BURMA LAW REPORTS

(1953) B.L.R

Containing cases determined by the

Supreme Court of the Union of Burma



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SUPREME COURT

1953

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

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Published under the authority of the President of the Union of Burma by the Superintendent, Union Government Printing and Stationery, Burma, Rangoon.

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HON'BLE JUDGES OF THE SUPREME COURT OF THE UNION OF BURMA DURING THE YEAR 1953

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3. The Hon'ble Justice *Thado Maha Thray Sithu* U MYINT THEIN, M.A., LL.B., *Barrister-at-Law.*

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ပြည်ထောင်စု မြန်မာနိုင်ငံတော်၏ ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံ ဥပဒေ ပုဒ်မ ၂၁၉၊ ၎င်းပုဒ်မများ ၂၂၀-၃၂-၄၄(၂)။ ၁၉၄၉ ခုနှစ်၊ ပြည်ထောင်စုနိုင်ငံ တွင်းထွက် ပင်ရင်းအခြေအမြစ်များကို ထုတ်ဖေါ် လုပ်ကိုင်နိုင်သော အခွင့်အရေး ပေးရန် (ခွင့်ပြုသည့်) အက်ဥပဒေ (၁၉၄၉ ခုနှစ်၊ အက် ဥပဒေ အမှတ် ၄၇)။ အခြေခံဥပဒေ၏ သဘောအဓိပ္ပါယ်ကို ကောက် ယူရာ၌ တရားရုံးများ လိုက်နာလေ့ရှိသော ထုံးတမ်းစဉ်လာနှင့် ဥပဒေသ များ။ မြန်မာနိုင်ငံတော် သမတသည် အောက်ပါပြဿနာနှစ်ရပ်ကို နိုင်ငံတော် တရားလွှတ်တော်ချုပ်သို့ စဉ်းစားစေရန်အလို့ငှါ လွှဲအပ် တော်မူသည်။ (၁) ပြည်ထောင်စု မြန်မာနိုင်ငံ၏သတ္တု စသည့်သဘာဝ ပင်ရင်း အခြေအမြစ်များကို လုပ်ကိုင်သုံးစွဲနိုင်သော၊ သို့တည်းမဟုတ် တိုးတက်အောင် ပြုလုပ်နိုင်သော၊ သို့တည်းမဟုတ် အသုံးချနိုင်သော အခွင့်အရေးကို ပြည်ထောင်စု မြန်မာနိုင်ငံ၏ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေ ပုဒ်မ ၂၁၉ တွင် ဖေါ်ပြထားသောပုဂ္ဂိုလ်များ၊ကုမ္ပဏီများ၊ သို့တည်းမဟုတ် အဖွဲ့အစည်းအား ပေးနိုင်ရန်အလို့ငှါ သီးခြားခွင်းချက် စည်းကမ်းများ ပြဋ္ဌာန်းခြင်းဖြင့်ငှင်း၊ အခြားတနည်းနည်းဖြင့်ငှင်း တရားဥပဒေပြုနိုင်သည့် အာဏာသည် ပြည်ထောင်စု ပါလီမန်တွင်ရှိပါသလော။ (ဖြေ) ၎င်းကိစ္စ အလို့ငှါ သီးခြား ခွင်းချက် စည်းကမ်းများ ပြဋ္ဌာန်းခြင်းဖြင့် တရားဥပဒေပြု နိုင်သည့် အာဏာသည် ပြည်ထောင်စု ပါလီမန်တွင်ရှိပါသည်။ သို့ရာတွင် ပြည်ထောင်စု ပါလီမန်သည် ထိုအာဏာကို ပြည်ထောင်စု နိုင်ငံ၏ အကျိုး

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စီးပွါးအလို့ငှါသာလျှင် အသုံးပြုရပါမည်။ အခြားတနည်းနည်းဖြင့် တရား ဥပဒေပြုနိုင်သည့် အာဏာသည် ပြည်ထောင်စု ပါလီမန်တွင် မရှိပါ။ (၂) ၁၉၄၉ ခုနှစ်၊ပြည်ထောင်စုနိုင်ငံ တွင်းထွက်ပင်ရင်းအခြေအမြစ်များ ကို ထုတ်ဖေါ်လုပ်ကိုင်နိုင်သော အခွင့်အရေးပေးရန် (ခွင့်ပြုသည့်) အက် ဥပဒေ (၁၉၄၉ ခုနှစ်၊ အက်ဥပဒေ အမှတ် ၄၇) တခုလုံးသည်ဥင်း၊ အစိတ်အပိုင်းတခုခုသည်ဥင်း ပြည်ထောင်စု ပါလီမန်၏ ဥပဒေပြု အာဏာ နယ်နိမိတ်အပြင်သို့ ကျရောက်လျက် ဥပဒေ အာဏာမတည်ဟု ဆိုရပါမည် လော။ (ဖြေ) ထိုအက်ဥပဒေတခုလုံးသည်ဥင်း၊ အစိတ်အပိုင်း တခုခုသည် ဥင်း ပြည်ထောင်စုပါလီမန်၏ ဥပဒေပြု အာဏာနယ်နိမိတ်အပြင်သို့ မကျ မရောက်ပါ။ ပြည်ထောင်စု ပါလီမန်၏ ဥပဒေပြုအာဏာ နယ်နိမိတ်အတွင်း သို့ ကျရောက်၍ ထိုဥပဒေတခုလုံးသည် ဥပဒေအာဏာတည်သောအက် ဥပဒေဖြစ်ပါသည်။ အခြေခံဥပဒေများနှင့် ငဥးတို့တွင်ပါရှိသော ပုဒ်မများ၊ ပြဋ္ဌာန်းချက်များ၏ သဘောအဓိပ္ပါယ်ကို ကောက်ယူရာတွင် တရားရုံးများ လိုက်နာလေ့ရှိသော ထုံးတမ်းစဉ်လာနှင့် ဥပဒေသအချို့တို့မှာ၊(၁)အခြေခံ ဥပဒေ၏ အဓိပ္ပါယ်သဘောကို ကောက်ယူရာတွင် ကျဉ်းမြောင်းအောင် ကန့်ကျပ်တည်းတည်း မကောက်ယူဘဲ ကျယ်ပြန့်အောင် ရက်ရက်ရော ရော ကောက်ယူရမည်။ (၂) အခြေခံဥပဒေများသည်ခေတ်ကာလအား လျော်စွာ ပေါ်ပေါက်လာသော အဖြစ်အပျက် အကြောင်းချင်းရာများကို လွှမ်းခြုံနိုင်မိအောင် ကြီးပွါးကျယ်ပြန့်၍ လာရမည့်ဥပဒေများ ဖြစ်ကြသည်ဟု အသိအမှတ်ပြု၍ အဓိပ္ပါယ်သဘောကို ကောက်ယူရမည်။ (၃) အခြေခံ ဥပဒေများတွင် ပေးဖွဲ့ထားသော တန်ခိုးအာဏာ များကို ကျယ်ပြန့်နိုင် သမျှ ကျယ်ပြန့်စေရန် အဓိပ္ပါယ်သဘောကောက်ယူရမည်။ (၄) သက် ဆိုင်ရာနိုင်ငံ၏ ပြည်သူလူထုမှာ အကျိုးအများဆုံး ဖြစ်ထွန်းနိုင်စေမည့် သဘော အဓိပ္ပါယ်ကို ကောက်ယူရမည်။ အထက်တွင် ဖေါ်ပြထား သော ထုံးတမ်းစဉ်လာ နည်းဥပဒေသများမှ တပါး၊ အခြားထုံးတမ်း စဉ်လာနှင့် နည်းဥပဒေများလည်း ရှိသေးသည်။ ငဥးတို့အနက် အချို့မှာ တိုင်းပြည်ပြုလွှတ်တော်၏ ရည်ရွယ်ချက်နှင့် အကြံအစည်များအတိုင်း ဖြစ်စေ ရန်၊ အခြေခံ ဥပဒေတစောင်လုံးကို ခြုံ၍ အဓိပ္ပါယ် ကောက်ယူရမည်။ အနည်းဆုံး အလားတူအကြောင်းချင်းရာများနှင့် စပ်လျဉ်းသော ပြဋ္ဌာန်း ချက်များကိုပါ ထည့်သွင်းစဉ်းစားပြီးမှ အဓိပ္ပါယ်သဘောကို ကောက်ယူ ရမည်။ပုဒ်မတခု၊ သို့မဟုတ် ပြဋ္ဌာန်းချက်တခု၏ သဘောအဓိပ္ပါယ်သည် မရှင်းလင်းမပြတ်သားစေကာမူ အခြားအလားတူ ပုဒ်မများ၊ ပြဋ္ဌာန်းချက် ကိုပါထည့်သွင်းစဉ်းစားလျှင် အဓိပ္ပါယ်ပေါ်လွင် ထင်ရှား၍လာနိုင်သည်။ (၁) *U Htwe* (a) *A. E. Madari v. U Tun Ohn and one*, (1948) B.L.R. 541 ; (၂) *American Jurisprudence*, Vol. XI, pp. 660 to 663 ; (၃) *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 ; (၄) *Baxter* v. *Commissioners of Taxation*, (1907) 4 C.L.R. 1087 at p. 1105, များကို ကိုးကားသည်။

ပြည်ထောင်စု မြန်မာနိုင်ငံတော်၏ ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံ ဥပဒေ ပုဒ်မ ၁၅၁ အရ လွှဲအပ်ခြင်းကိစ္စ 30

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CONTRACT ACT, s. 56—*Frustration—Restrictions upon use of commodity imposed by Government subsequent to the contract -- Suit for refund of advance paid and received—Contract Act, s. 65.—Determination of a cause, materials for.* The respondent contracted to sell and supply technical white oil and received an advance of Rs. 1,000 from the appellant who intended to market it. Subsequent to the contract, Notifications and Directives were issued by Government restricting the use of the commodity to industrial purpose only. The respondent could not furnish the particulars required by the Customs authorities for release of the oil as the appellant on his part was unwilling to declare that it was required for industrial purposes only. The contract for supply failed. The trial Court decreed the suit for refund of the advance paid, but it was reversed by the High Court. On appeal by Special Leave : *Held :* This is a case in which the commercial object of the contract has been frustrated, and the common object of the parties having been frustrated, the law, *i.e.*, ss. 56 and 65 of the Contract Act, provides a common relief from common disappointment and an immediate termination of the obligations as regards future performance. In re *Badische Company Ltd.*, (1921) L.R. 2 Ch. 331 at 379 ; *Denny Molt Dickson Ltd.* v. *James B. Fraser & Co. Ltd.*, (1944) A.C 265 at 271 ; *Hirji Mulji and others* v. *Cheong Yue Steamship Co. Ltd.*, (1926) A.C. 497 at 507, referred to. *J. W. Taylor & Co.* v. *Landauer & Co. Ltd.*, A.E.L.R. (1940), Vol. 4, p. 335, distinguished. *Held further :* In applying the principle enunciated in *Eshenchunder Singh* v. *Shamachurn Bhutto, Koilasunder Singh and others* of the absolute necessity that the determination in a case should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made, the whole of the circumstances must be taken into account and carefully scrutinised. The question is in ultimate analysis one of circumstances and not of law. *Eshenchunder Singh* v. *Shamachurn Bhutto, Koilasunder Singh and others*, 11 M.I.A. 7 ; *P. T. Christensen* v. *K. Suthi*, 5 L.B.R. 76, referred to. *Haji Umar Abdul Rahiman* v. *Gusadji Muncherji Cooper*, A.I.R. (1915) (P.C.) 89, referred to and followed.

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နိုင်ငံခြားသားများအက်ဥပဒေ ပုဒ်မ ၃။ ။ပြည်ထောင်စုမြန်မာနိုင်ငံ၏အခြေခံအက်ဥပဒေပုဒ်မ ၁၁(ခ)။ ။ပြည်ထောင်စုနိုင်ငံသားတဦးသည် နိုင်ငံခြားသားများ မှတ်ပုံတင်ရေး နည်းဥပဒေများအရ မိမိကိုယ်ကို နိုင်ငံခြားသားအဖြစ် မှတ်ပုံတင်ထားခြင်း။ ။ယင်းသို့ မှတ်ပုံတင်ထားခြင်းကြောင့်၊ ပြည်ထောင်စုမြန်မာနိုင်ငံသားအဖြစ်မှရပ်စဲပြီး ဖြစ် မဖြစ်။ လျှောက်ထားသူသည်၊ မြန်မာအမိမှ မြန်မာပြည်အတွင်း မွေးဖွါးခဲ့သော သားဖြစ်၍ သာမန်အားဖြင့် ပြည်ထောင်စု မြန်မာနိုင်ငံ၏ အခြေခံ အက်ဥပဒေ ပုဒ်မ ၁၁ (ခ) အရ ပြည်ထောင်စုမြန်မာနိုင်ငံ၏နိုင်ငံသားဖြစ်သည်။ ။ထိုသူလျှောက်ထားသည့် အတိုင်း ပြည်ထောင်စု မြန်မာနိုင်ငံတော် အစိုးရက နိုင်ငံခြားသားဟု မှတ်ပုံတင်ကာမျှဖြင့် သူသည် နိုင်ငံခြားသား မဖြစ်နိုင်။ ။၁၉၄၈ ခုနှစ်၊ ပြည်ထောင်စုမြန်မာနိုင်ငံ၊ နိုင်ငံခြားသားဖြစ်မှု အက်ဥပဒေ ပုဒ်မ ၁၄ အရ၊ သူသည် နိုင်ငံခြား၏နိုင်ငံသား ပြုမှုလက်မှတ်ကိုရမှ၊ နိုင်ငံခြား၏နိုင်ငံသား

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ပြုခြင်းကို ခံရမှ၊ ပြည်ထောင်စုနိုင်ငံသား အဖြစ်မှ ရပ်စဲသည်။ ပြည်ထောင်စု နိုင်ငံသားအဖြစ်မှ မရပ်စဲသေးသောသူကို၊ နိုင်ငံခြားသားများ အက်ဥပဒေ ပုဒ်မ ၃ အရ၊ ပြည်ထောင်စုမြန်မာနိုင်ငံတော်မှ ထွက်ခွါသွားရန် ပြည်နှင် ဒဏ် အမိန့်မပေးနိုင်။ ။ထိုအမိန့်ကိုမပေးနိုင်သဖြင့်၊ထိုအမိန့်နှင့်စပ်လျဉ်းပြီး ချုပ်တည်းရှု့ မထားနိုင်။

တိန်ယူဟန် နှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်သမတ ပါ (၂) 47

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Supreme Court, however, under s. 6 of the Union Judiciary Act, granted Special Leave to appeal. *Held:* A decision on a cardinal point in issue by itself does not make the order a "final order" but the test is whether the rights of the parties in the suit are finally disposed of by the decision. *U Nyo* v. *Ma Pwa Thin*, 10 Ran. 335; *Abdul Rahman* v. *D. K Cassim*, 11 Ran. 58; *Maung Sin* v. *Ma Byaung*, (1938) Ran 331; *Tan Cheng Leong and one* v. *U Po Thein*, Civil Misc. Appeal No. 14 of 1953 (S.C.), followed *Held:* Only when an order conclusively determines the rights of the parties in a matter material to the due execution of a decree, s. 47 and s. 2 (2) of the Civil Procedure Code could be invoked so that an appeal would lie. The order of the High Court setting aside the order of the District Court is within the meaning of s. 2 (2) and is as such appealable. *Bakat Ram* v. *Sardar Bhagwan Singh*, A.I.R. (1943) Lah. 140 (F.B.) followed. *Held:* S. 11 of the Code of Civil Procedure enumerates the conditions under which the plea of *res judicata* becomes effective, and though the section mentions "suits" it is established law that the principles of *res judicata* apply to execution proceedings *Daw Ohn Bwin* v. *U Ba and one*, 8 Ran. 302, followed. *Held further:* In view of the existence of the order of the District Judge of the 22nd December 1948 which was not set aside or reversed, the appellate Court cannot reconsider the issue determined in that order *Munul Pershad Dichit* v. *Orija Kant Lahiri Chowdhury*, 8 I.A. 123; *Ram Kirpal Shukul* v. *Mussamat Rup Kuari*, 10 I.A. 37; *Bani Ram* v. *Nanhu Mal*, 11 I.A. 181; *Raja of Ramnad* v. *Velusami Tevar*, 48 I.A. 45; *Hook* v. *Administrator-General of Bengal*, 48 I.A. 187; *Shashivaraj Gopalji* v. *Eddapakath Avissa Bi*, A I.R. (1949) (P.C.) 302; *Maung No and one* v. *Maung Po Thein and others*, 1 Ran. 363; *Tarini Charan Bhattacharya* v. *Kedar Nath Halder*, 56 C.L. 723, followed. *Dooply* v. *Dr. Chan Taik*, C.A. 9 of 1949 (S.C.), distinguished.

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of the Union. There is nothing to prevent him from changing his mind before he signs the declaration on oath or affidavit renouncing any other nationality or status as citizen of any foreign country. He signifies his election of citizenship of the Union only when he signs such a declaration. Until then the applicant still remains a foreigner, and his arrest and detention under the Foreigners Act are not illegal.

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URBAN RENT CONTROL ACT—*Licensees or permissive occupants not within scope—Ejectment order against such—Recovery of possession of premises not entailed—No ouster of jurisdiction by s. 11* (1) *of the Act. Held:* The appellant is only a licensee, and a license "passeth no interest, nor alters, or transfers property in anything, but only makes an action lawful which without it had been unlawful." *Held also:* Ss. 11 (*1*) and 13 (*1*) of the Urban Rent Control Act, 1948 make provisions regarding tenants and trespasse s who have been permitted by the Controller to continue in occupation of the respective premises but there is no provision whatsoever regarding licensees or permissive occupants. The order for ejectment of the appellant is not an order for recovery of possession of the premises within the purview of s. 11 (*1*) of the Urban Rent Control Act, and the Fourth Judge of the City Civil Court had power to pass it.

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URBAN RENT CONTROL ACT—*Aim and object of— S. 12* (1)—*Application by occupant to be made statutory tenant—S. 13* (1) (c)—*Application by landlord to evict tenant for own occupation—Writ of Mandamus, nature of. Held:* The Urban Rent Control Act was enacted to grant relief to landlords and tenants alike, and when s. 13 (*1*) (*c*) enables a landlord to seek eviction of a tenant on the ground that the premises are required *bonâ fide* for use and occupation by the landlord himself, the same provisions may be invoked in order to resist an application by an occupant who seeks to be made a tenant under s. 12 (*1*). *Tai Chuan & Co* v. *Chen Seng Cheong*, (1949) B.L.R. (S.C.) 86, followed. *Held also:* A writ of mandamus is a prerogative writ which may be granted or refused in the discretion of the Court.

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WRIT OF *habeas corpus—Order of detention under Suppression of Corruption Act signed by an Assistant Secretary, whether valid— Detention under order in Mandalay Jail of permanent resident of Rangoon, whether proper. Held :* According to the Rules for authentication of orders and other instruments which have been made by the President under s. 121 of the Constitution, an order made in his name can be signed by an Assistant Secretary to the Union Government in the Ministry concerned and his signature must be deemed to be the proper authentication of the order ; it is valid and cannot be called in question on the ground that it is not an order made by the President. *Gwan Kee* v. *The Union of Burma,* B.L.R. (1949) (S.C.) 151 ; *State of Bombay* v. *Purushottam Jog Naik,* A.I.R. (1952) (S.C.) 317. *Held also :* According to s. 4-A (2) of the Suppression of Corruption Act, 1948, as amended by Act 45 of 1951, an arresting officer can detain any person arrested by him in a place of custody which the President has specified by general or special order ; and as all jails are among the places of custody which the President has specified by a general order, there can be no doubt of the President's power to direct in his own order that the applicant's husband be detained in Mandalay Jail

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TRADE DISPUTES ACT—*Reference by President—Leave and Holidays Act, 1951—Extra expenditure imposed—Company unable to meet—Close down—Law pertaining to Lock-out inapplicable—Right of citizen to discontinue business, compulsion to continue unwarranted. Held :* Where a business is admittedly not a public utility service and which has not received any special consideration from the Government, an award made by the Industrial Tribunal cannot direct the management to continue to carry it on against their will. The question whether an employer could or could not close down a business permanently or temporarily falls outside the purview of the Industrial Disputes Act, which is more or less the same as the Burma Trade Disputes Act. *Indian Metal and Metallurgical Corporation* v. *Industrial Tribunal, Madras and another*, A.I.R. (1953) Mad. 98 ; *The Burma Oil Company (Burma Concessions) Ltd. and two others* v. *The Court of Industrial Arbitration, Burma, and two others*, (1951) B.L.R. (S.C.) 1, followed. *Held also :* As the Court of Industrial Arbitration itself has observed in the award "closure or discontinuance of business is neither a lock-out nor a strike", it is clearly wrong in assuming jurisdiction as if it were a lock-out and in applying the case law relating to lock-outs.

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SUPREME COURT.

MANILAL KUNDU (APPELLANT)

† S.C. 1953

Feb. 26.

v.

ABDUL MAJID AND FIFTEEN OTHERS (RESPONDENTS).*

Limitation Act, Article 181—Date fixed for redemption 31st December 1941—Application for final decree—Starting point for computation of time—Courts (Emergency Provisions) Act, 1943, s. 7—Courts deemed closed from 8th December 1941 to 31st March 1947—Time enlarged by act of Court.

By consent a preliminary mortgage decree was passed in April 1941 fixing 31st December 1941 for redemption. Owing to intervention of war and reconstruction of records the appellant applied only on the 8th April 1947 for a final decree, the mortgage not having been redeemed. The decision of the trial Court that limitation under Article 181 ran from the 1st April 1947 was reversed. On appeal by Special Leave.

Held: The legal fiction that is to be adopted by virtue of the Courts (Emergency Provisions) Act is that as from the 8th December 1941 to the 31st March 1947 the Courts were closed. The Judgment-debtor need not have paid in the decretal amount on the date fixed by the compromise decree as the Courts were closed; he would be entitled to postpone the payment till the 1st April 1947. It follows that plaintiff-appellant's right to seek a final decree would accrue only after respondent's failure to deposit the decretal amount, and that date would be the 2nd April 1947.

Held further: Although the parties themselves cannot extend the time prescribed for doing an act in Court on a particular day, yet if the delay is caused not by an act of their own but by some act of the Court itself, they are entitled to do the act on the first opening day of the Court.

Shooshi Bhushan Rudro v. *Gobind Chander Roy*, (1891) 18 Cal. 23; *Peary Mohan* v. *Ananda Charan*, (1891) 18 Cal. 631; *Samabasiva Chari* v. *Ramasami Reddi*, (1899) 22 Mad. 179; *Muhammad Jan* v. *Shiam Lal and others*, (1923) 46 All. 328; *Hari Mohan Dalal and another* v. *Parameshwa Shau and others*, (1929) 56 Cal. 61, referred to.

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* Civil Appeal No. 3 of 1951.

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

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Held also : S. 7 of the Courts (Emergency Provisions) Act, 1943 is in no way ambiguous in its purpose to establish the legal fiction that the Courts in Burma were closed as from the 8th December 1941 and the Act is not one which was meant to be retrospective only "to some extent."

Reid v. *Reid*, L.R. (1896) 31 Ch. D. 402 at 408 ; *Hoe Shwe Fong* v. *E. I. Attia*, (1949) B.L.R. 394, distinguished.

P. B. Sen for the appellant.

Hla Pe for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—The appellant Dr. Manilal Kundu sued one Ahmed Ebrahim on a simple mortgage. The parties arrived at a compromise and a preliminary decree in the following terms was passed in April 1941 :—

"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 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. . . . . "

The war intervened resulting ultimately in the evacuation of the legal Government to India. The defendant Ahmed Ebrahim made no deposit under the terms of the compromise decree and the plaintiff-appellant Manilal Kundu could take no further action until the return of the legal Government. The first step that Manilal Kundu took was on the 18th March 1947 when he applied for the reconstruction of the records in his suit, which were lost during the Japanese occupation, and some considerable time elapsed due to the necessity of adding heirs and legal representatives of Ahmed

Ebrahim who had died in 1945; so that it was only on the lst April 1948 that the records were reconstructed. On the 8th April 1948 an application for a final decree in the suit was filed by the appellant.

The respondents took the stand that the application was time-barred as coming within the mischief of Article 181 of the Limitation Act. The learned Judge on the Original Side held that it was not and ordered a final decree in the suit. On appeal however a Bench of the High Court held that it was in fact time-barred and thus the application was dismissed. Hence this appeal before us.

Several issues were raised and argued before the lower Courts but before us Mr. P. B. Sen for the appellant has abandoned all but one and the single issue on which he has concentrated is that, on a proper construction of section 7 of the Courts (Emergency Provisions) Act, his application for a final decree made on the 8th April 1948 was well within the three year limit prescribed by Article 181 of the Limitation Act.

Section 7 of this Act which was promulgated in India in 1943 runs:

> "7. Running of time. The Civil Courts of British Burma shall be deemed to be closed, within the meaning of section 4 of the Limitation Act, from the 8th December 1941, until such date as the Governor may, by notification, prescribe."

The ultimate date prescribed by the Governor was the 31st March 1947, so that the effect of section 7 is that the civil Courts in Burma must be deemed to be closed as between the 8th December 1941 and the 31st March 1947.

Mr. Sen's contention is that under the terms of the compromise decree the date up to which Ahmed Ebrahim could have made his deposit and to ask for

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a decree of redemption was the 31st December 1941. Ahmed Ebrahim was entitled to postpone payment into Court until the re-opening of the Courts, that is to say, until the lst of April 1947. Thus, according to Mr. Sen, the appellant would have to wait until that day to see if Ahmed Ebrahim (or his heirs and legal representatives) would exercise the right to deposit the amount mentioned in the decree. Only on the failure of Ahmed Ebrahim to make the deposit, the appellant's right to seek a final decree would accrue. Mr. Sen concludes therefore that since he had made his application for a final decree on the 8th April 1947 he was well within the three year limitation.

This contention, when it was raised in the Original Side of the High Court, was accepted. The learned Judge held that the right to apply for a final decree accrued to the appellant-plaintiff only on the failure of the defendant-respondent to make the deposit under the compromise decree. He held that under section 7 of the Courts (Emergency Provisions) Act the Courts were "closed" on the 31st December 1941 (the date mentioned in the decree) and that therefore defendant could take advantage of the "closure" and could have made the deposit on the date the Courts re-opened. The plaintiff, the learned Judge went on to hold, was bound to wait till the opening day, the lst April 1947, in order to ascertain whether the defendants would deposit the money, and that therefore the three year limit prescribed by Article 181 could be reckoned only as from that date.

The appellate Court however dismissed this contention with the following observations:

". . . . The 31st day of December 1941 and the lst day of January 1942 fell on the days when the Courts were closed, and Ahmed Ebrahim, the judgment-debtor, accordingly had time and opportunity until the 2nd January

1942 to pay the decretal amount into Court if he desired to do so—*vide* section 9 of the General Clauses Act. The right of the judgment-debtor to deposit the decretal amount into 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 the final decree for sale on the 3rd January 1942. . . . . In other words, the period of limitation for applying for the passing of the final decree, so far as M. Kundu is concerned, must in fact be considered to have accrued on the 3rd January 1942."

The reasoning for this conclusion was that the High Court was functioning on the 3rd January 1942 and that on that day neither the Courts (Emergency Provisions) Act nor any similar enactment had been promulgated. The right of Ahmed Ebrahim to pay in the decretal amount, according to the learned Judges, was already extinct and superseded when the Act of 1943 was passed.

We regret that we are unable to subscribe to this view. The war in Asia began on the 8th of December 1941 and almost immediately it reached Rangoon with its resultant chaos and disorder. The Courts were probably open on the 3rd of January 1942 in the sense that they were not formally closed but in actual fact things were far from normal. But whatever may have been the actual position prevailing, the legal fiction that is to be adopted by virtue of the Courts (Emergency Provisions) Act is that as from the 8th December 1941 the Courts were closed. And if the Courts were closed as from that date Ahmed Ebrahim need not have paid in the decretal amount on the 3rd January 1942 as the Courts were still closed. On the other hand he would be entitled to postpone payment until the day the Courts re-opened, which was on the lst of April 1947.

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Learned counsel for the respondents, U Hla Pe, has stressed that the fixation of the time limit merely enabled Ahmed Ebrahim to exercise, what he terms, his " option " during that period ending with the date prescribed ; while the appellant was " bound " to apply for a final decree on the expiry of the date. His contention is that the appellant should not have waited for that " option " to be exercised. It seems to us however that the appellant's right to seek a final decree was subject to the respondents' " option " and the real test would be, what would have happened if, soon after the Courts had recommenced to function after the liberation of Burma, the appellant had sought a final decree in the suit ? Surely it would have been open to Ahmed Ebrahim to object, and with validity contend that in the absence of a notification by the Governor under section 7 of the Act of 1943 the Courts were still " closed " and that he would wait for their re-opening, to pay in the decretal amount. In point of fact, the period 8th December 1941 to the 30th March 1947 is analogous to the Long Vacation of the High Court.

We are in full agreement with the principles enunciated in *Shooshi Bhushan Rudro* v. *Gobind Chander Roy* (1), *Peary Mohan* v. *Ananda Charan* (2), *Samabasiva Chari* v. *Ramasami Reddi* (3) and *Muhammad Jan* v. *Shiam Lal and others* (4) that although the parties themselves cannot extend the time prescribed for doing an act in Court on a particular day, yet if the delay is caused, not by an act of their own, but by some act of the Court itself, such as the fact of the Court being closed, they are entitled to do the act on the first opening day of the Court. Thus, in our judgment, the respondents

(1) (1891) 18 Cal. 23.
(2) (1891) 18 Cal. 631.
(3) (1899) 22 Mad. 179.
(4) (1923) 46 All. 328.

could still deposit the decretal amount and apply for a decree of redemption on the 1st April 1947. Once this point is established, then it follows that the plaintiff-appellant's right to seek a final decree would accrue only after respondents' failure to deposit the decretal amount, and that date would be the 2nd of April 1947. See *Hari Mohan Dalal and another* v. *Parameshwa Shau and others* (1) where it was laid down that in interpreting the language of the 3rd Schedule of the Limitation Act it should be done so as to date the cause of action from the date on which the remedy became available to the party.

A reference was made by the learned Judges of the appellate Court to the observations of Bowen L.J., in *Reid* v. *Reid* (2). The relevant quotation runs :

> " 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 forman, imponere debet non praeteritis,* that is, that except in special cases the new law ought to be construed as to interfere as little as possible with vested rights. It seems to me 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 "

With great respect we accept the proposition in its entirety but to us it seems that the Courts (Emergency Provisions) Act is not an Act which

(1) (1929) 56 Cal. 61. (2) L.R. (1896) 31 Ch. D. 402 at 408

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was meant to be retrospective only " to some extent ". The wording of section 7 is in no way ambiguous and even if the Act was passed from the security of the hills of Simla in the year of grace 1943, the unmistakable purport was to ensure the establishment of the legal fiction that the Courts in Burma were closed as from the 8th December 1941.

One more observation we have to make. Stress was placed in both the lower Courts on *Hoe Shwe Fong* v. *E. I. Attia* (1). The facts in that case were somewhat similar but as pointed out by the learned Judge on the Original Side, the effect of section 7 on the defendant's right to have the time extended in his favour was not raised or considered and therefore *Hoe Shwe Fong*'s case must remain as good authority only in respect of the views specifically expressed therein.

The appeal is therefore allowed with costs; Advocate's fees one hundred and seventy kyats. The order in Civil Appeal No. 3 of 1951 is set aside and the original order directing a final decree to be drawn up in CR. 250 of 1940 will stand.

1) (1949) B.L.R. 394.

SUPREME COURT.

U THAN TIN (APPELLANT)

v.

M. BA BA (RESPONDENT).*

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Contract Act, s. 56—Frustration—Restrictions upon use of commodity imposed by Government subsequent to the contract—Suit for refund of advance paid and received—Contract Act, s. 65—Determination of a cause, materials for.

The respondent contracted to sell and supply technical white oil and received an advance of Rs. 10,000 from the appellant who intended to market it. Subsequent to the contract, Notifications and Directives were issued by Government restricting the use of the commodity to industrial purposes only. The respondent could not furnish the particulars required by the Customs authorities for release of the oil as the appellant on his part was unwilling to declare that it was required for industrial purposes only. The contract for supply failed. The trial Court decreed the suit for refund of the advance paid, but it was reversed by the High Court. On appeal by Special Leave.

Held: This is a case in which the commercial object of the contract has been frustrated, and the common object of the parties having been frustrated, the law, *i.e.*, ss. 56 and 65 of the Contract Act, provides a common relief from common disappointment and an immediate termination of the obligations as regards future performance.

In re *Badische Company Ltd.*, (1921) L.R. 2 Ch. 331 at 379; *Denny Mott Dickson Ltd.* v. *James B. Fraser & Co. Ltd.*, (1944) A.C. 265 at 271; *Hirji Mulji and others* v. *Cheong Yue Steamship Co. Ltd.*, (1926) A.C. 497 at p. 507, referred to.

J. W. Taylor & Co. v. *Landauer & Co. Ltd.*, A.E.L.R. (1940) Vol. 4, p. 335, distinguished.

Held further: In applying the principle enunciated in *Eshenchunder Singh* v. *Shamachurn Bhutto, Koilasunder Singh and others* of the absolute necessity that the determination in a case should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made, the whole of the circumstances must be taken into account and carefully scrutinised. The question is in ultimate analysis one of circumstances and not of law.

Eshenchunder Singh v. *Shamachurn Bhutto, Koilasunder Singh and others*, 11 M.I.A. p. 7; *P. T. Christensen* v. *K. Suthi*, 5 L.B.R. 76, referred to.

Haji Umar Abdul Rahiman v. *Gusadji Muncherji Cooper*, A.I.R. (1915) (P.C.) 89, referred to and followed.

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*Civil Appeal No. 3 of 1952.

†*Present:* U THEIN MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE MYINT THEIN and U TUN BYU, C.J., High Court.

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

Kyaw Myint for the respondent.

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

U THEIN MAUNG.—U Than Tin, the plaintiff-appellant, entered into two agreements (Exhibits A and B, dated the 21st June, 1949) with U Ba Ba, the defendant-respondent, to purchase technical white oil from the latter. According to Exhibit A, U Than Tin was to pay nett cash for the goods on arrival of the steamer; and according to Exhibit B, U Than Tin must pay Rs. 10,000 in advance and he must pay the balance "on the notification by the Bank to the sellers for retirement of the draft against the shipment." He has paid Rs. 10,000 in advance in pursuance of the said agreement; the present appeal has arisen out of his suit for recovery of that amount from Ba Ba; and the other agreement has nothing to do with the present litigation.

The circumstances which led to his claim for refund are as follows. On the 1st July, 1949, the Ministry of Commerce and Supply issued the notification Exhibit E, which reads:

> "It is notified for general information that 'Technical White Oil' is not covered by Open General License and that importers are required to apply for Import License for import of this commodity.
>
> Consignments which have already been shipped on or before the 1st July 1949 need not be covered by Import License, but these consignments will be permitted to be cleared from the Customs only under written permits to be issued by the Deputy Director of Industries for use of the oil for industrial purpose."

On the same day the Deputy Director of Industries issued a notification which reads:

" In view of the impending restrictions on the import of technical white oil, it is hereby notified that all industrialists who require the material for use in the various manufacturing processes are requested to register their requirements of technical white oil in the office of the Deputy Director of Industries, giving the following particulars :—

1. Purpose for which required.
2. Nature of products manufactured with the help of white oil, quantities of such products manufactured per month and the percentage of white oil used.
3. Quantity of white oil required per month.

The last date for submission of applications for registering the requirements of white oil has been fixed as the 25th July 1949."

On the same day the Commissioner of Civil Supplies issued another notification, Exhibit D which reads :

" Under the provisions of paragraph 5 (1) of the Civil Supplies Management and Control Order, 1947, the Commissioner of Civil Supplies, Burma declares ' Technical White Oil, White Oil and/or White Mineral Oil ' as ' Essential ' for the purpose of taking suitable action if necessary in the public interest to control their procurement, distribution or prices."

This notification was accompanied by a directive which reads :

" The attention of importers and traders is invited to this Department Notification, dated the 1st July 1949 in which ' Technical White Oil, White Oil and/or White Mineral Oil ' have been declared as ' essential ' within the terms of paragraph 5-B (1) of the Civil Supplies Management and Control Order, 1947. All importers and traders of the above commodities are required with reference to the terms of paragraph 12 (2) of the Order cited above to declare all arrivals of the commodities to the Deputy Director of Industries, Burma, Ministry of Industry and Mines, Secretariat, as detailed in paragraph 2 below within three days of release of the consignments concerned by the Customs authorities. The commodities must not be disposed of except under the previous directions

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of the Deputy Director of Industries or an officer authorised by the Commissioner of Civil Supplies, Burma, in his behalf.

The following particulars should be submitted to the Deputy Director of Industries, Burma, Rangoon:

(*a*) Address where stocks are held/will be held.
(*b*) Date of arrival in Rangoon port or together with the name (s) of the Steamer (s).
(*c*) Description of commodities and brand (s) with weights.
(*d*) Pack and content.
(*e*) Number of Packs.
(*f*) Pack markings.
(*g*) C.I.F. Rangoon price.
(*h*) Landed cost price.
(*i*) Proposed wholesale price.

These particulars should be accompanied by a proposed distribution list, showing the full names and addresses of dealers/consumers to whom the importers propose to distribute their OIL/OILS together with the quantity intended for each.

Sales of these commodities shall not be effected without the previous receipt of necessary approval from the Deputy Director of Industries or an officer authorised by the Commissioner of Civil Supplies, Burma. Any person who contravenes the above directions shall be liable to the penalties provided in section 8 of the Essential Supplies and Services Act, 1947."

So Ba Ba sent copies of the said notifications and directive to U Than Tin and asked the latter to let him have all the information required by them in order that he might be able "to get the goods cleared from the wharf." (*See* Exhibit C dated the 7th July, 1949.)

Thereafter there was considerable exchange of correspondence between the learned Advocates for the parties. In the course of the said correspondence the learned Advocates for U Than Tin wrote:

"That at the time our client offered to purchase the White Oil from you, there was no condition imposed upon our client regarding the re-sale by him of the White Oil nor did our client give you any undertaking that the White Oil purchased would be used for industrial purpose only. The Government of The Union of Burma had not then placed any restriction or condition on the sale and on the specific use of this Oil. When our client offered to purchase the White Oil from you, his object was to re-sell the White Oil in open market to the public, either at wholesale price or retail price, and to make reasonable profit. That being so, our client is not in a position to state to you definitely as to the specific use of the White Oil by his customers, nor is our client in a position to assure you that the White Oil purchased by his customers will be used strictly for industrial purpose. It is regretted that the Government of The Union of Burma has now imposed some restriction and condition on the sale and on the use of the White Oil without giving due notice to the traders in this line of business. However, our client is willing to perform his part of the contract and receive delivery from you of the goods at his godown in terms of the contract, and the balance payment due to you paid and fully discharged.

We are now instructed by our client to write and ascertain from you whether or not you will deliver the goods to our client at his godown in Phongyi Street, Rangoon, on or before the 1st day of August 1949. If you are not in a position to deliver them by the appointed time, we are instructed to demand of you the refund of the advance money Rs. 10,000 to our client."

(*See* Exhibit H dated the 26th July, 1949.)

"It is therefore clear from that assurance that our client is ready to pay your client the balance sum due on the goods and in terms of the contract. But owing to the present control and restrictions by the Government in the disposal and use of the White Oil, our client was anxious to know whether your client would be in a position to perform his part of the contract and be able to deliver the White Oil drums at our client's godown as agreed upon in the contract."

(*See* Exhibit M dated the 17th August, 1949.)

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That in our letter of 26th July 1949 addressed to you directly, and in our second letter of 17th August 1949 addressed to you through your Advocate, Mr. H. A. Mulla, our client had repeatedly assured you that he is willing to perform his part of the contract and receive from you the delivery of the 250 drums of White Oil at his godown in Phongyi Street, Rangoon, and also pay to you the balance price of the White Oil in terms of the contract.

Our client had also repeatedly requested you in our letters to assure him whether or not you will be able to perform your part of the contract and deliver the White Oil. . . . . .

. . . . . .

our client have now held that you cannot perform your part of the contract and that the contracts between you and our client have now been rescinded by you."

(*See* Exhibit N dated the 27th August, 1949.)

"At the time the orders were placed and the indents signed there were no conditions and restrictions to the sale and marketing of the Technical white oil. If there had been, my client would never have signed the indents much less parted with his money. As far as delivery is concerned, between you and him, as seller and purchaser he is not bound by the restrictions introduced subsequent to the signing of the contract. It is up to you to fulfil your part of the contract as far as delivery is concerned."

(*See* Exhibit P dated the 4th February, 1950.)

As U Than Tin refused to let him have the particulars and the guarantee that the white oil would be used for industrial purposes only, Ba Ba tried to get it released by the Customs Authorities furnishing such particulars as he could. But with reference to the question "For what purpose will it be used ? (Give full particulars of the quantities required.)" he could only state "U Than Tin has not given us any answer" and ask the Deputy Director of Industries to hold U Than Tin responsible for his queries. (*See* Exhibit 3 dated the 14th September, 1949.) Ba Ba's attempts to get the goods released by

the Customs Authorities failed and he could not deliver them to U Than Tin; but he refused to refund the sum of Rs. 10,000 which U Than Tin had paid in advance on the ground that U Than Tin had broken the contract by refusing to pay the balance of the price and to furnish the particulars which were required for release of the goods by the Customs Authorities.

Ultimately on the 23rd February, 1950 U Than Tin sued Ba Ba for refund of the said amount stating in his plaint:

"(8) That the consignments, the plaintiff understands had duly arrived but no delivery as stipulated in the contracts has been made, although the plaintiff made attempts to pay the balance of the purchase price on the defendants' guaranteeing the due delivery being made at the plaintiff's godown in accordance with the condition expressed in the contracts. The defendants were neither willing nor able to give such a guarantee.

* * * *

(10) That the failure on the part of the defendants to make or to guarantee making the delivery of the contracted 250 drums of the oil at the plaintiff's godown in terms of the indents is a breach of the contracts sufficient to render them to be a nullity.

(11) That inasmuch as the defendants have committed the breach of the contracts now complained of the plaintiff is entitled to the reimbursement of the sum of Rs. 10,000 already paid as part of his contractual obligation to the defendant No. 1."

Ba Ba's defence (for the purpose of this appeal) is:

"The Plaintiff first failed to honour the retiring of the Bank drafts when informed and then the restrictions by the authorities coupled with the failure of the Plaintiff to supply the requisite information demanded by the Director of Industries, all these clearly indicates that if there was any breach it was by the Plaintiff."

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His other defence is that at the time of the contract "it was clearly understood between the parties that if there is to be any Government orders or restrictions by the authorities the parties are bound by it" is contrary to evidence and has not been pressed in this appeal. In fact his learned Advocate has very properly argued the appeal on the basis of there being no such agreement or understanding at all.

The learned trial Judge, who is the Chief Judge of the Rangoon City Civil Court, framed the following issues (*inter alia*) :—

"2. Who has committed breach of contract ?

3. Can Plaintiff demand delivery of the goods without first paying for the goods in terms of the contract ? "

However, in the course of his judgment he observed :

"As stated earlier, the pleadings have not been precise with the result that the correct issue has not been framed. But there is sufficient material on the record from which to arrive at a decision. The attention of the parties has no doubt been directed to the real point in the case—but the issues they had suggested (namely the 2nd, 3rd and 4th issues) have proved faulty. Now that I have heard the evidence and the arguments of the learned Advocates on both sides, I am of the opinion, that the real issue should have been—' Is there a frustration of the two contracts—Exhibits A and B ? ' "

He ultimately held that the said notifications and directive had the effect of making delivery by Ba Ba in terms of the contract impossible that there really had been no breach of contract by either party and that the contract had really been frustrated ; and he decreed U Than Tin's suit for refund of Rs. 10,000 under sections 56 and 65 of the Contract Act.

On appeal, however, the High Court set his decree aside and dismissed U Than Tin's suit observing in the course of their judgment :

" It being nobody's case as set out in the pleading that the contracts evidenced by Exhibits A and B had become impossible of performance owing to the notification issued by the Government *vide* Exhibit D, the learned trial Judge, in our opinion, was entirely wrong in having decided the case on the ground that the contract was frustrated, a point never pleaded by either of the parties to the suit.

. . . . . .

It is clear from the notification, directive, and the press communiqués cited above that there was no absolute prohibition against the procurement, distribution and sale of technical white oil but that such procurement, distribution and sale were subject to control.

. . . . . .

Now it seems to us that if the plaintiff had sued the defendant for breach of contract for failure to deliver white oil, as contracted for, after payment of the whole of the purchase price, it would be for the defendant either to confess judgment or to plead frustration as an excuse for not fulfilling his part of the contract. As it is neither parties has pleaded frustration presumably because the defendant can still plead that the plaintiff has not yet performed his part of the contract. As the case now stands, the plaintiff is not yet in a position to insist upon the delivery of oil at his godown in terms of the contract Exhibits A and B and his case for the recovery of Rs. 10,000 from the defendant must necessarily fail. "

The High Court has relied upon *Eshenchunder Singh* v. *Shamachurn Bhutto, Koilasunder Singh and others* (1) where their Lordships of the Privy Council pointed out " the absolute necessity that the determinations in a case should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made."

That, however, was a case in which, in the words of their Lordships themselves, " the decision

(1) 11 M.I.A. 7.

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of the High Court appears to be founded upon an assumed state of facts which is contradictory to the case stated in the plaint by the Plaintiff, and devoid not only of allegation, but also evidence in support of it."

That, again, was a second appeal in which, in the words of their Lordships themselves, the High Court "is not a Court at liberty to collect facts anew" and found "their conclusions upon an assumed case wholly inconsistent with the recorded findings contained in the original judgment."

As regards the facts of that case, their Lordships have pointed out:

> "The case made by the Plaintiff alleges a distinct agreement between the Plaintiff and two brothers (whose names have been pronounced in a short manner—the one *Koilas* and the other *Eshen*), that the three should be joint purchasers and joint owners—owners in common, at all events—of a certain lease which was put up by a *Zemindar* to be taken by public tender at a particular time. The plaint proceeds upon the allegation that that lease was taken by *Koilas* on his own behalf, and on behalf of *Eshen*, and on behalf of the Plaintiff, and that, in conformity with the agreement between the three, *Koilas* subsequently executed an instrument for the purpose of giving effect to the agreement. The allegations, therefore, in the plaint are inconsistent with the hypothesis of *Koilas* having no interest and acting in the transaction as Agent only of *Eshen*. The plaint also proceeds upon a clear and well-defined ground of relief, namely, contract and agreement between the parties interested. The decision proceeds upon what is set forth as an equity resulting from the relation betweem *Koilas* and *Eshen* of principal and agent, and from the alleged fact of *Koilas*, in the execution of his authority, having given certain rights and interests to the Plaintiff without which his principal (*Eshen*) would not have been able to obtain the property in question. But the difference between the two grounds of relief and between the two kinds of case is plain."

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The High Court has also referred to *P. T. Christensen* v. *K. Suthi* (1). However, in that case the Court merely followed the ruling in *Eshenchunder Singh*'s case (2). Besides, the facts of that case have been stated by Fox C.J., as follows: —

"In his plaint the plaintiff alleged that on the 24th January 1907 the first defendant, who is the appellant in this appeal, requested him to supply him with boats, and that a contract was then made between them for the supply of boats at the rate of Rs. 100 per day for each boat supplied. By the evidence he gave and produced, the plaintiff tried to prove that he had made a direct contract with the first defendant as alleged in the plaint. The learned Judge held that he had not proved this contract, but instead of dismissing the suit he came to the conclusion, upon his deductions from the evidence, that a contract had been made between the plaintiff and the first defendant, through the agency of the second and third defendants, for the supply of boats at a reasonable rate, and he gave the plaintiff a decree for the amount he claimed."

The present case is distinguishable from those two cases as (1) the case of frustration is involved in and consistent with the case made by the pleadings in which the said notifications and directive are expressly mentioned and (2) the case of frustration is not devoid of evidence in support of it inasmuch as (*a*) the said document and the said correspondence have been made exhibits in the case, (*b*) U Than Tin has deposed "I did not pay the same (*i.e.* the balance of the price) because I thought as the Government had issued restrictions the defendants would not be able to deliver the goods to me," and (*c*) Ba Ba himself has deposed, "He refused to pay giving an excuse that certain restrictions had come into force in respect of sale and purchase of technical white oil. . . . . On the 20th July the plaintiff wrote to me the

(1) 5 L.B.R. 76. (2) 11 M.I.A. 7.

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Exhibit F letter asking me if I could deliver the goods to him."

So the following remarks of their Lordships of the Privy Council themselves in *Haji Umar Abdul Rahiman* v. *Gusadji Muncherji Cooper* (1) are applicable to the present case also:

> "Their Lordships are of opinion that the High Court has applied this principle [*i.e.* the principle in *Eshenchunder Singh*'s case (2)] in an abstract and unsatisfactory way which has misled them in estimating the merits in the controversy before them. In applying such a principle the whole of the circumstances must be taken into account and carefully scrutinised. The question is in ultimate analysis one of circumstances and not of law."

With reference to the question as to whether the contract has really been frustrated, it is clear from the said notifications and directive (1) that after the lst July, 1949, import of technical white oil will be permitted for industrial purposes only, (2) that industrialists who require technical white oil for use in the various manufacturing processes will have to register their requirements in the office of the Deputy Director of Industries, (3) that importers are prohibited from selling it, even for industrial purposes, without the previous approval of Deputy Director of Industries or an officer authorized by the Commissioner of Civil Supplies, Burma.

It is also clear from those documents and the rest of the evidence, both oral and documentary (1) that Ba Ba was importing technical white oil not for industrial purpose but for sale to U Than Tin without any restriction whatsoever on its use, (2) that U Than Tin is not an industrialist or manufacturer but an ordinary retail seller of technical white oil and

(1) A.I.R. (1915) (P.C.) 89. (2) 11 M.I.A. 7.

(3) that at the time of entering into the contract he told Ba Ba he was buying technical white oil to sell it to others (*i.e.* without any restriction whatsoever on its use) and (4) that Ba Ba could not, under the circumstances of the case, get his technical white oil released by the Customs Authorities.

Ba Ba's contract with U Than Tin is for sale of technical white oil for general purposes and he has yet to import the required quantity; but subsequent to the contract competent authorities have prohibited both import and sale of technical white oil for general purposes with the result that the contract became unlawful under section 56 of the Contract Act " by reason of some event which the promisor could not prevent " *i.e.* by reason of administrative and legal intervention.

This is a case (1) in which the commercial object of the contract also has been frustrated [*cp.* in re *Badische Company Ltd.* (1) and *Denny Molt Dickson Ltd.* v. *James B. Fraser & Co. Ltd.* (2)] and (2) in which the common object of the parties having been frustrated the law, *i.e.* sections 56 and 65 of the Contract Act, provides " a common relief from common disappointment and an immediate termination of the obligations as regards future performance. [Cp. *Hirji Mulji and others* v. *Cheong Yue Steamship Co. Ltd.* (3)] at page 507 of which their Lordships of the Privy Council have observed :

" This is necessary, because otherwise the parties would be bound to a contract, which is one that they did not really make. If it were not so, a doctrine designed to avert unintended burdens would operate to enable one party to

(1) (1921) L.R. 2. Ch. 331 at 379. (2) (1944) A.C. 265 at 271.
(3) (1926) A.C. 497 at 507.

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profit by the event and to hold the other, if he so chose, to a new obligation."

The learned Advocate for Ba Ba has invited our attention to *J. W. Taylor & Co.* v. *Landauer & Co. Ltd.* (1) the Editorial Note to which reads:

> "If an act of State, such as embargo on dealing with a certain commodity, makes it impossible for a party to a contract for sale of that commodity entered into before the time of the embargo to perform his part of the contract, he is excused from such performance. If, however, the embargo is not absolute, but permits dealings subject to a licence being obtained, the seller is not automatically excused from performance. His duty is to endeavour to carry out the contract by applying for a licence, and only if the licence is refused, is he excused."

That case, however, is distinguishable from the present one, as the seller would, after obtaining the necessary licence be able to sell the goods in accordance with the contract *i.e.* without any restriction whatsoever on their use.

Besides, in the present case Ba Ba has actually applied to the customs authorities for release of his goods and deposed, "I have done everything necessary on my part to obtain the release of both the consignments of technical oil from the Customs Department."

With reference to the suggestion that U Than Tin should have paid the balance of the price, the contract, according to section 56 of the Contract Act, became void as soon as it became unlawful and Ba Ba is bound, under section 65 thereof to refund Rs. 10,000 as soon as the contract became void.

The circumstances are such that it is not necessary for U Than Tin to sue Ba Ba for breach of

(1) A.E.L.R. (1940) Vol. 4, p. 335.

contract after paying the balance of the price and see whether Ba Ba would plead frustration of the contract at all.

The appeal is allowed; but the appellant and the respondent must bear their own costs throughout.

SUPREME COURT.

† S.C. 1953

Feb. 18.

KHIN MAUNG MYINT (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

General Court Martial—Conviction and sentence by—Appeal to Supreme Court competent—Union Judiciary Act, 1948, s. 6—Special leave to appeal in criminal matters, when granted.

Held: Unlike s. 3 of the Judicial Committee Act, 1833, and s. 136 (2) of the Constitution of India, which specifically exclude appeals from Army Tribunals, s. 6 of the Union Judiciary Act, 1948 empowers the Supreme Court, in its discretion, to grant special leave to appeal from any judgment, decree or final order of any Court in any civil, criminal or other cases.

Mohammad Yakub Khan v. *Emperor*, A.I.R. (1947) (P.C.) 87; *Muhammad Nawaz* (alias) *Nazu* v. *Emperor*, A.I.R. (1941) (P.C.) 133, distinguished.

Held: Circumstances vary with cases and the variations may be so diverse that it would be futile to make an exhaustive definition of the limits within which only this Court, in its discretion, would grant special leave to appeal in criminal matters.

U Saw and four others v. *The Union of Burma*, (1948) B.L.R. 249; *Abdul Rahman* v. *The King-Emperor*, (1927) I.L.R. 5. Ran. 53, followed.

Kyaw Myint and *Mya Than Nu* for the appellant.

Ba Sein (Government Advocate), and *Gangooly* for the respondent.

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

U THEIN MAUNG.—This is an appeal which has been filed with special leave of this Court under section 6 of the Union Judiciary Act, 1948.

The learned Assistant Attorney-General has objected to the application for special leave on the

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* Criminal Appeal No. 1 of 1952.

† *Present:* U THEIN MAUNG, Chief Justice of the Union of Burma, MR. JUSTICE MYINT THEIN and U TUN BYU, C.J., High Court.

ground *inter alia* that appeal does not lie from an order of the General Court Martial to this Court, relying on *Mohammad Yakub Khan* v. *Emperor* (1) where their Lordships of the Privy Council observed:

". . . . their Lordships are clearly of opinion that the Indian Army Act intended the findings of a Court Martial as and when confirmed by the proper confirming officer, to be final, subject only to the power of revision for which this Act provides. There is no room for an appeal to His Majesty in Council consistently with the subject-matter and scheme of the Act."

However, as their Lordships have pointed out at the beginning of their judgment in that case, "the jurisdiction of the Judicial Committee of the Privy Council is purely statutory, resting on the Judicial Committee Act of 1833 and the amending Acts". The material provision is in section 3 of the Act of 1833 which merely provides:

"All appeals or complaints in the nature of appeals whatever, which either by virtue of this Act, or of any law, statute or custom, may be brought before His Majesty or His Majesty in Council from or in respect of the determination, sentence, rule or order of any Court, Judge or Judicial Officer . . . shall . . . be referred . . . to the said Judicial Committee. . ."

Unlike section 3 of the Judicial Committee Act, 1833, section 6 of the Union Judiciary Act, 1948, provides:

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

Besides, it does not contain any provision like section 136 (2) of the Constitution of India which reads:

1) A.I.R. (1947) (P.C.) 87.

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"Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces."

So although appeal from a Court Martial did not lie to the Privy Council, this Court can under the express authority of the said section grant special leave to appeal from a judgment or final order of a Court Martial.

The learned Assistant Attorney-General has also invited our attention to *Muhammad Nawaz* (alias) *Nazu* v. *Emperor* (1), in the course of his objection to the application for special leave. Viscount Simon, Lord Chancellor, observed in that case:

"The Judicial Committee is not a revising Court of criminal appeal: that is to say, it is not prepared or required to re-try a criminal case, and does not concern itself with the weight of evidence, or the conflict of evidence or with inferences drawn from evidence, or with questions as to corroboration or contradiction of testimony, or as to whether there was sufficient evidence to satisfy the burden of proof. Neither is it concerned to review the exercise by the previous tribunal of its discretion as to permitting cross-examination as a hostile witness or in awarding particular punishments. In some of the certificates of counsel which are before their Lordships in connexion with the present set of petitions the certificate sets out particular reasons why it is considered that there is a reasonable ground for appeal, and these reasons disclose that the certifying counsel has not appreciated, or allowed for, the fact that the Judicial Committee cannot be asked to review the facts of a criminal case, or set aside conclusions of fact at which the tribunal has arrived. In all such cases an appeal on such grounds is useless, and is indeed an abuse of the process of the Court."

With reference to the rules laid down by the Privy Council in connection with applications for special leave to appeal in criminal matters, this

(1) A.I.R. 1941 (P.C.) 153.

Court has already stated in *U Saw and four others* v. *The Union of Burma* (1) :

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

However, this Court has also observed in the same case :

"Circumstances vary with cases and the variations may be so diverse that it would be futile to make an exhaustive definition of the limits within which only this Court, in its discretion, would grant special leave to appeal in criminal matters."

The observations of the Lord Chancellor in *Muhammad Nawaz* (alias) *Nazu* v. *Emperor* (2) and the observations of this Court in *U Saw and four others* v. *The Union of Burma* (1) may be compared with directions, which have been given by Lord Goddard C.J., as to the practice of the Courts Martial Appeal Court, constituted under the Courts Martial (Appeals) Act, 1951. These directions have been summarized in the following extract from the Law Times, Vol. 214, p. 79 :—

". . . it was indicated, the Courts-Martial Appeal Court must treat the court-martial in exactly the same way as a jury. That court was the judge of fact and the appeal court would interfere only if there were some misdirection, or if the evidence did not support the conviction in law. His Lordship recalled that the Court of Criminal Appeal had always acted on the principle that it would not put itself into the position

(1) (1948) B.L.R. 249. (2) A.I.R. (1941) (P.C.) 133.

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of the jury, because to do so would be to substitute trial by judges for trial by jury. A court-martial was a proper constitutional court to deal with questions of fact and the officers forming it had what the Lord Chief Justice described as 'a priceless advantage, not shared by the appeal court,' of seeing the witnesses and observing how they behaved, and the manner in which they gave their evidence."

Special leave to appeal has been granted in spite of the learned Assistant Attorney-General's objections, as the evidence must be checked carefully in view of the following specific allegations in the grounds of appeal:—

"1. The sentence and finding of the GCM on charges 2, 3, 4 are legally unsustainable and there is no legal evidence to support it.

2. With reference to the 2nd charge that applicant permitted Saw Veda to enter the BACS lines there is definite evidence that—

(*a*) the permission was given by Major Ford (PW 16), the 2nd in command of the BACS,

. . . . . ."

Now we have checked the evidence carefully and we find that there is sufficient legal evidence to support the conviction and sentence on all the three charges, that there is no evidence whatsoever of the permission to enter the BACS lines having been given to Saw Veda by Major Ford.

According to the well established practice of the Privy Council, from which we do not see any reason to deviate, appeals in criminal cases are allowed only when it is shown that substantial and grave injustice has been done. [See *Abdul Rahman* v. *The King-Emperor* (1)]; and we are satisfied that there has not been any miscarriage of justice in this case.

(1) (1927) I.L.R. 5 Ran. 53.

After carefully analysing the evidence in the whole case, their Lordships held that there was no ground whatever for interference. The appeal was dismissed.

S.C. 1953

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တရားလွှတ်တော်ချုပ်။

† ၁၉၅၂

မေဖေါ်ဝါရီလ ၁၀ ရက်။

ပြည်ထောင်စုမြန်မာနိုင်ငံတော်၏ ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေပုဒ်မ ၁၅၁ အရလွှဲအပ်ခြင်း။*

ပြည်ထောင်စု မြန်မာနိုင်ငံတော်၏ ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံ ဥပဒေပုဒ်မ ၂၁၉၊ ၎င်းပုဒ်မများ ၂၂၀-၃၂-၄၄ (၂)။ ။၁၉၄၉ ခုနှစ်၊ ပြည်ထောင်စု နိုင်ငံ တွင်းထွက်ပင်ရင်းအခြေအမြစ်များကို ထုတ်ဖေါ်လုပ်ကိုင်နိုင်သော အခွင့်အရေးပေးရန် (ခွင့်ပြုသည့်) အက်ဥပဒေ (၁၉၄၉ ခုနှစ်၊ အက်ဥပဒေအမှတ် ၄၇)။

အခြေခံဥပဒေ၏ သဘောအဓိပ္ပါယ်ကို ကောက်ယူရာ၌ တရားရုံးများ လိုက်နာလေ့ရှိသော ထုံးတမ်းစဉ်လာနှင့် ဥပဒေသများ။

မြန်မာနိုင်ငံတော်သမတသည်၊ အောက်ပါပြဿနာနှစ်ရပ်ကို နိုင်ငံတော် တရားလွှတ်တော်ချုပ်သို့ စဉ်းစားစေရန်အလို့ငှါ လွှဲအပ်တော်မူသည်။

(၁) ပြည်ထောင်စု မြန်မာနိုင်ငံ၏သတ္တုစသည့်သဘာဝပင်ရင်းအခြေအမြစ်များကို လုပ်ကိုင်သုံးစွဲနိုင်သော၊ သို့တည်းမဟုတ် တိုးတက်အောင် ပြုလုပ်နိုင်သော၊ သို့တည်းမဟုတ် အသုံးချနိုင်သော အခွင့်အရေးကို ပြည်ထောင်စု မြန်မာနိုင်ငံ၏ ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံ ဥပဒေပုဒ်မ ၂၁၉ တွင် ဖေါ်ပြထားသော ပုဂ္ဂိုလ်များ၊ ကုမ္ပဏီများ၊ သို့တည်းမဟုတ် အဖွဲ့အစည်းများမှတပါး အခြားပုဂ္ဂိုလ်အား၊ သို့ဘည်းမဟုတ် ကုမ္ပဏီအား၊ သို့တည်းမဟုတ် အဖွဲ့အစည်းအားပေးနိုင်ရန်အလို့ငှါ သီးခြားခွင့်ချက် စည်းကမ်းများပြဋ္ဌာန်းခြင်းဖြင့်ငင်း၊ အခြားတနည်းနည်းဖြင့်ငင်း တရားဥပဒေပြုနိုင်သည့်အာဏာသည် ပြည်ထောင်စုပါလီမန်တွင် ရှိပါသလော။

(ခြေ) ၎င်းကိစ္စအလို့ငှါ သီးခြားခွင့်ချက် စည်းကမ်းများပြဋ္ဌာန်းခြင်းဖြင့် တရားဥပဒေပြုနိုင်သည့် အာဏာသည် ပြည်ထောင်စုပါလီမန်တွင် ရှိပါသည်။ သို့ရာတွင် ပြည်ထောင်စုပါလီမန်သည် ထိုအာဏာကို ပြည်ထောင်စုနိုင်ငံ၏ အကျိုးစီးပွါးအလို့ငှါသာလျှင် အသုံးပြုရပါမည်။

အခြားတနည်းနည်းဖြင့် တရားဥပဒေ ပြုနိုင်သည့်အာဏာသည် ပြည်ထောင်စုပါလီမန်တွင် မရှိပါ။

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* ၁၉၅၂ ခုနှစ်၊ လွှဲအပ်မှုအမှတ် ၂။

† နိုင်ငံတော်တရားဝန်ကြီးချုပ်၊ တရားဝန်ကြီး ဦးမြင့်သိန်းနှင့် တရားဝန်ကြီး ဦးထွန်းဖြူတို့၏ ရှေတော်၌ ကြားနာ၍၊ နိုင်ငံတော်တရားဝန်ကြီးချုပ်က အမိန့်ချမှတ်သည်။

၁၉၅၂

ပြည်ထောင်စု မြန်မာနိုင်ငံ တော်၏ ဖွဲ့စည်း အုပ်ချုပ်ပုံ အခြေခံ ဥပဒေ ပုဒ်မ ၁၅၁ အရ လွှဲအပ်ခြင်း။

(၂) ၁၉၄၉ ခုနှစ်၊ ပြည်ထောင်စုနိုင်ငံ တွင်းထွက်ပင်ရင်းအခြေအမြစ်များကို ထုတ်ဖေါ်လုပ်ကိုင်နိုင်သော အခွင့်အရေးပေးရန် (ခွင့်ပြုသည့်) အက်ဥပဒေ (၁၉၄၉ ခုနှစ်၊ အက်ဥပဒေအမှတ် ၄၇) တခုလုံးသည်ဖြင်း၊ အစိတ်အပိုင်း တခုခုသည်ဖြင်း ပြည်ထောင်စုပါလီမန်၏ ဥပဒေပြုအာဏာ နယ်နိမိတ် အပြင်သို့ ကျူးကျော်လျက် ဥပဒေအာဏာမတည်ဟု ဆိုရပါမည်လော။

(ဖြေ) ထိုအက်ဥပဒေတခုလုံးသည်ဖြင်း၊ အစိတ်အပိုင်းတခုခုသည်ဖြင်း ပြည်ထောင်စုပါလီမန်၏ ဥပဒေပြုအာဏာ နယ်နိမိတ်အပြင်သို့ မကျူးကျော်ပါ။ ပြည်ထောင်စုပါလီမန်၏ ဥပဒေပြုအာဏာ နယ်နိမိတ်အတွင်းသို့ ကျူးကျော်၍ ထိုဥပဒေတခုလုံးသည် ဥပဒေအာဏာတည်သော အက်ဥပဒေဖြစ်ပါသည်။

အခြေခံဥပဒေများနှင့် ဖြင်းတို့တွင်ပါရှိသော ပုဒ်မများ၊ ပြဋ္ဌာန်းချက်များ၏ သဘော အဓိပ္ပါယ်ကို ကောက်ယူရာတွင် တရားရုံးများလိုက်နာလေ့ရှိသော ထုံးတမ်းစဉ်လာနှင့် ဥပဒေ သအချို့တို့မှာ—

(၁) အခြေခံဥပဒေ၏ အဓိပ္ပါယ်သဘောကို ကောက်ယူရာတွင် ကျဉ်းမြောင်းအောင် ကျပ်ကျဉ်တည်းတည်း မကောက်ယူဘဲ ကျယ်ပြန့်အောင် ရက်ရက်ရောရော ကောက်ယူရမည်။

(၂) အခြေခံဥပဒေများသည် ခေတ်ကာလအားလျော်စွာ ပေါ်ပေါက်လာသော အဖြစ်အပျက်အကြောင်းချင်းရာများကို လွှမ်းခြုံငုံမိအောင် ကြီးမွါးကျယ်ပြန့်၍လာကြရမည့် ဥပဒေများဖြစ်ကြသည်ဟု အသိအမှတ်ပြု၍ အဓိပ္ပါယ် သဘောကို ကောက်ယူရမည်။

(၃) အခြေခံဥပဒေများတွင် ပေးဆ်ထားသော တန်ခိုးအာဏာများကို ကျယ်ပြန့်နိုင်သမျှ ကျယ်ပြန့်စေရန် အဓိပ္ပါယ်သဘော ကောက်ယူရမည်။

(၄) သက်ဆိုင်ရာနိုင်ငံ၏ ပြည်သူလူထုမှာ အကျိုးအများဆုံး ဖြစ်ထွန်းနိုင်စေမည့် သဘောအဓိပ္ပါယ်ကို ကောက်ယူရမည်။

အထက်တွင် ဖေါ်ပြထားသော ထုံးတမ်းစဉ်လာ နည်းဥပဒေသများမှတပါး အခြားထုံးတမ်းစဉ်လာနှင့် နည်းဥပဒေများလည်းရှိသေးသည်။ ဖင်းတို့ အနက်အချို့မှာ တိုင်းပြည်ပြုလွှတ်တော်၏ ရည်ရွယ်ချက်နှင့် အကြံအစည်များအတိုင်း ဖြစ်စေရန်၊ အခြေခံဥပဒေတစောင်လုံးကိုခြုံ၍ အဓိပ္ပါယ် ကောက်ယူရမည်။ အနည်းဆုံးအလားတူ အကြောင်းချင်းရာများနှင့် စပ်လျဉ်းသော ပြဋ္ဌာန်းချက်များကိုပါ ထည့်သွင်းစဉ်းစားပြီးမှ အဓိပ္ပါယ်သဘောကို ကောက်ယူရမည်။ ပုဒ်မတခု၊ သို့မဟုတ် ပြဋ္ဌာန်းချက်တခု၏ သဘောအဓိပ္ပါယ်သည် မရှင်းလင်း မပြတ်သားစေကာမူ အခြားအလားတူပုဒ်မများ၊ ပြဋ္ဌာန်းချက်များကိုပါ ထည့်သွင်းစဉ်းစားလျှင် အဓိပ္ပါယ် ပေါ်လွင်ထင်ရှား၍လာနိုင်သည်။

၁၉၅၂

ပြည်ထောင်စု မြန်မာနိုင်ငံတော်၏ ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေပုဒ်မ ၁၅၁ အရ လွှဲအပ်ခြင်း။

(၀) *U Htwe* (a) *A. E. Madari* v. *U Tun Ohn and one*, (1948) B.L.R. 541 ; (၂) *American Jurisprudence*, Vol. XI, pp. 660 to 663 ; (၃) *Martin* v. *Hunter's Lesse*, 1 Wheat. 304 ; (၄) *Baxter* v. *Commissioners of Taxation*, (1907) 4 C.L.R. 1087 at p. 1105 များကို ကိုးကားသည်။

ဦးချန်ထွန်း (နိုင်ငံတော်ရှေ့နေချုပ်ကြီး) ပြည်ထောင်စု မြန်မာနိုင်ငံတော် အစိုးရအတွက် လိုက်ပါဆောင်ရွက်သည်။

မစ္စတာ ဟောရော့ (ခ) (စ) (လွှတ်တော်ရှေ့နေကြီး) နှင့် မစ္စတာ ဆူးမားတို့ ကုမ္ပဏီအဖွဲ့အစည်းများအတွက် လိုက်ပါဆောင်ရွက်သည်။

နိုင်ငံတော်တရားဝန်ကြီးချုပ်အမိန့်ချမှတ်သည်။

ဦးသိန်းမောင်။ ။နိုင်ငံတော်သမတသည်၊ အောက်ပါအမိန့်ဖြင့် ပြဿနာနှစ်ခုကို ဤရုံးတော်သို့ စဉ်းစားစေရန်အလို့ငှါ၊ ပြည်ထောင်စုမြန်မာနိုင်ငံ၏ ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံ ဥပဒေပုဒ်မ ၁၅၁ အရ လွှဲအပ်တော်မူခဲ့သည်။

"ပြည်ထောင်စု မြန်မာနိုင်ငံ၏ သမ္ဘာများမှစ၍ သဘာဝပင်ရင်း အခြေအမြစ်များကို ထုတ်ဖော်လုပ်ကိုင်နိုင်သော၊ သို့တည်းမဟုတ် ကိုးတက်အောင်ပြုနိုင်သော အခွင့်အရေးကို ပြည်ထောင်စုမြန်မာနိုင်ငံ၏ ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံ ဥပဒေပုဒ်မ ၂၁၉ တွင် ဖော်ပြထားသော ပုဂ္ဂိုလ်များ၊ ကုမ္ပဏီများ၊ သို့တည်းမဟုတ် အဖွဲ့အစည်းများမှတပါး အခြားပုဂ္ဂိုလ်၊ ကုမ္ပဏီ၊ သို့တည်းမဟုတ် အဖွဲ့အစည်းအားပေးနိုင်ရန်အလို့ငှါ၊ တရားဥပဒေဖြင့် စည်းကမ်းချက်များ ပြဋ္ဌာန်းနိုင်သည့် အာဏာကို ပြည်ထောင်စုပါလီမန်အား ထိုအခြေခံဥပဒေပုဒ်မ ၂၁၉ ဖြင့် အပ်နှင်းထားသည်ဟု ယုံကြည်လျက် တိုင်းပြည်ပြုလွှတ်တော် (ပါလီမန်) သည် ၁၉၄၉ ခုနှစ်၊ ပြည်ထောင်စုနိုင်ငံတွင်းထွက်ပင်ရင်းအခြေအမြစ်များကို ထုတ်ဖော်လုပ်ကိုင်နိုင်သော အခွင့်အရေးပေးရန် (ခွင့်ပြုသည့်) အက်ဥပဒေကို ပြဋ္ဌာန်းခဲ့သည်တကြောင်း။

ပြည်ထောင်စုအစိုးရသည်လည်း အဆိုပါ အက်ဥပဒေအတိုင်း လိုက်နာဆောင်ရွက်လျက်ရှိသည်တကြောင်း။

သို့ရာတွင် ထိုသို့သောအာဏာကို၊ ပြည်ထောင်စုပါလီမန်အား ထိုအခြေခံဥပဒေက အပ်နှင်းထားရှိသည်ဟူသော ယုံကြည်ယူဆချက်နှင့် စပ်လျဉ်း၍ သံသယဖြစ်ပေါ်ရန် ရှိသည်တကြောင်း။

ထို့ကြောင့် တရားလွှတ်တော်ချုပ်၏ ထင်မြင်ယူဆချက်ကို ယူရလောက်အောင် ပြည်သူများအတွက် အရေးကြီးသည်ဟူသော ဥပဒေကြောင်း ဆိုင်ရာ အောက်ပါပြဿနာများ ပေါ်ပေါက်လာသည်ဟုဆင်း၊ ပေါ်ပေါက်ရန်အကြောင်း ရှိသည်ဟုဆင်း ; နိုင်ငံတော်သမတသည် ထင်မြင်ယူဆပါသောကြောင့်၊ ဤပြဿနာကို တရားလွှတ်တော်ချုပ်သို့ စဉ်းစားစေရန်အလို့ငှါ၊ ပြည်ထောင်စုမြန်မာနိုင်ငံ၏ ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေပုဒ်မ ၁၅၁ အရ လွှဲအပ်ပါကြောင်း။

၁၉၅၂

ပြည်ထောင်စုမြန်မာနိုင်ငံတော်၏ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံ ဥပဒေပုဒ်မ ၁၅၁ အရ လွှဲအပ်ခြင်း။

"၁။ ပြည်ထောင်စုမြန်မာနိုင်ငံ၏ သတ္တုစသည့် သဘာဝပင်ရင်းအခြေအမြစ်များကို လွှဲပြောင်းသုံးစွဲနိုင်သော၊ သို့တည်းမဟုတ် တိုးတက်အောင် ပြုနိုင်သော၊ သို့တည်းမဟုတ် အသုံးချနိုင်သော အခွင့်အရေးကို ပြည်ထောင်စုမြန်မာနိုင်ငံ၏ ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံ ဥပဒေပုဒ်မ ၂၁၉ တွင် ဖော်ပြထားသော ပုဂ္ဂိုလ်များ၊ ကုမ္ပဏီများ၊ သို့တည်းမဟုတ် အဖွဲ့စည်းများမှတပါး အခြားပုဂ္ဂိုလ်အား၊ သို့တည်းမဟုတ် ကုမ္ပဏီအား၊ သို့တည်းမဟုတ် အဖွဲ့အစည်းအား ပေးနိုင်ရန်အလို့ငှါ၊ သီးခြားခွင့်ချက် စည်းကမ်းများ ပြဋ္ဌာန်းခြင်းဖြင့်၎င်း၊ အခြားတနည်းနည်းဖြင့်၎င်း တရားဥပဒေပြုနိုင်သည့်အာဏာသည်၊ ပြည်ထောင်စုပါလီမန်တွင် ရှိပါသလော။

၂။ ၁၉၄၉ ခုနှစ်၊ ပြည်ထောင်စုနိုင်ငံ တွင်းထွက်ပင်ရင်းအခြေအမြစ်များကို ထုတ်ဖော်လုပ်ကိုင်နိုင်သော အခွင့်အရေးပေးရန် (ခွင့်ပြုသည့်) အက်ဥပဒေ (၁၉၄၉ ခုနှစ်၊ အက်ဥပဒေအမှတ် ၄၇)တခုလုံးသည်၎င်း၊ အစိတ်အပိုင်းတခုခုသည်၎င်း ပြည်ထောင်စုပါလီမန်၏ ဥပဒေပြု အာဏာနယ်နိမိတ်အပြင်သို့ ကျရောက်လျက် ဥပဒေအာဏာမတည်ဟု ဆိုရပါမည်လော။"

ပဌမပြဿနာကို စဉ်းစားရာ၌၊ အဆိုပါအခြေခံ ဥပဒေပုဒ်မ ၂၁၉ ၏ သဘောအဓိပ္ပါယ်ကို ကောက်ယူရမည်ဖြစ်ရာ၊ အခြေခံဥပဒေများတွင် ပါရှိသော ပုဒ်မတခုခု၊ သို့မဟုတ် ပြဋ္ဌာန်းချက်တခုခု၏ သဘောအဓိပ္ပါယ်ကို ကောက်ယူရာ၌ တရားရုံးများ လိုက်နာလေ့ရှိသော ထုံးတမ်းစဉ်လာနှင့် ဥပဒေသများကို အောက်တိုပြရချေသည်။

ဦးထွေး (ခေါ်) အေ၊ အီး၊ မဒါရိနှင့် ဦးထွန်းအုံး ပါ (၂) တို့၏အမှုတွင် ဤရုံးတော်သည် သက်ဆိုင်ရာစီရင်ထုံး အများအပြားကို ကိုးကားပြီးလျှင်၊ အခြေခံဥပဒေများနှင့် ၎င်းတို့တွင်ပါရှိသော ပုဒ်မများ၊ ပြဋ္ဌာန်းချက်များ၏ သဘောအဓိပ္ပါယ်ကို ကောက်ယူရာတွင် တရားရုံးများလိုက်နာလေ့ရှိသော ထုံးတမ်းစဉ်လာနှင့် ဥပဒေသအချို့ကို ဖော်ပြခဲ့ပြီးဖြစ်သည်။

၎င်းတို့မှာ—

(၁) အခြေခံဥပဒေ၏ အဓိပ္ပါယ် သဘောကို ကောက်ယူရာ၌ ကျဉ်းမြောင်းအောင် ကျပ်ကျပ်တည်းတည်း မကောက်ယူဘဲ၊ ကျယ်ပြန့်အောင် ရက်ရက် ရောရော ကောက်ယူ ရမည်ဖြစ်ကြောင်း။

(၂) အခြေခံ ဥပဒေများသည်၊ ခေတ်ကာလ အားလျော်စွာပေါ်ပေါက်လာသော အဖြစ်အပျက်၊ အကြောင်းချင်းရာ များကို လွှမ်းခြုံဝံ့မိအောင်ကြီးပွါးကျယ်ပြန့်၍လာကြရမည့် ဥပဒေများ

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[1] (1948) B.L.R. 541.

၁၉၅၂

ပြည်ထောင်စု မြန်မာနိုင်ငံ တော်၏ဖွဲ့စည်း အုပ်ချုပ်ပုံ အခြေခံဥပဒေ ပုဒ်မ ၁၅၁ အရ လွှဲအပ်ခြင်း။

ဖြစ်ကြသည်ဟုအသိအမှတ်ပြု၍ အဓိပ္ပါယ်သဘောကိုကောက်ယူရမည်ဖြစ်ကြောင်း။

(၃) အခြေခံဥပဒေများတွင်ပေးထားသောတန်ခိုးအာဏာများကို ကျယ်ပြန့်နိုင်သမျှကျယ်ပြန့်စေရန် အဓိပ္ပါယ်သဘော ကောက်ယူရမည်ဖြစ်ကြောင်း။

(၄) သက်ဆိုင်ရာ နိုင်ငံ၏ ပြည်သူလူထုမှာ အကျိုးအများဆုံးဖြစ်ထွန်းနိုင်စေမည့် သဘောအဓိပ္ပါယ်ကို ကောက်ယူရမည်ဖြစ်ကြောင်း။

အထက်တွင် ဖော်ပြခဲ့သော ထုံးတမ်းစဉ်လာ နည်းဥပဒေသများမှတပါး၊ အခြားထုံးတမ်းစဉ်လာနှင့် နည်းဥပဒေသများလည်း ရှိသေးသည်။ ၎င်းတို့အနက် အချို့မှာ၊ တိုင်းပြည်ပြုလွှတ်တော်၏ ရည်ရွယ်ချက်နှင့် အကြံ အစည်များအတိုင်း ဖြစ်စေရန်၊ အခြေခံဥပဒေ တစောင်လုံးကိုခြုံ၍ အဓိပ္ပါယ် သဘော ကောက်ယူရမည်။ အနည်းဆုံး အလားတူ အကြောင်းချင်းရာများနှင့် စပ်လျဉ်းသော ပြဋ္ဌာန်းချက်များကိုပါ ထည့်သွင်းစဉ်းစားခြင်းမှ၊ အဓိပ္ပါယ်သဘောကို ကောက်ယူရမည်။ ပုဒ်မဘခု၊ သို့မဟုတ်ပြဋ္ဌာန်းချက်တခု၏သဘော အဓိပ္ပါယ်သည် မရှင်းလင်းမပြတ်သားစေကာမူ အခြားအလားတူ ပုဒ်မများ၊ ပြဋ္ဌာန်းချက်များကိုပါ ထည့်သွင်း၍ စဉ်းစားလျှင်၊ အဓိပ္ပါယ်ပေါ်လွင်ထင်ရှား၍လာနိုင်ကြောင်း သတိပြုရမည်ဟူသော ထုံးတမ်းစဉ်လာနှင့်ဥပဒေသများဖြစ်သည် [*]။

ပြည်ထောင်စုမြန်မာနိုင်ငံ၏ ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေပုဒ်မ ၂၁၉ မှာ အောက်ပါအတိုင်း ဖြစ်သည်။

"၂၁၉။ ။သစ်တောနှင့်သတ္တုမြေများ၊သစ်တောများ၊ ရေ၊တံငါလုပ်ငန်း အမျိုးမျိုးဆိုင်ရာဒေသများ၊ သတ္တုများ၊ ကျောက်မီးသွေး၊ရေနံနှင့် အခြားတွင်းထွက်ဆီများ၊ ဓါတ်အားထွက်မည့်ပင်ရင်းအခြေအမြစ်များနှင့်အခြားသဘာဝပင်ရင်းအခြေအမြစ်များကို၊ပြည်ထောင်စုနိုင်ငံကလုပ်ကိုင်သုံးစွဲ၍ တိုးတက်အောင်ပြုရမည်။သို့ရာတွင် ပြည်ထောင်စုနိုင်ငံ၏ အကျိုးစီးပွါးအလို့ငှါ၊ ပါလီမန်၏အက်ဥပဒေအရ၊ ပြဋ္ဌာန်းထားသော သီးခြားခြွင်းချက် စည်းကမ်းများနှင့် မဆန့်ကျင်လျှင်၊ ပြည်ထောင်စုနိုင်ငံသည် အထက်ပါတို့ကိုလုပ်ကိုင်သုံးစွဲနိုင်သော၊ သို့တည်းမဟုတ် တိုးတက်အောင် ပြုနိုင်သော၊ သို့တည်းမဟုတ် အသုံးချနိုင်သော အခွင့်အရေးကို၊ ပြည်ထောင်စု နိုင်ငံသားများအားပေးနိုင်သည်။ သို့တည်းမဟုတ် ပြည်ထောင်စု နိုင်ငံသားများထံမှ အနည်းဆုံး ရာခိုင်နှုန်း ၆၀ မျှပါဝင်သည့် ဒွေရေးရှိသောကုမ္ပဏီများသို့သော်၎င်း၊ ထိုကဲ့သို့သောအဖွဲ့အစည်းများသို့သော်၎င်း ပေးနိုင်သည်။

[*] *Cp.* American Jurisprudence, Vol. XI, pp. 660 to 663.

ခြင်းချက်။ ။ထို့ပြင်၊ ပြည်သူလူထု အကျိုးအတွက် လိုအပ်သောအခါ၊ အထက်ပါ အခွင့်အရေးကို ပါလီမန်ကပြင်နိုင်ရမည်။ သို့တည်းမဟုတ် ပြောင်းနိုင်ရမည်။ သို့တည်းမဟုတ် ရုပ်သိမ်းနိုင်ရမည်ဟူသော စည်းကမ်းချက်များအရမှတပါး ထိုအခွင့်အရေးမျိုးကို မပေးရ။

အထက်က ဖေါ်ပြခဲ့သော သဘာဝ ပင်ရင်းအခြေအမြစ်များကို လုပ်ကိုင် သုံးစွဲခြင်း၊ တိုးတက်အောင်ပြုခြင်း၊ အသုံးချခြင်းတို့အတွက် လက်နှက်ကိုသော်၎င်း၊ လိုင်စင်ကိုသော်၎င်း၊ အခြားနည်းဖြင့် လွှဲအပ်သော လုပ်ပိုင်ခွင့်ကိုသော်၎င်း နှစ်ဆယ့်ငါးနှစ်ထက် ကျော်လွန်သော ကာလအပိုင်းအခြားအတွက်နောင်အခါတွင်မပေးရ။ သို့တည်းမဟုတ် နှစ်ဆယ့်ငါးနှစ်ထက် ကျော်လွန်သောနောက်ထပ်ကာလအပိုင်းအခြားအတွက် အသစ်လဲခွင့် မရှိစေရ။''

၁၉၅၂

ပြည်ထောင်စု မြန်မာနိုင်ငံ တော်၏ဖွဲ့စည်း အုပ်ချုပ်ပုံ အခြေခံ ဥပဒေ ပုဒ်မ ၁၅၁အရ လွှဲအပ်ခြင်း။

ပဌမပြဿနာအတွက် ဤပုဒ်မ ၂၁၉ တွင်ပါရှိသော စကားများအနက်၊ (ပြည်ထောင်စုနိုင်ငံ၏ အကျိုးစီးပွါး အလိုငှါ၊ ပါလီမန်၏ အက်ဥပဒေ အရ၊ ပြဋ္ဌာန်းထားသော သီးခြားခြွင်းချက်စည်းကမ်းများနှင့် မဆန့်ကျင်လျှင်) ဟူသော စကားများသည်၊ အရေးအကြီးဆုံးဖြစ်သည်။ ပဌမပုဒ်မ ၂၁၉ ကို အခြားပုဒ်မ များနှင့်ဝိုင်း၊ အခြားပြဋ္ဌာန်းချက်များနှင့်ဝိုင်း မနှိုင်းယှဉ်ဘဲ၊ သူ့ချင်းသက်သက် ဘတ်ရှသော် (ပြည်ထောင်စု နိုင်ငံ၏ အကျိုး စီးပွါး အလိုငှါ၊ ပါလီမန်၏ အက်ဥပဒေအရ၊ပြဋ္ဌာန်းထားသောသီးခြားခြွင်းချက်စည်းကမ်းများနှင့် မဆန့်ကျင်လျှင်) ဟူသော စကားများသည်၊ ပြည်ထောင်စုနိုင်ငံသည်၊ ပြည်ထောင်စုနိုင်ငံသားများအား၊သို့တည်းမဟုတ် ပြည်ထောင်စုနိုင်ငံသားများအနည်းဆုံး ရာခိုင်နှုန်း ၆၀ မျှပါဝင်သည့် ဒွေရင်းရှိသောကုမ္ပဏီများ၊ သို့မဟုတ် အဖွဲ့အစည်းများအား အခွင့်အရေး ပေးနိုင်ခြင်းကို ချုတ်ချယ်သော စကားများ ဖြစ်သယောင်ယောင် ရှိသည်။ အက်ဥပဒေနှင့် မဆန့်ကျင်မှ အခွင့်အရေးများကို ပြည်ထောင်စု နိုင်ငံသည်ဂင်းတို့အားပေးနိုင်သည်ဟု ဆိုသယောင်ယောင်ရှိသည်။ သို့ဖြစ်၍၊ထိုအခွင့် အရေးများကို ဂင်းတို့အား ပေးနိုင်ခွင့် ပြည်ထောင်စုနိုင်ငံ၏ အာဏာတွင် ခြွင်းချက်ပြု၍၊ထိုအာဏာကို ချုတ်ချယ်သော စကားများ ဖြစ်သယောင်ယောင် ရှိသည်။

ထိုပုဒ်မအရ၊ သဘာဝပင်ရင်းအခြေအမြစ်များကို၊ ပြည်ထောင်စု နိုင်ငံက လုပ်ကိုင်သုံးစွဲ၍တိုးတက်အောင်ပြုရမည်ဖြစ်သော်လည်း ပြည်ထောင်စု နိုင်ငံသည်၊ ထိုအခွင့်အရေးများကို ပြည်ထောင်စု နိုင်ငံသားများနှင့် ဆိုခဲ့သော ကုမ္ပဏီ၊အဖွဲ့ အစည်းများအား ပေးနိုင်သည်။ သို့ရာတွင်၊ ပါလီမန်၏ အက်ဥပဒေအရ၊ ပြဋ္ဌာန်း ထားသော သီးခြားခြွင်းချက်စည်းကမ်းများနှင့်ဆန့်ကျင်လျှင် မပေးရဟု တားမြစ် သကဲ့သို့ရှိသည်။

သို့ရာတွင်၊ အခြေခံဥပဒေကိုအင်္ဂလိပ်-မြန်မာနှစ်ဘာသာဖြင့် ပြဋ္ဌာန်းအတည် ပြုခဲ့ထားသည်။ ထိုဥပဒေပုဒ်မ ၂၁၇ အရလည်း အင်္ဂလိပ် ဘာသာဖြင့် ပြဋ္ဌာန်း

၁၉၅၂

ပြည်ထောင်စု မြန်မာနိုင်ငံတော်၏ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေ ပုဒ်မ ၁၅၁ အရ လွှဲအပ်ခြင်း။

ချက်တို့သည်၊ မြန်မာဘာသာဖြင့် ပြဋ္ဌာန်းချက်များကဲ့သို့ပင် အာနိသင်ရှိသည်။ သို့အတွက် ပုဒ်မ ၂၁၉ အတွက်မှာ၊ မြန်မာဘာသာကိုသာမဟုတ်ဘဲ၊ အင်္ဂလိပ်ဘာသာကိုပါကြည့်ရှုရ၍စဉ်းစားရချေမည်။ သို့စဉ်းစားသောအခါ (ပြည်ထောင်စုနိုင်ငံ၏အကျိုးစီးပွါးအလို့ငှါ၊ ပါလီမန်၏အက်ဥပဒေအရ ပြဋ္ဌာန်းထားသောသီးခြားခြွင်းချက်စည်းကမ်းများနှင့်မဆန့်ကျင်လျှင်) ဟူသောစကားများကို "subject to such specific exceptions as may be authorized by an Act of Parliament in the interest of the Union" ဟုဘာသာ ပြန်၍ထားကြောင်း တွေ့မြင်ရသည်။

(ပြဋ္ဌာန်းထားသော) ဆိုသောမြန်မာစကားနှင့် "authorized" ဟူသော အင်္ဂလိပ်စကားတို့သည် အဓိပ္ပါယ်မတူကြ။ "authorized" ၏အဓိပ္ပါယ်မှာ (ခွင့်ပြုထားသော) ဖြစ်သည်။ (ပြဋ္ဌာန်းထားသော) အစား (ခွင့်ပြုထားသော) ထည့်၍ဘတ်လျှင် (ပြည်ထောင်စု နိုင်ငံ၏အကျိုးစီးပွါးအလို့ငှါ၊ ပါလီမန်၏ အက်ဥပဒေအရ၊ ခွင့်ပြုထားသော သီးခြားခြွင်းချက်စည်းကမ်းများနှင့် မဆန့်ကျင်လျှင်) ဖြစ်၍လာသည်။ သို့ဖြစ်၍လာသောအခါ သဘော အဓိပ္ပါယ်သည် ပြောင်း၍သွားသည်။

မူလရှိရင်းစွဲဖြစ်သော (ပါလီမန်၏ အက်ဥပဒေအရ၊ ပြဋ္ဌာန်းထားသော သီးခြား ခြွင်းချက်စည်းကမ်းများနှင့် မဆန့်ကျင်လျှင်) ဟူသောစကားများသည်၊ ပြည်ထောင်စုနိုင်ငံသားများနှင့်ကုမ္ပဏီ၊ အဖွဲ့အစည်းများအား အခွင့်အရေးပေးရန် ပြည်ထောင်စုနိုင်ငံ၏ တန်ခိုးအာဏာကို ချုတ်ချယ်သကဲ့သို့ ရှိခဲ့သော်လည်း ပါလီမန်၏ ပြဋ္ဌာန်းချက်သည်သီးခြားခြွင်းချက်အနေဖြင့် ခွင့်ပြုသောပြဋ္ဌာန်းချက်ဖြစ်ရမည်ဆိုသည်နှင့်တပြိုင်နက်၊ အက်ဥပဒေဖြင့်ခွင့်ပြုသောသီးခြားခြွင်းချက်သည် (ပင်ရင်းအခြေအမြစ်များကိုပြည်ထောင်စုနိုင်ငံကလုပ်ကိုင်သုံးစွဲ၍တိုးတက်အောင်ပြုရမည်) ဟူသောပြဋ္ဌာန်းချက်၏ ခြွင်းချက်ဖြစ်ရမည်ဟု အနည်းငယ်ထင်ရှား၍လာ၏။ ထိုသီးခြားခြွင်းချက်သည်၊ ပြည်ထောင်စုနိုင်ငံသားများနှင့်ကုမ္ပဏီ၊ အဖွဲ့အစည်းများအား အခွင့်အရေးများကို ပြည်ထောင်စု နိုင်ငံက ပေးနိုင်ခွင့်ကို ချုတ်ချယ်သော ခြွင်းချက်မဟုတ်နိုင်ကြောင်း အနည်းငယ်ထင်ရှား၍လာ၏။

သို့ရာတွင်၊ ထိုကဲ့သို့ အဓိပ္ပါယ်သဘောကို ကောက်ယူရာမှာ (မဆန့်ကျင်လျှင်) ဟူသောစကားများကခုခံနေသကဲ့သို့ရှိသေးသည်။ သို့အတွက်အထက်တွင် ဖေါ်ပြခဲ့သော အင်္ဂလိပ်ဘာသာစကားများကို ထပ်၍သုံးသပ် ရန်လိုပြန်သည်၊ သို့သုံးသပ်သောအခါ (မဆန့်ကျင်လျှင်) ဟူသော မြန်မာစကားများအစား၊ အင်္ဂလိပ်စကားတွင် "subject to" ဟုသုံး၍ ထားသည်ကို တွေ့ရသည်။

" subject to " ၏ သဘောအဓိပ္ပါယ်မှာ (အထောက်အထားပြု၍)၊ သို့မဟုတ် (မဆန့်ကျင်စေမူ၍)၊ သို့မဟုတ် (အညံ့ပေး၍) ဖြစ်သည်။ သို့အတွက်၊ (မဆန့်ကျင်လျှင်) ဟူသော စကားများ၏သဘော အဓိပ္ပါယ်ကို ဤနေရာတွင် (မဆန့်ကျင်စေမူ၍) ဟုကောက်ယူမှသာလျှင်၊ တိုင်းပြည်ပြုလွတ်တော်၏ အာဘော်ကိုမိလိမ့်မည်။

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ပြည်ထောင်စု မြန်မာနိုင်ငံ တော်၏ဖွဲ့စည်း အုပ်ချုပ်ပုံ အခြေခံဥပဒေ၊ ပုဒ်မ ၁၅၁ အရ လွှဲအပ်ခြင်း။

ဤသို့သဘောအဓိပ္ပါယ် ကောက်ယူပြီးလျှင်၊ မူလ စာပိုဒ်ကိုဘတ်သော်၊ (ပြည်ထောင်စုနိုင်ငံ၏ အကျိုးစီးပွါးအလိုငှါ၊ ပါလီမန်၏ အက်ဥပဒေအရ ခွင့်ပြုထားသော သီးခြားခြွင်းချက် စည်းကမ်းများကို မဆန့်ကျင်စေမူ၍၊ ပြည်ထောင်စုနိုင်ငံသည်၊ ပြည်ထောင်စုနိုင်ငံသားများနှင့်ကုမ္ပဏီ၊ အဖွဲ့အစည်းများအား အခွင့်အရေးပေးနိုင်သည်) ဟုဖြစ်၍လာသည်။

သို့ဖြစ်၍လာသည့်အတိုင်း ပုဒ်မ ၂၁၉ ကိုသုံးသပ်ဝေဘန်လျှင်၊ ၎င်းမှာ အပိုင်း ၃ ပိုင်း ပါရှိကြောင်းထင်ရှား၍လာသည်။

ပဌမပိုင်းမှာ၊ သဘာဝပင်ရင်း အခြေအမြစ်များကို၊ ပြည်ထောင်စုနိုင်ငံက လုပ်ကိုင်သုံးစွဲ၍ တိုးတက်အောင်ပြုရမည် ဟူသောအပိုင်းဖြစ်သည်။

ဒုတိယပိုင်းမှာ၊ အထက်ပါစည်းကမ်းတွင်၊ ပြည်ထောင်စုနိုင်ငံ၏ အကျိုးစီးပွါးအလိုငှါ၊ ပါလီမန်က အက်ဥပဒေအရ ခွင့်ပြုသော သီးခြားခြွင်းချက် စည်းကမ်းများပြုလုပ်နိုင်သည်ဟူသောအပိုင်းဖြစ်သည်။

တတိယပိုင်းမှာ၊ ပါလီမန်က အက်ဥပဒေဖြင့် ခွင့်ပြုသော သီးခြားခြွင်းချက် စည်းကမ်းများကို မဆန့်ကျင်စေမူ၍၊ ပြည်ထောင်စုနိုင်ငံသည်၊ ပြည်ထောင်စုနိုင်ငံသားများနှင့် ဆိုခဲ့သောကုမ္ပဏီ၊ အသင်းအဖွဲ့များအား အခွင့်အရေးကို ပေးနိုင်သည်ဟူသောအပိုင်းဖြစ်သည်။

ပဌမပိုင်းအရ၊ သဘာဝပင်ရင်း အခြေအမြစ်များကို၊ ပြည်ထောင်စုနိုင်ငံက လုပ်ကိုင်သုံးစွဲ၍၊ တိုးတက်အောင်ပြုရမည်ဆိုသော်လည်း အချို့သဘာဝပင်ရင်း အခြေအမြစ်များ အတွက်မှာမူ၊ ပြည်ထောင်စုနိုင်ငံက လုပ်ကိုင်သုံးစွဲ၍ တိုးတက်အောင်ပြုရမည့်အစား အခြားသူများ၊ သို့မဟုတ် ကုမ္ပဏီ၊ အသင်းအဖွဲ့အစည်းများအား လုပ်ကိုင်သုံးစွဲစေ၍ တိုးတက်အောင်ပြုခွင့်ပေးနိုင်စေရန် ပါလီမန်သည် ဒုတိယပိုင်းအရဥပဒေဖြင့် ပြည်ထောင်စုနိုင်ငံ၏အကျိုးစီးပွါးအလိုငှါခြွင်းချက်များ ပြုလုပ်နိုင်သည်။ ဤသို့အဓိပ္ပါယ်ကောက်ယူခြင်းသည်၊ ပြည်သူလူထုမှာ အကျိုးစီးပွါး အများဆုံး ဖြစ်ထွန်းနိုင်စေမည့် သဘောအဓိပ္ပါယ်ကို ကောက်ယူရမည်

၁၉၅၂

ပြည်ထောင်စု မြန်မာနိုင်ငံတော်၏ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေ ပုဒ်မ ၁၅၁ အရ လွှဲအပ်ခြင်း။

ဟူသောစည်းမျဉ်း ဥပဒေသနှင့်ညီညွတ်သည်။ သည်မျှသာမကသေး၊ ဤသို့အဓိပ္ပါယ်ကောက်ယူခြင်းသည်၊ အခြေခံဥပဒေပုဒ်မ ၂၂၀ နှင့်လည်းညီညွတ်သည်။ ပုဒ်မ ၂၂၀ မှာအောက်ပါအတိုင်းဖြစ်သည်။

"ပြည်ထောင်စုနိုင်ငံ၏ အကျိုးစီးပွါးအလိုငှါ၊ ပါလီမန်၏ အက်ဥပဒေက ပြဋ္ဌာန်းထားသော သီးခြားခြွင်းချက်စည်းကမ်းများ အရမှတပါး၊ လုပ်ကိုင်သုံးစွဲစေရန်သော်၎င်း၊ တိုးတက်အောင် ပြုစေရန်သော်၎င်း၊ အသုံးချစေရန်သော်၎င်း မည်သည့်လယ်ယာကိုင်းကျွန်းမြေကိုမျှ၊ ပြည်ထောင်စုနိုင်ငံသား မဟုတ်သောသူများအား ပြည်ထောင်စုနိုင်ငံက၊ မပေးရ။"

ထိုပုဒ်မအရ မည်သည့်လယ်ယာကိုင်းကျွန်း မြေကိုမျှပြည်ထောင်စုနိုင်ငံသား မဟုတ်သော သူများအား၊ ပြည်ထောင်စုနိုင်ငံ ကမပေးရဟုဆိုသော်လည်း၊ ပြည်ထောင်စုနိုင်ငံ၏ အကျိုးစီးပွါးအလိုငှါ၊ ပါလီမန်က အက်ဥပဒေဖြင့် သီးခြားခြွင်းချက် စည်းကမ်း များပြုလုပ်၍၊ ပြည်ထောင်စုနိုင်ငံသား မဟုတ်သူများအား၊ လယ်ယာကိုင်းကျွန်း မြေများကို ပေးစေနိုင်သေးသည်။ ဤနည်းအတူပင်လျှင်၊ ပုဒ်မ ၂၁၉ အရ၊ သဘာဝပင်ရင်း အခြေအမြစ်များကို ပြည်ထောင်စုနိုင်ငံက လုပ်ကိုင်သုံးစွဲ၍တိုးတက်အောင်ပြုရမည်ဆိုသော်လည်း၊ပါလီမန်ကအက်ဥပဒေဖြင့် သီးခြားခြွင်းချက်များ ပြုလုပ်၍၊ သဘာဝပင်ရင်း အခြေအမြစ်များကို လုပ်ကိုင်သုံးစွဲ၍ တိုးတက်အောင် ပြုရန်အခွင့်အရေးများကို သူတပါးတို့အား ပေးရန်ခွင့်ပြုနိုင်သေးသည်။ဤစကားစပ်၌၊ ပုဒ်မ ၂၂၀ တွင်မြန်မာဘာသာဖြင့်ပါရှိသော (ပြည်ထောင်စုနိုင်ငံ၏ အကျိုးစီးပွါးအလိုငှါ၊ ပါလီမန်၏အက်ဥပဒေက ပြဋ္ဌာန်းထားသော သီးခြားခြွင်းချက် စည်းကမ်းများ အရမှတပါး) ဟူသောစာပိုဒ်နှင့် အလားတူအင်္ဂလိပ်စာပိုဒ်မှာ၊ "subject to such specific exceptions as may be authorized by an Act of Parliament in the interest of the Union" ဖြစ်ပြီး၊ ၎င်းအင်္ဂလိပ်စကားများသည်လည်း ပုဒ်မ ၂၁၉ တွင်ပါရှိသော အင်္ဂလိပ်စာပိုဒ်အတိုင်းဖြစ်၍ ပုဒ်မ ၂၁၉ ၏ အဓိပ္ပါယ်သဘောကို အထက်တွင်ဖေါ်ပြခဲ့သည့်အတိုင်း ကောက်ယူခြင်းသည် တိုင်းပြည်ပြုလွှတ်တော်၏ အာဘော်အတိုင်းဖြစ်ကြောင်း သာ၍ထင်ရှားသည်။

ဤသို့သဘောအဓိပ္ပါယ်ကောက်ယူခြင်းသည်၊ အခြေခံဥပဒေပုဒ်မ ၃၂ နှင့် ပုဒ်မ ၄၄ (၂) တို့နှင့်လည်းညီညွတ်သည်။ ထိုပုဒ်မများအရ၊ သဘာဝပင်ရင်း အခြေအမြစ်များကို နိုင်ငံတော်အစိုးရ ကိုယ်တိုင်လုပ်ကိုင်သုံးစွဲ၍ တိုးတက်အောင် ပြုရမည်ဟု သတ်မှတ်ပြဋ္ဌာန်းခြင်းသည်၊ ဥပဒေပြုရာ၌ဝင်း၊ အုပ်ချုပ်ရာ၌ဝင်း အလေးဂရုပြုရမည့်၊ ယေဘုယျလမ်းညွှန်များသာ ဖြစ်ကြောင်း။ ၎င်းတို့ကို ပြည်ထောင်စုနိုင်ငံတော်အစိုးရကိုယ်တိုင်မလုပ်ကိုင်သုံးစွဲနိုင်သေးလျှင်၊ အခြားသူများအားလုပ်ကိုင်ခွင့်ပေးနိုင်စေရန်ရည်ရွယ်ချက်ရှိကြောင်းပေါ်လွင်ထင်ရှားသည်။

၁၉၅၂

ပြည်ထောင်စု မြန်မာနိုင်ငံတော်၏ ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံ ဥပဒေ ပုဒ်မ ၁၅၁ အရ လွှဲအပ်ခြင်း။

တတိယပိုင်းအရလည်း၊ ပြည်ထောင်စုနိုင်ငံတော် အစိုးရသည် မိမိကိုယ်တိုင် မလုပ်ကိုင်မသုံးစွဲနိုင်သေးသော၊ သို့မဟုတ်မလုပ်ကိုင်မသုံးစွဲလိုသေးသော သဘာဝပင်ရင်းအခြေအမြစ်များကို လုပ်ကိုင်သုံးစွဲ၍ တိုးတက်အောင်ပြုရန် ပြည်ထောင်စု နိုင်ငံသားများအား၊ သို့မဟုတ် ဆိုခဲ့သော ကုမ္ပဏီ၊ အသင်းအဖွဲ့များအား အခွင့် ပြုနိုင်သည်။ သို့ခွင့်ပြုရာမှာမူ၊ ပါလီမန်က အက်ဥပဒေအရ ခွင့်ပြုထားသော သီးခြားခြွင်းချက်များရှိလျှင် ၎င်းတို့ကို အထောက်အထားပြု၍ ခွင့်ပြုရမည်။ ဥပမာပုံ၊ ပါလီမန်က သဘာဝပင်ရင်း အခြေအမြစ် တမျိုးမျိုးကိုလုပ်ကိုင်သုံးစွဲ၍ တိုးတက်အောင်ပြုရန် အခွင့်အရေးများကို ပြည်ထောင်စု နိုင်ငံသားများထံမှ အနည်းဆုံး ရာခိုင်နှုန်းမည်မျှပါဝင်သောကုမ္ပဏီ၊ သို့မဟုတ် အသင်းအဖွဲ့များအား ပေးနိုင်စေရမည်ဟုသီးခြားခြွင်းချက်အက်ဥပဒေဖြင့်လုပ်၍ထားလျှင်၊ ပြည်ထောင်စု နိုင်ငံတော်အစိုးရသည် တတိယပိုင်းအရ မိမိ၏အာဏာကို အသုံးပြုရာ၌၊ ထို ခြွင်းချက်ကိုမဆန့်ကျင်စေရ။ ထိုခြွင်းချက်ကို ရိုသေလေးစားရမည်။ တတိယပိုင်းကို ဤကဲ့သို့သဘောအဓိပ္ပါယ် ကောက်ယူခြင်းသည်၊ ထိုအပိုင်းအရ၊ ပြည်ထောင်စု နိုင်ငံတော်အစိုးရ ရရှိသောအာဏာကို အကျယ်ပြန့်ဆုံးဖြစ်အောင် ကောက်ယူခြင်း ဖြစ်၍၊ အထက်တွင်ဖေါ်ပြခဲ့သောနည်းဥပဒေသများနှင့်ညီညွတ်သည်၊ ထိုမှတပါး ထိုကဲ့သို့ကောက်ယူခြင်းသည်၊ အခြေခံဥပဒေပုဒ်မ ၎၄ (၂) ၏သဘောနှင့်လည်း လိုက်လျောညီညွတ်သည်။ ပြည်ထောင်စု နိုင်ငံတော်အစိုးရ၏ အာဏာကို ဤမျှ ကျယ်ပြန့်အောင် အဓိပ္ပါယ်သဘောကောက် ယူသော်လည်း စိုးရိမ်စရာမရှိနိုင် ကြောင်းကို၊ ပုဒ်မ ၂၁၉ တွင်ပါရှိသော ခြွင်းချက်အရထင်ရှားသည်။ ထိုခြွင်းချက် အရ၊ ပြည်ထောင်စု နိုင်ငံတော်အစိုးရက ပေးခဲ့ထားသော အခွင့်အရေးများကို၊ ပြည်သူ့အကျိုးအတွက် လိုအပ်သောအခါ၊ ပါလီမန်က ပြင်နိုင်ရမည်၊ ပြောင်း လဲနိုင်ရမည်၊ သို့ဘည်းမဟုတ် ရုပ်သိမ်းနိုင်ရမည်။ သို့အတွက် အထက်တွင် အဓိပ္ပါယ် သဘောကောက်ယူသည့်အတိုင်း၊ ပြည်ထောင်စု နိုင်ငံတော်အစိုးရမှာ ကျယ်ပြန့်သောအာဏာရှိသော်လည်း၊ ပြည်သူ့အကျိုးအတွက်ဝင်စွက်ရန်လိုလျှင်၊ ပါလီမန်လည်းဝင်စွက်နိုင်မည်သာဖြစ်သည်။

အထက်တွင်ဖေါ်ပြခဲ့သည့်အတိုင်း၊ ပုဒ်မ ၂၁၉ ၏ အပိုင်း ၃ ပိုင်းတို့ကို သဘော အဓိပ္ပါယ်ကောက်ယူခြင်းသည်၊ အခါကာလအားလျော်စွာ ဖြစ်ပေါ်လာသော အကြောင်းချင်းရာ အခြေအနေများကို ခြုံမိငုံမိအောင် ကြိုးထွားကျယ်ပြန့်နိုင်စေရန် သဘောအဓိပ္ပါယ်ကို ကောက်ယူရမည်ဟူသော ဥပဒေသနှင့်လည်း ညီညွတ်သည်။ အောက်တွင်ဖေါ်ပြထားရှိသော အမှု၌၊ အမေရိကန် ယူနိုက်တက်

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ပြည်ထောင်စု မြန်မာနိုင်ငံတော်၏ ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံ ဥပဒေ ပုဒ်မ ၁၅၁ အရ လွှဲအပ်ခြင်း။

စတိတ်နိုင်ငံ လွှတ်တော်ချုပ်တရားဝန်ကြီး စတိုရိ၏ ယူဆဆုံးဖြတ်ချက် များနှင့် လည်းညီညွတ်သည်။ °

သို့အတွက်၊ ပုဒ်မ ၂၁၉ ၏အဓိပ္ပါယ် သဘောအချုပ်မှာ (သဘာဝပင်ရင်း အခြေအမြစ်များကို၊ ပြည်ထောင်စုနိုင်ငံတော်အစိုးရက လုပ်ကိုင်သုံးစွဲ၍၊ တိုးတက် အောင်ပြုရမည်။ သို့ရာတွင် ထိုစည်းကမ်းတွင်၊ ပြည်ထောင်စုနိုင်ငံ၏ အကျိုးစီးပွါး အလို့ငှါ၊ ပါလီမန်က အက်ဥပဒေဖြင့် ခြွင်းချက်များပြုလုပ်နိုင်သည်။ ထိုမှတပါး၊ ထိုခြွင်းချက်များကိုအထောက်အထားပြု၍၊ ပြည်ထောင်စု နိုင်ငံတော်အစိုးရသည်၊ သဘာဝပင်ရင်းအခြေအမြစ်များကိုလုပ်ကိုင်သုံးစွဲရန် တိုးတက်အောင်ပြုရန် အခွင့် အရေးများကို၊ ပြည်ထောင်စုနိုင်ငံသားများအား၊ သို့မဟုတ် ၎င်းတို့ထံမှငွေရင်း အနည်းဆုံးရာခိုင်နှုန်း ၆၀ ပါသော ကုမ္ပဏီများ၊ သို့မဟုတ် အဖွဲ့အစည်းများအား ပေးနိုင်သည်) ဖြစ်ကြောင်း ဤရုံးတော်က ကောက်ယူဆုံးဖြတ်သည်။

သို့ကောက်ယူ ဆုံးဖြတ်သည့်အတိုင်း နိုင်ငံတော်သမတကလွှဲအပ်သည့်ပဌမ ပြဿနာကို ပြည်ထောင်စုပါလီမန်တွင် သီးခြားခြွင်းချက် စည်းကမ်း ပြဋ္ဌာန်းခြင်း ဖြင့် တရားဥပဒေပြုနိုင်သည့် အာဏာရှိသည်ဟုဖြေဆိုရမည်။

ထိုပြဿနာတွင်၊ အဆိုပါကိစ္စအလို့ငှါ အခြားတနည်းနည်းဖြင့်တရားဥပဒေ ပြုနိုင်သည့်အာဏာသည် ပြည်ထောင်စုပါလီမန်တွင် ရှိပါသလောဟူသော အမေး လည်းပါရှိ၍နေရာ ပုဒ်မ ၂၁၉ တွင် သီးခြား ခြွင်းချက် စည်းကမ်း များကို

° Delivering the opinion of the Supreme Court of the United States of America in the case of *Martin* v. *Hunter's Lessee*, 1 Wheat., 304, Story J., observed:

" The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require."

This passage has been cited with approval in *Baxter* v. *Commissioners of Taxation*, (1907) 4 C.L.R. 1087 at p. 1105.

ပါလီမန်၏အက်ဥပဒေအရပြဋ္ဌာန်းရန်သာပါရှိသောကြောင့်၊ အခြား နည်းအားဖြင့် အဆိုပါ ကိစ္စအလို့ငှါ တရားဥပဒေပြုနိုင်သည့် အာဏာသည် ပြည်ထောင်စုပါလီမန်တွင်မရှိပါဟု ဖြေဆိုရမည်။ ဤအချာ၌၊ ပြည်ထောင်စု နိုင်ငံတော် အစိုးရအတွက် လိုက်ပါဆောင်ရွက်သော နိုင်ငံတော် ရှေနေချုပ်ကြီးနှင့် ကုမ္ပဏီအဖွဲ့အစည်းများအတွက်လိုက်ပါဆောင်ရွက်ကြသော လွှတ်တော်ရှေနေကြီးများသည် အဆိုပါကိစ္စအတွက် အခြားတနည်းနည်းဖြင့် တရားဥပဒေ ပြုနိုင်သည့် အာဏာသည်ပြည်ထောင်စုပါလီမန်တွင်ရှိပါသည်ဟုအမြွက်လေသံမျှမပြောကြားခဲ့ကြချေ။

၁၉၅၂

ပြည်ထောင်စုမြန်မာနိုင်ငံတော်၏ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံ ဥပဒေ ပုဒ်မ ၁၅၁ အရ လွှဲအပ်ခြင်း။

နိုင်ငံတော် သမတက လွှဲအပ်တော်မူသော ဒုတိယ ပြဿနာနှင့် စပ်လျဉ်း၍ ၁၉၄၉ ခုနှစ်၊ပြည်ထောင်စုနိုင်ငံတွင်းထွက် ပင်ရင်းအခြေအမြစ်များကိုထုတ်ဖေါ်လုပ် ကိုင်နိုင်သောအခွင့်အရေးပေးရန် (ခွင့်ပြုသည့်) အက်ဥပဒေသည်၊ သို့မဟုတ် ထိုဥပဒေအစိတ်အပိုင်း တခုခုသည်၊ ပြည်ထောင်စုပါလီမန်၏ ဥပဒေပြု အာဏာနယ်နိမိတ်အပြင်သို့ကျူးရောက်သည် မကျူးရောက်သည်ကို စီစစ်ဝေဘန်ရာ၌ ထိုအက်ဥပဒေသည်၊ သို့မဟုတ် ထိုအက်ဥပဒေ၏ အစိတ်အပိုင်းတခုခုသည် ပုဒ်မ ၂၁၉ အရ၊ပါလီမန်ကအက်ဥပဒေဖြင့်ပြဋ္ဌာန်းနိုင်သော သီးခြားခွင်းချက် စည်းကမ်းများဟုတ်မဟုတ် စီစစ်ဝေဘန်ရချေမည်။

ထို အက်ဥပဒေကို မည်သည့်အတွက် ပြဋ္ဌာန်းရကြောင်း ဖေါ်ပြရာတွင်၊ အကြောင်းနှစ်ခု ပြ၍ထားသည်။ ပဌမ အကြောင်းမှာ တရားဥပဒေဖြင့် သီးခြားခွင်းချက်စည်းကမ်းများပြဋ္ဌာန်းနိုင်သည့်အာဏာကို ပြည်ထောင်စု ပါလီမန်အား အခြေခံဥပဒေပုဒ်မ ၂၁၉ ဖြင့်အပ်နှင်းထားကြောင်းဖြစ်သည်။ ဒုတိယအကြောင်းမှာ ပြည်ထောင်စုနိုင်ငံ၏ အကျိုးစီးပွါး အလို့ငှါ၊ သီးခြားခွင်းချက် စည်းကမ်းများကိုပြဋ္ဌာန်းရန်သင့်ကြောင်းဖြစ်သည်။

ထို အက်ဥပဒေ ပုဒ်မ ၂ အရမှာလည်း၊ ထိုပုဒ်မတွင် ပြဋ္ဌာန်း ထားသော ပြဋ္ဌာန်းချက်များကိုအခြေခံဥပဒေပုဒ်မ ၂၁၉ တွင် ရည်ညွှန်းထားသော သီးခြားခွင်းချက်စည်းကမ်းများ အဖြစ်ဖြင့် ပြဋ္ဌာန်းကြောင်း ပါရှိသည်။ သည်မျှသာမကသေး ထိုပုဒ်မတွင်ပါရှိသော ပြဋ္ဌာန်းချက်များကိုစီစစ်၍ကြည့်သောအခါမှာလည်း ၎င်းတို့သည် ပြည်ထောင်စုနိုင်ငံ၏ အကျိုး စီးပွါးအလို့ငှါ ဖြစ်ကြောင်း တွေ့မြင်ရသည်။

ထိုပြဋ္ဌာန်းချက်များမှာ အောက်ပါအတိုင်းဖြစ်သည်။

"(က) ပြည်ထောင်စုနိုင်ငံသား တဦးတယောက်ကသော်၎င်း၊ ပြည်ထောင်စု နိုင်ငံသားများထံမှ အနည်းဆုံးရာခိုင်နှုန်းခြောက်ဆယ်မျှပါဝင်သည့် ဌေရင်းရှိသောကုမ္ပဏီတခုခုက၊ သို့တည်းမဟုတ် အဖွဲ့အစည်း တခုခုကသော်၎င်း

၁၉၅၂

ပြည်ထောင်စု မြန်မာနိုင်ငံ တော်၏ဖွဲ့စည်း အုပ်ချုပ်ပုံ အခြေခံ ဥပဒေ ပုဒ်မ ၁၅၁ အရ လွှဲအပ်ခြင်း။

ထိုတွင်းထွက်ပင်ရင်းအခြေအမြစ်များကို နိုင်ငံတော်အကျိုးဖြစ်ထွန်းအောင် ထုတ်ဖေါ်လုပ်ကိုင်ရန် ဖြစ်စေ၊ တိုးတက်အောင်ပြုရန်ဖြစ်စေ စွမ်းဆောင်နိုင်လိမ့်မည်မဟုတ်ဟူ၍နိုင်ငံတော်အစိုးရကယုံကြည်ယူဆရန် အကြောင်းရှိခြင်း။

(ခ) အထက် အပိုဒ်(က)တွင် ဖေါ်ပြထားခြင်းမရှိသောပုဂ္ဂိုလ်၊ သို့တည်းမဟုတ် ကုမ္ပဏီ၊သို့တည်းမဟုတ်အဖွဲ့အစည်းအား၊ ထိုထုတ်ဖေါ်လုပ်ကိုင်နိုင်သော၊ သို့တည်းမဟုတ် တိုးတက်အောင်ပြုနိုင်သောအခွင့်အရေးမျိုးကိုမပေးဘဲနေခဲ့သော်၊ ပြည်ထောင်စုနိုင်ငံ၏အကျိုးစီးပွါးကို ပျက်ပြားစေမည်ဟူ၍ နိုင်ငံတော်အစိုးရက ယုံကြည်ယူဆရန် အကြောင်းရှိခြင်း။

(ဂ) အခွင့်အရေးကို အသစ်ထုတ်ပေးရာ၌ဝင်း၊ အဟောင်းကို ထပ်မံပြုပြင်ထုတ်ပေးရာ၌ဝင်းထိုအခွင့်အရေးသည် တည်ဆဲဖြစ်သော သတ္တုတူးဖေါ်ခွင့်နည်းဥပဒေများအရသာလျှင်ဖြစ်စေခြင်း။

(ဃ) ထိုအခွင့်အရေးကို နိုင်ငံတော်အစိုးရ၏ စီးပွါးရေးစီမံကိန်းနှင့် အညီအညွတ်ဖြစ်စေခြင်း။"

ထိုအက်ဥပဒေ၏ ကျန်အစိတ်အပိုင်းများမှာ၊ ထိုအက်ဥပဒေသည် မည်သည့်နေ့ရက်မှစ၍ အာဏာတည်ရမည်ဟူသော ပြဋ္ဌာန်းချက်နှင့် ထိုအက်ဥပဒေပါ ကိစ္စများနှင့် ရည်ရွယ်ချက်များကို ဆောင်ရွက်ရန်နည်းဥပဒေများ ,လုပ်နိုင်ခွင့်ဆိုင်ရာ ပြဋ္ဌာန်းချက်များသာဖြစ်သည်။

သို့ဖြစ်၍၊ ထိုအက်ဥပဒေသည် အခြေခံဥပဒေ ပုဒ်မ ၂၁၉ အတွင်း အကျုံးဝင်သော သီးခြားခြွင်းချက်စည်းကမ်းများဆိုင်ရာ အက်ဥပဒေမျှသာဖြစ်သည်။ သို့အတွက် ထိုအက်ဥပဒေသည်၎င်း၊ ထိုအက်ဥပဒေ၏ အစိတ်အပိုင်းတခုခုသည်၎င်း ပြည်ထောင်စုပါလီမန်၏ ဥပဒေပြုအာဏာ နယ်နိမိတ်အပြင်သို့ ကူးလွှားသည်မဟုတ်ချေ။ ထိုအက်ဥပဒေကိုအာဏာမတည်ဟု မဆိုနိုင်ချေ။

အထက်တွင် ဖေါ်ပြခဲ့သော အားကြောင်း အချက်များကို ဆင်ခြင် သုံးသပ်ပြီးလျှင်၊ ဤရုံးတော်က နိုင်ငံတော်သမတ လွှဲအပ်တော်မူသော ပြဿနာများကို အောက်ပါအတိုင်းဖြေကြား၍ နိုင်ငံတော်သမတထံအစီရင်ခံမည်။

(၁) ပြည်ထောင်စုမြန်မာနိုင်ငံ၏ သတ္တုစသည့် သဘာဝ ပင်ရင်းအခြေအမြစ်များကိုလုပ်ကိုင်သုံးစွဲနိုင်သော၊သို့တည်းမဟုတ် တိုးတက်အောင်ပြုနိုင်သော၊ သို့တည်းမဟုတ် အသုံးချနိုင်သောအခွင့်အရေးများကိုပြည်ထောင်စုမြန်မာနိုင်ငံတော်၏ ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေ ပုဒ်မ ၂၁၉ တွင် ဖေါ်ပြထားသော ပုဂ္ဂိုလ်များ၊ ကုမ္ပဏီများ၊ သို့တည်းမဟုတ် အဖွဲ့အစည်းများမှတပါး အခြားပုဂ္ဂိုလ်အား၊ သို့တည်းမဟုတ် ကုမ္ပဏီအား၊သို့တည်းမဟုတ်အဖွဲ့အစည်းအားပေးနိုင်ရန်

အလို့ငှါ၊ သီးခြားခွဲခြင်းချက်စည်းကမ်း ပြဋ္ဌာန်းခြင်းဖြင့် တရားဥပဒေ ပြုနိုင်သည့် အာဏာသည် ပြည်ထောင်စုပါလီမန်တွင် ရှိပါသည်။

သို့ရာတွင်ပြည်ထောင်စုပါလီမန်သည်၊ ထိုအာဏာကို ပြည်ထောင်စုနိုင်ငံ၏အကျိုးစီးပွါးအလို့ငှါသာလျှင် အသုံးပြုရပါမည်။

ထို ကိစ္စအလို့ငှါ၊ အခြား တနည်းနည်းဖြင့် တရားဥပဒေ ပြုနိုင်သည့်အာဏာသည် ပြည်ထောင်စုပါလီမန်တွင် မရှိပါ။

(၂) ၁၉၄၉ ခုနှစ်၊ပြည်ထောင်စုနိုင်ငံ တွင်းထွက် ပင်ရင်း အခြေအမြစ်များကို ထုတ်ဖေါ်လုပ်ကိုင်နိုင်သော အခွင့်အရေးပေးရန် (ခွင့်ပြုသည့်) အက်ဥပဒေ တခုလုံးသည်၎င်း၊ ထိုအက်ဥပဒေ၏ အစိတ်အပိုင်း တခုခုသည်၎င်း ပြည်ထောင်စုပါလီမန်၏ ဥပဒေပြုအာဏာ နယ်နိမိတ်အပြင်သို့ မကျူးမရောက်ပါ။

ထိုအက်ဥပဒေ တခုလုံးသည်၊ ပြည်ထောင်စု ပါလီမန်၏ ဥပဒေပြုအာဏာ နယ်နိမိတ်အတွင်းသို့ ကျရောက်၍ ဥပဒေအာဏာ တည်သော အက်ဥပဒေဖြစ်ပါသည်။

၁၉၅၂

ပြည်ထောင်စုမြန်မာနိုင်ငံတော်၏ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံ ဥပဒေ ပုဒ်မ ၁၅၁ အရ လွှဲအပ်ခြင်း။

SUPREME COURT.

† S.C. 1953 — Jan. 30.

M. M. RANDERIA HIGH SCHOOL TRUST BY ITS MANAGING TRUSTEE M. E. M. PATAIL (APPLICANT)

v.

G. JOE AND TWO OTHERS (RESPONDENTS).*

Urban Rent Control Act, ss. 16-A and 16-C—Interpretation—Whether agreement against sub-letting nullified by s. 16-C—Controller, power of, to permit sub-letting—Writ of Certiorari.

Held : There is nothing in s. 16-A which affirms the right of a tenant in spite of any covenant he may have entered into with his landlord to sub-let the premises leased to him. S. 16-c does not enable s. 16-A to override a covenant against sub-letting which cannot be said to be "anything contained in any other enactment for the time being in force."

Held further : S. 16-A (3) empowers the Controller to grant a permit for sub-letting only "if he is satisfied that there are no valid objections." In granting the permit in spite of the covenant against sub-letting which is a valid objection, the Controller acted in excess of his jurisdiction.

R. Basu for the applicant.

P. N. Ghosh for the respondent No. 1.

S. A. A. Pillay for the respondent No. 2.

The judgment of the Court was delivered by

MR. JUSTICE E MAUNG.—The first respondent has been a tenant of the applicants in respect of Room No. 1 in House No. 134/142 in Mogul Street, Rangoon, since 1st March 1945. The premises are admittedly not residential premises, the same being let out for business purposes as a jewellery shop.

* Civil Misc. Application No. 304 of 1952.

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

Some time after the first respondent became tenant of the premises, he sub-let a portion of the room to the second respondent who also occupied the said portion in his business as jeweller.

An agreement executed by the first respondent provides that the tenant shall not assign or sub-let the premises save with the consent of the landlords. The original sub-letting of a portion of the premises by the first respondent to the second respondent was without such consent of the landlords. It does not appear from the record when exactly this sub-letting took place though a witness examined on behalf of the applicant stated vaguely that he had seen the second respondent in the premises for the past five years.

On the 9th August 1952 the first respondent made an application to the Controller of Rents, Rangoon, for permission to sub-let the entire premises to the second respondent. On notice of this application being given to the applicants an objection was raised to the grant of permission. The objection was based on the condition in the lease against sub-letting save with the consent of the applicants. But the Controller, holding that section 16-C of the Urban Rent Control Act, as enacted by Act No. LV of 1949, had nullified the agreement against sub-letting granted permission to sub-let under section 16-A and section 16-C read together. This is what the learned Controller says:

> "The intention of the Legislature in enacting section 16-C is to prevent conflict of laws that might possibly arise in giving effect to the provisions of the Urban Rent Control Act as in the present case where on the one hand the petitioner having entered into an agreement and thus bound by the Contract Act not to sub-let the premises is now making an application under the provisions of the Urban Rent Control

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M. M. RANDERIA HIGH SCHOOL TRUST BY ITS MANAGING TRUSTEE M. E. M. PATAIL v. G. JOE AND TWO OTHERS.

Act which gives him the right to sub-let the premises with the sanction of the Controller".

In the first place, there is nothing in section 16-A which affirms the right of a tenant in spite of any covenant he may have entered into with his landlord to sub-let the premises leased to him. Further, section 16-C makes the provisions of section 16-A override only such matters as are "inconsistent therewith contained in any other enactment for the time being in force". The covenant against sub-letting cannot be said to be "anything contained in any other enactment for the time being in force".

Section 16-A (3) empowers the Controller to grant a permit for sub-letting only "if he is satisfied that there are no valid objections" thereto. The existence of a covenant against sub-letting which, as we have held, cannot be deemed to have been nullified by reason of section 16-A of the Act, is clearly such a valid objection. The learned Controller therefore acted in excess of his jurisdiction in granting the permit.

We desire to make it clear that this order will in no way affect the sub-letting, though in contravention of the covenant of lease, made some five years ago. That sub-letting does not form the subject-matter either of the proceedings before the Controller or before this Court.

In the circumstances of the case, there will be no order for costs.

တရားလွှတ်တော်ချုပ်

တိန်ယူဟန် (လျှောက်ထားသူ)

နှင့်

ပြည်ထောင်စု မြန်မာနိုင်ငံတော် သမတ ပါ(၂) (လျှောက်ထားခံရသူများ) *

† ၁၉၅၃
ဇန်နဝါရီလ ၂၆ ရက်။

နိုင်ငံခြားသားများ အက်ဥပဒေပုဒ်မ ၃။ ။ပြည်ထောင်စု မြန်မာနိုင်ငံ၏ အခြေခံအက်ဥပဒေ ပုဒ်မ ၁၃ (ခ)။ ။ပြည်ထောင်စု နိုင်ငံသားတဦးသည် နိုင်ငံခြားသားများ မှတ်ပုံတင်ရေး နည်းဥပဒေများအရ မိမိကိုယ်ကို နိုင်ငံခြားသားအဖြစ် မှတ်ပုံ တင်ထားခြင်း။ ယင်းသို့ မှတ်ပုံတင်ထားခြင်းကြောင့် ပြည်ထောင်စု မြန်မာနိုင်ငံသားအဖြစ်မှ ရပ်စဲပြီး ဖြစ် မဖြစ်။

လျှောက်ထားသူသည် မြန်မာအမိမှ မြန်မာပြည်အတွင်း ဖွားမွေးခဲ့သော သားဖြစ်၍ သာမန်အားဖြင့် ပြည်ထောင်စု မြန်မာနိုင်ငံ၏ အခြေခံ အက်ဥပဒေပုဒ်မ ၁၁ (ခ) အရ ပြည်ထောင်စုမြန်မာနိုင်ငံ၏ နိုင်ငံသားဖြစ်သည်။ ။ထိုသူလျှောက်ထားသည့်အတိုင်း ပြည်ထောင်စုမြန်မာနိုင်ငံတော်အစိုးရက နိုင်ငံခြားသားဟု မှတ်ပုံတင်ကာမျှဖြင့် သူသည် နိုင်ငံခြားသား မဖြစ်နိုင်။ ။၁၉၄၈ ခုနှစ်၊ ပြည်ထောင်စု မြန်မာနိုင်ငံ နိုင်ငံခြားသားဖြစ်မှု အက်ဥပဒေ ပုဒ်မ ၁၄ အရ၊ သူသည် နိုင်ငံခြား၏ နိုင်ငံသားပြုမှု လက်မှတ်ကိုရမှ နိုင်ငံခြား၏ နိုင်ငံသား ပြုခြင်းကိုခံရမှ ပြည်ထောင်စုနိုင်ငံသားအဖြစ်မှ ရပ်စဲသည်။

ပြည်ထောင်စု နိုင်ငံသားအဖြစ်မှ မရပ်စဲသေးသောသူကို နိုင်ငံခြားသားများ အက်ဥပဒေ ပုဒ်မ ၃ အရ ပြည်ထောင်စု မြန်မာနိုင်ငံတော်မှ ထွက်ခွါသွားရန် ပြည်နှင်ဒဏ် အမိန့် မပေးနိုင်။ ။ထိုအမိန့်ကို မပေးနိုင်သဖြင့် ထိုအမိန့်နှင့် စပ်လျဉ်းပြီး ချုပ်တည်း၍ မထားနိုင်။

ဦးကျော်မြင့် လျှောက်ထားသူအတွက် လိုက်ပါဆောင်ရွက်သည်။

ဦးချန်ထွန်းအောင် (လက်ထောက် နိုင်ငံတော်ရှေ့နေချုပ်) လျှောက်ထားခံရသူအတွက် လိုက်ပါဆောင်ရွက်သည်။

နိုင်ငံတော် တရားဝန်ကြီးချုပ် အမိန့်ချမှတ်သည်။

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* ၁၉၅၂ ခုနှစ်၊ ရာဇဝတ်အသေးအဖွဲ့ လျှောက်လွှာ အမှတ် ၂၅၂။

† နိုင်ငံတော်တရားဝန်ကြီးချုပ်၊ တရားဝန်ကြီး ဦးဖေမောင်နှင့် တရားဝန်ကြီး ဦးမြင့်သိန်း တို့၏ ရှေတော်၌ ကြားနာ၍ နိုင်ငံတော် တရားဝန်ကြီးချုပ်က အမိန့်ချမှတ်သည်။

၁၉၅၃

တိန်ယူဟန် နှင့် ပြည်ထောင်စု မြန်မာ နိုင်ငံတော် သမတ ပါ(၂)။

ဦးသိမ်းမောင်။ ။လျှောက်ထားသူ တိန်ယူဟန်ကို၊ နိုင်ငံတော်သမတက ပြည်ထောင်စု မြန်မာနိုင်ငံတော်မှ ထွက်ခွါသွားရန်၊ ပြည်နှင်ဒဏ်အမိန့် ချမှတ်လိုက်ပြီးသည့်နောက် ရန်ကုန်ခရိုင် ရာဇဝတ်တရားသူကြီး၏ အမိန့်အရ ဘမ်းဆီး၍ ထားခဲ့ရာ၊ တိန်ယူဟန်က မိမိသည် မိုးကောင်းမြို့၌ အမိ-မြန်မာလူမျိုး ဗုဒ္ဓဘာသာဝင်ဖြစ်သူ ဒေါ်ပုနှင့် အဘ တိန်တယ်ဟိုးမှ မွေးဖွါးသော ပြည်ထောင်စု မြန်မာနိုင်ငံတော်သားဖြစ်ကြောင်း။ သို့အတွက် မိမိကို နိုင်ငံခြားသား အက်ဥပဒေပုဒ်မ ၃ အရ၊ ပြည်နှင်ဒဏ်မပေးနိုင်ကြောင်း။ ထိုအမိန့်နှင့်စပ်လျဉ်း၍ မိမိကိုချုပ်တည်းထားခြင်းသည်၊ တရားဥပဒေနှင့် ဆန့်ကျင်ကြောင်း။ သို့အတွက် ရှေ့တော်သွင်း စာခွန်တော်အမိန့်ထုတ်၍ ပေးပါမည့်အကြောင်း လျှောက်ထားသည်။

ပြည်ထောင်စု မြန်မာနိုင်ငံတော် နိုင်ငံခြားရေးဌာန ဒုတိယ အတွင်းဝန် ဦးမောင်ကြီးက လျှောက်ထားသူ တိန်ယူဟန်သည်၊ မြန်မာပြည်တွင် မြန်မာလူမျိုး အမိဖြစ်သူ ဒေါ်ပုက မိုးကောင်းမြို့၌ မွေးဖွါး၍၊ မြန်မာပြည်တွင် နေထိုင်သူ ဟုတ်မဟုတ်ကို မသိကြောင်း။ သို့ရာတွင် တိန်ယူဟန်ကိုယ်တိုင်က၊ နိုင်ငံခြားသားများ မှတ်ပုံတင်ရေး နည်းဥပဒေများအရ၊ မိမိကို နိုင်ငံခြားသားအဖြစ် မှတ်ပုံတင်ထားပါရန် ၁၉၄၉ ခုနှစ်၊ ဖေဖော်ဝါရီလ ၂၁ ရက်နေ့က၊ ရန်ကုန်မြို့၊ လတ္တာလမ်း ရဲဌာနာရှိ နိုင်ငံခြားသားများ မှတ်ပုံတင်အရာရှိထံ လျှောက်ထားခဲ့ကြောင်း။ သို့လျှောက်ထားသည့်အတိုင်း တိန်ယူဟန်ကို နိုင်ငံခြားသားအဖြစ် မှတ်ပုံတင်ထားခြင်း ဖြစ်ကြောင်း။ တိန်ယူဟန်သည် နိုင်ငံခြားသား ဖြစ်ကြောင်း၊ မိမိကိုယ်ကို မိမိ ဝန်ခံထားပြီးဖြစ်ကြောင်း ရှင်းလင်း ချေပခဲ့သည်။

ထိုမှတပါး ဤရုံးတော်တွင် တိန်ယူဟန်၏ ထွက်ဆိုချက်အရငှင်း၊ နှစ်ဦးနှစ်ဘက်က တင်ပြထားသော သက်သေခံစာတမ်းများအရငှင်း တိန်ယူဟန်သည်၊ လွန်ခဲ့သည့် ကမ္ဘာစစ်ကြီးဖြစ်စ၊ ၁၉၄၂ ခုနှစ်၊ ဖေဖော်ဝါရီလ ၂၁ ရက်နေ့တွင် မြန်မာပြည်ရှိ တရုပ်ကောင်စစ်ဝန်ထမ်း မှတ်ပုံတင်လက်မှတ်တစောင်ကို တောင်းယူ ရရှိခဲ့သေးသည်။ ထိုလက်မှတ်ကို ရရှိပြီးနောက်၊ တိန်ယူဟန်သည် စစ်ဘေးဒဏ်ကို ရှောင်တိမ်းသောအနေဖြင့် တရုပ်ပြည်သို့ ပြောင်းရွှေ့ နေထိုင်ခဲ့သည်။ ထိုကမ္ဘာစစ်ကြီး ပြီးသည့်နောက်၊ ၁၉၄၅ ခုနှစ်၊ ဒီဇင်ဘာလ ၂၀ ရက်နေ့တွင် တရုပ်ပြည်၊ ကူမင်မြို့ရှိ အင်္ဂလိပ်အစိုးရ၏ ကောင်စစ်ဝန်ချုပ်ထံသို့ မြန်မာပြည်သို့ ပြန်လိုသော မြန်မာပြည်က တရုပ်တယောက်အဲ့နေဖြင့် လျှောက်လွှာ တင်သွင်းခဲ့လေသည်။ ထိုလျှောက်လွှာအရ မြန်မာပြည်သို့ပြန်ခွင့်ရပြီးသည့်နောက် သူသည်၊ ၁၉၄၇ ခုနှစ်၊ မတ်လ ၁၅ ရက်နေ့တွင် မြန်မာပြည်သို့ ပြန်ခဲ့လေသည်။ မြန်မာပြည်သို့ပြန်ရောက်ပြီးသည့်နောက် ဦးမောင်ကြီးထွက်ဆိုချေပသည့်အတိုင်း၊

၁၉၅၃

တိန်ယူဟန် နှင့် ပြည်ထောင်စု မြန်မာ နိုင်ငံတော် သမတပါ (၂)။

၁၉၄၉ ခုနှစ်၊ ဖေဖော်ဝါရီလ ၂၁ ရက်နေ့တွင် တိန်ယူဟန်သည်၊ နိုင်ငံခြား သားအဖြစ်နှင့် မှတ်ပုံတင်ရန် လျောက်လွှာကို တင်သွင်း၍၊ နိုင်ငံခြားသား မှတ်ပုံ တင်ရေးအရာရှိက သူ့ကို နိုင်ငံခြားသားအဖြစ်နှင့် မှတ်ပုံတင်၍ ထားခဲ့လေသည်။

သို့အတွက် ပြည်ထောင်စု မြန်မာနိုင်ငံတော် သမတအတွက် လိုက်ပါ ဆောင်ရွက်သော လက်ထောက် နိုင်ငံတော် ရှေနေချုပ်က၊ တိန်ယူဟန်သည် သူအဆိုရှိသည့်အတိုင်း မြန်မာနိုင်ငံအတွင်း မြန်မာအဓိမ္မမွေးဖွါးသော သူ ဖြစ်စေကာမူ၊ ၁၉၄၈ ခုနှစ်၊ ပြည်ထောင်စု မြန်မာနိုင်ငံ နိုင်ငံခြားသားဖြစ်မှု အက်ဥပဒေပုဒ်မ ၁၄ အရ၊ ပြည်ထောင်စုမြန်မာနိုင်ငံသားအဖြစ်မှ ရပ်စဲပြီးဖြစ်ကြောင်း၊ နိုင်ငံခြားသား အက်ဥပဒေအတွင်း အကျုံးဝင်သော နိုင်ငံခြားသားဖြစ်၍နေပြီဖြစ်ကြောင်း။ သို့အတွက် သူ့ကို အဆိုပါ အက်ဥပဒေပုဒ်မ ၃ အရ၊ ပြည်နှင်ဒဏ် အမိန့်ပေးနိုင်ကြောင်း လျောက်လဲခဲ့လေသည်။

တိန်ယူဟန်သည်၊ မြန်မာပြည်အတွင်း မြန်မာအဓိမ္မမွေးဖွါးသောသား ဖြစ်ကြောင်း တဘက်ကဝန်မခံသည့်အတွက် ထိုသို့ဟုတ်မှန်ကြောင်း သက်သေ ထင်ရှားအောင်ပြတို့တာဝန်မှာ နိုင်ငံခြားသား အက်ဥပဒေပုဒ်မ ၂ အရ၊ တိန်ယူဟန်၏အပေါ်တွင် ကျရောက်လျက်ရှိသည့်အတိုင်း တိန်ယူဟန်က မိမိကိုယ်တိုင် အစစ်ခံခဲ့သည့်အပြင်၊ မိမိ၏အမိ ဒေါ်ပုကိုလည်း သက်သေပြခဲ့သေးသည်။ သူသည် အခြား သက်သေများကို ခေါ်၍ ထားသေးသော်လည်း၊ သူနှင့် သူ၏ အမိကို တဘက်က စစ်ဆေးရာတွင် သူသည် မြန်မာအဓိဒေါ်ပုမှ မိုးကောင်းမြို့၌မွေးသော သားဖြစ်ကြောင်း ငြင်းဆိုသည့်နိမိတ်လက္ခဏာမပေါ်ပေါက်သဖြင့်၊ ကျန်သက်သေများကိုခေါ်၍ မစစ်ဆေးတော့ဘဲ ချန်လှပ်၍ထားခဲ့လေသည်။ တဘက်က သူသည် ထိုကဲ့သို့ မွေးဖွါးသောသားဖြစ်ကြောင်း မငြင်းဆိုတော့ဘဲ လျှော့၍ပေးလိုက်ခြင်းသည် သင့်လျော်မှန်ကန်သည်။ အဘယ်ကြောင့်ဆိုသော် သူသည် ထိုကဲ့သို့ မွေးဖွါးသောသား မဟုတ်ကြောင်းကို ထွက်ဆိုနိုင်သော သက်သေ တစုံတယောက်မျှမရှိ။ ၁၉၄၂ ခုနှစ်၊ ဖေဖော်ဝါရီလ ၂၁ ရက်နေ့က တရုပ်ကောင်စစ်ဝန်ထမ်းရရှိသော မှတ်ပုံတင်လက်မှတ်မှာလည်း သူ၏ မွေးဖွါးရာဌာနသည် မြန်မာပြည်ဖြစ်ကြောင်း ပါရှိခဲ့သည်။ ၁၉၄၅ ခုနှစ်၊ ဒီဇင်ဘာလ ၂၀ ရက် နေ့စွဲဖြင့် မြန်မာပြည်သို့ပြန်ခွင့်ရရန် သူတင်သွင်းသော လျောက်လွှာမှာလည်း သူ၏ မွေးဖွါးရာဌာနသည် မြန်မာပြည်ဖြစ်ကြောင်း။ သူ၏အဓိသည် ဒေါ်ပုဖြစ်ကြောင်း။ သူသည် ဇာတိအားဖြင့် ဗြိတိသျှအစိုးရ၏ ကျွန်တော်မျိုးဖြစ်ကြောင်း ပါရှိသည်။ ၁၉၄၉ ခုနှစ်၊ ဖေဖော်ဝါရီလ ၂၁ ရက်နေ့တွင် တင်သွင်းသော နိုင်ငံခြားသား မှတ်ပုံတင်ရန် လျောက်လွှာမှာလည်း၊ သူသည် မူလက ဗြိတိသျှအစိုးရ ကျွန်တော်

၁၉၅၃

တိန်ယူဟန် နှင့် ပြည်ထောင်စု မြန်မာ နိုင်ငံတော် သမတပါ (၂)။

မျိုး ဖြစ်ကြောင်း ဖေါ်ပြပါရှိသေးသည်။ သို့အတွက် သူသည် မြန်မာလူမျိုး အဓိ ဒေါ်ပုမ္မ မိုးကောင်းမြို့တွင် မွေးဖွါးသော သားဖြစ်သည်ဆိုသော စကားမှာ ယခု အမှုဖြစ်မှ ဖြစ်ပေါ်လာသော စကားမဟုတ်။ ယခု အမှုမဖြစ်မီ နှစ်တော်တော် များများကပင် ရုံးကိစ္စများနှင့်စပ်လျဉ်း၍ သက်ဆိုင်ရာရုံးများတွင် ပြောကြားပြီး မှတ် တမ်းတင်ထားပြီး စကားဖြစ်သည်။

တိန်ယူဟန်သည်၊ မြန်မာအဓိမှ မြန်မာပြည်အတွင်း မွေးဖွါးခဲ့သော သားဖြစ် ကြောင်း တဘက်က မငြင်းဆိုနိုင်တော့သဖြင့်၊ သူသည် သာမန်အားဖြင့် ပြည် ထောင်စု မြန်မာနိုင်ငံ၏ အခြေခံ အက်ဥပဒေပုဒ်မ ၁၁ (ခ) အရ၊ ပြည်ထောင်စု မြန်မာနိုင်ငံ၏ နိုင်ငံသားဖြစ်ရမည်။

သို့အတွက် ပညာရှိ လက်ထောက် နိုင်ငံတော်ရှေ့နေချုပ် လျှောက်ထားသည့် အတိုင်း၊ သူသည် ၁၉၄၈ ခုနှစ်၊ ပြည်ထောင်စုနိုင်ငံသားဖြစ်မှု အက်ဥပဒေပုဒ်မ ၁၄ အရ၊ ပြည်ထောင်စုနိုင်ငံသားအဖြစ်မှ ရပ်စဲပြီး ဟုတ်မဟုတ်ကိုသာလျှင် ဤရုံး တော်က စစ်ဆေးဆုံးဖြတ်ဘို့ လိုတော့သည်။

ထိုပုဒ်မ ၁၄ ၏ သက်ဆိုင်ရာအပိုင်းမှာ အောက်ပါအတိုင်းဖြစ်သည်။

အရည်အချင်းချို့ယွင်းသူမဟုတ်သော ပြည်ထောင်စုနိုင်ငံသားသည် နိုင်ငံခြား၏ နိုင်ငံသား ပြုမူလက်မှတ်ကိုရလျှင်၊ သို့တည်းမဟုတ် အိမ်ထောင်ပြုခြင်းကြောင့်မဟုတ်ဘဲ မိမိအလိုအတိုင်း ပြုမူသောကြောင့် ဖြစ်စေ၊ နည်းလမ်းတကျ ပြုမူသောကြောင့်ဖြစ်စေ နိုင်ငံခြား၏ နိုင်ငံသား ပြုခြင်းကိုခံရလျှင် ထိုသူသည် ပြည်ထောင်စုနိုင်ငံသားအဖြစ်မှ ရပ်စဲခဲ့သည်ဟု မှတ်ယူရမည်။

ကမ္ဘာစစ်ကြီးဖြစ်စ ၁၉၄၂ ခုနှစ်၊ ဖေဖော်ဝါရီလ ၂၁ ရက်နေ့တွင် တရုပ်ပြည် သို့ သွားရောက် တိမ်းရှောင်၍နေနိုင်ရန် မှတ်ပုံတင်လက်မှတ် တောင်းဆို၍ ရရှိခဲ့ ကာမျှဖြင့်၊ တိန်ယူဟန်သည် နိုင်ငံခြား၏ နိုင်ငံသားပြုမူလက်မှတ်ကို ရခဲ့သည် မဟုတ်။ နိုင်ငံခြား၏ နိုင်ငံသားပြုခြင်းကို ခံခဲ့ရသည်မဟုတ်။ စင်စစ်အားဖြင့် တဘက်ကလည်း မှတ်ပုံတင်လက်မှတ်ကို တောင်းယူရရှိခဲ့ရုံမျှဖြင့် တိန်ယူဟန်သည် ပြည်ထောင်စုနိုင်ငံသားအဖြစ်မှ ရပ်စဲခဲ့ပါသည်ဟု အဆိုမရှိ။

တဘက်ကအားကိုးသောအချက်များမှာ သူသည် စစ်ကြီးပြီး၍မြန်မာပြည်သို့ ပြန်ရောက်သည့်နောက် သူ့ကို နိုင်ငံခြားသားအဖြစ် မှတ်ပုံတင်ရန် လျှောက်ထား ခဲ့ခြင်းနှင့် သို့လျှောက်ထားခဲ့သည့်အတိုင်း မှတ်ပုံတင်ခံရခြင်းတို့သာဖြစ်သည်။

သူ့လျှောက်ထားသည့်အတိုင်း ပြည်ထောင်စု မြန်မာနိုင်ငံတော် အစိုးရက သူ့ကို နိုင်ငံခြားသားအဖြစ်နှင့် မှတ်ပုံတင်၍ထားသည်ကားမှန်၏။ သို့ရာတွင် ပြည် ထောင်စု မြန်မာနိုင်ငံတော်အစိုးရက သူ့ကို နိုင်ငံခြားသားဟုမှတ်ပုံတင်ကာမျှဖြင့်

၁၉၅၃

တိန်ယူဟန် နှင့် ပြည်ထောင်စု မြန်မာ နိုင်ငံတော် သမတပါ (၂)။

သူသည် နိုင်ငံခြားသားဖြစ်၍ မလာနိုင်။ အထက်ပါ ပုဒ်မ ၁၄ အရ၊ သူသည် နိုင်ငံခြား၏ နိုင်ငံသားပြုမှုလက်မှတ်ကိုရမှ၊ နိုင်ငံခြား၏ နိုင်ငံသားပြုခြင်းကိုခံရမှ ပြည်ထောင်စုနိုင်ငံသားအဖြစ်မှ ရပ်စဲမည်။ သူ့ကိုယ်ကိုသူ တရုပ်နိုင်ငံသားဟု ပြောကာမျှနှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံတော်အစိုးရကလည်း သူ့ကို တရုပ်နိုင်ငံသားဟု မှတ်ပုံတင်ကာမျှနှင့် သူသည် တရုပ်နိုင်ငံသား ဖြစ်၍မလာနိုင်။ တရုပ်နိုင်ငံအစိုးရက သူ့အား တရုပ်နိုင်ငံသားပြုမှ တရုပ်နိုင်ငံသားပြုမှု လက်မှတ်ပေးမှသာလျှင် သူသည်တရုပ်နိုင်ငံသားဖြစ်နိုင်သည်။ သို့ဖြစ်မှလည်း သူသည် ပြည်ထောင်စု မြန်မာနိုင်ငံသားအဖြစ်မှ ရပ်စဲမည်။ တရုပ်နိုင်ငံအစိုးရက သူ့ကို တရုပ်နိုင်ငံသားမပြုဘဲ တရုပ်နိုင်ငံသားပြုမှု လက်မှတ်မပေးဘဲ သူသည် တဘက်သတ်အားဖြင့် တရုပ်နိုင်ငံသားဖြစ်၍ မလာနိုင်။ သို့ဖြစ်၍ မလာနိုင်သောကြောင့် သူသည် ပြည်ထောင်စုနိုင်ငံသားအဖြစ်မှ မရပ်စဲသေး။ ပြည်ထောင်စုနိုင်ငံသားအဖြစ်မှ မရပ်စဲသေးသော သူကိုလည်း နိုင်ငံခြားသားများ အက်ဥပဒေပုဒ်မ ၃ အရ၊ ပြည်ထောင်စု မြန်မာနိုင်ငံတော်မှ ထွက်ခွါသွားရန် ပြည်နှင်ဒဏ်အမိန့်မပေးနိုင်။ ထို အမိန့်ကိုမပေးနိုင်သဖြင့် ထိုအမိန့်နှင့်စပ်လျဉ်းပြီး ချုပ်တည်း၍မထားနိုင်။

သို့အတွက် တိန်ယူဟန်အား ချုပ်တည်း၍ထားရန်အမိန့်ကို ပယ်ဖျက်ပြီးလျှင်၊ တိန်ယူဟန်ကို ဤရုံးတော်က လွှတ်လိုက်သည်။ ဤအမှုမပြီးမပြတ်မီအတွင်း တိန်ယူဟန်ပေး၍ထားသော အာမခံစာချုပ်ကိုလည်း ရုပ်သိမ်း ပယ်ဖျက်လိုက်သည်။

SUPREME COURT.

† S.C. 1953

June 10.

CHWA EIK HAUNG (*a*) CHWA TONG TAIK (APPLICANT)

v.

THE COMMISSIONER OF POLICE, RANGOON, AND ONE (RESPONDENTS).*

Alien resident in Union must respect her Laws—Political idcology otherwise irrelevant in Court becomes matter for scrutiny—Judicial notice taken in respect of depredations and subversive activities in the territories in the Union of Burma—Public Order (Preservation) Act, s. 5-A—Detention under, justification of.

Held: A Court of Law has no concern with a man's political ideology and as long as he respects the laws of the Union he may hold any political view; but when such a man, motivated by his ideology, pursues a course of action derogatory to the interests of the Union, then his political ideology is a factor which may well be taken into consideration.

Held further: When secret pamphlets dealing with the use of explosives and instructions on signals and codes used by the Army are found in a flat occupied by the detenu who admits allegiance to the Kuomintang authorities in Formosa, it cannot be said that his detention under the Public Order (Preservation) Act is unjustified.

San Hlaing for the applicant.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—Applicant Chwa Eik Haung *alias* Chwa Tong Taik was arrested on the allegation that he was concerned in unauthorised dealings in foreign exchange, and in the course of the investigation it was found that his entry

*Criminal Misc. Application No. 56 of 1953.

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

into Burma was obtained by a declaration made by him that his mother was a Burmese woman. The police allege that this declaration was false, and the applicant now is facing trials in respect of these charges.

Both these offences are bailable offences and he was granted bail but he was rearrested and detained by the Rangoon Police under section 5-A of the Public Order (Preservation) Act. One of the grounds for his detention was that when a search was made at his place of residence, two British War Office Restricted Publications, dated October 1952, containing instructions on the use and handling of Explosives and instructions on Signals, and Codes employed by the Army, were found. The applicant in his affidavit has said that he knew nothing about them and that they were found in a room occupied by two other persons besides himself.

The police allege that the applicant has connections with subversive elements and his reply is:

> "It is rather unfair and arbitrary to draw the conclusion as having a connection with subversive elements just because one happened to admit allegiance to a Government which has no diplomatic relations with the Union Government. . . . . "

The reference is obviously to the people in Formosa.

A Court of Law has no concern with a man's political ideology and as long as he respects the laws of the Union he may hold any political view; but when such a man, motivated by his ideology pursues a course of action derogatory to the interests of the Union, then his political ideology is a factor which should be taken into consideration.

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CHWA EIK HAUNG (*a*) CHWA TONG TAIK *v.* THE COMMISSIONER OF POLICE, RANGOON, AND ONE.

This Court must take judicial notice of the fact that the authorities in Formosa have done and are doing grave harm to the people of Burma by the depredations and subversive activities of their men in the territories of the Union, and when the applicant states that he bears allegiance to these authorities and when two secret pamphlets containing instructions pregnant with possibilities, are found in the flat in which he resides, and when there is reason to believe that he is connected with subversive elements, it can hardly be said that the Commissioner of Police, Rangoon, was unjustified in his view that to keep such a man at large would be prejudicial to the preservation of law and order.

The application is therefore dismissed.

SUPREME COURT

MA HLA YI (APPELLANT)

v.

MA THAN SEIN AND TWO (RESPONDENTS).*

† S.C. 1953

June 30.

Execution Proceedings—Civil Procedure Code, s. 47—Order under—When "final" and a decree within definition of s. 2 (2)—When appeal competent—Res judicata—*Civil Procedure Code, s. 11.*

In accordance with the orders of the High Court in Civil First Appeal No. 68 of 1947, the District Court, Pyapôn, came to a finding on the 22nd December 1948, in Civil Execution No. 4 of 1948, after an examination of accounts submitted by the decree-holders and judgment-debtor that the sum of Rs. 2,163-15-8 only was outstanding for complete satisfaction, as claimed by the decree-holders in their final accounts of the 14th January 1949. On the 21st December 1949 the decree-holders presented a fresh application, Civil Execution No. 3 of 1949, claiming Rs. 37,394-15-0 on the rejection of which they filed an appeal in Civil Miscellaneous Appeal No. 8 of 1950 in which for reasons given a Bench of the High Court set aside the order of the District Court. The same Bench refused a certificate for leave to appeal on the ground that the order passed was not a final order. The Supreme Court, however, under s. 6 of the Union Judiciary Act, granted Special Leave to appeal.

Held: A decision on a cardinal point in issue by itself does not make the order a "final order" but the test is whether the rights of the parties in the suit are finally disposed of by the decision.

U Nyo v. *Ma Pwa Thin*, 10 Ran. 335; *Abdul Rahman* v. *D. K. Cassim*, 11 Ran. 58; *Maung Sin* v. *Ma Byaung*, (1938) Ran. 331; *Tan Cheng Leong and one* v. *U Po Thein*, Civil Misc. Appeal No. 14 of 1953 (S.C.), followed.

Held: Only when an order conclusively determines the rights of the parties in a matter material to the due execution of a decree, s. 47 and s. 2 (2) could be invoked so that an appeal would lie. The order of the High Court setting aside the order of the District Court is within the meaning of s. 2 (2) and is as such appealable.

Bakat Ram v. *Sardar Bhagwan Singh*, A.I.R. (1943) Lah. 140 (F.B.), followed.

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* Civil Appeal No. 8 of 1952.

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

S.C. 1953

MA HLA YI v. MA THAN SEIN AND TWO.

Held: S. 11 of the Code of Civil Procedure enumerates the conditions under which the plea of *res judicata* becomes effective, and though the section mentions "suits" it is established law that the principles of *res judicata* apply to execution proceedings.

Daw Ohn Bwin v. *U Ba and one*, 8 Ran. 302, followed.

Held further: In view of the existence of the order of the District Judge of the 22nd December 1948 which was not set aside or reversed, the appellate Court cannot reconsider the issue determined in that order.

Munul Pershad Dichit v. *Orija Kant Lahiri Chowdhury*, 8 I.A. 123; *Ram Kirpal Shukul* v. *Mussamat Rup Kuari*, 10 I.A. 37; *Bani Ram* v. *Nanhu Mal*, 11 I.A. 181; *Raja of Ramnad* v. *Velusami Tevar*, 48 I.A. 45; *Hook* v. *Administrator-General of Bengal*, 48 I.A. 187, *Shashivaraj Gopalji* v. *Eddapakath Avissa Bi*, A.I.R. (1949), (P.C.) 302; *Maung No and one* v. *Maung Po Thein and others*, 1 Ran. 363; *Tarini Charan Bhattacharya* v. *Kedar Nath Halder*, 56 Cal. 723, followed.

Dooply v. *Dr. Chan Taik*, C.A. 9 of 1949 (S.C.), distinguished.

Basu and *Venkatram* for the appellant.

Kyaw Din for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—In Civil Regular Suit No. 1 of 1939 of the District Court of Pyapôn, which was a mortgage suit, the respondents obtained a final decree against the appellant on the 14th February 1941 and a sale proclamation for payment of Rs. 26,690-4-0 was issued. The appellant applied to the High Court in revision against the order of sale and the sale was stayed in Civil Revision No. 155 of 1941. These records are now untraceable.

The Japanese occupation of Burma came to pass in 1942 and the litigation which had lain dormant was revived on 6th March 1944 when the respondent decree-holders filed an execution application in the then Additional Divisional Court of Pyapôn for the sale of the mortgaged properties. The amount mentioned as due was Rs. 26,690-4-0 as on 14th February 1941. The accompanying explanatory petition mentioned that the sale of the

properties could not be carried out because of the order of stay issued by the High Court. The specific prayer was that in view of the Japanese Ordinance No. 6 of 1943 (which required pending proceedings to be revived within 90 days) the original execution proceedings may be continued or in the alternative, fresh execution proceedings be opened with the execution application attached to the petition.

The learned Judge enquired of the then Supreme Court at Rangoon if the original records were available and on being informed that they were not, acted on the alternative prayer and opened fresh execution proceedings registered as No. 6 of 1944. Notice was issued to the judgment-debtor who, through her agent at Pyapôn, deposited in Japanese currency the sum of Rs. 26,690·25 cents together with Rs. 34 Advocate fees and Rs. 2 stamp fees spent on the execution application, a total of Rs. 26,726·25 cents.

This prompt action on the part of the judgment-debtor, to say the least, was totally unexpected by the decree-holders, who apparently by that time did not want payment in Japanese currency which had declined much in value. They, therefore, took time on the ostensible ground that the amount due on the decree would be checked to see if the amount deposited was really the correct figure. This led the judgment-debtor to object to the execution application itself that it was time-barred because Ordinance No. 6 of 1943 gave only ninety days. The decree-holders retaliated with an application to have their execution application closed.

The proceedings dragged on until the 7th December 1944 when the learned Additional Divisional

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Judge passed an order in which he held that the judgment-debtor having deposited the money due under the decree, was estopped from pleading that the execution application was time-barred. In regard to the decree-holders' petition to close the execution case, the learned Judge mentioned that he could not understand why after seeking execution of the decree, the decree-holders had not withdrawn the money deposited. He pointed out that the deposit if not withdrawn would escheat to Government for lack of a claimant. The actual decision was that the decree had been fully satisfied by the deposit.

The decree-holders' desire appeared to have been to keep the matter alive and so an appeal was lodged in the then Supreme Court and registered as Civil First Appeal No. 9 of 1945 and the sole ground advanced was, the decree had not been fully satisfied as interest due from 14th February 1941 had not been accounted for. The case remained undisposed when Burma was reoccupied. When the civil administration took over and the High Court functioned again this appeal was converted into Civil First Appeal No. 68 of 1947. A Bench formed by U Tun Byu and U Aung Tha Gyaw JJ., dealt with the matter and by a judgment dated the 8th March 1948 held that interest as claimed by the decree-holders would have to be ascertained as the decree-holders were entitled to it. The order of the Additional Divisional Judge was set aside with the following observations :—

"It will accordingly be necessary, after the execution proceeding has been revived and reconstructed, to credit the judgment-debtor, who is the respondent in this appeal, with the payment of the said Rs. 26,726·25 cents in part satisfaction of the decree passed against her in Civil Regular Suit No. 1 of 1939, irrespective of the question whether the said sum had been

withdrawn by the appellants or not. The judgment-debtor has a right to make the deposit in Court, and this deposit was not only known to the decree-holders but the learned Additional Divisional Judge had made certain caustic observations on the conduct of the decree-holders in not withdrawing the said sum of Rs. 26,726·25 cents at once. The fact that the appellants had applied to have their execution proceedings revived in 1944 also suggests that they were willing and ready to accept payment in the currency prevailing at the time in satisfaction of the decree which they obtained against Ma Hla Yi. It might be remembered that the sum of Rs. 26,726·25 cents was paid into Court only after the appellants, who were the decree-holders, had applied for the revival of their execution proceeding of 1941 filed in the District Court of Pyapôn. . . . . .

. . . . . .

The execution proceeding No. 6 of 1944 will be returned to the District Court of Pyapôn for the purpose of reviving and reconstructing the execution proceeding which was pending in that Court in 1941, and, subject to the observation which had been made above in respect of the deposit of Rs. 26,726·25 cents paid into Court in May, 1944, the amount which is still due and legally payable under the decree passed in Civil Regular Suit No. 1 of 1939 will have to be decided by the District Court, or the Court having seisin of the execution proceeding. The order of the Additional Divisional Judge dismissing the application to revive the execution proceeding is accordingly set aside."

The proceedings reached the District Court on the 3rd April 1948 and emerged as Civil Execution No. 4 of 1948. A dispute arose immediately as to what the amount due was and accounts were filed by both sides. In the accounts of the decree-holders filed on the 15th May 1948, despite the directions of the High Court, no credit for Rs. 26,726·25 cents was shown, and the amount due was given as Rs. 41,269-0-3. On the other hand, the judgment- debtor claimed that the calculation of interest was wrong and that they had in fact made an excess payment of Rs. 6,752-9-10.

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The matter dragged on until the 22nd December 1948 when the learned District Judge passed an order determining—

(i) that the amount due as on the 20th March 1940 inclusive of interest was Rs. 26,690-4-0;

(ii) that the decree-holders were entitled to interest at 6 per cent per annum from 20th March 1940 to 4th May 1944, this being the date the deposit in Japanese currency was made; and

(iii) that this deposited sum of Rs. 26,726-4-0 was to be deducted from the decretal amount and that the decree-holders would be entitled to interest at 6 per cent per annum, only on the balance amount.

This order was not appealed against but instead on the 14th January 1949, the decree-holders submitted another application for execution in the usual form and the significant entry against the column " whether any or what previous application have been made for execution of the decree with what result " was—

" Civil Execution No. 8 of 1941 District Court of Pyapôn lost with no satisfaction of decree. Civil Execution No. 6 of 1944 of Additional District Judge's Court, Pyapôn. Part payment of Rs. 26,726-4-0 deposited in Court on 4th May 1944."

In the statement of accounts attached to the application the following item appears :—

" Deduct amount deposited by judgment-debtor on 4th May 1944 in Court Rs. 26,726-4-0 ".

The total sum claimed as balance due was only Rs. 2,163-15-8. At the same time the decree-holders filed an application for payment of " Rs. 26,726,25 cents " deposited.

The judgment-debtor in the mean-time objected to the correctness of the sum of Rs. 2,163-15-8 and on the 1st February 1949 the learned Judge had to pass another order in which he pointed out that his order of the 22nd December 1948 could have been appealed against. He further ruled (1) that his order would stand, (2) that the sum claimed by the decree-holders was in conformity with his order and (3) that the execution application of the 14th January 1949 was accepted. The judgment-debtors' objection was dismissed with costs. This order was not appealed against.

It is of interest to note that the Diary Order of the 21st February 1949 fixed the date of sale as the 4th April 1949. It is not clear why the sale did not take place even though on the 3rd March 1949 a warrant for sale was issued with directions to the Bailiff to report by the 7th April 1949. The Diary Order of the 28th May 1949 records that at the request of the decree-holders the execution was "temporarily closed." The decree-holders appeared to have been more concerned about their application for payment of the deposited money in respect of which an enquiry was then being made. This application was disposed of on the 16th August 1949 when the learned Judge, relying on section 152 of the Contract Act held that the Court was not liable to make good the loss as the destruction of Japanese currency in the custody of the Court was brought about by circumstances beyond its control. An appeal to the High Court resulted in its summary dismissal on the 15th November 1949 *vide* Civil Misc. Appeal No. 123 of 1949.

On the 21st December 1949 the decree-holders filed a fresh application for execution numbered as Civil Execution No. 3 of 1949 and claiming

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Rs. 37,394-15-0 and this time the decree-holders stated in their application,

"Civil Execution No. 8 of 1941 District Court of Pyapôn proceedings lost with no satisfaction of decree. C.E. No. 6 of 1944 of A.D.J.'s Court Pyapôn. The judgment-debtor deposited Japanese notes amounting to Rs. 26,726·25 cents. This deposit is not a lawful payment according to law."

The Diary Order of that date made by the Registrar runs:

"On a reference to C.E. No. 4/48 of this Court and Civ. Ex. Appln., dated 14-1-49 the outstanding is Rs. 2,163-15-8 only. Let U San U (D/holders' lawyer) amend his claim."

The matter dragged on again till the 9th February 1950 when the learned District Judge confirmed the Registrar's decision that the application should be amended for Rs. 2,163-15-8 only. The order concludes with the direction that the application would stand dismissed if no such amendment was made within seven days.

The decree-holders went on appeal in Civil Misc. Appeal No. 8 of 1950 and the matter was dealt with by a Bench formed by U San Maung and U Thaung Sein, JJ. The stand taken by the decree-holders was that the District Judge had erred in allowing Rs. 26,726·25 cents in Japanese currency deposited in 1944 to be set off against the decretal amount. This contention found favour with the learned Judges who observed that all that the appellate Judges in Civil First Appeal No. 68 of 1947 needed to do was to order the reconstruction of the lost proceedings (Civil Execution No. 8 of 1941) and that it was for the District Judge to calculate the exact amount still due on the decree. The learned Judges further observed that the direction embodied in the previous judgment of the High Court to give credit in respect

of the Japanese currency deposited was *obiter,* and that in fact no notice should have been taken of this deposit because firstly, according to the provisions of Order 34, Rule 3 (1), (which we may note in passing is different from the provisions in the Indian Code), no part payment could be accepted by a Court towards a mortgage decree and secondly, because as the stay order issued by the High Court in Civil Revision No. 155 of 1941 was not vacated, no deposit could have been accepted in respect of the decree. The order of the District Judge was set aside and the proceedings were sent back "to be proceeded with according to law".

Being aggrieved with this order the judgment-debtor sought application for leave to appeal under section 5 of the Union Judiciary Act and with abundance of caution sought direct in this Court, similar leave under section 6. The learned Judges of the High Court in the course of an exhaustive judgment in refusing leave, held that the order that they had passed was not a "final order" inasmuch as they had given a decision which even though on a cardinal issue, still left the execution case alive.

At the stage when leave to appeal was being sought before us U Kyaw Din for the decree-holders contended that the order was not "final" and therefore not appealable. Mr. Basu for the judgment-debtor did not meet this argument but stressed that the order in question was one made under section 47 of the Civil Procedure Code and a "decree" within the definition in section 2 (2). U Kyaw Din in his turn did not seriously contest this view and accepting it as we did then, special leave to appeal was granted. U Kyaw Din in the final stages of his submission in the main appeal reagitated the matter. We pointed

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out to him that the stage to take objections had passed and that we had, at the relevant stage, decided that an appeal lay. However, we shall give our reasons.

There are a host of authorities as to what a final order is and the matter has received attention from time to time in Burma and to choose a few, they are *U Nyo* v. *Ma Pwa Thin* (1), *Abdul Rahman* v. *D. K. Cassim* (2), *Maung Sin* v. *Ma Byaung* (3), and *Tan Cheng Leong and one* v. *U Po Thein* (4). We agree with the principle laid down in these cases that a decision on a cardinal point in issue by itself does not make the order a "final order" but the test is whether the rights of the parties in the suit are finally disposed of by the decision. The authorities set out above relate to pending suits and the orders involved were orders remanding the suits for trial on their merits.

The matter before us involves an order passed under section 47 of the Civil Procedure Code in execution proceedings. The section provides that all questions arising between parties to a suit in which a decree was passed and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree. There is also section 2 (2) which includes "the determination of any question within section 47", in the definition of a "decree". Taking the two sections together it does seem that the underlying intention is that all disputes arising out of execution proceedings should be decided by the executing Court, and that such decisions be made appealable as a decree, the obvious reason being that there should be speed and no

(1) 10 Ran. 335.
(2) 11 Ran. 58.
(3) (1938) Ran. 331.
(4) Civil Misc. Appeal No. 14 of 1953 (S.C.).

unnecessary delay in the disposal of execution proceedings. We desire to make it clear, however, that we do not subscribe to the view that every order passed in execution proceedings is a " decree ". There may be interlocutory or incidental orders, such as those that relate to minor matters of procedure, which cannot by their very nature, be construed as " decrees ". We agree with the observations made in *Bakat Ram* v. *Sardar Bhagwan Singh* (1) that it is only when an order conclusively determines the rights of the parties in a matter material to the due execution of a decree, section 47 and section 2 (2) could be invoked so that an appeal would lie. The facts in *Bakat Ram*'s case were, a subordinate Court had confirmed a sale in execution of a decree. The matter was taken up on appeal and a single Judge set aside the sale on the ground that the sale proclamation was defective and directed the issue of a fresh and accurate proclamation of sale and to take further proceedings. A Divisional Bench upheld the single Judge's order and on application being made for leave to appeal to the Privy Council, leave was refused and the majority view was expressed that there was no determination of the rights of the parties as the execution case was still pending and alive.

In the matter before us, the question involved in the District Court was whether the balance due on the decree was Rs. 2,163-15-8 or Rs. 37,394-15-0. The learned District Judge decided that credit must be given for the deposit in Japanese currency and that therefore the amount still due on the decree was Rs. 2,163-15-8. There was finality in that order, and hence an appeal was entertained in the High

(1) A.I.R. (1943) Lah. 140 (F. B.).

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Court. What the learned Judges of the High Court held on appeal was —

> " that credit should not be given to the judgment-debtor, *viz.* the applicant Ma Hla Yi for the sum of Rs. 26,726·25 cents in Japanese currency which she had deposited in Court during the Japanese occupation period."

(The quotation is from the order dated the 17th January 1952 refusing leave to appeal.)

This being so, there was finality in the order which conclusively determined the rights of the parties to the suit. Even if the formal order of the High Court was a direction to the District Judge to proceed "according to law", there was really nothing more for the learned Judge to do but to deny Ma Hla Yi the benefit of her deposit made in Japanese currency and to order a sale of the mortgage properties for the realisation of the exaggerated figure claimed by the decree-holders.

We regret our inability to agree with the learned Judges when they said :

> " Assuming (but not deciding) that our observations that no credit should be given to the judgment-debtor Ma Hla Yi for the sum of Rs. 26,726·25 cents deposited by her on the 4th May 1944 in Japanese currency is a decision binding on the parties, it is no more than a decision on a cardinal point in issue which still left the execution case alive to be proceeded with according to law."

(This again is a quotation from the order of the 17th January 1952).

The possibility of this decision being construed as *obiter* by another appellate Court would cause some concern to the District Court which would have to implement the order by executing it. However, as we have already stated, we consider that the point at issue was not only a cardinal point but one

that conclusively determined the rights of the parties in the suit and accordingly we hold that the order of the 28th June 1951 setting aside the order of the District Court was a "decree" within the meaning of section 2 (2); and as such appealable under section 6 of the Union Judiciary Act.

In regard to the main appeal Mr. Basu has concentrated on one point, that of *res judicata.* His case is that the order of the learned District Judge dated the 22nd December 1948 should have been taken up on appeal if the decree-holders were dissatisfied. He contends that the failure to have this order set aside has resulted in the finality of the decision to credit the deposit in Japanese money at its par value against the total amount due under the decree. He stressed that the first order of the High Court, that of U Tun Byu and U Aung Tha Gyaw JJ., itself was appealable. Not only did the decree-holders accept it but they accepted also, the order of the District Judge passed on the 22nd December 1948. They then followed up with an execution application on the 14th January 1949 in which credit was given for the deposit at its par value, in accordance with these orders. We note that it was the judgment-debtor who was dissatisfied with the order of the 22nd December 1948 which necessitated the learned Judge to pass another order on the 1st February 1949 in which he reaffirmed the correctness of the decree-holders' figure of Rs. 2,613-15-8 and accepted the execution application.

Section 11 of the Code of Civil Procedure enumerates the conditions under which the plea of *res judicata* becomes effective, and though the section mentions "suits", it is established law that the principles of *res judicata,* as laid down in section 11,

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together with the explanations thereto apply to execution proceedings. See *Daw Ohn Bwin* v. *U Ba and one* (1). This being the position, the question for determination is, in view of the existence of the order of the District Judge of the 22nd December 1948, which was not set aside or reversed, can the appellate Court reconsider the issue determined in that order ?

Mr. Basu has taken us through many authorities but it will be sufficient for our purpose to examine only a few of these, and the first is *Munul Pershad Dichit* v. *Orija Kant Lahiri Chowdhury* (2) where it was held that an order, even if erroneously made, was nevertheless valid unless reversed on appeal. This view prevailed also in *Ram Kirpal Shukul* v. *Mussamat Rup Kuari* (3). Dealing with a previous order in the same execution proceedings, the point was described as follows :

> "It was as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution."

Similarly in *Bani Ram* v. *Nanhu Mal* (4), *Raja of Ramnad* v. *Velusami Tevar* (5), *Hook* v. *Administrator-General of Bengal* (6), and *Shashivaraj Gopalji* v. *Eddapakath Avissa Bi* (7) the same view prevailed. *Maung No and one* v. *Maung Po Thein and others* (8) is another case on the point, even if it relates to two different suits and not to execution proceedings, but the principle is the same. The object of the doctrine

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(1) 8 Ran. 302.
(2) 8 I.A. 123.
(3) 10. I.A. 37.
(4) 11. I.A. 181.
(5) 48 I.A. 45.
(6) 48 I.A. 187.
(7) A.I.R. (1949) (P.C.) 302.
(8) 1 Ran. 363.

of *res judicata* is summed up in the observation of Rankin C. J., in *Tarini Charan Bhattacharya* v. *Kedar Nath Halder* (1) where he said :

"The object of the doctrine of *res judicata* is not to fasten upon parties special principles of law as applicable to them *inter se* but to ascertain their rights and the facts upon which these rights directly and substantially depend ; and to prevent this ascertainment from becoming nugatory by precluding the parties from re-opening or reconstructing that which has been finally decided."

The position in the present case is, on the 22nd December 1948 a particular issue was determined and that was, the deposit in Japanese currency was to be credited at par value. The matter was directly and substantially in issue, for as pointed out earlier, despite the order of U Tun Byu and U Aung Tha Gyaw JJ., the claim made by the decree-holders as per statement of accounts filed by them in the District Court of Pyapôn on the 15th May 1948 was for Rs. 41,269-0-3 a figure which did not give credit for the deposit in Japanese currency, whereas the judgment-debtor in her accounts filed on the 19th August 1948 made full claim of this deposit. In paragraph 12 of the affidavit made by Maung Maung Nyunt, one of the decree-holders, on the 12th November 1948 he said :

"I say that the amount shown in my account now filed in this case is correct and the amount now outstanding is Rs. 41,269-0-3."

All these averments and claims were obviously considered by the learned Judge when he passed his order of the 22nd December 1948 and this order, since it was not reversed, is still of full force and effect. The decree-holders had accepted the position and had acted accordingly, going to the extent of

(1) 56. Cal. 723.

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filing a fresh execution application for the realisation of Rs. 2,163-15-8, calculated on the basis of the order of the District Judge. Only when the property was about to be sold for the realisation of this amount, they asked that the application be closed temporarily. Then they waited for sometime to elapse and came in with a fresh application for an exaggerated amount, with the idea of reagitating a point which had been finally decided. The learned District Judge took the only possible view, and that was, the point could not be reagitated, and that the total amount realisable was Rs. 2,163-15-8. He directed that the application be amended to this figure. What he really should have done was to direct the sale of the mortgaged properties for the realisation of the correct amount.

However, the matter came on appeal and the issue of the Japanese currency was gone into again and the learned Judges, in effect have sat in judgment, not on the District Judge's order under appeal but on his order of the 22nd December 1948, against which there was no attempt at an appeal. For the reasons we have advanced we hold that the matter could not have been reagitated or reconsidered.

As regards the point made in the order under appeal to this Court, that part payment could not be accepted by a Court towards a mortgage decree in view of Order 34, Rule 3 (1), we merely wish to observe that even if the proposition is correct, it cannot apply in the present case because a final decree had already been passed as far back as the 14th February 1941 and it was on the decree-holders' application that the money was deposited, under Order 21, Rule 1(1)(*a*); and adjustment should have followed under Rule 2.

In regard to the point that because of a stay order passed in Civil Revision No. 155 of 1941, the Court could not have accepted the deposit, all that need be said is that it is the decree-holders' case that the order was vacated, *vide* Maung Maung Nyunt's affidavit dated the 12th November 1948 in which he specifically stated:

> "I say that the judgment-debtor applied to the High Court for revision of the said order of sale and the sale was stayed as per original notice hereto annexed and marked 'F'. This revision case was decided against the judgment-debtor and the order of the District Judge for sale was confirmed."

This case has been argued by learned counsel, ably and at length and throughout the arguments the spectre of *Dooply v. Dr. Chan Taik* (1) loomed in the background. The facts therein were different. It was a suit for redemption in which the mortgagor in his eagerness to discharge the mortgage in Japanese currency in view of the impending reoccupation of Burma, deposited the mortgage amount during the pendency of the suit, despite the objections of the mortgagee that he should be repaid in legal currency. It was held that there was no discharge. Here in this case it was the decree-holders who wanted discharge in Japanese currency, only later they changed their minds.

In the result, holding as we do, that the order of the learned District Judge of the 22nd December 1948 remains in full force and effect, the order of the High Court in Civil Miscellaneous Appeal 8 of 1950 is set aside with costs; Advocate's fees 340 kyats. The order of dismissal of the execution application out of which the proceedings before us

(1) C.A. 9 of 1949 (S.C.).

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has arisen is also set aside and the proceedings are returned to the District Court with the specific direction that the learned District Judge will take necessary steps for sale of the mortgaged properties as prayed for by the decree-holders for the realisation of the correct amount still due under the decree, after giving credit for Rs. 26,726-4-0.

SUPREME COURT.

DAW SAW YIN (APPLICANT)

v.

THE CONTROLLER OF RENTS AND TWO OTHERS (RESPONDENTS).*

† S.C. 1953

Sept. 7.

Urban Rent Control Act—Aim and object of—S. 12 (1)—Application by occupant to be made statutory tenant—S. 13 (1) (c)—Application by landlord to evict tenant for own occupation—Writ of Mandamus, nature of.

Held: The Urban Rent Control Act was enacted to grant relief to landlords and tenants alike, and when s. 13 (*1*) (*c*) enables a landlord to seek eviction of a tenant on the ground that the premises are required *bonâ fide* for use and occupation by the landlord himself, the same provisions may be invoked in order to resist an application by an occupant who seeks to be made a tenant under s. 12 (*1*).

Tai Chuan & Co. v. *Chen Seng Cheong*, (1949) B.L.R. (S.C.) 86, followed.

Held also: A writ of Mandamus is a prerogative writ which may be granted or refused in the discretion of the Court.

Myint Toon for the applicant.

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

Kyaw Din for the 2nd and 3rd respondents.

The judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—The petitioner, who had been out of the country since 1947 returned to Burma in November 1951 to find that her husband

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* Civil Misc. Application No. 69 of 1953.

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

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DAW SAW YIN v. THE CONTROLLER OF RENTS AND TWO OTHERS.

was living with another woman. The husband, however, allowed her to live by herself in the upper flat of another of his houses.

In March 1953 the house which was occupied by the petitioner was sold to the respondents who asked her to vacate. She declined and filed an application before the Rent Controller, Rangoon, to be made a statutory tenant under section 12 (*1*) of the Urban Rent Control Act.

It was alleged and not contradicted that the respondents who are now living in rented premises from which they have been asked to vacate, had bought this house for their own use and occupation. The Controller felt that even if he should grant a permit under section 12 (*1*), it would serve no great purpose since the respondents would follow it up with an application under section 13 (*1*) (*c*) under which they would be able to recover possession for their own *bonâ fide* use and occupation. He therefore refused a permit to the petitioner.

The circumstances in this case are peculiar but nevertheless the observations made in *Tai Chuan & Co. v. Chen Seng Cheong* (1) may well be applied here. The Urban Rent Control Act was enacted to grant relief to landlords and tenants alike, and when section 13 (*1*) (*c*) enables a landlord to seek eviction of a tenant on the ground that the premises are required *bonâ fide* for use and occupation by the landlord himself, the same provisions may well be invoked in order to resist an application by an occupant who seeks to be made a tenant under section 12 (*1*).

The petition before us is one for directions by way of a writ of mandamus, which is a prerogative writ, and which may be granted or refused in the

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

discretion of the Court. Viewed from this angle also the circumstances do not reveal any reason for interference by this Court and accordingly we dismiss the petition but without costs.

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DAW SAW YIN *v.* THE CONTROLLER OF RENTS AND TWO OTHERS.

SUPREME COURT.

† S.C. 1953

Aug. 17.

DAWSONS BANK LIMITED (APPELLANT)

v.

C. ENG SHAUNG AND THREE OTHERS (RESPONDENTS). *

Moneylenders Act, 1945, s. 12—Whether ultra vires—*Merely procedural and directional—No limitation or expropriation of private property involved —S 23 (4) of the Constitution—Compensation under—Question does not arise—Limitation Act, s. 3, analogous.*

Held: S. 12 of the Moneylenders Act does not purport to limit or expropriate any private property. It merely regulates procedure and directs Courts not to pass any decree for recovery of interest which together with interest already paid would exceed the amount of the respective principal. It requires creditors to sue for interest, if at all, before the amount thereof together with interest already paid exceeds the principal, although suits instituted later are to be dismissed in respect of surplus interest only.

Held further: As the section does not limit or expropriate private property, the question of compensation under s. 23 (4) of the Constitution does not arise at all.

S. Haque (a) *Islam* v. *N. Ahmed*, 8 L.R. (1950) (S.C.) 185, referred to.

Horrocks for the appellant.

P. K. Basu for the respondents.

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

U THEIN MAUNG, C.J.—This is an appeal filed with the certificate of the High Court under section 5 (*a*) of the Union Judiciary Act, 1948 that the case involves a question as to the validity of a law having regard to the provisions of the Constitution.

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* Civil Appeal No. 1 of 1952 against the decree of the High Court in Civil Special Appeal No. 5 of 1949.

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

The suit out of which the appeal has arisen is one for recovery of Rs. 5,000 being interest due on two mortgages or in default for sale of so much of the mortgaged properties as would suffice to discharge the decretal amount with costs and further interest; and it has been dismissed ultimately under section 12 of the Moneylenders Act, 1945 as the learned Advocate for the plaintiff-appellant admitted that interest already paid in respect of each mortgage had exceeded the principal.

The learned Advocate for the plaintiff-appellant has contended that section 12 of the Moneylenders Act, 1945 is *ultra vires* inasmuch as it does not prescribe in which cases and to what extent creditors shall be compensated as required by section 23 (4) of the Constitution.

Section 23 (4) of the Constitution 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. "

Section 12 of the Moneylenders Act, 1945 provides:

> " 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 section does not purport to limit or expropriate any private property. It merely regulates procedure and directs Courts not to pass any decree for recovery of interest which together with interest already paid would exceed the amount of the

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respective principal. It is very much like section 3 of the Limitation Act which reads:

"3. Subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made after the period of limitation prescribed therefor by the First Schedule shall be dismissed, although limitation has not been set up as a defence."

Just as section 3 of the Limitation Act regulates procedure and directs Courts to dismiss suits instituted, appeals preferred and applications made after the respective periods of limitation, section 12 of the Moneylenders Act, 1945 regulates procedure and directs Courts not to pass decrees as stated above.

Just as section 3 of the Limitation Act requires suits to be instituted, appeals to be preferred and applications to be made within the respective periods of limitation, section 12 of the Moneylenders Act, 1945 requires creditors to sue for interest, if at all, before the amount thereof together with interest already paid exceeds the principal, although suits instituted later are to be dismissed in respect of surplus interest only. Just as section 3 of the Limitation Act cannot be said to limit or expropriate private property, section 12 of the Moneylenders Act, 1945 cannot be said to limit or expropriate private property; and as the section does not limit or expropriate private property, the question of compensation under section 23 (4) of the Constitution does not arise at all.

With reference to the law of procedure, the law as stated in the following extract from Maxwell on Interpretation of Statutes, 9th Edition, page 232 is very well known:

"No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being, by or for the

Court in which he sues, and, if an Act of Parliament alters that mode of procedure, he has no other right than to proceed according to the altered mode . "

The learned Advocate for the respondents has also invited our attention to the following passage in *S. Haque (a) Islam* v. *N. Ahmed* (1) in which this Court held that the Urban Rent Control Act, 1948 is *intra vires*:

" Section 23 (2) of the Constitution provides that 'no person shall be permitted to use the right of private property to the detriment of the general public.' Section 29 of the Constitution imposes on the Parliament the duty to make laws to give effect to such a provision in the Constitution. Parliament therefore not only has a right to take measures to prevent owners of premises in residential areas from exacting excessive or unreasonably high rents, taking advantage of abnormal conditions, to the detriment of the general public but is under a duty to do so. "

We accordingly hold that section 12 of the Moneylenders Act, 1945 is *intra vires* and dismiss the appeal with costs; Advocate's fee eighty-five kyats.

(1) B.L.R. (1950) (S.C.) 185.

SUPREME COURT.

† S.C. 1953

July 15.

HAJI RAHIM BUX (APPELLANT)

v.

SHAIK MUBARAK HUSSEIN (RESPONDENT).*

Urban Rent Control Act—Licensees or permissive occupants not within scope—Ejectment order against such—Recovery of possession of premises not entailed—No ouster of jurisdiction by s. 11 (1) of the Act.

Held : The appellant is only a licensee, and a license "passeth no interest, nor alters, or transfers property in anything, but only makes an action lawful which without it had been unlawful."

Held also : Ss. 11 (*1*) and 13 (*1*) of the Urban Rent Control Act, 1948 make provisions regarding tenants and trespassers who have been permitted by the Controller to continue in occupation of the respective premises but there is no provision whatsoever regarding licensees or permissive occupants. The order for ejectment of the appellant is not an order for recovery of possession of the premises within the purview of s. 11 (*1*) of the Urban Rent Control Act, and the Fourth Judge of the City Civil Court had power to pass it.

Ba Gyan for the appellant.

N. R. Burjorjee for the respondent.

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

U THEIN MAUNG, C. J.—The learned Fourth Judge of the Rangoon City Civil Court has passed an order for ejectment of the appellant from a portion of room No. 6 of House No. 108/116 in 29th Street, Rangoon, which he had been allowed by the respondent to use free of rent; and the High Court has confirmed the said order.

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* Civil Appeal No. 7 of 1952 against the decree of the High Court in Civil 1st Appeal No. 60 of 1950.

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

The only question for consideration is whether the said order is one " for recovery of possession " of the premises within the purview of section 11 (*1*) of the Urban Rent Control Act, 1948, and therefore one which the learned Fourth Judge of the Rangoon City Civil Court could not pass at all.

According to the concurrent findings of fact the respondent has been using the premises all along inspite of his having given the appellant permission to use a portion thereof free of rent. Under these circumstances the respondent never lost possession of the premises and there is no necessity for him to recover possession thereof.

As the High Court has rightly pointed out, the appellant is only a licensee; and a license " passeth no interest, nor alters, or transfers property in anything, but only makes an action lawful which without it had been unlawful ". (*Thomas* v. *Sorrell,* Vaughan 351). The license in this case *i.e.*, the permission given by the respondent only made the appellant's user of a portion of the premises lawful.

Besides, it is highly significant that there is no reference whatsoever to mere licensees or persons in permissive occupation in any of the clauses of section 11 (*1*) of the Urban Rent Control Act, 1948. Sections 11 (*1*) and 13 (*1*) make provisions regarding tenants and trespassers who have been permitted by the Controller to continue in occupation of the respective premises; but there is no provision whatsoever regarding licensees or permissive occupants; and, in our opinion, no such provision has been made as it is really unnecessary.

We accordingly hold that the order for ejectment of the appellant is not an order for recovery of possession of the premises within the purview of

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section 11 (*l*) of the Urban Rent Control Act, 1948, and that the learned Fourth Judge of the Rangoon City Civil Court had power to pass it.

The appeal is dismissed with costs; Advocate's fee eighty-five kyats.

SUPREME COURT.

P. K. DUTTA (APPLICANT)

v.

THE SUPERINTENDENT, CENTRAL JAIL, RANGOON AND TWO OTHERS (RESPONDENTS).*

† S.C. 1953

Aug. 20.

Union Citizenship (Election) Act, 1948—Application under s. 11 (iv) of the Constitution to become a citizen—Procedure—Sworn declaration under s. 8 (5) renouncing other nationality the determining factor—Applicant remains a foreigner otherwise.

Held: A person, who applies for a certificate of citizenship, merely signifies his intention to elect for citizenship of the Union. There is nothing to prevent him from changing his mind before he signs the declaration on oath or affidavit renouncing any other nationality or status as citizen of any foreign country. He signifies his election of citizenship of the Union only when he signs such a declaration. Until then the applicant still remains a foreigner, and his arrest and detention under the Foreigners Act are not illegal.

P. K. Basu for the applicant.

Chan Htoon, Attorney-General, for the respondents.

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

U THEIN MAUNG, C.J.—The applicant, who has been arrested and kept in custody under section 4 of the Foreigners Act, has applied for a writ of *habeas corpus* on the ground that he has become a citizen of the Union of Burma under section 11 (iv) of the Constitution, which reads :

> "(iv) every person who was born in any of the territories which at the time of his birth was included

* Criminal Misc. Application No. 89 of 1953.

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

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> within His Britannic Majesty's dominions and who has resided in any of the territories included within the Union for a period of not less than eight years in the ten years immediately preceding the date of the commencement of this Constitution or immediately preceding the 1st January 1942 and who intends to reside permanently therein and who signifies his election of citizenship of the Union in the manner and within the time prescribed by law,
>
> shall be a citizen of the Union."

Election of citizenship of the Union must be signified in the manner and within the time prescribed by law; and they have been prescribed in the Union Citizenship (Election) Act, 1948.

Section 3 of the Act prescribes the officers to whom those who possess the necessary qualifications may apply for certificate of citizenship. Section 4 prescribes the particulars which they must give in their applications and section 10 prescribes the time limit within which they must apply. Sections 5 and 6 prescribe the procedure to be followed by officers at the hearing of the applications. Section 7 (*1*) provides that an officer who decides that an applicant has established his right to elect for citizenship of the Union must forthwith transmit to the Minister a certified copy of his decision together with that application for the certificate and the affidavit annexed thereto.

Section 7 (*2*) provides that if the officer decides that the applicant is not entitled to elect, the applicant may file an application in revision in the High Court.

Section 8 (*1*) and (*2*) provide that on receipt of the decison the Minister must issue a certificate of citizenship in the prescribed form unless he is in doubt of the correctness of the decision in which case he may refer the application to the High Court.

Section 8 (*3*) provides that the Minister shall issue a certificate of citizenship if the High Court finds that the applicant has established his right to elect for citizenship of the Union.

Section 8 (*4*) and (*5*) must be set out verbatim as the decision on the present application turns on the interpretation of these sub-sections and the last part of section 11 (iv) of the Constitution. They provide :

"(*4*) The officer shall, on receipt of the certificate, call upon the applicant to appear before him on a date fixed by him and to subscribe a declaration on oath or affirmation renouncing any other nationality or status as citizen of any foreign country and, on the applicant making and subscribing such declaration, the officer shall deliver to him the certificate after having endorsed thereon the date of the making of and subscribing the said declaration.

(*5*) The certificate shall not take effect unless the applicant makes and subscribes the declaration under the last preceding section."

Section 8 (*1*) requires the certificate of citizenship to be in the prescribed form; and the form, which has been prescribed by the rules made under section 11 (*2*), contains the statement that the holder of the certificate must be regarded as a citizen of the Union when he has subscribed a declaration on oath or affirmation renouncing any other nationality or status as citizen of any foreign country.

Parliament can make law requiring a foreigner, who wants to become a citizen of the Union, to renounce any other nationality or status as citizen of any foreign country as section 12 of the Constitution provides :

"12. Nothing contained in section 11 shall derogate from the power of the Parliament to make such laws as it thinks fit in respect of citizenship and alienage . . . . . "

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In the present case the applicant has applied for a certificate of citizenship and the officer concerned has transmitted to the Minister a certified copy of his decision that the applicant has established his right to elect for citizenship of the Union. However, the Minister has neither issued a certificate of citizenship under section 8 (*1*) nor referred the application to the High Court under section 8 (*2*). So the officer has not called upon the applicant to subscribe and the latter has not subscribed a declaration on oath or affirmation renouncing any other nationality or status as citizen of any foreign country.

The learned Advocate for the applicant has contended that the applicant became a citizen of the Union of Burma as soon as he filed the application for a certificate of citizenship as he then signified his election of citizenship of the Union in the manner and within the time prescribed by law.

However, application is only one of the steps prescribed by law *i.e.*, by the Union Citizenship (Election) Act, 1948. The most important step to be taken under the said Act is to subscribe a declaration on oath or affirmation renouncing any other nationality or status as citizen of any foreign country. Under section 8 (*5*) the certificate cannot take effect unless the applicant makes and subscribes the declaration; under section 8 (*4*) the officer must deliver the certificate to him "after having endorsed thereon the date of the making of and subscribing the said declaration;" and the certificate itself says that the holder must be regarded as a citizen of the Union after he has made and subscribed the declaration.

A person, who applies for a certificate of citizenship, merely signifies his intention to elect for citizenship of the Union. There is nothing to prevent him from changing his mind before he signs the

declaration on oath or affidavit renouncing any other nationality or status as citizen of any foreign country. He signifies his election of citizenship of the Union only when he signs such a declaration.

We accordingly hold that the applicant still remains a foreigner and that his arrest and detention under the Foreigners Act are not illegal.

The learned Advocate for the applicant has urged that the applicant should not have to suffer simply because the Minister has not passed any order under section 8 (*1*) or (*2*) ; but on the present application we are only concerned with the question as to whether the applicant's arrest and detention are illegal.

The application is dimissed and the rule is discharged.

SUPREME COURT.

† S.C. 1953

Aug. 31.

VELU SERVAI (APPLICANT)

v.

THE CONTROLLER OF RENTS AND TWO OTHERS (RESPONDENTS).*

Urban Rent Control Act—Conviction of offence under s. 16-B—Eviction proceedings under s. 16-BB—Plea under s. 16-AA (4) (a) *as amended not competent.*

Held: Where there has been a conviction under s. 16-B, s. 16-BB directing the summary eviction of all the unauthorised occupants is the appropriate section to be applied, irrespective of the distinction whether they came into occupation before or after the enactment of the amending Act, and s. 16-AA (*4*) (*a*) is inapplicable.

Aung Min (1) for the applicant.

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

R. Jaganathan for the respondents 2 and 3.

The judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—One Ramaswamy Mudaliar was convicted under section 16-B of the Urban Rent Control Act for letting out Room No. 3 in House No. 379, Maung Tawlay Street. Eviction proceedings under section 16-BB followed and orders for eviction of the unauthorised tenants were passed as long ago as the 2nd January 1952, and the room itself was allotted to the applicant Velu Servai.

While most of the unauthorised occupants have moved out as a result of this eviction order, two of

* Civil Misc. Application No. 68 of 1953.

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

them (respondents 2 and 3) have held on. They have contended before the Controller that they have been in occupation since July 1950, a date prior to the enactment of the amending Act of 1950, and that therefore they are not liable to be evicted. The learned Controller in upholding this view relied upon section 16-AA (*4*) (*a*) as amended by this Act, which restricts the application of the section to residential premises which are about to be vacant, or which are actually vacant, or which had been vacated and occupied after the 21st October 1950, the date the amending Act (L of 1950) came into force.

We however do not consider that section 16-AA is applicable to this case. There has been a conviction under section 16-BB and the action that is to be pursued after such conviction is specifically provided for by section 16-BB under which all unauthorised occupants are liable to be summarily evicted.

Section 16-BB is the appropriate section to be applied and the learned Controller was correct when on the 2nd January 1952 he ordered the summary eviction of all the unauthorised occupants. It remains for him now to implement this order irrespective of the distinction whether they came into occupation before or after the enactment of the amending Act.

His order dated the 7th May 1953 is quashed and the proceedings are returned to him for disposal according to law.

SUPREME COURT.

†S.C. 1953

Sept. 14.

MRS. S. C. LIU (APPLICANT)

v.

1. THE CHAIRMAN, BUREAU OF SPECIAL INVESTIGATION.
2. THE SUPERINTENDENT, CENTRAL JAIL, MANDALAY (RESPONDENTS).*

Writ of habeas corpus—*Order of detention under Suppression of Corruption Act signed by an Assistant Secretary, whether valid—Detention under order in Mandalay Jail of permanent resident of Rangoon, whether proper.*

Held: According to the Rules for authentication of orders and other instruments which have been made by the President under s. 121 of the Constitution, an order made in his name can be signed by an Assistant Secretary to the Union Government in the Ministry concerned and his signature must be deemed to be the proper authentication of the order; it is valid and cannot be called in question on the ground that it is not an order made by the President.

Gwan Kee v. *The Union of Burma*, B.L.R. (1949) (S.C.) 151; *State of Bombay* v. *Purushottam Jog Naik*, A.I.R. (1952) (S.C.) 317, followed.

Held also: According to s. 4-A (2) of the Suppression of Corruption Act, 1948 as amended by Act 45 of 1951, an arresting officer can detain any person arrested by him in a place of custody which the President has specified by general or special order; and as all jails are among the places of custody which the President has specified by a general order, there can be no doubt of the President's power to direct in his own order that the applicant's husband be detained in Mandalay Jail.

Kyaw Myint and *Chaung Po* for the applicant.

Chan Htoon, Attorney-General and *Ba Sein* (Government Advocate) for the respondents.

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

U THEIN MAUNG, C.J.—This is an application for directions in the nature of *habeas corpus*. The

* Criminal Misc. Application No. 96 of 1953.

† *Present*: U THEIN MAUNG, Chief Justice of the Union, U TUN BYU, Chief Justice of the High Court and U BO GYI, J.

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first contention of the learned Advocate for the applicant is that the order of detention which reads as follows is invalid as it has not been signed by the President himself:

"ORDER UNDER SECTION 4-A, SUB-SECTIONS (*2*) AND (*4*) OF THE SUPPRESSION OF CORRUPTION ACT, 1948.

ORDER No. 3-B/53 (72). *Dated Rangoon the 26th June 1953.*

WHEREAS the President of the Union has received a report from U Tin Aung, Assistant Director, Bureau of Special Investigation, Burma, Rangoon, that the person known as Mr. S. C Liu, son of Mr. L. K. Liu has been arrested and detained under section 4-A, sub-sections (*1*) and (*2*) of the Suppression of Corruption Act, 1948;

AND WHEREAS the President is satisfied with respect to Mr. S. C. Liu that he has committed or is committing an offence punishable under section 4 (*2*) of the Suppression of Corruption Act, 1948, and that it is necessary to make the following order;

NOW THEREFORE, in exercise of the powers conferred by section 4-A (*2*) and (*4*) of the said Act, the President of the Union directs—

(*a*) that the said Mr. S. C. Liu shall be detained until further orders for a period not exceeding (3) THREE months with effect from the 26th June 1953; and

(*b*) that he shall be detained in Mandalay Jail.

By order,

MAUNG HLA,

Assistant Secretary,
for *Secretary to the Prime Minister,*
(Special Investigation Administrative Board), Burma."

However, the power conferred by the Act on the President can be exercised in his name by the

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Government as section 13 of the Burma General Clauses Act (as amended by Act XI of 1950) provides:

"13. Where by an Act of the Parliament or any existing law as defined in section 222 of the Constitution, any power is conferred, or any duty imposed, on the President of the Union, then that power shall be exercisable, or that duty shall be performable, in his name by the Government."

Section 121(2) of the Constitution of the Union of Burma provides:

"(2) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President."

According to the Rules for authentication of orders and other instruments which have been made by the President under section 121 of the Constitution, an order made in his name can be signed (*inter alia*) by an Assistant Secretary to the Union Government in the Ministry concerned and his signature must be deemed to be the proper authentication of the order. [*See* Order I of 1948 in Ministry of Home Affairs (General Branch) Notification No. 123, dated the 4th January, 1948, published in the *Burma Gazette*, Part I, dated the 7th February, 1948, page 204.]

We must also take judicial notice of the fact that the Ministry concerned is that of the Prime Minister. (*See*, for instance, Notification Nos. 137 and 139 in the *Burma Gazette*, Part I, dated the 27th March 1952, at page 216.)

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We accordingly hold that the order of detention which has been signed by the Assistant Secretary is valid and that it cannot be called in question on the ground that it is not an order made by the President. [Cp. *Gwan Kee* v. *The Union of Burma* (1) where this Court held that an order signed by a Secretary as "By Order" was valid. *See* also *State of Bombay* v. *Purushottam Jog Naik* (2) where the Supreme Court of India has pointed out, with reference to a similar order, that the Constitution does not require a magic incantation which can only be expressed in a set formula of words.]

The second contention of the learned Advocate for the applicant is that detention in Mandalay Jail is illegal as the detenue is a permanent resident of Rangoon. However, according to section 4-A (*2*) of the Suppression of Corruption Act, 1948 as amended by Act 45 of 1951, even an arresting officer can detain any person arrested by him in a place of custody which the President has specified by general or special order; and all jails are among the places of custody which the President has specified by a general order. (*See* Notification No. 617 of the Ministry of Home and Religious Affairs published in the *Burma Gazette*, Part I, dated the 17th November, 1951, page 878.)

So there can be no doubt of the President's power to direct in his own order under section 4-A (*2*) and (*4*) of the Act that the applicant's husband be detained in Mandalay Jail.

As regards the rest of the contentions, we accept the statement of U Tin Aung, Assistant Director, Bureau of Special Investigation, that there is reasonable suspicion of the detenue having committed

(1) B.L.R. (1949) (S.C.) 151. (2) A.I.R. (1952) (S.C.) 317.

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several offences of criminal misconduct and his undertaking to send the detenue up for trial as soon as investigation is complete.

Incidentally, the learned Attorney-General has assured us that the detenue will be sent up for trial as soon as investigation is complete in respect of any one of the offences, which the detenue is suspected to have committed, without waiting for completion of investigation into all such offences.

The application is dismissed.

SUPREME COURT.

SR. M. C. T. ANNAMALAI CHETTYAR BY AGENT K. L. M. C. T. MANIKAM CHETTYAR (APPELLANT)

† S.C. 1953 — *Nov. 9.*

v.

GOR KYIN SEIN AND EIGHT OTHERS (RESPONDENTS).*

Civil Procedure Code, Order 21, Rules 90, 91 and 92—Court Sale—Interests of auction-purchaser—Competency of suit whether barred by Rule 92—Misrepresentation in Sale Proclamation material irregularity vitiating Sale—Title in property at Court sale, when passes—Auction-purchaser, foreigner, when bid accepted—Sale void—Transfer of Immoveable Property (Restriction) Act, 1947, ss. 3 and 5—Subsequent citizenship before confirmation of sale of no validating effect.

Held: An auction-purchaser at a Court sale is not a person whose interests are affected by the sale; "interests" in Order 21, Rule 90 are interests which exist prior to and independently of the sale and do not include interests created by the sale itself. The auction-purchaser is not left without any legal remedy as he can file a suit even though he cannot apply under Rule 90.

K. V. A. L. Chettyar Firm v. *M. P. Maricar*, I.L.R. (1928) 6 Ran. 621, followed.

The All-India Railwaymen's Benefits Fund, Ltd. and another v. *Ramchand and another*, I.L.R. (1939) Nag. 357, dissented from.

Held: It has been laid down again and again that in sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers.

Mahomed Kala Mea v. *Harperink and others*, 36 I.A. 32, followed.

Held also: Transfer of title in the property at a Court Sale must be deemed to have been effected from the time when it was sold and not from the time when the sale became absolute.

Chan Eu Chai v. *Lim Hock Seng*, (1949) B.L.R. (H.C) 24, approved

Held further: The auction-sale being void *ab initio* as the auction-purchaser was a foreigner at the time of the sale by reason of the Transfer of Immoveable Property (Restriction) Act, the mere fact that the sale was

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* Civil Appeal No. 5 of 1952.

† *Present:* U THEIN MAUNG, Chief Justice of the Union, U AUNG KHINE and U BO GYI, JJ.

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confirmed after the auction-purchaser became a citizen of the Union of Burma cannot make it valid for there can be no estoppel against the provisions of a Statute.

Ma Mo E and others v. *Ma Kun Hlaing and others*, (1941) R.L.R. 309, followed.

Venkatram for the appellant.

Wan Hock for the 1st respondent.

Sein Tun (2) for the 2nd to 9th respondents.

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

U THEIN MAUNG, C.J.—This is an appeal by special leave under section 6 of the Union Judiciary Act, 1948 from the judgment and decree of the Appellate Side of the High Court in Civil First Appeal No. 66 of 1950 which set aside the judgment and decree of the Original Side of the same Court in Civil Regular No. 92 of 1949.

The first respondent who is the auction-purchaser at a Court sale held in accordance with the sale proclamation Exhibit G has sued the decree-holder, the legal representatives of the judgment-debtors and the mortgagee whose mortgages have been redeemed with a part of his purchase money, for declaration that the said sale is null and void and for refund of the amounts taken by them out of his purchase money.

His case is *(inter alia)* (1) that the extent of the judgment-debtors' interest in the property to be sold was not set out in the Sale Proclamation, (2) that the Sale Proclamation contained the statement "Further particulars may be ascertained from the Bailiff of the Court," (3) that the Bailiff actually assured him at the time of the auction that the property belonged

to the judgment-debtor and that it was free from incumbrance, although as a matter of fact (*a*) the property really belonged to the estate of L. Soo Lim (deceased), father of L. Sin Nyan, (*b*) L. Sin Nyan, one of the judgment-debtors owned only a share in that property and (*c*) the property was subject to two mortgages in favour of the present appellant, and (4) that the auction-sale to him is void under section 5 of the Transfer of Immoveable Property (Restriction) Act, 1947 as he was still a foreigner when his bid for the property was accepted by the officer conducting the sale, *i.e.* the said Bailiff.

The learned trial Judge dismissed the suit as his Lordship was of the opinion (1) that "the statement made by the Bailiff to the intending purchasers was not wholly untrue as the judgment-debtor was a part-owner of the property which was to be sold", (2) that the fact that the property has been valued at Rs. 10,000 only in the particulars furnished by the decree-holder, should have normally put an intending purchaser on inquiry as to the real extent of the judgment-debtor's interest in the same and (3) that "the plaintiff knew that he was under a legal disability to make the purchase at the time he made the offer for the property at a Court sale".

On appeal however the Appellate Side of the High Court has held (1) that "the failure to mention at the time of the auction-sale that the judgment-debtor L. Sin Nyan owned only a share in the property to be sold was a material irregularity, (2) that there was a material irregularity in the conduct of the sale by the Bailiff inasmuch as he informed the intending purchasers that the property belonged to the judgment-debtors and was free from incumbrance and (3) that the auction-sale was void by reason of section 5 of the Transfer of Immoveable Property

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(Restriction) Act, 1947 as the appellant was a non-citizen of the Union of Burma; it has decreed the suit with proportionate costs; and according to its decree the appellant will have to pay Rs. 11,500 with costs, Rs. 789-6-2½ *plus* Rs. 798-4-11 to the first respondent.

The learned Advocate for the appellant has contended that the appellant (auction-purchaser) is a person "whose interests are affected by the sale" within the meaning of Order 21, Rule 90 and that the suit is incompetent in view of Order 21, Rule 92. The trial Judge did not deal with this contention as he was dismissing the suit on other grounds; but the Appellate Side of the High Court has discussed it at considerable length with reference not only to the history and the wording of Rules 90 and 91 but also to various rulings of the High Courts in India and come to the decision that an auction-purchaser at a Court sale is not a person whose interests are affected by the sale; and we agree with it that "interests" in Order 21, Rule 90 are interests which exist prior to and independently of the sale and that they do not include interests created by the sale itself. Although the decision of the Courts in India are not uniform, the question has been settled so far as this country is concerned, as long ago as 1928 by the ruling of the High Court in *K. V. A. L. Chettyar Firm* v. *M. P. Maricar* (1), wherein Das and Doyle JJ., observed :

"It is quite clear to our mind that the word 'interests' mentioned in that rule refers to interest existing at the time of the sale and not to interest created by the sale. The only rule under which an auction-purchaser can apply to set aside the sale is Order 21, Rule 91, of the Code of Civil Procedure, and if the Legislature had intended to allow an auction-

(1) I.L.R. (1928.) 6 Ran. 621.

purchaser to apply under Order 21, Rule 90, of the Code of Civil Procedure, his name would have been specifically mentioned in that rule."

We do not see any reason to disturb the law which has been settled so long ago. The learned Advocate for the appellant has invited our attention to the following passage in *The All-India Railwaymen's Benefits Fund, Ltd., and another* v. *Ramchand and another* (1) :

> "That tha law makes it imperative on the decree-holder to specify the various particulars including incumbrance specified in Rule 66 of Order 21 shows the anxiety of the legislature that the purchaser should have a fair deal. The buyer would be purchasing at his risk only when all these requisite formalities of law are observed and there is no fraud, but if they are not observed or there is fraud, would the law afford him no remedy? Where can he get his remedy except in the execution proceedings?"

However, with due respect to the learned Judges, we must say that they appear to have begged the question. The auction-purchaser is not left without any legal remedy as he can file a suit even though he cannot apply under Rule 90.

The learned Advocate for the appellant has further argued that remedy by suit is not as cheap and speedy as remedy by application; but that is a matter for consideration by the Legislature, and the Legislature in its supreme wisdom has not thought it necessary to amend Rule 90 inspite of the said observations in *K. V. A. L. Chettyar Firm* v. *M. P. Maricar* (2).

With reference to the question as to whether the sale was vitiated by material irregularity, even though the particulars furnished by the decree-holder might have put an intending purchaser on inquiry,

(1) I.L.R. (1939) Nag. 357. (2) I.L.R. (1928) 6 Ran. 621.

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he has actually inquired the Bailiff, from whom, according to the express terms of the sale proclamation, further particulars could be ascertained; the Bailiff has admittedly told him and the other intending purchasers that the property belonged to the judgment-debtors and was free from incumbrance; and the Appellate Side of the High Court has rightly observed:

"There was a definite misrepresentation of a very material fact. It is obvious that no bidder would have gone anywhere near Rs. 40,000 in his bid for the purchase of the building unless the property had been sold as the sole property of the judgment-debtor, without any encumbrances attached to it."

The mere fact that the statement made by the Bailiff was not wholly untrue as the judgment-debtor was a part-owner of the property cannot make any difference in the matter. We respectfully agree with their Lordships of the Privy Council who have observed in *Mahomed Kala Mea* v. *Harperink and others* (1):

"It has been laid down again and again that in sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. The Court, it is said, must at any rate not fall below the standard of honesty which it exacts from those on whom it has to pass judgment. The slightest suspicion of trickery or unfairness must affect the honour of the Court and impair its usefulness. It would be disastrous, it would be absolutely shocking, if the Court were to enforce against a purchaser misled by its duly accredited agents a bargain so illusory and so unconscientious as this."

With reference to the effect of sections 3 and 5 of the Transfer of Immoveable Property (Restriction) Act, 1947, the learned Advocate for the appellant

(1) 36 I.A. 32.

has contended that the auction-sale to the first respondent is not affected by them at all as the respondent obtained a certificate of citizenship of the Union of Burma before the sale was confirmed even though he was a foreigner at the time of the auction-sale.

However, as the Appellate Side of the High Court has rightly pointed out, the transfer of title in the property must, in view of section 65 of the Code of Civil Procedure be deemed to have been effected from the time when it was sold and not from the time when the sale became absolute; and as a Full Bench of the High Court has decided in *Chan Eu Chai* v. *Lim Hock Seng* (1), the sale is effected when the offer of the highest bidder is accepted by the officer conducting the sale. The auction-sale being void *ab initio,* the mere fact that it has been confirmed after the auction-purchaser became a citizen of the Union of Burma cannot make it valid. There is no allegation of the appellant having ever made any misrepresentation as to his status and there can be no estoppel against the provisions of a statute. [See *Ma Mo E and others* v. *Ma Kun Hlaing and others* (2).]

The appeal is dismissed; but as the Court sale has to be declared invalid on account (*a*) of material irregularities for which the appellant is not at all responsible and (*b*) of the first respondent's own legal incapacity to bid at the sale, the parties must bear their own costs in this Court.

(1) (1949) B.L.R. (H.C.) 24. (2) (1941) R.L.R. 309.

SUPREME COURT.

† S.C. 1953

Oct. 14.

U SAW HLINE *(a)* G. ANTRAM (APPLICANT)

v.

ASSISTANT CONTROLLER OF RENTS AND ONE (RESPONDENTS). *

Urban Rent Control Act, s. 12 (1)—Application for permit to continue in occupation of premises—Real question to be determined is bonâ fide *occupation—Other questions irrelevant.*

Held : Gross unreasonableness on the part of the applicant to set up a title to the property adversely to the interest of the respondent after he has enjoyed the latter's liberality for more than nine years is not relevant to the question as to whether he is in occupation of the said premises in good faith for residential or business purposes ; improper and ungrateful conduct is not a valid ground for holding that he is not in occupation of the said premises *bonî fide* for residential or business purposes.

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

M. Cassim for the applicant.

C. C. Khoo for the respondents.

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

U THEIN MAUNG, C.J.—The applicant, who has been occupying the premises known as No. 115, 34th Street, Rangoon with the permission of the second respondent since the 16th December, 1945, has applied on the 14th January, 1952 for a permit to continue in occupation of the said premises under section 12 *(1)* of the Urban Rent Control Act, 1948 ;

* Civil Misc. Application No. 70 of 1953.

† *Present:* U THEIN MAUNG, Chief Justice of the Union, U AUNG KHINE and U BO GYI, JJ.

and his application has been rejected by the Assistant Controller of Rents on the ground that his occcupation of the said premises is not *bonâ fide*.

The Assistant Controller's reasons for holding that the applicant's occupation of the said premises is not *bonâ fide* are contained in following extract from his order :—

"In this case while I am convinced that the applicant is not guilty of fraud I find that his occupation of the premises is not free from unreasonableness and unfair dealing. It is common ground that the applicant was allowed to stay in the suit premises gratis not only while he was in the respondent's employ but for several years after his discharge. Ample time has been given to him to find out alternative accommodation but it appears that he did not avail himself of the opportunity given. It is also in evidence that the respondent is in need of the premises for the purpose for which it was originally utilized *i.e* as a godown for storing merchandise. Another point which weighs heavily against the applicant's case is that he attempted to establish the status of a sub-tenant by alleging that he has been paying rent to the respondent. This is quite clear from the Exhibit 'E' which is written by his counsel admittedly under his instructions. It may also be mentioned that even if a permit is refused to the applicant it will take some time for the respondent to recover possession of his premises. Therefore it is gross unreasonableness on the part of the applicant to try to set up a title to the property adversely to the interests of the respondent after he had enjoyed the latter's liberality for more than nine years. In the circumstances I would hold that the applicant's occupation cannot be termed 'bonâ fide' and his application will accordingly be rejected."

Now section 12 (*1*) of the Act provides "Any person, not already being a tenant of any premises but being in occupation of such premises *bonâ fide* for residential or business purposes may make application to the Controller to be permitted to continue in occupation of such premises." So the

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real question that the Assistant Controller has to determine for the purpose of the application is whether the applicant is in occupation of the premises *bonâ fide* for residential or business purposes. The applicant has been living in the said premises since the 16th December, 1945; there is no allegation whatsoever of his having ever used it otherwise than for residential or business purposes; and what the Assistant Rent Controller has described as "gross unreasonableness on the part of the applicant to set up a title to the property adversely to the interest of the respondent after he has enjoyed the latter's liberality for more than nine years" is not relevant to the question as to whether he is in occupation of the said premises in good faith for residential or business purposes. His conduct in claiming, (before he filed the application for the permit), that he had already become a tenant of the respondent in respect of the said premises may be improper; and his conduct in filing the application for the permit may indicate want of gratitude on his part; but such improper and ungrateful conduct is not a valid ground for holding that he is not in occupation of the said premises *bonâ fide* for residential or business purposes. [Cp. *Saw Chain Poon and one* v. *The Assistant Controller of Rents, Rangoon and eight others* (1)].

We accordingly quash the order of the Assistant Rent Controller as a "speaking order" though without costs and remand the application for the permit to him for disposal in accordance with law after due consideration as to whether notice thereof should not be given to the owner of the premises.

(1) (1950) B.L.R. (S.C.) 109.

SUPREME COURT.

BABU RAMDAS (APPLICANT)

v.

THE CONTROLLER OF RENTS, SHWEBO, AND ONE (RESPONDENTS). *

† S.C. 1953

Nov. 23.

Urban Rent Control Act, s. 2 (c) and (g)—Definition of a tenant—S. 12 (1), application under, to continue in occupation of premises—Application by tenant incompetent.

Held: The provisions of s. 12 (*1*) of the Urban Rent Control Act enable only those who are not already tenants of the premises to apply to the Controller for permission to continue in occupation. In granting permission to continue in occupation of the premises to a person who is already a tenant thereof the Controller clearly exceeds his jurisdiction.

Tun Aung (1) for the applicant.

Tun Aung (2) for the respondent No. 2.

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

U THEIN MAUNG.—This is an application for directions in the nature of certiorari to quash the order of the Controller of Rents, Shwebo, by which he has given the second respondent permission under section 12 (*1*) of the Urban Rent Control Act, 1948, to continue in occupation of what is known as Kyin Byan Hin Pweyon on the ground that the second respondent is already tenant thereof and therefore incompetent to apply for such permission.

The relevant facts are as follows:

The applicant who is the owner of the land in question and the building which was on it then,

* Civil Misc. Application No. 72 of 1953.

† *Present:* U THEIN MAUNG, Chief Justice of the Union of Burma, U AUNG KHINE and U BO GYI, JJ.

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purported to mortgage them with one U Maung Gyi for Rs. 4,000 and put him in possession thereof in 1942. The building was damaged or destroyed during the war but U Maung Gyi repaired or reconstructed it and let it out to the second respondent. When this building was again damaged by fire in 1951, U Maung Gyi and the second respondent did the needful to make it further habitable and the second respondent has continued in occupation thereof as U Maung Gyi's tenant.

Before the building was damaged by fire in 1951, the applicant filed a suit against U Maung Gyi for recovery of possession thereof and the second respondent was subsequently added as a party to the said suit as he was in possession thereof as U Maung Gyi's tenant; and just a few days before the applicant got a decree in that suit for recovery of possession on payment of Rs. 4,000 to U Maung Gyi, the second respondent applied to the Controller of Rents for permission to continue in occupation thereof.

The application of the second respondent was under section 12 (*1*) of the Urban Rent Control Act, 1948, the relevant part of which reads:

> "In any area or in respect of any class of premises, to which the Governor may, by notifications declare this section to apply, any person, not already being a tenant of any premises, but being in occupation of such premises *bonâ fide* for residential or business purposes, may make application to the Controller to be permitted to continue in occupation of such premises."

The facts which have been set out above are not disputed and the Controller of Rents himself did notice that the second respondent was already in occupation of the premises as a tenant; but he

granted the permit under the said section as the second respondent had not obtained the lease from the present applicant.

Now according to the provisions of section 12 *(1)*, only those who are not already tenants of the premises can apply to the Controller; and the second respondent is admittedly a tenant.

It is true that he got the lease from U Maung Gyi; but U Maung Gyi, who had been put in possession of the premises by the applicant himself as security for repayment of Rs. 4,000, had the right to grant the lease and receive rent, and there cannot be any doubt of his being a landlord and the second respondent being a tenant as defined in section 2 (*c*) and (*g*) of the Urban Rent Control Act, 1948.

The Controller of Rents has clearly exceeded his jurisdiction in granting the second respondent permission to continue in occupation of the premises of which he is already a tenant; and on the present application we are concerned only with that part of his order in which he has granted the said permission.

We accordingly quash the said part of his order but the parties must bear their own costs.

SUPREME COURT.

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1953

Nov. 16.

MAULANA BEEDY Co. BY AGENT T. C. MOHAMED (APPLICANT)

v.

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

Trade Disputes Act—Reference by President—Leave and Holidays Act, 1951—Extra expenditure imposed—Company unable to meet—Close down—Law pertaining to Lock-out inapplicable—Right of citizen to discontinue business—Compulsion to continue unwarranted.

Held: Where a business is admittedly not a public utility service and which has not received any special consideration from the Government, an award made by the Industrial Tribunal cannot direct the management to continue to carry it on against their will. The question whether an employer could or could not close down a business permanently or temporarily falls outside the purview of the Industrial Disputes Act, which is more or less the same as the Burma Trade Disputes Act.

Indian Metal and Metallurgical Corporation v. *Industrial Tribunal, Madras, and another*, A.I.R. (1953) Mad. 98; *The Burma Oil Company (Burma Concessions) Ltd. and two others* v. *The Court of Industrial Arbitration, Burma, and two others*, (1951) B.L.R. (S.C.) 1, followed.

Held also: As the Court of Industrial Arbitration itself has observed in the award "closure or discontinuance of business is neither a lock-out nor a strike" it is clearly wrong in assuming jurisdiction as if it were a lock-out and in applying the case law relating to lock-outs.

Kyaw Myint and *C. H. Chan* for the applicant.

Ba Sein (Government Advocate) for the respondent No. 1.

T. P. Wan for the respondent No. 2.

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* Civil Misc. Application No. 95 of 1953.

† *Present:* U THEIN MAUNG, Chief Justice of the Union of Burma, U AUNG KHINE and U BO GYI, JJ.

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

U THEIN MAUNG.—This is an application for a writ of certiorari to quash the Award of the Court of Industrial Arbitration, Burma, in case No. 4 of 1952 on the ground that the Court has no jurisdiction to pass such an Award.

The relevant facts are as follows:

The Leave and Holidays Act, 1951 having come into force on the 1st January, 1952, the applicant company gave the second respondent, which is a federation of its employees, " one month's notice of closing down " its factory stating therein :—

> " As the Leave and Holiday Act has come into force from 1952, we are not in a position to meet with the extra expenditure of wages on holidays and leave days, while paying you 50 per cent of the selling price as wages on your turn over. "

The second respondent then replied " we cannot agree with your one month's notice served on the workers employed by you because the grounds stated in your notice are not reasonable " and asked the Company to withdraw the said notice.

Thereupon the company informed the second respondent that it would have to close the factory as mentioned in the said notice unless agreement was reached with reference to " either of the two options " which it suggested in the following terms :—

> " There are two options in view left for the workmen to decide, one is to work at a reduced rate of wages disregarding the contract of 50 per cent and enjoy the benefit of the Leave and Holiday Act, and the second is to work on Branch system introduced in India, by the Beedy business men. "

The second respondent, however, refused to consider the said suggestions and the President had to refer

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the following matters in dispute to the arbitration of the Industrial Court in exercise of the powers conferred by section 9 of the Trade Disputes Act:—

"(1) Whether there are sufficient grounds for the closing down of the Moulana Beedy Factory and the giving of one month's notice by the management to the workers terminating the latter's services with effect from the 21st February 1952.

(2) If so, whether the workers are entitled to any compensation for the termination of their services and what should be the amount of compensation."

The Court of Industrial Arbitration framed four issues at the outset; but it was left with only two issues to decide as the learned Advocate for the company has conceded that the Factory Act and the Leave and Holidays Act are applicable to its employees. Those two issues are:—

"1. Whether there are sufficient grounds for the closing down of the Respondent Company?

2. Are the workers entitled to any compensation? If so, to what extent?"

The Court of Industrial Arbitration has held on the first issue "that the intended closure of the factory is unjustified"; and it has found it unnecessary to decide the second issue in view of its decision on the first.

With reference to the first issue the principal dispute between the parties was whether the company would have to incur an additional expenditure of Rs. 1,26,000 or of Rs. 65,000 only per annum on account of holidays, earned leave, casual leave and medical leave under the Leave and Holidays Act, 1951, and whether it would lose if it had to incur such expenditure.

Evidence has been led at considerable length and account books also have been produced in connection with the said questions. The Court of

Industrial Arbitration, however, has not decided them. It has merely observed:

"Although we are not prepared to say that they are false, we feel inclined to remark that the accounts were not maintained properly in order to give a true position of the Company. We cannot, therefore, accept the accounts produced by the Respondent Company and at the same time we are rather reluctant to accept the figures of accounts and profits as given by the Applicant Union."

It appears from the following extract from the Award that the Court, after all, abstained from deciding the principal questions at issue as it was not sure that an employer could not close down his business at his own will regardless of the question of loss and profit:

"The main and the only ground as we have earlier said is merely an apprehended loss based on the maximum number of leave and holidays presumably enjoyed to the fullest extent by all the workers of the Respondent Company. Closure or discontinuance of business is neither a lock-out nor a strike. In the case of lock-outs and strikes it is common ground that we have every right to re-instate workers involved in the case. However it may be doubted that we have any such power to decide the question whether an employer can close down his business temporarily for an indefinite period or permanently at his own will. But in the present case we hold that the conduct of the Respondent Company tantamounts to locking-out the employees on a whole scale, and we are of the view that we have such a jurisdiction."

The doubt expressed in the first part of the above extract is in consonance with the contention of the company that the Court cannot decide whether it has sufficient grounds for closing down its factory; and this contention is in accordance with the ruling in *Indian Metal and Metallurgical*

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Corporation v. *Industrial Tribunal, Madras and another* (1). There a Divisional Bench of the Madras High Court consisting of Rajamannar C.J., and Venkatarama Ayyar J., has held:

"Where a business is admittedly not a public utility service and which has not received any special consideration from the Government, an award made by the Industrial Tribunal appointed under the Industrial Disputes Act cannot direct the management of an industry to continue to carry on any business against their will, as it follows from Article 19 (1) (*g*) that if a citizen has a right to carry on business, he must be at liberty not to carry it on if he so chooses. Such an award is therefore void to that extent as it is inconsistent with the Constitution. . . . . .

The question whether an employer could or could not close down a business permanently or temporarily falls outside the purview of the Industrial Disputes Act. No doubt the term 'industrial dispute' has been very widely defined in S. 2 (*k*) of the Act; but it is clear that the definition of an 'industrial dispute' and the Act taken as a whole assume the continued existence of an industry. Closing down a business even temporarily is distinct and different from a lock-out just as the discontinuance from service of an employee is not the same thing as a strike. While therefore the Industrial Tribunal has got the jurisdiction to adjudicate on the question whether a particular lock-out was justified or not, it cannot decide the question whether an employer can close down his business temporarily for an indefinite period or permanently."

With reference to the constitutional question the learned Advocate for the second respondent has invited our attention to the difference between Article 19 (1) (*g*) of the Constitution of India and Article 17 (4) of the Constitution of the Union of Burma. The former provides "All citizens shall have the right to practice any profession or to carry

(1) A.I.R. (1953) Mad. 98.

on any occupation, trade or business" whereas the latter provides:

> "There shall be liberty for the exercise of the following rights subject to law, public order and morality:—
>
> * * * *
>
> (iv) The right of every citizen . . . . . to follow any occupation, trade, business or profession."

The right to follow any occupation, trade, business or profession in the Union of Burma is expressly subject to law, public order and morality; but the learned Advocate cannot show that there is any law under which a private concern like the applicant company can be prevented from closing down its factory for production of beedis and compelled to continue its business. As the law now stands the following observations of the Madras High Court in the said ruling are applicable to this case also:—

> "If a citizen has got a right to carry on business, we think it follows that he must be at liberty not to carry it on if he so chooses. A person can no more be compelled to carry on a business than a person can be compelled to acquire or hold property. A person with money can certainly dispose of it as he pleases. He may invest it or part of it in running a business, but he need not. He can invest it in other ways or he may keep the money idle. . . . . .
>
> In this view, it is not necessary to embark on an enquiry as to whether the petitioner had proper grounds for deciding to close down the factory temporarily. We do not think it is open to us to canvass the grounds which prompted the owner to discontinue the business. The ground may be actual loss or apprehended loss. It may equally be disinclination to run the risk of running the business."

With reference to the right under Article 17 (iv) being subject to public order and morality it never was

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the second respondent's case that the closure of the Factory and stoppage of the company's business would affect public order and morality and the Court of Industrial Arbitration has not found that they would affect public order and morality.

As this Court has already observed in *The Burma Oil Company (Burma Concessions) Ltd. and two others* v. *The Court of Industrial Arbitration, Burma, and two others* (1) our Trade Disputes Act is more or less the same as the Indian Act; and the learned Advocate for the second respondent has admitted that the amendments, which have been effected after the Constitution of the Union of Burma came into force, are not relevant for the purpose of this case. So the following observation of the Madras High Court in the said ruling is applicable with equal force to the present case also :—

> "(15). Apart from this constitutional aspect, we are also inclined to hold that the question whether an employer could or could not close down a business permanently or temporarily falls outside the purview of the Industrial Disputes Act. No doubt the term 'Industrial dispute' has been very widely defined in S. 2 (*k*) of the Act; but it appears to be clear to us that the definition of an 'industrial dispute' and the Act taken as a whole assume the continued existence of an industry."

With reference to the statement in the Award "that the conduct of the company tantamounts to locking-out the employees on a whole scale", as the Court of Industrial Arbitration itself has observed just a little earlier in the award "closure or discontinuance of business is neither a lock-out nor a strike"; the Court is clearly wrong in assuming jurisdiction as if it were a lock-out and in applying

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

the case law relating to lock-outs; and the learned Government Advocate, who appears for it, has admitted that in assuming jurisdiction, as it did, it was not answering the questions, which had been referred to it by the President.

Incidentally, it is not quite correct to say that an attempt has been made to put undue pressure on the workers either to work at a reduced rate or wages disregarding the contract rate of 50 per cent of the selling price of beedis or to accept the Branch System, as one month's notice to close the factory had been given before these alternatives were suggested; nor is it quite correct to say that an attempt has been made to defeat the statutory provisions of the Leave and Holidays Act, 1951, since the Act will apply only if the company continues to do its business and the company's case is that it has to stop the business as it cannot afford to incur additional expenditure as required thereby.

We accordingly hold (1) that the Court of Industrial Arbitration is obviously wrong in assuming jurisdiction as if the closing down of the company's business was a lock-out and (2) that it has exceeded its jurisdiction in holding "that the intended closure of the factory is unjustified." and quash its award with costs; Advocate's fee, one hundred kyats.

SUPREME COURT.

†S.C. 1953

Nov. 24.

NGA PEIN AND TWO OTHERS (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

Criminal Trial—Evidence Act, s. 33—Admissibility of evidence—Right of cross-examination of prosecution witness, when arises—Previous statements before right exercised inadmissible—Evidence Act, s. 25, Second Repealing and Amending Act, 1945—Statement made to village headman, admissibility of—Penal Code, s. 201—Causing evidence of offence to disappear—Applicability to principal offender.

Held: According to the Proviso to s. 33 of the Evidence Act, the evidence of a prosecution witness will be admissible against the accused only if, before charges were framed against them, they "had the right and opportunity to cross-examine" him. The accused is not entitled as a matter of right to cross-examine prosecution witnesses in the trial of warrant cases before the framing of a charge; the mere fact that the Judge did, as a matter of practice and discretion, give their pleaders an opportunity to cross-examine a witness and that they did cross-examine him, cannot render his evidence admissible if he is not available for further cross-examination after the charges had been framed against the accused persons.

Emperor v. *C. A. Matthews*, A.I.R. (1929) Cal. 822 ; *Emperor* v. *Lachhmi Narain*, I.L.R. 54 All. 212; *S. C. Mitter* v. *The State*, A.I.R. (1950) Cal. 436, followed.

Held also: According to the amendment to s. 25 of the Evidence Act, by the Second Repealing and Amendment Act, 1945, statements made to a village headman are admissible in evidence.

Nga Myin v. *King-Emperor*, I.L.R. 2 Ran. 31 (F.B.), followed.

Held further: S. 201, Penal Code does not apply to a person who is proved or admitted to be the principal offender, although the mere fact that the accused is probably or possibly the principal offender does not prevent his conviction under the section.

Aung Kyaw Zan v. *Crown*, 1 L.B.R. 316, followed.

Tun Maung for the appellants.

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* Criminal Appeal No. 1 of 1953.

† *Present:* U THEIN MAUNG, Chief Justice of the Union, U AUNG KHINE and U BO GYI, JJ.

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Ba Sein (Government Advocate) for the respondent.

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

U THEIN MAUNG.—This is an appeal filed with special leave of this Court under section 6 of the Union Judiciary Act, 1948.

The first two appellants Nga Pein and Myaing Gyi were sentenced to death by the learned Special Judge, Pegu under section 302 (*1*) (*d*) of the Penal Code; but on appeal, the High Court has altered their conviction to one under section 302 (*2*) of the Penal Code and reduced their sentences to transportation for life.

The third appellant, Sein Maung was sentenced to rigorous imprisonment for five years by the learned Special Judge, Pegu under section 201 (*1*) of the Penal Code read with section 109 thereof; and his appeal against the conviction and sentence has been dismissed by the High Court.

The first contention of the learned Advocate for the appellants is that the learned Special Judge erred in admitting the evidence of Than Tha Beik (PW 6) under section 33 of the Evidence Act or at all.

Than Tha Beik, who was a very important witness for the prosecution, was examined and cross-examined before charges were framed against the appellants; but he was not available for further cross-examination after charges had been framed against them. Summonses and even warrants were issued to secure his attendance for further cross-examination; but they could neither be served nor executed on account of insurgent activities in the locality.

The learned Pleaders for the appellants agreed that his attendance could not be secured by any

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means and they did not raise any objection to his evidence being admitted and taken into consideration against the appellants. The grounds of appeal to the High Court also do not contain any such objection. So the learned Special Judge and the High Court have not discussed the admissibility or otherwise of his evidence at all.

This Court, however, has allowed the objection to be taken as it only raises a pure question of law.

According to the Proviso to section 33 of the Evidence Act, Than Tha Beik's evidence will be admissible against the appellants only if, before charges were framed against them, they "had the right and opportunity to cross-examine" him. However, as has been rightly held by the Calcutta and Allahabad High Courts in *Emperor* v. *C. A. Matthews* (1) and *Emperor* v. *Lachhmi Narain* (2), the accused is not entitled as a matter of right to cross-examine prosecution witnesses in the trial of warrant cases before the framing of a charge; and since the appellants had no right to cross-examine Than Tha Beik then, the mere fact that the learned Special Judge did, as a matter of practice and discretion, give their pleaders an opportunity to cross-examine him and that they did cross-examine him then cannot render his evidence admissible under the said section of the Evidence Act [Cp. *S. C. Mitter* v. *The State* (3)].

We accordingly uphold the contention that Than Tha Beik's evidence is not admissible under section 33 of the Evidence Act and proceed to consider whether the rest of the evidence on record is sufficient to sustain the appellant's conviction and sentences.

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(1) A.I.R. (1929) Cal. 822. (2) (1932) I.L.R. 54 All. 212.
(3) A.I.R. (1950) Cal. 436.

As against the first appellant Nga Pein there remain the evidence of Maung Hlaing (PW 2), Hla Maung (PW 5), Maung Khine (PW 7), U Po Shwe (PW 8), and U Po Kyaw (PW 9) and his own retracted confession; and as against the second appellant Myaing Gyi there remain the evidence of Maung Hlaing, U Po Shwe, U Po Kyaw and So Tint (PW 10); but as against the third appellant Sein Maung there does not remain any evidence whatsoever as he had been convicted solely on the evidence of Than Tha Beik.

The case for the prosecution is that Tun Maung and E Maung were poachers in the fishery of San Myaing, that Than Tha Beik, the appellants and their co-accused Kyaw Min, San Chon and Maung Tin were San Myaing's employees at the fishery, that two of the said employees *viz*. Nga Pein and Myaing Gyi, who were then in a boat with a crack at the back, asked Tun Maung and E Maung in the said fishery at about 9 p.m. on the 5th October, 1951 to go with them to a feast, that Tun Maung and E Maung who accordingly went along with them were shot dead by them about an hour thereafter, that Sein Maung told Myaing Gyi on the following morning to go and hide the dead body (? bodies) and that Myaing Gyi did so with the help of others.

In support of the case for the prosecution, Maung Hlaing, who was fishing with Tun Maung and E Maung then, has identified a boat found in San Myaing's fishery hut, where the appellants and others were living, as the boat of the men, who asked Tun Maung and E Maung to go with them to a feast, and deposed that gun shots were heard about an hour after Tun Maung and E Maung had gone with them. Maung Khine, who was then in San Myaing's fishery

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has deposed that Nga Pein, Myaing Gyi and Kyaw Min went out in a boat at about 9 p.m. that night, that Nga Pein was then armed with a Japanese rifle, and that they came back about an hour after gun shots were heard.

Maung Hla Maung, Headman U Po Shwe and U Po Kyaw have given evidence of the statements made by the inmates of the said hut shortly after the boat had been identified and one English rifle and one Japanese rifle had been found in their hut.

According to Maung Hla Maung, San Chon then stated that Tun Maung and E Maung had been killed by Nga Pein and Myaing Gyi and that he, Kyaw Min and Maung Tin had to help Myaing Gyi in burying the dead bodies as directed by Nga Pein and Myaing Gyi; Kyaw Min and Maung Tin corroborated the statement of San Chon; Myaing Gyi admitted that he happened to have shot as he was drunk and Myaing Gyi was one of those who pointed out the dead bodies.

Headman U Po Shwe has deposed (1) that Myaing Gyi first admitted to him that he was one of the murderers although he (Myaing Gyi) changed his statement a little later and said that Nga Pein shot both Tun Maung and E Maung, (2) that Myaing Gyi also admitted having asked San Chon, Kyaw Min and Sein Maung to bury the dead body of E Maung and having buried the dead body of Tun Maung himself with the help of San Chon and Kyaw Min and (3) that Myaing Gyi himself pointed out the dead body of Tun Maung.

According to U Po Kyaw, President of the Cultivators' Association, Myaing Gyi admitted that he and Nga Pein called Tun Maung and E Maung away, that after they had gone together about 500 fathoms Nga Pein shot both of them, that he

(Myaing Gyi) asked San Chon, Maung Tin and San Thein to bury the dead bodies and that he had thrown away Tun Maung's head which, by the way, was subsequently found at a place indicated by him.

So Tint stated very definitely in his examination-in-chief that Myaing Gyi, when he was asked by *Yebaws*, told them that he and Nga Pein had shot Tun Maung and E Maung dead; but under cross-examination he changed his statement and deposed that he did not remember what Myaing Gyi then said.

Nga Pein was not present when the search was made at San Myaing's fishery hut and statements were made by the inmates thereof as stated above, as he had left it on the following morning after the incident. However, he was arrested on the 9th October, 1951 and on the very next day after his arrest he confessed before the 6th Additional Magistrate, Pegu. In his confession, he stated that he went out in a boat with Myaing Gyi, that he fell back in a fright as some one in another boat, who had a *dah* or a stick in his hand, asked, "who are you?", that his (Nga Pein's) gun then went off accidentally and the man in the other boat fell into the water and that he was subsequently told by San Chon that two men were lying dead with gun-shot wounds.

The learned Advocate for the appellants has, in view of the ruling in *Nga Myin* v. *King-Emperor* (1) and the amendment to section 25 of the Evidence Act by the Second Repealing and Amending Act, 1945, admitted that the statements made to Village Headman U Po Shwe will ordinarily be admissible in evidence; nevertheless he has contended that the

(1) (1924) I.L.R. 2 Ran. 31 (F.B.).

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statements made not only to U Po Shwe but also to Maung Hla Maung and U Po Kyaw are not admissible under section 24 of the Evidence Act as they were made on account of threats and inducements by some *Yebaws*. However, the *Yebaws* were not persons in authority within the purview of the said section; according to Maung Khine they merely said that the inmates of the fishery hut might have to be arrested as the boat had been identified and the guns had been seized therein ; and the only person who made a statement to them on account of the said observation was Than Tha Beik, whose evidence is being excluded.

Nga Pein had retracted his confession and stated that he had to make the confession on account of ill-treatment by the police; but he has not made any attempt to prove the alleged ill-treatment.

We agree with the lower Courts that all the remaining evidence for the prosecution is admissible ; and having regard to all the circumstances and probabilities we are satisfied that the remaining evidence is sufficient to sustain the conviction of and sentences on Nga Pein and Myaing Gyi.

As for the third appellant, Sein Maung, who has been convicted solely on the evidence of Than Tha Beik, it is not necessary for us to order his retrial as the said evidence, even if it were admissible, would not show that he has committed an offence under sections 201 and 109 of the Penal Code at all. Even if he told the appellant Myaing Gyi to go and hide the dead body or bodies at night and Myaing Gyi hid the dead body or bodies as suggested by him, Myaing Gyi, who has been found to have been an actual murderer, would not have committed an offence under section 201 of the Penal Code; and as what was done by Myaing Gyi does not, in law,

amount to an offence under section 201, he cannot be held to have abetted Myaing Gyi to commit such an offence. The relevant part of section 201 reads:

"Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false, shall, ... if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine."

So far as this country is concerned it has been held as long ago as 1902 that the section does not apply to a person, who is proved or admitted to be the principal offender, although the mere fact that the accused is probably or possibly the principal offender does not prevent his conviction under the section. [See *Aung Kyaw Zan* v. *Crown* (1).] We do not see any reason to differ from the said ruling; and in the present case Myaing Gyi has been proved to be, and convicted as, one of the principal offenders.

We accordingly dismiss the appeal of Nga Pein and Myaing Gyi; but we set aside the conviction of and the sentence on Sein Maung, acquit him of the charge under section 201 of the Penal Code read with section 109 thereof and direct that he shall be released forthwith so far as the said charge is concerned.

(1) 1 L.B.R. 316.

SUPREME COURT.

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Nov. 23.

PAZUNDAUNG RICE MILL BY ITS MANAGING PARTNER U KO KO GYI (APPLICANT)

v.

R. R. KHAN RICE MILL AND TRADING CO., LTD. BY ITS AGENT AND MANAGER M. MALIM AND TWO OTHERS (RESPONDENTS).*

Urban Rent Control Act, 1948, ss. 3 and 19—Notification 301, dated 27th December 1950 of Ministry of Finance and Revenue—Land on which rice mill stands, whether exempt from Act—Executive powers of President, how exercised—Union of Burma (Adaptation of Laws) Order, 1948—General Clauses Act—Constitution of the Union of Burma and Order 1 of 1948.

Held : Under s. 3 (*1*) of the Urban Rent Control Act read with Notification No. 301, dated the 27th December 1950 of the Ministry of Finance and Revenue, the President has directed that all rice mills and their appurtenances shall be exempted from the operation of the Act ; and as a rice mill and godowns have been erected on the land in accordance with an undertaking by the lessee, it must be held to be an appurtenance of the mill.

Held also : Under the Union of Burma (Adaptation of Laws) Order, 1948, s. 5, " President of the Union " has been substituted for " Governor "; and by s. 13 Burma General Clauses Act, Article 121 of the Constitution of the Union of Burma, and Order 1 of 1948 as amended by Order 1 of 1949, powers conferred on the President can be exercised in his name by the Government, and orders and instruments made in his name can be authenticated by the signatures of certain officers in the Secretariat.

J. B. Sanyal for the applicant.

M. M. E. Darwoodjee for the respondent No. 1.

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

U THEIN MAUNG.—This is an application for directions in the nature of certiorari to quash the

* Civil Misc. Application No. 71 of 1953.

† *Present :* U THEIN MAUNG, Chief Justice of the Union, U AUNG KHINE and U BO GYI, JJ.

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order of the Controller of Rents, Rangoon in proceedings No. 246-E of 1951-52 and the order of the Ministry of Housing and Labour rejecting the appeal therefrom.

The relevant facts are as follows: The applicant, Pazundaung Rice Mill, has obtained a lease of a piece of land belonging to the first respondent R. R. Khan Rice Mill and Trading Co. Ltd. definitely undertaking to put up a rice mill and godowns thereon and has actually put up a rice mill and godowns thereon in accordance with the said undertaking. So the Controller of Rents rejected its application under section 19 of the Urban Rent Control Act, 1948, for a certificate certifying the standard rent for the said piece of land on the ground that it is exempt from the operation of the said Act under section 3 thereof read with the Ministry of Finance and Revenue Notification No. 301, dated the 27th December, 1950; and the Ministry of Housing and Labour has rejected the appeal therefrom on the ground that the President does not see any reason to interfere.

Section 3 (*1*) of the Act provides " The Governor may, by notification, exempt from the operation of the Act . . . . . any such class of premises as may be specified in such notification . . . "; Section 3 (*2*) provides " If any question arises whether any premises come within . . . any class of premises exempted from the operation of the Act by notification under sub-section (*1*), the decision of the Governor on such question shall be final "; and according to the said notification the President has directed that all rice mills and their appurtenances shall be exempted from the operation of the Act.

The first contention of the learned Advocate for the applicant is that the President cannot exercise the power given to the Governor by section 3 (*1*) of the

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Act. However, in making this contention he has overlooked the Union of Burma (Adaptation of Laws) Order, 1948, section 5 of which provides for substitution of "President of the Union" for "Governor".

The second contention of the learned Advocate is that the power conferred by section 3 (*1*) and (*2*) of the Urban Rent Control Act, 1948, on the President cannot be exercised on his behalf by any Ministry. Here again the learned Advocate has overlooked (1) section 13 of the Burma General Clauses Act which has been inserted by the General Clauses (Amendment) Act, 1950, (2) Article 121 of the Constitution of the Union of Burma and (3) Order No. 1 of 1948 issued thereunder as amended by Order No. 1 of 1949. Section 13 of the Burma General Clauses Act reads :

"Where, by an Act of the Parliament or any existing law as defined in section 222 of the Constitution, any power is conferred, or any duty imposed, on the President of the Union, then that power shall be exercisable, or that duty shall be performable, in his name by the Government."

Article 121 (1) and (2) of the Constitution read :

"(1) All executive action of the Union Government shall be expressed to be taken in the name of the President.

(2) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President."

Order No. 1 of 1948, as amended, provides for authentication of orders and other instruments made in the name of the President by the signature of the Chief Secretary, Secretary, Additional Secretary, Deputy Secretary, Under Secretary or Assistant

Secretary to the Union Government in the Ministry concerned.

The ultimate contention of the learned Advocate is that the applicant Pazundaung Rice Mill took a lease of the bare land and the mere fact that it has subsequently put up a mill on it cannot turn it into an appurtenance of the mill. However, the lease was by one Rice Mill Co. to another Rice Mill Co., the lessee had to undertake that it would put up a rice mill and godowns on the land and the rice mill and godowns have, in fact, been put up in accordance with the said undertaking. Under these circumstances the Controller of Rents cannot be said to have erred in holding that the land is appurtenant to the rice mill within the meaning of the said Notification and therefore exempt from the operation of the Act.

The application is dismissed with costs; Advocate's fees one hundred and seventy kyats.

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1953

Containing cases determined by the High Court, Rangoon

MR. B. W. BA TUN, M.A., LL.B., *Bar.-at-Law*, EDITOR.
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Published under the authority of the President of the Union of Burma by the Superintendent, Union Government Printing and Stationery, Burma, Rangoon.

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HON'BLE JUDGES OF THE HIGH COURT OF THE UNION OF BURMA DURING THE YEAR 1953

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3. The Hon'ble Justice U SAN MAUNG.
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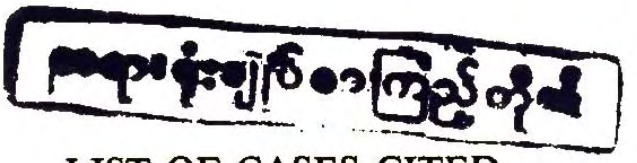
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ပြည်သူ့တန်ဆာ နှိပ်ကွပ်ရေးဥပဒေ ပုဒ်မ ၃ (က)။ ။၁၉၄၉ ခုနှစ်၊ ပြည်သူ့တန်ဆာ ပဖျောက်ရေးအက်ဥပဒေပုဒ်မ ၃၊ပုဒ်မငယ် (က)။ ။ဝါရမ်းမှု။ ။ရာဇဝတ် ကျင့်ထုံးကိုဥပဒေပုဒ်မ ၂၆၃ အရ၊ အကျဉ်းအားဖြင့် စစ်ဆေးခြင်း။ ။ငင်း ကိုဥပဒေပုဒ်မ ၃၄၂၊ ဒုတိယအပိုဒ်အရ တရားခံကို စစ်ဆေးခြင်းမပြု။ ။ ထိုမှားယွင်းချက်သည် ငင်းကိုဥ ဥပဒေပုဒ်မ ၅၁၇ ၏ အကူအညီရနိုင် မရနိုင်။ ပြည်သူ့တန်ဆာနှိပ်ကွပ်ရေးဥပဒေဟူ၍ယခုမရှိတော့ချေ။ ။၁၉၄၉ ခုနှစ်၊ ပြည်သူ့တန်ဆာပဖျောက်ရေး အက်ဥပဒေထုတ်ပြန်လိုက်သည့်နေ့မှစ၍ ပြည်သူ့တန် ဆာ နှိပ်ကွပ်ရေး ဥပဒေကိုပယ်ဖျက်ခဲ့သည်။ ၁၉၄၉ ခုနှစ်၊ ပြည်သူ့တန် ဆာ ပဖျောက်ရေး အက်ဥပဒေ ပုဒ်မ ၃၊ ပုဒ်မငယ် (က)အရ၊ ပြစ်မှုသည်အပြစ်ဒဏ် ပေးရာ၌ ထောင်ဒဏ်တနှစ် ကျခံစေနိုင်သည့်အတွက် ဝါရမ်းမှု ဖြစ်လေ သည်။ ဤဝါရမ်းမှုကို အောက်ရုံးက ရာဇဝတ်ကျင့်ထုံးကိုဥ ဥပဒေပုဒ်မ ၂၆၃ အရ၊ အကျဉ်းအားဖြင့် စစ်ဆေးခဲ့ရာတွင် တရားလိုပြသက်သေများကို စစ်ဆေးပြီးသည့်နောက် တရားခံဖြစ်သူကိုမစစ်ဆေးခဲ့ချေ။ ။ဝါရမ်းမှုများကို စစ်ဆေး သောအခါ ရာဇဝတ်ကျင့်ထုံးကိုဥ ဥပဒေပုဒ်မ ၃၄၂၊ ဒုတိယ အပိုဒ်အရ တရားခံကို စစ်ဆေးခြင်းသည် မလုပ်လျှင်မနေရ ဖြစ်သည်။ ဤပျက်ကွက်မှုသည် သာမန်မျှသာမဟုတ်ဘဲ အမှုတခုလုံးကိုလုံးဝပျက်စီး စေသော အချက်ဖြစ်သည်။ ငင်းမှားယွင်းသော ကိစ္စအတွက် ပုဒ်မ ၅၁၇ ၏ အကူအညီမရနိုင်။ ရာဇဝတ်ကျင့်ထုံးကိုဥဥပဒေပုဒ်မ ၂၆၃ အရ အကျဉ်း အားဖြင့်စစ်ဆေးသောအခါ သက်သေ အစစ်ခံချက်များကိုခွဲထွင်ရေးသားရန် မလိုချေ။ သက်သေ အစစ်ခံချက်များ အပေါ်တွင် အ တည် ပြုလုပ်ခါ အပြစ် ပေးရလျှင်၊ မည်သည့်အကြောင်း အချက်အလက်များနှင့် အပြစ်ပေးသည် ဆိုခြင်းကိုအယူခံရုံးမှသော်၎င်း၊ ပြင်ဆင်သောရုံးများမှသော်၎င်း သိနားလည် စေခြင်းအလို့ငှါ ပြည့်ပြည့်စုံစုံရေးသားအပ်ပေသည်။ ပြည့်ပြည့်စုံစုံမရေးသား ခဲ့ပါမူ ကောက်ယူ ဆုံးဖြတ်သော အချက်များသည် တရားဥပဒေနှင့်အညီ ဆုံးဖြတ်ခြင်းမဟုတ်ကြောင်း ထင်ရှားသည်။

ဘီရူး(ခေါ်) မကျင်နှုန့် ပြည်ထောင်စုမြန်မာနိုင်ငံ ... 110

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——————WIFE ALONE IN HUSBAND'S LIFE-TIME CANNOT SUE FOR ADMINISTRATION OF DECEASED FATHER-IN-LAW'S ESTATE 29

BURMA COURTS MANUAL, PARAGRAPH 22 114

CHIEF JUDGE, RANGOON CITY CIVIL COURT—AUTHORITY TO TRANSFER SUIT 82

CIVIL PROCEDURE CODE, s. 10—*Stay of suit—Prior suit declared pending and undecided.—No objections raised in subsequent suit—Procedure and validity of orders cannot be challenged in appeal—Parties interested must apply to original Court to be*

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impleaded—Administration suit—Strangers not necessary parties—Revision of interlocutory order, when necessary. Held: The rule under s. 10, Civil Procedure Code is one of procedure and simple and can be waived with the consent of the parties and when they expressly ask the Court to proceed with the subsequent suit. *Maung Thit Maung* v. *Maung Tin and three others,* (1949) B.L.R. 64, distinguished. *Gangaprashad and others* v. *Mt. Banaspati,* A.I.R. (1937) Nag. 132; *Jang Bahadur* v. *Bank of Upper India, Ltd., in liquidation,* I.L.R. (1928) Luck. Vol. 3, p. 314, referred to. *Held:* The defendants not only waived their rights to stay the second suit but actually acquiesced in the Court proceeding with the case, and therefore they cannot be permitted to object to the exercise of such jurisdiction by the Court. *Held further:* It is not for this Court to go into the question whether the 3rd, 4th and 5th applicants should have been impleaded as parties to the suit as no application was made in the lower Court to implead them. *Valliammal and another* v. *Official Assignee, Madras,* A.I.R. (1933) Mad. 74, referred to. *Held also:* Where a person outside the family is in possession of a part of the estate, such person cannot be joined as a party to an administration suit which is a suit for account. *Ah Kyan Sin and another* v. *Yeo Ah Gwan and others,* A.I.R. (1937) Ran. 497, referred to. *Held also:* Under s. 115, Civil Procedure Code, the High Court can revise an interlocutory order of a subordinate Court but it is only when a miscarriage of justice will inevitably ensue that it will do so. *Salam Chand Kannyram* v. *Bhagwan Das Chilhama,* (1926) I.L.R. 53 Cal. 767 at 775, followed.

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တရားမကျင့်ထုံးကိုဝ ဥပဒေပုဒ်မ ၉၂ အရ၊ အတည်ပြုထားပြီး သော စ ကင်း (Scheme)။ ။ထိုစကင်းကို အမှီသဟဲပြုလုပ်ခါ ကျောင်းနှင့် ကျောင်းမြေကို လက်ရောက်ရပြီး တရားခံများကို ကျောင်းမှနှင်ထုတ်ရန် တရားစွဲဆိုခြင်း။ တရားခံတို့က ၁၉၄၉ ခုနှစ်၊ ဝိနိစ္ဆယဌာန အက်ဥပဒေအရ၊ တရားမတရားရုံးတွင် စွဲဆိုနိုင်ခွင့်မရှိ ဟု ကန့်ကွက်ခြင်း။ ၎င်းဥပဒေ ပုဒ်မ ၂၉၊ ၁၅၊ ပုဒ်မငယ် (၁) နှင့် (၂)။ ။တရားမတရားရုံးက စီရင်ပိုင်ခွင့် အာဏာရှိမရှိ။ တရားလို ဘုရားဘဏ္ဍာတော်ထိန်းအဖွဲ့ စကင်း (Scheme) သည် တရားမကျင့်ထုံးကိုဝဥပဒေပုဒ်မ ၉၂ အရ၊ ဆွဲထားသောစကင်းဖြစ်သည်ကတကြောင်း၊ ၎င်းစကင်း ပေါ်တွင် အမှီသဟဲပြုလုပ်ခါ အမှုကိုစွဲဆို၍လည်း တကြောင်း ဤအကြောင်း များကြောင့်ဤအမှုသည် ဝိနိစ္ဆယဌာနနှင့် သက်ဆိုင်သည်ဟု ယူဆရန်ခဲယဉ်းပေသည်။ ၁၉၄၉ ခုနှစ်၊ ဝိနိစ္ဆယဌာနအက်ဥပဒေ ပုဒ်မ ၁၅၊ ပုဒ်မငယ် (၁) အရ၊ လက်ခံ ခြင်းမ ပြု စေ ရန် တား မြစ်ပိတ်ပင် ထားသည့် အမှုများမှအပ အခြားဝိနည်းဓမ္မကံ အဓိကရုဏ်းမှု အားလုံးကို ဝိနိစ္ဆယရုံးများက ဥပဒေအရကြားနာစစ်ဆေး၍ ဝိနည်းတော်နှင့်အညီ စီရင်ဆုံးဖြတ်ရန် အာဏာရှိသည်။ ပုဒ်မခွဲ (၂) အရ၊ ဝိနိစ္ဆယရုံးမှ စစ်ဆေးနိုင်သော အမှုများ၏ အကျဉ်းသရုပ်များကိုဤဥပဒေ၏ ပဌမဇယားတွင် ဖေါ်ပြထားသည်။ သို့ဖြစ်၍ ဤအမှုကိုတရားမတရားရုံးကစီရင် ပိုင်ခွင့်ရှိသည်။

ဦးခ၊ ဦးထွန်းအောင် နှင့် ဦးရေဝတ ပါ (၈) ... 86

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CIVIL PROCEDURE CODE, ORDER 1, RULE 8—*Representative suit—Permission of Court is imperative—Need not be express, sufficient if such permission can be implied. Held:* Even though the Court did not give an express permission to the plaintiff to sue the defendants, not only in their personal capacities, but also in their capacities as representatives of the other worshippers of the Banimandir, such permission must be deemed to have been given by necessary implication from the order of the Court directing publication of the notice under Order 1, Rule 8, Civil Procedure Code. *Hira Lal* v. *Bhairon and others*, 5 All. 602, referred to; *Dhunput Singh and others* v. *Paresh Nath Singh and another*, 21 Cal. 180; *Kalu Khabir* v. *Jan Meah*, 29 Cal. 100, followed.

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CIVIL PROCEDURE CODE, ORDER 1, RULE 10 (2)—*Adding or striking out parties—Principle governing course of action—Finality of litigation and interests of justice. Held:* The principle governing the question of adding a party is that unless an adjudication on all the issues involved in the case ensuing finality of litigation between the parties, or the interest of justice, demands it, a plaintiff should not be compelled to implead a party and particularly one against whom no claim is preferred. (*Pasumarthi*) *Subbaraya Sastri* v. *Mukkamala Seetha Ramaswami*, A.I.R. (1933) Mad. 664, distinguished. *Norris and another* v. *Beazley*, Common Pleas Divn. (1876-77) L.R. 80; *Vaithilinga Pandara Sannidhi Audhina Karthar Tiruvaduthurai Adhinam* v. *Sadasiva Iyer and others*, A.I.R. (1926) Mad. 836, referred to.

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CRIMINAL PROCEDURE CODE, s. 526—*Transfer of case—All cases and appeals must be heard in open Court, not in chambers—Burma Courts Manual, paragraph 22—Deportment of officers in charge of administration of justice—Justifiable apprehension of accused the main consideration in transfer application. Held:* A case should be heard in open Court and it is not a sufficient answer that the procedure of hearing it in chambers was adopted because it was a petty case and the accused had consented to it being heard in chamber. Paragraph 22 of the Burma Courts Manual directs that matters of an informal nature may in the discretion of the Judge or Magistrate be disposed of in chambers, but other judicial business of formal nature should be transacted in open Court. *Held further:* It is incumbent upon those in charge of the administration of justice to so deport themselves as to raise no apprehension in the minds of an accused person that he would not have a fair and impartial trial, the case must be transferred. *Kishori Lal* v. *Chunni Lal*, 31 All. 117, referred to. *Amar Singh* v. *Sadhu Singh*, 6 Lah. 396; *M. De Carmo Lobo* v. *G. C. Bhattacharjee*, A.I.R. (1937) Ran. 272, followed.

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ESSENTIAL SUPPLIES AND SERVICES ACT, 1947, s. 8. *(1)—Possession of sugar—For sale or personal use—Magistrate visiting shops—Importing personal knowledge to fill gap in prosecution case—Trial vitiated. Held:* Accused persons can be convicted only when it is proved that they possessed sugar for sale except under and in accordance with the terms of a license under Notification No. 166, dated the 28th December 1950 duly issued to them. *Held further:* The Magistrate in visiting the shops not for the purpose of understanding the evidence but to fill in the gap in the prosecution evidence did an act which is entirely unwarranted. He has imported his own knowledge of certain facts in the case and by so doing has vitiated the trial.

T. S. MOHAMED AND ONE *v.* THE UNION OF BURMA ... 107

EXECUTION OF DECREE—*Whether decree-holder can be restrained by Injunction at the instance of a third party—Civil Procedure Code, Order 21. Held:* Notwithstanding the claim of any other person in possession of the suit property, it will be an injustice to deny the decree-holder the right to execute his decree or to proceed as a landlord under Rules 97 and 98 of Order 21 of the Civil Procedure Code in case of resistance, especially when the decree has nothing whatever to do with the claim of the third party. *Nasarvanji Cawasji Arjani* v. *Shahajadi Begam and others*, A.I.R. (1922) Bom. 385 (2), referred to.

HAJEE ABDUL SHAKOOR KHAN *v.* MAUNG AUNG THEIN ... 51

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LIABILITIES (WAR-TIME ADJUSTMENT) ACT, 1945—*Order under s. 5—No appeal lies—Distinction between applications for execution of decree under the Act and under the Civil Procedure Code—S. 4, applicability of. Held:* An appeal is a creature of statute and as the Liabilities (War-Time Adjustment) Act has made no provision for an appeal against an order passed under s. 5 an appeal is not competent. *Held:* An application for leave of the Court to execute a decree under s. 3 of the Act raises different questions for consideration from those that arise in applications for execution of decrees under the Civil Procedure Code. *U Maung Gale* v. *V.V.K.R.V.S. Velayuthan Chettyar*, (1950) B.L.R. 220, referred to. *Held further:* S. 4 of the Act is not applicable to a debt or obligation arising by virtue of a contract made after the commencement of the Act.

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MOHAMMEDAN LAW—*Wakf for private as distinguished from wakf for public purpose—Only owner can dedicate property by way of wakf—Perpetuity one of four conditions necessary—Subsequent schemes cannot change fundamental character of a private wakf—Civil Procedure Code, s. 92 inapplicable—Order ending suit is a decree within meaning of s. 2 (2), Civil Procedure Code and is appealable. Held:* Under Mohammedan Law a wakf can be validly created for the support and maintenance of the settler's family and descendants. *S. 178, Mulla's Principle of Mohammedan Law*, 1950 Edition. It is only the owner of the property who can validly dedicate it by way of wakf. *Ameer Ali's Mohammedan Law*, Vol. I, p. 196, 1912 Edition; *Ehasan Beg and another* v. *Rahmat Ali and another*, (1935) 10 Luck. Series, p. 547, referred to. *Held:* Perpetuity, one of the four conditions necessary to constitute a valid wakf, has been fulfilled. *Jugatmoni Chowdrani Romjani Bibee and others*, (1884) I.L.R. 10 Cal. Series. p. 533 at p. 536, followed. *Held:* The wakf created by Ismail Ahmed Madha's will was a private wakf, by subsequent schemes framed for its administration, including a first charge for maintaining a water supply and a dispensary, his descendants cannot in law convert the private wakf into a public wakf, as they are not the owners and possess no power to dispose of those properties. S. 92 of the Civil Procedure Code does not apply as the wakf still remains in law a private wakf. *D. I. Attia and another* v. *M. I Madha and others*, 14 Ran. Series, p. 575 at p. 593, referred to. *Syad Sham Mohamed Kasim* v. *Syad Abi Saghir*, (1932), 11 Pat. Series, 288; *Quinn* v. *Leathem*, (1901) A.C. 495 at 506; *U Po Maung and others* v. *U Tun Pe and others*, (1928) 6 Ran. Series p. 594, referred to and distinguished. *Held:* An order which has the effect of determining the plaintiff's right to institute a suit becomes a decree within the meaning of s. 2 (2) of the Civil Procedure Code and an appeal lies. *Dayabta Jawanda and others* v. *A. M. M. Murugappa Chettyar*, (1935) 13 Ran. Series, p. 475; *Narindas Rahjunathdas* v. *Shantilal Bhola Bhai*, (1921) 45 Bom. Series, p. 377, referred to and followed.

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MORTGAGE DEED, UNREGISTERED—*Admissibility of, in evidence—Registration Act, s. 49 Proviso—Doctrine of Part Performance—Transfer of Property Act, s. 53-A—The rule in* Ma Kyi *v.* Ma Thone and another. *Held:* The proviso to s. 49 of the Registration Act empowers Courts to admit unregistered documents in evidence for the purpose of proving part performance, which, as embodied in s. 53-A of the Transfer of Property Act, has assumed a statutory right available to the defendant to resist dispossession. *Held:* A change in the possession of land based on a contract must always be regarded as an act of part performance both of the person who delivers possession and of the person who takes possession. *Held further:* The case of *Ma Kyi* v. *Ma Thone and another* is authority for the proposition that where the instrument of mortgage is in writing and the transaction also falls within s. 53-A of the Transfer of Property Act, the terms of the document can be relied on. *Ma Kyi* v. *Ma Thone and another*, I.L.R. 13 Ran. 274 (F.B.), followed. *Ko U Mar and one* v. *Ma Saw Myaing*, (1950) B.L.R. 80, referred to.

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RANGOON CITY CIVIL COURT ACT, S. 13—*Jurisdiction, all suits of civil nature up to ten thousand rupees—Act silent on different powers of four constituent Judges—Rules of practice have no force of law—Chief Judge has authority to transfer suit from his file to 3rd Judge. Held:* It is the Rangoon City Civil Court which is invested with jurisdiction to try all suits of a civil nature when the amount or value of the subject-matter does not extend over ten thousand rupees. The Court is presided over by four Judges; but the Act does not mention the extent of jurisdiction to be exercised by each particular Judge. *Held:* Rules of practice and Standing Order embodied in the Manual made from time to time as circumstances required do not have the force of law. *Held further:* Under

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Rule 34 of the Rangoon City Civil Court the Chief Judge may withdraw any suit or proceeding from any Judge and transfer it to himself or to any other Judge for disposal; he is accordingly authorised to withdraw a suit from his own file and transfer it to another Judge.

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RANGOON POLICE ACT, S. 31—*Burden of proof—Prosecution must establish reasonable suspicion that it was stolen property before accused is asked to explain possession—First Information Report, use of. Held:* What s. 31, Rangoon Police Act punishes is the possession of a property which may reasonably be suspected to be stolen. Before the accused can be asked to give an explanation of his possession, it must first be established that his possession of the property is such as to raise a reasonable suspicion that it is stolen property. *Held also:* In a case tried summarily, the first information report does not form part of the record. Even in a case tried in a regular way, the first information report is only admissible to corroborate or contradict the testimony of the informant.

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SPECIFIC PERFORMANCE—*Decree of trial Court for reconveyance of land on payment maintained by appellate Court with slight modification in the amount—Time fixed for payment by appellate Court, whether can be enlarged by the trial Court. Held:* In a decree for specific performance, which is of a preliminary nature, on condition of payment of the amount in Court within a certain time, the original Court, particularly when the decree of the appellate Court is fundamentally the same, still has jurisdiction in the matter, and can on good grounds shown extend the time fixed for payment by the appellate Court. *Mohideen Kuppai and another* v. *Mariam Kanni and others*, 12 I. C. p. 139; *Parmanand Das* v. *Kripasindhu Roy*, I.L.R. 37 Cal. p. 548 ; *Mooriantakath Ammoo* v. *Matathankandy Vatakkayil Pokkan*, A.I.R. (1940) Mad. 817 ; *M. E. O. Khan* v. *M. H. Ismail*, (1948) B.L.R. 799, discussed. *Abdur Rahim Molla and others* v. *Tamijaddin Molla*, A.I.R. (1933) Cal. 580 ; *Metta Rama Bhatlu* v. *Metta Annayya Bhatlu and others*, A.I.R. (1926) Mad. 144 ; *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib and others*, I L.R. 46 Mad., p. 148 ; *Ko Ba Chit and three* v. *Ko Than Daing and one*, 5 Ran. 615, followed.

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TRANSFER OF PROPERTY ACT, s. 53-A — *Doctrine of Part Performance — Unregistered usufructuary mortgage — Defendant mortgagee out of possession at time of suit for recovery of land by plaintiff owner—Initial possession affords protection as defence — "Possession" defined. Held :* The provisions of s. 53-A of the Transfer of Property Act apply to an usufructuary mortgage where the mortgagee has in pursuance of the contract obtained possession of the property. *U Mar and one* v. *Ma Saw Hlaing*, (1950) B.L.R. 81, followed. *Held:* It will be sufficient for the purpose of s. 53-A of the Transfer of Property Act if it can be shown that the mortgagee has in part performance of the contract taken possession of the property. *Held also :* It will not be proper to assume, in the absence of clear words to that effect, that s. 53-A also requires the mortgagee to be in actual possession of the land at the time he invokes the aid of the provisions of s. 53-A. *Held further :* "Possession" is said to be of two ways, either actual possession or possession in law. It may mean physical control sometimes called *de facto* possession or detention, or it may mean legal possession which may exist with or without *de facto* possession and with or without a rightful origin. It may also mean the right to possession, which may amount to ownership, or may be of a temporary or special character. *Haji Rahimbux Ashan Karim* v. *Central Bank of India Ltd.*, (1929) 56 Cal. 367 at 376, followed.

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TRANSFER OF PROPERTY ACT, S. 105— *Lease or license—Exclusive occupation of premises, sole test — Nomenclature given to transaction by parties inconclusive— Registration — Deed creating tenancy at will, no registration required— Urban Rent Control Act, s. 11—Compliance necessary for maintainability of suit to determine lease. Held :* Where exclusive possession has been given the agreement must be held to be one of lease and not of license. The test for determining whether a transaction is a lease or a license is to see whether the sole and exclusive occupation is given to the grantee. *Gurbachan Singh* v. *Jos. E. Fernando*, (1950) B.L.R. 1 ; *S. R. Raju* v. *The Assistant Controller of Rents, Rangoon, and two others*, (1950) B.L.R. (S.C.) 10, followed. *Held further:* The nomenclature given by the parties to the deed is immaterial, the essential thing being to look at the substance of the transaction. *In the matter of Burma Shell Oil Storage and Distributing Company of India*, 55 All. 874, followed. *Held also :* As the rent was payable daily, and as failure of payment of rent for 7 days will entitle the appellant to cancel the agreement and take possession of his shop, the deed does not require registration. *Ratnasabhapati* v. *Vencatachalam*, I.L.R. 14 Mad. 271, followed. *Held:* The relationship between the parties is that of a landlord and tenant, and as plaintiff has not complied with s. 11 of the Urban Rent Control Act, 1948, the suit is bad and is not maintainable.

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Criminal Procedure Code. *Heman Ram* (a) *Hem Raj* v. *The Crown*, (1946) I.L.R. 27 Lah. 399, distinguished. *Held*: S. 540 confers a very wide discretionary power, and if the Court thinks that in order to arrive at a just finding it is necessary to examine the witness then it would be a proper exercise of its power to summon such witness. *Held also*: The omissions which the witnesses were found to have made in their statements to the police dealt with matters of material importance to the accusation which they came forward to support and it is for this reason that the previous statements which they were proved to have made can be shown to be inconsistent with the sworn statements they later made in Court. *Sakhwat Imami Musalman* v. *Emperor*, A.I.R. (1937) Nag. 50; *Emperor* v. *Najibuddin and others*, A.I.R. (1933) Pat. 589; *Iltaf Khan* v. *King-Emperor*, I.L.R. (1926) 5 Pat. 346; *Nanak and another* v. *Emperor*, A.I.R. (1931) Lah. 189, referred to.

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AFFRAY—*Penal Code, s. 159—Distinct offence from assault—Penal Code, s. 323/324—Amalgamation of cases and joint trial irregular. Held*: The gravamen of the offence of affray under Penal Code, s. 159 is fighting in a public place by two or more persons or by two or more groups of persons fighting against each other; on the other hand, an offence of assault under s. 323/324 of the Penal Code is committed when a person is subjected to an assault by another person or by a group of persons. They constitute separate offences for which the parties involved should have been charged and tried separately.

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respect of the transaction out of which the claim for set-off has arisen. *Held also:* The claim for set-off fails on the ground that the claim for hiring charges which is a matter of dispute in a pending suit cannot be an ascertained amount. In a separate concurring judgment by U Bo Gyi J., *Held:* A claim for set-off sounding in damages in cross-demands which have not arisen out of the same transaction or are so connected in their nature and circumstances that they can be looked upon as part of a single transaction cannot be permitted.

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CIVIL PROCEDURE CODE, ORDER 9, RULE 13—*Application to set aside ex parte decree—Limitation Act, Schedule I, Article 164 - Starting point for computation—Date of decree or date of becoming aware of decree. Held:* In the circumstances prevailing in the present case it would only be fair to interpret the provisions of Article 164 liberally and to hold that the appellant's case comes within the purview of the second limb of the Article, which limb is intended to protect a defendant who has had no notice of the existence of the suit but afterwards comes to know of the *ex parte* decree and thus is given 30 days from the date of his knowledge of the decree in which to apply for setting it aside. *Messrs. Fleming & Co.* v. *Mangalchand Dwarkadas*, A.I.R. (1924) Sind 56; *Kshirode* v. *Nabin Chandra*, (1915) 19 C.W.N. 1230, referred to. *Surjit Singh* v. *Lieutenant-Colonel C. J. Torris*, (1923) 76 I.C. 14; *Tara Chand and others* v. *Ram Chand and others*, (1935) 154 I.C. 429; *Sham Sunder-Khushi Ram* v. *Devi Ditta Mal and another*, A.I.R. (1932) Lah. 539, distinguished.

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reason whatever can be found to justify the restriction sought to be imposed. *Maung Tun Zan* v. *Ma Myaing*, (1941) Ran. 403 at 408; *U Hpay Latt* v. *Ma Po Byu*, 13 Ran. 289 at 290; *Ma Thaw* v. *King-Emperor*, 7 L.B.R. 16, referred to and distinguished.

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LEGAL PRACTITIONERS ACT, S. 14 (*b*)—*Drafting and presenting petition on allegation known to be false—Professional misconduct—Morals and behaviour expected of member of honourable profession—His duty to Court. Held :* A professional man in the legal profession to whatever grade he belongs should realise fully that it is a professional misconduct to make a false statement to a Court which he must have known before he made it to be false. An advocate and every legal practitioner are expected to maintain a high standard of decorum in their conduct before Court and to maintain a high degree of professional ethics. *Emperor* v. *Rajani Kanta Bose and others*, (1922) 49 Cal. Series, 732 at 804; *In the matter of an Advocate*, A.I.R. (1931) Oudh 161 at 166; *Shyam Sunder* v. *S., a Pleader, Lucknow*, A.I.R. (1944) Oudh 236 at 237; In re *Pleader the Law*, I.L.R. (1944) Mad. Series, p. 550, followed. *Held further :* Their duty is to assist the Court in the proper administration of justice and to refrain from doing anything which will reflect on the administration of justice or on the high office of an honourable profession.

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with lethal weapons some of whom pursued and murdered him. Holding that the three appellants were not proved to have been present at the time of the assault but which resulted on account of their incitement the Special Judge convicted them under s. 302 (2) read with s. 109, Penal Code. On appeal it was held that on the trial Court's own showing the convictions under s. 302(2)/109, Penal Code could not be sustained, and that the appropriate charge on the facts of the case was one under s. 302 (2) read with s. 149, Penal Code. The conviction was accordingly altered and the sentence maintained. *Held :* S. 149 of the Penal Code creates no offence but it is merely declaratory of a principle of the Penal Law. If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence is a member of the same assembly is guilty of that offence. *Queen-Empress* v. *Bisheshar and others*, 9 All. 645; *Theethumalai Gounder and others* v. *King-Emperor*, 47 Mad. 746; *Ramasray Ahir* v. *King-Emperor*, 7 Pat. 484; *Barendra Kumar Ghosh* v. *King-Emperor*, 52 I.A. 40 ; *Reg* v. *Sabed Ali*, (1873) 11 Ben. L. R. 347; *Hari Lal* v *King-Emperor*, 14 Pat. 225; *Waryam Singh* v. *The Crown*, 22 Lah. 423; *Tun Aung* v. *The King*, (1946) R.L.R. 313, discussed and followed. *Held :* It will not be to the prejudice of the appellants to alter their convictions under s. 302(2)/109 of the Penal Code to ones under s. 302 (2) read with s. 149 as from their examinations they have had sufficient notice of the fact that there was an unlawful assembly some members of which were armed with *dahs* the kind of weapon with which the deceased was obviously done to death. *Held further :* The true test is whether the facts are such as to give the accused notice of the offence for which he is going to be convicted though not charged and that the accused is not prejudiced by the mere absence of a specific charge. *Maung Myint* v. *The Union of Burma*, (1948) B.L.R. 379 ; *Ohn Maung* v. *The Union of Burma*, (1949) B.L.R. 139; *Ba Maung* v. *The Union of Burma*, (1950) B.L.R. 131, referred to.

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PUBLIC SERVANT—*Penal Code, s. 21, clause (9)—Union of Burma Airways Board—Senior Traffic Superintendent—Duties—One to receive and account for cash realised from sale of tickets—Union of Burma Airways Order, 1950, paragraph 6 (1), 15* (c) *and* (d) *and 18. Held :* Under paragraph 6 (1) and paragraph 15 (*c*) and (*d*) of the Union of Burma Airways Order, 1950, not only their appointment, salary or other conditions of service, but the dismissal of the officers and servants of the

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Union of Burma Airways Board are subject to the control of the Government. Under paragraph 18 the Government has the power to be exercised at any time and without giving any reason whatsoever to dissolve the Union of Burma Airways Board and take over its entire business and assets. The Union of Burma Airways Board created under the Union of Burma Airways Order, 1950 can be considered to be a Government undertaking; and it follows that Maung Khin Zaw in receiving the money obtained from the sales of tickets was receiving it on behalf of the Government, and he is therefore a public servant for the purpose of s. 21 of the Penal Code. *Tamlin* v. *Hannaford*, (1950) 1 K.B. 18, distinguished.

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THE PRESIDENT—*Power of, to extend life of an Act—The Constitution, ss. 90 and 45—Urban Rent Control Act, s. 1 (3)—Ministry of Finance and Revenue Notification No. 171, dated the 28th August 1951—Conditional legislation as distinguished from Delegated legislation—Ministry of Finance and Revenue Notification No. 35, dated the 16th February 1951—Exemption created by—"Building" includes "room"—Civil Courts, jurisdiction to determine applicability of Notification—Bond executed under s. 11 (1) (d) of Urban Rent Control Act, purport of—Forfeiture and payment of compensation, inquiry prerequisite.* A piece of land, on a small portion of which the 1st respondent had, as lessee of the owner, the 2nd respondent, erected a hut, was leased by the owner to the appellant who sued to evict the 1st respondent and for the dismantling of the hut which interfered with the completion of the large building erected by appellant to be let out as flats. A compromise was effected and a decree was entered in the suit that the 1st respondent dismantle his hut and vacate the area and that the appellant and 2nd respondent execute a bond in the sum of Rs. 3,060 under s. 11 (*1*) (*d*) of the Urban Rent Control Act. Subsequently, on the application of the 1st respondent for installation in a room of the building now completed, the Court directed the appellant to comply, and also the forfeiture of the bond and a payment of compensation. On appeal it was contended that: (1) The Urban Rent Control Act came to an end on the 8th October 1951, and Notification No. 171, dated the 28th August 1951 issued by the President extending the life of the Act is *ultra vires* as it offends s. 90 of the Constitution. (2) Parliament cannot delegate to the President the power to extend the life of any Act. (3) The building in question was completed only after the 16th February 1951 when Notification No. 35 was issued and the exemption from the operation of the Urban Rent Control Act contained in this Notification applies to this building. (4) The civil Courts have no jurisdiction to determine whether this building comes within the purview of Notification No. 35. (5) The decree entered in the suit and the bond executed in its pursuance directs merely the payment of Rs. 3,060 on the bond, and appellant cannot be ordered to do anything further. *Held:* The President was entrusted with a discretion to extend the life of the Act if circumstances and conditions warranted such an extension. The Urban Rent Control Act was a complete law and was enacted by Parliament, and the President has not modified or tampered with it in any way. Merely extending the life of an Act does not amount to making a law. The action of the President has not contravened s. 90 of the Constitution. If the President was not competent to exercise the power given to him by s. 1 (3) of the Urban Rent Control Act, the provision in s. 45 of the Constitution that he "shall exercise and perform the powers and functions conferred . . . . by this Constitution and by law" would be meaningless *Held:* The act of the President was only a piece of conditional legislation permitted by the Urban Rent Control Act, and was not a delegated legislation. *Jatindra Nath Gupta* v. *The Province of Bihar and others*, (1949) 2 M.L.J. 356; *The Empress* v. *Burah and another*, I.L.R. 4 Cal. 172; In re *Kalvanam Veerabhadrayya*, (1949) 2 M.L.J. 663; In re *The Delhi Laws Act, 1912*; *The Ajmer-Merwara (Extension of Laws) Act, 1947, and The Part C States (Laws) Act, 1950*, (1951) 2 S.C.R. 747, referred to. *Held:* For the purpose of the Urban Rent Control Act, the term "building" means "a house and every part thereof". It does not necessarily

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follow that the date mentioned in the Completion Certificate was the date on which the building or room was finished, as it is possible to delay the issue of a certificate by a belated application for the same. The room was completed before the issue of Notification No. 35, and exemption will not therefore apply to this room. *Held*: There is no express or implied ouster of the jurisdiction of the civil Courts in s. 3 (*1*) of the Urban Rent Control Act, and there is nothing to prevent the civil Courts from interpreting the contents of a Notification. *H. C. Dey* v. *The Bengal Youngmen's Co-operative Credit Society*, (1939) R.L.R. 50, distinguished. *Held*: Whether there was a bond or not by the landlord, the 1st respondent was entitled to regain possession as provided by the decree and s. 11 (*1*) (*d*) of the Urban Rent Control Act. The bond was insisted upon only as an additional safeguard. There is nothing to suggest that the 1st respondent waived his right of possession on the execution of the bond by the appellant. It was never meant to be a device for crafty and dishonest landlords to avoid their responsibilities by paying up a monetary penalty. *Held also*: The legislature by sub-s. (*2*) of s. 11 of the Urban Rent Control Act, envisages some kind of an inquiry giving an opportunity to the landlord to show cause against an order of forfeiture of the bond and payment of compensation.

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UNDERTRIALS—*Military Personnel—Custody of, Civil Jail or Military custody—Criminal Procedure Code, ss. 167 and 344 (1)—Prisoners' Act, s. 3.* At the request of the Military Authorities, the Additional Sessions Judge remanded to military custody a Corporal and four riflemen of the Karenni regiment who were standing trial before him on a charge of murder. *Held*: A Magistrate acting under s. 167 of the Criminal Procedure Code may in his discretion authorize the detention of a person against whom the police are holding an investigation into jail custody or into police custody as the circumstances may require. In the case of an under-trial prisoner who has to be remanded under s. 344 of the Criminal Procedure Code the Magistrate or Judge has no such discretion. *Queen-Empress* v. *Engadu and others*, 11 Mad. 90 at 101; In re *Krishnaji Pandurang Joglekar*, 23 Bom. 32; *Nagendra Nath Chakravarti*, 51 Cal. 402, referred to and followed. In re *M. R. Venkatraman and others*, 49 Cr.L.J. 41, distinguished. *Held further*: The language of s. 344 (1) of the Criminal Procedure Code seems to indicate that the person to whose custody an under-trial prisoner is committed must be one amenable to the warrant of the Court; and what the legislature means by saying that an accused person if in custody may by warrant be remanded into custody is custody in jail. *Kunden Lal and others* v. *The Crown*, 12 Lah. 604, followed.

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Held: In the first suit there was not a complete cause of action because of a defective notice to the tenant, and in the fresh suit the cause of action became complete with a valid notice. The cause of action is different in the two suits, which means that the permit issued for the previous suit must be deemed to have exhausted itself when the case terminated on dismissal. *T. Gupta Chowdhury* v. *Manmatha Nath*, A.I.R. (1949) Cal. 574 ; *Chotey Lal* v. *Sheo Shankar*, A.I.R. (1951) All. 478, referred to and followed. *Pahlad Das* v. *Ganga Saran*, A.I.R. (1952) All. 32, distinguished.

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charges. In re *K. Ramaraja Tevan and fifteen others*, 52 Mad. Series 937; *N. A. Subramani Iyer* v. *King-Emperor*, I.L.R. 25 Mad. 61; *Abdul Rahman* v. *King-Emperor*, 5 Ran. 53, referred to.

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TRANSFER OF PROPERTY ACT, s. 92—*Right of subrogation—Person with no interest redeeming mortgage—Mere volunteer—Registered instrument from mortgagor and/or heirs necessary to confer right. Held:* Appellant had no direct interest in the suit lands, and when he paid off the mortgagees he was a mere volunteer, and does not acquire the right of subrogation as defined in s. 92 of the Transfer of Property Act. Such a person to acquire the right of subrogation must have a registered instrument executed by which the mortgagor or his heirs agreed to confer on him such a right.

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URBAN RENT CONTROL ACT, S. 11 (*1*) (*f*)—*Building required by owner for residential purposes—Word "exclusively" does not qualify "himself" but the words "for residential purposes"—Owner includes dependants. Held* : A person who acquires a building for residential purposes does so not only for his own occupation but for the occupation of his dependants as well. In providing s. 11 (*1*) (*f*) of the Urban Rent Control Act the legislature could never have intended that the premises sought for should be occupied only by its owner and not by his dependants. Thus, the word "exclusively" in the said clause could never have been meant to qualify the preceding word "himself" but to the three words following it, *viz.*, "for residential purposes".

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CHINESE BUDDHIST—*Estate of Chinese-Buddhist, rival applications for Letters-of-administration—Inheritance to Sino-Burmese Buddhist governed by Burmese Buddhist Law—Adoption by registered deed—Automatic inheritance not implied—*Kittima *adoption under s. 4 of the Registration of* Kittima *Adoptions Act (Burma Act XIV of 1939), contrast—Adoption terminated by mutual consent—Inheritance to a deceased brother or sister, the younger excludes the elder—Existence of one or both parents immaterial to principle.* **A**, a Sino-Burmese lady, after the death of her husband, in deference to Chinese customary usage requiring a male issue to perform the traditional rites of ancestral family worship, adopted by registered deed, her husband's nephew **B** as a "son to her husband" without the knowledge of **A**, or without consulting her, **B** in turn

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adopted **C**, his own nephew, by another registered deed. Three years later by a Release Deed the adoption of **B** by **A** was terminated by mutual consent. On **A**'s death, **C**, the adoptee of **B**, claimed sole inheritance to **A**'s estate on the basis that the adoption of **B** by **A** was tantamount to a *kittima* adoption with a view to inherit her estate. An elder brother and two younger sisters of **A** presented rival claims also; the latter submitted that they exclude the elder brother in the inheritance to the estate of their deceased sister. *Held:* If a Chinese Buddhist is *prima 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. *Tan Ma Shwe Zin* v. *Tan Ma Ngwe Zin and others*, I.L.R. 10 Ran. 97; *Ma Sein Byu and another* v. *Khoo Soon Thye and others*, I.L.R. 11 Ran. 310, dissented from. *Tan Ma Shwe Zin and others* v. *Khoo Soo Chong and others*, (1939) R.L.R. 548; *Cyong Ah Lin* v. *Daw Thike* (a) *Wong Ma Thike*, (1949) B.L.R. 168, followed. *Held:* A *kittima* son or daughter is one who is adopted with the express intention that he or she shall inherit according to the Burmese Buddhist Law; and there is no legal objection to the adoption of an adult. But with regard to Margaret Chor Pine's intention at the time of the adoption, it can hardly be doubted that she was bent on a strict observance of the rites of ancestral worship and no further. *Maung Po Kan* v. *Daw At and others*, 1 Ran. 102; *Ma Than Nyun* v. *Daw Shwe Thit*, I.L.R. 14 Ran. 557; *U Ba Thaung* v. *Daw U and others*, (1938) R.L.R. 323; *Ma Nu and others* v. *U Nyun*, I.L.R. 12 Ran. 634; *Abdul Aziz Khan Sahib* v. *Appayasami Naicker and others*, 31 I. A. 1, referred to. *Held also:* An adoption deed does not by itself confer the status of an adopted son nor create any interest in the property of the adoptive father, and is admissible in evidence in proof of adoption along with other evidence. *Vishwanath Ramji Karale* v. *Rahibhai Marad Ramji Karale and others*, I.L.R. 55 Bom. 103, followed. *Held:* A *kittima* child is not for all purposes in an identical position with a natural child. The relationship between an adoptive parent and his adopted child may be terminated at any time by mutual consent. A grandchild cannot be deprived of the right to inherit the estate of his grandfather even though his father be declared to be a "dog-son." *Ma Kyin Sein and others* v. *Maung Kyin Htaik*, (1940) R.L.R. 783; *U Sein* v. *Ma Bok and others*, I.L.R. 11 Ran. 158; *Maung Paik* v. *Maung Tha Shun and another*, (1940) R.L.R. 28, referred to. *Held further:* It must be taken as settled law that among Burman Buddhists younger brothers and sisters exclude the elder as heirs to a deceased brother or sister; the question whether the parents are alive or dead at the time of the death of a child, who is established in his own house, is immaterial. *Maung Tu* v. *Ma Chit*, I.L.R. 4 Ran. 62; *Mi A Pruzan* v. *Mi Chumra*, (1872—1892) Selected Judgments and Rulings, Lower Burma, 37, followed. *Held distinguishing:* Where there has been no division of the parental estate at the time of the child's death, all the children share equally irrespective of their order of seniority or juniority; and where the child dies leaving no other relations the parents succeed to the estate. *Maung Ba and Ma Saing* v. *Mai Oh Gyi*, I.L.R. 10 Ran. 162; *Maung Kun* v. *Ma Chi and another*, I.L.R. 9 Ran. 217; *Ma Pwa Thin* v. *U Nyo and others*, I.L.R. 12 Ran. 409, *Ramanujulu Naidu* v. *Gajaraja Ammal*, A.I.R. (37) (1950) Mad. 146, referred to.

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CIVIL PROCEDURE CODE, ORDER 26, RULE 4 (1) *(a)—Issue of commission for examination of a witness resident outside jurisdiction—Order on the application not a judgment within the meaning of s. 20, Union Judiciary Act, 1948—No appeal lies—Revisional application also not competent. Held:* An order refusing to issue a commission to examine witnesses cannot in effect be said to have put an end to a suit or proceeding which is pending in a Court of law. Such an order clearly does not decide any right or liability of the parties in a suit and such an order therefore does not amount to a judgment within the meaning of clause 13 of the Letters Patent the equivalent of s. 20 of the Union Judiciary Act which permits of an appeal. In re *Dayabhai Jiwandas and others* v. *A. M. M. Murugappa Chettiar*, I.L.R. 13 Ran. 457; *U Ohn Khin* v. *Daw Sein Yin*, (1949) B.L.R. (H.C.) 201; *Tan Chu Khaing and two* v. *Daw Chein Pon*, Special Civil Appeal No. 1 of 1951; *Mahomed Hussain* v. *Hoosain Hamadance & Co.*, (1925) I.L.R. 3 Ran. 293; *Tuljaram Row* v. *Alagappa Chetty*, (1912) 35 Mad. p. 1; *Dhanbai Burjorji Cooper* v. *Bablibai Shapurji Sorabji and others*, (1934) A.I.R. Bom. 168; *Toremull Dilsook Roy* v. *Kunj Lall Manohar Dass*, A.I.R. (1920) Cal. 894, followed. *Held also:* S. 20 of the Union Judiciary Act shows moreover that no revision application lies in law against the order dismissing the application for issue of commission.

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respondent's claim is hit by clause 13 of the special provisions in the Policy. *King-Emperor* v. *U Damapala*, 14 Ran. 666 (F.B.), referred to.

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CRIMINAL PROCEDURE CODE, s. 406-A—*Substituted by s. 118, Criminal Procedure (Amendment) Act, 1945—Appeal lies to Sessions against orders under ss. 488-489—For enhancement only, no appeal but revision lies. Held:* It is clear from s. 406-A of the Criminal Procedure Code that an appeal is allowed to any person who has been ordered to pay maintenance under s. 488 of the Criminal Procedure Code, *i.e.* a husband; or to a wife whose application has been rejected. This section does not permit a wife to apply for enhancement of the amount of maintenance by means of an "appeal" against the order of the Magistrate. There being no right of appeal, the application can be converted into a revision proceeding.

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PENAL CODE, s. 302, SUB-CLAUSE (1) (*b*)—*Premeditated murder—Premeditation, what constitutes, to bring killing within scope of sub-clause (1). Held:* To constitute a premeditated killing it is necessary that the accused should have had time to reflect, with a view to determine whether he would kill or not, and that he should have determined to kill as a result of that reflection; that is to say, the killing should be a predetermined killing upon consideration, and not a sudden killing under the momentary excitement and impulse of passion upon provocation given at the time or so recently before as not to allow time for reflection. *Kirpal Singh* v. *The State*, (1951) 52 Cr.L.J. p. 1520, followed.

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PENAL CODE, s. 397—*Robbery or dacoity with grievous hurt—Words "uses any deadly weapon, or"—Deleted by Burma Act IV of 1940. Minimum punishment. Held:* The charge as framed

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against the appellant contained the words "using a deadly weapon" which was unnecessary as they have been deleted from s. 397 of the Penal Code by Burma Act IV of 1940. *Held also:* S. 397 of the Penal Code clearly lays down that where a robber or a dacoit causes grievous hurt to any person during a robbery or dacoity he is liable to a minimum punishment of seven years' rigorous imprisonment.

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TRANSFER OF PROPERTY ACT, s. 58, CLAUSE (*f*)—*Mortgage of immoveable property by deposit of title-deeds—Alternative claim for recovery of loan secured by promissory-note—Burmese Buddhist couple—Tenants-in-common—Neither party can alienate the interest of the other party in the joint property of the marriage without consent. Held:* Unless there is delivery of title-deeds to the creditor or his agent at the time of the loan, it would not constitute, even if other ingredients of clause (*f*) of s. 58 of the Transfer of Property Act are satisfied, a mortgage by deposit of title-deeds, and it would not be possible to hold that the loan was secured as the charge became effective

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only with the deposit of title-deeds. *Held:* A Burmese Buddhist husband has no power to mortgage or sell the joint property acquried by either of them whether before or during marriage except in the circumstances in which it might properly be said that he has acted with the consent of his wife or as her agent, as they are tenants-in-common in the property. *N. A. V. R. Chettyar Firm* v. *Maung Than Daing*, (1931) 9 Ran. Series 524 at 539; Overruling *Ma Paing*'s case, I.L.R. 5 Ran. 296; *U Pe* v. *U Maung Maung Kha*, (1932) 10 Ran. Series 261 at 279-280, followed.

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ARBITRATION ACT, 1944—*Award by arbitrator appointed by consent—No appeal lies—Statutory period of 30 days for objection against award not provided—Award invalid—Objection against arbitrator not raised at outset—Procedure before arbitrator not identical with judicial procedure—Not invalid therefor. Held :* Where a party to an arbitration does not raise at the start of the proceedings the objection that the arbitrator was incompetent to act but raised it after the award has gone against him, his objection can have no merit. *Jagmohan* v.

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Suraj Narain, A.I.R. (1935) Oudh 499, followed. *Held also:* Unless in the procedure adopted by the arbitrator there has been something radically wrong or vicious, no award can be impeached on the ground that the technical web of judicial procedure was not strictly adhered to. *Maung Shwe Hpu and two* v. *U Min Nyun*, 3 Ran. 387.

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CIVIL PROCEDURE CODE, s. 115—*Revisional Powers of High Court, limits of—When exercised—Specific Relief Act, s. 9, proceedings under—Summary remedy—Finding not conclusive—Other remedy open. Held.* However erroneous the conclusions arrived at by a subordinate court might be on points of law or fact they would not be treated as wrongful exercise of jurisdiction or illegal exercise of jurisdiction attended with material irregularity, and therefore the revisional discretion of the High Court can only be invoked when there is a clear transgression of one of the conditions set out in s. 115 of the Civil Procedure Code. *Held also:* The High Court normally does not interfere in revision if the party has another remedy by way of an appeal to a subordinate Court or by way of a regular suit. *U Kyaw Lu* v. *U Shwe So*, 6 Ran. 667; *Amir Hassan Khan* v. *Sheo Baksh Singh*, (P.C.) 11 Cal. 6; *Maung Ye E* v. *N. K. R. A. T Vallagu Velli*, A.I.R. (1934) Ran. 243; *Bhundal Panda and others* v. *Pandol Pos Patil and others*, I.L.R. 12 Bom. 224, *Daw Min Baw* v. *A. V. P. L. N. Chettyar Firm*, I.L.R. 11 Ran. 134; *N. S. Venkatagir Ayyangar and another* v. *Hindu Religious Endowment Board*, Vol. LXXVI (1949) I.A. p. 67 at 73; *Sundar Singh* v. *Doru Shankar and others*, I.L.R. 20 All. 78; *Ramgopal Jhoonjhoonwalla* v. *Joharmall Khemka*, I.L.R. 39 Cal. 47; *B. B. Bhadra* v. *Ram Sarup Chamar*, 16 C.W.N. 1015; *Mithalal Ranchhoddas* v. *Maneklal Mohanlal Modia*, A.I.R. (1941) Bom. 271, followed. *Badrul Zaman and another* v. *Firm Ilaji Faiz Ullah Abdullah*, A.I.R. (1938) All. 635; *Badri Das and another* v. *Mt. Dhanni and another*, A.I.R. (1934) All. 541; *Ajodhiya Prasad Beli ar Sao and another* v. *Chassiram Premsai Nai*, A.I.R. (1937) Nag. 326, distinguished.

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CIVIL PROCEDURE CODE, ORDER 21, RULE 97—*Application by decree-holder of ejectment decree against third party for obstruction—Application withdrawn—Second application for subsequent obstruction, whether relates back to first obstruction—Limitation Act, Article 167—Each obstruction provides cause for fresh application. Held:* Each time a decree for possession is sought to be executed and the execution is met by resistance or obstruction such resistance or obstruction must be complained of within thirty days. Article 167, Limitation Act, applies, and it makes no difference that there was a prior obstruction because it is not the prior obstruction that is complained of, it also makes no difference whether the obstruction is by the same person or by a different person. *Mukund Bapu Jadhav* v. *Tanu Sakhu Pawar*, A.I.R. (1933) Bom. (F.B.) 457, dissented from. *Raghunandan Prosad Misra* v. *Ramcharan Manda*, A.I.R. (1919) Pat. (F.B.) 425; *Meyappa Chetty* v. *Meyappan Servai*, A.I.R. (1921) Mad. 559; *Surama Sundari Debi* v.

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Kiranshashi Chowdhurani, A.I.R. (1938) Cal. 352; *Kedar Nath Bothra* v. *Baijnath Bothra and others*, A.I.R. (1939) Cal. 494, followed.

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CIVIL PROCEDURE CODE, s. 96 AND ORDER 41, RULE 1, SUB-RULE 1—*Appeal—Copy of decree appealed from prerequisite—Administration suit—Preliminary stages—No decree but interlocutory order, not final—Appeal incompetent—Held:* As all matters in dispute between the parties have not been finally decided by the order under review, and as costs of the suit, which is an important matter and may affect the parties materially, have not been decreed, an appeal against the order is incompetent. *A. T. N. A. T. Chockalingam Chettiar* v. *Ko Maung Gyi and others*, A.I.R (1938) Rang. 372, referred to.

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CIVIL PROCEDURE CODE, s. 100 AND ORDER 42—*Concurrent finding of fact by original Court and 1st Appellate Court—Second Appeal, when competent—Burmese Buddhist Law—Child taking share of inheritance on remarriage of father—No further interest at his death. Held :* Where a finding of fact by the original Court has been accepted by the 1st Appellate Court, however unsatisfactory the finding might be, unless it is based upon no evidence or unless there is failure to determine some material issue of law or substantial error or defect in procedure, a second appeal does not lie. *Ma Pu* v. *K. C. Mitra*, 6 Rang. 586. *Held also :* Where on the re-marriage of the father, a child has taken a share of the joint property of the marriage with the deceased mother, the child has no further interest in the estate on the death of the father. *Ma Ohn Yin* v. *Ma Ngwe Yin*, 7 Rang. 398.

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PRINCIPAL AND AGENT—*Suit by principal for recovery of money received on his behalf against agent and/or legal representatives —Limitation Act, Articles 62 and 89—Where power-of-attorney is registered, Article 116 applies. Held :* As the contract of agency was not by a registered document Article 116 of the Limitation Act has no application. *Tricomdas Cooverji Bhoja* v. *Sri Gopinath Jiu Thakur*, A.I.R. (1916) (P.C.) 182; *Ganapa Putta Hegde* v. *Hammad Saiba and Abdul Saib*, 49 Bom. 596, distinguished. *Held :* A suit of the description referred to in Article 89 may be brought against the legal representative of the agent as well as against the agent himself; but where the suit is brought against the legal representative of an agent merely for the recovery of a definite sum, such a suit is governed by Article 62 and not by Article 89. *Bindraban Behari* v. *Jamunar Kunwar*, 25 All. 55; *Rao Girraj Singh* v. *Rani Raghubir Kunwar*, 31 All. 429, dissented from. *Sree Rajah Parthasaradhi . Subba Rao and others*, A.I.R. (1927) Mad. 157 at 160 ; *Bikram Kishore Manikya Bahadur* v. *Jadab Chandra Chowdry and others*, A.I.R. 1935) Cal. 817; (*Maharajadhiraj Sir*) *Rameshwar Singh Bahadur* v. *Narendra Nath Das and others*, A.I.R. (1923) Pat. 259; *Ashutosh Roy and others* v. *Arun Sankar Das Gupta and others*, A.I.R. (1950) Dacca 13, followed.

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RETROSPECTIVE EFFECT OF ACT—*Where no date fixed—Matter one of procedure only, full retrospective effect—Requisitioning (Emergency Provisions) Act, 1947 in force 31st July 1947— Requisitioning (Claims and Compensation) Order, 1949 in force 15th October 1949—Claim made thereunder for damage in 1945— Requisitioning (Emergency Provisions) (Amendment) Act, 1951— New provision sub-s. (4) added to s. 6 of Requisitioning (Emergency Provisions) Act, 1947—Effect of—. Held :* It is a clear and well-understood rule of construction that no retrospective operation will be attributed to a statute unless it is expressly stated to be so, or unless it clearly arises by necessary implication, and unless that effect cannot reasonably be avoided without doing some violence to the language of the statute ; and no greater retrospective effect will be given to a statute more than what the language of the statute renders it to be necessary *Laurie* v. *Renad*, (1892) Ch. D. 402 at 421; In re *Athlumney*, (1898) 2 Q.B. 547 at 551; In re *An Arbitration between Williams and Stepney*, (1891) 2 Q.B. 257 at 259 ; *Hutchinson* v. *Jauncey*, (1950) 1 K.B. 574 at 579, followed. *Held further :* Where the provision of law is a matter of procedure only and no date has been fixed to indicate up to which date the retrospective operation was to take effect, full retrospective effect can be given to the statute. *The Ydun*, (1899) Prob. Divn. 236 ; *Wright* v. *Hale*, (1860) 6 H & N 227 at 232, followed.

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TRANSFER OF PROPERTY ACT, s. 54, THIRD PARAGRAPH—*Immoveable property—Value Rs. 100 and under—Delivery of possession, valid sale effected thereby—Deed of sale, unregistered, of no consequence—Evidence to show nature of possession by delivery not barred by Evidence Act or Registration Act, s. 49. Held:* The third paragraph of s. 54 of the Transfer of Property Act expressly states that where the value of property is less than Rs. 100 the sale can be effected by delivery of possession. The existence of an unregistered sale deed obtained by the purchaser through misconception or over caution cannot render a sale by delivery of possession ineffective. *Kupuswami* v. *Chinnaswami Goundan and others*, A.I.R. (1928) Mad. 546 at 548, dissented from. *Daw Yin* v. *U Sein Kyu and three others*, (1950) B.L.R. 190, referred to. *Keshwar Mahton* v. *Sheonandan Mahton*, A.I.R. (1929) Pat. 620 at 622; *Tribhovan Hargowan* v. *Shankar Desai*, A.I.R. (1943) Bom. 431 at 433; *Gulab and others* v. *Lattu Singh and another*, (1919) 51 I.C. 561, followed. *Held also:* There is nothing in the Evidence Act or in s. 49 of the Registration Act to show that oral proof cannot be given to explain the nature of the vendor's possession for the purpose of establishing a sale by delivery of possession.

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APPELLATE CIVIL.

Before U Tun Byu, C. J., and U On Pe, J.

T. C. LEONG AND ONE (APPELLANTS)

v.

U PO THEIN (RESPONDENT).*

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Nov. 20

Urban Rent Control Act, s. 12—Permit to continue in possession of premises after ejectment decree—Effect of—Application under s. 14 for rescission of decree when maintainable—"Pending proceedings" defined —Remand order, whether a judgment within the meaning of ss. 5 and 20, Union Judiciary Act and s. 13, Letters Patent.

Held : The mere production of a permit under s. 12 (*1*) of the Urban Rent Control Act is sufficient to stop or at least stay the proceedings. The permit-holder can apply under the provisions of s. 14 (*1*) for a rescission of the decree so long as the decree or order for ejectment or recovery of possession of the premises against him has not been executed.

K. E. M. Abdul Majid v. *M. A. Madar and two others*, Civil First Appeal No. 6 of 1949; *Saw Chain Poon and one* v. *Tan Choo Keng and two others*, Civil Reference No. 19 of 1951 (F.B.), followed.

Held also : A proceeding must be considered pending until it is finally concluded. An appeal pending in a higher Court must be considered to be a continuation of the application made before the trial Court.

In re *Clagett's Estate, Fordham* v. *Clagett*, (1881-82) 20 Ch. D., p. 637 at p. 653, referred to.

Held further : The expression "judgment" in ss. 5 and 20 of the Union Judiciary Act, 1948 and s. 13, Letters Patent means an order by which the rights of the parties are determined; it cannot be construed to include an order that merely paves the way for a final adjudication in a proceeding.

Re. *Dayabhai Jiwandas and others* v. *A. M. M. Murugappa Chettiar*, 13 Ran. 457 (F.B.), followed.

U Ohn Khin v. *Daw Sein Yin*, (1949) B.L.R. (S.C.) p. 105 at p. 106; *Spencer* v. *Metropolitan Board of Works*, (1883) 22 Ch. D. p. 142 at p. 162, referred to.

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* Special Civil Appeal No. 1 of 1951 against the decree of the Appellate Side of the High Court in Civil 2nd Appeal No. 30 of 1950.

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T. C. LEONG AND ONE v. U PO THEIN.

P. K. Basu for the appellants.

P. B. Sen for the respondent.

The judgment of the Bench was delivered by

U TUN BYU, C. J.—The appellants instituted the Civil Regular Suit No. 5 of 1949 of the Court of the First Assistant Judge, Bassein, against the respondent U Po Thein for possession of the premises, situate at No. 10, Merchant Street, Bassein, on the ground that U Po Thein was a trespasser. A decree was passed against U Po Thein in the said suit, and he appealed in Civil Appeal No. 17 of 1949 to the District Court of Bassein against the said decree, but his appeal was dismissed.

Subsequently, U Po Thein applied to the Controller of Rents, Bassein, under section 12 (*1*) of the Urban Rent Control Act, 1948, for a permit to enable him to continue to remain in possession of the aforesaid premises; and his application for a permit under section 12 (*1*) was granted on or about 31st January, 1950.

It might be mentioned that on the 17th November, 1949, the appellants applied to the trial Court in Civil Execution Case No. 10 of 1949 for the execution of the decree which they obtained in the Civil Regular Suit No. 5 of 1949; and the execution proceeding was still pending at the time U Po Thein obtained the permit from the Rent Controller under section 12 (*1*) of the Urban Rent Control Act, 1948.

On the 9th of February, 1950, U Po Thein next applied for the rescission of the decree passed against him in the Civil Regular Suit No. 5 of 1949, in view of the provisions of section 14 of the Urban Rent Control Act, 1948. The learned trial Judge dismissed

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U TUN BYU, C.J.

the application of U Po Thein made under section 14 of the Urban Rent Control Act, 1948, but the learned District Judge, Bassein, on appeal against the said order of dismissal, set aside the order of dismissal and remanded the case for trial on merits. The learned trial Judge again passed an order, dismissing the application of U Po Thein made under section 14 of the Urban Rent Control Act, 1948 on the ground that his application was not maintainable in law. U Po Thein next appealed to the District Court, in the Civil Appeal No. 7 of 1950, against the fresh order of dismissal by the learned First Assistant Judge, Bassein, but his appeal was dismissed by the learned District Judge. U Po Thein further preferred an appeal to the High Court, in the Civil Second Appeal No. 20 of 1950. U Aung Khine J., before whom the appeal was heard, however, held that both the learned District Judge and the trial Court were wrong in their decision, and he remanded the case to the trial Court for disposal on merits. U Aung Khine J., after referring to section 14 (*1*) of the Urban RentControl Act, 1948, stated:

"Therefore, in any case where a decree for the recovery of possession of any premises to which this Act applies is sought to be executed, the mere production of the permit under section 12 (*1*) is sufficient to stop or at least stay the proceedings. This view is taken in the case of *K. E. M. Abdul Majid* v. *M. A. Madar and two others* (1) by a Bench of this Court. The application of the appellant made under section 14 of the Act in this case was, after the decree-holder had taken out execution proceedings, maintainable. . . ."

The real question, which calls for consideration in this appeal, is whether the provisions of section 14 (*1*) of the Urban Rent Control Act, 1948 apply, in the circumstances, to the present case. Section 14 (*1*) reads:

(1) Civil First Appeal No. 6 of 1949 of the High Court.

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"14 (*1*). At the time of making or giving of any order or decree for recovery or possession of any premises to which this Act applies or for the ejectment therefrom of a tenant or a person permitted to occupy under the provisions of section 12 (*1*) or in the case of any such order or decree which has been made or given whether before or after the commencement of this Act and which has not yet been executed, either at the time of the application made by the landlord for execution of such order or decree or on application made by the tenant or the person permitted to occupy under section 12 (*1*) against execution of such order or decree, the Court shall, except in a case in which either clause (*c*) of section 11 (*1*) or clause (*b*) of section 13 (*1*) applies, 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 it thinks fit, in regard to payment by the tenant or by the person against whom the order or decree has been made or given, of arrears of rent or mesne profits, and if such conditions are complied with, the Court shall discharge or rescind the order or decree."

Thus, if any question arises as to whether an application which has been filed under section 14 of the Urban Rent Control Act, 1948, lies in law or not, such question will have to be decided in accordance with the circumstances that exist at the time when that application was first made in Court. If the present proceeding is considered in that light, it becomes apparent that the application of U Po Thein under section 14 of the Urban Rent Control Act, 1948, was made in proper time, in that the decree or order for possession had not been executed at the time U Po Thein filed his application under section 14. A perusal of section 14 (*1*) makes it clear that U Po Thein, who has obtained a permit under section 12 of the Urban Rent Control Act, 1948, becomes thereafter a person who can, in law, apply under the provisions of section 14 (*1*) so long as the decree or order for ejectment or recovery of possession of the

premises, which has been passed against him has not been executed ; and it is immaterial whether he applies for a permit under section 12 (*1*) before or after the decree or order has been passed against him. The decree or order, which the appellants obtained against U Po Thein in the Civil Regular Suit No. 5 of 1949 of the Court of the First Assistant Judge, Bassein, had indisputably not been executed on the date U Po Thein filed his application under section 14 of the Urban Rent Control Act, 1948, namely, on the 9th February, 1950. It is also not disputed that U Po Thein had, in fact, obtained a permit under section 12 (*1*) of the Urban Rent Control Act, 1948, before he filed his application under section 14 (*1*). U Po Thein's application must therefore be conisdered to have been properly filed under section 14 of the Urban Rent Control Act, 1948.

In *Saw Chain Poon and one* v. *Tan Choo Keng and two others* (1) it was observed :

"A statutory right is conferred upon a person who has obtained a permit under section 12 of the Urban Rent Control Act, and being a special provision, so far as a permit-holder is concerned, it will impliedly override a general provision of law and any right arising out of a general provision of law, which is contrary to or militates against the provisions of section 12 (*2*) of the Urban Rent Control Act. Section 12 has bestowed a new right upon a permit-holder ; and the effect of the provisions of section 12 is obviously contradictory to the decree giving possession to the applicants, passed in Civil Regular No. 114 of 1947, and the decree must therefore be considered to be affected, impliedly, by the provisions of section 12, for the period mentioned therein. The intention of the legislation in section 12 is explicit, and it is beyond controversy. In making this construction, this Court is only giving effect to the will of the Legislature, as embodied in section 12. The object of section 12 is to protect a person, who has obtained a permit under section 12 (*1*), from being dispossessed of the premises he occupies, except in certain

(1) Civil Reference No. 19 of 1951 (F.B.).

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circumstances, particularly when the main object of the Urban Rent Control Act, 1948 is to give protection to persons in occupation of premises in the areas to which the Act has been applied. It will be contrary to the express intention of the Legislature, as expressed in section 12, to ordinarily allow a permit-holder to be dispossessed from a premises in respect of which he has obtained a permit allowing him to continue to be in occupation. It seems to be clear that a permit-holder can only be dispossessed after the grant of the permit to him in circumstances set out in the Urban Rent Control Act, 1948. It is the duty of the Court to carry out the intended scope and purposes of a statute; and where the intention of the Legislature is clear, it ought to be given effect to."

It was therefore argued that the proper course for U Po Thein to pursue was to apply for stay of execution by reason of the provisions of section 12 of the Urban Rent Control Act, 1948, and that he had no right to apply under section 14 for the rescission of the decree or order passed against him in the Civil Regular Suit No. 5 of 1949. We cannot accept such contention. The right which accrues to U Po Thein under section 12 is not quite the same as what is bestowed under section 14 (*l*), and it is open to him to decide what course to adopt. The choice lies with him.

It was also contended on behalf of the appellants that as the trial Judge had already passed an order, delivering possession of the premises to the appellants-decreeholders, and placed them in possession of the said premises, U Po Thein could no longer, after the appellants-decreeholders had obtained possession of the premises, pursue the application which he filed earlier under section 14 (*l*) of the Urban Rent Control Act, 1948. There is, in our opinion, no merits in this contention. U Po Thein filed his application under section 14 on the

9th February, 1950, and when his application was dismissed by the trial Judge, U Po Thein preferred an appeal on or about 15th March, 1950 to the District Court against the said order of dismissal. U Po Thein was, in fact, seeking his remedy from Court to Court as allowed to him by law, and his appeal, which was pending in a higher Court must, in law, be considered to be a continuation of his application made before the trial Court under section 14 of the Urban Rent Control Act, 1948.

In re *Clagett's Estate, Fordham* v. *Clagett* (1), Jessel M. R., observed:

> "A cause is said to be pending in a Court of justice when any proceeding can be taken in it. That is the test. If you can take any proceeding it is pending. 'Pending' does not mean that it has not been tried. It may have been tried years ago. In fact, in the days of the old Court of Chancery, we were familiar with cases which had been tried fifty or even one hundred years before, and which were still pending."

We are of opinion that a proceeding must be considered to be pending, until it is finally concluded. As the possession of the premises was delivered by the trial Court while an appeal in respect of it was pending before a higher Court, such delivery of possession must be considered, in law, to be illegal; otherwise, it would lead to easy evasion or frustration of the provisions of section 14 of the Urban Rent Control Act, 1948.

A preliminary point of law had been taken before us on behalf of U Po Thein to the effect that the present appeal was incompetent on the ground that the order of remand for the case to be tried on merits, passed in the Civil Second Appeal No. 20 of 1950, did not fall within the

(1) (1881-82) 20 Ch.D. p. 637 at p. 653.

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meaning of the word "judgment" under section 20 of the Union Judiciary Act, 1948. It was submitted that the said order did not decide anything touching the rights of the parties before the Court and that, in any case, that order was not a judgment within the meaning of the Full Bench decision of the late High Court of Judicature at Rangoon in Re. *Dayabhai Jiwandas and others* v. *A. M. M. Murugappa Chettiar* (1) and that the word "judgment" in section 20 of the Union Judiciary Act, 1948, should be given the same meaning as was given to it in clause 13 of the old Letters Patent.

It cannot be disputed that the order of U Aung Khine J., remanding the case to the trial Court for trial on merits is not a judgment within the meaning of the Full Bench decision in Re. *Dayabhai Jiwandas and others* v. *A. M. M. Murugappa Chettiar* (1). In the case of *U Ohn Khin* v. *Daw Sein Yin* (2), the Full Bench decision was brought to the notice of the Supreme Court, but it had no occasion to re-consider it.

It was however urged that as the order of U Aung Khine J., would have been appealable under Order 43, Rule 1, of the Code of Civil Procedure, it should be considered to be a "judgment" within the meaning of clause 20 of the Union Judiciary Act, 1948. It is clear that many orders, which come under Order 43, Rule 1, are merely interlocutory orders, and they have nothing to do with the merits of the case; nor could such orders be said to have put an end to the proceedings before the Court. An interlocutory order, which merely paves the way for a final

(1) 13 Ran. 457 (F.B.).
(2) (1949) B.L.R. (S.C.) p. 105 at p. 106.

adjudication in a proceeding, cannot, in our opinion, be considered to be a judgment.

The expression "judgment" also appears in section 5 of the Union Judiciary Act, 1948, where the expression "final order" is also mentioned. Moreover, the word "order" also occurs in clause 13 of the old Letters Patent. If in enacting section 20 of the Union Judiciary Act, 1948, it was intended to make the meaning of the word "judgment" wider than what was attributed to it in clause 13, one would have expected this intention to have been expressed clearly, particularly in view of the Full Bench decision in Re. *Dayabhai Jiwandas and others* v. *A. M. M. Murugappa Chettiar* (1) where it was held that the expression "judgment" in clause 13 of the old Letters Patent meant a decree made in a suit, in which the rights of the parties were determined. We are of the opinion that it will not be correct to give a more extended meaning to the expression "judgment" in section 20 of the Union Judiciary Act, 1948, than what the same word conveys in section 5 of the Union Judiciary Act, 1948. It is obvious that the word "judgment" in section 5 cannot be construed so as to include an order also, as that would render the expression "final order" in section 5 superfluous; and this latter expression is more restrictive than the word "order". It is a rule of interpretation that the Court ought not to give a construction, if it is possible to avoid doing so, which will render certain words used by the Legislature superfluous or redundant.

Jessel M. R., observed in *Spencer* v. *Metropolitan Board of Works* (2):

(1) 13 Ran. 457 (F.B.). (2) (1883) 22 Ch.D. p 142 at p. 162.

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" . . . I agree with the principle which was laid down by Mr. Justice Chitty, that as a general rule a word is to be considered as used throughout an Act of Parliament in the same sense, and that therefore we may look through the other sections to see in what sense the word is there used."

It appears to us to be a good rule of construction to impart the same meaning to the same word used in one statute or enactment, in the absence of very good and explicit reason to indicate to the contrary.

We, at least at the present, see no good or explicit reason to extend to the word " judgment " in section 20 of the Union Judiciary Act, 1948 a meaning wider than what was bestowed upon it under clause 13 of the old Letters Patent. The order passed in the Civil Second Appeal No. 20 of 1950 cannot therefore be considered to be a judgment for the purpose of section 20 of the Union Judiciary Act, 1948.

The appeal is, for the reasons we have set out, dismissed with costs; and Advocate's fee is fixed as one hundred kyats.

APPELLATE CIVIL.

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

H.C. 1952

Dec. 8.

U TOE LU (APPELLANT)

v.

U KYAUNG LU AND TWO OTHERS (RESPONDENTS).*

Transfer of Property Act, s 53-A—Doctrine of Part Performance—Unregistered usufructuary mortgage—Defendant mortgagee out of possession at time of suit for recovery of land by plaintiff owner—Initial possession affords protection as defence—" Possession " defined.

Held : The provisions of s. 53-A of the Transfer of Property Act apply to an usufructuary mortgage where the mortgagee has in pursuance of the contract obtained possession of the property.

U Mar and one v. *Ma Saw Hlaing*, (1950) B.L.R. 81, followed.

Held : It will be sufficient for the purpose of s. 53-A of the Transfer of Property Act if it can be shown that the mortgagee has in part performance of the contract taken possession of the property.

Held also: It will not be proper to assume, in the absence of clear words to that effect, that s. 53-A also requires the mortgagee to be in actual possession of the land at the time he invokes the aid of the provisions of s.53-A.

Held further: " Possession " is said to be of two ways, either actual possession or possession in law. It may mean physical control sometimes called *de facto* possession or detention, or it may mean legal possession which may exist with or without *de facto* possession and with or without a rightful origin It may also mean the right to possession, which may amount to ownership, or may be of a temporary or special character.

Haji Rahimbux Ashan Karim v. *Central Bank of India Ltd.*, (1929), 56 Cal. 367 at 376, followed.

Ba Shun and *G. N. Banerji* for the appellant.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The plaintiff-appellant U Toe Lu executed an unregistered deed in January 1945, which purported to create an usufructuary mortgage

* Special Civil Appeal No. 4 of 1951 against the decree of the Appellate Side of the High Court in Civil 2nd Appeal No. 38 of 1951.

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U TOE LU v. U KYAUNG LU AND TWO OTHERS.

U TUN BYU, C.J.

over a piece of paddy land in favour of the 1st defendant-respondent U Kyaung Lu from whom he received a sum of Rs. 8,000 in Japanese currency; and U Kyaung Lu was also given possession of the paddy land. Three years afterwards, *i.e.*, on the 23rd March 1948, U Kyaung Lu executed an unregistered deed under which he purported to create an usufructuary mortgage in favour of Ko Tha Myaing and his wife Ma Ngwe Khin, the 2nd and 3rd defendants-respondents, in consideration of a sum of Rs. 1,500 in legal currency, which he received from them.

Paragraphs 2, 3, 4, 5 and 7 of the amended plaint indicate that the nature of the suit was really for the recovery of the paddy land in question from U Kyaung Lu, who had obtained possession of it under an unregistered mortgage deed and who had declined to allow the plaintiff-appellant to take back the paddy land on repayment of an equivalent sum in the legal currency, and that Ko Tha Myaing and Ma Ngwe Khin were added as defendants because the paddy land in question was in their possession at the time of the institution of the suit. This is also supported by the fact that no lawyer's notice was sent to Ko Tha Myaing or his wife, although the plaintiff-appellant caused a lawyer's notice to be served upon U Kyaung Lu before the suit was instituted.

The defence of U Kyaung Lu was, in effect, that the provisions of section 53-A of the Transfer of Property Act were applicable in the circumstances of the present case and that U Toe Lu could not, in law, demand back the paddy land before the expiry of period of eight years stipulated in the unregistered mortgage deed. It was, on the other hand, argued on behalf of U Toe Lu that section 53-A of the Transfer of Property Act was not applicable to the

facts of the present case, as the paddy land in question was not in actual possession of U Kyaung Lu at the time of institution of the suit.

In *U Mar and one* v. *Ma Saw Hlaing* (1) , it was held that the provisions of section 53-A of the Transfer of Property Act applied to an usufructuary mortgage where the mortgage had, in pursuance of the contract, obtained possession of the property. We respectfully agree with that conclusion.

The relevant portion of section 53-A of the Transfer of Property Act, so far as it relates to the contention made on behalf of the plaintiff-appellant that it is necessary, under section 53-A, for the alleged mortgagee to be in actual possession of the property at the time when the suit was instituted, reads :

> "And the transferee has, in part performance of the contract, taken possession of the property or any part thereof, *or* the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract."

The word " or " has been italicized by us. We have no doubt that it has been used deliberately in a disjunctive sense. It follows that the words " the transferee has, in part performance of the contract, taken possession of the property or any part thereof " must be read disjunctively from the words that follow them, namely, "or the transferee, being already in possession, continues in possession in part performance of the contract. " The expression " being already in possession " relates to the time when the contract was made, and this expression ought, in our opinion, to be read in that light. Thus, it will be sufficient for the purpose of section 53-A of the Transfer of Property Act, if it can also be shown that

(1) (1950) B.L.R. 81.

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U TOF LU v. U KYAUNG LU AND TWO OTHERS.

U TUN BYU, C.J.

the alleged mortgagee has, in part performance of the contract, also taken possession of the property. And it is not disputed that U Kyaung Lu, the 1st defendant-respondent, did assume possession of the paddy land after the unregistered deed of mortgage was executed and that the paddy land was in his actual possession for three years before the 2nd and 3rd defendants-respondents took over the land from him to work it and enjoy the fruits thereof.

The deed under which the 2nd and 3rd defendants-respondents were said to have obtained a sub-mortgage of the land in question was not registered, and thus there was, in law, no valid sub-mortgage effected. It is clear that the legal possession of the paddy land continues to be with U Kyaung Lu. U Kyaung Lu was therefore entitled to protect his possessory title under section 53-A of the Transfer of Property Act. It will not be proper to assume, in the absence of clear words to that effect, that section 53-A also requires U Kyaung Lu to be in actual possession of the land at the time he invokes the aid of the provisions of section 53-A. It was observed in *Haji Rahimbux Ashan Karim* v. *Central Bank of India Ltd.* (1) that:

> " Possession is said two ways either actual possession or possession in law (*Termes de a Ley*). It may mean physical control, sometimes called *de facto* possession or detention or it may mean legal possession, which may exist with or without *de facto* possession and with or without a rightful origin. It may also mean the right to possession, which may amount to ownership, or may be of a temporary or special character. In my opinion, therefore, when construing an Indian Act, words should be given their widest possible meaning, consistent with the context, unless there is something in the Act itself to indicate that they are intended to be used in the artificial and technical sense which they have acquired in English law, or in any other restricted sense."

(1) (1929) 56 Cal. 367 at 376.

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It must accordingly be held that the provisions of section 53-A of the Transfer of Property Act apply in the circumstances of the present case, allowing U Kyaung Lu to protect his possessory title, which he acquired after the unregistered deed was executed. This appeal is therefore dismissed with costs.

U AUNG KHINE, J.—I agree.

APPELLATE CIVIL.

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

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Dec. 24.

RASOOL BIBI AND ONE (APPELLANTS)

v.

AHMED EBRAHIM MADHA AND TWO (RESPONDENTS).*

Mohammedan Law—Wakf for private as distinguished from wakf for public purposes—Only owner can dedicate property by way of wakf—Perpetuity one of four conditions necessary—Subsequent schemes cannot change fundamental character of a private wakf—Civil Procedure Code, s. 92 inapplicable—Order ending suit is a decree within meaning of s. 2 (2) Civil Procedure Code and is appealable.

Held: Under Mohammedan Law a wakf can be validly created for the support and maintenance of the settler's family and descendants.

S. 178, Mulla's Principle of Mohammedan Law, 1950 Edition.

It is only the owner of the property who can validly dedicate it by way of wakf.

Ameer Ali's Mohammedan Law, Vol. 1, p. 196, 1912 Edition ; *Ehasan Beg and another* v. *Rahmat Ali and another*, (1935) 10 Luck. Series, p. 547, referred to.

Held: Perpetuity, one of the four conditions necessary to constitute a valid wakf, has been fulfilled.

Jugatmoni Chowdrani v. *Romjani Bibee and others*, (1884) I.L.R. 10 Cal. Series, p. 533 at p. 536, followed.

Held: The wakf created by Ismail Ahmed Madha's will was a private wakf ; by subsequent schemes framed for its administration, including a first charge for maintaining a water supply and a dispensary, his descendants cannot in law convert the private wakf into a public wakf, as they are not the owners and possess no power to dispose of those properties. S. 92 of the Civil Procedure Code does not apply as the wakf still remains in law a private wakf.

D. I. Attia and another v. *M. I. Madha and others*, 14 Ran. Series, p. 575 at p. 593, referred to.

Syad Shah Mohamed Kasim v. *Syad Abi Saghir*, (1932) 11 Pat. Series, p. 288 ; *Quinn* v. *Leathem*, (1901) A.C., 495 at 506 ; *U Po Maung and others* v. *U Tun Pe and others*, (1928) 6 Ran. Series, p. 594, referred to and distinguished.

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* Civil 1st Appeal No. 73 of 1950 against the decree of the High Court, Original Side, Rangoon, in Civil Regular No. 36 of 1949, dated the 21st August 1950.

Held : An order which has the effect of determining the plaintiff's right to institute a suit becomes a decree within the meaning of s. 2 (2) of the Civil Procedure Code, and an appeal lies.

Dayabha Jawanda and others v. *A. M. M. Murugappa Chettyar*, (1935) 13 Ran. Series, p. 475; *Narindas Rahjunathdas* v. *Shantilal Bhola Bhai*, (1921) 45 Bom. Series, p. 377, referred to and followed.

P. B. Sen for the appellants.

Dr. Ba Han for the respondent No. 1.

S. R. Chowdhury for the respondents Nos. 2 and 3.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—One Ismail Ahmed Madha died on the 17th June, 1913. He left 4 children surviving him, namely Mahomed Ismail Madha, Hafiz Bibi, Ebrahim Ismail Madha and Rasool Bibi. By his will, dated the 11th March, 1913, he created a wakf of one-third of his estate and directed that the income was to be distributed among the poor descendants of his family. He appointed his wife Hawa Bibi and his eldest son Mahomed Ismail Madha to be the first trustees of the wakf. The relevant portion of the will of Ismail Ahmed Madha reads :

" . . . With regard to one-third part or share of the said proceeds or sale and cost which I have reserved and which I am entitled to dispose according to my wishes according to the said Mohammedan Law: I will and direct my said Executors and Trustees to purchase the house in which I live and the house behind the same. Of the said one-third part and of the remaining sum they may purchase buildings and to spend or dispose of the income among my members of families who may be poor, and repair and do the needful in the house in which I live and in such manner as to my said Executors and Trustees shall seem fit and proper. And I direct and declare that none of my heirs or any person shall be entitled or have any right to ask or claim on account of this disbursement from my said Executors and Trustees"—*vide* Exhibit A.

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U TUN BYU, C.J.

In 1916, Rasool Bibi (youngest daughter of Ismail Ahmed Madha) instituted a suit, known as Civil Regular No. 173 of 1916, against Hawa Bibi (widow) and Mohamed Ismail Madha, Ebrahim Ismail Madha and Hafiz Bibi, who are the three other children of the deceased Ismail Ahmed Madha, for a declaration that the wakf created by the will of Ismail Ahmed Madha was invalid and for the administration of the estate left by the latter. A compromise was arrived in that suit, and an order was drawn up in accordance with the compromise, in which a scheme for the administration of the wakf was also set out—*vide* Exhibit B. There it was declared that the wakf created by Ismail Ahmed Madha was a good and valid wakf, but the objects of the wakf were considerably extended to include objects of public and charitable nature. It provided that Hawa Bibi and Mohamed Ismail Madha were to be the trustees of the wakf. Hawa Bibi, however, died in February, 1923.

On the 22nd July, 1930 Ebrahim Ismail Madha (second son of Ismail Ahmed Madha) and Ahmed Dawood Madha (a son of Hafiz Bibi) instituted a suit, known as Civil Regular No. 182 of 1930, against Mohamed Ismail Madha (eldest son of Ismail Ahmed Madha) for a declaration that the scheme for the administration of the wakf, framed in Civil Regular Suit No. 173 of 1916, was binding upon the defendant Mohamed Ismail Madha, for the latter's removal as the surviving trustee of the wakf and for the appointment of new trustees to manage the wakf properties. The second suit was instituted with the consent of the then Government Advocate. The outcome of that suit was that a new scheme for the administration of the wakf was framed with the

consent of the parties, and Mohamed Ismail Madha and Ebrahim Ismail Madha were, under the new scheme, made trustees of the Ismail Ahmed Madha Wakf—*vide* Exhibit C. Paragraph 16 of the new scheme reads:

> " 16. The remaining three-fourths of the net income shall be applied for support and maintenance of any indigent and needy descendants of the said Ismail Ahmed Madha and the surplus if any may be used for the purposes of support and maintenance of any indigent and needy descendants of other branches of the Madha family; and if there should still be surplus the same shall be used for the purpose of helping the poor generally provided always that the expenses of maintaining the supply of water to the people of Variav and maintaining a dispensary known as Ismail Ahmed Madha Charitable Dispensary at Variav shall constitute the first duty of the trustees before the said three-fourths of the net income is used for any other purposes set out in this clause ".

It is clear, therefore, that the expenses for maintaining a water supply and a dispensary at Variav were made, under the new scheme for the management of wakf properties, the first charge on the income of the wakf, before any payment could be made to any indigent descendant of the Madha family. Braund J., expressed the same opinion in the case of *D. I. Attia and another* v. *M. I. Madha and others* (1).

In 1935, Dawood Ismail Attia and Ismail Mohamed Madha (two grand-children of Ismail Ahmed Madha) instituted a suit known as Civil Regular No. 275 of 1935 against Mohamed Ismail Madha, Ebrahim Ismail Madha, Hafiz Bibi and Rasool Bibi (four children of Ismail Ahmed Madha) to have the schemes that were framed for the administration of the wakf in Civil Regular No. 73

(1) 14 Ran. Series, p. 575 at p. 593.

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of 1916 and Civil Regular No. 182 of 1930 set aside on the ground that those schemes were beyond the terms of the wakf created by Ismail Ahmed Madha. The plaintiffs in 1935 suit were not parties to the earlier two suits. They also ask for a declaration that the wakf created by the will of Ismail Ahmed Madha was a private wakf and for the administration of the wakf in accordance with the terms set out in the will of Ismail Ahmed Madha. Paragraphs 4 and 10 of the written statement filed by Ebrahim Ismail Madha, who was the second defendant, in Civil Regular No. 275 of 1935 were:

"4. With reference to paragraph 9, this defendant submits that the scheme referred to the said paragraph cannot be set aside without the trustees being made parties to the suit and this Hon'ble Court cannot direct that the wakf should be administered by the Trustees named in the will and appointed in terms of the said will without a suit being filed under section 92 of the Code of Civil Procedure with the consent of the Government Advocate.

* * * *

10. This defendant further maintains that the suit is barred by the principle of *res judicata* and no suit can lie in any case without the consent of the Government Advocate of Burma."

Hafiz Bibi, who was the third defendant in that suit, maintained the same objection in paragraph 11 of her written statement. We ought to mention here that the three defendants in the present litigation are the sons of Ebrahim Ismail Madha.

Braund J., held, on a point of law raised, that the sanction of the Government Advocate was not necessary for the institution of that suit on the ground it was a suit to enforce a private wakf created by the will of Ismail Ahmed Madha. After the

preliminary issue was decided, the plaintiffs, however, agreed to have their suit in Civil Regular No. 275 of 1935 dismissed without costs, and it was accordingly dismissed on the 10th August 1936—*vide* Exhibit E.

In 1949, Rasool Bibi (youngest child of Ismail Ahmed Madha) and Ismail Mohamed Madha (a grand-child of Ismail Ahmed Madha) instituted the present suit, that is Civil Regular No. 36 of 1949, against the three sons of Ebrahim Ismail Madha. It might be mentioned here that Mohamed Ismail Madha (father of Ismail Mohamed Madha) died in 1941 and that Ebrahim Ismail Madha died in 1948. Hafiz Bibi was also dead, with the result that Rasool Bibi was the only surviving child of Ismail Ahmed Madha at the time Civil Regular No. 36 of 1949 was instituted. The plaintiffs-appellants in this suit asked for a removal of the three defendants-respondents, who had been appointed trustees under the scheme of management made in Civil Regular No. 182 of 1930, for the appointment of new trustees and for settling a new scheme.

It appears to be clear from the written statement, which the three defendants-respondents filed, that they are at the present managing the wakf properties under the scheme framed in Civil Regular No. 182 of 1930. However, as the result of the objection which the defendants-respondents raised in paragraph 1 of their written statement that an issue on a point of law was framed, namely,

> "1. Is the present suit incompetent in view of previous decision made in Civil Regular No. 275 of 1935 of the late High Court of Judicature at Rangoon to the effect that the trust in suit was not for public purposes of a charitable nature within the meaning of section 92 of the Civil Procedure Code?"

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The plaintiffs-appellants filed the present appeal to set aside the decision of the learned Judge of the Original Side on the above issue, which was adverse to them. There, U Aung Tha Gyaw J., stated :

" . . . . it would, therefore, appear that the question as to whether the wakf in suit was a private or a public Trust, was conclusively decided between the parties in the former suit and it is not therefore open to any of the parties impleaded in the former suit to litigate again on the basis contrary to what was done in the said decision."

It was contended on behalf of the plaintiffs-appellants that the matter which was directly involved in Civil Regular No. 275 of 1935, in so far as it relates to the issue No. 1, was not the same as in the 1949 suit, in that the plaintiffs in Civil Regular No. 275 of 1935 was claiming adverse to the scheme which had been framed for the management of the wakf properties, whereas in the present litigation no claim adverse to the scheme was made by the plaintiffs-appellants. It was also asserted before us that the written statement, which the three defendants-respondents filed in Civil Regular No. 36 of 1949, show that they were actually administering the wakf properties in accordance with the scheme framed in Civil Regular No. 182 of 1930.

A question arises, whether the provisions of section 92 of the Code of Civil Procedure apply in the circumstances obtaining in the present litigation. It will be convenient to reproduce the relevant words of section 92 (1) of the Code of Civil Procedure :

"92 (1). In the case of any alleged breach of an expressed or constructed trust created for public purposes of a charitable or religious nature, ..."

There must accordingly be a public trust of a charitable or religious nature, in order to attract the

provisions of section 92 of the Code of Civil Procedure.

It was not disputed before us that the wakf, which was created by the will of Ismail Ahmed Madha, was in the nature of a private wakf; and the extract, which we have reproduced from the will earlier in the judgment, indicates that it was a private wakf. It appears to be clear now that a wakf can, under Mohammedan Law, be validly created for the support and maintenance of the settler's family and descendants—vide *section 178 of Mulla's Principle of Mohammedan Law*, 1950 Edition.

It appears from the penultimate paragraph of the judgment of Braund J., in *D. I. Attia and another* v. *M. I. Madha and others* (1) that the learned Judge did not, in giving his decision on the point of law raised before him, consider what legal effect, if any, the previous schemes produced. It was for this reason that the learned Advocate for the plaintiffs-appellants submitted before us that the question, which came for consideration before Braund J., was not really the same as that which rose in the present litigation.

The question which the Court would have to consider became, whether by reason of the schemes, which had been framed for the administration of the wakf in the two earlier suits, the private wakf created by the will of Ismail Ahmed Madha had not become a public wakf. It was argued that where a property is burdened with obligation "for public purposes of a charitable or religious nature", it falls within the purview of section 92 of the Civil Procedure Code, and reliance was placed upon the observation made in *Syad Shah Mohamed Kasim* v. *Syad Abi Saghir* (2)

(1) 14 Ran Series, p. 575 at p. 593. (2) (1932) 11 Pat. Series, p. 288.

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One of the questions involved in that case was whether the properties, which were the subject of litigation, could be considered to be trust properties made for public purposes of a charitable or religious nature. The question which is raised in the present appeal is different, namely, whether the private wakf created by the will of Ismail Ahmed Madha had, in law become a public wakf within the meaning of section 92 of the Civil Procedure Code by reason of the fact that the schemes, which had been framed subsequently for administering the wakf properties, include public purposes of a charitable nature. We do not consider that having regard to the facts in the Patna case that the observation made in that case afforded any assistance in determining the point of law involved in the appeal before us as the observation made in the Patna case must be read in the light of the circumstances obtaining there. Earl of Halsbury L.C., observed in *Quinn* v. *Leathem* (1):

> ". . . . there are two observations of a general character which I wish to make, and one is to repeat what I have often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides."

It was further argued on behalf of plaintiffs-appellants that as the scheme had been framed in Civil Regular No. 182 of 1930 under the provisions of section 92 of the Civil Procedure Code, it could only be modified by a suit filed with the consent of

(1) (1901) A.C. p. 495 at p. 506.

the Attorney-General, and the case of *U Po Maung and others* v. *U Tun Pe and others* (1) was relied upon for this proposition of law. The scheme, which was framed in that case, was for the management of a well-known pagoda, called the Kyaiktiyo Pagoda in the Thatôn District. There, the character of the trust involved can from the outset be described as being for public purposes of a charitable or religious nature; and it will not be correct to read the decision made in that case apart from the circumstances obtaining there.

Clause 25 of the scheme framed for the management of Ismail Ahmed Madha Wakf, in Civil Regular No. 182 of 1930, was also relied upon strongly on behalf of the plaintiffs-appellants to indicate that they had no alternative but to institute their present suit under section 92 of the Civil Procedure Code. It reads:

> "25. That whatever amendments to this scheme is sought from the High Court at Rangoon or any of the principal Court of Original Jurisdiction in Rangoon the same shall be made by an application, in the above proceedings *viz.*— Civil Regular No. 182 of 1930 of the High Court of Judicature at Rangoon and not by separate suit under section 92 of the Civil Procedure Code."

It must, in this connection, be remembered that three defendants-respondents in the present appeal were not parties in Civil Regular No. 182 of 1930; but it was contended that as their father, Ebrahim Ismail Madha, was a party in Civil Regular No. 182 of 1930, the three defendants-respondents should also be deemed, in view of Explanation IV to section 11 of the Code of Civil Procedure, to be parties. We cannot concede to this suggestion. The wakf created

(1) (1928) 6 Ran. Series, p. 594.

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by Ismail Ahmed Madha's will was clearly a private wakf. We are unable to apprehend how certain descendants of the wakif, that is, of Ismail Ahmed Madha, can in law convert a private wakf so created into a public wakf. It seems to us to be apparent also that the parties in Civil Regular No. 182 of 1930 had only a life-interest in the properties of the wakf. It is, moreover, obvious that the descendants of Mohamed Ismail Madha cannot, in any circumstance, be considered the owners of the wakf properties; and they do not possess any power to dispose of those properties. It is clear also that, under the Mohammedan Law, it is only the owner of the property who can validly dedicate it by way of a wakf. *Ameer Ali, in his Mohammedan Law,* Volume I, 1912 Edition, page 196, stated—

> "As a general rule, it must be stated that all persons who are competent to make a valid gift are also competent to constitute a *Wakf*."

It was also stated in *Ehasan Beg and another* v. *Rahmat Ali and another* (1) that a person who was not an owner of a property cannot create a wakf of it.

Perhaps, we ought to reproduce paragraph 26 of the scheme, framed in Civil Regular No. 182 of 1930, which was—

> "26. Only two or more beneficiaries as defined herein shall have the right to apply as valid for the amendments of this scheme 'beneficiaries for the purpose shall mean the descendants in the male and female line of Ismail Ahmed Madha'".

Paragraph 26 of the scheme rather suggests that the parties in the Civil Regular No. 182 of 1930 continued to regard the wakf created by the will of Ismail Ahmed Madha as a private wakf, in spite of

(1) (1935) 10 Luck. Series, p. 547.

the scheme which they had framed. We find it difficult to conceive at the present how the schemes, which had been framed for the administration of the wakf properties in Civil Regular No. 96 of 1916 and Civil Regular No. 182 of 1930, can operate to alter the fundamental character of the wakf created by the will of Ismail Ahmed Madha. Moreover the persons who had or would have had interest in the wakf properties were not all made parties in those two suits. Perpetuity has also been said to be a necessary condition to constitute a valid wakf. And in *Jugatmoni Chowdrani* v. *Romjani Bibee and others* (1) it was stated—

> ". . . . in the first place, the appropriator must destine its ultimate application to objects not liable to become extinct; secondly, it is a condition that the appropriation must be at once completed; thirdly, that there be no stipulation in the *waqf* for a sale of a property and expenditure of the price on the appropriator's necessities; and fourthly, perpetuity is a necessary condition."

For the reasons set out above, we hold that the provisions of section 92 of the Civil Procedure Code do not apply in the circumstances obtaining in the present litigation, in that the wakf of Ismail Ahmed Madha still remains, in law, a private wakf.

A preliminary objection was, however, raised on behalf of the defendants-respondents that no appeal lie in the present case—not being a judgment within the meaning of the decision of the Full Bench in *Dayabba Jawanda and others* v. *A. M. M. Murugappa Chettyar* (2). It is true that no formal decree was actually drawn up in the present case, but in its

(1) (1884) I.L.R. 10 Cal. Series, p. 533 at p. 536.
(2) (1935) 13 Ran. Series, p. 475.

H.C. 1952 — RASOOL BIBI AND ONE v. AHMED EBRAHIM MADHA AND TWO. — U TUN BYU, C.J.

place a formal order was drawn up in which the plaintiffs were ordered to pay the costs of the suit to the defendants, *i.e.* particulars of the costs were set out as would have been done in the case of a decree. The decision of the learned Judge on the Original Side has, in our opinion, the effect of putting an end to the plaintiff's case, as instituted in Civil Regular No. 36 of 1949, as that suit would have to be dismissed, whatever course the plaintiffs might adopt. The decision of the learned Judge on the Original Side, therefore, has the effect of determining the plaintiff's right to institute that suit, and it becomes a decree within the meaning of section 2 (2) of the Civil Procedure Code. The case of *Narindas Rahjunathdas* v. *Shantilal Bhola Bhai* (1) is somewhat similar to the case now under appeal, so far as this point is concerned. In the Bombay case, the plaintiffs were allowed to withdraw their suit, with liberty to take such other action as they might be advised, but no cost was awarded against them there. It was held in that case that the pronouncement so made amounted to a judgment in that it had the effect of putting an end to the suit.

We, accordingly, hold on the preliminary objection that an appeal lay in the present case; but for the reasons, which we have stated earlier, the appeal is dismissed. Each party is to bear its own costs in this appeal.

U AUNG KHINE, J.—I agree.

(1) (1921) 45 Bom. Series, p.377.

APPELLATE CIVIL.

Before U Thaung Sein and U Aung Khine, JJ.

MA HTWE (APPELLANT)

v.

MA TIN U (RESPONDENT).*

H.C. 1952

Nov. 5.

Administration suit — Persons entitled to sue — Burmese Buddhist Law — Husband and wife tenants - in - common — Without divorce no partition of joint properties — Wife alone in husband's life time cannot sue for administration of deceased father-in-law's estate.

Held : The only persons who can maintain a suit for administration are (1) a creditor, (2) a legatee, (3) a next-of-kin and (4) an executor or administrator.

Held : During the subsistence of the marriage neither of the spouses can obtain a partition though a Burmese Buddhist husband and wife are tenants-in-common and his or her interest is alienable or attachable.

N.A.V.R. Chettyar Firm v. *Maung Than Daing*, I.L.R. 9 Ran. 524 ; *U Pe* v. *U Maung Maung Kha*, I.L.R. 10 Ran. 261, referred to.

Held further : By the simple expedient of adding the spouse, who has inherited the property, without consent, as a party, the other spouse cannot maintain an administration suit.

Dr. Ba Han for the appellant.

Than Sein for the respondent.

The judgment of the Bench was delivered by

U THAUNG SEIN, J.—This is an appeal against the judgment and decree of the District Court of Mandalay dismissing the appellant-plaintiff Ma Htwe's suit for administration of the estate of her father-in-law U Tun. It appears that U Tun died on the 14th February 1946 leaving a son Maung Kyaung (husband of the appellant-plaintiff) and a daughter Ma Tin U (respondent) to succeed him. In the plaint it was alleged that Maung Kyaung who had

* Civil 1st Appeal No. 53 of 1951 against the decree of the District Court, Mandalay, in Civil Regular Suit No. 7 of 1950, dated the 20th April 1951.

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joined a band of Communist rebels died on or about 7th January 1949 and that the appellant-plaintiff was thus entitled to a half share in the estate which was said to be in the possession of the respondent Ma Tin U. This claim was resisted by the respondent who pleaded *inter alia* (1) that Maung Kyaung was still alive, (2) that there had been a divorce between the appellant-plaintiff and Maung Kyaung, and (3) that the suit as framed was not maintainable.

The learned District Judge, after weighing the evidence led at the trial, held that Maung Kyaung was still alive and this finding has been accepted before us by the learned counsel for the appellant-plaintiff. After having arrived at this finding, the learned District Judge took a short cut for the determination of the suit and held that since Maung Kyaung was alive there could not have been any divorce between the appellant-plaintiff and her husband. The issue as to whether there had been a divorce or not was not dependent on the question whether Maung Kyaung was alive or dead and clearly therefore the learned District Judge paid no attention to the evidence led by both the parties on the alleged divorce. Be that as it may, the suit was dismissed on the ground that "without proof of the death of Maung Kyaung the plaintiff's suit has no legs to stand on." It has been contended on behalf of the appellant-plaintiff that even though Maung Kyaung may still be alive she is entitled to maintain the present suit as she has a vested interest in the share of her husband in the estate of U Tun. According to the learned counsel for the appellant-plaintiff, all that need be done is for his client to sue for the administration of the estate both on her own behalf and that of her husband and to add Maung

Kyaung (husband) as a party. Now, there is no dispute that Maung Kyaung is entitled to a half share in the estate and that he could maintain a suit for the administration of that estate. But the question is whether the wife (appellant-plaintiff) who, according to Burmese Buddhist Law has a vested interest of a one-third share in the property of her husband on the principle of *nissiya* and *nissita,* is entitled to maintain the suit. This is a somewhat novel point and we have not been able to trace any direct authorities on the subject. It is of course settled law that a Burmese Buddhist husband and wife are "tenants-in-common" of their joint properties—*see* the cases of *N.A.V.R. Chettyar Firm* v. *Maung Than Daing* (1), and *U Pe* v. *U Maung Maung Kha* (2). But during the subsistence of the marriage neither of the spouses can obtain a partition of his or her share as against the other spouse. However, even though the interest of the spouses in their joint properties may be impartable during the continuance of the marriage, either of them is competent to alienate or otherwise dispose of his or her share in these properties. So also the interest of a Burmese Buddhist husband or wife in their joint properties may be attached and sold in execution of a decree obtained against the spouse concerned. It should be noted, however, that though the above-mentioned interests of either spouse may be attached or sold, there can be no right of partition of the joint properties except on the death or divorce of the other spouse. From the mere fact that the appellant-plaintiff is a "tenant-in-common" with her husband in the share of the estate of U Tun, it does not necessarily follow that she is entitled to

(1) I.L.R. 9 Ran. 524. (2) I L.R. 10 Ran. 261.

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maintain a suit for administration of that estate. The only persons who may maintain such a suit have been listed by Mulla at page 730 of his Code of Civil Procedure, 11th Edition, 1941, as follows :

"The following person may maintain an administration suit : —

(1) A *creditor* of the deceased, when his claim is not paid off by the legal representatives of the deceased.

(2) A *legatee*, whether specific or pecuniary, where the legacy is not paid to him by the legal representatives of the deceased.

(3) The next-of-kin of the deceased, for their share in the estate of the deceased.

(4) An *executor* or *administrator*, when there are disputes amongst the legatees or next-of-kin as to the amount of the property left by the deceased and the amount to which the legatees or next-of-kin are entitled."

This is supported by authorities which we do not propose to quote. The appellant-plaintiff does not fall within any of the above categories and is certainly not one of the "next-of-kin" of the deceased U Tun. We would point out that if she were allowed to sue and succeed in the present suit, it would be impossible to draw up the preliminary decree as per Form No. 17 in Appendix D to the First Schedule of the Code of Civil Procedure. Then again, to allow the appellant-plaintiff to maintain the present suit would be tantamount to laying down that the moment a Burmese Buddhist husband or wife inherits any property, the other spouse can promptly sue for the administration of the estate concerned without the consent of the spouse who has inherited the property. Such a proposition of law is not traceable in any texts or authorities whatsoever. As stated earlier, the appellant-plaintiff does not

come within any of the categories of persons who are entitled to maintain a suit for administration.

This appeal must, therefore, necessarily fail and is dismissed, with costs.

U AUNG KHINE, J.—I agree.

APPELLATE CIVIL.

Before U On Pe and U Bo Gyi, JJ.

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Feb. 19.

ABDULLA KHAN (APPELLANT)

v.

ABDUL MAJID (RESPONDENT).*

Transfer of Property Act, s. 105—Lease or License—Exclusive occupation of premises, sole test—Nomenclature given to transaction by parties inconclusive—Registration—Deed creating tenancy at will, no registration required—Urban Rent Control Act, s. 11—Compliance necessary for maintainability of suit to determine lease.

Held: Where exclusive possession has been given the agreement must be held to be one of lease and not of license. The test for determining whether a transaction is a lease or a license is to see whether the sole and exclusive occupation is given to the grantee.

Gurbachan Singh v. *Jos. E. Fernando*, (1950) B.L.R. 1 ; *S. R. Raju* v. *The Assistant Controller of Rents, Rangoon, and two others*, (1950) B.L.R. (S.C.) 10, followed.

Held further: The nomenclature given by the parties to the deed is immaterial, the essential thing being to look at the substance of the transaction.

In the matter of Burmah Shell Oil Storage and Distributing Company of India, 55 All. 874, followed.

Held also: As the rent was payable daily, and as failure of payment of rent for 7 days will entitle the appellant to cancel the agreement and take possession of his shop, the deed does not require registration.

Ratnasabhapati v. *Vencatachalam*, I.L.R. 14 Mad. 271, followed.

Held: The relationship between the parties is that of a landlord and tenant, and as plaintiff has not complied with s. 11 of the Urban Rent Control Act, 1948, the suit is bad and is not maintainable.

Hla Pe for the appellant.

M. E. Dawoodjee for the respondent.

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* Civil 1st Appeal No. 16 of 1952 against the decree of the 3rd Judge, City Civil Court, Rangoon, in Civil Regular Suit No. 181 of 1951.

H.C. 1953

ABDULLA KHAN v. ABDUL MAJID.

The judgment of the Bench was delivered by

U ON PE, J.—This is an appeal arising out of a suit instituted by the plaintiff-appellant for a declaration and injunction decree in respect of a restaurant and a roadside footpath stall in front of it at No. 520, Dalhousie Street, Rangoon. The plaintiff-appellant's case is that by an agreement dated 28th January 1950 he granted the defendant-respondent for a period of one and a half years commencing from 1st February 1950, "the right of license only without the right of occupancy or sub-tenancy, to enter the said restaurant and run the same, and use the furniture, etc., and also to enter the said pavement stall and run the same and use its equipments mentioned in paragraphs 1 and 2 of his plaint on a daily charge." It has also been averred by him that he cancelled the said agreement, which he claimed to have the right to do in pursuance of the terms of paragraph 6 of the said agreement, on account of the defendant-respondent's default to pay the charges since the 13th November 1950. He has thus asked for a declaration that the defendant-respondent's rights have ceased, and for an injunction restraining the defendant-respondent and all persons under his right or claim from entering, using, running or carrying on business in the said premises.

The defendant-respondent has resisted the claim in these words in paragraph 8 of his amended written statement:

> "With reference to paragraph 9 of the amended plaint, the defendant is advised to submit that as the Agreement between the plaintiff and defendant is an ordinary tenancy Agreement between landlord and tenant, they are governed by the provisions of the Urban Rent Control Act, 1948, and the suit is therefore not maintainable without compliance of the requirements of section 11 of the said Act."

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The lower Court framed two issues :

1. Whether the agreement executed by the parties is a lease or a license ? If it is a lease what legal effect sections 16-A and 16-B of the Urban Rent Control Act, 1948, or section 107 of the Transfer of Property Act and Article 35 of the First Schedule to the Stamp Act have on the same ?

2. Is the present suit maintainable without compliance with the requirements of section 11 of the Urban Rent Control Act, 1948 ?

On Issue No. 1 the lower Court came to the finding that the agreement was not an agreement of license, relying on the tests laid down in the case of *Gurbachan Singh* v. *Jos. E. Fernando* (1), and in that of *S. R. Raju* v. *The Assistant Controller of Rents, Rangoon, and two others* (2). In the former case it was held as follows :

> " The test for determining whether a transaction is a lease or a license is to see whether the sole and exclusive occupation is given to the grantee."

In the latter case it was held, despite the fact that the agreement describes the arrangement as that of license, that the provisions of the agreement which purported to give exclusive possession to the appellant were inconsistent with the appellant being a mere licensee.

It would appear that in the present case the defendant-respondent has had sole and exclusive right of occupation of the suit premises,—a fact which must, in the circumstances of the case, be held to have been proved. Where an exclusive possession has been given, as in this case, the agreement, in the light of the decisions referred to

1) (1950) B.L.R. 1. (2) (1950) B.L.R. (S.C.) 10.

in the two cases mentioned above, must be held to be one of lease and not of license. It is true that in clause 4 of the agreement words occur which denote the agreement to be one of license. Clause 4 reads :

" That during the tenure of this agreement the First Party shall remain the sole and absolute tenant of the premises described herein above and shall be solely liable to pay the rent to the Sooratee Bara Bazaar Company and encroachment tax to the Municipal Corporation of Rangoon. Likewise the Second Party shall not claim to be the sub-tenant of the First Party in respect of the premises in question at any time during the existence of this contract."

But the nomenclature given to the parties to the deed is held to be immaterial, the essential thing being to look at the substance of the transaction. The judgment of Sulaiman C. J., *In the matter of Burmah Shell Oil Storage and Distributing Company of India* (1), which is pertinent on the point, says :

" No doubt the parties call this document an agreement by way of license and throughout that document the same phraseology has been used and the parties are called licensor and licensee. There is also a clear statement that this deed shall not be construed to create a tenancy in favour of the Oil Company. It is, however, clear that such recitals in a document can never be conclusive, and we have to look to the substance of the terms agreed upon and not to the nomenclature given to the deed by the parties."

The contention that the transaction is in law and in fact one of lease is strengthened by the fact that there is consideration for occupation of the suit premises in the shape of daily rent of Rs. 13 to be paid by the defendant-respondent, which would leave no room for doubt that the agreement was one of lease (*vide* clause 1 of the agreement). We, therefore,

(1) 55 All. 874.

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U ON PE, J.

hold that the finding of the lower Court to the effect that the agreement was one of lease is a correct one.

The next contention urged before us is that even if it be held that the agreement was one of lease, the same could not have been a valid one inasmuch as the provisions of section 16-A of the Urban Rent Control Act, 1948, had not been complied with. It is true that the omission to do so might entail a penalty for the landlord under section 16-B of the said Act if the Rent Controller was so minded to take action as the matter was one within his discretion. But this does not mean that the lease becomes invalid for it might be a case in which the Rent Controller may not find it necessary to take action.

As regards the contention that the agreement was not valid for want of registration, we do not see how this question could arise in view of the arrangement made that the rent was payable daily, and also in view of the fact that failure to pay rent for 7 days will entitle the plaintiff-appellant to cancel the agreement and take possession of his shop. That an agreement of the kind under consideration does not require registration finds support in what has been laid down in the case of *Ratnasabhapati* v. *Vencatachalam* (1):

> "Where the lessee is liable to be evicted at fifteen days' notice, the mere fact that the land is given on a specified yearly rent does not make the tenancy anything more than a tenancy at will, and the document creating it would not therefore require registration."

Having held that the relationship between the parties is that of a landlord and a tenant, we must hold that the suit instituted is bad and is not

(1) I.L.R. 14 Mad. 271.

maintainable, the plaintiff-appellant having not complied with section 11 of the Urban Rent Control Act, 1948. In the result this appeal fails and is accordingly dismissed, with costs; Advocate's fees Kyats 85.

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ABDULLA KHAN *v.* ABDUL MAJID.

U ON PE, J.

APPELLATE CIVIL.

Before U Thaung Sein and U Bo Gyi, JJ.

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Feb. 24.

MRS. R. D'SOUZA (APPELLANT)

v.

MRS. D. McCANN (RESPONDENT). *

Brokerage on sale of property—When earned—Commission contracts, nature of—Rights and liabilities of principal and agent arising thereunder.

Held: The question whether an agent is entitled to commission has repeatedly been litigated and it has usually been decided that if the relation of buyer and seller is really brought about by the act of the agent he is entitled to commission although the actual sale has not been effected. There is no duty cast upon him to arrange for the execution of the sale deed and the receipt of the sale price by the principal.

James T. Burchell v. *Gowrie and Blockhouse Collieries Ltd.*, (1910) A.C. p. 614; *The Municipal Corporation of Bombay* v. *Cuverji Hirji and others*, I.L.R. 20 Bom. p. 124; *Vasanji Moolji* v. *Karsondas Tejpal*, I.L.R. 3 Bom. p. 627; *Green* v. *Bartlett*, 14 C.B.N.S., p. 681, referred to.

Held: (1) Commission contracts are subject to no peculiar rules or principles of their own; (2) No general rule can be laid down by which the rights of the agent or the liabilities of the principal under commission contracts are to be determined; (3) Contracts by which owners of property desiring to dispose of it put it into the hands of agents on commission terms are not contracts of employment in the ordinary meaning of those words. No obligation is imposed on the agent to do anything. The contracts are merely promises binding on the principal to pay a sum of money upon the happening of a specified event, which involves the rendering of some service by the agent.

Luxor (Eastbourne) Ltd. v. *Cooper*, (1941) A.C. p. 108 at pp. 124 and 125, followed.

Saw Hla Pru for the appellant.

N. C. Sen for the respondent.

* Civil 1st Appeal No. 71 of 1952 against the decree of the 2nd Judge, City Civil Court, Rangoon, in Civil Regular Case No. 522 of 1950.

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MRS. R. D'SOUZA v. MRS. D. MCCANN.

The judgment of the Bench was delivered by

U THAUNG SEIN, J.—This is an appeal against the judgment and decree of the City Civil Court dismissing the appellant-plaintiff's (Mrs. R. D'Souza) suit for the recovery of Rs. 3,800 alleged to be due to her as brokerage commission for the sale of respondent-defendant's (Mrs. D. McCann) house. The facts are simple and as follows:—

The respondent-defendant was the owner of a bulding known as No. 50, Prome Road, 6th Mile, which was sold to the Government Spinning and Weaving Board on the 25th March 1950 for a sum of Rs. 80,000. The appellant-plaintiff's case is that she was instrumental in the sale in that she was promised a commission of 5 per cent on the sale price but was paid a sum of Rs. 200 only. The total amount of the commission works out to Rs. 4,000 and hence she sought to recover the balance of Rs. 3,800. She relates that sometime in November 1948 the respondent-defendant, who is an old friend and schoolmate of hers, requested her to find a buyer for the house in question and also promised to pay the usual brokerage commission of 5 per cent on the sale price. The appellant-plaintiff continues and states that though she tried her utmost she could not get a buyer for many months. This may have been due in part to the fact that the house was under requisition by the Government of the Union of Burma and was actually occupied by an officer of the British Embassy. However, in or about the first week of January 1950, U Khin Maung (PW 2), Chief Executive Officer and Secretary of the Spinning and Weaving Board, appeared at the appellant-plaintiff's house and enquired after the

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U THAUNG SEIN, J.

whereabouts of the respondent-defendant. The appellant-plaintiff soon learnt from U Khin Maung that the Government Spinning and Weaving Board were anxious to buy the respondent-defendant's house and that U Hla Maung (PW 3), Secretary to the Government of the Union of Burma, Ministry of National Planning, who was in overall charge of the Government Spinning and Weaving Board was anxious to meet the house owner. Accordingly, the appellant-plaintiff took the respondent-defendant to the house of U Khin Maung a few days later and a general discussion took place regarding the proposed purchase of the house in question. This was followed by an inspection of the house 3 days later along with the appellant-plaintiff and the respondent-defendant. A day after the inspection the price was discussed and an interview was arranged with U Hla Maung. That interview took place on the 11th January 1950 in the office of U Hla Maung in the Secretariat and it may be noted that the appellant-plaintiff was present throughout with the respondent-defendant. The conversation which ensued between U Hla Maung and the respondent-defendant on that day is exceedingly important but unfortunately U Hla Maung has no clear recollection of the actual words uttered by the latter. However, U Khin Maung (PW 2), who was also present, remembered the text of the conversation and reproduced it as follows: "U Hla Maung asked the defendant to reduce the price. The defendant replied that she could not reduce. Then U Hla Maung asked her the reason for her not being able to reduce the price. The defendant replied that she would have to pay commission to the plaintiff and also that she had incurred debt." It appears that the

respondent-defendant asked for a lakh of rupees for the house and that the " debts " referred to meant a sum of Rs. 17,000 owed to Messrs. Balthazar & Son Ltd., in respect of an equitable mortgage on the house. U Hla Maung then began to bargain for a reduction of the price in the following terms: Mrs. McCann, this is a direct transaction between you and the Government. No commission is payable to anyone. Can't you reduce the price? No agreement was reached with regard to the price at that interview. The appellant-plaintiff met the respondent-defendant a few days later and learnt that U Hla Maung had offered Rs. 80,000, and that he had asked the respondent-defendant to give him a reply within the next two or three days. As the appellant-plaintiff felt that the respondent-defendant was likely to get her original price, she advised against accepting the reduced figure of Rs. 80,000. The respondent-defendant ignored this advice and finally sold the house to the Government Spinning and Weaving Board for a sum of Rs. 80,000 and without the knowledge of the appellant-plaintiff. News of the sale reached the appellant-plaintiff two days later-through U Khin Maung and she set out to contact the respondent-defendant with a view to demand her commission. Unfortunately, the appellant-plaintiff was unable to meet the respondent-defendant as the latter was away at Syriam. A few days later, the respondent-defendant appeared at the office of Mr. V. A. D'Souza (PW 1), the husband of the appellant-plaintiff, and handed over a sealed envelope addressed to the appellant-plaintiff. Inside that envelope was a sum of Rs. 200 without any covering note. The appellant-plaintiff then realised that the respondent-defendant

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was now bent on avoiding the full payment of the commission agreed upon earlier. She was thus compelled to issue a notice to the respondent-defendant as per Exhibit A dated the 31st March 1950, demanding payment of the balance of Rs. 3,800. There was no reply till the 17th April 1950 as per Exhibit B, in which the respondent-defendant denied ever having requested the appellant-plaintiff to find a purchaser for the house or that she had ever agreed to pay commission on the sale price. With regard to the payment of Rs. 200 this was said to have been "an *ex gratia* payment" at the appellant-plaintiff's request. This reply was drafted by Mr. P. D. Patel (DW 1), who was an adviser of the respondent-defendant and who had arranged for the final transfer of the house to the Government Spinning and Weaving Board.

It is noteworthy that the respondent-defendant refrained from giving evidence on oath and merely pleaded that she was too ill to appear in Court. She did not, however, produce any medical certificate in support of her statement. There is no dispute that the parties in this case are respectable persons and hence there is no reason to doubt the testimony of the appellant-plaintiff, especially as it stands unrebutted. The learned trial Judge accepted the appellant-plaintiff's story that the respondent-defendant did ask the former to try and find a buyer for the house. But he was convinced that there was no promise of a commission. He then went on to say that "the plaintiff did not carry out the negotiation for sale of the property but only got a purchaser for the house". The learned trial Judge went further and said that "there is further the duty of a broker

to get the sale deed executed and to have the sale price paid", but did not quote any authority in support of this view. Coming to the payment of Rs. 200, the learned trial Judge has remarked that " the defendant did pay Rs. 200 to the plaintiff as brokerage commission taking it to be the proper amount to which the plaintiff is entitled". According to him, the appellant-plaintiff " had carried out only a minor portion of the agreement, namely, getting of the purchaser for the house" and she was thus entitled to a sum of Rs. 200 and no more.

The learned Counsel for the respondent-defendant supports the views of the learned trial Judge, especially as regards the payment of Rs. 200. According to him, the respondent-defendant was rather charitably inclined towards the appellant-plaintiff, who was in difficult financial circumstances, and gave her a sum of Rs. 200 for the troubles she had taken in accompanying her to U Khin Maung and U Hla Maung. He has referred to the statement of U Khin Maung to the effect that he " employed the plaintiff only as a friend and messenger to bring the defendant to my office" and stressed that the only service rendered by the appellant-plaintiff was that of a " messenger ". If that be so, the respondent-defendant is an extremely generous lady as " messengers " are seldom or never paid Rs. 200 for carrying two or three messages over a short distance. Besides this, it is indeed strange and extraordinary that she did not take the trouble of explaining to the appellant-plaintiff the reason for the liberality at the time the monies were handed over in an envelope. The manner in which the monies were left in a sealed envelope at the office of the appellant-plaintiff's husband suggests that she was anxious to avoid

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U THAUNG SEIN, J.

any embarrassment in having to meet the appellant-plaintiff. Then again, if she did not request the appellant-plaintiff to find a buyer for the house and did not promise her a brokerage commission why did she refrain from denying this fact on oath? This is an unanswered question. The appellant-plaintiff on the other hand has sworn that she was asked to find a buyer, that a brokerage commission was promised, that she introduced U Khin Maung to the respondent-defendant and that the sale of the house took place. That a brokerage commission had been agreed upon between the parties is clearly borne out by the admission before U Hla Maung and the payment of Rs. 200 after the sale of the house.

The respondent-defendant's main defence is that the appellant-plaintiff did not in fact find the buyer for the house and that the Government Spinning and Weaving Board had independently of her (appellant-plaintiff) decided to buy the property and that she was merely utilised as a messenger as stated above. Under the circumstances—so says the learned Counsel for the respondent-defendant—no commission was payable even if there had been any agreement as stated by the appellant-plaintiff. In support of this view reliance is placed on the rulings in *James T. Burchell* v. *Gowrie and Blockhouse Collieries, Ltd.* (1), *The Municipal Corporation of Bombay* v. *Cuverji Hirji and others* (2) and *Vasanji Moolji* v. *Karsondas Tejpal* (3) which followed the principle laid down in *Green* v. *Bartlett* (4) as follows: "The question whether or not an agent is entitled to commission, has repeatedly been litigated, and it has

(1) (1910) A.C. p. 614.
(2) I.L.R. 20 Bom. p. 124.
(3) I.L.R. 3 Bom. p. 627.
(4) 14 C.B.N.S. 681.

usually been decided that, if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission, although the actual sale has not been effected by him."

It will be noticed that there is no mention in any of these rulings as to the duty of the broker to arrange for the execution of the sale deed and the receipt of the sale price as stated by the learned trial Judge. The learned Counsel for the respondent-defendant has stressed that the sale in the present case was not "really brought about by the act of the agent" even if the appellant-plaintiff be regarded as the agent of the respondent-defendant. The term "act" is not defined in any of the above rulings, but the learned Counsel says that merely taking a willing purchaser in the person of U Khin Maung to the house of the respondent-defendant and from thence to the office of U Hla Maung did not amount to performing any act to bring about the sale of the property. To put it in another way, since the Government Spinning and Weaving Board had decided to purchase the property without any reference to the plaintiff and merely stumbled on her in their search for the owner, the sale cannot be considered to have been "really brought about by the act of the agent". A chance or accidental meeting with a willing buyer is thus of no advantage to a commission agent. The learned Counsel goes further and suggests that the appellant-plaintiff should have assumed the role of a canvasser for the property and if as a result of her canvassing a buyer is traced then she would have been entitled to a commission. He has not cited any authority in support of this latter view.

The meaning of commission contracts and the rights and liabilities of the agent and the principal

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have been laid down in a most clear and succinct manner by Lord Russell in the *House of Lords'* case of *Luxor (Eastbourne) Ltd.* v. *Cooper* (1) in the following terms:—

"(1) Commission contracts are subject to no peculiar rules or principles of their own; the law which governs them is the law which governs all contracts and all questions of agency. (2) No general rule can be laid down by which the rights of the agent or the liability of the principal under commission contracts are to be determined. In each case these must depend upon the exact terms of the contract in question, and upon the true construction of those terms. And (3) contracts by which owners of property, desiring to dispose of it, put it in the hands of agents on commission terms, are not (in default of specific provisions) contracts of employment in the ordinary meaning of those words. No obligation is imposed on the agent to do anything. The contracts are merely promises binding on the principal to pay a sum of money upon the happening of a specified event, which involves the rendering of some service by the agent. There is no real analogy between such contracts, and contracts of employment by which one party binds himself to do certain work, and the other binds himself to pay remuneration for the doing of it."

Applying these principles to the present case, it is clear that the respondent-defendant did request the appellant-plaintiff to find a buyer for the house and agreed to pay a commission of 5 per cent on the sale price. There is no hint or suggestion on the part of the respondent-defendant that this commision would only be payable in respect of a sale to a buyer traced by the appellant-plaintiff through canvassing or any other similar means. Furthermore, at no time did the respondent-defendant withdraw or cancel the contract arrived at between themselves. No doubt the appellant-plaintiff met the buyer by accident when U Khin Maung turned up at her

(1) (1941) A.C., p. 108 at pp. 124 and 125.

house but since she was also in search of a buyer she acted promptly and introduced him to the house owner. This introduction was an "act" on her part and she followed this up by interviewing U Hla Maung. She did not rest content after the interview and gave the respondent-defendant sensible advice to hold out for her price of one lakh of rupees. Had the respondent-defendant held out a little longer she might have obtained the price originally demanded. It is difficult to understand how anything more could have been expected of the appellant-plaintiff. The respondent-defendant herself acknowledged the services rendered by the appellant-plaintiff when she admitted before U Hla Maung that brokerage commission was payable to the latter. To this U Hla Maung retorted that it was a direct transaction between the Gorvernment and the house owner and that no commission was therefore payable. This is, of course, U Hla Maung's personal opinion of the matter and did not affect the appellant-plaintiff's rights in any way. The respondent-defendant appears to have been aware that she could not possibly escape payment of a commission but had hoped to silence the appellant-plaintiff with a paltry sum of Rs. 200.

The rulings quoted by the learned Counsel for the respondent-defendant did not therefore really assist his client and on the contrary support the appellant-plaintiff's case. On the whole the appellant-plaintiff has performed her part of the contract, namely, to find a willing purchaser for the house and the sale has taken place she is certainly entitled to the commission of 5 per cent on the sale price as agreed upon between the parties. This appeal is, accordingly, allowed with costs and the judgment and decree of the trial Court are hereby set aside

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and instead there will be a decree in favour of the appellant-plaintiff for a sum of Rs. 3,800 as prayed for. It should be noted, however, that the appellant-plaintiff was permitted to appeal *in forma pauperis* and in accordance with Order 33, Rule 7 of the Code of Civil Procedure she is directed to pay a sum of Rs. 310 being the Court fees in this appeal to the Collector of Rangoon. Send a copy of this Judgment to the Collector.

APPELLATE CIVIL.

Before U On Pe and U Bo Gyi, JJ.

HAJEE ABDUL SHAKOOR KHAN (APPELLANT)

v.

MAUNG AUNG THEIN (RESPONDENT).*

H.C. 1952

Dec. 1.

Execution of decree—Whether decree-holder can be restrained by Injunction at the instance of a third party—Civil Procedure Code, Order 21.

Held : Notwithstanding the claim of any other person in possession of the suit property, it will be an injustice to deny the decree-holder the right to execute his decree or to proceed as a landlord under Rules 97 and 98 of Order 21 of the Civil Procedure Code in case of resistance, especially when the decree has nothing whatever to do with the claim of the third party.

Nasarvanji Cawasji Arjani v. *Shahajadi Begam and others*, A.I.R. (1922) Bom. 385 (2), referred to.

Kyaw Khin for the appellant.

S. N. Maine for the respondent.

The judgment of the Bench was delivered by

U ON PE, J.—This is an appeal against the order passed by the Rangoon City Civil Court in Civil Regular No. 540 of 1951 granting an *ad interim* injunction restraining the appellant from executing his ejectment decree in Civil Regular No. 645 of 1950 against the defendant Dr. Ba Glay.

It may not be out of place to state a few facts relating to the passing of the ejectment decree in question. It was passed with the consent of the parties on these terms, *viz.*, that the judgment-debtor Dr. Ba Glay was to pay one month's rent towards the arrears and costs along with the current rent on

* Civil Misc. Appeal No. 49 of 1951 against the order of the 3rd Judge City Civil Court, Rangoon, in Civil Regular No. 540 of 1951.

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HAJEE ABDUL SHAKOOR KHAN v. MAUNG AUNG THEIN.

U ON PE, J.

or before the 25th of every month, commencing from September 1950 and that, in default of any instalment, the judgment-debtor was liable to be evicted from the suit premises—Room No. 4, 185 / 187, 48th Street, Rangoon. This decree is dated the 5th September, 1950. On the failure of the judgment-debtor to pay the monthly instalment due, the appellant initiated the Execution Proceeding No. 911 of 1950 for issue of warrant of eviction in execution of the decree against Dr. Ba Glay. Dr. Ba Glay, in his petition, dated the 16th September, 1950, moved the Court to recall the warrant of ejectment on grounds, one of which reads as follows:

> "That your respondent submits that he has no knowledge of notice of execution, and that your respondent is ready and willing to pay the arrears of rent."

The executing Court, by its order, dated the 8th May, 1951, dismissed the petition to recall the warrant.

On 15th May, 1951, *i.e.* seven days later, the respondent Maung Aung Thein instituted the present suit Civil Regular No. 540 of 1951, for declaration and perpetual injunction against the appellant out of which suit the present apppeal has arisen. In paragraph 6 of the plaint in the suit the plaintiff prays "for a perpetual injunction restraining the defendant from ejecting actually the plaintiff from the said room."

It has been urged by the appellant that inasmuch as the ejectment decree was not against any person claiming the right title and interest in the suit premises independently of Dr. Ba Glay, the appellant had the right to execute the decree against Dr. Ba Glay and other person or persons claiming through or under him. The next point urged is that

the proper remedy for a person other than the judgment-debtor, claiming to be in possession of the suit property on his own account or on account of some person other than the judgment-debtor, is to make the claim for possession under the relevant rules of Order 21 of the Civil Procedure Code.

We do not propose to discuss here anything which might prejudice the pending case and we shall, therefore, content ourselves with making certain observations which would be sufficient for the purpose of disposing this appeal. The learned Judge of the lower Court has allowed the injunction to remain in force further on the ground that "the balance of convenience weighs in favour of the plaintiff." We do not think that, in doing so, he has put the case in its true light. In the first place, it will be an injustice to deny the decree-holder in this case the right to execute his decree against Dr. Ba Glay for decretal amount and costs awarded against Dr. Ba Glay, notwithstanding the claim of any other person in possession of the suit premises. Secondly, the decree-holder should not be denied his right as landlord to proceed under Rules 97 and 98 of Order 21 of the Civil Procedure Code, in case of resistance or obstruction to the deliverance of possession. In our view, we do not think it right and proper that the door should be shut against the party from seeking to get the benefit of his decree, especially upon the decree which has nothing whatever to do with the respondent Maung Aung Thein's claim. This view is in consonance with the principle laid down in *Nasarvanji Cawasji Arjani* v. *Shahajadi Begam and others* (1) where the facts are very similar to those in the present case. In

(1) A.I.R. (1922) Bom. 385 (2).

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UON PE, J.

that case the plaintiffs, as owners of the property, filed a suit against the defendant claiming that they were entitled to possession on the ground that the lease had expired and that the decree which the defendant had obtained against his sub-tenants for possession was not binding upon them and for an injunction against the defendant not to take possession; and after the suit was filed, they asked for, and were granted a temporary injunction restraining the defendant from executing his decree against the sub-tenant. Macleod C.J., held as follows:

". . . .The Court has no jurisdiction to restrain the defendant from seeking to get the benefit of the decree he has obtained, which has nothing whatever to do with the plaintiff's claim. What the plaintiffs ought to have asked for was the appointment of a Receiver, so that the Court might take charge of the property through its Receiver pending the settlement of the dispute between the plaintiffs and the defendant."

We must accordingly set aside the order granting *ad interim* injunction with costs; Advocate's fees Kyats 34.

APPELLATE CIVIL.

Before U Bo Gyi and U On Pe, JJ.

S. S. V. RAMACHANDRAN (APPELLANT)

H.C. 1952

Dec. 23

v.

K.P.A.N.K.T. KATHIRESAN CHETTYAR (RESPONDENT).*

Liabilities (War-Time Adjustment) Act, 1945—Order under s. 5—No appeal lies—Distinction between applications for execution of decree under the Act and under the Civil Procedure Code—S. 4, applicability of.

Held : An appeal is a creature of statute and as the Liabilities (War-Time Adjustment) Act has made no provision for an appeal against an order passed under s. 5 an appeal is not competent.

Held : An application for leave of the Court to execute a decree under s. 3 of the Act raises different questions for consideration from those that arise in applications for execution of decrees under the Civil Procedure Code.

U Maung Gale v. *V.V.K.R.V.S. Velayuthan Chettyar*, (1950) B.L.R. 220, referred to.

Held further : S. 4 of the Act is not applicable to a debt or obligation arising by virtue of a contract made after the commencement of the Act.

R. Jaganathan for the appellant.

P. B. Sen for the respondent.

The judgment of the Bench was delivered by

U BO GYI, J.—This appeal purports to be one under section 47, read with section 96, of the Code of Civil Procedure and is made against the order of the District Court of Insein, dated the 4th October, 1951, under section 5 of the Liabilities (War-Time Adjustment) Act, 1945, granting leave to the appellant to execute a mortgage decree obtained by him against the respondent but on condition that

*Civil Misc. Appeal No. 4 of 1952 against the order of the District Court, Insein, in Civil Misc. No. 4 of 1951, dated the 4th October 1951.

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U BO GYI, J.

the decree must be executed only after the 1st October, 1953. The respondent has raised a preliminary objection that no appeal lies against the order in question.

The brief facts of the case are that on the 5th April, 1940, the appellant obtained a preliminary mortgage decree against the respondent. For some reason or other, a final decree was not obtained and then the war intervened. On the 28th March, 1947, the parties filed a joint application asking the Court to pass a final decree on the terms set out in their petition, and a final decree was accordingly passed. When the appellant applied for leave under sections 3 and 4 of the Liabilities (War-Time Adjustment) Act for permission to execute the decree, the respondent opposed the application. The District Court held an enquiry and passed the order which is now the subject of the appeal.

The preliminary objection is not without substance. It is settled law that an appeal is a creature of the statute and that, therefore, unless express provision for appeal against an order is made in an enactment, no appeal lies against that order. We can find no provision in the Liabilities (War-Time Adjustment) Act, 1945, providing for an appeal against an order passed under section 5 of the Act. The respondent's learned Advocate is fortified in his contention by the fact that under section 13 of the Act provision is made for an appeal against a scheme approved under section 10 of the Act. Further, it has been observed by a Bench of this Court in *U Maung Gale* v. *V.V.K.R.V.S. Velayuthan Chettyar* (1) that an application for leave of the Court to execute a decree under section 3 of

(1) (1950) B. L. R. 220.

the Act is distinct from an application for execution of the decree and that the questions which fall to be decided in such applications are different. It would seem therefore that no appeal lies against the order of the District Court.

Even if an appeal lay, we should not be prepared to interfere with the order. The learned District Judge has gone carefully into the evidence before passing the order he did and we find ourselves in agreement with his view that relief should be granted to the respondent.

It is contended on the appellant's behalf that, in view of the proviso to section 4 of the Liabilities (War-Time Adjustment) Act, the District Court has no jurisdiction to grant relief under the Act. The proviso runs :

> " Provided that nothing in this section shall apply to any remedy or proceeding available in consequence of any default in the payment of a debt, or the performance of an obligation, being a debt or obligation arising by virtue of a contract made after the commencement of this Act."

We are of the opinion that the proviso does not apply to the circumstances of the case; for, it says that section 4 of the Act cannot be invoked in the case of a debt or obligation arising by virtue of a contract made after the commencement of the Act. Here, in this case, the contract *i.e.*, the mortgage, was made before the war and once the appellant has obtained a preliminary mortgage decree, under Order 34, Rule 5 (3) of the Code of Civil Procedure he has a right to obtain a final decree if no payment has been made. The compromise entered into between the parties, in these circumstances, cannot be regarded as a contract made after the commencement of the Liabilities (War-Time Adjustment) Act. The

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intention of the Act would seem to be to relieve debtors who have been hit by the war in respect of debts and obligations incurred by virtue of contracts made before the commencement of the Act.

Accordingly, the appeal is dismissed with costs ; Advocate's fee in this Court, three gold mohurs.

APPELLATE CIVIL.

Before U Aung Khine, J.

MA HLA MYINT AND FOUR OTHERS (APPLICANTS)

v.

MA SEIN MYAING AND TWO OTHERS (RESPONDENTS).*

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Oct. 30.

Civil Procedure Code, s. 10—Stay of suit—Prior suit declared pending and undecided—No objections raised in subsequent suit—Procedure and validity of orders cannot be challenged in appeal—Parties interested must apply to original Court to be impleaded—Administration suit—Strangers not necessary parties—Revision of interlocutory order, when necessary.

Held : The rule under s. 10, Civil Procedure Code is one of procedure pure and simple and can be waived with the consent of the parties and when they expressly ask the Court to proceed with the subsequent suit.

Maung Thit Maung v. *Maung Tin and three others*, (1949) B L.R. p. 64, distinguished.

Gangaprashad and others v. *Mt. Banaspati*, A.I.R. (1937) Nag. 132; *Jang Bahadur* v. *Bank of Upper India, Ltd., in liquidation*, I.L.R. (1928) Luck. Vol. 3, p. 314, referred to.

Held : The defendants not only waived their rights to stay the second suit but actually acquiesced in the Court proceeding with the case, and therefore they cannot be permitted to object to the exercise of such jurisdiction by the Court.

Held further : It is not for this Court to go into the question whether the 3rd, 4th and 5th applicants should have been impleaded as parties to the suit as no application was made in the lower Court to implead them.

Valliammal and another v. *Official Assignee, Madras*, A.I.R. (1933) Mad. 74, referred to.

Held also : Where a person outside the family is in possession of a part of the estate, such person cannot be joined as a party to an administration suit which is a suit for account.

Ah Kyan Sin and another v. *Yeo Ah Gwan and others*, A.I.R. (1937) Ran. 497, referred to.

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* Civil Revision No. 53 of 1951 against the order of the District Court, Amherst, in Civil Regular No. 1 of 1946, dated the 17th May 1951.

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Held also: Under s. 115, Civil Procedure Code, the High Court can revise an interlocutory order of a subordinate Court but it is only when a miscarriage of justice will inevitably ensue that it will do so.

Salam Chand Kannyram v. *Bhagwan Das Chilhama*, (1926) I.L.R. 53 Cal. 767 at p. 775, followed.

Tun I for the applicants.

S. T. Leong for the respondent No. 1.

S. A. A. Pillay for the respondent No. 2.

U AUNG KHINE, J.—This is an application in revision against the order of the District Judge, Amherst, dated the 17th May, 1951, in his Civil Regular Suit No. 1 of 1946. That was a suit filed by the first respondent Ma Sein Myaing for the administration of the estate of U Tin, deceased who died in Moulmein in the year 1944. The applicants U Shan Byu, Maung Soe Tin and U Ba Yin are not parties to the suit. In the lower Court, U Shan Byu acted as the representative of the first two applicants in his capacity as *guardian ad litem.*

Ma Thin Hla, also deceased, was the first wife of U Tin, deceased. Ma Hla Myint and Maung Ba Aung, the first two applicants, are the children of U Tin by Ma Thin Hla. Ma Sein Myaing, first respondent, is the second wife and Ma Yu May, the second respondent, the third wife of U Tin. U Shan Byu is the father of U Tin and Maung Soe Tin is his son-in-law. U Ba Yin, the fifth applicant, is also the son of U Shan Byu.

U Tin died sometime in 1944 and Ma Sein Myaing and her daughter Nu Nu Yi filed a suit for the administration of his estate in Civil Regular No. 9 of 1944 in the Court of the Divisional Judge, Moulmein, during the Japanese occupation.

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The defendants then were Ma Hla Myint, Maung Ba Aung and U Shan Byu. This suit remained undisposed of at the time of reoccupation of Burma by the Allied Forces.

In the year 1946, Ma Sein Myaing and her daughter Nu Nu Yi, instead of reviving the suit they had filed in the Court of the Divisional Judge, Moulmein, (Civil Suit No. 9 of 1944), in Civil Regular No. 1 of 1946 filed a fresh suit again for the administration of the estate of U Tin, impleading Ma Hla Myint, Maung Ba Aung and Ma Yu May as defendants. In the original plaint as well as in the subsequent amended plaint, the fact that the plaintiffs had filed a suit for the administration of U Tin's estate in Civil Regular No. 9 of 1944 of the Divisional Court of Moulmein and that this suit was pending and remained undecided at the time of the British reoccupation was mentioned.

No objection was raised by the defendants to the plaintiff's proceeding with the fresh suit. A preliminary decree, by consent of the parties, was passed on 18th June, 1947 following a compromise petition made by Ma Sein Myaing, plaintiff and Ma Yu May, the 3rd defendant. In this preliminary decree, it was ordered that the accounts of both moveable and immoveable properties belonging to the estate of U Tin vested or otherwise, outstanding and undisposed of at his death be taken and to find out as to the respective shares, under the Burmese Buddhist Law, of the plaintiff and the 3rd defendant together and that of the first and second defendants together in the estate. An account of the funeral and testamentary expenses and liabilities, if any, due by the estate of U Tin was also directed to

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be taken. For the purpose of carrying out the above, Mr. S. A. Jabbar, Higher Grade Pleader, was appointed a Commissioner.

The Commissioner on 22nd June, 1950, submitted his report to the Court. Against this report, the plaintiff as well as the defendants filed written objections. On 17th May 1951, the learned District Judge passed orders, in which he directed the Receiver to take steps to recover the properties mentioned in the Schedule if they still exist or their value from the persons named in the order.

It is now submitted on the authority of the decision in *Maung Thit Maung* v. *Maung Tin and three others* (1) that the learned Judge of the District Court should have stayed proceedings in Civil Suit No. 1 of 1946 in view of the fact that Civil Suit No. 9 of 1944 of the Divisional Court of Moulmein was still pending, especially as the cause of action in the two suits are identical.

In the case cited above, U Thaung Sein J., held that provisions of section 10 of the Code of Civil Procedure are mandatory and Courts are bound to stay a subsequent suit if a former suit is pending irrespective of whether a party makes an application for stay or not. The facts obtaining in that case are as follows:

The plaintiff-respondents instituted Civil Regular Suit No. 2 of 1942 in the Subdivisional Court of Maubin for specific performance of a contract of sale. This suit was still undecided when the Japanese military forces occupied Burma. In spite of a proclamation issued by the Commander-in-Chief of the Japanese Armed Forces that the litigants were

(1) (1949) B.L.R. p. 64.

to revive or to reconstruct all suits pending before the evacuation of the British within 90 days of the promulgation of Act No. VI of 1305 B.E. (1943), no steps were taken to have Civil Regular Suit No. 2 of 1942 revived or reconstructed by the plaintiff-respondents. Instead, they instituted a fresh suit namely Civil Regular Suit No. 9 of 1944 on the same cause of action. It was pleaded that the subsequent suit was not maintainable. This plea was rejected in both the two lower Courts. It was pointed out by U Thaung Sein J., that the Commander-in-Chief of the Japanese Armed Forces exceeded his powers in fixing a time-limit, within which pending cases should be revived or reconstructed when he enacted Act No. VI of 1305 B.E. and therefore, this Act was clearly *ultra vires*. It was also pointed out that the correct course for the plaintiff-respondents to have adopted was to apply for the reconstruction of Civil Regular Suit No. 2 of 1942 rather than to proceed with the hearing of the subsequent suit. The judgments and decrees of the two lower Courts were accordingly set aside and the second suit, instituted by the plaintiff-respondents was stayed, pending the decision of Civil Regular Suit No. 2 of 1942.

In this case, the facts are different. Although in the pleadings, it was specifically mentioned that Civil Suit No. 9 of 1944 of the Divisional Court of Moulmein was pending, the defendants did not raise any objection to proceeding with the second suit. On the other hand, the parties agreed to have a Receiver appointed in the second suit and on diverse occasions, they withdrew large sums of money deposited in Court by the Receiver. Secondly, they agreed to have a preliminary decree

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passed and they also agreed to have a Commissioner appointed. After the Commissioner's report was submitted, the learned District Judge doubted the propriety of the order passed by one of his predecessors on the compromise-petition filed by the plaintiff and the third defendant, as minor-defendants were not parties to the petition. The Advocate for the minors appeared before the Court at a subsequent date and submitted that the only thing left to be done in this case was to hear objections to the report of the Commissioner. Furthermore, on 19th March 1951, when arguments were heard the parties, represented by their Advocates, submitted that it was agreed between the parties as to what share each party is entiled to in the estate. It was only when the learned District Judge directed the Receiver to institute a suit against certain persons, who are in possession of the property belonging to the estate that this application in revision is filed.

It has been pointed out by Vivian Bose J., in *Gangaprashad and others* v. *Mt. Banaspati* (1) that the institution of a second suit is not barred by section 10 of the Civil Procedure Code and all that it says is the trial of the second suit cannot be proceeded with. Furthermore, as the rule is one of procedure pure and simple, in civil cases the rule can be waived with the consent of the parties and when the parties expressly ask the Court to proceed along with a subsequent suit, neither side can afterwards turn round and challenge the validity of these proceedings because of section 10. In the Privy Council case of *Jang Bahadur* v. *Bank of*

(1) A.I.R. (1937) Nag. 132.

Upper India, Limited, in liquidation (1), in the course of the judgment, Lord Sinha observed as follows:

"This is a matter of procedure and not of jurisdiction. The jurisdiction over the subject-matter continues as before, but a certain procedure is prescribed for the exercise of such jurisdiction. If there is non-compliance with such procedure the defect might be waived and the party who has acquiesced in the Court exercising it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings."

If the proceedings in the second suit are studied carefully, it would be seen that the first and second defendants, through their guardian, not only had waived their rights to stay the second suit but also had actually acquiesced in the Court proceeding with the case. Therefore, they cannot now be permitted to object to the exercise of such jurisdiction by the Court; to allow them to do so would mean a gross abuse of procedure. Furthermore, it would mean the destroying of all the fruits of labours of the District Court in this suit within the last six years or more.

On behalf of applicants U Shan Byu, in his personal capacity, Maung Soe Tin and U Ba Yin, it is submitted that they should have been impleaded as parties to the suit. This is the first time they have raised this point. They probably feel that the order of the Court, directing the Receiver to proceed against them for the recovery of certain items of property belonging to the estate was not justified. It is contended that as the order of the learned District Judge shows that they are meddling with the estate, they should be impleaded as parties in this suit. Reliance is placed on the following observation made by Beasley C.J., in the case of

(1) I.L.R. (1928) Luck. Vol. 3, p. 314.

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MA E LA MYINT AND FOUR OTHERS v. MA SEIN MYAING AND TWO OTHERS.

U AUNG KHINE, J.

Valliammal and another v. *Official Assignee, Madras* (1):

"Appellant 1 is the next-of-kin of the deceased and a next-of-kin is certainly a proper party to an administration suit. As regards the other appellants and indeed as regards appellant 1, the allegations are that they have intermeddled in the estate and if those allegations are true—it is not for us to inquire into them—that is a matter for the learned trial Judge—then obviously they would be proper parties to the suit; but in my view it is unnecessary to go into this question."

It must be pointed out that they had never come forward to make an application in the lower Court to be impleaded as parties. It is not for this Court to go into this question. However, I think it necessary to point out that a contrary view has been taken in the case of *Ah Kyan Sin and another* v. *Yeo Ah Gwan and others* (2). It was held in that case that an administration suit is a suit for an account and the cause of action is entirely different from a suit for recovery of possession of land. Where therefore a person outside the family is in possession of a part of the estate, such person cannot be joined as a party to an administration suit. The proper course for the representative of the estate is to file a separate suit for the recovery of such part.

Lastly, I must point out that in this suit, the learned District Judge had taken precautions at all stages of the case to see that justice is done. His Diary Order dated 5th December 1950 shows that he was scrupulously careful to safeguard the interests of the minor-defendants. He had also taken great care to see that those who are not interested in the estate should not enjoy the estate property.

(1) A.I.R. (1933) Mad. 74. (2) A.I.R. (1937) Ran. 497.

It is true that the High Court can, in suitable cases under section 115 of the Civil Procedure Code, revise an interlocutory order passed by a subordinate Court from which no appeal lies to the High Court, but in this connection, the following observation of Page C.J., in *Salam Chand Kannyram* v. *Bhagwan Das Chilhama* (1) is highly deserving of attention:

> " 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."

For the reasons set out above, no interference is called for. The application is dismissed with costs, three gold mohurs.

1) (1926) I.L.R. 53 Cal. 767 at p. 775.

APPELLATE CIVIL.

Before U Aung Khine, J.

H.C. 1952

Oct. 2.

SAW AUNG GYAW (APPLICANT)

v.

MAUNG AUNG SHEIN AND TWO (RESPONDENTS).*

Specific Performance—Decree of trial Court for reconveyance of land on payment maintained by appellate Court with slight modification in the amount—Time fixed for payment by the appellate Court, whether can be enlarged by the trial Court.

Held : In a decree for specific performance, which is of a preliminary nature, on condition of payment of the amount in Court within a certain time, the original Court, particularly when the decree of the appellate Court is fundamentally the same, still has jurisdiction in the matter, and can on good grounds shown extend the time fixed for payment by the appellate Court.

Mohideen Kuppai and another v. *Mariam Kanni and others*, 12 I.C. p. 139 ; *Parmanand Das* v. *Kripasindhu Roy*, I.L.R. 37 Cal. p. 548 ; *Mooriantakath Ammoo* v. *Matathankandy Vatakkayil Pokkan*, A.I.R. (1940)Mad. 817; *M. E. O. Khan* v. *M. H. Ismail*, (1948) B.L.R. p. 799, discussed.

Abdur Rahim Molla and others v. *Tamijaddin Molla*, A.I.R. (1933) Cal. 580; *Metta Rama Bhatlu* v. *Metta Annayya Bhatlu and others*, A.I.R. (1926) Mad. 144; *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib and others*, I.L.R.46 Mad., p. 148; *Ko Ba Chit and three* v. *Ko Than Daing and one*, 5 Ran. p. 615, followed.

Tun I for the applicant.

S. A. A. Pillay for the respondents.

U AUNG KHINE, J.—In Civil Appeal No. 33 of 1947 in the District Court of Amherst, a compromise decree was passed to the effect that the applicant Saw Aung Gyaw shall reconvey the suit paddy land to the respondents Maung Aung Shein and two others as legal representatives of one Daw Di (deceased) on their paying Rs. 2,500 to the applicant within 2

* Civil Revision No. 71 of 1951 against the order of the District Court of Amherst in Civil Appeal No. 15 of 1951, dated the 8th September 1951.

months from the date of the decree, *i.e.* 28th day of August, 1950. Daw Di, mother of the respondents, had filed a suit for specific performance of contract for the re-purchase of land in question and a decree was passed in her favour in the Court of the 1st Assistant Judge, Moulmein. It was decreed that the applicant Saw Aung Gyaw and his wife Ma Khin Htaw shall within one month from the date of the decree *i.e.* 9th September, 1947, reconvey the suit land to Daw Di on her payment of Rs. 1,500 (as principal) *plus* Rs. 900 or 750 baskets of paddy (as arrears of interest). It will thus be seen that the said compromise decree is merely a slight modification of the decree that was passed in the Court of 1st Assistant Judge, Moulmein. On 28th October, 1950, an application was made in the Court of first instance, *i.e.* 1st Assistant Judge, Moulmein by the respondents to extend the time for payment of Rs. 2,500 for reasons set out in their application, and in spite of a strong objection being taken by the applicant, the Court granted extension of the time asked for. An appeal against this order made in the District Court of Amherst was dismissed. Hence this application in revision.

The grounds taken up by the applicant are that (1) the Court of the 1st Assistant Judge, Moulmein, had no jurisdiction to extend the time for payment of money as set out in the consent decree of the appellate Court and (2) the decree of the appellate Court being a compromise decree, the time could not be enlarged except by consent of parties. The following decisions of various High Courts have been invoked in support of the applicant's case :—

Mohideen Kuppai and another v. *Mariam Kanni and others* (1); *Parmanand Das* v. *Kripasindhu*

(1) 12 I.C. p. 139.

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Roy (1); *Mooriantakath Ammoo* v. *Matathankandy Vatakkayil Pokkan* (2); *M. E. O. Khan* v. *M. H. Ismail* (3).

The decision in the first case was by a Bench of the Madras High Court. In a short judgment, without setting out the facts of the case, it was held that where time for payment of money is fixed by an appellate Court in its decree, it is not competent to a subordinate Court to which the decree is sent for execution to extend the time. The nature of the case in which this decision was made is not apparent and the facts there may not at all be similar to those now under consideration.

The facts in the second case of *Parmanand Das* v. *Kripasindhu Roy* (1), are entirely different from the case now under consideration. It was held that the only Court that could, after an appeal had been preferred, modify the terms of the decree or extend the time fixed in the decree for its execution, or suspend the order, made in the decree, would be the appellate Court.

In the third case of *Mooriantakath Ammoo* v. *Matathankandy Vatakkayil Pokkan* (2), a compromise decree was passed, fixing the time within which the landlord was to deposit the value of the improvement made to the land by the tenant. On deposit being made, the tenant was to surrender the property. The landlord failed to make the deposit within the period fixed by the decree. It was held that the Court could not extend the time under section 148 of the Civil Procedure Code and the decree could not be executed by eviction of the tenant.

In the last case, *i.e.*, *M. E. O. Khan* v. *M. H. Ismail* (3), the appellant was a tenant of the respondent in

(1) I.L.R. 37 Cal. p. 548. (2) A.I.R. (1940), Mad. 817.
(3) (1948) B.L.R. p. 799.

respect of two rooms in a house and a decree for his ejectment was passed in 1946. Subsequently, acting under the powers conferred upon the Court by sub-section (*3*) of section 14 of the Urban Rent Control Act, 1946, as substituted by Burma Act No. XXVI of 1947, altered the order previously passed in the following terms :—

" On the J/D paying to the D/H or depositing in Court within ten days from the date of this order the sum of Rs. 800 said to be due by way of rent for the period February to May 1946 and the costs of the suit in C.R. 1176 of 1946 the order for ejectment passed on 20th December 1946 shall stand unexecutable for so long as the J/D continues to pay regularly in advance by the 5th of each month the rent due for the use of the suit rooms, the rent to commence from the date on which occupation is restored to him by virtue of this order."

Appellant M. E. O. Khan made a default in respect of the rent payable for December, 1947 and following this an execution proceeding followed and in spite of objections raised, the decree-holder was allowed to have his decree executed. Reliance was placed on section 148 of the Civil Procedure Code and it was argued that the Court may, in its discretion, from time to time enlarge the period which is fixed by the Court for doing of any act, prescribed or allowed by the Court. This contention was overruled and it was held that the provisions of section 148 giving power to the Court to extend the time does not apply where time is allowed for doing an act by a decree or an order, having the force of a decree. The facts in that case are entirely different to those in the case now under consideration.

On the other hand, there is ample authority to show that in a decree for specific performance, on condition of payment of the amount in Court within a certain time, the Court has jurisdiction on good

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grounds shown to extend the time for payment of such amount.

In *Abdur Rahim Molla and others* v. *Tamijaddin Molla* (1), it was held that in a decree for specific performance, the condition of payment of a certain sum of money was in the nature of a preliminary decree and the Court had jurisdiction to extend the time if it was satisfied that there were adequate reasons for the same.

In the case of *Metta Rama Bhatlu* v. *Metta Annayya Bhatlu and others* (2) it was held that as an order for specific performance of the contract for transfer of immoveable property is in the nature of a preliminary decree, and as the Court does retain the power to make any stipulation it thinks fit with reference to the performance, that power to extend time vests in the Court, which actually passed its order for specific performance, although it is an appellate Court.

Another case on this point is that of *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib and others* (3). In that case, the plaintiff was given a decree for specific performance of contract for the re-conveyance of certain lands to him by the defendants on his paying the price within a certain time. The defendants preferred an appeal against the decree and the plaintiff made an application to the original Court for extension of time limited in the decree and the Court ordered the application to lie over pending the appeal. The defendants contended that as the plaintiff did not pay the decretal amount, the decree had become infructuous and the time could not be extended by either the orginial or the appellate Court.

(1) A.I.R. (1933) Cal. 580. (2) A.I.R. (1926) Mad. 144.
(3) I.L.R. 46 Mad. p. 148.

It was held that the appellate Court had power to extend the time limited by the original decree and the original Court had still jurisdiction in the matter and had full powers to deal with any point that might arise including, if necessary, an application for time.

In *Ko Ba Chit and three* v. *Ko Than Daing and one* (1) it was held that if no date has been fixed in a decree for specific performance of a contract of sale, such a date may be fixed by the Court which made the decree after the decree has been passed, and that, whether the date is fixed in the decree or in a subsequent order, the Court which made the decree has a discretion to extend the time.

It is clear that the decree passed in the suit, in the light of the rulings above, was in the nature of a preliminary decree. The Court which passed the original decree was the Court of 1st Assistant Judge, Moulmein, and the compromise decree was passed in the appellate Court, only slightly modifying that decree and therefore the decision in this case would turn on the proprietry of incorporating the appellate decree in terms of the original decree. It must be observed that the original Court still has jurisdiction in the matter, and therefore the contention that it had no power to extend the time as embodied in the appellate decree is against the run of authorities quoted above. It has not been shown that the discretion exercised by the trial Court was either illegal or was fraught with material irregularities. Cogent reasons have been advanced by the learned Assistant Judge in granting extension of time to the respondents. For all these reasons, I would dismiss the application with costs.

(1) 5 Ran. p. 615.

APPELLATE CIVIL.

Before U Aung Khine, J.

H.C. 1952

Nov. 25.

U PO TOKE AND ONE (APPLICANTS)

v.

U BA THAW (RESPONDENT).*

Mortgage deed, unregistered—Admissibility of, in evidence—Registration Act, s. 49 Proviso— Doctrine of Part Performance— Transfer of Property Act, s. 53-A —The rule in Ma Kyi *v.* Ma Thone and another.

Held: The proviso to s. 49 of the Registration Act empowers Courts to admit unregistered documents in evidence for the purpose of proving part performance, which, as embodied in s. 53-A of the Transfer of Property Act, has assumed a statutory right available to the defendant in possession under that document to resist dispossession.

Held: A change in the possession of land based on a contract must always be regarded as an act of part performance both of the person who delivers possession and of the person who takes possession.

Held further: The case of *Ma Kyi* v. *Ma Thone and another* is authority for the proposition that where the instrument of mortgage is in writing and the transaction also falls within s. 53-A of the Transfer of Property Act, the terms of the document can be relied on.

Ma Kyi v. *Ma Thone and another*, I.L.R. 13 Ran. 274, followed.
Ko U Mar and one v. *Ma Saw Myaing*, (1950) B.L.R. 80, referred to.

Aung Min (2) for the applicants.

S. R. Chowdhury for the respondent.

U AUNG KHINE, J.—This application is against the order of the Subdivisional Judge, Pyinmana, in his Civil Regular Suit No. 24 of 1951, in which he held that an unregistered document creating a mortgage cannot be admitted as evidence in a case where the plaintiff sues for the recovery of possession of a

* Civil Revision No. 1 of 1952 against the order of the Subdivisional Court of Pyinmana in Civil Regular Suit No. 24 of 1951, dated the 10th November 1951.

piece of land based on title. The defendants claimed that they were put in possession of the land in pursuance of the terms embodied in the document sought to be admitted.

The proviso to section 49 of the Registration Act reads:

"Provided that an unregistered document affecting immoveable property and required by this Act or the Transfer of Properry Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of section 53-A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument."

Thus, the proviso empowers Courts to admit unregistered documents in evidence for the purpose of proving part performance. Since 1929, the doctrine of part performance, as embodied in section 53-A of the Transfer of Property Act, has assumed a statutory right, but only as a right available in defence to enable a defendant to resist dispossession of land if he holds the same under an unregistered document.

The case of *Ma Kyi* v. *Ma Thone and another* (1), referred to by the learned trial Judge, is a classic in itself and worthy of profound study. At page 280, after portraying the shape usufructuary mortgages in Burma and India usually take, as a safeguard against possible evasion of law, it was held: "It follows, therefore, that unless *the instrument of mortgage in such a case is in writing, and the transaction also falls within section 53-A of the Transfer of Property Act*, the terms of the mortgage cannot be relied on as a ground of attack or of defence by either the plaintiff or the defendant in a mortgage suit, except in cases in which they are

(1 I.L.R. 13 Ran. 274.

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embodied in a duly registered written instrument." These words have a direct bearing in the suit under consideration inasmuch as the document sought to be admitted as evidence is an instrument of mortgage in writing and the transaction also undoubtedly falls within the meaning of section 53-A of the Transfer of Property Act. A change in the possession of land based on a contract must always be regarded as an act of part performance both of the person who delivers possession of it and of the person who takes possession. Section 53-A of the Transfer of Property Act applies to usufructuary mortgages where the mortgagee in part performance of the contract has taken possession of the land—See *Ko U Mar and one* v. *Ma Saw Myaing* (1).

The learned trial Judge appears to have overlooked the exception to the general rule "that the terms of the mortgage cannot be relied on as a ground of attack or of defence by either the plaintiff or the defendant in a mortgage suit, except in cases in which they are embodied in a duly registered written instrument."

It is contended on behalf of the respondent in this application that the document in question provided that the mortgagees were to enjoy the usufruct of the land for 3 years only and, therefore, since the document has already served its purpose for which it was created, it cannot be used as evidence in this suit. This contention, I consider, is untenable. Here, the document is only sought to be admitted to prove the nature of the possession and not for any other purpose. There cannot be the slightest doubt that the defendants cannot claim any right in respect of the property except as provided by the express terms of the contract into which they have entered.

(1) (1950) B.L.R. 80.

For the above reasons, the document creating the mortgage should have been received as evidence in the trial Court; the mistake may now be corrected.

In the result the application is allowed with costs; Advocate's fees three gold mohurs.

APPELLATE CIVIL.

Before U Bo Gyi, J.

H.C. 1952

Nov. 13.

ABDUL SHAKOOR ABBA (APPLICANT)

v.

DAWOOD HAJI ALLY MOHAMED (RESPONDENT).*

Promissory Note—Suit by Indorsee—Negotiable Instruments Act, s. 118—Presumption under—Burden of proof when on holder in due course and when on maker—Trial Court committing material irregularity conducive of irremediable damage—Intervention in current litigation warranted.

Held: Where the defendant admits execution of the promissory-note but alleges material alteration the burden of proof lies on him.

J. K. Shaha v. *Dula Meah*, (1939) R.L.R. 397, followed.

Held: Under s. 118 of the Negotiable Instruments Act the presumption arises that a negotiable instrument was indorsed for value and the holder is a holder in due course. It is only when the document has been obtained by fraud or for unlawful consideration that the burden lies on the holder to prove that he is a holder in due course.

Held further: Where an error has been committed which is so material that it may affect the ultimate decision and which may do irreparable damage a correction must be made in current litigation.

A. N. S. Venkataguri Ayyangar and another v. *The Hindu Religious Endowments Board, Madras*, I L.R. (1950) Mad. 1. (P.C.), referred to.

Ram Oudh v. *Union Government of Burma*, (1939) R.L.R. 591, followed.

N. R. Majumdar for the applicant.

N. Bose for the respondent.

U BO GYI, J.—This revision application is against the order dated the 29th November 1951 placing the burden of proof on the plaintiff in Civil Regular Suit No. 1 of 1951 of the Court of the Additional District

* Civil Revision No. 6 of 1952 against the order of the Additional District Judge's Court, Mandalay, in Civil Regular Suit No. 1 of 1951, dated the 29th November 1951.

Judge, Mandalay. In that suit the plaintiff-applicant sued the defendant-respondent for recovery of Rs. 12,577-8-0 on a promissory-note alleged to have been executed by the respondent for consideration in favour of Abdul Sattar Hajee Ally, who in his turn indorsed it to the applicant for consideration. At first, the respondent filed a written statement which was rather vague and it was only when the applicant called upon him either to admit or deny the execution of the promissory-note, that the respondent filed an additional written statement in which he admitted having executed the document but stated that in the circumstances narrated in the additional written statement he had been induced by the fraud of Abdul Sattar Hajee Ally to sign the document. He also pleaded that the document was vitiated by material alterations and, further, denied that the applicant was the holder in due course. I may here mention in passing that the respondent has not denied that the pronote has been indorsed to the applicant by the payee.

On the above pleadings the decision of the Bench of the late High Court of Judicature at Rangoon in *J. K. Shaha* v. *Dula Meah* (1) is in point. It has been held there that if the plaintiff sues on a promissory-note and the defendant admits his signature on the promissory-note but asserts that he did not sign the pronote in the condition in which it was filed, the burden of proof lies upon the defendant. No evidence has yet been led in this case, and Baguley J., in his referring judgment made these enlightening observations :

"In addition to the pleadings there was the promissory-note itself, and the points on which the Court at that stage

(1) (1939) R.L.R. 397.

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U BO GYI, J.

would have to decide would be the pleadings and the promissory-note with its admitted signature. If no further evidence were available with regard to the note, it seems to me that the defendant would have to fail because, when a document is filed, the assumption is that the document is and means what it says. The document would be a promissory-note signed by the defendant, and it will be for the defendant to show that it was other than what it appeared to be. At the stage when the proceedings consist merely of the pleadings and the promissory-note the burden of proof, in my opinion, should be regarded as being on the defendant, because he has got to prove that the promissory-note is not what it appears to be; *omnia praesumuniur rite esse acta.*"

I find myself in respectful agreement with these observations. Added to all this is the fact that under section 118 of the Negotiable Instruments Act, the presumption arises that a negotiable instrument was made and/or indorsed for consideration and that the holder of a negotiable instrument is a holder in due course. The learned Advocate for the respondent takes his stand on the proviso to section 118 (*g*) of the Negotiable Instruments Act, but the relevant portion of the proviso itself states that it is only when a negotiable instrument has been obtained from the maker or acceptor thereof by means of an offence of fraud, or for unlawful consideration that the burden of proving that the holder is a holder in due course lies upon him. No such proof has been given in this case. Similarly, when the respondent pleads material alteration of the document, it is for him to show how the document has been materially altered. Further, where a pronote has been executed the holder is entitled to recover according to its tenor.

For all the above reasons I hold that the burden of proving all the material issues that remain

for decision in the case lies upon the defendant-respondent, and that in placing the burden of proof on those issues on the plaintiff-applicant the trial Court acted at least with material irregularity, "that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision" within the meaning of the decision of the Privy Council in *A. N. S. Venkataguri Ayyangar and another* v. *The Hindu Religious Endowments Board, Madras* (1). I also find that the interlocutory order should be corrected at this stage of the suit because, unless so corrected, it may do irreparable damage to the plaintiff-applicant—vide *Ram Oudh* v. *Union Government of Burma* (2).

The order under review is accordingly set aside and the trial Court will now try the suit in accordance with law. Advocate's fee in this Court is fixed at three gold mohurs.

(1) I.L.R. (1950) Mad. 1 (P.C.). (2) (1939) R.L.R. 591.

APPELLATE CIVIL.

Before U Bo Gyi, J.

H.C. 1952

Dec. 17.

SOONIRAM RAMESHUR (APPLICANT)

v.

U THA WIN (RESPONDENT).*

Rangoon City Civil Court Act, s. 13—Jurisdiction, all suits of civil nature up to ten thousand rupees - Act silent on different powers of four constituent Judges—Rules of practice have no force of law—Chief Judge has authority to transfer suit from his file to 3rd Judge.

Held: It is the Rangoon City Civil Court which is invested with jurisdiction to try all suits of a civil nature when the amount or value of the subject-matter does not extend over ten thousand rupees. The Court is presided over by four Judges; but the Act does not mention the extent of jurisdiction to be exercised by each particular Judge.

Held: Rules of practice and Standing Orders embodied in the Manual made from time to time as circumstances required do not have the force of law.

Held further: Under Rule 34 of the Rangoon City Civil Court the Chief Judge may withdraw any suit or proceeding from any Judge and transfer it to himself or to any other Judge for disposal; he is accordingly authorised to withdraw a suit from his own file and transfer it to another Judge.

B. K. Dadachanji for the applicant.

Hla Pe for the respondent.

U BO GYI, J.—This revision application is against the order dated the 9th January, 1952 of the learned 3rd Judge of the Rangoon City Civil Court which was passed in the following circumstances:—

* Civil Revision No. 13 of 1952 of the order of the 3rd Judge of the City Civil Court of Rangoon in Civil Regular Suit No. 668 of 1949, dated the 9th January 1952.

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U BO GYI, J

In 1949, the applicant Sooniram Rameshur sued respondent U Tha Win for ejectment from certain premises known as Nos. 105/107 Morton Street, Rangoon and recovery of arrears of rent. The suit was valued at Rs. 4,600 for purposes of jurisdiction. In 1950, the respondent along with others sued the applicant for a declaration and injunction in respect of the same premises valuing the suit for purposes of jurisdiction at Rs. 1,800. Under the arrangement made by the learned Chief Judge of the Court by his standing order No. 1 of 1948 regarding distribution of work among the Judges of the Court, the second suit was allocated to the 3rd Judge and the first to the Chief Judge himself for trial. It appears that an application was made to the learned Chief Judge to try the two suits himself so as to prevent a conflict of decisions. On the 17th December, 1951 the learned Chief Judge transferred the suit pending before himself to the learned 3rd Judge for disposal at the same time with the other suit. The applicant questioned the jurisdiction of the learned 3rd Judge to try the suit so transferred to him, and the 3rd Judge for reasons with which I find myself in agreement held that he was competent to try the suit.

It is true that distribution of work among the Judges is mentioned in paragraph 6 of the Manual of the Practice of the Rangoon City Civil Court; but this Manual, as mentioned in its preface, merely contains the rules of practice of the Rangoon City Civil Court which have grown up with the Court and consists mainly of standing orders introduced from time to time as occasion required. The instructions contained in the Manual do not have the force of law.

Now, under section 13 of the Rangoon City Civil Court Act, subject to certain provisions which

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U BO GYI, J.

are not material to the purpose in hand, it is the Rangoon City Civil Court which is invested with jurisdiction to try all suits of a civil nature when the amount or value of the subject-matter does not exceed rupees ten thousand. The Court is presided over at present by four Judges; but the Act does not mention the extent of jurisdiction to be exercised by each particular Judge. In this respect the Rangoon City Civil Court Act is different from the Courts Act, 1950 by which different grades of Civil Courts are constituted and invested with different jurisdictions.

It is contended on applicant's behalf that under Rule 24 of the Rangoon City Civil Court rules made by the High Court under section 32 of the Rangoon City Civil Court Act, the Chief Judge, subject to the control of the High Court, may from time to time make such arrangements as he thinks fit for the distribution of the business of the Court among the various Judges, and that consequently the arrangements made by the learned Chief Judge regarding the allocation of work among the various Judges of the Court has the force of law. I find myself unable to accede to this contention. I agree with the learned 3rd Judge that while Rule 34 has been made under the rule-making power of the High Court under section 32 of the Act, the arrangements made by the Chief Judge has not been made under that section of the Act. Under the rule the Chief Judge has been authorised to make arrangements for the distribution of judicial business and he is authorised to do so from time to time and as he thinks fit. It is true that the Chief Judge in making the arrangements is subject to the control of the High Court; but the rule does not mention that the previous approval of the High Court must be obtained before

such arrangements are made. I agree therefore with the learned 3rd Judge that he has jurisdiction to try the suit transferred to him.

The next question is whether the learned Chief Judge can under Rule 34 withdraw the suit from his own file and transfer it to the learned 3rd Judge. The relevant portion of the rule runs: "And he may withdraw any suit or proceeding from any Judge and transfer it to himself or to any other Judge for disposal." The use of the words "any Judge" in close proximity to the words "any other Judge" is significant. Furthermore, according to the settled rule of interpretation the word "any" must be given its full force and effect and when this is done, it would seem that the learned Chief Judge has authority to withdraw any suit or proceeding from his own file and transfer it to any other Judge for disposal. Since it is the Court itself that is invested with jurisdiction, the learned Chief Judge who is responsible for the administration of the Court is invested with such power with a view to making arrangements for the smooth and efficient working of the Court.

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

တရားလွှတ်တော်။

တရားဝန်ကြီး ဦးအောင်ခိုင် ရှေ့တော်၌။

၁၉၅၂
ဒီဇင်ဘာလ
၂ ရက်။

ဘ။ ဦးခ။ ၂။ ဦးထွန်းအောင် (လျှောက်ထားသူများ)

နှင့်

ဦးရေဝတ ပါ (၈) (လျှောက်ထားခံရသူများ)*။

တရားမကျင့်ထုံးကိုဥပဒေပုဒ်မ ၉၂ အရ၊ အတည်ပြုထားပြီးသော စကင်း (Scheme)။ ။ ထိုစကင်းကို အမှီသဟဲပြုလုပ်ခါ ကျောင်းနှင့် ကျောင်းမြေကို လက်ရောက်ရပြီး တရားခံများကို ကျောင်းမှနှင်ထုတ်ရန် တရားစွဲဆိုခြင်း။ ။တရားခံတို့က၊ ၁၉၄၉ ခုနှစ်၊ ဝိနိစ္ဆယဋ္ဌာန အက်ဥပဒေအရ၊ တရားမ တရားရုံးတွင် စွဲဆိုနိုင်ခွင့်မရှိဟု ကန့်ကွက်ခြင်း။ ။ဒေးဥပဒေပုဒ်မ ၂၉၊ ၁၅၊ ပုဒ်မငယ် (၁) နှင့် (၂)။ ။တရားမ တရားရုံးက စီရင်ပိုင်ခွင့်အာဏာရှိမရှိ။

တရားလို ဘုရားဘဏ္ဍာတော်ထိန်းအဖွဲ့ စကင်း (Scheme)သည်၊ တရားမကျင့်ထုံးကိုမဥပဒေ ပုဒ်မ ၉၂ အရ၊ ခွဲထားသော စကင်းဖြစ်သည်ကတကြောင်း၊ ၎င်းစကင်းပေါ်တွင် အမှီသဟဲပြုလုပ်ခါ အမှုကိုစွဲဆို၍လည်း တကြောင်း၊ ဤအကြောင်းများကြောင့် ဤအမှုသည် ဝိနိစ္ဆယဋ္ဌာနနှင့် သက်ဆိုင်သည်ဟု ယူဆရန် ခဲယဉ်းပေသည်။

၁၉၄၉ ခုနှစ်၊ ဝိနိစ္ဆယဋ္ဌာန အက်ဥပဒေ ပုဒ်မ ၁၅၊ ပုဒ်မငယ် (၁) အရ၊ လက်ခံခြင်း မပြုစေရန် တားမြစ်ပိတ်ပင်ထားသည့် အမှုများမှအပ၊ အခြားဝိနည်း ဓမ္မကံအဓိကရဏ်းမှ အားလုံးကို ဝိနိစ္ဆယရုံးများက ဥပဒေအရ၊ ကြားနာစစ်ဆေး၍ ဝိနည်းတော်နှင့်အညီ စီရင်ဆုံးဖြတ်ရန် အာဏာရှိသည်၊ ပုဒ်မခွဲ (၂) အရ၊ ဝိနိစ္ဆယရုံးမှ စစ်ဆေးနိုင်သော အမှုများ၏ အကျဉ်းသရုပ်များကို ဤဥပဒေ၏ ပဋမဇယားတွင် ဖေါ်ပြထားသည်။

သို့ဖြစ်၍ ဤအမှုကို တရားမတရားရုံးက စီရင်ပိုင်ခွင့်ရှိသည်။

ဦးကျော်ထွန်း (လျှောက်ထားသူများအတွက်)။

ဦးစံလှိုင် (လျှောက်ထားခံရသူများအတွက်)။

တရားဝန်ကြီးဦးအောင်ခိုင်။ ။ဤပြင်ဆင်မှုသည်၊ ရန်ကုန်မြို့တော်တရားမတရားရုံး၊ ၁၉၅၁ ခုနှစ်၊ တရားမကြီးမှုအမှတ် ၁၄၄၇ မှ ပေါ်ပေါက်လာသော

* ၁၉၅၂ ခုနှစ်၊ တရားမပြင်ဆင်မှု အမှတ် ၄၁။

၁၉၅၂

၁။ ဦးခ။
၂။ ဦးထွန်း အောင် နှင့် ဦးရေဝတ ပါ (၀)။

ဦးအောင်ခိုင်၊ တရားဝန်ကြီး။

အမှုဖြစ်သည်၊ ထိုအမှုတွင် ယခုလျှောက်ထားသူ အိမ်တော်ရာဘုရား ဘဏ္ဍာတော်ထိန်းအဖွဲ့က တရားလို အနေနှင့် အလျှောက်ထားခံရသူ ဦးရေဝတနှင့် အခြား ၇ ဦးတို့ကို၊ တရားခံပြုလုပ်ခါ၊ အိမ်တော်ရာဘုရား ပရဝုဏ်အတွင်းရှိ မမွှံရံသီကျောင်းနှင့် ကျောင်းမြေကို လက်ရောက်ရပြီး တရားခံများကို ကျောင်းမှ နှင်ထုတ်ရန် တရားစွဲဆိုခဲ့သည်၊ ဤကဲ့သို့တရားစွဲဆိုခြင်းကို လျှောက်ထားခံရသူတို့က၊ ၁၉၄၉ ခုနှစ်၊ ဝိနိစ္ဆယဋ္ဌာန အက်ဥပဒေအရ၊ ရန်ကုန်မြို့တော် တရားမ တရားရုံးတွင် စွဲဆိုနိုင်ခွင့်မရှိဟု ကန့်ကွက်ခဲ့သည်။ ဤကန့်ကွက်ချက်ကို အတည်ပြုကာ၊ အောက်ရုံးပညာရှိ တရားသူကြီးက ၎င်း၏ရုံးတွင်၊ ဤအမှုကိုစစ်ဆေးနိုင်ခွင့် အာဏာမရှိ၍၊ တရားစွဲဆိုခြင်းကို လက်ခံနိုင်သည့် ရုံးတော်တွင် စွဲဆိုရန်အမိန့် ချမှတ်ခဲ့၏။ ဤအမိန့်ကို မကျေနပ်၍၊ ယခုပြင်ဆင်မှုဖြစ်ပေါ်လာရသည်။

အိမ်တော်ရာဘုရား ဘဏ္ဍာထိန်းအဖွဲ့-အုပ်ချုပ်ရေးစကင်း (Scheme) ကို ရန်ကုန်မြို့၊ ဟိုက်ကုတ်တရားလွှတ်တော်၊ ၁၉၄၇ ခု၊ တရားမကြီးမှုနံပါတ် ၁၀၂ တွင်၊ တရားမကျင့်ထုံးကို ခဉပဒေ ပုဒ်မ ၉၂ အရ၊ အတည်ပြုခဲ့သည်၊ ယခုအမှုမှာ ဤစကင်း (Scheme) အပိုဒ် ၁၅ ကို အဓိသဟဲပြုခါ၊ စွဲဆိုသောအမှုပင် ဖြစ်သည်။

မူလစဉ်းစားရန်ပြဿနာမှာ ဤအမှုမျိုးသည် ဝိနိစ္ဆယဋ္ဌာနများနှင့် သက်ဆိုင်ပါသလား ဆိုသောပြဿနာပင်ဖြစ်သည်။ ဤကိစ္စအတွက် ဝိနိစ္ဆယဋ္ဌာန အက်ဥပဒေ ပုဒ်မ ၂၉ ကို၊ သုံးသပ်ရန်လိုပေသည်၊ ဝိနိစ္ဆယဋ္ဌာနအက်ဥပဒေ ပုဒ်မ ၂၉ မှာ အောက်ပါအတိုင်းပင်ဖြစ်သည်။

"ဤဥပဒေ အခြားနေရာများတွင် မည်သို့ပင် ပါရှိစေကာမူ၊ တရားမကျင့်ထုံးဥပဒေ ပုဒ်မ ၉၂ အတွင်းကျရောက်သော မှုခင်းကိစ္စများသည်၊ ဤဥပဒေအရ၊ တည်ထောင်ထားသည့် ဝိနိစ္ဆယဋ္ဌာနများနှင့် မသက်ဆိုင်စေရ။"

ဤလက်ရှိ အိမ်တော်ရာဘုရား ဘဏ္ဍာတော်ထိန်းအဖွဲ့စကင်း (Scheme) သည်၊ တရားမကျင့်ထုံးကိုခဉပဒေ ပုဒ်မ ၉၂ အရ၊ ဆွဲထားသော Scheme ဖြစ်သည်တကြောင်း၊ ၎င်း Scheme ပေါ်တွင် အဓိသဟဲပြုလုပ်ခါ အမှုကို စွဲဆို၍လည်းတကြောင်း၊ ဤအကြောင်းများကြောင့် ဤအမှုသည် ဝိနိစ္ဆယဋ္ဌာန နှင့် သက်ဆိုင်သည်ဟု ယူဆရန်ခဲယဉ်းပေသည်။ တဖန်ဤအက်ဥပဒေ ပုဒ်မ ၁၅၊ ပုဒ်မငယ် (၁) အရ၊ လက်ခံခြင်း မပြုစေရန်၊ တားမြစ်ပိတ်ပင်ထားသည့် အမှုများမှအပ အခြားဝိနည်းဓမ္မကံ အဓိကရဏ်းမှုအားလုံးကို ဝိနိစ္ဆယရုံးများက ဥပဒေအရ ကြားနာစစ်ဆေး၍ ဝိနည်းတော်နှင့်အညီ စီရင်ဆုံးဖြတ်ရန်အတွက်

၁၉၅၂

၁။ ဦးခ။
၂။ ဦးထွန်း
အောင်
နှင့်
ဦးရေဝတ
ပါ(၀)။

ဦးအောင်ခိုင်၊
တရားဝန်ကြီး။

အခွင့်အာဏာများ ပေးထားသည်။ ပုဒ်မခွဲ (၂) တွင် ဝိနည်းဓမ္မကံ အဓိကရုဏ်း မှုများ ခွဲခြားသတ်မှတ်ပေးထားသည်။ ပုဒ်မခွဲ (၂) တွင် အကျုံးဝင်သည့် အဓိကရုဏ်းမှုများ၏ အကျဉ်းသရုပ်များကို ဤဥပဒေ၏ ပဌမဇယားတွင် ဖေါ်ပြထားလေသည်။ သို့ဖြစ်၍ ဝိနိစ္ဆယရုံးမှစစ်ဆေးနိုင်သော အမှုများမှာ ပဌမဇယား၌ ဖေါ်ပြထားသည့် အဓိကရုဏ်းမှုများပင်ဖြစ်သည်။ ယခုစွဲဆိုသည့်အမှုသည် ဥပဒေ၏ ပဌမဇယား၌ ပါဝင်သော အမှုမျိုးဖြစ်သည်ဟု တိတိကျကျ လျှောက်ထားခံရသူတို့က မပြောဆိုနိုင်၊ ထို့ပြင်တဝဤကိစ္စနှင့် ပတ်သက်၍ ရန်ကုန်မြို့မ အလယ်ပိုင်း ဝိနိစ္ဆယဌာနရုံးသို့ တခါလျှောက်ဘူးခဲ့ပြီး၊ ဝိနည်းဝိုရ် ဆရာတော်များတ ဤဓမ္မရုံသီကျောင်းအမှု အဓိကရုဏ်းကို၊ ဝိနိစ္ဆယဌာန အက်ဥပဒေ ပုဒ်မ ၂၉ အရ၊ ဝိနိစ္ဆယဌာနများနှင့် လုံးဝမသက်ဆိုင်ဟုမှတ် တမ်းချခဲ့ကြ၏။

ဤအကြောင်းအရာများကို ထောက်ထားခြင်းအားဖြင့် လက်ရှိအိမ်တော်ရာ ဘဏ္ဍာတော်ထိန်းအဖွဲ့ လူကြီးများက လျှောက်ထားခံရသူတို့ အပေါ်တွင် စွဲဆိုသော အမှုသည်၊ ရန်ကုန်မြို့တော်တရားမ တရားရုံးက စိစစ်ပိုင်ခွင့် အာဏာရှိသည်ဟု ကျွန်ုပ်ယူဆသည်၊ ဤကဲ့သို့ယူဆသည့်အတိုင်း ဤလျှောက် လွှာ ကို တရားစရိတ်နှင့်လက်ခံ၍၊ ဤအမှုကိုအောက်ရုံးသို့ ဥပဒေအရ လက်ခံစစ်ဆေးစေရန် အမိန့်ချမှတ်လိုက်သည်။

APPELLATE CIVIL.

Before U Aung Khine, J.

MA AYE (APPLICANT)

v.

BOKE GAH AND FIVE OTHERS (RESPONDENTS).*

H.C. 1952 — *Dec. 18.

Civil Procedure Code, Order 1, Rule 10 (2) — Adding or striking out parties—Principle governing course of action—Finality of litigation and interests of justice.

Held : The principle governing the question of adding a party is that unless an adjudication on all the issues involved in the case ensuring finality of litigation between the parties, or the interests of justice, demands it, a plaintiff should not be compelled to implead a party and particularly one against whom no claim is preferred.

(*Pasumarthi*) *Subbaraya Sastri* v. *Mukkamala Seetha Ramaswami*, A.I.R. (1933) Mad. 664, distinguished.

Norris and another v. *Beazley*, Common Pleas Divn. (1876-77) L.R. 80 ; *Vaithilinga Pandara Sannidhi Audhina Karthar Tiruvaduthurai Adhinam* v. *Sadasiva Iyer and others.* A.I.R. (1926) Mad. 836, referred to.

Ba On for the applicant.

San Thein for the respondents.

U AUNG KHINE, J.—This is an application in revision against the order of the learned 2nd Judge of the City Civil Court, Rangoon, directing the applicant Ma Aye to add another party as a defendant to those whom she had already impleaded in Civil Regular Suit No. 217 of 1952 of the City Civil Court, Rangoon.

The facts as alleged by the applicant Ma Aye in the suit are simple and in a nutshell they are these :

* Civil Revision No. 50 of 1952 against the order of the 2nd Judge, City Civil Court, Rangoon, in Civil Regular Suit No. 217 of 1952, dated the 5th May 1952.

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U AUNG KHINE, J.

She is the owner of a single-storied building known as No. 20, Upper Pazundaung Road, Rangoon, standing on a house site known as Lot No. 100 in Block No. 7-C, Pazundaung Circle, Rangoon. She became the owner of this building by right of purchase from one Ralli Pillay in 1946, that she had made substantial repairs to the building, and that she is paying both municipal tax and ground rent. The respondents Boke Gah, Bah Nah, Tin Nah, Boon Htat, Byat Kyone, and Ko Paw, who are the defendants in the lower Court, denied that the applicant is the owner of the house in question and they asserted that the house belonged to them. They further stated that they themselves put up the building after getting the necessary permission from the owners of the house site. They contended that the owners of the house site are a necessary party to the suit. This last contention was upheld by the lower Court and it accordingly directed the applicant to add the owners of the house site as a party. Hence this application.

The authority quoted by the lower Court in support of the order is the case of (*Pasumarthi*) *Subbaraya Sastri* v. *Mukkamala Seetha Ramaswami* (1). That was a case in which the plaintiff brought a suit to eject the defendant from a site and to remove a pial erected by him thereon. The plea of the defendant was that the land belonged to the Municipal Council and that he put up a pial with its permission, and that the Municipal Council was a necessary party to the suit. The trial Court held that it was unnecessary to implead the Municipality, but on appeal it was decided that the Municipality was a necessary party to the suit. With great

(1) A.I.R. (1933) Mad. 664.

respect, I am in entire agreement with this decision of the Madras High Court. However, what the lower Court failed to realise is that in the present suit the applicant did not claim the house site as belonging to her, as was done by the plaintiff in the above quoted case. There the plaintiff claimed that the land belonged to him, but the defendant denied this and claimed that he put up a pial with the authority of the Municipality to which the land belonged. The title of the third party in that case was disputed. In this suit, however, the applicant did not claim that the house site belonged to her and, therefore, she is not at cross-purpose with the owners of the house site. The respondents also do not claim the house site to be theirs and, therefore, the decision in this suit turns on the question as to who is the owner of the suit house. Incidentally, I find that such an issue, amongst others, has been framed by the lower Court. The principle underlying regarding the addition of a party is that there must be finality to litigation by deciding all questions of controversy between the interested parties. There is no controversy between the applicant and the owners of the house site and as such the ruling quoted by the lower Court cannot be applied to this case.

It is contended on behalf of the applicant that the owners of the house site have no interest whatsoever in the suit building and, therefore, she should not be compelled to litigate against them. The question, therefore, is can the Court adjudicate on questions involved in the action between the applicant and the respondents without bringing the owners of the house site on record? The applicant does not desire to proceed against the owners and,

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U AUNG KHINE, J.

therefore, unless justice cannot be done without their being brought on record, the Court ought not to make the applicant proceed against that party against her will. See *Norris and another v. Beazley* (1). At page 84, Lord Coleridge C.J., observed :

> " . . . . . the defendant to be added must be a defendant against whom the plaintiff has some cause of complaint, which ought to be determined in the action, and that it was never intended to apply where the person to be added as a defendant is a person against whom the plaintiff has no claim, and does not desire to prosecute any."

This decision has been relied on in the case of *Vaithilinga Pandara Sannidhi Audhina Karthar Tiruvaduthurai Adhinam v. Sadasiva Iyer and others* (2). The principles applicable to such a case as the present one are clearly enunciated in those two decisions. On these principles, I am clearly of the opinion that the order of the learned 2nd Judge, City Civil Court, Rangoon, directing the applicant Ma Aye to add the owners of the house site as a defendant in the suit is erroneous. The application is, therefore, allowed and the order complained against is vacated, with costs.

(1) Common Pleas Divn. (1876-77) L.R. 80.
(2) A.I.R. (1926) Mad. 836.

APPELLATE CIVIL.

Before U San Maung, J.

L. C. BARUA AND ONE (APPLICANTS)

v.

KO MAUNG NYO AND ONE (RESPONDENTS).*

H.C. 1952.
Dec. 12.

Civil Procedure Code, Order 1, Rule 8 — Representative suit —Permission of Court is imperative—Need not be express, sufficient if such permission can be implied.

Held : Even though the Court did not give an express permission to the plaintiff to sue the defendants, not only in their personal capacities, but also in their capacities as representatives of other worshippers of the Banimandir, such permission must be deemed to have been given by necessary implication from the order of the Court directing publication of the notice under Order 1, Rule 8, Civil Procedure Code.

Hira Lal v. *Bhairon and others*, 5 All. 602, referred to.

Dhunput Singh and others v. *Paresh Nath Singh and another*, 21 Cal. 180; *Kalu Khabir* v. *Jan Meah*, 29 Cal. 100, followed.

P. B. Sen and *B. K. Sen* for the applicants.

U SAN MAUNG, J. — In Civil Regular Suit No. 11 of 1952 of the Subdivisional Court of Bassein, the plaintiff-respondent Ko Maung Nyo sued the defendant-applicants L. C. Barua, S. B. Chowdhury and one D. K. Malakar for the recovery of Rs. 4,045 as price of the timber sold and delivered. In the title of the plaint, it is mentioned that the defendants were sued on their own behalf as well as in their capacities as representatives of the other worshippers of the Banimandir, Maxwell Road, Bassein. In paragraph 4 of the plaint also, the plaintiff mentioned that the defendants were also

* Civil Revision No. 100 of 1952 against the order of the Subdivisional Judge's Court, Bassein, in Civil Regular Suit No. 11 of 1952, dated the 3rd September 1952.

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L. C. BARUA AND ONE v. KO MAUNG NYO AND ONE.

U SAN MAUNG, J.

sued in their capacities as representative of the other worshippers of Banimandir and that notice should therefore be issued by the Court under Order 1, Rule 8, of the Civil Procedure Code by public advertisement. Accordingly, on the 26th of July, 1952, the date of filing of the plaint, the learned Subdivisional Judge made the following entry in his diary:—

"Issue notice to defendants for settlement of issues on payment of deficient stamps returnable on 4-8-52. Also issue notice under O.1, R.8, Civil Procedure Code to the representatives of the other worshippers of Banimandir, Maxwell Road, Bassein, to appear before the Court and contest the suit, if they choose to, by publication in one issue of "The Nation", returnable on 9-8-52."

No express permission was however granted by the Court and it was therefore contended by the present applicants, who were the second and third defendants in the case, that the suit against them as representatives of the worshippers of the Banimandir, was not maintainable. However, it is clear that even though the learned Subdivisional Judge did not give any express permission to the plaintiff to sue the defendants, not only in their personal capacities, but also in their capacities as representatives of the other worshippers of the Banimandir, such permission must be deemed to have been given by necessary implication, otherwise, there was no point in the Subdivisional Judge passing an order for the issue of notice under Order 1, Rule 8 of the Civil Procedure Code by publication in "The Nation". No doubt, in the case of *Hira Lal* v. *Bhairon and others* (1) Stuart C.J., held that such permission must be expressed and not implied. However, this dictum of Stuart C.J., was dissented from by a Bench of the Calcutta High Court in *Dhunput Singh and others* v. *Paresh Nath Singh and another* (2)

(1) 5 All. 602. (2) 21. Cal. 180.

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U SAN MAUNG, J.

where it was held that section 30 of the Civil Procedure Code corresponding to Order 1, Rule 8, did not require an express permission to be recorded by the Court but that if such permission can be well gathered from the proceedings of the Court in which the suit was instituted, an appellate Court may (where an objection that no permission was given is taken on appeal) infer from such proceedings that permission was really granted. The decision in *Kalu Khabir* v. *Jan Meah* (1) is to the same effect. Therefore, I hold that the present application for revision which is based upon the ground that under Order 1, Rule 8 of the Civil Procedure Code leave of the Court must be first obtained before the suit can be said to be properly instituted and that the Court had no jurisdiction to entertain the suit for the failure of the plaintiff to obtain the express permission of the Court, cannot be admitted and the same is hereby dismissed summarily.

(1) 29 Cal. 100.

တရားလွှတ်တော်။

တရားဝန်ကြီး ဦးစံမောင်ရွှေတော်၌။

၁၉၅၂
ဒီဇင်ဘာလ
၉ ရက်။

မောင်ဝင်း ပါ (၃) (အယူခံတရားလိုများ)

နှင့်

ပြည်ထောင်စုမြန်မာနိုင်ငံ (အယူခံတရားခံ)*။

၁၉၄၉ ခုနှစ်၊ ပြည့်တန်ဆာပယောက်ရေး အက်ဥပဒေပုဒ်မ ၅၊ ပုဒ်မခွဲ (၁) နှင့် (၂)။ ။ ၎င်းပုဒ်မ ၆။

ပြည့်တန်ဆာဖြစ်စေရန်သော်၎င်း၊ ပြည့်တန်ဆာ ကိစ္စအလို့ငှါ ပြည့်တန်ဆာအိမ်တွင် သွားရောက်နေထိုင်ရန်၎င်း၊ ကြိုးစားယ်လျက် ယွေးဆောင်သည်ဟူ၍ ယူဆနိုင်ရန်အကြောင်းရှိမှ၊ ၁၉၄၉ ခုနှစ်၊ ပြည့်တန်ဆာပယောက်ရေး အက်ဥပဒေပုဒ်မ ၆ အရ၊ အပြစ်ပေးစီရင်နိုင်သည်။

တစုံတယောက်သောသူသည် မိမိ၏အိမ်၌ ပြည့်တန်ဆာ အလုပ်ဖြင့် ပိုက်ဆံရှာစေ၏။ ။ဆိုသူက အားပေးအားမြှောက်ပြု၍သာ၊ ၎င်း၏အိမ်၌ ဤကဲ့သို့ ပိုက်ဆံရှာနိုင်သည်ဟု ယူဆရပေမည်။ ။ယင်းသို့ ယူဆသည့်အတိုင်း၊ ၁၉၄၉ ခုနှစ်၊ ပြည့်တန်ဆာပယောက်ရေး အက်ဥပဒေပုဒ်မ ၅၊ ပုဒ်မခွဲ (၂) တွင် အကျုံးဝင်လျက် ထိုသူအား အဆိုပါ အက်ဥပဒေပုဒ်မ ၅၊ ပုဒ်မခွဲ (၁) အရ အပြစ်ပေးစီရင်ထိုက်သည်။

ဦးကျော် (အစိုးရရှေ့နေ) အယူခံတရားခံအတွက်။

တရားဝန်ကြီး ဦးစံမောင်။ ။ရန်ကုန်မြို့၊ အရှေ့ပိုင်း အထူးအာဏာရ၊ ရာဇဝတ်တရားသူကြီး၏ရုံး၊ ၁၉၅၂ ခု၊ ရာဇဝတ်ကြီးမှု အမှတ် ၁၀၅ တွင်၊ အယူခံတရားလို မောင်ဝင်းနှင့် မည္သည့်ရိတို့အား၊ ပြည့်တန်ဆာ အဖြစ်ဖြင့် ရှာဖွေသည့် စီးပွါးကိုမှီ၍၊ အသက်မွေးမြူသည့်အတွက်၊ ၁၉၄၉ ခုနှစ်၊ ပြည့်တန်ဆာပယောက်ရေး အက်ဥပဒေပုဒ်မ ၅၊ ပုဒ်မခွဲ (၁) အရငင်း၊ အယူခံတရားလို မောင်လှိုင်အား မကျင်မြဲဆိုသူကို၊ ပြည့်တန်ဆာ ဖြစ်မြောက်အောင် သွေးဆောင်ခြင်းကြောင့်၊ အဆိုပါအက်ဥပဒေ ပုဒ်မ ၆ အရငင်း အပြစ်ပေးစီရင်ထိုက်သော ပြစ်မှုကျူးလွန်သည်ဟု၊ အလုပ်ကြမ်းနှင့် ထောင်ဒဏ်တန်စီကျခံစေရန်၊ အမိန့်ချမှတ်လိုက်ခြင်းကို၊ အယူခံတရားလိုများက မကျေနပ်၍၊ အယူခံသောအမှုဖြစ်သည်။

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*၁၉၅၂ ခု၊ ရာဇဝတ်အယူခံမှု အမှတ် ၅၀၁—၅၀၃။ ရန်ကုန်မြို့၊ အရှေ့ပိုင်းနယ်ပိုင် ရာဇဝတ်တရားသူကြီးရုံး၊ ၁၉၅၂ ခု၊ ရာဇဝတ်မှုကြီး အမှတ် ၁၀၅-တွင်၊ ၁၉၅၂ ခုနှစ်၊ အောက်တိုဘာလ ၆ ရက်နေ့က ချမှတ်သောအမိန့်ကို အယူခံသောအမှု။

၁၉၅၂
မောင်ဝင်း
ပါ(၃)
နှင့်
ပြည်ထောင်စု
မြန်မာနိုင်ငံ။
ဦးပဲမောင်၊
တရားဝန်ကြီး။

၁၉၅၂ ခု၊ ဖြေလ ၇ ရက်နေ့ည ၈ နာရီ ၅၇ မိနစ် အချိန်တွင်၊ တယ်လီဖုံးနံပါတ် ၉၉၉၊ ရန်ကုန်ရဲဌာနာချုပ်သို့ တယ်လီဖုံးဖြင့်၊ အကူအညီတောင်းသဖြင့်၊ ကန်တော်ကလေး လူအိုးရုံထောင့်သို့၊ ဝိုင်ယာလက်ကားနံပါတ် အာရ်၊ အေ၊ ၆ (က ၆) နှင့်အတူ၊ ရဲကြပ်မောင်စံလှ (လိုပြ ၇) သည်၊ လိုက်ပါသွားရာ ထိုလမ်းထောင့်၌ မောင်မြမောင်ဆိုသူနှင့်တွေ့ရှိ၍၊ ၎င်းမောင်မြမောင်၏ ညွှန်ပြချက်အရ၊ ဦးလှကျော်ကွက်သစ်သို့ တောင်လုံးပြန်ဌာနာ၊ ရာဇဝတ်အုပ် ဦးဘသန်းနှင့် သွားရောက်ကာ၊ အယူခံတရားလို မောင်ဝင်း၏အိမ်သို့ ဝင်ရောက်ရှာဖွေရာတွင်၊ မောင်ဝင်း၊ ၎င်း၏မယားမညွှန့်ရီနှင့် မကျင်မြတို့ကို တွေ့ရှိရ၍၊ ၎င်းဘိုအား ဌာနာသို့ခေါ်ဆောင်ခဲ့၏။ ဌာနာသို့ ရောက်ရှိသည့်ကာလ၊ မကျင်မြက (က) အမှတ်ဖြင့်၊ သက်သေခံ တင်ပြသားသော တိုင်ချက်ကို ပေးရာဝယ်၊ မိမိသည်၊ အယူခံတရားလို မောင်လှိုင်နှင့်အတူ ခိုးရာပါသို့လိုက်၍၊ မောင်လှိုင်၏သူငယ်ချင်းဖြစ်သူ မောင်ဝင်း၊ မညွှန့်ရီတို့၏နေအိမ်တွင် အဘူနေထိုင်ခဲ့ချိန်မှ၊ မောင်လှိုင်က အလုပ်လုပ်ရန် သွားမယ်ဆိုပြီး ထွက်သွားကြောင်း။ ထိုနောက် မောင်ဝင်း၏အိမ်၌မောင်ဝင်းက မိမိအားကြပ်မတ်ပြီး မကောင်းသောအသက်မွေးဝမ်းကျောင်းဖြင့်၊ ပိုက်ဆံရှာခိုင်းသဖြင့်၊ မောင်ဝင်းကို ကြောက်ရွံ့ပြီး ၎င်းစေခိုင်းသည့်အတိုင်း ပြုလုပ်ခဲ့ရကြောင်း။ ထိုနောက် မောင်ဝင်းတို့လင်မယား မရှိခိုက် စတော့ကိတ်လမ်းထိပ်၊ သတင်းစာရောင်းသည့် အမည်မသိသူ တဦးအား အကျိုးအကြောင်းတိုင်တန်းသဖြင့်၊ ယင်းသို့ရဲအရာရှိများက၊ မိမိတို့အား၊ လာရောက်ဖမ်းဆီးကြောင်း ဖေါ်ပြခဲ့၏။ ရုံးတော်၌၊ ကျမ်းနှင့်အစစ်ခံရာတွင်လည်း၊ မကျင်မြက၊ မောင်လှိုင်သည် မိမိအားမောင်ဝင်းနှင့်မညွှန့်ရီအိမ်၌ထားခဲ့ပြီးနောက်၊ အလုပ်သွားလုပ်မည်ဟု ပြောပြီးထွက်သွား၍၊ ပြန်မလာတော့ကြောင်း။ ထိုနောက် မောင်ဝင်းနှင့် မညွှန့်ရီတို့က၊ မိမိအား မကောင်းသောအလုပ်ဖြင့် ပိုက်ဆံရှာခိုင်းကြောင်း။ ထိုသူတို့အား ကြောက်ရွံ့သဖြင့်၊ ယင်းကဲ့သို့ ပြုလုပ်ရကြောင်း ထွက်ဆိုလေသည်။ ရဲအရာရှိများ လာသောနေ့ နံနက်တွင်၊ မောင်လှိုင်သည် မိမိနေသောအိမ်သို့ လာရာ၊ မိမိက မောင်ဝင်းတို့ လင်မယား၏ ပြိမ္မုခက်ကို တိုင်တန်း၍၊ မောင်လှိုင်က "နေအုံး၊ အိမ်ရှာအုံးမယ်" ဟူ၍သာပြောပြသည်ဟု ထွက်ဆိုပြီးနောက်၊ မောင်လှိုင်က မေးခွန်းကြပ်သည့်အခါဝယ်၊ မောင်ဝင်းတို့လင်မယားက၊ မိမိအား ဒုက္ခရှာသည်ဟူ၍သာ၊ မောင်လှိုင်အားပြောပါသည်။ ပိုက်ဆံရှာရသည့်အကြောင်းကို ရှက်၍ထည့်မပြောပါဟုဝန်ခံလေသည်။ ထို့ပြင်တရားခံမညွှန့်ရီက မေးခွန်းကြပ်သည့်အခါဝယ်၊ သူကြီးလာစဉ်ကမတိုင်ဝံ့၍ မတိုင်ဘဲ နေပါသည်။ယင်းသို့မတိုင်ဝံ့ခြင်းမှာ တရားခံတို့ကို ကြောက်ရွံ့သောကြောင့် ဖြစ်ပါသည်ဟုထွက်ဆိုလေသည်။

၁၉၅၂

မောင်ဝင်း
ပါ(၃)
နှင့်
ပြည်ထောင်စု
မြန်မာနိုင်ငံ။

ဦးစံမောင်၊
တရားဝန်ကြီး။

ရန်ကုန်မြို့၊ ကန်တော်ကြီးစောင်းနေ၊ ဦးလှကျော် ကွက်သစ်၌၊ သတင်းစာ ရောင်းသူ ကိုမြဒင် (လိုပြ ၁) အား၊ စစ်ဆေးရာဝယ်၊ ကိုမြဒင်က၊ မကျင်မြသည်၊ မိမိထံသို့လာပြီး၊ "ဦးလေးကြီး၊ မနက်ဖြန် ကမ်းနားသို့သွားပြီး ကိုလှိုင်တွေ့လျှင်၊ ငွေ ၁၀၀ ရှာပေးပါလို့ ပြောပါ" ဟု ပြောကြောင်း။ ထိုငွေ ၁၀၀ မှာ ရွှာပြန်ရန် အတွက်၊ စရိတ်လိုချင်သည်ဟူ၍လည်းပြောကြောင်း။ သို့ရာတွင်မိမိသည် ကမ်း နားသို့မသွားသဖြင့် မောင်လှိုင်ကို မကျင်မြက၊ မှာကြားသည့်အတိုင်း မပြောကြား ခဲ့ရကြောင်းထွက်ဆိုလေသည်။ ထို့ကြောင့် အကယ်၍၊ မကျင်မြက၊ တိုင်တန်းသည် ဆိုသော သတင်းစာရောင်းသူမှာ၊ ကိုမြဒင် (လိုပြ ၁) အမှန်ဖြစ်ခဲ့ပါသျှင်၊ ကိုမြ ဒင်၏ထွက်ချက်သည်၊ မကျင်မြ၏ထွက်ချက်ကို ထောက်ခံရာမရောက်။ မောင် ဝင်းနှင့် မည္ဆန်ရီတို့ကို ကျမ်းနှင့် အစစ်ခံရာဝယ်၊ မကျင်မြသည် မိမိတို့အိမ်သို့ မောင် လှိုင်နှင့်အတူ အချင်းမဖြစ်မီ ၁၅ ရက်ခန့်က ရောက်လာ၍ နေထိုင်ကြကြောင်း။ မောင်လှိုင်သည် နေ့စဉ်အလုပ်ဆင်း၍ ညတွင်၊ မိမိတို့အိမ်သို့ ပြန်အိပ်ကြောင်း။ မိမိတို့က မကျင်မြကို မကောင်းသောအလုပ်ဖြင့် ပိုက်ဆံမရှာခိုင်းရကြောင်းထွက်ဆို လေသည်။ မောင်လှိုင်ကလည်း၊ ထိုအတိုင်းထွက်ဆိုခဲ့သည်။ မောင်ဝင်း၏ အိမ်နီးပါးချင်းများကလည်း၊ မကျင်မြက၊ ၎င်းတို့အား၊ မောင်ဝင်းတို့က၊ အတင်း အဓမ္မ မကောင်းသောအလုပ်ဖြင့်၊ ပိုက်ဆံရှာခိုင်းသည်ဟု၊ မတိုင်တန်းဘူးပါဟု ထွက်ဆိုကြသည်။

မကျင်မြက၊ မောင်လှိုင်သည်၊ မိမိအား မောင်ဝင်းနှင့် မည္ဆန်ရီတို့အိမ်တွင် ထားခဲ့ပြီးနောက်၊ အလုပ်ရှာရန်ဆိုပြီး၊ မောင်လှိုင်ထွက်ခွါသွားရာမှ၊ အချင်းဖြစ် သောနံနက်၌သာလျှင်၊ မိမိရှိရာသို့ပြန်လာရာ၊ မောင်ဝင်းတို့လင်မယားက်ပြုမူချက် နှင့်စပ်လျဉ်း၍၊ မောင်လှိုင်ကို ဘာမှမဟိုင်တန်းပါဟု ဝန်ခံခဲ့သည်။ ဤဝန်ခံချက် အရပင်လျှင်၊ အကယ်၍ မောင်ဝင်းတို့လင်မယားက မကျင်မြကို အတင်းအဓမ္မ မကောင်းသော အလုပ်ဖြင့်၊ ပိုက်ဆံရှာခိုင်းစေကာမူ၊ ထိုအရာကို မောင်လှိုင် သိ မည်မသိမည်ဆိုသောအချက်နှင့်စပ်လျဉ်း၍၊ ဒွိဟသံသယဖြစ်စရာအကြောင်းရှိ၏။ မောင်လှိုင်သိမည်ဟူ၍ ကျန်ပ်တို့တထစ်ချမယူဆနိုင်။ မောင်လှိုင်သည်၊ မကျင်မြ ကို ပြည့်တန်ဆာဖြစ်စေရန်သော်၎င်း၊ ပြည့်တန်ဆာကိစ္စအလို့ငှါ၊ ပြည့်တန်ဆာအိမ် တွင်၊ သွားရောက်နေထိုင်ရန်ဝင်း ကြံရွယ်လျက် သွေးဆောင်သည်ဟူ၍၊ ကျန်ပ်တို့ ယူဆနိုင်ရန်ခဲယဉ်း၏။ ထို့ကြောင့် မောင်လှိုင်အား၊ ၁၉၄၉ ခုနှစ်၊ ပြည့်တန်ဆာ ပယောဂ်ရေးအက်ဥပဒေပုဒ်မ ၆ အရ၊ အပြစ်ပေးစီရင်ခြင်းကို ကျန်ပ်တို့ပယ်ဖျက်ရ ပေမည်။ အယူခံတရားလိုမောင်ဝင်းနှင့်မည္ဆန်ရီတို့အဘို့မှာမူကား၊ အကယ်၍မကျင် မြသည်၊ ၎င်းတို့အတင်းအဓမ္မပြုမူချက်အရမဟုတ်ဘဲ၊ အလိုတူအလိုပါမကောင်း

သော အုပ်ဖြင့် အသက်မွေးဝမ်းကျောင်းပြုလုပ်သည်ဆိုစေကာမူ၊ ၎င်းတို့အပေါ်၌၊ ဥပဒေအရ၊ အပြစ်ပေးစီရင်နိုင်လောက်အောင် အကြောင်းလုံလောက်သည်ဟူ၍ ကျွန်ုပ်ယူဆ၏။ အဘယ်ကြောင့်ဆိုသော်၊ ၁၉၄၉ ခုနှစ်၊ ပြည့်တန်ဆာပပျောက်ရေး အက်ဥပဒေ ပုဒ်မ ၅၊ ပုဒ်မခွဲ (၂) တွင်၊ ပြည့်တန်ဆာ တဦးတယောက်ကို ပြည့်တန်ဆာအဖြစ်ဖြင့်၊ စီးပွါးရှာစေရန် ကူညီသည်၊ အားပေးသည်ဟူ၍၊ ယူဆဘွယ်ရာဖြစ်အောင် တဦးတယောက်သောသူသည်၊ ပြည့်တန်ဆာနှင့် အတူနေလျှင်၊ ထိုသူသည် အခြားသူဘဦးဘယောက်၊ ပြည့်ဘန်ဆာအဖြစ်ဖြင့်၊ ရှာဖွေရရှိသော စီးပွါးဖြစ်ကြောင်း သိလျက်နှင့် စီးပွါးကိုမှီ၍၊ အသက်မွေးမြူခြင်း မပြုကြောင်း ထင်ရှားအောင်မပြနိုင်ပါက၊ ထိုသူအား၊ ထိုကဲ့သို့မှီ၍ အသက်မွေးမြူသည်ဟု မှတ်ယူရမည်ဟူ၍ဖေါ်ပြထား၏။

၁၉၅၂
မောင်ဝင်း
ပါ(၃)
နှင့်
ပြည်ထောင်စု
မြန်မာနိုင်ငံ။
ဦးစံမောင်၊
တရားဝန်ကြီး။

အမှန်စင်စစ်၊ မကျင်မြသည်၊ မောင်ဝင်း၊ မညွှန့်ရီတို့၏အိမ်၌၊ မကောင်းသောအလုပ်ဖြင့်၊ ပိုက်ဆံရှာသည်ကို၊ ကျွန်ုပ်တို့ဘာမှ မယုံကြည်နိုင်စရာအကြောင်းမရှိ။ မကျင်မြကိုယ်တိုင်က၊ ယင်းသို့ ထွက်ဆိုသည်သာမက၊ ၎င်းအားဖမ်းဆီးသောနေ့မှာပင်၊ ပဌမတိုင်ချက်၊ သက်သေခံအမှာ် (က) ၌ ဖေါ်ပြထား၏။ ၎င်းကမောင်ဝင်းတို့လင်မယားကိုကြောက်ရွံ့သဖြင့်၊ ယင်းသို့ပြုလုပ်ရသည်ဆိုသော အချက်မှာ ဟုတ်ချင်လည်းဟုတ်မည်။ ဟုတ်ချင်မှလည်းဟုတ်မည်။ မည်သို့ပင်ဆိုစေကာမူ၊ မောင်ဝင်းတို့လင်မယားက၊ အားပေးအားမြှောက်ပြု၍သာ၊ ၎င်းတို့အိမ်၌၊ ဤကဲ့သို့ ပိုက်ဆံရှာနိုင်သည်ဟု ကျွန်ုပ်တို့ ယူဆရပေမည်။ ယင်းသို့ ယူဆသည့်အတိုင်း၊ ၁၉၄၉ ခုနှစ်၊ ပြည့်ဘန်ဆာပပျောက်ရေး အက်ဥပဒေပုဒ်မ ၅၊ ပုဒ်မခွဲ (၂) နှင့်သက်ဆိုင်လျက်၊ အယူခံတရားလိုမောင်ဝင်းနှင့်မညွှန့်ရီတို့သည်၊ အဆိုပါအက်ဥပဒေပုဒ်မ ၅၊ ပုဒ်မခွဲ (၁) အရ၊ အပြစ်ပေးစီရင်ထိုက်သော ပြစ်မှုကျူးလွန်သည်ဟု ကျွန်ုပ်တို့ယူဆရပေမည်။ ထိုကြောင့် အယူခံတရားလိုမောင်ဝင်းအား အဆိုပါ အက်ဥပဒေပုဒ်မ ၅၊ ပုဒ်မခွဲ (၁) အရ၊ အပြစ်ပေးစီရင်ခြင်းကို ကျွန်ုပ်တို့ အတည်ပြု၍၊ ၎င်း၏အယူခံကိုပယ်လိုက်ရမည်။ အယူခံတရားလို မညွှန့်ရီအတွက်မှာ မူကား။ ၎င်းအား အဆိုပါအက်ဥပဒေပုဒ်မ ၅၊ ပုဒ်မခွဲ (၁) အရ၊ အပြစ်ပေးထိုက်သောပြစ်မှု ကျူးလွန်သည်ဟု ယူဆသော်ငြားလည်း၊ အလုပ်ကြမ်းနှင့်ထောင်ဒဏ် တနှစ်မှာ ထိုက်သင့်သည်ထက်ပို၍ပြင်းထန်သဖြင့်၊ ထောင်ဒဏ်ကိုတနှစ်မှ ၄ လသို့ လျော့ရန်ကျွန်ုပ်အမိန့်ချမှတ်လိုက်သည်။

အယူခံတရားလို မောင်လှိုင်အပေါ်၌၊ ပေးထားသောအပြစ်ဒဏ်ကို ပယ်ဖျက်ကာ၊ ၎င်းအား တရားသေလွှတ်ရန်၊ ကျွန်ုပ်အမိန့်ချမှတ်လိုက်သည်။

APPELLATE CRIMINAL.

Before U San Maung, J.

H.C. 1953

Feb. 26.

THE UNION OF BURMA (APPLICANT)

v.

JOKOK *(a)* TUN AUNG (RESPONDENT).*

Rangoon Police Act, s. 31—Burden of Proof—Prosecution must establish reasonable suspicion that it was stolen property before accused is asked to explain possession—First Information Report, use of.

Held : What s. 31, Rangoon Police Act punishes is the possession of a property which may reasonably be suspected to be stolen. Before the accused can be asked to give an explanation of his possession, it must first be established that his possession of the property is such as to raise a reasonable suspicion that it is stolen property.

Held also : In a case tried summarily, the first information report does not form part of the record. Even in a case tried in a regular way, the first information report is only admissible to corroborate or contradict the testimony of the informant.

Choon Foung (Government Advocate) for the applicant.

U SAN MAUNG, J.—In Criminal Summary Trial No. 518 of 1952 of the 6th Additional Magistrate, Rangoon, Jokok *(a)* Tun Aung, was convicted of the offence punishable under section 31 of the Rangoon Police Act and was sentenced to one month rigorous imprisonment. As there is no appeal against the conviction and sentence, Jokok's appeal had to be dismissed. However, revision proceedings have been opened by this Court on its own motion with a view to consider the legality of the finding and sentence against him.

* Criminal Revision No. 133 (A) of 1952 being Review of the order of the 6th Additional (Special Power) Magistrate, Rangoon, in Criminal Summary Trial No. 518 of 1952

In the particulars of the offence explained to Jokok, it was mentioned that he was found, on the 18th of July, 1952, in possession of Rs. 500 in currency notes and four longyis which were suspected to be stolen. Jokok explained that the longyis were his own and that Rs. 500 in currency notes were his winnings from a Gambling *Waing* in Taungchan-Kwetthit. The learned Magistrate disbelieved his story and the brief statement of the reasons given by him for the conviction of Jokok reads as follows:

> "In this case, the burden of proof was on the accused to account for the possession of exhibits satisfactorily. The accused said he won the money in the Gambling and 2 D.Ws. also said accused won money in Gambling. D.Ws. were Kyi Sein and Hla Maung of Taungchan-Kwetthit. Both were not able to say how much accused had won the money in the gambling. They said they gambled at a funeral house but accused could not prove that. The accused was unable to account satisfactorily for possession of the exhibits and he is thus convicted."

This is clearly quite insufficient to support a conviction under section 31 of the Rangoon Police Act. What this section punishes is the possession of a property which may reasonably be suspected to be stolen. Before the accused can be asked to give an explanation of his possession, it must first be established that his possession of the longyis and the currency notes was such as to raise a reasonable suspicion that they were stolen property. There is nothing in the reasons recorded by the Magistrate to show how and in what circumstances Jokok was found in possession of them so as to raise such a reasonable suspicion. In a case tried summarily, the first information report does not form part of the record. Even in a case tried in a regular way, the first information report is only admissible to

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

U SAN MAUNG, J.

corroborate or contradict the testimony of the informant.

For these reasons, I hold that there is no evidence whatsoever to warrant the conviction of Jokok under section 31 of the Rangoon Police Act. The conviction and sentence are therefore set aside. The properties seized from him must be returned.

APPELLATE CRIMINAL

Before U San Maung, J.

THE UNION OF BURMA (APPLICANT)

v.

MA SOE LAY (RESPONDENT).*

H.C. 1952

Dec. 8.

Witnesses' Expenses—Process Fees—Rule 18, sub-rule (a) (1) *clause* (ii)—*Direct complaint of non-cognisable and bailable warrant case—Witnesses recalled for further cross-examination after charge framed—Government pays expenses of witnesses.*

Held: The right to recall witnesses for the prosecution conferred upon the accused by s. 256 of the Criminal Procedure Code is as much a statutory right as is conferred upon him by s. 351 (*a*) of the Code to claim a *de novo* trial, which right cannot be defeated by ordering the accused to deposit process fees and witnesses' expenses. Witnesses' expenses should therefore be paid by the Government and processes issued under such circumstances should be considered as falling within clause (ii) of sub-rule (*a*) (1) of Rule 18 of the Process Fees Rules.

Maung Chit Tay v. *Maung Tun Nyun*, 13 Ran. 297; *Amin Chand and others* v. *Emperor*, 6 Cr. L. J. 339; *Birdhichand* v. *Lakhmichand*, 13 Cr.L.J. 544; *Taqi Chah* v. *Emperor*, 22 Cr.L.J. 112, followed.

Kyaw (Government Advocate) for the applicant.

U SAN MAUNG, J.—In his Criminal Revision case No. 127 of 1952 the Sessions Judge of Pyinmana has reported to this Court for orders Criminal Regular Trial No. 58 of 1952 of the Township Magistrate of Pyinmana, wherein the Township Magistrate had ordered the payment by the accused of Rs. 5-6-0 as witness expenses of witnesses who had to be re-summoned for the purpose of cross-examination after a charge under section 427 of the Penal Code had been framed against the accused in a case instituted on the direct complaint of one Ma Soe Lay.

* Criminal Revision No. 198 (B) of 1952 being Review of the order of the Township Magistrate, Pyinmana, in Criminal Regular Trial No. 58 of 1952.

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It is not necessary for me to recapitulate the facts which have been fully set out in the order of reference of the Sessions Judge dated 16th September 1952. The Sessions Judge relying upon the ruling in the case of *Maung Chit Tay* v. *Maung Tun Nyun* (1) which he considered should be applied by analogy to the present case has recommended that the order of the Township Magistrate regarding the payment by the accused of a sum of Rs. 5-6-0 be set aside as the witness expenses should have been paid by the Government.

In the case of *Maung Chit Tay* v. *Maung Tun Nyun* (1) Dunkley J., has held that the right of an accused person to demand a *de novo* trial on a new magistrate succeeding the original magistrate is a statutory right which cannot in a non-cognisable case be defeated by ordering that the accused shall deposit process-fees and witnesses' expenses before the witnesses already examined before the first magistrate are re-summoned. In coming to this conclusion the learned Judge considered that the payment of witness expenses by the Government could be made under the discretion conferred upon the Court by section 544 of the Code of Criminal Procedure and that the processes issued for the purpose of a *de novo* trial fall within the ambit of clause (ii) of sub-rule (*a*) (1) of Rule 18 of the Process Fees Rules. There is, however, no direct authority in Burma on the question whether or not witness expenses should be paid by the Government and processes issued free of charge when witnesses had to be re-called for the purpose of cross-examination under the provisions of section 256 of the Criminal Procedure Code when the case is a non-cognisable and bailable warrant case.

(1) 13 Ran. 297.

In the case of *Amin Chand and others* v. *Emperor* (1) it was held by Mr. Justice Shah Din of the Chief Court of the Punjab that under section 256 of the Criminal Procedure Code it is the duty of a Magistrate, if the accused wishes, to recall the prosecution witnesses for further cross-examination and that the accused cannot be deprived of his right of further cross-examination on the ground of non-payment of the necessary expenses by him. As explained in that case " the procedure contemplated in the Criminal Procedure Code is that the prosecution witnesses should be heard, the charge framed and the accused called upon to cross-examine the prosecution witnesses at one consecutive hearing continued, if necessary, from day to day and the said witnesses should not be discharged till the accused have been questioned whether they wish to cross-examine after the charge. Where the hearing is not consecutive and the prosecution witnesses are allowed to leave before the charge is framed it is the duty of the Magistrate to recall them at the public expense, if the accused so demands after the charge is framed."

This case was followed by the Judicial Commissioner, Nagpur, in the case of *Birdhichand* v. *Lakhmichand* (2) where the learned Judicial Commissioner also referred to the above quotation and added " I would also refer to section 254 of the Code which makes it clear that a charge may be framed before all the evidence available for the prosecution has been recorded. Where in order to suit the convenience of the Court or for reasons connected with the discharge of other public business, the witnesses for the prosecution are allowed to leave before the charge has been framed or the right

(1) 6 Cr.L.J. p. 339. (2) 13 Cr. L.J.p. 544.

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conferred by section 256 exercised, they must be required to attend again and ordinarily any expenses which may be allowed them on this score should be paid by Government. There is nothing in Chapter 21 of the Code which enables the Magistrate to demand even from a complainant the expenses to be incurred by his witnesses, though such a power is conferred by section 244 (3) where the case under trial is a summons-case." *Birdhichand*'s case (1) was one under section 500 of the Penal Code, that is to say, a non-cognisable bailable warrant case. In the case of *Taqi Chah* v. *Emperor* (2) which was one under section 498 of the Penal Code, it was held by Mr. Justice Chevis of the Lahore High Court that section 256 of the Criminal Procedure Code gives the accused an absolute right to recall prosecution witnesses for cross-examination at the expense of the Government, and it is not open to the Magistrate to order the accused to pay costs for recalling those witnesses. In my opinion also the right to recall witnesses for the prosecution conferred upon the accused by section 256 of the Criminal Procedure Code is as much a statutory right as is conferred upon him by section 351 (*a*) of the Code to claim a *de novo* trial. Witness expenses should therefore be paid by the Government and processes issued under such circumstance should be considered as falling within clause (ii) of sub-rule (*a*) (1) of Rule 18 of the Process Fees Rules.

For these reasons I would accept the recommendation of the Sessions Judge, Pyinmana, and direct that the order of the Township Magistrate requiring the payment of Rs. 5-6-0 by the accused in the case before him be set aside and the amount paid by them refunded.

(1) 13 Cr. L.J.p. 544. (2) 22 Cr. L.J.p. 112.

APPELLATE CRIMINAL.

Before U Bo Gyi, J.

T. S. MOHAMED AND ONE (APPLICANTS)

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Dec. 5.

v.

THE UNION OF BURMA (RESPONDENT).*

Essential Supplies and Services Act, 1947, s. 8(1)—Possession of sugar—For sale or personal use—Magistrate visiting shops—Importing personal knowledge to fill gap in prosecution case—Trial vitiated.

Held: Accused persons can be convicted only when it is proved that they possessed sugar for sale except under and in accordance with the terms of a licence under Notification No. 166, dated the 28th December 1950 duly issued to them.

Held further: The Magistrate in visiting the shops not for the purpose of understanding the evidence but to fill in the gap in the prosecution evidence did an act which is entirely unwarranted. He has imported his own knowledge of certain facts in the case and by so doing has vitiated the trial.

Mya Thein (Government Advocate) for the respondent.

U BO GYI, J.—These two revision cases were heard together and although different accused persons are involved, the material facts are practically the same in both the cases. They are, therefore, disposed of in this order.

The facts are that on the 25th April 1951, U Me who has been described as D.S.I., Mergui, visited the shops of accused N. K. Hussain and T. S. Mohamed in Mergui Town and found in the former shop some 26 viss of sugar and in the latter shop about 32 viss of similar commodity.

* Criminal Revision No 203 (B) and No. 218 (B) of 1952 being Review of the order of the 5th Additional Magistrate, Mergui, in Criminal Regular Trial No. 54 and No. 55 of 1952.

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The two accused were, therefore, prosecuted under section 8 (*1*) of the Essential Supplies and Services Act.

Now, by the Civil Supplies Department's Import I Branch Notification No. 166, dated the 28th December 1950 and published in Part IV of the *Burma Gazette* dated the 6th January 1951, the Commissioner of Civil Supplies, Burma, has under paragraph 9 of the Civil Supplies Management and Control Order, 1947, directed that no person shall sell or acquire or possess for sale or otherwise deal in sugar save under and in accordance with the terms of a licence issued by him or by an officer of the Civil Supplies Department authorized by him in this behalf. This Notification was duly published in the official gazette and consequently, the accused persons must be deemed to have had notice of it.

It would seem in the circumstances of the present cases that the accused persons can be convicted only when it is proved that they possessed sugar for sale except under and in accordance with the terms of a licence duly issued to them.

The learned trial Magistrate did not in the charges mention that possession of the sugar in question was for sale. Apparently neither he nor those responsible for the prosecution realised at the beginning that the possession of sugar to come within the mischief of the notification must be for sale. Perhaps for this reason the prosecution witnesses were not asked at what particular places in the shops the sugar was kept. The defence was that the sugar had been acquired not for sale but for the purpose of entertaining the employees of the shops during the *Idd*. Faced

with this situation and apparently because it was argued on behalf of the accused that the prosecution had failed to prove that the sugar was possessed for sale, the learned Magistrate visited the shops. Reading his judgment as a whole, it would seem that the learned Magistrate at first recognised that the burden of proof in each case was on the prosecution and also that the prosecution failed to lead evidence to show that sugar was stored for the purpose of sale. He felt himself, however, unable to discharge the accused because the sugar was actually found in the shops where other properties were kept for sale. He then went on to say that unless the accused could prove that the sugar was not kept for sale they could not be discharged. The learned Magistrate then visited the shops and although he said that he was not influenced by the facts he noticed at his visits to the shops that the sugar was found with the other things kept for sale, he convicted them saying that the accused had failed to prove to his satisfaction that the sugar was solely stored for private consumption. The learned Magistrate in visiting the shops not for the purpose of understanding the evidence but to fill in the gap in the prosecution evidence did an act which is entirely unwarranted. He has imported his own knowledge of certain facts into the cases and by so doing has vitiated the trials.

I accordingly accept the recommendations but on other grounds than those mentioned by the learned Sessions Judge and set aside the convictions and sentences and direct that the accused persons be acquitted and the fines, if paid, be refunded to them.

တရားလွှတ်တော်။

တရားဝန်ကြီး ဦးအောင်ခိုင်ရွှေတော်၌။

၁၉၅၃
ဖေဖော်ဝါရီလ
၂၆ ရက်။

ဘီရူး (ခေါ်) မကျင်နု (ပြင်ဆင်ရေးလျှောက်ထားသူ)
နှင့်
ပြည်ထောင်စုမြန်မာနိုင်ငံ (ပြင်ဆင်ရန်လျှောက်ထားခံရသူ)*။

ပြည့်တန်ဆာနှိပ်ကွပ်ရေး ဥပဒေ ပုဒ်မ ၃ (က)။ ၁၉၄၉ ခုနှစ်၊ ပြည့်တန်ဆာပျောက်ရေး အက်ဥပဒေ ပုဒ်မ ၃၊ ပုဒ်မငယ်(က)။ ။ဝါရမ်းမှု။ ။ရာဇဝတ်ကျင့်ထုံးကိုဥပဒေ ပုဒ်မ ၂၆၃ အရ အကျဉ်းအားဖြင့် စစ်ဆေးခြင်း။ ။ထင်းကိုဥပဒေပုဒ်မ ၃၄၂၊ ဒုတိယ အဝိုဒ်အရ တရားခံကို စစ်ဆေးခြင်းမပြု။ ။ဆိုမှားယွင်းချက်သည် ထင်းကိုမ ဥပဒေ ပုဒ်မ ၅၃၇ ၏ အကူအညီရနိုင် မရနိုင်။

ပြည့်တန်ဆာနှိပ်ကွပ်ရေး ဥပဒေဟူ၍ ယခုမရှိတော့ချေ။ ၁၉၄၉ ခုနှစ်၊ ပြည့်တန်ဆာပပျောက်ရေး အက်ဥပဒေ ထုတ်ပြန်လိုက်သည့်နေ့မှစ၍ ပြည့်တန်ဆာနှိပ်ကွပ်ရေး ဥပဒေကို ပယ်ဖျက်ခဲ့သည်။

၁၉၄၉ ခုနှစ်၊ ပြည့်တန်ဆာ ပပျောက်ရေး အက်ဥပဒေပုဒ်မ ၃၊ ပုဒ်မငယ် (က) အရ ပြစ်မှုသည် အပြစ်ဒဏ်ပေးရာ၌ ထောင်ဒဏ် တန့်စ်ကျခံစေနိုင်သည့်အတွက် ဝါရမ်းမှုဖြစ်လေသည်။

၎ဝါရမ်းမှုကို အောက်ရုံးကရာဇဝတ်ကျင့်ထုံးကိုဥပဒေ ပုဒ်မ ၂၆၃ အရ အကျဉ်းအားဖြင့် စစ်ဆေးခဲ့ရာတွင် တရားလိုပြသက်သေများကို စစ်ဆေးပြီးသည့်နောက် တရားခံဖြစ်သူကို မစစ်ဆေးခဲ့ချေ။ ။ဝါရမ်းမှုများကို စစ်ဆေးသောအခါ ရာဇဝတ်ကျင့်ထုံးကိုဥပဒေ ပုဒ်မ ၃၄၂၊ ဒုတိယအဝိုဒ်အရ တရားခံကို စစ်ဆေးခြင်းသည် မလုပ်လျှင် မနေရဖြစ်သည်။ ၎ပျက်ကွက်မှုသည် သာမန်မှုသာမဟုတ်ဘဲ အမှုတခုလုံးကို လုံးဝပျက်စီးစေသော အချက်ဖြစ်သည်။ ထင်းမှားယွင်းသောကိစ္စအတွက် ပုဒ်မ ၅၃၇ ၏ အကူအညီမရနိုင်။

ရာဇဝတ်ကျင့်ထုံးကို ဥပဒေ ပုဒ်မ ၂၆၃ အရ အကျဉ်းအားဖြင့် စစ်ဆေးသောအခါ သက်သေအစစ်ခံချက်များကို ချွတ်ယွင်းရေးသားရန်မလိုချေ။ သက်သေ အစစ်ခံချက်များ အပေါ်

*၁၉၅၃ ခုနှစ်၊ရာဇဝတ်ပြင်ဆင်မှုအမှတ် ၂၂ (ခ)။ ရန်ကုန်မြို့၊ သတ္တမရာဘက်(အထူးအာဏာ)ရာဇဝတ်တရားသူကြီးရုံး၊၁၉၅၂ ခု၊ရာဇဝတ်အကျဉ်းမှုအမှတ် ၈၄၉ တွင်၊၁၉၅၃ ခုနှစ်၊ဇန်နဝါရီလ ၂၇ ရက်နေ့က ချမှတ်သောအမိန့်ကို ပြန်၍ဆင်ခြင်မှု။

တွင် အတည်ပြုလုပ်ခါ အပြစ်ပေးရလျှင် မည်သည့်အကြောင်းအချက်အလက်များနှင့် အပြစ်ပေးသည်ဆိုခြင်းကို အယူခံရုံးမှသော်၎င်း၊ ပြင်ဆင်သောရုံးများမှသော်၎င်း သိနားလည်စေခြင်းအလို့ငှါ ပြည့်ပြည့်စုံစုံရေးသားအပ်ပေသည်။ ပြည့်ပြည့်စုံစုံမရေးသားခဲ့ပါမူ ကောက်ယူဆုံးဖြတ်သော အချက်များသည် တရားဥပဒေနှင့်အညီ ဆုံးဖြတ်ခြင်းမဟုတ်ကြောင်း ထင်ရှားသည်။

၁၉၅၃

ဘီရူး (ခေါ်) မကျင်နှင့် ပြည်ထောင်စုမြန်မာနိုင်ငံ။

ဦးအောင်ခိုင်၊ တရားဝန်ကြီး။

မစ္စတာ ဒဗလျူ၊ကျင်ထိုး၊ ပြင်ဆင်ရန်လျှောက်ထားသူအတွက်။

ဦးချစ်၊ ပြင်ဆင်ရန်လျှောက်ထားခံရသူအတွက်။

တရားဝန်ကြီး ဦးအောင်ခိုင်။ ။ဤ ပြင် ဆင် ချက် လျှောက်လွှာကို အောက်တွင် ဖေါ်ပြမည့်အကြောင်းများကြောင့် လက်ခံရပေမည်။ ပညာရှိ အောက်ရုံးတရားသူကြီး၏ အမိန့်နှင့် ချမှတ်ဆားသော အပြစ်ဒဏ်ကိုပယ်ဖျက်ခါ လျှောက်ထားသူအား တရားသေလွှတ်ရပေမည်။

လျှောက်ထားသူ ဘီရူး (ခေါ်) မကျင်နုအား ပြည့်တန်ဆာနှိပ်ကွပ်ရေး ဥပဒေပုဒ်မ ၃ (က) အရ ရုံးသို့ဘာသားစွဲဆိုဘင်ပို့ခြင်းဖြစ်သည်။ ပြည့်တန်ဆာနှိပ်ကွပ်ရေး အက်ဥပဒေဟူ၍ ယခုမရှိတော့ချေ။ မူလပြည့်ဘန်ဆာ နှိပ်ကွပ်ရေး အက်ဥပဒေကို ၁၉၄၉ ခုနှစ်၊ ပြည့်ဘန်ဆာ ပပျောက်ရေး အက်ဥပဒေ ထုတ်ပြန်လိုက်သည့်နေ့မှစ၍ ပြည့်တန်ဆာနှိပ်ကွပ်ရေး ဥပဒေကို ပယ်ဖျက်ခဲ့သည်။ မူလပြည့်တန်ဆာ နှိပ်ကွပ်ရေး အက်ဥပဒေပုဒ်မများအနက် ၃ (က) ဟူ၍မရှိ။ ၁၉၄၉ ခုနှစ်၊ ပြည့်တန်ဆာပပျောက်ရေးအက်ဥပဒေမှသာလျှင် ပုဒ်မ ၃၊ ပုဒ်မ ငယ် (က) ရှိသည်။ ဤပုဒ်မ ၃ (က) အရ၊ ပြစ်မှုကျူးလွန်သူအား ထောင်ဒဏ် တနှစ်ဖြစ်စေ၊ ငွေနှင့်ထောင်ဒဏ် နှစ်ရပါင်းဖြစ်စေ ကျခံစေနိုင်သည်။ ဤကဲ့သို့ ဥပဒေ ပြောင်းလဲခြင်းကိုရဲဌာနာမှသော်၎င်း၊ အောက်ရုံးတရားသူကြီးကသော်၎င်း သိဟန်လက္ခဏာမတူ၊ ဤအမှုသည် ပြည့်တန်ဆာပပျောက်ရေး အက်ဥပဒေ ပုဒ်မ ၃ (က) အရ တင်သည်ဆိုပါက အပြစ်ဒဏ်ပေးရာ၌ ထောင်ဒဏ်တနှစ် ကျခံစေနိုင်သည့်အတွက် ဤအမှုမှာ (ဝါရမဲမှ) ဖြစ်လေသည်။အောက်ရုံးတရားသူကြီးက ဤအမှုကို ရာဇဝတ်ကျင့်ထုံးကို ဥပဒေပုဒ်မ ၂၆၃ အရ အကျဉ်းအား ဖြင့် စစ်ဆေးခဲ့သည်။ ဤကဲ့သို့အကျဉ်းအားဖြင့် စစ်ဆေးသည်ဖြစ်သောကြောင့် သက်သေအစစ်ခံချက်များကို ချွတ်ထွင်ရေးသားရန်မလိုချေ။ သက်သေအစစ်ခံချက်များအပေါ်တွင် အတည်ပြုလုပ်ခါ အပြစ်ပေးရလျှင် မည်သည့်အကြောင်းအချက်အလက်များနှင့် အပြစ်ပေးသည်ဆိုခြင်းကို အယူခံရုံးမှသော်၎င်း၊ ပြင်ဆင်သော

၁၉၅၃

ဘီရူး (ခေါ်)
မကျင်နှင့်
ပြည်ထောင်စု
မြန်မာနိုင်ငံ။

ဦးအောင်ခိုင်၊
တရားဝန်ကြီး။

ရုံးများမသော်ငင်း သိနားလည်စေခြင်းအားလျှော်ပြည့်ပြည့်စုံစုံရေးသားအပ်ပေသည်။ ဤကဲ့သို့ပြည့်ပြည့်စုံစုံမရေးသားခဲ့ပါမူ လျှောက်ထားသူအတွက် များစွာမှပင် နစ်နာခြင်းဖြစ်ပေမည်မှာ အမှန်ပင်ဖြစ်သည်။ လျှောက်ထားသူမှာ မိမိအမှုအတွက် အားကိုးစရာအောက်ရုံးတရားသူကြီး၏ ထင်မြင်ချက် မှတ်စုများသာလျှင်ဖြစ်သည်။ ဤထင်မြင်ချက်များကို ပေါ်လွင်အောင် ရေးမထားပါက အထက်ရုံးများက လျှောက်ထားသူတွင် အပြစ်ရှိမရှိ ဝေဘန်ရန် ခဲယဉ်းမည်မှာလည်း အမှန်ပင်ဖြစ်သည်။

ဤအမှုတွင် တရားခံအားပေးထားသောအပြစ်သည် အယူခံနိုင်သောအမှုမဟုတ်၍ ပြင်ဆင်မှုသာ လျှောက်ထားခြင်း ဖြစ်သည်။ အောက်ရုံးတရားသူကြီးကောက်ယူဆုံးဖြတ်သည့် အကြောင်းပြချက်များကို ဖေါ်ပြရာမှာလည်း အမှုအကြောင်းအရာများအပြည့်အစုံမပါကြောင်းတွေ့ရသည်။ ဥပမာပြရမည်ဆိုလျှင် လျှောက်ထားသူသည် ဂေါ်ဒွင်လမ်း၊ အမှတ် ၃၉၊ ဝရဇ်တာမှနေ၍ အများသွားလာသော လမ်းပေါ်ရှိလူများအား ပြည့်တန်ဆာအလုပ်ကို လုပ်နိုင်ရန် ကိုယ်ဟန်ပြခြင်း အလုပ်များကို ပြုလုပ်ခဲ့သည်ဆိုသည်၊ သို့ရာတွင်မည်ကဲ့သို့ ကိုယ်ဟန်ပြခြင်းအကြောင်း ဖေါ်ပြမထားချေ။ ဤကဲ့သို့ကိုယ်ဟန်ပြခြင်းကို မည်သူတစုံတယောက်က မြင်သည်ဟုလည်း နာမည်များဖေါ်ပြမထား။ သို့ဖြစ်၍ ကောက်ယူဆုံးဖြတ်သည့်အကြောင်းပြချက်များသည် ဤအမှုတွင် စုံစုံလင်လင်ပါရှိသည်ဟုမဆိုသာ၊ ဤကဲ့သို့စုံစုံလင်လင် မပါသည့်အတွက် ဤကောက်ယူဆုံးဖြတ်သော အချက်များသည် တရားဥပဒေနှင့်အညီ ဆုံးဖြတ်ခြင်းမဟုတ်ကြောင်း ထင်ရှားသည်။

ဤအချက်ဖြင့်ပင်လျှင် အောက်ရုံးတရားသူကြီး၏ အမိန့်ကို ပယ်ဖျက်နိုင်သည်။ သို့ရာတွင်ဤအမှုမှာ ဖေါ်ပြပါ၌ယွင်းချက်မှအပ ဥပဒေအရ မှားယွင်းနေသော အချက်ကြီးတခုလည်းရှိပေသေးသည်။ ဤအမှုမှာ (၀၂ရခ၊း) မှုဖြစ်၍ ၀၂ရခ၊းမှုများကို စစ်ဆေးသောအခါ တရားခံကို စစ်ရစမြဲဖြစ်သည်။ ရာဇ၀တ်ကျင့်ထုံးကိုဥပဒေပုဒ်မ ၃၄၂၊ ဒုတိယအပိုဒ်အရ တရားလိုပြသက်သေများကို စစ်ဆေးပြီးသည့်နောက် တရားခံဖြစ်သူကို စစ်ဆေးရမည်ဟု အတိအလင်းဖေါ်ပြထားသည်။ ယခုအမှုတွင်တရားခံ (လျှောက်ထားသူ) အား တရားလိုပြသက်သေများကို စစ်ဆေးပြီးနောက် အောက်ရုံးတရားသူကြီးက မစစ်ဆေးခဲ့၊ တရားခံ (လျှောက်ထားသူ) က မိမိတွင်အပြစ်မရှိဟုဆိုသည်။ ဤကဲ့သို့တရားခံကိုစစ်ဆေးခြင်းမပြုခဲ့သည့်အတွက် ဥပဒေအရမည်သည့်အခြေခို ရောက်သွားမည်ကိုသုံးသပ်ရန်လိုပေသည်။ ရာဇ၀တ်ကျင့်ထုံးကိုဥပဒေ ပုဒ်မ ၃၄၂ အရ တရားခံကို

၁၉၅၃

ဘိရွီး (ခေါ်) မကျင်နှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံ။

ဦးအောင်ခိုင်၊ တရားဝန်ကြီး။

စစ်ဆေးခြင်းသည် မလုပ်လျှင် မနေရဟုအတိအလင်းဖေါ်ပြထားသည့် ညွှန်ကြား ချက်များရှိရာ မလိုက်နာဘဲ ပျက်ကွက်ခဲ့သည်။ ဤပျက်ကွက်မှုသည် သာမန် မှုသာမဟုတ်ဘဲ အမှုတခုလုံးကို **လုံးဝ**ပျက်စီးသောအမှုမျိုးဖြစ်သည်။ ဤအမှု မျိုး၌ ရာဇဝတ်ကျင့်ထုံးပုဒ်မ ၅၁၇ တွင် ဖေါ်ပြထားသောဥပဒေအချက်အလက် များနှင့် မသက်ဆိုင်၊ ဤမှားယွင်းသော ကိစ္စများအတွက် ပုဒ်မ ၅၁၇ ၏ အကူ အညီကို မရနိုင်။

ဤအကြောင်းအချက်များကြောင့် မူလတရားစွဲဆိုခြင်းကလည်း မမှန်။ စစ် ဆေးခြင်းမှာလည်း ချို့ယွင်း၊ အမှုစစ်ဆေးပြီးနောက် ကောက်ယူဆုံးဖြတ်သည့် အကြောင်းပြချက်များသည်လည်း မစုံလင်။ သို့ဖြစ်ခြင်းကြောင့် လျှောက်ထားသူ ဘိရွီး (ခေါ်) မကျင်နု၏ လျှောက်လွှာကို လက်ခံပြီး အောက်ရုံးကချမှတ်ထား သောအမိန့်နှင့် အပြစ်ဒဏ်တို့ကို ပယ်ဖျက်လိုက်၍ ၎င်းအားတရားသေ လွှတ်ရန် အမိန့်ချမှတ်လိုက်သည်။

APPELLATE CRIMINAL.

Before U San Maung, J.

H.C. 1952

Dec. 12.

MAUNG KYAW AYE (APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Criminal Procedure Code, s. 526—Transfer of case—All cases and appeals must be heard in open Court, not in chambers—Burma Courts Manual. paragraph 22—Deportment of officers in charge of administration of justice—Justifiable apprehension of accused the main consideration in transfer application.

Held: A case should be heard in open Court and it is not a sufficient answer that the procedure of hearing it in chambers was adopted because it was a petty case and the accused had consented to it being heard in the chamber. Paragraph 22 of the Burma Courts Manual directs that matters of an informal nature may in the discretion of the Judge or Magistrate be disposed of in Chambers, but other judicial business of formal nature should be transacted in open Court.

Held further: It is incumbent upon those in charge of the administration of justice to so deport themselves as to raise no apprehension in the minds of an accused person that he would not have a fair and impartial trial.

Held also: If the words or action of the Magistrate would raise an apprehension in the mind of the accused person that he would not have a fair and impartial trial, the case must be transferred.

Kishori Lal v. *Chunni Lal*, 31 All. 117, referred to.

Amar Singh v. *Sadhu Singh*, 6 Lah. 396; *M. DeCarmo Lobo* v. *G. C. Bhattacharjee*, A.I.R. (1937) Rau. p. 272, followed.

Hla Tun Pru for the applicant.

Kyaw (Government Advocate) for the respondent.

U SAN MAUNG, J.—This is an application under section 526 of the Criminal Procedure Code by the applicant Maung Kyaw Aye for the transfer of

*Criminal Misc. Application No. 49 of 1952 being Application for transfer of Criminal Summary Trial No. 163 of 1952 of the 2nd Additional Magistrate, Rangoon.

Criminal Summary Trial No. 163 of 1952 pending against him in the Court of the Second Additional Magistrate, Rangoon to the Court of some other competent Magistrate in Rangoon. The grounds for the transfer as set out in the affidavit annexed to the application may be briefly stated as follows :—

(1) On the 3rd of July 1952 the trial Magistrate told the applicant that it would be better if he pleaded guilty to the charge under section 23 (*i*)(*b*) of the General Sales Tax Act as under the law he had no option but to convict him, and that when the applicant told the Magistrate that he had a good defence to the case against him the Magistrate shouted out, " All right then, fight out, good, well-done, fight, fight, fight, let me see. "

(2) While the applicant was unable to attend the Court for nearly two months owing to illness, the trial Magistrate told his father who is a Higher Grade Pleader that the applicant should be advised to plead guilty as in that case he could be given a lenient sentence. The Magistrate also told the applicant's father that under the General Sales Tax Act there was no option for him but to convict those who were prosecuted under the Act.

(3) When the applicant asked the Magistrate to call the Commercial Tax Officer, Central Circle, as a Court witness to enable him to cross-examine that officer regarding some of the points involved in the case, the Magistrate not only dismissed the application saying that the officer could be examined as a defence witness but also repeated that according to law there was no alternative for him but to convict those prosecuted under the General Sales Tax Act.

(4) The Magistrate tried the case in Chambers behind closed doors and when the applicant was examined on oath on behalf of his own defence

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MAUNG KYAW AYE v. THE UNION OF BURMA.

U SAN MAUNG, J.

there was no one in the Chambers except the Magistrate, complainant U Win Naing and the applicant, the Magistrate having refused to grant the applicant even a few hours time to enable him to procure the attendance of his Counsel.

The trial Magistrate who was asked to make a report regarding the allegations made against him has commented upon the apparently dilatory tactics adopted by the applicant in not appearing in Court until several summons have been issued for his appearance and in obtaining adjournments on the ground of his illness. The Magistrate denied that he ever told the applicant or his father to plead guilty to the charge saying that there was no alternative for him but to convict the applicant. He also said that the applicant knew fully well he was being examined on oath on behalf of his own defence and that the application made by the applicant to summon the Commercial Tax Officer as a prosecution witness was rejected because the applicant could if he wished to have the evidence of that officer, have him examined as a witness for the defence. The Magistrate, however, admitted that the case was tried in Chambers and not in open Court but stated that this procedure was adopted with the consent of the applicant because the case was of a petty nature.

Now as regards the allegation made by the applicant that the Magistrate had on several occasions advised him to plead guilty to the charge saying there was no alternative for him but to convict, it is on the face of it most improbable. If as the applicant contends the Magistrate had as early as the 3rd of July 1952 made this remark there seems no cogent reason why an application for transfer should not then

and there have been made, especially as the applicant's father who was then defending him was a Higher Grade Pleader. As it is the application for transfer was not made until the 17th of October, 1952 more than 3 months after the first remark was allegedly made by the Magistrate. This ground of transfer must therefore be rejected as untenable.

As regards the contention that the Commercial Tax Officer, Central Circle should have been called by the Court as a witness to enable the applicant to cross-examine him I am of opinion that the Magistrate was not wrong in saying that if the applicant wished to have the evidence of this officer he should be called as a witness for the defence. No doubt in the case of *Kishori Lal* v. *Chunni Lal* (1) their Lordships of the Privy Council disapproved of the practice common in litigation in the United Province in India for each litigant to cause his opponent to be summoned as a witness with the design that each party shall be forced to produce the opponent so summoned as a witness, and thus give the counsel for each litigant the opportunity of cross-examining his own client. However, the facts in that case are quite different from those of the present. Here, if as the applicant contends the complainant U Win Naing is only a *pro forma* complainant and the Commercial Tax Officer, Central Circle is the officer who really knows about the facts of the case, there is nothing to prevent the applicant from summoning this officer as his own witness. It does not seem that the applicant would be put in a disadvantageous position by having to adopt this course. There is therefore no substance in this ground of transfer also.

(1) 31 All. 117.

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Nevertheless in the events that have happened I consider that this is not a case which the learned Second Additional Magistrate, Rangoon should continue to handle. As the case has been tried summarily even if any statement made by the witnesses has been recorded in writing by the Magistrate it would not form part of the proceedings. In such cases therefore it is incumbent upon those in charge of the administration of justice to so deport themselves as to raise no apprehension in the minds of an accused person that he would not have a fair and impartial trial. The case should have been heard in open Court and it is no sufficient answer to say that the procedure of hearing it in Chambers was adopted because it was a petty case and the accused had consented to it being heard in the Chamber. In this connection I would re-produce paragraph 22 of the Courts Manual which reads: "All Judges and Magistrates should try cases or hear appeals in the Court room, and not in a private Chamber unless there are special reasons for so doing. Matters of an informal nature may in the discretion of the Judge or Magistrate be disposed of in Chambers, but other judicial business of formal nature should be transacted in open Court."

Summary trial of a case cannot be regarded as a matter of an informal nature. The Magistrate says that in this case the hearing of the case in the Chambers was with the consent of the accused person but I doubt if the accused consent was really asked or given.

In any event the consent of an accused person affords no sufficient excuse for the non-compliance of the provisions of paragraph 22 of the Courts Manual. As it is the hearing of this case in Chambers has

occasioned the making of all sorts of allegations against the Magistrate thus creating an atmosphere not conducive to the further hearing of the case before the same Magistrate. In the case of *Amar Singh* v. *Sadhu Singh* (1) Shadi Lal C.J., has observed that in dealing with an application under section 526 (1) (*a*) for transfer the Court considers not merely whether there has been any real bias in the mind of the presiding Judge against the applicant, but whether incidents may not have happened which, though they may be susceptible of explanation, are nevertheless such as are calculated to create in the mind of the applicant a justifiable apprehension that he would not have an impartial trial. In the case of *M. De Carmo Lobo* v. *G. C. Bhattacharjee* (2) U Ba U J., observed that when the accused applies for a transfer of the case to another Magistrate, what effect the words or the action of a trying Magistrate will have on the mind of an accused person should always be considered and if the words or action of the Magistrate would raise an apprehension in the mind of the accused person that he would not have a fair and impartial trial, then the case must be transferred.

In the present case the trial of the case in Chambers apparently on the ground that it was merely a petty case and the examination of the accused on oath in Chambers in the absence of his Counsel and in the presence of only the Magistrate and the complainant would in the circumstances obtaining in this case be sufficient to raise in the mind of the accused person an apprehension that he would not have a fair and impartial trial.

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(1) 6. Lah. p. 396. (2) A.I.R. (1937) Ran. p. 272.

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I would therefore direct that Criminal Summary Trial No. 163 of 1952 be removed from the file of the Second Additional Magistrate, Rangoon and transferred to that of such other competent Magistrate as the District Magistrate, Rangoon may direct.

APPELLATE CIVIL (FULL BENCH).

Before U Tun Byu, Chief Justice, U San Maung and U On Pe, JJ.

A. M. PALANICHAMY THEVAR AND ONE (APPLICANTS)

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v.

GURUSINGAM THEVAR AND OTHERS (RESPONDENTS).*

Receiver appointed by Court—Part of estate allotted for cultivation by District Agricultural Board—Permission of Court, necessity of—Possession of estate, Court or Receiver, in whom vests—"Person" definition of—General Clauses Act—Disposal of Tenancies Act, s. 3 (ii)—Receiver within meaning—Court not a juridical person—Character of Receiver's possession—High Court—No jurisdiction to restrain tenant by Injunction from doing act required by law.

Held: The Court is not a juridical person. It cannot be sued. It cannot take property and it cannot assign it.

Raj Raghubar Singh and another v. *Jai Indra Bahadur Singh*, (1919) 46 I.A. 228 at 238; *L. Hoke Sein* v. *The Controller of Rents for the City of Rangoon and one*, (1949) B.L.R. (S.C.) 160 at 163, followed.

Held: For the purpose of s. 3 (ii) of the Disposal of Tenancies Act, a Receiver is a "person" within the meaning of the General Clauses Act. It follows that the paddy land in question was one over which the Village Agricultural Committee has power to allocate to A. M. Palanichamy Thevar for cultivation.

Chan Eu Chai v. *Lim Hock Seng* (a) *Chin Huat*, (1949) B.L.R. p. 24, referred to.

Held also: The effect of the appointment of a Receiver is to bring the subject-matter of the litigation in *custodia legis*, and he holds the property for the benefit of those ultimately found to be the rightful owners.

Harihar Mukherji v. *Harendra Nath Mukherji*, (1910) I.L.R. 37 Cal. Series, 754 at 757, followed.

Held further: A person to whom land has been allotted under the disposal of Tenancies Act is required to take possession and make himself ready to cultivate it in proper time. He cannot be said to have done

* Civil Reference No. 1 of 1952 being a Reference made by the Hon'ble Justice U Bo Gyi in Civil Regular No. 57 of 1948 of the High Court, Original Side, dated the 19th September 1951.

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something wrong or illegal when he was doing nothing more than what the law in effect required him to do, and he cannot be restrained from doing it by the Court.

A. M. Dunne v. *Kumar Chandra Kisora*, (1903) 30 Cal. Series, p. 593, distinguished.

P. K. Basu for the applicants.

G. N. Banerjee for the respondents.

The judgment of the Bench was delivered by

U TUN BYU, C. J.—The plaintiffs A. M. Palanichamy Thevar and A. M. Vinayaga Thevar and the 6th defendant Ponniah Thevar are the sons of one A. Muthuswamy Thevar, deceased. The two plaintiffs instituted a suit, known as Civil Regular No. 57 of 1948, on the Original Side of the High Court for partition and possession of their share in the estate of a joint-Hindu family. A Receiver was subsequently appointed to take charge of the properties belonging to the estate of the said joint-Hindu family, which included a piece of land, known as holding No. 13, Ko-Bin Kwin, Kyauktan Township, measuring about 30 acres. The first plaintiff A. M. Palanichamy Thevar and Gurusingam Thevar, who was added subsequently as one of the defendants in the above-mentioned suit, both applied to the Village Agricultural Committee concerned for permission to work that piece of paddy land, measuring about 30 acres; and the Village Agricultural Committee, apparently after hearing the parties, allotted the said paddy land to A. M. Palanichamy Thevar for cultivation for the year 1951-52. The appeal of Gurusingam Thevar against the order of the Village Agricultural Committee, allotting the land to A. M. Palanichamy Thevar for cultivation, was also dismissed by the District Agricultural Board. Thus, in the absence of a decision of a superior Court, the said paddy land must be considered to have been rightly allotted

to A. M. Palanichamy Thevar for cultivation for the year 1951-52.

On or about the 24th July, 1951, *i.e.* after the appeal of Gurusingam Thevar was dismissed by the District Agricultural Board, Karuppiah Thevar, who had been appointed a Receiver, applied on the Original Side of the High Court for an injunction to prohibit A. M. Palanichamy Thevar and his agents and servants from interfering with the Receiver's possession of the paddy land in question; and an *ad interim* injunction was issued against A. M. Palanichamy Thevar, restraining him from interfering with the Receiver's possession of the paddy land in question. The learned Judge on the Original Side, when the application of the Receiver for the grant of an injunction against A. M. Palanichamy Thevar came for hearing before him, after a notice had been issued upon the latter, however thought it fit to refer the following questions for decision :—

(1) Has the High Court jurisdiction to issue an injunction to restrain a person from interfering with its possession of property by its receiver?

(2) Has the High Court jurisdiction to issue an injunction to a person to whom a Village Agricultural Committee has allotted, for cultivation, land in the possession of the Court by its receiver restraining him from interfering with the possession of the Court?

We propose, in this reference, to first deal with the second question, which has been referred for our decision. Section 3 of the Disposal of Tenancies Act, 1948 reads:

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"3. Notwithstanding anything contained in the Tenancy Act, 1946 or any agreement to the contrary, the President may, so far as appears to him to be necessary or expedient, for maintaining or increasing cultivation essential to the economic rehabilitation of Burma, by order provide—

(i) for regulating or controlling the lease of any agricultural land by any person or class of persons holding such land to any tenant or class of tenants; or for prescribing the nature of crops to be cultivated on such land; or

(ii) for making leases of agricultural lands in the possession of any person or class of persons subject to the payment to that person or class of persons of standard rent as prescribed by Government from time to time by any tenant to whom such land is allotted by the President:

Provided that the provisions of this Act shall not apply to any agricultural land or lands—

(*a*) not exceeding fifty acres in area and in the possession of a person who is engaged in the cultivation of the same land with his own hands as his principal means of subsistence; or

(*b*) belonging to any institution created, controlled or guaranteed by Government or to any religious or charitable institution."

Rules have also been made under section 5 of the said Act, and it was under those rules that the Village Agricultural Committee and District Agricultural Board were constituted.

It has been argued on behalf of the Receiver that A. M. Palanichamy Thevar acted wrongly in taking possession of the paddy land without obtaining the prior permission of the Court, even though the land had been allotted by the Village Agricultural Committee to A. M. Palanichamy Thevar for cultivation. It is contended that as the Receiver holds the land on behalf of the Court

which appointed him, the Receiver's possession could not be disturbed without leave of the Court concerned. It was observed in *Raj Raghubar Singh and another* v. *Jai Indra Bahadur Singh* (1), which came before the Privy Council:

> "But the Court is not a juridical person. It cannot be sued. It cannot take property, and as it cannot take property it cannot assign it."

The above observation was cited with approval in *L. Hoke Sein* v. *The Controller of Rents for the City of Rangoon and one* (2). As the Court, not being a juridical person, cannot actually take possession of the property, it will not strictly be correct to say that the Court is in possession of the paddy land in question, constructive or otherwise. It appears to us that it is the Receiver who is in constructive possession of the paddy land at the time it was allotted by the Village Agricultural Committee to A. M. Palanichamy Thevar for cultivation, because ordinarily the Receiver would have been the person who would lease out the piece of paddy land in question, if the Disposal of Tenancies Act, 1948, had not been enacted.

The expression "person" is defined in the Burma General Clauses Act as—

> "'person' shall include any company or association or body of individuals, whether incorporated or not."

This definition was considered by the Full Bench in the case of *Chan Eu Chai* v. *Lim Hock Seng* (a) *Chin Huat* (3), where it was held that the Bailiff, who conducted the auction-sale on the Original Side of the High Court, could be considered to be a person who

(1) (1919) 46 I.A. 228 at 238. (2) (1949) B.L.R. (S.C.) 160 at 163.
(3) (1949) B.L.R. p. 24.

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made the sale for the purpose of section 3 of the Transfer of Property (Restriction) Act, 1947, the relevant portion of which was in these words :

" 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."

If the Bailiff, selling any immoveable property at a Court auction-sale, can properly be considered to come within the expression " person " appearing in section 3 of the Transfer of Property (Restriction) Act, 1947, we are unable to conceive of any good reason whatsoever why the Receiver in the present case, who ordinarily has the right to lease out the paddy land concerned, cannot properly be said to be a person who was, at least, in constructive possession of the paddy land at the time the Village Agricultural Committee allotted it to A. M. Palanichamy Thevar for cultivation. The Receiver was clearly the person who was holding the paddy land in question for the benefit of the persons, who will ultimately be successful in the litigation, at the time the Village Agricultural Committee allotted it to A. M. Palanichamy Thevar for cultivation. In *Harihar Mukherji* v. *Harendra Nath Mukherji* (1), it was observed :

" The effect of the appointment of a Receiver is to bring the subject-matter of the litigation in *custodia legis*, and the Court can effectively manage the property only through its officer, who is the Receiver. In other words, the Receiver ordinarily is not the representative or agent of either party in the administration of the trust, but his appointment is for the benefit of all parties, and *he holds the property* for the benefit of those ultimately found to be the rightful owners."

(1) (1910) I.L.R. 37 Cal. Series, 754 at 757.

We have italicized a few words. We accordingly hold that a Receiver is, for the purpose of section 3 of the Disposal of Tenancies Act, 1948, a "person" within the meaning of General Clauses Act; and it follows that the paddy land in question was one over which the Village Agricultural Committee has power to allocate to A. M. Palanichamy Thevar for cultivation.

It was also submitted before us, on behalf of the Receiver, that although the Receiver might be said to be in possession of the paddy land, yet his possession should be regarded as the possession of the Court, and for that reason, the Receiver's possession could not be disturbed without the leave of the Court concerned and that any attempt to interfere with such possession can be restrained by the Court. It is, however, clear that the person to whom a land has been allotted for cultivation under the Disposal of Tenancies Rules, 1949, is liable to be prosecuted, if he fails to cultivate it in view of Rule 17 of the said Rules; and Rule 17 is consistent with the object of the Disposal of Tenancies Act, 1948, which was to maintain and increase cultivation in this country. Thus, the implication which arises out of Rule 17 is that the person, to whom the land has been allotted under the Disposal of Tenancies Act, 1948, is required to take possession of the land after it has been allotted to him and that he should make himself ready to cultivate it in proper time. A. M. Palanichamy Thevar could, when he assumed possession of the paddy land after it was allotted to him by the Village Agricultural Committee, be said to have done what he was impliedly required to do under the Disposal of Tenancies Act, 1948 and the rules framed thereunder. Moreover, the Receiver

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would still continue to be the person, who would be entitled to receive the rent from A. M. Palanichamy Thevar to whom the land had been allotted for cultivation. We cannot conceive how the latter can be said to have done something wrong or illegal, when he was doing nothing more than what the law in effect required him to do.

The decision in *A. M. Dunne* v. *Kumar Chandra Kisora* (1) turns on entirely different set of facts. There, two sets of *zemindars* claimed to collect toll at a *hat*, which was on the boundary of two estates. The receiver, who was appointed in connection with the dispute between the two sets of *zemindars*, was clearly not an agent of any of the parties to that litigation, and he could therefore be said to be an unnecessary party in the proceeding under section 145 of the Code of Criminal Procedure.

In view of our answer to the second question propounded, we do not consider it necessary to answer the first question.

There will be no costs awarded so far as this reference is concerned.

(1) (1903) 30 Cal Series, p. 593.

APPELLATE CIVIL.

Before U Tun Byu, Chief Justice, and U Aung Khine, J.

IN THE MATTER OF A LOWER GRADE PLEADER.*

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Jan. 26.

Legal Practitioners Act, s. 14 (b)—*Drafting and presenting petition on allegation known to be false—Professional misconduct—Morals and behaviour expected of member of honourable profession—His duty to Court.*

Held : A professional man in the legal profession to whatever grade he belongs should realise fully that it is a professional misconduct to make a false statement to a Court which he must have known before he made it to be false. An advocate and every legal practitioner are expected to maintain a high standard of decorum in their conduct before Court and to maintain a high degree of professional ethics.

Emperor v. *Rajani Kanta Bose and others*, (1922) 49 Cal. Series 732 at p. 804; *In the matter of an Advocate*, A.I.R. (1931) Oudh 161 at p. 166; *Shyam Sunder* v. *S., a Pleader, Lucknow*, A.I.R. (1944) Oudh 236 at p. 237; In re *Pleader the Law*, I.L.R. (1944) Mad. Series, p. 550, followed.

Held further : Their duty is to assist the Court in the proper administration of justice and to refrain from doing anything which will reflect on the administration of justice or on the high office of an honourable profession.

Tun Maung for the applicant.

Kyaw (Government Advocate) for the respondent.

U TUN BYU, C.J.—U Hla Pe, against whom a proceeding under the Legal Practitioners Act had been opened, is a Lower Grade Pleader practising in the Pyinmana District. H. M. Akbar filed a suit against U San Shwe for ejectment from a building in Pyinmana, known as Civil Regular No. 4 of 1951 of the Court of Assistant Judge, Pyinmana, which was subsequently converted into Civil Regular No. 2 of 1951 of the Court of the Subdivisional Judge, Pyinmana. In the above suit, U Po Sai, a Higher Grade Pleader, appeared on behalf of the plaintiff

* Civil Misc. Application No. 12 of 1952.

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H. M. Akbar, while U Hla Pe appeared for the defendant U San Shwe. Prior to the institution of this suit, H. M. Akbar obtained a certificate from the Assistant Rent Controller, Pyinmana, giving him permission to sue three of his tenants for ejectment, but the name of U San Shwe was not included in that certificate. This certificate, which had been marked as Exhibit G, was filed in Court on the 27th September 1950, but it was not made an exhibit in Court till about the 9th December 1950.

Subsequently, when H. M. Akbar was examined in Court, he stated, *inter alia*—

> ". . . . . then I applied to the Rent Controller to grant me permission to file a suit for ejectment against the defendant. I now file the order passed by the Rent Controller (Order admitted as Exhibit G). The Rent Controller held an enquiry before he passed his order. He examined witnesses in that case."

It was on that occasion only that Exhibit G was actually made an exhibit in the case, and not before. Thus U Hla Pe had ample time to study or examine Exhibit G before H. M. Akbar was examined. We have analysed the above statements made by H. M. Akbar, and every sentence of it is, in fact, true. The statements of H. M. Akbar apparently irritated U Hla Pe, and U San Shwe's statement about the conversation which he had with U Hla Pe after H. M. Akbar had been examined was—

> "After the suit was heard, I came down from the Court and asked my lawyer, U Hla Pe, why Exhibit G was admitted. U Hla Pe replied that the applicant was giving false evidence because U Tha Dun, had never given permission to eject me by the applicant, and that by giving that false evidence, the plaintiff was trying to make me suffer in the suit."

"I replied to U Hla Pe 'I shall not bear this' and asked him what I should do. U Hla Pe then told me that he would apply for sanction to prosecute the applicant in the same Court, and that I should search for Rs. 1,000 to bear costs, etc."

On the 10th December, 1950, U Hla Pe filed an application for sanction to prosecute H. M. Akbar and his lawyer U Po Sai under sections 471, 474, 511, 193 and 34 of the Penal Code; and both he and U San Shwe signed on that application. It was alleged that Exhibit G was a forged document and that it had been illegally obtained. The expression used was "လက်မှတ်တု" and "တရားသောလက်မှတ် အမှန်မဟုတ်", and if we read these expressions in the light of the provisions of sections 471 and 474 of the Penal Code, it becomes obvious that what U Hla Pe meant was that Exhibit G was a forged document. U San Shwe, in his examination in the proceedings under the Legal Practitioners Act, also stated—

"I told him that he (U Hla Pe) understood law and that he should do as he thought best. But I warned him not to do anything unjustly or unfairly."

It is thus clear that U Hla Pe is responsible for the false insertion of the objectionable statements appearing in the application for sanction to prosecute H. M. Akbar and U Po Sai. It is said that the application was in the handwriting of U Hla Pe, and we accept this as correct. U San Shwe stated that he did not give detailed instructions to U Hla Pe for drafting the application, and we accept this statement of U San Shwe also. We also accept U San Shwe's statements, reproduced earlier, about the conversation which occurred between him and U Hla Pe a day or so before the application for sanction was filed.

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U Hla Pe could, in the circumstances, be said to have deliberately and falsely alleged in the application for sanction, which he filed on behalf of U San Shwe, that Exhibit G, which U Po Sai filed on behalf of his client H. M. Akbar, was a forged document in that he must have known, especially as a practising lawyer, that Exhibit G was a genuine document. The Exhibit G bore the signature of the Subdivisional Officer, who was also an Assistant Rent Controller of Pyinmana, and it bore the seal of the Office of the Subdivisional Officer. Moreover, U San Shwe, a client of U Hla Pe, had also received a copy of this order, which had been filed as Exhibit 3, in the regular suit; and Exhibit 3 was apparently received by U San Shwe long before H. M. Akbar was examined in connection with Exhibit G. We can see no justification for making the false statements contained in the application for sanction, which U Hla Pe filed on behalf of his client U San Shwe, particularly when they implied that U Po Sai, a lawyer on the opposite side, was also a party to the filing of a forged document in Court. A professional man in the legal profession to whatever grade he belongs should realise fully that it is a professional misconduct to make a false statement to a Court, which he must have known before he made it to be false, and that such conduct becomes more reprehensible when it amounts to an allegation of a criminal misconduct against a member of an honourable profession. An advocate and every legal practitioner are expected to maintain a high standard of decorum in their conduct before Court. Their duty is to assist the Court in the proper administration of justice and to refrain from doing anything which will reflect on the administration of justice or on the high office of an honourable profession.

Mookerjee J., in *Emperor* v. *Rajani Kanta Bose and others* (1), observed—

" A pleader, however, is more than a mere agent or servant of his client. He is also an officer of the Court, and as such he owes the duty of good faith and honourable dealing to the Courts before which he practises his profession. His high vocation is to inform the Court as to the law and facts of the case and to aid it to do justice by arriving at correct conclusions. The practice of the law is not a business open to all who wish to engage in it ; it is a personal right or privilege limited to selected persons of good character with special qualifications duly ascertained and certified ; it is in the nature of a franchise from the State conferred only for merit and may be revoked whenever misconduct renders the pleader holding the license unfit to be entrusted with the powers and duties of his office."

In the matter of an Advocate (2), it was stated—

" Having regard to his education and training, and in particular to the profession in which G.S. is engaged, he was expected to have exercised greater degree of caution and rectitude than ordinary persons in making a statement on oath in a Court of law."

The above observation was made in respect of a false statement made in Court by an advocate, but it appears to us that the above observation applies equally to a pleader.

Every legal practitioner ought to remember that the legal profession is an honourable profession and that a legal practitioner, even of the lower grade, is expected to maintain a high degree of professional ethics. It is observed in *Shyam Sunder* v. *S., a Pleader, Lucknow* (3)—

" We are therefore of opinion that the conduct of the pleader in making the untrue statements referred to above

(1) (1922) 49 Cal. Series, p. 732 at p. 804.
(2) A.I.R. (1931) Oudh 161 at p. 166.
(3) A.I.R. (1944) Oudh 236 at p. 237.

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cannot be lightly disregarded. Members of the legal profession are expected to maintain not only a high standard of professional morality and ethics but they are also expected as men of education and culture and as members of an honourable profession to act in an honest, straightforward and upright manner."

Section 126 of the Evidence Act is not relevant for the purpose of the present proceedings. It has no application to the statements which U San Shwe deposed to in the enquiry against U Hla Pe. Neither has anything been pointed out to us in U San Shwe's statements, which can be said to contravene the provisions of section 126 of the Evidence Act. Section 129 also does not, in our opinion, apply.

Our attention has, during the arguments, been drawn to all the relevant parts of the proceedings, and we agree with both the learned Subdivisional Judge, who held the enquiry under the Legal Practitioners Act against U Hla Pe, as well as with the learned District Judge, Pyinmana, who also forwarded his report in connection therewith to this Court, that it can in this case be said to have been proved that U Hla Pe had induced his client U San Shwe to file an application for sanction to prosecute H. M. Akbar and the latter's lawyer, U Po Sai, under sections 471, 474 and other sections of the Penal Code, by falsely representing to U San Shwe that the order of the Assistant Rent Controller, as represented by Exhibit G, was forged or illegally procured and that, in filing the application for sanction, U Hla Pe was actuated by a personal feud which he entertained towards U Po Sai, a lawyer appearing on the opposite side. Such conduct constitutes a grossly improper conduct within the meaning of clause (*b*) of section 13 of the Legal Practitioners Act. It cannot be, and was not, disputed that there had been

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a long standing enmity between U Hla Pe and U Po Sai. Moreover, the written objection, which U Hla Pe filed in the enquiry held against him under the Legal Practitioners Act also contained contumacious statements against U Po Sai, and this circumstance discloses, at least, a lack of good sense and propriety on the part of U Hla Pe. Even if U Po Sai was guilty of a misconduct, it could not form a subject for enquiry in the proceedings which had been opened against U Hla Pe. Thus those contumacious statements were wholly unnecessary and irrelevant for the purpose of the enquiry, which was being held against U Hla Pe under the Legal Practitioners Act. This is therefore a case where the Court ought to express its disapproval of the misconduct of U Hla Pe. Such a misconduct cannot be overlooked. A legal practitioner ought to restrain himself from being vindictive or too fractious.

In re *Pleader the Law* (1) it was considered to be a serious matter for a legal practitioner to include false statements in the pleading which had been drafted by him. This observation is equally applicable where a legal practitioner knowingly included false statements in any application or petition filed by him on behalf of his client. However, taking into consideration the recommendation of the learned District Judge and the learned Subdivisional Judge, Pyinmana, that U Hla Pe might be dealt with leniently, we feel that it will constitute a sufficient punishment, in the circumstances of the present case, if an order of suspension for a short period is passed. U Hla Pe, a Lower Grade Pleader, Pyinmana is therefore suspended, in respect of the first charge, for a period of one month from the date when he delivers his certificate to the Court of District Judge, Pyinmana.

(1) I.L.R. (1944) Mad. Series, p. 550.

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We do not think that it is necessary to consider the second charge, as it is doubtful if the second charge can be distinctly separated from the matter which forms the subject of the first charge. We, therefore, refrain from passing any order in respect of the second charge.

U AUNG KHINE, J.—I agree.

APPELLATE CIVIL.

Before U Bo Gyi and U On Pe, JJ.

MOHAMED ISMAIL (APPELLANT)

v.

ARIFF MOOSAJI DOOPLY AND ONE (RESPONDENTS).*

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Feb. 19.

Civil Procedure Code, Order 9, Rule 13—Application to set aside ex parte *decree—Limitation Act, Schedule I, Article 164—Starting point for computation—Date of decree or date of becoming aware of decree.*

Held: In the circumstances prevailing in the present case it would only be fair to interpret the provisions of Article 164 liberally and to hold that the appellant's case comes within the purview of the second limb of the Article, which limb is intended to protect a defendant who has had no notice of the existence of the suit but afterwards comes to know of the *ex parte* decree and thus is given 30 days from the date of his knowledge of the decree in which to apply for setting it aside.

Messrs. Fleming & Co v. *Mangalchand Dwarkadas*, A.I.R. (1924) Sind 56; *Kshirode* v. *Nabin Chandra*, (1915) 19 C.W.N. 1230, referred to.

Surjit Singh v. *Lieutenant-Colonel C. J. Torris*, (1923) 76 I.C. 14; *Tara Chand and others* v. *Ram Chand and others*, (1935) 154 I.C. 429; *Sham Sunder-Khushi Ram* v. *Devi Ditta Mal and another*, A.I.R. (1932) Lah. 539, distinguished.

D. N. Dutt for the appellant.

J. B. Sanyal for the respondents.

The judgment of the Bench was delivered by

U BO GYI, J.—This appeal is against the order dated the 18th December 1951, of the Rangoon City Civil Court in its Civil Regular No. 52 of 1951, dismissing appellant Mohamed Ismail's application under Rule 13 of Order 9, Code of Civil Procedure, for setting aside the *ex parte* decree passed against him in the said suit. It appears that on the 12th January 1951, the suit was filed by the respondents

* Civil Misc. Appeal No. 12 of 1952 against the order of the 4th Judge, City Civil Court, Rangoon, in Civil Regular No. 52 of 1951.

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against the appellant for ejectment from certain premises known as Room No. 9 in House No. 180, 32nd Street, Rangoon. The appellant put in an appearance before the Court by his agent Peer Khan. He had apparently known from the proceedings before the Rent Controller instituted by the respondents for permission to sue him in ejectment that a suit would be instituted, and had left for India after having granted a general power-of-attorney to Peer Khan. Mr. Jaganathan, an Advocate of this Court, appeared for him in the suit. On the 30th April 1951, when the case was called on for hearing, the respondents were absent and the appellant appeared before the Court by his lawyer. The suit was accordingly dismissed for default. The same day, the respondents filed an application for setting aside the order of dismissal and the Court ordered issue of notice to the appellant through his Advocate Mr. Jaganathan. The learned Advocate refused to accept the notice on the ground that the suit had been dismissed and that he had received no further instructions from the appellant. Thereupon the notice was tendered to Peer Khan as agent of the appellant and he also refused to accept it. Report was accordingly made to the Court, which ordered issue of substituted notice to the appellant by posting it at his last residence, and the notice was posted there. The appellant was absent on the date fixed for hearing the application and the learned 4th Judge of the Court accepted the respondents' explanation for their failure to appear on the date fixed for the hearing of the suit and set aside the order of dismissal and fixed the case for hearing on the 29th June 1951. The appellant was, of course, absent on the date fixed and the suit was heard and decreed *ex parte* against him.

On the 5th September 1951, appellant who had by that time returned from India presented an application to the Court to set aside the *ex parte* decree passed against him and the learned 4th Judge after hearing the parties and their witnesses dismissed the application on the ground that it was barred by limitation and that there was no sufficient cause for appellant's failure to appear before the Court and contest the suit on the date fixed for hearing.

Now, it is not seriously disputed that at all times material to the present case the appellant was in India. There is evidence to that effect and the appellant's passport exhibited in this case shows that he arrived in Rangoon on the 26th August 1951. The appellant said that he arrived in Rangoon on that date and that he came to know of the *ex parte* decree against him the same day after his arrival here. This evidence has not been either shaken or rebutted.

The crux of the case, therefore, is whether when notice of the application by the respondents to set aside the dismissal order was tendered to Peer Khan he was still the appellant's agent so that his knowledge of the filing of the application could be imputed to the appellant. Peer Khan states that on the day the suit was dismissed for default he cancelled the power-of-attorney and returned it by post to the appellant in India together with a letter intimating that the suit had been dismissed and that he would no longer be able to act as agent of the appellant. The suit was dismissed for default on the 30th April 1951, and the appellant states in his evidence that on the 9th May 1951 he received a letter from Peer Khan. The letter has not been produced. But the evidence of the appellant and Peer Khan on the point has not

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been rebutted. It appears from the evidence of Mr. Jaganathan and Peer Khan that on the day the suit was dismissed for default the latter told the former that he was not acting as agent for the appellant any more. Peer Khan adds that on the 16th or 17th May 1951, while he was outside the Court-room of the 4th Judge of the Rangoon City Civil Court he heard the suit called and he went into the Court room and informed the Court that he was no longer agent of the appellant. The Diary Order dated the 17th May 1951 in the proceedings shows that when on that day the case was called on for return of notice issued on the application to set aside the dismissal order, the appellant was absent. The learned Judge did not note down in the diary that Peer Khan mentioned to the Court that he was no longer agent of the appellant. But respondent M. M. Dooply himself admits in his cross-examination that on one occasion Peer Khan informed the Court that he had ceased to be the appellant's agent. It would seem, therefore, that respondent M. M. Dooply in mentioning the above fact was referring to what Peer Khan had told the Court on the 17th May 1951. In all the above circumstances, it must be held that on the day the notice of the application to set aside the dismissal order was tendered to Peer Khan he was no longer acting as agent for the appellant.

Certain authorities have been cited before us in support of the propositions that the summons referred to in Article 164 of Schedule I to the Limitation Act is the summons issued for the first hearing of the suit and that where there has been due service of such summons, the mere fact that the defendant has not received notice of an adjourned hearing will not cause limitation for an application to

set aside an *ex parte* decree to run from the date on which the defendant becomes aware of the decree having been passed. It is said that the underlying principle in such a case is that where the existence of a suit has been brought to the notice of the defendant by due service of a summons on him, it is his duty thereafter to inform himself of what is being done in the case—see *Surjit Singh* v. *Lieutenant-Colonel C. J. Torris* (1), *Tara Chand and others* v. *Ram Chand and others* (2) and *Sham Sunder-Khushi Ram* v. *Devi Ditta Mal and another* (3). But the circumstances obtaining in those cases were entirely different from those of the present case. There the suits had not been dismissed for default but were still pending. Here, in this case, the summons was served on the appellant and on the date fixed for hearing he appeared by his lawyer, and the suit was dismissed for default. The result was that for all intents and purposes the suit, having been dismissed, was no longer pending before the Court. In these circumstances if the provisions of Article 164 of the Limitation Act were read literally, there would be a denial of justice to the appellant. It seems to us that this Article has not been exactly intended for circumstances such as those prevailing in the present case. It would therefore be fair to interpret the provisions of the Article liberally and to hold that the appellant's case comes within the purview of the second limb of the Article, which limb, it seems, is intended to protect a defendant who has had no notice of the existence of the suit but afterwards comes to know of the *ex parte* decree and thus is given 30 days

(1) (1923) 76 I.C. p. 14. (2) (1935) 154 I.C. p. 429.
(3) A.I.R. (1932) Lah. p. 539.

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from the date of his knowledge of the decree in which to apply for setting it aside. In the present case, so far as the appellant was concerned, the suit had come to an end on the 30th April 1951 and he came to know of the subsequent proceedings on his return to Rangoon on the 26th August 1951. That the provisions of Article 164 have not been interpreted mechanically, can be seen from the decision in *Messrs. Fleming & Co.* v. *Mangalchand Dwarkadas* (1) where it was held that Article 164 is not necessarily restricted to applications to set aside a decree passed in a suit but applies also to applications under Order 9, Rule 13 of the Civil Procedure Code read with section 141 of the Code in proceedings other than suits, *e.g.*, to petitions for filing an award under the Arbitration Act.

If this view is correct, and we think it is correct, the first limb of Article 164 being in the circumstances entirely out of place, it must be held on the evidence that the appellant became aware of the *ex parte* decree against him only on his return from India and he promptly filed the application to set it aside.

The circumstances of the present case are similar to those in *Kshirode* v. *Nabin Chandra* (2) cited by Mulla on Civil Procedure Code in his commentary on Rule 13 of Order 9 as follows :

> " When a summons was served upon a *purdanashin* lady to whom the serving officer was not able to obtain access, by affixing a copy of the summons on the outer door of her dwelling house under Order 5, Rule 17 and it appeared that the lady had no knowledge of the suit against her, the Court set aside the *ex parte* decree passed against her on the ground that she was prevented by ' sufficient cause ' from appearing at the hearing of the suit."

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(1) A.I.R. (1924) Sind 56. (2) (1915) 19 C.W.N. 1230.

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In the present case the appellant did not know of the posting of the notice because he was away in India.

For all the above reasons, the order under appeal and the *ex parte* decree are set aside. In view of the terms of Rule 13 of Order 9 of the Civil Procedure Code and in all the circumstances of the case where neither party was responsible for the present situation, the parties shall bear their costs in both the Courts.

APPELLATE CIVIL.

Before U Thaung Sein and U Bo Gyi, JJ.

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Mar. 20.

U BA SEIN (APPELLANT)

v.

MOOSAJI ALI BHAI PATAIL AND ONE (RESPONDENTS).*

The President—Power of, to extend life of an Act—The Constitution, ss. 90 and 45—Urban Rent Control Act, s. 1 (3)—Ministry of Einance and Revenue Notification No. 171, dated the 28th August 1951—Conditional legislation as distinguished from Delegated legislation—Ministry of Finance and Revenue Notification No. 35, dated the 16th February 1951—Exemption created by—"Building" includes "room"—Civil Courts, jurisdiction to determine applicability of Notification—Bond executed under s. 11 (1) (d) of Urban Rent Control Act, purport of—Forfeiture and payment of compensation, inquiry prerequisite.

A piece of land, on a small portion of which the 1st respondent had, as lessee of the owner, the 2nd respondent, erected a hut, was leased by the owner to the appellant who sued to evict the 1st respondent and for the dismantling of the hut which interfered with the completion of the large building erected by appellant to be let out as flats. A compromise was effected and a decree was entered in the suit that 1st respondent dismantle his hut and vacate the area and that appellant and 2nd respondent execute a bond in the sum of Rs. 3,060 under s. 11 (*1*) (*d*) of the Urban Rent Control Act. Subsequently, on the application of the 1st respondent for installation in a room of the building now completed, the Court directed the appellant to comply, and also the forfeiture of the bond and a payment of compensation.

On appeal it was contended that :

(1) The Urban Rent Control Act came to an end on the 8th October 1951, and Notification No. 171, dated the 28th August 1951 issued by the President extending the life of the Act is *ultra vires* as it offends s. 90 of the Constitution.

(2) Parliament cannot delegate to the President the power to extend the life of any Act.

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*Civil Misc. Appeal No. 2. of 1952 against the order of the Chief Judge, City Civil Court, Rangoon, in Civil Misc. No. 37 of 1951, dated the 13th December 1951.

(3) The building in question was completed only after the 16th February 1951 when Notification No. 35 was issued and the exemption from the operation of the Urban Rent Control Act contained in this Notification applies to this building.

(4) The civil Courts have no jurisdiction to determine whether this building comes within the purview of Notification No. 35.

(5) The decree entered in the suit and the bond executed in its pursuance directs merely the payment of Rs. 3,060 on the bond, and appellant cannot be ordered to do anything further.

Held: The President was entrusted with a discretion to extend the life of the Act if circumstances and conditions warranted such an extension. The Urban Rent Control Act was a complete law and was enacted by Parliament, and the President has not modified or tampered with it in any way. Merely extending the life of an Act does not amount to making a law. The action of the President has not contravened s. 90 of the Constitution. If the President was not competent to exercise the power given to him by s. 1 (*3*) of the Urban Rent Control Act, the provision in s. 45 of the Constitution that he "shall exercise and perform the powers and functions conferred . . . by this constitution and by law" would be meaningless.

Held: The act of the President was only a piece of conditional legislation permitted by the Urban Rent Control Act, and was not a delegated legislation.

Jatindra Nath Gupta v. *The Province of Bihar and others*, (1949) 2 M.L.J. 356; *The Empress* v. *Burah and another*, I.L.R. 4 Cal. 172; In re *Kalvanam Veerabhadrayya*, (1949) 2 M.L.J. 663; In re *The Delhi Laws Act, 1912*; *The Ajmer-Merwara (Extension of Laws) Act, 1947, and The Part C States (Laws) Act, 1950*, (1951) 2 S.C.R. 747, referred to.

Held: For the purpose of the Urban Rent Control Act, the term "building" means "a house and every part thereof." It does not necessarily follow that the date mentioned in the Completion Certificate was the date on which the building or room was actually finished, as it is possible to delay the issue of a certificate by a belated application for the same. The room was completed before the issue of Notification No. 35, and the exemption will not therefore apply to this room.

Held: There is no express or implied ouster of the jurisdiction of the civil Courts in s. 3 (*1*) of the Urban Rent Control Act, and there is nothing to prevent the Civil Courts from interpreting the contents of a Notification.

H. C. Dey v. *The Bengal Young Men's Co-operative Credit Society*, (1939) R.L.R. 50, distinguished.

Held: Whether there was a bond or not by the landlord, the 1st respondent was entitled to regain possession as provided by the decree and s. 11 (*1*) (*d*) of the Urban Rent Control Act. The bond was insisted upon only as an additional safeguard. There is nothing to suggest that the 1st respondent waived his right of possession on the

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execution of the bond by the appellant. It was never meant to be a device for crafty or dishonest landlords to avoid their responsibilities by paying up a monetary penalty.

Held also: The Legislature by sub-s. (2) of s. 11 of the Urban Rent Control Act, envisages some kind of an inquiry giving an opportunity to the landlord to show cause against an order of forfeiture of the bond and payment of compensation.

P. K. Basu for the appellant.

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

R. Basu for the respondent No. 2.

The judgment of the Bench was delivered by

U THAUNG SEIN, J.—This appeal raises a question of general interest to landlords and tenants, namely, whether the President is legally competent to extend the life of the Urban Rent Control Act by means of a notification under section 1 (*3*) of that Act. The facts involved are as follows:

The 2nd respondent Hawa Bibi Hashim Ariff is the owner of a piece of land in the city of Rangoon known as No. 537—541, Dalhousie Street. The 1st respondent Moosaji Ali Bhai Patail was a tenant of the 2nd respondent in respect of a portion of that land measuring 8′ × 28′ on which he had erected a hut. On the 1st November 1947, the whole of that land was leased to the appellant U Ba Sein who had planned to erect a three-storeyed building thereon for the purpose of renting it out in flats to prospective tenants. Soon after the lease the appellant began to construct a building on the site. But he had reckoned without the 1st respondent who refused to budge from the area occupied by him. The appellant then hit upon a plan to evict the 1st respondent and with the aid of the Corporation of Rangoon dismantled the hut. This was the beginning of all the troubles between them. The 1st respondent promptly retaliated with a suit

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under section 9 of the Specific Relief Act and he was duly restored to possession. During the pendency of that suit the appellant in turn applied to the Controller of Rents for a permit under section 14-A of the Urban Rent Control Act to sue the 1st respondent for ejectment from the land. This permit was granted and finally resulted in Civil Regular Suit No. 226 of 1950 in the City Civil Court which has given rise to the present appeal. On 18th October 1950 there was a consent decree in that suit which was in the following terms :—

> "It is ordered that the 1st defendant (1st respondent) do quit vacate and give up peaceful possession of the suit land in question to the plaintiff (appellant), failing which he and anything found on the land shall be removed therefrom. . . . . The plaintiff (appellant) and the 2nd defendant (2nd respondent) shall execute a bond in the sum of Rs. 3,060 under section 11 (*1*) (*d*) of the Urban Rent Control Act."

The bond mentioned therein was duly executed and on the 7th December 1950 the 1st respondent gave up possession of his area to the appellant. On that date the building was almost complete and the only construction which remained was the area occupied by the 1st respondent's hut.

On the 13th February 1951, *i.e.*, 2 months and 6 days, after he had vacated the land, the 1st respondent applied to the City Civil Court to be reinstated in a room of the building in accordance with the terms of the decree and the bond mentioned above. In that application he asserted that the construction of the building, inclusive of the area originally occupied by him, had been completed "about a week ago." To the utter surprise of the 1st respondent the appellant contested the application on the ground that the building had

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not been completed on the date of the application, and that in view of Ministry of Finance and Revenue Notification No. 35, dated the 16th February 1951 issued by the President under section 3 (*1*) of the Urban Rent Control Act, both the decree and the bond were no longer enforceable. In particular, the appellant relied on the "completion certificate" dated 17th March 1951 (Exhibit 6 in the trial record) issued by the Corporation of Rangoon in respect of the building. If this certificate correctly sets out the date of completion, then it would appear that the room claimed by the 1st respondent was ready for occupation only after the publication of Notification No. 35 which reads:

> "In exercise of the powers conferred by sub-section (*1*) of section 3 of the Urban Rent Control Act, 1948, the President hereby exempts from the operation of the said Act, all newly constructed buildings and substantially reconstructed buildings.
>
> The exemption given above shall not extend to any building the construction or substantial reconstruction of which, as the case may be, was completed before the date of issue of this Notification.
>
> *Explanation.*—In this Notification 'substantially reconstructed building' means a building the value of reconstruction of which is not less than forty per cent of the prevailing market value of the whole building."

It should be noted, however, that the building under consideration is a three-storeyed structure with two rooms or flats on each of the 1st and 2nd floors, while the ground floor contains four rooms which are separate tenements. The dispute in this case centres round Room No. 2 which is $10\frac{1}{2}' \times 45'$ in dimensions and was built over the area originally occupied by the 1st respondent's

hut. The 1st respondent claimed that he is entitled to an area of 8′ × 28′ (being the size of his original hut) in this room. The learned Chief Judge of the City Civil Court who dealt with the case has found that the room was completed before the issue of Notification No. 35 and accordingly directed that the 1st respondent be allowed to occupy a space 8′ × 28′ in that room. The appellant now seeks to have the finding and the decree of the trial Court reversed on various grounds which may be summarised as follows :

In the first place, it is urged that the room in question was in fact completed after the issue of Notification No. 35 and hence it is outside the scope of the Urban Rent Control Act, and that the decree and bond under consideration are no longer enforceable. The learned counsel for the appellant began his arguments by pointing out that the Urban Rent Control Act is a temporary Act of limited duration and that all rights acquired under such an Act are enforceable only while the Act is in force. Several rulings were then quoted to show that the interpretation of a temporary Act differs from that of a permanent Act. The learned counsel went on to say that Notification No. 35 had in effect wiped out the rights acquired by the 1st respondent to be restored to possession and that the decree could not be executed any longer. It was pointed out to the learned counsel that the Urban Rent Control Act had not been repealed and that Notification No. 25 did not purport to extinguish any rights acquired by tenants or landlords prior to its issue. His attention was drawn to Ministry of Finance and Revenue Notification No. 171, dated the 28th August

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1951 issued by the President and which is in the following frame:—

> "No. 171. In exercise of the powers conferred by sub-section (3) of section 1 of the Urban Rent Control Act, 1948, the President hereby directs that the said Act shall continue to be in force in all Urban areas to which the said Act is applicable for a further period of three years from the eighth day of October 1951."

The learned counsel then shifted ground and conceded that the decree in the present case was unaffected by Notification No. 35 and that the rights and liabilities of the parties must be deemed to have merged in the decree. This concession would appear to fit in with the following definition of "decree" in section 2 of the Code of Civil Procedure:—

> "2. (2) 'Decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit."

But it was stressed that the exact terms of the decree under consideration should be referred to and enforced. According to the learned counsel, the decree clearly required the 1st respondent to give up possession of the area occupied by him, while the appellant was merely called upon to execute a bond in the sum of Rs. 3,060. In the event of the appellant failing to abide by the terms of the bond, namely, to restore the 1st respondent in possession, then the bond would be forfeited. To put it in another way, the only remedy open to the 1st respondent, after he had vacated the land, was to enforce the bond and no further.

This argument should be considered along with the following frank admission by the appellant that he is determined to prevent the 1st respondent regaining possession of the room: "As I want the room No. 2 for my personal use I do not want to let it out to Moosajee under any circumstances."

The learned counsel has apparently overlooked the fact that the bond in this case is one "under section 11 (*l*) (*d*) of the Urban Rent Control Act" which reads:

"11. (*l*) 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. . . . . .

* * * *

(*d*) the premises, in the case of land which was primarily used as a house site and was subsequently let to a tenant, are *bonâ fide* required by the landlord for erection or re-erection of a building or buildings and the landlord executes a bond in such amount as the Court may deem reasonable that the premises will be used for erection or re-erection of a building or buildings, that he will give effect to such purpose within a period of one year from the date of vacation of the premises by the tenant, and that he will, if so desired by the tenant, reinstate the tenant displaced from the land on completion of erection or re-erection of such buildings in case the buildings are erected for the purpose of letting."

This provision was never meant to be a device for crafty or dishonest landlords to avoid their responsibilities by paying up a monetary penalty. Obviously, the decree in the present case was a conditional one, *i.e.*, the 1st respondent agreed to vacate the land on the distinct understanding that

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he would be restored to possession after the building had been completed. Whether there was a bond or not by the landlord, the 1st respondent was entitled to regain possession as provided by the decree and section 11 (*1*) (*d*) of the Urban Rent Control Act. The bond was insisted upon only as an additional safeguard to ensure the due observance by the landlord of his responsibilities. There is nothing in the decree to suggest that the 1st respondent waived his right of possession on the execution of a bond by the appellant.

The next ground urged by the learned counsel for the appellant is that the civil Courts are debarred from deciding whether the suit room comes within the purview of Notification No. 35 and that this question can only be decided by the President. Reliance is placed on the wording of section 3 (*1*) and (*2*) of the Urban Rent Control Act which reads:

> "3. (*1*) The President may, by notification, exempt from the operation of this Act or any portion thereof any such area or class of premises as may be specified in such notification and may subsequently cancel or vary such notification.
>
> (*2*) If any question arises whether any premises come within an urban area or within any area or class or premises exempted from the operation of the Act by notification under sub-section (*1*), the decision of the President on such question shall be final."

In addition, the learned counsel has cited the case of *H. C. Dey* v. *The Bengal Young Men's Co-operative Credit Society* (1) as authority for the view that the jurisdiction of the civil Courts is barred. The head-note of that case reads:

(1) (1939) R.L.R. 50.

"By Rule 15 of the Burma Co-operative Societies Rules, 1931, framed by the Government of Burma under s. 50 (2) (*l*) of the Burma Co-operative Societies Act, every dispute touching the business of a co-operative society between a member and the committee of the society shall be referred to the Registrar.

Held, that a suit brought by a co-operative society against its member to recover a loan due by the member to the society was impliedly barred under section 9 of Civil Procedure Code."

It will be noticed that the Burma Co-operative Societies Act referred to therein contains an express provision which resulted in the jurisdiction of the civil Courts being barred. There is no such express or implied ouster of the jurisdiction of the civil Courts in section 3 (*l*) of the Urban Rent Control Act, and according to section 9 of the Civil Procedure Code, "the Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred." The President is of course at liberty to issue any exemption which he may be advised under section 3 (*l*) of the Urban Rent Control Act, but there is nothing to prevent the civil Courts from interpreting the contents of a notification issued under that section.

Coming to the actual wording of Notification No. 35, the exemption mentioned therein is in respect of a "building" and the question that arises is whether the term "building" includes a part of a building, *e.g.*, a room. Had the notification referred to "premises" instead of "building" there would have been no difficulty whatsoever as according to the definition in section 2 *(d)* (i) of the Urban Rent Control Act, "premises" means any building or part

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of a building. If a room is not included in the term "building", then obviously in accordance with section 11 (*l*) (*d*) of the Urban Rent Control Act, the 1st respondent would have to be restored to possession. Unfortunately the term "building" is not defined in the Urban Rent Control Act. We have also searched various dictionaries for a workable definition but they have not been of much assistance. For instance, "A New English Dictionary on Historical Principles" defines the term as: "That which is built; a structure, edifice: now a structure of the nature of a house built where it is to stand." This definition is far too narrow for the purpose of the Urban Rent Control Act. There is, however, a definition in section 3 (iv) of the City of Rangoon Municipal Act which appears to be most appropriate— "Building" means a house and every part thereof. In our opinion, the same definition should be adopted for the purpose of the Urban Rent Control Act.

The next problem is to find out the approximate date on which the room under consideration was completed. The appellant fixes this date as the 17th March 1951 on the strength of the "completion certificate" (Exhibit 6 in the trial record) issued by the Corporation of Rangoon in respect of the whole building. As to how far such certificates may be relied upon appears from the evidence of U Tin (DW 1) Buildings Inspector of the Rangoon Corporation who was cited by the appellant himself. He deposed as follows:

> "The Buildings Engineer issued the completion certificate on 26th May 1950 in respect of the whole building 537, Dalhousie Street, except the room in dispute. The respondent made an application for the completion certificate on 3rd May 1950."

That the appellant's Engineer, U Kah, did apply for a completion certificate on 3rd May 1950 is borne out by the original application filed as Exhibit 7 in the trial proceedings. If the completion certificate was issued on the 26th May 1950, then it does seem strange that a fresh certificate was issued again on the 17th March 1951. Actually the certificate of the 26th May 1950 was in respect of the building exclusive of the area occupied by the 1st respondent. To all appearances the Exhibit 6 completion certificate was issued after the room under consideration had been completed. However, it does not necessarily follow that the date mentioned in the completion certificate was the date on which the building or room was actually finished. Such certificates are issued on the application of the house owner and do not mention the date of actual completion. In other words, it is possible to delay the issue of a completion certificate by a belated application for the same. The appellant admits that he was bent on preventing the 1st respondent from regaining entry into the building and hence he might well have delayed his application for the completion certificate in this case. It should be remembered that the appellant began the construction of the building soon after the land was leased to him on 1st November 1947 and that by May 1950 the entire building had been completed with the exception of the suit room *vide* the evidence of the Buildings Inspector U Tin. The 1st respondent was out of possession for about 6 months after his hut had been dismantled and during the pendency of the suit under section 9 of the Specific Relief Act. As pointed out by the learned trial Judge, a good deal of the construction on the ground floor had been completed during that period. There is reason to believe that but for the success of the

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1st respondent in the suit under section 9 of the Specific Relief Act the room in question would probably have been completed by May 1950. The 1st respondent vacated the land on the 7th December 1950 and he asserts that he kept a vigilant eye on the construction as he was exceedingly anxious to regain possession of a room. There can be no doubt from the evidence on the trial record that the room was in fact ready for occupation sometime before the 1st respondent applied to the trial Court to be restored to possession. We would, therefore, accept the finding by the learned trial Judge that the room was completed before the issue of Notification No. 35. The exemption mentioned in this notification will not therefore apply to the suit room.

Finally, the learned counsel for the appellant has, as a last resort, argued that the Urban Rent Control Act is no longer in force as it died a natural death on the 8th October 1951, and that Notification No. 171, dated the 28th August 1951 issued by the President under section 3 (*1*) of that Act, extending its life, is *ultra vires* as it offends section 90 of the Constitution. Section 1 (*3*) of the Urban Rent Control Act reads :-

" 1. (*3*) The Act shall come into force at once except the provisions of sections 16-A, 16-AA, 16-B, and 16-BB which shall come into force on such date and in such area as the President may appoint in this behalf ; and it shall be in force until the eighth day of October 1951; but the President may, by notification, direct that it shall continue to be in force for such further period or periods and in such areas as may be specified in that behalf."

Then again, section 90 of the Constitution is in the following terms :—

" 90. Subject to the provisions of this Constitution, the sole and exclusive power of making laws in the Union shall be vested in the Parliament :

Provided that an Act of the Parliament may authorise any person or authority therein specified to make rules and regulations consonant with the Act and having the force of law, subject, however, to such rules and regulations being laid before each Chamber of Parliament at its next ensuing session and subject to annulment by a motion carried in both Chambers within a period of three months of their being so laid, without prejudice, however, to the validity of any action previously taken under the rules or regulations."

It has been urged that in purporting to extend the life of the Urban Rent Control Act by means of a notification the President had exercised legislative powers and thereby usurped the functions of the Parliament. Furthermore, it was stressed that Parliament is not competent to delegate to the President the power to extend the life of any Act. There is some support for this view in *Jatindra Nath Gupta* v. *The Province of Bihar and others* (1), which was decided by the Federal Court of India. The relevant extract from the head-note reads:

"The Bihar Maintenance of Public Order Act of 1947 came into force on 16th March, 1947 and by sub-section (*3*) of section 1, its operation was limited to one year from the date of its commencement. There was, however, a proviso to the effect 'that the Provincial Government may, by notification, on a resolution passed by the Bihar Legislative Assembly and agreed to by the Bihar Legislative Council, direct that this Act shall remain in force for a further period of one year with such modifications, if any, as may be specified in the notification.' On the 11th March 1948, after a resolution of both Houses the Provincial Government issued a notification extending the life of the Act for one year from 16th March, 1948 to 15th March 1949.

Held (Kania C.J., Mehrchand Mahajan and Mukherjea, JJ.): The proviso to sub-section (*3*) of section 1 of the Bihar Maintenance of Public Order Act of 1947 was *ultra vires* in that it amounted to a delegation of legislative power. That

(1) (1949) 2 M.L.J. 356.

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Act which was a temporary Act came to an end when the one year expired and had not been validly re-enacted."

This decision was a majority one and Kania C.J., who delivered the leading judgment remarked as follows at page 360:

"The proviso contains the power to extend the Act for a period of one year, with modifications if any. It is one power and not two severable powers. The fact that no modifications were made in the Act when the power was exercised cannot help in determining the true nature of the power. The power to extend the operation of the Act beyond the period mentioned in the Act *primâ facie* is a legislative power. It is for the Legislature to state how long a particular legislation will be in operation. That cannot be left to the discretion of some other body. The power to modify an Act of a Legislature, without any limitation on the extent of the power of modification, is undoubtedly a legislative power. It is not a power confined subject to any restriction, limitation or proviso (which is the same as an exception) only. It seems to me therefore that the power contained in the proviso is legislative. Even keeping apart the power to modify the Act, I am unable to construe the proviso, worded as it is, as conditional legislation by the Provincial Government."

On the other hand, Fazl Ali J., who differed from the views of Kania C.J., was of the opinion that the power granted to the Provincial Government to extend the life of the Act in question did not amount to anything more than conditional legislation and relied on the leading case of *The Empress* v. *Burah and another* (1) in support of his opinion. His exact words are as follows (at page 380):

"The question to be decided is whether the proviso which is impugned before us can be regarded as a piece of conditional legislation. The proviso in question confers a two-fold power on the Provincial Government, (1) to extend the Act for one year; and (2) to make modifications, while

(1) I.L.R. 4 Cal. 172.

extending the Act. So far as the extension of the Act is concerned, I am not prepared to hold that it amounts to legislation or exercise of legislative power. From the Act, it is clear that, though it was in the first instance to remain in force for a period of one year, the Legislature did contemplate that it might have to be extended for a further period of one year. Having decided that it might have to be extended, it left the matter of the extension to the discretion of the Provincial Government. It seems to me that the Legislature having exercised its judgment as to the period for which the Act was or might have to remain in force, there was nothing wrong in its legislating conditionally and leaving it to the discretion of the executive authority whether the Act should be extended for a further period of one year or not. It would be taking a somewhat narrow view of the decision in *Burah*'s case (1) to hold that all that the Legislature can do when legislating conditionally, is to leave merely the time and the manner of carrying its legislation into effect to the discretion of the executive authority and that it cannot leave any other matter to its discretion. The extension of the Act for a further period of one year does not amount to its re-enactment. It merely amounts to a continuance of the Act for the maximum period contemplated by the Legislature when enacting it."

The case of *Jatindra Nath Gupta* v. *The Province of Bihar and others* (2) was followed by the High Court of Madras in re *Kalvanam Veerabhadrayya* (3) which re-affirmed the principle that "the bare power of extension of the life of an Act is a legislative power and not a matter of mere administrative discretion and such power to extend cannot be delegated by the Legislature to the Executive Government." At pages 668 and 669 of that ruling there is the following significant passage which sets out the distinction between "conditional legislation" and "delegated legislation":—

"The power of delegation however is recognised, but the question is, what are the limits of such delegation? As

(1) I.L.R. 4 Cal. 172. (2) (1949) 2 M.L.J. 356.
(3) (1949) 2 M. L. J. 663.

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the legislative power of a Government is vested in the Legislature under the Constitution Act it is not open to the Legislature to surrender or abdicate that power or delegate it to another authority whether it is the executive Government or some other body. But a Legislature is authorised to delegate a power which is non-legislative in character. Sometimes the delegated power may be in the nature of conditional legislation authorising an authority such as the executive to determine the time of the commencement of an act and the area of its application after determining, if necessary, certain facts. It may also entrust the power of extending the Act to other matters not enumerated in the Act itself. In other cases the Legislature entrusts to the subordinate bodies the power of making by-laws and regulations so as to carry out into execution the Act in which the principles and the policy of the Legislature have been laid down with precision. In other words, the Legislature by the Act passed by it lays down general principles and the policy, leaving out details to be filled in by regulations or rules by the Executive Government or some other authority. This form of Legislation is described by some text-writers as subordinate legislation and is very often resorted to by Legislatures. The reason is that the Legislatures have no time or the aptitude to consider and enact rules relating to the various details having regard to the complex nature of the administration and social life. The difficulty however is to draw the line between a Legislative power and a non-legislative power. So far as we are aware, no authority has attempted to draw the line of demarcation, and all that is done is to state a number of principles by which the legality of delegation by a Legislature is to be determined. The application of these principles, it must be admitted, is not very easy. All that can be said is as stated by Crawford on Statutory Construction at page 25,

> 'As a general rule, it would seem to be *the nature of the power* rather than the *manner* in which it is exercised by the administrative officer, which determines whether the delegation is lawful.'

Another principle which is very often quoted from an American decision is :

> 'The true distinction therefore is between the delegation of power to make the law which

> necessarily involves a discretion as to what it shall be and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done. To the latter no valid objection can be made.'

Conditional legislation of the kind dealt with by the Privy Council in *Empress* v. *Burah* (1), is considered to fall within the latter category, and it has been uniformly held that such a kind of delegation is valid."

Then again, at pages 672 and 673, the meaning of the term "extend" as applied to Acts of Legislature was discussed as follows:

"Acts may be classified with reference to their *duration* into *permanent* or *perpetual* Acts and *temporary* Acts. A perpetual Act is of unlimited duration and continues in force for ever unless repealed or altered while a temporary Act continues in force during a fixed period or until repealed or altered earlier. It is for the Legislature to determine whether an Act should be perpetual or only of temporary duration. The period of the life of an Act is therefore determined by the exercise of the legislative will and is a legislative power. It is not analogous to the power of applying a legislation which is already complete to particular areas or particular class of persons or goods or even of determining the time of its commencement or the amount of its operation. Conditional legislation, as the decisions already referred to show, is of the latter description. After the expiration of the period fixed for the operation of a temporary Act, the Act automatically comes to an end. There is no analogy between conditional legislation which authorises an outside authority to determine the commencement or termination of an Act and the power to determine the life of an Act itself. No doubt in the case of conditional legislation, until the condition is determined or is fulfilled, the law may be in a state of suspended animation but still it is law but needs its application to be determined by an extraneous authority. The power of extending the life of an Act is really a power to bring the Act itself into existence for a further period and if not so brought would cease to be law.

(1) I.L.R. 4 Cal. 172.

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It is therefore difficult to accept the contention of the learned Advocate-General that a bare power to extend an Act is in the nature of conditional legislation and is valid. Of course the word 'extend' is capable of more than one meaning. If it is merely a question of extending the operation of the Act already complete and alive, to other persons or goods or even to other areas not already specified in the Act itself the argument of the learned Advocate-General on the authorities is perfectly sound. But if by 'extend' is meant to extend the life of the Act itself and to prolong its duration it is a different matter and cannot be treated on the same footing as conditional legislation. The legislature it is that is charged with the duty of taking into consideration the circumstances existing at the time of enacting a law, whether the law should continue in operation only for a short duration or should be perpetual. At each time that the Legislature thinks it fit to continue the life of an Act it must exercise its mind taking into consideration the circumstances and the situation at the time in order to decide whether there is or is not justification for extending the provisions of the Act particularly so in a case where the liberty of a subject is concerned and the effect of the Act is to curtail that liberty without recourse to a judicial determination by ordinary tribunals of the question whether a proper case for depriving a subject of his liberty is made out or not. Such a power cannot be delegated. The power of extending the life of an Act in our opinion, is clearly legislative power and its delegation in the present case to the Provincial Government, namely, the executive, is not warranted by any of the principles known to Constitutional law."

The ruling in In re *Kalvanam Veerabhadrayya* (1) was finally tested out in the Supreme Court of India in In re *The Delhi Laws Act, 1912; The Ajmer-Merwara (Extension of Laws) Act, 1947, and The Part C States (Laws) Act, 1950*, (2), on a reference by the President of India. The points on which the opinion of the Supreme Court was sought and the views of that Court are set out briefly in the head-note as follows:

(1) (1949) 2 M.L.J. 663. (2) (1951) 2 S.C.R. 747.

"Section 7 of the Delhi Laws Act, 1912, provided that The Provincial Government may by notification in the official gazette extend, with such restrictions and modifications as it thinks fit, to the Province of Delhi, or any part thereof, any enactment which is in force in any part of British India at the date of such notification.' Section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, provided that 'The Central Government may, by notification in the official gazette, extend to the Province of Ajmer-Merwara, with such restrictions and modifications as it thinks fit, any enactment which is in force in any other Province at the date of such notification.' Section 2 of the Part C States (Laws) Act, 1950, provided that 'The Central Government may, by notification in the official gazette, extend to any Part C State. . . . , or to any part of such State, with such restrictions and modifications as it thinks fit, any enactment which is in force in a Part A State at the date of the notification and provision may be made in any enactment so extended for the repeal or amendment of any corresponding law . . . which is for the time being applicable to that Part C State.' As a result of a decision of the Federal Court, doubts were entertained with regard to the validity of laws delegating legislative powers to the executive Government and the President of India made a reference to the Supreme Court under Article 143 (1) of the Constitution for considering the question whether the abovementioned sections or any provisions thereof were to any extent, and if so to what extent and in what particulars, *ultra vires* the legislatures that respectively passed these laws and for reporting to him the opinion of the Court thereon:

Held (1) *per* Fazl Ali, Patanjali Sastri, Mukherjea, Das and Bose, JJ. (Kania C.J., and Mahajan J., *dissenting*).—Section 7 of the Delhi Laws Act, 1912, and s. 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, are wholly *intra vires*. Kania C.J.—Section 7 of the Delhi Laws Act, 1912, and s. 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, are *ultra vires* to the extent power is given to the Government to extend Acts other than Acts of the Central Legislature to the Provinces of Delhi and Ajmer-Merwara respectively inasmuch as to that extent the Central Legislature has abdicated its functions and delegated them to the executive government. Mahajan J.,—The above said sections are *ultra vires* in the following

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particulars : (i) inasmuch as they permit the executive to apply to Delhi and Ajmer-Merwara, laws enacted by legislatures not competent to make laws for those territories and which these legislatures may make within their own legislative field, and (ii) inasmuch as they clothe the executive with co-extensive legislative authority in the matter of modification of laws made by legislative bodies in India."

It is interesting to note that five of the learned Judges who sat in the Federal Court, namely, Kania C.J., Fazl Ali, Patanjali Sastri, Mehrchand Mahajan, and Mukherjea JJ., were on the Bench of the Supreme Court when the reference in question was decided. Of these, Kania C.J., and Mahajan J., adhered to their original views, but Mukherjea J., modified his previous opinion. By a majority decision the Supreme Court of India refrained from accepting the principles laid down in In re *Kalvanam Veerabhadrayya* (1). There was general acceptance of the principles laid down in *The Empress* v. *Burah and another* (2). In this connection the Privy Council which decided this case laid down as follows (at page 182) :

"Legislation, conditional on the use of particular powers or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing ; and, in many circumstances, it may be highly convenient."

It should be remembered that the Legislatures of both India and Burma are creatures of a written Constitution and the remarks of Patanjali Sastri J., at page 857 in the Supreme Court case in re *The Delhi Laws Act, 1912, etc.* (3), are most apposite :

"It is now a commonplace of constitutional law that a legislature created by a written constitution must act within the ambit of its powers as defined by the constitution and subject to the limitations prescribed thereby and that every legislative act done contrary to the provisions of the constitution is void.

(1) (1949) 2 M.L.J. 663. (2) I.L.R. 4 Cal. 172.
(3) (1951) 2 S.C.R. 747.

In England no such problem can arise as there is no constitutional limitation on the powers of Parliament, which, in the eye of the law, is sovereign and supreme. It can, by its *ordinary* legislative procedure, alter the constitution, so that no proceedings passed by it can be challenged on constitutional grounds in a court of law. But India, at all material times,—in 1912, 1947 and 1950 when the impugned enactments were passed—had a written constitution, and it is undoubtedly the function of the courts to keep the Indian legislatures within their constitutional bounds. Hence, the proper approach to questions of constitutional validity is 'to look to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they were restricted. If what has been done is legislation within the general scope of the affirmative words which gave the power and if it violates no express condition or restriction by which the power is limited (in which category would of course, be included any Act of the Imperial Parliament at variance with it) it is not for any court of justice to inquire further or to enlarge constructively those conditions and restrictions.'—*Empress* v. *Burah* (1)."

In the case before us, all that the President was empowered to do was to extend the life of the Urban Rent Control Act, and this he has done before the Act expired on the date fixed in section 1 (*3*) of that Act. As explained by Fazl Ali J., in *Jatindra Nath Gupta* v. *The Province of Bihar and others* (2), and whose views later prevailed in the Supreme Court of India, merely extending the life of an Act does not amount to making a law. The President was no doubt entrusted with a discretion to extend the life of the Act if circumstances and conditions warranted such an extension. The Urban Rent Control Act was a complete law and was enacted by the Parliament, and the President has not modified or tampered with it in any way. On the principles laid down in *The Empress* v. *Burah and another* (1), the act of the President was only a piece of conditional legislation

(1) I.L.R. 4 Cal. 172. (2) (1949) 2 M.L.J. 356.

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permitted by the Urban Rent Control Act, and not a delegated legislation, as urged by the learned counsel for the appellant. If the President was not competent to exercise the power given to him by section 1 (*3*) of the Urban Rent Control Act, then the following provision in section 45 of the Constitution would be meaningless :—

> " 45. There shall be a President of the Union hereinafter called ' the President' who shall take precedence over all other persons throughout the Union, and who shall exercise and perform the powers and functions conferred on the President by this Constitution and by law."

In short, we are unable to see how the action of the President in extending the life of the Urban Rent Control Act may be considered to have contravened section 90 of the Constitution.

As regards the reliefs granted, it is mentioned in the memorandum of appeal that the operative part of the order under review as finally signed by the learned Judge of the lower Court is not strictly in accordance with the order which was dictated from the Bench. No affidavit has, however, been filed in support of this challenge and the matter is not pressed before us. Nevertheless, there are certain irregularities in the final order which cannot be overlooked. One of the grounds of appeal is that " the judgment is otherwise contrary to law in that it awards damages never claimed and upon a basis with reference to which there is no evidence before the Court and to which attention of the parties was never directed." This contention is not without substance; for, the relief claimed in the petition was for reinstatement, and reinstatement only, in the premises in question and naturally the attention of the parties would have been directed to that issue alone. Consequently, the

appellant has not had an opportunity to prove, before the order of forfeiture of the bond was passed, that he had been prevented from complying with the conditions imposed in the bond for reasons which might appear to the Court satisfactory. Besides, the order of forfeiture and payment of compensation is open to exception inasmuch as it is one of contingent forfeiture which is not contemplated by sub-section (2) of section 11 of the Urban Rent Control Act, 1948. Under that provision of law, so far as material to the present case, when application is made by the tenant that the landlord has failed to comply with the terms of the order or decree or bond, the Court may, after giving an opportunity to him to prove that he was prevented for sufficient reasons from complying with the conditions of the bond, declare that the amount entered in the bond be forfeited to the Government and, in addition, direct him to pay compensation to the tenant. It is clear, therefore, that the Legislature envisages some kind of an inquiry before the order of forfeiture and payment of compensation is passed by the Court. We accordingly direct that the order of forfeiture of the bond and payment of compensation be vacated; otherwise, the appeal is dismissed with costs; Advocate's fee in this Court ten gold mohurs.

APPELLATE CIVIL.

Before U On Pe and U Bo Gyi, JJ.

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Apl. 21.

MISS S. AARON (APPELLANT)

v.

THAKIN SOE MYINT (RESPONDENT).*

Civil Procedure Code, Order 8, Rule 6—Set-off—Contract Act, s. 128—Surety's liability—Nature of obligation of principal and surety—Requisites for a claim of set-off.

Held : S. 128 of the Contract Act explains the quantum of the surety's obligation, but before he can be accepted to be one and the same with the principal debtor to bring a claim for set-off within the ambit of Rule 6, Order 8 of the Civil Procedure Code there must be materials before the Court to show the nature of the obligation of either the principal or the surety in respect of the transaction out of which the claim for set-off has arisen.

Held also : The claim for set-off fails on the ground that the claim for hiring charges which is a matter of dispute in a pending suit cannot be an ascertained amount.

In a separate concurring judgment by U Bo Gyi, J.

Held : A claim for set-off sounding in damages in cross-demands which have not arisen out of the same transaction or are so connected in their nature and circumstances that they can be looked upon as part of a single transaction cannot be permitted.

G. D. Williams for the appellant.

T. P. Wan for the respondent.

U ON PE, J.—This appeal arises out of a suit in the Rangoon City Civil Court, being Civil Regular No. 903 of 1951 in which a sum of Rs. 2,500 was claimed by the plaintiff-respondent and in respect of which the defendant-appellant admitted liability for a sum of Rs. 700 and claimed a set-off of Rs. 1,800. The suit was decreed for the full amount claimed.

The dispute centres around the question of set-off. The lower Court has disallowed the claim for set-off, holding that it does not fall within the

* Civil 1st Appeal No. 21 of 1952 against the decree of the 3rd Judge, City Civil Court, Rangoon, in Civil Regular No. 903 of 1951.

ambit of Order 8, Rule 6 of the Civil Procedure Code. In doing so, it has apparently treated the claim to all intents and purposes as a plaint in a cross suit and adjudicated on the same.

The claim for a set-off has arisen in the following circumstances :—

According to the defendant-appellant she had hired a printing machine on the hiring charges of Rs. 150 per month to the plaintiff-respondent and his guarantor U Thein Shwe and as they had not paid her the said hiring charges she filed a suit for the recovery of Rs. 1,925 in Civil Regular Suit No. 966 of 1950 of the Rangoon City Civil Court for the period between 1st August 1949 and 25th August 1950. It s her case that they owed her for it for the period 25th August 1950 to 24th August 1951 Rs. 1,800 which she claims that she is entitled to set-off against the claim of the plaintiff-respondent.

This claim is resisted on the ground that the parties did not fill the same character and that the amount sought to be set-off was not an ascertained sum.

This question of set-off has thus been fixed as the only issue in this case. The plaintiff-respondent met the claim of set-off in the following words in his reply to the written statement in the suit : —

" That the plaintiff states that the claim made by the defendant in suit Civil Regular No. 966 of 1950 of the City Civil Court, Rangoon is a claim for hiring charges which is being denied as legally recoverable and that the sum as such is not a liquidated sum.

That furthermore the transaction in suit Civil Regular No. 966 of 1950 of the City Civil Court, Rangoon is a separate and distinct transaction and does not form any part of the transaction in the present suit ."

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The lower Court has held that the claim to set-off does not fulfil the condition of applicability of the rule, allowing set-off. The particular rule reads :

"It must be recoverable by the defendant from the plaintiff or all plaintiffs if more than one."

In the present case, the guarantor U Thein Shwe does not figure as one of the parties—a circumstance which would contravene this particular rule, requiring the claim for set-off to be recoverable from the plaintiff or plaintiffs.

The learned Counsel for the defendant-appellant has argued that the lower Court has misconceived section 128 of the Contract Act, that in this case the creditor may sue either the principal or surety or both and that the creditor is not bound to proceed against one before suing the other. I do not quarrel with this provision of law but it must be borne in mind that section 128 of the Contract Act only explains the quantum of the surety's obligation, when the terms of the contract did not limit it, as they often do. This is clear from the language of the section itself which reads : "The liability of surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract."

Before the arguments, raised by the learned Counsel for the defendant-appellant in the lower Court that the other person, namely, U Thein Shwe being only a guarantor, he did not exist by himself and that he was one and the same with the principal debtor who was the plaintiff in this case can be accepted there must be materials before the Court which would show the nature of the obligation of either the principal or the surety in respect of the transaction out of which the claim for set-off has arisen. In this view of the case, it is clear to us that

the condition required to bring the case within the ambit of this rule is not being fulfilled. This is one ground why the claim for set-off should fail. It should also fail on another ground, namely that the claim for hiring charges which is a matter of dispute in a pending suit cannot be an ascertained amount. In the result this appeal fails and is dismissed with costs; Advocate's fee Kyats 51.

U BO GYI, J.—I agree that the appeal should be dismissed, but would base my decision on the grounds that a set-off is claimed in this case in respect of an unascertained sum which sounds in damages and that on the face of the pleadings the cross-demands apparently have not arisen out of the same transaction or are so connected in their nature and circumstances that they can be looked upon as part of a single transaction. A reference to the plaint in Civil Regular No. 966 of 1950 of the Rangoon City Civil Court in which the present appellant has sued the present respondent and the latter's guarantor for recovery of hiring charges of a printing machine and the deed of agreement on which that suit is based shows that the machine was hired out for six months only. The period of hire under the agreement expired on 18th August, 1949. It would seem, therefore, that the claim in respect of the machine after the expiry of the six months stipulated for in the agreement should be not for hiring charges but for compensation for unlawful detention of the machine. Further, according to the plaint in the present suit, the loan was taken by the appellant in November, 1949, pledging a printing machine. This allegation is admitted in appellant's written statement. It seems clear, therefore, that the loan was advanced some three months after the expiration of the period

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of hire of the machine. In these circumstances, the cross-demands arise out of entirely distinct transactions, with the result that the appellant cannot be permitted to plead an equitable set-off.

APPELLATE CIVIL.

Before U On Pe, J.

P. C. DUTT (APPELLANT)

H.C. 1953

June 8.

v.

SHAZADEE BEGAM (*a*) KHIN KHIN NYUNT AND ONE (RESPONDENTS). *

Urban Rent Control Act—Suit for ejectment withdrawn—Subsequent suit with defect remedied—Fresh Permit from Controller under Urban Rent Control Act, s. 14-A, whether necessary.

Held : In the first suit there was not a complete cause of action because of a defective notice to the tenant, and in the fresh suit the cause of action became complete with a valid notice. The cause of action is different in the two suits, which means that the permit issued for the previous suit must be deemed to have exhausted itself when the case terminated on dismissal.

T. Gupta Chowdhury v. *Manmatha Nath*, A.I.R. (1949) Cal. 574; *Chotey Lal* v. *Sheo Shankar*, A.I.R. (1951) All. 478, referred to and followed.

Pahlad Das v. *Ganga Saran*, A.I.R. (1952) All. 32, distinguished.

V. S. Venkatram for the appellant

Tun Aung (2) for the respondents.

U ON PE, J.— This is an appeal against the order of the learned Third Judge of the City Civil Court, Rangoon, passed in Civil Regular No. 1086 of 1951, which is a suit for ejectment under section 11 *(1)(f)* of the Urban Rent Control Act, against the appellant. The order passed by the learned Third Judge is on the two following issues which were taken up as preliminary issues :—

1. Can the plaintiff maintain the present suit without obtaining a fresh permit under section 14-A of the Urban Rent Control Act ?

* Civil Misc. Appeal No. 72 of 1952 against the order of the 3rd Judge, City Civil Court, Rangoon, in Civil Regular No. 1086 of 1952.

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U ON PE, J.

2. In view of the dismissal of Civil Regular No. 694 of 1951 of this Court, is the present suit barred by *res judicata* ?

The learned Judge held that the suit was maintainable and that it was not barred under Order 23, Rule 1(3) of the Civil Procedure Code. Hence this appeal.

The facts giving rise to the dispute in this case are these: The plaintiffs had filed a suit to eject the defendant from Room No. 4 of House No. 183, Lewis Street, Rangoon, under section 11 *(1) (f)* of the Urban Rent Control Act in Civil Regular No. 694 of 1951, after obtaining a permit from the Controller of Rents, Rangoon, as required under section 14-A of the Urban Rent Control Act. That suit was withdrawn on 3rd August, 1951, as there was a defect in the ejectment notice given to the tenant. The order dismissing the suit reads, "The suit is dismissed with costs as being withdrawn." No leave to file a fresh suit was then obtained or was asked for by the plaintiffs. The plaintiffs on 8th September, 1952, filed the present suit on the same ground using the permit issued by the Controller of Rents for the earlier suit, as a basis of the suit. The suit was contested on the ground that it was barred by *res judicata* and that the suit was not maintainable without obtaining a fresh permit under section 14-A of the Urban Rent Control Act.

It has been urged before me that no suit for ejectment would lie without a permit of the Controller of Rents under section 14-A of the Urban Rent Control Act and that the permit issued for the previous suit would not avail in the present suit as it had exhausted itself with the termination of the suit for which it was issued.

The question arises: If the cause of action is the same in the two suits, or in other words, if the two suits can be said to be one and the same, whether a fresh permit would still be necessary. This question, in my view, is besides the point in this case, for the first suit which was dismissed and the fresh suit can be said to be two different suits, each having a different cause of action. It will be necessary to consider the meaning and import of the *permit* in question in view of its bearing on the case. I find that the permit in question makes mention of the words "*to institute a suit*" which, it is urged, lends support to the view that its use was intended for one suit only and that, by dismissal of the suit for which it was issued, it had exhausted itself and cannot be made the basis of another suit. In the first suit, there was not a complete cause of action because of a defective notice to the tenants and in the fresh suit, the cause of action became complete with a valid notice. In this view, the cause of action must be said to be different in the two cases, which would mean, that the *permit* issued for the previous suit must be deemed to have exhausted itself when the case terminated in the circumstances in which it was dismissed.

In *T. Gupta Chowdhury* v. *Manmatha Nath* (1), it has been held in a similar case:

> "The permission to institute suit must relate to the particular suit in question. A permission granted in respect of a previous suit which has ultimately been dismissed will not help the landlord for the purpose of a second suit."

In *Chotey Lal* v. *Sheo Shankar* (2), the same question came under discussion. That was the case

(1) A.I.R. (1949) Cal. 574. (2) A.I.R. (38) (1951) All. 478.

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in which the availability of the permit issued for one suit, for another suit which was to be instituted afresh in circumstances similar to the present case, was considered. In that case, the previous suit was withdrawn with permission to file a fresh suit on the same cause of action, and the permit was an unconditional one. That case can, therefore, be distinguished from the present case, in which, causes of action cannot be said to be the same.

The lower Court has relied on *Pahlad Das* v. *Ganga Saran* (1) which lays down a different view from that of the Calcutta case cited above. The learned Judge has quoted the following from that case :—

> " The question with which the District Magistrate is concerned, when approached by the landlord to allow him to sue a tenant for ejectment, is whether, in view of all the circumstances of the situation, such permission can be properly granted. If District Magistrate grants a permission, it would be presumed that those circumstances existed. And the object in view, namely, ejectment of the tenant, can be sought to be achieved by the landlord filing a second suit, if the suit first filed by him has for some reason proved infructuous. Therefore, unless it is proved that circumstances had altered which might have changed the attitude of the District Magistrate and that officer might possibly have refused permission, if approached again, before the second suit was filed, the second suit can be validly filed even in the absence of a fresh permission to file it."

The proposition laid down in this extract clearly shows to be a hypothetical one, for there could be cases in which circumstances had altered since the filing of the first suit which would justify the refusal by the District Magistrate of the permit applied for in which case there can be no question of a fresh suit being filed. It resolves to this, that the second

(1) A.I.R. (1952) All. 32.

suit cannot be filed without a permit of the District Magistrate if it can be proved that circumstances had altered which might have changed the attitude of the District Magistrate since the first suit had proved infructuous on account of some defect. I do not think, with respect, that this case is a right guidance in the matter.

In the result the preliminary issues will be decided in favour of the appellant. This appeal is allowed with costs; Advocate's fee Kyats 51.

APPELLATE CRIMINAL.

Before U San Maung, J.

H.C. 1953. *Jan. 28.*

MAUNG SHWE PO NYUNT
MAUNG THEIN } (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

Penal Code, s. 149—Creates no offence—Merely declaratory—Ss. 34 and 109 analogous—Alteration of charge—Conviction on charge not specified, when permissible.

On the night of the 17th July 1952, deceased Maung San Hla was flushed out of a house in which he took refuge by a group of persons armed with lethal weapons some of whom pursued and murdered him. Holding that the three appellants were not proved to have been present at the time of the assault but which resulted on account of their incitement the Special Judge convicted them under s. 302 (2) read with s. 109, Penal Code. On appeal it was held that on the trial Court's own showing the conviction under s. 302 (2)/109, Penal Code could not be sustained, and that the appropriate charge on the facts of the case was one under s. 302 (2) read with s.149, Penal Code. The conviction was accordingly altered and the sentence maintained.

Held: S. 149 of the Penal Code creates no offence but it is merely declaratory of a principle of the Penal Law. If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence is a member of the same assembly is guilty of that offence.

Queen-Empress v. *Bisheshar and others*, 9 All. 645; *Theethumalai Gounder and others* v. *King-Emperor*, 47 Mad. 746; *Ramasray Ahir* v. *King-Emperor*, 7 Pat. 484; *Barendra Kumar Ghosh* v. *King-Emperor*, 52 I.A. 40; *Reg* v. *Sabed Ali*, (1873) 11 Ben. L.R 347; *Hari Lal* v. *King-Emperor*, 14 Pat. 225; *Waryam Singh* v. *The Crown*, 22 Lah. 423; *Tun Aung* v. *The King*, (1946) R.L.R. 313, discussed and followed.

Held: It will not be to the prejudice of the appellants to alter their convictions under s. 302 (2)/109 of the Penal Code to ones under s. 302 (2) read with s. 149 as from their examination they have had sufficient notice of the fact that there was an unlawful assembly some members of which

* Criminal Appeal No. 631 of 1952 being Appeal from the order of the Special Judge, Meiktila, in Criminal Regular No. 5 of 1952.

were armed with *dahs* the kind of weapon with which the deceased was obviously done to death.

Held further : The true test is whether the facts are such as to give the accused notice of the offence for which he is going to be convicted though not charged and that the accused is not prejudiced by the mere absence of a specific charge.

Maung Myint v. *The Union of Burma*, (1948) B.L.R. 379 ; *Ohn Maung* v. *The Union of Burma*, (1949) B.L.R. 139 ; *Ba Maung* v. *The Union of Burma*, (1950) B.L.R. 131, referred to,

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Chit (Government Advocate) for the respondent.

U SAN MAUNG, J.—In Criminal Regular Trial No. 5 of 1952 of the Special Judge, Meiktila, the appellants Maung Shwe, Po Nyunt and Maung Thein were sent up for trial under section 302 of the Penal Code for the alleged murder of one San Hla at Segyi-North on the night of the 17th July, 1952. The deceased Maung San Hla lived at Segyi-South which is about 2 furlongs away from Segyi-North. He used to drink liquor quite frequently and there is evidence to show that he has had quarrels with Tha Po (PW 3), Hla Shwe and others while under the influence of liquor. On night of the occurrence of this case he visited the house of one Maung Chit Thein at about 8 p.m. From there he went to the house of Ma Ohn Nyunt accompanied by Chit Thein (PW 1) and one Nyan Yin who happened to be at Chit Thein's house on a visit. In Ma Ohn Nyunt's compound San Hla, who was then under the influence of liquor, collided with the appellant Maung Shwe apparently as a gesture of defiance. Chit Thein and Nyan Yin intervened in order to prevent a fight and Maung Shwe left saying, "You will see." or words to that effect. This provoked San Hla who tried to follow Maung Shwe but was restrained by Chit Thein and Nyan Yin who succeeded in bringing him back to Chit Thein's house. Shortly after that Nyan Yin left so that Chit Thein alone was with San Hla. Thereafter,

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according to Chit Thein (PW 1) who heard Maung Shwe crying out " Hay, you young fellows throw stones at the house." In response to this shout stones were thrown and Maung Shwe was again heard to urge that more stones should be thrown. In the meanwhile the appellant Po Nyunt arrived armed with a *dah* in one hand and an electric torch in the other. Standing in front of Chit Thein's house Po Nyunt told Chit Thein to produce San Hla as he must be killed that night. At the time San Hla was hiding in Chit Thein's house. Chit Thein pleaded with Maung Po Nyunt to let San Hla alone that night saying " Tomorrow you can do anything you like." Upon this Po Nyunt replied " I can't wait till tomorrow. I want him tonight." So saying Po Nyunt moved back some two bamboo lengths away to the south-east of Chit Thein's house and sat on a bench waiting for San Hla to appear. Just then the appellant Maung Thein came into the compound also armed with a torch and a *dashe*. He said to Chit Thein " Hey Chit Thein, produce him. If not, we shall smash your house." Chit Thein again entreated Maung Thein to wait till the next day and Maung Thein replied that San Hla must be dealt with that night. Thereafter Maung Thein went off in a northernly direction while Po Nyunt sat waiting on the bench. Maung Thein was heard to shout out to those present that stones should be thrown until the house was smashed. Stones were continued to be thrown while Chit Thein went to report the matter to the headman U Dwe (PW 11) who lived in Segyi-South. He was accompanied by his neighbours Ko Po Khin and Ko Po Yone. After the headman had received Chit Thein's report he directed Chit Thein to the Ywa-zaw (village cryer) Ko Tin Nge. Chit Thein went to Ko Tin Nge to be told that there was no necessity for him to go to

admonish any one that night as San Hla was already found to be dead near Ko Po Pyaing's house. Chit Thein therefore went to inspect the dead body and found that it received a *dah* cut on the left calve, two *dah* cuts on the left side of the head, a *dah* cut severing one of the testicles besides a stab wound on the anus. It is apparent therefrom that while Chit Thein was away at the headman's house, San Hla was subjected to an attack by a person or persons unknown near Po Pyaing's house about 150 yards away from Chit Thein's house.

Maung Tin Maung (PW 2) was one of those who participated in the attack on Chit Thein's house with stones. He was one of the Kalathas (young-blood) of Segyi-North, who had banded themselves together into a group under the leadership of the appellant Maung Shwe as Kalatha-gaung. According to this witness, Maung Shwe was heard to shout out from the front of Ma Sein Tint's house thus : " Young fellows, come on and surround." He therefore went over to Maung Shwe and found him in front of Ma Sein Tint's house with Tha Po, San Tint, Maung Bu, Mya Thein and others, Ma Sein Tint being the mother-in-law of Chit Thein living with him. When the Kalathas, several of whom responded to Maung Shwe's shout, pelted Chit Thein's house with stones, San Hla ran out of the house to be chased by Po Nyunt, Maung Shwe and Maung Thein. Maung Shwe and Maung Thein were armed with *dahs*. Tin Maung, Tha Po, San Tint, Maung Bu and Mya Thein followed at a slower pace at the direction where San Hla, Po Nyunt, Maung Shwe and Maung Thein went, so that on arrival at a spot about 3 bamboo lengths away from Po Pyaing's house they saw Po Nyunt flashing his torch while Maung Shwe and Maung Thein cut San Hla with their *dahs* in the beam of

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the light fom Po Nyunt's torch. Tin Maung said that he did not stay any longer near the scene of occurrence because Maung Shwe cried out "Lu hma mai" (you might be attacking the wrong person) and also because they were afraid to stay there any longer. Tha Po (PW 3) also gave the same story as Tin Maung. He also was one of the several Kalathas who surrounded Chit Thein's house and pelted it with stones in an endeavour to induce San Hla to appear. He stated that besides Maung Shwe, Maung Thein, Po Nyunt and several others, who were thought to be Kalathas, also chased San Hla as he ran away. Maung Bu (PW 4) was also one of the Kalathas who responded to his leader Maung Shwe's shout for help. He saw San Hla running out of Chit Thein's house to be followed by people who were surrounding that house. He was however silent as to what the Kalathas who surrounded Chit Thein's house did in the meantime. It is apparent that he was trying to hide the part taken by him in pelting stones at Chit Thein's house. Maung Mya Thein (PW 5) also responded to Maung Shwe's call for help. On arriving near Ma Sein Tint's house he heard Maung Shwe giving orders to the effect that stones should be thrown. He also heard stones falling on Ma Sein Tint's house. He met Maung Shwe at a spot about 3 bamboo lengths away from Ma Sein Tint's house before hearing Po Nyunt shout out to the effect that San Hla had run away. Then some one whom Mya Thein thought to be Po Nyunt ran in the direction in which San Hla went flashing his torch. In front of him were two persons who looked like Maung Shwe and Maung Thein. When Po Nyunt had proceeded a distance of about 50 yards or so Mya Thein started to run after them till he saw Po Nyunt and his companions arrive at

a spot near Po Pyaing's house. Mya Thein then stopped because he heard the sound of beating. He also saw somebody flashing his torch in the direction of Po Pyaing's ladder where San Hla was prostrate. He saw some three or four persons standing not far away from San Hla. In the light of the torch Mya Thein saw 4 or 5 blows being delivered on San Hla but he could not say who the assailants were or what weapons they were using. U Pyaing (PW 7), near whose house the incident occurred, could give no evidence or would not make any statement which would help to elucidate the murder. His story was that while the attack was being made he could not get out of his house to see because his two grandchildren held him back.

When the news of the murder reached headman U Dwe (PW 11) he visited the scene of crime and examined several persons. From Chit Thein he learnt that the people who threw stones at his house were Maung Shwe, Maung Thein and Po Nyunt. From that he surmised that these three persons were concerned in the murder of San Hla. He accordingly examined Maung Thein who denied any knowledge of what transpired at Ma Sein Tint's house or in front of Ko Po Pyaing's house. Po Nyunt, who was also examined by the headman, stated that he was assaulted by San Hla but that he did not retaliate. He denied taking any part in the stone throwing or in the incident in front of Po Pyaing's house. Maung Shwe admitted to the headman that he met San Hla earlier that night near Po Khin's house but said that on finding that San Hla was under the influence of liquor he asked Chit Thein and Tun Sein to take him away to Ma Ohn Nyunt's house. He denied being concerned in the stone throwing at

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Ma Sein Tint's house or in the incident which took place in front of Po Pyaing's house.

The learned Special Judge who tried this case believed that Maung Shwe, Po Nyunt and Maung Thein were involved in the stone throwing at Ma Sein Tint's house, but he did not accept the story told by Tin Maung (PW 2) and Tha Po (PW 3) that they recognised Po Nyunt as the man who flashed his torch to enable Maung Shwe and Maung Thein to assault San Hla in front of Po Pyaing's house. The learned Special Judge argued that the person behind the torch could not have been recognised and that because these two witnesses had jumped to the conclusion regarding the identity of the man with the torch they could also not be believed as to the identity of the persons whom they said they saw in the beam of the light from that torch. Nevertheless he convicted the three appellants of an offence under section 302 (2) read with section 109 of the Penal Code for the reasons which may be briefly stated by quoting a passage from his judgment as follows:

> "They (Maung Shwe, Po Nyunt and Maung Thein) were not proved to be present at the time of the assault in Ko Po Pyaing's house. But that did not mean that they were not present. For these reasons, I am satisfied that San Hla's death was brought about by the incitement made by Maung Shwe, Maung Thein and Po Nyunt and because they have not been proved present at the assault, they must be convicted under section 302 (2) read with section 109 of the Penal Code"

What the learned Special Judge seems to have held was that the assault on San Hla by a person or persons unknown in front of Po Pyaing's house was the direct result of the threats made by Maung Shwe, Maung Thein and Po Nyunt near Ma Sein Tint's

house and that these three appellants were therefore guilty of abetment of the crime because of the provisions of the First Clause of section 107 of the Penal Code read with section 108 thereof.

To me it appears that the inference that the assault by a person or persons unknown on San Hla in front of Po Pyaing's house was the direct result of the threats uttered by Maung Shwe, Maung Thein and Po Nyunt near Ma Sein Tint's house is too far-fetched for acceptance. If it is proved that Maung Shwe, Maung Thein and Po Nyunt were sufficiently near at hand to incite the assailants of San Hla for their words of threats to be heard by the assailants, a conviction under section 302 (2) of the Penal Code read with section 109 would be sustainable. In the circumstances obtaining in this case as viewed by the learned Special Judge, a conviction under section 302 (2) read with section 109 cannot be allowed to stand.

However, even if the evidence of Tin Maung (PW 2) and Tha Po (PW 3) be viewed with suspicion, there seems nothing to discredit the story of Maung Mya Thein (PW 5) who stated that the incident in front of the house of Maung Chit Thein and his mother-in-law Ma Sein Tint and that in front of Po Pyaing's house were in the course of one and the same transaction in the sense that the same mob or the majority who composed that mob that attacked Ma Sein Tint's house went after San Hla who fled towards Po Pyaing's house. It would not be too far-fetched to presume that the witnesses for the prosecution themselves, namely, Maung Tin Maung (PW 2), Maung Tha Po (PW 3) and Maung Mya Thein (PW 5) were also following the leader Maung Shwe in an endeavour to render help

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to him. In a sense they were accomplices in the crime because they were also members of the same unlawful assembly whose common object was to cause hurt or grievous hurt to San Hla. Their evidence must therefore be treated with caution, but in the circumstances prevailing there is nothing to discredit that part of their story which goes to show that it was the same mob or the majority of the persons comprising it that chased San Hla from Chit Thein's house to that of Po Pyaing. Quite a number of the members of that mob, including Po Nyunt, Maung Shwe and Maung Thein, were armed with such lethal weapons as *dahs*, weapons which could not be hidden but which had to be openly carried.

Now, under section 149 of the Penal Code, if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence is a member of the same assembly is guilty of that offence. From the nature of the threats uttered by Po Nyunt and Maung Thein at Ma Sein Tint's house and the hue and cry raised by Maung Shwe and the nature of the weapons carried by these appellants it must be apparent to all those persons that murder was the likely consequence of the attack on Ma Sein Tint's house in an endeavour to dislodge San Hla therefrom. Therefore the proper offence for which each of the appellants should have been charged was an offence under section 302 (2) read with section 149 of the Penal Code.

The appellants Maung Shwe, Po Nyunt and Maung Thein declined to give evidence on behalf of

their own defence. When examined they denied taking any part either in the stone throwing at Ma Sein Tint's house or in the incident near Po Pyaing's house. Unfortunately for them Maung Aung Din (DW 1), cited by the appellant Maung Shwe himself, in speaking of the incident at Ma Sein Tint's house had to admit that it was Maung Shwe who had called out the Kalathas for help and that it was Maung Shwe and the appellant Maung Thein who incited the Kalathas to throw stones at Ma Sein Tint's house. Aung Din's evidence also went to show that when San Hla ran away from Ma Sein Tint's house he was chased by the mob that had surrounded Ma Sein Tint's house. This is entirely in consonance with the case for the prosecution. In these circumstances the learned Special Judge who has had the opportunity of seeing the defence witnesses and of appraising their credibility was quite justified in rejecting the alibi sought to be established by the appellants.

The question now for consideration is whether it would be competent for this Court in appeal to convert the convictions of the appellants under section 302 (2)/109 of the Penal Code to those under section 302 (2) read with section 149 thereof. There is considerable judicial opinion in favour of the view that section 149 of the Penal Code creates no offence but that it is merely declaratory of a principle of the penal law. In the case of *Queen-Empress* v. *Bisheshar and others* (1) Edge C. J., observed as follows:

"Section 149 appears to me to create no offence, but to be, like section 34 of the same Code, merely declaratory of a principle of the common law, which at any rate in

(1) 9 All. 645

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England has prevailed. . . . . The object of section 149, as I think, in such a case as the present is to make it clear that an accused who comes within that section, cannot put forward as a defence that it was not his hand which inflicted the grievous hurt. Take the case of Mangan, whose hand did, in fact inflict grievous hurt upon Mr. Turner. In his case he was a member of the same unlawful assembly, and the offence committed by him was committed in the prosecution of the common object of that assembly, and was such as he and the other appellants knew to be likely to be committed in prosecution of that object."

The observations in the case of *Queen-Empress* v. *Bisheshar* (1) were followed by a Full Bench of the Madras High Court in *Theethumalai Gounder and others* v. *King-Emperor* (2) where it was held that section 149 of the Indian Penal Code creates no offence but is merely declaratory of a principle of the common law, so that omission of that section from a charge does not make the charge illegal. Both these cases were cited with approval by a Bench of the Patna High Court in *Ramasray Ahir* v. *King-Emperor* (3) where it was also held that section 149 does not create a definite offence and that, therefore, omission to mention the section in a charge did not vitiate the convictions. On the other hand, the Privy Council seems to have held a different view in *Barendra Kumar Ghosh* v. *King-Emperor* (4), where their Lordships observed (at page 52):

"The other part of the appellant's argument rests on sections 114 and 149, and it is said that, if section 34 bears the meaning adopted by the High Court, these sections are otiose. Section 149, however, is certainly not otiose, for in any case it creates a specific offence and deals with the punishment of that offence alone. It postulates an assembly of five or more persons having a common object—namely, one of those named in section 141: *Reg* v. *Sabed Ali* (5)—and then

(1) 9 All. 645.
(2) 47 Mad. 746.
(3) 7 Pat. 484.
(4) 52 I.A. 40 at 52.
(5) (1873) 11 Ben. L.R. 347, 359.

the doing of acts by members of it in prosecution of that object. There is a difference between object and intention, for, though their object is common, the intentions of the several members may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action, which is the leading feature of section 34, is replaced in section 149 by membership of the assembly at the time of the committing of the offence. Both sections deal with combinations of persons, who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap, but section 149 cannot at any rate relegate section 34 to the position of dealing only with joint action by the commission of identically similar criminal acts, a kind of case which is not in itself deserving of separate treatment at all."

However, a parallel seems to have been drawn by their Lordships between the provisions of section 34 of the Penal Code and those of section 149 and there is now considerable authority in favour of the view that section 34 of the Penal Code did not create a distinct offence. In the case of *Hari Lal* v. *King-Emperor* (1) it was held by a Bench of the Patna High Court that there is in law no distinction between a charge under section 379 of the Penal Code and a charge under that section read with section 34 and that the latter section is a mere statement of explanation to be attached to any section which deals with a criminal offence. This decision was followed by the Lahore High Court in *Waryam Singh* v. *The Crown* (2) and was cited with approval by U E Maung J., in *Tun Aung* v. *The King* (3) where he observed :—

" In *Hari Lal* v. *King-Emperor* (1) a Bench of the Patna High Court held :

> ' There is in law no distinction between a charge under section 379 of the Penal Code and a charge under that section read with section 34.

(1) 14 Pat. 225. (2) 22 Lah. 425.
(3) (1946) R.L.R. 313.

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> The latter section is a mere statement of explanation to be attached to any section which deals with a criminal offence.'

I am very much attracted by the line of reasoning adopted in that case as applied to section 109 of the Penal Code but it is not necessary to pursue the matter further in the present case."

Adopting the line of reasoning in *Tun Aung*'s case (1) I may also say that I am very much attracted by the line of reasoning appearing in the Full Bench case of *Theethumalai Gounder and others* v. *King-Emperor* (2) but that it is not necessary to pursue the matter in the present case for the purpose of coming to a decision whether or not section 149 of the Penal Code is merely declaratory of a principle of the common law or whether it creates a specific offence. Suffice to say that in the case under appeal it will not be to the prejudice of the appellants to alter their convictions under section 302 (2)/109 of the Penal Code to ones under section 302 (2) read with section 149. From their examinations they have had sufficient notice of the fact appearing in the prosecution case against them that there was an unlawful assembly which surrounded the house of Ma Sein Tint pelting it with stones with a view to compel San Hla to come out for the purpose of being assaulted and that members of the same assembly chased San Hla to Po Pyaing's house for the purpose of assaulting him there. They have also sufficient notice of the fact that some members of the unlawful assembly were armed with *dahs*, the kind of weapon with which San Hla was obviously done to death. As observed by U Thein Maung, the then Chief Justice of the High Court, in the case of *Maung Myint* v. *The Union of Burma* (3), the true test is

(1) (1946) R.L.R. 313. (2) 47 Mad. 746.
(3) (1948) B.L.R. 379.

whether the facts are such as to give the accused notice of the offence for which he is going to be convicted though not charged and that the accused is not prejudiced by the mere absence of a specific charge. The appellants in this case had notice of the facts which would constitute an offence under section 302 (2) read with section 149 of the Penal Code. Their defence in any event would be that they were not members of the unlawful assembly as they were somewhere else at that time and not that there was no such unlawful assembly which had been responsible for the murder of San Hla. See also *Ohn Maung* v. *The Union of Burma* (1) where the conviction under section 3 (*1*) of the High Treason Act, 1948, of which the appellant in that case was convicted, was altered to one under section 302 read with section 34 of the Penal Code and *Ba Maung* v. *The Union of Burma* (2) where the conviction under section 3 (*1*) of the High Treason Act, 1948, of which the appellant in the case was convicted, was altered to one under section 395 of the Penal Code.

For these reasons I would alter the convictions of the appellants Maung Shwe, Po Nyunt and Maung Thein under section 302 (2)/109 of the Penal Code to those under section 302 (2) read with section 149 of the Penal Code and maintain the sentence of ten years' rigorous imprisonment meted out to each of them. Their appeals are accordingly dismissed.

(1) (1949) B.L.R. 139. (2) (1950) B.L.R. 131.

APPELLATE CRIMINAL.

Before U San Maung, J.

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Feb. 28.

AH KAUK AND FOUR OTHERS (APPLICANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

Affray—Penal Code, s. 159—Distinct offence from assault—Penal Code, s. 323 1 324—Amalgamation of cases and joint trial irregular.

Held: The gravamen of an offence of affray under Penal Code, s. 159 is fighting in a public place by two or more persons or by two or more groups of persons fighting against each other ; on the other hand, an offence of assault under s. 323 1 324 of the Penal Code is committed when a person is subjected to an assault by another person or by a group of persons. They constitute separate offences for which the parties involved should have been charged and tried separately.

Choon Foung (Government Advocate) for the respondent.

U SAN MAUNG, J.—The applicants Ah Kauk and four others were sent up by the police under section 324 of the Penal Code for causing hurt to Yon Win Kaik (PW 1), with a dangerous weapon, following an investigation made upon a first information report lodged by Yon Win Kaik. The police also instituted another case against the applicants for committing an affray, an offence punishable under section 160 of the Penal Code. The learned First Additional Magistrate, Wakema, before whom the cases came up for trial, tried the applicants in one and the same case for these two offences and framed charges against them under section 160 of the Penal Code and under sections 324 and 323 of the Penal Code. A joint trial of these two offences

* Criminal Revision No. 253 (B) of 1952 being review of the order of the 1st Additional (Special Power) Magistrate of Wakema, in Criminal Regular Trial No. 117 of 1952.

is irregular inasmuch as they constitute separate offences for which the applicants should have been charged and tried separately. From the definition of " affray " appearing in section 159 of the Penal Code, it is clear that the gravamen of an offence punishable under section 160 of the Penal Code is, fighting in a public place by two or more persons or by two or more groups of persons fighting against each other. All the persons involved in such a fight are guilty of the offence. On the other hand, an offence under section 324 of the Penal Code is committed when a person is subject to an assault by another person or, by a group of persons. If an affray had, in fact, been committed, Yon Win Kaik should have been made one of the accused in the case.

For these reasons, I would quash the charges framed against the applicant and four others in Criminal Regular Trial No. 117 of 1952 of the First Additional Magistrate, Wakema, and direct that the case against them under sections 324 of the Penal Code and 160 of the Penal Code be tried separately.

APPELLATE CRIMINAL (FULL BENCH).

Before U Tun Byu, Chief Justice, U Aung Tha Gyaw and U On Pe, JJ.

H.C. 1953

Mar. 26.

THE UNION OF BURMA (APPLICANT)

v.

MAUNG KHIN ZAW (RESPONDENT).*

Public Servant—Penal Code, s. 21, clause 9—Union of Burma Airways Board—Senior Traffic Superintendent—Duties—One to receive and account for cash realized from sale of tickets—Union of Burma Airways Order, 1950, paragraph 6 (1), 15 (c) and (d) and 18.

Held : Under paragraph 6 (1) and paragraph 15 (*c*) and (*d*) of the Union of Burma Airways Order, 1950, not only their appointment, salary or other conditions of service, but the dismissal of the officers and servants of the Union of Burma Airways Board are subject to the control of the Government. Under paragraph 18 the Government has the power to be exercised at any time and without giving any reason whatsoever to dissolve the Union of Burma Airways Board and take over its entire business and assets. The Union of Burma Airways Board created under the Union of Burma Airways Order, 1950 can be considered to be a Government undertaking ; and it follows that Maung Khin Zaw in receiving the money obtained from the sales of tickets was receiving it on behalf of the Government, and he is therefore a public servant for the purpose of section 21 of the Penal Code.

Tamlin v. *Hannaford*, (1950.) 1 K.B. p. 18, distinguished.

L. Choon Foung for the applicant.

Kyaw Myint for the respondent.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The question, which has been referred to this Court, is :

"Is a Senior Traffic Assistant in the service of the Union of Burma Airways Board constituted under the

* Criminal Reference No. 14 of 1952 being Review of the order of the Special Judge (SIAB and BSIA) of Rangoon, in Criminal Regular Trial No. 7 of 1952.

Union of Burma Airways Order, 1950 a public servant within the meaning of section 21 of the Penal Code?"

The relevant portion of section 21 of the Penal Code, is the clause ninth, which reads:

"21. The words 'public servant' denote a person falling under any of the descriptions hereinafter following, namely:—

* * * *

NINTH.—*Every officer whose duty it is, as such officer, to take, receive, keep or extend any property on behalf of Government,* or to make any survey, assessment or contract on behalf of Government, or to execute any revenue-process, or to investigate, or to report, on any matter affecting the pecuniary interests of Government, or to make, authenticate or keep any document relating to the pecuniary interests of Government, or to prevent the infraction of any law for the protection of the pecuniary interests of Government, and every officer in the service or pay of Government, or remunerated by fees of commission for the performance of any public duty;

* * * * "

The relevant words in the ninth clause of section 21 have been italicized by us.

Maung Khin Zaw was employed as a Senior Traffic Assistant in charge of internal passage booking section of the Union of Burma Airways, Rangoon; and U Taw, General Manager of the Union of Burma Airways, described the duties of Maung Khin Zaw as:

"The duties of the accused, as the Senior Traffic Assistant in charge of Internal Passage Booking Section, were that he must account for all the cash realised from the sale of tickets for the day in the evening, and that

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THE UNION OF BURMA v. MAUNG KHIN ZAW.

U TUN BYU, C. J.

he must deposit those earnings in the Cash Department of the UBA daily in the evening. He had to maintain a register of all payments made into the Cash Department daily. . . . . At the close of the day, he had to deposit all the cash collected by him together with his register of accounts and the relevant counterfoils. The cashier then acknowledged the receipt of his payment in his register. . . . . The accused had under him about 4 booking clerks. The booking clerks received cash directly from the passengers. It was the duty of the accused to collect the earnings from the booking clerks either in the course of the day or finally at the end of the day's work. It would take one hour the most to collect the counterfoils of tickets, the cash earnings and make the entry in the register."

Thus it is the duty of Maung Khin Zaw as Senior Traffic Assistant in the Union of Burma Airways to receive money belonging to the Union of Burma Airways and deposit them each day, in the evening, in the Cash Department of the Union of Burma Airways.

A question arises, whether the Union of Burma Airways can, in the circumstances of this case, be said to be a Government undertaking or a department of the Government, and if so, this reference will have to be answered in the affirmative. The Union of Burma Airways Order, 1950, was subsequently superseded by the Union of Burma Airways Order, 1952 wherein an employee of the Union of Burma Airways can, in the circumstances of the present case, be said to be a public servant within the meaning of section 21 of the Penal Code—*vide* paragraph 31 of the Union of Burma Airways Order, 1952. The present case occurs, however, when the Union of Burma Airways Order, 1950

was still in force, and therefore it is the provisions of the Union of Burma Airways Order, 1950 that the Court will have to consider for the purpose of this reference, and not the subsequent provisions of the Union of Burma Airways Order of 1952.

It will be necessary in this reference to carefully scrutinize the provisions of the Union of Burma Airways Order, 1950. The Union of Burma Airways Board, which was responsible for the organization and establishment of air transport services in Burma, was made responsible to the Minister of Transport and Communications. Under paragraph 6 (1) and paragraph 15 (*c*) and (*d*) of the Union of Burma Airways Order, 1950, not only their appointment, salary and other conditions of service, but the dismissal of the officers and servants of the Union of Burma Airways Board were also subject to the control of the Government. The Union of Burma Airways Board could not incur any expenditure in excess of the estimate which had been sanctioned, without obtaining the orders of the Government, and it had to maintain accounts of its transactions in the form approved by the Government. Moreover, the Union of Burma Airways Board was required to deposit all its moneys, which were not required immediately, into the Bank or Banks in which the balances of the Government were ordinarily deposited. The Government had also to find moneys for the Union of Burma Airways Board to enable it to exercise its powers and functions in such sums as it might think fit to do. A careful perusal of the Union of Burma Airways Order, 1950, indicates that it purports to give the Government a complete control over the affairs of the Union of Burma Airways

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THE UNION OF BURMA v. MAUNG KHIN ZAW.

U TUN BYU, C.J.

Board, as complete as can reasonably, in the circumstances, be done.

In the case of *Tamlin* v. *Hannaford* (1), it was held that the servants of the British Transport Commission, created under the Transport Act, 1947, are not civil servants and that its properties are not Crown properties. We do not consider that this case affords any real guidance. Although it might be said that the object of English Transport Act, 1947, was to nationalize all transport undertakings and to place them under a central control, known as the British Transport Commission, yet it must be remembered that the decision in the case of *Tamlin* v. *Hannaford* (1) was arrived at in the light of a different historical legal background. There, the British Transport Commission was given power to invest its excess assets in any manner as it might consider fit to do so, a power which the Union of Burma Airways created under the Union of Burma Airways Order, 1950, did not possess. The servants of the British Transport Company also did not enjoy any of the immunities and privileges of the Crown, while the officers and servants of the Union of Burma Airways could not be sued or proceeded against for anything done or intended to be done by them in good faith in the performance of their duties in the Union of Burma Airways. This privilege is also not enjoyed by the servants of a mercantile or business firm. The Union of Burma Airways Board, unlike the British Transport Commission, was also not liable to pay any tax or super-tax. Thus the circumstances in which the case of *Tamlin* v. *Hannaford* (1) was decided are not really the same as the case now under

(1) (1950) 1 K.B. p. 18.

reference. Each case will have to be decided in its own peculiar circumstances.

It has, however, been submitted on behalf of Maung Khin Zaw that although the Government exercises a complete control over the Union of Burma Airways, still the Union of Burma Airways cannot be considered to be a Government undertaking or a department of Government in that the Union of Burma Airways is a statutory creature created by the Union of Burma Airways Order, 1950, which is to function for a commercial purpose independently of the Government. We are unable to agree with this contention. We have already indicated earlier that the control of the Government over the affairs and functions of the Union of Burma Airways Board is complete. The fact that there is no express provision in the Union of Burma Airways Order, 1950, which states that the Union of Burma Airways Board is to be considered to be a Government undertaking or a Government department, does not necessarily mean that the Union of Burma Airways Board cannot be so considered, if there are sufficient materials to justify such conclusion. A careful perusal of the provisions of the Union of Burma Airways Order, 1950, indicates that the Government exercises a complete control and supervision over the affairs of the Union of Burma Airways Board. Moreover, under paragraph 18 of the Union of Burma Airways Order, 1950, the Government has the power, to be exercised at any time and without giving any reason whatsoever, to dissolve the Union of Burma Airways Board and take over its entire business and assets. No such power existed in the British Government under the Transport Act, 1907.

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THE UNION OF BURMA v. MAUNG KHIN ZAW.

U TUN BYU, C. J.

The provisions of section 44 (1) of the Constitution of the Union of Burma are important, so far as this reference is concerned, and they read:

"44. (1) The State shall direct its policy towards operation of all public utility undertakings by itself or local bodies or by peoples' co-operative organizations."

It becomes clear when we read the preamble to the Union of Burma Airways Order, 1950, that what was purported to be done under the Union of Burma Airways Order, 1950, was to enable the Government to carry out the duty imposed upon it by virtue of section 44 (1) of the Constitution of the Union of Burma. If we bear in mind that the Union of Burma Airways Board was also to function as a commercial undertaking, the control which the Government possesses over the affairs and functions of the Union of Burma Airways Board is, in effect, as complete as any private person might exercise over the affairs of the business he created and financed. The Union of Burma Airways Board created under the Union of Burma Airways Order, 1950, can, in the circumstances obtaining in the present case, be considered to be a Government undertaking; and it follows that Maung Khin Zaw in receiving the money obtained from the sales of tickets was receiving it on behalf of the Government, and he is therefore a public servant for the purpose of section 21 of the Penal Code.

The reference is accordingly answered in the affirmative.

APPELLATE CRIMINAL.

Before U San Maung, J.

THE UNION OF BURMA (APPLICANT)

H.C. 1953

Mar. 30.

v.

TA OH AND THREE OTHERS (RESPONDENTS).*

Undertrials—Military Personnel—Custody of, Civil Jail or Military Custody —Criminal Procedure Code, ss. 167 and 344 (1)—Prisoners' Act, s. 3.

At the request of the military authorities, the Additional Sessions Judge remanded to military custody a corporal and four riflemen of the Karenni regiment who were standing trial before him on a charge of murder.

Held : A Magistrate acting under s. 167 of the Criminal Procedure Code may in his discretion authorize the detention of a person against whom the police are holding an investigation into jail custody or into police custody as the circumstances may require. In the case of an under-trial prisoner who has to be remanded under s. 344 of the Criminal Procedure Code the Magistrate or Judge has no such discretion.

Queen-Empress v. *Engadu and others*, 11 Mad. 90 at 101; In re *Krishnaji Pandurang Joglekar*, 23 Bom. 32; *Nagendra Nath Chakravarti*, 51 Cal. 402, referred to and followed.

In re *M. R. Venkatraman and others*, 49 Cr. L. J. 41, distinguished.

Held further : The language of s. 344 (1) of the Criminal Procedure Code seems to indicate that the person to whose custody an under-trial prisoner is committed must be one amenable to the warrant of the Court ; and what the Legislature means by saying that an accused person if in custody may by warrant be remanded into custody is custody in jail.

Kunden Lal and others v. *The Crown*, 12 Lah. 604, followed.

Mya Thein (Government Advocate) for the applicant.

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* Criminal Revision No. 115 (A) of 1952 being review of the order of the Additional Sessions Judge, Pakôkku, in Criminal Regular Trial No. 10 of 1952, on reference by Sessions Judge, in Criminal Reference No. 1 of 1952.

H.C. 1953

THE UNION OF BURMA *v.* TA OH AND THREE OTHERS.

U SAN MAUNG, J. —In Criminal Regular Trial No. 10 of 1952 of the Court of the Additional Sessions Judge, Pakôkku, Maung Aung Yin *alias* Kyaw Yin and four others were sent up for trial by the Myingyan Police under section 302/34 of the Penal Code for the alleged murder of two Police Constables of the Special Police Reserve at Myingyan foreshore on the evening of the 10th of June 1951. Of the five accused in the case one is the Corporal and four others are the riflemen of the Karenni Regiment. On the 20th August 1952 when the case against them was sent up for trial the five accused were brought under Police custody before the Sessions Judge, Myingyan, who then forwarded the case to the Additional Sessions Judge for disposal after remanding the accused to the 5th of September 1952. The learned Additional Sessions Judge came on circuit to Myingyan in September and on the 8th of September 1952 when the five accused were produced before him, he remanded them to jail custody for the following day for the purpose of passing certain orders. They were not produced on the next morning because it was not found necessary and the case was therefore adjourned till the 10th of October 1952 after the remand papers had been signed. Subsequently, acting on a letter received from the Military Headquarters at Maymyo, the Additional Sessions Judge passed orders on the 22nd of September 1952 in his case diary directing the four accused riflemen to be handed over to Capt. Chit Swe of the Army after an acknowledgment of this fact had been taken from him by the

Superintendent of Jail, Myingyan. The letter which prompted the Additional Sessions Judge to take this action reads as follows :

" To,

U KHIN MG. U,

Asst. Div. and Sessions Judge,
Pakôkku.

SUBJECT. — *Discipline — No. 91229/L/CPL AUNG YIN AND PARTY OF 1 E KAYAH.*

* * * *

" It is requested the u/m Persl., who at present being detained in Central Jail Myingyan, may please be handed over to Capt. Chit Swe of 10 Buregt for safe custody. They will be produced before you when required. "

This letter was signed by an Officer of the Headquarters, North Burma Sub District, Maymyo.

The question now for consideration is whether it was legal for the Additional Sessions Judge to have handed the four under-trial prisoners to what may be called " Military custody ". The learned Sessions Judge of Myingyan, who has referred this case to this Court for orders, has strongly relied upon the ruling in the cases of *Kunden Lal and others* v. *The Crown* (1) and *Bal Krishna* v. *The Crown* (2) for his contention that the order of the learned Additional Sessions Judge was illegal.

In the first place I would like to point out that under section 435 of the Criminal Procedure Code the Sessions Judge may call for and examine the record of any proceeding before any *inferior criminal Court* within his jurisdiction for the purpose of satisfying himself as to the correctness, legality,

(1) 12 Lah. 604. (2) 12 Lah. 435.

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U SAN MAUNG, J.

etc. of any finding, sentence or order recorded therein. As the Additional Sessions Judge, Myingyan, is an Additional Judge of the Sessions Court, he has concurrent jurisdiction with the Sessions Judge himself, so that section 435 of the Criminal Procedure Code does not empower the Sessions Judge to call for and examine the record of proceedings of the Additional Sessions Judge. The case of *Emperor* v. *Bhatu Sadu Mali* (1) relied upon by the Sessions Judge is not of any help as the facts therein contained are quite different from the present.

However, as the matter involved in this case is important I shall proceed to pass orders under section 439 of the Criminal Procedure Code as the High Court may, in its discretion, exercise any of the powers specified in that section no matter in what manner the proceedings of a subordinate Court have come to its notice. Now, the custody of a person during the investigation of the case against him by the Police is regulated by the provisions of section 167 of the Criminal Procedure Code, which provides *inter alia* that "the Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole." During the enquiry or trial of the case, however the custody of an accused person is regulated by the provisions of section 344 (1) of the Criminal Procedure Code, which is in the following terms: —

"344. (1) If, from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or

(1) (1938) Bom. 331 (F.B.).

trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody : "

Comparing these two sections the significant difference is that whereas in section 167 the words " in such custody as such Magistrate thinks fit " occur, section 344 (1) of the Criminal Procedure Code speaks of remanding the accused if in custody by a warrant. The difference in the language of these two sections seems to me to be not without its due significance. Paragraph 419 of the Courts Manual, which deals with places of custody, reads as follows:

" 419. Section 167 empowers the Magistrate to authorize detention in such custody as he thinks fit. The remand should ordinarily be to jail, if there is a jail in the subdivision. If there is no jail the remand should ordinarily be to the police-station at the headquarters of the subdivision or township. Detention in an outlying police-station or outpost or any other place should not be authorized except in cases of real necessity, as for instance, where there is reason to believe that the accused can point out stolen property or materially assist in elucidating a case or bringing other offenders to justice. *In every case the place in which the accused is to be confined shall be specified in the Magistrate's order and warrant.*"

Thus the Magistrate acting under section 167 of the Criminal Procedure Code may, in his discretion, authorize the detention of a person, against whom the police are holding an investigation, into jail custody or into police custody as the circumstances may require. In the case of an under-trial prisoner who has to be remanded under section 344 of the Criminal Procedure Code, the Magistrate or Judge seems to have no such discretion as is given to the Magistrate under section 167 of the Criminal

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U SAN MAUNG, J.

Procedure Code. This is the view taken by the Calcutta, Madras and Bombay High Courts. In *Queen-Empress* v. *Engadu and others* (1) "under an order made under section 167, Criminal Procedure Code, the accused person is detained in the custody of the police, or in such other custody as the Magistrate making the order thinks fit. Ordinarily, no doubt, he will be in the custody of the police. Such detention is altogether different from the custody in which an accused person is kept under remand given under section 344, Criminal Procedure Code, which is the custody provided by the legislature for under-trial prisoners." In in re *Krishnaji Pandurang Joglekar* (2) Parsons J., said—

> "The Magistrate in his proceedings in the present case says that 'remands were given from time to time to complete police investigation — section 344, Criminal Procedure Code.' This section, however, relates to proceedings in inquiries or trials, and has nothing to do with police investigation, and it contemplates a remand to jail and not to police custody."

In the case of *Nagendra Nath Chakravarti* (3) a Bench of the Calcutta High Court observed —

> "The power of remand under section 167 is given to detain prisoners in custody while the police make the investigation, and in a proper case, to commence the inquiry. But the custody mentioned in section 344 is quite different and is intended for under-trial prisoners."

A discordant note, however, seems to have been sounded by a Bench of the Madras High Court in In re *M. R. Venkatraman and others* (4) where it was held that "whenever an accused is brought before the Court and the Court issues an order of remand, the Magistrate has complete freedom to

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(1) 11 Mad. 90 at 101.
(2) 23 Bom. 32.
(3) 51 Cal. 402.
(4) 49 Cr.L.J. 41.

remand the accused to whatever custody he thinks fit." However, a study of that case shows that the observation was not meant to be of general application but was only directed to showing that the Magistrate making a remand under section 344 had the discretion of choosing to which jail the undertrial should be remanded.

Now, there is nothing in the Code of Criminal Procedure regulating the places of custody of under-trial prisoners. However, the language of section 344 (1) of the Criminal Procedure Code seems to indicate that the person to whose custody an under-trial prisoner is committed must be one amenable to the warrant of the Court. The answer to the question as to who is such a person is furnished by section 3 of the Prisoners' Act, which reads:

> "The officer in charge of a prison shall receive and detain all persons duly committed to his custody, under this Act or otherwise, by any Court, according to the exigency of any writ, warrant or order by which such person has been committed, or until such person is discharged or removed in due course of law."

The word "prison" is defined in the Prisons Act as "any jail or place used permanently or temporarily under the general or special orders of the President for the detention of prisoners" but not including any place for the confinement of prisoners who are exclusively in the custody of the police. Therefore, I have no doubt whatsoever in my mind that what the legislature means by saying in section 344 (1) of the Criminal Procedure Code that an accused person, if in custody, may by warrant be remanded into custody, is custody in jail. In this connection it is worthy of note that the Prisons Act makes a distinction between two classes of criminal prisoners,

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U SAN MAUNG, J.

namely, a criminal prisoner by which is meant any prisoner duly committed to custody under a warrant of a Court or authority exercising criminal jurisdiction and a convicted criminal prisoner by which is meant any criminal prisoner under sentence of a Court including a person detained in prison under the provisions of Chapter VIII of the Code of Criminal Procedure. The whole matter has been exhaustively discussed by a Bench of the Lahore High Court in *Kunden Lal and others* v. *The Crown* (1) which has been strongly relied upon by the learned Sessions Judge in his order of reference. There it was held that during an enquiry or trial the custody in which an accused person concerned in such enquiry or trial is to be detained is "judicial" custody or, in other words, confinement in a prison, which, according to section 3 of the Prisons Act, means any jail or place used permanently or temporarily under the general or special orders of a Local Government for the detention of prisoners, which term, as applied to criminal prisoners, means any prisoner duly committed to custody under the writ, warrant or order, of any Court or authority exercising criminal jurisdiction. I may say with great respect that I am fully in agreement with the views expressed by the learned Judges composing that Bench.

For these reasons I would set aside the order of the Additional Sessions Judge, Myingyan, directing the four accused Ta Oh, Khi Ye, Di Ye and Phi Ye into what may be termed "Military" custody and direct that the Additional Sessions Judge do proceed with the trial of the case against them according to law in the light of the remarks contained above.

(1) 12 Lah. 604.

APPELLATE CRIMINAL

Before U Aung Tha Gyaw, J.

U MAUNG MAUNG (APPLICANT)

H.C. 1953

Apl. 21.

v.

DAW E BU (RESPONDENT).*

Criminal Procedure Code, s. 488 (3)—Maintenance order, enforcement of—Power not confined to Magistrate alone who passed original order.

Held : If s. 488 (3) Criminal Procedure Code requires that the Magistrate who should enforce the order of maintenance passed under s. 488 (1) should be the same Magistrate who dealt with the original matter there should be some indication in the section itself to justify the assumption ; no reason whatever can be found to justify the restriction sought to be imposed.

Maung Tun Zan v. *Ma Myaing*, (1941) Ran. 403 at 408 ; *U Hpay Latt* v. *Ma Po Byu*, 13 Ran. 289 at 290 ; *Ma Thaw* v. *King-Emperor*, 7 L.B.R. 16, referred to and distinguished.

N. R. Mazumdar for the applicant.

U AUNG THA GYAW, J.—This is an application in revision brought against the order of the learned Sessions Judge, Pyinmana, passed in his Criminal Appeal No. 82 of 1952 where he held that under the terms of section 488 (3) of the Criminal Procedure Code the learned Subdivisional Magistrate of Yamèthin had jurisdiction to entertain an application for enforcement of the order of maintenance passed by the Headquarters Magistrate of Yamèthin.

It is now contended that the learned Subdivisional Magistrate, Yamèthin, had no jurisdiction to deal with the matter referred to in section 488 (3) of the

* Criminal Revision No. 25 (B) of 1953 being review of the order of the Subdivisional Magistrate, Yamèthin, in Criminal Misc. Trial No 39 of 1951, and the order of the Sessions Judge, Pyinmana, in Criminal Appeal No. 82 of 1952.

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U MAUNG MAUNG v. DAW E BU.

U AUNG THA GYAW, J.

Criminal Procedure Code and that the words "any such Magistrate" occurring in this part of the section refer only to the Magistrate who dealt with the original maintenance application. Support for this view is sought in the observations made by Mosely J., in *Maung Tun Zan* v. *Ma Myaing* (1) where, making his comment on section 490 of the Criminal Procedure Code, the learned Judge stated "This section gives an alternative remedy by enabling an application for execution to be made direct to the Magistrate within whose jurisdiction the person against whom the order is passed may be, *as well as to the Magistrate who passed the original order, or his successor.*"

Reference is also invited to the remarks made by the same learned Judge in *U Hpay Latt* v. *Ma Po Byu* (2) to the following effect. "The provisions of that section (490) are merely supplementary to those of section 488, sub-section (3), Criminal Procedure Code, which allows the Magistrate who passed the order for payment of maintenance to enforce it, as was pointed out as long ago as *Ma Thaw* v. *King-Emperor* (3)."

In *Ma Thaw*'s case it was held that "when a person ordered, under section 488 of the Code of Criminal Procedure, to pay maintenance has ceased to reside in the jurisdiction of the Magistrate who passed the order, an order for the recovery of arrears may be made either by the Magistrate who passed the order for payment of maintenance or by a Magistrate having jurisdiction in the place where such person resides."

There can be no doubt that where an application is being made under section 490 of the Code, the

(1) (1941) Ran. 403 at 408. (2) 13 Ran. 289 at 290.
(3) 7 L.B.R. 16.

views expressed in the above cases would deserve the greatest respect. In the present case, however, the application for enforcement of the order of maintenance being made in a Court at Yamèthin where the original proceedings took place, there is no question whatsoever that the Subdivisional Magistrate, Yamèthin, is a Magistrate competent to deal with an application brought under section 488 (1) of the Code, and if section 488 (3) would require that the Magistrate who should enforce the order of maintenance passed under section 488 (1) should be the same Magistrate who dealt with the original matter, there should be some indication in the section itself to justify the assumption. In the absence of any clear reference to the Magistrate who dealt with the original matter the words "any such Magistrate" occurring in section 488 (3) must necessarily mean any Magistrate of the categories set out in sub-section (1) to section 488. No reason whatever can be found to justify the restriction sought to be imposed on these words that the order of enforcement must in all cases be made by the Magistrate who originally passed the order of maintenance. This being the case, the view adopted by the learned Sessions Judge would appear to be correct and this application must consequently be rejected.

APPELLATE CRIMINAL.

Before U Aung Tha Gyaw, J.

H.C. 1953

May 6.

U SOE LIN (APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Municipal Councillor—Complaint of cheating—Sanction, when necessary—Municipal Act, s. 60—Criminal Procedure Code, s. 197—Warning to accused when examined on oath—Police papers in case taken up by Bureau of Special Investigation subject to Criminal Procedure Code, s. 162—Appellate judgment, requirements of—First Information Report, what should be.

Held: Under s. 60 Municipal Act a Municipal Councillor is a public servant within the meaning of s. 21, Penal Code, and if the act complained of was committed by him in the discharge of his official duties, sanction as required by s. 197, Criminal Procedure Code would have to be obtained before he could be criminally prosecuted. In order that an act committed by a public servant should fall within the purview of s. 197 (1) there must be something in the nature of the act complained of that attached it to the official character of the public servant.

King-Emperor v. *U Maung Gale*, 4 Ran. 128, distinguished.

Capt. M. O. Angelo v. *Mandan Manjhi and another*, A.I.R. (1940) Pat. 316 at p. 321; *Dr. Hori Ram Singh* v. *Emperor*, A.I.R. (1939) (F.C.) 43 at p. 52, followed.

Held: It would be more in consonance with the spirit of the amendment for the accused to be warned as required under s. 342 (1) (*b*) of the Criminal Procedure Code immediately before he gives his evidence on oath, and not two months prior to that occasion.

Held: An investigating officer investigating an offence under the B.S.I. Act is not exempted from the provisions of law contained in the Criminal Procedure Code. S. 17 of the B.S.I. Act is clear on this point, and it was the duty of the Court Prosecuting Officer to draw attention to this section, and to supply copies of witnesses' statements if desired.

Nga Tha Aye and another v. *Emepror*, A.I.R. (1935) Ran. 299; *Nga U Khine and others* v. *King-Emperor*, 13 Ran. 1, followed.

Held: An appellate judgment must be a self-contained document and it cannot be read in connection with and supplementary to the judgment of

* Criminal Revision No. 45-B of 1953 being review of the 1st Additional Magistrate, Shwebo, in Criminal Regular No. 13 of 1952.

the trial Court. Though not in detail, if not erroneous or perverse, there is no failure of justice.

Solhu and others v. *Kishna Ram*, A.I.R. (1924) Lah. 660, referred to.

Held also: The report originally sent to the Director of the B.S.I. was not made available at the trial, and if any offence was alleged to have been committed, that report should have been treated as the first information report in the case.

Shwe Pru v. *The King*, (1941) Ran. 346, followed.

Held further: Where there are striking discrepancies between the first report and the story told by the prosecution witnesses in Court, a conviction cannot be maintained.

Mohabli and another v. *Emperor*, A.I.R. (1915) Lah. 438, followed.

Ba Shun for the applicant.

U AUNG THA GYAW, J.—This is an application in revision brought against the order of the Sessions Judge, Shwebo, passed in his Criminal Appeal No. 3 of 1953, confirming the conviction of the petitioner for an offence under section 420 of the Penal Code.

The complainant Pu Shwin and two others were interested in running a *Zatpwe* which they had engaged on contract at the nightly rate of K 750. Two days after the show began there was an outbreak of cholera in the town and the complainant and his associates apprehending that the *pwe* permit might be cancelled on that account, contacted the petitioner, an unregistered medical practitioner and a Municipal Councillor, who was related by marriage to the complainant. The petitioner is alleged to have given out that as a member of the municipal committee he had power to get the *pwe* permit cancelled through the exercise of his influence on the Civil Surgeon who was the Health Officer for the municipal area within which the *pwe* was being held. The petitioner is alleged to have demanded and received a sum of of K 100 from the complainant Pu Shwin for the

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purpose of influencing the Civil Surgeon in the matter, and on proof of this fact, he has been convicted and sentenced for an offence of cheating.

Before dealing with the evidence given in the case in support of the charge brought against the petitioner it is necessary to dispose of a number of legal points raised in this application.

In the first place, it has been contended that the petitioner, being a public servant within the meaning of section 21 of the Penal Code, could not be prosecuted in respect of the present charge without prior sanction having been obtained from the President of the Union. In support of this contention, attention is drawn to the provisions of section 60 of the Municipal Act and the terms of section 197 of the Criminal Procedure Code. Undoubtedly, under section 60 of the Municipal Act the petitioner was a public servant within the meaning of section 21 of the Penal Code and if the act complained of against him was committed by him in the discharge of his official duties as Municipal Councillor, there could be no question that sanction, as required under section 197 of the Code, would have to be obtained before he could be criminally prosecuted in court; but the demand for a sum of money from the complainant for the purpose of influencing the official conduct of the Civil Surgeon of the district was not an act which a Municipal Councillor is normally expected to carry out in the discharge of his ordinary duties. The petitioner is said to be related by marriage to the complainant, and the latter and his business associates were evidently concerned with the outbreak of cholera epidemic in the town and the possible cancellation of the *pwe* permit, and the petitioner had evidently gone out of his way in making the necessary arrangements to

ensure that such an eventuality did not take place. This being the case, it does not appear that the decision in *King-Emperor* v. *U Maung Gale* (1) can be held to apply to the facts of this case. In order that an act committed by a public servant should fall within the purview of section 197 (1) there must be something in the nature of the act complained of that attached it to the official character of the public servant. See *Capt. M. O. Angelo* v. *Mandan Manjhi and another* (2) and *Dr. Hori Ram Singh* v. *Emperor* (3).

It is next pointed out that in conducting the trial of the petitioner the learned Magistrate had not observed the mandatory provisions of section 342 of the Criminal Procedure Code in that he had not warned the petitioner that the evidence which he was going to give on oath would be used against him. It is true that the petitioner was not warned in this way immediately before he was examined on oath, but the learned Magistrate, two months previously, on 9th October 1952 had entered in his diary that he had complied with the law in this respect. It would have been more in consonance with the spirit of the amendment had the petitioner been warned as required under section 342 (1) (*b*) of the Criminal Procedure Code immediately before he gave his evidence on oath. In the circumstances now present, it cannot, however, be said that this provision has been grossly infringed to justify a wholesale condemnation of the trial as being illegal.

It is next contended that the use of police papers was denied to the petitioner, and attention is drawn

(1) 4 Ran. 128. (2) A.I.R. (1940) Pat. 316 at 321.
(3) A.I.R. (1939) (F.C.) 43 at 52.

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to the decisions made in the cases of *Nga Tha Aye and another* v. *Emperor* (1) and *Nga U Khine and others* v. *King-Emperor* (2) where the law on the point was set out in the following words:—

> "As soon as a defence pleader asks a witness a question covering his statement to the police, it is the bounden duty of the Sessions Judge to ask the pleader whether he wishes to have a copy of that witness's statement to the police supplied to him, or not. If the pleader does not desire a copy of the statement, then all questions concerning the witness's statement to the investigating officer should be disallowed. If he does desire a copy of the statement, it should be supplied, and be proved, and used for the purpose of cross-examining the witness and brought on the record in the proper way."

The learned trying Magistrate failed to observe this rule of procedure on the specious plea that the statement made to an investigating officer conducting an investigation under the B.S.I. Act was not subject to the provisions contained in section 162 of the Code. This view of the law, as pointed out by the learned Sessions Judge, is clearly erroneous. An investigating officer investigating an offence under the B.S.I. Act is not exempted from the provisions of law contained in the Criminal Procedure Code. Section 17 of the B.S.I. Act is clear on this point, and it was the duty of the Court Prosecuting Officer conducting the prosecution before the learned Magistrate to draw the attention of the Court to the provision of this section. The learned Sessions Judge himself went through the police papers, as was done by the learned Judges of the High Court in *Nga U Khine*'s case, and he appears to have been satisfied that there was nothing in those statements which could have helped the petitioner in proving his innocence in the Court of the trying Magistrate.

(1) A.I.R. (1935) Ran. 299. (2) 13 Ran. 1.

It is next contended that the judgment of the learned Sessions Judge does not conform to the requirements of section 367 of the Criminal Procedure Code in that in dealing with the evidence adduced for the defence the learned Sessions Judge had not given any reasons for the finding arrived at by him that this evidence was of no help to the petitioner. "An appellate judgment must be a self-contained document and it cannot be read in connection with and supplementary to the judgment of the trial Court." See *Solhu and others* v. *Kishna Ram* (1). Although the learned Sessions Judge had not dealt with the substance of the defence evidence in adequate detail, he had not arrived at an erroneous and perverse decision in the final assessment of its value and it cannot be said that his brief conclusion regarding the effect of the evidence given for the defence had resulted in a failure of justice.

On the facts brought out in the evidence given before the trial Court it does not appear that an offence of cheating had been clearly brought home to the petitioner. The report originally sent to the Director of the B.S.I. was not made available at the trial and if any offence was alleged to have been committed, that report should have been treated as the first information report in the case. See *Shwe Pru* v. *The King* (2). However, the report which was treated as the first information report in this case was lodged with the Shwebo police on 13th March 1952, some five months after the alleged commission of the offence, and this delay had a somewhat adverse effect on the reliability and accuracy of the testimony offered by the witnesses.

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(1) A.I.R. (1924) Lah. 660. (2) (1941) Ran. 346.

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The first information report alleged that a sum of K 100 was paid to the petitioner with a view to persuade the Civil Surgeon not to cancel the *pwe* permit on account of the outbreak of cholera epidemic in the town. The money was said to have been demanded by the petitioner for the purpose of paying the same to the Civil Surgeon and the payment made by the complainant was said to have been reported to the President of the Municipal Committee U Aung Gyi (PW 13) and another member U Myo Din (PW 2).

Now, in their sworn testimony given in Court Pu Shwin and his business partner Maung Pya have given different versions of what had really taken place in respect of this alleged payment of K 100 to the petitioner. According to Pu Shwin, the complainant, the payment was not made on the stage, as was alleged in the first information report; it was made at the entrance to the hall where the *pwe* was being held. To the question put by the Court the complainant made it clear that the money was wanted by the petitioner for the purpose of entertaining the Civil Surgeon and not paying him as gratification. Witness could not say whether the Civil Surgeon was entertained or not, as was promised when payment was made by him.

According to Maung Pya, the money in respect of which the petitioner was charged with cheating in this case was paid to the petitioner as a fee for the medical attention given by him to the members of the *pwe* troupe. This evidence of his has been contradicted by the statement he made to the investigating officer in Exhibit 8. In this statement witness had given a few details regarding the manner in which this payment was made to the petitioner. Two days after the show began witness was informed by the

complainant that the Civil Surgeon would have to be entertained so that the *pwe* permit should not be cancelled. Witness told the complainant to act as he thought fit. He was later told by the complainant that the petitioner had been paid a sum of K 100 in that connection. The money that was paid to the petitioner was repeatedly mentioned as entertainment expenses. The next morning witness had to go and pay the petitioner another sum of K 100 as the latter said that he was hard up. The petitioner in his evidence explained that this was paid because of the fee earned by him in looking after the health of the *pwe* troupe, and no charge was brought against the petitioner in respect of this payment.

The first information report did not positively allege that the payment demanded by the petitioner was a bribe or a present meant for the Civil Surgeon of the district, and in the sworn evidence given by the complainant and his business associate Maung Pya the money that was paid to the petitioner on the first night was paid towards the expenses likely to be incurred in entertaining the Civil Surgeon in order that he might not put a stop to the *pwe* on the plea that a cholera epidemic had broken out in the town. The statements made in Court by the complainant and his business partner Maung Pya are thus at variance with those appearing in the first information report and "where there are striking discrepancies between the first report and the story told by prosecution witnesses in Court, a conviction cannot be maintained." See *Mohabli and another* v. *Emperor* (1).

The *pwe* permit was not, in fact, cancelled or curtailed on any account and, strangely enough, on the night on which the petitioner was paid K 100

(1) A.I.R. (1915) Lah. 438.

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by the complainant, the Civil Surgeon, Dr. Puthu, was paid a similar sum by the petitioner after a professional visit paid to the house of Maung San Hla Gyaw (PW 10). San Hla Gyaw's evidence that he paid K 50 to U Soe Lin for the latter to pay the same to the Civil Surgeon for his visit to his house to see his sick sister who was suffering from typhoid, would appear to stand self-contradicted. The fee which he paid was for a single visit and a bottle of medicine, and on the face of it, it is difficult to believe the witness's story of the payment alleged to have been made by him. In his cross-examination he stated "The accused never told me that he would give it to the Civil Surgeon and I did not expressly tell him to pay it to the C.S. He also did not demand it from me. I do not know if this sum reached the hand of the C.S." It would seem that the story of the receipt of a fee for medical attendance on the night of occurrence was put up for the purpose of extricating the Civil Surgeon from the criminal implication of the monetary transaction which the petitioner had with the complainant. Dr. Puthu's admission that he found a sum of K 100 in his pocket on the morning following his brief condescension to the society of the petitioner on the night in question would rather seem to give rise to an inference that the money which the petitioner received from the complainant probably reached its destination and that it was not utilised in throwing an expensive party in his entertainment.

It is also worthy of note that in the evidence of Dr. H. Singh, Sub-Assistant Surgeon (PW 8) and that of U Ba Oh (PW 5) there is an appreciable discrepancy in regard to the amount of money alleged to have been paid to and received by the petitioner on Dr. Puthu's behalf. In this state of the

evidence it is difficult to accept the finding that the sum of money which the petitioner was alleged to have received on the night in question was paid as a result of any dishonest inducement made by the petitioner and that it was the petitioner who had appropriated the same. The conviction of the petitioner for an offence of cheating cannot therefore be sustained and the same will be set aside and he shall be acquitted so far as this case is concerned.

APPELLATE CRIMINAL.

Before U Aung Tha Gyaw, J.

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May 13.

N. SEENI EBRAHIM (APPLICANT)

v.

UNION OF BURMA (M. A. CHELLAN) (RESPONDENT).*

Acquittal, order of—Revisional application by private party to set aside—Criminal Procedure Code, ss. 252 (2) and 540—Additional witnesses—Discretion of Court to summon—S. 162—Use of Police papers—Material evidence not disclosed to Police—Omission can be used to impeach credibility of witness.

Held : In an application for revision of an order of acquittal, brought by a private party, without any attempt made on his part to move the Government to appeal against the order under s. 417 of the Code of Criminal Procedure, the Court has to act on certain general principles in order to ensure that the law is not made to subserve private ends. By long established practice of the Courts revisional applications against orders of acquittal are not entertained from private petitioners except it be on very broad grounds of the exceptional requirements of public justice.

Thandavan v. *Parianna*, I.L.R. 14 Mad. 363; *Heerabai and another* v. *Framji Bhikaji*, I.L.R. 15 Bom. 349; *Queen-Empress* v. *Ala Bakhsh*, I.L.R. 6 All. 484; *Qayyum Ali and another* v. *Faiyaz Ali and others*, I.L.R. 27 All. 359; *Faujdar Thakur* v. *Kasi Chowdhury*, I.L.R. 42 Cal. 612 at 616; *Hashmat Ali* v. *Emperor*, 36 I.C. 139; In re *Faredoon Cawasji Parbhu*, I.L.R. 41 Bom. 560; *Damodar* v. *Jujharsingh and another*, A.I.R. (1926) Nag. 115; *Ma Nyein* v. *Maung Chit Hpu*, I.L.R. 7 Ran. 538; *U Min* v. *Maung Taik and another*, I.L.R. 8 Ran. 663; *Htandameah* v. *Anamale Chettyar*, A.I.R. (1936) Ran. 247; *Karachi Municipal Corporation* v. *Thaoomal and Khushaldas* A.I.R. (1937) Sind 100; *Mohammad Ali* v. *The Crown*, A.I.R. (1950) Lah. 165; *Dhania* v. *Paras Ram*, A.I.R. (1950) Himachal Pradesh 44, reviewed, and followed.

Held : Where the case as at present was instituted on the police report the Magistrate is not under an equal obligation to summon each and every witness named by the complainant on a private complaint ; the law gives him a discretion as to whom or which of them he shall summon under s. 252 (2), Criminal Procedure Code.

Heman Ram (a) *Hem Raj* v. *The Crown*, (1946) I.L.R. 27 Lah. 399, distinguished.

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* Criminal Revision No. 27-B of 1953 being Review of the order of the Additional Sessions Judge sitting as Special Judge, Rangoon, in Criminal Regular Trial No. 1 of 1952.

Held : S. 540 confers a very wide discretionary power, and if the Court thinks that in order to arrive at a just finding it is necessary to examine the witness then it would be a proper exercise of its power to summon such witness.

Held also : The omissions which the witnessess were found to have made in their statements to the police dealt with matters of material importance to the accusation which they came forward to support, and it is for this reason that the previous statements which they were proved to have made can be shown to be inconsistent with the sworn statements they later made in Court.

Sakhwat Imami Musalman v. *Emperor*, A.I.R. (1937) Nag. 50 ; *Emperor* v. *Najibuddin and others*, A.I.R. (1933) Pat. 589 ; *Iltaf Khan* v. *King-Emperor*, I.L.R. (1926) 5 Pat. 346; *Nanak and another* v. *Emperor*, A.I.R. (1931) Lah. 189, referred to.

Dr. Ba Han for the applicant.

G. D. Williams for the respondent.

U AUNG THA GYAW, J.—In this application in revision the petitioner Seeni Ebrahim has asked this Court to set aside the order of acquittal passed by the Additional Sessions Judge, Hanthawaddy, sitting as Special Judge, Rangoon, in Criminal Regular Trial No. 1 of 1952, in favour of the respondent M. A. Chellan and his co-accused, one Ratnam.

The respondent M. A. Chellan and four others, namely Ratnam, Vella Swami, Valu and Ramu were prosecuted on a police report for offences under 302/324/144 of the Penal Code and after a protracted trial lasting almost a year the respondent Chellan and his co-accused Ratnam were acquitted of the charges brought against them while the three others, Vella Swami, Valu and Ramu, were discharged from the case at an earlier stage of the trial (10th April 1952).

The petitioner has put forward three grounds in support of his plea for a retrial of the accused

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persons. In the course of their examination in Court the petitioner Seeni Ebrahim as well as one Hassan Ali (PW 11) stated that at the time of the occurrence there was present inside the petitioner's shop, outside which the fatal attack took place, a Sadhu from the Ramakrishna Mission by the name of Swami Akunthananda. In the evidence of Hassan Ali (PW 11) there also occurs a statement that an old Burmese lady was running a stall at the corner of Thompson and Bigandet Streets in the immediate proximity of which the fatal assault was said to have been committed and Esa (PW 12) an employee of the petitioner, had further stated that one of the daggers produced in Court was picked up by this lady and handed over to him. At the close of the prosecution evidence (4th April 1952) the Advocate who conducted the prosecution on behalf of the Public Prosecutor applied to the Court that the Sadhu and the old Burmese lady referred to by the witnesses as aforesaid might be summoned and examined in the case. On this application the learned trying Magistrate passed his order declining to accede to the request stating as his reason that from the evidence of the Investigating Officer he did not think that they were important witnesses in the case. It is now put forward on behalf of the petitioner that this refusal on the part of the learned trying Magistrate to summon the witnesses contravenes the provisions of section 252 (2) of the Criminal Procedure Code and amounts to an illegality of so serious a nature as to justify the retrial of the accused person.

It is next pointed out that after the conclusion of the trial, a further application was made to the trial Court for the examination of the said Sadhu as

a witness in the case under the provisions of section 540 of the Criminal Procedure Code. In passing his orders on this application, the learned trying Magistrate remarked that in his opinion the alleged presence of the Sadhu inside the petitioner's shop at the time of the occurrence was a matter of some doubt and that the evidence coming from such a source would not give him any assistance in arriving at the truth relating to the charge.

It is contended that this refusal to summon the witness under section 540 of the Criminal Procedure Code was a further illegality calling for the revisional interference of this Court with the order of acquittal passed by the trial Court.

It is next contended that the rejection of the evidence of eye-witnesses on the ground that no mention was made to the police of certain facts deposed to by them in Court amounted to a wrong and unjustifiable use of the provisions of section 162 of the Criminal Procedure Code.

Now, in an application for revision of the present nature brought by a private party, in the absence of any attempt made on his part to move the Government to appeal against the order of acquittal under section 417 of the Code of Criminal Procedure, this Court has to act on certain general principles in order to ensure that the law is not made to subserve private ends. In *Thandavan* v. *Parianna* (1), a Bench of the Madras High Court, dealing with the case of a private prosecutor seeking to put the Court in motion to revise an acquittal arrived at by a Sessions Judge concurring with the Assessors, held the view that an appeal against an

(1) I.L.R. 14. Mad. 363.

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acquittal by way of revision is not contemplated by the Code, and it should, on public grounds, be discouraged. The same view was taken by the High Courts of Bombay and Allahabad in *Heerabai and another* v. *Framji Bhikaji* (1); *Queen-Empress* v. *Ala Bakhsh* (2); *Qayyum Ali and another* v. *Faivaz Ali and others* (3).

Jenkins C.J., in *Faujdar Thakur* v. *Kasi Chowdhury* (4), after a review of the case law on the subject held that although the High Court had jurisdiction to interfere on revision with an acquittal, it should ordinarily exercise this jurisdiction sparingly and only where it is urgently demanded in the interests of public justice. In this connection Walsh J., in *Hashmat Ali* v. *Emperor* through Ambar (5) remarked: " The general principle of the criminal law is that a man is entitled to the benefit of the doubt, and if he has been properly tried and acquitted by a competent Court, the least that you can say is that there is a reasonable doubt about his guilt and I think the usual practice is not to encourage the prosecution to have a second shot, unless there is some very strong reason in the public interest." Unless there is clear evidence of a miscarriage of justice an accused party who has stood his trial ought not to be ordered to run the risk again. A High Court " has power under 439 of the Criminal Procedure Code to interfere in revision with an order of acquittal; but by a long established practice of the Courts revisional applications against orders of acquittal are not entertained from private petitioners except it be on very broad grounds of

(1) I.L.R. 15 Bom. 349.
(2) I.L.R. 6 All. 484.
(3) I.L.R. 27 All. 359.
(4) I L.R. 42. Cal. 612 at 616,
(5) 36. I.C. 139.

the exceptional requirements of public justice." [*See* in re *Faredoon Cawasji Parbhu* (1).]

"Applications by private parties to revise orders of acquittal ought to be discouraged unless interference is urgently demanded in the interest of public justice. Where the purpose of a revision application is simply to serve personal ends and not to secure administration of justice, it should not be entertained." [See *Damodar* v. *Jujharsingh and another* (2).]"

In *Ma Nyein* v. *Maung Chit Hpu* (3), Baguley J., remarked at page 539 of the report: "I can well understand that cases may occur in which owing to non-recording of evidence or improper recording of inadmissible evidence, the Court interfering in revision might set aside an order of acquittal and direct a retrial." Following the decision in *Faujdar Thakur*'s case (4), Dunkley J., in *U Min* v. *Maung Taik and another* (5) held that although the High Court had jurisdiction to interfere on revision with an order of acquittal this jurisdiction should ordinarily be exercised sparingly and only where it is urgently demanded in the interests of public justice.

"The High Court will not ordinarily entertain an application for revision from an order of acquittal, as under section 417 an appeal is permitted against such order, unless there has been illegality in the proceedings of the Court which passed the order of acquittal or if the order was made without jurisdiction." Mya Bu J., in *Htandameah* v. *Anamale Chettyar* (6).

"The right of an accused person who has been acquitted, that he should not be tried a second time

(1) I.L.R. 41 Bom. 560.
(2) A.I.R. (1926) Nag. 115.
(3) I.L.R. 7. Ran. 538.
(4) I.L.R. 42 Cal. 612 at 616.
(5) I.L.R. 8. Ran. 663.
(6) A.I.R. (1936) Ran. 247.

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is a valuable right and not to be interfered with lightly. The High Court will interfere in revision with an order of acquittal in exceptional circumstances but not until the normal procedure for appeal under section 417 has been taken and failed. [See *Karachi Municipal Corporation* v. *Thaoomal and Khushaldas* (1).]

The High Court, in exercise of its power of revision, can set aside an order of acquittal and order a retrial in cases where the order of acquittal is passed by a Court not having jurisdiction or is based on an incomplete record of evidence, or is against any provision of law. [See *Mohammad Al* v. *The Crown* (2).]

The general rule is that in all cases of applicatio for setting aside an order of acquittal the power i one to be exercised only in exceptional cases an with caution. It is the practice of the High Court not to interfere with the order of acquittal in revisio sought by a private party on the ground that the Government can be moved to file an appeal against the acquittal under section 417, Criminal Procedure Code; but where the Government has been moved and it has declined to take action, the discretion of the Court cannot be allowed to be fettered in any way and where there had been an error of law, the Court should interfere in order to prevent a miscarriage of justice." [See *Dhania* v. *Paras Ram* (3).]

From this review of the judicial pronouncements made by the various High Courts on the subject, it is clear that where initiative has been taken by a

(1) A.I R. (1937) Sind 100. (2) A.I.R. (1950) Lah. 165.

(3) A I.R. (1950) Himachal Pradesh 44.

private party in the attempt made to set aside an order of acquittal, the High Court in the exercise of its revisional jurisdiction, would rarely interfere and that, only in cases where an order of acquittal has been passed by a Court without jurisdiction or a miscarriage of justice has taken place owing to some illegality in the conduct of the trial resulting from non-recording of relevant and important evidence or improper recording of inadmissible evidence.

The plea of illegality of the trial on the score that section 252 (2) of the Criminal Procedure Code has been infringed cannot be readily conceded. In the trial of warrant cases, the Code no doubt provides in section 252 (2) that " the Magistrate shall ascertain, from the complainant or otherwise, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon to give evidence before himself such of them as he thinks necessary." This aspect of the law of criminal procedure would appear to have been considered and dealt with by a Bench of the Lahore High Court in *Heman Ram* (a) *Hem Raj* v. *The Crown* (1) where it was held that " in a warrant case like the present the Magistrate, by reason of the first sub-section of section 252, is not only bound to take all evidence that may be produced by the prosecutor but by reason of the second sub-section of that section he is under further obligation of ascertaining from the complainant or otherwise the name of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution and of summoning to give evidence before himself such of them as he thinks necessary."

(1) (1946) I.L.R. 27 Lah. 399.

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From the terms of this provision it would appear that it is not every witness which a complainant names as likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, which the Magistrate after due ascertainment must summon to give evidence before himself. He is bound to summon only such of them as he thinks necessary, *i.e.*, such of those as he thinks will be of value in assisting the prosecution case.

The procedure thus prescribed under section 252 (2) would without doubt apply to a case instituted on a private complaint and where the complainant is examined by the Court in respect of the subject-matter of the complaint under section 200 of the Code. Where the case, as at present, was instituted on the police report, the procedure prescribed in section 252 (1) would first apply and the Magistrate will be bound, when the accused appears before him, to take all such evidence as may be produced in support of the prosecution.

It would seem that when the petitioner made the application for the examination of the Sadhu as a prosecution witness this part of the section had been fully complied with by the trying Magistrate and consequently the second part of the section would come into play and the Magistrate will thus have the power under it to exercise his discretion as to whether the witness or witnesses named by the complainant were necessary to be summoned. The learned trying Magistrate did make an effort to determine this issue. He assumed whether rightly or wrongly that the Investigating Officer had examined all the necessary witnesses

in the case and consequently came to the conclusion that it was not necessary for him to summon the witness cited by the complainant.

Though after the close of the evidence for the prosecution the trying Magistrate was bound under section 252 (2) to ascertain the names of any other witnesses who might be able to give evidence for the prosecution, he was not under an equal obligation to summon each and every witness so named by the complainant. The law gives him a discretion as to whom or which of them he shall summon, and on the facts presented in this case, it does not appear that this discretionary power has been abused by the trying Magistrate.

Mere presence of the Sadhu inside the shop where he had gone on the specific errand of using the shop telephone would not show that he was a likely eye-witness to the fatal attack which was alleged to have suddenly taken place in front of the shop. Nor was a Burmese lady a likely witness to the fatal assault for the mere reason that she picked up the dagger alleged to have been dropped by one of the assailants who presumably were perfect strangers to her. There was thus no illegality in the failure of the trying Magistrate to summon the Sadhu and the Burmese lady under section 252 (2) of the Criminal Procedure Code.

At the conclusion of the trial a further application was made under section 540 of the Code for the examination of the Sadhu as a witness in the case. Section 540 of the Code no doubt confers upon the trying Court a very wide discretionary power in the matter of summoning witnesses but this discretion

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has to be exercised with a great deal of caution, the primary consideration being the duty cast upon the Court of arriving at the truth by all lawful means. If the Court thinks that in order to arrive at a just finding it is necessary to examine the witness, then it would be a proper exercise of its power to summon such witness under section 540 of the Code. The learned trying Magistrate in this case has given his reason for thinking that the witness asked to be summoned in the case was not likely to give useful evidence in support of the prosecution, as from the statements made by the witnesses before him, the very alleged presence of the witness at the scene of crime was a matter of some doubt. No element of illegality can thus be detected in the order of the learned trying Magistrate to which the petitioner has taken objection.

Regarding the manner in which previous statements to the police had been used in this case to contradict the prosecution witnesses, it has been strenuously put forward that omissions occurring in such statements cannot be used to contradict the testimony given by the witnesses at the trial. Reliance is placed upon the observations made by a Bench of the Nagpur High Court in *Sakhwat Imami Musalman* v. *Emperor* (1)—"Section 162, Criminal Procedure Code, does not permit the use of statements to the police for such a purpose. The section provides that such statements can be used only for the purpose of contradiction. Contradiction means the setting up of one statement against another and not the setting up of a statement against nothing at all."

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(1) A.I.R. (1937) Nag. 50 at 53.

A Bench of the Patna High Court in *Emperor* v. *Najibuddin and others* (1) had this to say on this question:

"It has long been accepted that a statement to an investigating officer has been 'reduced into writing' even when the officer has not recorded the statement in full, but has merely noted the gist of what was stated to him. The value of such a note for the purpose of contradicting testimony given on oath at a subsequent trial varies with the nature of the testimony and of the officer's note. Ordinarily such a note contains only such excerpts from the statement as appear to the officer, at the time, to be important. Further investigation and subsequent developments may, and often do, show that points of great materiality have been omitted. When therefore the only record of a witness's statement to the investigating officer is a brief note, it follows that omissions from that note are of practically no value for the purpose of proving that the witness did not state to the officer matters to which he deposes at the trial."

Since these observations were made, the law on the subject, namely, section 162 of the Criminal Procedure Code, has been materially altered and amended by permitting the use of the previous statement made to the police for the further purpose of impeaching the credit of the witness in the manner provided by section 155 of the Evidence Act.

This being the state of the law on the subject, the credit of the witnesses in this case could have been impeached by proof of former statements which were inconsistent with any part of the evidence given in Court under the provisions of section 155 (*3*) of the Evidence Act. The Investigating Officer in this case no doubt took down rather too briefly, considering the importance of the charge made against the accused persons—the statements made by those

(1) A.I.R. (1933) Pat. 589 at 593.

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witnesses during the investigation and evidently the record of those statements could not have included many important details which on more mature reflection they would have remembered; but the omissions which the witnesses in the present case were found to have made dealt with matters of material importance to the accusation which the witnesses came forward to support. It was for this reason that the previous statements which they were proved to have made to the police have been shown to be inconsistent with the sworn statements they later made in Court.

Rose J., in *Iltaf Khan* v. *King-Emperor* (1) was of the view that "To construe section 162 of the Code of Criminal Procedure as meaning that while any part of the statement of a witness to the police may be used to contradict him, yet if the contradiction consists in this that a statement made at the trial was not made in any part of the statement to the police, such a contradiction cannot be proved, seems to be an artificial construction. . . . . I can find nothing in the language of section 162 which would lead to such a conclusion."

A similar omission was used to impeach the credit of eye-witnesses in the case of *Nanak and another* v. *Emperor* (2). Where an omission detected in the previous statements of the witnesses relates to a vitally important and material fact relating to the commission of the crime sought to be proved against the accused person, the terms of section 162 would clearly permit the use of the said statements for the purposes set out therein.

This application must accordingly be rejected.

(1) I.L.R. (1926) 5 Pat. 346 at 349. (2) A.I.R. (1931) Lah. 189.

G.U.B.C.P.O.—No. 24, H.C.R., 24-4-56—1,750—IX.

APPELLATE CIVIL.

Before U Aung Khine, J.

DAW HAN (APPELLANT)

v.

DAW TINT AND ONE (RESPONDENTS).*

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July 10.

Urban Rent Control Act, s. 11 (1) (f)—Building required by owner for residential purposes—Word "exclusively" does not qualify "himself" but the words "for residential purposes"—Owner includes dependants.

Held: A person who acquires a building for residential purposes does so not only for his own occupation but for the occupation of his dependants as well. In providing section 11 (*1*) (*f*) of the Urban Rent Control Act the legislature could never have intended that the premises sought for should be occupied only by its owner and not by his dependants. Thus, the word "exclusively" in the said clause could never have been meant to qualify the preceding word "himself" but to the three words following it, *viz.* "for residential purposes."

D. N. Dutt for the appellant.

San Thein for the respondent No. 1.

U AUNG KHINE, J.—This is an appeal against the judgment and decree of the Rangoon City Civil Court in Civil Regular Suit No. 916 of 1951 dismissing the suit filed by the appellant Daw Han for ejectment from the northern room of her house, No. 83 in 15th Street, against the respondents Daw Tint and Ko Nyan Nga. The facts of the case are quite simple and, in brief, are as follows:

The appellant Daw Han is the owner of House No. 83, 15th Street, Rangoon, and respondent Daw Tint occupies the northern rooms in this house paying a rent of K 54 per month. Daw Tint came

* Civil 1st Appeal No. 62 of 1952 against the decree of the City Civil Court in Civil Regular Suit No. 916 of 1951.

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to occupy these rooms in the following circumstances. During the Japanese occupation, Daw Han vacated the building the whole of which she occupied and kept it in charge of Daw Mya (PW 4). She went and resided during the period of occupation in Bahan. Daw Mya installed Ko Maung Myit (PW 1) in the house to look after the same. It was Maung Myit who permitted Daw Tint to occupy the rooms in question, rent free. When Daw Han returned to live in town again she could not get possession of the rooms occupied by Daw Tint. Daw Tint promised to vacate her rooms but she herself was unable to secure any other place to live in. Daw Han was therefore obliged to take rent from her and thus, a relationship of landlord and tenant was created between them.

Daw Han has five sons and they are all living with her. Four of them are married and some have children. The total number of Daw Han's family has now risen to 17 although a few years back there were only 14. The house in question is by no means a spacious one. It only measures $45' \times 25'$ and although it is a two-storeyed building there are no rooms downstairs. Daw Han probably found it very inconvenient to live in a small space of $22\frac{1}{2}' \times 25'$ with 16 other members of her family.

Therefore she filed an application before the Controller of Rents, Rangoon, under section 14-A (3) read with section 11 (1) (f) of the Urban Rent Control Act, 1948 to allow her to file a suit for ejectment against Daw Tint and her sub-tenant Ko Nyan Nga. Her application was opposed by Daw Tint and an inquiry had to be made. At the close of the inquiry the Controller of Rents permitted Daw Han to file a suit against Daw Tint and her sub-tenant Ko Nyan Nga.

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Armed with this permit appellant Daw Han filed the present suit. The respondent Daw Tint alone filed her written statement and the suit against Ko Nyan Nga was heard *ex parte*.

It is the contention of the respondent Daw Tint that the appellant did not require the suit premises reasonably and *bonâ fide* for her own use and occupation. In amplification of this broad statement it was submitted that the respondent had been paying a rent of K 75 previously and the appellant had demanded a rent of K 100 per month. She therefore made an application to the Rent Controller to fix the standard rent for the rooms she occupied. The rent was reduced to K 54 per month. It was on this account that the present suit was instituted. A further submission was made to the effect that the appellant intended to let out the house to a Chinese from whom a *salami* of K 5,500 had been expected. After hearing the evidence adduced by the parties, the learned 3rd Judge of the City Civil Court dismissed the suit on three grounds, *viz.* (i) that the suit was filed out of grudge as a sequel to the successful application made by the respondent for the fixation of the standard rent for the rooms occupied by her, (ii) that the suit house was intended to be let out to a Chinese from whom a *salami* of K 5,500 was expected and (iii), that the rooms from which respondent Daw Tint is sought to be ejected is not required for the occupation of the appellant herself but for the members of her family.

It is true that the suit was filed on 3rd August 1951 after the Rent Controller had reduced the rent of the rooms to K 54 on 3rd January 1951. I am of the opinion that no adverse inference should be drawn against the appellant by this single factor. The learned Judge of the lower Court has failed to take into account other facts obtaining in the case,

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for instance, the permit to file the present suit was sought for by the appellant before the standard rent was fixed, to be exact, on 12th December 1950. Apart from this, a reference to Exhibit 1, notice filed by the defence, shows that the respondent was addressed to quit by that notice and the notice was dated the 11th November 1950 and that was before the respondent Daw Tint filed an application to the Rent Controller to fix the standard rent of the rooms. Had these pertinent facts not been glossed over I am quite convinced that the learned 3rd Judge would have come to a different conclusion.

On the question of *salami* the learned 3rd Judge has chosen to believe Maung Sein (DW 3) whom he describes as an independent witness. I must make mention of the fact that Maung Sein did not figure as a witness before the Rent Controller when the application of the appellant to obtain a permit to file the present suit was stoutly opposed by the respondent Daw Tint. Daw Tint's star-witness on that point then was not Maung Sein (DW 3) but one Hoke Sein. Maung Sein (DW 3) would have it that he went to rent the entire house from the appellant and the appellant had demanded a rent of K 100 per month *plus* a *salami* of K 5,500. According to him, he mentioned this fact to the respondent Daw Tint but, strangely enough, Daw Tint did not say a single word about this in her deposition. Again, appellant Daw Han was never asked in her cross-examination whether or not it was true that she had asked for a *salami* of K 5,500 from a Chinese. I cannot understand how this kind of evidence could be taken as absolute truth. The defence did not think it appropriate to confront the appellant with Maung Sein while she was in the witness-box. On the other hand, when Maung Sein was giving evidence they

conveniently made him point out the appellant who was in the Court room.

Then, when considering the circumstances in which K 2,000 was offered by the appellant to the respondent for vacating the rooms in question, the learned 3rd Judge chose to presume that to get K 5,500 as *salami* from a Chinese she had offered K 2,000 to the respondent to vacate the rooms. This is what the appellant said in connection with this matter: "The first defendant told me that she would have to give K 3,000 as *salami* for a house in the 14th Street and that she, therefore, wanted to have this amount." According to the appellant Daw Tint demanded this amount, K 3,000, but she was willing to pay K 2,000 only. The fact that the appellant had been trying to get back the rooms from the respondent since she returned to live in town is spoken of by Ko Maung Myit (PW 1) and Daw Mya (PW 4). I am firmly of the opinion that the appellant's offer of K 2,000 to the respondent was merely to get back the rooms from her and not actuated by an ulterior motive of getting K 5,500 from the alleged prospective tenant.

Now, regarding the last point about the requirement by the owner of a building for residential purposes as provided in section 11 (*1*) (*f*) of the Urban Rent Control Act it has been construed by the learned 3rd Judge in a very narrow and restrictive sense. He is of the view that the premises required must be for occupation for residential purposes of the owner himself and, not of the members of the family. He appears to be of the opinion that the word "exclusively" in clause (*f*) qualifies the preceding word "himself". He has singled out a statement made in cross-examination by the appellant to the effect that she wanted the suit premises for

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her children, to fit in with the construction he has put on the said clause.

A person who acquires a building for residential purposes does so not only for his occupation but for the occupation of his dependants as well. Surely, in providing this clause the legislature could never have intended that the premises sought for should be occupied only by its owner and not by his dependants. Thus, the word "exclusively" in the said clause could never have been meant to qualify the preceding word "himself" but to the three words following it, *viz.* "for residential purposes."

When the appellant stated that she wanted the rooms for her children she must have meant those who were residing with her and who would continue to reside with her in the same house. After a careful consideration of the facts obtaining on record I am of the opinion that the judgment of the learned 3rd Judge has been based on faulty reasoning and wrong construction placed on section 11 (*l*) (*f*) of the Urban Rent Control Act. In these circumstances the judgment of the lower Court cannot be sustained.

The appellant has to my mind fully made out her case that, owing to the circumstances which she had plainly made out in her pleadings and deposition that she reasonably and *bonâ fide* required the rooms for occupation—exclusively for residential purposes. In the result, the appeal is allowed and the judgment and decree of the lower Court are set aside. There will be a decree for the plaintiff-appellant Daw Han as prayed for with costs in both Courts.

APPELLATE CIVIL.

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

HAJI ABDUL SHAKOOR KHAN (APPELLANT)

v.

MESSRS. BURMA PUBLISHERS LTD. (RESPONDENT).*

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Aug. 19.

Burma Companies Act, s. 30 (1) (2) — Memorandum and Articles of Association, registration of—Immediate consequences—Subscriber to memorandum, application for shares, necessity of—Company's Minute-books, accuracy of entries, presumption of—Contract Act, ss 196, 197 —Acts of agent, ratification of—Civil Procedure Code, Order 29, Rule 1—Signing and verification of plaint of Company—Limitation Act, Article 112, Schedule I—Suit for value of shares, time for—Date of cause of action, mistake in plaint, whether fatal.

Held: A person who subscribes his name in the memorandum of association becomes at once on registration a member of the company and he is therefore bound to take and pay for the shares indicated against his name, and so far as he is concerned no application of allotment is strictly necessary, and no entry in the register of allotment is necessary also.

Banwari Lal v. *Kundan Cloth Mills Limited*, (1937) I.L.R. 18 Lah. 294; *Lord Lurgan*'s case, (1902) 1 Ch. D. 707; *The Collector of Maradabad* v. *Equity Insurance Co. Ltd.*, A.I.R. (1948) Oudh 197, referred to and followed.

In re *Florence Land and Public Works Company*, (1885) 29 Ch. D. 421; In re *Borron Baily and Company*, (1867-68) 3 Ch. Appeals 592; *The Karachi Oil Products Limited* v. *Kumar Shree*, I.L.R. (1950) Bom. 192, distinguished.

Held: In view of s. 83 of the Burma Companies Act the entries in the minute-books of a company should ordinarily be considered to be true unless they could be shown to be clearly incorrect or to be inserted falsely.

Held: As there is nothing in the Burma Companies Act which militates against or is derogatory to the provisions of ss. 196 and 197 of the Contract Act, they will apply in considering whether there had been ratification of what the agent had done while the principal was absent in India.

* Civil 1st Appeal No. 97 of 1951 against the decree of the High Court, Original Side, in Civil Regular Suit No. 69 of 1950.

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Held: Under Order 29, Rule 1, of the Civil Procedure Code certain officers of a company are deemed in law to constitute an agent of a company for signing and verifying a plaint without any express authority for this purpose and it is to be read where it is possible to do so, as supplementary to the articles of association; a managing director therefore has power to sign and verify the plaint on behalf of the company.

Held also: It is clear from the wording of Article 112 of Schedule I to the Limitation Act that the period of limitation as against a subscriber to pay for the shares subscribed against his name will commence only from the time the call is made upon him.

Held further: A mistake in the plaint about the date of the cause of action cannot be considered to be fatal; it is only good sense that this aspect of the case should be decided on the evidence proved in the case.

P. K. Basu for the appellant.

P. N. Ghosh for the respondent.

The judgment of the Bench was delivered by

U TUN BYU, C. J. —The primary question, which arises in this appeal, is whether it could, in the circumstances of the present case, be rightly held that the defendant-appellant Haji Abdul Shakoor Khan had taken 20 shares in Messrs. Burma Publishers Limited, hereinafter referred to as "the Company". This is, in effect, the question which falls for consideration under paragraph 2 of the plaint, read with paragraph 2 of the reply to the written statement; and this is more a question of fact.

Haji Abdul Shakoor Khan was one of the persons who primarily conceived the idea of promoting a company. He apparently permitted the Company to take over the two rooms that were in his occupation and utilize them as business premises of the Company.

On or about the 24th April, 1946, a meeting was held for the purpose of promoting a company, where Haji Abdul Shakoor Khan, Hubdar Khan and Roshan Din were also present. Apparently, certain

matters were discussed there, but nothing definite was decided upon at that meeting. The Exhibit 3 receipt, which shows that Haji Abdul Shakoor Khan paid Rs. 3,000 for the value of three shares of Rs. 1,000 each, does not disclose that he had in truth agreed to take three shares of Rs. 1,000 each only. The importance of Exhibit 1 photographic copy has been stressed on behalf of the defendant-appellant, but it does not appear that the original document, from which Exhibit 1 was reproduced, was, if at all, in existence on or before the 24th April, 1946, the date on which the first promoters' meeting was held. We do not know who dictated or typed out the original document of Exhibit I; nor is there any evidence to explain who gave direction for preparing that document; or how the words in ink came to be inserted in Exhibit I, or who wrote them. Hakim Aich is dead; and there is no evidence to support the statement of Haji Abdul Shakoor Khan that the original document was seen in the possession of Hakim Aich, from whom Haji Abdul Shakoor Khan was alleged to have obtained it for the purpose of making a photographic copy. Thus no consideration could be given to Exhibit I. In any case, we do not consider that any reliance can properly be placed on Exhibit I. It was, however, urged on behalf of the defendant-appellant that Hubdar Khan, a managing director of the Company, admitted, while he was being cross-examined, that one of the signatures in Exhibit I was his, but the deposition showed that he immediately afterwards denied it to be his signature. In the absence of evidence to prove that Hubdar Khan must have signed that document, it would not be reasonable to hold that the first statement, which Hubdar Khan made, must have been true, or that it was not made under a mistaken impression.

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Haji Abdul Shakoor Khan departed for India on or about the 14th May, 1946. After his departure, a second promoters' meeting was held in the month of October, 1946, to consider a draft memorandum and articles of association that had been prepared by an Advocate, N. R. Burjorjee, where it was also decided to fix the value of the shares of the company at Rs. 500 each, instead of at a value of Rs. 1,000, as was contemplated earlier by some of the promoters. Before Haji Abdul Shakoor Khan left Burma, he executed a power-of-attorney in favour of Abdul Hamid Khan and two other persons; and it was Abdul Hamid Khan who attended the second promoters' meeting, held in the month of October, 1946, on behalf of Haji Abdul Shakoor Khan. We might mention at once that the powers-of-attorney did not empower Abdul Hamid Khan to act in matters connected with the plaintiff-company.

The memorandum and articles of association of the Company were registered on or about the 29th October, 1946. Seven persons' names appeared as subscribers to the memorandum and articles of association; and it was his agent Abdul Hamid Khan, who subscribed the defendant-appellant's name in the memorandum and articles of association. A director's share-qualification was fixed at Rs. 7,500. The memorandum and articles of association reveal that Haji Abdul Shakoor Khan was one of the promoters of the Company and that he had agreed to take 20 shares of the value of Rs. 500 each. The articles of association do not set out as to who were to constitute the directors of the Company, but those promoters whose names were subscribed in the memorandum and articles of association were regarded as the first directors of the Company; and

those persons appear to have acted on that assumption in the present case.

The defendant-appellant remained in India between May, 1946 and June, 1948. It was submitted that as the defendant-apppellant had not applied for the 20 shares specified in the memorandum and articles of association, the allotment of the 20 shares to him was not binding upon him and that he did not become an allottee. It was also urged that the 20 shares had not, in fact, been allotted to the defendant-appellant. It appears to us that there is sufficient evidence to indicate that those shares had, in fact, been allotted to him—*vide* Exhibit B4 and Exhibit E. We accept Hubdar Khan's statement as to how the slip came to be inserted in Exhibit B4; and we do not think that it was done dishonestly. Moreover, Hubdar Khan had not been asked to produce the allotment register for the purpose of proving the contrary. A person becomes, on the other hand, a member of a company, if it can be shown that he comes within either sub-section (*1*) or within sub-section (*2*) of section 30 of the Burma Companies Act; and section 30 reads:

"30. (*1*) The subscribers of the memorandum of a company shall be deemed to become members of the company and on its registration shall be entered as members in its register of members.

(*2*) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company."

It will be observed that, under sub-section (*1*), a person, who subscribes his name in the memorandum of association, becomes at once on registration a member of the company, and he is therefore bound to take and pay for the shares indicated against his name in the memorandum of association and that, so

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far as he is concerned, no application of allotment is strictly necessary. This is a reasonable construction, and that is the legal position which sub-section (*1*) of section 30 clearly implies. The difference in the wording of sub-section (*1*) and sub-section (*2*) of section 30 also suggests that no entry in the register of allotment is necessary in respect of such person.

In *Banwari Lal* v. *Kundan Cloth Mills Limited* (1), it was held that, where a person agreed to take up shares in a limited company at the time of its formation and had subscribed in the memorandum of association, he was liable for the call money on the shares so subscribed; and *Lord Lurgan*'s case (2) was referred to, where it was observed:

> "At the moment of registration, two things take place by the force of the Companies Act, 1862, ... The company springs into existence and the subscribers to the memorandum of association become members of the company."

The above observation also expresses the law in Burma by reason of the provisions of sub-section (*1*) of section 30 of the Burma Companies Act. It was held in *Lord Lurgan*'s case (2) that no allotment of shares to Lord Lurgan was necessary, as he became a member of the company on registration by reason of his signature in the memorandum of association. A similar observation was expressed in the case of *The Collector of Maradabad* v. *Equity Insurance Co. Ltd.* (3) where, after referring to the case reported in (1900) 2 Chancery at page 56, it was stated:

> "A subscriber of a memorandum of association becomes . . . . . a member in respect of the number of shares subscribed by him without any further application by him or allotment of shares to him. Every such subscriber

(1) (1937) I.L.R. 18 Lah. 294. (2) (1902). R.L. 1 Ch. D. 707.
(3) A.I.R. (1948) Oudh p. 197.

becomes a member *ipso facto* on the incorporation of the company, and liable as the holder of whatever number of shares he has subscribed for. Section 30 of our Act is the same as section 25 of the English Act of 1909."

Certain cases were cited during the hearing of this appeal on behalf of the defendant-appellant. In the case of in re *Florence Land and Public Works Company* (1), W.T. and P. applied for shares, but their names were not entered in the register ; nor was any allotment money paid or any share certificate issued. Thus, the circumstances in that case are entirely different from the case now under appeal where the provisions of law, which arise for consideration, fall within sub-section (*1*), and not sub-section (*2*) of section 30 of the Burma Companies Act. The same observation will apply to the case of in re *Borron Baily and Company* (2), and it was submitted, by reason of that case, that the mere fact that a person attended the meetings of a company as a director thereof would not make him a member of the company, but in the case now under appeal the defendant-appellant had done very much more. The case of *The Karachi Oil Products Limited* v. *Kumar Shree* (3) was one for the recovery of a sum of Rs. 5,000, as the price of 500 shares, which the defendant agreed to take, and which were purported to have been allotted to him. It was held in that case that the allotment of shares was not made within a reasonable time, and that the defendant could not, in the circumstances, be compelled to accept the allotment made after a lapse of considerable time. The defendant in that case was not one of the persons whose names appear in the memorandum of association. The decision in that case turns,

(1) (1885) 29 Ch.D. 421. (2) (1867-68) 3 Ch. Appeals p. 592.
(3) I.L.R (1950) Bom. p. 192.

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therefore, on a different consideration of the provisions of law.

Haji Abdul Shakoor Khan did not, of course, actually sign the memorandum or articles of association himself, but this circumstance alone will not exonerate him from liability. We have also to examine other facts and circumstances that have been proved in this case. Hubdar Khan, a managing director of the Company, stated that before the defendant-appellant left for India, he informed the witness that he had instructed Abdul Hamid Khan to do all that was necessary in connection with the company which they were contemplating to form. Although we might, ordinarily, have been disinclined to accept a statement, which is not consistent with the powers-of-attorney, yet we feel, in this case, that the learned Judge on the Original Side had acted rightly in accepting the statement of Hubdar Khan in this respect. The conduct of Abdul Hamid Khan, after the departure of the defendant-appellant, in attending the meetings held before and after the memorandum and articles of association of the company were registered was consistent with Hubdar Khan's statement. Haji Abdul Shakoor Khan, who maintained a business in Rangoon, was apparently in communication with his agent in Burma while he was in India, as he was absent from Burma for no less than 2 years. It is also not likely that his agent would have permitted the company to occupy the two rooms in Frazer Street without the defendant-appellant's prior consent, especially when the company had not been registered at the time the agreement of lease was executed; nor would his agent have sent the letter, dated the 29th September, 1947, to the company asking for the return of the rooms at No. 190/192, Frazer Street, which the

Company was using as its business premises, without consulting the defendant-appellant about it. The defendant-appellant was, moreover, one of the original promoters of the company; and he had already paid Rs. 3,000 for shares in the company, although it had not yet been incorporated at the time he left for India.

His conduct, after his return from India, in attending the meetings of the board of directors on no less than seven or eight occasions also indicates that he considered himself to be a director of the Company. The last meeting of the board of directors, which he attended, was held on the 23rd December, 1949, *vide* Exhibit B12 of the minutes of the meeting of the board of directors. His explanation that he attended those meetings of the board of directors merely for the purpose of regaining the possession of his two rooms in Frazer Street and for recovering the rents due on these two rooms cannot, in the circumstances of this case, be accepted. The minutes of five of the meetings of the board of directors held on the 11th September, 1948, the 25th March, 1949, the 24th June, 1949, the 23rd August, 1949 and the 23rd December, 1949, do not show that anything was mentioned or said in connection with the recovery of rent or the return of the two rooms in Frazer Street; and we accept those minutes as containing accurate records of what occurred at those five meetings of the board of directors. The defendant-appellant was present at those five meetings; and he obviously attended those meetings as a director of the company. He also did not protest, at any time, why his name was included in the memorandum and articles of association. His silence lends support to Hubdar Khan's statement. We are also unable to accept Haji

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Abdul Shokoor Khan's statement that he did not receive the articles of association. He is a business man and was one of the original promoters of the company. He attended the general meeting of the Company held on the 26th June, 1949, where he was elected as one of the directors of the Company for that year—*vide* Exhibit D2. The entries in the minute-books of a company should, in view of section 83 of the Burma Companies Act, ordinarily be considered to be true, unless they could be shown to be clearly incorrect or to be inserted falsely; and the burden lies on those who assert to the contrary to establish that the entries are untrue or inserted fraudulently.

Even assuming that there was an irregularity when his agent Abdul Hamid Khan subscribed the name of Haji Abdul Shakoor Khan to the memorandum or articles of association, a question would still arise as to whether this defect was fatal to the Company's case. It seems to us that the ordinary rules of the law of contract will apply in considering this aspect of the case, unless there is something appearing in the Burma Companies Act to indicate, directly or indirectly, to the contrary. Sections 196 and 197 of the Contract Act are in these terms:

> "196. Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify them the same effects will follow as if they had been performed by his authority.
>
> 197. Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done."

We have not been able to discover anything in the Burma Companies Act, which militates against or is

derogatory to the provisions of sections 196 and 197 of the Contract Act in so far as the position of the defendant-appellant as a promoter of the Company is concerned. It will, therefore, be necessary to examine whether there had been ratification of what Abdul Hamid Khan had done while the defendant-appellant was absent in India. It was urged on his behalf that, as no specific issue was framed for this purpose, this aspect of the case could not be considered in the present appeal. We cannot agree, as this aspect of the case was raised in paragraph 2 of the reply to the written-statement, which should be read with paragraph 2 of the plaint; and the issue No. 2 is sufficiently comprehensive for this purpose.

Haji Abdul Shakoor Khan attended no less than eight meetings of the board of directors after his return from India, and this extended over a period of one and a half years after he arrived back in Burma. He also attended the general meeting of the Company held on the 26th June, 1949. It is inconceivable, in these circumstances, that he would have, from time to time, continued to attend the meetings of the Company and allowed himself to be formally elected as a director at the general meeting of the Company held on the 26th June, 1949, without having seen the articles of association. He is, moreover, a business man, who owns the business of the Bombay Burma Electric Company in Frazer Street.

The minutes of the general meeting of the Company, held on the 22nd April, 1948, when the defendant-appellant was still in India, also show that he had been elected as one of the directors of the Company at that annual general meeting and that his agent Abdul Hamid Khan attended the

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general meeting on his behalf. In the lawyer's notice sent on behalf of the defendant-appellant on the 6th December, 1948, he also unequivocally acknowledged himself to be a director of the Company. The defendant-appellant also seconded certain resolutions passed at the meetings of the board of directors held on the 29th July, 1948, the 11th September, 1948 and the 25th March, 1949. He also sent a lawyer's notice—Exhibit J, resigning from the board of directors. Thus, there is, in the present case, sufficient evidence on which the Court might properly come to a conclusion that the defendant-appellant had by his subsequent conduct, after his return to Burma, ratified what his agent Abdul Hamid Khan did or purported to have done on his behalf, while he was in India.

The evidence of N. R. Burjorjee, Advocate, shows that when the defendant-appellant went and saw him after the receipt of Exhibit F lawyer's notice, Haji Abdul Shakoor Khan complained as to why a notice should have been sent to him when he had not taken shares in the Company. N. R. Burjorjee then enquired as to why he had acted as a director of the Company, and instead of replying immediately, as we would have expected him to do if he had not in fact acted as a director of the Company, he merely said that he would reply later on through a lawyer. The Exhibit F is an important lawyer's notice calling upon the defendant-appellant to pay in the balance money due on the twenty shares that were alleged to have been allotted to him. We are not entirely convinced that a reply was, in fact, sent, although Exhibit 12 is alleged to be a copy of the reply to Mr. N. R. Burjorjee's notice. We do not consider that there is any good reason for not sending the reply direct to Mr. N. R. Burjorjee,

especially when Mr. N. R. Burjorjee was known to the defendant-appellant previously. If the reply had been sent direct to Mr. N. R. Burjorjee, the Court would have been in a position to decide readily whether a reply was, in fact, sent or not, as there could be no misapprehension about the credibility of N. R. Burjorjee's statement in Court. We might mention that even if Exhibit 12 reply had, in fact, been sent, it does not really help the defendant-appellant on the question as to whether he had, by his subsequent conduct, ratified what his agent Abdul Hamid Khan did, or purported to have done, on his behalf while in India, as he had not asserted in Exhibit 12 that he had never acted as a director of the Company. There are, therefore, sufficient materials on which the learned Judge on the Original Side could have arrived at the conclusion that the defendant-appellant was liable for the balance money due on the twenty shares that appeared against his name in the memorandum of association of the Company.

The suit, in the present case, was, as it should have been done, instituted in the name of the Company. One of the two managing directors of the Company is said to be in India, that he has been in India for some considerable time and that his present whereabouts is unknown. It was contended that as the two managing directors of the Company, who have been empowered under clause 10 (i) of the articles of association to " institute, conduct, defend ; compound or abandon any legal proceedings by or against the company or its officers, or otherwise, concerning the affairs of the company . . . . . and to sign, verify and affirm all the pleadings, petitions, affidavits or other proceedings and to incur and to pay all such fees, costs and expenses as may

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be necessary for proper conduct thereof", have not both signed and verified the plaint, the suit became incompetent on the ground that the plaint was signed and verified only by one of the managing directors of the Company. We are unable to construe clause 10 (i) of the articles of association as excluding the operation of Order 29, Rule 1 of the Code of Civil Procedure, as clause 10 (i) ought not to be construed to exclude the provisions of Order 29, Rule 1 of the Code of Civil Procedure, unless they are so inconsistent with each other so as to clearly make their existence, side by side, impossible. We are also unable to find anything in clause 10 or in any other clauses of the articles of association, which provides that a managing director of the Company cannot sign or verify the plaint unless both the directors join in to do so. If we were to concede to the arguments so advanced, it would mean that one of the managing directors alone could not perform some of the things set out in items (*a*) to (*n*) of clause 10 of the articles of association, and this will render the smooth working of the company most difficult, if not almost impossible. It is more reasonable, and this construction would make the provisions of clause 10 (i) of the articles of association harmonious with the provisions of the Code of Civil Procedure, if Order 29, Rule 1 of the Code of Civil Procedure is read as supplementing clause 10 (i) of the articles of association, in that under Order 29, Rule 1, certain officers of a company are also deemed, in law, to constitute an agent of a company for signing and verifying a plaint, without any express authority for this purpose. Hubdar Khan, as a managing director of the Company, therefore, has power to sign and verify the plaint on behalf of the Company in the present case.

We have expressed earlier that a subscriber to the memorandum of association will ordinarily be liable to pay for the shares subscribed against his name, but in the absence of anything in the memorandum or articles of association, or in an agreement, requiring a subscriber to a memorandum of association to make payment by a specified date or occasion, it seems to us to be clear from the wording of Article 112 of Schedule I to the Limitation Act that the period of limitation, as against such subscriber, will commence only from the time the call is made upon him. Thus, so long as he is not called upon to pay the balance money due on the shares subscribed against his name, the period of limitation, as against him, could not arise by reason of Article 112 of Schedule I to the Limitation Act. It was, however, argued on behalf of the defendant-appellant that as it was decided at the meeting of the directors, held on the 19th May, 1947, to demand payment for the balance due on the shares that had been allotted, the present suit, which was instituted on the 20th September, 1950, should be considered as barred by limitation of time. There is no evidence in the present case to prove that any letter or notice was, in fact, sent to any person, in pursuance of the resolution passed at the meeting of the directors held on the 19th May, 1947, calling for payment of the balance money due on the shares; and it could not, therefore, be said that a call was, in fact, made upon the defendant-appellant in 1947. It was also contended that as the Company had alleged, in their plaint, that the cause of action arose on the 1st September, 1947, their suit, which was instituted on the 29th September, 1950, ought also to be considered as barred by limitation of time. We have not been informed during the arguments before us how the

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cause of action was alleged to have arisen on the lst September, 1947, nor have we been able to trace the reason for fixing the cause of action as having arisen on the lst September, 1947. There was apparently a mistake somewhere; and we cannot appreciate, on what reasoning, a mistake in a plaint about the date of the cause of action can be considered to be fatal to the Company's case. It is only good sense that this aspect of the case ought to be decided on the evidence proved in the case.

The lawyer's notice calling upon the defendant-appellant to pay up the balance price of the shares bears the date of the 19th August, 1948; and as this is the only notice which has been proved to have been sent for that purpose, the claim of the Company must be considered to be within time and is not barred by reason of the Limitation Act.

The appeal is, for the reasons set out above, dismissed with costs. We might mention that some of the directors of the Company in the present case had apparently not appreciated the limitation to their powers, *qua directors* in passing the third resolution held on the 14th May, 1950, which had the effect of reducing the value of the shares of the directors below the value of the director's qualification share fixed in the articles of association of the Company; and this is wrong. However, as neither Hubdar Khan nor Roshan Din is a party to the present litigation, although they appeared as witnesses for the Company, we refrain from making further comment.

APPELLATE CIVIL.

Before U Aung Khine, J.

KO MAUNG GYI (APPELLANT)

v.

DAW LAY AND THREE OTHERS (RESPONDENTS)*.

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July 23.

Transfer of Property Act, s. 92—Right of subrogation—Person with no interest redeeming mortgage—Mere volunteer—Registered instrument from mortgagor and/or heirs necessary to confer right.

Held: Appellant had no direct interest in the suit lands, and when he paid off the mortgages he was a mere volunteer, and does not acquire the right of subrogation as defined in s. 92 of the Transfer of Property Act. Such a person to acquire the right of subrogation must have a registered instrument executed by which the mortgagor or his heirs agreed to confer on him such a right.

Hla Gyaw for the appellant.

Sein Tun (1) for the respondents.

U AUNG KHINE, J.—This second appeal arises out of Civil Appeal No. 25 of 1950 of the District Court of Mandalay in which the judgment and decree of the Court of the Assistant Judge, Sagaing, in its Civil Regular Suit No. 16 of 1948 was reversed. The facts of the case are simple and as they have been dealt with rather exhaustively in the judgments of the two lower Courts, it will not be necessary to recapitulate them in this judgment.

The undisputed facts are that the two pieces of suit paddy-land originally belonged to one U Bwint. U Bwint had mortgaged them separately to two different parties some thirty years ago. Two of his children, namely, U Thin and Daw Lay survived him.

* Civil 2nd Appeal No. 68 of 1951 against the decree of the District Court, Mandalay, in Civil Appeal No. 25 of 1950.

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U AUNG KHINE, J.

U Thin was the father of the appellant Ko Maung Gyi and Daw Lay is the first respondent in this appeal. U Thin is now dead.

During the period of Japanese Occupation, taking advantage of the fact that Japanese military notes had the same par value with the legal currency, the appellant Ko Maung Gyi redeemed the two mortgages. It is to be considered now as to the rights which had accrued to him by this redemption. About a year later, the suit lands came to be worked by Daw Lay and her husband U Tha Kywe, the 2nd respondent. Subsequently, they in turn mortgaged the lands to Maung Ba Thein and Ma Aye Hmyin, the 3rd and 4th respondents.

It is not disputed that U Thin was still alive when the mortgages were paid off. Nowhere in the proceedings of the trial Court can I find evidence to show that the lands were redeemed by the appellant on behalf of U Thin or at his behest.

The two persons ostensibly interested in the suit properties at the time of the redemption were U Thin and Daw Lay. The appellant had no direct interest in the suit lands and as such, when he paid off the mortgages he was, as has been held by the lower Appellate Court, a mere volunteer. He therefore could not have stepped into the shoes of the respective mortgagees and acquire the right of subrogation as defined in section 92 of the Transfer of Property Act. At the best he was the person who advanced the money with which the mortgages were redeemed. Such a person to acquire the right of subrogation must have a registered instrument executed by which the mortgagor or his heirs agreed to confer on him such a right. The lower Appellate Court was therefore correct in its finding regarding the status of the appellant at the time of

the redemption of the suit lands. It is stressed strenuously on behalf of the appellant that as the first respondent, Daw Lay, had agreed to pay a rent of Rs.100 per annum to the appellant for working the lands after the mortgages had been paid off, her interests in the suit properties must be deemed subordinated to that of the appellant. This, I consider, is a wrong approach to the question. If the mortgages had been redeemed by U Thin a different consideration might arise. The appellant on the death of U Thin as his heir, could then claim that the right of subrogation which had accrued to his father had devolved upon him. As it is, I fail to see how a person who then had no vested interest in the suit properties can claim a better title to the lands than one who is an obvious heir and who is in possession of the same.

The appellant perhaps was ill-advised to file a suit for the recovery of possession of the suit lands. A suit for administration, perhaps, would have been the proper one in the interests of all those concerned in the property.

There is, I consider, no merit in this appeal and it is accordingly dismissed with costs; Advocate's fee K 100.

APPELLATE CIVIL.

Before U Aung Khine, J.

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June 24.

MA THEIN TIN (APPLICANT)

v.

U NYAN AND FOUR OTHERS (RESPONDENTS).*

Civil Procedure Code, Order 6, Rule 17—Amendment of Pleadings—Permission within discretion of Court—Belated application after closure of case—Introducing new defence fundamentally different from original—Rejection justified.

Held: Leave to amend pleadings is a matter in the discretion of the Court and the Court would ordinarily be justified in refusing to allow amendment to raise new issues especially when the parties have closed their respective cases and only arguments remain to be heard. The applicant cannot be permitted to convert the original defence into another of a fundamentally different and inconsistent character.

Tun Sein for the applicant.

G. N. Banerjee for the respondent No. 1.

U AUNG KHINE, J.—This is an application in revision by Ma Thein Tin, the principal defendant in Civil Regular Suit No. 963 of 1949 of the Rangoon City Civil Court against the order of the learned Fourth Judge, dated 6th December, 1951, disallowing her to amend her written statement. The facts leading to Ma Thein Tin's application for the amendment of her written statement are these:

She is a resident of house No. 6/8, Forest Road, Ahlone, Rangoon, and she hired the site on which the building stood from one Basu.

* Civil Revision No. 12 of 1952 against the order of the 4th Judge, City Civil Court, Rangoon, in Civil Regular Suit No. 963 of 1949.

The respondent U Nyan purchased the said house site from one Ma Mya Sein who had previously bought the same from one Muchtoon Bibi said to be the sole heir of the original owners Shaik Chand and Shaik Moideen. Apparently, Muchtoon Bibi was not the sole owner and it is not disputed now that Basu from whom the applicant Ma Thein Tin is said to have rented the house site, was also a co-heir.

U Nyan had previously filed a suit against Ma Thein Tin and others for ejectment from the house site, but as his title then was defective, he was not successful. Now, in order to perfect his title, he had got round Basu to join other co-heirs of Shaik Chand and Shaik Moideen in executing another deed of conveyance. After perfecting his title to the suit house site, U Nyan filed this suit *i.e.* Civil Regular Suit No. 963 of 1949 in the Rangoon City Civil Court, after obtaining the necessary permit from the Controller of Rents.

Ma Thein Tin in her written statement alleged *inter alia* that she was not the tenant of the respondent U Nyan. In the suit the following five issues were framed namely:—

1. Whether the first defendant is the tenant of the plaintiff ?
2. Whether the notice is valid ?
3. Whether the premises are required reasonably *bonâ fide* for the alleged purpose ?
4. Whether the permit granted by the Controller of Rents is *ultra vires* and illegal ?
5. To what relief if any is the plaintiff entitled ?

Evidence was led and the parties closed their respective cases and arguments were heard. The learned Fourth Judge decided the first issue only and

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U AUNG KHINE, J.

it was his finding that there was no relationship of landlord and tenant between the plaintiff and the defendant Ma Thein Tin; and on that ground, without considering other issues, the suit was dismissed.

On appeal (Civil First Appeal No. 81 of 1950), the judgment of the learned Fourth Judge was set aside and it was held by U Si Bu J., that the first defendant, *i.e.* Ma Thein Tin, is the tenant of the respondent U Nyan. The suit was remanded to the Court of the learned Fourth Judge for trial of the remaining issues.

As evidence had been completely recorded, it remained then only to rehear the arguments on the remaining issues.

It was at this stage that the applicant Ma Thein Tin sought leave of the lower Court to have her written statement amended. She wants to plead now that there was an agreement between her and Basu and the latter permitted her to put up a permanent structure on the land. On that account, the plaintiff-respondent U Nyan as a successor in title to Basu is estopped from evicting her. She also desires Basu to be brought on record as one of the defendants.

In her former written statement, Ma Thein Tin beyond stating that she had erected a permanent building with C.I. sheet roofing since the year 1942 on payment of rent, did not raise a plea of estoppel.

It must be remembered that permit granted to the respondent U Nyan to institute a suit for ejectment was on the ground specified in clause (*d*) of sub-section (*1*) of section 11 of the Urban Rent Control Act, to eject the persons residing on the suit house site. He had no interest whatsoever in the building constructed thereon. If, eventually a decree

is passed against her the applicant Ma Thein Tin would be entitled to remove all the building materials belonging to her from the house site.

It is an accepted principle now that leave to amend would be refused when the amendment seeks to introduce a totally different new and inconsistent case and the application is made at a late stage of the proceedings.

It is submitted on behalf of the applicant that the new plea is but an offshoot of the original main plea, that the applicant Ma Thein Tin was not a tenant of the respondent U Nyan. It is therefore necessary to see whether the averments in this amended written statement amounted to no more than a repetition of the former plea with such additional statements which did not go beyond its original scope and intendment. If what is submitted is true, then the defendant would be entitled to amend her pleadings.

A close study of the two sets of the written statement, however, clearly shows that there has been a complete change of front in the defence. No mention was made of the alleged agreement between the applicant Ma Thein Tin and Basu regarding the putting up of a wooden structure on the suit house site, and estoppel was not pleaded in the first instance. It is hardly correct that the defendant, coming into Court with one set of defence and having failed in her main defence, should be granted to proceed upon another which was not originally pleaded. If the amendment now sought for is allowed, it would mean permitting her to convert her original defence into another of a fundamentally different and inconsistent character. Furthermore, leave to amend pleadings is a matter in the discretion of the Court and the Court would ordinarily be justified in refusing to

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allow amendment to raise new issues especially, when the parties have closed their respective cases and only arguments remain to be heard.

For all these reasons, I consider that there is no merit in the application and it is accordingly dismissed with costs.

APPELLATE CRIMINAL.

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

MAUNG HLA MAUNG AND SIX OTHERS (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

H.C. 1953
July 14.

Accused persons charged with one offence—Convicted of another not charged with—Duty of Judges and Magistrates in so doing—Care to be exercised in citation of authority—Misjoinder of Charges—Same transaction—Criminal Procedure Code, s. 235 (1)—Curable under s. 537—Emergency Provisions Act, s. 3—Penal Code s. 333 read with s. 511—Arms (Temporary Amendment) Act, 1951, s. 19-A.

The accused were charged with the offence under s. 3, Emergency Provisions Act, but were convicted under s. 333 read with s. 511, Penal Code. They were also charged with and convicted of the offence under s. 19-A of the Arms (Temporary Amendment) Act.

Held : It is incumbent upon a Judge or Magistrate to analyse what are the essential ingredients of an offence and to state why it could be said, in the circumstances of a particular case, that the offence has not been proved.

Held : It is not correct for a Judge or Magistrate to merely say that in certain cases, where the facts might be somewhat different, the High Court has arrived at different conclusions as to the nature of the offence actually committed and then to follow one of the decisions, without analysing carefully to see whether the facts of the two cases are exactly similar, and without specifying how it could be said that the facts before him are entirely similar to the facts of the case he purported to follow.

Held also : A trial Court ought, as a general rule, to analyse the relevant provisions of law minutely and see whether they really fit in with the facts that have been proved before it alters a conviction to one under another provision of law different from what was set out in the original charge.

Held also : No definite rules can be laid down to indicate how different acts might be considered to form part of one and the same transaction as the tests which might be applied are likely to vary with the peculiar circumstances of each case.

Faiz Muhammad and others v. *Emperor*, A.I.R. (1946) Sind 23 ; *K. T. Panchal* v. *Emperor*, A.I.R. (1944) Bom. 306, referred to.

*Criminal Appeal Nos. 63 to 69 and Criminal Revision No. 19-A of 1953, being Appeal from the order of the Special Judge (Sessions Judge) of Shwebo in Special Judge Regular Trial No. 10 of 1952.

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Held further: S. 537, Criminal Procedure Code is quite clear; a trial is not necessarily illegal in every case of misjoinder of charges.

In re *K. Ramaraja Tevan and fifteen others*, 52 Mad. Series 937; *N. A. Subramani Iyer* v. *King-Emperor*, I.L.R. 25 Mad. 61; *Abdul Rahman* v. *King-Emperor*, 5 Ran. 53, referred to

Choon Foung (Government Advocate) for the respondent.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The seven appellants Maung Hla Maung, Maung Chit Aung, Maung Yan Kin, Maung Aye, Maung Po Aye, Maung Po Shein and Maung Po Saw, and the two respondents Maung Than Lwin and Maung Nyo against whom a revision proceeding had been opened in this Court in Criminal Revision No. 19-A of 1953, were all charged, firstly, with an offence under section 3 of Emergency Provisions Act, 1950, and, secondly, for possession of illicit firearms under section 19-A of the Arms Act, as amended by the Arms (Temporary Amendment) Act, 1951. The learned Sessions Judge convicted them of an offence under section 333, read with section 511, of the Penal Code, instead of the offence under section 3 of the Emergency Provisions Act, 1950, so far as the first charge is concerned. These appellants, as well as the two respondents in the revision proceeding, were also convicted under section 19-A of the Arms Act. The appellants were all sentenced to 5 years' rigorous imprisonment for each of the two offences, and the sentences were ordered to run concurrently. In respect of Maung Than Lwin and Maung Nyo, because of their youth, they were sentenced to 2 years' rigorous imprisonment for each of the offences, and, in their case too, the sentences were ordered to run concurrently.

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The brief facts of this case, as disclosed in the evidence of the prosectuion, are that on the 20th April, 1952 Boh San Kyaw proceeded, with about 100 men of the armed forces and civil police, and surrounded Pauktaw village; and it was about 5 a.m. when they arrived there. There were about 30 houses in Pauktaw village, and they were fired upon from inside the village, apparently by the rebels, who were said to be in the village at that time. The firing from the village ceased at about 6 a.m., and a cry of surrender was heard from inside the village. Boh San Kyaw consequently ordered that all genuine villagers should come out of the village, and it was said that over 100 villagers came out; and they were kept together at one place.

It appears that Pauktaw village was, at that time, overrun by the rebels. P.S.O. U Lu Tha, who was with Boh San Kyaw, proceeded into the village, accompanied by some police and army personnel, and when they arrived inside the village they saw 5 men, who were each armed with a gun, in U Lu Aung's compound. These men were arrested, namely, Hla Maung, Chit Aung, Maung Aye, Po Shein and Po Saw. U Lu Tha also arrested Maung Yan Kin, Maung Than Lwin, Maung Po Aye and Maung Nyo, who were found in the compound of one U Aung Chein, which was about 4 bamboo lengths away from the house of U Lu Aung. Out of these 9 men, Maung Po Shein sustained a gun-shot wound on his leg, while Maung Yan Kin received a gun-shot wound on his forearm. These wounds were apparently caused by the firing from the armed forces and the police. No ammunition was, however, recovered from any of these men, which in effect suggested

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that these men had used up all their ammunition before they decided to surrender. They were all brought out to where Boh San Kyaw was, and they were taken, on the same day, to Ye-U Police Station.

Boh San Kyaw (PW 1) and U Lu Tha (PW 2) could not say, when they were examined in Court, which of the guns that had been seized belonged to which of the 9 accused as everything was done in haste and excitement at that time, and as the guns had been mixed up at the time of seizure by the police in Pauktaw village. U Lu Tha laid the First Information Report on the same day. The evidence of U Lu Tha (PW 2), Maung Yoot (PW 3) and Maung Nyo (PW 4) proves beyond doubt that those 9 men were the persons who were arrested inside Pauktaw village and, when U Lu Tha first saw them, they were each armed with a gun, and that, in all, 7 rifles and 2 sten-guns were obtained from them. We accept the evidence of those prosecution witnesses in this respect, and it will not accordingly be necessary to consider the search-list; and moreover the search-list was made at Ye-U sometime after Boh San Kyaw and his party arrived back there.

Boh San Kyaw examined the guns that had been seized by U Lu Tha after those 9 men had been arrested. He detected the smell of gun-powder on all those guns, and we accept his evidence on this point, as Boh San Kyaw had not been cross-examined in this respect. Thus there is sufficient evidence on which it could properly be concluded that those 9 men were seen each armed with a gun and that they must have used their guns in firing at the armed forces and the police, who had surrounded Pauktaw village.

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The learned Sessions Judge has nowhere set out his reasons as to why he should consider that the offence under section 3 of the Emergency Provisions Act, 1950 has not been proved in the circumstances of the case. He also has not analysed what are the essential ingredients of the offence under section 3 of the Emergency Provisions Act, 1950. It is incumbent upon a Judge or Magistrate to analyse what are the essential ingredients of an offence and to state why it could be said, in the circumstances of a particular case, that the offence has not been proved. It will not be correct for a Judge or Magistrate merely to say that, in certain cases where the facts might be somewhat different, the High Court has arrived at different conclusions as to the nature of the offence actually committed, and then to follow a decision which might appear to be more adaptable to his view, without analysing carefully to see whether the facts of the two cases decided by the High Court are exactly similar, and without specifying how it could be said that the facts of the case before him are entirely similar to the facts of one of the cases decided by the High Court.

It should be remembered that an offence under section 3 of the Emergency Provisions Act, 1950 involves, essentially, a question of fact, and that it becomes very necessary to make a careful analysis of the facts of the case before it can properly be ascertained whether the set of facts in a particular case will fall under provisions of section 3 of the Emergency Provisions Act, 1950, or not. It is obvious that it will be useless to attempt to lay down any general rule for this purpose, as each case must be decided on its own peculiar facts and circumstances.

It appears to us, on the facts proved in this case, and in the light of provisions of sections 236 and

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237 (1) of the Code of Criminal Procedure, that it could be said that the trial Court was not acting illegally in convicting the accused persons under section 333, read with section 511, of the Penal Code, instead of under the original charge under section 3 of the Emergency Provisions Act, 1950. Their convictions and sentences under section 333, read with section 511, of the Penal Code are therefore not incorrect, nor illegal. A trial Court ought, as a general rule, to analyse the relevant provisions of law minutely and see whether they really fit in with facts that have been proved, before it alters a conviction to one under another provision of law, different from what was set out in the original charge.

It is not necessary in this appeal to enter into any discussion as to whether there is sufficient evidence to sustain a conviction under section 3 of the Emergency Provisions Act, 1950 or not, as this question does not arise, either in the appeals now under consideration, nor in the revision proceeding which had been opened against Maung Than Lwin and Maung Nyo.

The next question which falls for consideration is, whether there has been a misjoinder of charges. The provisions of section 235 (1) of the Code of Criminal Procedure read :

> "If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence."

It will accordingly be necessary to establish that the evidence, which is required to adduce in connection with the offence under section 19-A of the Arms Act, is so intimately connected with the evidence, which is required to prove the offence under section 3 of the Emergency Provisions Act, 1950, so as to constitute one and same transaction. The expression

"transaction" has been left undefined; and thus it will have to be given its ordinary meaning. It therefore becomes a question of fact to be decided in the circumstances of each particular case, whether the two different offences with which an accused is charged can be considered to have arisen from one and same transaction. No definite rules can be laid down to indicate how different acts might be considered to form part of one and same transaction, as the tests which might be applied are likely to vary with the peculiar circumstances of each case.

In *Faiz Muhammed and others* v. *Emperor* (1) Davis C.J., observed, after referring to the words set out in section 235 (1) of the Code of Criminal Procedure—

> "The essential condition is the continuity of action which involves essentially continuity or proximity of time; in other words, the series of acts must be so connected together as to form a single and entire transaction. Clearly then continuity of action or proximity of time is a very essential element in connecting a series of acts together so as to form part of the same transaction."

It is clear from the wording of section 235 (1) of the Code of Criminal Procedure that the question as to whether a series of facts are so intimately connected as to constitute one and the same transaction is primarily a question of fact which must be answered in accordance with the peculiar circumstances and facts of a particular case. In *K.T. Panchal* v. *Emperor* (2) it was observed:

> "Ordinarily a series of acts may be said to be so connected together as to form the same transaction when they are so related to one another in point of purpose or cause and effect or as principal and subsidiary acts as to constitute one continuous action. But, as observed in 41 Bombay Law

(1) A.I.R. (1946) Sind. p. 23 at 24. (2) A.I.R (1944) Bom. p. 306.

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Reports, page 98, a mere common purpose does not constitute a transaction, nor is the mere existence of the same general purpose or design sufficient to make all acts done with the object in view parts of the same transaction."

In the case now under appeal, it could not be said that two different sets of witnesses for the prosecution had been examined to prove the two charges, one set to prove the offence under section 19-A of the Arms Act and another set of witnesses to prove the charge under section 3 of the Emergency Provisions Act, 1950, because the witnesses, who are required to be examined in connection with the offence under section 19-A of the Arms Act will also be required to be examined in connection with the charge under section 3 of the Emergency Provisions Act, 1950. The 9 accused were alleged in the present case to be in possession of a gun each at the moment U Lu Tha arrived inside the village to look for the rebels who had surrendered. This was, of course, after the gun-firing had ceased and after the rebels had decided to surrender; and it might be urged that strictly the acts which were required to prove as against these accused, so far as the charge under section 3 of the Emergency Provisions Act is concerned, must have all been completed by the time U Lu Tha saw them in possession of the guns that had been obtained from them. We do not consider it necessary for the purpose of this appeal to express any definite opinion as to whether the joinder of the two charges are strictly correct in law, because even if it could be said that the acts which are required to be proved in order to sustain a conviction under section 19-A of the Arms Act are separate and distinct from the acts which are required to be proved under section 3 of the Emergency Provisions Act, 1950, it could not, in our opinion, be said that any prejudice or injustice has

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been done by trying the accused with the two charges in the same trial. Moreover, the witnesses, who are required to prove the offence under the Arms Act, so far as the present case is concerned, were also required to be examined to prove the other charge against those 9 accused.

In re *K. Ramaraja Tevan and fifteen others* (1) it was stated:

> "No doubt, ever since the pronouncement of the Judicial Committee in *N. A. Subramani Iyer* v. *King-Emperor* (2), it has been the general practice to assume that, if a mandatory provision of the Code has been infringed in framing the charge, the Court must of necessity be held to have failed in administering justice to the accused. Section 537 affords no real ground for any such assumption, and the Judicial Committee itself, when it had occasion to refer to 28 I.A., 257 in *Abdul Rahman* v. *King-Emperor* (3), clearly indicated that the impugned procedure must be one that is not only prohibited by the Code, but also works actual injustice to the accused."

The provisions of section 537 appears to us to be clear; and it is difficult to conceive how it could be assumed in view of section 537 of the Code of Criminal Procedure that the trial is necessarily illegal in every case of misjoinder, without ascertaining from the facts and circumstances of each case, whether a prejudice or an injustice has actually occurred; and in the present case, under appeal, we see none, with the result that all the seven appeals are dismissed.

It will also not be necessary to order a re-trial, and for this reason the revision proceeding will stand closed.

U AUNG KHINE, J.—I agree.

(1) (1930) 52 Mad. Series, p. 937 at 940.
(2) (1901) 28 I.A. 257; I.L.R. 25 Mad. 61.
(3) (1926) 54 I.A. 96; I.L.R. 5 Ran 53.

APPELLATE CIVIL.

Before U Aung Khine, J.

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July 29.

MOHAMED ESOOF (APPELLANT)

v.

MAUNG THEIN HLA (RESPONDENT).*

Transfer of Property Act, s. 109—Rights of vendor in properties conveyed pass to vendee—Inapplicable to a license in property—Interest unassignable—Lower Burma Town and Village Lands Act, s. 7—Licensee acquires no interest in land adverse to Government.

Held: The contention that the vendee became possessed of all the rights of the vendor in the properties conveyed would prevail if they were free-hold or lease-hold land. A license is not assignable and a transfer does not create any interest in the property to which it relates in favour of the transferee.

Held also: In s. 7 of the Lower Burma Town and Village Lands Act it is clearly mentioned that no right of any description as against the Government shall be deemed to have been acquired by any person over any land, except the right created by grant or lease made by or on behalf of the Government.

D. N. Dutt for the appellant.

P. K. Basu for the respondent.

U AUNG KHINE, J.—This second appeal arises out of Civil Appeal No. 3 of 1952 of the District Court of Bassein, in which the judgment and decree passed by the Township Judge, West, Bassein, in Civil Regular Suit No. 70 of 1951, was confirmed.

The suit was for recovery of possession of holdings No. 38 and 46 of 1950-51, situated in Jail Road, Htaunggon Akwet No. 67, Myoma Middle Oksu No. 63, Bassein West Township, Bassein, by the

* Civil 2nd Appeal No. 35 of 1952 against the decree of the District Court of Bassein in Civil Appeal No. 3 of 1952.

respondent Maung Thein Hla against the appellant Mohamed Esoof. There was an alternative prayer in the plaint for a declaration that the appellant Mohamed Esoof is only a tenant of the respondent and that he had no independent right to have any renewal of the lease in his favour personally as against the plaint of the respondent.

Holding No. 38 originally was a lease-hold land, whereas, holding No. 46 has, at all times, been a free-hold land. In respect of holding No. 38, a 30 years' lease was originally issued to one Maung Ba Tu with the right of renewal and it was subsequently transferred to V.M.R.P. Chettiar Firm. When the lease was about to expire on 10th April 1946, the Chettiar Firm applied for the renewal of the same. Renewal was refused because of the provisions in section 3 of the Transfer of Immoveable Property (Restriction) Act, 1947, and instead, a license, for a period of one year expiring on 20th July 1949, was issued to the said Chettiar Firm by the Deputy Commissioner, Bassein. There is no dispute that the appellant Mohamed Esoof was occupying both these holdings No. 38 and 46 on payment of a monthly rental of Rs. 5 to V.M.R.P. Chettiar Firm.

On 4th July 1949, sixteen days prior to the expiry of the license issued in respect of holding No. 38, V.M.R.P. Chettiar Firm sold and transferred all his right, title and interest in the above two holdings to the respondent Maung Thein Hla in consideration of a sum of Rs. 3,300. It is now claimed that by operation of law, the appellant Mohamed Esoof became, after such a transfer, the tenant of the respondent Maung Thein Hla. On 21st July 1949, the respondent Maung Thein Hla filed an application for a renewal of the original lease in respect of holding No. 38 for a period of 30 years in the office of

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the Deputy Commissioner, Bassein, in D.O.R.P. No. 10 of 1949-50. Likewise, on 16th August 1949, in a similar application, the appellant Mohamed Esoof applied for the issue of the lease in respect of the same holding in D.O.R.P. No. 24 of 1949-50.

This action on the part of the appellant was interpreted by the respondent as an act of denial of his right, title and interest in the said two holdings and therefore it is claimed that the appellant, as his tenant, had forfeited his right to be in use and occupation of the said holdings and hence the suit for possession. It is not disputed now that the appellant has given up possession of holding No. 46 to the respondent and the decision in this appeal concerns with holding No. 38 only.

It is submitted on behalf of the appellant that although V.M.R.P. Chettiar Firm purported to transfer his right, title and interest in holding No. 38, the respondent has not acquired any right, title or interest in respect of the same, as V.M.R.P. Chettiar Firm, at the time of the sale, was not a lessee of this holding but merely a licensee. It is further submitted that a license is not assignable and it does not create any interest in the property to which it relates in favour of the transferee.

Against this submission, it is contended, on behalf of the respondent, that the right of renewal is a substantial right and that nowhere in the Transfer of Immoveable Property (Restriction) Act, 1947, it is enacted that the State cannot grant a lease to a non-national and to show that the State could make grants independent of the Transfer of Property Act, the provisions of the Crowns Grants' Act has been referred to. Section 2 of the said Act reads:

"Nothing in the Transfer of Property Act contained shall apply or be deemed ever to have applied to any grant or

other transfer of land or of any interest therein heretofore made or hereafter to be made by or on behalf of the Crown to, or in favour of any person whomsoever."

Be that as it may, the fact remains that V.M.R.P. Chettiar Firm did not press his right to have the lease renewed, and instead he suffered a license to be granted in respect of holding No. 38. This tantamounts to his waiver of the right of renewal—a right of a doubtful nature. It is also claimed on behalf of the respondent that under section 109 of the Transfer of Property Act, the respondent became possessed of all the rights of V.M.R.P. Chettiar Firm when he purchased the two holdings No. 38 and 46. This contention would prevail if, at the time of the transfer, in respect of holding No. 38, V.M.R.P. Firm had a lease.

It is also contended, on behalf of the respondent, that "license" in the Lower Burma Town and Village Lands Act, is quite different from the license as understood in contradistinction to a lease as defined in section 105 of the Transfer of Property Act. It is, however, not claimed that a license issued under the Lower Burma Town and Village Lands Act creates any interest in the estate. A license issued under this Act only gives the licensee the use of the property, while it remains in the possession and control of the Government. In section 7 of the Act, it is clearly mentioned that no right of any description as against the Government shall be deemed to have been acquired by any person over any land, any town or village except the following namely:—

(*a*) right created by grant or lease made by or on behalf of the Government.

Since only a license is issued by the Government permitting the V.M.R.P. Chettiar Firm to occupy

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the land temporarily, no interest is created in the land in favour of the said firm.

In the judgment of the District Court, it was mentioned that the appellant had paid Rs. 5 per mensem as rent to the respondent. This is a mistake. The appellant had not paid any rent to the respondent after the transfer made by V.M.R.P. Firm to the respondent. It was the view of the learned District Judge that the appellant having renounced his character as a tenant by setting up a title in a third person, or by claiming a title to himself, had clearly forfeited his right of occupancy under section 111 (*g*) (*2*) of the Transfer of Property Act. In this case, after the expiry of the license issued to V.M.R.P. Firm, both the respondent and the appellant filed separate applications, the respondent for the renewal of a lease probably on the assumption that the lease still subsisted and by the appellant to have a lease issued in his favour. No doubt, the applications can be considered as rival applications.

Even assuming that the appellant was a tenant, in respect of holding No. 38 by operation of law, there could have been no objection to his pointing out that the respondent's interest in the land had determined since the beginning of the relationship of landlord and tenant between them. The respondent filed his application for the renewal of a lease on 21st July 1949 and that is one day after the expiry of the license. The very fact that he had to file an application for the renewal of the lease shows that he no longer had any interest in the land. The appellant had never openly avowed that he was no longer a tenant of the respondent, nor did he set up a title in another person or by claiming a title in himself. He knew that the license had expired and

therefore, he applied to the Government to issue a lease to him and that is exactly what the respondent himself did. I am therefore of the opinion that the appellant's action in filing an application before the Deputy Commissioner for the issue of a lease in his name did not amount to a renunciation of his status as a tenant.

For the two reasons stated above namely—

(1) that no right, title or interest passed from V.M.R.P. Chettiar Firm to the respondent in respect of holding No. 38 and

(2) that the appellant's action in applying for a lease of the same holding on expiry of the license issued to V.M.R.P. Chettiar Firm did not amount to a renunciation of his status assuming that he was a tenant,

the appeal must be sustained.

The appeal is allowed and the judgment and the decree of the lower appellate Court is set aside and the suit is dismissed with costs; Advocate's fees K 50.

တရားလွှတ်တော်

တရားဝန်ကြီး ဦးအောင်ခိုင် ရှေ့နှင့်။

၁၉၅၃ မစ္စတာ ဒီ၊ရာဖိုး (လ်) (ပြင်ဆင်ရေန် လျှောက်ထားသူ)

ဇူလိုင်လ ၂၂။

နှင့်

ပြည်ထောင်စုမြန်မာနိုင်ငံတော် (ပေါ်မမစောအောင်) (ပြင်ဆင်ရန် လျှောက်ထားခံရသူ)*

ရာဇဝတ်ပြင်ဆင်မှု၊ ရာဇသတ်ဝုဒ်မ ၄၂၀ လိမ်လည်လှည့်ဖြားကာ ကုန်များကို ရောင်းခြင်း။

ရာဇသတ်ဝုဒ်မ ၄၂၀ အရ၊ သမ္မာန်စာချုပ်ချုပ်ခြင်းသည် တရားဥပဒေနှင့် ဆန့်ကျင်၍ ပယ်ဖျက်ပေးရန် လျှောက်ထားခြင်း။ ။ဤလျှောက်လွှာ မျိုးကို တရားလွှတ်တော်က များသောအားဖြင့် လက်ခံစဉ်းစားလေ့မရှိ။ အောက်ရုံးကရုံးသူကြီးများ စစ်ဆေးနေသည့် အမှုများတွင်၊ ခုမှတ်သောအဓိန္ဓိကို၊ ရုတ်တရက်ပယ်လေ့မရှိ၊ သို့ရာတွင် တရားဥပဒေနှင့် သိသိသာသာ ဆန့်ကျင်နေပါက၊ တရားလွှတ်တော်က ဒုရေးယူနိုင်သည်။ သိသိသာသာ တရားဥပဒေနှင့် ဆန့်ကျင်နေသည်ဆိုရာ၌၊ အမှုအသွားအလာ၊ အဖြစ်အပျက်ကို၊ ရုံးတော်သို့ ဖေါ်ထုတ်ကာ ပြောပြရုံနှင့်၊ အောက်ရုံးတရားသူကြီး၏ အဓိန္ဓိသည်၊ ချိုယွင်းနေသည်ကို၊ သိနိုင်ရပေမည်။

အမှုဖြစ်ပျက်သော အကြောင်းအရာများကို၊ တရားလို၏ မူလရုံးတွင်၊ ဘင်သော လျှောက်လွှာနှင့် သမ္မာန်စာမထုတ်မီ၊ ၎င်းကရုံးတွင် အစစ်ခံသော၊ အစစ်ခံချက်များကို၊ ကြည့်ခြင်းအားဖြင့်၊ သိရပေသည်။

လျှောက်ထားသူသည်၊ နယ်လှည့်ကိုယ်စားလည်ဖြစ်၍ အယူခံတရားခံထဲမှ၊ ကုန်အမှာစာကို ရှင်းသောအခါ၊ မိမိ၏ဆိုင်ကြီးသို့၊ အမှာစာပို့လိုက်၏။ မိမိ၏ဆိုင်ကြီးက၊ မှာလိုက်သည့် ကုန်အတိုင်း၊ ပို့နိုင်မည် မပို့နိုင်မည်ကို၊ အယူခံတရားခံထံ၊ အကြောင်းမကြားဘဲ၊ မမှာသောကုန်များ ပို့ခြင်းဖြင့်၊ လျှောက်ထားသူသည်၊ လိမ်လည်လှည့်ဖြားကာ၊ ကုန်များကို ရောင်းသည်ဟု မဆိုသာ။

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* ၁၉၅၃ ခု၊ ရာဇဝတ်ပြင်ဆင်မှု အမှတ် ၁၀၀ (ခ) ရုန်းကုန်မြို့၊ အရှေ့ပိုင်းနယ်ပိုင် ရာဇဝတ်တရားသူကြီး၏ရုံး၊ ၁၉၅၃ ခုနှစ်၊ ရာဇဝတ်ကြီးမှုအမှတ် ၁၀၈ တွင် ချမှတ်သော အမိန့်ကို၊ ပြန်ချဆင်ခြင်မှု။

ကုန်ပစ္စည်းများမှာခြင်းကို၊ လက်ခံရယူသည့် အချိန်၌၊ လျှောက်ထားသူတွင်၊ လိမ်လည်လှည့်ဖြားလိုသော စိတ်ရှိသည်ဟု မပြောနိုင်လျှင်၊ လိမ်လည်မှုမဖြစ်နိုင်။

မှာလိုက်သောကုန်ပစ္စည်း၏ အဆင်းအရောင်နှင့် ပို့လိုက်သော ကုန်ပစ္စည်း၏အဆင်းအရောင် အနည်းငယ်ကွဲပြားရုံမျှနှင့် ရာဇဝတ်ကြောင်း ခွဲဆိုရန်မသင့်။

လျှောက်ထားသူ၏ဆိုင်ကြီးက၊ ပဋိညာဉ်ပျက်ကွက်သဖြင့်၊ အယူခံတရားခံက၊ ၎င်းမှာ အကျိုးနစ်နာသည်ဆိုပါက၊ တရားမလမ်းကြောင်းဖြင့် လျော်ကြေးငွေရရန် ခွဲဆိုနိုင်သည်။

၁၉၅၃

မစ္စတာ ဒီ၊ ရာဖီး (လ်) နှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံတော် (ဒေါ်မမစောအောင်)။

ဦးထွန်းအုံ၊ ပြင်ဆင်ရန် လျှောက်ထားသူအတွက်။

ဦးအောင်မင်း (၁)၊ ပြင်ဆင်ရန်လျှောက်ထားခံရသူအတွက်။

တရားဝန်ကြီး ဦးအောင်ခိုင်။ ။လျှောက်ထားသူ၊ မစ္စတာ ဒီ၊ ရာဖီး (လ်) က၊ မိမိအပေါ်တွင်၊ ရန်ကုန်မြို့၊ အရှေ့ပိုင်း ရာဇဝတ်တရားသူကြီးက၊ ၎င်း၏ရုံး၊ ၁၉၅၃ ခု၊ ရာဇဝတ်ကြီးမှု အမှတ် ၁၀၀ တွင်၊ ရာဇသတ်ပုဒ်မ ၄၂၀ အရ၊ သမ္မာန်ချထားခြင်းသည်၊တရားဥပဒေနှင့်ဆန့်ကျင်၍၊၎င်းအပေါ်တွင်၊ ငွဲ့ဆိုထားသည့်အမှုကို၊ ပယ်ဖျက်ပေးပါဟု လျှောက်ထားလေသည်။

ဤလျှောက်လွှာမျိုးကို၊ တရားလွှတ်တော်က၊ များသောအားဖြင့် လက်ခံစဉ်းစားလေ့မရှိ၊ ဒေသာဂ်ရုံး တရားသူကြီးများ၊ စစ်ဆေးနေသည့် အမှုများတွင်၊ ချမှတ်သော အမိန့်ကို ရုပ်တရက် ပယ်လေ့မရှိ၊ သို့ရာတွင်၊ တရားဥပဒေနှင့် သိသိသာသာ ဆန့်ကျင်နေပါက၊ တရားလွှတ်တော်က၊ အနှောင့်ယှက်နိုင်သည်။ သိသိသာသာတရားဥပဒေနှင့် ဆန့်ကျင်နေသည်ဆိုသောစကားကို၊ အဓိပ္ပါယ်ရှင်းရမည်ဆိုလျှင်၊ အမှုအသွားအလာ၊ အဖြစ်အပျက်ကို၊ ရုံးတော်သို့ ဖေါ်ထုတ်ကာ၊ ပြောပြရုံနှင့် အောက်ရုံးတရားသူကြီး၏ အခိန့်သည် ချို့ယွင်းနေသည်ကို သိနိုင်ပါက၊ ၎င်းအမိန့်သည်၊ သိသိသာသာ ချို့ယွင်းနေသည်ဟု ဆိုရပေမည်။

အမှုဘွဲ့၊ ဖြစ်ပျက်သော အကြောင်းအရာများကို၊ လျှောက်ထားခံရသူ ဒေါ်မမစောအောင်၏ မူလ ရုံးတွင်း၊ ဘင်သောလျှောက်လွှာနှင့် သမ္မာန်စာ မထုတ်မီ၊ ၎င်းကရုံးတွင်၊ အစစ်ခံသော အစစ်ခံချက်များကို၊ ကြည့်ခြင်းအားဖြင့်၊ သိရပေသည်။လျှောက်ထားသူ မစ္စတာ ဒီ၊ရာဖီး (လ) မှာ၊လန်ဒန်မြို့ရှိ၊အာ (ရ)၊ အက် (စ်)၊ရာဖီး (လ) လ်မိဘက်၊ ကုမ္ပဏီမှ နယ်လှည့် ကိုယ်စားလှယ်ဖြစ်သည်။ ၎င်းကုမ္ပဏီမှာ အဝတ် အထည်များ ရောင်းချသော ကုမ္ပဏီဖြစ်ဟန် တူသည်။ ၁၉၅၁ ခု၊ အောက်တိုဘာလ ၈ ရက်နေ့က၊ လျှောက်ထားသူ ဒီ၊ရာဖီး (လ) ရန်ကုန်တွင် ရှိနေခိုက် မမစောအောင် ကုမ္ပဏီမှ၊ ၎င်းဆိုင်တွင် ခဝ် လက်မ အနံရှိ၊ နှိုင်လွန်ကိုက်ပေါင်း ၅,၀၀၀ မှာယူသည်၊ လျှောက်ထားသူ ဒီ၊ ရာဖီး (လ) က၊

၁၉၅၃

မစ္စတာ ဒီ၊ ရာဖီး (လ) နှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံတော် (ဒေါ်မမစောအောင်)။

တရားဝန်ကြီး ဦးအောင်ခိုင်။

မမစောအောင် ကုမ္ပဏီမှ အလိုရှိသော နိုင်လွန်များကို၊ ၎င်း၏ ကုမ္ပဏီကြီးက၊ ရောင်းနိုင်မည်ဟု ပြောခဲ့သော်၊ အရောင်းအဝယ် ပြုလုပ်ခြင်းဖြစ်သည်ဟု ယူဆရပေမည်။ ၎င်းနိုင်လွန်များကို မှာရာတွင်၊ အဖြူ (Rose) (ခေါ်) ပန်းရောင် အနုနှင့် အပြာနုရောင်များ အလိုရှိသည်ဟု မှာခဲ့သည်။ ၎င်းအပြင် နိုင်လွန်အဖြူမှာ၊ (Rose) (ခေါ်) ပန်းရောင်နှင့် အပြာနုရောင်မျိုးများ၏ နှစ်ဆဖြစ်စေရမည်ဟူ၍ မှာလိုက်သည်။ ဤကဲ့သို့၊ မှာလိုက်ပြီးနောက်၊ အာ (ရဲ)၊ အက် (စ်)၊ ရာဖီး (လ) ကုမ္ပဏီကြီးမှ၊ ၁၉၅၁ ခု၊ အောက်တိုဘာလ ၁၉ ရက် နေ့စွဲနှင့်စာတစောင်အရ၊ အလိုရှိသော ကုန်များအနက် တဝက်ကို၊ ရိုးမ (ခေါ်) သဘော်ဖြင့် တင်ပို့လိုက်ကြောင်း၊ အကြောင်းကြားလိုက်သည်။

ဤကဲ့သို့ ကုန်များမပို့မီ ဘဏ်တိုက်တွင် ငွေတင်ပို့ရာ၌၊ တင်ပို့သော ကုန်များကို လျှို့ဝှက် (စ်) ဈေးနှုန်း (ခေါ်) ကိုယ်စားလည်များက စစ်ဆေးပြီးမှန်သည်ဆိုမှ၊ ငွေထုတ်ယူရန် ဆိုသော စည်းမျဉ်းတခု ရေးထည့်ထား၏။ သို့ရာတွင်၊ အာ (ရဲ)၊ အက် (စ်)၊ ရာဖီး (လ) ကုမ္ပဏီက၊ မိမိတို့မှာ ဂုဏ်သရေရှိကုန်သည်များဖြစ်သည့်အလျောက်၊ ဤစာပို့ဒ် ထည့်ထားပါက၊ မသင့်လျော်၍၊ ၎င်းစာပို့ဒ်ကို ရုပ်သိမ်းရန် ၁၉၅၁ ခု၊ အောက်တိုဘာလ ၁၉ ရက်နေ့စာတွင် တပါတည်း ရေးထည့်သဖြင့်၊ ဒေါ်မမစောအောင်က၊ သဘောတူကာ၊ ထိုစာပို့ဒ်ကို ဖြုတ်ပစ်လိုက်သည်။

၎င်းနောက် ပဌမ တသုတ် တင်ပို့လိုက်သော ကုန်များခရောက်ရှိလာသော အခါ၊ အထည်မှာမှာ၊ မှာသည့် နိုင်လွန်စမျိုး ဖြစ်သော်လည်း၊ ၎င်းတို့အလိုမရှိသော (Pink) (ခေါ်) ပန်းရောင် နိုင်လွန်စ ၅၉၃ ကိုက် ပါလာကြောင်း။ ဤအကြောင်းကို၊ ယခု လျှောက်ထားသူအား ပြောကြားရာ၊ နောက်နောင် ဤကဲ့သို့ မဖြစ်စေရပါဟု၊ ၎င်းက ပြောကြားသည်ဟု ဆို၏။ သို့ရာတွင်၊ ဒုတိယ တကြိမ် ကုန်များရောက်လာသောအခါ၊ အထက်ပါ (Pink) (ခေါ်) ပန်းရောင် ၅၀၀ ကိုက်နှင့် ခရမ်းရောင်နု ၈၇၅ ကိုက်ပါလာပြန်လေသည်။ ၎င်းကုန်များသည်၊ မှာသော ကုန်များမဟုတ်၊ ၎င်းကုန်များအတွက် အရောင်းရကုန်ပြီး၊ ငွေပေါင်း ၁၅,၀၀၀ ကျပ်ခန့်မျှ ဆုံးရှုံးသည်ဟု ဖေါ်ပြထားသည်။

ဤအမှုလျှောက်လဲချက်ကိုကြားနာရာ၌၊ လျှောက်ထားခံရသူ၏ ရှေ့နေကြီး ဦးအောင်မင်းအား၊ လျှောက်သူ ရာဖီး (လ) က၊ မည်ကဲ့သို့ လိမ်ကြောင်း၊ မည်ကဲ့သို့ လှည့်ဖြားကာ ကုန်များကို ရောင်းကြောင်း မေးသောအခါ၊ ၎င်းက မိမိအမှုသည်၊ နစ်နာသောအချက်မှာ၊ မှာလိုက်သော အဖြူ (Rose) (ခေါ်) ပန်းနုရောင်နှင့် အပြာနုရောင်များသာ ပို့ရန်သာရှိသော်လည်း၊ (Pink) (ခေါ်)

ပန်းရောင်စုနှင့် (Lilac) (ခေါ်) ခရမ်းနုရောင်များ ပါလာသဖြင့်၊ ၎င်း၏အမှုသည်မှာ၊ နစ်နာကြောင်း။ သည့်အပြင်လျှောက်ထားသူက အခြားလိမ်လည်သည်၊ သို့မဟုတ် လှည့်ဖြားသည်ဟု၊ မစွပ်စွဲဟု အဘည့်အလင်း ထုတ်ဖော်ပြောသည်။ သို့ဖြစ်၍၊ ဤအမှုတွင်၊ များစွာ မစဉ်းစားရဘဲ၊ ပေါ်လွင်သည်မှာ၊ လျှောက်ထားသူသည်၊ မမစောအောင် ကုမ္ပဏီမှ၊ အမှာစာကို ရရှိသောအခါ၊ မိမိ၏ဆိုင်ကြိုးသို့ အမှာစာ ပို့လိုက်ကြောင်း။ မိမိဆိုင်ကြိုးက၊ မှာလိုက်သည့်အတိုင်း ပို့နိုင်မည်၊ မပို့နိုင်မည်ကို၊ မမစောအောင် ကုမ္ပဏီသို့ အကြောင်းကြားရန်သာ ရှိသည်။ ဤကဲ့သို့ အကြောင်းမကြားဘဲနှင့် မမှာသော ကုန်များကို ပို့သည်ဆိုလျှင် လျှောက်ထားသူအပေါ်၌၊ မည်ကဲ့သို့သော အပြစ်ရှိပါမည်နည်း။

၁၉၅၃

မစ္စတာ ဒီ၊ ရာဖီး (လ်) နှင့် ပြည်ထောင်စု မြန်မာနိုင်ငံတော် (ဒေါ်မမစောအောင်)။

တရားဝန်ကြီး ဦးအောင်ခိုင်။

ဒုတိယအကြိမ်ကုန်များ မရမီ၊ နောက်နောင် ဤကဲ့သို့ မဖြစ်စေရပါ၊ဟု၊ လျှောက်ထားသူက၊ ပြောကောင်း ပြောဆိုပေလိမ့်မည်။ သို့ရာတွင်၊ ဤကဲ့သို့ ပြောဆိုခဲ့လျှင်၊ ၎င်း၏ကုမ္ပဏီကိုအမှန်းတင်ထားလိုသည်က တကြောင်း၊ ထိခိုက်မည်ကိုစိုးရိမ်၍လည်း တကြောင်း၊ ဤအကြောင်းများကြောင့်၊ ပြောဆိုပေလိမ့်မည်။ မမစောအောင် ကုမ္ပဏီထံမှ ပစ္စည်းများမှာခြင်းကို၊ လက်ခံရယူရှိသည့်အချိန်တွင်၊ လျှောက်ထားသူတွင် လိမ်လည်လှည့်ဖြားလိုသော စိတ်ထားရှိသည်ဟုမပြောနိုင်။ သို့ကြောင့် လိမ်လည်မှုမဖြစ်နိုင်။ ၎င်းမှာ၊ ကိုယ်စားလည်သာဖြစ်၍၊ အလိုရှိသော ပစ္စည်းကို ပေးနိုင်၊ မပေးနိုင်ဆိုသည်ကို၊ ဒီဇူမပြောနိုင်သည့်အပြင်၊ ပစ္စည်းများ ပို့စဉ်အခါကလည်း၊ ၎င်းကြိုးကြပ်၍ ဆောင်ရွက်ရသည်မဟုတ်။ သို့ဖြစ်ခြင်းကြောင့်၊ လျှောက်ထားသူအပေါ်တွင်၊ ရာဇဝတ်ကြောင်းစွဲဆိုခြင်းမှာ၊ နည်းလမ်းမကျဟု ကျွန်ုပ်ယူဆသည်။ အကယ်၍သာ၊ လျှောက်ထားသူက၊ မိမိ၏ကုမ္ပဏီထံသို့အမှာစာ ပို့လိုက်လျှင်၊ ၎င်းကုမ္ပဏီက၊ မှာသောပစ္စည်း အစား၊ အခြားပစ္စည်းများ ပို့လိုက်လိမ့်မည်ဟု၊ မိမိကိုတင်သိမည်ဆိုပါက၊ ၎င်းအပေါ်တွင်၊ ရာဇဝတ်ကြောင်း စွဲနိုင်ပေမည်။ ဒေါ်မမစောအောင်၏ အမှုစွဲဆိုသော လျှောက်လွှာမှာသော်ဝှင်း၊ ၎င်း၏အစစ်ခံချက်၌သော်၎င်း လျှောက်ထားသူ ရာဖီး (လ်) က၊ ဤကဲ့သို့ ကြိုတင်သိနှင့်သည်ဟု မပြောဆိုခဲ့။ မူလပစ္စည်းများကို မှာစဉ်အခါကလည်း၊ ၎င်းတွင်၊ မရိုးမဖြောင့်သော သဘောနှင့် လက်ခံကြောင်းလည်း ထုတ်ဖော်မြွက်ဟခြင်း မပြုခဲ့။

အမှုဘခုလုံး ခြုံ၍ကြည့်လျှင်၊ ဒေါ်မမစောအောင် မှာသော နိုင်လွန်အမျိုးအစားများရောက်၏။ သို့ရာတွင်၊ ဤနိုင်လွန်အစများတွင် မိမိအလိုမရှိသော အရောင်များနှင့် နိုင်လွန်စများပါလာ၍၊ နစ်နာသည်ဟုဆိုနိုင်ပေသည်။ အဆင်းအရောင်ကလေး အနည်းငယ်ကွဲပြားရုံမျှနှင့် လျှောက်ထားသူအပေါ်၊ ရာဇဝတ်

၁၉၅၃

မစ္စတာ ဒီ၊ ရာဖီး (လ) နှင့် ပြည်ထောင်စု မြန်မာ နိုင်ငံတော် (ဒေါ်မမစော အောင်)။

တရားဝန်ကြီး ဦးအောင်ခိုင်။

ကြောင်း စွဲဆိုရန်မသင့်။ ဒေါ်မမစောအောင်မှာ၊ လန်ဒန်မြို့၊ အာ (ရှ်)၊ အက် (စ်)၊ ရာဖီး (လ်) ကုမ္ပဏီကြီးက၊ ပဋိညာဉ် ပျက်ကွက်ခဲ့သဖြင့်၊ ၎င်းမှာအကျိုးနစ်နာသည်ဆိုပါက၊ တရားမလမ်းကြောင်းဖြင့် လျော်ကြေးငွေများရရန် စွဲဆိုနိုင်သည်။ အထက်ဖေါ်ပြအကြောင်းများကြောင့် ဤလျှောက်လွှာကို လက်ခံ၍၊ အရှေ့ပိုင်း တရားသူကြီးရုံး၊ ၁၉၅၃ ခု၊ ရာဇဝတ်ကြီးမှုအမှတ် ၁၀၀ တွင်၊ လျှောက်ထားသူအား သမ္မာန်စာ ဆင့်ဆိုခေါ်သော အမိန့်ကို ပယ်ဖျက်လိုက်သည်။

APPELLATE CIVIL.

Before U Tun Byu, C.J., and U Thaung Sein, J

MULLAIYA (APPELLANT)

v.

D. M. MOLAKCHAND (RESPONDENT). *

H.C. 1953

June 23.

Suit for ejectment - Notice to quit—Validity of—Transfer of Property Act, s. 106 (1)—Urban Rent Control Act, s. 11 (1) (a)—Burma General Clauses Act, s. 27.

Held : Where a notice is required by law to be sent by post, it is deemed in law to have been effected, if it is despatched by pre-paid registered post, containing the proper address of the person to whom it is sent.

K. M. Modi v. *Mohamed Siddique and one*, (1947) R.L.R. pp. 423 at 462 and 471; *In the matter of L. C. De Souza*, (1932) I.L.R. All. Vol. 54, p. 548, referred to.

B. K. Dadachanji for the appellant.

S. A. A. Pillay for the respondent.

The judgment of the Bench was delivered by

U TUN BYU, C. J.—The plaintiff-respondent D. M. Molakchand sued the defendant-appellant Mullaiya, in Civil Regular No. 580 of 1950 of the Rangoon City Civil Court, for ejectment from a room in the premises, situate at No. 108/116, 38th Street, Rangoon, in that the latter had defaulted in the payment of rents due by him; and his claim for ejectment was decreed. Mullaiya appealed against the decree so passed against him; and his appeal, which was known as Civil First Appeal No. 25 of 1951 of the High Court, Rangoon, was dismissed.

* Special Civil Appeal No. 3 of 1951 against the decree of the High Court, Appellate Side, in Civil 1st Appeal No. 25 of 1951.

H.C. 1953 — MULLAIYA v. D. M. MOLAK-CHAND. — U TUN BYU, C.J.

The relevant portion of the diary order dated the 15th March, 1951, in Civil Regular No. 580 of 1950 reads:

"Defendant waives contention in paragraph 2 of the written statement. Parties agreed to have the suit disposed of on argument on the question of notice."

And the issue which was framed for that purpose was—

"Whether there is a notice and whether it is valid ?"

It will be convenient, for the purpose of answering the above question, to reproduce at once the relevant portions of section 106 (*1*) of the Transfer of Property Act and those of section 11 (*1*) (*a*) of the Urban Rent Control Act, 1948:

"106 (1). . . . . .

Every notice under this section must be in writing signed by or on behalf of the person giving it, and *either be sent by post* to the party who is intended to be bound by it or . . . . . ."

The relevant portion of section 11 (*1*) (*a*) of the Urban Rent Control Act, 1948 is in the following terms:—

"11 (1) . . . . . 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—

(*a*) any rent lawfully due from the tenant which accrued after the resumption of civil government on the conclusion of the hostilities 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. . . . . ."

Certain words in section 106 (*1*) of the Transfer of Property Act and in section 11 (*1*) (*a*) of the Urban

Rent Control Act, 1948 have been italicized by us. The notice, which the plaintiff-respondent sent to Mullaiya, dated the 6th July, 1949, was by a registered post, and there is no dispute in this respect. It will be also necessary, in order to ascertain whether there has been effective notice in the present case, to reproduce the provisions of section 27 of the Burma General Clauses Act, which state :

" 27. 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, pre-paying, 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. "

It will be observed that where a notice is required by law to be sent by post, it is to be deemed in law to have been effected, if it is dispatched by pre-paid registered post, containing the proper address of the person to whom it is sent. It was contended before us by the learned Advocate, who appeared on behalf of the defendant-appellant, that the observation of Roberts C.J., and that of Sharpe J., in *K. M. Modi* v. *Mohamed Siddique and one* (1) were not really correct in law, in view of the provisions of section 27 of the Burma General Clauses Act. Roberts C. J., in the above case, observed—

" . . . . The sending of notices by post is recognized by section 26 of the English Interpretation Act, 1889, which, although it does not apply to this country, is often of value in determining the meaning of words in a statute. And the ' sending by post ' is recognized in the amending Act of 1929 here. It does not say a word about the receipt of a

(1) (1947) R.L.R., pp. 423 at 462 and 471.

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notice by the addressee. It is no longer a question whether a notice was received, but only whether it was sent by post."

Section 26 of the English Interpretation Act, 1889, is, in effect, the same as section 27 of the General Clauses Act. The observation of Sharpe J., was to the same effect, although it might be said that it was expressed more emphatically—

> "In my opinion a lessor sufficiently complies with the requirements of section 111 (*g*) of the Transfer of Property Act if he sends to his lessee, by pre-paid ordinary post, at his last known address, a letter in which he declares his intention to determine the lease; and this act of the lessor is sufficient for the purposes of that section even if the lessee never receives the letter."

It might be mentioned here that the clause (*g*) of section 111 of the Transfer of Property Act contains the words "gives notice in writing to the lessee of his intention to determine the lease". And according to section 27 of the General Clauses Act the effect is the same whether the word used in a statute is "give" "send" or "serve". We, however, do not consider it necessary, in the present appeal, to discuss whether the presumption raised in section 27 of the Burma General Clauses Act is in the nature of a rebuttable presumption or not.

In the matter of L. C. DeSouza (1), it was observed that the words "unless the contrary is proved" in section 27 of the General Clauses Act should be construed to refer to the service of the notice as well as to the time, and that section 27, read as a whole, meant that the presumption was held to be good unless the contrary has been proved. The Allahabad case was strongly stressed upon on behalf of the defendant-appellant as laying down a

(1) (1932) I.L.R. All. Vol. 54, p. 548

good and sound law. We also do not think it necessary to express any opinion over the Allahabad case referred to above, because, even if this appeal is decided on the assumption that section 27 of the General Clauses Act merely raises a rebuttable presumption of law, it appears to us, to be clear in the present case that the presumption so raised has not been rebutted. In such a case it is more a question of fact whether the presumption so raised has been rebutted or not; and the answer, in each case, will depend on the peculiar facts of each case.

The notice which the plaintiff-respondent sent to Mullaiya on the 6th July, 1949 was in a registered cover, addressed to "Room No. 7, House No. 108/116, 38th Street, Rangoon". The registered cover was returned by the Post Office with an endorsement "Addressee left". No oral or any other evidence was offered by the defendant-appellant. In fact no oral evidence was recorded at all, and the case decided on the pleadings and the registered cover referred to above. There is no evidence to show that the defendant-appellant was not living in the Room No. 7 in July, 1949, or that he was absent from Rangoon on the relevant date when the postman went there; and it seems to us to be only reasonable to assume that Mullaiya was at that time living at Room No. 7 of the House No. 108/116 in 38th Street, Rangoon, on the date the postman presented the registered letter. Thus the endorsement found on it was incorrect in fact. There is no one who is more interested than Mullaiya in having the registered letter returned to the sender as Mullaiya had been badly in arrear with the payment of house rents due by him for some considerable time before July, 1949. The notice which was sent to Mullaiya

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U TUN BYU, C.J.

on the 6th July, 1949 could therefore be held to be effective, and sufficient for the purpose of section 106 (*1*) of the Transfer of Property Act as well as for the purpose of section 11 (*1*) (*a*) of the Urban Rent Control Act, 1948.

The appeal is therefore dismissed with costs.

APPELLATE CRIMINAL.

Before U Chan Tun Aung, J.

H.C. 1953

July 30.

UNION OF BURMA (MAUNG TIN AYE) (APPLICANT)

v.

MAUNG AUNG TIN (RESPONDENT).*

Criminal Misappropriation—Penal Code, s. 407—Venue of Trial—Place where the subject-matter of the offence was received or retained by the accused—Criminal Procedure Code. ss. 181 (2), 186 (2) and 526 (3).

Held: S. 181 (2) of the Criminal Procedure Code is quite explicit that an offence of criminal breach of trust or criminal misappropriation can be enquired into or tried by a Court within the local limits of whose jurisdiction the property which is the subject-matter of the offence was received or retained by the accused or the offence was committed.

Ahmed Ebrahim v. *Hajee A. A. Ganny*, (1923) I.L.R. 1 Ran. 56; *Ali Mohamed Kassin* v. *Emperor*, 32 Cr. L.J. (1931) p. 1120, followed.

U Chit (Government Advocate) for the applicant.

U CHAN TUN AUNG, J.—The District Magistrate, Hanthawaddy, has under section 186 (2) of the Criminal Procedure Code reported for the orders of this Court in respect of a pending case before the 1st Additional Magistrate, Kayan, because it appears that the said Magistrate has no jurisdiction to try the said case.

It appears that in Criminal Regular Trial No. 31 of 1953 of the Court of the 1st Additional Magistrate, Kayan, one Maung Aung Tin was prosecuted at the instance of one Maung Tin Aye for an offence under section 407 of the Penal Code. The facts alleged against the accused Maung Aung Tin are that

* Criminal Misc. Application No. 22 of 1953 on a Reference made by the District Magistrate, Hanthawaddy, for transfer of Criminal Regular Trial No. 31 of 1953 of the 1st Additional Magistrate, Kayan, to Pegu District.

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U CHAN TUN AUNG, J.

he was entrusted at Moulmein by the complainant Maung Tin Aye with some timber and some paraphernalia for setting up a cart bought by Maung Tin Aye and after such entrustment he was instructed by Maung Tin Aye to convey them in a sampan to Kayan where Maung Tin Aye had gone ahead. It is alleged that the accused did not carry out the instructions and instead of bringing the timber and the cart paraphernalia over to Kayan he misappropriated them at Gwegyi Village, Thanatpin Township, Pegu District.

It is abundantly clear from these facts that the 1st Additional Magistrate, Kayan, has no local jurisdiction to try the accused. The proper venue for the trial of the case in question is in Pegu District. Section 181 (2) of the Criminal Procedure Code is quite explicit, for it lays down that an offence of criminal breach of trust or criminal misappropriation can be enquired into or tried by a Court within the local limits of whose jurisdiction the property which is the subject-matter of the offence was received or retained by the accused, or the offence was committed. Here, the offence of criminal breach of trust or criminal misappropriation, if at all it had been committed, was committed not within Kayan Township or at Kayan, but within the Pegu District. Regarding the venue for the trial of such offences, it is clear from the decisions in *Ahmed Ebrahim* v. *Hajee A. A. Ganny* (1) and *Ali Mohamed Kassin* v. *Emperor* (2), that the proper Court having the jurisdiction is the Court in whose jurisdiction the offence of criminal misappropriation or criminal breach of trust is committed.

Therefore, under section 186 (2), read with section 526 (3) of the Criminal Procedure Code, I consider, in the ends of justice and in accordance with the

(1) (1923) I.L.R. 1 Ran. p. 56. (2) 32 Cr.L.J. (1931) p. 1120.

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provisions of section 181 (2) of the Criminal Procedure Code, that Criminal Regular Trial No. 31 of 1953 *Maung Tin Aye* v. *Maung Aung Tin*—now pending before the 1st Additional Magistrate, Kayan, should be transferred to the Court of the District Magistrate, Pegu or to a Court of such competent Magistrate within his jurisdiction as the District Magistrate, Pegu, may direct; and I direct that the same be done accordingly.

APPELLATE CIVIL.

Before U Thaung Sein and U Bo Gyi, JJ.

H.C. 1953

Sept. 1.

CHAN EU GHEE (APPELLANT)

v.

MRS. IRIS MAUNG SEIN (*a*)LIM GAIK PO AND TWO OTHERS (RESPONDENTS).*

Chinese Buddhist—Estate of Chinese-Buddhist, rival applications for Letters-of-administration—Inheritance to Sino-Burmese Buddhist governed by Burmese Buddhist Law—Adoption by registered deed—Automatic inheritance not implied—Kittima *adoption under s. 4 of the Registration of* Kittima *Adoptions Act (Burma Act XIV of 1939), contrast—Adoption terminated by mutual consent—Inheritance to a deceased brother or sister, the younger excludes the elder—Existence of one or both parents immaterial to principle.*

A, a Sino Burmese lady, after the death of her husband, in deference to Chinese customary usage requiring a male issue to perform the traditional rites of ancestral family worship, adopted by registered deed, her husband's nephew, **B** as a "son to her husband" without the knowledge of **A**, or without consulting her, **B** in turn adopted **C**, his own nephew, by another registered deed. Three years later by a Release Deed the adoption of **B** by **A** was terminated by mutual consent. On **A**'s death, **C**, the adoptee of **B**, claimed sole inheritance to **A**'s estate on the basis that the adoption of **B** by **A** was tantamount to a *kittima* adoption with a view to inherit her estate. An elder brother and two younger sisters of **A** presented rival claims also; the latter submitted that they exclude the elder brother in the inheritance to the estate of their deceased sister.

Held: If a Chinese Buddhist is *prima 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.

Tan Ma Shwe Zin v. *Tan Ma Ngwe Zin and others*, I.L.R. 10 Ran. 97; *Ma Sein Byu and another* v. *Khoo Soon Thye and others*, I.L.R. 11 Ran. 310, dissented from.

Tan Ma Shwe Zin and others v. *Khoo Soo Chong and others*, (1939) R.L.R. 548; *Cyong Ah Lin* v. *Daw Thike* (a) *Wong Ma Thike*, (1949) B.L.R. 168, followed.

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* Civil 1st Appeal No. 68 of 1951 against the decree of the High Court, Original Side in Civil Regular Suit No. 294 of 1947, dated the 25th July 1951.

Held : A *kittima* son or daughter is one who is adopted with the express intention that he or she shall inherit according to the Burmese Buddhist Law ; and there is no legal objection to the adoption of an adult. But with regard to Margaret Chor Pine's intention at the time of the adoption, it can hardly be doubted that she was bent on a strict observance of the rites of ancestral worship and no further.

Maung Po Kan v. *Daw At and others*, I.L.R. 1 Ran. 102; *Ma Than Nyun* v. *Daw Shwe Thit*, I.L.R. 14 Ran. 557 ; *U Ba Thaung* v. *Daw U and others*, (1938) R.L.R. 323; *Ma Nu and others* v. *U Nyun*, I.L.R. 12 Ran. 634; *Abdul Aziz Khan Sahib* v. *Appayasami Naicker and others*, 31 I.A. 1, referred to.

Held also : An adoption deed does not by itself confer the status of an adopted son nor create any interest in the property of the adoptive father, and is admissible in evidence in proof of adoption along with other evidence.

Vishwanath Ramji Karale v. *Rahibhai Marad Ramji Karale and others*, I.L.R. 55 Bom. 103, followed.

Held : A *kittima* child is not for all purposes in an identical position with a natural child The relationship between an adoptive parent and his adopted child may be terminated at any time by mutual consent. A grandchild cannot be deprived of the right to inherit the estate of his grandfather even though his father be declared to be a "dog-son."

Ma Kyin Sein and others v. *Maung Kyin Htaik*, (1940) R.L.R. 783; *U Sein* v. *Ma Bok and others*, I.L.R. 11 Ran. 158; *Maung Paik* v. *Maung Tha Shun and another*, (1940) R.L.R 28, referred to.

Held further : It must be taken as settled law that among Burman Buddhists younger brother and sisters exclude the elders as heirs to a deceased brother or sister; the question whether the parents are alive or dead at the time of the death of a child, who is established in his own house, is immaterial.

Maung Tu v. *Ma Chit*, I.L.R. 4 Ran. 62; *Mi A Pruzan* v. *Mi Chumra*, (1872—1892) Selected Judgments and Rulings, Lower Burma, 37, followed.

Held distinguishing : Where there has been no division of the parental estate at the time of the child's death, all the children share equally irrespective of their order of seniority or juniority; and where the child dies leaving no other relations the parents succeed to the estate.

Maung Ba and Ma Saing v. *Mai Oh Gyi*, I.L.R. 10 Ran. 162 ; *Maung Kun* v. *Ma Chi and another*, I.L.R. 9 Ran. 217; *Ma Pwa Thin* v. *U Nyo and others*, I.L.R. 12 Ran. 409 ; *Ramanujulu Naidu* v. *Gajaraja Ammal*, A.I.R. (37) (1950) Mad. 146, referred to.

P. K. Basu, *Kyaw Myint*, and *W. T. Shan* for the appellant.

L. Hoke Sein for the respondent No. 1.

O. S. Woon for the respondent No. 2.

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Daw Aye Kyi for the respondent No. 3.

The judgment of the Bench was delivered by

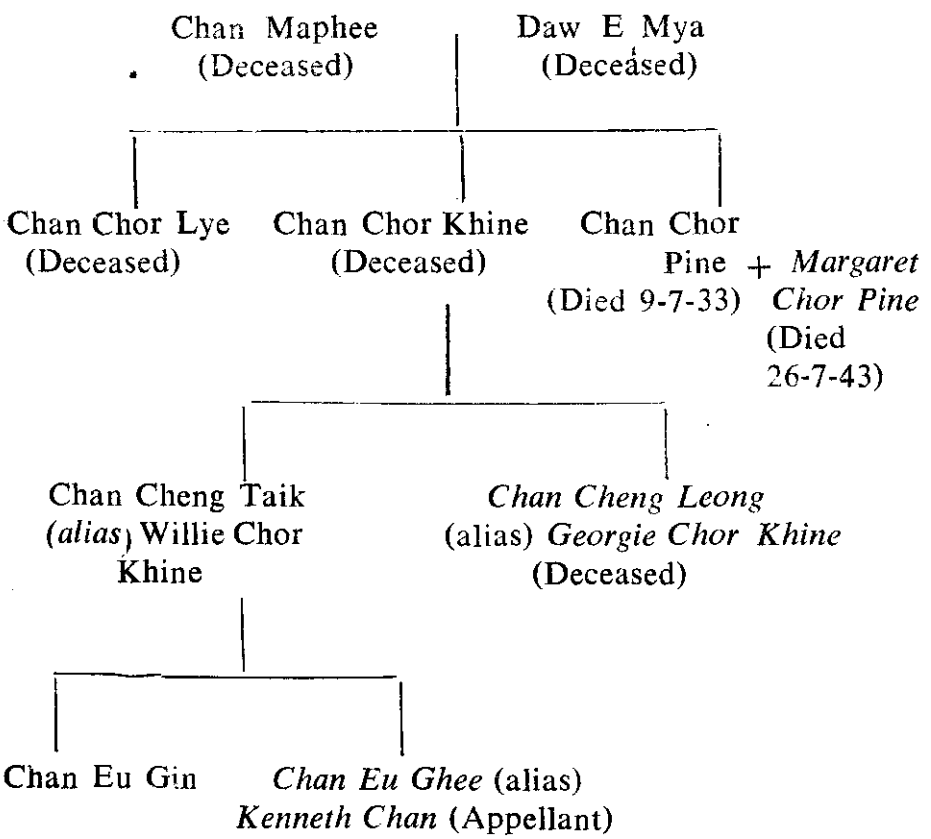
U THAUNG SEIN, J.—This appeal and Civil First Appeals Nos. 69, 70, 71, 73, and 75 of 1951 which have arisen out of rival applications for letters-of-administration to the estate of one Mrs. Margaret Chor Pine, a wealthy Sino-Burmese lady, who died at Dedaye on the 26th July 1943, have been dealt with together and the present judgment will cover all the cases.

The deceased (Margaret Chor Pine)was the widow of one Chan Chor Pine, a son of an exceedingly rich Chinaman named Chan Maphee who died a long while ago. The appellant Chan Eu Ghee is a grand-nephew of Chan Chor Pine but he also claimed to be an adopted grandson of the deceased Margaret Chor Pine and thus the sole heir to her estate. The 2nd respondent Lim Kar Gim and the 1st and 3rd respondents Mrs. Iris Maung Sein and Mrs. Bella Orr are the elder brother and younger sisters of the deceased. Two nephews of the deceased, *viz.*, Ronnie Kyi Lwin and Eric Kyi Lwin who featured as respondents in the case arising out of the present appellant's application (Civil Regular Suit No. 294 of 1947) also claimed to be the *Kittima* adopted children of the deceased, but their claims were disallowed and they have not appealed against that decision.

Four separate applications were filed on the Original Side of this Court by the appellant Chan Eu Ghee and the three respondents for letters-of-administration and unfortunately for the appellant his application was dismissed while letters-of-administration were issued jointly to the 2nd respondent Lim Kar Gim and the 1st respondent Mrs. Iris Maung Sein, the elder brother and younger sister of

the deceased. The other sister Mrs. Bella Orr (3rd respondent) would have been included in the letters but for the fact that she is at present resident at Penang, *i.e.*, out of the Union of Burma. Hence the present appeal and Civil First Appeals Nos. 69, 70 and 71 of 1951 by the appellant Chan Eu Ghee. Mrs. Iris Maung Sein (1st respondent) has also appealed in Civil First Appeals Nos. 73 and 75 of 1951 on the ground that her elder brother Lim Kar Gim is not an heir to the estate and thus not entitled to letters-of-administration.

Before proceeding to discuss the facts and law involved in this case, it may be a good plan to set out the blood relationship between the appellant Chan Eu Ghee and Margaret Chor Pine and her husband Chan Chor Pine by means of the following portion of the relevant family-tree :—



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It should be noted also that Chan Chor Pine pre-deceased his wife on 9th July 1933 without leaving any issue and eleven days after his demise, *i.e.*, 20th July 1933, Margaret Chor Pine adopted her husband's nephew Chan Cheng Leong (since deceased) as " a son to her husband " by means of a registered deed which for some unknown reason has disappeared and was not produced in the trial Court. An interesting feature of this adoption is that the adoptive mother was only 5 years older than her adoptive son. On the same day, *i.e.*, 20th July 1933, Chan Cheng Leong in turn adopted his nephew, the present appellant, Chan Eu Ghee—who was then a two-year old infant—by means of another registered deed as per Exhibit 1 in the trial record. It is not clear from the evidence on record whether Margaret Chor Pine was aware of the latter adoption nor is there any suggestion that she was consulted in the matter. Yet another document was drawn up and executed on that day between Margaret Chor Pine and Chan Cheng Leong, namely, Exhibit O, whereby the latter was declared to be " the sole heir to the late Chan Chor Pine, " while the former was given a life interest in the estate of her husband.

Now, Margaret Chor Pine and her husband and their families were Sino-Burmese Buddhists but at the time when the abovementioned documents were executed, *i.e.*, 20th July 1933, they were undoubtedly under the impression that the Sino-Burmese community were governed by Chinese customary law. This was due perhaps to the rulings in *Tan Ma Shwe Zin* v. *Tan Ma Ngwe Zin and others* (1), and *Ma Sein Byu and another* v. *Khoo Soon Thye and others* (2), where it was held that " succession to the estate of a Chinese Buddhist, domiciled in Burma, is governed

(1) I.L.R. 10 Ran. 97. (2) I L R. 11 Ran. 310.

by Chinese customary law." But in 1939 the Privy Council in *Tan Ma Shwe Zin and others* v. *Khoo Soo Chong and others* (1), completely upset the previous view and declared that "*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 custom or usage varying the ordinary Buddhist rules of inheritance is on the person asserting the variance." The position with regard to Sino-Burmese Buddhists has been clarified still further after the independence by the High Court in *Cyong Ah Lin* v. *Daw Thike* (a) *Wong Ma Thike* (2), where it was laid down that Sino-Burmese Buddhists are governed by Burmese Buddhist Law. This view was accepted by the Supreme Court when the case went up on appeal (*see* Civil Appeal No. 19 of 1949 of the Supreme Court), and their Lordships remarked as follows :

> "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."

Be that as it may, the fact that Margaret Chor Pine and the relatives of her husband were labouring under a misapprehension as to the law by which they were governed is also borne out by the manner in which Chan Cheng Leong was adopted. The adoption in question was done posthumously on behalf of Chan Chor Pine by his widow. Such an adoption is said to

(1) (1939) R.L.R. 548. (2) (1949) B.L.R. 168.

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be highly desirable, if not imperative, for a Chinaman who dies without male issue in order that the ancient and traditional rites of ancestral worship might continue to be performed in the family of the deceased. Needless to say, posthumous adoption is unknown to the Burmese Buddhist Law.

To continue with the sequence of events, three years elapsed after the adoption of Chan Cheng Leong and the appellant Chan Eu Ghee without incident between Margaret Chor Pine and the adoptees. But in or about June 1936 Chan Cheng Leong sold away BOC shares of the value of about Rs. 2 lakhs belonging to the estate of Chan Chor Pine and there was an immediate protest by Margaret Chor Pine who followed it up with the execution of three documents on 26th June 1936 as per Exhibits B and C and one other registered deed. By means of the Exhibit B deed Chan Cheng Leong released all his claims to the estate of Chan Chor Pine in the following terms :—

> "The Releasor (Chan Cheng Leong) releases all claims in the estate of Chan Chor Pine, deceased, as an adopted son of the said Chan Chor Pine in favour of the Releasee herein—(to wit, Margaret Chor Pine) covenanting with her that nothwithstanding anything to the contrary in the indentures of the 20th July 1933, the said Releasor is and was not the adopted son of Chan Chor Pine and/or Margaret Chor Pine and that save and except to the extent provided by the indenture of 26th June 1936 executed by Margaret Chor Pine in favour of the Releasor herein, he waives all claims to the assets, moveables and immoveables forming the estate of Chan Chor Pine in favour of the Releasee (Margaret Chor Pine)."

In consideration of this release he received from Margaret Chor Pine several items of landed properties valued at Rs. 2 lakhs as per Exhibits C and D. The third deed was one relating to certain immoveable properties but this was not produced before the trial

Court. An attempt was made to file it under Order 41, Rule 27, of the Civil Procedure Code, during the appeal but we refused to allow it as there was sufficient evidence on the record to pronounce a judgment.

Great stress is laid by the learned counsel for the appellant on the fact that Chan Cheng Leong was adopted by means of a registered deed and it is urged that even though Margaret Chor Pine purported to adopt a "son to her husband," the adoption must be deemed to have been on behalf of her husband and herself. It is indeed regrettable that the document in question has not been produced as it may contain the key to the solution as to the exact nature of the adoption. The learned counsel then went on to state that this adoption was not cancelled at any time and, according to him, the release deed (Exhibit B), was not a repudiation or cancellation of the adoption. It is nowhere laid down, however, that an adoption which has been effected by a registered deed can only be cancelled by means of another registered deed. Then again, it is somewhat difficult to reconcile the argument of the learned counsel with the passage from the Exhibit B release deed which has been quoted earlier. The learned counsel asserts that the operative part of this document was the portion in which "the releasor releases all claims in the estate of Chan Chor Pine, deceased, as an adopted son of the said Chan Chor Pine in favour of the releasee," and not the so-called covenant. In the alternative it was argued that at the worst this "covenant" was nothing more than an admission of fact which could be controverted. That the passage under consideration was a covenant is clear from the undertaking by Chan Cheng Leong to the effect that "he waives all claims to the assets, moveables and immoveables forming the estate of Chan Chor Pine in favour of the releasee." Finally,

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the learned counsel for the appellant has argued that even if Chan Cheng Leong did repudiate the adoption of himself he could not thereby divest the appellant Chan Eu Ghee of his right to inherit as the grandson of Margaret Chor Pine.

It is common ground that the parties in this case as well as the deceased Margaret Chor Pine and her husband were at all material times governed by the Burmese Buddhist Law and not the Chinese customary law. This is a natural consequence of the rulings in *Tan Ma Shwe Zin and others* v. *Khoo Soo Chong and others* (1) and *Cyong Ah Lin* v. *Daw Thike* (a) *Wong Ma Thike* (2), which no doubt were decided long after the incident under consideration. But as explained in *Ramanujulu Naidu* v. *Gajaraja Ammal* (3), "judicial decisions, unlike enactments of the Legislature, are merely declaratory of the law as it has always stood." Hence, the main question at issue between the parties was whether Chan Cheng Leong was the adopted son of the deceased Margaret Chor Pine and, if so, what was the exact nature of that adoption. The next question was whether the adoption of Chan Cheng Leong was repudiated or cancelled at any time. The learned trial Judge (U Aung Tha Gyaw, J.) found that there had been an adoption of Chan Cheng Leong for the purpose of ancestral worship and that this adoption was later cancelled. These findings have been attacked in various ways which we shall discuss presently.

There is no dispute as to the fact that Chan Cheng Leong was adopted by Margaret Chor Pine as a "son to Chan Chor Pine" by means of a registered deed. The 1st respondent Mrs. Iris Maung Sein tried to make out, however, that this deed was executed under duress by Chan Chor Khine, the elder brother

(1) (1939) R.L.R. 548. (2) (1949) B.L.R. 168.
(3) A.I.R. (37) (1950) Mad. 146.

of Chan Chor Pine, but the evidence led on this point was unconvincing. All that she did prove was that Margaret Chor Pine was naturally in a very distressed state of mind owing to her bereavement when the adoption deed was signed. It was established also that the relatives of the deceased Chan Chor Pine considered the adoption of a son absolutely essential for the performance of ancestral worship according to ancient Chinese custom. In common with other members of the Sino-Burmese community Margaret Chor Pine and her husband observed many of the Chinese customs especially as regards ancestral worship and the meaning and import of this custom to the Chinese is explained by Jamieson in " Chinese Family and Commercial Law " as follows:

> " The foundation of Chinese society is the Family, and the religion is Ancestral Worship. Ancestral Worship is not a thing which the community as a whole can join in; it is private to each individual family, meaning by family all those who can trace through male descent to a common Ancestor, however numerous, and however remotely related. "

Unfortunately for Chan Chor Pine he had died childless and perhaps it was felt that both for the peace and tranquillity of his soul and the benefit of his relatives a son should be adopted posthumously on his behalf. According to the learned counsel for the appellant, the adoption of Chan Cheng Leong as a " son to Chan Chor Pine " was in fact and law a *Kittima* adoption within the meaning of that term in Burmese Buddhist Law. The requisites of a *Kittima* adoption are well known and for a concise definition of that term, reference may be made to section 4 of the Registration of *Kittima* Adoptions Act (Burma Act XIV of 1939), which is in the following terms: " A *Kittima* son or daughter is one who is adopted with the express intention that he or she shall inherit

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according to the Burmese Buddhist Law."—*See* also the rulings in *Maung Po Kan* v. *Daw At and others* (1), *Ma Than Nyun* v. *Daw Shwe Thit* (2), and *U Ba Thaung* v. *Daw U and others* (3). Generally speaking, children are usually taken in adoption but there is of course no legal objection to the adoption of an adult according to the ruling in *Ma Nu and others* v. *U Nyun* (4).

The problen in this case is what was the intention of Margaret Chor Pine at the time when she "adopted" Chan Cheng Leong who was only 5 years her junior? The answer to this is to be found in the Exhibits B and C deeds where she referred to him as "a son of her husband Chan Chor Pine, then deceased." If she meant to adopt Chan Cheng Leong herself, it is strange that she failed to mention this fact at any time. Another factor which should not be lost sight of is that the adoption deed relating to Chan Cheng Leong was the work of Chan Chor Khine who instructed an eminent adovcate, Mr. E. C. V. Foucar (DW 13), *Barrister-at-Law*, to draw it up. A pleader named Mr. C. A. Nicholas (since deceased) was also consulted by Chan Chor Khine and the deeds were drawn up without any consideration as to its legal effect. Mr. Foucar's account of this matter makes interesting reading and was as follows:

> "*A*. . . . . Mr. Nicholas and Chor Khine came to me and gave me instructions to draw up two deeds of adoption, and I was told that I was not required to consider the legal position at all. And on those instructions I drew up two deeds of adoption, one by Mrs. Margaret Chor Pine and the other by Chan Cheng Leong.

(1) I.L.R. 1 Ran. 102.
(2) I.L.R. 14 Ran. 557.
(3) (1938) R.L.R. 323.
(4) I.L.R. 12 Ran. 634.

* * * *

Q. Am I to take it that in drawing up those deeds you did not apply yourself to Chinese Customary Law ?

A. No. In drawing up the adoption deeds I did not consider the question of Chinese Customary Law.

Q. You did not consider that whether the requirements of Chinese Customary Law were complied with when the alleged adoption took place ?

A. It took place a long time ago—19 years ago. I was of course familiar generally with the practice of adoption among the Chinese, but I was told not to consider the legal position. Therefore I drew up the deeds accordingly."

The learned counsel for the appellant has argued that in order to assess the real intention of Margaret Chor Pine and the nature of the adoption, the transaction must be viewed in the light of the law by which the parties concerned thought they were governed, *i.e.*, the Chinese customary law, and in support of this view cited the ruling in *Abdul Aziz Khan Sahib* v. *Appayasami Naicker and others* (1). Judged by Chinese customary law—so says the learned counsel—the widow (Margaret Chor Pine) was divested of all the properties in the estate by the adopted son and this was tantamount to a declaration that he would inherit to her estate also. Such an adoption is said to be nothing short of a *Kittima* adoption if judged by the principles of Burmese Buddhist Law. If what the learned counsel says be true, then it does seem strange that after divesting herself of all her properties she promptly rose in protest as soon as Chan Cheng Leong sold away the BOC shares and took effective steps to prevent any further interferences with the estate. In addition,

(1) 31 I.A. 1.

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there is clear evidence in the trial record that even after the adoption she continued to manage the estate by her own agent Chan Gyin Leong (PW 9) and on several occasions sold away items of landed property on her own account and without reference to Chan Cheng Leong. With regard to Margaret Chor Pine's intention at the time of the adoption, it can hardly be doubted that she was bent on a strict observance of the rites of ancestral worship, and no further. It is noteworthy that in all the documents referred to already she took good care to refer to Chan Cheng Leong as "a son of Chan Chor Pine," and never as her own adopted son.

The appellant's case is based mainly on the fact that there was a registered deed of adoption in respect of Chan Cheng Leong. But as explained in *Vishwanath Ramji Karale* v. *Rahibhai Marad Ramji Karale and others* (1), the adoption deed "does not by itself confer the status of an adopted son nor create any interest in the property of the adoptive father and is admissible in evidence in proof of adoption along with other evidence." As pointed out already, the "other evidence" discussed above does not in any way tend to show that Chan Cheng Leong was adopted as a *Kittima* son of Margaret Chor Pine.

Coming to the question whether there was a repudiation or cancellation of the adoption of Chan Cheng Leong, there can be no doubt from the ruling in *Ma Kyin Sein and others* v. *Maung Kyin Htaik* (2), that the relationship between an adoptive parent and his adopted child may be terminated at any time by mutual consent. In the present case, even if it were possible to hold that Chan Cheng Leong was a *Kittima* adopted son of the deceased Margaret Chor

(1) I.L.R. 55 Bom. 103. (2) (1940) R.L.R. 783.

Pine, then obviously that adoption was cancelled by the release deed (Exhibit B). This is clear from the following recital in the deed which has been dealt with already : " . . . . . The said Releasor is and was not the adopted son of Chan Chor Pine and/or Margaret Chor Pine . . " Besides this, there is nothing in the evidence on record to suggest that Chan Cheng Leong behaved or acted as a son of either Chan Chor Pine or Margaret Chor Pine before or after the execution of the deeds in question, or that he made any further claims to the estate of Chan Chor Pine after the execution of Exhibit B : Add to this that on the death of his natural father (Chan Chor Khine) he inherited the share of the estate bequeathed to him in the will of his father. As far as can be ascertained from the evidence, he appears to have completely severed all connections with Margaret Chor Pine after the execution of the deeds.

The next question that arises is whether the repudiation of the adoption by Chan Cheng Leong automatically severed the relationship between the appellant Chan Eu Ghee and Margaret Chor Pine. In this connection it has been pointed out in *Ma Kyin Sein and others* v. *Maung Kyin Htaik* (1), that " a *Kittima* child is not for all purposes in an identical position with a natural child. " Under Burmese Buddhist Law parents cannot possibly disinherit their natural children and it follows therefore that grandchildren also cannot be deprived of their rights of inheritance . Viewed in that light the rulings in *U Sein* v. *Ma Bok and others* (2) and *Maung Paik* v. *Maung Tha Shun and another* (3), to the effect that even if the father of the grandson be declared to be a " dog-son " this fact cannot

(1) (1940) R.L.R. 783. (2) I.L.R. 11 Ran. 158.
(3) (1940) R.L.R. 28.

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deprive the grandchild of his right to inherit the estate of the grandfather, can be easily appreciated.

The appellant's case, however, stands on a somewhat different footing and his learned counsel has not been able to trace any similar case of an adopted grandson claiming to the estate of an adoptive grandparent through a father who was himself an adopted child and our researches have also been in vain. Nevertheless, it is clear that the tie between the appellant Chan Eu Ghee and the deceased Margaret Chor Pine was purely an artificial one dependent on a chain of adoptions and where this chain is broken at the first link by Chan Cheng Leong's repudiation of his own adoption it is difficult to understand how the connection with Margaret Chor Pine could still be maintained by the so-called adopted grandson. In other words, we are not prepared to hold that the appellant Chan Eu Ghee is entitled to claim the status of a grandson of Margaret Chor Pine.

The deceased having left no children or grandchildren, the only persons who could possibly lay any claim to her estate were her elder brother Lim Kar Gim (2nd respondent) and the younger sisters Mrs. Iris Maung Sein (1st respondent) and Mrs. Bella Orr (3rd respondent), and the question is whether the elder brother is excluded by the younger sisters. In this connection it must be borne in mind that at the time of Margaret Chor Pine's death her mother Mrs. Lim Chin Tsong was alive and the problem is whether this fact could affect the principle laid down in *Maung Tu* v. *Ma Chit* (1) that " it must be taken as settled law that among Burman Buddhists younger brothers and sisters exclude the elder as heirs to a deceased brother or sister." This

(1) I.L.R. 4 Ran. 62.

ruling followed an earlier one in *Mi A Pruzan* v. *Mi Chumra* (1), and it is interesting to note that in this case the deceased was survived by one of his parents and his elder and younger sisters. There is no hint or suggestion in that decision that the parent was entitled to any share in the estate of the deceased child and it was held that the "elder brothers or sisters are postponed to younger brothers and sisters in the law of inheritance." The above decisions are based on section 18 of *Manugye*, Volume X, a translation of which reads as follows:

"18th. After the death of the parents, when the property is divided amongst the children, and they are living separately, the law that it shall not ascend.

When after the death of the parents each of the children is established in his own house, the law that the property shall not ascend is this: If after the heirs have received their shares, and established themselves separately, one shall die without leaving direct heirs, *i.e.*, wife or husband, son or daughter, let the property not ascend to the elder brothers or sisters; let the younger brothers and sisters only of the deceased share it. This is what is meant by not allowing the property to ascend."

This section is different from the one previous to it, namely section 17, which is in the following strain :—

"17th. After the death of the parents, if the sons or daughters die, the law for the partition of their property between their relations.

If after the death of the parents, and before the division of the property left, an unmarried child shall die, the law for the partition of the deceased child's effects amongst the relations (brothers and sisters) is, that they shall share in equal proportions."

The emphasis in this section is on the fact that there has been no division of the parental estate at the time of the child's death. This is clear from the words "and before the division of the property." In

(1) (1872—1892) Selected Judgments and Rulings, Lower Burma, 37.

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such cases it is hardly surprising that all the children share equally irrespective of their order of seniority or juniority according to their ages. But it should be noted that the property which is to be shared equally among the brothers and sisters is the undivided share of the deceased in the parental estate. This is clear from the Burmese version which refers to "သားသမီးဆုံးစဲ့" which has been translated wrongly by Richardson as " the deceased child's effects." The principle enunciated in this section has received judicial recognition in *Maung Ba and Ma Saing* v. *Mai Oh Gyi* (1). Section 18 of *Manugye*, Volume X, on the other hand, relates to the case where the children have set up their own homes and families. The emphasis here is not so much on the fact that the parents have died as on the fact that " each of the children is established in his own house." This has been explained clearly in *Mi A Pruzan* v. *Mi Chumra* (2) as follows:

> " It is true that this section commences with the words ' after the death of the parents ' ; and it was contended by the learned Advocate for the respondent in this Court that the insertion of these words excludes the present case, since Kyon Gyin's mother was living when he died in 1865. But I am of the opinion that these words are only inserted because ordinarily the brother will not have come into possession of the ancestral estate in the life-time of his parents and the principle of the section is that property in the possession of a brother shall not ascend to his elder brothers or sisters, but shall go to the younger brothers or sisters. "

The rule of succession in such cases is a settled one and as far as we are aware the ruling in *Maung Tu* v. *Ma Chit* (3) has not been overruled or dissented from at any time. However, the learned trial Judge referred to section 19 of *Manugye*, Volume X, as

1) I.L.R. 10 Ran. 162.
(2) (1872—1892) Selected Judgments and Rulings, Lower Burma, 37.
(3) I.L.R. 4 Ran. 62.

authority for the view that where one of the parents is alive at the time of the death of a child all the brothers and sisters of the deceased child share equally in the estate of the deceased. With due respect, we regret we are unable to trace any such rule in this section and for better certainty quote it below:

"19th. Though it is said the property shall not ascend, the law when it shall do so.

Though this is the law, why is it also said, 'the father and mother of the deceased have a right to his property?'— because if the parents be alive, and the deceased has no other relations, they shall inherit his property, as by way of illustration, the offerings intended to be made to the priests may be offered to God. If the deceased has no father, mother, sons, daughters or relations (brothers and sisters), the law by which the grandfather and mother inherit is this: If there be none of the above-named heirs, six (degrees of) relatives of the husband and six of the wife are laid down as heirs; but if the own grandfather and grandmother are alive, they shall inherit before these six relatives. I will make a comparison: as the water of the main ocean receives the waters of the five hundred smaller rivers which have flowed into the five large ones, the grandfather and grandmother have a right to the property."

There is nothing in this section to suggest that it is meant to qualify in any way the principle laid down in either section 17 or 18. It merely provides a rule of inheritance where the parents survive a child who "has no other relations," *i.e.*, no wife, child, brothers or sisters. Where there are no such heirs, it naturally follows that the parents should succeed to the estate in question. This principle was accepted in *Maung Kun* v. *Ma Chi and another* (1) which was followed in *Ma Pwa Thin* v. *U Nyo and others* (2).

In the present case it is admitted by Mr. Woon, learned Advocate for the 2nd respondent Lim Kar Gim that the deceased Margaret Chor Pine and her

(1) I.L.R. 9 Ran. 217. (2) I.L.R. 12 Ran. 409.

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husband lived apart from their parents and that the estate under consideration was derived from Chan Chor Pine who in turn inherited it from his father Chan Mahphee and that none of the properties was derived from the parents of Margaret Chor Pine. Nevertheless, the learned counsel is firmly of the opinion that since the mother of Margaret Chor Pine was alive the case falls within the ambit of section 17 of *Manugye,* Volume X. It has been explained already that the question whether the parents are alive or dead at the time of the death of a child is immaterial, and that the principle underlying that section is that the surviving brothers and sisters share equally in the undivided share of the deceased in the parental estate. In the present case, the estate left by Margaret Chor Pine consists of properties derived from her husband and not from her parents, and we fail to see therefore how section 17 could apply to it.

In our opinion, the present case falls within section 18 of *Manugye,* Volume X , and is governed by the principle laid down in *Maung Tu* v. *Ma Chit* (1). That this principle is supported by a number of *Dhammathats* is borne out by the following extracts from section 310 of "A Digest of the Burmese Buddhist Law, Volume I, Inheritance":—

"SECTION 310.

RELATIVES OF PREVIOUS GENERATIONS WHO ARE NOT ENTITLED TO INHERIT.

* * * *

Dhamma.

The rule whereby elder relatives shall not inherit is as follows:—

On a co-heir dying childless, his or her younger brothers and sisters are entitled to inherit, but not his or her elder brothers and sisters.

(1) I.L.R. 4 Ran. 62.

Manugye.

The rule whereby elder relatives are debarred from inheritance is as follows :—

The co-heirs live apart from one another. One of them dies without leaving a wife or a husband or a child. His or her estate shall be partitioned among his or her younger brothers and sisters, but not among the elder co-heirs.

* * * *

Rajabala.

The rule whereby younger brothers and sisters come in for a share of their elder brother's or sister's estate is as follows :—

A couple live apart from their parents and die childless. The younger brothers and sisters of the deceased are entitled to inherit the deceased's estate, but not their parents and elder brothers and sisters. The estate of a deceased person shall not be inherited by his or her elder relatives.

* * * *

Manu.

The co-heirs live apart from one another after each has received his or her share of inheritance. On the death of any of them, his or her estate shall be inherited by his or her younger brothers and sisters, but not by the elder brothers and sisters or other elder relatives.

Panam.

* * * *

The co-heirs live apart from one another. On the death of any of them without heirs, his or her younger brothers and sisters shall inherit the estate.

* * * * "

In short, the 2nd respondent Lim Kar Gim, the elder brother of the deceased Margaret Chor Pine, is excluded by the younger sisters, namely, Mrs. Iris

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U THAUNG SEIN, J.

Maung Sein and Mrs. Bella Orr. Hence the decree of the trial Court will be modified and the name of Lim Kar Gim will be struck off from the letters-of-administration.

Accordingly, this appeal (No. 68 of 1951) and Civil First Appeals Nos. 69, 70 and 71 of 1951 shall stand dismissed. The appeals by Mrs. Iris Maung Sein in Civil First Appeals Nos. 73 and 75 of 1951 are allowed and letters-of-administration will be issued in the sole name of Mrs. Iris Maung Sein. The appellant shall pay the costs in this appeal (No. 68 of 1951) and there will be no order for costs in the connected appeals by him. Advocate's fee in this Court is fixed at Rs. 340.

APPELLATE CRIMINAL.

Before U Bo Gyi, J.

H.C. 1953

J. F. AMBROSE (APPELLANT)

v.

Oct. 20.

THE UNION OF BURMA (RESPONDENT).*

Sanction to prosecute—Assistant Secretary to Ministry of Information—Sale of Cossor radios on behalf of Government—Breach of trust in respect of monies received—Penal Code, s. 409—Special Judge (SIAB & BSIA), competency to try—Act No. L of 1951—Sanction to prosecute public servant, necessity of—Entrustment of sale proceeds, how inferred.

Held : A Special Judge (BSIA & SIAB) is competent to try an offence under s. 409 of the Penal Code when the criminal breach of trust has been committed in respect of public property. The relevant provision of law in Act No. L of 1951 (The Special Investigation Administration Board and Bureau of Special Investigation Act, 1951) has not been questioned as unconstitutional.

Held : No sanction is necessary under s. 197 of the Code of Criminal Procedure for the prosecution of appellant as a public servant for he was neither acting nor purporting to act in the discharge of his official duty in committing the offence.

King-Emperor v. *Maung Bo Maung*, 13 Ran. 540, followed.

Held also : Under s. 405 of the Penal Code the offence of criminal breach of trust can be committed by any person who is " in any manner entrusted with property or with any dominion over property " and the law does not require any express entrustment.

Appellant in person.

Ba Kyaing (Government Advocate) for the respondent.

U BO GYI, J.—These four appeals arise out of Criminal Regular Trial Nos. 2/52, 3/52, 30/52 and 31/52 respectively of the Court of the Special Judge (2)

* Criminal Appeal Nos. 358/359/360/361 of 1953 being appeals from the order of U Ba Swe, Special Judge (2) (SIAB & BSIA) in Criminal Regular Trial Nos. 2/3/30/31 of 1952.

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J. F. AMBROSE v. THE UNION OF BURMA.

U BO GYI. J.

(SIAB & BSIA), Rangoon, in which the appellant J. F. Ambrose, has been convicted under section 409 of the Penal Code for criminal breach of trust in respect of the sale proceeds of Cossor radios belonging to the Government and sentenced in each case to three years' rigorous imprisonment, all the sentences to run concurrently.

Apart from the evidence relating to the specific charges framed against the appellant, several common questions of fact and law arise in the four cases and since the four appeals have been heard together, this order will cover all of them.

At all times material to the cases, the appellant was Assistant Secretary to the Ministry of Information of the Government of the Union of Burma. The Government had procured Cossor radios and the evidence shows that appellant as Assistant Secretary sold them on behalf of the Government to members of the public, particularly to Government servants. Such sales were permitted by his superior Officer U Thant, Secretary to the Ministry of Information. Appellant had under him Office Superintendent U Than, Accountant Maung Ko, and clerks Maung Thaung Pe and Ma Khin Myint Myint besides others who, however, do not figure in the cases. It appears from the evidence that the procedure adopted in the office in connection with the sales of radios was for one or other of the clerks to prepare memoranda of issue and chalans, both in triplicate and take them to the appellant in his office room together with the monies paid in by the purchasers. It also appears that sometimes appellant received the monies direct especially from those who were of standing, but usually the memoranda and chalans together with the monies were taken to the appellant who signed the memoranda and sent them out

retaining the chalans and the monies with him. Sales were made over a considerable period of time and eventually, it was found out that large sums of money did not reach the Union Bank of Burma. Appellant was, therefore, prosecuted with the result mentioned above.

The first legal objection taken up before me is that the learned Special Judge is not competent to try an offence under section 409 of the Penal Code. But, as explained by the learned trial Judge, he is competent to try an offence under section 409 of the Penal Code when the criminal breach of trust has been committed in respect of public property. The relevant provision of law in Act No. L of 1951 has not been questioned as being unconstitutional and, as at present advised, I see no reason to hold it to be so.

The decision in *King-Emperor* v. *Maung Bo Maung* (1) is a complete answer to the contention that sanction is necessary under section 197 of the Code of Criminal Procedure for the prosecution of the appellant. The next contention is that there was no entrustment of the sale proceeds of the Cossor radios to the appellant under any official orders. But under section 405 of the Penal Code, the offence of criminal breach of trust can be committed by any person who is "in any manner entrusted with property or with any dominion over property. . . . . " and the law does not require any express entrustment of property or dominion over property before a person can be run in for criminal breach of trust.

I shall now proceed to consider the facts of each case.

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(1) 13 Ran. p. 540.

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U BO GYI, J.

Criminal Appeal No. 358 of 1953 arising out of Criminal Regular Trial No. 2 of 1952. The charge is in respect of K 1,395 being the sale proceeds of three Cossor radios sold to Mr. Wong, U Po Hman and U Hla Shwe. Richard Maung Lat (PW 6) accompanied two boys Arthur and Edward Wong to appellant's office and saw them pay K 375 to the appellant, who thereupon made over an Issue Memorandum to the boys and they went and took over a radio from the Chief Engineer of the Radio Department. Ko Ba Thwin (PW 5) saw U Po Hman pay K 400 to a lady clerk in appellant's office and he states that the clerk went into an office room with the money and came out with an Issue Memorandum. Armed with that document, U Po Hman went and took delivery of a Cossor radio. U Po Hman is now dead. The clerk mentioned by the witness is, apparently, Ma Khin Myint Myint (PW 2). She does not remember having received any money from U Po Hman but can describe the procedure adopted by her when purchases were made at her office. The third purchaser U Hla Shwe has not been examined. It is said that he was summoned before the Court but did not appear. The Office Superintendent, U Ba Than (PW 3), states that on receipt of K 620 from U Hla Shwe, he sent in the money together with the relevant documents and an Issue Memorandum was issued by the appellant.

The relevant Issue Memoranda have been exhibited in the case and appellant admits having signed them. In each of them appellant acknowledged receipt of the money for the radio purchased. When the accounts and relevant papers kept in appellant's office and in the Accountant-General's office, relating to the sales in question were checked,

it was found that the sale proceeds of the three radios in question had not been credited to the Government. The relevant chalans acknowledging receipt of the monies could not be produced. The appellant was a high official in the office and his story that he did not know whether the monies, if received, were credited to the Bank cannot be accepted. It is contended that an officer of the Union Bank of Burma should have been called to show whether the monies have been credited to the Government; but if the monies have been credited, relevant chalans would have been found either at appellant's office or in the Accountant-General's office. When the prosecution have made out a very strong *primâ facie* case against the appellant, he should have called an Officer of the Bank, if he so wished, to show that the monies have been paid into the Bank. He has not done so. I accordingly find the charge established. I may here remark in passing that in this case and in Criminal Regular Trial No. 3 of 1952, separate charges should have been framed in respect of the sale proceeds of each radio.

Criminal Appeal No. 359 of 1953 arising out of Criminal Regular Trial No. 3 of 1953. The charge in this case is in respect of K 1,860, being the sale proceeds of three Cossor radios sold to Lt. Soe Myint, U Ba Shin (Shein) and U San Aung. Lt. Soe Myint (PW 5), personally paid K 620 to the appellant. U San Aung (PW 6) paid K 620 to the Office Superintendent who sent a clerk with the money and relevant papers into an office room. The clerk came out and gave him the Issue Memorandum Exhibit (e) on the strength of which he went and took delivery of a Cossor radio from the Chief Engineer of the Radio Department.

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U BO GYI, J.

U Aye Cho (PW 7) bought a Cossor radio for U Ba Shein and paid K 620 direct to the appellant who issued the Issue Memorandum Exhibit (o). I can find no reason to disbelieve the evidence of these three witnesses. Appellant, in his defence, states that he did not accept any money and that, if he did so, he gave it to the Accountant to pay into the Union Bank of Burma. No chalans have been produced, or could be found for these monies. After a consideration of all the evidence on the record, oral and documentary, I find that the charge has been established.

Criminal Appeal No. 360 of 1953 arising out of Criminal Regular Trial No. 30 of 1952. This case relates to criminal breach of trust in respect of K 1,610 made up of thirty-two first instalments paid for thirty-two Cossor radios sold by the appellant. Appellant states that nine of the purchasers have been examined for the prosecution in this case, but I can find only seven such purchasers having been examined. This difference, however, is not material. Appellant further contends that one of the purchasers, Bo Kyaw Soe, has, according to Maung Thaung Pe, paid the first instalment. This mistake also is immaterial in view of the fact that the accuracy of the other facts of the charge has not been questioned. The appellant admits having signed all the Issue Memoranda in respect of the thirty-two radios, and the radios were taken delivery of on the strength of those documents. No chalans have been found or could be produced. For the reasons given above, I consider that this charge also is substantially established.

Criminal Appeal No. 361 of 1953 arising out of Criminal Regular Trial No. 31 of 1952. The charge in this case is in respect of K 5,615 made up of a

hundred and nineteen first instalments paid in for Cossor radios sold by the appellant. Appellant in his arguments states that sixty-three of the purchasers have been examined in this case. The witnesses for the prosecution, as do those in Criminal Regular Trial No. 30 of 1952, have described the procedure adopted when sales of radios were made in the appellant's office. Appellant admits having signed all the Issue Memoranda. Each of these documents acknowledges receipt of the first instalment paid in for the radio sold. Here also, no chalans have been produced or could be found; and in all the circumstances appearing in the case, I agree with the learned trial Judge that the offence has been brought home to the appellant.

Now, the appellant held a responsible position in the Government Service and the offences of criminal breach of trust committed by him were spread over a considerable length of time and involved large sums of money. In all the circumstances of the case, I am not prepared to hold that the sentences are unduly excessive.

The appeals are dismissed.

APPELLATE CIVIL.

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

H.C. 1953

Aug. 25.

MA OHN KYI AND FIVE OTHERS (APPELLANTS)

v.

DAW HNIN NWE AND THREE OTHERS (RESPONDENTS).*

Transfer of Property Act, s. 58, clause (f)—*Mortgage of immoveable property by deposit of title-deeds—Alternative claim for recovery of loan secured by promissory-note—Burmese Buddhist couple—Tenants-in-common—Neither party can alienate the interest of the other party in the joint property of the marriage without consent.*

Held : Unless there is delivery of title-deeds to the creditor or his agent at the time of the loan, it would not constitute, even if other ingredients of clause (*f*) of s. 58 of the Transfer of Property Act are satisfied, a mortgage by deposit of title-deeds, and it would not be possible to hold that the loan was secured as the charge became effective only with the deposit of title-deeds.

Held : A Burmese Buddhist husband has no power to mortgage or sell the entire joint property acquired by either of them whether before or during marriage except in the circumstances in which it might properly be said that he has acted with the consent of his wife or as her agent, as they are tenants-in-common in the property.

N. A. V. R. Chettyar Firm v. *Maung Than Daing*, (1931) 9 Ran. Series 524 at 539; Overruling *Ma Paing*'s case, (1927) I.L.R. 5 Ran. 296 ; *U Pe* v. *U Maung Maung Kha*, (1932) 10 Ran. Series 261 at 279-280, followed.

G. N. Banerji for the appellants.

U Thein for the respondents Nos. 1 and 2.

N. Bose for the respondents Nos. 3 and 4.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—U Po Aung instituted a suit on the Original Side for recovery of a sum of

* Civil 1st Appeal No. 106 of 1951 against the decree of the High Court, Original Side, in Civil Regular No. 88 of 1949, dated the 9th November 1951.

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U TUN BYU, C.J.

Rs. 68,000 due, as principal and interest, on a mortgage by deposit of title-deeds, in respect of the immoveable property at No. 54/56, University Avenue; and in the alternative for a decree for the amount due on the promissory-note, dated the 14th September, 1946. This deposit of title-deeds was also said to have been made by U Thein Maung on the 14th September, 1946. U Po Aung died after the suit was instituted, and Daw Hnin Nwe and Ma Khin Ma Gyi, who are the 1st and 2nd respondents in the present appeal, had been brought in as his legal representatives. Daw Aye Khin, wife of U Thein Maung, was dead at the time of the institution of the suit and the appellants, including the 4th respondent Maung Maung, were sued in their capacity as legal representatives of Daw Aye Khin. Her husband U Thein Maung was sued both in his personal capacity as well as a legal representative of Daw Aye Khin. The 6th appellant Ma San Myint (*a*) Ma San Mya, on the other hand, claimed the immoveable property at No. 54/56, University Avenue as hers on the ground that it had been purchased for her.

A decree was passed in favour of the plaintiffs-respondent Daw Hnin Nwe and Ma Khin Ma Gyi; and the six defendants-appellants appealed against the said decree, making U Thein Maung and his son Maung Maung, who were also defendants at the trial, respondents in this appeal.

The first question, which might be considered in this appeal, is, whether a deposit of title-deeds was, in fact, made at all in the present case. Clause (*f*) of section 58 of the Transfer of Property Act reads—

"(*f*). Where a person in any of the following towns, namely, the towns of Rangoon, Moulmein, Bassein and Akyab, and in any other town which the President may, by notification in the Gazette, specify in this behalf, delivers to a creditor or

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his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds."

It will be observed that under clause (*f*) of section 58 of the Transfer of Property Act actual delivery of title-deeds is also essential in order to constitute a mortgage by deposit of title-deeds. In other words, unless there is delivery of title-deeds to the creditor or his agent it would not constitute, even if other ingredients of clause (*f*) are satisfied, a mortgage by deposit of title-deeds, as the charge becomes effective only with the deposit of title-deeds. Thus, in the present appeal unless it is also proved that there was a deposit of title-deeds it would not be possible to hold that the loan of Rs. 50,000, which U Po Aung made to U Thein Maung, was secured by a mortgage by deposit of title-deeds.

U Po Aung's deposition which was recorded in Criminal Regular Trial No. 37 of 1947 was put in as evidence in the present case. It is clear from his deposition that U Thein Maung did not deposit any title-deed with him at the time U Thein Maung received a cheque for Rs. 50,000 from him, and that took place at about 10 a.m. According to U Po Aung, U Thein Maung was alleged to have brought the title-deeds at about midday on the day in question and deposited them with him in connection with the loan of Rs. 50,000, as had been agreed upon between them, and this was on the 14th September, 1946, which fell on a Saturday. It was alleged that U Thein Maung visited U Po Aung's house again on the 16th September, 1946 and took away the title-deeds of the premises at No. 54/56, University Avenue from him for the purpose of raising a fresh loan with which U Thein Maung was to repay back the loan of Rs. 50,000 due to U Po Aung.

U Ba Nyunt, who was present with U Po Aung on the 14th and 16th September, 1946, gave similar evidence. U Ba Nyunt also stated that after U Thein Maung took away the cheque for Rs. 50,000 from U Po Aung, he brought the title-deeds of the immoveable property to U Po Aung two or three hours afterwards.

The Exhibit D cheque for Rs. 50,000, which U Po Aung delivered to U Thein Maung, was cleared by Messrs. Oversea Chinese Banking Corporation on the 16th September, 1946. This is what the stamp endorsement on Exhibit D discloses, and Khoo Sein Po, a Sub-Manager of Messrs. Oversea Chinese Banking Corporation, also gave evidence to the same effect. He also stated that the title-deeds of the premises at No. 54/56, University Avenue were returned to U Thein Maung only on the 16th September, 1946. We accept his evidence in this respect. It will not, in the circumstances, be correct to accept the statement of U Po Aung or that of U Ba Nyunt that the documents of title, relating to the premises at No. 54/56, University Avenue were, in fact, delivered to U Po Aung on the 14th September 1946. A bank is not likely to part with the title-deeds, which have been deposited with it as security for a loan made by it, before the loan is repaid, and no adequate reason has been advanced in the present case which could reasonably induce Messrs. Oversea Chinese Banking Corporation to part with the title-deeds of the premises at No. 54/56, University Avenue before the cheque for Rs. 50,000 was actually cleared. The amount which U Thein Maung owed to Messrs. Oversea Chinese Banking Corporation is large, and when this circumstance is considered with the evidence of Khoo Sein Po, it is only reasonable to hold that the title-deeds of the premises at No. 54/56,

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University Avenue, were, in fact, with the Bank on the 14th and 15th September, 1946. It follows that the title-deeds were not, in fact, delivered to U Po Aung on the 14th September, 1946. U Thein Maung also stated that the title-deeds were received back from Messrs. Oversea Chinese Banking Corporation only on the 16th September, 1946. Thus, it becomes clear also that the writing in ink on Exhibit E memorandum, dated the 14th September, 1946, was inserted only on the 16th September, 1946 after the title-deeds had been received back from Messrs. Oversea Chinese Banking Corporation.

It has not been asserted in the present case by either U Po Aung or U Ba Nyunt that any title-deeds of the premises at No. 54/56, University Avenue, was actually made over to either of them on the 16th September, 1946; nor was U Thein Maung cross-examined in this respect. The relevant words in Exhibit H, which U Thein Maung signed on the 16th September, 1946, were in these terms—

> "The following Title Deeds, Documents, Plan of the Site & Insurance Policy which are deposited with U Po Aung of University Estate, Rangoon, for the loan of Rs. 50,000 as per Pro-note, d/ 14th Sept. 1946, are temporarily taken away by me for arrangement with the Bank in connection with money transaction. . . ."

It will be observed that the Exhibit H raises, at most, an implication that the title-deeds had been delivered to U Po Aung on the 14th September, 1946. This is an implication which can be rebutted, and, as we have indicated earlier, there is the evidence of Khoo Sein Po, a Sub-Manager of Messrs. Oversea Chinese Banking Corporation, to prove to the contrary, and he is supported by the stamp endorsement on the reverse of Exhibit D cheque for Rs. 50,000. It is not alleged in the present case

that there was any mortgage over the property in question on a basis other than that of a mortgage by deposit of title-deeds. The finding of the learned Judge on the Original Side on this aspect of the case is clearly not borne out by the evidence on the record, and we accordingly hold that the title-deeds of the premises at No. 54/56, University Avenue, were not delivered to either U Po Aung or U Ba Nyunt, at any time in connection with the loan of Rs. 50,000.

The plaintiffs-respondents, however, have claimed, in the alternative, a simple money decree, and they are, in accordance with the evidence on the record, entitled to a decree in this respect. The Exhibit B promissory-note for Rs. 50,000 was executed by U Thein Maung alone. His wife Daw Aye Khin was not present at U Po Aung's house either on the 14th or the 16th September, 1946. U Thein Maung and Daw Aye Khin, as a Burmese Buddhist couple, held the properties which they acquired, whether before or during their marriage, as tenants-in-common, and each had a vested right in those properties. It was accordingly contended by the learned Advocate appearing on behalf of appellants, who were legal representatives of Daw Aye Khin, that no decree could properly be passed against them in the light of the fact that the promissory-note for Rs. 50,000 was executed by U Thein Maung alone, and not by Daw Aye Khin.

In *N. A. V. R. Chettyar Firm* v. *Maung Than Daing* (1) Page C.J., observed:

"But I go further, for while it is well settled that during the subsistence of a Burmese Buddhist marriage neither party to the marriage is entitled to alienate the interest of the other party in the joint property of the marriage without such other

(1) (1931) 9 Ran. Series 4 at 539.

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party's consent ; in my opinion, before and until *Ma Paing*'s case was decided it was equally well settled that either the husband or the wife was competent to alienate or otherwise dispose of his or her own interest in the joint property of the marriage."

And *Ma Paing*'s case (1) was overruled by the Special Bench which decided the case of *N. A. V. R. Chettyar Firm* v. *Maung Than Daing* (2).

In the subsequent case of *U Pe* v. *U Maung Maung Kha* (3) where their Lordships of the Privy Council, after their attention was drawn to the case of *Ma Paing* (1) and the *Dhammathats,* observed :

> " The outcome of it is that there is nothing in them which would point more to joint ownership than to tenancy-in-common, and therefore it is quite right to prefer the one which leads to the least evil consequences. After all, the ancient law has still a wide scope if admittedly all property acquired by either or both of the spouses before or during marriage passes into the common enjoyment and it is only dealt with by either according to his or her vested interest therein."

Thus, a Burmese Buddhist husband has no power to mortgage or sell the entire joint property acquired by either of them, whether before or during marriage, except in the circumstances in which it might properly be said that he has acted with the consent of his wife or as her agent. What proof is required to establish this will, of course, depend on the circumstances of each case. The question then arises as to whether U Thein Maung can, in the circumstances proved in the present case, be said to have also taken the loan of Rs. 50,000, whether expressly or impliedly, on behalf of his wife Daw Aye Khin.

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(1) (1927) I.L.R. 5 Ran. 296. (2) (1931) 9 Ran. Series 524 at 539.
(3) (1932) 10 Ran. Series 261 at 279-280.

The premises at No. 54/56, University Avenue were, as we have indicated earlier, subject to a mortgage by deposit of title-deeds with Messrs. Oversea Chinese Banking Corporation for loans owed to Messrs. Oversea Chinese Banking Corporation, and it was said that about Rs. 50,000 was outstanding at the time U Thein Maung obtained the loan of Rs. 50,000 from U Po Aung. The questions that were put to U Thein Maung and the answers made by him in this connection were:

"*Q.* When you deposited these title-deeds in the Bank you told the Bank that the property was yours ?

A. Yes, both of us. My wife's and my property.

Q. But, your wife never signed the promissory-note in favour of the Bank ?

A. No.

Q. You signed the promissory-note for yourself and on behalf of your wife ?

A. Yes.

Q. So in other words, you acted as your wife's attorney ?

A. Yes, in that particular case.

Q. Although you acted as your wife's attorney, the promissory-note which you signed in favour of the Bank was not drawn in the name of yourself and your wife but it was drawn in the sole name of yourself ?

A. No, it was drawn in the joint name.

Q. I put it to you that since you received that power-of-attorney from your wife, you represented her many times before Courts of Justice ?

A. Yes, I think two or three times in Police Court."

It becomes obvious therefore that the loan of Rs. 50,000 obtained from U Po Aung was paid to Messrs. Oversea Chinese Banking Corporation and that this loan of Rs. 50,000 was taken by U Thein

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Maung to repay the loans which he and his wife Daw Aye Khin owed to Messrs. Oversea Chinese Banking Corporation. The loan from U Po Aung was thus utilised in repayment of the loans due to Messrs. Oversea Chinese Banking Corporation and for which Daw Aye Khin was also personally liable. It could, in the circumstances, be said that U Thein Maung was also acting, at least impliedly, on behalf of his wife Daw Aye Khin in respect of the loan for Rs. 50,000, which he obtained from U Po Aung. The evidence also shows that U Thein Maung held a general power-of-attorney from Daw Aye Khin.

As regards the contention that the premises at No. 54/56, University Avenue belong to Ma San Myint, *(a)* Ma San Mya, we must say that we cannot see any merit in this contention. U Thein Maung had dealt with these premises on the basis that they belonged to him and his wife Ma Aye Khin, in his dealings with Messrs. Oversea Chinese Banking Corporation, both before and after he obtained the sum of Rs. 50,000 from U Po Aung. The answers which U Thein Maung made to certain questions that were put to him in cross-examination also lead to a similar conclusion,—

> "*Q.* You represented to U Po Aung that the house belonged to you and your wife although it was in the name of your minor daughter ?
>
> *A.* No, I said that I got the title-deeds although they were in the name of the minor daughter.
>
> *Q.* Did you state that the property belonged to you ?
>
> *A.* I did not say particularly. They knew that it belonged to me. I do not think that any discussion arose over this point."

For the reasons which we have set out above, the judgment and decree of the learned Judge on the

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Original Side granting a preliminary mortgage decree against the defendants are set aside and there will, instead, be a decree for payment of a sum of Rs. 84,388 by the defendant U Thein Maung and by the other defendants as the legal representatives of Daw Aye Khin; and in the circumstances of this case the parties are to bear their own costs throughout. And interest at 6 per cent per annum on Rs. 84,388 from the date of the decree on the Original Side is also granted.

CRIMINAL REVISION.

Before U Thaung Sein, J.

H.C. 1953

Aug. 19.

MA THAN (APPLICANT)

v.

MAUNG TUN BAW (RESPONDENT). *

Criminal Procedure Code, s. 406-A—Substituted by s. 118, Criminal Procedure (Amendment) Act, 1945—Appeal lies to Sessions against orders under ss. 488-489—For enhancement only, no appeal but revision lies.

Held : It is clear from s. 406-A of the Criminal Procedure Code that an appeal is allowed to any person who has been ordered to pay maintenance under s. 488 of the Criminal Procedure Code, *i.e.* a husband ; or to a wife whose application has been rejected. This section does not permit a wife to apply for enhancement of the amount of maintenance by means of an "appeal" against the order of the Magistrate. There being no right of appeal, the application can be converted into a revision proceeding.

Ba Thawt for the applicant

Thein Maung for the respondent.

U THAUNG SEIN, J.—This case was originally filed as an appeal but was later converted into a revision proceedings under the following circumstances: The applicant Ma Than applied under section 488 of the Criminal Procedure Code in the Court of the learned Western Subdivisional Magistrate, Rangoon, for maintenance against her husband Maung Tun Baw (respondent) and obtained an order directing the latter to pay Rs. 30 per month. However, she was disappointed with the amount awarded by the learned Magistrate and accordingly "appealed" against the order under section 406-A

* Criminal Revision No. 159-B of 1953 being Review of the order of the Western Subdivisional Magistrate, Rangoon, in Criminal Misc. Trial No. 232 of 1952, dated the 23rd March 1953.

of the Criminal Procedure Code as substituted by section 118 of the Criminal Procedure Code (Amendment) Act, 1945 (Burma Act No. XIII of 1945). Prior to 1945 no appeal was allowed in respect of orders passed by Magistrates under sections 488 and 489 of the Criminal Procedure Code and persons aggrieved by such orders had to resort to applications in revision. But with the amendment of section 406-A of the Criminal Procedure Code appeals were allowed in certain cases as stated in that section which reads:

"406-A. Any person aggrieved by an order made under section 488, directing him to pay maintenance on account of his wife or child, or rejecting an application for maintenance by a wife or child, or by an order made under section 489, rejecting or allowing an application for alteration of a maintenance allowance, may appeal against such order to the Court of Session."

The learned Counsel for the respondent contended that no appeal lay in the present case as the application by Ma Than under section 488 of the Criminal Procedure Code had not been rejected and on the contrary had been allowed and the only complaint is in respect of the amount awarded as maintenance. There is a good deal of force in this contention as according to the wording of section 406-A of the Criminal Procedure Code it is clear that an appeal is allowed to any person who has been ordered to pay maintenance under section 488 of the Criminal Procedure Code, *i.e.*, a husband, or to a wife whose application has been rejected. This section does not permit a wife to apply for enhancement of the amount of maintenance sanctioned under section 488 of the Criminal Procedure Code by means of an "appeal" against the order of the Magistrate.

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MA THAN v. MAUNG TUN BAW.

U THAUNG SEIN, J.

There being no right of appeal against the order under consideration the learned Counsel for Ma Than made a verbal application that the "appeal" be converted into a revision proceeding. As I considered that there are grounds for the revision of the order I allowed the application and the proceedings were converted into a revision case.

Now the respondent Maung Tun Baw is admittedly in receipt of a salary of Rs. 375 net per month. No doubt he is also required to maintain some children by a former wife but nevertheless he must also maintain the present applicant Ma Than. The learned Magistrate took great pains to calculate the amounts required by the respondent as messing fees, transportation charges, etc., but paid scant attention to the needs of the applicant. In my opinion a sum of Rs. 30 is hardly adequate and the applicant cannot possibly maintain herself on such a paltry figure. Accordingly, the order of the learned Magistrate will be modified and the amount of maintenance awarded to the applicant will be altered from Rs. 30 to Rs. 50 per month.

APPELLATE CIVIL.

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

H.C. 1953

Sept. 8.

SURYA NATH SINGH (APPELLANT)

v.

SHIO KARAN SINGH AND TWO OTHERS (RESPONDENTS).*

Civil Procedure Code, Order 26, Rule 4 (1) (a)—Issue of commission for examination of a witness resident outside jurisdiction—Order on the application not a judgment within the meaning of s. 20, Union Judiciary Act, 1948—No appeal lies—Revisional application also not competent.

Held: An order refusing to issue a commission to examine witnesses cannot, in effect, be said to have put an end to a suit or proceeding which is pending in a Court of law. Such an order clearly does not decide any right or liability of the parties in a suit, and such an order therefore does not amount to a judgment within the meaning of clause 13 of the Letters Patent, the equivalent of s. 20 of the Union Judiciary Act which permits of an appeal.

In re *Dayabhai Jiwandas and others* v. *A. M. M. Murugappa Chettiar*, I.L.R. 13 Ran. 457; *U Ohn Khin* v. *Daw Sein Yin*, (1949) B.L.R. (H.C.) 201; *Tan Chu Khaing and two* v. *Daw Chein Pon*, Special Civil Appeal No. 1 of 1951; *Mahomed Hussain* v. *Hoosain Hamadance & Co.*, (1925) I.L.R. 3 Ran. 293; *Tuljaram Row* v. *Alagappa Chetty*, (1912) 35 Mad. p. 1; *Dhanbai Burjorji Cooper* v. *Bablibai Shapurji Sorabji and others*, (1934) A.I.R. Bom. 168; *Toremull Dilsook Roy* v. *Kunj Lall Manohar Dass*, A.I.R. (1920) Cal. 894, followed.

Held also: S. 20 of the Union Judiciary Act shows moreover that no revision application lies in law against the order dismissing the application for issue of commission.

Appellant in person.

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

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* Civil Misc. Appeal No. 19 of 1952 against the order of the High Court, Original Side, in Civil Regular No. 3 of 1950, dated the 5th February 1952.

H.C. 1953

SURYA NATH SINGH v. SHIO KARAN SINGH AND TWO OTHERS.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—Surya Nath Singh, who is the plaintiff in Civil Regular No. 3 of 1950 of the Original Side of the High Court, applied in August, 1950, for the issue of a commission to examine witnesses in India on interrogatories. At about the same time, Shio Karan Singh, who is the 1st respondent in the above suit, also applied for the issue of a commission to examine certain witnesses in India on interrogatories. Subsequently, in October, 1950, Baij Nath Singh and Chandra Bir Singh, who are the 2nd and 3rd defendants, also made a similar application for the examination of witnesses in India. These applications were all granted; and they had been executed and returned from India.

On the 10th of December, 1951, it was said that Baij Nath Singh and Chandra Bir Singh again applied for the issue of a commission to India and that their application, for the issue of commission, was granted. On the 21st December, 1951, Surya Nath Singh also applied for the issue of a fresh commission to examine certain witnesses in India, and his application was dismissed.

His present appeal is against the said order refusing to grant his application for the issue of a fresh commission. A preliminary objection has been raised on behalf of the respondents that no appeal lies, in law, against the order of the learned Judge on the Original Side, dismissing the second application of the plaintiff for the issue of a commission to examine the witnesses in India. Section 20 of the Union Judiciary Act, 1948, is in the following terms:—

"20. An appeal shall lie to the High Court from the judgment of a single Judge of the High Court sitting in the

exercise of its original jurisdiction or in the exercise of its appellate jurisdiction, not including revisional jurisdiction; provided that in the latter case the Judge declares that the case is a fit one for appeal."

Section 20 of the Union Judiciary Act, 1948, might be described as an equivalent of clause 13 of the Letters Patent of the late High Court of Judicature at Rangoon. The meaning of the expression "judgment" in clause 13 of the Letters Patent was finally decided in the case of in re *Dayabhai Jiwandas and others* v. *A. M. M. Murugappa Chettiar* (1). So far as the late High Court of Judicature at Rangoon, prior to the Independence of Burma, was concerned, it was finally held in that case that the word "judgment" in clause 13 means a decree in a suit where the rights of the parties at issue are determined; and Sir Arthur Page C.J., observed, at page 475:

> "A final judgment is a decree in a suit by which all the matters at issue therein are decided. A preliminary or interlocutory judgment is a decree in a suit by which the right to the relief claimed in the suit is decided, but under which further proceedings are necessary before the suit in its entirety can be determined.
>
> All other decisions are 'orders' and are not 'judgment' under the Letters Patent, or appealable as such."

The Full Bench decision of the Rangoon High Court in the case of in re *Dayabhai Jiwandas and others* v. *A. M. M. Murugappa Chettiar* (1) of the High Court of Judicature at Rangoon was, in effect, approved in the case of *U Ohn Khin* v. *Daw Sein Yin* (2) which was decided after the Independence of Burma. In the subsequent case of *Tan Chu Khaing and two* v. *Daw Chein Pon* (3), it was held that the expression

(1) I.L.R. 13 Ran. p. 457. (2) (1949) B.L.R. (H.C.) p. 201.
(3) Spl. Civil Appeal No. 1 of 1951.

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SURYA NATH SINGH v. SHIO KARAN SINGH AND TWO OTHERS.

U TUN BYU, C.J.

"judgment", occurring in clause 20 of the Union Judiciary Act, possesses the same meaning as was attributed to it in the case of in re *Dayabhai Jiwandas and others* v. *A. M. M. Murugappa Chettiar* (1).

An order refusing to issue a commission to examine the witnesses cannot, in effect, be said to have put an end to a suit or proceeding, which is pending in a Court of law. It is difficult to conceive how such an order can be said to amount to an adjudication on the merits of the case, which are in issue, whether directly or indirectly, between the parties in a suit. Such order clearly does not decide any right or liability of the parties in a suit; and such an order, therefore, does not amount to a judgment.

It was held in *Mahomed Hussain* v. *Hoosain Hamadanee & Co.* (2) that an order dismissing an application for the examination of a witness on commission is not a judgment within the meaning of Clause 13 of the Letters Patent, where the observation made in the case of *Tuljaram Row* v. *Alagappa Chetty* (3) was cited with approval, and it was in these words:

> " An order refusing to issue a commission, however serious the ultimate results to the party, is a purely interlocutory order and not a judgment terminating a suit or other proceedings or affecting the merits."

The decision of the Madras Full Bench in the case of *Tuljaram Row* v. *Alagappa Chetty* (3) was also approved by Beaumont C. J., in a Bombay case of *Dhanbai Burjorji Cooper* v. *Bablibai Shapurji Sorabji and others* (4). The Calcutta High Court also arrived at the same conclusion in the case of

(1) I.L.R. 13 Ran. p. 457.
(2) (1925) I.L.R. 3 Ran. p. 293.
(3) (1912) 35 Mad. p. 1.
(4) (1934) A.I.R. Bom. p.168.

Toremull Dilsook Roy v. *Kunj Lall Manohar Dass* (1).

The preliminary objection must, in the circumstances of the present case, be upheld. Section 20 of the Union Judiciary Act, shows, moreover, that no revision application lies in law against the order of the learned Judge on the Original Side of the High Court.

We agree with the learned Judge on the Original Side that no good reasons exist in the present case for the issue of second commission, as desired by Surya Nath Singh. The latter, who is the plaintiff, ought not to be encouraged in what he sought to do at the present, namely to attempt to establish his case through his opponents' witnesses, especially when he has been afforded an opportunity of cross-examining the witnesses for the opposite side on an earlier occasion. It will also not be proper, it seems to us, at the present, to allow him a further opportunity of showing that a witness who has been examined on commission in India by the opposite side was not really speaking the truth. The fault, if any, lies with the plaintiff himself, if the witness or the witnesses, who had been examined by the opposite side on an earlier commission, had not been cross-examined or broken down on the points, on which he now desires to contradict them. The issue of a commission is, moreover, discretionary, and it follows that good grounds must exist to induce us to interfere with the discretion of the learned Judge on the Original Side, of which we see none in the present case.

The appeal is, accordingly, dismissed with costs; Advocate's fee K 51.

(1) 55 I.C. (1920) p. 766; A.I.R. (1920) Cal. p. 894.

APPELLATE CRIMINAL.

Before U Thaung Sein, J.

H. C. 1953

Oct. 2.

TAY TA (*a*) TAY YA (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Penal Code, s. 397—Robbery or dacoity with grievous hurt—Words "uses any deadly weapon, or"—Deleted by Burma Act IV of 1940—Minimum punishment, 7 years.

Held : The charge as framed against the appellant contained the words "using a deadly weapon" which was unnecessary as they have been deleted from s. 397 of the Penal Code by Burma Act IV of 1940.

Held also : S. 397 of the Penal Code clearly lays down that where a robber or a dacoit causes grievous hurt to any person during a robbery or dacoity he is liable to a minimum punishment of 7 years' rigorous imprisonment.

For appellant *Nil.*

For respondent *Nil.*

U THAUNG SEIN, J.—At about 5 p. m. on the 6th February 1953 three armed *lusoes* appeared at the hut of an Indian woman named Indrani (PW 4) at Myo-gyo-pyit village in Mandalay District and after overawing the inmates ransacked the place for cash and valuables. The house-owner was absent on a visit to some neighbours at the time but she soon returned and met the robbers who promptly relieved her of a gold ring from her nose. While giving up this ring she suddenly burst into yells for help and was joined by the other inmates of the house. One of the *lusoes* attempted to silence her by cutting her several times with a *dah*, but to no avail, and before

* Criminal Appeal No. 354 of 1953 being Appeal from the order of the 2nd Special Judge, Mandalay, in Criminal Regular Trial No. 4 of 1953, dated the 13th July 1953.

long a large crowd of villagers arrived at the scene. The result was that the *lusoes* fled from the house with the villagers in hot pursuit. At a short distance from the village the pursuers caught up with one of the robbers who turned on two of the villagers and cut them with a *dah*. Despite this attack with the *dah* the villagers held on to the *lusoe* and brought him back to the village. This *lusoe* was easily identified by the victims of the robbery as the one who was armed with a *dah* during the looting. The *lusoe* in question was none other than the appellant Tay Ta (*a*) Tay Ya.

The house-owner Indrani (PW 4), who received rather severe cuts on her hands, one of which was grievous, identified the appellant as the robber who cut her with a *dah*. On these facts the learned 2nd Special Judge, Mandalay, rightly convicted the appellant Tay Ta (*a*) Tay Ya of an offence under section 397 of the Penal Code and sentenced him to 7 years' rigorous imprisonment. However, the learned trial Judge is apparently unaware of the deletion of the words " uses any deadly weapon, or " from section 397 of the Penal Code by Burma Act IV of 1940. The charge as framed against the appellant contained these words which was unnecessary and also mentioned that he had caused grievous hurt to Indrani. It is clearly laid down in section 397 of the Penal Code, as it stands at present, that where a robber or a dacoit causes grievous hurt to any person during a robbery or dacoity, he is liable to a minimum punishment of seven years' rigorous imprisonment. In the present case the appellant was the *lusoe* who caused grievous hurt to Indrani and hence the sentence of 7 years' rigorous imprisonment meted out to him was appropriate. The appeal is accordingly dismissed.

APPELLATE CRIMINAL.

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

H.C. 1953

Sept. 30.

THAN MYINT (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Penal Code, s. 302, sub-clause (1) (b)—Premeditated murder—Premeditation, what constitutes, to bring killing within scope of sub-clause (1).

Held: To constitute a premeditated killing it is necessary that the accused should have had time to reflect, with a view to determine whether, he would kill or not, and that he should have determined to kill as a result of that reflection; that it is to say, the killing should be a predetermined killing upon consideration, and not a sudden killing under the momentary excitement and impulse of passion upon provocation given at the time or so recently before as not to allow time for reflection.

Kirpal Singh v. *The State*, (1951) 52 Cr.L.J. p. 1520, followed.

Maung Maung for the appellant.

Mya Thein (Government Advocate) for the respondent.

The judgment of the Bench was delivered by

U CHAN TUN AUNG, J.—The appellant Maung Than Myint, a Police Constable of a police out-post at Ma-so-yein Village, Ye-U Police Station jurisdiction, Shwebo District, has been found guilty of murder for causing the death of another police constable, Maung Po Htwe and has been sentenced to death under section 302 (1) (*b*) of the Penal Code by the Sessions Judge, Shwebo, sitting as Special Judge. He has now appealed against the

*Criminal Appeal No. 350 of 1953 from the order of the Sessions Judge, sitting as Special Judge, of Shwebo, in Special Judge Trial No. 68 of 1952, dated the 31st July 1953.

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THAN MYINT v. THE UNION OF BURMA.

U CHAN TUN AUNG, J.

sentence and conviction. The case as disclosed by the prosecution arose under the following circumstances :—

A police out-post was opened at Ma-so-yein Village some two miles north of Tabayin in the Shwebo District about two months before this case happened. The out-post was in charge of Head Constable U Ba Thin (PW 1). The appellant Maung Than Myint and Maung Po Htwe (deceased) were constables under U Ba Thin. The Exhibit map " o " shows the scene of the incident. It appears that Ye-U-Tabayin motor-road runs east to west and when it gets near Ma-so-yein Village the road is crossed by the Mu Canal which runs north to south. There is a bridge across the canal and close to the canal on the north-side of the road police personnel were posted for duty as an emergency measure and they stationed themselves in a large bunker built nearby. U Ba Thin (PW 1), the officer-in-charge of the out-post, lived in a hut quite close to the canal, *i.e.*, near the south-western junction of the Ye-U-Tabayin motor-road at its crossing over the Mu Canal by the bridge aforesaid. There were other huts to the west of U Ba Thin's hut where constables Mya Maung (PW 13), Than Maung (PW 14), Maung Net (PW 15), and appellant Than Myint lived. The evidence shows that on the 6th November, 1952, at about 7 p.m., Ma Aye Sein (PW 2), the wife of U Ba Thin, came back from Shwebo. The deceased Maung Po Htwe on hearing this news came over to U Ba Thin's hut carrying a rifle to enquire about the latest news from Shwebo. He was followed soon after by the appellant Maung Than Myint who was without any arms. Apparently, Maung Than Myint was off-duty and as soon as

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he saw Maung Po Htwe he said: "မင်းလူပါးဝသည်။". Maung Po Htwe then retorted :"ဘာလူပါးဝတာတုံး။". This was followed by another retort of Maung Than Myint: "မင်းနေရာတကာပါတယ်". This exchange of hot words between the two persons finally ended with Maung Po Htwe, the deceased, banging the butt end of his gun on to the ground and throwing out a challenge saying: "ဝတယ်ကွ၊ဘယ်ဒေကောင်ဗိုလ်ကျသလဲ။". U Ba Thin (PW 1) fearing that some thing serious would happen if he did not check these two quarrelling constables, sent for constable Than Maung (PW 14), who was then on duty at the bridge. Than Maung came and with some difficulty he dragged away Maung Po Htwe from U Ba Thin's hut to the bunker, which is marked "ခ" on the map Exhibit "ဝ". It appears that at the relevant time Maung Po Htwe was living temporarily with his wife in the bunker as he had not been provided with quarters. Even while he was dragged away by Than Maung, Maung Po Htwe's passion to fight did not seem to subside, for he shouted out to Than Myint :"မည်သူမှမကြောက်ဘူး—သတ္တိရှိလိုက်ခဲ့။". Than Myint was then seen running back to his own hut where he had gone, as disclosed by the prosecution evidence, to get his rifle and arming himself with it he was seen going towards the bunker to which Maung Po Htwe was taken away by Than Maung. It appears that just in front of the appellant's hut, as he came out with the rifle, he was met by another police constable Maung Hmat (PW 6), who seeing that there would be serious trouble, prevented the appellant from proceeding further. The appellant, however, refused to be prevented and after struggling himself free from Maung Hmat ran straight towards the east. Ma Aye Sein, wife of U Ba Thin, had also come

out on to the road to stop Maung Than Myint proceeding further, but it was to no avail. In fact she was pushed away so forcefully by the appellant that she fell down on the ground. The appellant was thus free to run towards Maung Po Htwe's bunker and the evidence shows that as he rushed towards Maung Po Htwe's bunker he met on the way Than Maung (PW 14) and U Ba Thin (PW 1), who had come back from Maung Po Htwe's bunker after they had left him there. When the appellant got near the bunker he stood on the road and then fired into the bunker twice. No sooner had he fired his rifle than Maung Po Htwe, the deceased, was heard to have shouted out "I have been hit, I have been hit by Than Myint." Than Myint then ran away. There were eye-witnesses who saw Than Myint fire his rifle from a close range into the bunker in which Maung Po Htwe was. Thus, a commotion was caused by this firing and every one present nearby rushed towards the bunker to examine Maung Po Htwe's condition. Maung Po Htwe was found lying with gun-shot injuries. The appellant Than Myint was at once sent for by U Ba Thin (PW 1) and placed under arrest. His rifle was also seized. Three empty cartridges were found near the spot from where the appellant had fired his rifle. U Shwe Mya (PW 3) and U Ohn Yit (PW 8), who examined the rifle seized from the appellant, found that it had been fired very recently. They smelt the barrel of the rifle soon after its seizure and got the smell of carbide which unmistakably indicated that it had been fired just a few hours before. The prosecution evidence further shows that when the exhibit cartridges and the exhibit rifle were sent to the gun expert

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U Tun Myint (C.I.D., Insein), the gun expert stated on commission that the empty cartridges were those that had been fired from the exhibit rifle.

Maung Po Htwe died in his bunker very soon after he had been shot at, and his body was removed to the Civil Hospital, Shwebo. We entertain not the slightest doubt that, according to the medical report given by Dr. Singh (PW 9), that Po Htwe was killed by the bullets fired from a rifle. The injuries sustained by him were mostly on the thigh, arm and on the lower portion of the abdomen causing a fracture of the pelvic bone. There was also found embedded in his body a rifle bullet. On the strength of the prosecution evidence as disclosed above, the appellant was charged under section 302 (1) (*b*) of the Penal Code. The appellant however pleaded not guilty to the charge and on being examined, he stated on oath that he was drunk on the evening in question; that as he was sent back to his hut by U Ba Thin, the officer-in-charge, he went back there; that as soon as he got to his hut he fell off to sleep and that he did not know what had taken place thereafter. This testimony of the appellant has not been accepted by the trial Court, as it was obviously a falsehood in view of clear evidence of the prosecution that he had altercation with Maung Po Htwe before he shot him and also in view of some eye-witnesses who saw the actual shooting from close quarters. Added to this there is the evidence of U Ba Thin (PW 1), Ma Aye Sein (PW 2), Maung Hmat (PW 6) and Than Maung (PW 14) which shows that though the appellant was deterred by these people from acting rashly, yet he just pushed them aside, and fired his rifle and caused the death of Maung Po Htwe, his brother constable. We are fully satisfied, from the evidence of eye-witnesses adduced by the

prosecution and also taking into consideration the fact that the rifle that was seized from the appellant soon after the incident unmistakably revealed that it had been fired recently—a fact which has been confirmed by the evidence of the gun expert U Tun Myint—coupled with the fact that the empty cartridges picked up near the scene of crime were found to be those that had been fired from the rifle seized from the appellant that the appellant was the person who shot at Maung Po Htwe with his rifle and killed him on the night in question.

The question for our determination is whether in the circumstances set out above the appellant has been rightly convicted under section 302 (1) (*b*) of the Penal Code. There is clear evidence that both the deceased and the appellant were under the influence of liquor; but none of them was worse for the drink at all. No doubt, at U Ba Thin's hut the appellant was the person who first asked Maung Po Htwe whether he was "ရုပ်ဝဘတ္တာလား" Maung Po Htwe was infuriated by, what might be called, a gratuitous insult, and that was the beginning of the whole trouble. Maung Po Htwe became very aggressive and he was challenging Than Myint. However, as observed above, we do not find any evidence on the record to enable us to hold that the appellant was so drunk as to be incapable of knowing what he was doing that night, as he tried to make out in his statement on oath. The trial Court has rightly rejected this assertion, and we are satisfied that the appellant was fully alive to what he was doing. His conduct before and after the shooting on the night in question clearly belies the truth of any assertion regarding his incapacity to commit the crime with the necessary intent. However, the question for consideration is whether his act in shooting Maung

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Po Htwe, under the circumstances set out above, is an act done with full deliberation or in other words, with premeditation so as to bring him within the ambit of section 302 (1) (*b*) of the Penal Code. The learned trial Judge found that there was premeditation; but we feel that we must regard the entire incident as a continuous one, in view of the facts and circumstances disclosed in the present case. No doubt, the appellant first started the quarrel, but there is definite evidence that the deceased himself was also highly provocative; and despite every effort on the part of U Ba Thin (PW 1) and his fellow constables to pacify him, yet he was bent on throwing challenge after challenge to the appellant using highly aggressive words. This must have infuriated the appellant. Besides, there was no time lost between appellant's departure from U Ba Thin's hut and the fetching of the rifle from his own hut. The hut was not far away from the place of the incident, and taking into consideration that he was slightly under the influence of liquor, it is somewhat difficult to attribute to the appellant a definite deliberate premeditation so as to bring his act within sub-clause (1) of section 302 of the Penal Code. To constitute premeditation, there must be, in our view, time for reflection and deliberation after passions inflamed under certain circumstances have more or less died down. In *Kirpal Singh* v. *The State* (1) it is observed that to constitute a premeditated killing it is necessary that the accused should have had time to reflect, with a view to determine whether he would kill or not and that he should have determined to kill as a result of that reflection; that is to say, the killing should be a predetermined killing upon consideration, and not a sudden killing under the momentary excitement and

(1) (1951) 52 Cr.L.J., p. 1520; A.I.R. (1951) Pun. 137 at 140.

impulse of passion upon provocation given at the time or so recently before as not to allow time for reflection. The circumstances in the case now under appeal indicate that the appellant was still excited and not really free from the impulse of passion resulting from the provocation which the deceased had given him repeatedly before the actual shooting, nor had there been sufficient lapse of time for his reflection, especially when the appellant has had some liquor earlier.

We feel that, in any event, there is certain amount of doubt as to whether the appellant had premeditated the crime, notwithstanding the fact that he had gone back to his hut to fetch the rifle before shooting the deceased. The hut was however quite near. We consider that the benefit of doubt in that respect should be in the appellant's favour. Therefore, we alter the conviction of the appellant under section 302 (1) (*b*) to one under section 302 (2) of the Penal Code and we set aside the death sentence imposed upon him and in lieu thereof we direct that he be sentenced to undergo 10 years' rigorous imprisonment. The appeal is allowed to the extent indicated above.

U TUN BYU, C.J.—I agree.

APPELLATE CIVIL.

Before U Bo Gyi and U Thaung Sein, JJ.

H.C. 1953 — *Sept. 15.*

THE BURMA (GOVERNMENT SECURITY) INSURANCE COMPANY, LIMITED, BY ITS MANAGING DIRECTOR U TIN MAUNG (APPELLANT)

v.

DAW SAW HLA (RESPONDENT). *

Contract of Insurance—Insured, Naval personnel—Specific clause in Policy excluding War Risk—Insured killed while on patrol duty—Infringement of terms of Policy—Liability of Company—Competency of named beneficiary to sue—Rule in Tweddle, stranger to contract cannot sue, not sacrosanct—Right to enforce contract renders Succession Certificate unnecessary.

Held: There is nothing in the Indian Contract Act which prevents the recognition of a right in a third party to enforce a contract made by others which contains a provision for his benefit.

Daw Fo and others v. *U Po Hmyin and another*, (1940) Ran 237; *K. Datta* v. *M. Panda*, 61 Cal. 841; *D. Dutt* v. *C. Ghose*, 41 Cal. 137; *Khwaja Muhammad Khan* v. *Husaini Begam*, 37 I. A. 152; *Dan Kuer* v. *Sarla Devi*, A.I.R. (1947) (P.C.) 8; *Ma E Tin* v. *Ma Byaw and others*, 8 Ran. 266, followed.

Tweddle v. *Atkinson*, (1861) 1 B & S. 393; *The Oriental Government Security Life Assurance Ltd.* v. *Vanteddu Ammiraju*, 35 Mad. 162; *Shankar Vishvanath* v. *Umabai*, 37 Bom. 471; *A. C. Mandal* v. *D. G. Das*, 63 Cal. 1172; *Krishna Lal* v. *Mt. Promila*, A.I.R. (1928) Cal. 518; *Daw Yu* v. *Sun Life Assurance Company of Canada*, A.I.R. (1935) Ran. 211; *Cleaver* v. *Mutual Reserve Fund Life Association*, (1892) 1 Q.B. 147, dissented from.

Held: As the respondent has a right of action on the insurance contract, no Succession Certificate is necessary before a decree can be passed in her favour.

Held further: On the face of the life assurance policy the company are liable to pay the insurance money, and they must show if they are to avoid such liability, that the respondent's claim is hit by clause 13 of the special provisions of the Policy.

King-Emperor v. *U Damapala*, 14 Ran. 666 (F.B.), referred to.

Dr. Thein for the appellant.

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* Civil 1st Appeal No. 45 of 1952 against the decree of the 2nd Judge, City Civil Court of Rangoon, in Civil Regular No. 1294 of 1951, dated the 26th March 1952.

Ze Ya for the respondent.

The judgment of the Bench was delivered by

U BO GYI, J.—This appeal is against the decree of the Rangoon City Civil Court in Civil Regular No. 1294 of 1951 directing the appellants, the Burma (Government Security) Insurance Company Ltd. (hereinafter called the company), to pay a sum of K 5,000 being insurance money, with interest and costs of the suit to the respondent Daw Saw Hla. The facts which are not in dispute are that the respondent is mother of Maung Saw Khine, an ablebodied seaman of the Burma Navy, who had taken out a life assurance policy with the company for a sum of K 5,000. Apart from certain special provisions which are endorsed on the back of the policy, the terms of the policy so far as material to the purpose in hand are that the insurance money together with such profits as may have accrued are payable "to the assured if living on the date of maturity of this policy, or to Daw Saw Hla, mother of the assured, if the assured dies earlier." It is not disputed that the assured had been paying the premiums regularly and it is also common ground that he died on the 23rd June, 1951 from a bullet-wound at Bawle in the Insein district.

In view of the terms of the policy, therefore, the company would *primâ facie* be liable to pay the insurance money. They however took their stand on clause 13 of the special provisions, which sets out: "Military, naval and other hazardous occupation risks.—If a policy is effected at ordinary rates even with extra load for hazardous occupation or Military or Naval risk, it does not cover war risk, and the policy-holder is required to intimate to the Company before

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engaging in active service, or proceeding to the danger zone or war-like operation, or takes part in any insurrection and pay such extra premium as will be determined by the Company according to the circumstances then existing. Failure to give intimation to the Company, and the non-payment of the extra premium will terminate the liability of the Company under the policy except to the extent of its surrender value, if any." They averred that the assured died while he was engaged in active service, or was proceeding to a danger zone or on a war-like operation and that he had failed to give intimation to them before he left his headquarters on such service and to pay the extra premium to cover war risk. They therefore repudiated liability in terms of the policy. On the other hand, the respondent contended that the assured was on patrol duty when he met his death and the case did not come within clause 13 of the special provisions. The parties went to trial on the issue as to the circumstances in which the assured met his death. There was also a dispute as to liability to pay interest on the sum claimed, but this matter is no longer in issue. Before this Court, two additional grounds of appeal are taken, namely, that the respondent not being a party to the contract of insurance has no right to sue for recovery of the insurance money and that the decree has been passed without the production of a succession certificate.

The additional grounds of appeal will be considered before going into the merits of the case. The crux of the question involved in these grounds of appeal is whether the respondent who is not a party to the contract but only a beneficiary thereunder has a right to sue for the insurance money. There has been a wide divergence of juridical

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opinion on this question, which is due to the rule of English common law established in the year 1861 in *Tweddle* v. *Atkinson* (1) that a person not a party to a contract cannot enforce it and to attempts made thereafter by Courts both in England and India to mitigate the harshness of the rule by introducing fictions such for example as trust and agency and theories of nearness of relationship and family arrangement. Indeed, things had come to such a pass that the authors of Pollock's Principles of Contract were led to observe in the thirteenth edition of their learned treatise at page 171: "It must be confessed that some of the English decisions raise the inference that if the Courts wish to enable **X** to sue, they make **Y** a trustee, but that if they wish to prevent him from doing so they fall back upon the dogma that there is no privity of contract between **X** and **Y**."

When those circumstances are steadily borne in mind, the conflicting judicial authorities and the grounds on which they are founded can be appreciated. Thus, the cases of *The Oriental Government Security Life Assurance Ltd.* v. *Vanteddu Ammiraju* (2), *Shankar Vishvanath* v. *Umabai* (3), *Krishna Lal* v. *Mt. Promila* (4) and *Daw Yu* v. *Sun Life Assurance Company of Canada* (5) which held that a beneficiary named in an insurance policy could not sue for recovery of the insurance money were based on the decision in *Cleaver* v. *Mutual Reserve Fund Life Association* (6) which was decided in 1891. The main ground of the decision in *Cleaver*'s case (6), and which is relevant to the cases which followed it, is the English common

(1) (1861) 1 B. & S. 393.
(2) 35 Mad. 162.
(3) 37 Bom. 471.
(4) A.I.R. (1928) Cal. 518.
(5) A.I.R. (1935) Ran. 211.
(6) (1892) 1 Q.B. 147.

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law rule, settled in *Tweddle*'s case (1) that only the parties to a contract can enforce it. On the other hand, in *Daw Po and others* v. *U Po Hmyin and another* (2) it was held by Dunkley J., following *K. Datta* v. *M. Panda* (3), that a stranger to a contract can sue on the contract if it is made for his benefit. In *K. Datta*'s case (3), a Bench of the Calcutta High Court canvassed several authorities bearing on the present question and refused to be bound by the rule in *Tweddle*'s case (1) or to resort to any fiction and following the decision of the eminent jurists Jenkin C.J., and Mookerjee J. in *D. Dutt* v. *C. Ghose* (4) held: "There is nothing in the Indian Contract Act which prevents the recognition of a right in a third party to enforce a contract made by others, which contains a provision for his benefit; and the definition of consideration in section 2 (*d*) is wider than in English law." This case was dissented from by another Bench of the same Court in *A. C. Mandal* v. *D. G. Das* (5), who followed the rule in *Tweddle*'s case (*see* page 1182 of the Report) and held that a stranger to a contract cannot benefit by it unless a trust for him is clearly intended. That the rule in *Tweddle*'s case is not considered sacrosanct outside England is clear not only from *Daw Po*'s and *K. Datta*'s case mentioned above but also from the Privy Council decisions in *Khwaja Muhammad Khan* v. *Husaini Begam* (6) and *Dan Kuer* v. *Sarla Devi* (7). In the last-mentioned case, which was decided in 1947, their Lordships of the Privy Council observed that it was too late to doubt the rule which had prevailed in India that where a contract was intended

(1) (1861) 1 B. & S. 393.
(2) (1940) Rang. 237.
(3) 61 Cal. 841.
(4) 41 Cal. 137.
(5) 63 Cal. 1172.
(6) 37 I.A. 152.
(7) A.I.R. (1947) (P.C.) 8.

to secure a benefit to a third party as a beneficiary under a family arrangement, he could sue in his own right to enforce it. That, they added, seemed to be the principle underlying the decision in *Khwaja Muhammad Khan*'s case (1). It is noteworthy that the fiction of a trust was not mentioned. Again, in *Ma E Tin* v. *Ma Byaw and others* (2), Das J., followed the decision in *Khwaja Muhammad Khan*'s case without making any reference to a trust.

It is clear, therefore, that the rule in *Tweddle*'s case (3) has not been considered to be of binding authority in Burma. In fact, Dunkley J., went further and observed in *Daw Po*'s case (4) that the decision in *K. Datta*'s case (5) that a stranger to a contract could always sue on the contract if it was made for his benefit seemed to be in accordance with the modern English cases. Now, the authors of Pollock's Principles of Contract mention at page 172 of their treatise that the question was investigated by the Lord Chancellor's Law Revision Committee who in their Sixth Interim Report, 1937 "recommended that where a contract by its express terms purports to confer a benefit on a third party, it shall be enforceable by the third party subject to any defences that would have been valid between the contracting parties; but that the parties to the contract may, unless it otherwise provides, cancel it at any time before the third party has adopted it, expressly or by conduct." The editors added a footnote "It was also pointed out that the Common Law stands alone among modern legal systems in its rigid adherence to the view that a contract shall not confer any rights on a stranger to it".

(1) 37 I.A. 152.
(2) 8 Ran. 266.
(3) (1861) 1 B. & S. 393.
(4) (1940) Ran. 237.
(5) 61 Cal. 841.

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The doctrine that a stranger to a contract may sue on it if it is for his benefit does not appear to offend against the provisions of the Contract Act, but on the contrary seems to be in consonance with those of section 37 of the Act which provides that, except in circumstances which need not here be set out "The parties to a contract must either perform, or offer to perform, their respective promises." Reading these provisions of law, unbiased by the rule in *Tweddle*'s case (1), it is difficult to see any legal bar to making the company perform their promise to pay the insurance money to the respondent on her son's death.

It must accordingly be held that the respondent has a right of action on the insurance contract, and it follows that no succession certificate is necessary before a decree can be passed in her favour. Consequently, it is unnecessary to consider the request of the respondent's advocate for leave to amend the plaint in case the Court should hold that the respondent could not sue in her personal capacity.

The next question that falls to be determined is whether, as alleged by the company, the assured was killed while he was engaged in active service, or was proceeding to a danger zone or on a war-like operation within clause 13 of the special provisions. Dr. Thein for the company admits that by "active service" is meant actual engagement with the enemy. It is common ground that the assured had been paying the premiums as they fell due and that he died on the 23rd June, 1951. Consequently, on the face of the life assurance policy the company are liable to pay the insurance money; and under section 103 of the Evidence Act, they must show, if they are to avoid such liability, that the respondent's

(1) (1861) 1 B. & S. 393.

claim is hit by clause 13 of the special provisions. It is submitted that since both parties have led evidence, the question of onus of proof is only of academic interest. It must be remembered, however, that although the burden of introducing evidence may change in the course of a trial, the burden of establishing the case remains constant—*King-Emperor* v. *U Damapala* (1); and this factor must be taken into account when finally considering the evidence, or lack of evidence, on the point for determination.

Now, no eye-witness to the occurrence has been examined. The respondent has examined herself and the Chief of the Naval Staff, Commander U Than Pe (PW 1). The only useful information U Than Pe gives is that the assured was on M.L.-105 which had been sent out to Bawle on patrol duty when he met his death and that at that time Bawle had just been cleared of insurgents. U Than Pe adds that, according to the report received by him, it was at Shwele (apparently in Bawle area) that the assured received the fatal wound and that Shwele had at the time been cleared of insurgents, and was within half a mile or one mile of the insurgent-occupied area. Evidently, U Than Pe was not present on the scene and did not know exactly where the assured was wounded. Strangely enough, none of the officers and crew on M.L.-105 has been examined as a witness. The evidence led by the company is equally unsatisfactory. Neither U Tin Maung who is the managing director of the company nor Lt. Tin Maung Yin who has been summoned to produce certain War Office records has any personal knowledge of the circumstances of the assured's death. U Tin Maung relies on the replies to certain questions in the Exhibits C to C3

(1) 14 Ran. 666 (F.B.).

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as to the circumstances in which the assured was killed; but the replies have been made from hearsay and, moreover, do not help the company's case. Lt. Tin Maung Yin states, it is true, that in support of the respondent's claim for family pension the Commanding Officer mentioned that the assured had been "killed in action of gunshot wound in the head", but he adds that the officer had mentioned the fact not from personal knowledge but from the reports he had received from the War Office. Lt. Tin Maung Yin's evidence as to the ground on which the Commanding Officer recommended family pension is of no value. Even assuming, therefore, that the evidence relating to such a recommendation is admissible under section 35 of the Evidence Act, it has no probative force.

Capital is sought to be made out of the fact that the respondent has been awarded not only family pension but also death gratuity which, it is said, is granted to the heir of a soldier who is killed in action or dies of wounds received in action. Under regulation 416 of the Pension Regulations for the Army in India, Part II, such gratuity may be granted to the heirs of an Indian Officer or Indian Warrant Officer, and not of the rank and file. In any case, however, the decision of the War Office cannot bind a Court of Law when under section 43 of the Evidence Act, except in certain conditions, the judgment of a Court is irrelevant in another case between the same parties.

The learned trial Judge has held, without any admissible evidence to support his finding, that the assured received the fatal wound while on patrol duty in a danger zone. The learned Advocate for the company candidly concedes that this finding does not bind the appellate Court. This is as it should

be, for the respondent's suit has been decreed and she is in no position to file an appeal or a cross-objection. Furthermore, Commander U Than Pe states that when he ordered M.L.-105 to go out on patrol duty he did not specify which particular places she was to visit and that the crew did not know where or on what duty they were proceeding.

In all the above circumstances, it must be held that clause 13 of the special provisions of the policy does not apply, and the appeal is dismissed with costs.

APPELLATE CIVIL.

Before U San Maung, J.

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Sept. 10.

U BA YI (APPELLANT)

v.

DAW HMI (*a*) MRS. KHOO SEIN BAN (RESPONDENT). *

Appeal—Civil Procedure Code, Order 41, Rule 1—On ground not raised in written statement in trial Court, whether permissible—Recovery of land from tenant—Urban Rent Control Act, s. 11 (1) (d)*—Land must have been used as a house site prior to letting out.*

Held : When a question of Law is raised for the first time in a Court of last resort upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea.

M. E. Moolla Sons, Limited v. *Burjorjee*, I.L.R. 10 Ran. 242; *Connecticut Fire Insurance Co.* v. *Kavanagh*, (1892) A.C. 473 at 480, followed.

Held : Although the land in suit was intended to be used as a house site it had not in fact been used as such prior to its letting out to the defendant, and therefore s. 11 (*1*) (*d*) of the Urban Rent Control Act is inapplicable.

Ba Maung for the appellant.

Ba Thawt for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 374 of 1949 of the City Civil Court, Rangoon, the plaintiff-respondent Daw Mi sued the defendant-appellant U Ba Yi for his ejectment from the suit land namely Lot No. 3-B-2 of Block No. 43-A, Cantonment Circle, Rangoon. The plaintiff alleged that the defendant was her tenant and that the land which was a house site was required by her *bonâ fide* for the purpose of erecting a building thereon

* Civil 1st Appeal No. 60 of 1952 against the decree of 4th Judge's Court of Rangoon in Civil Regular No. 374 of 1952, dated the 28th January 1952.

for her own use and occupation. The suit was therefore one under section 11 *(1)(d)* of the Urban Rent Control Act, 1948. The requisite order in writing for the filing of such a suit having been obtained from the Controller, the defendant U Ba Yi admitted that he was a tenant of Daw Mi but contended that the plaintiff did not require the land for the *bonâ fide* purpose of erecting a building thereon for her own use and occupation. The only issue which arose for consideration was therefore as regards the *bonâ fide* of the plaintiff and the learned 4th Judge of the City Civil Court who tried the suit having found this issue in favour of the plaintiff, decreed her suit for the ejectment of the defendant with costs. In appeal the only ground which has been urged before me is that the trial Court had erred in giving the plaintiff a decree under section 11 *(1)* *(d)* of the Urban Rent Control Act as the land was not primarily used as a house site. The first ground of appeal relating to the validity of the first order of the Controller granting permission to the plaintiff has been abandoned by the learned Advocate for the appellant.

The ground of appeal urged before me is based upon a point of fact not raised in the written statement filed by the defendant in the trial Court. However, their Lordships of the Privy Council in delivering the judgment of the Board in the case of *M. E. Moolla Sons, Limited* v. *Burjorjee* (1) quoted with approval the observation of Lord Watson, in *Connecticut Fire Insurance Co.* v. *Kavanagh* (2) where it was observed as follows:

"When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is

(1) I.L.R. 10 Ran. (1932) 242. (2) (1892) A.C. 473 at 480.

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not only competent but expedient in the interests of justice to entertain the plea."

Therefore it is a matter for consideration whether there are facts either admitted or proved beyond controversy in the suit under appeal sufficient to support the plea now raised for the first time in this Court.

Daw Hmi in giving evidence stated *inter alia* that the land in suit was purchased by her prior to the breaking out of the last war for the purpose of building a house thereon for the occupation of her son and other relations. She could not carry out her intention because of the event of the war. During the Japanese occupation period it was let out on rent to the defendant U Ba Yi. Her son Ko Bun Tin in giving evidence also made a statement to the same effect.

Now the relevant portion of clause *(d)* of section 11*(1)* of the Urban Rent Control Act reads as follows:

> "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**—
>
> * * * *
>
> *(d)* the premises, in the case of land which was primarily used as a house site and was subsequently let to a tenant are *bonâ fide* required by the landlord for erection or reerection of a building or buildings etc."

From the language of this clause it seems to be clear that for a landlord to be able to recover his land from a tenant under the provisions of this clause the land must not only be a house site that must

have been used as such at some time prior to its letting out to a tenant. The Burmese version "(မူလကအိမ်မြေရာအဖြစ် အသုံးပြုခဲ့ပြီး၍၊ နောက်တွင်အိမ်ငှါးသို့ အငှါးချထားသည့် အဆောက်အအုံမြေရာကို အဆောက်အအုံ၊ သို့တည်းမဟုတ် အဆောက်အုံများဆောက်လုပ်ရန်၊ သို့တည်းမဟုတ် ပြန်လည်ဆောက်လုပ်ရန်) makes the meaning still clearer. From the admissions made by Daw Hmi and Ko Bun Tin it has been established beyond controversy that although the land in suit was intended to be used as a house site it had not in fact, been used as such prior to its letting out to the defendant U Ba Yi. Therefore section 11 (*l*) (*d*) of the Urban Rent Control Act, 1948, is inapplicable and the plaintiff-respondent's suit must fail.

However, considering that the defendant-appellant U Ba Yi succeeds on a point not raised by him in the trial Court, I do not think that he should receive any cost. For these reasons I would, while setting aside the judgment and decree of the 4th Judge of the City Civil Court in Civil Regular No. 374 of 1949, order that the plaintiff-respondent Daw Hmi's suit be dismissed and that the parties bear their own costs throughout.

APPELLATE CIVIL.

Before U Chan Tun Aung, J.

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Oct. 20.

BALMIC SHUKUL (SHAKOOR) (APPLICANT)

v.

PHOMAN SINGH AND FOUR OTHERS (RESPONDENTS).*

Civil Procedure Code, s. 115—Revisional powers of High Court, limits of—When exercised—Specific Relief Act, s. 9, proceedings under—Summary remedy—Finding not conclusive—Other remedy open.

Held: However erroneous the conclusions arrived at by a subordinate Court might be on points of law or fact they would not be treated as wrongful exercise of jurisdiction or illegal exercise of jurisdiction attended with material irregularity, and therefore the revisional discretion of the High Court can only be invoked when there is a clear transgression of one of the conditions set out in s. 115 of the Civil Procedure Code.

Held also: The High Court normally does not interfere in revision if the party has another remedy by way of an appeal to a subordinate Court or by way of a regular suit.

U Kyaw Lu v. *U Shwe So*, 6 Ran. 667; *Amir Hassan Khan* v. *Sheo Baksh Singh*, (P.C.) 11 Cal. 6; *Maung Ye E* v. *N. K. R. A. T. Vallagu Velli*, A.I.R. (1934) Ran. 243; *Bhundal Panda and others* v. *Pandol Pos Patil and others*, I.L.R. 12 Bom. 221; *Daw Min Baw* v. *A. V. P. L. N. Chettyar Firm*, I.L.R. 11 Ran. 134; *N. S. Venkatagir Ayyangar and another* v. *Hindu Religious Endowment Board*, Vol. LXXVI (1949) I.A. p. 67 at 73; *Sundar Singh* v. *Doru Shankar and others*, I.L.R. 20 All. 78; *Ramgopal Jhoonjhoonwalla* v. *Joharmall Khemka*, I.L.R. 39 Cal. 473; *B. B. Bhadra* v. *Ram Sarup Chamar*, 16 C.W.N. 1015; *Mithalal Ranchhoddas* v. *Manekla Mohanlal Modia*, A.I.R. (1941) Bom. 271, followed.

Badrul Zaman and another v. *Firm Haji Fait Ullah Abdullah*, A.I.R. (1938) All. 635; *Badri Das and another* v. *Mt. Dhanni and another*, A.I.R. (1934) All. 541; *Ajodhiya Prasad Belihar Sao and another* v. *Chassiram Premsai Nai*, A.I.R. (1937) Nag. 326, distinguished.

G. N. Banerji for the applicant.

Basu and *Venkatram* for the respondents.

U CHAN TUN AUNG, J.—This application in revision is against the judgment and decree of the

* Civil Revision No. 33 of 1952 against the decree of the Township Court, Prome, in Civil Regular Suit No. 14 of 1951.

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BALMIC SHUKUL (SHAKOOR) v. PHOMAN SINGH AND FOUR OTHERS.

U CHAN TUN AUNG, J.

Township Judge of Prome before whom the present applicant has instituted a suit under section 9 of the Specific Relief Act for recovery of possession of two rooms in the Sikh Temple situate in High Street, Prome. The applicant was said to be a monthly tenant of the said rooms, the landlords being the present respondents, who are the Trustees of the said Temple. The case arose under the following circumstances :—

The applicant had been a tenant of the two rooms in the said Temple for many years. On the 16th May, 1950, when the applicant went out after locking up the two rooms, the respondents with the help of the insurgents who had then occupied Prome, forcibly broke open the lock fixed by the applicant and unlawfully took possession of the rooms by locking them with their own lock, thus preventing the applicant from occupying the two rooms in question. The applicant, on the re-occupation of Prome by the Government forces and upon re-establishment of civil administration instituted a suit under section 9 of the Specific Relief Act as against the Trustees, the respondents. The respondents denied the applicant's claim and averred *inter alia* that the applicant's rooms were closed at the instance of the insurgent commander on the 16th May, 1950, and that the applicant's suit was barred by limitation. What the respondent Trustees averred in effect was this—that if the applicant had been dispossessed of his rooms, the respondents Trustees were not responsible for it, but that it was the insurgent commander who ordered the closing of the two rooms when Prome was under insurgents' occupation. Further assertion was made that the applicant was not entitled to the possession of the rooms inasmuch as he was a monthly tenant having been served with a month's notice of termination of tenancy as there had been arrears of rent amounting to about

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U CHAN TUN AUNG, J.

Rs. 1,000. On these averments the learned trial Judge framed the following issues :—

(1) Whether the suit was time-barred ?

(2) Whether the applicant had lost his right of tenancy on the grounds as set out in paragraph 5 of the written statement ?

(3) If so, can the applicant be put in possession of the rooms in suit otherwise than in due course of law ?

(4) Whether the act of insurgents' commander in evicting the applicant forcibly out of the rooms in suit on the application of the defendants amounted to dispossession by the defendants otherwise than in due course of law ?

The issues framed were not happily worded. However, the hearing of the case took place and the applicant examined 3 of his witnesses, while the respondents examined nearly ten of them. After hearing the case the learned Township Judge came to the conclusion that since the applicant's suit was instituted on the 7th May, 1951, and whereas the alleged dispossession took place on the 16th May 1950, and that since the Township Court of Prome was entertaining civil suits on the 2nd May 1951 in accordance with Military Administration Proclamation No. 1 of 1951, the applicant's suit was out of time by 5 days. In effect what the Township Judge has held is, the applicant's suit being one under section 9 of the Specific Relief Act, he should have filed it on the re-opening of the Township Judge Court of Prome, *i.e.*, on the 2nd May 1951, and since the applicant has filed it on the 7th May 1951 he was out of time by 5 days, and hence his claim is barred. The learned

Township Judge also determined the other two issues, namely, Nos. 2 and 3. After assessing the evidence given by the applicant, the respondent and their respective witnesses, he came to the following conclusions. Here, I shall use his own words, though they are somewhat unhappy:

"Therefore the question of the plaintiff who was dispossessed not in due course of law does not arise at all as it was of the plaintiff own creation by leaving the rooms of his own accord, letting the properties of his employees shut up inside the rooms. At the request of the employess of the plaintiff, Insurgent Bo broke open the door of the rooms of the plaintiff and the defendants had nothing to do with the same. Therefore these two issues need not be answered in this suit."

I do not quite follow what the learned Township Judge really means, when after holding as of fact that it was at the request of the employees of the plaintiff (the applicant) the insurgent Bo broke open the door of the rooms and that the defendants (the respondents) had nothing to do with the same, he concludes that the two relevant issues need not be answered. To my mind, though he has not expressed in so many words, yet the learned Township Judge's finding as of fact is, that the applicant himself having left the two rooms, it was at the instance of some of his employees the insurgent Bo came and broke open the door and locked the rooms with a separate lock, and that the respondents had nothing to do with the alleged dispossession.

The main ground taken in revision is that the learned trial Judge has, in the exercise of his jurisdiction, acted illegally and with material irregularity, in holding that the applicant's suit was time-barred.

Now, it is obvious that the applicant in invoking the provision of section 9 of the Specific Relief Act is only seeking a speedy remedy by means of summary

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U CHAN TUN AUNG, J.

processes of the civil Court, the Township Judge Court of Prome, and that even if he were unsuccessful in the said suit, other remedy founded upon possessory rights or other similar rights is available to him. Thus, it has been urged on behalf of the respondent Trustees, as a preliminary objection, that even if the trial Judge has acted in the exercise of his jurisdiction illegally and with material irregularity in that he has erroneously held that the applicant's suit was time-barred yet, inasmuch as another remedy by way of a suit being open to the applicant, and such remedy being certain and conclusive, the present revision is not maintainable. *U Kyaw Lu* v. *U Shwe So* (1) has been cited in support of this contention. It was held therein that the remedy open to an unsuccessful party in a suit under section 9 of the Specific Relief Act is to file a regular suit based on his own title and that such remedy being open to him, the High Court need not exercise its revisional powers. It was also pointed therein that on the principles laid down in *Amir Hassan Khan* v. *Sheo Baksh Singh* (2) the High Court has no power of revision as against the decision of a subordinate Court on a point of law and not of jurisdiction. A reference to the provision of section 9 of the Specific Relief Act itself, makes it clear that a further remedy is open to an unsuccessful party in a suit under the said provision. Second part of section 9 of the Specific Relief Act lays down: "Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof". It is clear therefore that the relief given under section 9 of the Specific Relief Act is not at all conclusive as against the parties concerned. Reliance was also placed on some other decisions, but I shall only refer to three of them

(1) (1928) 6 Ran. I.L.R. p. 667. (2) (P.C.) 11 Cal. 6.

which are found to be pertinent to the question now involved. In *Maung Ye E* v. *N. K. R. A. T. Vallagu Velli* (1) it was held that a party to a civil proceeding seeking the exercise of discretionary powers of the High Court under section 115, Civil Procedure Code must satisfy the Court that he has no other remedy open to him to set right what he alleges, to have been illegally, irregularly or without jurisdiction done by a subordinate Court. In the said case the application for removal of attachment was dismissed and the applicant sought in revision to set aside the dismissal order, but there being a remedy open to him by way of a suit under Order 21, Rule 63 of the Civil Procedure Code, the High Court refused to interfere in revision. Similarly, in *Bhundal Panda and others* v. *Pandol Pos Patil and others* (2) it was held that, inasmuch as it was open to the defendants to establish their rights by a regular suit even if the Subordinate Judge had acted with material irregularity in the exercise of his jurisdiction in a suit arising under section 9 of the Specific Relief Act the High Court refused to exercise its revisional powers. But in *Daw Min Baw* v. *A. V. P. L. N. Chettyar Firm* (3) it was pointed out that the High Court normally does not interfere in revision if the party has another remedy by way of an appeal to a subordinate Court or by way of a regular suit, but this rule, it was further pointed out, is a rule of practice and that the question of interference by way of revision must be decided according to the circumstances of each case. On the authorities cited there is, to my mind, considerable force in the contention that if there is another remedy open by way of a regular suit, revision application is not generally entertained by the High Court; although,

(1) A.I.R. (1934) Ran. p. 243. (2) (1887) I.L.R. 12 Bom. p. 221
(3) (1933) I.L.R. 11 Ran. p. 134.

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U CH AN TUN AUNG, J.

as pointed out in *Daw Min Baw* v. *A. V. P. L. N. Chettyar Firm* (1) the decision in that regard is to be given in accordance with the circumstances of each case. Under the facts and circumstances obtaining in this case, I am inclined to hold that the applicant is not entitled to invoke the revisional powers under section 115 of the Code of Civil Procedure. Apart from reluctance of this Court to exercise its revisional power when there is another remedy available to the applicant, the question that arises for consideration is whether the wrong decision of the trial Court on the point of limitation is one which amounts to exercise of jurisdiction illegally or with material irregularity within the purview of section 115 of Civil Procedure Code. *A propos* it has been contended by the learned Counsel for the respondents, that the revisional power laid down in section 115 of the Civil Procedure Code is limited; and he invites my attention to the Privy Council decision in *N. S. Venkatagir Ayyangar and another* v. *Hindu Religious Endowment Board* (2) wherein applying the principle laid down in *Amir Hassan Khan* v. *Sheo Baksh Singh* (3) which was relied on in *U Kyaw Lu* v. *U Shwe So* (4), Sir John Beaumont, delivering the judgment on behalf of their Lordships, observed:

"Section 115 applies only to cases in which no appeal lies, and, where the legislature has provided no right of appeal, the manifest intention is that the order of the trial Court, right or wrong, shall be final. The section empowers the High Court to satisfy itself on three matters, (*a*) that the order of the subordinate Court is within its jurisdiction; (*b*) that the case is one in which the court ought to exercise jurisdiction; and (*c*) that in exercising jurisdiction the court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of

(1) (1933) I.L.R. 11 Ran. p. 134.
(2) (1949) I.A. Vol. LXXVI, p. 67 at p. 73.
(3) (P.C.) 11 Cal. 6.
(4) (1928) 6 Ran. I.L.R. p. 667.

procedure in the course of the trial which is material in that it may have affected the ultimate decision. If the High Court is satisfied on those three matters, it has no power to interfere because it differs, however profoundly, from the conclusions of the subordinate Court on questions of fact or law."

With due respect, this observation correctly states the scope of revisional powers of the High Court. It appears that however erroneous the conclusions arrived at by a subordinate Court might be on points of law or fact they would not be treated as wrongful exercise of jurisdiction or illegal exercise of jurisdiction attended with material irregularity; and therefore the revisional discretion of the High Court can only be invoked when there is a clear transgression of one of the conditions set out in section 115 of the Civil Procedure Code.

Another point urged by the Counsel for the applicant is that an erroneous decision on the question of limitation amounts to illegal exercise of jurisdiction or exercising it with material irregularity. As against this contention, my attention has been drawn to the decisions in *Sundar Singh* v. *Doru Shankar and others* (1), *Ramgopal Jhoonjhoonwalla* v. *Joharmall Khemka* (2), *B. B. Bhadra* v. *Ram Sarup Chamar* (3) and *Mithalal Ranchhoddas* v. *Maneklal Mohanlal Modia* (4), where it was held that findings on the question of limitation whether right or wrong made by a subordinate Court are findings of law which do not attract the revisional power exercisable under section 115 of the Civil Procedure Code. To my mind, the finding as to whether a claim is barred by limitation or not, is finding of law and I am inclined to agree with the decisions given above. I am therefore of the view that even if the learned Township Judge, Prome, has

(1) I.L.R. 20 All. p. 78.
(2) (1912) I.L.R. 39 Cal. p. 473.
(3) 16 C.W.N. p. 1015.
(4) A.I.R. (1941) Bom., p. 271.

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gone wrong in holding that the applicant's suit was barred by limitation, I am not disposed to hold that such an error is an error in law materially affecting the exercise of his jurisdiction.

The applicant's Counsel further submits that there are instances where the High Courts have accepted in revision arising out of suits under section 9 of the Specific Relief Act and in support thereof, the following cases have been cited: *Badrul Zaman and another* v. *Firm Haji Faiz Ullah Abdullah* (1), *Badri Das and another* v. *Mt. Dhanni and another* (2) and *Ajodhiya Prasad Belihar Sao and another* v. *Chassiram Premsai Nai* (3). I have carefully examined those decisions, but in none of them the question of availability to the applicant of another remedy was considered. The applications in revision were heard and they were either accepted or rejected on merits, having regard to the facts and circumstances in each case. The question whether in view of other remedy being available to the aggrieved party in suit, the revisional powers under section 115 of the Civil Procedure Code could be invoked or not was not specifically considered. Therefore, the authorities cited by the applicant's Counsel do not really help him.

Taking the entire view of the case, and after considering the facts and circumstances under which the applicant has instituted the suit, and in view of another remedy being open to him, and also in view of the decisions which indicate the limit of High Court's powers of revision under similar circumstances, I must hold that the present application in revision does not lie. The application is therefore dismissed with costs; Advocate's fee is three gold mohurs (51 kyats).

(1) A.I.R. (1938) All. p. 635. (2) A.I.R. (1934) All. p. 541.
(3) A.I.R. (1937) Nag. p. 326.

APPELLATE CIVIL.

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

MAHMOOD EBRAHIM ARIFF (APPELLANT)

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Oct. 21.

v.

ASHA BEE BEE AND NINE OTHERS (RESPONDENTS).*

Administration suit—Transfer of property during lifetime by deceased—Not part of estate at time of death—Transfer cannot appropriately be challenged in administration suit—Union Judiciary Act, s. 20—Appealable judgment, order ending a claim to property.

Held: *Primâ facie* a transfer of property, even if it were to turn out subsequently to be really *benami*, is legal and valid in law Where such transfer is challenged after the death of the transferor as being in the nature of *benami*, the property should continue to be regarded in law as belonging to the transferee and cannot be considered as belonging to the estate of the deceased at the time of his death; it is therefore not within the purview of Order 20, rule 13 (1) of the Code of Civil Procedure.

Mt. Amir Bir v. *Abdul Rahmin Sahib and others*, A.I.R. (1928) Mad. 760; *Oon Chain Thwin and another* v. *Khoo Zunne and another*, A.I.R. (1938) Ran. 254; *Naran Singh and others* v. *Ishar and others*, A.I.R. (1932) Lah. 328; *Motibhai Shankerbai Patel* v. *Nathabai Naranbai*, I.L.R. 45 Bom. 1053; *Benode Behari Bose* v. *Nistarini Dassi*, I.L.R. 33, Cal. 180=32 I.A. 193; *Petherpermal Chetty* v. *Muniandy Servai*, I.L.R. 35 Cal. 551, referred to and distinguished.

Mt. Shafi-ul-Nisa v. *Mt. Fizal-ul-Nisa*, A.I.R. (1950) East Pun. 276, *Mt. Mohamed Zamani Begam and another* v. *Fazal-ul-Rahaman and another*, A.I.R. (1943) Lah. 241; *Lutchmi Ammal* v. *Narasamma and others*, 13 B.L.T. 237, followed.

Held also: As the order so far as the plaintiff is concerned put an end to his claim to obtain a share of the property, it relates to something more than a mere procedure, and must be considered to amount to a judgment within the meaning of s. 20, Union Judiciary Act.

In re *Dayabhai Jiwandas and others* v. *A. M. M. Murugappa Chetty* 13 Ran. 457, followed.

* Civil Misc. Appeal No. 3 of 1952 against the order of the High Court, Original Side, in Civil Regular No. 2 of 1950.

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MAHMOOD EBRAHIM ARIFF v. ASHA BEE BEE AND NINE OTHERS.

J. B. Sanyal for the appellant.

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

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

The learned trial Judge, on the Original Side held, on a preliminary issue, against the plaintiff

appellant; and the preliminary issue was to the effect, whether the plaintiff-appellant could in a suit for the administration of the estate of the deceased Mohamed Ismail Ariff seek for a declaration that the transfers of the said shares by the deceased in his lifetime to his daughter and widow be declared null and void on the allegation that the transfers were in the nature of *benami* transactions. This appeal, accordingly, raises an important point of law. The nature of an administration suit has been indicated in the case of *Mt. Amir Bir* v. *Abdul Rahmin Sahib and others* (1), which was referred to on behalf of the plaintiff-appellant:

> ". . . . Administration means management of the deceased's estate. The Court is requested to assume its management, to take upon itself the function of an executor or administrator and administer the estate. The administration of a deceased's estate consists of collection and preservation of assets, payments of debts and legacies, acts in respect of adverse claims to assets, dealings with creditors or legatees and distribution finally among the heirs or next-of-kin."

The amended plaint shows that the present litigation is in the nature of an administration suit. The Court has in such a suit, under Order 20, Rule 13 (1), of the Code of Civil Procedure, to pass first a preliminary decree, directing that accounts to be taken and inquiries to be made before it passes a final decree; and thus an administration suit resolves, in effect, into two stages. The question which arises in the present appeal is, whether the plaintiff-appellant can agitate in an administration suit about the validity of the transfers of shares in certain companies, which were made in the lifetime of the deceased. It was submitted on behalf of the plaintiff-appellant that

(1) A.I.R. (1928) Mad. 760, 761.

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since it was alleged in the plaint that the transfers of the shares were in the nature of *benami*, the shares of those three companies should be considered as belonging to the estate of the deceased Mohamed Ismail Ariff at the time of his death, and consequently, the question whether those transfers of shares were in the nature of *benami* transfers or not could properly be decided in an administration suit.

The inquiries that are contemplated under Order 20, Rule 13 (1), of the Code of Civil Procedure, it has been contended, would include all inquiries, which will be required for the purpose of ascertaining whether certain properties could properly be said to form a part of the estate of the deceased. It appears to us that the provisions of Order 20, Rule 13 (1), of the Code of Civil Procedure ought to be read strictly. We cannot appreciate how the allegation in the plaint that the transfer was *benami* can alter the existing legal position of the property, which has been transferred, in accordance with law, to another person and in whose name such property appears and who is in possession of such property at the time of the death of the deceased. *Primâ facie* such transfer, even if it were to turn out subsequently to be really *benami*, is legal and valid in law, until it is proved to be otherwise. Where such transfer is challenged after the death of the transferor as being in the nature of *benami*, it seems to us that the property, so transferred, should continue to be regarded in law as belonging to the transferee, unless the transfer is declared ineffective or illegal in a Court of law. Such property cannot at the outset be considered as belonging to the estate of the deceased at the time of his death; and it is therefore not within the purview of Order 20, Rule 13 (1), of the Code of Civil Procedure.

In *Mt. Amir Bir* v. *Abdul Rahmin Sahib and others* (1), the question which was raised was, whether certain defendants in that case had released their claim to the estate of the deceased. Thus, the real question involved there was whether those defendants were entitled to share in the estate of the deceased at the time of his death, and such question is clearly a question which ought properly to be agitated in an administration suit, the ultimate object of which was to distribute the estate finally among the heirs who were entitled to share in the estate. In the case of *Oon Chain Thwin and another* v. *Khoo Zunne and another* (2), Ma Sein Daing died on the 16th September, 1928, but before her death, she transferred her entire immoveable properties to her daughter, whose husband was the second defendant in the case. It does not appear that the question whether such transfer could properly be attacked in an administration suit was raised and discussed there.

The facts in *Naran Singh and others* v. *Ishar and others* (3) are different from the facts of the case now under appeal. There the plaintiff alleged that the defendants were in possession of certain property as agents and managers of the deceased, and the allegation that they were agents or managers of the deceased was apparently not denied. The property which was in the possession of the agents or managers of the deceased might, in the peculiar circumstances of that case, be regarded as belonging to the deceased's estate at the time of his death, unless they can be proved to be otherwise. In the case of *Motibhai Shankerbai Patel* v. *Nathabai Naranbai* (4), the defendant was in possession of all the

(1) A.I.R. (1928) Mad. 760, 761.
(2) A.I.R. (1938) Ran. 254.
(3) A.I.R. (1932) Lah. 328.
(4) (1921) 45 Bom. 1053.

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properties of the deceased. In *Benode Behari Bose* v. *Nistarini Dassi* (1), the plaintiff-widow's case was that she was induced by the frauds of the executors to execute certain deeds, and she sought to have them declared void, and that was therefore a case which related to matters that arose after the death of the deceased, in connection with the estate of the deceased dealt with in his will. The case of *Petherpermal Chetty* v. *Muniandy Servai* (2), which was also referred to on behalf of the plaintiff-appellant, was not an administration suit. There the predecessor-in-title of the respondent executed a deed of sale in favour of the appellant Petherpermal Chetty; and the respondent subsequently instituted a suit against the appellant to have the sale deed declared *benami* and to recover possession of the immoveable property.

It was however observed in *Mt. Shafi-ul-Nisa* v. *Mt. Fizal-ul-Nisa* (3):

> ". . . . if the main object of the suit is to administer the estate, and if the Court, in the suit, has to decide as to the existence or otherwise of an alienation, an administration suit will lie, but where the main object of the suit is to have an alienation, alleged to be made by the deceased, set aside or to obtain possession of the property illegally withheld by one of the heirs, an administration suit is not the proper remedy."

The above observation appears to us to set out the true scope of the inquiry which should be made under Order 20, Rule (13) (1), of the Civil Procedure Code. It is difficult to conceive how a property can properly be said to belong to the estate of the deceased at the time of his death, which had apparently been conveyed or transferred, in

(1) (1906) 33 Cal. 180 = 32 I.A. 193. (2) (1908) 35 Cal. 551.
(3) A.I.R. (1950) East Pun. 276.

accordance with law, to another person during the lifetime of the deceased. In the case of *Mt. Mohamed Zamani Begam and another* v. *Fazal-ul-Rahaman and another* (1) it was also held that it was not open to the Court, in an administration suit, to determine the validity of alienation made by the deceased. There the deceassd, *inter alia*, made a gift of certain properties to the defendant No. 5 during his lifetime. Those properties could not therefore, strictly, be said to belong to the estate of the deceased at the time of his death. A similar observation appears in the case of *Lutchni Ammal* v. *Narasamma and others* (2) :

> "The proper method for recovering lands in the suit would be by regular suits in the proper Courts against the persons who claim and possess the lands respectively. Each had a right to have the question of his title to the land he had, dealt with separately and in due course of law."

The facts in *Lutchni Ammal* v. *Narasamma and others* (2) were, of course, not the same as in the case now under appeal, but the opinion expressed there appears to us to be more consistent with the strict reading of the provision in Order 20, Rule 13 (1), of the Civil Procedure Code, because where a property has been conveyed or transferred to another person in accordance with law, such conveyance or transfer ought not to be presumed to be invalid or inoperative, unless some action has been taken to declare it so. The present case now under appeal relates to certain shares in three registered companies. A person in whose name shares are registered in the register of a company will, in law, be presumed to be the owners of those shares; and before this legal position can be disturbed it appears to us to be only reasonable that

(1) A.I.R. (1943) Lah. 241 at 242. (2) (1920) 13 B.L.T. 237.

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some action ought to be taken to alter the subsisting legal position. Ordinarily a person who desires to buy a share in a registered company can, in law, assume that what is stated in the register of the company is correct. It is difficult to see how the shares that had been transferred to the defendants-respondents Nos. 1 to 4 can be considered to belong to the estate of the deceased at the time of his death, unless some action has been taken, for one reason or another, to set aside such transfers. The mere allegation that the transfers were *benami* will not alter the strict legal position in which those shares stand, as in law those shares must, at the outset, be presumed to belong to the defendants-respondents Nos. 1 to 4 until the transfers are set aside or declared invalid. We do not consider that it was intended that the scope of the inquiry, under Order 20, Rule 13 (1), of the Code of Civil Procedure should be extended to include an inquiry into the ownership of properties which *primâ facie* belong, in law, to another person at the time of the death of the deceased.

Certain cases which relate to the Court Fees Act had been referred to, on behalf of the plaintiff-appellant, during the arguments in this appeal. We do not think it is necessary to deal with them in detail because the question which is involved in those cases is not the same as what is involved in the present case. In the cases which relate to the provisions of the Court Fees Act the common question which arose was, whether the plaintiff in those cases could sue for a declaration of his title to the immoveable property without asking for the deeds concerned to be set aside. The decisions in those cases proceeded on a different consideration. Where the deed is a mere sham, or where the transaction is *benami* in its nature, it was clearly

not necessary to ask for the deed to be set aside, because once a deed is declared to be a share, or the transaction declared to be a *benami*, the document transferring or conveying the property becomes inoperative and has no value whatever. It would therefore not be necessary to ask the Court in such cases to have those deeds cancelled or set aside. Thus the cases which relate to the Court Fees Act cannot lend any help to the solution of the question which arises in the present appeal.

A preliminary question has also been raised on behalf of the defendants-respondents Nos. 1 to 4 that no appeal lies against the order of the learned Judge passed on the Original Side. It has been contended that the said order is not a judgment within the meaning of section 20 of the Union Judiciary Act, and we cannot accept this contention. The order passed on the 11th December, 1951 has, so far as the plaintiff is concerned, put an end to his claim to obtain a share of the property which had gone into the hands of the defendants-respondents Nos. 1 to 4, and it therefore relates to something which is more than a mere procedure. Where the legislature has permitted a suit to be filed in a particular manner, it would amount to more than an invasion of procedure, if that person is deprived of his right of instituting his suit in the manner which the law allows. The right to institute a particular type of suit is, in our opinion, a substantive right. Moreover, the effect of that order of the 11th December, 1951 will not only prevent the plaintiff from litigating in an administration suit against defendant-respondents Nos. 1 to 4, but his suit was also to be dismissed if the plaint was not amended in the manner directed in the order. The order must accordingly be considered to amount to a

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judgment even in accordance with the pronouncement made in the Full Bench decision of in re *Dayabhai Jiwandas and others* v. *A.M.M. Murugappa Chetty* (1). However for the reasons, which we have set out in the earlier portion of this judgment, the appeal is dismissed with costs; and the Advocate's fees are fixed as 100 kyats.

U CHAN TUN AUNG, J.—I agree.

(1) (1935) 13 Ran. 457.

APPELLATE CIVIL.

Before U San Maung, J.

MAUNG KYAW YO (APPLICANT)

v.

HAJEE ABDUL SHAKOOR KHAN (RESPONDENT).*

H.C. 1953

Oct. 5.

Civil Procedure Code, Order 21, Rule 97—Application by decree-holder of ejectment decree against third party for obstruction—Application withdrawn—Second application for subsequent obstruction, whether relates back to first obstruction—Limitation Act, Article 167—Each obstruction provides cause for fresh application.

Held: Each time a decree for possession is sought to be executed and the execution is met by resistance or obstruction such resistance or obstruction must be complained of within thirty days. Article 167, Limitation Act applies, and it makes no difference that there was a prior obstruction because it is not the prior obstruction that is complained of; it also makes no difference whether the obstruction is by the same person or by a different person.

Mukund Bapu Jadhav v. *Tanu Sakhu Pawar*, A.I.R. (1933) Bom. (F.B.) 457, dissented from.

Raghunandan Prosad Misra v. *Ramcharan Manda*, A.I.R. (1919) Pat. (F.B.) 425; *Meyappa Chetty* v. *Meyappan Servai*, A.I.R. (1921) Mad. 559; *Surama Sundari Debi* v. *Kiranshashi Chowdhurani*, A.I.R. (1938) Cal. 352; *Kedar Nath Bothra* v. *Baijnath Bothra and others*, A.I.R. (1939) Cal. 494, followed.

Kotumal Khemchand v. *Bur Ashram*, A.I.R. (1947) Sind 118, referred to.

Thein Han (2) for the applicant.

Kyaw Khin for the respondent.

U SAN MAUNG, J.—On the 20th of May, 1950, in Civil Regular suit No. 1016 of 1949, of the City Civil Court of Rangoon, the plaintiff-respondent Hajee Abdul Shakoor Khan, obtained a consent decree for the ejectment of Maung Ohn Shwe and Maung Than Myint from room No. 3 of house No. 185 in 48th Street, Rangoon, for non-payment of arrears of

* Civil Revision No. 44 of 1952 against the order of the 4th Judge, City Civil Court, Rangoon, in Civil Misc. No. 43 of 1952.

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rent. One of the conditions of the consent decree was that the defendants in the case should pay the arrears of rent amounting to Rs. 1,127 by monthly instalments of Rs. 100 on the 10th of every month in addition to the current rent and that the decree for ejectment would become at once executable upon their failure to pay any one of the monthly instalments as aforesaid. On the 14th of May, 1951, Abdul Shakoor Khan filed an application for execution of an ejectment decree against Maung Ohn Shwe and Maung Than Myint on the ground that they had failed to comply with the terms of the decree. During the pendency of the execution proceedings, Maung Kyaw Yo, the present applicant, intervened to say that since May, 1950, he had been residing in the premises in suit with Maung Than Myint and that soon after his arrival, Maung Than Myint shifted to another place after installing him therein upon condition that he was to continue to pay the instalments as ordered by the Court in Civil Regular suit No. 1016 of 1949; that thereafter, he (Maung Kyaw Yo), made regular payments towards the decretal amount to Abdul Shakoor Khan's Advocate until the 19th of March, 1951, when all the sums due on the decree had been paid. A dispute arose between him and Abdul Shakoor Khan when he was asked to pay mesne profits for the period January 1950 to March 1950, said to be due by Maung Ohn Shwe and Maung Than Myint. Therefore, in these circumstances, he (Maung Kyaw Yo), should be regarded as a tenant of Abdul Shakoor Khan within the meaning of that term in the Urban Rent Control Act. The application of Maung Kyaw Yo was, however, dismissed by the learned Fourth Judge of the City Civil Court on the ground that Maung Kyaw Yo had no *locus standi*

to file such an application. A warrant for the ejectment of Maung Ohn Shwe and Maung Than Myint was issued on the 24th August, 1951, but the same was returned unexecuted on the 12th of September, 1951. Subsequently, on the 10th November, 1951, Abdul Shakoor Khan filed an application purporting to be one under Order 21, Rule 97 of the Civil Procedure Code against Maung Kyaw Yo for his alleged resistance to the delivery of possession by the Bailiff of the Court in terms of the warrant for the ejectment of Maung Ohn Shwe and Maung Than Myint. This application was objected to by Maung Kyaw Yo and the same was subsequently dismissed as withdrawn. Thereafter, on the 9th of January, 1952, Abdul Shakoor Khan made another application for the issue of a warrant for the ejectment of Maung Ohn Shwe and Maung Than Myint and all the other persons residing in the premises in suit with the leave and license of these two persons. An ejectment warrant was issued on the 25th February, 1952, and the same was again returned unexecuted on the 24th of March, 1952. On the 5th of March, 1952, Abdul Shakoor Khan filed another application under Order 21, Rule 97 of the Civil Procedure Code for action against Maung Kyaw Yo for his alleged obstruction to the warrant for the ejectment of Maung Ohn Shwe and Maung Than Myint. This application was resisted by Maung Kyaw Yo mainly on the ground that it was barred by limitation. Thereupon, the learned Fourth Judge of the City Civil Court passed an order now sought to be revised. It runs as follows :

" This is an application by the holder of a decree for possession of immovable property under Order 21, Rule 97, C.P.C. against Maung Kyaw Yo, a third party, to the decree.

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MAUNG KYAW YO *v.* HAJEE ABDUL SHAKOOR KHAN.

U SAN MAUNG, J.

On 20/3/50 the applicant obtained an order of ejectment against Ko Ohn Shwe and Maung Than Myint. On 14/5/51 the applicant filed an application for execution of order of ejectment. Application to execute was granted on 13/8/51.

On 12/9/51, Bailiff of the Court went to the premises to execute the warrant on ejectment. But the respondent offered resistance and obstruction to execution of the warrant.

On 10/11/51 the applicant D.H. made an application under Order 21, Rule 97, C.P.C. to take action against the respondent: Respondent contended that the application was time-barred. He further submitted that he never offered resistance or obstruction to the Bailiff. The obstruction or resistance complained of happened on 12/9/51; but as the application under Order 21, Rule 97 was made on 10/11/51, the application was hopelessly time-barred. The applicant therefore withdrew his application under Order 21, Rule 97.

On 29/1/52 the applicant made another application for execution of the order of ejectment and his application was granted 4/2/52. In pursuance of this order Bailiff went to take possession of the property on 29/2/52. But he was unsuccessful as he was resisted by the respondent: Hence this application made on 5/3/52. It is now contended by the respondent that this application is not maintainable, and is barred by limitation: It is argued that the applicant cannot make this second application as the first application had been withdrawn being time-barred, I cannot accept this argument. Lastly it is contended that the application is time-barred inasmuch as the obstruction was caused by the same party. Counsel for the respondent had therefore asked me to work out limitation from the date of 1st Resistance, *i.e*, 12/9/51. This contention must be overruled. A separate cause of action arose on every resistance or obstruction. Therefore time began to run from 29/2/52. Since application was made on 5/3/52, within 30 days from the date of resistance complained of the application must be held within time. I hold that the application is maintainable and is within time. Respondent shall have to pay costs Rs. 17 to the applicant."

Being dissatisfied with the order of the Fourth Judge of the City Civil Court, the applicant Maung

Kyaw Yo has now applied to this Court to set it aside on revision. The grounds strenuously urged by the learned Advocate for the applicant is that the learned Judge of the City Civil Court has acted with material irregularity by holding that the second application under Order 21, Rule 97 is maintainable against the same person and in the same character when it is clearly barred by limitation having been made more than thirty days after the date of the first alleged obstruction or resistance. In support of this contention, the learned Advocate has relied strongly upon the observations of Beaumont C.J., in the case of *Mukund Bapu Jadhav* v. *Tanu Sakhu Pawar* (1). There the learned Judge held that where the judgment-creditor fails to apply for removal of an obstruction under Order 21, Rule 97, within thirty days from the date of obstruction, he is not debarred from making an application under Order 21, Rule 35, to obtain a fresh warrant for possession as Article 167 of the Limitation Act, has nothing to do with such an application for warrant for possession, but that the article will be applicable notwithstanding the fresh order for possession to a subsequent application in respect of the same obstruction. He further observed that if the obstruction is by the same person and in the same character, the mere fact that the decree-holder is applying under a fresh warrant for possession would not make the obstruction a fresh obstruction.

In the case of *Raghunandan Prosad Misra* v. *Ramcharan Manda* (2), it was held that when an auction-purchaser who is not a decree-holder has made an application for delivery of possession and that application has been rendered infructuous by reason of obstruction, he is entitled to make an

(1) A.I.R. (1933) Bom. (F.B.) 457. (2) A.I.R. (1919) Pat. (F.B.) 425.

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U SAN MAUNG, J.

application for a fresh writ of possession within the period of limitation allowed for such an application without applying under Order 21, Rule 97 of the Civil Procedure Code. In the case of *Meyappa Chetty* v. *Meyappan Servai* (1) also, it was held that an application for removal of a second obstruction made more than thirty days after acquiescence in a previous obstruction is not barred by Article 167 as such acquiescence does not deprive the person entitled to possession of any further right to obtain it in execution. In *Surama Sundari Debi* v. *Kiranshashi Chowdhurani* (2) Ghose J., after holding that a second application by an auction-purchaser under Order 21, Rule 95 of the Civil Procedure Code for delivery of possession of property purchased by him is maintainable made the following observation :—

"The next point is that assuming that the second application under Rule 95 was maintainable, the application made on 13th May 1937 under Rule 97 was barred by limitation, inasmuch as the second resistance was made by the same petitioner who had made the first resistance on 3rd June 1934, and the limitation of one month will run from 3rd June 1934. This is opposed on the other side. Both sides have quoted numerous cases but on a plain reading of Article 167, Limitation Act, it appears that the period of 30 days is to be counted from the date of the resistance or obstruction of which complaint is made. In this case, complaint was made of the resistance made on 24th April 1937 and it being within one month of that act of resistance, the application was within time."

In the case of *Kedar Nath Bothra* v. *Baijnath Bothra and others* (3) also it was held that a separate right arises on each occasion when there is obstruction provided a fresh writ for possession has been issued, and that the period of thirty days

(1) A.I.R. (1921) Mad. 559. (2) A.I.R. (1938) Cal. 352.
(3) A.I.R. (1939) Cal. 494.

prescribed by Aricle 167, Limitation Act, would run from the time of the particular resistance or obstruction in respect of which the decree-holder is complaining. In *Kotumal Khemchand* v. *Bur Ashram* (1) Thadani J., after reviewing most of the case law on the subject held that what is contemplated in Article 167, Limitation Act, is a complaint of a particular obstruction or resistance, and that if the complaint is made within thirty days of it, Article 167, Limitation Act, applies and it makes no difference that there was a prior obstruction because it is not the prior obstruction that is complained of. He also held that it also makes no difference whether the obstruction is by the same person or by a different person. Each time a decree for possession is sought to be executed and the execution is met by resistance or obstruction such resistance or obstruction must be complained of within thirty days, for a judgment-creditor is entitled to execute his decree any number of times during the lifetime of the decree so long as it remains unsatisfied and each obstruction or resistance to it constitutes a fresh cause for complaint. I am in general agreement with the conclusions arrived at by the learned Judge and I am of the opinion that, in the case under consideration, the learned Fourth Judge of the City Civil Court, has rightly come to the conclusion that an application under Order 21, Rule 97 of the Civil Procedure Code, was maintainable in respect of the obstruction alleged to have taken place on the 29th of February, 1952. The application for revision fails and must, therefore, be dismissed with costs; Advocate's fees, three gold mohurs.

(1) A.I.R. (1947) Sind. 118.

APPELLATE CIVIL.

Before U Thaung Sein and U Bo Gyi, JJ.

H.C. 1953

Sept. 30.

RAMANAND (APPELLANT)

v.

U. N. MENON (RESPONDENT).*

Arbitration Act, 1944—Award by arbitration appointed by consent—No appeal lies—Statutory period of 30 days for objection against award, failure to provide for—Award invalid—Objection against arbitrator not raised at outset—Procedure before arbitrator not identical with judicial procedure, not invalid therefor.

Held: Where a party to an arbitration does not raise at the start of the proceedings the objection that the arbitrator was incompetent to act, but raised it after the award has gone against him, his objection can have no merit.

Jagmohan v. *Suraj Narain*, A.I.R. (1935) Oudh 499, followed.

Held also: Unless in the procedure adopted by the arbitrator there has been something radically wrong or vicious, no award can be impeached on the ground that the technical web of judicial procedure was not strictly adhered to.

Maung Shwe Hpu and two v. *U Min Nyun*, 3 Ran. 387.

H. Subramanyam for the appellant.

Ghosh and *Guha* for the respondent.

The judgment of the Bench was delivered by

U THAUNG SEIN, J.—This is an appeal under section 39 (*1*) (vi) of the Arbitration Act, 1944, against the order of the learned Chief Judge, Rangoon City Civil Court, refusing to set aside an award by the sole Arbitrator appointed in Civil

*Civil Misc. Appeal No. 66 of 1951 against the decree of the Chief Judge, Rangoon, in Civil Regular No. 24 of 1949.

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U THAUNG SEIN, J.

Regular Suit No. 24 of 1949 of that Court. The facts giving rise to the appeal are briefly as follows:

The respondent-plaintiff U. N. Menon sued the appellant-defendant Ramanand for recovery of a sum of money alleged to be due on a promissory-note. The suit was hotly contested by the appellant-defendant who denied the execution of the promissory-note and also challenged the respondent-plaintiff's title as a "holder-in-due-course" of the said promissory-note. The respondent-plaintiff was thus obliged to amend his plaint by adding an alternative claim for the original consideration. The appellant-defendant in turn filed an amended written statement and on the pleadings no less than eight issues were framed by the trial Court. The case then went to trial but after the examination of several witnesses the parties decided to appoint Mr. V. R. Pillay, advocate for the respondent-plaintiff, as a mediator "to decide the dispute in the above case" and agreed to abide by his decision. On the 14th September 1947 the "mediator" presented to the learned Chief Judge what was termed a "decision" according to which "there shall be a decree for Rs. 7,581 and costs in favour of the plaintiff." The appellant-defendant refused to accept this decision and insisted that the suit be decided on its merits by the learned Chief Judge of the Rangoon City Civil Court. However, on 29th September 1949 a joint petition signed by the parties and their lawyers was filed praying that Mr. V. R. Pillay be appointed as sole Arbitrator in the case and that "all the documents, pleadings and records be sent to the said Mr. V. R. Pillay" for the purpose of deciding the matter in dispute. Accordingly the Registrar of the Rangoon City Civil Court drew up a formal order of reference to

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Mr. V. R. Pillay to decide "whether the defendant owes to the plaintiff a sum of Rs. 7,581 due on a promissory-note or alternatively as money due." It is common ground that the entire proceedings and records of the suit were forwarded to Mr. V. R. Pillay along with that order of reference. After a series of sittings extending from 23rd November 1949 to 13th January 1950 the Arbitrator finally pronounced an award and submitted the same to the learned Chief Judge. This award was accepted and a decree drawn up directing the appellant-defendant to pay the respondent-plaintiff the sum of Rs. 7,581 without costs.

The appellant-defendant then went up on appeal against the order of the learned Chief Judge and the decree based on the award. But as pointed out in the order dated 17th January 1951 in Civil Miscellaneous Appeal No. 6 of 1950 of this Court, no appeal lay against the order in question. That appeal was converted however into one for revision, the reason being that the learned Chief Judge had failed to allow the appellant-defendant the full term of 30 days in which to file an objection against the award, as laid down by the Arbitration Act. The order of the learned Chief Judge and the decree drawn up in accordance with that order were accordingly set aside and the case remanded to the trial Court to enable the appellant-defendant to file an objection if he so desired within the period allowed by statute.

On receipt of the proceedings the learned Chief Judge issued notices to the parties and after considering the objections filed and hearing learned counsel for both sides accepted the award and drew up a decree in accordance with it. This order and decree have now been strenuously attacked by the

learned counsel for the appellant-defendant on the ground that the award was invalid and should have been set aside under section 30 (*a*) and (*c*) of the Arbitration Act, 1944. According to him, there cannot be the slightest doubt that Mr. V. R. Pillay, the Arbitrator, had "misconducted himself" and that the award was "improperly procured or is otherwise invalid." The learned counsel has explained, however, that he does not mean to imply that Mr. V. R. Pillay had been guilty of any misbehaviour or other act involving moral turpitude. The "misconduct" referred to was said to be "legal misconduct" or "misconduct" in the judicial sense of the word and not from a moral point of view. In particular, he asserts that Mr. V. R. Pillay had displayed a definite bias in favour of the respondent-plaintiff who was his own client and that this is borne out by the earlier "decision" as a mediator. This bias is said to be apparent on the face of the award itself. But when the learned counsel was asked to point out the exact passages in the award relating to this matter, all that he could say was that the decision had been against his client. Needless to say it is absurd to suggest that, simply because an arbitrator decides against any party, he is prejudiced or biased against that party. After all the decision must be in favour of one party or the other and if we accept the argument of the learned counsel for the appellant-defendant, then indeed no award could be free from "bias" and there would be no object in referring any matter to arbitration.

With regard to the allegation that Mr. V. R. Pillay had displayed a bias in favour of the respondent-plaintiff by his former "decision" as a mediator, this is bound up with the second ground of appeal, *viz.*, that the award was improperly procured or is

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otherwise invalid. The learned counsel for the appellant-defendant has argued that his client was unaware of the legal and other implications when he agreed to Mr. V. R. Pillay acting as the sole Arbitrator despite his earlier decision as a mediator. This argument overlooks the fact that the appellant-defendant was by no means in a helpless plight and that on the contrary he was represented by an advocate named Mr. Burjorjee who was certainly aware of the implications, if any. Then again, he was represented by counsel throughout the proceedings before the Arbitrator and at no time did he ever suggest that Mr. V. R. Pillay was incompetent to act owing to his decision as a mediator. It is now far too late in the day to complain on this score and if any authority is required for this view, reference may be made to *Jagmohan* v. *Suraj Narain* (1), where it was laid down as follows:

> "Where a party to an arbitration does not raise the objection as to the arbitrator having no jurisdiction to proceed with the matter, at the start of the arbitration proceedings, but raised the objection after the award has gone against him while challenging the award in the Court, his objection can have no merit."

Next, it has been urged that the order of reference to the Arbitrator was defective and that the award is thus "otherwise invalid." This is the first time that such an objection has been taken to the order of reference and neither the appellant-defendant nor his counsel made any attempt either before the learned Chief Judge or the Arbitrator to have the order of reference amended. In the first place, the wording of the order of reference was wide enough to enable the appellant-defendant to put forward all

(1) A.I.R. (1935) Oudh. 499.

the defences set out in the written statement. Besides this, the entire proceedings were forwarded to the Arbitrator as requested by the parties. It should be remembered also that Mr. V. R. Pillay, the Arbitrator, is an Advocate and therefore perfectly aware of the nature of the dispute between the parties. The learned counsel for the appellant-defendant has urged that the enquiry before the Arbitrator should have been conducted on the same lines as a trial before a regular civil court and that there should have been a finding on each of the issues in the case. There is a complete answer to this argument in *Maung Shwe Hpu and two* v. *U Min Nyun* (2) which lays down "that unless in the procedure adopted by the arbitrators there has been something radically wrong or vicious, an award cannot be impeached on the ground that the technical web of judicial procedure and rules of evidence which surround judicial procedure were not strictly adhered to." Actually, the real issue between the parties was as stated in the order of reference and the Arbitrator rightly concentrated on it.

On the whole, we do not consider that there is any substance in any of the grounds of appeal and accordingly this appeal shall stand dismissed, with costs.

(1) I.L.R. 3 Ran. 387.

APPELLATE CIVIL.

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

H.C. 1953

Nov. 2

U LUN MAUNG AND ONE (APPELLANTS)

v.

U SHWE BA AND SIX OTHERS (RESPONDENTS). *

Religious Trust—Election of new trustees—Rigid compliance with provision of Scheme necessary—Procedure other than prescribed, though affecting same object and causing no injustice—Election void.

Held: The trust scheme must be read strictly, and clause (*b*) of paragraph 6 requiring at least 15 days of advertisement in two daily Burmese newspapers must be considered to be an essential requisite for a valid election under the scheme; that where the advertisement appeared on less than 15 occasions, the contention that the spirit of the clause has been carried out and no injustice has been done cannot prevail.

Ba Maung for *Kyaw Myint* for the appellants.

Ba Win for the respondents.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The seven respondents, who were the old trustees of the Sule Pagoda Trust, applied in Civil Miscellaneous No. 3 of 1952 of the Original Side, for the confirmation of the election of (1) U Ba Pe (2) U Ba Khin (3) U Ba Tun (4) U Ba Thin (5) U Ngwe (6) U Shwe Ba and (7) U Pe Aung as trustees of the Sule Pagoda Trust. Paragraph 6 (*b*) of the trust scheme, which was framed in 1926, reads:

"6. *Election of trustees.*—Trustees in office shall conduct election of new trustees as follows:—

* * * *

(*b*) In case of vacancy in the office of Trustees, they shall advertise it within one month from the

* Civil Misc. Appeal No. 55 of 1952 against the order of the High Court, Original Side, in Civil Misc. No. 3 of 1952.

date of occurrence in two Burmese Daily Newspapers for 15 days successively, fixing a date for submission of nomination papers."

It appears to us in this case to be clear that the advertisements in two Burmese daily newspapers appeared not successively, but on alternate days, beginning from 1st November, 1951 to 27th November, 1951 at most, and this would indicate that the advertisement calling for nomination papers in two Burmese daily newspapers appeared only on 14 occasions, and no more; and it was not therefore in confirmation of what was required under clause (*b*) of paragraph 6 of the scheme.

It has been urged on behalf of the respondents in this appeal that the spirit of clause (*b*) of paragraph 6 of the trust scheme has, in fact, been carried out and that no injustice was really done by the mere fact that the advertisements for submission of nomination papers appeared on less than 15 occasions, and not as prescribed under clause (*b*) of paragraph 6 of the scheme. We regret we are unable to concede to this contention because it appears to us that clause (*b*) of paragraph 6 of the scheme should be read strictly, and reading it in that light, it requires at least 15 days of advertisement in two daily Burmese newspapers, and the minimum days required for advertisement should in our opinion, be considered to be an essential requisite for a valid election under the scheme. The more the advertisements appear in the newspapers, more voters are likely to be acquainted with the purport of the advertisement. This point has apparently been overlooked by the learned Judge on the Original Side because his order appears to suggest as if there had been 15 insertions in the two Burmese daily newspapers, although made on alternate days.

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U LUN MAUNG AND ONE v. U SHWE BA AND SIX OTHERS.

U TUN BYU, C.J.

The order confirming the election of the trustees passed by the learned Judge on the Original Side on 4th July, 1952 is hereby set aside.

It was also urged before us that there were no registers of candidates or voters maintained as required under clause (*a*) of paragraph 6 of the scheme. We do not think we ought to say anything on this point so far as this appeal is concerned, in view of what we have expressed on the point which arose out of clause (*b*).

The appeal is accordingly allowed with costs; Advocate's fees fifty kyats.

APPELLATE CIVIL.

Before U Bo Gyi and U. Thaung Sein, JJ.

DAW HNIT (APPELLANT)

v.

DAW CHOE AND NINE OTHERS (RESPONDENTS).*

H.C. 1953

Sept. 30.

Civil Procedure Code, s. 96 and Order 41, Rule 1, sub-rule 1—Appeal—Copy of decree appealed from prerequisite—Administration suit—Preliminary stages—No decree but interlocutory order, not final—Appeal incompetent.

Held : As all matters in dispute between the parties have not been finally decided by the order under review, and as costs of the suit, which is an important matter and may affect the parties materially, have not been decreed an appeal against the order is incompetent.

A. T. N. A. T. Chockalingam Chettiar v. *Ko Maung Gyi and others*, A.I.R. (1938) Ran. 372, referred to.

G. Horrocks for the appellant.

P. K. Basu for the 5th to 10th respondents.

The judgment of the Bench was delivered by

U BO GYI J.—This appeal is from an order dated the 17th September, 1951 in Civil Regular No. 14 of 1946 of the District Court of Mandalay. The appeal has been brought by Daw Hnit who was the 4th defendant in the suit against certain findings of the District Judge in respect of properties which she claims as her own. On the face of the memorandum of appeal is this note by the appellant: "The appellant undertakes to file a certified copy of the Decree when the same is received." Apparently, on that undertaking, the memorandum of appeal was accepted by the Office; but, no decree has been

* Civil 1st Appeal No. 92 of 1951 against the order of the District Judge Court of Mandalay, in Civil Regular Suit No. 14 of 1946.

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U BO GYI, J.

drawn up by the District Court up to date. Under section 96 of the Civil Procedure Code, an appeal lies from a decree and not from a judgment, and Order 41, Rule 1, sub-rule (1) provides *inter alia* that the memorandum of appeal shall be accompanied by a copy of the decree appealed from. It is clear therefore that there is no proper appeal before this Court.

It is contended on appellant's behalf that this appeal should be stayed and the District Court directed to draw up a decree, which it is bound to do under section 33 of the Code. We have been attracted by this argument because no act or omission of a Court of Law should prejudice a party. Mr. Basu, the learned Advocate for the respondents, submits however that there is no judgment but only an interlocutory order in the case and that consequently no decree can be drawn up as yet. This submission is not without substance. The preliminary decree which was made by consent declared the shares of the heirs in the estate and after ordering an account to be taken of the properties provided: "And it is ordered that the above enquiries and accounts be made and taken, and all other acts ordered to be done, be completed, and that the Commissioner do certify the result of the inquiries, and the accounts, and that all other acts ordered are completed and have this certificate in that behalf ready for the inspection of the parties on a date to be fixed by the Court." The decree then went on to say that the suit should stand adjourned to a reasonable date for making the final decree. A Commissioner was appointed pursuant to the decree and he recorded evidence and submitted his report. Written objections were filed and the learned District Judge passed the order dated the 17th September, 1951 mentioned

before. On the date the order was passed, the learned Judge adjourned the case to 28th September, 1951 for mention. On the latter date, time was asked for and granted to study the order and on the 23rd October, the present appellant intimated her intention to file an appeal against the order. The memorandum of appeal was presented to this Court on the 3rd November, 1951.

Now, beyond recording findings agreeing or disagreeing with those of the Commissioner, the learned District Judge has not taken any steps in the administration of the estate. In point of fact, he has not even given an order as to the costs of the suit. In an administration suit such as the present, it is well-known that the costs of the suit is an important matter which may affect the parties materially.

The circumstances of the present case are similar to those in *A. T. N. A. T. Chockalingam Chettiar* v. *Ko Maung Gyi and others* (1). The first head-note to the case which we think sets out the effect of the judgment runs:

> "Where a preliminary decree for administration has been drawn up, nothing more is required from the Court beyond giving directions to the administrator or the receiver or whoever it is who is in charge of the estate, as to the lines the administration ought to take ; and the only other decree which can be passed in the administration is the final decree, which will declare that the estate had been administered and which will allot out of the assets remaining in the hands of the Court or the administrator the various shares to the parties entitled to receive them. Hence after the preliminary decree, a supplementary decree cannot be passed by the Court on the application of a creditor."

It is true that the Civil Procedure Code does not specifically provide what should be the contents of a

(1) A.I.R. (1938) Ran. 372.

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U BO GYI, J.

final decree in an administration suit and the contents of the decree must be adapted to the matters in dispute between the parties. But, in the present case, we are of the view that all matters in dispute between the parties have not been finally decided by the order under review. To mention but one instance, the costs of the suit have not been decreed.

By our dismissing the appeal as being incompetent, the parties will not be prejudiced. The appellant can move the District Court to take further steps in the matter and draw up the final decree and can then file an appeal, if she so wishes. This, we think, is the safest and most proper course to take in the present case.

The appeal is accordingly dismissed as being incompetent. The costs of the appeal will follow the result of the appeal if any, which may be preferred against the final decree in the administration suit.

APPELLATE CIVIL.

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

In re MESSRS. BURMA CORPORATION LTD. (APPLICANT)

H.C. 1953

Oct. 22.

v.

THE UNION OF BURMA (RESPONDENT)*.

Retrospective effect of Act—Where no date fixed—Matter one of procedure only, full retrospective effect—Requisitioning (Emergency Provisions) Act, 1947 in force 31st July 1947—Requisitioning (Claims and Compensation) Order, 1949, in force 5th October 1949—Claim made thereunder for damage in 1945—Requisitioning (Emergency Provisions) (Amendment) Act, 1951—New provision sub-s. (4) added to s. 6 of Requisitioning (Emergency Provisions) Act, 1947, effect of—.

Held: It is a clear and well understood rule of construction that no retrospective operation will be attributed to a statute unless it is expressly stated to be so, or unless it clearly arises by necessary implication, and unless that effect cannot reasonably be avoided without doing some violence to the language of the statute; and no greater retrospective effect will be given to a statute more than what the language of the statute renders it to be necessary.

Laurie v. *Renad*, (1892) Ch.D. 402 at 421; In re *Athlumney*, (1898) 2 Q.B. 547 at 551; In re *An Arbitration between Williams and Stepney*, (1891) 2 Q.B. 257 at 259; *Hutchinson* v. *Jauncey*, (1950) 1 K.B. 574 at 577, followed.

Held further: Where the provision of law is a matter of procedure only and no date has been fixed to indicate up to which date the retrospective operation was to take effect, full retrospective effect can be given to the statute.

The Ydun, (1899) Prob. Divn. 236; *Wright* v. *Hale*, (1860) 6 H & N 227 at 232, followed.

Choon Foung, Assistant Attorney-General, for the respondent.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The facts which led to the present reference might be stated, briefly, to be that in or about the month of June, 1945, the British

*Civil Reference No. 4 of 1952 on a Reference made by the Chief Judge, Rangoon City Civil Court, in Civil Arbitration Case No. 119 of 1950.

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In re MESSRS. BURMA CORPORATION LTD.

v.

THE UNION OF BURMA.

U TUN BYU, C.J.

military authorities requisitioned the premises, situated at No. 20, Windermere Gardens, and that was done under the Defence of Burma Rules. The said premises were de-requisitioned on or about the 9th March, 1946. Messrs. Burma Corporation Ltd., hereinafter called "the Company", alleged that considerable damage was done to the premises at No. 20, Windermere Gardens, during the period of requisition; and on or about the 3rd March, 1947, they were said to have submitted a bill for the damage incurred to the Assistant Director, Claims and Hirings, South Burma Area. Subsequently, the Company accepted, without prejudice, an offer of Rs. 2,650 from the Government of Burma for the damage which was alleged to have been done to the premises during the period of requisition.

On the 15th May, 1948, the Company filed an application under the Requisitioning (Claims and Compensation) Order, 1947, before the Collector of Rangoon, to have the matter referred to arbitration, and the application was forwarded to the Chief Judge, Rangoon City Civil Court, for disposal, and in consequence the Arbitration Case No. 1 of 1949 was opened. The Defence of Burma Act expired on the 31st July, 1947, and consequently the Defence of Burma Rules also lapsed on the 31st July, 1947; and thus the Requisitioning (Claims and Compensation) Order, 1947, which was made under the Defence of Burma Rules, also lapsed on the 31st July, 1947. Consequently, the application, which the Company filed before the Collector of Rangoon, on the 15th May, 1948, was made at a time when the Requisitioning (Claims and Compensation) Order, 1947, had ceased to operate.

It might be mentioned at once that the Requisitioning (Emergency Provisions) Act, 1947,

came into force on the date that the Defence of Burma Act and the Rules made under that Act expired; and the Requisitioning (Claims and Compensation) Order, 1949, was made on or about the 5th October, 1949.

On the 3rd January, 1950, the Company withdrew the Arbitration Case No. 1 of 1949, apparently because it was made under a law which had ceased to operate. A fresh application to refer the matter in dispute to arbitration was again filed before the Collector of Rangoon on the 17th January, 1950, who transmitted it to the Chief Judge, Rangoon City Civil Court, for disposal, as was done previously; and the proceedings thereafter became known as Arbitration Case No. 1 of 1950; and while the Arbitration Case No. 1 of 1950 was still pending before the Chief Judge, Rangoon City Civil Court, a new Act, known as the Requisitioning (Emergency Provisions) (Amendment) Act, 1951, was enacted. It has been argued on behalf of the Company that the new provisions of sub-section *(4)* of section 6 that were introduced by the Requisitioning (Emergency Provisions) (Amendment) Act, 1951, do not, in law, operate retrospectively to affect the right to claim compensation under the Requisitioning (Claims and Compensation) Order, 1949, in view of the provisions of sections 5 and 6 of the Requisitioning (Emergency Provisions) Act, 1947.

Lindley L.J., in *Laurie* v. *Renad* (1), stated:

"It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary."

(1) (1892) Ch.D. 402 at 421.

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A similar observation was made in In re *Athlumney* (1):

"No rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards a matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in a language which is capable of either interpretation, it ought to be construed as prospective only."

Thus, it has become a clear and well understood rule of construction of statutes that no retrospective operation will be attributed to a statute unless it is expressly stated to be so, or unless it clearly arises by necessary implication, and unless that effect cannot reasonably be avoided without doing some violence to the language of the statute. It is also an accepted rule of construction that no greater retrospective effect will be given to a statute more than what the language of the statute renders it to be necessary. However, in construing the provisions of a statute, it must also be remembered that where an enactment is expressly or plainly retrospective in operation, the Court will have no alternative but to interpret it in that sense, as it is only reasonable to assume that the Legislature intended a statute to have the meaning which it plainly expresses. Lord Esher, M.R. in In re *An Arbitration between Williams and Stepney* (2), observed:

"It is the duty of the Court to construe any Act that come before it, and to deal only with what is expressed in the Act."

Evershed, M.R., also observed in *Hutchinson* v. *Jauncey* (3), as follows:

". . . . . It seems to me that if the necessary intendment of the Act is to affect pending causes of action,

(1) (1898) 2 Q.B. 547 at 551. (2) (1891) 2 Q.B. 257 at 259.
(3) (1950) 1 K.B. 574 at 579.

then this Court will give effect to the intention of the Legislature, even though there is no express reference to pending actions."

We respectfully and entirely agree with the above observations.

The Requisitioning (Emergency Provisions) (Amendment) Act, 1951, purports to add a new sub-section *(4)* to section 6 of the principal Act, namely, to the Requisitioning (Emergency Provisions) Act, 1947, and it reads:

"*(4)* No compensation shall be payable under the provisions of this section unless the owner of the property or thing, requisitioned or deemed to have been requisitioned under the provisions of this Act, submits his claim for such compensation within ninety days from the date on which the said property or thing was de-requisitioned:"

And sub-section *(2)* of section 1 of the Requisitioning (Emergency Provisions) (Amendment) Act, 1951, is in these words:

"*(2)* It shall be deemed to have come into force on the 4th January 1948."

The meaning of sub-section *(2)* of section 1 of the Requisitioning (Emergency Provisions) (Amendment) Act, 1951, appears to us to be very clear and definite. It expressly purported to make the new provisions in sub-section *(4)* of section 6 retrospective in operation as if it had been in force on the 4th January, 1948. We cannot conceive how a different construction can be placed on the provisions of the amending Act of 1951, without doing some violence to the meaning of the words used in section 1 *(2)* of the Requisitioning (Emergency Provisions) (Amendment) Act, 1951.

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Under section 5 of the Requisitioning (Emergency Provisions) Act, 1947, all the requisitionings and de-requisitionings that were done under the Defence of Burma Rules, are deemed to have been made under the Requisitioning (Emergency Provisions) Act, 1947, and this Act was said to have come into force on the 31st July, 1947. Thus, where certain properties had been de-requisitioned before the Requisitioning (Emergency Provisions) Act, 1947, came into force, they could, by reason of the provisions of section 5 of the Requisitioning (Emergency Provisions) Act, 1947, be deemed to have been de-requisitioned under that Act as soon as that Act came into force, which was on the 31st July, 1947.

Sub-section (*2*) of section 1 of the Requisitioning (Emergency Provisions) (Amendment) Act, 1951, which has been reproduced earlier, however shows clearly that the retrospective operation of the new sub-section (*4*) of section 6 was to relate back as far as the 4th January, 1948, only, and not to the 31st July, 1947, when the Requisitioning (Emergency Provisions) Act, 1947, first came into force. The learned Assistant Attorney-General contended that as the amending Act of 1951 dealt with a matter of procedure only, and that as the amendment was in the nature of procedure only, the Court ought to give retrospective effect relating back to the date on which the Requisitioning (Emergency Provisions) Act, 1947, came into force, *i.e.*, the retrospective effect should extend back as far as the 31st July, 1947, and he relied for this purpose on the case of *The Ydun* (1). We are unable to accept this contention in that the amending Act of 1951 expressly stated that the retrospective operation was to relate back only as far as the 4th January, 1948. Moreover, if we were to

(1) (1899) Prob. Divn. 236.

accept the construction which the learned Assistant Attorney-General attempted to place on the amending Act of 1951, it would mean that sub-section (*2*) of section 1 of the Requisitioning (Emergency Provisions) (Amendment) Act, 1951, was not intended to have any meaning, and that it was altogether superfluous. It is difficult to appreciate how the provisions of sub-section (*2*) can be considered to be superfluous when the Legislature has expressly enacted them. Thus, it appears to us to be clear that when the provisions of sub-section (*2*) of section 1 of the amending Act of 1951 are read with the provisions of the new sub-section (*4*) of section 6 of the principal Act, it means that where the de-requisitionings were made, or could be deemed to have been made, after the 4th January, 1948, no claims for compensation will be entertained, if the claims are not made within ninety days from the date on which the property was de-requisitioned, or could be deemed to have been de-requisitioned.

As regards the contention that the new provisions of sub-section (*4*) of section 6 is *ultra vires* of the provisions of section 23 (*4*) of the Constitution we agree with the conclusions which U Bo Gyi J., has arrived at. The new sub-section (*4*) of section 6 relates, in our opinion, to a matter of procedure only in that it merely prescribes the period within which the claims for compensation should be made. The provision of law, which came before the Court of Appeal in the case of *The Ydun* (1), is somewhat analogous, in effect, to the provisions of the new sub-section (*4*) to section 6 of the Requisitioning (Emergency Provisions) (Amendment) Act, 1951. There it was held to be a matter of procedure only, and a full retrospective effect was given to the statute

(1) (1899) Prob. Divn. 236.

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concerned. There no date was fixed to indicate up to which date the retrospective operation was to take effect. A. L. Smith L.J., observed in that case as follows:

" . . . . . The rule applicable to cases of this sort is well stated by Wilde, B., in *Wright* v. *Hale* (1) namely, that when a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act."

The answer to the first question propounded in the order of the learned Chief Judge of the Rangoon City Civil Court, is in the negative, while the answer to the second question is that where a property or thing was de-requisitioned, or could be deemed to have been de-requisitioned under the Requisitioning (Emergency Provisions) Act, 1947, after the 4th January, 1948, all claims which were not made within ninety days from the date on which the property or thing was de-requisitioned or deem to have been de-requisitioned shall be considered to be barred by limitation of time and liable to be dismissed. Each party will bear its own costs as far as this reference is concerned.

(1) (1860) 6 H. & N. 227 at 232.

APPELLATE CIVIL.

Before U Chan Tun Aung, J.

MA NYEIN BYU AND FOUR OTHERS (APPELLANTS)

v.

MA THET YON (RESPONDENT). *

H.C. 1953

Oct. 22.

Civil Procedure Code, s. 100 and Order 42—Concurrent finding of fact by original Court and 1st Appellate Court—Second Appeal, when competent—Burmese Buddhist Law—Child taking share of inheritance on remarriage of father—No further interest at his death.

Held : Where a finding of fact by the original Court has been accepted by the 1st Appellate Court, however unsatisfactory the finding might be, unless it is based upon no evidence or unless there is failure to determine some material issue of law or substantial error or defect in procedure, a second appeal does not lie.

Ma Pu v. *K. C. Mitra*, 6 Ran. 586.

Held also : Where on the re-marriage of the father, a child has taken a share of the joint property of the marriage with the deceased mother, the child has no further interest in the estate on the death of the father.

Ma Ohn Tin v. *Ma Ngwe Yin*, 7 Ran. 398.

Ba Maung for the appellants.

Khin Maung for the respondent.

U CHAN TUN AUNG, J.—This is an appeal under section 100 of the Civil Procedure Code against the judgment and decree of the District Court of Prome, setting aside the judgment and decree of the Assistant Judge's Court, Paungdè, before which the appellants-plaintiffs sued the present respondent-defendant and others for recovery of possession of certain piece of land and also for recovery of 200 baskets of paddy or its value—K 600 as mesne profit.

* Civil 2nd Appeal No. 42 of 1952 against the decree of the District Court, Prome, in Civil Appeal No. 21-P of 1948.

H.C. 1953

MA NYEIN BYU AND FOUR OTHERS v. MA THET YON.

U CHAN TUN AUNG, J.

The facts and circumstances under which the appellants-plaintiffs sued for the recovery of possession of land in suit as against the respondent-defendant, are fully set out in the judgment of the 1st Appellate Court dated the 18th January, 1952 and I need not recapitulate them. Most of the facts are not in dispute by the parties. But the circumstances under which the present appeal has arisen to this Court are as follows:

At the trial of the suit, the trial Judge framed 8 issues and after adducing evidence thereon by the parties concerned, and after hearing them the learned trial Judge decreed the suit in favour of the appellants-plaintiffs, giving possession of the land in suit and also allowing recovery of 100 baskets of paddy or its value—K 300 as mesne profit. As against that judgment and decree passed after the first hearing of the suit, only the present respondent-defendant preferred an appeal to the District Judge, Prome, who in his Civil Appeal No. 21-P of 1948 remanded the case to the lower Court with the direction to try and give a decision on an additional issue which the learned District Judge considered to be most material in the determination of the suit in question. The additional issue framed by the learned District Judge is as follows:

> "Whether Ma Sein Chit has taken her share of inheritance in the joint property of her parents on the re-marriage of U Aung Byu and if so, is she entitled to further interest in the property left by U Aung Byu after his death?"

The order of remand was made on the 23rd August 1951. The learned Assistant Judge of Paungdè, on receipt of the District Judge's order for the determination of the additional issue set out

above, gave notices to the parties concerned and thereafter gave a finding thereon on 9th November 1951. In determining the additional issue, the learned Assistant Judge held that the appellants-plaintiffs had no more interest in the estate of U Aung Byu, deceased, inasmuch as Ma Sein Chit had taken her share of inheritance in the joint property of her parents on the re-marriage of U Aung Byu with Ma Thet Yon, the present respondent-defendant. In other words, the original Court held that the appellants-plaintiffs, who are claiming as collaterals and who are, in fact, the aunts of Ma Sein Chit, they being sisters of Ma Chet, (Ma Sein Chit's mother, the first wife of U Aung Byu) they had no further right of inheritance in the estate of U Aung Byu. The learned trial Judge then submitted the proceedings with his finding on the additional issue to the District Judge who, as stated above, accepted his finding and allowed the appeal preferred by the respondent-defendant. It is against that judgment and decree the present appeal has arisen. The main ground taken up here by the appellants-plaintiffs is that no opportunity had been given to them to adduce further evidence when the additional issue framed by the 1st Appellate Court was determined by the trial Court after the remand, and that as such, they had been greatly prejudiced in not having had that opportunity. The appellants-plaintiffs' counsel further contends that since no opportunity to cross examine the witnesses cited by the respondent-defendant in that behalf has been given to appellants-plaintiffs by the trial Court, the determination of the additional issue was improper and that it was an error contrary to law. I am afraid, I cannot accept this contention. The trial

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proceedings show that the remand order for the determination of the additional issue was received by the trial Court on the 24th August 1951 and on that very day necessary notices were issued to the parties concerned through their lawyers. After 2 or 3 adjournments, the parties were served with the notices and on the 5th October 1951 when the case was called, the 1st appellant-plaintiff with her lawyer U Kyan was present, and the respondent-defendant with her lawyer U Maung Maung was also present. The 1st appellant-plaintiff's witnesses were also present. However, so far as respondent-defendant and her witnesses were concerned U Kyan appearing for the 1st appellant-plaintiff requested the Court to recall all the defence witnesses for purposes of further cross-examination with a view to proper determination of the additional issue. On the day in question, only the respondent-defendant was examined and none of her witnesses was examined, as they were absent. U Maung Maung for the respondent-defendant objected to the recall of the defence witnesses. The case was then adjourned till 6th October 1951 for further consideration of the objection raised by both the parties. On 6th October 1951 when the case was called U Kyan for the appellants-plaintiffs moved the Court under Order 18, Rule 17 of the Civil Procedure Code to recall and examine the defence witnesses cited by respondent-defendant. The respondent-defendant's lawyer, however, objected to it. However, the Court directed U Kyan to make a written application stating the names and witnesses whom he wished to cross-examine and fixed 10th October 1951 for the purpose. On 10th October 1951, when the case was called, Pleader U Hla Gyaw representing U Kyan for the

appellants-plaintiffs stated that U Kyan did not wish to file the list of defence witnesses whom he proposed to recall for further cross-examination. U Maung Maung for the defence witnesses was also present on the day and on 12th October 1951, the trial Court gave a decision on the additional issue indicated above. These facts are fully set out in the diary of the trial record and it would be seen that every opportunity was given to the appellants-plaintiffs for the recall and cross-examination of defence witnesses cited by the respondent-defendant so as to enable them to adduce any evidence to cover the point involved in the additional issue; yet their lawyer did not choose to avail herself of the opportunity so given, though he had undertaken to file a list of the witnesses whom he wished to recall. It has now been urged that decisions of both the lower Courts on the issue were based upon irrelevant evidence. I regret I cannot agree with this submission. The decisions were based upon facts and facts alone and the parties have had every opportunity of adducing evidence in that regard to cover the points involved in the additional issue and I do not see any substantial error or defect in the procedure which would justify interference by this Court in second appeal. A clear and definite finding has been made based upon evidence adduced before the original Court that Ma Sein Chit has no more interest in the estate of U Aung Byu, deceased, inasmuch as she had already taken a share of interest in the joint property of her parents on the re-marriage of U Aung Byu with the present respondent-defendant. Both on point of fact and of law, the finding is in consonance with the principles of Burmese Buddhist Law and I fully accept the authority cited in support thereof. See

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Ma Ohn Tin v. *Ma Ngwe Yin* (1). Furthermore, the appellants-plaintiffs are aunts of Ma Sein Chit and therefore under the Burmese Buddhist Law they are not preferred to other collaterals when the inheritance can descend.

Besides, second appeals are not permissible against concurrent finding of facts. Here, in the present appeal, the original Court has found in regard to the material issue affecting the appellants-plaintiffs' claim against them and the said finding has been accepted by the 1st Appellate Court. Thus, there are concurrent findings of fact and to my mind however unsatisfactory the findings might be, unless such finding is based upon no evidence, or unless there is failure to determine some material issue of law, or substantial error or defect in procedure, I do not think second appeal lies under section 100 of the Civil Procedure Code vide *Ma Pu* v. *K. C. Mitra* (2).

Therefore, taking into consideration all the facts and circumstances of the case and also in view of concurrent findings of the two lower Courts on the material issue arisen therein, I do not see any reason to interfere with such findings I therefore dismiss this appeal with costs.

(1) I.L.R. 7 Ran. 398. (2) I.L.R. 6 Ran. 586.

APPELLATE CIVIL.

Before U San Maung, J.

H.C. 1953

Sept. 29.

MAUNG BA SIN (APPLICANT)

v.

DAW MON AND THREE OTHERS (RESPONDENTS).*

Principal and Agent—Suit by principal for recovery of money received on his behalf against agent and/ or legal representatives—Limitation Act, Articles 62 and 89—Where power-of-attorney is registered, Article 116 applies.

Held : As the contractiof agency was not by a registered document Article 116 of the Limitaton Act has no application.

Tricomdas Cooverji Bhoja v. *Sri Gopinath Jiu Thakur*, A.I.R. (1916) (P.C.) 182 ; *Ganapa Putta Hegde* v. *Hammad Saiba and Abdul Saib*, 49 Bom. 596, distinguished.

Held : A suit of the description referred to in Article 89 may be brought against the legal representative of the agent as well as against the agent himself ; but where the suit is brought against the legal representative of an agent merely for the recovery of a definite sum, such a suit is governed by Article 62 and not by Article 89.

Bindraban Behari v. *Jamunar Kunwar*, 25 All. 55 ; *Rao Girraj Singh* v. *Rani Raghubir Kunwar*, 31 All. 429, dissented from.

Sree Rajah Parthasaradhi v. *Subba Rao and others*, A.I.R. (1927) Mad. 157 at 160; *Bikram Kishore Manikya Bahadur* v. *Jadab Chandra Chowdry and others*, A.I.R. (1935) Cal. 817; (*Maharajadhiraj Sir*) *Rameshwar Singh Bahadur* v. *Narendra Nath Das and others*, A.I.R. (1923) Pat. 259 ; *Ashutosh Roy and others* v. *Arun Sankar Das Gupta and others*, A.I.R. (1950) Dacca 13, followed.

Ghosh and *Guha* for the applicant.

Tun I for the respondents.

U SAN MAUNG, J.—In Civil Miscellaneous Case No. 6 of 1951 of the District Court of

*Civil Revision No. 36 of 1952 against the order of the District Court, Pyapôn, in Civil Misc. No. 6 of 1951.

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MAUNG BA SIN v. DAW MON AND THREE OTHERS.

U SAN MAUNG, J.

Pyapôn, the applicant Maung Ba Sin made an application for leave to sue *in forma pauperis* the legal representative of U Ni Toe, the husband of the first respondent Daw Mon and the father of the second, third and fourth respondents Maung Thein, Ma Mya Khin and Maung Aye Cho. He alleged that by a registered general power-of-attorney dated the 17th of November, 1930, he and his mother Daw Sint (now deceased) appointed U Ni Toe as their agent for the management of their paddy-lands, that in the course of his management thereof U Ni Toe gave a Shindan (statement of accounts) dated the 11th August, 1937 wherein he acknowledged that he had in his possession a sum of Rs. 5,764-9-0 belonging to his principals and that U Ni Toe who continued to manage the paddy-lands until his death on the 20th of April 1948 furnished no further account although his collections of the rental paddy amounted to 1,950 baskets per year. It was alleged that on the death of U Ni Toe he was owing his principals a sum of Rs. 10,206-9-0 being the balance of the sum of Rs. 15,514-9-0 *minus* the sums which they had received from time to time before and after his death.

The learned Judge of the District Court of Pyapôn who had to deal with the application of Maung Ba Sin dismissed it on the ground that the suit was barred by limitation whether it is held to come within the ambit of Article 62 of the Limitation Act or of Article 89 of that Act.

In this application for revision the learned Advocate for the applicant has contended, firstly, that the learned Judge of the District Court was in error in not considering the fact that the contract of agency between U Ni Toe and principals

was created by registered documents and that therefore the period of limitation was 6 years under Article 116 of the Limitation Act and secondly, that the learned Judge also erred in assuming that the money sued for was received by the respondents and that therefore Article 89 of the Limitation Act was applicable.

The first contention of the learned Advocate for the applicant is entirely without foundation because a perusal of the proceedings shows that the power-of-attorneys given to U Ni Toe were merely authenticated and not registered as contended by him. Therefore the rulings in the cases of *Tricomdas Cooverji Bhoja* v. *Sri Gopinath Jiu Thakur* (1) and *Ganapa Putta Hegde* v. *Hammad Saiba and Abdul Saib* (2) wherein the contracts under consideration were registered documents, have no application whatsoever.

There are no doubt two rulings in favour of the contention that a suit by a principal against the legal representative of his agent for money received by him and not accounted for is governed by Article 120 of the Limitation Act.

See *Bindraban Behari* v. *Jamunar Kunwar* (3) and *Rao Girraj Singh* v. *Rani Raghubir Kunwar* (4). However, the learned Judges who decided these cases seem to have proceeded on the assumption, which appears to me to be erroneous, that Article 89 of the Limitation Act cannot be applicable to such cases because it only mentions of a suit by a principal against his agent and not as against the legal representative of a deceased agent. In this connection I am of the same opinion as Curgenven J., who expressly dissented from the

(1) A.I.R. (1916) (P.C.) 182.
(2) 49 Bom. 596.
(3) 25 All. 55.
(4) 31 All. 429.

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U SAN MAUNG, J.

view held in *Bindraban Behari* v. *Jamunar Kunwar* (1) in the following terms:—

"In that case it was not only held that a fresh cause of action arose, when, upon the death of the father, the money came into the defendant's hands; but, further, that the suit against the son would not fall under Article 89 of the Limitation Act because the suit was not against the agent but against his legal representative. With all respects, I must dissent from both propositions—against the latter it has only to be pointed out that the Limitation Act classifies suit according to their 'description' and that a suit of the description referred to in Article 89 may be brought against the legal representative of an agent as well as against the agent himself, just as under Article 78 the drawer's representatives may be sued upon a dishonoured bill of exchange.".

See *Sree Rajah Parthasaradhi* v. *Subba Rao and others* (2). The Madras decision was followed by a Bench of the Calcutta High Court in *Bikram Kishore Manikya Bahadur* v. *Jadab Chandra Chowdry and others* (3) where it was held that "the omission of any mention of legal representatives in the words under 'description' of suit in Article 89 does not mean that the article is not intended to apply to a suit against the legal representatives." (In *Maharajadhiraj Sir*) *Rameshwar Singh Bahadur* v. *Narendra Nath Das and others* (4) a Bench of the Patna High Court held that Articles 89 and 90 of the Limitation Act which relate to suit by principal against his agent do not apply to suits against representatives of a deceased agent for money received and that the proper article of Limitation Act, Article 62, read in the light of section 2 of the Limitation Act would include a claim against the legal representatives for money received for

(1) 25 All. 55.
(2) A.I.R. (1927) Mad. 157 at 160.
(3) A.I.R. (1935) Cal. 817.
(4) A.I.R. (1923) Pat. 259.

the plaintiffs' use by the defendants or by their father through whom they derived their liability to be sued. However, practically the whole case law on the subject seems to have been reviewed by Guha J., in *Ashutosh Roy and others* v. *Arun Sankar Das Gupta and others* (1) where the learned Judge held that a suit of the description referred to in Article 80 may be brought against the legal representative of the agent as well as against the agent himself; but that where the suit is brought against the legal representative of an agent merely for the recovery of a definite sum, such a suit is governed by Article 62 and not by Article 89. I am entirely in agreement with the view expressed by the learned Judge in this case and I am of the opinion that there can be suits not only under Article 89 of the Limitation Act but also under Article 62 as against the legal representatives of a deceased agent.

In the case now under consideration no matter whether Article 62 or Article 89 is held to be applicable it is clearly barred by limitation. The application for leave to sue as a pauper has therefore been rightly dismissed by the learned Judge of the District Court of Pyapôn. In the result the application for revision fails and must be dismissed with costs; Advocate's fee three gold mohurs.

(1) A.I.R. (1950) Dacca 13.

APPELLATE CIVIL.

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

H.C. 1953

Oct. 22.

MAUNG SAN BWINT AND ONE (APPELLANTS)

v.

AH HEIN (RESPONDENT).*

Transfer of Property Act, s. 54, third paragraph—Immoveable property—Value Rs. 100 and under—Delivery of possession, valid sale effected thereby—Deed of sale, unregistered, of no consequence—Evidence to show nature of possession by delivery not barred by Evidence Act or Registration Act, s. 49.

Held: The third paragraph of s. 54 of the Transfer of Property Act expressly states that where the value of property is less than Rs. 100 the sale can be effected by delivery of possession. The existence of an unregistered sale deed obtained by the purchaser through misconception or over caution cannot render a sale by delivery of possession ineffective.

Kuppuswami v. *Chinnaswami Goundan and others*, A.I.R. (1928) Mad. 546 at 548, dissented from.

Daw Yin v. *U Sein Kyu and three others*, (1950) B.L.R. 190, referred to.

Keshwar Mahton v. *Sheonandan Mahton*, A.I.R. (1929) Pat. 620 at 622; *Tribhovan Hargowan* v. *Shankar Desai*, A.I.R. (1943) Bom. 431 at 433; *Gulab and others* v. *Laltu Singh and another*, (1919) 51 I. C. 561, followed.

Held also: There is nothing in the Evidence Act or in s. 49 of the Registration Act to show that oral proof cannot be given to explain the nature of the vendor's possession for the purpose of establishing a sale by delivery of possession.

Kyaw Htoon for the appellants.

Ba Shun for the respondent.

U TUN BYU, C.J.—The plaintiff-respondent Ah Hein instituted a suit for the possession of a piece of land which he purchased about 20 years ago for a

* Special Civil Appeal No. 5 of 1952 against the decree of the High Court, Appellate Side, in Civil 2nd Appeal No. 67 of 1951.

sum of Rs. 75 and for the recovery of Rs. 180 as mesne profits. The defendants-appellants Maung San Bwint and Ma Ngwe Nu, who had been in possession of this land for some years pleaded that they had purchased the land in dispute from one Ton Sha, a nephew of the plaintiff-respondent, and that they had also been in adverse possession of the land for about 17 years. The learned 2nd Subordinate Judge, Thazi, answered the issues in favour of the plaintiff-respondent Ah Hein; and he gave a decree for possession of the land in dispute and for payment of Rs. 60 as mesne profits, with costs.

The defendants-appellants appealed against the judgment and decree passed against them in the Court of the 2nd Subordinate Judge, Thazi, but their appeal was dismissed, with costs, in Civil Appeal No. 5 of 1951 of the District Court of Meiktila. The defendants-appellants next appealed to the High Court in Civil Second Appeal No. 67 of 1951, and their appeal in the High Court was also dismissed, with costs.

The defendants-appellants further preferred an appeal under section 20 of the Union Judiciary Act. We might say at once that there was evidence on which the three Courts might arrive at the conclusion that the land in dispute had been sold to Ah Hein for Rs. 75 and that Ah Hein received possession of the land in dispute. Thus, there is a concurrent finding of fact against the defendants-appellants that Ah Hein did receive the possession of the land in dispute after he had purchased it under an unregistered sale deed from its original owner. In fact, the land subsequently appears in Ah Hein's name, and he was also assessed to land revenue payable on this land. There was also evidence to show that

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MAUNG SAN BWINT AND ONE v. AH HEIN.

U TUN BYU, C.J.

Ah Hein had a fence placed around the land after he had obtained possession of it.

It has been argued before us on behalf of the defendants-appellants that as the sale deed, which was executed in favour of Ah Hein was not registered, he could not adduce other evidence to prove his title to the land in dispute although it was only of the value of Rs. 75, and that the delivery of possession, which was made after the sale deed had been executed, could not be used to prove that the sale had been effected in accordance with the third paragraph of section 54 of the Transfer of Property Act. The learned Advocate for the defendants-appellants had placed great reliance upon the case of *Kupuswami* v. *Chinnaswami Goundan and others* (1) as laying down the correct proposition of law where it was stated :

". . . . . The expression 'sale by delivery of property' should properly be construed only as referring to and comprising a case where the parties agree that the transaction of sale should be effected by delivery of property and only in that way and cannot possibly be construed as to include a case where the parties agree to reduce to the form of a document the terms of the sale. The moment the parties for some reason consider that it is not sufficient to effect the transaction of sale by mere delivery of property, but require that as evidence of such transaction there should be a deed or document, the transaction can scarcely be correctly described as one effected by mere delivery of property."

We deeply regret that we are unable to accept the law propounded in *Kupuswami* v. *Chinnaswami Goundan* (1) as laying down the correct interpretation of the 3rd paragraph of section 54 of the Transfer of Property Act, which are in these words :

"In the case of tangible immoveable property, of a value less than one hundred rupees, such transfer may be made

(1) A.I.R .(1928) Mad. 546 at 548.

either by a registered instrument or by delivery of the property."

We are unable to see anything ambiguous in those words, and they ought therefore to be attributed with their ordinary meaning which, in effect, clearly allows a person to effect a sale of immoveable property of less than Rs. 100 in value in one of the two modes indicated therein. So long as the purchase can be shown to have been made in one of the two modes prescribed therein, it appears to us to be only consistent with good reason to hold that the requirement of the statute has been conformed to. The case of *Kupuswami* v. *Chinnaswami Goundan and others* (1) was also dissented from in the case of *Keshwar Mahton* v. *Sheonandan Mahton* (2). The decision in *Kupuswami* v. *Chinnaswami Goundan and others* (1) was also not followed in the case of *Tribhovan Hargowan* v. *Shankar Desai* (3) where it was observed:

". . . With respect, I prefer the ratio of the other cases that where there is an unregistered sale deed which cannot be used for proving the title, the party in question is not precluded from proving the sale by the delivery of the property."

The case of *Daw Yin* v. *U Sein Kyu and three others* (4) was also referred to on behalf of the defendants-appellants. It does not appear in that case that it was suggested either in the pleadings or in the evidence that there was delivery of possession of the property after the alleged sale was effected. Stuart, J.C. in *Gulab and others* v. *Laltu Singh and another* (5) observed:

"I fail to see how, when the transferee has already got a good title, his title can be lost by any act on the part of the

(1) A.I.R. (1928) Mad. 546 at 548.
(2) A.I.R. (1929) Pat. p. 620 at 622.
(3) A.I.R. (1943) Bom. 431 at 433.
(4) (1950) B.L.R. 190.
(5) (1919) 51 I.C. 561.

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transferor, and I have great difficulty in following the reasoning of the Madras High Court in view of the fact that registration of a deed transferring property of less than Rs. 100 is optional."

The third paragraph of section 54 of the Transfer of Property Act expressly states that where the value of property is less than Rs. 100 the sale can be effected by delivery of possession. Thus, a choice is given by law, and in such a case a registered sale deed becomes unnecessary. If a purchaser, through a misconception or over caution conceived that he should also obtain a document executed by the vendor, even if it were to be unregistered, it is difficult to appreciate upon what process of reasoning that it can be reasonably asserted that the existence of an unregistered sale deed has rendered a sale by delivery of possession ineffective, when the third paragraph of section 54 of the Transfer of Property Act expressly allows this mode of making a valid transfer of property of less than Rs. 100 in value. We consider that we would be reading something into the third paragraph of section 54 of the Transfer of Property Act, which is not there, if we were to say that the existence of an unregistered sale deed would render a sale of property of less than Rs. 100 in value ineffective, although it was effected by delivery of possession. It appears to us to be most clear that the third paragraph of section 54 of the Transfer of Property Act was enacted to give a wider scope for effecting a sale of property of less than Rs. 100 in value; and that it would be wrong, unless there are clear words to the contrary, to say that where an unregistered sale deed had also been executed, the sale of the property of less than Rs. 100 in value cannot be effected or validly made by delivery of possession.

We are also unable to trace anything in the provisions of section 49 of the Registration Act or in the Evidence Act, which will show that oral evidence cannot be given to explain the nature of Ah Hein's possession, for the purpose of establishing a sale by delivery of possession, which is one of the modes of effecting a valid transfer under the third paragraph of section 54 of the Transfer of Property Act.

The defendants-appellants, it was found, had not proved the alleged sale of the land in dispute to them, and they were not able also to prove adverse possession for 12 years or more. It cannot in the present case be said that there is no evidence on which such findings might be arrived at; and the appeal is therefore dismissed with costs.

U CHAN TUN AUNG, J.—I agree.