation of the learned Chief Judge of the Rangoon City Civil Court, which has been quoted earlier, the defendant-appellant must be considered to have waived his objections to the award, and he cannot, in the circumstances, be now permitted to reagitate the points raised in his objections filed on the 30th January 1950 for the purpose of having the award remitted for reconsideration by the arbitrator. It was contended on behalf of the defendant-appellant that the order of the learned Chief Judge passed on the 16th February 1950, should be set aside in that he had failed to issue notice about

the filing of the award to the parties in the present case. There is, in our opinion, no real merit in this contention. The note made by the arbitrator when the award was filed shows that he gave notice about the signing and filing of the award to the parties on or about the date the award was filed. Moreover, the parties were able to file their objections to the award on the 30th January 1950, that is, within 12 days of the date on which the award was filed in Court ; and it must, in the circumstances, be considered that it was not at all necessary or desirable in the present case to issue any notice about the filing of the award to the parties concerned, even if it can be brought within the provisions of section 14 (2) of the Arbitration Act, 1944.

The point which requires fuller consideration is whether the learned Chief Judge of the Rangoon City Civil Court could, in law, have passed the order directing a decree to be drawn up in accordance with the award, without waiting for the period of 30 days to expire, within which a party to an arbitration could apply to set aside an award under section 33 as is required under section 17 which reads :

" Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, or upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with the award."

Thus, section 17, when it is read with the Third Schedule of the Act allows a party to an arbitration a period of 30 days from the date of the service of notice

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of filing of the award to file an application, if he so desires, to set aside the award ; and it cannot be disputed in this case that the learned Chief Judge of the Rangoon City Civil Court has not allowed a period of 30 days to expire before he passed the order, dated the 16th February 1950. There is also nothing on the record to indicate that the defendant-appellant or his Advocate had at any time stated that the defendant-appellant did not intend to file any application to set aside the award under section 33 of the Arbitration Act, 1944. As Ramanand is given a period of 30 days by law for the purpose of filing an application to set aside the award, if he so desires, it appears to us that the order of the learned Chief Judge of the City Civil Court, which was passed before the period of 30 days had expired, is clearly contrary to law, and it must be set aside as having been made without jurisdiction. The right which a party to arbitration acquires under section 33 read with the Third Schedule to the Act is a substantial right, and it cannot in the absence of any provisions of law to the contrary be whittled down to a shorter period ; and the wording of section 17 clearly lends support to this view.

The order of the learned Chief Judge of the Rangoon City Civil Court passed on the 16th February 1950 and the decree made in pursuance of that order are accordingly set aside, and the case will be remanded to the trial Court for disposal and to enable Ramanand to file an application for setting aside the award. A formal notice should be issued to the parties after the proceedings are received back in the trial Court and Ramanand should be allowed a period of 30 days for filing an application to set aside the award. Costs will be costs in the cause.

U SAN MAUNG J.—I agree.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice, and U On Pe, J.

MAUNG TIN AND ONE (APPELLANTS)

v.

U PO NYAN AND ONE (RESPONDENTS).*

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Jan 23.

Transfer of Immoveable Property (Restriction) Act, 1947, ss. 3 and 5—Union Citizenship Act, 1948, s. 6 (2)—Purchase of immoveable property by a foreigner who had not yet obtained a certificate at the date of purchase—Effect of subsequent grant of certificate—Code of Civil Procedure, Order 41, Rule 27—Admission of document.

Held: Where the plaintiffs purchased immoveable property on the 23rd March 1949 before they obtained Certificate of Citizenship under the Union Citizenship Act of 1948, but obtained such Certificate during the pendency of the suit which mentioned that he was a citizen of Burma from 4th January 1948, the subsequent grant of Certificate would have retrospective effect and would validate the sale on the 23rd March 1949.

Where a Certificate was not produced by a party and which was granted after institution of the suit, the Court would receive that Certificate under Order 41, Rule 27 of the Code of Civil Procedure if the Court thought that such certificate was necessary to enable it to pronounce its judgment.

Ba Nyunt for the appellants.

Ba U for the respondents.

The judgment was delivered by

U TUN BYU, C.J.—It is said that on the 23rd March 1949, the defendant-appellants Maung Tin and Ma Kyin Sein purchased a piece of land, which gave rise to the litigation in the present appeal, and in the connected appeal, Civil 1st Appeal No. 49 of 1950, under a registered sale deed, a matter which is not disputed by the plaintiff-respondents U Po Nyan and Daw Nwai who are in possession of a portion of the land in question and who have built a house

* Civil 1st Appeal No. 48 of 1950 against the decree of the 2nd Judge, City Civil Court of Rangoon in Civil Regular Suit No. 852 of 1949, dated 26th June 1950.

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U TUN BYU, C.J.

thereon. Daw Mai Htai, who is the plaintiff-respondent in Civil 1st Appeal No. 49 of 1950, is also in possession of a portion of the land in question, and she also has built a house thereon. The plaintiff-respondents in the two cases have sought for a declaration that the sale of the land in question to Maung Tin and Ma Kyin Sein was void on the ground that Maung Tin and Ma Kyin Sein, who are husband and wife, are foreigners, and as such the purchase of the land in question by them was void in view of the provisions of sections 3 and 5 of the Transfer of Immoveable Property (Restriction) Act, 1947, which read :

"3. Notwithstanding anything contained in any other law for the time being in force, no transfer of any immoveable property or lease of immoveable property for any term exceeding one year, shall be made by any person in favour of a foreigner or any person on his behalf, by way of sale, gift, mortgage or otherwise :

* * * *

5. All transfers of immoveable property and of lease of immoveable property contrary to the provisions of this Act shall be void, and the President may, by order in writing, declare such property or any portion thereof to be forfeited to the State :

* * * * * "

Maung Tin, who is now 45 years of age, stated that he was born, at Pegu, of a Sino-Burmese mother and a Chinese father. He was, however, not questioned as to whether one of his grandparents on his maternal side was a Burmese national ; nor was he questioned about the parents or grandparents of his wife Ma Kyin Sein. On the 9th May, 1950, that is after Civil Regular Suit No. 852 of 1949, out of which the present appeal arose, was instituted, Maung Tin obtained a grant of a Certificate of a Citizenship under section 6 of the Union Citizenship Act, 1949, in which he was declared

to be a citizen of the Union of Burma with effect from the 4th day of January, 1948; and this declaration is consistent with the provisions of sub-section (2) of section 6 of the Union Citizenship Act, 1948, which reads:

"6 (2). Such certificate shall be conclusive evidence as to existence of such citizenship and the person in respect of whom it is granted, shall as from a date for that purpose to be specified in the certificate, be deemed to have been a citizen of the Union; provided that, the certificate shall not be regarded as an admission that he was not, previous to the date so specified, such a citizen."

It becomes clear therefore that section 6 expressly allows a retrospective effect to be given in the Certificate of Citizenship issued under section 6 of the Union Citizenship Act, 1948. In other words, a Certificate of Citizenship, which is to be granted under section 6, could properly be made with retrospective effect. Maung Tin could, in view of the Certificate of Citizenship granted under section 6 of the Union Citizenship Act, 1948, be considered to have established that he had, at least, become a citizen of the Union of Burma by the 4th day of January, 1948. The purchase of the land in question by him, which was effected on the 23rd March, 1949, must therefore be considered to have been made to a citizen of the Union of Burma and the transfer to Maung Tin was therefore proper and legal. The learned 2nd Judge, Rangoon City Civil Court, has, in our opinion, omitted to consider the effect of the Certificate of Citizenship issued to Maung Tin under section 6 of the Union Citizenship Act, 1948, and if his attention had been drawn to the effect of the Certificate of Citizenship issued to Maung Tin, we have no doubt what his decision on this point would have been.

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Maung Tin in his examination in Court also stated that his wife Ma Kyin Sein had also applied for a Certificate of Citizenship, the result of which was not known then. Ma Kyin Sein has in this appeal asked the Court to consider the Certificate of Citizenship granted to her under section 6 of the Union Citizenship Act, 1948, and that she might be allowed to place it before the Court for consideration in this appeal. Order 41, Rule 27, of the Code of Civil Procedure makes it clear that it is for the appellate Court to consider whether it really requires additional evidence to enable it to pronounce a proper judgment. It appears to us that after Maung Tin had stated in Court that his wife Ma Kyin Sein had also applied for a Certificate of Citizenship under the Union Citizenship Act, 1948, the trial Court ought to have adjourned the delivery of judgment until the result of Ma Kyin Sein's application for a Certificate of Citizenship was known in view of the fact that the Certificate of Citizenship, if granted, could also be made with retrospective effect—*vide* section 6 (2) of the Union Citizenship Act 1948.

It is clear now that Ma Kyin Sein has also been granted a Certificate of Citizenship under the Union Citizenship Act, 1948 and it becomes necessary in this appeal to also consider the nature or effect of the Certificate of Citizenship obtained by her to enable the appellate Court to do substantial justice, because if she was really a citizen of the Union of Burma on or before the 23rd March, 1949, it becomes clear that the sale of the land in question to her on the 23rd March, 1949, will also have to be considered to be legal. A perusal of the Certificate of Citizenship issued to Ma Kyin Sein under section 6 shows that she was also declared to be a citizen of the Union of Burma, at least, from the 4th January, 1948.

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This can therefore be said to be a case where it is necessary to allow Ma Kyin Sein to produce a Certificate of Citizenship to enable the appellate Court to pronounce a proper judgment in a case where the substantial question which arose before the Court was, whether Maung Tin and his wife Ma Kyin Sein could be said to be persons who were citizens of the Union of Burma on the 23rd March, 1949, when they purchased the land in question. The Certificate of Citizenship, which Ma Kyin Sein obtained, undoubtedly has a definite and important bearing on the main issue in the case. This is therefore a case where it is necessary for the appellate Court to examine the effect of the Certificate of Citizenship granted to Ma Kyin Sein to enable the appellate Court to pronounce a proper judgment, and the Certificate which Ma Kyin Sein obtained is, therefore, made an exhibit in the case now under appeal. This Certificate was indisputably not available to Ma Kyin Sein before the trial Court pronounced the judgment which is now under appeal. The purchase of the land in question by Ma Kyin Sein on the 23rd March, 1949, must also be said, in the circumstances of this case, to be legal.

The appeal is allowed, and the judgment and decree passed by the learned 2nd Judge, Rangoon City Civil Court, in Civil Regular No. 852 of 1949, are set aside. As neither Ma Kyin Sein nor her husband Maung Tin formally applied to the learned 2nd Judge, Rangoon City Civil Court, to adjourn the delivery of his judgment until the result of Ma Kyin Sein's application for a Certificate of Citizenship under the Union Citizenship Act, 1948, was known, it seems to us that each party should bear its own costs in both Courts.

APPELLATE CRIMINAL.

Before U Tun Byu, Chief Justice, and L. On Pe, J.

H.C. 1951

Jan. 31.

CHIT TIN (*a*) SU THI AND ONE (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

Code of Criminal Procedure, s. 403—Arms (Temporary Amendment) Act, 1949, s. 19-A—Conviction under s. 19-A of the Arms Act—Subsequent trial for offence under s. 122 (1) of the Penal Code—Whether conviction in the previous case bars subsequent action.

Held: Where a person has been convicted under s. 19-A of the Arms Act, as amended by Arms (Temporary Amendment) Act in an earlier trial and was sentenced to transportation for life, he could still be tried and convicted for an offence under s. 122 of the Penal Code. S. 403 (2) read with Illustration (*b*) attached to that section allows a trial for a distinct offence.

The point for consideration is not whether the offence in the subsequent trial arose out of the same transaction in which the offence for which he was tried in the previous trial arose, but whether it could be said that the conviction or acquittal in the former trial necessarily or impliedly involved also a conviction or acquittal of the charge made in the subsequent trial.

Ram Sahay Ram v. *Emperor*, (1921) 48 Cal. Series, 81 at 83; *R.* v. *Barron* (1914) 2 (K.B.) 570; *Abdul Hamid* v. *King Emperor*, (1936-37) 14 Ran. Series, 24 at 28, followed.

The question as to whether a particular trial is barred by reason of previous prosecution ending in conviction or acquittal is a question to be determined on facts and circumstances of a particular case.

Jitendra Nath Gupta and one v. *Emperor*, A.I.R. (1937) Cal. 99 at 113, followed.

Judged by the above test it is clear that the conviction for offence under the Arms Act did not imply conviction under s. 122 of the Penal Code.

Ba Shun for the appellants.

L. Choon Foung for the respondent.

The judgment was delivered by

U TUN BYU, C.J.—Three accused, namely, the two appellants Chit Tin *alias* Su Thi and Kyaw Win,

* Criminal Appeals Nos. 21 and 22 of 1951, from the order of the 1st Special Judge of Tavoy, dated 23rd December 1950, passed in Criminal Regular Trial No. 5 of 1950.

and one Aung Nyein, who was discharged in the trial Court, were sent up for trial in Criminal Regular Trial No. 5 of 1950 of the Court of the 1st Special Judge, Tavoy, in connection with the attack by the Communists on the adjoining villages of Yange and Kamyaing, which are about 3 or 4 furlongs apart. Both Chit Tin and Kyaw Win were convicted under the present section 122 (1) of the Penal Code, and they were each sentenced to death. The evidence of PSO U Po Kyin (PW 1), Maung Saw U (PW 2), Maung Sein (PW 3), Maung Aye (PW 4), Maung Han Nyunt (PW 5), Maung Min Shwe (PW 6), Maung U Thin (PW 7), Maung Lin Pe (PW 8), Maung Than Shwe (PW 9), Maung Po Hmyin (PW 10), Maung Tun Tha (PW 11), Maung Hme (PW 16), Maung Khin Shwe (PW 17) Maung Tha Ba (PW 18), Unoos (PW 19), Maung Than Gyi (PW 20), Maung Mya Si (PW 22) Maung Ba Si (PW 23), Maung Paw U (PW 24), and Maung Ba Aye Shwe (PW 25), shows that about 100 or more Communists attacked Yange and Kamyaing villages on the 10th May, 1950, at about 5 a.m., that PSO U Po Kyin and his men, with the help of some of the villagers, resisted the attack of the Communists and were able to drive them away, with the result that the Communists were compelled to retreat at about 10 a.m. on the same day. One of the insurgents was found dead, and apparently he was the man who was shot by Maung Han Nyunt (PW 5) during the attack by the insurgents. Maung Lin Pe (PW 8), a villager, also received a superficial gunshot wound on his back. There can be no doubt that it was an organized attack by the insurgents so far as this case is concerned and that those who took part in the attack on Yange and Kamyaing villages must have known that members of the Police Force were being

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stationed at Yange at that time. This explains why the insurgents commenced their attack by firing a mortar at Yange village; and all persons who joined in the attack on Yange and Kamyaing villages must, in the circumstances of this case, be considered to have committed an offence of high treason within the meaning of section 121 of the Penal Code as subsequently amended.

The appellant Chit Tin was said to have been arrested during the attack by the insurgents, with an American rifle in his hand. Some ammunitions, a bamboo water-bottle and a badge were also recovered from him; and he apparently had gone into the village area when he was arrested. Chit Tin also gave a confession on the 22nd May, 1950, which was marked as "ဆ". It has not been suggested, in this case, to any of the witnesses for the prosecution that Chit Tin had been illtreated or induced to make the confession. Moreover, he admitted in his examination in Court that he was present in the attack by the Communists on Yange and Kamyaing villages on the 10th May, 1950 and that he was arrested on that day, although he denied that he had anything more than a bamboo water-bottle and a packet of food with him at the time of his arrest. There can, in our opinion, be no doubt that he was also found to be in possession of an American rifle and some ammunitions at the time he was arrested. In view of the fact that the attack on the villages lasted for about 5 hours, if not more, it is only proper to assume that Chit Tin must have been one of the insurgents who joined in the attack on Yange and Kamyaing villages for him to be found in the village area at the time the insurgents retreated. We are, in the circumstances of this case, unable to accept Chit Tin's suggestion that he was taken forcibly by the Communists to join them in the attack on

Yange and Kamyaing villages because if that were so, we would have expected him to have made his escape before he was arrested, or at least to have thrown away his rifle and ammunitions. There is also no evidence to show that Chit Tin ever mentioned to any one after he was arrested on the 10th May, 1950, that he had been forcibly compelled to join in the attack on Yange and Kamyaing villages. It is also not likely that a man who had been compelled against his will to join the insurgents would be entrusted with a rifle and ammunitions for use during the attack on Yange and Kamyaing villages.

It is clear from the evidence of Unoos (PW 19) that while he and his companion were pursuing the insurgents who were retreating, they came across the appellant Kyaw Win at about one furlong outside the village, whom they arrested. Kyaw Win had a *dah* with him at the time. Maung Tha Shwe (PW 9) stated that Kyaw Win was wearing khaki short pants and a shirt with short sleeves at the time he was arrested. Kyaw Win also made what has been called a confession, marked as "ę", but the alleged confession was more in the nature of exculpatory statements. We are also unable in this case to accept his statement that he had been forced to go along with the insurgents when they attacked Yange and Kamyaing villages because if that were so we would have expected him to have run away far from the scene of crime before he was arrested, which was only about 5 hours after the attack commenced. It is also not suggested that he made any statement to any one at the time he was arrested or after he was arrested that he had been compelled by the insurgents to accompany them against his will. He has also called no witnesses to prove that he was forced to accompany the insurgents in their attack on Yange and Kamyaing villages.

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Thus, the only reasonable inference in this case appears to us to be that Kyaw Win must also have joined the insurgents voluntarily. The fact that he had only a *dah* with him does not necessarily suggest that he must have been compelled to join the insurgents because we cannot expect all the insurgents to be all armed with rifles when they attacked a village in large numbers. Moreover, Kyaw Win was found to have worn khaki short pants at the time he was arrested, which are not garments which villagers ordinarily wear. We also find it difficult to imagine that a villager who has been forced to join the insurgents in the attack on Yange and Kamyaing villages would not have had an opportunity to make good his escape during the progress of the attack on those villages, particularly when the attack began at an hour when there was not much light and when the attack was shown to have lasted for about 5 hours before the insurgents retreated.

It has been contended on behalf of Chit Tin that he had been convicted under section 19-A of the Arms Act, as amended by the Arms (Temporary Amendment) Act, 1949, in an earlier trial, which was known as Criminal Regular Trial No. 8 of 1950 of the Court of the Second Special Judge, Tavoy, in which he was sentenced to transportation for life and that he could not again be tried for an offence under section 122 of the Penal Code in view of the provisions of section 403 of the Code of Criminal Procedure. It will, for this purpose, be necessary to examine the provisions of sub-section (2) of section 403 of the Code of Criminal Procedure, which is—

"(2) 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)."

It will also be convenient to reproduce Illustration (*b*) to section 403, which reads :

" (*b*) A is tried upon a charge of murder and acquitted. There is no charge of robbery ; but it appears from the facts that A committed robbery at the time when the murder was committed ; he may afterwards be charged with, and tried for, robbery."

It is thus clear that when section 403 (2) is read with Illustration (*b*), it allows a trial for a distinct offence ; and the real test which should be applied is not whether the offence for which an accused is tried in a subsequent trial arose out of the same transaction in which the offence for which he was tried in a previous trial arose, but whether it could in the circumstances of the case be said that the conviction or acquittal in the former trial necessarily or impliedly involved also a conviction or acquittal of the charge made in the subsequent trial. Mookerjee A.C.J., in *Ram Sahay Ram* v. *Emperor* (1) stated—

" The true test is, as Lord Reading observed in *R.* v. *Barron* (2), not so much whether the facts are the same in both trials as whether the acquittal on the first charge necessarily involves an acquittal on the second charge."

And the observation of Mookerjee A.C.J., was referred to with approval in *Abdul Hamid* v. *King-Emperor* (3). In *Jitendra Nath Gupta and one* v. *Emperor* (4) it was also observed :

" The question as to whether a particular trial is barred by reason of previous prosecution ending in conviction or acquittal is a question to be determined on the facts and circumstances of a particular case ; one of the tests the Commissioners of the

(1) (1921), 48 Cal. Series, p. 81 at p. 83.
(2) (1914), 2 (K.B.) 570.
(3) (1936-37), 14 Ran. Series, p. 24 at p.28.
(4) A.I.R. (1937) Cal. p. 99 at p. 113.

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Tribunal in the case before us have observed in their judgment is whether facts are the same or not, but the true test as has been said in cases decided by this Court is not so much whether the facts are the same in both trials as whether the acquittal or conviction from the first charge necessarily involves an acquittal or conviction on the second charge :"

So far as this case is concerned, it will be necessary to also reproduce the relevant portion of section 19-A of the Arms Act, as amended by the Arms (Temporary Amendment) Act, 1949, which reads :

" 19-A. Whoever, with the intention of committing an offence punishable under the Treason Act, or murder or dacoity, and, in contravention of the provisions of section 13 or section 14 or section 15, goes armed with, or has in his possession or under his control, any of the following types of arms or ammunition or military stores, namely :—

(*i*) Small arms, such as,—

(*a*) Rifles,

* * * *

shall be punished with death or transportation for life :

Provided that, notwithstanding anything to the contrary contained in any other law for the time being in force, it shall be presumed, until the contrary is proved, in a prosecution under this section, that the person found going armed with, or in possession of, or having under his control any of the arms, ammunition or military stores specified herein had the intention of committing an offence under the Treason Act, or murder or dacoity."

It will be observed that section 19-A of the Arms Act, as amended by the Arms (Temporary Amendment) Act, 1949, so far as this case is concerned, purports to provide punishment for an offence which is entirely distinct from the offence of high treason within the meaning of section 121 of the Penal Code. It is true that the Treason Act is mentioned in section 19-A, but

the proviso to that section makes it clear that the law under section 19-A, allows a presumption as to the purpose for which arms were possessed or carried to be drawn, without having to prove any overt act of treason or of having done anything in connection with any treasonable act. In other words, the offence under section 19-A of the Arms Act, read with the Arms (Temporary Amendment) Act, 1949, is clearly distinct in character, and separate, from the offence of high treason punishable under section 122 (1) of the Penal Code, and a charge of high treason was a charge which could have been, under section 235 (1) of the Code of Criminal Procedure, framed separately from the charge under section 19-A of the Arms Act read with the Arms (Temporary Amendment) Act, 1949, even if Chit Tin had been sent up for those charges in one trial. The appellant Chit Tin must accordingly be considered to have been properly convicted under section 122 (1) of the Penal Code in the subsequent trial.

The convictions and sentences of death passed upon the appellants Chit Tin and Kyaw Win in Criminal Regular Trial No. 5 of 1949 are therefore correct.

It has been urged before us by the Advocate for the appellants that this is a case were clemency should be exercised in favour of the appellants, particularly in view of the observation which the learned Sessions Judge, Tavoy, who tried the case in the lower Court as the First Special Judge, made towards the end of his judgment, which reads :

"Although the two accused appear to be ignorant followers merely, the law provides only one penalty for the offence committed by them. It is to be hoped, however, that clemency would be shown to them by the authorities concerned."

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U TUN BYU, C.J.

We must also say that we are unable to see anything on the record which will indicate that either Chit Tin or Kyaw Win acted as a leader in the attack on Yange and Kamyaing villages or that either of them was guilty of any act of cruelty or that they participated in setting fire to a house, which occurred at the time of the attack by the insurgents. On the other hand, the evidence in this case indicates that they readily surrendered when they were asked to do so, without attempting to run away or resist arrest. This is, however, a case where the Court has no option to pass any sentence other than a sentence of death.

The appeals of the appellants Chit Tin *alias* Su Thi and Kyaw Win are therefore dismissed, and their convictions and sentences of death are confirmed.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice, and U On Pe, J.

H.C. 1951

Feb. 26.

V. A. S. AROGYA ODEYAR (APPELLANT)

v.

VR. RM. N.S. SATHAPPA CHETTIAR (RESPONDENTS).*

Foreigner—Written statement through agent claiming exemption from jurisdiction—Point decided against him—Injunction to restrain a foreign decree whether could be granted.

A obtained a decree against B in the Rangoon City Civil Court and took a copy of the said decree to India and obtained another decree on the same in an Indian Court and B then filed a suit for mandatory injunction against A restraining him from executing the decree in his favour in India. A appeared through his agent and contested the jurisdiction of the Court and also claimed that no injunction could be issued against him. The Trial Judge in Rangoon answered both the points in favour of the present plaintiff and dismissed the suit.

On appeal Held: That when a defendant was served with process by a foreign Court he had the alternative of doing nothing or appearing in Court and contesting the claim. If he did not appear the Court might give a judgment against him but unless he has some property within the jurisdiction of the Court the decree could not be executed against him. But if the defendant appeared through agent and contested the suit on merit and also questioned the jurisdiction of the Court, he really submits to the jurisdiction of the Court. Once the suit is decided on merits he cannot challenge the decision on the ground of want of jurisdiction. The fact that he appeared through agent does not make any difference.

Harris v. *Taylor*, (1915) 2 K.B.D. 580 at 587-588, 592; *Rama Ayyar* v. *Krishna Patter*, (1916) I.L.R. 39 Mad. 773; *T. Sundaram Pillai* v. *Kandaswami Pillai*, (1941) A.I.R. Mad. 387; *A. Janoo Hassan Sait by his authorised agent Dada Beg Muhammad* v. *M. S. N. Mahomed Ohuthu*, (1924) I.L.R. 47 Mad. 877 at 880, followed.

Where a defendant is residing in a foreign country and has obtained a decree there it is not in the interest of justice that he should be restrained from executing the decree he has obtained in the foreign court by a permanent injunction even though the decree that he has obtained is on the basis of a judgment obtained in Burma.

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* Civil 1st Appeal No. 56 of 1950 against the decree of the City Civil Court Rangoon in Civil Regular Suit No. 124 of 1950, dated the 24th July 1950.

H.C. 1951

V. A. S. AROGYA ODEYAR v. VR. RM.N.S. SATHAPPA CHETTIAR.

The Carr Iron Company Proprietors v. *James Maclaren, Henry Dawson, E. H. Tibbats Stainton*, (1855) 5 H.L.C. 416 at 442; *Vulcan Iron Works* v. *Bishumbhur Prosad*, (1909) I.L.R. 36 Cal. 233 at 237; *Jumna Dass* v. *Harcharan Dass*, (1911) I.L.R. 38 Cal. 405 at 407, followed.

J. R. Chowdhury for the appellant.

A. H. Paul (a) *U Hla Pe* for the respondent.

The judgment was delivered by

U TUN BYU, C.J.—The defendant-respondent VR. RM. N.S. Sathappa Chettiar obtained a decree against the plaintiff-appellant V. A. S. Arogya Odeyar for a sum of Rs. 3,100 with costs, in the Civil Regular Suit No. 1381 of 1946 of the City Civil Court, Rangoon. V. . RM. N.S. Sathappa Chettiar next instituted a suit on the basis of the decree obtained in the Civil Regular Suit No. 1381 of 1946 against V. A. S. Arogya Odeyar in the Court of the Subordinate Judge of Devakottai, India, which was known as the Civil Regular Suit No. 123 of 1949, for the recovery of the amount which was decreed in his favour in the City Civil Court, Rangoon ; and a decree was also passed in his favour in India on the 29th December, 1949. V. A. S. Arogya Odeyar subsequently filed a suit in the Rangoon City Civil Court, known as the Civil Regular Suit No. 124 of 1950, for a mandatory injunction to prohibit VR. RM. N.S. Sathappa Chettiar from executing the decree which the latter obtained in his favour in India for the reasons which were set out in the plaint. VR. RM. N.S. Sathappa Chettiar is in India, and he has apparently not been to Burma after he instituted his suit in the Court of the Subordinate Judge, Devakottai, India. He, it is said, has a duly constituted Agent in Rangoon, and this Agent filed a written statement, contesting the suit instituted by V. A. S. Arogya Odeyar in the Civil Regular Suit

No. 124 of 1950, and paragraphs 1 and 2 of the written statement read:

"1. The suit as framed is not maintainable and is barred by the provisions of section 56 (*a*) and (*b*) of the Specific Relief Act.

2. This Court has no jurisdiction as no part of the cause of action arose within its jurisdiction and the relief sought being one in equity acting *in personam* the defendant should actually and voluntarily reside or personally work for gain within the jurisdiction and service on the agent through whom the defendant carries on business will not avail or give jurisdiction."

Eight issues were framed by the trial Court in the Civil Regular Suit No. 124 of 1950, and two of the issues were—

"1. Is the suit maintainable in its present form and not barred under section 56 (*a*) and (*b*) of the Specific Relief Act?

2. Has this Court jurisdiction to try this suit as contended in paragraph 2 of the Written Statement?"

The learned 3rd Judge of the Rangoon City Civil Court answered the above issues in favour of VR. RM. N.S. Sathappa Chettiar, and he dismissed the suit of V. A. S. Arogya Odeyar, with costs.

VR. RM. N.S. Sathappa Chettiar is, as we have observed above, still residing in India. It has however been strongly urged on behalf of V. A. S. Arogya Odeyar that VR. RM. N.S. Sathappa Chettiar should, in view of the fact that his Agent in Rangoon has filed a written statement on his behalf contesting the suit of the plaintiff-appellant, be considered to have submitted to the jurisdiction of the City Civil Court, Rangoon, so far as the Civil Regular Suit No. 124 of 1950 is concerned. In the case of *Harris* v. *Taylor* (1), the defendant, after he was served with a writ in England, personally appeared, although conditionally, before the

(1) (1915) 2 K.B.D., 580 at 587-588; 592.

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U TUN BYU, C.J.

Court of the Isle of Man and applied to have the order of service, which was served upon him out of jurisdiction, set aside. Buckley L.J., stated :

"When the defendant was served with the process he had the alternative of doing nothing. He was not subject to the jurisdiction of the Court, and if he had done nothing, although the Court might have given judgment against him, the judgment could not have been enforced against him unless he had some property within the jurisdiction of the Court. But the defendant was not content to do nothing ; he did something which he was not obliged to do, but which, I take it, he thought it was in his interest to do. He went to the Court and contended that the Court had no jurisdiction over him. The Court, however, decided against this contention and held that the defendant was amenable to its jurisdiction. In my opinion there was a voluntary appearnce by the defendant in the Isle of Man Court and a submission by him to the jurisdiction of that Court. If the decision of the Court on that occasion had been in his favour he would have taken advantage of it ; as the decision was against him, he was bound by it and it became his duty to appear in the action, and as he chose not to appear and to defend the action he must abide by the consequences which follow from his not having done so."

Bankes L.J., in the same case also observed :

"The fact that the defendant has sought the protection of the Court imposes upon him an obligation to obey the judgment of the Court if it should happen that it is given against him. It is in my opinion an entire misconception of the principle applicable to these cases to say that there is a voluntary submission to the jurisdiction of a foreign Court only when the defendant by appearing in the action in the technical sense has consented to the jurisdiction."

The case of *Harris* v. *Taylor* (1) was followed in the case of *Rama Ayyar* v. *Krishna Patter* (2), where it was also held that the defendant should be deemed to have

(1) (1915) 2 K.B.D. 580 at 587-588 ; 592.
(2) (1916) I.L.R. 39 Mad. 773.

submitted to the jurisdiction of a foreign Court where he appeared and defended the suit on the merits, although he protested against the jurisdiction of the Court to entertain the suit against him. The case of *Harris* v. *Taylor* (1) was again followed in the case of *T. Sundaram Pillai* v. *Kandaswami Pillai* (2), the first paragraph of the headnote of which reads :

"The action of a defendant in filing a written statement in Court and attacking the jurisdiction of the Court amounts to submission to that jurisdiction as he is asking the Court to decide a point in controversy between him and the plaintiff."

In the present case VR. RM. N.S. Sathappa Chettiar did not appear personally before the City Civil Court, Rangoon, but his Agent had filed a written statement on his behalf contesting the suit instituted by V. A. S. Arogya Odeyar. Can it, in the circumstances, be said that the VR. RM. N.S. Sathappa Chettiar had not submitted to the jurisdiction of the City Civil Court, Rangoon, so far as the Civil Regular Suit No. 124 of 1950 was concerned ? In *A. Janoo Hassan Sait by his authorised agent Dada Beg Muhammed* v. *M. S. N. Mahamed Ohuthu* (3) it observed as follows :

"The first question for consideration is whether the first defendant had submitted to the jurisdiction of the foreign Court, and on this point I must agree with the learned District Judge that he did so by executing the power-of-attorney in favour of Abdul Rahiman empowering the latter to conduct litigation in the Ceylon Courts, namely, in a place where the agent was conducting business for his principals, and it is clearly a contract binding him to appear in those Courts and amounts to submission to the jurisdiction of those Courts."

It seems to us, that where a defendant, who lives in a foreign country, conducts business in Burma through

(1) (1915) 2 K.B.D. 580 at 587-588 ; 592.
(2) (1941) A.I.R. Mad. 387.
(3) (1924) I.L.R.. 47 Mad. Series, 877 at 880.

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his duly constituted Agent, who has been empowered also to sue and appear on his behalf in the Courts of Burma, he could at least in a case where the Agent has contested the suit on his behalf, be regarded as having impliedly submitted himself to the jurisdiction of the Court in Burma.

The question which arises next is, does the conclusion, which we have come to above, necessarily conclude the case so far as the preliminary issues are concerned? It appears to us however, that the mere fact that VR. RM. N.S. Sathappa Chettiar, who is residing in India, could, in the circumstances of this case, be considered to have impliedly submitted to the jurisdiction of the Rangoon City Civil Court, does not necessarily indicate that this is a case where a mandatory injunction, which is sought for, must necessarily be issued. The question whether the Court ought to issue a mandatory injunction against VR. RM. N.S. Sathappa Chettiar, who is still residing in India, will thus have to be considered. We ought here to reproduce the observations which Lord Cranworth made in the case of *The Carr Iron Company Proprietors* v. *James Maclaren, Henry Dawson, E. H. Tibbats Stainton* (1), which read:

"The Company has real property in London and Liverpool, and in the County of Cumberland. The question is, whether this connexion with England makes it fit that the Court should interfere to prevent the Appellants from exercising their right of proceeding in the tribunals of their own country. I confess I can discover no foundation for such a proposition. The circumstance that the Appellants have property in this country which may be attached or sequestrated, enables the Court to make any injunction it may issue effectual; but I do not see on what principle it can make the issuing of an injunction just or expedient, if it would have been unjust or inexpedient, supposing there had been no property capable of being sequestrated.

(1) (1855) 5 H.L.C. 416 at 442.

But here the Appellants not only had property in England, but agents for the sale of goods. How does that vary the case ? The existence of such an agency may, in some cases, enable third parties to sue the principals, though out of the jurisdiction, by reason of their being for certain purposes represented by their agents. But I can discover no principle which would justify the Courts of this country in holding that the existence of an agency here for the sale of goods can deprive a foreign principal of his rights as a creditor in his own country."

We agree, if we may with respect say so, with the above observations. The decision in *The Carr Iron Company Proprietors* v. *James Maclaren, Henry Dawson, E. H. Tibbats Stainton* (1) was followed in *Vulcan Iron Works* v. *Bishumbhur Prosad* (2), where Fletcher J., observed :

"It follows in my opinion that the jurisdiction of this Court to restrain proceedings in Courts outside its jurisdiction is governed by the same principles as those that govern Courts of Equity in England, namely, the party, whom it is sought to restrain, is within the limits of the jurisdiction of this Court so that in the event of an injunction being granted against him and being disobeyed he would be subject to process of contempt."

In *Jumna Dass* v. *Harcharan Dass* (3), where the cases of *The Carr Iron Company Proprietors* v. *James Maclaren, Henry Dawson, E. H. Tibbats Stainton* (1) and *Vulcan Iron Works* v. *Bishumbhur Prosad* (2), were also referred to, Stephen J., observed :

"In *Vulcan Iron Works* v. *Bishumbhur Prosad* (2), Fletcher J., after referring to *The Carr Iron Co.* v. *Maclaren* (1), comes to the conclusion that a Court of Equity can only restrain a person from proceeding with a suit in a Foreign Court, if he is within the jurisdiction of the Court. It has been sought to show that this conclusion was not properly deduced from the authority referred to on the ground that that case was

(1) (1855) 5 H.L.C. 416 at 442.
(2) (1909) I.L.R. 36 Cal. 233 at 237.
(3) (1911) I.L.R. 38 Cal. 405 at 407.

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decided on the merits of the case, and that if the Court that is asked to issue an injunction can make any order that would affect the person whom it is sought to enjoin, if, as is said, the Court can reach him by attaching or sequestering his property, it has jurisdiction to issue an injunction. I do not consider that this is so. The Court in *The Carr Iron Co.* v. *Maclaren* (1), proceeded not on the particular merits of the case but on the general rule that a person living entirely under a foreign jurisdiction must be left to obtain such relief as his own Courts may afford, and that being so, the case is an authority for the proposition put forward by Fletcher J."

We are also unable to see any cogent reason why the Court here should exercise its discretion and grant a mandatory injunction, which is an action *in personam*, against a person residing in a foreign country to restrain the latter from taking out execution of a decree which he obtained there, and over which the Court of that country has complete and proper seisin. It is true that the decree which the defendant-respondent obtained in India was based on the decree which he obtained in Burma, but this is a matter which the law allows him to do. A foreign decree can also form the basis of a suit in Burma. We do not think that it will be proper or right to allow any consideration of hardship, if any, to influence our consideration in this matter.

The appeal is dismissed with costs.

(1) (1855) 5 H.L.C. 416 at 442.

CIVIL REVISION.

Before U On Pe, J.

BISWANATH CHOWBY AND ONE (APPLICANTS)

v.

JANAW (RESPONDENT).*

H.C. 1951

Feb. 21.

Cause of action—Whether acknowledgment of account stated gives a fresh cause of action.

Held: That acknowledgment of account stated which was not a mutual account does not in itself constitute a fresh contract.

Kenkani and two others v. *Maung Po Yin*, 1 L.B.R. 190; *Ganga Prasad* v. *Ram Dayal*, (1901) 23 All. 502, followed.

But where the accounts have been settled and agreed upon between two parties, and one of the parties has promised to pay the amount, a suit can be filed on such promise.

Maung Chit U v. *Maung Pya*, I.L.R. 6 Ran. 538, followed.

San Hlaing for the applicants.

S. R. Chowdhury for the respondent.

U ON PE, J.—This is an application to revise the judgment and decree passed by the District Court of Henzada in Civil Appeal No. 2 of 1950 of the said Court, setting aside the decree passed by the 1st Subordinate Judge, Henzada, passed in Civil Regular Suit No. 67 of 1948 of the said Court. The suit is named as one "to recover Rs. 499-10-9 on accounts stated or in the alternative on original consideration." The claim, made in the plaint, is as stated in paragraph 2 therein, that "on 20th April 1948 there was a settlement of accounts and it was found that the defendant owed Rs. 499-10-9 to the plaintiffs in all including the original dues of Rs. 210-7-6 mentioned in the previous paragraph. The sum of Rs. 210-7-6 was said to be the amount payable by the defendant on 20th September 1947 when there was a previous settlement of accounts.

* Civil Revision No. 25 of 1950 against the decree of the District Court of Henzada in Civil Appeal No. 2 of 1950, dated the 31st March 1950.

H.C. 1951

BISWANATH CHOWBY AND ONE v. JANAW.

U ON PE, J.

Issues were framed which were all confined to settlement of accounts between the plaintiff and the defendant and the amounts payable by the defendant on such settlement of accounts. There is nothing mentioned in the pleadings about the claim being made on original consideration and no attempt has been made to prove the claim based on such consideration. The parties went to trial for recovery on accounts *stated*, and this is made clear from paragraph 3 of the plaint which is as follows :

"That the cause of action arose on 20th April 1948 being the date of final statement of accounts at Henzada within the jurisdiction of this Court."

The learned Subordinate Judge decreed the suit, believing the evidence of Baratu (PW 3), Sivdarson Lal (PW 4) and Ramphal (PW 5). He rejected the evidence of the defence, saying that the defence witnesses bore grudge against the plaintiff Biswanath, as nearly all of them had received notices from the plaintiff for the loans that they had taken from the plaintiff.

The learned District Judge took the contrary view and dismissed the suit. In doing so, he raised a legal point that the plaintiff had no cause of action, relying on the case of *Kenkani and two others* v. *Maung Po Yin* (1). There, it is held that an acknowledgment on an account stated does not in itself constitute a fresh contract, breach of which would be the foundation of a cause of action. Similar view is laid down in *Ganga Prasad* v. *Ram Dayal* (2) where it was held that a mere acknowledgment on settlement of an account, which is not a mutual account could not alone be the basis of a suit.

(1) L.B.R. Vol. I, p. 190. (2) (1901) 23 All. p. 502.

It has been contended by the learned Counsel for the applicant, relying on *Maung Chit U* v. *Maung Pya* (1) that where accounts have been settled and agreed upon between two parties and one party has promised to pay, a suit can be filed on that promise. But that is a case which deals with a settled account of mutual dealings and is therefore distinguishable from the case of *Kenkani and two others* v. *Maung Po Yin* (2).

An account stated is not the same as an acknowledgment signed by a debtor in the account book of his credit. Their difference has been brought out in the case of *Ganga Prasad* v. *Ram Dayal* (3). The relevant passages on this point may aptly be reproduced from the judgment :

" An *account stated* in the true sense is where several cross claims are brought into account on either side, and are set off against each other and a balance is struck. The consideration for the payment of the balance is the discharge on each side . . . . . A mere acknowledgment signed by a debtor in the account book of his creditor showing a balance standing against the debtor on an account, which is not a mutual account, is neither an account stated, nor is it evidence of a new contract which can be the basis of a suit. "

The present suit is clearly not based on accounts stated but on acknowledgment and in the light of the authorities cited, this case must fail as the acknowledgment relied on by the plaintiff cannot be the basis of a suit. It may be mentioned in passing that the plaintiff by not complying with Order 7, Rule 17 of the Civil Procedure Code when the plaint was filed, had given good cause to the opposite side to say that his shop book, which is now unfortunately not available, could not have been a genuine one. In the result this application is dismissed with costs.

(1) I.L.R. 6 Ran. p. 538. (2) L.B.R. Vol. I, p. 190.
(3) (1901) 23 All. p. 502.

CIVIL REVISION.

Before U Aung Khine, J.

H.C. 1951

Jan. 12.

U SHWE YA AND ONE (APPLICANTS)

v.

SITAREE (RESPONDENT).*

Burden of proof—S. 102 of Evidence Act.

Held : Where in a document the executant has admitted the receipt of consideration and if he alleges in a suit that he did not receive the consideration, the burden of proof is on him or her to prove the non-receipt of the consideration.

Ram Chand v. Chhunni Mal, (1925) I.L.R. 6 Lah. 470; *Mrs. N. Johnstone, etc.* v *Gopal Singh and others*, A.I.R. (1931) Lah. 319 at 328, followed.

Where the burden of proof has been mis-placed and case has been decided wrongly the High Court can interfere in revision.

Rasu v. *Kattara*, I.L.R. (1924) 2 Ran. 202, followed.

S. T. Leong for the applicants.

Kyaw Htoon for the respondent.

U AUNG KHINE, J.—On the 11th August 1946 the defendant-respondent Sitaree executed a hypothecation bond by which he pledged three cows and acknowledged receipt of Rs. 250 in cash from the plaintiff-applicants U Shwe Ya and Daw Thin U and promised to pay them interest at the rate of 5 per cent per mensem. The plaintiff-applicants U Shwe Ya and Daw Thin U later filed a suit for the recovery of the amount advanced together with interest at the rate of Rs. 2-8-0 per mensem, in all amounting to Rs. 337-8-0.

The defence put up by the defendant-respondent is that the bond was executed by him with a view to defraud one Panday and that no consideration passed.

* Civil Revision No. 69 of 1948 against the decree of the District Court of Hanthawaddy in Civil Appeal No. 13 of 1948, dated the 10th July 1948.

H.C. 1951

U SHWE YA AND ONE v. SITAREE

U AUNG KHINE, J.

The plaintiff-applicant U Shwe Ya gave evidence and testified about the payment of Rs. 250 to the defendant-respondent. According to him the amount was made up of three sums of Rs. 100, Rs. 60 and Rs. 90, the last of which was paid on the day the document was executed. In support of his claim the plaintiff-applicant examined three witnesses, U Ba Shwe, U San Nyunt and U Ba Tin. U Ba Tin is a pleader and he wrote the document. To him the defendant-respondent acknowledged receipt of the money before the bond was executed. The defendant-respondent did not go into the witness box to substantiate the plea he had put forward. The trial Court passed a decree for Rs. 250 with interest at 1 per cent per mensem from the 11th August 1946 to the 11th December 1947 in favour of the plaintiff-applicants. On appeal the learned District Judge, on the ground that the plaintiff-applicants had failed to discharge the *onus* of proving the consideration, allowed the appeal and dismissed the suit.

It is now contended on behalf of the plaintiff-applicants that the burden of proof has been wrongly placed and since the execution of the bond was admitted it was incumbent on the defendant-respondent to prove that the document was only a sham one and as a matter of fact he did not receive any consideration from the plaintiff-applicants. It is further contended that section 102 of the Evidence Act is applicable in this case and that Illustration (*b*) in section 102 is almost on all fours with the present case. Illustration (*b*) runs as follows:

"(*b*) A sues B for money due on a bond. The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies. If no evidence were given on either side, A would succeed as the bond is not disputed and the fraud is not proved. Therefore the burden of proof is on B."

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U SHWE YA AND ONE v. SITAREE

U AUNG KHINE, J.

In support of this contention my attention was drawn to a Full Bench case of *Ram Chand* (*Plaintiff*), *Petitioner* v. *Chhunni Mal* (*Defendant*), *Respondent*, (1). It was held therein that :

"Where an unregistered document, the execution of which is admitted or proved, contains an admission of the payment of the consideration the *onus* lies on the person executing the document to prove that what he himself admitted to be true was, as a matter of fact, false and that he did not receive the consideration."

In another case *Mrs. N. Johnstone, etc.* (*Defendants*) *Appellants* v. *Gopal Singh and others* (*Plaintiffs*) *Respondents* (2), it was held that :

"Where the vendor admits receipts of full consideration in the sale deed, the burden lies heavily on him to explain the admission and prove non-receipt of consideration."

If in the present case no evidence was adduced by either party, the trial Court would have to decide in favour of the plaintiff-applicants as the execution of the document is admitted and the declaration about receipt of consideration therein has not been proved to be false. The principles propounded in the above cases are well founded on natural reasons and as they are based on law as well, I have no hesitation in following them. In the result I must hold that the learned District Judge has erred in placing the onus of proving the passing of consideration on the plaintiff-applicants. To my mind the judgment and decree of the trial Court should not have been disturbed.

However, the defendant-respondent has now claimed that this Court has no power to revise the order of the District Court as it had not exercised its

(1) I.L.R. 6 Lah. 470.
(2) A.I.R. (1931), Lah. 419 at 428.

jurisdiction illegally or with material irregularity. It is true that ordinarily the High Court does not interfere in revision unless some grave injustice or hardship would result from a failure to do so. In this case however, the learned District Judge disregarded the provisions of law to which his attention was drawn and obviously he did not apply his mind to it. He has not given any reasons whatsoever why section 102 of the Evidence Act was not applicable. Such being the case I am of the opinion that a ground for revision exists and that the application must be allowed. I am fortified in this view by the decision in the case of *Rasu* v. *Kattura* (1). In the course of the judgment Young J., said:

"In 2 L.B.R., pages 333 and 340, it was held that where a Court has applied its mind to the law and decides wrongly, then there is no ground for revision, but where it disregards some provision of law and has not applied its mind to that provision, then there is ground for revision . . . :"

In the result the application is allowed. The judgment and decree of the District Court, Hanthawaddy, is set aside and that of the trial Court restored with costs throughout.

(1) I.L.R. (1924), 2 Ran. 202.

SPECIAL BENCH.

Before U Tun Byu, Chief Justice, U Aung Tha Gyaw and U Bo Gyi, JJ.

H.C. 1950

Aug 11.

U ON KHIN (PETITIONER)

v.

THE UNION OF BURMA (RESPONDENT). *

Press (Emergency Powers) Act, s. 4 (1) (d)— Whether a political party is a class or section within the meaning of s. 4 (1) (d)—Principles on which the matter should be decided—Interpretation of Statute—Duty of Judge—Meaning of the word "Government"— Constitution of Burma.

Held : In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication, and the language of Statutes is to be interpreted according to the recognized canons of construction laid down and the Judges are not entitled to read words into an Act of Parliament unless clear reasons are to be found within the four corners of the Act itself.

Solomon v. *Solomon*, (1897) A.C. 22 at 38 ; *Cox* v. *Hakes*, (1890) 15 A.C. 506 at 528 ; *Vickers* v. *Evans*, (1910) 79 L.J. (K.B.) 955, followed.

The duty of the Judge is to endeavour to apply the law correctly as he finds it, and in a liberal spirit and without any bias. It is not the province of a Judge to inquire into the wisdom of the legislature. He is to administer the law as he finds it and he is not to be influenced by his own personal conceptions of propriety, or non-propriety, of the piece of legislation that comes for consideration before him. The Court should not give rigid definition of words not defined by Legislature.

The Socialist Party in Burma has large repesentatives in the Parliament of the Union of Burma and has numerous members or adherents in different parts of the country and it is not that class of political party which is likely to disappear or become defunct when any of its leaders leaves it or dies. It follows a certain political ideology which is different from the ideologies followed by other parties in the country. It is a well-known political organization with three of its members in the present Cabinet of Ministers its members form an ascertainable portion of the residents of Burma. Therefore the Socialist Party is a section of persons resident in Burma within the meaning of s. 4 (*1*) (*d*) of Press (Emergency Powers) Act.

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* Civil Misc. No. 172 of 1950.

Raj Pal v. *The Crown*, (1922) 3 Lah. 405 at 413 ; "*Janashti*" *of Sylhet and others*, (1932) A.I.R. Cal. 649 ; *Emperor* v. *Miss Manniben L. Kara*, (1933) 57 Bom. 253 at 259 : *Kamal Sircar* v. *Emperor*, (1937) A.I.R. Cal. 691 at 694 ; *King-Emperor* v. *Benomali Maharana*, (1943) 22 Pat Series, 48 at 53 ; *Emperor* v. *Miss Manniben*, I.L.R (1933) 57 Bom. 253 ; *Re.* "*The Co-operative Capital Press*," *Lahore*, (1949) A.I.R. Lah. 218 at 228 ; *Annie Besant* v. *Advocate-General*, *Madras*, (1918-19) 46 I.A. 176 at 195-196 ; 43 Mad. 146 ; *B. Ram Saran Das Johri* v. *Emperor*, A.I.R. (1934) All. 717 at 718, referred to.

Narayan Vasudev Phadke v. *Emperor*, (1940) A.I.R. Bom. 379 at 381 ; *In the Matter of* "*Nawai Waqf Daily*," *Lahore* v. *The Crown*, (1947) 28 Lah. Series, 497 at 514 and 561-562 ; "*Daily Zamindar*" *Lahore* v. *Emperor*, (1947) A.I.R. Lah. 340 ; *The* "*Zamindar*," *Newspaper*, *Lahore*, (1934) A.I.R. Lah. 219 at 226, view of some judges dissented from.

In the Matter of "*Jang-i-Azadi*", *Lahore*, (1948) A.I.R. Lah 6, referred to.

The intention of the author for the purposes of the present case is entirely immaterial. In considering the question it is the duty of the Court to have regard to the surrounding circumstances ; for instance, the context in which the words appear, the persons to whom the words were addressed, the political atmosphere in which the words were delivered, and the place where they were published.

"*Nawai Waqf Daily*," *Lahore* v. *The Crown*, (1947) 28 Lah. 497 at 514 561-562 ; *Re.* "*Anandabazar Patrika*," (1933) 60 Cal. 408 ; *In the Matter of* "*The Sun Press*" *Limited*, (1935) 13 Ran. 98 ; *In Re.* "*Saptah*" *and In Re. Benoy Kumar*, (1949-50) 54 C.W.N. 334 ; *S. N. S. Mudaliar* v. *The Secretary of State for India in Council*, (1932) 10 Ran. 165 at 169, followed.

Honest or legitimate criticism in a democratic country is not only desirable but it may be regarded as a source of strength in the healthy growth of a democracy. It is in the interest of the public and of the Government, that a writer or a critic should be free to write on all subjects or topics so long as he does it temperately though he may use strong or severe expressions here and there.

Every free man has an undoubted right to lay what sentiments he pleases before the public, to forbid this is to destroy the freedom of the Press. One political organization is entitled to criticise and even attack another political organization but such criticism and attack must be legitimate and not prohibited by law.

Annie Besant v. *Advocate-General*, *Madras*, (1918-19) 46 I.A. 176 at 195-196 ; 43 Mad. 146 ; *Ma Khin Than* v. *The Commissioner of Police, Rangoon and one*, (1949) B.L.R. 13 at 16, followed.

The general effect of the article in question must be considered to be one which tends indirectly at least to create a feeling of hatred or contempt against the Socialist Party in Burma.

Under s. 114 read with s. 56 of the Constitution, the Cabinet, of which the Prime Minister is the head constitutes the Government for the purpose of 4 (*1*) of the Press (Emergency Powers) Act The article was not directed against the Ministry as a whole.

H.C. 1950

U ON KHIN v. THE UNION OF BURMA.

Per U AUNG THA GYAW, J.—That the words "class or section" in s. 4 (*1*) (*d*) of the Press (Emergency Powers) Act do not include any political party like the Socialist Party in Burma.

Read in the light of the principles laid down in decided cases referred to the article does not come within the provisions of s. 4 (*1*) (*d*) of the Press (Emergency Powers) Act. Read as a whole in a liberal and detached spirit, what an ordinary reader would understand is that the predominant political party in the country was going to assume complete control of the Government machinery and that certain unfavourable and undesirable consequences were likely to happen if such an eventuality took place.

In the Matter of the Indian Companies Act VII of 1913 and of the Traders' Bank Ltd., Lahore, 36 A.I.R. (1949) Lah. 48 ; *In the Matter of "The Co-operative Capital Press," Lahore*, (1949) A.I.R. Lah. 218 at 227 ; *Annie Besant* v. *Advocate-General of Madras*, (1920) I.L.R. 43 Mad. 146 at 163-164; 46 I.A. 176 ; *Raj Pal.* v. *Emperor*, 3 Lah. 405-28 Cr. L.J. 721 ; *Jaswant Rai*, 5 Cr.L.J. 43) ; *Chamupati*, 13 Lah. 152 (S.B.) ; *Munshi Singh*, 10 Luck. 712 ; *In Re. Jonnalagadds Ramlingaya*, (1937) Mad. 14 ; *Manohar Damodăr Patil and another* v. *The Government of Bombay*, (1950) Cr.L.J. Bom. 829 ; In *Katragadds Rajagopala Rao* v. *The Province of Madras*, (1949) I.L.R. Mad. 149 at 157 ; "*Co-operative Capital Press*," *Lahore*, (1947) I.L.R. 28 Lah. 497 ; *Emperor* v. *Miss Manniben*, I.L.R. (1933) 57 Bom. 253 ; *In the Matter of the Newspaper "The Daily Pratap"*, 51 Cr.L.J. East Pun. 725 at 727 ; "*The Co-operative Capital Press*," *Lahore* (1934) A.I.R. Lah. 219 at 225 ; *Urdu Daily Newspaper "Fratap", New Delhi* v. *The Crown*, 36 A.I.R. (1949) East Pun. 305 ; *In the Matter of "Jang-i-Azadi," Lahore*, 35 A.I.R. (1948) Lah. 6 ; *S. Gurbakhsh Singh* v. *Emperor*, 34 A.I.R. (1947) Lah. 361 ; *Mrs. Annie Besant* v. *Emperor*, (1916) I.L.R. 39 Mad. 1085 ; *Manomohan Ghose* v. *Emperor*, (1911) I.L.R. 38 Cal. 253, followed.

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In the well-known paper "*Bamakhit*" the editor U On Khin used to write on political topics under the name of MOGYO and the following article appeared in that paper on the 28th February 1950 :—

ဗမာ့ခေတ်သတင်းစာ ၁၉၅၀ ခုနှစ်၊ ဖေဖော်ဝါရီလ ၂၀ ရက် (၂၀-၂-၅၀)

ဆိုရှယ်လစ်ခြေတမျှီးလှမ်းချေတော့မည်။ ဆိုရှယ်လစ်တွေကြီစေနေကြပုံအလုံးစုံ။

ရေးသူ မိုးကြိုး။

ယခုလက်ရှိ အစိုးရအဖွဲ့တွင် ဆိုရှယ်လစ် ဗိုလ်ခင်မောင်ကလေး၊ ဦးဝင်းနှင့် ဦးကျော်မြင့်ကလေးတို့ကိုပြန်လည်ဝန်ကြီးများအဖြစ်ခန့်စဉ်က၊ တိုင်းပြည်သို့ ထုတ်ပေးသော ဝန်ကြီးချုပ်သခင်နု၏ ကျေညာချက်ကို စာဘတ်ပရိသတ်တို့ မှတ်မိကောင်းမှတ်မိကြပေလိမ့်မည်။ ထိုကျေညာချက်တွင် ဆိုရှယ်လစ်သုံးဦးကို ဤသို့ဝန်ကြီးခန့်ခြင်းမှာ ဆိုရှယ်လစ်များကတောင်းဆို၍မဟုတ်ဘဲ၊ မိမိက ဖိကုပ်ပြီးနတ်ပြည်တင်ခြင်းသာဖြစ်ကြောင်း ဖော်ပြပါရှိခဲ့သည်။ ထိုကျေညာချက်တွင်ပင် ဝန်ကြီးနှစ်နေရာလိုသေးကြောင်းဖော်ပြထားသည်။

ထိုသခင်နု၏ ကျေညာချက်ကိုထောက်၍ နောက်ထပ်ဝန်ကြီးနှစ်နေရာတွင် ဆိုရှယ်လစ်များကိုပင် ထပ်မံ ခန့်ထားမည်ဆိုပါက မည်သူမျှ အံ့သြကြမည် မဟုတ်ပေ။ ဝန်ကြီးနှစ်ဦးထပ်ခန့်လျှင် ဆိုရှယ်လစ်များပင်ဖြစ်လိမ့်မည်ဟု လူတိုင်း တွက်ထားကြလေသည်။

သို့ရာကွင် ဆိုရှယ်လစ်ပါတီအတွင်းမှ မိုးကြိုးစုံစမ်းသိရှိရသည်မှာ၊ ထိုကဲ့သို့ မဟုတ်ဘဲ၊ လက်ရှိဝန်ကြီးအဖွဲ့မှ ပါတီမရှိသောတသီးပုဂ္ဂလများအားလုံးကို ဖြုတ်ချ ပြီး၊ ဆိုရှယ်လစ်ပါတီဝင်အစိုးရသန့်သန့်ဖွဲ့စည်းရန် ဆိုရှယ်လစ်တို့ စိုင်းပြင်း နေသည်ဟူသောသတင်းကိုကြားရသဖြင့်အထူးအံ့သြမိပေသည်။

ဤအတိုင်းဆိုလျှင်ဘက္ကာရေးဝန်ကြီးဦးတင်၊ ပြန်ကြားရေးဝန်ကြီးဦးထွန်းဖေ နှင့်လူငယ်ဦးဘဂျမ်းတို့အားထုတ်ပစ်လိမ့်မည်။ ဦးဘဂျမ်းကိုမူမကြာမီထွက်စာတင် ဘို့ တိုက်တွန်းနေလေပြီ။ ဦးတင်နှင့်ဦးထွန်းဖေတို့ကိုမူ အသာအယာ နုတ်ထွက် မသွားခဲ့လျှင် ထုတ်ပစ်လိမ့်မည်။ ဤကဲ့သို့ ထုတ်ပစ်ရာတွင် တောင်တန်းဒေသ ဝန်ကြီးများနှင့်ကရင်အမျိုးသားဝန်ကြီးများမပါဝင်ချေ။ ဝန်ကြီးချုပ်သခင်နုကိုမူ ထုတ်ပစ်လိမ့်မည်မဟုတ်ဘဲ။ သူ့အလိုအလျောက် နုတ်ထွက်သွားအောင်အခြေ အနေကိုဖန်တီးပေလိမ့်မည်ဟုသိရှိရသည်။ သခင်နု နုတ်ထွက်ခဲ့သော် ဗိုလ်နေဝင်း အားဝန်ကြီးချုပ်အဖြစ်ဖြင့် ထားမည်ရည်ရွယ်ကြသည်။

ဤကဲ့သို့ဆိုရှယ်လစ်များ၏ အဖျက်ခြေလှမ်းသစ်ဖန်တီးကြခြင်းအကြောင်း ရင်းကိစ္စတခုမှာ သကြားကိစ္စနှင့် သီနီး ၃၀ အတွက်အဘမ်းခံရသော ကုန်စည် ဖြန့်ဖြူးရေးမင်းကြီး ဦးခင်မောင်လတ်နှင့် အတွင်းဝန် ဦးသာဒင်တို့ အကြောင်း ဗမာ့ခေတ်ကဖေါ်ထုတ်ရေးသားခြင်းကြောင့်ပင်ဖြစ်လေသည်။ ဦးခင်မောင်လတ် တို့အား ဘမ်းဆီးခြင်းကို တသီးပုဂ္ဂလဝန်ကြီးများက သဘောတူခဲ့ကြလေသည်။ ထိုကြောင့် ဦးခင်မောင်လတ်တို့အား ဘမ်းပြီးသည်နှင့်တပြိုင်နက် သကြားဘုတ် အဖွဲ့ ချယ်ယာမင် သခင်တင်နှင့် အကျိုးဆောင် ဦးဘညိမ်းတို့ကိုပါ ဆက်လက်၍ ဘမ်းရန်စီစဉ်ခဲ့သည်ဆို၏။ သို့ရာတွင် ဘာ့ကြောင့်မသိ သခင်နုလက်လျှော့လိုက်ရ သည်။ ဤကိစ္စတွင် ဆိုရှယ်လစ်များအလွန်နာလေသည်။ တလောကချည်ထုပ်များ ရောင်းစားသည့်အတွက် အဘမ်းခံရကာ၊ ယခု ရုံးရောက်နေသူများမှာလည်း အားလုံးပင် ဆိုရှယ်လစ်များဖြစ်သဖြင့်၊ ဤကဲ့သို့ ဘမ်းခိုင်းရာတွင် ခေါင်းဆောင် သောဝန်ကြီးချုပ်သခင်နုနှင့် တသီးပုဂ္ဂလဝန်ကြီးများကိုဆိုရှယ်လစ်တို့သည် မကြေ နိုင်ကြတော့ပေ။

ဗိုလ်ရန်နိုင်အား ပုဒ်မ ၅၅ နှင့်ဘမ်းထားရာမှ တရားလွှတ်တော်ချုပ် က လွှတ်လိုက်ခြင်းအတွက်လည်း ဆိုရှယ်လစ်များသည် မခံမရပ်နိုင်ဖြစ်ခဲ့ကြသည်။

H.C. 1950

U ON KHIN v. THE UNION OF BURMA.

ရွေးကောက်ပွဲကိုလည်း နောက်ထပ်တနှစ် ရွှေဆိုင်းလိုက်ပြီးဖြစ်သဖြင့် ဆိုရှယ်လစ်များသည် တနှစ်အတွင်း တို့ထင်ရာတို့လုပ်မည်ဟူသော သဘောနှင့် ဤသို့ကြံစည်ခြင်းဖြင့်တန်ရာသည်။

အထက်ပါသတင်းကို မိုးကြိုးရေးသားရခြင်းမှာ မိမိဝတ္တရား မပျက်ရလေအောင်သိရသမျှကို တိုင်းပြည်သို့ရေးသားတင်ပြလိုခြင်းကြောင့်ပင် ဖြစ်ပါသည်။ မဟုတ်မမှန်လုပ်ကြံ၍ ဆိုရှယ်လစ်များကို တိုင်းပြည်က မုန်းစေတော့ဆိုသော မနာလိုမရှစိမ့်သော စေတနာလုံးဝမရှိပါ။ ဆိုရှယ်လစ်များအား တိုင်းပြည်က မုန်းတီးတို့ချာဘွက်မိုးကြိုးက မဟုတ်မမှန်လုပ်ကြံရေးသားရန်ပင် လိုမည်မထင်ပါ။ သူ့အရှိန်နှင့်သူသွားနေပါသည်။

ဤသတင်းကို ရေးသားလိုက်ခြင်းအတွက် မိုးကြိုးဘဝေးရန်ပိုမိုများပြားလာကြောင်းကိုလည်း ကောင်းကောင်းသိပါသည်။ သို့ရာတွင် သခံါရတရားကို ကောင်းစွာသိထားသူဖြစ်သဖြင့် မတုန်လှုပ်ပါ။ သေတနေ့ မွေးတနေ့ပင်။

ဖေါ်ပြခဲ့သောသတင်းအတိုင်း ဆိုရှယ်လစ်များသည်၊ ခြေလှမ်းလှမ်းကြမည်ဆိုက တိုင်းပြည်သည်ငါးပါးမက၊ သံဃာစင်ပါမှောက်လိမ့်မည်။ ထိုကြောင့် ဤကဲ့သို့ တိုင်းပြည်အား တိုင်ကြားခြင်းဖြင့်၊ ဆိုရှယ်လစ်များသည် ထိုခြေလှမ်းကို ဆက်လက်မလှမ်းဖြစ်အောင်ပိတ်ပင်တားမြစ်ရာရောက်စေချင်ပါသည်။

အထက်ပါသတင်းသည် လုံးဝမဟုတ်မမှန်ပါဟု တာဝန်ရှိသူတို့က ဖြေကြားခဲ့လျှင်၊ သိန်းထီပေါက်သည်ထက်မိုးကြိုးသည်ဝမ်းသာပါလိမ့်မည်။

ဆိုရှယ်လစ်များသည် အထက်ပါ သတင်းအတိုင်း ခရိုးသွားမည်ဆိုက တောင်တန်းနယ်များကခံကြမည်လော။ ထိုသို့ငုံ့မခံလျှင်ဘာဖြစ်မည်နည်း။ ထိုသို့ ဆိုရှယ်လစ်အစိုးရ ဖွဲ့လိုက်လျှင်၊ အင်္ဂလိပ်-အမေရိကံတို့က ပေးမည့်ဆဲဆဲဖြစ်သော ငွေကြေးဆက်လက်အကူအညီကိုရကြမည်လော။ မရခဲ့လျှင် တရုပ်နှိနှင့်ဆက်သွယ်ကြမည်လော။ တရုပ်နိုကလက်ခံမည်လား။ လက်ခံခဲ့လျှင် ဗမာပြည်ဘယ်အခြေဆိုက်မည်နည်း စသောမေးခွန်းများ ပေါ်လာမည်ဖြစ်သဖြင့် မိုးကြိုးမူကားဆက်၍ မတွေးဝံ့ဖြစ်ပါသည်။

ဆိုရှယ်လစ်များသည်အထက်ပါ စီမံကိန်းအတိုင်းဖြစ်မြောက်အောင်ကြိုးစားနိုင်ခဲ့လျှင်၊ ထင်းတို့ပါတီဝင်များကိုလည်း သန့်ရှင်းဦးမည်ဖြစ်ရာ၊ ဝန်ကြီးဦးဝင်းသည်လည်း ထိုသန့်ရှင်းရာတွင် ဦးစွာပါဝင်သွားလိမ့်မည်ဟုလည်းသိရှိရသည်။

ဗမာ့တပ်မတော်နှင့်ပတ်သက်၍ ဆိုရှယ်လစ်များ၏စီမံကိန်းကိုမူမိုးကြိုး မရေးသားဝံ့ပါခင်ဗျား။

A free translation of the article in English is given below :—

THE SOCIALISTS ARE TAKING A NEW STEP.

THE FULL PLAN OF THE SOCIALISTS.

(*Writer MOGYO*).

1. Newspaper reading public will remember the statement issued by the Prime Minister Thakin Nu to the country at the time of the re-appointment of Socialists Bo Khin Maung Gale, U Win and U Kyaw Myint (junior) as Ministers in the present Government. In that statement he mentioned that such appointment of three Socialists as Ministers was not at the request of the Socialists but that " he himself took them by the neck and sent them to celestial abode ". In that statement it was also mentioned that there were still two vacancies in the Ministry.

2. Judging from that statement made by Thakin Nu no one will be surprised if two Socialists are again appointed in the said two vacancies in the Ministry. Everyone thinks that if two Ministers are again appointed they will be Socialists.

3. But according to what Mogyo has learnt from enquiries made from within the Socialist Party—that was not so (*i.e.*, situation was different) I am greatly surprised to hear that after removal of the non-party (Independent) Members from the present Cabinet a purely Socialist Party Cabinet will be formed.

4. If this happens Finance Minister U Tin, U Tun Pe the Minister for Information and U Ba Gyan, Youth Minister will be thrown out. As for U Ba Gyan he has been urged to put in his letter of resignation shortly. As for U Tin and U Tun Pe if they do not resign of their own accord they will be thrown out. The Hill Region Ministers and Karen Minister will not be included in such purge. As for Prime Minister Thakin Nu he will not be ousted. But such situation will be created that he will resign of his own accord. If Thakin Nu resigns it is planned to make Boh Ne Win, Prime Minister.

5. One of the reasons why the Socialists have taken this new destructive step, is because the "*Bamakhit*" has written about U Khin Maung Latt Commissioner of Civil Supplies and Secretary U Tha Din who were arrested for payment of 30 lakhs of rupees for sugar. The Independent Ministers agreed to the arrest of U Khin Maung Latt and U Tha Din. Immediately after the arrest of these two, it was planned to arrest Thakin Tin, Chairman of the Board and Secretary U Ba Nyein. But for reasons not known, Thakin Nu did not take such action. The Socialists are much hurt by this action. As the people who were recently arrested for selling Cotton Yarn and who are now before Court are all Socialists, the Socialists cannot forgive Prime Minister Thakin Nu and the Independent Minister who were responsible for ordering the arrest.

6. The Socialists were dissatisfied when Bo Yan Naing who had been detained under section 5 was released by the Supreme Court.

7. As the elections have been postponed for another year they have thus come to such a plan with the idea that they would do what they like in one year.

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8. Mogyo has written the above news because he does not want to fail in his duty to put before the country all that he knows ; (1) have no intention to plot against the Socialists by publishing false news and making the country hate the Socialists. Mogyo thinks that it will not be necessary for him to plot against them to make the country hate the Socialists. They are going on with their own momentum. Mogyo appreciates fully well that danger to his personal safety is increased in writing this article but as he knows well what the Law of Mutability is he is undaunted. Person is born only to die.

9. If the Socialists were to carry out their design which has been revealed to the readers the country will be utterly ruined ; it is for that reason that the country is being informed about their design so that it might have the effect of deterring the Socialists from carrying out their design.

Mogyo will be happier than one winning the lottery of one lakh, if those responsible will answer that the news is totally untrue.

If the Socialists will carry out the plan as stated in the above news, will the Hill Regions take things lying down ? What will happen if they do not take it thus.

If the Socialist Government is thus formed will British and American aid in arms and money, which is about to be given, be forthcoming ? If we do not receive this aid, will we have relations with Red China ? Will Red China accept us ? If they accept what will be the fate of Burma ? These are the questions which will arise and Mogyo dare not think further.

If the Socialists succeed in their plans they will also purge their party and it is learnt that Minister U Win will be one of the first to go.

Mogyo dare not write what the design of the Socialists in connection with Burma Army is.

P. K. Basu for the applicant.

L. Choon Foung for the respondent.

The majority judgment of the Chief Justice and U Bo Gyi J., was delivered by

U TUN BYU, C.J.—The Petitioner U On Khin and his wife are the owners of "Bamakhit Press," Rangoon. The Petitioner applies under section 23 (*1*) of the Press (Emergency Powers) Act to set aside the order of the President directing him to deposit a sum of Rs. 3,000, as security under section 3 (*3*) of that Act ; and the relevant portion of the notice issued to the Petitioner reads :

"I am directed to say that the President considers that the article under the headline "ဆိုရှယ်လစ်ဝင်ခြေလှမ်းတမျိုးလှမ်းချတော့မည်"

published on pages 1 and 2 of the 'Bamakhit Daily' of the 28th February, 1950 contains matter of the nature described in section 4 (*1*) of the Press (Emergency Powers) Act.

2. Under section 3 (*3*) of the said Act, therefore, the President hereby orders you to deposit with the District Magistrate, Rangoon, a sum of Rs. 3,000 (Rupees Three thousand only) or the equivalent thereof in Securities of the Government of the Union of Burma as you may choose. The deposit shall be made to the District Magistrate, Rangoon, within 15 days of the issue of this Order."

The relevant portion of section 4 (*1*) of the Press (Emergency Powers) Act, so far as it relates to the present proceedings is as follows :

'4 * * * *

24 (*1*) Whenever it appears to the President that any printing press in respect of which any security has been ordered to be deposited under section 3 is used for the purpose of printing or publishing any newspaper, book or other document containing any words, signs or visible representations * * *

* * * *

or which tend, directly or indirectly,—

(*d*) to bring into hatred or contempt the Government established by law in the Union of Burma or the administration of justice in the Union of Burma or any class or section of persons resident in the Union of Burma or to excite disaffection towards the said Government, or

* * * *

(*f*) to encourage or incite any person to interfere with the administration of the law or with the maintenance of law and order, or to commit any offence, or to refuse or defer payment of any land-revenue, tax, rate, cess or other due or amount payable to Government or to any local authority, or any rent of agricultural land or anything recoverable as arrears of or along with such rent, or

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(*h*) to promote feelings of enmity or hatred between different classes of persons resident in the Union of Burma, or

(*i*) to prejudice the recruiting of persons to serve in any of the Burma forces, or in any police force, or to prejudice the training, discipline or administration or any such force, or

* * * * "

The learned Government Advocate rightly and properly conceded, during the arguments, that this article would not fall within Clause (*h*) of section 4 (*1*) because it is obvious that Clause (*h*) contemplated two classes, whereas the above article was directed against the Socialist Party only, even if it were considered to constitute a class within the meaning of Clause (*h*). In our opinion, the article does not also fall within either Clause (*f*) or Clause (*i*), and we do not think it will be necessary to dilate on these points. There is no reference in the article to the administration of law ; nor does it purport to deal with law and order ; nor is there any allusion to the recruitment, training, discipline or administration of the armed forces in Burma. We cannot also conceive how the article can be said to have any prejudicial effect on recruitment, training, discipline or administration of any of the armed forces in Burma. The last paragraph of the article refers to something too remote for any reader to imagine that it is likely to disturb the mind of the members of the armed forces in Burma.

The learned Government Advocate has submitted that the article has a tendency to produce the mischievous effect described in Clause (*d*) of section 4(*1*) of the Press (Emergency Powers) Act, and he has contended that, in any case, the Socialist Party in Burma falls within the expression " class or section of persons resident in the Union of Burma." It might

be observed that the wording of Clause (*d*) of section 4 (*1*) of the Press (Emergency Powers) Act is wider than the provisions of section 124-A of the Penal Code, in that it is sufficient for the purpose of Clause (*d*) of section 4 (*1*), if the article complained of has a tendency, even indirectly, to create feeling of hatred or contempt in the mind of its readers against the Government or against a class or section of the residents in the Union of Burma, or to excite feeling of disaffection towards the Government.

We have listened with attention to the able arguments of the learned Counsel for the Petitioner as well as the able arguments of the learned Government Advocate ; and we are grateful to both of them for the assistance they have rendered in this case. It will be more convenient so far as this case is concerned, if we proceed to deal first with the point as to whether the Socialist Party in Burma, against whom the articles is directed, can be said to properly fall within the expression " class or section of the residents of the Union of Burma." We ought to observe here that a similar expression has not received a uniform interpretation in the Courts of India.

In *Raj Pal* v. *The Crown* (1) the articles relates to only a few police officers, and not to the police force as a whole, and it was observed :

" * * a class or section as contemplated by Clause (*c*) connotes a well defined group of His Majesty's subjects, and I do not think that a fortuitous concourse of one or two Inspectors or sub-Inspectors and a few policemen, who happened to be employed at a particular place, can be designated a section of His Majesty's subjects, much less a class thereof. The expression ' section of His Majesty's subjects ' signified a distinct portion of His Majesty's subjects and it would be straining the language to describe the aforesaid group of officials by that phrase."

(1) (1922) 3 Lah. 405 at 413.

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The same view was adopted in *In the Matter of "Janaskti" of Sylhet and others* (1), where the article deals with an incident in which only about 9 police officers were concerned. The earlier part of the observation, which has been reproduced above in *Raj Pal* v. *The Crown* (2) was quoted with approval. It has not been urged before us that a group of persons, whose numbers are very small, can constitute a class or section for the purpose of section 4 (*1*) of the Press (Emergency Powers) Act.

The case of *Emperor* v. *Miss Manniben L. Kara* (3) arose out of two speeches made on May Day, the first of which was unobjectionable. The second speech exhorted the labourers to unite together and destroy the capitalist system in order to establish a labour raj ; and it was held that the expression "capitalists" was too vague to constitute a class, a conclusion with which we respectfully agree. There, Beaumont C.J., observed :

"I think that any definite and ascertainable class of His Majesty's subjects will come within the section, although the classes may not be divided on racial or religious grounds. But I differ from the learned Chief Presidency Magistrate when he says that capitalists are a sufficiently defined class. 'Capitalist' in the literal sense of the word is, I suppose, any one who professes any accumulated wealth, and practically every one possesses some accumulated wealth, though some people do not possess very much. On that definition practically everybody will be within the capitalist class."

Nanavati J., also observed at page 262 :

"It is not likely that the term 'capitalist' in the speech of the accused was meant to include poor people holding a very small amount of capital. Yet an attempt to restrict the term in some way presents very great difficulties."

(1) (1932) A.I.R. Cal. 649. (2) (1922) 3 Lah. 405 at 413.
(3) (1933) 57 Bom. 253 at 259.

The expression "capitalists", as already observed, is obviously very vague and indefinite. The capitalists had not been organized into an ascertainable group or organization, with the result that it was very difficult, if not impossible to ascertain who were the persons who could strictly be called capitalists, and who were not.

We are of opinion that each case must be decided on its own facts and circumstances. It would be legislating, and not interpreting, the provisions of a statute, if we were to attempt to place a rigid, arbitrary or restrictive meaning on the term "class or section" unless there is something in the Press (Emergency Powers) Act to permit us to place a restrictive interpretation on it. It is also a primary rule of interpretation that, unless there is anything in the context or in any other part of the statute to indicate to the contrary, the words of a statute should be read its ordinary meaning. We ought, in attempting to interpret the words of a statute, which are ordinarily capable of wide meaning, to bear this primary rule of interpretation in mind, especially when it will not be against the object of the Act to give them their ordinary meaning.

It was held in *Narayan Vasudev Phadke* v. *Emperor* (1) that moneylenders and landlords did not constitute a class. But moneylenders and landlords are clearly very vague terms to really form a class, because it is possible for some of the labourers to possess a few acres of agricultural land, which are incapable of yielding adequate income, and are thereby compelled to lease land from other persons for cultivation. It is also possible for persons of very limited means or income to lend out money from time to time.

(1) (1940) A.I.R. Bom. 379 at 381.

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The observation of Wassoodew J., in the same case is—

"In my opinion, the expression 'classes of His Majesty's subjects' in section 153-A of the Code is used in a restrictive sense as denoting a common and exclusive designation and also possessing common and exclusive characteristics which may be ascertained with their origin, race or religion, and that the term 'class' within that section carries with it the idea of numerical strength so large as could be grouped in a single homogeneous community."

With respect, we are unable to appreciate on what principle of reasoning that a word or phrase which ordinarily possesses a wide meaning should be read in a very restrictive sense as indicated above when there is nothing in the Press (Emergency Powers) Act to justify such a narrow construction.

In *Kamal Sircar* v. *Emperor* (1) the poster was intended by pictorial representation to describe the exploitation of labour by capital, with slogans such as "unity and struggle", "the rich become richer" and "the poor become poorer". There it was observed as follows :

"The words 'class or section' in Clause (*d*) of section 4 (*1*) to my mind mean a definitely ascertainable body of individuals, not an indeterminate body or group having no clearly defined and non-variable characteristics or criteria by which they may be distinguished from any other body or group. Exploiters or capitalists as such, any more than, say, literates or illiterates, or the rich or the poor do not in my opinion constitute a 'class' or a 'section' within the meaning of this clause."

A poem entitled "Labourers, the mainstay of the world," which was published in the case of *Kumar Badri Narain Singh* v. *Chief Secretary to Government of Bihar* (2), urged the labourers to rise in rebellion

(1) (1937) A.I.R. Cal. 691, 694.
(2) (1941) A.I.R. Pat. 132 at 134.

against their masters or exploiters, and it was observed there—

"The words 'masters or exploiters are too wide and vague to denote a definite or ascertainable class so as to come within Clause (*d*) of section 4 (*1*) of the Act; *See* 57 Bom. 253. The Advocate-General very properly conceded that he could not seriously contend that the poem complained of came within the mischief of section 4(*1*) (*d*) of the Act."

We respectfully agree with that observation and the observation we have made about the capitalists will apply to the expression "masters or exploiters" also.

The effect of the decision in *King-Emperor* v. *Banomali Maharana* (1) is that the term "class" in section 153-A of the Penal Code contemplates that it must not only be clearly defined or separable but it must also be sufficiently numerous to constitute a class, and that a small and a limited group of zamindars does not constitute a class. There Meredith J., observed :

"For the purposes of the present case it is not necessary to decide whether the expression 'zamindars' or the expression 'landlords' used in relation to such people as a whole can be held to designate a class within the meaning of section 153-A."

We ought to observe here that the word "section" does not appear in the provisions of section 153-A of the Penal Code.

In the Matter of "Nawai Waqf Daily," Lahore v. *The Crown* (2) it was held by Muhammad Munir and Mohammad Sharif JJ., that a Muslim League is not a class or section of His Majesty's subjects. Muhammad Munir J., observed as follows :

"The words 'different classes' in the Clause refer in my opinion to religious, racial, social, tribal and possibly economic or functional, but not to political classes like the Congress, the

(1) (1943) 22 Pat. Series, 48, 53.

(2) (1947) 28 Lah. Series, 497 at 514 and 561-562.

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Hindu Mahasabha or the Indian National Congress. If the feelings of hatred are engendered or tend to be engendered by the publication in a religious, racial or social class as such, the publication would be hit by the Clause but not where such feelings are engendered or tend to be engendered not in any such class as a whole but among the admirers or followers of a particular person, to whatever religious, racial or social class they might belong."

The observation of Mohammad Sharif J., was to the same effect :

"The expression 'classes' as used in section 153-A of the Indian Penal Code and in section 4 of the Press Emergency Act is difficult of exact definition. It certainly covers well defined religious denominations and racial groups really ascertainable where there is some element of permanence and the group is sufficiently numerous [*Emperor* v. *Miss Manniben* (1)]. Beyond that it is not safe to speculate and each case must be decided on its own facts. But it cannot cover a political party or group held together by the community of interests to achieve a common objective. Political parties come and go and are susceptible to rapid changes in their complexion and composition. To hold otherwise would lead to strange and inconvenient results."

We are, with respect, unable to subscribe to the observations of Muhammad Munir and Mohammad Sharif JJ. We can see no really valid or adequate reason why a group of persons, if any, with its organization spread over different parts of the country and which also possesses the necessary attributes that go to constitute a class or section of residents in Burma, should be excluded from becoming a class or section of the residents for the purpose of section 4 (*1*) of the Press (Emergency Powers) Act, merely because it happens to be a political organization. It seems to us that it is possible for a group of inhabitants of a country to be held together, with some semblance or touch of permanence, under certain common political ideologies.

(1) (1935) 57 Bom. 253 at 159.

The number of adherents or members of such group may vary from time to time, but this will not take it out of the expression "class or section," because not every such group will necessarily become defunct or fade away, merely because some of its members die or secede from time to time. Each case should be considered in its own peculiar circumstances. Achhru Ram J., in a dissentient judgment, however observed as follows, at pages 527-528 :

"If a well defined group or collection of persons, of sufficient importance numerically, bearing one common and exclusive name, is bound together by common attributes or characteristics, I do not see any reason, on principle, why it cannot be regarded as a class within the meaning of section 153-A, Indian Penal Code or section 4 (*1*) of the Indian Press (Emergency Powers) Act, and why feelings of enmity or hatred between two such groups can be promoted or attempted to be promoted with impunity, merely because the common attributes or characteristics which bind them together consist of their respective political programmes and ideologies, particularly when those programmes and ideologies are diametrically opposed to each other, and have been pursued by the groups with such vigour that they have come to be regarded, and to regard themselves, as two absolutely hostile and wholly irreconcilable groups. Both the provisions of the law mentioned above are meant for preserving the public peace, and I can see no reasonable ground at all for assuming that the legislature intended to hit promoting or attempting to promote feelings of hatred or enmity between those groups of bodies of persons only which were bound together by common religious, racial, social, tribal, economic, or functional attributes ; my learned brother is prepared to extend the definition of 'classes' to all such groups, but had no intention of preventing such feelings being promoted or attempted to be promoted between groups, however great their importance numerically and however sharp the line dividing them from each other, where each of them is bound together only by common attributes consisting of a common political programme or ideology ; although the need for preventing such feelings being promoted between them may be the greatest."

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In *In the Matter of "Daily Zamindar," Lahore* v. *Emperor* (1), it was also held that a political party like the Congress did not constitute a class of His Majesty's subjects. The observation, which we have made in reference to the case of *In the Matter of "Nawai Waqf Daily," Lahore* v. *The Crown* (2), will apply equally to the case of *In the Matter of "Daily Zamindar," Lahore* v. *Emperor* (1). It will be illogical, and also not strictly consistent with good reason, if we are to exclude an organization, which has the necessary attributes that go to constitute a class or section, from being considered a class or section for the purpose of the Press (Emergency Powers) Act, merely because such organization assumes the character of a political organization.

In the Matter of "Jang-i-Azadi," Lahore (3), it was held that individual police officers, who did not form the entire police force, did not constitute a class or section of His Majesty's subjects. Bhandhari J., however observed that he approved of the view taken by Agha Haidar J., in *In the Matter of "The Zamindar" Newspaper, Lahore* (4), but no fresh reason was given for adopting the dissentient view taken by Agha Haidar J.

In *In the Matter of "The Zamindar" Newspaper, Lahore* (4) the article related to the police force in general, who were alleged to have perpetrated certain detestable acts, and it was held that the police force, as a whole, formed a well defined group of His Majesty's subjects. Agha Haidar J., in a dissenting judgment however said :

"I would hold that the words 'class or section' in this context signify large portions of the population of His Majesty's

(1) (1947) A.I.R. Lah. 340.
(2) (1947) 28 Lah. Series, 497 at 514 and 561-562.
(3) (35) A.I.R. (1948) Lah. 6.
(4) (1934) A.I.R. Lah. 219, 226.

subjects in British India and those portions should be determined not by any artificial or official designation but by some natural or spontaneous process where large masses of population are grouped into separate categories. In other words the expression as it occurs in the sub-section under consideration, refers to permanent and distinct elements of society which are to be found in the country and which exist and would continue to exist irrespective of any action of the Government."

We regret that we are unable to see any real justification for placing a much narrower meaning on the expression "class or section" than what this expression ordinarily conveys. According to Murray Dictionary, the word "section" means—"a separable portion of any collection or aggregate of persons, *i.e.*, of the population of a country ; a group *distinguished by a special variety of opinion*, forming part of a political or religious party ;". Certain words have been italicised by us.

The first part of the headnote in *B. Ram Saran Das Johri* v. *Emperor* (1) reads :

"A pamphlet definitely referred on the one side to the kisan labourers in the district of Muttra who labour in the fields and factories, and on the other hand the rich persons, the zamindars, the bankers and the petty shop-keepers :

Held : That the Classes referred to in the pamphlet were sufficiently well defined for the purpose of section 16 : "

And it was observed, at page 718, as follows :

"The pamphlet however definitely refers on the one side to the kisan labourers in the district of Muttra who labour in the fields and factories, and on the other hand to the rich persons, the zamindars, the bankers and the petty shop-keepers. I do not think that there is any difficulty in holding that the classes referred to in the pamphlet are sufficiently well defined for the purpose of the section in question."

(1) (1934) A.I.R. All. 717 at 718.

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The decision in *In the Matter of "The Co-operative Capital Press," Lahore* (1) was to the same effect as in *In the Matter of "The Zamindar" Newspaper, Lahore* (2) and in *B. Ram Saran Das Johri* v. *Emperor* (3), and it was held that Pakistan Army constituted a class or section of his Majesty's subjects. There Cornelius J., observed :

"When this large body of persons thus bears all the external marks of an easily distinguishable class among the subjects of His Majesty in the Dominion, is there any good reason why they should not be considered as falling within the meaning of the expression 'class or section of His Majesty's subjects' in clause *(d)* ?"

The effects of those last three cases, especially if those cases are considered in the light of some of the observations that have been made in some of the cases that were referred to earlier in this judgment, is that an ascertainable group of the residents in this country, which is sufficiently numerous and which also possesses some semblance or touch of permanence, could be considered to fall within the expression "class or section." This conclusion is also consistent with the observation made in the Privy Council case of *Annie Besant* v. *Advocate-General, Madras* (4) where it was observed :

"As to Clause (*c*) the majority of the Judges in the High Court were brought to the conclusion that the attacks on Anglo-India or Anglo-Indians or the bureaucracy, as the case may be, were calculated, whatever might have been the primary object of the writer, to bring into hatred or contempt persons forming a class or section of His Majesty's subjects, namely, English Civil servants in India, in some cases Englishmen in India generally."

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(1) (1949) A.I.R. Lah. 218, at 228.
(2) (1934) A.I.R. Lah. 219 to 226.
(3) (1934) A.I.R. All. 717 at 718.
(4) (1918-19) 46 I.A. 176 at 195-196 ; 43 Mad. 146.

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Clause (*c*) referred to above is in substance the same as Clause (*d*) of section 4 (*1*) of the Press (Emergency Powers) Act.

The fundamental duty of a judge is to endeavour to apply the law correctly as he finds it, and in a liberal spirit and without any bias. It is not the province of a Judge to inquire into the wisdom of the legislature. His duty is clear. He is to administer the law as he finds it, and he is not to be influenced by his own personal conception of propriety, or non-propriety, of the piece of legislation that comes for consideration before him. It is a common knowledge that the Socialist Party in Burma is an organized political party, with its headquarters in Rangoon. It has risen into prominence for some years; and it has become a large political party. It has large representatives in the Parliament of the Union of Burma, and it consequently has numerous members or adherents in different parts of Burma. It is not that class or political party which is likely to disappear or become defunct when any of its leaders leaves it or dies, and it could thus be said to be a political party which has some semblance or touch of permanence in it. The Socialist Party follows certain political ideologies; and its ideologies are obviously not quite the same as those entertained by other political parties, but which ideologies, however, link the members or adherents of the Socialist Party in this country into an ascertainable group. The term "socialists" might be said to be too vague and indefinite to form any well-defined group of citizens, but this cannot be said of the Socialist Party in Burma, in that the latter is a well-known political organization, with three of its members in the present Cabinet of Ministers. The members of the Socialist Party in Burma, by reason of their organization, can be said to form an ascertainable portion of the residents of Burma.

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The Socialist Party in Burma could, therefore, be considered to constitute at least a section of the residents of the Union within the meaning of section 4 (*1*) of the Press (Emergency Powers) Act. It must be remembered that the words "class or section" are wide terms.

It has been submitted on behalf of the Petitioner during the argument that, if it were held that the term "class or section" in Clause (*d*) of section 4 (*1*) of the Press (Emergency Powers) Act includes a political organization, it would, in effect, stifle all adverse criticisms of the action or conduct of a political organization and that would be detrimental to the healthy growth of democratic institutions in this country.

We do not see any real force in this suggestion. Clause (*d*) does not penalise any legitimate adverse criticism of the action, conduct or method of a political organization in power. It purports to deter only such publication as will tend, directly or indirectly, to raise feeling of hatred or contempt against the Government, or a section of the residents in the Union of Burma, or which will tend, directly or indirectly, to create feeling of disaffection against the Government. In other words, it penalises only such publication or writing, which has a tendency, directly or indirectly, to promote feeling of hatred, contempt or disaffection in the mind of the readers for whom such publication or writing is intended; and whether the publication or writing has this objectionable tendency is a question which will have to be decided in the light of the facts and circumstances of each case. Clause (*d*) is not directed against any publication or writing, which might have only a remote tendency to create or promote feeling of hatred, contempt or disaffection. It is aimed against only such publication or writing as is likely to produce

the pernicious effect in the mind of its readers, which is envisaged in that clause.

Honest or legitimate criticism can, in a democratic institution, be considered to be not only desirable, but it might also be regarded as a source of strength in the healthy growth of a democratic institution. It is in the interest of public good, and of Government, that a writer or a critic should be free to write on all subjects of topics so long as he does it, on the whole, temperately, although he might employ strong or severe expressions or phrases here and there. Sir William Blackstone in his Commentaries (1) laid down, nearly two centuries ago, what the law of the Press was:

> "Every freeman has an undoubted right to lay what sentiments he pleases before the public, to forbid this is to destroy the freedom of the Press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity."

The law relating to the liberty of the Press in this country has been succinctly expressed in *Ma Khin Than* v. *The Commissioner of Police, Rangoon, and one* (2) which came before the Supreme Court, as follows:

> "The AFPFL is a political organization and the Communist Party and the PYA are other such organizations in the Union. It is of the essence of democratic Government that one political organization is entitled to criticise and attack another political organization so long as such criticism and attack is legitimate and is not prohibited by law."

And the Press (Emergency Powers) Act is one of such law, which the writer or critic o u ght not to transgress

(1) (1918-19) 46 I.A. 176 at 195-196; 43 Mad. 146.
(2) (1949) B.L.R. 13 at 16.

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so long as that Act remains in force. It appears to us to be clear that the Press (Emergency Powers) Act does not intend, and could not have been intended, to prevent wholesome, honest or legitimate criticism of the conduct, method or action, or of any ideology of a political organization, even if they are couched in severe or pungent language here and there, so long as they are done, on the whole, temperately. The criticism should reflect the honest or legitimate opinion or view of the writer or critic, and they must not be urged or prompted by personal ill-will or malicious motive, as it has to be remembered that a writer or a critic is privileged to write or criticise for the good of the public, and not to gratify his personal feelings.

The intention of the author, for the purpose of the present case, is entirely immaterial, vide *In the Matter of the "Nawai Waqf Daily," Lahore* (1) and *In Re. "Anandabazar Patrika"* (2). It is also immaterial to consider as to whether what has been written is true or false ; nor is it necessary to enquire into the object of the article, vide *In the Matter of "The Sun Press" Limited* (3), and *In Re. "Saptah"* and *In Re. Benoy Kumar* (4). We ought also to bear in mind the cardinal principle of Criminal Jurisprudence that, if there is any doubt as to whether any particular writing falls within the purview of any of the clauses under section 4 (*1*) of the Press (Emergency Powers) Act, the benefit of the doubt should, as the Act is penal in character, go in favour of the subjects. This cardinal principle must, in our opinion, prevail in the construction of all statutes that are penal in character.

(1) (1947) 28 Lah. Series, 497 at 514 and 561-562.
(2) (1933) 60 Cal. Series, 408.
(3) (1935) 13 Ran. Series, 98.
(4) (1949-50) 54 C.W.N. 334.

It is the effect or tendency of the words used that we are to consider, and they should be considered in the light of the observation which Sir Arthur Page C.J., made in *S. N. S. Mudaliar* v. *The Secretary of State for India in Council* (1):

"In considering this question it is the duty of the Court to have regard to the surrounding circumstances for instance, the context in which the words appear, the persons to whom the words were addressed, the political atmosphere in which the words were delivered, and the place where they were published. Such matters as these are *ad rem*, and must be borne in mind when a problem of this nature is under consideration."

We are thus concerned with the effect of the words used by the writer, and the question becomes whether the article, reading it as a whole, and reading it fairly and in a liberal spirit and in the light of the background or circumstances under which the article was published, is open to the objection set out in Clause (*d*) of section 4 (*1*) of the Press (Emergency Powers) Act, without enquiring into the intention of the writer for the purpose with which it was written. It is not the province of a Court to investigate into the intention of the Legislature, and then to attempt to bend the meaning of the words used to suit that supposed intention. If we were to do so, we would be in effect legislating, and not merely interpreting the provisions of a Statute. Lord Watson, in *Solomon* v. *Solomon* (2), observed:

". . . . In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."

(1) (1932) 10 Ran. 165 at 169.
(2) (1897) A.C. 22 at 38.

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And Lord Herschell in an earlier case of *Cox* v. *Hakes* (1) observed :

" . . . . it must be admitted that, if the language of the Legislature, interpreted according to the recognised canons of construction, involves this result, your Lordship must frankly yield to it, even if you should be satisfied that it was not in the contemplation of the Legislature."

Lord Loreburn L.C., in a more recent case of *Vickers* v. *Evans* (2) also observed :

" We are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself."

The heading of the article shows that it relates to the Socialist Party in Burma, and that it is directed against the Socialist Party becomes transparent as we peruse through the article, paragraph by paragraph. It contains much more than a mere publication of sensational news. Paragraph 2 indicates that this article was based on what the writer was alleged to have learnt from some person in the Socialist Party. The article was thus based on something which had been imparted to the writer secretly. If the article had stopped with paragraphs 1 and 2, it might be said that what had been done was merely to set out as sensational news what the writer had acquired from a confidential source.

The writer proceeded to set out in paragraph 3 what he heard the Socialist Party would do, and in paragraph 4, he sets out the reasons which, according to him, impell the Socialist Party to form their design to compel the Prime Minister Thakin Nu and the independent Ministers of the present Cabinet to resign. The writer also informed his readers that the Socialist Party was very much annoyed over the Government's

(1) (1890) 15 A.C. 506 at 528. (2) (1910) 79 L.J. (K.B.) 955

proposal to arrest Thakin Tin and U Ba Nyein, who are known or reputed to be Socialists in connection with the payment of Rs. 30,00,000 which had been paid out, without actually receiving the sugar, and at a time when the insurgents were about to overrun the place where the sugar was manufactured and stored, and he went on to allege that that was one of the reasons which impelled the Socialist Party to compel the Prime Minister and the independent Ministers, who are collaborating with him, to resign from the present Ministry. In doing so, he appears to us to attempt, when it is considered with the implications contained in paragraphs 5, 6 and 7, and particularly when these implications are made at a time when insurrections are raging widely in different parts of the country by certain factions or sections, who are dissatisfied with the Government, which also consists of some Socialist Ministers, and when the economic life of the country is being severely and adversely affected, to create a feeling of contempt or hatred against the Socialist Party. The effect of paragraphs 4, 5, 6 and 7 is that they imply that the Socialists are unscrupulous or pernicious men, who, taking advantage of the breathing time which they obtained by the election having been postponed for a year, would not hesitate, and for no reason whatever, to intrigue and drive away the Prime Minister Thakin Nu, who is being held in high esteem in and outside Burma, and the independent Ministers who are his collaborators, for doing nothing more than their duty in attempting to prevent, by means of criminal prosecution, public money being wasted or being paid out unnecessarily. It must, moreover, be remembered that the Prime Minister Thakin Nu is being considered generally as being the only man who could successfully bring about general peace in this disturbed country. There is also the

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insinuation that the Socialist Party is consisted of persons who do not like to bow even to the decisions of the highest Court of the country, and this is a baneful insinuation.

The readers for whom the article is ordinarily intended are also familiar with the background of the highly disturbed conditions of the country in which it was written, which arose more out of misunderstanding and distrust ; and reading the article in that light, it appears to us clearly to be an article which tends to create, directly or indirectly feeling of hatred or contempt against the Socialist Party in Burma. It must also be remembered that the Prime Minister Thakin Nu, with the help of other Ministers, who are his collaborators in the present Cabinet and who had loyally and whole heartedly supported him in his effort to suppress the insurrections, and with the loyal support of the Armed Forces, has of late been able to regain for Burma the confidence and esteem of countries outside Burma.

The last sentence of paragraph 8 reads :

" Mogyo appreciates fully that danger to his personal safety is increased in writing this article, but as he knows well what the law of mutability is, he is undaunted ; a person is born only to die."

It is thus clear from the last sentence in paragraph 8 that the writer of the article realises fully the offensive or obnoxious character of his writing because he feared that he might even be assassinated for what he had written. This was why he also added the phrase " a person is born only to die " at the end of paragraph 8 of the article. And who could envisage or realise the probable effect of the article more than the writer himself ? It also insinuates thereby that there are man-killers in the Socialist Party.

Paragraph 9 of the article might also be translated as follows :

" If the Socialists were to carry out their design, which has been revealed to the readers, the country would be utterly ruined ; and it is for that reason that the country is being informed about their design, so that it might have the effect of deterring the Socialists from carrying out their design."

Paragraph 9, in effect, accuses the Socialist Party, at a time when the country is in the throes of widespread insurrection, of being concerned in a pernicious or mischievous design which would ruin the country altogether.

The purport of paragraph 10 is obvious. It represents to the readers of confusion, trouble, misery and chaos that might follow in the wake of the alleged design of the Socialist Party. Why is this miserable picture conjured up ? What is likely to be the feeling of the readers towards the Socialists who were alleged to be planning to do something, which was to create confusion, trouble, misery and chaos in the country ? It is obvious what the reaction in the mind of the readers would be towards the Socialists.

The writer finally wound up the article in these words :

" Mogyo dare not write what the design of the Socialists in connection with the Burma Army is."

What is the implication here ? Does it not insinuate to the readers that the Socialist Party are scheming to do something very sinister and terrible with regard to the Army, which is at the present the backbone of the country's peace and prosperity and which have achieved astonishing success in the fighting fields ? And this is clearly what it implies, otherwise it is difficult to appreciate why the writer of the article,

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who in accordance with the article is a very brave man, should be deterred from setting out before his readers what the Socialist Party proposed to do in connection with the Army.

For the reasons, which we have indicated above, the article in question must be considered to be an article which tends, indirectly at least, to create feeling of hatred or contempt against the Socialist Party in Burma. The order of the President calling upon the Petitioner to deposit a sum of Rs. 3,000 was, therefore, rightly made.

The effect of section 114 of the Constitution is plain, which reads :

" 114. The Union Government shall consist of the Prime Minister and other members appointed under section 56, " and

Section 56 reads as follows :

" 56 (1) The President shall, on the nomination of the Chamber of Deputies, appoint a Prime Minister who shall be the head of the Union Government.

(2) The President shall, on the nomination of the Prime Minister, appoint other members of the Union Government.

(3) The President shall, on the advice of the Prime Minister, accept the resignation or terminate the appointment of any member of the Union Government."

It is thus clear that the Cabinet Ministers, of which the Prime Minister is the head, constitutes the Government for the purpose of section 4 (*1*) of the Press (Emergency Powers) Act. We might state at once, without entering into any detailed discussion, that we do not consider that the article in question has a tendency, directly or indirectly, to create feeling of hatred or contempt, or of disaffection against the Government. It was directed ostensibly, and solely, against the Socialist Party, and not against the Ministers as a whole. We are unable to find anything

in the article which would really indicate that it was intended to create, even indirectly, feeling of hatred or contempt, or of dissatisfaction, against the Ministers as a whole.

The application will, however, for the reasons already set out earlier in this judgment be dismissed.

U AUNG THA GYAW, J.—I have had the advantage of reading the judgment of my learned brothers, the Chief Justice and Justice Bo Gyi, and although I find myself in general agreement on the minor points dealt with by them, I feel constrained to say, with the deepest regret, that on the major issues involved in this case I am unable to subscribe to their views.

The offending publication is an article published by one Mogyo in the 'Bamakhit', a Rangoon daily, purporting to give out a sensational news item concerning the imminent plan of the Socialist Party of Burma to form a purely Socialist Government. The article at the outset reminds the readers of the recent appointment of three Socialist Ministers to the Cabinet and of the general expectation that the two portfolios remaining in the Cabinet would also be filled by the Socialists. Contrary to such expectation, and to the surprise of the writer, he has learnt from a Socialist source that the Socialist Party is planning to form a purely Socialist Cabinet after removing, by direct and indirect means, the independent AFPFL Ministers including the Prime Minister himself. The writer then mentions three reasons which moved the Socialist Party to take this impending step. Briefly, these reasons were (1) the abortive attempt to implicate Thakin Tin, the Chairman of the Sugar Control Board and U Ba Nyein, its Secretary, in what has been known as the Zeyawaddy Sugar case, (2) the arrest and prosecution of certain Socialists for disposing of some bales

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of cotton yarn issued by the Civil Supplies Department, and (3) the release by the Supreme Court of one Bo Yan Naing who had been undergoing detention under the Public Order (Preservation) Act. The writer opines that the Socialists are taking this opportunity of carrying out their plan as the General Election has been put off for another year. The writer then states that he deems it his duty to make the above disclosures to the country and that he has no malicious intention of arousing hatred against the Socialists by inventing any falsehood, a proceeding which he thinks is unnecessary, as, in his opinion, the popularity of the Socialist Party is on the wane. He, however, realises that in making such disclosures he is placing himself in more danger than in what he already is, but being mindful of the law of impermanency he is unafraid, it being the lot of all persons to die one day. Then, the writer continues to express his fears of what might happen to the country should the Socialist Party adopt the line of action as already set out. He hopes that the making of these disclosures will deter the Socialists from taking the step planned by them. If any responsible person making an assurance that the news item is totally untrue, the writer's joy would be unbounded. He then proceeds to speculate on what can possibly happen if the Socialist Party took supreme control of the Government. Reference is made to the relations with the frontier areas, to the financial and material support about to be given by the British and American Governments, to the setting up of international relationship with Red China and to other possibilities into which the writer dare not stretch his imagination. Then again, the writer speaks of the possibility of a purge in the Party and the consequent removal of Minister U Win from the Ministry. Finally, the writer mentions that he dare not write about the Socialist Plan regarding the army.

For the publication of the above article the petitioner has been directed to deposit a sum of Rs. 3,000 as security under section 3 (*3*) of the Press (Emergency Powers) Act, and it has been contended on the petitioner's behalf that this article does not fall within the mischief of section 4 (*1*) of the said Act for the reason that the Socialist Party does not fall within the definition of 'class or section' occurring in section 4 (*1*) (*d*) of the Act and that the article in question is entirely innocuous in its effect upon an ordinary reader.

After a fairly exhaustive survey of the Indian authorities placed before us, my learned Brothers have come to the findings that the Socialist Party in Burma is a class or a section of the residents of the Union of Burma within the meaning of section 4 (*1*) (*d*) of the Press (Emergeney Powers) Act and that the article complained against offends this provision of law by the tendency it has of causing hatred or contempt of the Socialist Party in the minds of its readers. Of the many reported decisions reviewed in this case I need only mention a few in support of the contrary view which I find it my misfortune to put forward in this case.

The first ground of dissidence which I feel bound to give expression is in respect of the question as to whether the Socialist Party of Burma can in law be deemed to be a section or class of the residents of the Union of Burma within the meaning of section 4 (*1*) (*d*) of the Press (Emergency Powers) Act. Now, the words of section 4 (*1*) (*d*) of this Act and of the old Indian Press Act of 1910 follow the wordings found in section 124-A of the Penal Code which defines 'sedition', but with this difference, that under the present section a mere tendency, either directly or indirectly, to bring into hatred or contempt the

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administration of justice or any 'class or section' of the residents of the Union of Burma also becomes actionable. In the interpretation of a statute, words borrowed from another statute must be assumed to have the same meaning or connotation as has been placed upon them by the courts. See *In the Matter of the Indian Companies Act VII of 1913 and of the Traders' Bank Ltd., Lahore* (1).

Thus, when interpreting the meaning of the words "class or section" used in section 4 (*1*) (*d*) of the Act the fact that the whole of the provision of section 124-A of the Penal Code has been reproduced in section 4 (*1*) (*d*) with the small difference above stated cannot be lost sight of. The hatred or contempt which the publication has a tendency to excite must be against the government established by law in the Union of Burma or against the administration of justice in the Union of Burma or against any class or section of persons resident in the Union of Burma, and from this wording of the clause it is clearly open to inference that this clause has exclusive reference to the exciting of hatred or contempt in the minds of the readers against the Government established by law or against the administration of justice or against any class or section of persons resident in the Union of Burma, who are actively connected with the executive Government of the country, *viz.*, the different organs of the Government like the Police Force, the Army and the Civil Service. Any publication which tends to excite hatred or contempt against these classes of people would surely have the effect of creating disaffection against the Government established by law. Section 4 (*1*) (*h*) of the Act, however, refers to another and different form of sedition, namely, the promotion of feeling of enmity or hatred between different classes

(1) 36 A.I.R. (1949) Lah. 48.

of persons resident in the Union of Burma and this clause is a reproduction of section 153-A of the Penal Code, and different considerations must necessarily arise in interpreting the meaning of the word 'classes' occurring in this clause. Although the same word may occur in the two different clauses of the same section of law their respective meaning cannot be correctly and properly interpreted without paying regard to the legislative intent expressed in their previous use in two different sections of the Penal Code dealing with two widely different aspects of the same offence—namely, exciting hatred, contempt or disaffection against the Government, administration of justice, etc., and promoting hatred between different classes of residents of the Union, both of which, according to Halsbury's Law of England, form part of the offence of sedition. (Reference : paragraph 458, Volume 9, Hailsham Edition, quoted by Cornelius J., *In the Matter of "The Co-operative Capital Press," Lahore* (1). It may here be noted that with the exception of Clause (*e*) which is directed against blackmail, all the other provisions of section 4 (*1*) of the Act relate clearly to sedition, as the term is ordinarily understood and, in particular Clause (*d*) relates to that type of sedition which may be compendiously described as creating disaffection towards the Government established by law.

In weighing the effect of the offending article, the words of Lord Phillimore in *Annie Besant* v. *Advocate-General, Madras* (2) might well be kept in mind. In making an attempt to interpret the words 'class or section' appearing in section 4 (*1*) of the Press (Emergency Powers) Act:—Lord Phillimore said :

"The balancing of important political considerations which is effected by adding Explanation II to the enacting words

(1) (1949) A.I.R. Lah. 218 at 228.

(2) (1920) I.L.R. 43 Mad. 146 at 163-164 ; 46 I.A. 176.

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which are found in the earlier part of the section has its analogy in sections 124-A and 153-A of the Indian Penal Code. The language is not precisely the same, but there is the same delicate balancing of two important public considerations, the undesirability of anything tending to excite *sedition* or to excite *strife* between classes and the undesirability of preventing any *bonâ fide* argument for reform.

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In applying these balancing principles it is inevitable that different minds may come to different results, one mind attaching more weight to the consideration of freedom of argument, and the other to the preservation of law and order or of harmony."

At page 164 of the report the following illuminating remarks occur :

" It may well be that the primary object was a legitimate attack upon a system, but unless care is taken it becomes difficult to make a fierce attack upon a system without conveying some imputation upon the class which the system makes or which carries the system into practice. And it must be remembered that those words in Clause (*c*) which refer to the hatred or contempt of a class or section are not limited by Explanation II, and that there has been in this respect some departure from the policy of the Penal Code, which superadded a qualifying explanation which has not found a place in the Press Act."

It was held in that case that the article complained against was an attack on the English Civil servants in India and Englishmen in India generally and that these persons constituted a class or section of His Majesty's subjects as defined in section 4 (*1*) (*c*) of the Press Act, 1910 [now 4 (*1*) (*d*) of the present Act]. Much has happened in India and in this country since Lord Phillimore wrote about the balancing of two important public considerations noted above, and freedom of opinion expressed in the public press within the limits allowed by law is now a right guaranteed by the Constitution of the Republic of the Union of Burma.

In *Raj Pal* v. *Crown* (1) the meaning of the word "classes" as used in section 153-A of the Penal Code was held not to be restricted to "races" merely but to include also "religious denominations". For a body of persons to come within the definition of a 'class' of the residents in the Union of Burma they must form a well-defined and readily ascertainable group having some element of permanence and stability and sufficiently numerous and widespread in their distribution in the country. Applying this test, Europeans and Indians, Hindus and Mahomedans, Kisans and Zamindars or landowners, workmen and mill-owners have been held to be classes. *See* the cases of *Jaswant Rai* (2); *Chamupati* (3); *Munshi Singh* (4) and *In Re. Jonnalagadds Ramlingaya* (5).

In a number of Indian cases where the publications objected to had either attacked political parties or advanced political views, there are found expressed those principles relating to the freedom of the press—which I venture to quote with respectful approval. In a democracy it is essential that the masses should be politically educated, and they are entitled to know the pros and cons of every political system and every political ideology and within the limits of law, a particular party may place his views and its principles before the people. See *Manohar Damodar Patil and another* v. *The Government of Bombay* (6). In *Katragadds Raiagopala Rao* v. *The Province of Madras* (7) it was pointed out that "it will be indeed a dangerous doctrine to hold that any adverse expression of opinion on the action of a particular party then in power by an organ or member of an opposite party

(1) (1922) 3 Lah. 405 at 413.
(2) 5 Cr. L.J. 439.
(3) 13 Lah. 152 (S.B.)
(4) 10 Luck. 712.
(5) (1937) Mad. 14.
(6) (1950) Cr. L.J. Bom. 829.
(7) (1949) I.L.R. Mad. 149 at 157.

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should by itself be held to fall within the enactment. [Clause (*d*) of section 4 (*1*) of the Press (Emergency Powers) Act]. No doubt if the language used is so violent and exciting as to lead to violence, insurrection or disturbance, it may fall within other provisions under which appropriate action might be taken against the authors of such writing.

Where the objectionable publication relates to the army of the country, Cornelius J., *In the Matter of "The Co-operative Capital Press," Lahore* (1) states "there can be no doubt that if it is sought to bring any persons within the expression 'class or section of His Majesty's subjects', it will be necessary first of all to look for well-ascertained, well-defined and sufficiently numerous groups * * bearing all the external marks of an easily distinguishable class among the subjects of His Majesty in the Dominion". The question before him was whether the Pakistan army numbering about 100,000 comes within the definition of 'class or section' appearing in section 4 (*1*) (*d*) of the Press (Emergency Powers) Act and in giving an affirmative answer to this question regard was had to the fact that the army was a class or section of the people closely associated with the established Government enjoying a common official status, the same consideration which applied to the case of *Annie Besant* v. *Advocate-General, Madras* (2).

In the Matter of the "Nawai Waqf Daily," Lahore (3) the publication complained of was an article attacking the utterances and activities of the late Indian leader Mr. Gandhi. The majority of the Bench in that case hold that the words " different classes " in section 4 (*1*) (*h*) of the Press (Emergeney Powers) Act refer to religious, racial, social, tribal and possibly economic

(1) (1949) A.I.R. Lah. 218 at 228. (2) (1918-19) 46 I. A. 176 at 195-196 ; 43 Mad.146.
(3) (1947) 28 Lah. Series, 497 at 514 and 561-562.

or functional but not to political classes like the Muslim League, the Mahasabha or the Indian National Congress. The dissenting view of Achhru Ram J., seeks its justification in the current context of political rivalry which then existed between the Indian National Congress and the Muslim League. But the attempt made to bring the Congress and the Muslim League within the definition of " classes " used in section 4 (*1*) of the Act was in respect of an alleged contravention of section 4 (*1*) (*h*) of the Act (promoting feeling of enmity and hatred between different classes), and it is admitted by Achhru Ram J., that in countries with settled constitutions, the difference between different political parties would generally be one of policy only, with each of them seeking to get the control of the Governmental machinery by trying to win over the majority of one common electorate to its side, and that consequently they would not be regarded as different classes within the meaning of any statute containing provisions similar to those found in the Indian Penal Code and the Press (Emergency Powers) Act. The learned Judge further states " there is, however, no analogy at all between such political parties and political parties like the Congress and the Muslim League in India each of which is trying to force the other to accept its own views on the constitutional question, which has yet to be settled, not by an appeal to a common electorate, which does not exist, but by other means, not always altogether peaceful, and, occasionally at least, including threats of violence, it would be dangerous, and at the present moment when the atmosphere is so much surcharged, disastrous, if the members of these two bodies could with impunity, indulge in the use of language calculated, to promote feelings of enmity or hatred between the two bodies, their acts being within the reach neither of section

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153-A, Indian Penal Code nor of section 4 (*1*) of the Press (Emergency Powers) Act."

Mohammad Sharif J., in attempting to get at the meaning of the word " classes " used in the Act did not feel safe to go beyond the views expressed in the case of *Emperor* v. *Miss Manniben* (1). In his view the term " classes " cannot cover a political party or group held together by the community of interests to achieve a common objective. Political parties come and go and are susceptible to rapid changes in their complexion and composition. To hold otherwise would lead to strange and inconvenient results. In that case a severe attack on the motives and methods of a political party may be actionable and this would retard the growth of a better and healthier society particularly in countries which aim at a democratic form of government. It would, therefore, follow that the leader of a political party however eminent he might be, cannot be placed on the same pedestal as the founder of a religion or a spiritual head whose votaries are animated by the common faith and not actuated by expediency. By his very position and activities a political leader invites criticism and exposes himself to censure and even ridicule. It would not make any difference if his followers or partizans solely or predominantly belong to one religious community so long as attack is in respect of matters pertaining to their political views and ideals.

As already pointed out, considerations which apply to a case falling under section 4 (*1*) (*h*) cannot with equal force and validity apply to a case sought to be brought under section 4 (*1*) (*d*) of the Act. However, I find myself in respectful agreement with the view of Mohammad Sharif J., expressed above, especially in view of the fact that in trying to apply some meaning

(1) (1933) 57 Bom. 253 at 259.

to the words " class or section " we are attempting to construe the meaning of the words of a statute of a penal nature. The provisions of the Press Act must be interpreted liberally and in favour of the subject. (See *In the Matter of the Newspaper " The Daily Pratap "* (1).

In this connection, it is well to remember that the Press (Emergency Powers) Act is a piece of precautionary and preventive legislation, and extreme care should be taken that in interpreting the words used in the enactment the fundamental rights guaranteed in the Constitution are not insidiously encroached upon and although the words " class or section " used in the Act need not necessarily signify large portions of a population and that those portions should be determined not by any artificial or official designation, but by some natural or spontaneous process whereby large masses of population are grouped into separate categories, as was held in the dissenting judgment of Agha Haider J., in *In the Matter of " The Zamindar " Newspaper, Lahore* (2), such class or section may well be comprised of a large body of men forming a separable portion of a country possessing exclusive, and among themselves, common attributes and characteristics, as for instance the police force of the country or the army. " While on the one hand it is of the utmost importance that the courts should act to suppress sedition, it is not less important that the freedom of political controversy on which to a very great extent in modern times, the political health and welfare of the community depends, should not be unduly restricted or hampered. It is necessary that the public to which the decision of so many questions of the utmost importance affecting their well-being and in certain circumstances even their destiny is under modern conditions entrusted should

(1) 51 Cr.L J. East Pun. 725 at 727. (2) (1934) A.I.R. Lah. 219 to 226.

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by being acquainted fully with the merits and demerits of the various political theories offered to them, be in a position to judge for themselves along which path of the many that political propagandists offer to them, their true well-being lies. This involves free criticism of one political party by another, and it is commonly found that such criticism is couched in outspoken terms, and often in the language of exaggeration" per Cornelius J., in *In the Matter of "The Co-operative Capital Press," Lahore* (1) (at page 225).

The weight of judicial opinion as far can be gathered from the reported Indian decisions would appear to be in favour of the view that a political party does not possess that degree of permanency or exclusive characteristics as would constitute a class or section within the meaning of Clause (*d*) of section 4 (*1*) of the Press (Emergency Powers) Act. Political parties are amorphous in their very nature and are capable of speedy change and dissolution depending upon the trend of political development in the country. These parties are formed with the purpose of carrying out such changes in the political and economic life of the people as may be deemed necessary for the realization of certain objectives based on a particular theory or ideology. Under our present Constitution the goal may be a common one but the path to be chosen and the methods to be adopted to arrive at it can be divergent giving rise to the adoption of different and mutually opposed policies. The numerical strength and permanence of a party would, of course, depend upon the support it receives from the electorate. Besides, there are other considerations of a general nature which, of course, as stated by Mohammad Sharif J., *In the Matter of the "Nawai Waqf Daily" (Urdu), Lahore, Abdul Hamid, Publisher of*

(1) (1949) A.I.R. Lah. 218 at 228.

"*Nawai Waqf,*" *Lahore* v. *The Crown* (1), cannot bring a political party as such within the ambit of section 4 (*1*) (*d*) of the Press (Emergency Powers) Act.

The Constitution of the Union of Burma definitely aims at the creation of the socialist welfare state and all political parties professing to work for this end within the framework of the constitution must of necessity be inspired by a common political ideology, whatever name or label they may choose to give themselves. It is in regard to the methods sought to be employed by them to reach the common goal that differences of opinion may exist and since the common electorate must be educated to be able to vote for the party proposing to adopt the best possible means to achieve the desired end, a free public press becomes a necessary democratic institution. Political parties by the very nature of the policies to which they are pledged and the work they have to carry out in furtherance of such policies, must in the fitness of things be subjected to criticism and comment in the public press to the degree allowed by the ordinary law. The crowning argument against the inclusion of a political party within the meaning of section 4 (*1*) (*d*) of the Press (Emergency Powers) Act lies in the incontrovertible fact that almost every day, views and opinions are published in the public press to say that the Communist Party suppresses religion and denies freedom of worship to the people brought under its political domination. Such publication would undoubtedly tend to bring the Communist Party to hatred and contempt of the newspaper readers who value such freedom of worship. But the law allows the inculcation of Communist dogma among the people and also its public condemnation as something vile and deleterious to the life of the community or nation.

(1) (1947) 28 Lah. 497 at 514, 561-562.

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Thus in a democracy, the mere adoption of a political programme or the holding of certain political opinions however widely and efficiently organized and expressed such work and opinion may be, would not in my view qualify the party to the inclusion in the class or section of the residents of the Union of Burma within the meaning of section 4 (*1*) (*d*) of the Press (Emergency Powers) Act. I am not in the least unmindful of the unhappy fact brought out in argument that the country is sorely beset with both internal and external dangers, but if I may be permitted to use a simile, the ship of state having set out its course on a democratic sea cannot, despite the perils aforesaid, afford to cut down or shorten one of its main sails, and thereby retard its progress towards the cherished goal.

However, even on the assumption that a political party can be deemed to be a section or class of the residents of the Union of Burma within the meaning of this penal provisions in the press laws of the country, it is extremely doubtful whether the article complained against can be held to be within the mischief set out in section 4 (*1*) (*d*).

Before dealing with the meaning and substance of the article in question, it appears necessary to keep in mind certain general principles which have been laid down from time to time in reported decisions dealing with matters of the same nature. *In the Matter of the Newspaper "The Daily Pratap"* (1) the Special Bench of the East Punjab High Court has this to say (at page 727) :

> "Although incitement to violence or disorder has been held not to be an essential ingredient of the offence of sedition in India the provisions of the Press Act must be interpreted liberally and in favour of the subject * * * The section [referring to section 4 (*1*) of the Act] taken and read as a whole is

(1) 51 Cr. L.J. East Pun. 725 at 727.

not to be regarded as intended to minister to the mere vanity or susceptibilities of the Government or its officers but permit reasonable criticisms, comments and ventilation of grievances although the same may generate or excite some amount of resentment or disapprobation against the Government provided that such resentment or disapprobation does not generate or excite the more intense or deeper passion of hatred, contempt or disaffection. To put the same thing in another way, the hatred, contempt or disaffection made culpable by the sections we are considering must, in its intensity and depth, be more than a mere feeling of resentment or disapprobation which is generated by legitimate comments, criticisms or ventilation of genuine grievances."

The same view was held in *Urdu Daily Newspaper "Pratap," New Delhi* v. *The Crown* (1).

"In order to find out whether or not a particular article is objectionable and whether it tends to produce a certain effect upon its readers, the court must look at the whole of the article and not single out a few words or sentences here and there per Teja Singh J., in *In the Matter of "Jang-i-Azadi," Lahore* (2) ". "Now it is quite clear that before we can hold that the words in question have the tendency set out in Clause (*d*) of section 4 (*1*) of the Act, it must be clear to us that this tendency must be felt by the ordinary man in the street. In our opinion, it would not be sufficient that a member of the communist party, on reading the article in question, will entertain feelings of enmity or hatred against the Government, to bring the words within the mischief of the enactment." [See *Katragadds Rajagopala Rao* v. *The Province of Madras* (3) (at page 157)].

"In assessing the value to be attached to words employed in political pamphlets, and their effect upon the mind of the average reader, it is necessary to bear in mind this quality of the average reader, namely that he is now so well accustomed to political claptrap

(1) (36) A.I.R. (1949) East Pun. 305. (2) (35) A.I.R. (1948) Lah.6.
(3) (1949)I.L.R. Mad. 149 at 157.

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that the words employed do not produce upon his mind the effect which their dictionary meaning might suggest" per Cornelius J., in *In the Matter of "The Co-operative Capital Press," Lahore* (1) (at page 225). "It is a well-known canon of interpretation that in order to find out whether a particular article appearing in a paper or a journal is hit by a penal enactment like the Press (Emergency Powers) Act, (1931), because it produces or tends to produce a certain effect, the article must be read as a whole and in a free and liberal spirit. It is not fair to pick out a few words or even sentences. The standard to be applied is that of an average reader belonging to the class of people for among whom the newspaper or the journal is intended or whom it has circulation and not that of a critic"— per Teja Singh J., in *S. Gurbakhsh Singh* v. *Emperor* (2). "It is of course true that the intention of the writer is not a deciding factor for the determination of the question whether or not a writing has a particular tendency, but it is not altogether irrelevant, particularly so when the plea is that the words used do nothing more than to bring out the intention that was uppermost in the writer's mind" (at page 365 *ibid*).

"Certain amount of latitude must be allowed to the writers in the public press and it must be remembered that journalists are not necessarily constitutional writers or Parliamentary draftsmen, and therefore are not expected to conform to a high standard of scientific thought and precision of expression" per Agha Haider J., in *In the Matter of "The Zamindar" Newspaper, Lahore* (3). "The (hatred) and 'contempt' towards 'the Government' occurring in section 4 (Indian Press Act) may be created by articles 'imputing to the Government base, dishonourable, corrupt or

(1) (1949) A.I.R. Lah. 218 at 228. (2) (34) A.I.R. (1947) Lah. 361.
(3) (1934) A.I.R. Lah. 219 at 226,

malicious motives in the discharge of its duties', or by articles unjustly accusing the Government of hostility or indifference to the welfare of the people". See *Mrs. Annie Besant* v. *Emperor* (1). In construing a newspaper article its meaning must be taken from the article as a whole and not from isolated passages. See *Manomohan Ghose* v. *Emperor* (2) where it was held that an article in a newspaper attacking a rival political organization was held as not being seditious within the meaning of section 124-A of the Penal Code.

It is in the light of the principles noted above that the offending article in the present case must be considered to see whether it falls within the clutches of the law provided in section 4 (*1*) (*d*) of the Press (Emergency Powers) Act. The article read as a whole purports to divulge the line of action which a prominent political party in the Union of Burma is going to take and speculations are offered as to what would happen to the country should such a consummation take place as projected by the said political party. The article also seeks to find some explanation for the disagreement between this political party and the independent AFPFL Ministers in the Ministry which influenced the said party to embark on its new policy of assuming sole power of government in the country. There can be no reflection on the honesty of motives of the admittedly numerically superior and predominant party if it decides to form a government composed solely of its members, for that would be in accord with the ordinary constitutional practice. But the writer did not want that event to happen at this particular juncture in the country's history. He thought that if the party assumes sole power and carries out its political programme the country would be ruined ; the Union may disintegrate ; the expected

(1) (1916) I.L.R. 39 Mad. 1085. (2) (1911) I.L.R. 38 Cal. 253.

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foreign loan may not be forthcoming; international contact with Red China, which has since been done, might bring unforseen results; the party might undertake a purge and eject one of its members from the Ministry; and, lastly, the writer made a reference to what the party in power would do with the army—a piece of speculation upon which he did not venture to enter. It is difficult to say how the fears of the writer expressed in the article as to what might take place if a predominant political party assumes complete power in the country, should tend to excite hatred or contempt in the minds of its readers against the said party. The ordinary men in the street to whom the news are conveyed would hardly care about the composition of the Government. Members, supporters and sympathizers of the party would be glad that the event they have been waiting and working for is going to take place. Readers of the newspaper who were not in sympathy with the aims and objects of the party will of course entertain some degree of disappointment and disapproval, and even of resentment. Therefore, so far as the principal news-item is concerned there can be no question of it having a tendency, directly or indirectly, to create hatred or contempt against the Socialist Party of Burma.

There are one or two portions of the article which divorced from the context are said to impute improper motives and sentiments against this party. A number of criminal prosecutions are mentioned as well as a decision made by the Supreme Court as having caused this dissension with the independent members of the AFPFL. A suggestion is conveyed that so far as the criminal prosecutions are concerned, they were attempts made by the independent AFPFL Ministers to discredit the leaders and members of the Socialist Party. Such a suggestion has not been

contradicted by means of an affidavit before this Court. The article also ventures the suggestion that the decision made by the Supreme Court in respect of a prominent political detenu had offended the Socialist Party. One of the members of the said Court had previously for an appreciable period held important portfolios in the Cabinet. This suggestion also has not been controverted by means of an affidavit.

The next paragraph of the article, which was brought under adverse criticism, is the one where the writer said that by making the disclosures about the plans of the Socialist Party he has put himself in more personal danger, and in a spirit of bravado generally born of temerity he stated further that he was not afraid to die for carrying out his duty to the country by revealing the truth about the Party's plan. The personal danger which the writer anticipates, could vary from common assault to assassination. Merely for the reason that the writer exaggerates the danger in which he felt himself placed, it cannot be said that he is thereby conveying an innuendo that the party whose plan he was divulging employs assassination as one of its methods of removing political opposition in the country. The news which the writer was conveying in the article was not such as would excite intense hatred of the writer in the minds of the members of the Socialist Party, for such an assumption of political power by a predominent party in the Legislative Assembly cannot be considered as either illegal or undemocratic.

The next sentence in the article which is said to have a tendency to excite hatred or contempt of the Socialist Party in the minds of its readers, is the one relating to the Plan of the Socialist Party in respect of the army, which the writer dared not venture to write about now. A government in power in the absence of

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a strong and stable opposition may seek the co-operation of the army for the realization of its ideal of a planned state and for perpetuation of its political regime. This, in a true democratic country, would be a misfortune, and by merely pointing out this unfortunate possibility arising out of having a single party in control of the machinery of the government it cannot be said that the Socialist Party was being held up to hatred or contempt.

Thus, reading the article as a whole, and in a liberal and detached spirit, what an ordinary reader would understand is that a predominant political party in the country was going to assume complete control of the governmental machinery and that certain unfavourable and undesirable consequences were likely to happen if such an eventuality took place. To the ordinary man in the street the article conveys information of an educative character which, if the meaning is realised to the full, might guide his vote in the next election.

The writer by writing the article claims to have done his duty to the country and that he was not actuated by any malicious motives. He assumes that the party about which he was writing was waning in its popularity. There can possibly be no objection to both these assumptions made by the writer. As to the extent of the damage which a one-party government might likely cause to the country, the writer, I think is at liberty to give his own views in the matter.

Thus, in my opinion, a political party cannot be held to be a class or section of the residents of the Union of Burma within the meaning of section 4 (*1*) (*d*) of the Press (Emergency Powers) Act and that there is nothing in the article in question, read in a liberal and detached spirit, which would bring it under the said section and clause of this Act. The order passed to the prejudice of the petitioner should be set aside.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice and U On Pe, J.

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Dec. 18.

E. M. CHOKALINGAM CHETTYAR (APPELLANT)

v.

SAW THA DWE (RESPONDENT).*

Contract of sale on behalf of minor—Advance paid—Recovery of—S. 65 of the Contract Act whether applicable—Whether purchaser could advance in equity.

Where a sum of Rs. 5,000 in Japanese Currency was paid by the agent appointed by a Hindu minor's mother as guardian in pursuance of an alleged agreement to purchase land and the suit was filed for return of the said money amongst other claims :

Held : That the agreement of purchase of land entered on behalf of the minor is void *ab initio.*

Mohori Bibee v. *Dharmodas Ghose*, (1903) 30 Cal. Series, 539 at 548 ; *Limbaji Ravji Hajare* v. *Rahi Kom Ravji Hajare and others*, (1925) 49 Bom. Series, 576, followed.

Ss. 64 and 65 of the Contract Act are not applicable to a claim for refund of the advance as these sections start from the basis of there being a contract between the competent parties. The Court however on equitable principle can direct the refund of the advance money when the alleged purchaser can plead no equity in his favour.

The Court ought to be most chary to act against the interest of the minor and his interest should not be jeopardised for a technical error in drafting the plaint. Leave should therefore be granted to amend the plaint even at a late stage.

Khan Gul and another v. *Lakha Singh and another*, A.I.R. (1928) Lah. 609 ; *Manmatha Kumar Saha* v. *Exchange Loan Co. Ltd.*, A.I.R. (1936) Cal. 567 ; *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark*, 9 Lah. Series, 701, referred to.

Ma Shwe Myat v. *Maung Mo Hnaung*, I.L.R. 48 Cal. 832 at 835, followed and applied.

K. R. Venkatram for the appellant.

O. S. Woon for the respondent.

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* Special Civil Appeal No. 1 of 1950 against the decree in Civil 2nd Appeal No. 39 of 1949, dated 21st February 1950.

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The judgment of the Bench was delivered by

U TUN BYU, C.J.—E. M. Chokalingam Chettyar, a minor, sued, by his next friend Unnamalai Achi, who is the minor's mother and natural guardian, for the recovery of a sum of Rs. 4,000 in the present currency from Saw Tha Dwe, defendant-respondent, which was alleged to be payable by the latter for the breach of contract of sale of 300 acres of paddy land, of which Rs. 2,000 was said to be for the refund of the advance paid to Saw Tha Dwe at the time the agreement for sale, was executed, while the remaining sum of Rs. 2,000 was claimed as compensation due under the terms of the agreement of sale, dated the 13th February, 1944. It might be mentioned at once that the advance was paid in Japanese currency and that the amount for which Saw Tha Dwe was sued was calculated on the basis set out in the Japanese Currency (Evaluation) Act, 1947. Paragraph 1 of the written statement, which Saw Tha Dwe filed, reads :

> "The suit is not maintainable inasmuch as—
>
> (*a*) the alleged agreement to purchase is void as the plaintiff is a minor ;
>
> (*b*) the alleged agent E. M. Govindaswamy Naidu has no status as such in law ; and
>
> (*c*) there is no privity of contract between the plaintiff and the defendant."

Two preliminary issues were framed, and the learned Assistant Judge, before whom the trial first came, heard arguments on the first preliminary issue ; and he held that the suit, which the plaintiff-appellant instituted, was not maintainable in law, and dismissed the suit of the plaintiff-appellant, with costs.

The plaintiff-appellant appealed against the order dismissing his suit, and his appeal, which was known

as Civil Appeal No. 1 of 1948, was also dismissed with costs. Both the lower Courts held in effect that the contract of sale was void *ab initio* in that the plaintiff-appellant was a minor. The plaintiff-appellant next appealed to the High Court in Civil 2nd Appeal No. 39 of 1949, and the points, which were argued before the learned Judge, who heard the appeal, were, to use his own words, as follows :

> "In this appeal under section 100 of the Civil Procedure Code by the appellant, his learned advocate has urged that both the lower Courts had erred in coming into a finding of fact that Govindaswamy Naidu was acting for himself in entering into the contract, without hearing any evidence adduced by the plaintiff on that behalf and that in any event both the lower Courts had erred in ignoring section 65 of the Contract Act inasmuch as the plaintiff's suit was not merely one for compensation for breach of contract but also for the refund of the purchase money."

The learned Judge was of opinion that the plaintiff-appellant should have been permitted to adduce evidence to show that when E. M. Govindaswamy Naidu entered into the agreement for the purchase of the paddy land, he did so for and on behalf of the plaintiff-appellant minor, and not in his own personal capacity. The learned Judge, however, held, in effect, that even if Govindaswamy Naidu had entered into contract for the purchase of the paddy land on behalf of the plaintiff-appellant minor, the latter was not entitled under section 65 of the Contract Act to recover the advance paid to the defendant-respondent Saw Tha Dwe, nor was he entitled to claim compensation from the latter.

The agreement, dated the 13th February, 1944, shows that Saw Tha Dwe agreed to sell 300 acres of paddy land to E. M. Govindaswamy Narahtu of Moulmein. The word "Narahtu", which was written

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in Burmese, was obviously a mispronunciation for "Naidu", which was the correct name of Govindaswamy. The powers of attorney, which Govindaswamy Naidu held, shows that Unnamalai Achi, the mother and natural guardian of the minor Chokalingam Chettyar, appointed Govindaswamy Naidu as her attorney for the purpose of carrying on the business of the minor, which was being conducted under the name of "ENA MUNA" or "E.M.". The powers granted to Govindaswamy Naidu were set out in the powers of attorney, and paragraph 1 of the plaint reads as follows:

> "1. That on 13th February 1944 at Thatôn, by an Agreement, the defendant abovenamed through his Agent, Saw Tun Aye, entered into a Written Agreement with the Govindaswamy Naidu, duly constituted Agent of Plaintiff appointed by his natural guardian Unnamalai Achi for sale of about 300 acres of paddy lands, which are situated in Yin-Nyein Ngagyi-in Kwin No. 767 and Sar-gyo-gyaung Kwin No. , Paung Township at the rate of Rs. 300 per acre, and received from the said Govindaswamy Naidu Rs. 5,000 as earnest money. The said earnest money belonged to the plantiff and the said Agreement was entered into for the benefit of the plaintiff."

There is, thus, sufficient material on the record on which it might be found that the agreement for the purchase of 300 acres of paddy land from Saw Tha Dwe could be held to be an agreement in which Govindaswamy Naidu purported to act for and on behalf of E. M. Chettyar, a firm which had its office at Moulmein. It could, under the circumstances, be said that the sum of Rs. 5,000 in Japanese currency, which is equivalent to Rs. 2,000 in the present currency, belonging to the minor plaintiff-appellant, was paid over to the defendant-respondent Saw Tha Dwe under an agreement which was void *ab initio*.

The question, which has been argued before us, is that the plaintiff-appellant was entitled, under the provisions of section 65 of the Contract Act, to recover the advance paid to Saw Tha Dwe and that, in any case, the plaintiff-appellant was entitled to recover the advance in equity as the money was his and as Saw Tha Dwe could have no right, whether in law or in equity to retain it. We are of opinion that section 65 of the Contract Act does not apply to the case now under appeal. It was observed in *Mohori Bibee* v. *Dharmodas Ghose* (1), which came before the Privy Council, as follows :

"The question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act, and cannot arise in the case of an infant. Their Lordships are therefore of opinion that in the present case there is not any such voidable contract as is dealt with in section 64.

A new point was raised here by the appellants' Counsel founded on section 65 of the Contract Act, a section not referred to in the Courts below, or in the cases of the appellants or respondent. It is sufficient to say that this section, like section 64, starts from the basis of there being an agreement or contract between competent parties ; and has no application to a case in which there never was, and never could have been, any contract."

In *Limbaii Ravji Hajare* v. *Rahi Kom Ravji Hajare and others* (2) it was also held as follows :

"A sale made by a step-mother on behalf of her minor son is a sale by an unauthorised person and the minor is entitled to have it set aside.

The sale by the step-mother is not voidable but void *ab initio* and, therefore, sections 64 and 65 of the Indian Contract Act, 1872, are not applicable."

(1) (1903) 30 Cal. Series, 539 at 548. (2) (1925) 49 Bom. Series, 576.

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The question which next arises is whether the minor plaintiff-appellant can, in equity, claim to recover his money, which was paid as advance to Saw Tha Dwe under an agreement, which was void *ab initio* in that the plaintiff-appellant was a minor. It appears to us that the statutory inability imposed upon a minor is intended for the protection and the good of the minor, and it will require a very strong and cogent reason before we can permit this statutory inability on the part of the minor to be used to the injury or disadvantage of the minor. We are unable to see any good reason in this case, why, where the minor is concerned, the Court ought not, in the exercise of its equitable discretion, to restore the parties to the position in which they were before the contract, which was void *ab initio*, was entered into. It is difficult to conceive, in the circumstances of the present case, on what principle, whether in justice or equity, the vendor can claim to retain the advance paid to him by or on behalf of the minor under a contract which was void *ab initio*. The minor plaintiff-appellant in attempting to recover the advance, which passed into the hands of Saw Tha Dwe, does not attempt to deprive the defendant of anything which the latter owns or possesses lawfully. It is difficult to understand how Saw Tha Dwe can even plead equity in his favour. Apparently, no attempt was made to look into the powers of attorney which Govindaswamy Naidu held, otherwise Saw Tha Dwe would have observed at once that Govindaswamy Naidu was appointed an attorney to carry on a business belonging to the minor at Moulmein for certain purposes only. It is also clear from the powers of attorney granted to Govindaswamy Naidu that he had no power to purchase immoveable property on behalf of the minor.

In *Khan Gul and another* v. *Lakha Singh and another* (1) Shadi Lal C.J., observed :

"If the infant is in possession of any property which he has obtained by fraud, he can be compelled to restore it to his former owner. * * * * * The equitable jurisdiction is founded upon the desire of the Court to do justice to both the parties by restoring them to the *status quo ante*, and there is no real difference between restoring the property and refunding the money except that the property can be identified but cash cannot be traced."

In *Manmatha Kumar Saha* v. *Exchange Loan Co. Ltd.* (2) it was observed :

"It would appear, therefore, that the Judicial Committee have in effect recognised the principle that the Courts in India have an equitable discretion to direct the refund of money which an infant may have obtained by his own fraud provided the lender is actually deceived by the fraud perpetrated by the minor. It may of course be argued that jurisdiction to order restitution only exists in cases in which the minor invokes the order of the Court as a plaintiff, but as Sir Shadi Lal C.J., has pointed out in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (3), cited above :

'It is difficult to understand why the granting of an equitable remedy should depend upon a mere accident : namely whether it is the minor or his adversary who has taken the initiative in bringing the transaction before the Court. The material circumstances in both cases are exactly the same. A contract has been entered into with an infant and as it is an invalid transaction it must be cancelled.'"

We are also of opinion that the Court has, on equitable principle, discretion to *direct* in a proper case the refund of the advance money belonging to the minor to him ; and this appears to us to be a case where this direction ought to be given. It is true that the

(1) A.I.R. (1928) Lah. 609. (2) A.I.R. (1936) Cal. 567.
(3) 5 Lah. Series, 701.

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plaintiff-appellant has not set out in his plaint that he also claims, in the alternative on equitable principle to recover the advance, which was paid when the agreement, dated the 13th February, 1944, was executed. It is, however, clear from the plaint filed that he also claims for the return of the advance, which was paid to the defendant-respondent Saw Tha Dwe under an agreement, which was void *ab initio*, and this, therefore, appears to us to be a case where we ought to allow the plaint to be amended. In asking for permission to be allowed to amend the plaint, it could not, in this case, be said that the plaintiff-appellant was attempting to set up a new cause of action. It seems to us that the Court ought to be most chary to act against the interest of a minor. We do not think it will be proper or just to penalise a minor for a defect, which is really a technical error in drafting the plaint. The plaintiff-appellant does not, by amending the plaint for this purpose, attempt to introduce a new cause of action into his plaint, in that it was implied in paragraph 1 of the plaint that the plaintiff-appellant was a minor at the time the agreement was entered into on his behalf. This is, in our opinion, a special case where leave to amend the plaint at a very late stage ought to be granted. And Lord Buckmaster observed in *Ma Shwe Myat* v. *Maung Mo Hnaung* (1) as follows:

> "All rules of Court are nothing but provisions intended to secure the proper administration of justice and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but none the less no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suit."

(1) I.L.R. 48 Cal. 832 at 835.

The plaintiff-appellant will, accordingly, be allowed to amend his plaint; and after the plaint has been amended and filed in this Court, a decree will be passed and drawn up setting aside the judgments and decrees passed in the Court of the Assistant Judge, Thatôn, the Court of the District Judge, Thatôn, and in Civil 2nd Appeal No. 39 of 1949 of this Court, and there will be a decree for the payment of a sum of Rs. 2,000 by the defendant-respondent Saw Tha Dwe to the plaintiff-appellant. Each party should, however, in the circumstances of this case, bear its own costs throughout.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice and U Ohn Pe, J.

H.C. 1951

Mar. 16.

DAW OHN SEIN (APPELLANT)

v.

SHINSAWBU CONCO LIMITED (RESPONDENT).*

Burma Co-operative Societies Act, s. 15—Award by Officer appointed by Registrar, Co-operative Societies Rule 15—Award made by such arbitrator —Arbitration Act, ss. 14, 15, 16 and 17—Whether such award could be challenged in a Court of Law under the Arbitration Act.

Where an award has been made by an Officer appointed by the Deputy Registrar of the Co-operative Society in the exercise of powers under Rule 15 of the Burma Co-operative Societies Rules directing payment of a sum of money :

Held : That Rule 15, sub-clause (3) authorized the Registrar to appoint an arbitrator and sub-rule (4) provide that such an award shall be enforceable as a decree of a Court having local jurisdiction in the matter.

Held further : That this Rule 15 is inconsistent with the provisions of ss. 14, 15, 16 and 17 of the Arbitration Act. It is not contemplated by Rule 15 that an award is to be filed in Court or the Court would have the power to modify or remit the award under the Arbitration.

S. 32 of the Arbitration Act does not apply to an award made under Rule 15 of the Burma Co-operative Societies Rules and such award cannot be challenged in Civil Court.

Nanda Kishore Gowswami v. *Ball Co-operative Credit Society, Limited*, (1943) Vol. II, Cal. Series, 431 at 434, followed.

Ba Shun for the appellant.

Ba Nyunt for the respondent.

The judgment was delivered by

U TUN BYU, C.J.—One U Ba Aye was the Chairman and Treasurer of Shinsawbu Conco Limited, while his wife Daw Ohn Sein, the appellant, was also a

* Civil Misc. Appeal No. 15 of 1950 against the order of the High Court, Original Side in Civil Misc. No. 60 of 1950, dated 3rd May 1950.

member of Shinsawbu Conco Limited. It is said that there was a shortage of a sum of Rs. 12,432-8 belonging to Shinsawbu Conco Limited when U Ba Aye left Rangoon on or about 28th April, 1949 to go to a place in Prome District, which was then under the insurgents' domination. U Ba Aye had not returned to Rangoon since that date. On 8th June, 1949, his wife Daw Ohn Sein executed an undertaking, whereby she agreed to repay the sum of Rs. 12,432-8-0 to Shinsawbu Conco Limited should U Ba Aye fail to return to Rangoon after a reasonable lapse of time, and she also agreed to the two houses mentioned in the document, with other properties belonging to her, being sold for the repayment of the said sum of Rs. 12,432-8-0 to Shinsawbu Conco Limited. Daw Ohn Sein paid a sum of Rs. 1,000 to Shinsawbu Conco Limited on or about 3rd June 1949. She failed to pay anything more subsequently ; and Shinsawbu Conco Limited referred the matter to the Registrar of the Co-operative Societies. The Deputy Registrar of the Co-operative Societies, in exercise of the powers under section 15 of the Burma Co-operative Societies Rules, 1931, appointed the Range Officer, Co-operative Societies, as an arbitrator to decide the matter in dispute between " Shinsawbu Consumers' Co-operative Society Limited represented by its Secretary U Ngwe Lay on the one part and U Ba Aye, *ex*-Chairman and Treasurer, represented by his wife and surety member Daw Ohn Sein and other 14 old Committee Members on the other part ". The arbitrator made his award on the 12th December 1949, wherein Daw Ohn Sein, wife of U Ba Aye, was directed to pay a sum of Rs. 11,432-8-0 together with the costs of the arbitration to Shinsawbu Conco Limited and her properties mentioned in the undertaking given by her were to be sold on her failure to pay the amount awarded against

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her. Rule 15 of the Burma Co-operative Society Rules, 1931 reads:

"15. (1) Every dispute touching the business of a co-operative society—

(*a*) between members or past members of the society or persons claiming through a member or past member, or

(*b*) between a member or past member or persons so claiming and the committee or any officer of the society,

shall be referred to the Registrar. Reference may be made by the committee, or by the society by resolution in general meeting, or by any party to the dispute, or, if the dispute concerns a sum due from a member of the committee to the society, by any member of the society.

(2) On receipt of such reference the Registrar shall either decide the dispute himself or refer it for decision to an arbitrator appointed by him or three arbitrators, one of whom may be appointed by him and one by each of the parties to the dispute.

(3) The Registrar, arbitrator or arbitrators shall enquire into the dispute, and on completion of the enquiry shall record a decision or award in writing.

(4) Such decision or award shall on application to the civil court having local jurisdiction be enforceable as a decree of such court.

(5) In proceedings before the Registrar or an arbitrator or arbitrators, no party shall be represented by a legal practitioner."

Sub-rule (4) of Rule 15 is, in our opinion, inconsistent with the provisions of sections 14, 15, 16 and 17 of the Arbitration Act, 1944. It is clear that Rule 15 does not contemplate an award being filed in Court, or of the Court modifying or remitting the award under the provisions of section 15 or 16 of the Arbitration Act. Nor is it necessary to pronounce judgment on the award made under Rule 15 of the Burma Co-operative Societies Rules, 1931, in that the award of the arbitrator could, under sub-rule (4) of Rule 15,

be enforced as if it were a decree of a Court, without anything more being done after it was made.

Rule 15 of the Burma Co-operative Societies Rules, 1931, was made apparently under Clause (1) of section 50 of the Burma Co-operative Societies Act; and it has not been contended before us that Rule 15 is *ultra vires* of section 50 of that Act. We cannot appreciate how an application to set aside an award made by reason of Rule 15 of the Burma Co-operative Societies Rules, 1931 can be entertained when it is clear from Rule 15 that such an application could not have been contemplated in view of the provisions of sub-rule (4) of Rule 15, the effect of which is to convert the award made by an arbitrator under Rule 15 into a decree which can be enforced by a Court having jurisdiction in the place in which the award was made. The provisions of Rule 15 must in the circumstances be considered to be entirely inconsistent, at least, with the provisions of sections 14, 15, 16 and 17 of the Arbitration Act.

In *Nanda Kishore Gowswami* v. *Ball Co-operative Credit Society, Limited* (1) Mukherjea J., observed :

> "The Court cannot modify an award as laid down in section 15 of the Arbitration Act, nor is there any necessity of filing an award in Court as is contemplated by section 14, and we are definitely of opinion that it is not necessary to have a judgment on an award as indicated in section 17 of the Arbitration Act."

The above observation applies with equal force to the Arbitration Act, 1944 which is in force in Burma ; and it might be mentioned that the provisions of sections 14, 15, 16 and 17 of the Burma Arbitration Act are same as those in the Bengal Act.

(1) (1943) Vol. II, Cal. Series, p. 431 at 434.

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It has also been argued on behalf of the appellant that the Court has power, in view of the provisions of section 31 (2) of the Arbitration Act, 1944, to decide all questions relating to the validity, effect or existence of an award, although the award had not been filed before it and even though the time ordinarily allowed for filing the award had expired. We must say that we find it difficult to see how an award made under Rule 15 of the Burma Co-operative Societies Rules, 1931 can be said to be an award which "may be filed" in Court when, in accordance with the provisions of Rule 15 under which the award is made, it is an award which is not required to be filed in Court to make it enforceable as a judgment or decree of the Court. Moreover, the time prescribed for filing an award in Court had also long expired. The question whether the award, with which we are concerned in the present case, can be attacked by means of a suit is not a matter which calls for consideration in the present appeal, and it will, therefore, not be right for us to deal with it. The appeal is accordingly, for the reasons which we have already stated, dismissed with costs ; Advocate's fees three gold mohurs.

APPELLATE CRIMINAL.

Before U Tun Byu, Chief Justice, and U On Pe, J.

SEIN HLA (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

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May 18.

Criminal Procedure Code, ss. 256 (2) and 342 (1) (a), (b) and (c)—Examination of accused after defence witnesses—If irregularity vitiating trial—Duty of accused in criminal case—Burden of proof of guilt always on Prosecution.

Where defence witnesses had been examined in a murder case and subsequenty the accused was examined and it was contended that s. 256 (2) of the Criminal Procedure Code had not been complied with and the same amounted to a serious defect in procedure so as to vitiate the trial.

Held : That the mere fact that the imperative statutory rule of procedure has been broken is not enough to vitiate the trial or proceeding. The Court should consider the gravity of the irregularity and whether the irregularity has caused injustice to the accused. The irregularity in examining the accused after the defence witnesses has not prejudiced the accused and it is not such serious defect in procedure as to vitiate the trial.

Kallu v. *Bashir Uddin*, (1931) 53 All. 172 at 178, referred to.

Abdul Rahman v. *King-Emperor*, (1927) 5 Ran. 53 at 69, followed.

Held further : That an accused person owes no duty to anybody and the burden of proving his guilt remains throughout the trial with the prosecution who must prove such guilt beyond all reasonable doubt.

Thein Han for the appellant.

Choon Foung (Government Advocate) for the respondent.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The appellant Sein Hla was convicted, in connection with the death of one Aung Sein, of an offence of murder punishable under section 302 (1) (*b*) of the Penal Code, and he was sentenced

* Criminal Appeal No. 156 of 1951 being appeal from the order of Sessions Judge sitting as Special Judge of Maubin, dated 6th March 1951 passed in Criminal Regular Trial No. 17 of 1950.

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to death in respect of this charge. He was also convicted, in connection with the death of Tin Hla and his wife Ma Yin, of offences of murder punishable under section 302 (2) of the Penal Code, and he was sentenced to transportation for life in respect of the second and third charges. He now appeals against the said sentences and convictions passed upon him in the Criminal Regular Trial No. 17 of 1950 of the Court of Sessions Judge, sitting as Special Judge, Maubin.

The learned Advocate for the appellant submitted, during the arguments, that the trial of Sein Hla in the present case must in law be set aside on the ground that Sein Hla was examined on oath only after all the defence witnesses had been examined and that it was an irregularity which was prejudicial to the accused. Sub-section (2) of section 256 of the Criminal Procedure Code, as amended by the Code of Criminal Procedure (Amendment) Act, 1945, reads :

" On entering upon his defence the accused shall be asked whether he desires to give evidence on his own behalf, and the Magistrate shall warn him in the manner required by sub-section (1) of section 342. If the accused decides to give evidence, his evidence shall next be taken, and after his cross-examination and re-examination (if any) the evidence of witnesses for the defence (if any) shall be taken. If the accused declines to give evidence, he shall before the evidence of the witnesses for the defence is taken, be examined in the ' manner provided by sub-section (2) of section 342 '."

It has not been contended before us that the provisions of section 342 (1) (*a*) (*b*) and (*c*) have not been properly explained to Sein Hla at the trial ; and the relevant portion of the case diary in Criminal Regular Trial No. 17 of 1950, dated 30th January, 1951 also reads :

" Charges under three heads—under section 302 (1) (*b*), 302 (2) and 302 (2) of the Penal Code—framed against the accused.

Charges explained and the plea of the accused recorded. He declines to recall any of the P.Ws. for further cross-examination.

The accused is called upon to enter into his defence and summary of his defence recorded.

Accused is asked if he desires to give evidence on oath on his own behalf and he replied in the affirmative, after due warning.

For hearing of defence on 1st March 1951.

U Thein Maung for the accused applies for permission to file a list of D.Ws. within seven days. Issue summonses to them immediately the list is filed.

Witnesses warned off yesterday are present. They are discharged."

The defence witnesses whom the appellant Sein Hla desired to examine for his defence were examined on 1st March 1951, and the case was postponed, apparently for delivery of judgment, to 6th March 1951. The learned trial judge subsequently realised that he had omitted to examine Sein Hla on oath as desired by the latter ; and Sein Hla was accordingly examined on 5th March 1951. The case diary dated the 1st March 1951 reads :

" Case called. Accused Sein Hla present in custody. P.P. for the Union of Burma and U Thein Maung for the accused.

Six D.Ws. summoned for today are present. Four of them examined and cross-examined. U Thein Maung waives D.Ws. Po Hla and Sein Maung who are present.

Heard U Thein Maung and P.P.

For orders on 6th March 1951.

Accused remanded."

The deposition of Sein Hla made on oath in Court has been read before us, and a perusal of his deposition shows that Sein Hla has been fully examined in his examination-in-chief and that U Lwin, who appeared for U Thein Maung who conducted the defence of the appellant on earlier dates, had

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conducted the examination of Sein Hla satisfactorily, as an Advocate ought to have done when defending an accused of a serious charge. It was moreover not alleged by the appellant in his memorandum of appeal that he had been in any way prejudiced in his examination on oath in Court by the absence of U Thein Maung in Court on the 5th March 1951. The judgment of the trial Court also shows that the trial Judge had certainly considered the statements which Sein Hla made on oath before the judgment was delivered. The appellant could not therefore be said to have been prejudiced in any way by the mere fact that he was examined only after the defence witnesses had been examined. We are also unable to see how it could in any way be said that an injustice has been done to him through that irregularity.

It has however also been urged on behalf of the appellant that the word "shall" in the second sentence of sub-section (2) of section 256 of the Code of Criminal Procedure indicates that the provisions of sub-section (2) of section 256 of the Code are imperative and that the accused must be examined before any of the witnesses for the defence is examined, and that, if that is not done, the whole trial is vitiated and becomes illegal.

In *Kallu* v. *Bashir Uddin* (1), after referring to the decision of their Lordships of the Privy Council in *Abdul Rahman* v. *King-Emperor* (2), King J., observed :

"..... it is no longer open to the courts in India to hold that the mere fact that an imperative statutory rule of procedure has been broken is enough to vitiate the trial or proceeding. It is clear that the courts should consider the gravity of the irregularity or omission and whether it might have worked actual injustice to the accused. If non-compliance with

(1) (1931) 53 All. 172 at 178.
(2) (1927) 5 Ran. 53 at 69.

an imperative provision in section 360 is curable under section 537, as held by their Lordships, it is clear that it is open to this Court to consider whether a breach of a statutory provision under section 356 is not similarly curable."

The observation made at the end of the decision of their Lordships of the Privy Council in *Abdul Rahman* v. *King-Emperor* (1) was—

"To sum up, in the view which their Lordships take of the several sections of the Code of Criminal Procedure, the bare fact of such an omission or irregularity as occurred in the case under appeal, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction, which on their Lordships' view, may be supported by the curative provisions of sections 535 and 537."

We do not consider the irregularity in examining the accused after the defence witnesses have been examined, instead of examining him before any of the witnesses for the defence is examined, to be such serious defect in procedure so as to vitiate the trial. The appellant Sein Hla was afforded every opportunity of making his statements on oath, as he might deem necessary for his defence, and he appeared to have said all that he might properly make in his defence. It cannot in that circumstance be said to be an irregularity which has occasioned a failure of justice or which has prejudiced his defence. The irregularity in examining the accused after the defence witnesses were examined is not an irregularity which will vitiate the trial, unless it can be shown to have occasioned a failure of justice or, at least, to be such, as must have materially prejudiced the accused in his defence.

The deceased Aung Sein, Tin Hla and his wife Ma Yin apparently died at about 4 p.m. on the 12th December 1951. The fishery hut where they died was about 5 miles away from Htani village. It cannot be

(1) (1927) 5 Ran. 53 at 69.

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disputed that, besides the deceased Aung Sein, Tin Hla and Ma Yin, the appellant Sein Hla and three other persons namely Maung Sein Daing, his wife Ma Khin Sein and Kyee Pyu were also living at the fishery hut on the night of the occurrence. Maung Sein Daing and Ma Khin Sein were first sent up for trial along with Sein Hla, the present appellant, but the prosecution against them was withdrawn, and they were subsequently examined as witnesses for the prosecution. Ma Khin Sein is said to have produced a set of gold buttons which were alleged to be the property of the deceased Aung Sein, and she said that they were given to her by the appellant Sein Hla. Ma Khin Sein must in this case be considered to have, at least, placed herself in the position of an accomplice, and her evidence cannot properly be acted upon unless it is corroborated by some evidence from an independent source. We are unable to see any evidence on the record which would indicate, independently of the evidence of Ma Khin Sein, that the appellant must have given her those gold buttons. The evidence of her husband Maung Sein Daing does not stand on higher position.

The most important witness in this case is Kyee Pyu (P.W. 1), and there can, in our opinion, be no doubt that he was actually present in the fishery hut at the time the incidents occurred. He stated that he was awakened by the noise of a gunshot and that he actually saw the appellant Sein Hla fire one shot with a rifle at the deceased Aung Sein who was still inside a mosquito curtain. This witness also saw Sein Hla shoot at the deceased Ma Yin when the latter shouted out အစ်ယဲလေးဘဲ့နဲ့ လုပ်တာလဲ ; and he also said that he saw Sein Hla shoot at the deceased Tin Hla who was running out of the hut when the latter saw that his wife had been shot at ; and according to Kyee Pyu, he

heard Tin Hla cry out အဖေသေးဖျက္ခန္ေတာ့ေသပါ့ဗ်ိ after Tin Hla was shot at. Kyee Pyu said that the appellant Sein Hla also fired 4 or 5 shots at him as he dived into a stream to make his escape. Fortunately, Kyee Pyu was not hit, and he went over to the hut of Than Ge who lived a short distance away.

According to Kyee Pyu, a lamp was burning in the hut at the time those incidents took place, and we accept his evidence on this point, because if a watch was kept at night at the fishery, as was done in this case, a lamp must have been kept burning in the hut also. Thus Kyee Pyu must have been in a position to see clearly what occurred at the fishery hut. Kyee Pyu stated that no dacoity occurred at the fishery hut on the night of the occurrence, and we also accept his evidence on this point. It is not possible in this case to accept the suggestion made on behalf of the defence that lusoes had attacked the fishery hut on the night of the occurrence. There can be no dispute that there were two guns at the fishery hut on the night of the occurrence and that none of those guns were taken away. A lusoe would, we think, not have hesitated to seize, at least, the DBBL gun which was lying by the side of the deceased Aung Sein, if he had been shot at by a lusoe. This circumstance strongly, in our opinion, supports the statement of Kyee Pyu that the fishery hut was not attacked by lusoes on the night of the occurrence. Thus it must have been the appellant Sein Hla, as deposed to by Kyee Pyu, who shot at the deceased Aung Sein, Ma Yin and her husband Tin Hla on the night of the occurrence.

Kyee Pyu could not, in view of the fact that there was a lamp burning in the hut at the time of the occurrence have made any mistake about the identity of the appellant Sein Hla. The evidence also shows that Kyee Pyu and Sein Hla used to sleep under the

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same mosquito curtain at the fishery hut. There is evidence in this case to show that Kyee Pyu not only reported about what had happened at the fishery hut to Than Ge (P.W. 2) when he arrived at the latter's hut, but there is also evidence to show that after Kyee Pyu left Than Ge's hut in the company of Chit Pon (P.W. 5) at daybreak to report the incident to the police he also denounced the appellant Sein Hla in the latter's presence to the Police party, whom he met at Kalone village, as the person who actually shot at the deceased Aung Sein and other persons. Kyee Pyu is supported in this respect by the evidence of Chit Pon. The conduct of Kyee Pyu after the incidents which occurred at the fishery hut appears to us to be clearly consistent with the conduct of a man who had personal knowledge of what occurred at the fishery hut and was willing to disclose what knowledge he had of what took place at the fishery hut. The appellant, in his statement on oath, suggested that Kyee Pyu probably harboured a grudge against him as he had occasion to kick Kyee Pyu once, which was about 10 days before the day of the occurrence, but Kyee Pyu had not been cross-examined about it, and no weight could accordingly be given to this suggestion. If Kyee Pyu's evidence is accepted as to what occurred at the fishery hut before he went over to the hut of Than Ge, and which evidence we accept, it is clear that it was the appellant Sein Hla who shot at the deceased Aung Sein and Ma Yin and that the shot which Sein Hla fired at Tin Hla while the latter was running away from the fishery hut must have also struck Tin Hla. The medical evidence shows that Tin Hla also received dah-cut wounds, but this does not necessarily suggest that the lusoes must have attacked the fishery hut on the night of the occurrence because it was possible for the appellant to have gone

to the place where Tin Hla had fallen and inflicted those dah-cut wounds after Kyee Pyu had fled.

It is true that no motive has been proved in this case, but we are satisfied that there can be no doubt that it was the appellant Sein Hla who killed the deceased Aung Sein and Ma Yin and that it was also the appellant who inflicted the gunshot wound found on Tin Hla.

The doctor could not say what was the real cause of Aung Sein's death, because his dead body was partially burnt by the fire which occurred at the fishery hut after Kyee Pyu had jumped into the stream to make his escape. It is most likely that Aung Sein died from the gunshot wound which he received at the hand of the appellant Sein Hla. In any case the appellant in setting fire to the hut must have realised at that time that in doing so he was likely to cause the death of Aung Sein who was lying in the hut at the time. There is, of course, no evidence to show definitely that it was Sein Hla who actually set fire to the hut, but the circumstances of this case suggest strongly that it must have been Sein Hla who set fire to the hut after Aung Sein and other persons had been shot at in order to cover his misdeeds. Sein Daing and his wife Ma Khin Sein have not been cross-examined to suggest that they were concerned in setting fire to the fishery hut. Thus the appellant could in the circumstances of the case be said to have done some act which he knew was sufficient in the ordinary course of nature to have caused the death of Aung Sein, and his offence so far as the death of Aung Sein is concerned becomes one of murder. It has not been suggested in this case that there was any quarrel between the appellant Sein Hla and the deceased Aung Sein at the time the latter was shot at. Moreover, the evidence in this case shows that the deceased

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Aung Sein was still in his mosquito curtain at the time he was shot at and that he must have been asleep for some time before he was shot at. The attack on Aung Sein could, therefore in the circumstances of this case, be said to have been premeditated, and the appellant Sein Hla must, therefore, be considered to have been rightly convicted of an offence under section 302 (1) (*b*) of the Penal Code so far as the death of Aung Sein is concerned.

Ma Yin was probably shot at because she had cried out အဖမ်းဆီးခံရ and it could not thus be said that the appellant Sein Hla had premeditated her death also. The fact that she was shot at with a gun shows however that the appellant must have also intended to have caused an injury which was sufficient in the ordinary course of nature to cause the death of Ma Yin. The same remarks will apply in so far as the death of her husband Tin Hla is concerned. It is probable that Tin Hla was shot at, because the appellant had already shot at Ma Yin, wife of Tin Hla. It could not in the circumstances be said that the appellant Sein Hla had premeditated the death of Tin Hla. Thus the convictions and sentences passed upon the appellant in respect of the death of Ma Yin and her husband Tin Hla must also be considered to have been correct.

It has been submitted during the arguments, on behalf of the appellant, that the learned Sessions Judge was unduly influenced in his conclusion by the fact that the accused had not attempted to explain why he had hidden the rifle on the night of the occurrence and by the accused's conduct in not denying his guilt at once when Kyee Pyu denounced him to the SIP U Ba Gyaw and in that the accused had not attempted to explain how he came to possess the exhibit buttons. We think we ought to say, as clearly as we can emphasise, that an accused person owes no

duty to anybody and that the burden of proving his guilt remains throughout the trial with the prosecution and that the prosecution must prove his guilt beyond all reasonable doubt. It is clear in this case, however, from what we have set out earlier, without making any adverse inference against the appellant by reason of his omission to make certain statements in Court, that there is sufficient and reliable evidence in this case to prove beyond doubt that it was the appellant Sein Hla who shot at the deceased Aung Sein and Ma Yin and that the shot which the appellant fired at Tin Hla also struck the latter.

We are unable to see anything in the evidence which has been adduced for the defence which can help to throw any doubt on the credibility of Kyee Pyu's evidence, and so far as the suggestion that the fishery hut must have been attacked by lusoes on the night of the occurrence is concerned we cannot, in the circumstances of this case, accept it. The convictions and sentences passed upon the appellant in the trial Court are, therefore, correct, and we also confirm the conviction and sentence of death under section 302 (1) (*b*) of the Penal Code in respect of the death of Aung Sein. The appeal is therefore dismissed.

APPELLATE CIVIL.

Before U San Maung and U Thaung Sein, JJ.

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July 5.

DAWSONS BANK LTD. (APPELLANTS)

v.

C. EIN SHAUNG AND THREE OTHERS (RESPONDENTS).*

Money Lenders Act, s. 12—Constitution of the Union of Burma, s. 23 (4)—'Property' whether includes debts and choses in action—Plea under s. 12, Money Lenders Act not taken—Whether appellate Court can give relief—Admission by advocate—Binding nature on client.

Held: At the time the Constitution of the Union of Burma came into force a debt was regarded as a piece of property capable of being transferred by law and capable of being expropriated. The term 'property' in s. 23 (4) of the Constitution is not confined only to corporeal or tangible property but also includes incorporeal or intangible property such as debts and other choses in action.

Halsbury's Law of England (Vol. 25), 189—194; *Imperial Bank of India* v. *Bengal National Bank*, 59 Cal. 377 (P.C.), referred to.

Sections of the Constitution should not be interpreted in a narrow and technical manner but should always have a large, liberal and comprehensive interpretation.

U Htwe (a) *A. E. Madari* v. *U Tun Ohn and one*, (1948) B.L.R. 541, followed.

The Usurious Loans Act and the Money Lenders Act had never been considered *ultra vires* of the Legislature under the Government of Burma Act, 1935. There is no difference between the said provisions of the Government of Burma Act, 1935, s. 145 (2) and s. 23 (4) of the Constitution.

Held also: That it is a matter of general principle that the determination in a case must be founded upon a case either to be found in the pleadings or involved in or consistent therewith. This principle does not exclude the application of s. 12 of the Money Lenders Act on appeal. This section prohibits all Courts from passing a decree for a sum greater than the principal of the original loan and arrears of interest which exceeds such principal, taken together with any interest already paid. The duty cast upon the Courts is that provisions of the section are applied in proper cases though the parties may not have raised the plea.

P. T. Christensen v. *K. Sulhi*, 5 L.B.R. 76; *Ma Htwe* v. *Maung Lun*, 8 L.B.R. 334 (F.B.); *Haji Chit and five others* v. *Haji Kyaw*, 3 U.B.R. 201; *Shivabasava* v. *Sangappa*, 29 Bom. 1 (P.C.); *The Official Trustee of Bengal* v. *Krishna Chandra Mozumdar and others*, 12 Cal. 239 (P.C.); *Harendra Kumar Bose and another* v. *Khemada Kinkar Roy and others*, A.I.R. (1927) Cal. 86, referred to.

* Special Civil Appeal No. 5 of 1949 against the decree of the Appellate Side of the High Court, Rangoon in Civil 2nd Appeal No. 21 of 1949, dated 10th June 1949.

The terms of the Usurious Loans Act, 1918, have been applied even in favour of a defendant who had confessed judgment.

S.P.R.M. Firm v. *Maung Po Kyi and others*, 1 Ran. 580, referred to.

There is no reason therefore why the Money Lenders Act should not be applied in proper cases in favour of a defendant who had failed to invoke the same.

An admission of fact by counsel is binding on the client and when once a fact is admitted proof of the same need not be furnished. A compromise by counsel without knowledge or instructions of the client stands on a different footing.

Shepherd v. *Robinson*, (1919) 1 (K.B.) 474, distinguished.

G. Horrocks for the appellants.

P. K. Basu for the respondents.

U SAN MAUNG, J.—This is an appeal under section 20 of the Union Judiciary Act against the judgment and decree of the learned Chief Justice of this Court in Civil 2nd Appeal No. 21 of 1949 setting aside the judgment and decree of the District Court of Pyapôn in Civil Appeal No. 10 of 1948 and restoring the judgment and decree of the Court of the 1st Assistant Judge, Pyapôn, dismissing Civil Regular Suit No. 30 of 1947 of Messrs. Dawsons Bank Limited, who are the appellants in the present appeal. In Civil Regular Suit No. 30 of 1947 aforesaid, Messrs. Dawsons Bank Limited, sued C. Ein Shaung and three others for recovery of Rs. 5,000 being interest due on the first and second mortgages executed by the defendant-respondents' father T. Lwan Shaung and by the defendant-respondents themselves. It was alleged that the plaintiff in filing the suit for interest only was merely exercising one of the rights reserved in the instruments of mortgage. The suit was resisted mainly on the ground that the amounts due on the two mortgages in question had been fully paid up during the Japanese regime to one U Po Tay, the Office Superintendent of Dawsons Bank, who was left in charge of the current

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duties on the evacuation of the Managing Director and the General Manager of the Bank from Burma, and who was subsequently appointed a Custodian of Enemy Property by the Japanese sponsored Burmese Government. This defence was accepted by the 1st Assistant Judge, Pyapôn, who held that "the settlement of the suit mortgages was made between defendant U Ein Shaung on the one part and U Po Tay on the other party with their consent, and U Po Tay was acting as an Executive Officer of the Department of the Custodian of Enemy Property under the Burmese Government. Therefore the settlement in question holds good." The suit was accordingly dismissed with costs. On appeal to the District Court of Pyapôn the learned District Judge held that under International Law neither the Japanese sponsored Burmese Government nor U Po Tay, who derived his authority as Divisional Officer of Enemy Properties from that Government, had any right to take charge of private property and accept repayments towards the discharge of the debts contracted during pre-occupation time and that therefore the debt was still subsisting. The learned Judge considered that the provisions of the Money Lenders Act, 1945, should not be taken into consideration as the question of the applicability of the Act was not raised in the trial Court. On appeal to the High Court, the learned Chief Justice held that this was a fit case for application of section 12 of the Money Lenders Act, 1945, which is in the following terms:

"12. Notwithstanding anything to the contrary contained in any other law for the time being in force, or in any contract, no Court shall, in respect of a loan advanced before or after the commencement of this Act, pass a decree for a sum greater than the principal of the original loan and arrears of interest which, together with any interest already paid, exceeds the amount of such principal."

The plaintiff's suit was then dismissed for the reasons given by the learned Chief Justice in the following words :

"Thus it must be held that the plaintiff-respondent Bank is not entitled to recover under section 12 of the Money Lenders Act as interest a sum which is larger than the principal amount of the loan advanced. U Po Tay, an employee of the plaintiff-respondent Bank mentioned that Rs. 4,000 or Rs. 5,000 had, since 1925, been paid each year as interest by the 1st defendant-appellant. However the learned Advocate, who appears on behalf of the plaintiff-respondent Bank, frankly stated during the argument before this Court that the total amount of interest, in respect of the two loans advanced on the 17th November, 1925, and 10th May, 1929, which had been received by the plaintiff-respondent Bank had, in both cases, exceeded the sum of Rs. 25,000. The plantiff-respondent Bank cannot, in the circumstances claim for more payment of interest from the defendants-appellants. The judgment and decree of the District Court are therefore set aside, and the judgment and decree of the Court of the 1st Assistant Judge will be restored."

In the course of the argument before the learned Chief Justice it was contended on behalf of the plaintiff that the Money Lenders Act, 1945, was no longer good law in view of the provisions of sub-section (4) of section 23 of the Constitution because of the absence of the provisions relating to the manner in which the owner of the property should be compensated. This contention was rejected on the ground that the money due to the plaintiff by the defendants on the simple mortgages of the properties in suit could not be considered as property within the ambit of sub-section (4) of section 23 of the Constitution.

This appeal under section 20 of the Union Judiciary Act, therefore raises an interesting question as to the nature of the property contemplated by section 23 (4) of the Constitution besides other questions of importance. First and foremost it has to be considered whether

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section 12 of the Money Lenders Act and other allied sections restricting the accretion of interest on loans are no longer valid and enforceable in view of sub-section (4) of section 23 of the Constitution, which reads :

" (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."

The learned Chief Justice, who had answered this question in the negative, had proceeded on the assumption that the word "property" occurring in this sub-section means corporeal or tangible property and not incorporeal or intangible property such as debts and other "choses in action". We have carefully considered this matter and with great respect we must say that in our opinion a debt must be considered to be a piece of property within the contemplation of sub-section (4) of section 23. Certain fundamental rights have been guaranteed by the Constitution of the Union of Burma and section 23 thereof, which has guaranteed to the citizens and others residing within the Union certain economic rights, guarantees the right of private property and of private initiative in the economic sphere provided that no person uses the right of private property to the detriment of the general public and no monopolist organizations have been set up to injure the interests of the national economy. These provisions are contained in sub-sections (1), (2) and (3) of section 23. Sub-section (4) has already been quoted. Sub-section (5) is in the following terms :

" (5). Subject to the conditions set out in the last preceding sub-section, individual branches of national economy or single enterprises may be nationalized or acquired by the State by law if the public interest so requires."

Thus, it will be seen that private enterprises may be nationalized subject to the conditions set out in sub-section (4) of section 23. Is it to be conceived that in the nationalization of private enterprises only corporeal and tangible property will be involved regard being had to the complexity of modern conditions? Most of the assets of private enterprises are in the form not only of tangible property but also of intangible property such as choses in action. Assume for the sake of argument that Burma as an agricultural country would have in the near future many land mortgage Banks similar to Dawsons Bank Limited, and that the State has in the public interest decided to expropriate the assets of these Banks for the purpose of nationalization. The tangible or corporeal property belonging to such Banks will consist mainly of the Bank buildings and furniture, whereas the intangible will consist mainly of debts due to the Banks by the cultivators. Therefore, if the word "property" occurring in sub-section (4) of section 23 is to be interpreted as meaning only tangible or corporeal property the Banks which are expropriated for the purpose of nationalization will only receive compensation for the buildings and furniture and not for the other assets. This clearly is not within the contemplation of this sub-section. In English law property can be both corporeal and incorporeal or tangible and intangible. Personal property is divisible into two classes, namely, chattels personal and chattels real and the expression "chattels personal" which strictly speaking has meant things moveable has in modern times been used to denote any kind of property other than real property and chattels real. Property in chattels personal may be in possession or in action and the expression "choses in action" or "things in action" is now commonly used, in a wider sense, to include all incorporeal interests in pure

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personality unaccompanied by physical possession, whether or not the subject-matter is capable of reduction into physical possession by action or otherwise. See *Halsbury's Laws of England*, Volume 25, pages 189 to 194. In International Law also a debt is considered to be a piece of personal property. McNair in his Legal Effects of War has this to say regarding the effect of the outbreak of war on the debts owing to or by the enemy :

> "By English law, as we have already seen, the outbreak of war does not automatically involve the confiscation of private enemy property in this country, though the Crown may by inquisition of office bring about a forfeiture, or Parliament may produce this effect by legislation. A debt is essentially a piece of property, and it is worth remembering that the action of debt was in origin a recuperatory action, the theory being that the defendant was wrongfully retaining the plaintiff's property."

Later the learned author remarks :

> "In conclusion, it is submitted that where as a result of a pre-war contract there has accrued due to a party who becomes an enemy a liquidated sum of money, whether already payable to him when war broke out or becoming payable to him during the war, the right to that payment is merely suspended during the war and, in the absence of arrangements to the contrary made either during the war (including forfeiture by inquisition of office) or in consequence of the Peace Treaty, is enforceable in our Courts by the *ex*-enemy when the war is at an end."

See pages 119 and 121. There is no definition of property in the Burma General Clauses Act, the only definitions occurring therein being those of moveable property and immoveable property. Section 6 of the Transfer of Property Act provides that property of any kind may be transferred, except as otherwise provided by the Act or by any other law for the time being in force and a debt is a specie of property which can be

transferred under the Act. In the case of *Imperial Bank of India* v. *Bengal National Bank* (1) their Lordships of the Privy Council held that the definition of "actionable claim" added to section 3 of the Transfer of Property Act, 1882, by Act II of 1900, did not prevent a debt secured upon immoveable property from being transferred apart from the security.

Therefore it is clear that according to the state of laws existing at the time the Constitution of the Union of Burma came into force a debt was regarded as a specie of property which was capable of being transferred by law. It was also a specie of property which was capable of being expropriated.

As held by their Lordships of the Supreme Court in *U Htwe* (alias) *A. E. Madari* v. *U Tun Ohn and one* (2), sections of the Constitution should not be interpreted in a narrow and technical manner but should on all occasions be interpreted in a large, liberal and comprehensive spirit. Constructions most beneficial to the widest possible amplitude of its powers should be adopted and the Constitution though written should be interpreted in such a way as will be subject to development through usage and convention. In our opinion it will not be in accordance with the rule laid down by the Supreme Court if we were to interpret sub-section (4) of section 23 of the Constitution as only confined to tangible property as otherwise we shall be a party to a misapprehension that all private property except those which are tangible or corporeal can be expropriated for the purpose of being nationalized without payment of any compensation whatsoever to the owner thereof.

Having interpreted the word "property" occurring in sub-section (4) of section 23 in the manner indicated above, it has still to be considered, whether because of

(1) 59 Cal. p. 377 (P.C.) (2) (1948) B.L.R. p. 541.

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the provisions of this sub-section, section 12 of the Money Lenders Act, 1945, and other allied sections of this Act are no longer valid and enforceable. It has been contended that because section 12 of the Money Lenders Act, 1945, limits all accumulation of interest to an amount not exceeding the principal, no matter for how long the loan remains unpaid, it is in fact limiting private property within the meaning of sub-section (4) of section 23 of the Constitution. This, in our opinion is a fallacious way of looking at the provisions of the Money Lenders Act referred to. What section 12 of the Money Lenders Act purports to do is to limit the accretion of interest on loans in the interest of debtors in general. This is not such a limitation and/or expropriation which is contemplated by sub-section (4) of section 23, which must be read in conjunction with sub-section (5) of that section. These two sub-sections read together protect the citizens and other persons residing in the Union of Burma from expropriation, either in full or in part, of their private property for the purpose of nationalization without being compensated therefor. They have not been designed to hamper the State from making such rules as it deems necessary for regulating the relationship between creditors and debtors in general for the purpose of protecting the latter from the usurious propensities of the former. The relevant provisions of the Money Lenders Act, 1945, are in effect similar to the corresponding provisions in the Usurious Loans Act repealed thereby. If the Usurious Loans Act and the Money Lenders Act, 1945, had never been considered to be *ultra vires* of the legislature owing to the Government of Burma Act, 1935, it could hardly be contended that section 12 and other allied sections of the Money Lenders Act, 1945, are now invalid and unenforceable in view of the provisions of section 23 of the

Constitution. In this connection there is no real difference between the provisions of sub-section (2) of section 145 of the Government of Burma Act, 1935, and sub-section (4) of section 23 of the Constitution.

The next point for consideration is whether the High Court in its Civil 2nd Appeal No. 21 of 1949 was wrong in dismissing the plaintiff-appellant's suit on the ground that section 12 of the Money Lenders Act, 1945, was applicable when the defendant-respondents had never raised this plea in their pleadings nor canvassed it in the trial Court. It has no doubt been established as a matter of general principle that the determination in a cause must be founded upon a case either to be found in the pleadings or involved in, or consistent with the case thereby made. See *P. T. Christensen* v. *K. Suthi* (1); *Ma Htwe* v. *Maung Lun* (2); *Haji Chit and five others* v. *Haji Kyaw* (3) and *Shivabasava* v. *Sangappa* (4). This principle of law is applicable not only to Courts of original jurisdiction but also to appellate Courts. See *The Official Trustee of Bengal* v. *Krishna Chandra Mozumdar and others* (5); and *Harendra Kumar Bose and another* v. *Khemada Kinkar Roy and others* (6). However, in our opinion it is within the competence of any Court, whether of original or of appellate jurisdiction, to take into consideration the provisions of section 12 of the Money Lenders Act although parties to a suit may not have pleaded this section in defence to a claim against them. This section is explicit in that it prohibits all Courts of law from passing a decree for a sum greater than the principal of the original loan or arrears of interest which, together with any interest already paid, exceed the amount of such principal. Therefore, a

(1) 5 L.B.R. p. 76.
(2) 8 L.B.R. p. 334 (F.B.).
(3) 3 U.B.R. p. 201.
(4) 29 Bom. p. 1 (P.C.).
(5) 12 Cal. p. 239 (P.C.).
(6) A.I.R. (1927) Cal. p. 86.

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duty is cast upon the Courts to see that the provisions of this section are applied in proper cases notwithstanding the fact that parties may not have made any plea in this connection. In the case of *S.P.R.M. Firm* v. *Maung Po Kya and others* (1), in which the applicability of the Usurious Loans Act, 1918, was considered, it was held by a Bench of the late High Court of Judicature that the provisions of the Usurious Loans Act could be applied even in favour of the defendant who had confessed judgment. As already observed above, the provisions of section 12 of the Money Lenders Act, 1945, and or other allied sections of the Act are in terms similar to those contained in the Usurious Loans Act. Therefore, if the provisions of the Usurious Loans Act could be applied even in favour of a defendant who had confessed judgment, there seems no reason why the provisions of the Money Lenders Act, 1945, should not be applied in proper cases in favour of the defendant who has failed to invoke them in his defence. It is therefore a matter for consideration whether in this case the learned Chief Justice in dealing with the matter in second appeal had sufficient material before him to justify the plaintiff-appellant's suit being dismissed on the ground that section 12 of the Money Lenders Act, 1945, had operated to debar Courts of law from decreeing any interest on the two mortgages in suit. As pointed out by the learned Chief Justice, U Po Tay, an employee of the plaintiff-appellant Bank, who was in a position to be able to know what had occurred and who was examined as a witness for the plaintiff, had admitted that since the year 1925 U Ein Shaung, who was one of the most regular payers among the clients of Dawsons Bank, had been paying interest to the Bank to the extent of Rs. 4,000 or Rs. 5,000 every year. This admission was

(1) 1 Ran. p. 580.

sufficient to indicate clearly that interest already paid on the two mortgages in suit had exceeded the principal amount and this fact apparently led the learned Chief Justice to question the learned Advocate for the plaintiff-appellant Bank whether or not the total amount of interest in respect of the two loans had in each case exceeded the principal. The learned Advocate then admitted that this was the case and this is an admission of fact which must be considered as binding on his client the plaintiff-appellant Bank. It is idle for the plaintiff now to contend that what purported to be two mortgages each for Rs. 25,000 were in fact not mortgages for these amounts but that what were secured by the mortgage deeds in suit were in fact credit facilities which were not to exceed the limits prescribed. These facts were not pleaded in the plaint filed by the plaintiff-appellant. The admission of the learned Advocate for the plaintiff-appellant has entirely dispensed with proof of the fact whether or not interest already paid had exceeded the principal amounts secured by the two mortgages in suit. Therefore the learned Chief Justice was quite justified in having applied the provisions of section 12 of the Money Lenders Act and in dismissing the plaintiff-appellant's suit with costs. The case of *Shepherd* v. *Robinson* (1), where in an action for a debt being called upon for hearing, counsel for the defendant compromised the suit without knowledge of the fact that the defendant had given instructions that the case was not to be settled and the compromise was accordingly set aside by the Court, is clearly distinguishable from the present.

For these reasons the appeal fails and must be dismissed with costs ; Advocate's fees ten gold mohurs.

U THAUNG SEIN, J.—I agree.

(1) (1919) 1 K.B.D. 474.

APPELLATE CRIMINAL.

Before U Tun Byu, Chief Justice.

H.C. 1951

June 8.

MA MYAING (APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Disposal of exhibits—Order for return of jewellery—Conviction for breach of trust—Opportunity to owner to be given—Contract Act, s. 178—Sale of Goods Act, s. 2 (9).

Where a broker entrusted by owner with authority to sell certain jewellery gave it to another person who in his turn pledged it in a pawn-shop and upon conviction of the broker for criminal breach of trust the Magistrate made an order for return of the jewellery to the owner without notice to pawnee and the Additional Sessions Judge cancelled the said order and directed the same to be returned to the pawn-shop owner.

Held: That unless the order of the trial Magistrate can be said to be clearly wrong on the face of the record it ought to be sustained. Where opportunity is not given to the pawn-shop owner or to the original owner to be heard before the orders for the return of the jewellery were passed, that fact would amount to serious irregularities.

The pledge in the present case was made by (P.W. 3) and not by the original broker. There was also nothing to show that the jewelleries were in fact pledged in her name. There is consequently no material on record that the pledged jewellery must be considered to have been a pledge made by a broker.

Held further: That under s. 178 of the Contract Act a mercantile agent acting in the ordinary course of business can pledge goods in his possession with the consent of the owner and a broker in jewellery given for sale comes within the definition of mercantile agent as defined in s. 2 (9) of the Sale of Goods Act.

Sulaiman v. *Ma Ywet*, (1934) A.I.R. Ran. 198, referred to.

Yan Aung and Tin Maung (Government Advocate) } for the respondent.

U TUN BYU, C.J.—One Ma Tin May was convicted of criminal breach of trust in Criminal Regular No. 23 (G) of 1949-50 of the Court of the 2nd Additional Magistrate (1), Hsipaw, and she was sentenced, under section 406 of the Penal Code,

* Criminal Revision No. 186-A of 1950 being review of the order of the Additional Sessions Judge of Hsipaw, dated 9th September 1950 passed in Criminal Misc. No. 1 of 1949-50.

to suffer six months' rigorous imprisonment. The learned 2nd Additional Magistrate (1), Hsipaw, directed the exhibit jewelleries, worth about Rs. 1,270, which formed the subject of the offence in that case, to be returned to their original owner Ma Myaing (P.W. 1). Subsequently, the Additional Sessions Judge, Hsipaw, modified the order of the 2nd Additional Magistrate (1), Hsipaw, in so far as the exhibit jewelleries were concerned, and ordered them to be returned to the pawn-shop from which the exhibits had been seized ; and the learned Additional Sessions Judge also set out the conditions under which the jewelleries were to be returned to the proprietor of the pawn-shop. He, however, did not give any opportunity to Ma Myaing to be heard ; nor did the 2nd Additional Magistrate (1), Hsipaw, give the proprietor of the pawn-shop an opportunity to be heard before he ordered the exhibit jewelleries to be returned to Ma Myaing, their original owner. These irregularities must be considered to be serious in that persons whose rights or liberties were affected ought ordinarily to be given an opportunity of being heard before an order is passed against them. These irregularities, however, do not appear to be of importance now, in that the revision application will have to be considered on its merits by this Court.

Thus, the point which arises in this revision application becomes, whether the order of the 2nd Additional Magistrate (1), Hsipaw, directing the jewelleries to be returned to their original owner Ma Myaing, can be said to have been made properly or correctly ; and it will in this connection be necessary to reproduce the provisions of section 178 of the Contract Act, which read :

" 178. Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods,

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MA MYAING v. THE UNION OF BURMA.

U TUN BYU, C.J.

any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorized by the owner of the goods to make the same : provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge.

Explanation.—In this section, the expressions 'mercantile agent' and 'documents of title' shall have the meanings assigned to them in the Sale of Goods Act."

The expression "mercantile agent" is defined in section 2 (*9*) of the Sale of Goods Act, as follows :

"2 (*9*). 'mercantile agent' means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods ;"

In *Sulaiman* v. *Ma Ywet* (1), it was held that a broker in jewellery who had been given jewelleries by their owner for sale came within the meaning of "mercantile agent", as defined in section 2 (*9*) of the Sale of Goods Act. Section 178 of the Contract Act refers to cases where the pledge was made by the mercantile agent either in person or expressly on his behalf. In the case at present under consideration it is clear that the pledge was not made by Ma Tin May, the broker, but the jewelleries were in reality pledged by Maung Oo Sein (P.W. 3) who was asked by Ma Tin May to pledge those jewelleries for her. There also does not appear to be anything on the record to show that the jewelleries were in fact pledged in Ma Tin May's name. Maung Oo Sein, who went and pledged those jewelleries, described himself as a dealer in motor tyres and tubes. There is, therefore, no material on the record to indicate that the pledge of the jewelleries must be considered to have been a pledge made by

(1) (1934) A.I.R. Ran. p. 198.

a broker in jewelleries. It is, in the circumstances, difficult to conceive how the pledge of the jewelleries in the present case by Maung Oo Sein can be said to fall clearly within the provisions of section 178 of the Contract Act. I do not think that it can, as the record stands at present, be said that it is a case in which the pledge can be said to fall clearly within the provisions of section 178 of the Contract Act.

The cases that had been referred to during the arguments before this Court were cases where the pledge was actually made by persons to whom the properties were entrusted for sale, which is not the case here. I do not feel that I ought to say anything more about the provisions of section 178 of the Contract Act as this matter can be re-agitated again in a Civil Court, if the aggrieved party so desires. I am of opinion that it cannot be said to be a case where the order of the 2nd Additional Magistrate (1), Hsipaw, directing the return of the exhibit jewelleries to their original owner is on the face of the record clearly wrong. The order of the Additional Sessions Judge, Hsipaw, which modifies the order of the 2nd Additional Magistrate (1), Hsipaw, is set aside, and the order of the 2nd Additional Magistrate (1), Hsipaw, is restored.

APPELLATE CIVIL.

Before U Si Bu, J.

H.C. 1951

June 23.

SUNDERMAL RANGLAL (APPLICANT)

v.

JHABARMAL BAJAJ AND OTHERS (RESPONDENTS).*

Code of Civil Procedure, s. 10 and s. 151.

Held: That s. 10 of the Code of Civil Procedure provides for stay of suit pending hearing of another Civil Suit. There is no provision for stay of a Civil Suit pending criminal trials. S. 151 of the Code of Civil Procedure cannot be invoked to stay a suit which cannot be legally stayed otherwise.

Lakshmi Insurance Co. Ltd. v. *B. K. Kaula and another,* (1940) A.I.R. Lah. 85, referred to.

J. K. Munshi for the applicant.

M. M. Rafi for the respondent 1.

D. N. Dutt for the respondent 2.

U SI BU, J.—This is an application for stay of Suit No. 1119 of 1950 of the Rangoon City Civil Court, pending the disposal of two criminal cases which are now in the Court of the 5th Additional Magistrate, Rangoon.

The applicant's case is that the 1st Respondent J. Bajaj has filed two complaints against him, which, when he filed his application, were pending in the Court of the 1st Additional Magistrate, but which has since been transferred to the Court of the 5th Additional Magistrate under the orders of this Court. He says that the subject-matter of the two complaints is the

* Civil Misc. Application No. 21 of 1950 being an application for stay of Civil Suit No. 1119 of 1950 of the Rangoon City Civil Court pending disposal of two criminal cases.

same as that of the Civil Suit, which also has been filed by the 1st Respondent against the applicant and two others ; that the issues to be decided in the two criminal cases are substantially the same as those to be decided in the Civil Suit, and that grave injustice will be caused him if the newly instituted Civil Suit is allowed to be heard concurrently or simultaneously with the two criminal cases or either of them.

The 1st Respondent, on the other hand, contends that considerations that apply in the two criminal cases are different from those applicable in the Civil Case and that no prejudice will be caused if the Civil Suit is heard.

Mr. Munshi, the learned Advocate for the applicant, has explained to me, at some length, the facts of the two criminal cases and the various stages through which they have passed ; and his main contention is that he does not want the Civil Suit to proceed while the criminal cases are being heard.

As I felt that it was somewhat unusual that an accused should apply to stay a Civil Suit pending the hearing of a criminal case or cases—(generally the practice being exactly the opposite)—I asked the learned Advocate for the applicant if he could refer me to any decided cases where a Civil Suit had been stayed pending the hearing of a criminal case and his reply was in the negative. Mr. Rafi, the learned Advocate for the 1st Respondent, has assured me that he must have looked up some 40 cases and had not been able to find any. I myself have found none.

Section 10 of the Code of Civil Procedure provides for the stay of suits and Mr. Munshi has admitted—quite rightly—that this section does not apply. He invokes the inherent powers of this Court referred

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to in section 151 of the Code to obtain a stay of the Civil Suit.

In *Lakshmi Insurance Co. Ltd.* v. *B. K. Kaula and another* (1) it was held that section 10 of the Code of Civil Procedure being inapplicable—section 151 of the same Code could not be invoked to stay a suit which could not be legally stayed. This is a view with which I entirely agree.

Assuming, however, that this Court can exercise its inherent powers it is certain that it cannot do so lightly and that, at least, a proper case must first be made out to justify the exercise of that exceptional power. The question therefore is—Has such a case been made out ?

The applicant has alleged in his application that he will suffer " grave prejudice " if the Civil Suit were proceeded with—but his learned Advocate has not been able to show how and in what manner he will be prejudiced if the Civil Suit were allowed to take its course.

I have read the two complaints and also the plaint filed by the applicant with this application and I find that while the complaints referred to such offences as criminal breach of trust, cheating and forgery—(*See* paragraph 11 of the 1st complaint and paragraphs 4 and 5 of the second complaint)—the Civil Suit is one for account of partnership, pure and simple.

Considerations which will arise in the criminal cases need not arise in a Civil Suit.

The Civil Suit does not and cannot depend upon the result of either of the criminal cases. Whatever may be the result whether in favour of the accused or against him, the Civil Suit must, in the end, proceed. I cannot therefore see any object in staying it.

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(1) A.I.R. (1940) Lah. 85.

In the result, the applicant has failed to make out a case and I am satisfied that no prejudice will be caused him if the Civil Suit proceeds.

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

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U SI BU, J.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice, and U Si Bu, J.

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Sept. 12.

P.R.P.L. RAMASWAMY CHETTIAR AND OTHERS (APPELLANTS)

v.

MA AYE AND ANOTHER (RESPONDENTS). *

Transfer of Immoveable Property (Restriction) Act, 1947, ss. 3 and 5—'Foreigner'—Union of Burma Adaptation (Laws) Order, 1948—Bailiff conducting auction is 'person' under General Clauses Act—Order 21, Rule 90 of the Code of Civil Procedure whether applies to illegal sales.

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 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.

Khiarajmal v. *Daim*, (1905) 32 Cal. 296 at 312, cited and relied on.

The Bailiff who conducts the auction in a High Court sale is a "person" as defined in the General Clauses Act. He could not sell immoveable property to a 'foreigner' in contravention of that Act.

Chan Eu Ghai v. *Lim Hock Seng* (a) *Chin Huat*, (1949) B.L.R. 647, relied on.

Order 21, Rule 90 of the Code of Civil Procedure does not apply to an illegal sale, and the sale to a foreigner is void *ab initio*.

P. B. Sen for the appellants.

N. C. Sen for the respondents.

The judgment of the Court was delivered by

U TUN BYU, C.J.—The first appellant P.R.P.L. Ramaswamy Chettiar obtained a mortgage decree against Maung U Khin, U Chit Khin, Ma Aye, U Mya Bu and Daw Thein May in Civil Regular Suit No. 9 of 1947 of the District Court of Bassein, and the immoveable property which formed the subject of

* Civil Misc. Appeal No. 36 of 1950 against the order of the District Court of Bassein in Civil Execution No. 4 of 1948, dated 6th day of October 1950.

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U TUN BYU, C.J.

the mortgage was sold and purchased by the decree-holder at a Court auction sale on the 23rd February 1949 for a sum of Rs. 7,000. The sale to the decree-holder was confirmed by the District Court on the 25th March 1949, and a sale certificate was issued to him on the 19th April 1949.

The Chettiar decree-holder sold the immoveable property in question on the 17th February 1949 to U Ba Kywa, Daw Sein May and Daw Mya May, who are the second, third and fourth appellants, for a sum of Rs. 4,000. About five months afterwards, namely, on the 22nd December 1949, U Mya Bu and Ma Aye applied under section 47 and Order 21, Rule 90, of the Court of Civil Procedure to set aside the sale of the immoveable property in question to the Chettiar decree-holder and to order restitution of the said immoveable property on the ground of fraud and certain irregularities in the conduct of the sale. There was some delay in the hearing of this application, and U Mya Bu and Ma Aye applied, on the 7th June 1950, to add an additional ground for setting aside the sale to the Chettiar decree-holder. They further contended that the sale of the immoveable property in question to the Chettiar decree-holder was void in view of the provisions of sections 3 and 5 of the Transfer of Immoveable Property (Restriction) Act, 1947, on the ground that P.R.P.L. Ramaswamy Chettiar was a foreigner and as such was incapable of purchasing the immoveable property in question. It was only then that the provisions of section 151 of the Code of Civil Procedure was mentioned. The learned District Judge held that the sale of the immoveable property to P.R.P.L. Ramaswamy Chettiar was void in view of the provisions of the Transfer of Immoveable Property (Restriction) Act, 1947, and he set aside the sale to P.R.P.L. Ramaswamy Chettiar. He also held

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that U Ba Kywa, Daw Sein May and Daw Mya May were in no better position than the decree-holder and that they were accordingly not entitled to retain the immoveable property in question. He therefore ordered restitution of the immoveable property to the judgment-debtor Ma Aye in exercise of the Court's inherent power under section 151 of the Code of Civil Procedure.

It is obvious in this case that P.R.P.L. Ramaswamy Chettiar, who lives in India, could not be considered to be a citizen of the Union of Burma after the 4th of January 1948 when Burma became an independent state. The expression 'foreigner' in the Transfer of Immoveable Property (Restriction) Act, 1947, as subsequently amended by the Union of Burma (Adaptation of Laws) Order, 1948, is defined as —

" 'foreigner' means any person who is not a citizen of the Union.";

and section 11 of the Constitution of the Union of Burma specifies the classes of persons, who are considered to be the citizens of the Union of Burma.

The Union of Burma (Adaptation of Laws) Order, 1948 came into force in January 1948, and it is this definition which applies in the present case in view of the fact that the sale of the immoveable property in question to P.R.P.L. Ramaswamy Chettiar was not made until over a year afterwards, read with, of course, the provisions of section 11 of the Constitution of the Union of Burma.

The relevant portions of section 3 and section 5 of the Transfer of Immoveable Property (Restriction) Act, 1947 read :

" 3. Notwithstanding anything contained in any other law for the time being in force, no transfer of any immoveable property or lease of immoveable property for any term exceeding

one year, shall be made by any person in favour of a foreigner or any person on his behalf, by way of sale, gift, mortgage or otherwise :

. . . . . .

5. All transfers of immoveable property and of leases of immoveable property contrary to the provisions of this Act shall be void, and the President may, by order in writing, declare such property or any portion thereof to be forfeited to the State :

. . . . . "

It is therefore clear that the purport of the provisions of the Transfer of Immoveable Property (Restriction) Act, 1947 is to prohibit a transfer of immoveable property to a foreigner, except in the restricted circumstances permitted under that Act and to make a transfer of immoveable property in contravention of the provisions of that Act void *ab initio*. The sale to P.R.P.L. Ramaswamy Chettiar must therefore be considered from the outset to be a nullity, and no proceeding will, in the circumstance, be required to set it aside. The fact that the Chettiar decree-holder had obtained the permission of the Court to bid at the auction sale is not a factor which the Court can consider in view of the explicit provisions of the Transfer of Immoveable Property (Restriction) Act, 1947. In the Privy Council case of *Khiarajmal* v. *Daim* (1) Lord Davey stated :

" But on the other hand the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside. If authority be desired for these elementary propositions it may be found in the judgment of Sir Barnes Peacock in *Kishen Chunder Ghose* v. *Ashoorun* (2). "

(1) (1905) 32 Cal. 296 at 312. (2) (1863) 1 Marsh, 647.

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U TUN BYU, C.J.

We are unable to accept the contention that the Transfer of Immoveable Property (Restriction) Act, 1947 does not apply to the sale made to P.R.P.L. Ramaswamy Chettiar on the ground that this sale does not fall within the provisions of section 3 of the Transfer of Immoveable Property (Restriction) Act, 1947. It was held in *Chan Eu Ghai* v. *Lim Hock Seng* (a) *Chin Huat* (1) that the bailiff, who conducted the High Court auction sale, was a person as defined in the General Clauses Act, that he could not sell immoveable property to a foreigner in contravention of the provisions of the Transfer of Immoveable Property (Restriction) Act, 1947, and that any such sale made by him was void in view of the provisions of section 5. The sale in the present case appears to us to have been made in similar circumstances as the sale conducted in the High Court auction sale, and in any case we are of opinion that the officer conducting a Court auction sale in the District Court could also be considered to be a person for the purpose of section 3 of the Transfer of Immoveable Property (Restriction) Act, 1947.

The sale to the Chettiar decree-holder being illegal and void *ab initio*, it follows that U Ba Kywa, Daw Sein May and Daw Mya May could acquire no interest whatever in the immoveable property in question. This is therefore a case where the original parties should be relegated to their former position before the ineffective sale which occurred in February 1949. The Court has the necessary record before it, and it appears to us to be only consistent with good reason and justice, in the circumstances of the present case, that the Court should make an order to relegate the parties back to the position in which they were

(1) (1949) B.L.R. 24.

previous to the illegal sale. It will, of course, depend on the circumstances of each case whether a Court ought or ought not to exercise its inherent power under the provisions of section 151 of the Court of Civil Procedure, but the Court ought to exercise its inherent power where good reason and justice require it and where no provisions of law exist in the Code of Civil Procedure or elsewhere, which will meet the necessity of the case under consideration.

The provisions of Order 21, Rule 90, do not, in our opinion, apply to the circumstances of the present case where the sale is illegal and void *ab initio*, and this cannot therefore be said to be a case where the appellants have a remedy provided elsewhere in the Code of Civil Procedure. The decision of the District Court must accordingly be considered to have been correct and the appeal is dismissed with costs ; Advocate's fees three gold mohurs.

APPELLATE CIVIL.

Before U San Maung and U Thaung Sein, JJ.

DAW NGWE LAY (APPELLANT)

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v.

Sept. 7.

W. COOPER AND ANOTHER (RESPONDENTS).*

*Wills—Proof of execution and attestation—Principles involved—*Onus*—Letters of administration with Will annexed—Grant of—S. 232, Succession Act.*

Held : That under s. 232 of the Succession Act a residuary legatee may be admitted to prove the Will and Letters of Administration with Will annexed may be granted to him to the whole estate or the unadministered part.

The principles involved with reference to proof of due execution and attestation of Wills are well settled. The *onus* lies in every case upon the party propounding the Will and he must satisfy the conscience of the Court that the Will is the last Will of a free and capable Testator. If a party writes or prepares a Will, under which he takes a benefit, the Court must be judicially satisfied that the Will expresses the true intention of the deceased and the Court must be vigilant and jealous in examining the evidence in support of the same.

Barry v. *Butlin*, (1838) 2 Moore (P.C.) 480 ; *Tyrrel* v. *Painton and another*, (1894) L.R. Probate Division 151 ; *William Robins* v. *National Trust Co. Ltd. and others*, A.I.R. (1927) (P.C.) 66 ; *Eusoof Ahmed Sema* v. *Ismail Ahmed Sema and others*, A.I.R. (1938) Ran. 322 ; *Jarat Kumari Dassi* v. *Bisscssur Dutt*, 39 Cal. 245 ; *Harmes and another* v. *Hinkson*, A.I.R. (1946) P.C.) 156 ; *Parker and another* v. *Felgate and Tilly*, (1883) L.R. 8 Probate Division 171, referred to.

Where a testator is of sound mind and gives instructions for a Will and accepts the instrument drawn in pursuance thereof at the time of signature he must be deemed to be of sound mind when it is accepted.

Perera and others v. *Perera and another*, (1901) A.C. 354, referred to and followed.

M M. Rafi for the appellant.

P. K. Basu for the respondents.

The Judgment of the Bench was delivered by :

U SAN MAUNG, J.—This is an appeal from the order of the District Judge of Bassein passed in his Civil Regular Suit No. 15 of 1947 for the grant of letters of

* Civil 1st Appeal No. 18 of 1949 against the order of the District Court of Bassein in Suit No. 15 of 1947, dated 25th January 1949.

administration to the estate of the late Mr. P. Cooper to the first respondent Mr. W. Cooper with a copy of "Mr. P. Cooper's Will" annexed thereto. Mr. W. Cooper is not an executor under the Will and the letters of administration with the Will annexed was apparently granted under the provisions of section 232 of the Succession Act, the relevant portion of which reads :

"When the deceased has appointed an executor who is legally incapable or refuses to act, an universal or a residuary legatee may be admitted to prove the Will, and letters of administration with the Will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered."

The appellant in the case is Daw Ngwe Lay who is the widow of the deceased P. Cooper and the second respondent Mrs. Schiller, who has made common cause with Daw Ngwe Lay, is a niece of Daw Ngwe Lay and is also one of the many illegitimate children of Mr. P. Cooper.

The evidence of the witnesses quoted, especially that of Mr. Calvert, leaves no possible room for doubt that Exhibit A was the document purporting to be a Will which was found at P. Cooper's house soon after his death and that it was read out by U Ko Kyi in the presence of witnesses, including several children of Mr. P. Cooper. Mr. Calvert's paging and initials at the top righthand corner of Exhibit A also establishes the fact that all the seven sheets of the document were those found and read out and that no page has been extracted therefrom or otherwise substituted, (the document marked "W" referred to by Mr. Calvert being Exhibit A).

The next point for consideration is, is the Will Exhibit A the one produced before the then District Judge, Mr. Evans, with the application for Probate in the year 1942. This application has been filed in

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the proceedings as Exhibit G at pages 22 and 23 of the exhibit file. It bears the signature of the then District Judge, Mr. Evans, who had signed across the Court-fee stamp affixed thereon in token of its cancellation. In this application it is stated *inter alia* that P. Cooper, a stevedore residing at No. 33, Strand Road, Bassein, died on the 1st January, 1942, that the writing annexed to the application and marked "W" was his last Will and testament, that it was duly executed at Bassein on the 29th of September, 1940, that the applicant Dr. Nair was the executor named in the Will and that the deceased had left surviving him the following relatives who would be entitled to succeed to his estate had he died intestate under the provisions of the Indian Succession Act, namely—

(1) Mrs. P. Cooper *alias* Ma Ngwe Lay, formerly residing at Victoria Street, Bassein, and at the time of the application residing in Tamangyaung Kanni Village, Bassein West Township.

(2) William Cooper, Stevedore, No. 33, Strand Road, Bassein, the only son of the said deceased.

(3) Alice Cooper *alias* Mrs. Schiller, daughter of the deceased, residing at No. 37, Fytche Road, Rangoon.

(4) Emma Pinto, a daughter of the deceased, residing at No. 9, Strand Road, Bassein.

(5) Mrs. Wyllie, daughter of the deceased, residing at No. 9, Strand Road, Bassein.

The application was verified by the applicant Dr. Nair and also bore the following verification :—

"I, the undersigned, one of the witnesses to the last Will and testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his

signature thereto. Signed this verification at Bassein on this 27th day of January 1942.

(Sd.) JOSEPH LAWRENCE."

Now, the Will Exhibit A was discovered at P. Cooper's house during the first week of January 1942, and the application for Probate was made on the 27th January 1942, about three weeks later. There is no evidence to show that any Will, dated 29th September 1940, was discovered in the meantime. The only Will that was discovered was Exhibit A which was read out to those present by U Ko Kyi, the then Township Judge, Bassein West, and Additional Magistrate, Bassein. Joseph Lawrence (P.W. 3) had attested only one Will, namely, Exhibit A, and it was he who had made the verification to the application for Probate. Therefore, it is difficult to reject the story told by Dr. Nair (P.W. 1) and his brother M. M. Nair (P.W. 9) who acted for Dr. Nair at the time the application for Probate was made that it was the Will Exhibit A which was produced in Court with the application Exhibit G. In the application itself the addresses of all those interested in contesting the Will were given and the presumption is that special notices were issued to them by the then District Judge. At pages 27 and 28 of Exhibit G are (*a*) a receipt given to Mr. Nair for payment of process-fees, and (*b*) a sheet of paper containing Dr. Nair's address and a five rupee process-fee stamp which has been punched and cancelled by the then District Judge, Mr. Evans. The endorsement on the receipt also shows that processes had been issued on the 31st of January 1942. The process-fee for the issue of a notice being one rupee it is reasonable to presume that notices were in fact issued to all the five persons named in the application as those interested in the estate of P. Cooper had he died intestate. Therefore,

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the probabilities are also in favour of the fact that the Will which was discovered at P. Cooper's house a few days after his death and read out by U Ko Kyi to those present, including some of his daughters, was the Will which was in fact produced with the application. There seems no point in any party wishing to suppress at that time the Will Exhibit A which was then regarded among the circle of friends and relatives as the last Will and testament of P. Cooper. There was also no point whatsoever in attaching to the application for Probate a spurious Will at the imminent risk of it being discovered as a forgery. For these reasons we have no hesitation in coming to the conclusion that Exhibit A was in fact the Will produced by Dr. Nair at the time he applied for Probate. The fact that Exhibit A does not bear the signature of the then District Judge, Mr. Evans, is not of much import. The general practice among the District Judges varies. Some take the precaution of putting their initials on documents at the time of receipt, some at the time it is proved by evidence of witnesses and some at an even later date. The agreement Exhibit B, which was presumably produced with the Will Exhibit A at the time the application for probate was made, also does not bear the signature of the District Judge. But the list of documents produced by the applicant Dr. Nair shows that besides the Will of P. Cooper a copy of agreement was also produced. The copy of agreement produced can be no other than Exhibit B, no other agreement being relevant for the purpose of the aforesaid probate proceedings.

As already observed above, Dr. Nair, M. M. Nair and W. Cooper only made an attempt to foist the copy of the Will, of which Exhibit C is a certified copy, in Civil Miscellaneous Case No. 26 of 1946, in order to suit their own purpose, namely, to avoid the

terms of the disability clause contained in the original Will Exhibit A. It is impossible to believe that none of these persons had noticed that this disability clause was absent in the copy produced in Civil Miscellaneous Case No. 26 of 1946 and that they did not therefore know that the copy of the Will produced by them could not have been a true copy of the original Will.

Having established the fact that Exhibit A was the Will which was found at P. Cooper's house a few days after his death and that it was the Will produced by Dr. Nair with his application for Probate in Civil Miscellaneous Case No. 1 of 1942, the next point for consideration is, is this the Will of P. Cooper duly signed by P. Cooper and attested by the witnesses present and that P. Cooper knew the contents of the paper which he was then signing? As regards proof of due execution and attestation of Wills various authorities have been cited by the learned Advocates for both parties. In fact, there is no real divergence as to the principles involved. The earliest well-known authority is the case of *Barry* v. *Butlin* (1). There the following rules were formulated by Parke, B :—

". . . . . the first that the *onus probandi* lies in every case upon the party propounding a Will ; and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator.

The second is, that if a party writes or prepares a Will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased."

These observations of Parke, B., were quoted with approval in *Tyrrell* v. *Painton and another* (2) and

(1) (1838) 2 Moore (P.C.) p. 480. (2) (1894) L.R., Probate Division, p. 151.

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followed by the Court of Appeal. See also *William Robins* v. *National Trust Co. Ltd. and others* (1) and *Eusoof Ahmed Sema* v. *Ismail Ahmed Sema and others* (2), where the ruling in *Tyrrell* v. *Painton* (3) was followed. However, in the case of *Jarat Kumari Dassi* v. *Bissessur Dutt* (4) a Bench of the Calcutta High Court has laid down what seems to us to be a correct approach to the question as to the standard of proof required to establish a Will under the Evidence Act. There Jenkins C.J., observed:

"In so handling the case the learned Judge professed to be guided by *Tyrrell* v. *Painton and another* (3). As I understand that decision it laid down no new principle, but it merely applied a well established principle to an exceptional set of circumstances. That principle was enunciated in *Barry* v. *Butlin* (5) where it was said : 'The rules of law according to which cases of this nature are to be decided do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two: The first, the *onus probandi* lies in every case upon the party propounding a Will, and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator. The second is, that if a party writes or prepares a Will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased.'

The effect of this decision is tersely stated by Lord Davey, as he afterwards became, in *Tyrrell* v. *Painton and another* (3), where he said :'The principle is that wherever a Will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless the suspicion is removed.'

(1) A.I.R. (1927) (P.C.) p. 66.
(2) A.I.R. (1938) Ran. p. 322.
(3) (1894) L.R. Probate Division, p. 151.
(4) 39 Cal. 245.
(5) (1838) 2 Moore (P.C.) p. 480

The suspicion to which allusion is made must, I think, be one inherent in the transaction itself, and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction.

Now, while I willingly concede the value to us of these decisions, it must not be forgotten that the law is laid down for us in clear and imperative terms by Acts of the Indian Legislature, and it is by the provisions of those Acts that we must be guided.

* * * *

Demonstration, or a conclusion at all points logical, cannot be expected, nor can a degree of certainty be demanded of which the matter under investigation is not reasonably capable. Accepting the external test which experience commends, the Evidence Act, in conformity with the general tendency of the day, adopted the requirements of the prudent man as an appropriate concrete standard by which to measure proof."

That this is the right approach to the question is amply borne out by the attitude taken by their Lordships of the Privy Council in *Harmes and another* v. *Hinkson* (1), the headnote of which reads as follows :

"The rules formulated and reaffirmed in *Tyrrell* v. *Painton and another* (2) *i.e.*, (1) that the *onus probandi* lies in every case upon the party propounding a Will ; and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator and (2) that if a party writes or prepares a Will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased are rules which enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion a resolute and impenetrable incredulity. He is never

(1) A.I.R. (1946) (P.C.) p. 156. (2) (1894) L.R. Probate Division, p. 151.

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required to close his mind to truth. The first rule requires that the conscience of the Court must be satisfied. Whether or not the evidence is such as to satisfy the conscience of the tribunal must always be, in the end, a question of fact. The second rule warns the Judge that the evidence of the witness who drew the Will must be received with caution, but this does not mean that it must be rejected altogether. The burden of proof may be discharged. The adverse presumption may be rebutted. The rule is not to be understood as meaning that at some point, which the law can define, the Judge will be in a position to say that the presumption has become conclusive against the Will, so that, if he were trying the case with a jury, it would be right to direct them that they must pronounce against it. If this were the meaning of the rule, it would involve the untenable proposition that it is a question of law whether or not presumption of fact has been rebutted. That question must always be one of fact and the true meaning of the rule is that unless the tribunal is finally satisfied that its initial suspicions were unfounded the burden of proof remains undischarged and the presumption must prevail."

Applying the principles so deduced to the case now under consideration, it is clear that there is sufficient evidence in proof of the fact that the Will Exhibit A was executed by P. Cooper and that it was duly attested by Dr. F. B. Mennon and Joseph Lawrence. P. Cooper was illiterate. Athough he spoke English fairly well, he could neither read nor write in that language. He could however sign his name in English. Dr. Nair (P.W. 1) was his trusted friend and family doctor. He used to consult Dr. Nair regarding his private affairs including the desirability of making a Will. Mr. Nair (P.W. 9), *Barrister-at-law*, was Dr. Nair's youngest brother and to him was entrusted the duty of preparing several drafts of the Will before the final one was approved. The Will Exhibit A was the result of the finally approved draft. As each draft was made P. Cooper used to take it away with him only to bring it back to Mr. Nair for

the purpose of making corrections which were more or less minor in nature. To the knowledge of Dr. Nair and Mr. Nair only one Will was executed by P. Cooper and that on the 29th of September 1940. It was Exhibit A and, besides the attesting witnesses Joseph Lawrence (P.W. 3) and Dr. Mennon, an assistant of Dr. Nair, there were present at the time of its execution Dr. Nair and his brother Mr. Nair. Besides Dr. Nair and Mr. Nair, against whom suspicion attaches on account of their conduct in relation to Civil Miscellaneous Case No. 26 of 1946, Joseph Lawrence (P.W. 3), (whose testimony cannot be impugned in any way except that he happened to be a compounder employed by Dr. Nair) has given evidence in favour of the due execution and attestation of the Will Exhibit A. Furthermore, Daw Mary (P.W. 5), who must be regarded as an independent witness, had stated that the signature on the Will looked like that of her father P. Cooper. On a comparison of the signature on Exhibit A with the admitted signatures of P. Cooper on Exhibit B and Exhibit 1 we are of the opinion that they can be the signatures of one and the same person. As a successful stevedore and a well-known resident of Bassein P. Cooper's signature must have been known to many of his friends and relations, including the appellant Daw Ngwe Lay and the respondent Mrs. Schiller. Neither Daw Ngwe Lay nor Mrs. Schiller could bring any evidence to show that the signature purporting to be that of Mr. P. Cooper on the Will Exhibit A is in fact not his. They themselves have not come forward to deny it on oath. Therefore it must be taken as established on the evidence on record that Exhibit A was in fact executed by P. Cooper and attested by Dr. Mennon and Joseph Lawrence in the manner stated by the witnesses for the plaintiff-respondent W. Cooper.

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In the case of *Tyrrell* v. *Painton* (1) and in each of the cases following it, which have been brought to our notice, suspicion was attached to the circumstances leading to the execution of the Will in question by the fact that the person who helped in its preparation was either the sole or the main beneficiary thereunder. As pointed out by Jenkins C.J., in *Jarat Kumari Dassi* v. *Bissessur Dutt* (2), the suspicion to which allusion was made in *Tyrrell* v. *Painton and another* (1) was inherent in the transaction itself and not to suspicions aroused by the subsequent conduct of witnesses to the proceedings. In the case now under consideration there is nothing on record to show that Dr. Nair, his brother Mr. Nair, Dr. Mennon and Joseph Lawrence had conspired together in 1940 in order to induce P. Cooper to execute the Will Exhibit A against his better judgment. Even assuming that the subsequent conduct of Dr. Nair and his brother was suspicious, no such suspicion can be attached to the conduct of Dr. Mennon and Joseph Lawrence. Therefore, the evidence on record is such as to satisfy any prudent person similarly placed as we are that Exhibit A was duly executed by P. Cooper and attested by Dr. Mennon and Joseph Lawrence. This is the standard of proof required by the Evidence Act. In other words, the conscience of the Court is satisfied as to the due execution and attestation of the Will Exhibit A. However, considering that P. Cooper was illiterate, it has still to be considered whether he knew of the contents of the Will Exhibit A before he affixed his signature thereto. There is no specific evidence to show that it was read out to him at that time. However, there is credible evidence on record to show that P. Cooper was a very careful man besides being a successful stevedore. He was careful enough to have several drafts made of his Will before

(1) (1894) L.R. Probate Division, p. 151. (2) 39 Cal. 245.

he was finally satisfied. Each time the Will was drafted it was taken away by him, presumably to be carefully studied in the manner best known to himself. After the Will was executed it was kept in his custody for more than one year before it was finally discovered after his death on the 1st of January, 1942. Therefore, it is entirely inconceivable that he did not know the contents of the Will before he signed it or that any one would have the temerity to foist upon him a Will contrary to the specific instructions given by him to Mr. Nair. Mr. Nair was positive in that the Will which P. Cooper had signed was drafted in accordance with the instructions given to him by P. Cooper. In these circumstances there is sufficient evidence on record to enable the Court to come to the conclusion that the Will Exhibit A was drafted according to the instructions given by P. Cooper and that P. Cooper knew the contents of Exhibit A before he affixed his signature thereto.

In the case of *Parker and another* v. *Felgate and Tilly* (1) where the testatrix signed a Will a few days before her death while she was roused to consciousness from a coma by pain or discomfort, Sir J. Hannen in addressing the Jury observed as follows :

" This being the material evidence, the law applicable to the case is this : If a person has given instructions to a solicitor to make a Will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good Will, if executed by the testator, is that he should be able to think thus far, ' I gave my solicitor instructions to prepare a Will making a certain disposition of my property. I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out.' Now, I have only put into language that which flashes across the mind without being expressed in words. Do you believe that she was so far capable of understanding what was going on ? Did she at that

(1) (1883) L.R. 8 Probate Division, p. 171.

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time know and recollect all that she had done with Mr. Parker? That would be one state of mind. But if you should come to the conclusion that she did not at that time recollect in every detail all that had passed between them, do you think that she was in a condition, if each clause of this Will had been put to her, and she had been asked, 'Do you wish to leave So-and-So so much,' or do you wish to do this (as the case might be), she would have been able to answer intelligently 'Yes' to each question? That would be another condition of mind. It would not be so strong as the first, *viz.*, that in which she recollected all that she had done, but it would be sufficient. There is also a third state of mind which, in my judgment, would be sufficient. A person might no longer have capacity to go over the whole transaction, and take up the thread of business from the beginning to the end, and think it all over again, but if he is able to say to himself, 'I have settled that business with my solicitor. I rely upon his having embodied it in proper words, and I accept the paper which is put before me as embodying it;' it is not, of course, necessary that he should use those words, but if he is capable of that train of thought in my judgment that is sufficient. It is for you to say whether, having regard to the circumstances under which this Will was prepared and executed, you accept the view of those who were present at the time, and who have given their evidence, and who say that in their judgment she was conscious."

The ruling in *Parker and another* v. *Felgate and Tilly* (1) was approved by the Privy Council in *Perera and others* v. *Perera and another* (2) where the head-note reads:

"Where a testator is of sound mind when he gives instructions for a Will, but at that time of signature accepts the instrument drawn in pursuance thereof without being able to follow its provisions, *held*, that he must be deemed to be of sound mind when it is executed."

Although these cases do not afford an exact parallel, the principle underlying them is this: Can the Court infer from the circumstances obtaining in the

(1) (1883) L.R. 8 Probate Division, p. 171. (2) (1901) A.C., p. 354.

case that at the time the testator affixed his signature on the Will he knew its contents notwithstanding that the Will could not be read out to him in full nor its terms appreciated by him in full even if it could be read out to him ? Bearing this principle in mind we are of the opinion that the Will Exhibit A was drafted by Mr. Nair in accordance with the instructions given to him by P. Cooper and that P. Cooper was aware of the contents of the Will Exhibit A before he affixed his signature thereto. In fact the internal evidence contained in the Will itself shows that P. Cooper was a careful person solicitous or rather over anxious for the welfare of his son Willie Cooper and that he had made elaborate provisions for his son, including preferential treatment to him in the event he married a Roman Catholic girl of Anglo-Indian or European parentage. Such a Will could not have evolved out of the mind of anybody else but that of P. Cooper. Very cogent reasons were given why he had left his wife Daw Ngwe Lay, his daughter Mrs. Schiller and his other daughter out of the Will. For these reasons we hold that Exhibit A has been proved to be the last Will and testament of P. Cooper duly executed and attested.

The next question is whether letters of administration with the Will annexed should be granted to W. Cooper. He has come out of the present affray with his armours very much dented. Had it been considered possible to avoid such a course we would have refused to grant him letters of administration in favour of some one more worthy. However, he is the residuary legatee under the Will of P. Cooper and the other bequests made in the Will Exhibit A are negligibly small. It has not been satisfactorily shown that he has been mismanaging P. Cooper's estate and it is common ground that all through the Japanese

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occupation period and thereafter it was really he and not Dr. Nair who was managing the estate. Therefore, provided sufficient security is taken from him to ensure that he is under the proper control of the Court, there seems no reason why we should not grant him letters of administration. The security demanded from him by the learned District Judge of Bassein seems to be quite adequate. Therefore, the order of the District Judge of Bassein granting letters of administration with the Will Exhibit A annexed to the respondent W. Cooper on his furnishing security in the sum of Rs. 60,000 with two sureties is confirmed and the appeal dismissed. As regards costs, in the peculiar circumstances obtaining in this case we would direct each party to bear his own costs throughout.

APPELLATE CIVIL.

Before U San Maung, J.

H.C. 1951

Aug. 16.

AUNG TIN NYUNT (APPELLANT)

v.

MA KHWE MA AND ANOTHER (RESPONDENTS).*

Civil Procedure Code, s. 100—Finding of fact when final—Questions of law and fact—What are—Evidence Act, ss. 101 and 102—Burden of proof—Misapprehension of Lower Court.

Plaintiff sued the defendant Maung Sein for cancellation of a Registered Sale Deed on the ground that she and her hubsand had purchased from the previous owner during Japanese regime and that subsequent sale by the owner to the defendant was collusive and without consideration. The Trial Court decreed the suit and the decree was confirmed on appeal by the District Court.

On Second Appeal, Held : That no second appeal lies under s. 100 of the Code of Civil Procedure except on the grounds mentioned therein and where there is no error or defect in procedure the finding of the first Appellate Court on the question of fact is final, if there was evidence before that Court.

Mussummat Durga Choudhrain v. *Jawahir Singh Choudhri*, 17 I.A. 123, followed.

What are questions of law and questions of fact are sometimes difficult to disentangle. When the allocation of *onus* of proof is one of the most vital question between the parties, it is the duty of the Court to rectify the mistake made by the Lower Appellate Court.

Nafar Chandra Pal Chowdhury v. *Shukur Sheik*, 46 Cal. 189 (P.C.) ; *Madho Ram* v. *Nandu Mal*, 1 Lah. 429 ; *Ganga Ram* v. *Rulia and others*, 1 Lah. 249, referred to.

The question of *onus* of proof is a question of law rendering a second appeal competent.

The fundamental principles relating to the burden of proof are embodied in ss. 101 and 102 of the Evidence Act. As the genuineness of the document Exhibit 2 in favour of the defendant was proved, the Lower Appellate Court was entirely wrong in dismissing the appeal under misapprehension as to the burden of proof, which lay upon him to disprove consideration.

Hla Gyaw for the appellant.

Tun Aung for the 1st respondent.

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* Civil 2nd Appeal No. 26 of 1950 against the decree of the District Court and Subordinate Judge's Court of Shwebo in Civil Appeal No. 2 of 1949 and Civil Regular No. 54 of 194

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MAUNG TIN NYUNT v. MA KHWE MA AND ANOTHER.

U SAN MAUNG, J.—In Civil Regular Suit No. 53 of 1948 of the Court of the Subordinate Judge, Shwebo, the plaintiff-respondent Ma Khwe Ma sued the defendant-appellant Maung Tin Nyunt and one Maung Sein for the cancellation of a registered deed of sale of the house in suit on the ground that the house in question was the one which she and her husband U Lu Daw had purchased from Maung Sein during the Japanese regime for a sum of Rs. 1,800 and that the alleged sale to Maung Tin Nyunt by Maung Sein was collusive and without consideration. As Maung Sein died after filing the written statement in the case, his wife Ma Thi was brought on the record as his legal representative. Both Maung Tin Nyunt and Maung Sein filed written statements denying that the sale was collusive or without consideration and contended that the house was sold during the Japanese regime to Maung Tin Nyunt by Maung Sein for a sum of Rs. 1,800 ; that a document of sale was then executed but could not be registered owing to the absence of Registration Office and that after the British re-occupation of the country a fresh deed of sale had to be executed and registered, the equivalent of the purchase price being fixed by mutual agreement at Rs. 1,000 in British currency. Witnesses for both sides were examined on the issue as to whether or not the sale of the house was made to U Lu Daw and his wife Ma Khwe Ma as alleged by the plaintiff, or to Maung Tin Nyunt as alleged by the defendants, whether the unregistered deed of sale was executed on the 11th August 1943, and whether after the British occupation a registered deed of sale was executed on the 26th September 1947. In the circumstances alleged by the defendant, the learned Trial Judge answered these issues in favour of the plaintiff and decreed the plaintiff's suit with costs. The appeal

to the District Judge of Shwebo by Maung Tin Nyunt was unsuccessful. Hence the present appeal under section 100 of the Civil Procedure Code by the defendant-appellant Maung Tin Nyunt. Now, it is settled law that no Second Appeal lies except on the grounds specified in section 100 of the Civil Procedure Code (corresponding to section 584 of the Code of 1882) and that where there is no error or defect in the procedure, the finding of the First Appellate Court upon a question of fact is final, if that Court had before it proper evidence for its consideration in support of the finding. See *Mussummat Durga Choudhrain* v. *Jawahir Singh Choudhri* (1). However, questions of law and of fact are sometimes difficult to disentangle. For instance while the proper legal effect of a proved fact, the admissibility of evidence, and the question of whether any evidence has been offered on one side or the other are essential questions of law, the question whether the fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact. See *Nafar Chandra Pal Chowdhury* v. *Shukur Sheik* (2). In *Madho Ram* v. *Nandu Mal* (3), a Bench of the Lahore High Court, consisting of Shadi Lal and Wilberforce JJ., held that when the question of allocation of *onus* is the most vital one between the parties, it is the duty of the Court in Second Appeal to rectify a mistake made by the lower Appellate Court in this respect. This case was followed by another Bench of the Lahore High Court in *Ganga Ram* v. *Rulia and others* (4) where it was held that the question of *onus probandi* arising in the case was a question of law rendering a second appeal competent.

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(1) 17 I.A. p. 123.
(2) 46 Cal. p. 189 (P.C.).
(3) 1 Lah. p. 429.
(4) 2 Lah. p. 249.

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MAUNG TIN NYUNT v. MA KHWE MA AND ANOTHER.

U SAN MAUNG, J.

In the case now under consideration, the learned District Judge has clearly misplaced the burden of proof. He observed :

" On the evidence upon record the learned Trial Judge came to the findings that the Exhibit No. 2 (registered deed of sale) was executed by the defendant Maung Tin Nyunt and U Sein without any consideration being passed and that thus the same must be held to be void under section 25 of the Contract Act. Now it remains for me to consider whether the evidence upon record justifies the lower Court to answer the issues in favour of the plaintiff. In view of the defendants' plea of the Exhibit No. 2 document being a genuine one, the burden of proof must be placed on them."

Later, after discussing the evidence of the witnesses for the defence, the learned Judge concluded the discussion by saying :

" In consideration of all the facts set out above, I am inclined to the view that the evidence that the defendants could adduce on the point in issue is not such as may be considered good enough to discharge the burden falling on them. I must therefore hold that learned trial Judge was justified in answering the issues Nos. 4 and 5 against the defendants."

Now the fundamental principles relating to the burden of proof are embodied in sections 101 and 102 of the Evidence Act. Section 101 enacts that :

" Whoever desires any Court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist."

Section 102 enacts that :

" The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

It is clear from the above that since it is Ma Khwe Ma who asserts that the registered deed of sale, Exhibit 2, is collusive and without consideration

it is for her to prove these facts. Furthermore, from the pleadings in the case it is clear that if no evidence at all were given on either side, the plaintiff's Ma Khwe Ma's suit must fail. Therefore the burden of proof on the collusive nature of the registered deed of sale, Exhibit 2, is clearly upon Ma Khwe Ma.

Let us consider how she has succeeded in discharging this burden. She has cited as a witness her *ex*-husband, U Lu Daw who stated that the house in question was purchased during the Japanese regime by his son Maung Tin Nyunt, who was then a boy of about 10 or 12 with the money belonging to Maung Tin Nyunt obtained by the sale of jewelleries belonging to Maung Tin Nyunt's mother who was his first wife. A deed of sale, Exhibit 1, was executed then but could not be registered. Thereafter, on the re-occupation of Burma by the British, a fresh deed of sale had to be executed.

She also cited as her witness Maung Thein (P.W. 1), the writer of the deed, Exhibit 1, who stated that this deed was written during the Japanese regime at the house where Ma Khwe Ma and Maung Lu Daw were living and that at the time it was written Ma Khwe Ma was also present.

The other of the plaintiff's witnesses who spoke to the contrary could only say that they heard that the house was purchased by Ma Khwe Ma and Maung Lu Daw. They could not state this as a fact. The defence has cited U Po Kyoke (D.W. 2), who knew of the execution of the first sale deed, Exhibit 1, and who also attested it ; and U Po Yin (D.W. 4) who knew of the execution of the registered deed of sale Exhibit 2, in lieu of the document executed during the Japanese regime.

In these circumstances, it is clear that the genuiness of the document, Exhibit 2, was proved not only by the

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evidence called by the defence but also by the evidence called by the plaintiff herself. In these circumstances the learned Judge of the District Court was entirely wrong in having dismissed the defendant-appellant Maung Tin Nyunt's appeal. Had the learned Judge been not under a misapprehension as to the burden of proof, I have no doubt whatsoever that on the evidence on record he would have come to a contrary finding. For these reasons I would set aside the judgment and decree appealed against and dismiss the plaintiff-respondent Ma Khwe Ma's suit with costs in favour of the defendant-appellant Maung Tin Nyunt. Advocate's fees three gold mohurs.

ORIGINAL CIVIL.

Before U Bo Gyi, J.

H.C. 1951

Aug. 17.

U HLA PE (PLAINTIFF)

v.

THE BOARD OF DIRECTORS, UNION OF BURMA AIRWAYS (DEFENDANTS).*

Carrier, liability of—Doctrine of res ipsa loquitur *meaning and application—Position in law of carrier—Whether can contract out of liability for accident by a condition.*

Plaintiff's wife was a passenger in a Dove aircraft which crashed into the Gulf of Martaban on the 19th March 1949 and she lost her life. Plaintiff claimed damages for himself and his children under the Fatal Accidents Act and the defendants denied that they were common carriers, that there was any negligence and that under the conditions printed on the back of the Ticket they were absolved from liability.

Held: That a carrier of passengers, even a common carrier, is not liable unless he has been negligent.

Readhead v. *The Midland Railway Company*, (1868-69) 4 Q.B. 379, referred to.

The doctrine of *res ipsa loquitur* (the thing speaks for itself) is not a proposition of law but only a figure of speech meaning that any other view except liability of the defendant is inconsistent on mere proof of facts. It is also used in the sense that on mere proof of certain facts an inference of negligence might be drawn reasonably. The plaintiff himself admitted that he was unable to connect the accident with the particulars furnished by him and the defendants' theory about the accident did not require examination. The doctrine *res ipsa loquitur* cannot be invoked in the circumstances and the death has not been proved as due to any negligence.

Held also: That a carrier of passengers is in law neither an insurer nor precluded from making any special contract with its passengers.

Easson v. *London and North Eastern Railway Company*, (1944) 1 K.B. 421 at 425; *Ludilt and others* v. *Ginger Coote Airways Limited*, (1947) A.C. 233 at 245, referred to.

It is open to a carrier to make a special contract excluding liability and if the deceased before the death had by a valid contract excluded himself from the Fatal Accidents Act his representatives cannot maintain an action under that Act. The conditions in the notice are printed at the back but attention is called to them on the face of the ticket and reasonable steps had been taken to bring the conditions to the notice of the intending passengers. The defendants are absolved from liability by reason of the said conditions.

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* Civil Regular Suit No. 14 of 1950 of the High Court, Rangoon.

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U HLA PE v. THE BOARD OF DIRECTORS, UNION OF BURMA AIRWAYS.

Thompson v. *London, Midland and Scottish Railway Company*, (1930) 1 K.B. 41 ; *Penton* v. *Southern Railway* (1931) 2 K.B. 103, followed.

Ba Win for the plaintiff.

Tin Maung (Government Advocate) } for the defendants.
G. Horrocks }

U BO GYI, J.—This action has been brought by U Hla Pe under the Fatal Accidents Act for himself and on behalf of his son and two daughters for recovery of Rs. 30,000 as damages for negligence from the Union of Burma Airways. The plaintiff's wife Daw Aye Kyi was a passenger for reward on board the defendants' aircraft, a de Havilland Dove which it is now common ground crashed into the Gulf of Martaban on the 14th March 1949, on her flight from Rangoon to Moulmein. It is also undisputed, now, that there is no admissible evidence on the record as to the circumstances in which the plane with all on board met her tragic fate.

The plaintiff alleges, however, that the defendants were at the material time common carriers and that his wife's death was due to the negligence and default of the defendants, their agents or servants. The following particulars of negligence have been given, *viz.*, the most suitable type of aircraft was not used and the one that was in service was not airworthy, no embarkation advice was given as to the use of safety appliances, the wireless operator failed to send an S.O.S. while the pilot on his part failed to make a forced landing, and, finally, salvage operations were not promptly conducted. The particulars of negligence that the defendants had failed to get the Carriage by Air Act applied to internal air carriage cannot

possibly be, and has not been, pressed to an issue. The defendants deny having ever been common carriers, they deny that their agents or servants were guilty of negligence or default, and they claim under the conditions of carriage printed on the back of the passenger ticket to be absolved from liability for Daw Aye Kyi's death.

The following issues, as now re-arranged, have been joined :—

(1) Were defendants common carriers at all material times?

(2) Was the death of Daw Aye Kyi due to the negligence or default of the defendants or their servants?

(3) Are the defendants absolved from liability by reason of the conditions on the back of the ticket issued to Daw Aye Kyi ?

(4) If relief is granted, to whom and in what proportion should it be granted ?

Learned counsel for the plaintiff frankly admits that he cannot put the liability of the defendants as high as that of an insurer and he grounds his claim on negligence and/or default. Generally speaking, a carrier of passengers, even a common carrier, is not liable unless he has been negligent : *Readhead* v. *The Midland Railway Company* (1). In this state of the law and since the defendants have on their ticket expressly repudiated the status of a common carrier, I am of the opinion that no useful purpose would be served by trying on the slender evidence now tendered the issue whether or not the defendants were at the material time common carriers. A decision on this issue being unnecessary, I shall refrain from deciding it.

(1) (1868-69) 4 Q.B. 379.

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U BO GYI, J.

With regard to the question of negligence, plaintiff's learned counsel admits that the initial burden of proving negligence lies on the plaintiff, for merely because an accident has occurred does not raise a presumption that the defendants' servants were negligent ; but he contends that in the circumstances of this case the doctrine of *res ipsa loquitur* (the thing speaks for itself) should be invoked in plaintiff's favour. This maxim is nothing more than a rule of evidence, a commonsense rule the effect of which is that in certain circumstances the thing speaks for itself, so much so that a *primâ facie* case of negligence is presumed to be made out and the burden of proving that he was not negligent is shifted on to the defendant. For instance, a motor car does not usually run onto the pavement or into a stationary object standing in the middle of a clear road, and when such an accident occurred, it is but good sense to assume that if the driver had not been negligent it would not have occurred. But, as submitted by learned counsel for the defendants, before the maxim can come into operation, there must be tangible facts such that it can reasonably be said that if there was no negligence the accident would not have occurred. This position is implicit in the maxim itself the effect of which is no more than that in certain circumstances the thing speaks for itself. In *Easson* v. *London and North Eastern Railway Company*, (1) Du Pareq L.J., observed :

"* * * Where an action is based on negligence, the plaintiff has to prove negligence on the part of the defendant, and that by reason of that negligence he has suffered damage. Much has been said about what is called the doctrine of *res ipsa loquitur*. That there is such a doctrine nobody doubts, but, if it is invoked, it is necessary to be sure what the precise

(1) (1944) 1 K.B. 421 at p. 425.

doctrine is. The words *res ipsa loquitur* themselves are hardly a proposition of law though they allude to one. They are a figure of speech, by which sometimes is meant that certain facts are so inconsistent with any view except that the defendant has been negligent that any jury which, on proof of those facts, found that negligence was not proved would be giving a perverse verdict. Sometimes, the proposition does not go as far as that, but is merely that on proof of certain facts an inference of negligence may be drawn by a reasonable jury although the precise circumstances are not fully known."

Here in the present case, however, there were no known survivors of the crash and no one who may have witnessed it has been examined by the plaintiff. On the other hand, the defendants have led evidence which goes to show that the de Havilland Dove aircraft has been found reliable not only in the Union of Burma but all over the world, that the care and maintenance of the machine in question was proper and adequate, and the usual inspections were made before the plane took off and the engines and radio equipment were found to be in working order, that the pilot was able and experienced and the radio operator competent, and, in short, that everything that should be done was done to guard against a possible accident. It is in evidence that the plane delayed her departure by half an hour until the early morning fog had cleared, and when she took off the weather was fine and nothing unusual was noticed. At 8 a.m. she left Mingaladon and at 8-10 a.m. sent a message to the Duty Control that she expected to arrive at Moulmein at 8-45 a.m. and again at 8-27 a.m. she contacted the Duty Control and asked the correct time. The messages did not contain any intimation of engine trouble or other unusual happening. All was apparently well and if something unforeseen had not suddenly occurred the plane would most probably have reached Moulmein at 8-45 a.m. It would seem

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U BO GYI, J.

therefore that something happened to the plane between 8-27 a.m. and 8-45 a.m., during the space of about 18 minutes, which sent the plane crashing down into the sea. The plaintiff admits that he is unable to connect the accident with the particulars of negligence mentioned by him. On the other hand, the defendants have led evidence to show that the particulars of negligence are incorrect and could not have accounted for the accident. The defendants, on their part, have, through their witnesses, advanced certain theories to account for the accident. It is suggested that the insurgents who were infesting the area over which the plane passed may have fired upon the plane and hit the pilot or in the alternative that a fair-sized bird may have collided with the plane and crashing through the wind-screen may have injured the pilot. The third theory advanced is that pirates may have travelled on the plane in the guise of passengers and attacked the pilot. Now, as I have mentioned before, there is no evidence as to how the plane crashed into the sea, and therefore I do not think it would be profitable to examine the theories in detail. The circumstances in which the plane crashed into the sea will probably remain shrouded in mystery for ever. The most that can be said to account for the crash is that during the short interval of about 18 minutes some overwhelming disaster may have overtaken the plane suddenly, so that the Wireless Operator could not even find the time to send an S.O.S. In the course of the argument the plaintiff's learned counsel submits that since the plane was equipped with dual controls, a co-pilot should have flown her along with the pilot. This ground has not been mentioned in the particulars of negligence furnished by the plaintiff ; and, moreover, since what actually occurred just before the crash cannot be ascertained it is

difficult to attribute the crash to the absence of a co-pilot. In all these circumstances I find myself unable to invoke the doctrine of *res ipsa loquitur* and on the available evidence I must hold that the death of Daw Aye Kyi has not been proved to have been due to the negligence or default of the defendants or their servants, and I answer the second issue accordingly.

As regards the third issue, a carrier of passengers is in law neither an insurer nor precluded from making a special contract with his passengers: *Luditt and others* v. *Ginger Coote Airways Limited* (1). It is admitted that the conditions under which the passenger ticket was issued to Daw Aye Kyi were the same as those on the specimen ticket (Exhibit 1). Conditions No. 6 run:

"6. The passenger and the property or baggage of the passenger is carried at the passenger's own risk and the carrier is not a common carrier and does not accept the obligations or liability of a common carrier and shall be exempt from any liability under the law whether to the passenger or to his dependents, next-of-kin or other legal representatives, in case of death, injury, or delay to the passenger, or non-completion of the flight or damage, loss or detention of the property or baggage of the passenger from any cause whatsoever (including negligence or default of pilots, agents, flying, ground or other staff or employees of the carrier or breach of statutory or other regulations) whether in the course of the journey or prior or subsequent thereto and whether while the passenger, property or baggage be on board the aircraft or otherwise."

It is contended that these conditions are unlawful inasmuch as they would defeat the provisions of the Fatal Accidents Act. But under that Act the representatives of a deceased person may sue for damages when, and only when, the deceased person, if alive, would have been entitled to maintain an action

(1) (1947) A.C. 233 at 245.

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U HLA PE v. THE BOARD OF DIRECTORS, UNION OF BURMA AIRWAYS.

U BO GYI, J.

for recovery of damages in respect of a wrongful act, neglect or default ; and accordingly if the deceased before his death had by a valid contract excluded himself from such a right, his representatives would not be competent to institute a suit under the Fatal Accidents Act. I hold therefore that conditions (6) of carriage were valid.

Now, it is in evidence that Daw Aye Kyi did not know English but that she sent her son-in-law U Kyaw Myint (P.W. 4), who knows English well, to buy the passenger ticket for her. U Kyaw Myint was therefore her agent for the purchase of the ticket and in law Daw Aye Kyi must be imputed with notice of the conditions whether she could read English or not. On the face of the ticket about the middle are the words :

" FOR CONDITIONS OF CARRIAGE SEE BACK. "

printed more or less conspicuously in a cage ; and on the back of the ticket the conditions are printed in clear type. The defendants have apparently taken reasonable steps to bring the conditions to the notice of intending passengers. For these reasons and on the authority of the decisions in *Thompson* v. *London, Midland and Scottish Railway Company* (1) and *Penton* v. *Southern Railway* (2) I hold that the defendants are absolved from liability by reason of the conditions mentioned above and I answer the issue accordingly.

Before parting with the case I cannot help mentioning that in all probability the present suit would not have been instituted if the defendants had not

(1) (1930) 1 K.B. 41. (2) (1931) 2 K.B. 103.

mentioned in their letter (Exhibit D) to the plaintiff that passengers and crew were fully covered by insurance. It has been ascertained, however, that the policy of insurance covered the liability of the defendants in respect of their passengers and that the passengers were not entitled to sue on the policy. I shall take these facts into account in considering the question of costs.

The suit is dismissed. In the circumstances abovementioned the defendants will be awarded half the usual costs.

APPELLATE CIVIL.

Before U San Maung, J.

H.C. 1951

Aug. 24.

SEETHA RAM (APPELLANT)

v.

MST. ALLA RAKHI AND OTHERS (RESPONDENTS).*

Evidence Act, ss. 65-A and 85—Presumption—Power-of-attorney registered in India—Whether presumption of authenticity applicable to Burma—S. 2 (50), General Clauses Act.

Held: The presumption as to authenticity arising in connection with powers-of-attorney executed before and authenticated by the authorities mentioned in s. 85 of the Evidence Act will not necessarily arise in regard to documents registered outside Burma. Under s. 2, Clause (50) of the General Clauses Act, 'registered' with reference to a document means registered according to the law in force in Burma.

In the case of powers-of-attorney executed and authenticated as mentioned under s. 85 of the Evidence Act, proof of execution must be dispensed with; in the case of powers-of-attorney not so executed and authenticated legal proof must be given.

In the goods of A. J. Primrose, 16 Cal. 776, referred to.

Where the substituted power-of-attorney was produced but the original power authorising such substitution was not produced and it was claimed that the holder of the original power, being resident-outside, was not compellable to produce the original power, such a plea is not available; the substitute cannot place himself in a better position than the holder and the original power must be proved unless such proof is to be dispensed with under s. 85 of the Evidence Act.

Sladen (deceased), 21 Mad. 492, distinguished.

Kyaw Myint for the appellant.

Dr. Ba Han for the respondents.

U SAN MAUNG, J.—In the suit out of which this appeal has arisen the plaintiff-respondents Alla Rakhi, Sardar Begum and Mohamed Zahir-ud-Din purporting to act by their agent A. Aziz Khan sued the defendant-

* Civil 2nd Appeal No. 6 of 1951 against the decree of the District Court of Lower Chindwin in Appeal No. 2 of 1950.

appellant Seetha Ram for a declaration that the house in suit known as the "West Kyauktaik" situated in Mônywa belonged to them. The defendant-appellant in his written statement challenged the authority of Aziz Khan to represent the plaintiffs in the suit. It was contended that Mohamed Nasir-ud-Din from whom Aziz Khan derived his authority was not himself proved to be a duly authorised agent of the plaintiffs and that even if Nasir-ud-Din was the plaintiffs' agent he could not delegate his authority to Aziz Khan. It was also contended that the plaintiffs Alla Rakhi and Sardar Begum were dead at the time of the institution of the suit. Therefore one of the issues raised in the case was as regards the *locus standi* of Aziz Khan to file the suit. The other issues in the case were as regards the persons upon whom the estate of the late Ellahi Bakhs devolved on his death, the maintainability of the suit for a bare declaration and the validity of the mortgage by Khuda Bakhs, a grandson of Ellahi Bakhs, to the defendant-appellant Seetha Ram. All these issues were answered by the learned Assistant Judge of Mônywa, who tried the case, in favour of the plaintiff-respondents and the appeal by the defendant Seetha Ram to the District Judge of Lower Chindwin was unsuccessful. Hence this appeal under section 100 of the Civil Procedure Code by the defendant-appellant Seetha Ram.

Many questions have been raised and argued by the learned Advocates for both sides and among them were the maintainability of the suit for a bare declaration in view of the proviso to section 42 of the the Specific Relief Act, the question of estoppel by the conduct of the plaintiffs or their agent Aziz Khan, the applicability of section 41 of the Transfer of Property Act, the question of limitation and the authority of Aziz Khan to file the suit under appeal.

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U SAN MAUNG, J.

In my opinion for the purpose of decision in this case it is not necessary to discuss any of the questions involved except that of the authoritiy of Aziz Khan to represent the plaintiffs Alla Rakhi, Sardar Begum and Mohamed Zahir-ud-Din. Aziz Khan claimed to derive such authority by virtue of a power-of-attorney granted by Nasir-ud-Din and filed in Civil Suit No. 8 of 1948 of the Court of the Assistant Judge of Mônywa as Exhibit A. [A true copy of this power-of-attorney has been filed as Exhibit C in the suit under appeal.] This power-of-attorney which was executed at Lahore on the 1st of June 1933 and registered at the Office of the Sub-Registrar, Lahore, contains an endorsement of the Sub-Registrar to the effect that execution was admitted by Nasir-ud-Din who was personally known to him and that Nasir-ud-Din was purporting to act under the power-of-attorney granted to him on the 15th November 1927 by Rakhi, Sardar Begum, Zahir-ud-Din and Seth Khuda Bakhs under the guardianship of Sardar Begum. It runs as follows :

"Know all to whom these presents shall come that I Mohamed Nasir-ud-Din son of Sheikh Taj-ud-Din, B.A. of Lahore attorney for Mst. Allah Rakhi widow of Mir Sheikh Ellahi Bakhsh son of Mir Karim Bakhsh of Lahore, Mst. Sardar Begum wife of Mohamed Nasir-ud-Din and daughter of the said late Mir Sheikh Ellahi Bakhsh and Zahir-ud-Din and Seth Khuda Bakhsh sons of Mohamed Nasir-ud-Din under the guardianship of their mother Mst. Sardar Begum appointed and constituted, *vide* general power-of-attorney registered in Lahore on 15th November 1927, do hereby constitute and appoint A. Aziz Khan son of Nazir Khan to be my lawful attorney to do all or any of the following acts, deeds and things that is to say :—

1. To manage the property or properties situated at Mônywa and to realize the rents and profits thereof and to let or demise the properties or any part thereof to any person or persons for me and on my behalf.

2. To receive money and grant receipt thereof or to do all other acts and things which may be necessary to be done for the improvement and management of such property or properties.
3. To sign and present pleadings, appeals or petitions for execution, review or revision, withdrawal, compromise, restoration, setting aside an *ex parte* proceedings or decrees or other petitions for the prosecution of the suits filed for recovery of the rents and profits accruing due from the said properties.
4. To employ any legal practitioner authorising him to exercise powers regarding prosecution of suit or suits.

In witness whereof I have hereunto set my hands at Lahore this 1st day of June 1933."

The original power-of-attorney under which Nasir-ud-Din purported to act has not been produced in Court but a true copy of it, which was made at Mônywa on the occasion of Nasir-ud-Din's visit to that town in the year 1933, was sought to be proved by the evidence of Ghulam Haider (P.W. 3) who deposed to the effect that the true copy was typed out by Nasir-ud-Din himself and that it was compared by witness with the original. It is Exhibit A filed in the proceedings and although its admission was objected to by the defendant-appellant it was nevertheless received in evidence. The learned trial Judge held that since Nasir-ud-Din was a person out of the reach of, or not subject to, the process of the Court, secondary evidence of the existence, condition or contents of the power-of-attorney granted to him by plaintiffs was admissible under Clause (*a*) of section 65 of the Evidence Act read with the proviso to section 66. His view was shared by the learned District Judge on appeal and it has been strenuously contended on behalf of the defendant-appellant that both the Courts below were wrong in having admitted Exhibit A in

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evidence. In my opinion this contention must be allowed to prevail. The original of Exhibit A is apparently a general power-of-attorney granted to Nasir-ud-Din in very comprehensive terms by his mother-in-law Alla Rakhi, widow of Ellahi Bakhs, and his wife Sardar Begum, mother of his two children Zahir-ud-Din and Seth Khuda Bakhs. It states *inter alia* :

"AND GENERALLY to do execute and perform any other act, deed, matter or thing whatsoever which ought to be done executed or performed or which in the opinion of our said attorney ought to be done, executed or performed in or about our concerns, engagements and business of every nature and kind whatsoever as fully and effectually to all intents and purposes as we ourselves could do if we were present and did the same in our proper persons it being our intent and desire that all matters and things respecting the same shall be under the full management and direction of our said attorney; AND FOR THE FURTHER better and more effectually doing, effecting, executing and performing of the several matters and things aforesaid, we hereby give and grant unto our said attorney full power and authority from time to time to appoint one or more substitute or substitutes to do, execute and perform all or any such matters and things as aforesaid and the same substitute or substitutes at pleasure to remove, and to appoint another or others in his or their place or places ;".

It was therefore contended on behalf of the plaintiff-respondents that Aziz Khan who was granted the power-of-attorney Exhibit B (Exhibit A in Civil Suit No. 8 of 1948) must be regarded as substituted agent within the ambit of section 194 of the Contract Act and not a mere sub-agent. However, it is clear that although Nasir-ud-Din might have had the power to appoint a substituted agent within the ambit of section 194 of the Contrat Act, Aziz Khan whom he had appointed, *vide* the power-of-attorney Exhibit B was his sub-agent. The phrase "do hereby constitue and appoint A. Aziz Khan son of Nazir Khan to be *my lawful attorney* to

do all or any of the following acts, etc.", makes it clear that Aziz Khan was not to be regarded as the agent of his principals Alla Rakhi, Sardar Begum and Zahir-ud-Din but as his own sub-agent accountable to him for all that Aziz-Khan might have done in management of the properties at Mônywa. The fact that Aziz Khan, when on a visit to Lahore in the year 1938, rendered accounts to the plaintiffs, even if true, does not make any difference to his legal position.

If Aziz Khan has the power to file the suit under appeal it is only as a sub-agent of the plaintiffs, namely, Nasir-ud-Din. Therefore it is incumbent upon Aziz Khan not only to prove that he was the sub-agent appointed by Nasir-ud-Din to manage the properties at Mônywa but also that his principal Nasir-ud-Din was himself the duly authorized agent of the plaintiffs holding a general power-of-attorney granted to him by them. This can only be done by the production of the original power-of-attorney granted to Nasir-ud-Din by the plaintiffs and by proof of its execution unless such proof must be dispensed with under section 85 of the Evidence Act, which reads :

> "The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a notary public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of His Britannic Majesty, was so executed and authenticated."

Even had the original document been produced the mere fact of its being registered in India may not be proof of its execution because presumptions which may arise in connection with the authenticity of documents registered in Burma will not necessarily arise in regard to documents registered outside this country because

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the word "registered" with reference to a document means registered under the law for the time being in force in the Union of Burma for the registration of documents. *See* Clause (50) of section 2 of the General Clauses Act. Both the Judges of the lower Court were wrong in considering that Nasir-ud-Din, in whose possession the original of Exhibit A was said to be, was to be regarded as a person out of the reach of, or not subject to, the process of the Court within the meaning of that phrase in Clause (*a*) of section 65 of the Evidence Act. Nasir-ud-Din in fact was the person for whom Aziz Khan was purporting to act in filing the suit under appeal and Aziz Khan could not be placed in a better position than if Nasir-ud-Din had himself filed the present suit. In the latter event it would have been incumbent upon Nasir-ud-Din not only to have produced the original power-of-attorney but to have proved its execution unless such proof must be dispensed with under section 85 of the Evidence Act.

No doubt in the evidence of Aziz Khan there appears the following statement :—

> "In 1927, November, Alla Rakhi, Sardar Begum (widow and daughter of Ellahi Bakhs) executed a power-of-attorney in favour of Begum's husband Nazir-ud-Din appointing him as their agent for the management of their estate at Mônywa and other places. Begum signed that power-of-attorney both in her personal capacity as well as in her representative character as the guardian of her two minor children, Khuda Bakhs and Zahir-ud-Din."

However, this statement does not necessarily imply that Aziz Khan was himself present at the time of the execution of the power-of-attorney in question. In fact he did not commit himself to saying that much. Therefore all that this statement can imply is that Aziz Khan having seen the power-of-attorney in

question and knowing its terms and also believing that Nasir-ud-Din was in fact the agent had made the necessary inference about the due execution of the power-of-attorney.

In any event this statement without the production of the original power-of-attorney is of no avail as proof of the existence and condition of the document in question and of its execution. I have referred to some of the authorities relating to the proof of execution of powers-of-attorney and I need only refer to two of them. In the case of *In the Goods of A. J. Primrose* (1) on an application for letters of administration to the estate of the deceased who was domiciled in Scotland, and to whose estate one P had been appointed executor, the application being made by one K under a power-of-attorney granted by P, the application was refused by Norris J., on the ground that that power-of-attorney not having been executed and authenticated in the manner provided by section 85 of the Evidence Act could not be acted upon. This decision was dissented from by Shephard J., in the case of *Sladen* (Deceased) (2). The learned Judge observed:

"..... Mr. Justice Norris seems to have assumed that the provision contained in section 85 is of an exhaustive character and that no other mode of proving the execution of a power-of-attorney is admissible. That assumption, however, is, in my opinion, not warranted by the language of the section, nor can it have been intended to exclude other legal modes of proving the fact in question, *viz.*, the execution of the power-of-attorney. I cannot see why the fact should not be proved by an affidavit made before a person competent to administer an oath. The Evidence Act is expressly declared not to apply to affidavits."

The difference of opinion between the two learned Judges is not, in my opinion, irreconcilable. What

(1) 16 Cal. 776. (2) 21 Mad. 492.

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section 85 of the Evidence Act contemplates is that in the case of powers-of-attorney executed and authenticated as therein prescribed proof of execution must be dispensed with, whereas in the case of powers-of-attorney not so executed and authenticated proof of execution must be given in whatever manner it is legally admissible. For these reasons I hold that it has not been proved that Aziz Khan had the *locus standi* to file the suit under appeal.

In the result the appeal succeeds. The judgment and decree appealed against are set aside and the suit is dismissed with costs as against Aziz Khan; Advocate's fees five gold mohurs.

CIVIL REVISION.

Before U Aung Khine, J.

DAW PAN MYAING AND OTHERS (APPLICANTS)

v.

KO SEIN KHANT (*a*) MAGBUL AHMED (RESPONDENT). *

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Aug. 30.

Debt Settlement Board Act 72 of 1947—Act 14 of 1951, s. 4-A (2)—Application under—Duty of executing Civil Court—Proof of application for scaling down.

Held : Although a Debt Settlement Board was to have been established under Act 72 of 1947 nothing has been done therein ; but for purposes of ss. 26 and 28 of the said Act an application made by a debtor to the Deputy Commissioner under s. 4 (*a*) (*1*) of the Act 14 of 1951 shall be deemed to be an application made to a Board and sub-s. 1 of s. 4-A authorises the Deputy Commissioner or other officer named to receive applications for scaling down of debts presented by the debtor residing within the jurisdiction. Where such an application has been made to a Board, any suit, appeal or other proceeding pending before a Civil Court in respect of a debt for the settlement of which an application has been made, shall be stayed under s. 26 of the Act 72 of 1947. The Civil Court could not thereafter make an enquiry whether the applicants are *bonâ fide* agriculturists.

Hla Sein for the applicants.

Mohamed Jaffer for the respondent.

U AUNG KHINE, J.—In Civil Execution Case No. 15 of 1947 of the Court of the 1st Assistant Judge, Myaungmya, the decree-holder Ko Sein Khant (*a*) Magbul Ahmed took out execution proceedings against the original judgment-debtor U Ba Zan on the 11th October 1947. During the pendency of the execution proceedings some time in January 1950 the judgment-debtor U Ba Zan died and the present applicants, namely, Daw Pan Myaing, Maung Nyein and Maung Kyaw Than

* Civil Revision No. 41 of 1950 against order of 1st Assistant Judge of Myaungmya in Civil Execution No. 15 of 1947, dated the 23rd August 1950.

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were brought on the record as the legal representatives of U Ba Zan. On 10th July 1950 an application was filed on behalf of the applicants to have the proceedings stayed on the ground that an application under section 4 of the Agriculturists' Debt Relief Act had been filed with the Deputy Commissioner, Myaungmya. It is noted in the diary order of that day that an intimation to this effect had also been received from the Deputy Commissioner. On the application of the applicants the learned Assistant Judge opined that an enquiry was necessary to find out whether the applicants were *bonâ fide* agriculturists or not. The applicants contested the competency of a Civil Court to hold such an enquiry. On the other hand, it was contended on behalf of the respondent that the application was bound to fail as the applicants had declared themselves to be traders in a connected Civil Miscellaneous Case (Civil Miscellaneous No. 1 of 1948 of the Court of the 1st Assistant Judge, Myaungmya).

Although the establishment of a Debt Settlement Board was envisaged in the Burma Act No. 72 of 1947, nothing had been done in that direction and, therefore, the application was filed with the Deputy Commissioner, Myaungmya. In Act No. 14 of 1951, in section 4-A (*2*), it is clearly mentioned that for the purposes of section 26 and section 28 in Act No. 72 of 1947, an application made by a debtor to the Deputy Commissioner under sub-section (*1*) shall be deemed to be an application made to a Board under section 4. Sub-section (*1*) of section 4-A authorizes the Deputy Commissioner or any Sub-divisional Officer or Township Officer to receive applications for scaling down of debts presented to him by a debtor residing in the local limits of his jurisdiction. Therefore, the contention of the applicants that the executing Court should have stayed

the proceedings as soon as it was intimated the fact that an application for the scaling down of debts had been made to the Deputy Commissioner concerned, appears to be correct in view of the clear provisions of section 26 of the Burma Act No. 72 of 1947. Section 26 reads as follows :

"Where an application has been made to a Board under section 4, any suit, appeal or other proceedings then pending before a Civil Court in respect of any debt for the settlement of which the application has been made, shall be stayed until the Board has rejected or dismissed the application."

The provisions of section 26 are clearly mandatory and it would not permit any excuse, legal or otherwise, to have any civil proceedings kept alive after the filing of an application under section 4 of the Burma Act No. 72 of 1947. However pertinent an enquiry may be necessary to find out, whether the applicants are *bonâ fide* agriculturists or not, the law, as it stands, will not allow a Civil Court to go into this matter.

The order of the learned Assistant Judge directing an enquiry to be made as to whether the applicants are agriculturists or not is not warranted by law and as such it must be vacated. In the result this application is allowed. The execution proceedings in Civil Execution No. 15 of 1947 will be stayed until such time the application made by the applicants under section 4 of the Burma Act No. 72 of 1947 is decided. Advocate's cost three gold mohurs.

CIVIL REVISION.

Before U Aung Khine, J.

H.C. 1951 — *Sept. 18.*

U HLA AUNG
U HLA SAUNG AND OTHERS } (APPLICANTS)

v.

U SEIN THANT
U PHAN NGA AND OTHERS } (RESPONDENTS).*

Urban Rent Control Act, 1948, ss. 19 (1), 22 (1) and 5—Decision under—If revisable by High Court under s. 115 of the Code of Civil Procedure.

When by an Act of Legislature, a new authority is constituted for determining questions which are the creations of the Act and a Judge or Presiding Officer of the Court as distinct from the Court is directed to perform such functions it must be presumed, in the absence of express enactment or necessary implication, the intenion of the legislature was that the Judge or Presiding Officer is a *persona designata*.

Decision under s. 22 of the Urban Rent Control Act fixing Standard Rent upon a reference from the Rent Controller is not subject to revision by the High Court under s. 115 of the Code of Civil Procedure.

Mahomed Ebrahim Moolla v. *S. R. Jandass*, 11 L.B.R. 387 ; *K. A. M. Mohideen* v. *Bukshi Ram*, I.L.R. 3 Ran. 410 ; *H. D. Chatterjee* v. *L. B. Tribedi*, A.I.R. (1922) Cal. 427 ; *Naranarayan Mandal* v. *Aghorechandra Ganguli*, I.L.R. 63 Cal. 136 ; *C. K. Ramaswami Goundan* v. *Muthu Velappa Goundan and others*, A.I.R. (1933) Mad. 192 ; *Shah Chaturbhuj* v. *Shah Mauji Ram*, A.I.R. (1938) All. 456 ; *K. Parthasaradhi Naidu Garu* v. *C. Koteswara Rao Garu and another*, A.I.R. (1924) Mad. 561 ; *Thakin Aye Maung* v. *The Hon'ble Justice U Aung Tha Gyaw and others*, (1949) B.L.R. 188 (S.C.) ; *The Municipal Corporation of Rangoon* v. *M. A. Shakur*, I.L.R. 3 Ran. 560 ; *H. A. Aziz* v. *Kilyoboy*, I.L.R. 4 Ran. 304 ; *U Ba Pe and another* v. *U Ba Shwe and others*, I.L.R. 11 Ran. 1, referred to.

P. B. Sen for the applicants.

S. A. A. Pillay and San Thein for the respondents.

* Civil Revision Nos. 3 and 6 of 1951 against the orders of the 1st Assistant Judge's Court of Yenangyaung in Civil Misc. No. 8 of 1950, dated 18th October 1950 and in Civil Misc. Case No. 12 of 1950, dated 2nd December 1950.

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U HLA AUNG
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v.
U SEIN THANT
U PHAN NGA AND OTHERS

U AUNG KHINE, J.—Civil Revision Cases Nos. 3 and 6 of 1951 are taken up together to consider a common point of law as to whether this Court has power to entertain applications in revision arising out of orders passed by the Courts acting under section 22 of the Urban Rent Control Act, 1948. This was a preliminary point raised by the counsel for the respondents in these two proceedings. The facts leading to the filing of the two revision applications are simple.

The Assistant Rent Controller of Yenangyaung, acting under the provisions of section 19 (*1*) of the Urban Rent Control Act, 1948, passed orders fixing certain standard rents of the two premises leased out by the respective landlords. The parties aggrieved by the passing of the orders, made references to the Court of the 1st Assistant Judge, Yenangyaung, under section 22 (*1*) of the same Act, and the learned Assistant Judge proceeded to pass his own orders after hearing the respective parties. It is now contended on behalf of the applicants that this Court, in spite of the provisions of section 22 (*5*) of the Urban Rent Control Act, 1948, has jurisdiction to entertain applications in revision. Section 22 (*1*) and (*5*) read as follows :—

"22 (*1*). If the decision of the Controller fixing the standard rent for any premises under section 19 or the order of the Controller made under sub-section (*3*) of section 14-A is questioned, a reference shall lie to the Chief Judge of the City Civil Court of Rangoon, should the premises be situated in the City of Rangoon, and to such Judge as may be prescribed by the Governor if the premises are situated in any urban area in which the Act is in force.

* * * *

(*5*) The decision of the Chief Judge of the City Civil Court of Rangoon or of the Judge of such other Court as aforesaid shall be final."

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U AUNG KHINE, J.

The first case cited in support of this contention is that of *Mahomed Ebrahim Moolla* v. *S. R. Jandass* (1). That is a case in which a Full Bench of the Chief Court held that the Controller, when dealing with applications under the Rangoon Rent Act was acting judicially in the exercise of a Civil Jurisdiction and, therefore, must be held to be subordinate to the Chief Court. However, in the case of *K. A. M. Mohideen* v. *Bukshi Ram* (2), the majority of a Full Bench of the High Court of Judicature held that the Rent Controller of Rangoon is not a Court and that the High Court has no jurisdiction to interfere directly in revision with orders passed by the Rent Controller, Rangoon.

Mr. P. B. Sen, appearing for the applicants, however maintains that the dissenting judgment of Sir Sydney Robinson C.J., in the case of *K. A. M. Mohideen* v. *Bukshi Ram* (2), is of great weight and that his line of reasoning is in consonance with a great number of decisions given in the various High Courts in India and as such should be followed. Quite a good deal of Indian authorities has been canvassed in support of the above argument and these cases are *H. D. Chatterjee* v. *L. B. Tribedi* (3); *Naranarayan Mandal* v. *Aghorechandra Ganguli* (4); *C. K. Ramaswami Goundan* v. *Muthu Velappa Goundan and others* (5); *Shah Chaturbhuj* v. *Shah Mauji Ram* (6); and *K. Parthasaradhi Naidu Garu* v. *C. Koteswara Rao Garu and another* (7). Finally, it was urged on behalf of the applicants, citing the case of *Thakin Aye Maung* v. *The Hon'ble Justice U Aung Tha Gyaw and others* (8), that it has been held by the Supreme Court that the words in section 15, sub-section (3) of

(1) 11 L.B.R. 387.
(2) I.L.R. 3 Ran. 410.
(3) A.I.R. (1922) Cal. 427.
(4) I.L.R. 63 Cal. 136.
(5) A.I.R. (1923) Mad. 192.
(6) A.I.R. (1938) All. 456.
(7) A.I.R. (1924) Mad. 561.
(8) (1949) B.L.R. 188 (S.C.).

the City of Rangoon Municipal Act, "final and conclusive" has not an inflexible meaning, and that it may mean "final and unalterable in the Court which pronounced it," or it may mean that "it cannot be made the subject-matter of the appeal." It was further held also that even though the appeal may not lie under section 15 (3) of the City of Rangoon Municipal Act, yet under section 25 of the Constitution of Burma, if any fundamental right of a citizen is infringed, he can apply to the Court for direction in a writ of *certiorari*. The facts of this case are quite distinct from the cases now under consideration and as such the above decision of the Supreme Court in that case will not be applicable here.

As against the array of numerous decisions mostly of the Indian Courts as cited by the applicants, we have decisions that in cases, such as the ones under consideration, the High Court has no authority to interfere. Following on the decision in *K. A. M. Mohideen* v. *Bukshi Ram* (1), first we have the Full Bench case of *The Municipal Corporation of Rangoon* v. *M. A. Shakur* (2). In that case under section 14 of the Rangoon Municipal Act, the Chief Judge of the Rangoon Small Cause Court, in performing the functions assigned to him, was held to be acting as a *persona designata* and not as a Court and that the High Court had no jurisdiction under section 115 of the Civil Procedure Code to interfere in revision with his decisions.

Next, we have a case which is on all fours with the present cases. It is also another Full Bench decision of four Hon'ble Judges of the High Court of Judicature at Rangoon, namely, *H. A. Aziz* v. *Kilyoboy* (3). It was held that the 1st Judge of the Court of

(1) I.L.R. 3 Ran. 410. (2) I.L.R. 3 Ran. 560.
(3) I.L.R. 4 Ran. 304.

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U HLA AUNG v. U HLA SAUNG AND OTHERS

U SEIN THANT v. U PHAN NGA AND OTHERS.

U AUNG KHINE, J.

Small Causes, Rangoon, in exercising the powers under section 18 of the Rangoon Rent Act, 1920, acts as a *persona designata* and not as a Court, and that the High Court had no jurisdiction to review the decisions made by him in respect of references under section 18 of the Rangoon Rent Act, 1920. The last portion of section 18 of the Rangoon Rent Act reads as follows: "The decision of the 1st Judge of the Court of Small Causes, Rangoon or the Judge of such other Court as aforesaid shall be final."

Lastly, we have the case of *U Ba Pe and another* v. *U Ba Shwe and others* (1). In this case it was held that the District Judge, who was functioning under the Electoral Rules of the Mandalay Municipality, acted as a *persona designata* and his opinion given was not subject to any revision by the High Court.

Thus, it will be seen that there is a preponderance of Burma decisions holding that "when by an Act of the Legislature a new authority is constituted for the purpose of determining questions concerning rights which are themselves the creations of the Act and a Judge or Presiding Officer of a Court, as distinct from the Court itself, is directed to perform the functions of the newly created authority then it must be presumed, unless the contrary is expressly enacted or necessarily implied, that the intention of the Legislature was that the Judge or Presiding Officer should perform those functions as a *persona designata* and not as a Court."

For all these reasons I must hold that this Court has no jurisdiction to review the decisions of the 1st Assistant Judge, Yenangyaung, in respect of the references made under section 22 of the Urban Rent Control Act, 1948. The applications are therefore dismissed with costs of three gold mohurs in each case.

(1) I.L.R. 11 Ran. 1.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice, and U Si Bu, J.

U BO GYI AND ANOTHER (APPELLANTS)

v.

U KAN WIN AND ANOTHER (RESPONDENTS).*

H.C. 1951

Sept. 14.

Mortgage document invalid—Whether suit for money lies—S. 49, Registration Act.

By Exhibit A the owners purported to create a mortgage of a godown and things attached thereto for Rs. 600. They undertook to pay this amount by instalments from December 1948. Upon a contention whether the personal liability could be enforced when the mortgage is invalid :

Held : In s. 49 of the Registration Act, 1908 the language employed in previous corresponding sections has been changed ; under the old section no instrument like the one in question "could be received in evidence or shall be acted upon in Civil Proceedings." The effect of the amendment is that the transaction cannot affect immoveable property. "Affect" is a compendious term for expressing the longer phrase " purporting or operating create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether invested or contingent."

Saraswathamma v. *Paddayya*, (1923) 46 Mad. 349 at 359, referred to.

The personal covenant to pay a loan, if it can be separated from the mortgage, is not a matter which affects such immoveable property in any way.

Captain C. R. Smith v. *Mrs. Heplonstall*, (1938) R.L.R. at 11, distinguished.

The object of the legislature in enacting s. 49, Registration Act was to shut out evidence of a document affecting an interest in land unless it should have been registered.

Lachmipat Singh Dugar v. *Mirza Khajrat Ali*, (1869) 4 Bengal Law Reports 18 (F.B.) ; *Ulfatunnissa* v. *Hussein Khan*, (1883) 4 Cal. Series, 520 at 525, referred to.

In the present case it is possible to separate the obligation from the interest in the immoveable property. The suit is for recovery of the debt and not for enforcement of lien. The document was tendered to establish that the loan had been made, not for proving a transaction affecting the property.

Sheodial and another v. *Prag Dat Misra and another*, (1880) 3 All. 228 at 233, referred to.

Maung Ba v. *Maung Tha Kyu and another*, (1939) R.L.R. 39 ; *Bhabi Dutt* v. *Ramalalbyamal*, A.I.R. 1934) Ran. 303, distinguished.

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* Civil 1st Appeal No. 71 of 1950 against the order of the City Civil Court in Case No. 1078 of 1949.

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U BO GYI AND ANOTHER v. U KAN WIN AND ANOTHER.

G. N. Banerji for the appellants.

Aung Min (*1*) for the respondents.

U TUN BYU, C.J.—U Bo Gyi and Daw Kyin Po, the plaintiffs-appellants, claimed to recover a sum of Rs. 600 from U Kan Win and Ma Saw Aye, the defendants-respondents, in Small Cause Suit No. 1078 of 1949 of the Rangoon City Civil Court. Their suit was dismissed on a preliminary issue, which was—

"Whether the present suit is maintainable as framed for recovery of money due on the original consideration in view of the fact that there was an invalid mortgage document executed at the time this suit loan was advanced by the plaintiffs to the defendants."

The learned 2nd Judge of the Rangoon City Civil Court held that as Exhibit A, which purported to create a mortgage of immoveable property, was inadmissible in evidence to prove the mortgage, it was also inadmissible for the purpose of proving the personal covenant given by U Kan Win and Ma Saw Aye to repay the sum of Rs. 600 by instalments ; and he accordingly held that the suit, as instituted, was not maintainable in law.

Exhibit A shows that U Kan Win and Ma Saw Aye purported to create a mortgage on their godown and a few other things attached to or used with the godown in favour of U Bo Gyi and Daw Kyin Po for a sum of Rs. 600, and they also undertook in the latter portion of Exhibit A to repay the sum of Rs. 600 by instalments, with effect from the month of December, 1948. Section 49 of the Registration Act reads :

"49. No document required by section 17 or by any provision of the Transfer of Property Act or by any law formerly

in force for the registration of documents in Burma to be registered shall—

(*a*) affect any immoveable property comprised therein, or

(*b*) confer any power to adopt, or

(*c*) be received as evidence of any transaction affecting such property or conferring such power,

unless it has been registered :

Provided that an unregistered document affecting immoveable property may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, or as evidence of part performance of a contract for the purposes of section 53-A of the Transfer of Property Act, or as evidence of any collateral transaction not required to be effected by registered instrument."

The contention made on behalf of the plaintiffs-appellants is that section 49 does not prohibit Exhibit A from being admissible in evidence for the purpose of proving the personal covenant to repay a sum of Rs. 600 which in the present case constitutes a distinct transaction, separate from the mortgage transaction and in that a personal covenant for the repayment of a loan is not required by law to be registered. It will be observed from the provisions of section 49 of the Registration Act that Exhibit A, being unregistered, could not be used to prove the mortgage which it purported to create, or for the purpose of establishing any right or claim arising out of the mortgaged property. It is clear, however, that section 49 of the Registration Act does not prohibit an unregistered document from being received in evidence for all purposes. We do not think that it will be proper to extend the prohibition in section 49 beyond what it clearly prohibits.

The relevant portion of the corresponding section of the Act of 1864 was in the following terms :—

"*No instrument . . . shall be received in evidence* in any civil proceeding in any Court, *or shall be acted on* by any public

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U BO GYI AND ANOTHER v. U KAN WIN AND ANOTHER.

U TUN BYU, C.J.

officer . . . . unless the same shall have been registered in the manner and within the time prescribed by this Act."

We have italicized certain words in the corresponding section of the old Act of 1864. Section 49 of the Registration Act of 1866 was :

"*No instrument* required by section 17 to be registered *shall be received in evidence* in any civil proceeding in any Court, *or shall be acted on* by any public officer as defined in the Indian Penal Code, or shall affect any property comprised therein, unless it shall have been registered in accordance with the provisions of this Act."

We have also italicized certain words in section 49 of the Act of 1866. Thus it is clear that when the Registration Act was first introduced, it specifically prohibited an unregistered instrument, which was required to be registered under the Registration Act, from being received as evidence at all in civil proceedings. The implication, which arises from the subsequent change in the wording of section 49 of the Registration Act, is that it is intended now to allow an unregistered document being used for other purposes, which do not strictly fall within the prohibition of the provisions of the present section 49 of the Registration Act.

In *Saraswathamma* v. *Paddayya* (1) Spencer J., stated :

"All sorts of transactions may remotely affect immoveable property. Section 49 of the Registration Act has to be read in the light of section 17 of the same act, and section 91 of the Evidence Act. If this is done, the word 'affect' will be seen to be a compendious term for expressing the longer phrase 'purporting or operating to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether invested or contingent'."

(1) (1923) 46 Mad. 349 at 359.

It is difficult to see how a personal covenant to pay a loan, if it can be separated from the mortgage, can strictly be regarded as an obligation, interest or claim, which arises out of the immoveable property, which formed the subject of the abortive mortgage, or that it is a matter which affects such immoveable property in any way.

The facts in the case of *Captain C. R. Smith* v. *Mrs. Heptonstall* (1) are different from the case which is now under appeal; and there Goodman Roberts C.J., observed:

> "The learned trial Judge thought that the cause of action on the mortgage and the cause of action on the deficiency were quite separate and distinct. But in my opinion no separate cause of action for the personal remedy accrued after mortgaged property was found on sale to be insufficient to satisfy the mortgage debt."

There, the personal liability emerges out of the mortgage, and it arose only after the sale of the immoveable property had been effected and discovered to be insufficient to pay the decretal amount due under the mortgage decree; and thus the decision in *Captain C. R. Smith* v. *Mrs. Heptonstall* (1) does not afford any assistance on the question under consideration. In the present case under appeal the defendants-respondents specifically agreed in the latter portion of Exhibit A to pay the sum of Rs. 600 by instalments, commencing from the month of December, 1948, and this personal covenant to pay the sum of Rs. 600 is contained in the last three or four lines of Exhibit A, which can be separated from the earlier portion of Exhibit A without impairing the meaning or purport of the latter portion of the Exhibit A.

(1) (1938) R.L.R.at 11.

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U TUN BYU, C.J.

Peacock C.J., observed, in the Full Bench case of *Lachmipat Singh Dugar* v. *Mirza Khairat Ali* (1), as far back as 1869, under the more stringent provisions of the old Registration Act:

" It appears to me that the object of the legislature in section 49 was that no document should be received in evidence as a document affecting an interest in land unless it should have been registered; but that it was not the intention that such a document should not be admissible in evidence for a purpose for which registration was not necessary."

The above observation applies more pertinently to the present provisions of section 49, as the present section 49 of the Registration Act does not prohibit a civil Court from receiving an unregistered instrument in evidence for any purpose whatever.

A relevant passage in the Full Bench case of *Ulfatunnissa* v. *Hussein Khan* (2) reads:

" Under the Act, therefore, it was settled law for whole of India that an unregistered document like the present was a factum and might be used in evidence to charge the person, though not the land. On a matter of such general importance, we think we ought not to hold the law to be changed, unless we can see very clearly that the legislature intended to change it. But when the language of the two acts is compared it is seen that the words of the latter are not more stringent, but less stringent, than those of the earlier."

The Acts referred to were the earlier Registration Acts. The words "shall be received as evidence of any transaction affecting such property" in section 49 ought, in our opinion, to be read as referring to a transaction which affects land or anything arising out of, or connected with, the land, and nothing more. In the case at present under consideration, it is not a

(1) (1869) 4 Bengal Law Reports 18 (F.B.).
(2) (1883) 4 Cal. Series 520 at 525.

case where it is not possible to separate that portion of Exhibit A, which purported to create a mortgage on the immoveable property, from the portion, which creates the personal covenant or liability. The Allahabad High Court also maintained the same view as the Calcutta High Court, as far back as 1880 ; and the observation of Straight J., in the Full Bench case of *Sheodial and another* v. *Prag Dat Misra and another* (1) is also pertinent to the point now under consideration, and it reads :

"But in the present case the bond creates a personal as divisible from a property obligation, and the loan can be separated from the hypothecation. The suit was simply for the money debt and not for enforcement of lien, and the bond was not tendered in evidence for the purpose of proving a transaction affecting property, but in order to establish that the loan had been made."

Oldfield J., also observed in that Full Bench case as follows :

"The bond imposes a personal liability for a debt on the obligor, and also affects the mortgage of a property and the two transactions are distinct. The instrument may be received in evidence of the former though not of the latter transaction."

The prayer in the plaint of the case now before us was simply for the repayment of the loan of Rs. 600, and not for the purpose of enforcing any claim, right, or interest, which might arise out of the immoveable property mentioned in Exhibit A. As the present suit is in effect to enforce a monetary debt only, it could not, in the circumstances, be said to have been intended to establish or enforce any right, claim, or interest, which might arise out of the immoveable property.

(1) (1880) 3 All. 228 at 233.

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U BO GYI AND ANOTHER v. U KAN WIN AND ANOTHER.

U TUN BYU, C.J.

The point, which arose in the case of *Maung Ba* v. *Maung Tha Kyu and another* (1), is entirely different. There, the suit was for the redemption of an usufructuary mortgage of certain lands, which was purported to have been affected by an unregistered deed and that was therefore a case where the terms of the usufructuary mortgage could not be proved by a document, which was inadmissible by reasons of the provisions of section 49 of the Registration Act, which forbids an unregistered document from being used to prove the abortive mortgage. In *Bhabi Dutt* v. *Ramalalbyamal* (2) the transaction, which relates to both moveable and immoveable properties, could not be separated and made divisible. The Exhibit A must therefore for the reasons set out above be held, in the circumstances of this case, to be admissible in evidence for the purpose of proving the personal covenant.

The Advocate for the plaintiffs-appellants has also contended that U Bo Gyi and Daw Kyin Po were entitled, apart from the mortgage deed, to claim in the alternative a refund of the sum of Rs, 600 paid under the abortive mortgage in view of the provisions of section 65 of the Contract Act. The plaint, however, made no mention of section 65 of the Contract Act. We do not think we ought, in the circumstances, to consider whether section 65 of the Contract Act can be resorted to, or be said to be applicable, in the present case. It is open to the plaintiffs-appellants and their Advocate to consider whether it will be expedient to amend the plaint or not, and the question whether the amendment will be permitted or not, will then be decided by the original Court, when the application is made before it. Both parties will be allowed to suggest new issues, if they desire to do so.

(1) (1939) R.L.R. 39. (2) A.I.R. (1934) Ran. 303.

We think we ought to make it clear that we do not in this appeal purport to decide whether the plaintiffs-appellants had in fact paid the sum of Rs. 600 to the defendants-respondents or not. The costs of this appeal will, as well as the costs already incurred in the original Court, be left to be decided by that Court when the final hearing in that Court is concluded.

The appeal will, for the reasons already set out, be allowed; and the judgment and decree of the original Court will be set aside.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice, and U Si Bu, J.

H.C. 1951

Oct. 2.

U BA OHN (APPLICANT)

v.

MAUNG HLA KYI AND ONE (RESPONDENTS).*

Administration suit—Property jointly acquired by Buddhist couple—Mortgage by one of them—Proper decree.

A house was jointly acquired during the coverture of U Ba Nyein and Ma Aye Kyi. The Respondent claimed the property as the property of their father U Ba Nyein and after his death their mother married again and they claimed two-thirds share on the principle of *Nissaya* and *Nissita*. The house had been mortgaged during the lifetime of the husband once by the wife who redeemed the mortgage.

Held : That the Respondents stepped into the shoes of the husband. He was burdened with the liability, for the mortgage, for one half of which he was clearly liable. The proper decree in favour of the Respondents would be for one half share subject to the payment of half the debt as the liability must be considered to have passed to them.

Ba Nyun for the applicant.

N. R. Majumdar for the respondents.

U SI BU, J.—This is a suit for the administration of the estate of one U Ba Nyein, deceased, the father of the plaintiff-respondents. The appellant is the 4th defendant.

The case of the plaintiff-respondents is that their father U Ba Nyein was the owner of the house in suit, having bought it with his own money, that after his death their mother Ma Aye Kyi married again, and that sometime later, she mortgaged the said house to the present appellant, who obtained a mortgage decree, and bought it, apparently at a court

* Civil Misc. Application No. 17 of 1950 against the decree of the City Civil Court, Rangoon in Civil Regular No. 750 of 1949.

sale held in execution of the mortgage decree. The respondents claimed a two-thirds share in the said house on the principle of *Nissaya and Nissita.*

The only defendant who seriously contested the suit is the 4th defendant the appellant in this appeal. His case is that the property stood in the name of the mortgagor Ma Aye Kyi, the mother of the respondents, that she was the sole owner of the property and that the plaintiff-respondents have no right, title, or interest therein.

The trial Court came to the conclusion that the said house was jointly acquired by U Ba Nyein and Ma Aye Kyi, the parents of the respondents, and therefore gave a decree entitling the respondents to one-half share therein ; and hence, this appeal.

We have read the evidence, and we agree with the learned trial Judge that this house was jointly acquired during the coverture of U Ba Nyein and Ma Aye Kyi, but we do not agree that the respondents are entitled to one-half share therein without payment of their half share in the redemption money. It must not be forgotten that this house was mortgaged twice by Ma Aye Kyi, the mother of the respondents. The first mortgage was with one U Po Lin during the lifetime of her husband U Ba Nyein, the father of the plaintiff-respondents. Ma Aye Kyi redeemed the mortgage for Rs. 900 out of her own money. So, at the death of U Ba Nyein the house was burdened with a liability of Rs. 900, for one-half of which he was clearly liable. Now that he is dead and the plaintiff-respondents have stepped into his shoes, his liability must be considered to have passed on to them.

In the result, we would vary the decree by subjecting the half-share of the respondents to a deduction of Rs. 450 ; that is to say, there will be a

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U BA OHN v. MAUNG HLA KYI AND ONE.

U SI BU, J.

decree in favour of the plaintiff-respondents to one-half share in the house subject to payment by them of Rs. 450 to the purchaser, namely, the appellant U Ba Ohn. And that part of the decree directing the appointment of a commissioner, if necessary, to take accounts and to effect a partition of the house and give delivery of the plaintiffs' share of the house to the plaintiffs, is confirmed, and the commissioner, if appointed, shall also have power to sell the property for the purpose of distribution, should he find it difficult to have it partitioned in a manner which will be acceptable to both parties. The minor's share, if the property is sold, will be paid into Court. The commissioner's fee shall be paid equally by both parties.

As the appellant has succeeded only to a limited extent, each party will bear its own costs in both Courts.

U TUN BYU, C.J.—I agree.

APPELLATE CIVIL.

Before U Aung Khine, J.

ESOOF MOHAMED AND FOUR OTHERS (APPELLANTS)

v.

NIZAMI SUPPLY COMPANY (RESPONDENTS).*

H.C. 1951

Nov. 14.

Execution, stay of—Terms and conditions imposed by Judge—Successor in office not competent to cancel and substitute new terms and conditions—Defaulter not entitled to make fresh application for stay.

Held : However laudable the object may be in imposing fresh terms and conditions, a successor-in-office cannot arrogate to himself the functions of a Court sitting in appeal or in revision on the order passed by his predecessor.

Held also : Having failed to comply with the terms imposed upon him a defaulter is not entitled to make a fresh application for stay of execution.

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

A. I. Modan for the appellants.

Mohamed Jaffer for the respondents.

U AUNG KHINE, J.—The respondent Nizami Supply Company were the tenants of the appellants in respect of room No. 1 on the ground floor of House No. 92/96, Lewis Street, Rangoon, on a monthly rental of Rs. 100. The respondent fell into arrears of rent of the said premises for a period of 13 months beginning from 1st June 1949 to the end of June 1950. The suit was filed against the respondent for ejectment of the respondent and it was decreed with costs. In the execution proceedings taken out, on the application of the respondent the execution of the decree was stayed on the following terms and conditions namely, the respondent to pay the arrears due and costs of the suit in six equal monthly instalments, and each instalment to be paid on or before the 10th of every month commencing from 1st January

* Civil Misc. Appeal No. 43 of 1951 against the order of the 3r Judge City Civil Court of Rangoon in Civil Execution No. 194 of 1951, dated the 20th June 1951.

H.C. 1951

ESOOF MOHAMED AND FOUR OTHERS v. NIZAMI SUPPLY COMPANY.

U AUNG KHINE, J.

1951. The respondent paid Rs. 220 on 9th January 1951. However, in February 1951, the respondent defaulted and Rs. 150 was deposited only on 13th February 1951 and again Rs. 30 on 15th February 1951 and finally Rs. 80 on 27th February 1951. As the respondent failed to comply with terms as agreed upon the appellant again applied for the execution of the decree. The respondent objected to the execution of the decree on the ground that they had not committed any breach of terms imposed upon them. The terms and conditions for the stay were drawn up by U Ba Kyaw who was officiating as 3rd Judge of the City Civil Court in place of U Kyaw Sint who was promoted to officiate as 2nd Judge of the same Court. This order now under appeal was passed by U Kyaw Sint on his reversion to his old post. He held that the previous order passed by U Ba Kyaw was untenable in the sense that the order was not only vague but was possible of different interpretation. He therefore cancelled the previous order passed and substituted it by a fresh one drawn up by him and which he considered to be more precise in language. However, laudable the object may be in imposing fresh terms and conditions on the respondent, I am of the opinion that his action was not warranted by law. He cannot arrogate to himself the functions of a Court sitting in appeal or in revision on the order passed by his predecessor.

The order passed by his predecessor, it appears to me was a simple one. The judgment-debtor was directed to pay the arrears due and costs by six monthly instalments. By arrears due, he must have meant the rents due for the period lst June 1949 to 30th June 1950 and no more. It was due to the non-payment of rents for this period that the suit

for ejectment was filed and it is only a question of simple arithmetic to find out what is the actual amount which was in arrears.

Even assuming that the respondent was right in his calculation that he was to pay Rs. 220 per month, he clearly defaulted when he did not pay in this sum by the 10th February 1951. He paid in Rs. 150 only on the 13th of February 1951. Having failed to comply with the terms imposed upon him, he was not entitled to make a fresh application for stay of execution. In *K. S. Abdul Kader* v. *Sri Kali Temple Trust* (1) it was held that where a tenant has obtained an order for stay of execution of a decree for ejectment on a certain condition, he cannot, after he has broken that condition, apply again for stay of execution under section 14 (*1*) of the Act. The Lower Court knew of this decision but held that the respondent had not committed the breach of terms imposed upon it. How the Lower Court came to this conclusion, I am at a loss to understand. By a series of specious argument, the learned 3rd Judge tried to prove that the order of his predecessor was untenable for lack of precision. It is crystal clear inspite of all arguments put forward that the respondent had broken the conditions on his failure to deposit even the minimum amount of Rs. 220 on 1st February 1951. This the learned Judge preferred to overlook.

For all the reasons given above, I am of the opinion that the order of the 3rd Judge, City Civil Court under appeal is clearly untenable. In the result the appeal is allowed with costs. The Lower Court's order would be set aside and the appellants will be allowed to proceed with their execution of the decree they had obtained. Advocate's fees three gold mohurs.

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

APPELLATE CIVIL.

Before U San Maung and U Thaung Sein, JJ.

H.C. 1951

Aug. 27.

K. K. S. KADER MEERA (APPELLANT)

v.

S. P. MOHAMED ABUBACKER & BROTHERS AND ANOTHER (RESPONDENTS).*

Suit for malicious prosecution—Meaning of the word "prosecution"—Whether suit for malicious prosecution lie if defendant files an application under s. 145 of the Criminal Procedure Code and obtains an attachment—Essential points to be proved in a suit for malicious prosecution.

Held : The word "prosecution" in a suit for malicious prosecution should not be interpreted in a narrow and restricted sense in which it is used in the Code of Criminal Procedure. It is not essential that the original proceedings should have been of such a nature as to render the persons against whom it was taken liable to be arrested, fined or imprisoned. Where there has been deliberate abuse of the process of the criminal court and salutary provisions framed by the legislature to secure the prevention of offences have been utilised maliciously and without reasonable and probable cause for the harassment of the plaintiff who has thereby suffered damage in reputation and property an action for malicious prosecution or malicious abuse of judicial process is maintainable.

C. H. Crowdy v. *L. O. Reilly*, (1912-13) 17 C.W.N. 554 ; *Bishun Persad Narain Singh and another* v. *Phulman Singh and others*, (1914-15) 19 C.W.N. 935 ; *Jagdeo* v. *Dwarka*, (1947) I.L.R. 26 Pat. 68 ; *Mohamed Amin* v. *Jogendra Kumar Bannerjee and others*, (1946-47) 74 I.A. 193, followed.

In a suit for malicious prosecution the following points should be proved:—

(1) that the plaintiff was prosecuted by the defendant,

(2) that the proceedings complained of terminated in favour of the plaintiff,

(3) that the prosecution was instituted without reasonable and probable cause,

(4) it was due to malicious intention of the defendant and not with a mere intention of carrying the law into effect.

Balbhaddar Singh v. *Badri Sah*, 1 Luck. 215 ; *U Soe* v. *Maung Ngwe Tha and eight others*, (1927) I.L.R. 5 Ran. 705, followed.

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* Civil 1st Appeal No. 14 of 1950 against the decree of the Original Side, High Court, Rangoon, in Civil Regular No. 33 of 1946, dated 2nd February 1950.

P. K. Basu for the appellant.

Dr. Ba Han for the respondent No. 1.

N. R. Burjorjee for the respondent No. 2.

The judgment of the Bench was delivered by

U THAUNG SEIN, J.—This is an appeal against the judgment and decree of the Original Side of this Court dismissing the appellant-plaintiff K. K. S. Kader Meera's suit for damages amounting to Rs. 40,000 for malicious prosecution. The appellant-plaintiff's case was that on or about the 25th January 1946 the second respondent V. N. V. Mohamed Eusoof, who was the Agent and Manager of the 1st respondent firm of S. P. Mohamed Abubacker & Brothers, had maliciously and without any reasonable and probable cause instituted proceedings against him (appellant-plaintiff) under section 145 of the Criminal Procedure Code in the Court of the 3rd Additional Magistrate, Rangoon, and in consequence his shop at No. 40/42, Edward Street, was attached and he was evicted therefrom. Fortunately for him he applied to the High Court in revision against that order which was set aside and the shop was restored. According to the appellant-plaintiff, the learned 3rd Additional Magistrate was induced into passing the order which he did as a result of false representations on the part of the 2nd respondent V. N. V. Mohamed Eusoof and hence he claimed that he was entitled to damages for harm and injury inflicted to his reputation and credit by means of the "malicious prosecution." He claimed further that the "prosecution" by the 2nd respondent V. N. V. Mohamed Eusoof was at "the instance and active instigation and for the benefit of the 1st respondent firm of S. P. Mohamed Abubacker & Brothers, of

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which he was the Manager and Agent, and that this firm is thus liable to pay him damages."

In his written statement the 2nd respondent V. N. V. Mohamed Eusoof admitted the institution of the criminal proceedings referred to but denied that he did so with malice or without reasonable and probable cause. On the contrary he asserted that his application was a well founded one and that he had acted all along on the advice of competent counsel in the person of Dr. U Thein. Furthermore, he denied that the proceedings were instituted for and on behalf of the 1st respondent firm of S. P. Mohamed Abubacker & Brothers.

The 1st respondent firm on their part disclaimed all liability for the acts of the 2nd respondent V. N. V. Mohamed Eusoof so far as the criminal proceedings were concerned, and contended "that it was no part of the 2nd defendant's (2nd respondent's) employment to institute any criminal proceedings in general and the said application under section 145, Criminal Procedure Code, in particular." They went on to say that "since they came to know of it they expressed their entire disapproval of the said proceedings."

The suit went to trial and the main issue between the parties was whether the 2nd respondent V. N. V. Mohamed Eusoof maliciously and without reasonable and probable cause instituted the proceedings in question before the 3rd Additional Magistrate, Rangoon, and if so, whether the 1st respondent firm is liable to pay damages for the acts of the 2nd respondent V. N. V. Mohamed Eusoof, who was their Manager and Agent. The learned Judge sitting on the Original Side (U On Pe J.), accepted the respondents' contention that the proceedings were not instituted with any malicious intent or without reasonable and probable cause and accordingly

dismissed the suit. On appeal it has been strenuously argued by the learned counsel for the appellant-plaintiff that the learned Judge's decision is wrong and that there was clear and definite proof, both from the oral and documentary evidence adduced at the trial, that the proceedings were prompted by malice on the part of the 2nd respondent V. N. V. Mohamed Eusoof to damage his client's reputation and credit. In addition it was urged that the 2nd respondent V. N. V. Mohamed Eusoof had been guilty of gross misrepresentation of facts before the 3rd Additional Magistrate, Rangoon.

Now, at the outset it should be noted that though the suit was one for damages for "malicious prosecution" there was in fact no prosecution of the appellant-plaintiff in the sense in which this term is usually understood. The term "malicious prosecution" is a name applied to a form of tort and as pointed out in the ruling in *C. H. Crowdy* v. *L. O. Reilly* (1), the word "prosecution" should not be interpreted in a narrow and restricted sense in which it is used in the Criminal Procedure Code. That was also a case for "malicious prosecution" arising out of an application under section 145, Criminal Procedure Code. The relevant portion of the headnote reads :

"It is not that an action for damages for malicious prosecution lies only when the original proceeding was a 'prosecution' in the sense in which the term is used in the Code of Criminal Procedure ; it is not essential that the original proceeding should have been of such a nature as to render the person against whom it was taken liable to be arrested, fined or imprisoned.

Where there has been a deliberate abuse of the process of the Criminal Court and salutary provisions framed by the

(1) (1912-13) 17 C.W.N. 554.

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Legislature to secure the prevention of offences have been utilised maliciously and without reasonable and probable cause for the harassment of the Plaintiff who has thereby suffered damage; in reputation and property an action for malicious prosecution or malicious abuse of judicial process is maintainable."

This ruling was followed in *Bishun Persad Narain Singh and another* v. *Phulman Singh and others* (1), and the above dictum was repeated in the following form :

"The action for damages for malicious prosecution is not a creature of any statute. To determine whether such an action lies, the term 'prosecution' should not be interpreted in the restricted sense in which it is used in the Code of Criminal Procedure."

Both these cases were referred to and followed in *Jagdeo* v. *Dwarka* (2). The same principles were also laid down by the Privy Council in *Mohamed Amin* v. *Jogendra Kumar Bannerjee and others* (3), where, after referring to the ruling in *Bishun Persad Narain Singh and another* v. *Phulman Singh and others* (1), and numerous other rulings, their Lordships (at page 202) stated as follows :

"To found an action for damages for malicions prosecution based on criminal proceedings the test is not whether the criminal proceedings have reached a stage at which they may be correctly described as a prosecution ; the test is whether such proceedings have reached a stage at which damage to the plaintiff results."

It is thus clear that an action for "malicious prosecution" will lie even in respect of proceedings under section 145, Criminal Procedure Code.

According to the Privy Council ruling in *Balbhaddar Singh* v. *Badri Sah*, (4), which was

(1) (1914-15) 19 C.W.N. 935.
(2) (1947) I.L.R. 26 Pat 28.
(3) (1946-47) 74 I.A. 193.
(4) 1 Luck. 215

followed by the High Court of Judicature at Rangoon in *U Soe* v. *Maung Ngwe Tha and eight others* (1), in all suits for damages for malicious prosecution it is incumbent on the plaintiff to prove the following points :—

"(1) That he was prosecuted by the defendant ; (2) that the proceedings complained of terminated in favour of the plaintiff, if from their nature they were capable of so terminating ; (3) that the prosecution was instituted against him without any reasonable and probable cause ; and (4) that it was due to a malicious intention of the defendant and not with a mere intention of carrying the law into effect."

The appellant-plaintiff claims that he did in fact prove all these points and that he was thus entitled to a decree as prayed for by him.

* * * *

On evidence the learned Judge held that though the evidence of defence is weak, plaintiff's case has not been proved.

(1) (1927) I.L.R 5 Ran 705.

APPELLATE CIVIL.

Before U San Maung and U Thaung Sein, JJ.

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Sept. 20

ABDUL HAMEED (APPELLANT)

v.

S. A. ABDUL HAMEED (RESPONDENT).*

S. 2(d), *Urban Rent Control Act, 1949—Premises—Ejectment of occupant—S. 11* (1) *whether applies to permissive occupation—S. 17, City Civil Court Act—Application under—Appeal.*

Held: That s. 2 (*d*) of the Urban Rent Control Act defines premises. S. 11 of the same Act refers in every one of its clauses to 'tenants'. None of these clauses apply to a person merely in permissive occupation of the building. By the amendment of the definition of 'premises' under s. 2 (*d*), all persons in occupation of premises do not come within the ambit of s. 11; otherwise s. 13 providing for ejectment of persons permitted to occupy premises under s. 12 would be redundant and therefore this could not have been in the contemplation of the Legislature. The mention of the Rangoon City Civil Court Act in s. 11 (*1*) of the Urban Rent Control Act does not affect the provision of s. 17 (*1*) of the former Act. No appeal lies against the order under this section.

Saw Chain Poon v. *Tan Choo Keng and three others*, (1947) R.L.R. 23, followed.

In special circumstances, in the ends of justice, a Memorandum of Appeal can be converted into one of revision.

Nyun Maung for the appellant.

Ba Gyan for the respondent.

The judgment of the Bench was delivered by

U SAN MAUNG, J.—In Civil Regular Suit No. 1225 of 1950 of the City Civil Court, Rangoon, the appellant Abdul Hameed filed an application under section 17 of the City Civil Court Act for ejectment of the respondent S. A. Abdul Hameed on the ground that the respondent was in permissive occupation of room No. 2 in house No. 212/214, Edward Street,

* Civil 1st Appeal No. 10 of 1951 against the decree of the City Civil Court of Rangoon in Civil Regular No. 1226 of 1950, dated the 3rd February 1951.

of which he (the appellant) was the lessee of the Soorty Bara Bazaar Co. Ltd., and that the respondent had refused to vacate although permission given to him to reside in the premises in suit had since been withdrawn. The application was contested and therefore it was treated as a suit—*vide* Rule 3 of the Rules made by the High Court to regulate the procedure of the Rangoon City Civil Court in such proceedings. The respondent in his written statement contended that he was not merely in permissive occupation of the suit premises as alleged by the appellant but that the suit premises had been sub-leased to him by the appellant at a rental of Rs. 100 a month. On the pleading the learned 2nd Judge of the City Civil Court who tried the case framed four issues as follows:

"1. Is the suit as framed maintainable in Law?

2. Is the suit correctly valued for the purposes (*a*) of Court Fees and (*b*) of jurisdiction?

3. Is the Indo-Burma Medicine Company a necessary party to the suit?

4. Was the occupation of the suit premises permissive only as alleged by the plaintiff, or by way of tenancy as alleged by the defendant?"

He then dismissed the appellant's "suit" on a preliminary issue as to its maintainability. He held that since the amendment of the definition of the word "premises" contained in section 2 (*d*) of the Urban Rent Control Act, 1949, no application under section 17 of the City Civil Court Act for the ejectment of a person in permissive occupation of any premises as defined in the Urban Rent Control Act would lie and that the only way in which such persons could be ejected is by way of a suit framed under either one or other of the clauses of sub-section (*1*) of section 11 of the Urban

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Rent Control Act. Now the definition of the word "premises" given in section 2 (*d*) of the Urban Rent Control Act, 1949 reads as follows:

"any land on which a building has been erected and any building or part of a building *let or occupied or intended to be let or occupied* separately for any purpose whatever including a stall let for the retail sale of goods in a market or any other building, any land, furnished furniture or fixture let together with such building or part of a building."

From this definition the learned Judge has deduced that if any one is in occupation of any premises as defined in that section, the only manner in which he can be ejected is by way of suit under section 11 (*1*) of the Urban Rent Control Act.

To our mind, it is difficult to understand how the learned Judge could have fallen into such an error as this. The definition of the word "premises" as given in section 2 (*d*) of the Urban Rent Control Act could not in any way lead to the conclusion that any one in occupation of such premises must be regarded as a tenant thereof within the contemplation of the Urban Rent Control Act. What section 11 (*1*) enacts is that no one who is a tenant of any premises as defined in the Act can be ejected therefrom and possession of the premises in question recovered from him except under the circumstances given in one or other of the clauses of that sub-section. This conclusion is fortified by the fact that all the clauses (*a*) to (*f*) enumerated therein refer to tenants. For example clause (*a*) refers to a tenant from whom rent is lawfully due; clause (*b*) to a tenant against whom a decree for arrears of rent had been given prior to the resumption of the Civil Government on the conclusion of the hostilities with Japan; clause (*c*) to a tenant who is personally guilty of a conduct which is a

nuisance, etc., or whose household is guilty of such conduct; clause (*d*) to a tenant whose house site is *bonâ fide* required by the landlord for the erection or re-erection of a building; clause (*e*) to a tenant whose house is reasonably and *bonâ fide* required by the landlord for major repairs and clause (*f*) to a tenant whose house is required by the owner *bonâ fide* for his own residence.

None of those clauses apply to a person merely in permissive occupation of a building without having to make any payment therefor.

If, as the learned Judge thinks, by the mere amendment of the definition of the word "premises" occurring in section 2 (*d*) of the Urban Rent Control Act all persons in occupation of such premises come within the ambit of the Rent Control Act, section 13 of the Act providing for the ejectment of persons who have been permitted to occupy premises under the provisions of section 12 would be entirely redundant. In fact some of the provisions contained in section 13 (*1*) would contradict with those contained in section 11 (*1*). This could hardly have been contemplated by the legislature in amending this definition of the word "premises" contained in section 2 (*d*).

No doubt section 11 (*1*) enacts that notwithstanding anything contained in the Transfer of Property Act or the Contract Act or the Rangoon City Civil Court Act no order or decree for the recovery of possession of any premises to which this Act applies or, for the ejectment of a tenant therefrom shall be made except under the circumstances stated therein. A reference to Rangoon City Civil Court Act is necessary as otherwise a tenant could be ejected under section 17 (*1*) of the City Civil Court Act merely on proof of the fact that the tenancy has been determined as required by the Transfer of Property Act. The mention of

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Rangoon City Civil Court in section 11 (*1*) of the Urban Rent Control Act however, does not affect the provisions of section 17 (*1*) of the City Civil Court in so far as it concerns persons in permissive occupation of buildings, etc.

Therefore in our opinion the learned 2nd Judge of the City Civil Court was wrong in having dismissed the application of Abdul Hameed under section 17 of the City Civil Court Act on the ground that it was not maintainable in law.

However, no appeal lies against the order of the 2nd Judge of the City Civil Court. The law on this point has been elaborately discussed by a Bench of the late High Court of Judicature at Rangoon in *Saw Chain Poon* v. *Tan Choo Keng and three others* (1) where it was held that a final decision in a proceeding under section 17 of the Rangoon City Civil Court Act, is not a decree but an order and that no appeal lies against such an order. However, in the ends of justice we consider that the memorandum of appeal should be regarded as an application for revision and that we should exercise our powers under section 25 of the City Civil Court Act. Accordingly the order of the 2nd Judge of the City Civil Court dismissing the application of Abdul Hameed is set aside and the City Civil Court is directed to proceed with the application according to law. Costs so far incurred by the parties in the City Civil Court must be considered as costs in the proceedings of that Court. Each party should bear its own costs in this Court. Advocate's fees two gold mohurs.

(1) (1947) R.L.R. 23.

APPELLATE CIVIL.

Before U On Pe and U San Maung, JJ.

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Oct. 2.

S.P.S.N. KASIVISVANATHAN CHETTIAR (APPELLANT)

v.

S.S. KRISHNAPPA CHETTIAR AND OTHERS (RESPONDENTS).*

S. 12 of the Code of Civil Procedure—Foreign judgment—Production of decree copy but not judgment of foreign Court—Maintainability—Article 60, Limitation Act.

A suit was filed upon a foreign judgment and only copy of a decree of the foreign Court was produced. The claim according to the decree was for amount due on a deposit letter and the suit was dismissed on the ground that the claim in the foreign Court was barred by limitation. On appeal—

Held : Article 60, Limitation Act is applicable to the claim in question and the matter of limitation hinges on whether there was a demand for payment of the money more than three years prior to suit. The fact that the defendant failed to enter appearance in the foreign Court would go to show that there was no such demand and if there was no demand beyond three years, the judgment was correct.

The said judgment cannot be said to be founded upon breach of the law in force in Burma. The suit to recover moneys in deposit is not an illegal claim. The general rule is that a Court which entertains a suit on a foreign judgment cannot enquire into the merits of the original action or the propriety of the decision.

Baijnath Karnani v. *Vallabhadas Damani*, A.I.R. (1932) Mad. 661 ; *Brijlal Ramjidass and another* v. *Govindram Gorhandas Seksaria and others*, A.I.R. (34) (1947) (P.C.) 192 ; *Ganga Prasad and another* v. *Ganesh Lal and others*, 56 All. 119, referred to.

Ba Tun for the appellant.

D. N. Dutt for the respondent No. 1.

The judgment of the Bench was delivered by

U SAN MAUNG, J.—The suit out of which the present appeal has arisen was one founded on a "foreign judgment" as defined in section 2 (6) of the Civil Procedure Code. Oddly enough the

* Civil 1st Appeal No. 4 of 1950 against the decree of 3rd Judge, City Civil Court, Rangoon in Civil Regular No. 51 of 1947.

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U SAN MAUNG, J.

plaintiff-appellant (S.P.S.N. Kasivisvanathan Chettiar) merely filed a copy of the decree obtained by him in Small Cause Suit No. 22 of 1946 before the Subordinate Judge of Sivaganga and failed to produce a copy of the judgment of that Court. However, as pointed out by the learned 3rd Judge of the City Civil Court a suit on a foreign decree alone is maintainable without production of the judgment on which it is based, *vide* the rulings in *Baijnath Karnani* v. *Vallabhadas Damani* (1) and *Brijlal Ramjidass and another* v. *Govindram Gorhandas Seksaria and others* (2). It seems hardly necessary to stress that it would have been far more satisfactory if the judgment of the foreign Court had been produced and indeed the appellant's failure in his suit was due mainly to the non-availability of that judgment to the trial Judge. For instance, it is not clear whether the question of limitation was ever considered by the learned Subordinate Judge of Sivaganga and such a doubt might easily have been removed if the judgment had been produced. The plaintiff-appellant undertook to file a copy of the judgment and though he took several adjournments he finally failed to produce it. No satisfactory reasons have been furnished for this failure though the learned Counsel for the plaintiff-appellant tried to make out that as the suit before the "foreign Court" was a Small Cause one the judgment was not of the usual type to be found in regular suits. Be that as it may, the decree of the "foreign Court" in question is interesting and reproduces the claim of the plaintiff-appellant as put forward in that Court as follows :

"Claim for Rs. 894-9-9 due on a deposit letter dated 13th April 1938 executed by late Sockalingam Chettiar the

(1) A.I.R. (1932) Mad 661. (2) A.I.R. (34) (1947) (P.C.) 192

undivided father of defendants 1, 2 and 4 and husband of 3rd defendant to plaintiff for Rs. 952 payable with the current rate of interest prevailing in Rangoon. Payments of Rs. 101 and Rs. 200 were made on 4th July 1939 and 1st April 1941 respectively."

In other words, it was a suit for the payment of monies deposited with the respondents. And the learned 3rd Judge of the City Civil Court who dealt with the plaintiff-appellant's suit was of the opinion that the claim was time-barred and that the learned Subordinate Judge of Sivaganga erred in granting the decree which he did. According to him, the two payments of Rs. 101 and Rs. 200 on 4th July 1939 and 1st April 1941 respectively were presumably made in response to demands and hence the period of limitation would begin to run from the last date, *viz.*, 1st April 1941 and as the suit was filed in 1946 only the claim was time-barred. It is impossible to say whether the learned Subordinate Judge of Sivaganga did in fact consider the question of limitation before pronouncing judgment. To add to the difficulties the parties also failed to lead evidence on this point in the trial Court. Then again, it is not clear whether the Indian Limitation Act was applied by the learned Subordinate Judge of Sivaganga. If the Indian Limitation Act was applicable then this Act is the same as the Limitation Act in force in Burma. According to section 3 of the Limitation Act "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." The fact that the suit was decreed by the Subordinate Judge of Sivaganga goes to show perhaps that there was no question of the plaintiff-appellant's claim being time-barred.

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U SAN MAUNG, J.

Now, it is common ground that article 60 of the Limitation Act is applicable to the claim in question and hence the whole matter hinges on whether there was any demand by the plaintiff-appellant for the payment of the monies lying in deposit. The learned 3rd Judge of the City Civil Court has presumed that these payments were made on demands. But it does not necessarily follow that all payments against deposits are the results of demands by the depositor. In the present case, the parties were apparently on friendly terms and there was mutual trust between them. It might well be that the payments were according to some previous arrangements arrived at between the parties. Had it been otherwise, the respondents would no doubt have pleaded it before the Subordinate Judge of Sivaganga and pleaded that the claim was time-barred. The fact that they failed to set up any such defence or to put in an appearance would go to show that there was no demand for the payments. If there was no demand then the plaintiff-appellant's claim was well within time. For the above reasons we regret that we are unable to agree with the learned 3rd Judge of the City Civil Court that the decree of the "foreign Court" was in respect of a time-barred debt.

There is yet another aspect to this case. Section 13 of the Civil Procedure Code lays down that "a foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties," except under certain specified circumstances. Assuming for the sake of argument that the plaintiff-appellant's claim was time-barred, the learned Counsel for the respondents has argued that the foreign Court's decree is "a claim founded on a breach of a law in force in Burma." It is difficult to appreciate this argument as a claim to recover monies in deposit

is hardly an illegal claim. Had the suit been one for the recovery of a gambling debt or in respect of an immoral contract then clearly such a claim would be "founded on a breach of a law in force in the Union of Burma". In *Ganga Prasad and another* v. *Ganesh Lal and others* (1) it was laid down by a Bench of the Allahabad High Court that where a foreign Court merely applies its own law of Limitation in respect of a matter before it that Court cannot be said to have refused to recognise the law of India simply because the law of Limitation may be different in the two countries. The learned Counsel for the respondents has submitted that if the learned Subordinate Judge of Sivaganga had held that the plaintiff-appellant's claim was not time-barred according to the law of Limitation applicable in Sivaganga, he would be precluded from questioning the decree of that Court. He goes on to say that since this question was not touched upon by a foreign Court it was open to him to raise the matter in the City Civil Court. As pointed out earlier the question of Limitation was presumably considered by the foreign Court before the suit was decreed and hence the respondents cannot be permitted to question the decree of that Court. In this connection the following observations at page 121 of the above-mentioned ruling are most apposite :—

> "The general rule is that a court which entertains a suit on a foreign judgment cannot institute an enquiry into the merits of the original action, or the propriety of the decision, ... "

Accordingly this appeal will be allowed with costs. The judgment and decree of the City Civil Court are set aside and there will be a decree for the plaintiff-appellant as prayed for.

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(1) 56 All. 119.

APPELLATE CIVIL.

Before U On Pe and U San Maung, JJ.

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Oct. 10.

EPHRAIN SOLOMON (APPELLANT)

v.

C. AH FOUNG AND ANOTHER (RESPONDENTS). *

Mesne profits—Meaning of—Whether it includes interest—S. 2 (12) of the Code of Civil Procedure—Grant of interest.

Held : That in view of the definition of mesne profits in s. 2 (12) of the Code of Civil Procedure it is clear mesne profits mean not only those profits which a person in wrongful possession of the property actually received or might with due diligence have received but also interest on such profits.

When a preliminary decree grants mesne profits to the plaintiff it is not open to the Court at a later stage of the proceedings to say that the plaintiff is not entitled to any interest on the profits which the person in wrongful possession of the property actually received or might with ordinary diligence have received therefrom.

V. C. K. P. Menon v. *V. C. K. R. Menon*, 54 Mad. 955 (F.B.) at 960-961, followed.

Kyaw Din for the appellant.

Ze Ya for the respondents.

The judgment of the Bench was delivered by

U SAN MAUNG, J.—In Civil Regular Suit No. 302 of 1947 of the Original Side of this Court the plaintiff-appellant Ephrain Solomon, who sued the defendant-respondents C. Ah Foung, Chin Hone On and two others for possession of the premises in suit and for mesne profits for the use and occupation of the said premises as from the 1st of August 1947 to the 30th of November 1947 reserving to himself the right to sue for future mesne profits, was granted a

* Civil 1st Appeal No. 80 of 1950 against the order of this Court on the Original Side in Civil Regular No. 302 of 1947, dated 23rd November 1950.

preliminary decree dated the 5th of March 1949 by the then Hon'ble Judge sitting on the Original Side (U Bo Gyi J.), in these terms :

" Suit for possession of immoveable properties mentioned in paragraph 1 of the plaint and for recovery of Rs. 2,000 due as compensation or mesne profits for use and occupation of the said properties by the defendants from 1st August 1947 to 30th November 1947 at the rate of Rs. 500 per month ; the plaintiff reserving his rights to sue for compensation or mesne profits which may be due in future in respect of the said properties.

For the purpose of jurisdiction the suit is valued at Rs. 47,000 and for Court-fees the suit is valued at Rs. 45,000 being the market-value of the properties as per certificate of valuation annexed to the plaint and at Rs. 2,000 for compensation or mesne profits.

This cause coming on the 22nd, 23rd and 24th days of February, 1949, and the 2nd day of March, 1949, for hearing and disposal before the Hon'ble Justice U Bo Gyi, one of the Judges of the High Court, Rangoon, in the presence of Mr. V. S. Venkatram with Mr. M. Ahmed, Advocates for the plaintiff, U Zeya, Advocate for the 1st and 3rd defendants and Mr. C. A. Soorma, Advocate for the 2nd defendant and there being no appearance by or on behalf of the 4th defendant and this day for delivery of judgment ;

It is Held : That the plaintiff is entitled to mesne profits as claimed as regards the 7th issue set out hereunder and it is ordered that the said issue be remitted to the Official Referee for enquiry and report together with his findings thereon and reasons thereof.

It is further Ordered : That the suit do stand adjourned for making a final decree until the Official Referee has filed his report.

7th Issue

Is the plaintiff entitled to mesne profits and, if so, what is the amount and against whom ? "

The decree was confirmed by an Appellate Bench of this Court in Civil 1st Appeal No. 19 of 1949, the appellants in the case being the respondents

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U SAN MAUNG, J.

C. Ah Foung and Chin Hone On. Thereafter by an order dated the 19th of June 1950, a Commissioner was appointed for the purpose of taking accounts in respect of the mesne profits to which the plaintiff was entitled under the preliminary decree passed in his favour on the 5th of March 1949. The Commissioner (U Tin Toon) reported that the plaintiff was entitled to mesne profits for a period of 28 months from the date of the institution of his suit, namely, the 17th of December 1947, at the rate of Rs. 500 per mensem with interests thereon calculated month by month at the Court rate of 9 per cent per mensem and that the total mesne profits to which he was entitled was Rs. 14,000 *plus* Rs. 1,488-Rs. 15,488. When the matter came up again before the Original Side of this Court, the Hon'ble Judge (U Aung Tha Gyaw J.,) ordered that there should be a final decree for the payment of mesne profits to the extent of Rs. 16,000 consisting of Rs. 2,000 specifically claimed in the plaint and Rs. 14,000 for the period of 28 months commencing from the 17th of December 1947 at the rate of Rs. 500 per mensem. The interest recommended by the learned Commissioner was disallowed. No mesne profit was given for part of the month of December prior to the institution of the suit.

Both the learned Commissioner, to whom the matter regarding mesne profits was referred, and U Aung Tha Gyaw J., seem to have overlooked the fact that in the preliminary decree granted to the plaintiff-appellant Ephrain Solomon it was mentioned that the plaintiff was entitled to mesne profits as claimed ; and the mesne profit claimed was merely for the period lst of August 1947 till the 30th of November 1947, the right to sue for future mesne profits being reserved. However, since the respondents have not filed a cross-appeal in regard to the grant of

mesne profits to the plaintiff- appellant for the period of 28 months commencing from the 17th of December 1947,the matter does not need any further consideration.

This appeal is by the plaintiff Ephrain Solomon against the order of U Aung Tha Gyaw J., disallowing interest and mesne profits for the period 1st of December 1947 till the 16th of December 1947. As regards interest it is clear that the learned Judge on the Original Side was wrong in not allowing any interest to the plaintiff. From the definition of mesne profits given in section 2 (12) of the Civil Procedure Code, it is clear that mesne profits means not only those profits which the person in wrongful possession of property actually received or might with ordinary diligence have received therefrom, but also interest on such profits. Therefore, when the preliminary decree, dated the 5th of March 1939 mentions, as it does, that the plaintiff is entitled to mesne profits, it is not open to the Court at a later stage of the proceedings to say that the plaintiff is not entitled to any interest on the profits which the person in wrongful possession of property actually received or might with ordinary diligence have received therefrom. It is no doubt true that the Court which has still seizin of the case can decide the quantum of mesne profits which the plaintiff should receive, and this includes the amount of interest properly payable to him. Therefore when the Commissioner recommends that a certain sum of money should be included in the mesne profits as interest, it is within the jurisdiction of the Court to reduce the amount to a sum lower than that recommended by the Commissioner, or to enhance the amount to a sum greater than that recommended by the Commissioner. It is not open to the Court totally to disallow any interest given at that stage. In this connection we are entirely in agreement with the

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observations of Anantakrishna Ayyar J., in the case of *V.C.K.P. Menon* v. *V.C.K.R. Menon* (1). There the learned Judge observed :

" According to the definition of the expression 'mesne profits,' contained in section 2 (12) of the Code of Civil Procedure,— 'Mesne profits of property' means 'those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom together with interest on such profits.' The result is that, though the first decree (which would be a *final* decree so far as the delivery of the property is concerned, but only a *preliminary* decree in so far as it directed an inquiry as to the mesne profits,—past or future—) be a decree for 'mesne profits' merely, yet, having regard to the definition of the term 'mesne profits' mentioned above, the Court which inquires into the amount of mesne profits should award to the successful plaintiff not only the profits which the defendant in wrongful possession actually received or might with ordinary diligence have received from the property during the period in question, but also award 'interest' on such profits. No separate, or specific direction in the first decree as regards the award of interest is necessary to enable the Court when inquiring into the amount of mesne profits to pass a decree for interest also on the said amounts of profits, under Order 20, Rule 12 (2), Code of Civil Procedure. The questions,—whether mesne profits should be awarded or not, and if so, the period for which the same should be awarded,—are questions to be decided by the Court which passes the first decree under Order 20, Rule 12 (1), Code of Civil Procedure. 'Mesne profits' are in the nature of damages which such Court may mould, according to the justice of the case. It may, having regard to the circumstances, decline to award any mesne profits at all; or limit the period for which such profits are to be awarded; or give specific directions as to how the same should be calculated having regard to the special circumstances of the case. Similarly such Court has jurisdiction to direct that no interest at all be awarded to the plaintiff, or to fix the rate of interest in the circumstances. All these are open to the Court which passes the first decree under Order 20, Rule 12 (1). But, if that Court simply passes a decree for

(1) 54 Mad. 955 (F.B.) at 960-961.

'mesne profits' for a particular period, then it is no more open to the Court inquiring into the matter under Rule 12(2), either to refuse mesne profits at all, or to limit the period for which profits should be decreed, or to decline to award any interest at all,—though it is open to it to fix the amount of such profits and also to fix the rate of interest."

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For these reasons we would allow the appeal in so far as it relates to interest and direct that interest as calculated month by month be given at the rate of 3 per cent per annum. The amount of interest so payable will be one-third of that recommended by the learned Commissioner, *viz.*, one-third of Rs. 1,488-Rs. 496.

As regards mesne profit for the period 1st of December 1947 till the 17th of December 1947, the appeal is dismissed for the reason which we have already given above, namely, that in the plaint the plaintiff has specifically stated that he would reserve his right to sue for mesne profits for the future period, namely, that commencing from the 1st of December 1947. No such suit has been filed.

In the result the appeal succeeds in part. The amount of mesne profits awarded to the plaintiff-appellant will be increased by a sum of Rs. 496 as calculated above. Each party must bear its own costs of this appeal.

CIVIL REVISION.

Before U On Pe and U San Maung, JJ.

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Oct. 12.

MAUNG THEIN (APPELLANT)

v.

DAW HTWE AND OTHERS (RESPONDENTS).*

Administration suit—Addition of person in possession as party—Necessary parties in administration suit—Whether a suit should be dismissed against an unnecessary party or he should be struck off—Code of Civil Procedure, Order 1, Rule 10.

Held: That 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. A person outside the family cannot be joined as a party although he may be in possession of a part of the estate; the proper course then is for the representatives of the estates to file a separate suit for the recovery of such properties.

In the case of Burmese Buddhist administration suit should be filed when division or inheritance is claimed from another heir.

When a person who is not a necessary party in the administration suit, is added, he should be struck off from the suit under Order 1, Rule 10 of the Code of Civil Procedure and suit should not be dismissed as against him and the defendant struck off should not be granted *ad valorem* costs.

Ah Kyan Sin and one v. *Yeo Ah Gwan and others*, A.I.R. (1937) Ran. 497; *Ma Thin On and others* v. *Ma Ngwe Hmon and others*, A.I.R. (1936) Ran. 13; *Maung Ba Tu* v. *Ma Thet Su and others*, 5 Ran. 785, followed.

Sher Ali v. *Jagmohan Ran and another*, 53 All. 466; *Ramji Pandey* v. *Alaf Khan*, 3 Pat. 859, distinguished.

Hla Gyaw for the appellant.

Ba Han for the respondents.

The judgment of the Bench was delivered by

U SAN MAUNG, J.—In Civil Regular Suit No. 4 of 1950 of the Court of the Assistant Judge, Myingyan, the plaintiff-appellant Maung Thein, in suing Daw Htwe and Daw Aye Tin, two wives of the deceased,

* Civil Revision No. 74 of 1951 against Civil Regular Suit No. 4 of 1950 of the Assistant Judge's Court of Myingyan, dated the 19th August 1950.

U Belu, for the administration of the estate of the deceased also joined as co-defendant the second respondent Ulingan (*alias*) Pulingan, a clerk of U Belu, who after the death of his employer, married his chief wife Daw Htwe. The plaintiff claimed, as the adopted son of U Belu and Daw Htwe, he was an heir to U Belu's estate. Ulingan was joined as party defendant on the ground that some of the properties comprising the estate was in his possession. Of the two preliminary objections raised by the defendant-respondent Ulingan, one was that he should not be added as a party defendant in an administration suit as he was a person outside the family. This preliminary objection was sustained and the learned trial Judge ordered that the suit as against the defendant-respondent Ulingan be dismissed with costs. In this appeal against the order dismissing the suit so far as Ulingan was concerned, it is contended that the learned Assistant Judge, Myingyan, had erred in ignoring the fact that Ulingan had not only married Daw Htwe, the widow of U Belu, but that he was in actual possession of the properties belonging to the estate now sought to be administered and that in any event, the learned Judge had erred in awarding *ad valorem* cost to this respondent, in view of the fact that the suit in so far as this respondent is concerned, was disposed of upon a preliminary point. In course of the argument before us, a preliminary objection was raised by the learned Advocate for the second defendant regarding the maintainability of this appeal. The learned Advocate has urged that the so-called dismissal of the suit in so far as the respondent Ulingan is concerned, is really an order striking out his name under Order 1, Rule 10, of the Civil Procedure Code and as such, not subject to appeal. In our opinion, this contention must be allowed to prevail. Although

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the order was wrongly worded, its real effect was to have the name of defendant-respondent Ulingan struck off from the array of defendants as having been improperly joined as a party defendant. This order is substantially correct, as a suit for administration is really a suit for accounts as between the members of the family of the deceased person and as such, a person outside the family, cannot be joined as a party although he may be in possession of a part of the estate. The proper course is for the representative of the estate to file a separate suit for the recovery of such property. See *Ah Kyan Sin and another* v. *Yeo Ah Gwan and others* (1), in which the ruling in the case of *Ma Thin On and others* v. *Ma Ngwe Hmon and others* (2) was relied upon. *See* also *Maung Ba Tu* v. *Ma Thet Su and three others* (3), where it was held that the proper suit which a Burman Buddhist should file to obtain a division of inheritance from the other members of the family, is a suit for the administration of the estate of the deceased. There is no doubt authority for the proposition that where the name of a defendant has been struck off on the ground that the plaint does not disclose any cause of action against him the order operates as a decree and is appealable as such. In the case of *Sher Ali* v. *Jagmohan Ran and another* (4) which was a suit for damages for malicious prosecution against two defendants and the Court after considering the pleadings was of the opinion that the plaint did not disclose any cause of action against the second defendant and ordered that the name of the second defendant be struck off, it was held that a cause of action against the defendant having been specifically pleaded and a relief claimed against him, the order directing the removal of his name from the array of parties is in

(1) A.I.R. (1937) Ran. p. 497.
(2) A.I.R. (1936) Ran. p. 13.
(3) 5 Ran p. 785.
(4) 53 All. p. 466.

substance a decree and appealable as such. However, *Sher Ali*'s case (1) is not only distinguishable from the present but the observations of the learned Judges who decided it are not inapposite. The learned Judges observed :

"Where the plaintiff had impleaded a person merely upon the ground of convenience and the plaint discloses no cause of action against him and the plaintiff has claimed no relief against him, the order of the Court directing the removal of the name of such a defendant does not operate as a decree, for, it has not the effect of an adjudication, and the integrity of the original claim remains unbroken."

As already observed above, in an administration suit there is no cause of action as against a person who is a stranger to the family. The defendant-respondent Ulingan was merely joined because it was convenient to do so and the removal of his name from the array of defendants did not therefore have the effect of an adjudication, the integrity of the original claim namely that the plaintiff-appellant is the heir of U Belu's estate remaining unbroken.

The case of *Ramji Pandey* v. *Alaf Khan* (2) cited by the learned Advocate for the appellant is also distinguishable on the facts.

In the result the appeal fails. However, as it was highly improper for the learned trial Judge to have awarded *ad valorem* cost to the defendant-respondent, Ulingan, as if the suit as against him could be properly dismissed on the merits, we would treat the appeal as an application for revision. The order of the Assistant Judge, will be varied by substituting the following for the sentence "in the result the suit against the defendant Ulingan (*alias*) Pulingan will be dismissed with costs":—"in the result the preliminary objection

(1) 53 All. p. 466. (2) 3 Pat. p. 859.

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of the defendant Ulingan (*alias*) Pulingan is sustained. His name will be struck off from the array of defendants. He will also be awarded three gold mohurs namely Rs. 51 as his costs."

Let each party bear its own cost in this Court.

APPELLATE JURISDICTION.

Before U San Maung and U Thaung Sein, JJ.

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Oct. 26.

ADAMJEE HAJEE DAWOOD & Co. LTD. (APPELLANT)

v.

THE COLLECTOR OF RANGOON (RESPONDENT).*

Land Acquisition Act—Ss. 4, 5-A, 6, 9 and 11—Power of the Collector to release lands—S. 23 (1)—Meaning of the word "market-value"—When to be computed—Principle on which appeals are allowed.

Held : In view of the clear wordings of ss. 4, 5-A, 6, 9 and 11 of the Land Acquisition Act neither the Collector nor the Judge sitting on the Original Side was competent, to reduce or limit or over-ride the decision of the Government as to the necessity or otherwise of acquisition of any portion of land. The Collector's duty is confined to marking out the boundaries and Collector and Court are authorized to decide only the quantum of compensation payable to the owner for land taken over by Government but neither can release any portion of the land acquired.

Market-value of a land is the price that an owner willing and not obliged to sell might reasonably expect to obtain from a willing purchaser with whom he was bargaining for sale and purchase of the land, and such value should be the value at the time of the declaration under s. 4 of the Land Acquisition Act. Potential value of the land acquired should be taken into consideration in assessing market-value. The Collector should generally visit the land personally before fixing the market value.

In appeals involving the question of valuation in land acquisition cases, the decree complained of will not be interfered with unless some erroneous principle has been invoked or some piece of evidence over-looked or has been misapplied.

Re. an Arbitration between Lucas and the Chesterfield Gas and Water Board, (1909) 1 K.B. 16 at 29-30 ; *Cedars Rapids Manufacturing & Power Co.* v. *Lacoste*, (1914) A.C. 569 ; *Fraser and others* v. *City of Fraserville*, (1917) A.C. 187 ; *Swift & Co.* v. *Board of Trade*, (1925) A.C. 520 ; *Reddiar and San Chein* v. *Secretary of State for India in Council and the Special Collector of Rangoon*, I.L.R. 5 Ran. 799 ; *Premchand Burral and another* v. *The Collector of Calcutta*, I.L.R. 2 Cal. 103 ; *R. B. Lalal Narsingh Das* v. *Secretary of State for India*, (1925) A.I.R. (P.C.) 91 ; *Ma Sein and others* v. *Collector of Rangoon*, I.L.R. 7 Ran. 227 ; *Government of Bombay* v. *Merwan Mondigar*

* Civil 1st Appeal No. 57 of 1949 against the decree of the Original Side, High Court in Civil Regular No. 144 of 1949, dated 12th August 1949.

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Aga, I.L.R. 48 Bom. 190 ; *Pribhu Diyal* v. *Secretary of State*, (1931) A.I.R. Lah. 364 ; *Maung Bow Khin* v *Special Collector, Maubin*, (1935) A.I.R. Ran. 157 ; *Sri Raja Vyricherla Narayana Gajapatiraju Bahadur Garu* v. *The Revenue Divisional Officer, Vizagapatam*, (1939) I.L.R. Mad. 532 at 548 ; *Mohini Mohan Banerjee and others* v. *The Secretary of State*, (1921) A.I.R. Cal. 193 ; *The Collector* v. *The Manager, Kurla Estate*, (1926) A.I.R. Bom. 223 ; *Maung Po Ni and one* v. *Ma Shwe Kyi and others*, I.L.R. 2 Ran. 397 ; *Kanlo Prashad Hazari* v. *Jagat Chandra Dutta and others*. I.L.R. 23 Cal 335 ; *Atmaram Bhagwant Ghadgay* v. *Collector of Nagpur*, (1929) A.I.R. (P.C.) 92, referred to and followed.

C. A. Soorma for the appellant.

Tin Maung for the respondent.

U THAUNG SEIN, J.—The appellants (Messrs. Adamjee Hajee Dawood & Co. Ltd.), are a well-known firm of match manufacturers whose factory is situated in Pazundaung Quarter of Rangoon Town. Certain lands belonging to the appellants and lying outside and contiguous to their factory premises have been acquired by the Government at the instance of the Rangoon Development Trust for the setting up of a residential quarter for the labourers and employees of the various mills and factories situated in and around that area. The Collector of Rangoon, who was in charge of the land acquisition proceedings, awarded compensation at the rate of Rs. 2,000 per acre in respect of the 13½ acres of land which were taken over. The appellants were naturally dissatisfied with this rate as they had originally claimed no less than Rs. 14,000 per acre. There was a further complaint against the award on the following grounds.

The appellants' factory is situated at some distance from the Pazundaung Creek which is the only source of supply of matchwood to the factory. It appears that the wood in question is floated down from the forests of Upper Burma in rafts and later broken up into single logs in the Pazundaung Creek. From thence the logs

are floated into the factory along a small waterway which links the factory with Pazundaung Creek. This waterway flows through the land which has since been acquired by the Government and the appellants are thus anxious to retain a narrow strip, 20-feet wide on each bank to enable them erect watchmen's huts for the protection of the logs while in transit from the Pazundaung Creek to the factory. Unfortunately for them the Collector of Rangoon refused to accede to their request with the result that the award was not accepted and the whole matter was referred to the Original Side of the High Court under section 18 of the Land Acquisition Act. The reference was dealt with by U Aung Tha Gyaw J., who after exhaustive enquiry raised the rate of compensation from Rs. 2,000 to Rs. 3,000 per acre in respect of a portion of the land measuring about 6·75 acres, and accepted the Collector's valuation as regards the remainder of the land. But the prayer of the appellants for the exclusion of a 20-feet strip on either bank of the waterway, referred to above, was rejected once again.

On appeal it has been urged on behalf of the appellants that the rate sanctioned by U Aung Tha Gyaw J., is far too low and that a 20-feet strip of land along the small waterway is vital to the appellants for the maintenance of a regular supply of matchwood to the factory. So far as this strip of land is concerned, a great deal of argument was led both on the Original Side and before us. But in view of the clear wording of sections 4, 5-A, 6, 9 and 11 of the Land Acquisition Act, neither the Collector of Rangoon nor the learned Judge sitting on the Original Side was competent to limit the extent of the land already acquired by the Government.

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In this connection the various steps in a land acquisition proceedings may be of interest. In the first place, before any land is sought to be acquired there must be a notification under section 4 of the Land Acquisition Act signifying the Government's intention to acquire the land for a public purpose. After the issue of this notification any persons interested in the land notified are at liberty to raise objections to the acquisition before the Collector. On receipt of the objections, if any, the Collector is required to submit the proceedings to the Government with his recommendations thereon, *vide* section 5-A of the Land Acquisition Act. It is clearly laid down in this section that "the decision of the Government on the objections shall be final." After considering the objections and recommendations the Government issues a declaration under section 6 of the Act to the effect that the particular land mentioned therein is required for a public purpose. According to this section, "the said declaration shall be conclusive evidence that the land is needed for a public purpose." The proceedings are then returned to the Collector for action in accordance with section 9 of the Act, that is to say, a notice is issued stating that the Government intends to take possession of the land and that claims for compensation in respect of it should be filed before the Collector. If any objections are filed by interested persons in response to this notice the Collector is expected to go into them and finally pronounce an award setting out "(i) the true area of the land; (ii) the compensation which in his opinion should be allowed for the land; and (iii) the apportionment of the said compensation among all the persons known or believed to be interested in the land, of whom, or of whose claims, he has information whether or not they have respectively appeared before him." Immediately after the award "the land vests absolutely

in the Government," and the Collector may proceed to take possession of it.

There is nothing in any of the above provisions to suggest that the Collector is empowered to alter or reduce the extent or limit of the land which has been declared by the Government under section 6 of the Land Acquisition Act to be required for a public purpose. His main duty, after the issue of the notification or declaration is to demarcate the actual boundaries on the land itself and the only objections which may be raised by interested persons is as to the delimitation of that boundary and the exact amount of compensation payable for the acquisition. For instance, it might well happen that in marking out the boundaries the Collector may make a mistake and include lands which are not mentioned in the declaration under section 6. In such a case the owner of the land affected could no doubt point out the error to the Collector and ask him to peg out the correct boundaries. Beyond this they cannot go as section 6 of the Land Acquisition Act is emphatic that the declaration issued "shall be conclusive." If it were permissible for land owners to object to the inclusion of their lands in the acquisition even after the issue of the declaration under section 6, then indeed it would be the Collector or the Court to which a reference may be made under section 18 of the Land Acquisition Act, and not the Government, which would finally decide whether any particular land should be acquired or not. In other words, the Collector or the Court concerned could in effect over-rule the decision of the Government as to the necessity or otherwise of the acquisition. No such power is conferred by the Land Acquisition Act either on the Collector or the Court concerned and all that these authorities are competent to

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do is to decide the quantum of compensation payable to the owner of the land taken over by Government.

The above provisions apparently escaped the notice of U Aung Tha Gyaw J., and the learned counsel (Mr. Soorma) for the appellants during the hearing on the Original Side. When the attention of the learned counsel was drawn to the provisions in question he frankly conceded that his only remedy lay with the Government and that he would seek his relief in appropriate quarters after the conclusion of the present appeal.

The only question remaining for decision in this appeal therefore is as to the adequacy or otherwise of the compensation sanctioned by U Aung Tha Gyaw J. For this purpose a short history of the circumstances leading up to the acquisition proceedings should be borne in mind. The appellants' factory was established as long ago as in 1924 on an extensive plot of land which stretched as far as the Pazundaung Creek. Some years later in 1937 the Rangoon Development Trust, which is entrusted with the task of improving the lay out of the City of Rangoon, decided to link the Upper Pazundaung Road which ran past the factory from the direction of Rangoon City with Kyaikkasan Road which came from Kyaikkasan. This new link road was designed to cut across the appellants' land and for this purpose an area of about 8 acres of the appellants' land was required. Instead of acquiring the 8 acres, the Rangoon Development Trust arrived at an amicable agreement with the appellants whereby the latter received from the former 13½ acres of land in exchange for the roadway. The new link road was then constructed and named Masjid Road. As a result of this roadway the appellants were practically cut off from the river frontage on

Pazundaung Creek as only a small strip remained between the Creek and the road. This strip was worthless for industrial or other purposes owing to the smallness of its size and the danger from tidal erosion. This can be appreciated by reference to the maps filed as Exhibits N and 3 in the trial record. The narrow strip referred to is indicated north of the Masjid Road in those maps. The appellants were, however, able to maintain access with the Pazundaung Creek by means of a small waterway which ran from the Pazundaung Creek to the factory. This waterway had of course to pass under the Masjid Road and across the appellants' lands.

The lands which the appellants received in exchange for the construction of the Masjid Road have now been acquired by the Government and form the subject-matter of the present appeal. It appears that these lands have been lying vacant ever since they came into the possession of the appellants. That they would be acquired by the Rangoon Development Trust in due course was perhaps a foregone conclusion from 1937 onwards. In that year the Rangoon Development Trust established what is known as a "Busti" area not far from the appellants' factory to relieve the acute shortage of housing accommodation in Rangoon Town especially among the labouring classes. The "Busti" area is about 800 feet away from the appellants' lands and is separated from it by a railway line. This area was acquired at a cost of Rs. 2,000 per acre and the Collector of Rangoon adopted the same rate as compensation to the appellants in respect of the lands taken over from them.

The appellants have attacked the award by U Aung Tha Gyaw J., on three main grounds based on the

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first, third and fourth clauses of section 23 (*1*) of the Land Acquisition Act, which read as follows :

"23. (*1*) In determining the amount of compensation to be awarded for land acquired under this Act, the Court shall take into consideration—

first, the market-value of the land at the date of the publication of the notification, under section 4, sub-section (*1*) ;

secondly, * * * *

thirdly, the damage (if any) sustained by the person interested at the time of the Collector's taking possession of the land, by reason of severing such land from his other land ;

fourthly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, moveable or immoveable, in any other manner, or his earnings ;

* * * * ."

It has been urged by the learned counsel for the appellants that the rate fixed by U Aung Tha Gyaw J., is not in fact a true "market-value" of the land especially as the potential value of the land in question as an industrial site has been left out of account. Further, it was contended that as a result of the acquisition the appellants have lost a valuable site for the erection of barracks for their labourers. It appears that under the latest amendment to the Factory Act the appellants, in common with other factory owners, are bound to provide quarters for their labourers or pay house allowance in lieu thereof. All hopes of providing quarters for the labourers have now vanished and the appellants are thus saddled with the payment of house allowance to their labourers.

Now, there are certain recognized methods by which the "market-value" should be determined in land acquisition proceedings and these are set out at

pages 187-188 of Om Prakash Aggarawala's book entitled "Compulsory Acquisition of Land," 1950, Third Edition, in the following terms :—

"Market-value cannot be calculated with mathematical precision. A certain amount of conjecture is inevitable but court should be careful not to go too far in this direction. Averages are often a fallacious test in awarding compensation. Certain methods of valuation have, however, been recognized, by the various judicial decisions, and will be noted below.

The methods of valuation of land acquired under this Act may be classified under three heads : (1) the price paid, within a reasonable time, in *bonâ fide* transactions of purchase of the lands acquired, or of the lands adjacent to the land acquired and possessing similar advantages ; (3) a number of years' purchase of the actual, or immediately prospective, profit from the lands acquired ; (3) the opinion of valuators or experts."

This statement is based on a large number of rulings which have been discussed in detail in the book. In *In Re. an Arbitration between Lucas and the Chesterfield Gas and Water Board* (1), Fletcher Moulton L.J., laid down as follows :

"The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent, *i.e.*, that which they were worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognized as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers. The owner is only to receive compensation based upon the market-value of his lands as they stood before the scheme was authorized by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him."

(1) (1909) 1 K.B 16 at 29-30.

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These principles were reaffirmed in *Cedars Rapids Manufacturing & Power Co.* v. *Lacoste* (1); *Fraser and others* v. *City of Fraserville* (2); and *Swift & Company* v. *Board of Trade* (3). These are no doubt English cases, but in *Reddiar and San Chein* v. *Secretary of State for India in Council and the Special Collector of Rangoon* (4), which referred to *Fraser and others* v. *City of Fraserville* (2), a Bench of the High Court of Judicature at Rangoon stated :

> " That there is no difference between the English and Indian principle of determining compensation to be awarded for land compulsorily acquired. The Court takes into consideration the market-value of the land which is the price that an owner willing and not obliged to sell might reasonably expect to obtain from a willing purchaser with whom he was bargaining for the sale and purchase of the land."

Coming to Indian cases, there is *Premchand Burral and another* v. *The Collector of Calcutta* (5), according to which the market-value for purposes of compensation in land acquisition proceedings is the "current price of similar property in the neighbourhood" at the time of the acquisition. The same view is to be found in *R. B. Lalal Narsingh Das* v. *Secretary of State for India* (6), and *Ma Sein and others* v. *Collector of Rangoon* (7), which lays down that the market-value means the value at the time of the declaration under section 4 of the Land Acquisition Act. The meaning of the term "market-value" has also been defined in *Government of Bombay* v. *Merwan Mondigar Aga* (8), as follows :

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(1) (1914) A.C. 569.
(2) (1917) A.C. 187.
(3) (1925) A.C. 520.
(4) I.L.R. 5 Ran. 799.
(5) I.L.R. 2 Cal. 103.
(6) (1925) A.I R. (P.C.) 91.
(7) I.L.R. 7 Ran. 227.
(8) I.L.R. 48 Bom. 190.

"The expression 'market-value', as used in section 23 of the Land Acquisition Act (I of 1894) means the value which a parcel of land would realise if sold in the market. The seller must be a willing seller; a forced sale affords no criterion of market-value. The purchaser also must be a willing purchaser, and further, he must be a prudent purchaser, that is, one who makes his offer after making necessary inquiries as to the value of the lands; an offer made by one who knows nothing of the value of the land in the locality and who makes no inquiries about it, affords no test of market-value. The market-value is the value that can be realised on a sale in the open market. The market may be dull or brisk. But whether it be dull or brisk it cannot be excluded from consideration."

That the "potential value" of the land acquired should be taken into consideration in assessing its value is further explained in *Pribhu Diyal* v. *Secretary of State* (1); *Maung Bow Khin* v. *Special Collector, Maubin* (2); which refers to *Premchand Burral and another* v. *The Collector of Calcutta* (3); and *Sri Raja Vyricherla Narayana Gajapatiraju Bahadur Garu* v. *The Revenue Divisional Officer, Vizagapatam* (4). The last case is of some interest especially with reference to the following passage (at page 548):—

"The truth of the matter is that the value of the potentiality must be ascertained by the arbitrator on such materials as are available to him and without indulging in feats of the imagination."

If a fairly exhaustive analysis of both the English and Indian laws on the subject of compensation in land acquisition proceedings is desired, then reference may be made to *Mohini Mohan Banerjee and others* v. *The Secretary of State* (5).

Applying the principles enunciated above to the present case, the problem is to fix the market-value of

(1) (1931) A.I.R. Lah. 364.
(2) (1935) A.I.R. Ran. 157.
(3) I.L.R. 2 Cal. 103.
(4) (1939) I.L.R. Mad. 532 at 548.
(5) (1921) A.I.R. Cal. 193.

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the appellants' lands which have been acquired by the Government. As the declaration under section 4 of the Land Acquisition Act in respect of these lands was issued in November 1941, the market-value means the value at or about that time. Before proceeding further, we regret to note that the Collector of Rangoon entirely overlooked Direction 39 at page 47 of the Burma Land Acquisition Manual which casts a duty on him of inspecting the land personally before fixing the market-value. The importance of this personal inspection has been stressed in *The Collector* v. *The Manager, Kurla Estate* (1), in the following terms :—

> " In cases of compensation the Court has to consider what a willing purchaser would give for the land on or about the date of the notification for acquisition. The Judges while ascertaining the value of compulsorily acquired lands should consider, when they have worked out the figures according to their calculations from the evidence, how that result would compare with the opinion which they are entitled to form from their own inspection of the land."

A fairly good guide in estimating the market-value is to compare the price fetched by sale of similar lands in the locality about the time of the acquisition. Unfortunately there were no such sales in and around the area of the appellants' lands at or about November 1941 and the only evidence of sales are those which took place some 10 years or so previously as per Exhibits H, L and M. Then again, the sales mentioned therein were of lands situated on the Pazundaung Creek itself and which were thus entirely suited for industrial purposes, *e.g.*, erection of rice mills, timber mills, etc. The appellants' lands, on the other hand, have no proper frontage on the Pazundaung Creek as a result of the Masjid Road. No doubt a small strip remained between the Pazundaung Creek and the road after the

(1) (1926) A.I.R. Bom. 223.

construction of the roadway, but this strip is far too narrow to be of any real industrial value. At present the only use to which this land has been put is by some squatters who have built small huts on it. Hence the sales in Exhibits H, L and M were by no means a useful guide in the fixation of the market-value of the appellants' lands.

The appellants also cited an instance of the sale of a certain piece of land in the vicinity of the lands in question after the acquisition proceedings. Exhibit Q is a true copy of a sale deed whereby the Tyan Moh Oil Company which adjoins the appellants' factory, was sold to the Henzada Rice Corporation Limited for a sum of Rs. 90,000. This sale took place on the 15th October 1948, that is to say, seven years after the declaration under section 4 of the Land Acquisition Act. Apart from this, the sale was in respect of an oil mill whereas the land acquired from the appellants is a vacant plot. Obviously this sale is of no real assistance in fixing the market-value of the appellants' land.

The appellants appeared to have realized the difficulty of relying on the sales mentioned above and accordingly called in the evidence of several alleged expert land valuers in the persons of Mr. M. Minus (PW 2), Mr. V. C. French (PW 3), and Mr. T. A. Florey (PW 4). The learned trial Judge who saw and heard these witnesses was not very impressed with their evidence. So far as Mr. Minus was concerned, though he is employed as an Assessor by Balthazar & Son, Ltd., he confessed that he was not an expert in land valuation in the following terms :—

"*Q.* Do you pose as an expert in assessing the valuation of lands, Mr. Minus ?

A. Not as an expert, but I have experience.

Q. Nor in the industrial buildings and machineries ?

A. No.

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Q. You do not hold any diploma or any certificate from any recognised institutes about your ability in measuring and assessing land of industrial undertakings ?

A. Nothing except from experience.

Q. Whatever opinion that you have given in the examination-in-chief is founded on your experience ?

A. Yes."

He then went on to assert that the land in question was "industrial land" and that it was worth Rs. 20,000 per acre at the least and that the rate claimed by the appellants at Rs. 14,000 per acre was a fair one. That Mr. Minus had no right to pose as an expert land valuer becomes clearer from the following extract from his deposition :—

"*Q.* For how many years were you employed in the Port Commissioners ?

A. 22 years.

Q. What was your work ?

A. Superintendent of Land.

Q. You have been to all these lands. Tell his Lordship what your duties were and what you had to do in connection with the industrial properties ?

A. My duties were to inspect all the sites along the Rangoon River and the Pazundaung Creek to see that no structures were being built outside the land, also to see what was going on in all those industrial sites. Most of the lands alongside the River belong to the Port Commissioners.

Q. When did you join Balthazar & Son ?

A. In 1939.

Q. As what ?

A. Assistant Assessor."

Next there was Mr. French (PW 3), an *ex*-Executive Engineer of the Public Works Department, who joined the firm of Clark & Greig, Ltd., Builders and Contractors, on the termination of his service with the Government of Burma as a result of the Declaration of

Independence. As to whether or not he should be classed as an expert land valuer may be gauged from his own statement on the Original Side :

"*Q.* Were you ever at any time in Burma connected with the Government of Burma Factory Department ?

A. Yes, I was formerly Inspector of Factories.

Q. For how many years were you Inspector of Factories ?

A. 1938 to 1942, till the time of evacuation."

He was also questioned specifically on his competence as a land valuer and his reply was as follows :

"*Q.* Have you any experience about the valuation of private land ?

A. I have experience only mainly of Government land.

Q. Not of private land ?

A. The private lands, too, while I was in the P.W.D.

Q. Have you ever acted as an assessor or valuer of lands in the neighbourhood of this factory ?

A. Never in this neighbourhood."

Despite these admissions, Mr. French calmly fixed the market-value of the appellants' lands at Rs. 20,000 per acre. His exact words in this respect are interesting :

"*Q.* As between a willing seller and a willing buyer, what would you say would be a fair price per acre for the land to be acquired by Government now ?

A. I would say at Rs. 20,000 per acre.

Q. Why do you say it would be a fair price ?

A. Because this land is just of the same type as that of Eng Thong Oil Mill, for they have the railway facilities as well as water facilities in coming to the road."

Finally, there was Mr. Florey (PW4) who styles himself as "Architect and Surveyor". He was of the opinion that the price claimed by the appellants at Rs. 14,000 per acre was a fair one especially as the land was "industrial land" possessing great potentialities. Though he was ready and willing to

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accept the appellants' valuation, he admitted that there had been no sale of industrial land in that locality for at least 10 years prior to the acquisition. In this connection the following extract from his deposition may be of interest:—

"*Q.* It has been suggested that industrial undertakings in Burma are on the decline and therefore the value of industrial land is declining; in assessing the value of land would you consider the price which a willing seller is ready to take and a willing buyer ready to give is a factor to be taken into account?

A. Yes.

Q. In assessing the value of land to be acquired, would you consider the prices given in forced sales?

A. I would not take it into account.

Q. Within the last 10 years, between 1930 and end of 1941, did you know of any industrial land having changed hands?

A. I did not know.

Q. Nor since after liberation of Rangoon?

A. No."

To all appearances Mr. Florey relied mainly on his own imagination to fix the value of the lands in question.

On the whole the evidence of these so-called experts could not possibly have been accepted. The learned counsel for the appellants has argued at some length that even if the evidence of these witnesses is unconvincing there is indisputable documentary evidence that the value of the lands was not less than Rs. 7,000 per acre. For this he relies on an alleged copy of a certain letter from the Land Officer of the Rangoon Development Trust to the appellants and filed as Exhibit R in the proceedings. If that letter is in fact a true copy of the original which was said to have been written by the Rangoon Development Trust to the appellants, then the task of fixing the market-value of the appellants' lands would be an easy one. According

to this letter, in the year 1929 the Rangoon Development Trust agreed to sell to the appellants a portion of the lands which were later exchanged for the area required by the Masjid Road at Rs. 7,000 per acre. It is said that the appellants agreed to buy the lands in question at that rate but later there was an agreement for the exchange of these lands for the area given up to the Masjid Road. If these facts are satisfactorily proved then the price of Rs. 7,000 per acre would certainly be the price between a willing seller and a willing purchaser.

The letter in question reads as follows :

"RANGOON DEVELOPMENT TRUST

228-234, MONTGOMERY STREET.
Rangoon, 27th September 1929.

No. TM. 136/28.

FROM

U PO THAUNG,
Offg. Land Officer.

To

MESSRS. ADAMJEE HAJEE DAWOOD & CO. LTD.
RANGOON.

SUBJECT.—*Proposals for sale of land in Survey Block No. 4-B, Tamwe Circle.*

GENTLEMEN,

With reference to your applications for lease or purchase of various pieces of land in Block No. 4-B. I am directed to make you the following proposals. It must however be understood that any sales will require the approval of the Board and sanction of the Local Government. I am prepared to consider modifications of the areas to be leased or sold.

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Holdings Nos. 4, 2-c and 2-B shown in blue hatch on the plan are offered for sale at the rate of Rs. 7,000 an acre. The area of these holdings is approximately 1·116 acres. The portions of holdings 38-B and 2-D and the small corner of 2 and 3 as shown on the plan in red hatch are offered for sale at Rs. 7,000 an acre. The remainder of holdings 38-B and 2-D together with a portion of 35-A shown on the plan in yellow hatch are offered for sale at Rs. 4,000 an acre, or alternatively will be leased for 30 years with one revision of rent after 15 years at Rs. 100 per acre per year. The areas of these pieces of land are 1·116, 0·856 and 3·321 acres, respectively.

As for holdings 38 and 38-A I understand that you have no particular use for them at present, but if you wish you may keep them on a year to year lease at the present rate of rent, namely, Rs. 26 per acre per year.

I shall be glad to have your reply with any suggestions you wish to make in due course.

I have the honour to be,
Gentlemen,
Your most obedient servant."

The question is whether Exhibit R is admissible in evidence and, if so, what is its probative value? To all appearances Exhibit R is merely a piece of typewritten paper and according to Mr. Jamal (PW 6), the General Manager of the appellants' factory he found it in the factory precincts after the war. The main repository of the documents relating to the appellants' firm was its Head Office in Mogul Street which was damaged during the war and all documents contained therein were either lost or destroyed. From the mere fact that all documents lying in the Head Office were lost or destroyed it does not necessarily follow that Exhibit R was a true copy of a letter lying in that office. Secondary evidence of such a document would no doubt be admissible if there was proof that the original was in fact received by the appellants, that it was later lost or destroyed, and that Exhibit R is a copy "made from or compared with the original."

No such proof was forthcoming in the present case and all that the learned counsel for the appellants could say was that the language, wording and contents of Exhibit R bespeaks its genuineness as a true copy of the original and that it could not be a fabrication. This is hardly the way in which secondary evidence should be led of a lost or destroyed document and the provisions of section 63 of the Evidence Act should be adhered to strictly. It is not clear whether the admissibility or otherwise of Exhibit R was gone into on the Original Side but on the strength of the rulings in *Maung Po Ni and one* v. *Ma Shwe Kyi and three* (1), and *Kanto Prashad Hazari* v. *Jagat Chandra Dutta and others* (2), the appellate Court is in a position to question its admissibility.

Even assuming that Exhibit R was admissble in evidence its probative value still remains to be considered. Documents do not as a rule prove themselves, and it was incumbent on the appellants to prove the genuineness of Exhibit R. All that the appellants did was to file it in Court and then assumed that all the contents therein would be accepted as gospel truth. Actually they should have taken pains to prove the circumstances under which the letter was received and of the manner in which the copy was prepared. In the absence of such proof, Exhibit R is quite worthless and cannot be relied upon as establishing the true market-value of the lands in question.

As against the above, the respondent contended that the land in question was similar in many respects to the one acquired by the Rangoon Development Trust in 1937 for the setting up of a "Busti" area. The distance between the two lands is about 800 feet and they are separated by a railway line. The "Busti"

(1) I.L.R. 2 Ran. 397. (2) I.L.R. 23 Cal. 335.

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area was acquired at a cost of Rs. 2,000 per acre and this figure was accepted by the Collector of Rangoon as a fair price for the appellants' land. On the other hand, U Aung Tha Gyaw J., pointed out that part of the acquired lands flanked the Masjid Road and that lands bordering on a highway are always more valuable than those away from it. It was on this account that the rate adopted by the Collector of Rangoon was increased to Rs. 3,000 per acre in respect of the land contiguous to Masjid Road. The appellants assert that their land is "industrial land" with vast potentialities and hence different from the "Busti" area. The "experts" who were called in to testify to this matter were not in fact competent to certify on the quality of the land. Unfortunately for the appellants, the land in question is without any river frontage and hence it was difficult to compare it with any of the industrial sites on Pazundaung Creek. Besides this, the land has been lying vacant ever since it came into the possession of the appellants. The alleged experts Mr. Minus (PW 2), Mr. French (PW 3) and Mr. Florey (PW 4) who insisted that the land in question possessed great potentialities as an industrial site, appear to have indulged in feats of imagination.

The evidence of U Kyaw Sein (DW 3), Chief Engineer of the Rangoon Development Trust, leaves no room for doubt that the acquired lands are low-lying and that a good deal of money would have to be expended before they are fit for residential purposes. The lands in question are in a sense contiguous to the "Busti" area from which they are separated by only a railway line and hence should be considered to be of the same class.

In *Atmaram Bhagwant Ghadgay* v. *Collector of Nagpur* (1), the following principles were laid down

(1) (1929) A.I.R., (P.C.) 92.

by the Privy Council in dealing with appeals involving questions of valuation in land acquisition cases :

"In appeals involving questions of valuation, the decree complained of will not be interfered with by the Privy Council unless some erroneous principle has been invoked or some important piece of evidence has been overlooked or has been misapplied."

The same principles should be applied in the present case and there is nothing to suggest that a wrong principle was in fact applied by U Aung Tha Gyaw J. On the contrary, we are of the opinion that the method adopted for the valuation of the appellants' lands was exceedingly fair.

Accordingly, this appeal fails and is dismissed, with costs.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

Before U San Maung, J.

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Jan. 16.

MEENAKSHI ACHI AND ANOTHER (APPELLANTS)

v.

S.K.A.R.S.T. CHETTYAR FIRM AND ANOTHER (RESPONDENTS).*

Hindu law—Karta—Partnership arrangement between karta and strangers —Whether family becomes Partner—Karta when aged.

Held : Where the Managing member of a joint family enters into a partnership with a stranger the other members of the family do not *ipso facto* become partners in the business.

Lachhman Das v. *Commissioner of Income-tax*, A.I.R. (1948) (P.C.) 8 ; *Sokkanadha Vannimunder* v. *Sokkanadha Vannimundar and others*, 28 Mad. 344 at 345-346 ; *Samalbhai Nathubhai* v. *Someshvar, Mangal and Harkisan*, I.L.R. 5 Bom. 38 ; *Grande Gangayya* v. *Grande Venkatramiah*, 41 Mad. 454 at 456-457 ; *Ramanathan Chetty* v. *Yegappa Chetty*, (1916) 30 M.L.J. 241 ; *Vadilal* v. *Shah Khushal*, (1903) I.L.R. 27 Bom. 157 ; *Daiva Ammal and others* v. *Selvaramanuja Nayakar and others*, A.I.R. (1936) Mad. 479 ; *P.K.P.S. Pichappa Chettiar and others* v. *Chokalingam Pillai and others*, A.I.R. (1934) (P.C.) 192, followed.

But for the purpose of forming partnership with a stranger effected through the medium of its karta a Joint Hindu Family is regarded as a unit capable of being represented by its manager because the Hindu Joint Family is a legal unit which can be represented by its karta.

Maharaj Kishen v. *Hargobind and Basheshar Lal*, 49 Punjab Record Judl. 377 ; *Narain Das and others* v. *Ralli Brothers*, 50 Punjab Record Judl. 270 at 271 ; *Moti Ram* v. *Muhammad Abdul Jalia*, 46 All. 509 at 510 ; *Mewa Ram* v. *Ram Gopal and Hoti Lal and others*, 48 All. 395 at 396 ; *Gauri Shankar* v. *Keshab Deo and others*, (1929) All. 148 ; *Khanjer Kapra Co. Ltd.* v. *Daya Kishan and others*, 43 All. 116, referred to.

It is a question of fact in each case whether the partnership is—

(*a*) between the karta in his individual capacity utilizing his own separate property and a stranger, or

(*b*) between the karta acting for the benefit of the family by using the joint family property and the stranger, and

(*c*) whether the karta acting as agent of the family and the stranger.

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* Civil 2nd Appeal No. 38 of 1949 against the order of the District Court of Hanthawaddy in Civil Appeal No. 1 of 1949, dated 8th October 1949 .

In the first case the family is not interested in the partnership. In the second case, the family property is affected by the partnership of the karta with the stranger, but the family as such is not a partner in the partnership. In the third case, the family itself, as a unit and not the karta, is the partner.

Annamalai Chetty v. *Murugesa Chetty*, (1903) I.L.R. 26 Mad. 544, at 545, distinguished.

P. K. Basu for the appellants.

J. N. Dutt for the respondent No. 1.

T. Wan Hock for the respondent No. 2.

U SAN MAUNG, J.—On the 31st of March 1947 a suit was filed in the Court of the Assistant Judge of Hanthawaddy by S.K.A.R.S.T. Chettyar Firm as represented by its agent S.V.L.L. Lakshmanan Chettyar against Meenakshi Achi, widow of P.R.A.L.M. Muthu Karuppan Chettyar, deceased, who was carrying on money-lending business under the name and style of P.R.A.L.M. and one O.L. Chokalingam Chettyar for the recovery of Rs. 4,160 being the value of paddy entrusted to P.R.A.L.M. Firm or in the alternative for the recovery of the same amount as damages for wrongful conversion of the paddy so entrusted. The plaintiffs alleged that prior to the evacuation of Burma in 1942, 2,190 baskets of paddy were stored in a granary belonging to P.R.A.L.M. Firm in Tetti Village, Twante Township, and that after the reoccupation of Burma by the British the second defendant acting for and on behalf of P.R.A.L.M. Firm disposed of the plaintiffs' paddy without the knowledge or consent of the plaintiffs and that therefore the defendants were liable to pay the value of the paddy, or damages for wrongful conversion of it. The first defendant Meenakshi Achi in her written statement dated the 17th of June 1947 contended that no paddy was ever entrusted by the plaintiffs to the defendants' firm at any time prior to the evacuation of Burma by the British, that the

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godown which had been built at Tetti Village was meant for the exclusive use of P.R.A.L.M. Firm and in respect of which Chokalingam Chettyar had no authority whatsoever to let out to any other person and that in any event the plaintiffs' story that paddy belonging to the plaintiffs' firm was stored in the defendants' godown could not be true as the plaintiffs had a godown at Tetti Village on the other side of the river. The defendant also contended that the suit as framed was not maintainable as both the principal and the *ex*-agent could not be joined as defendants in the same suit in the absence of any special allegation to the effect that they were joint tort-feasors. The second defendant in a separate written statement filed on the same day, *viz.*, the 14th of July 1947, followed the same line of defence as that of the first defendant, and also contended that the suit against him was not maintainable in law as he was merely an *ex*-agent of a principal whose name was disclosed. On the 26th of April 1948 an amended plaint was filed adding the third defendant P.R.A.L.M.M. Annamalai Chettyar as a party-defendant on the ground that Annamalai Chettyar had been adopted by the widow of Muthu Karuppan Chettyar in accordance with the well-established custom prevailing among the Nattukotai Chettyar in south India and that the effect of the adoption was to vest in the third defendant, by survivorship, the property and assets of the P.R.A L.M. firm subject to the rights of the first defendant as a widow. On the 9th of October 1948 the first defendant filed an additional written statement whereby she contended that S.V.L.L. Lakshmanan Chettyar could not represent the firm of S.K.A.R.S.T. Chettyar (which had in fact dissolved), as the power-of-attorney was given to Lakshmanan Chettyar by the two sons of Sithambaram Chettyar in their individual capacity.

The second defendant also filed an additional written statement dated the 6th of October 1948 whereby he contended that S.K.A.R.S.T. Chettyar Firm having consisted of three partners, one of whom had died before the filing of the suit, S.V.L.L. Lakshmanan Chettyar could not represent the dissolved firm on the power-of-attorney granted by the two other persons in their individual capacity. The third defendant Annamalai Chettyar who had filed a written statement on the 2nd of August, 1948, on the same line as his adoptive mother Meenakshi Achi, filed an amended written statement on the 9th of October 1948, in which he contended, *inter alia*, that the firm of S.K.A.R.S.T. being a partnership could not bring the present suit without prior registration as required by the Partnership Act and that since Chettiappa Chettyar, who was one of the partners of the firm, died in or about 1946, the suit was not maintainable without adding his legal representatives as parties to the suit. This amended written statement of the third defendant was filed after Lakshmanan Chettyar, who was examined on the 5th of October 1948, had stated that the plaintiffs' firm had three proprietors namely Arunachalam Chettyar and his brother Karuppan Chettyar and Chettiappa Chettyar (a stranger to the family), and that Chettiappa Chettyar died four months after the general power-of-attorney was given to him. On the 9th December, 1948, the plaintiffs filed what was called a further reply to the additional written statements of the first and second defendants. In that reply the plaintiffs stated, *inter alia*, that the joint coparcenary family of S.K.A.R.S.T. consisting of Sithambaram Chettyar and his two sons Arunachalam Chettyar and Karuppan Chettyar carried on banking business in Rangoon in the family name, that in the year 1929 the family through the agency of its manager

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Sithambaram Chettyar and employing the family assets, entered into partnership with one Chettiappa Chettyar under the name and style of S.K.A.R.S.T which partnership was subsequently registered in 1933 according to the provisions of the Partnership Act, that Sithambaram Chettyar died in 1941, that on his death his elder son Arunachalam Chettyar assumed the managership of the family of S.K.A.R.S.T. while the partnership firm of S.K.A.R.S.T. continued under the same name and style as hitherto, that the partnership was dissolved on the death of Chettiappa Chettyar in January 1947, but that the affairs of the dissolved firm of S.K.A.R.S.T. not having been wound up as yet, the family of S.K.A.R.S.T. as the surviving partner of the dissolved firm had the right to institute the present suit as a step in the process of winding up the firm which in law must be deemed to be continuing to exist and that the general power-of-attorney, which was given on the 18th of June 1946 to S.V.L.L. Lakshmanan Chettyar by S.K.A.R.S.T. Arunachalam Chettyar and S.K.A.R.S.T. Karuppan Chettyar (the only two surviving members of the S.K.A.R.S.T. family) was valid in law, as the S.K.A.R.S.T family had no other business in Burma except as a partner of the firm of S.K.A.R.S.T. To this further reply, the third defendant filed a written objection contending that the plaintiffs were not entitled to improve their case by making statements in their further reply which should really be made in the amended plaint, that the partnership firm of S.K.A.R.S.T. which was formed between Sithambaram Chettyar and Chettiappa Chettyar and registered in 1933 under the Partnership Act must be deemed to have been dissolved in 1941 on the death of Sithambaram Chettyar and that Chettiappa Chettyar who was the surviving partner was the only person entitled to sue

the realization of the assets of the dissolved firm, and that if after the death of Sithambaram Chettyar his two sons had agreed with Chettiappa Chettyar, the surviving partner of the dissolved firm, to carry on business under the style and name of S.K.A.R.S.T., this arrangement was tantamount to a fresh partnership requiring registration under the Partnership Act, that the present suit having been filed by Lakshmanan Chettyar under the power-of-attorney granted by Arunachalam Chettyar and Karuppan Chettyar was not maintainable in law, and that Chettiappa Chettyar having died prior to the institution of the present suit his legal representatives were the only persons who could file the present suit. The written objection of the second defendant was on the same line as that of the third defendant. On the 17th of January 1949, the learned Assistant Judge, Hanthawaddy, after hearing the arguments addressed to him on the point held that the proposed further reply of the plaintiffs did not contain any matter setting up a new case for the plaintiffs or any fact inconsistent with the previous pleadings, but that it was an attempt to clarify the whole position, and that therefore an amendment of the plaint was not called for as the further reply could be treated as part of the pleadings.

Thereafter the learned Assistant Judge framed seven issues on the 9th of April 1949 after abandoning the previous issues framed by his predecessors. These seven issues are as follows :

1. Whether the suit is bad for misjoinder of parties?

2. Whether the suit is barred by limitation ?

3. Is a partnership entered into by a Hindu joint family with a stranger through the agency of its manager illegal ?

4. Was the firm of S.K.A.R.S.T. dissolved in law on the death of Sithambaram Chettyar ?

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5. Is the suit maintainable for want of registration of the firm after Sithambaram's death ?

6. Whether the suit is maintainable in the name of the firm without bringing in the legal representatives of Chettiappa Chettyar ?

7. Whether S.V.L.L. Lakshmanan Chettyar can file the present suit on the strength of the power-of-attorney filed ?

He then answered the 1st issue in the negative on the ground that the principal and his agent could be sued as joint tort-feasors. He answered the 2nd issue in the negative on the ground that the paddy was only sold subsequent to the British reoccupation of Burma in 1945. He answered the 3rd issue in the negative because it was conceded by the Advocates for the first and second defendants that it was not illegal for a Hindu joint family to enter into a partnership with a stranger through the agency of its manager. He, however, answered the 4th issue in the affirmative on the ground that a stranger can enter into partnership only with the karta of a joint Hindu family and not with a family itself and that the partnership would be dissolved on the death of the karta of the joint Hindu family. He answered the 5th issue in the negative on the ground that if on the death of Sithambaram Chettyar a partnership was formed between the surviving members of the joint Hindu family and Chettiappa Chettyar, a fresh partnership requiring registration was constituted and that the suit was not maintainable for want of registration. He answered the 6th issue in the sense that the present plaintiffs not being partners of the dissolved S.K.A.R.S.T. firm could not file the present suit and that the proper plaintiffs were the legal representatives of the deceased Chettiappa Chettyar. The 7th issue was also answered in the negative for the same reason. In the result the plaintiffs' suit was dismissed with costs.

In their appeal to the District Court against the dismissal of their suit by the trial Court, the plaintiffs contended, *inter alia* that the trial Judge was wrong in answering the 4th issue in the affirmative after having answered the 3rd issue in the negative, that in any event he has failed to note that their Lordships of the Privy Council had ruled that the joint Hindu family can be regarded as a unit capable of entering into partnership with a stranger, that in any event the question whether the joint Hindu family of S.K.A.R.S.T. or the then manager Sithambaram Chettyar alone was a partner with Chettiappa Chettyar was one of fact which could only be decided after all the evidence in the suit had been recorded and that the learned Assistant Judge had failed to appreciate the meaning of the expression '*ipso facto*' contained on the ruling cited on behalf of the defendants in connection with the 4th issue. It was further contended that even assuming that the finding of the learned trial Judge on the 4th issue was correct in law the learned Judge had failed to note that the plaintiffs had also pleaded the fact of a fresh arrangement having been entered into between the surviving members of the joint Hindu family and Chettiappa Chettyar for continuing the partnership after the death of Sithambaram Chettyar, the suit should not have been dismissed without affording the plaintiffs an opportunity to establish this fact by means of evidence, and that the present suit being one for the realization of the property of a dissolved firm absence of registration was no bar to the filing of the suit on the alternative plea of a fresh arrangement having been entered into between Chettiappa Chettyar and the surviving members of the joint Hindu family on the death of Sithambaram Chettyar.

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The learned District Judge relying mainly upon the observations of their Lordships of the Privy Council in *Lachhman Das* v. *Commissioner of Income-tax* (1), held that a joint Hindu family is a legal entity which can enter into partnershp with a stranger through the agency of its karta and that it was a question of fact whether the partnership which Sithambaram Chettyar had entered with Chettiappa Chettyar was on his own behalf or as agent of the joint Hindu family of which he was karta. He also held that if it was the joint Hindu family which had entered into a partnership with Chettiappa Chettyar, members of the joint Hindu family could file the present suit without impleading the legal representatives of Chettiappa Chettyar. He accordingly set aside the judgment and decree of the trial Court dismissing the plaintiffs' suit, and remanded the suit under the provisions of Order 41, Rule 23 of the Civil Procedure Code for its trial on the issues involved. Hence this appeal by the defendants under Order 43, Rule 1, Clause (*u*) of the Civil Procedure Code.

In this Court it is contended on behalf of the defendant-appellants that the learned Judge of the trial Court was wrong in allowing the further reply of the plaintiffs, dated the 9th of December 1948 to be treated as part of the pleadings in the case as the suit as originally framed was on behalf of S.K.A.R.S.T. Chettyar Firm by its agent Lakshmanan Chettyar whereas in the further reply the plaintiffs sought to introduce new factors, namely, that S.K.A.R.S.T. Chettyar Firm was dissolved on the death of Chettiappa Chettyar and that the members of the S.K.A.R.S.T. joint Hindu family consisting of Arunachalam Chettyar and Karuppan Chettyar, as the surviving partners, had the right to maintain the suit in the name of the dissolved

(1) A.I.R. (1948) (P.C.) 8.

firm. There is no doubt considerable force in this contention, and I am bound to say that the proper method by which this new factor should have been introduced was by way of an amendment of the plaint and not by filing what has been called a further reply to the written statement. However, it cannot be said that by introducing this new factor, the plaintiffs had changed their cause of action or had introduced a totally new and inconsistent case. The cause of action remained the same, *viz.*, the alleged wrongful conversion of the paddy belonging to the S.K.A.R.S.T. firm by the defendants, the only new factor introduced being the fact of S.K.A.R.S.T. firm having been dissolved by the death of Chettiappa Chettyar. Whether or not there was such a firm of S.K.A.R.S.T. consisting of the S.K.A.R.S.T. joint Hindu family and Chettiappa Chettyar or merely between Sithambaram Chettyar, the manager of S.K.A.R.S.T. joint Hindu family and Chettiappa Chettyar, is one of fact which need only to be gone into during the hearing of the case and which need not really form part of the pleadings in the case. No question of limitation seems to be involved, and since the modern trend seems to be in favour of allowing amendment of the pleadings to the largest extent possible rather than to compel parties to file a fresh suit on the same cause of action, I think the only grievance which the defendants in the case under appeal can legitimately ventilate is that they had been mulcted of the costs which they would otherwise have received had the learned trial Judge insisted upon the filing of an amended plaint instead of allowing the particulars objected to by them to be mentioned in the so-called further reply to the written statement. This, however, is a grievance which can be rectified when costs are finally awarded on the conclusion of the suit. The real question in issue in this appeal is whether the

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learned District Judge was right in interpreting the observations of their Lordships of the Privy Council in *Lachhman Das* v. *Commissioner of Income-tax* (1) as meaning that a joint Hindu family as such can enter into partnership with a stranger and, if so, whether their Lordships themselves have laid down the law correctly in ruling that a joint Hindu family is a legal entity which can enter into partnership with a stranger. If this question is answered in the affirmative it is a question of fact whether the partnership which Sithambaram Chettyar had entered into with Chettiappa Chettyar was for and on behalf of the joint Hindu family of S.K.A.R.S.T. If so, the death of Sithambaram Chettyar would not have the effect of dissolving the partnership which would remain undissolved till the death of Chettiappa Chettyar in which event any one who can validly represent the surviving partner, namely, the S.K.A.R.S.T. joint family can bring the present suit as against the defendants.

Although quite a large number of cases have been cited before me, I need only mention a few of them. In *Sokkanadha Vannimunder* v. *Sokkanadha Vannimundar and others* (2) Subrahmania Ayyar and Boddomital JJ., held :

"It was urged on behalf of the plaintiff-appellant that Kandasami's death did not dissolve the partnership, but this cannot be upheld. It is scarcely necessary to say that a joint Hindu family though at times spoken of by Judges as a corporation cannot, as contended for the plaintiff, be taken as a legal person in the strict sense of the term so as to constitute a partnership such as the present one subsisting between the plaintiff on the one hand, and a real corporation on the other. No doubt when business is carried on by the members of a joint family for the benefit of the family without a contract among the

(1) A.I.R. (1948) (P.C.) 8. (2) 28 Mad. 344 at 345-346.

members constituting themselves actual partners, the legal relation subsisting between them may have some sort of resemblance to that of partners, but it is not identical with it. The death of a member of a family thus engaged in business has in truth no other effect upon the rights of the surviving members in the business than to enlarge their interest to the extent of the share to which the deceased was entitled in his lifetime if he left no male issues, and if he left such issue, then to enlarge the shares of such issue, similarly. It is to such results that the observations of Mr. Justice Melvill in *Samalbhai Nathubhai* v. *Someshvar, Mangal and Harkisan* (1) on which reliance was placed on behalf of the plaintiff should be taken to refer. Therefore whether the contract of partnership entered into between the plaintiffs and Kandasami be taken as creating that relation only between the two or between the plaintiff on the one hand and the adult members of the family on the other or again between the plaintiff and all the members of the family including the minors, the death of Kandasami necessarily caused a dissolution of the relation which was the creature of a contract as between the plaintiff on the one hand and the rest on the other."

In *Grande Gangayya* v. *Grande Venkatramiah* (2) Kumaraswami Sastriyar J., who delivered the judgment of the Full Bench of the Madras High Court observed :

" It is well settled that a contract of partneship between a member of a joint family and a stranger does not make every member of the joint family which the managing member represents a partner so as to clothe him with all the rights and obligations of a partner as defined in section 239 of the Contract Act. I need only refer to *Sokkanadha Vannimunder* v. *Sokkanadha Vannimundar* (3) ; *Ramanathan Chetty* v. *Yegappa Chetty* (4) and *Vadilal* v. *Shah Khushal* (5). It is no doubt true that as between the members of the undivided family and the coparcener who enters into a contract of partnership for the benefit of the family they will be entitled to call upon him to

(1) I.L.R. 5 Bom. 38.
(2) 41 Mad. 451 at 456-457.
(3) 28 Mad. 344 at 345-346.
(4) (1916) 30 M.L.J. 241.
(5) (1903) I.L.R. 27 Bom. 157.

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account for the profits earned by him from the partnership and to share in such profits but this will not place them in any position of direct contractual relationship with the other partners of the firm. Nor would the fact that the entire assets of the joint family might be available to the creditors of the firm make any difference. The position of the plaintiff in the present case cannot be higher than that of a sub-partner. The managing member of an undivided family though he has the power of representing the interests of the other members is not their agent in the strict sense of the term so as to clothe the other members of the family with all the rights of principals in respect of contracts entered into by their agent. His position is, as pointed out by their Lordships of the Privy Council in *Annamalai Chetty* v. *Murugesa Chetty* (1) more analogus to that of a trustee."

Subsequently the Full Bench held that a contract of partnership entered into by the manager of a joint Hindu family with strangers does not *ipso facto* make the other members of the family partners; and not being partners, the other members whether divided or undivided cannot institute any suit in respect of partnership, *e.g.*, a suit for dissolution of partnership. This Full Bench ruling was followed in *Daiva Ammal and others* v. *Selvaramanuja Nayakar and others* (2) where Madhavan Nai and Stone JJ., held that where the Manager of a joint Hindu family is a member of a trading partnership, the family as a whole does not become a member of the partnership firm and the partnership terminates at his death, but that if such a partnership is continued with the heirs or the legal representatives of the deceased, it is not the same partnership but a new one.

In *P. K. P. S. Pichappa Chettiar and others* v. *Chokalingam Pillai and others* (3) their Lordships of

(1) (1903) I.L.R. 26 Mad. 544 at 545.
(2) A.I.R. (1936) Mad. 479.
(3) A.I.R. (1934) (P.C.) 192.

the Privy Council who had to consider the same question observed :

" In their Lordships' opinion, the law in respect of the matter now under consideration is correctly stated in Mayne's Hindu Law (Edn. 9) at p. 398, as follows :

' Where a managing member of a joint family enters into a partnership with a stranger the other members of the family do not *ipso facto* become partners in the business so as to clothe them with all the rights and obligations of a partner as defined by the Indian Contract Act. In such a case the family as a unit does not become a partner, but only such of its members as in fact enter into a contractual relation with the stranger : the partnership will be governed by the Act.' "

In all these above cases it does not seem to have been considered whether a joint Hindu family as such could or could not have entered into partnership with a stranger. All that the learned Judges who decided these cases seem to have laid down is that when the karta of a joint Hindu family enters into partnership with a stranger for the benefit of the family, the members of the joint family do not *ipso facto* become members of the partnership so as to clothe them with all the rights and liabilities of a partner under the Partnership Act. That a joint Hindu family could be regarded as a unit has, however, been envisaged as early as 1914 by the Chief Court of Punjab in *Maharaj Kishen* v. *Hargobind and Basheshar Lal* (1). Later in the year 1915 the question was considered by a Judge of no less eminence than Shadi Lal J. (later Sir Shadi Lal) in *Narain Das and others* v. *Ralli Brothers* (2). There it was held that where the father of the minor was a partner in a firm, he, as the Manager of the joint Hindu family, consisting of himself and his minor sons, represented the whole family in the partnership

(1) 49 Punjab Record Judl. 377 (2) 50 Punjab Record Judl. 270 at 271.

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and his death did not therefore cause a dissolution of the partnership, the family, which may be regarded as a *persona*, remained a partner *after* his death as it was *before* his death.

In *Moti Ram* v. *Muhammad Abdul Jalia* (1) where a question arose whether a joint Hindu family could be considered as one person for the purpose of the Indian Companies Act of 1882, a Bench of the Allahabad High Court observed:

"The Companies Act of 1882 nowhere defines 'person'. We are therefore thrown back upon the General Clauses Act (No. X of 1897). 'Person' is there defined to include any Company or Association or body of individuals, whether incorporated or not. It is therefore obvious that 'person' can be used to include a collection of people and an appropriate illustration which will at once occur to Indian lawyers is that association of individuals known as a joint Hindu family."

Although the question to be decided in this case was whether a joint Hindu family could be considered as one person for the purpose of the Indian Companies Act of 1882, the view held by the learned Judges regarding the nature of a partnership between a joint Hindu family and a stranger seems to be more in accord with the Punjab decisions than with those of Madras. Much more explicit on the point is the judgment of Sulaiman J., in *Mewa Ram* v. *Ram Gopal and Hoti Lal and others* (2) where the learned Judge observed :

"The only way in which the defendant can urge that the number exceeds 20 is by saying that many of these executants are members of joint Hindu families consisting of a large number of other members and if all the other members of each family were to be counted, the total number exceeded 20. We are of opinion that this is not the right method of calculating the number in order to ascertain whether the association consists of 20 or more members. If each of the executants entered into

(1) 46 All 509 at 510. (2) 48 All. 395 at 396.

this partnership in his own individual capacity he admittedly counts as one. On the other hand, if he entered into the partnership in his representative capacity on behalf of his family, then his joint family must be considered to be a unit and must be deemed to be one person within section 4 of the Indian Companies' Act."

This observation is the precursor of the view which now seems current that the karta of a joint Hindu family can enter into partnership either in his individual capacity or as representing his family, in which case his family, and not he, is the partner.

In *Gauri Shankar* v. *Keshab Deo and others* (1) a Bench of the Allahabad High Court consisting of Sulaiman and Kendall JJ., were specific in that a joint Hindu family can become a partner in partnership business and that where a joint family is a partner, the partnership is not dissolved on the death of the managing member of the family inasmuch as a joint family does not die on the death of the manager.

It may be mentioned that a discordant note was sounded in *Kharider Kapra Co. Ltd.* v. *Daya Kishan and others* (2) by another Bench of the Allahabad High Court which doubted the decision in *Narain Das and others* v. *Ralli Brothers* (3) and preferred to follow the Full Bench case of Madras High Court in *Grande Gangayya* v. *Grande Venkataramiah* (4). However in *Lachhman Das* v. *Commissioner of Income-tax* (5), the dual personality of a coparcener in a joint Hindu family has been fully emphasised by their Lordships of the Privy Council whose views have been aptly summarised in the headnote, which reads:

"It is now firmly established that an individual coparcener, while remaining joint, can possess, enjoy and utilise, in any way

(1) (1929) All. 148.
(2) 43 All. 116.
(3) 50 Punjab Record Judl. 270 at 271.
(4) 41 Mad. 454 at 456-457.
(5) A.I.R. (1948) (P.C.)8.

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he likes, property which was his individual property, not acquired with the aid of or with any detriment to the joint family property. It follows from this that to be able to utilise this property at his will, he must be accorded the freedom to enter into contractual relations with others, including his family, so long as it is represented in such transactions by a definite personality like its manager. In such a case he retains his share and interests in the property of the family, while he simultaneously enjoys the benefit of his separate property and the fruits of its investment. To be able to do this it is not necessary for him to separate himself from his family. This must be dependent on other considerations, and the result of a separate act evincing a clear intention to break away from the family. In this view of the Hindu law it is clear that if a stranger can enter into partnership, with reference to his own property, with a joint family through its karta there is no sound reason to withhold such opportunity from a coparcener in respect of his separate and individual property.

The case of a partnership with a stranger cannot be distinguished on the ground that the karta's entering into a partnership on behalf of a joint Hindu family is in substance of the nature of an alienation, because the acceptance of a stranger to the benefits of a partnership with the joint family cannot be regarded as an alienation and further a joint Hindu family can alienate an asset belonging to it to a member of the family without causing a disruption of the family.

Though in its nature a joint Hindu family may be fleeting and transitory, it has been regarded as capable of entering through the agency of its karta, into dealings with others; and the principle that a firm, not being recognised as a legal entity, cannot as such, enter into partnership with another firm as such, cannot be applicable to a joint Hindu family in transactions where it acts through the agency of its karta. Therefore, it cannot be said that a joint Hindu family being, by its nature, frequently changing entity no partnership could be formed with it."

In my opinion there is no real conflict between the views expressed by their Lordships of the Privy Council in the earlier case, *viz.*, *P.K.P.S. Pichappa*

Chettiar and others v. *Chokalingam Pillai and others* (1) and in this case. What their Lordships had said in the earlier case was that where a managing member of a joint family enters into a partnership with a stranger the other members of the family do not *ipso facto* become partners in the business. They did not also say that the family as a unit could not also become a partner in the partnership with a stranger. In *Lachhman Das*'s case, their Lordships did not go so far as to adopt *in toto* the view held by some of the eminent Hindu Judges that a joint Hindu family is in its true nature a "corporation" capable of a continuous existence in spite of fleeting changes in its constitution. Nevertheless they held that for the purpose of forming partnership with a stranger, effected through the medium of its karta, a joint Hindu family has been for a long time past regarded as an entity capable of being represented by its manager, and that the principle of law by which a firm not being recognised as a legal entity cannot as such enter into partnership with another firm, as such, cannot be applicable to a joint Hindu family in transactions where it acts through the agency of its karta. Thus their Lordships have clearly recognised the principle that a joint Hindu family is a legal entity which can be represented by its karta acting as its agent.

With great respect I may say that the views expressed in *Lachhman Das*'s case seem to be clearly in accord with the accepted principles of Hindu law relating to a joint Hindu family. A Hindu, even if he is joint, may possess separate property belonging exclusively to him. He may sell it, make a gift, or bequeath it by will to any person he likes. It is not liable to partition and on his death intestate it passes

(1) A.I.R. (1934) (P.C.) 192.

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by succession to his heirs, and not by survivorship to his coparceners. In the case of joint family property a father has no greater interest in it than any of his sons or son's to the third generation. However, as manager and head of the family he is entitled to the possession thereof. The male issues in the family takes an interest in it by birth. Among the separate property which a member of the joint Hindu family may possess are gifts, Government grants, income of separate property, separate earnings, gains of learning, etc. Whereas in the case of joint family property all the accretions go to the benefit of the family, in the case of separate property all the accretions go to the benefit of the member of the family in his individual capacity. Hence it is but logical that a member of the joint Hindu family, whether he is a karta or not, should be able to enter into partnership with a stranger either in his individual capacity or in his representative capacity, except that the special rules governing the Hindus debar a member of the Hindu family other than the karta from representing it to the outside world. Although the karta, as such, cannot always bind the members of the family by entering into partnership with strangers, it does not necessarily follow that the family as a unit cannot be represented by the karta as its agent in a partnership with strangers. Whether in any particular case a partnership is (*a*) between the karta in his individual capacity utilizing his own separate property and a stranger, or (*b*) between the karta acting for the benefit of the family by using the joint family property and the stranger, or (*c*) betweeen the karta acting as agent for his family and the stranger, is a question of fact which must be decided with reference to the facts and circumstances of each particular case. In the first case, the family is not interested in the

partnership. In the second case, the family property is affected by the partnership of the karta with the stranger but the family as such is not the partner in the partnership. In the third case, the family itself, as a unit, and not the karta, is the partner. There may also be cases of the karta acting in both the second and third capacity in the same partnership with a stranger. Where a joint Hindu family as a unit is a partner in the partnership, the death of the karta would not dissolve the partnership because the karta is merely the agent of the principal (namely, the joint Hindu family), and on the death of one agent the principal can be represented by another, (namely, a new karta). In coming to this decision I am not unmindful of the observations of their Lordships of the Privy Council in *Annamalai Chetty* v. *Murugesa Chetty* (1) where their Lordships held that the karta as such is not the agent of the members of a joint Hindu family so as to make them liable to be sued as if they are the principals of the manager and that the relation between the karta and the other members of the joint Hindu family rather resembles that of trustee and *cestui que trust* than that of principal and agent. However their Lordships were not considering whether a karta could not in fact become an agent of a joint Hindu family considered as a unit, and the view expressed by them in their latest decision on the subject namely, *Lachhman Das* v. *Commissioner of Income-tax* (2) must be deemed to be their considered opinion. In this connection it is interesting to note the observations of the learned authors of Pollock and Mulla's, "The Indian Sale of Goods and the Indian Partnership Act," 1950 Edition, in their note to section 5 of the

(1) (1903) I.L.R. 26 Mad. 544 at 545. (2) A.I.R. (1948) P.C. 8.

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Partnership Act at page 313. It reads :

"The Privy Council has held that a joint Hindu family through the agency of its karta can enter into contractual relations either with a stranger or even with an individual coparcener in respect of his separate property and also with a firm. A joint Hindu family has, in substance, been accorded a legal personality."

This in my opinion is the latest and the correct view on the subject.

For these reasons I hold that the order of the learned District Judge of Hanthawaddy remanding the suit to the trial Court under Order 41, Rule 23 of the Civil Procedure Code is correct. This appeal fails and must be dismissed with costs ; Advocate's fees ten gold mohurs.

CIVIL REVISION.

Before U On Pe, J.

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Aug. 18.

KO PHAN NGA (APPLICANT)

v.

DAW PWAY AND OTHERS (RESPONDENTS).*

Suit for specific performance against party to agreement—Impleading of purchasers with notice of such agreement—Whether misjoinder—Specific Relief Act, s. 27 (b).

Petitioner sued for specific performance of contract to sell a house against the 1st Respondent who was party to the agreement and Respondents 2, 3 and 4 as purchasers with notice of the agreement. The District Judge recorded a finding that the suit was bad for misjoinder of the subsequent purchasers and that plaintiff should elect to proceed with one claim in his suit. Upon revision—

Held : That a person with knowledge of a previous contract to sell purchases property, the purchase is voidable at the option of the prior promisee and the contract can be enforced specifically against the subsequent purchaser.

The proper decree in a suit for specific performance of a contract to sell land when the same has been sold to a third party subsequent to the contract with plaintiff, is to direct the subsequent purchaser to execute a conveyance to the plaintiff.

Under s. 27 of the Specific Relief Act a contract can be specifically enforced not only against the parties to the contract and the parties claiming under them by subsequent title but also against persons claiming under a title which might have been displaced by the defendant.

Consequently the facts in the present case do not warrant institution of a separate suit and the suit as framed was competent.

T. Rangayya Reddy v. *V. R. Subramania Aiyar and others*, 60 Mad. 365 ; *Nitai Lal Dutta* v. *Gobinda Bhushan Sen and others*, A.I.R. (1936) Pat. 142, distinguished.

Gullipilli Ramulu and others v. *Kokku Venkatasubba Rao and others*, A.I.R. (1944) Mad. 554 ; *Kali Charan Singh and another* v. *Janak Deo Singh and others*, A.I.R. (1932) All. 694 ; *Kanshi Ram and another* v. *Ishwardas and another*, A.I.R. (1923) Lah. 108 ; *Shanmukha Madan and others* v. *Arunachala Chettyar and others*, A.I.R. (1922) Mad. 332 ; *Gaurishankar and others* v. *Ibrahim Ali*, A.I.R. (1929) Nag. 298, referred to.

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* Civil Revision No. 45 of 1950 against the order of the District Court of Magwe in Civil Regular Suit No. 2 of 1950, dated 28th October 1950.

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KO PHAN NGA v. DAW PWAY AND OTHERS.

San Thein for the applicant.

P. B. Sen for the respondents.

U ON PE, J.—In Civil Regular Suit No. 2 of 1950 of the District Court of Magwe, the petitioner sued for specific performance of contract to sell a house to him for Rs. 13,000 or in the alternative for damages for the same amount. The defendants were the first respondent, as party to the agreement, and the respondents Nos. 2, 3 and 4 as persons who had subsequent to the date of contract of sale purchased the suit property, the relief asked for as against them (defendants 2, 3 and 4) being that as they had purchased in bad faith and without any consideration and with notice of the agreement "the sale effected by the defendant No. 1 in favour of the defendants 2, 3 and 4 embodied in sale deed No. 19 of 1950 of the Sub-Registrar of Yenangyaung be declared invalid". The lower Court framed three preliminary issues the decision on one of which, now under revision, is in respect of Issue No. 1 which reads as follows :

"Is the suit bad for misjoinder of causes of action and parties ?"

Its decision reads :

"Following the analogy of the illustration given above (Commentaries under Order 2, Rule 4, Civil Procedure Code by Sarkar, 2nd edition) the plaintiff's suit against Daw Pway and the subsequent transferees is bad for misjoinder of parties. I also find that the two claims and causes of action for declaration that the sale deed is invalid and for specific performance of the contract or damages are absolutely independent. The suit therefore is bad for misjoinder of causes of action as well and I would decide this issue accordingly."

Holding that the suit is in respect of two claims and causes of action which are absolutely independent, the lower Court has directed that the plaintiff should elect to proceed with one claim and that he should amend the plaint accordingly.

Before me it has been contended by the applicant's Counsel that, amongst other things, the lower Court has overlooked the provisions of section 27 (*b*) of the Specific Relief Act. I have reason to think that the learned District Judge would not have arrived at the decision which he did, if the case reported in 40 Madras quoted by him had been made available to him. It is a Full Bench case in which the headnote giving the decision of the Full Bench (Abdur Rahim J., *contra*) reads :

> "(1) That the claim for partition was wrongly joined with the claim for specific performance, as at the date of suit the plaintiff had no right to sue for partition not having completed his title by a sale-deed and
> (2) that by reason of the subsequent partition the other members of the joint family were properly made parties to the suit for specific performance as subsequent transferees with notice."

The decision of Abdur Rahim J., is as follows :

> "The suit as framed for specific performance as well as for partition and possession against all the members of the family is maintainable under Order 1, Rule 3, Civil Procedure Code, and section 27 (*c*) of the Specific Relief Act."

This case [*T. Rangayya Reddy* v. *V. R. Subramania Aiyar and four others* (1)] is distinguishable in that the subject-matter of the dispute relates to a share of a member of an undivided Hindu family and the question there was whether the relief for specific performance

(1) 60 Mad. 365.

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against the party to the contract would give the plaintiff the right to the relief of partition and separate possession from the other coparceners. The transaction which would entitle the plaintiff to such relief against the other members of the family had yet to come into existence, namely, the execution by the vendor of a proper conveyance of his share. That is to say, he has no right to sue strangers to the contract for partition and possession till he gets his conveyance, and before one is obtained his suit for partition and possession against strangers must be said to be premature. It is in this view arising out of the peculiar nature of the share of a coparcener in a joint Hindu family that it was held that the plaintiff had no right to sue for partition along with the claim for specific performance.

In the present case it cannot be said as in the case in 40 Madras that the right to partition has not arisen and that it would require the plaintiff first to enforce the specific performance of the contract of sale and then to institute a separate suit for partition.

If the attention of the learned District Judge had been drawn to section 27 of the Specific Relief Act, he would have seen that there are provisions made under that section as to against what persons contracts may be specifically enforced. It is laid down there that they include not only (*a*) parties to the contract and (*b*) parties claiming under them by title arising subsequently to the contract other than transferees for value who have paid their money in good faith and without notice of the original contracts, but also (*c*) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant.

In *Gullipilli Ramulu and others* v. *Kokku Venkatasubba Rao and others* (1) it was held "A contract which cannot be enforced in full at the time the contract was entered into may nevertheless be enforced if it can be fulfilled at the time of the filing of the suit. Such a contract can be enforced against transferees with notice of the contract. They are proper parties to a suit for specific performance." The same view is held in *Kali Charan Singh and another* v. *Janak Deo Singh and others* (2) from which the following may be aptly quoted :—

"When a person with knowledge of the previous contract of sale, purchases the property, the purchase is voidable at the option of the prior promisee and the contract with him can be enforced specifically against the subsequent purchaser. In such a suit the Court should declare the second purchase as null and void and cancel it, and order the original promisor to carry out his contract by executing a sale-deed in favour of the prior promisee."

Also see *Kanshi Ram and another* v. *Ishwardas and another* (3) which lays down the maxim "No one can convey a better title than he himself has." and *Shanmukha Madan and others* v. *Arunachala Chettyar and others* (4) ; *Gaurishankar and others* v. *Ibrahim Ali* (5) lays down a decision which strengthens the view that respondents 2, 3 and 4 are necessary parties to a suit like the present. It reads :

"The proper decree in a suit for specific performance of a contract to sell land when the same has been sold to a third party subsequent to the contract with plaintiff is to direct the subsequent purchaser to execute a conveyance to the plaintiff."

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1) A.I.R. (1944) Mad. 554.
2) A.I.R. (1932) All. 694.
3) A.I.R. (1923) Lah. 108.
4) A.I.R. (1922) Mad. 332.
5) A.I.R. (1929) Nag. 298.

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This is a direction which may be borne in mind, although I do not wish to anticipate the conclusion which the learned District Judge may come to.

Before I come to the order which I am passing, it may be necessary to touch on another case cited by the learned District Judge—*Nitai Lal Dutta* v. *Gobinda Bhushan Sen and others* (1) which also was not available to him. That was a suit for the declaration of the plaintiff's title to some share in certain plots of land on the basis of his purchase from the predecessor-in-title and for partition by metes and bounds between him and defendant 1. In that suit the plaintiff also impleaded raiyats, defendants 2 to 4 and asked for a permanent injunction against them restraining them from erecting any house upon the suit land and for an order that any house which may have been built by them upon the land should be removed. It has been brought out in the judgment in the case that two causes of action against two sets of defendants have been combined in one suit. Thus it is clearly distinguishable from the present suit.

In the light of the principles laid down in the above-mentioned cases, I am clearly of the view that the facts in the present case do not warrant institution of separate suits. The order of the lower Court is set aside and the suit as instituted can proceed trial. Costs will abide the result the case.

(1) A.I.R. (1936) Pat. 142.

APPELLATE CIVIL.

Before U San Maung, J.

DAW CHI (APPELLANT)

v.

MAUNG CHET (RESPONDENT).*

H.C. 1951

Aug. 23.

Waiver of rights—Right to address Court under the provisions of Order 41, Rule 11 (1) of the Code of Civil Procedure—Whether can be waived.

Held: Where a rule has been enacted solely for the protection of a class of persons and their estates, and not upon grounds of public policy or interest of the public generally, then the person in whose favour the rule operates may by his conduct debar himself from the right of insisting upon its enforcement.

Thus where an advocate engaged by a party had the right of being heard, waived that right and filed written argument, then his client cannot make failure to hear the advocate a ground of appeal. The right to be heard has been waived.

Sashi Bhusan Prasad Singh v. *Dalip Narain Singh and others*, A.I.R. (1936) Pat. 75; *Bimalnandan Prasad* v. *The United Refineries Ltd. and others*, 11 Ran. 79; *Raja Shyam Sunder Singh and others* v. *Kaluram Agarwala and others*, A.I.R. (1938) (P.C.) 230, referred to.

Thein for the appellant.

Ba Gyan for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 2 of 1950 of the Court of the Assistant Judge, Mônywa, the plaintiff-appellant Ma Chi sued the defendant-respondent Maung Chet for a sum of Rs. 2,720 on the ground that it was the amount of the rent due to be paid to her by Maung Chet as the tenant of the house, which Maung Chet himself had mortgaged to her by way of usufructuary mortgage. The defendant Maung Chet, in his written statement, denied that he was a tenant of Ma Chi. He contended that the house in question belonged to his mother and that he was living therein

* Civil 2nd Appeal No. 30 of 1950 against the decree of the District Court of Lower Chindwin in Civil Appeal No. 1 of 1950, dated 5th September 1950.

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with his mother who knew of the two mortgage deeds which he had executed in favour of Ma Chi and had herself attested these deeds. The mortgage deeds had to be executed in the form of usufructuary mortgages under pressure from Ma Chi. No rent was ever paid to her and the 2nd mortgage deed was executed in respect of the principal and interest due on the first mortgage. On the pleadings two issues were framed by the learned trial Judge, namely—

1. Whether the plaintiff and the defendant stood in the relation of landlady and tenant?
2. To what relief was the plaintiff entitled?

After examination of Ma Chi and her witness U Ba Thein (PW 2), Maung Chet and his witness Ma Hla Yin (DW 2), (Maung Chet's mother), the learned trial Judge came to the conclusion that on Ma Chi's own admission the house in question never came into her possession although the mortgage deeds executed in her favour purported to be usufructuary mortgages and that on the evidence on record it has not been established that Maung Chet was the tenant of Ma Chi. On appeal to the District Court, Lower Chindwin, the learned District Judge dismissed the appeal under Order 41, Rule 11 (1) of the Civil Procedure Code without hearing the appellant, or her pleader, but after perusing the written argument submitted to him by the learned Advocate for the appellant.

In this appeal by Ma Chi under section 100 of the Civil Procedure Code, one of the grounds raised by her learned Advocate, is that the order of the lower Appellate Court dismissing the appeal summarily after merely reading the written argument of the appellant's Advocate but without hearing the appellant or her Advocate personally, as required by law, was illegal.

Now it was quite irregular for the learned District Judge of Lower Chindwin to have disposed of the appeal at Sagaing after merely perusing the proceedings of the trial Judge, the memorandum of appeal and the written argument of the appellant's Advocate. Order 41, Rule 11 (1) of the Civil Procedure Code enacts :

> " The Appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader."

Therefore it was incumbent upon the learned District Judge of Lower Chindwin to have fixed the date for hearing the case at Mônywa so as to give an opportunity to the appellant or her pleader to argue the case. The procedure adopted by the learned District Judge should therefore be deprecated and had times been normal and communication between Sagaing and Mônywa not so disrupted or hazardous, as at present, I would have strongly discountenanced it. However, in the conditions now prevailing there is some excuse for the learned District Judge in not visiting Mônywa regularly and for the learned Advocate for the appellant in not having insisted upon a date for hearing the case at Mônywa being fixed. By submitting with the memorandum of appeal containing the grounds urged in favour of the appellant, a written argument containing practically all the arguments which the learned Advocate could possibly urge in support of the grounds of appeal, it is clear that the learned Advocate for the appellant had waived his right to appear and be heard in person. The learned Advocate must have been aware of the provisions of Order 41, Rule 11 (1) of the Civil Procedure Code and by

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heading his written argument as " written argument for admission by the Advocate for plaintiff-appellant Daw Chi ", he had clearly meant to convey to the learned District Judge the impression that it was in lieu of his personal appearance before the learned District Judge. Hence it cannot be said that the failure on the part of the District Judge to fix a date for hearing the appellant or her pleader had in any way prejudiced the appellant's case. The Power of Attorney given to the Advocate in question by the appellant is sufficiently wide to enable him to waive personal appearance on her behalf.

In the case of *Sashi Bhusan Prasad Singh* v. *Dalip Narain Singh and others* (1), a single Judge of the Patna High Court held that there is nothing to prevent any litigant waiving any right he may have under the Civil Procedure Code or under any statute for that matter, unless the waiver of the right or the absence of the right makes any particular matter illegal. This observation seems not inapposite although with respect I must say that it is much wider than is strictly justifiable. A mere conservative and better view of the law is enunciated by a Bench of the late High Court of Judicature at Rangoon consisting of Page C.J., and Mya Bu J., in *Bimalnandan Prasad* v. *The United Refineries Ltd. and others* (2). In that case a question arose as to whether a party can waive the notice required to be issued by the Court under Order 21, Rule 22 of the Civil Procedure Code and in this connection Page C.J., observed :

" The Court sits to administer justice according to law, and whenever it is possible to do so the Court ought to refuse to permit mere technicalities to override the substance of the law. The Court should move along the broad stream of the law, and

(1) A.I.R. (1936) Pat. p. 75. (2) 11 Ran. p. 79.

not allow itself to be enticed into side rivulets where the water is neither deep nor clear, and it is easy to run aground. It is to be borne in mind that Order 21, Rule 22, was enacted solely in aid of judgment-debtors and their legal representatives, and to prevent a 'snap' order being obtained for execution against a judgment-debtor or his estate."

Later on in the case the learned Chief Justice observed :

"In each case, however, regard must be had to the intention of the legislature in enacting the rule, and in cases such as the present case, in which a rule has been enacted solely for the protection of judgment-debtors and their estates, and not upon grounds of public policy or in the interest of the public generally, in my opinion it is clear both upon principle and authority that a person in whose favour the rule operates may by his conduct debar himself from the right of insisting upon its enforcement."

See also the case of *Raja Shyam Sunder Singh and others* v. *Kaluram Agarwala and others* (1).

In the case now under consideration the Rule relating to the fixing of the date for hearing the appellant or his pleader being made exclusively for the benefit of the appellant it can be waived by the appellant and or her pleader. Therefore the first ground of appeal cannot be allowed to prevail.

Coming to the merits of the case, it is clear that both the Courts below were justified in the conclusion arrived at by them that the relationship of landlady and tenant cannot be held to have been established upon the evidence on record. The house has been proved to belong to Maung Chet's mother, Ma Hla Yin at the time of the mortgages in question having been sold to Ma Hla Yin by Maung Chet by a registered deed of sale Exhibit 1, dated the 21st of June 1939. It never came into the possession of Ma Chi inspite of

(1) A.I R. (1938) (P.C.) p. 230.

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the execution of the two mortgage deeds one after another. It has not been proved that Ma Chi was ever paid rent by Maung Chet in respect of the house. Before the Rent Controller U Ba Thein (PW 2), Maung Chet stated that he had never paid any rent to Ma Chi for any month and this statement remains unchallenged. Maung Chet has been living all along, both prior and subsequent to the mortgage, with his mother Ma Hla Yin to whom the house belonged. In a suit properly framed the fact that Ma Hla Yin had attested the mortgage deeds may perhaps estop her from denying that the house belonged to her son, Maung Chet. However, the fact remains that in the suit under appeal Ma Chi has failed to establish that Maung Chet was her tenant. Her appeal was therefore rightly dismissed by the learned District Judge of Mônywa. In the result this appeal fails and must be dismissed with costs. Advocate's fees three gold mohurs.

APPELLATE CIVIL.

Before U Si Bu, J.

U SAN GYWE (APPELLANT)

v.

HIRCHAND KALIDAS (RESPONDENT).*

H.C. 1951

Aug. 30.

Second appeal under Civil Procedure Code, s. 100, Clauses (a) to (c).

Held : Where the question before the Court was whether there has been a material alteration of a promissory note by change of figure "1" and word "one" to figure "3" and word "three" and on evidence on record both the Courts found in favour of a party, such finding is one of fact, the matter can not be agitated in second appeal in the High Court.

If there is no evidence at all or the Courts fail to appreciate or determine the real question of fact, the matter will be one of law.

Damusa and another v. *Abdul Samad and others*, A.I.R. (1919) (P.C.) 29 ; *Sheik Rahmat Illahi* v. *Mohammad Hayat Khan and others*, A.I.R. (1943) (P.C.) 208 ; *Mussamut Khoob Conwur and others* v. *Baboo Moodharain Singh and others*, 9 Moore's I.A. 1 ; *Petamber Manik-Jee* v. *Motee Chund Manik-Jee*, 1 Moore's I.A. 423 ; *Mt. Anupa Bai* v. *Bhagwant Singh and others*, (1938) Nag. 470, distinguished.

Dr. Ba Han for the appellant.

P. K. Basu for the respondent.

U SI BU, J.—This is a defendant's second appeal from the judgment of the District Court, Amherst.

The facts are perfectly simple and present no difficulty whatever.

The plaintiff instituted a suit in the Court of the 2nd Assistant Judge, Amherst, at Moulmein, against the defendant for recovery of Rs. 4,243 due on a promissory note executed by him. The defence

* Civil 2nd Appeal No. 12 of 1951 against the decree of the District Cour of Amherst in Civil Appeal No. 14 of 1949, dated the 16th December 1950.

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U SI BU, J.

was a denial. Hence the followineg two issues were framed :—

(1) Did the defendant execute the suit promissory note after settlement of debts?

(2) To what relief, if any, is the plaintiff entitled?

After hearing the evidence (including the evidence of the plaintiff's books of accounts), the learned trial Judge answered the first issue in the affirmative and decreed the plaintiff's claim. From this decree the defendant preferred an appeal to the District Court and sometime later applied to the said Court for leave to amend his written statement in order to bring out the fact that the promissory note contained a material alteration. It would appear from the exhibit promissory note that the rate of interest first written was " 1 (one) " per cent and later altered to " 3 (three) " per cent. The learned District Judge for the reasons he has given permitted the amendment and framed the following issue :—

" Whether there has been material alteration of the promissory note Exhibit ' A ' in view of the fact that figure ' 1 ' and word ' one ' have been altered to figure ' 3 ' and word ' three' " ?

The case then went back to the trial Court and its finding on that issue is that the alteration was made before the execution of the promissory note and with the knowledge and consent of the defendant. The nett result, in so far as the learned District Judge is concerned, is that, he has agreed with the trial Court that the promissory note was executed by the defendant and also that the alteration was made before the promissory note was executed and with the knowledge and consent of the defendant.

Now, it is hardly necessary to point out that

both the issues referred to above, *i.e.*, execution and alteration, are issues of fact and that no second appeal lies on a question of fact.

Attempt was, however, made to bring this second appeal under section 100 of the Civil Procedure Code. For instance, the very first ground of appeal says that the learned District Judge has erred "*in law*," *firstly*, in not comparing the defendant's signature on the promissory note with his signature in the summons and next with his signature on his lawyer's power ; and *secondly*, in not noticing that plaintiff had not produced any account books showing that a promissory note had been executed. I must confess that I have been unable to appreciate that these constitute errors "in law." I may be wrong—but I know of no law which says that a court, before it can hold that a promissory note has been executed must make a comparison referred to, or that if such comparison is not made, it would be an error of law. Indeed, it would be placing a premium on fraud if such a comparison were enjoined by law. For, no person would, in that case, place his genuine signature on the summons served on him or on the power he gives to his lawyer, if he means to deny his signature on a particular document. Nor am I aware of any law which says, firstly, that a plaintiff must note in his account book that a promissory note has been executed and secondly that he must produce that account book or the failure of the Judge in noticing these omissions would be an error of law. At the best, these may in a proper case be factors in the consideration of the issues involved—but their non-consideration cannot be a legal error particularly if there is other evidence which satisfies the Judge.

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Dr. Ba Han the learned Advocate for the appellant has cited the following cases :—

Damusa and another v. *Abdul Samad and others* (1) ; *Sheik Rahmat Ilahi* v. *Mohammad Hayat Khan and others* (2) ; *Mussamut Khoob Conwur and three others* v. *Baboo Moodharain Singh and after his death two others* (3) ; *Petamber Manik-Jee* v. *Motee Chund Manik-Jee* (4) *and Mt. Anupa Bai w/o Gorelal Kirar* v. *Bhagwant Singh and others* (5). In the first case, their Lordships of the Privy Council in the course of their judgment, observed at pages 30-31 :

" The view of the Judicial Commissioner was that the 1st respondent was ready and willing to pay the purchase-money on the 26th June, and that it was due to the action of the Sub-Registrar and of the appellants in leaving the office when they did that he was prevented from doing so. He was also rightly of opinion that in point of law there was no evidence at all to support the finding of fraud. It is unfortunate that an issue was not framed on the real question, which was whether the 1st respondent was ready and willing to pay the purchase-money on the 26th June, and was prevented from doing so by the action of the appellants."

In the case before me—can it be said that there is no evidence at all to support the finding of execution or that no issue was framed on that question ? I am afraid not.

In the second case, their Lordships of the Privy Council held:

" There is no difference in principle between a failure to appreciate and determine the real question of fact to be tried and a failure to appreciate and determine a question of fact which vitally affects the issue stated in the case. In either case the failure is a failure in the duty imposed by law upon the Court . . . . . "

(1) A.I.R. (1919) (P.C.)29.
(2) A.I.R. (1943) (P.C.) 208.
(3) 9 Moore's I.A. 1.
(4) 1 Moore's I.A. 423.
(5) (1938) Nag. 470.

In the case before me—has the learned District Judge failed to appreciate and determine the real question, namely—execution and alteration of the promissory note ? And what is that question of fact which vitally affects the issues and which he has failed to appreciate and determine ? It cannot be, the failure to make the comparisons already referred to.

In the third case, their Lordships of the Privy Council held :

" Though the onus of proof of the genuineness of an instrument in its altered state lies upon the party producing and claiming under it, yet the altered and suspicious appearance of the instrument may be explained by proof of its original state when executed, and its existing state sufficiently accounted for, to rebut the presumption of the deed having been falsified and tampered with after execution by the party claiming under it."

In the case before me the rule of law laid down above was fully complied with by the trial Court and also by the lower appellate Court.

Even the fact that the defendant would call no evidence has been appreciated by the trial Judge. He has pointed out that having denied execution of the promissory note the defendant could not very well adduce evidence of alteration.

In the fourth case their Lordships of the Privy Council observed :

" The question depends entirely upon facts ; and in a case coming before this Court, depending upon facts, which have received the judgment of two Courts in India, this Court ought not to set aside the last judgment, unless it can see very clearly that that judgment is wrong. It must be

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most completely satisfied it was wrong and inconsistent with the justice of the case, and against the facts. So far from that being the case in the present case, their Lordships are of opinion that, if those facts had been presented to us in the first instance, we should have given the same judgment as pronounced by the two Courts in India."

In the case before me both the lower Courts have held that the promissory note was executed by the defendant and that the alteration was made before execution and with the knowledge and consent of the defendant; and according to that ruling I must not disturb that finding. Following in the footsteps of their Lordships, I must respectfully add that had I been trying this suit, I too would have arrived at the same findings as the two lower Courts have.

In the fifth case, the plaintiff who was a *Purdanashin* lady of sorts alleged fraud and undue influence against the defendant. The trial and the appellate Court negatived that allegation. The High Court of Nagpur pointed out that in the first instance, the plaintiff was not required to prove fraud, misrepresentation or undue influence. All she was required to prove was that the bargain was unfair and that the party who benefited by it was in a position to influence her. Niyogi J., then went on to hold at pages 472 and 473:

"That there is an error of law when a Court's finding proceeds upon a misconception of the real nature of the issue in the case when several facts admitted or proved are not considered in their relation to each other and weighed as a whole, when a certain legal consequence which naturally flows from admitted and proved facts is overlooked, or when a material part of admissible evidence which vitally bears on the point at issue is disregarded. A case which involves such an error of law must in my opinion fall within the ambit of section 100 of the Civil Procedure Code."

Now, in the case before me, I can find no misconception on the part of either of the lower Courts of the real nature of the issue in the case; nor can I find any admitted and proved facts which have not been considered.

The case before the lower Courts was a simple case of a promissory note involving two simple issues relating to execution and alteration. The onus in the case of both the issues was laid on the plaintiff and he has been held by both the lower Courts to have discharged it. I can see no point of law; no irregularity and no failure to appreciate the case in its proper perspective.

Mr. Basu, the learned Advocate for the respondent has also cited several cases but I do not think it is necessary to discuss them. They tend to show that a second appeal cannot be entertained on ground of erroneous finding of fact, however gross or inexcusable the error may seem to be.

In the result, I hold that this second appeal does not lie and I dismiss it with costs; Advocate's fee five gold mohurs.

Even if it did lie, I would have dismissed it on merits.

ORIGINAL CIVIL.

Before U Bo Gyi, J.

H.C. 1951

Sept. 3.

P. B. SEN (PLAINTIFF)

v.

THE DEPUTY CONTROLLER OF EXCHANGE (DEFENDANT). *

Foreign Exchange Regulation Act, 1947, s. 4 (4), s. 6 (1) clause 5 (b)—Whether Controller or Deputy Controller bound to issue permit for remittance of money—Mandamus—If lies—S. 45-A, Specific Relief Act.

Under the scheme of the Foreign Exchange Regulation Act, 1947 final authority in respect of remittance of money outside Burma is the Controller or Deputy Controller or an Assistant Controller appointed under s. 3. The provisions of s. 6 of the said Act read with other provisions prohibit remittance of money to persons resident out of Burma and clearly include the contingency of a person in Burma remitting money to himself outside Burma. In the present case application was made for permit to remit money to himself and his wife and it comes within the mischief of s. 6 (*1*) (*v*) (*b*).

Burma currency is legal tender in Burma alone. The Government of Burma has to husband its holdings in foreign exchange to secure currency stability and economic security and applicant was not entitled to call upon the Government of Burma to part with a portion of the foreign exchange in consideration of Burma currency. The applicant therefore does not come within the purview of s. 45 of the Specific Relief Act.

There is no mandatory provision in the Foreign Exchange Regulation Act which makes it incumbent upon the authorities to permit remittance of money abroad. As the Deputy Controller in the present case considered the application in the case according to certain principles formulated for guidance and acted *bonâ fide* and not arbitrarily no application for mandamus can lie.

Chwan Seng Chan v. *The Commissioner of Police, Rangoon*, (1937) R.L.R. 414, referred to.

P. B. Sen in person.

Dr. Ba Han for the respondent.

U BO GYI, J.—This is an application by Mr. P. B. Sen, an Advocate of this Court, for an order in the nature of the Writ of Mandamus under section 45 of

* Civil Misc. No. 131 of 1951 Original Side.

the Specific Relief Act, directing the Deputy Controller of Exchange to issue a permit enabling him to remit the sum of Rs. 30,000 through his Bankers, the Mercantile Bank of India Limited, Rangoon, to his account with the Central Bank of India Limited, Calcutta. It appears from Mr. Sen's affidavit that he has sold his house in Rangoon for Rs. 30,000 and that he desires to use the money for purposes of building a house for him and his family in Calcutta. The Deputy Controller of Exchange replied that Mr. Sen's application would be considered only at the time of his permanent retirement from Burma. Thereupon, Mr. Sen wrote to the Deputy Controller that he was contemplating retiring from Burma, but could not retire unless he had a house to live in after retirement and also he required a little time to wind up his affairs in Burma. To this the Deputy Controller replied that the application could not be considered. This was not a mere refusal to consider Mr. Sen's application but, as appears from the affidavit and evidence of the Deputy Controller, was a final order passed on the application after a consideration of all the relevant circumstances.

Now, Mr. Sen contends that his case is covered by sub-section (*4*) of section 4 of the Foreign Exchange Regulation Act, 1947. I find myself unable to see how Mr. Sen could invoke these provisions of law which merely provide for the scrutiny of an application such as the present by dealers in foreign exchange, the Mercantile Bank of India Limited in this case, through whom Mr. Sen wants to remit the money; and it is clear from the scheme of the Act that the final authority in the matter is the Controller or the Deputy Controller or an Assistant Controller appointed under section 3 of the Act. The Deputy Controller on his part states that Mr. Sen's application comes within the

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U BO GYI, J.

purview of section 6, sub-section (*1*) (*v*) (*b*) of the Act, which reads:

"6. (*1*). Save as may be provided in and in accordance with any general or special exemption from the provisions of this sub-section which may be granted conditionally or unconditionally by the Controller, no person in, or resident in, British Burma shall—

(*v*) make any payment to or for the credit of any person as consideration for or in association with—

(*b*) the creation or transfer in favour of any person of a right (whether actual or contingent) to receive a payment or acquire property outside Burma."

On the other hand, Mr. Sen contends that since he is remitting the money to the credit of his own account in Calcutta he is not making any payment to the credit of "any person" within the meaning of section 6, sub-section (*1*) (*v*) (*b*) of the Act. These provisions, when read with the foregoing provisions of the section which prohibit remittances of money to persons resident outside Burma, seem to me clearly to guard against the contingency of a person in, or resident in, Burma, remitting money to himself outside Burma. If, in accordance with the well-settled canon of interpretation, every material word in an enactment is given its full force and effect, the words "any person" in section 6 (*1*) (*v*) (*b*) certainly seem to include the remitter himself. This, however, is only of academic importance; for in his application Exhibit A and his declaration Exhibit B, Mr. Sen asks for permission to transfer the sum of Rs. 30,000 to the credit of the joint account of himself and his wife Mrs. Lila Baty Sen.

Mr. Sen urges that he is trying to remit the money for purposes of rehabilitation of his home because he has had to send his family off to Calcutta in the early part of 1949 owing to unsettled conditions here and that he is trying to set up a home in Calcutta. This

may or may not be an investment, although the Deputy Controller says it is; but, in any case, section 6 (*1*) (*v*) (*b*) lays an embargo on remittances in association with the creation or transfer in favour of any person of a right to receive a payment or acquire property outside Burma. I am of opinion that Mr. Sen's case comes within the mischief of section 6 (*1*) (*v*) (*b*) and he is prohibited from remitting the money unless he is permitted so to do by the Controller or the Deputy Controller, as the case may be.

Certain cases have been cited before me in which the public authorities were directed to do certain acts under the relative enactments. But the enactments in connection with which those cases arose are not *in pari materia* with the Foreign Exchange Regulation Act, 1947, which is now under consideration and consequently, those cases will not help to a decision here. Before applying the enactments in question, the real facts of the case must be clearly borne in mind; and so far as I can gather from the arguments of Mr. Sen, and Dr. Ba Han as well as the evidence and affidavit of the Deputy Controller, what Mr. Sen desires in this case is not to send the sum of Rs. 30,000 which he holds in the Mercantile Bank of India Limited, Rangoon, but to get the equivalent of this sum in Indian currency in Calcutta. It is well-known that the Burma currency is legal tender in Burma, and Burma alone. Now, the Government of the Union of Burma has acquired foreign exchange and has to husband its holdings in foreign exchange so that the currency stability and economic security of the country may not be jeopardised. In these circumstances, can Mr. Sen call upon the Government of the Union of Burma to part with a portion of the foreign exchange under its control in consideration of the sum of Rs. 30,000 which he is willing to pay in here? I should, certainly, think

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U BO GYI, J.

not. It follows then that Mr. Sen cannot bring himself within the purview of section 45, proviso (*a*) of the Specific Relief Act.

Furthermore, there is no mandatory provision in the Foreign Exchange Regulation Act, 1947, which makes it incumbent on the Controller or the Deputy Controller to issue a permit to Mr. Sen for the purpose of remitting money, which in the circumstances obtaining in the case is really to make provision for exchange facilities in Mr. Sen's favour. Of the cases cited before me, the nearest approach to the present is that of *Chwan Seng Chan* v. *The Commissioner of Police, Rangoon* (1), where the terms of section 4 of the relative Act, the Rangoon Hackney Carriages Act (Burma Act No. IV of 1947) which are on much the same lines as those of section 6 of the Foreign Exchange Regulation Act, read :

> "No vehicle shall be let to hire, or taken to ply, or offered for hire, except under a licence duly granted to the owner thereof in that behalf by the Commissioner of Police."

and it was held in that case that no order could be issued under section 45 of the Specific Relief Act against the Commissioner of Police requiring him not to restrict the number of rickshaws which might ply for hire and to consider the application of the appellant Chwan Seng Chan for the issue of licences to him for plying rickshaws. Here also the ban imposed under section 6 of the Foreign Exchange Regulation Act, 1947, is general and it is only in certain cases that the Controller may provide exchange facilities by way of exception.

As regards the merits of the case, it appears from the evidence of the Deputy Controller that the Controller and the Ministry of Finance and Revenue

(1) (1937) R.L.R. p. 414.

consulted together and formulated certain principles for guidance. For instance, exchange facilities are provided for marriage, schooling and maintenance expenses of the members of the family of foreigners resident in Burma. In the present case also, the Deputy Controller is willing to consider Mr. Sen's application if he is retiring permanently from Burma ; and I am not prepared to hold that the Deputy Controller has rejected Mr. Sen's application arbitrarily or *mala fide*. The application is accordingly dismissed with costs.

Advocate's fees allowed five gold mohurs.

APPELLATE CIVIL.

Before U Aung Khine, J.

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Oct. 3

NAGESWAR RAO
MULLAIYA } (APPELLANTS)

v.

DUNGARMULL MAHADEV
MOLCHAND } (RESPONDENTS).*

General Clauses Act, s. 27—Urban Rent Control Act, s. 11 (1) (a)—Notice under —Whether must reach addressee—'sent

Held : S. 11 (*1*) (*a*) of the Urban Rent Control Act provides that a written demand for payment of rent must be sent to the tenant by registered post and not complied with for three weeks. Neither under s. 106 nor s. 100 (g) of the Transfer of Property Act is it stated that the notice should reach or be received by the addressee. Under s. 11 (*1*) (*a*) of the Urban Rent Control Act all that the law requires is that a notice be sent and non-compliance for three weeks thereafter.

L. C. DeSouza, Cawnpore, A.I.R. (1932) All. 374, referred to.

K. M. Modi v. *Mohamed Siddique and another*, (1947) R.L.R. 423 at 461-463, followed.

Under s. 27 of the General Clauses Act there is a rebuttable presumption that a notice properly addressed and sent by registered post reached the addressee in proper time. Even if in a notice to a tenant 40 months' rent be demanded when claim for four months has become time barred, the demand is not illegal. Rights as to part may be barred but they are not extinguished and will be held to be actually due.

B. K. Dadachanji for the appellants.

Pillay and Pillay for the respondents.

U AUNG KHINE, J.—Civil 1st Appeals Nos. 23 and 25 of 1951 are taken up together and they arise out of Civil Regular Suit No. 489 and No. 580 of 1950 respectively of the Rangoon City Civil Court. The

* Civil 1st Appeals Nos. 23/25 of 1951 against the decree of the City Civil Court, Rangoon, in Civil Regular No. 489 of 1950, dated 4th day of April 1951.

facts in the two cases are on all fours, and in each case the legal question involved is the same. The respondent Molchand sued appellant Nageswar Rao in Suit No. 489 and appellant Mullaiya in Suit No. 580 for ejectment from room No. 1 and room No. 6 respectively of House No. 108/116, 38th Street, Rangoon on the ground that Nageswar Rao had been owing 40 months' rent and Mullaiya 34 months' rent to the respondent. It is alleged that a written demand on each appellant was made on 6th July 1949 for payment of the arrears of rent through registered post and the demands had not been complied with.

In each of the suits the defendant resisted the claim of the respondent on the ground stated in paragraphs 2 and 3 of their amended written statements. The language used in both the written statements are the same and they are reproduced here for the sake of clarity :

"2. Without prejudice to other contentions with reference to paragraph 2 of the plaint the defendant denies that he has not paid rent since September 1946.

3. Without further prejudice, with reference to paragraph 3 of the plaint the defendant denies receipt of a notice as alleged therein, and further submits that even if the notice on the lines expressed in the said paragraph was served, it was not proper and legal as *inter alia* the arrears of rent claimed therein were not due."

Necessary issues were framed and in due course the two appellants waived their contention raised in paragraph 2 of their written statements, and it was agreed by the parties to have the suit disposed of on the question of notices—*see* diary entry dated the 15th March 1951, in each case. It is the case of the appellants that the notices, dated the 6th July 1949 were not actually served on them and therefore the lower Court was wrong in giving a decree in favour of

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the respondent in each case. On the other hand, the respondent claims that the law does not require that notices should be actually served on the appellants. All that the law required him to do was to send notices by post to the appellants at their proper addresses. So far as he is concerned, it does not really matter whether the notices were actually served on the appellants so long as he can prove that he had actually sent by post the notices demanding rent. As against this contention the appellants say that the Urban Rent Control Act is a special Act and that the law governing the Transfer of Property Act cannot be made applicable *mutatis mutandis* to the cases under the Urban Rent Control Act. It is argued that section 11 (*1*) (*a*), Urban Rent Control Act requires first of all a notice to be sent and then three weeks must elapse before the landlord can sue the tenant in case of non-compliance. If there must be a compliance notices must be actually served on the appellants, and therefore although in the section the word 'sent' has been used, it really means that the notices must be actually served on the appellants. *In Re. L. C. DeSouza, Cawnpore*, (1) was the case in which to an income-tax assessee a registered notice was sent through registered post by the Income Tax Officer, and it was held there that section 63 of the Income Tax Act, 1922 is to be read along with section 27 of the General Clauses Act. The words "unless the contrary is proved" in section 27 refer to both the service and the time. Consequently, when a notice has been posted, properly addressed and prepaid and in a registered cover, the presumption raised even as regards the service is not conclusive but is rebuttable. Mr. Dadachanji appearing for the appellants argues with great emphasis that in this case

(1) A.I.R. (1932) All. 374.

also the provisions of section 11 (*1*) (*a*), Urban Rent Control Act, must be read along with section 27 of the General Clauses Act. Section 27 of the General Clauses Act runs as follows :

> " Where any Act authorizes or requires any document to be *served* by post whether the expression 'serve' or either of the expressions 'give' or 'send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting by registered post a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

Now, referring to section 63 of the Income Tax Act it will be observed that a notice or requisition under this Act must be *served* on the person named therein. Therefore without a doubt section 63 of the Income Tax must be read along with section 27 of the General Clauses Act.

Section 11 (*1*) (*a*) of the Urban Rent Control Act however reads as follows : Notwithstanding anything contained in the Transfer of . . . . . given unless—

> " any rent lawfully due from the tenant which accrued after the resumption of civil government on the conclusion of the hostilites with Japan has not been paid to the landlord or deposited with the Controller under section 14-B after a written demand for payment of such rent has been *sent* to the tenant by registered post and has not been complied with for three weeks from the date of such demand, or any other obligation of the tenancy, whether under the contract of tenancy or under this Act, so far as the same is consistent with the provisions of this Act, has been broken or not performed ; or "

Under this Act a written demand for payment of rent does not require to be served on the tenant but the only pre-requisite is that the demand for payment of

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rent due should be *sent* to the tenant. In the case of *K. M. Modi* v. *Mohamed Siddique and another* (1), the question of the determination of a lease of immoveable property by forfeiture was involved and section 111 (*g*) of the Transfer of Property Act came into play. Under section 111 (*g*) before the lease is determined it requires the lessor or his transferee to give notice in writing to the lessee of his intention to determine the lease. The point taken up in that case is that in order to be effectual, the notice given must actually reach the lessee and before that there was only a presumption that it has reached the lessee and which presumption is clearly rebuttable. Section 106 of the Transfer of Property Act explains the requirements of a valid notice to quit in cases of leases from month to month. Notices under section 106 of the Transfer of Property Act are either to be sent by post to the party or be tendered or delivered personally to such party or to one of his family or servants at his residence or affixed to a conspicuous part of the property. Nowhere in either section 106 or in section 111 (*g*) of the Transfer of Property Act, it is stated that a notice should reach or be received by the addressee. In that connection the observations of Sharpe J. in the above case are very apposite. This is what he says:

"The appellant denied receiving the letter, and we must take it that he did not receive it. The first question is whether the non-receipt by a lessee of a notice under section 111 (*g*) deprives the lessor of the right which he would otherwise have to re-enter for breach of an express condition. I do not think it does. 'Giving notice in writing to' is very different from 'serving notice upon.' There are some sections in the Transfer of Property Act which require a notice in writing to be served ; *see* section 69 (*2*) (*a*), the second paragraph of section 83 and section 114-A. It is, I think, impossible to say that the different

(1) (1947) R.L.R. 423 at 461-463.

words employed in section 111 (*g*) really amount to the same thing as is mentioned in the other sections to which I have just referred. . . . .

I am quite sure that 'giving notice' is something less, in a legal sense, than 'serving notice' and that the posting of this letter to the appellant was a sufficient giving of notice in writing to him, although he never received it."

A general rule of construction of statute is that the Legislature intends to have meant what they have actually expressed. Where by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the Legislature, it must be enforced even though it be absurd or mischievous. In this case, if the Legislature had intended that the notice should be actually served on the tenant it would have stated so in clear terms. The safe and correct method of dealing with the question of construction is to take the words themselves and arrive at their meaning without trying to read into it something that is not there. Thus under section 11 (*1*) (*a*) of the Urban Rent Control Act all that the law requires is that a notice be sent and if after three weeks no payment is made the landlord is at liberty to sue for ejectment of the tenant. It is not competent for the Court to go into the question as to whether the notices had been actually served on the tenants or not. By parity of reasoning and following the general principles of law set out in the case of *K. M. Modi* v. *Mohamed Siddique and another* (1), this is the only logical conclusion that could be arrived at.

It is further contended that the demand of 40 months' rent from appellant Nageswar Rao was illegal inasmuch as 40 months' rent was not legally due. The respondent could not, it is further contended, claim more than 36 months' rent. This to my m...

(1) (1947) R.L.R. 423 at 461-463.

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is rather a specious argument. Although the respondent by the application of Limitation Act may not be able to recover all the 40 months' rent, nevertheless it is impossible to regard his debt as discharged. By the application of Limitation Act although the remedies for recovery of 4 months' rent out of 40 months' rent may be barred, the rights are not extinguished entirely and must be held to be actually due. For all these reasons, I am clearly of the opinion that the lower Court was correct in its finding. The appeals are dismissed. Advocate's fees three gold mohurs in each case.

CIVIL REVISION.

Before U San Maung, J.

P.L.K. KASI CHETTIAR (*a*) U KASI AND ONE (APPLICANTS)

H.C. 1951 Oct. 12.

v.

SHASHAMMAL (*a*) SHAYUSH AMMA (RESPONDENT).*

Suit on behalf of a lunatic—When can be filed—Revision against interlocutory order—S. 115, Code of Civil Procedure—Order 32, Rule 15—Alternative claim in the same suit as a person of sound mind and a person of unsound mind—Not maintainable.

Held : Before a suit on behalf of a lunatic can be instituted by his next friend, the lunatic must either be a person who has been adjudged to be of unsound mind or a person who, though not so adjudged, is found by the Court on enquiry by reason of unsoundness of mind or mental infirmity to be incapable of protecting his interests when suing. Otherwise a suit by a person posing himself as the next friend of the lunatic and on his behalf is not competent.

It is open to a person to file a suit as a person of unsound mind through an agent or to have a suit filed on that person's behalf by next friend under Order 32, Rule 15 of the Code of Civil Procedure in which event there must be an allegation in the plaint that the plaintiff is a person of unsound mind. The plea in the alternative in the same suit is untenable.

Maung Kya Yan and another v. *Maung Tha E*, A.I.R. (1936) Ran. 121, followed.

Nirendra Lall Bhattacharyya and one v. *Bepin Chandra Bhattacharyya and others*, A.I.R. (1935) Cal. 224 ; *Maung San Bwin* v. *Maung Nyi*, 3 Ran. 239, referred to.

The Court will revise an interlocutory order when irremediable injury will be done and a miscarriage of justice will ensue.

Mohamed Chootoo and others v. *Abdul Hamid Khan and others*, 11 Ran. 36, followed.

Ba Tu for the applicants.

K. R. Venkatram for the respondent.

U SAN MAUNG, J.—This application for revision must be allowed. In Civil Regular Suit No. 3 of 1951 of the Court of the District Judge, Bassein, a suit for declaration of title and/or possession of a house and

* Civil Revision No. 47 of 1951 against the order of the District Judge, Bassein in Civil Regular Suit No. 3 of 1951, dated 7th July 1951.

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site was filed against the defendant-applicants P.L.K. Kasi Chettiar and Daw Tin by the plaintiff who described herself as follows :

"Shashammal (*a*) Shayush Amma—daughter of late A. N. Govindan Maistry and wife of M. Padmanabha—now since deceased—of Olani Village, Nagapatam Taluq, Tanjore District, Madras Province, by her agent M. A. Lingam through the substituted agent P. Pangi, trader of 36, Myenu Road, Bassein."

The defendants raised a preliminary objection regarding the validity of the power-of-attorney granted to the so-called substituted agent P. Pangi, but the learned trial Judge by an order dated the 2nd of June 1951 disallowed this objection. However, in the written statement and in the course of the examination of some of the witnesses for the plaintiff it was suggested that the plaintiff was a lunatic. Presumably this was done with a view to question the *locus standi* of the so-called substituted agent P. Pangi to file the suit on behalf of the plaintiff. Therefore, on the 14th of June 1951 an application for leave to amend the plaint was filed, wherein it is stated *inter alia* that the defendants after contesting the validity of the power-of-attorney filed the written statement wherein they had asserted that the plaintiff being of unsound mind the suit should have been instituted by a next friend and that therefore in order to avoid further delay in the disposal of the suit the plaintiff intended to adopt the defendants' suggestion by amending the plaint so that the suit would appear to be filed in the alternative by a next friend of Shashammal. The title of the amended plaint reads as follows :

"Shashammal (*a*) Shayush Amma—daughter of late A. N Govindan Maistry and wife of M. Padmanabha now since deceased of Olani Village, Nagapatam Taluq, Tanjore District, Madras Province, by her agent M. A. Lingam through the substituted agent P. Pangi, trader of 36, Myenu Road, Bassein, *alternatively by the*

said P. Pangi, as her (plaintiff's) next friend according to the provision of Order 32, Rule 15, read with Order 32, Rule 1, Civil Procedure Code—on the basis of her being 'non compos mentis' as asserted in paragraph 1 of the written statement—*Plaintiff.*

v.

1. P.L.K. Kasi Chettiar (*a*) U Kasi—residing at 17, Yobodat Road, Bassein.

2. Daw Tin wife of the 1st defendant and living together with him—*Defendants.*"

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U SAN MAUNG, J.

Paragraph 12 of the plaint also says "The plaintiff files this suit alternatively through her next friend P. Pangi, as has been detailed above in the description of the plaintiff at the beginning of the plaint, on the basis of her being 'non compos mentis' as asserted and suggested by the defendants in paragraph 1 (last portion) of their written statement filed on 11th June 1951 to the original plaint." The application for leave to amend the plaint was allowed by the learned District Judge and hence this application for revision.

In my opinion the learned District Judge's order is clearly not sustainable in law and is subject to revision as he must be deemed to have acted illegally in the exercise of his jurisdiction within the meaning of clause (*c*) of section 115 of the Civil Procedure Code. Shashammal is either sane, in which event she can herself file a suit by an agent, or insane in which event a suit can be filed by a next friend on her behalf, *vide* Order 32, Rule 15 of the Civil Procedure Code read with Rule 1 thereof. If she is insane it must be alleged in the plaint that she is insane and that it is necessary for a suit to be filed by a next friend on her behalf because she is incapable of protecting her own interests. In the case of *Maung Kya Yan and another* v. *Maung Tha E* (1) it was held that in order that a suit by a lunatic can be instituted in his name by his

(1) A.I.R. (1936) Ran. 121.

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next friend, the lunatic must either be a person who has been adjudged to be of unsound mind or a person who, though not so adjudged, is found by the Court on enquiry by reason of unsoundness of mind or mental infirmity to be incapable of protecting his interests when suing. Otherwise a suit by a person posing himself as the next friend of the lunatic and on his behalf is not competent. See also *Nirendra Lall Bhattacharyya and one* v. *Bepin Chandra Bhattacharyya and others*(1) and *Cf. Maung San Bwin* v. *Maung Nyi* (2). In the case of *Mohamed Chootoo and others* v. *Abdul Hamid Khan and others* (3) it was held that the High Court will revise an interlocutory order when irremediable injury will be done and a miscarriage of justice will ensue if the Court held its hands. Such will be the result if the amended plaint is allowed to stand. The suit will be infructuous *ab initio* and all the time, labour and expenses involved will be entirely wasted. Either of the following two courses is open to the plaintiff: (1) To file a suit as a person of sound mind acting through her agent. (2) To have a suit filed on her behalf by a next friend under Order 32, Rule 15 of the Civil Procedure Code, in which event there must be an allegation in the plaint itself that the plaintiff is a person of unsound mind. The plea in the alternative is entirely untenable.

In the result the application for revision is allowed, the order of the District Court dated the 7th July, 1951, now sought to be revised is set aside. The applicants will be allowed costs in this connection, Advocate's fees in this Court three gold mohurs and in the District Court one gold mohur.

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(1) A.I.R. (1935) Cal. 224. (2) 3 Ran. 239.
(3) 11 Ran. 36.

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