BURMA LAW REPORTS

(1955) B.L.R

Containing cases determined by the

Supreme Court of the Union of Burma



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SUPREME COURT

1955

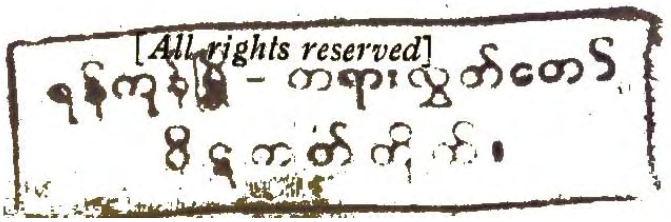
Containing cases determined by the Supreme Court of the Union of Burma

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တရားရုံးချုပ်စာကြည့်တိုက်

HON'BLE JUDGES OF THE SUPREME COURT OF THE UNION OF BURMA DURING THE YEAR 1955

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2. The Hon'ble Justice *Thado Maha Thray Sithu* U MYINT THEIN, M.A., LL.B., *Barrister-at-Law.*
3. The Hon'ble Justice *Thado Maha Thray Sithu* U CHAN HTOON, LL.B., *Barrister-at-Law.*
4. The Hon'ble Justice *Maha Thiri Thudhamma* U BO GYI, B.A., B.L. (from 16th March 1955).

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remain in force for a further period not exceeding five years." The President directed that it would continue in force for five years beginning from 1st August 1952. *Held :* The President in exercising his powers under s. 1 (iii) was not bringing into operation any new law, nor was he making any modifications or restrictions to the Act, but was merely prolonging the life of the Act for a period within the allotted span. No delegated or conditional legislation was involved, and in effect he was merely bringing into operation the second instalment of the life of the Act. *Re. Kalayam Veerbhaddrya*, I.L.R. (1950) Mad. 243 = (1949) 2 M.L.J. 663 ; *Chatturam and others* v. *Commissioner of Income-tax, Bihar*, (1947) F.C.R. 116; *Jatindra Nath Gupta* v. *The Province of Bihar*, (1949) F.C.R 175 = (1949) 2 M.L.J. 356; A.I.R. (1951) (S.C.) 332, referred to. *Joylal Agarwala* v. *The State*, A.I.R. (1951) (S.C) 484; *Milan Chand* v. *Dwarka Das*, A.I.R. (1954) Rajasthan 252, approved.

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၁၉၅၃ ခုနှစ်၊ ဒီဒိုကရေစီ ဒေသန္တရအုပ်ချုပ်ရေး အက်ဥပဒေ ပုဒ်မ ၆—ကျေးရွာ ကောင်စီအသီးသီးပါဝင်ရမည့်လူကြီးအရေအတွက်—၅ ဦးစီပါဝင်ရမည်မှာ နိုင်ငံတော် အစိုးရက သတ်မှတ်ခြင်း—အရွေးခံရသူ ၃ ဦးစီသာ ရှိပြီး၊ ၎င်းအုပ်ချုပ်ရေး နည်းဥပဒေ ၂၆ (က) အရ ကျေညာခဲ့ခြင်း၊ နည်းဥပဒေ ၅၄ အရ ပဌမအကြိမ် အစည်းအဝေးကျင်းပ၍ သူကြီးပါ လူကြီး ၄ ဦး တက်ရောက်လျက် ကျေးရွာကောင်စီမှ မြို့နယ်ကောင်စီသို့ တက်ရောက်ရန်ကိုယ်စားလှယ် ၄ ဦးတင်မြောက်ကြခြင်း။ ၎င်း ၄ ဦးတွင် မူလကျေးရွာကောင်စီမှရွေးလွှတ်လိုက်သော ၃ ဦးအနက်တဦးသည် ဥက္ကဋ္ဌ အဖြစ်ပါဝင်လာလေသည်။ နည်းဥပဒေ ၅၉ အရ နိုင်ငံတော်သမတထံ ခရိုင် ကောင်စီသို့ တက်ရောက်ရန် ကိုယ်စားလှယ်ရွေးချယ်ခြင်းကို အတည်ပြုသင့် မပြုသင့် ကျေညာရန် တင်ဆက်ရသည်။ ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံ ဥပဒေ ပုဒ်မ ၆၉ (၃)၊ နိုင်ငံတော်အစိုးရက (၁) ကျေးရွာ ကောင်စီများတွင် ကောင်စီဝင်လူကြီး ဦးရေအပြည့်အစုံ မရွေးကောက်ရသေးသည့် အတွက် ထိုကျေးရွာကောင်စီဝင်များ မိမိတို့၏ ဥက္ကဋ္ဌနှင့် မြို့နယ်ကောင်စီသို့ တက်ရောက်ရန် ကိုယ်စားလှယ်များကို ရွေးချယ်ခြင်းမပြုနိုင်သေး၊ (၂) ၎င်း သို့ရွေးချယ်ခြင်းမပြုနိုင်ဘဲလျက်၊ ရွေးချယ် တင်မြောက်လိုက်သော ကိုယ်စားလှယ်များပါဝင်ခဲ့သော မြို့နယ်ကောင်စီ အစည်းအဝေးသည် ဥက္ကဋ္ဌ၊ ဒုတိယ ဥက္ကဋ္ဌနှင့် ကိုယ်စားလှယ်များရွေးချယ်ပိုင်ခွင့်မရှိကြောင်း၊ (၃) တရားဝင်သောကျေးရွာကောင်စီမှ လွှတ်လိုက်သောကိုယ်စားလှယ်များပါဝင်သော အခြားမြို့နယ်ကောင်စီ ပဌမအကြိမ် အစည်းအဝေးသည်လည်း တရားမဝင်သော မြို့နယ်ကောင်စီအစည်းအဝေးဖြစ်၍ ပယ်ဖျက်လိုက်ခြင်း။ ၎င်းအမိန့်ကိုမကျေနပ်၍ ကျေးရွာကောင်စီမှဥက္ကဋ္ဌအဖြစ်ဖြင့်ရွေးချယ်ခံရသော ကိုယ်စားလှယ်က အမှုခေါ်စာရွက်တော် အမိန့်ထုတ်ပြန် ပေးစေရန် လျှောက်ရာ၊ (၁) ဒီဒိုကရေစီ ဒေသန္တရအုပ်ချုပ်ရေး ဝန်ကြီးဌာန (နိုင်ငံတော် သမတ)သည် နည်းဥပဒေ ၅၉ (၂) အရ အတည်ပြုရမည့် စီရင်ခွင့် အာဏာပိုင်ဖြစ်လေသည်။ (၂) ကျေးရွာကောင်စီများဆိုင်ရာရွေးကောက်ပွဲတွင် ကျေးရွာကောင်စီတခုအတွက် လိုအပ်သည့်လူကြီး ဦးရေအပြည့်အစုံ ရွေးကောက် တင်မြောက်ခြင်းမရှိခဲ့သောကြောင့် ထိုရွေးပြီးသားသူများသည် ကျေးရွာကောင်စီကို ဖွဲ့စည်း၍ သက်ဆိုင်သည့် ကိစ္စများကို မဆောင်ရွက်နိုင်သေးဟုဆိုသောအကြောင်းသည် တရားဥပဒေနှင့် မညီညွတ်ပေ။ ၎င်သို့လိုအပ်သည့် လူကြီးဦးရေ ပြည့်စုံစွာမရှိသေးသမျှကာလပတ်လုံး ကျေးရွာကောင်စီသည် မိမိ၏တာဝန်ဝတ္တရားများကို မဆောင်ရွက်ဘဲ ဆိုင်းငံ့နေရမည်ဟုလည်း ပြဋ္ဌာန်းချက်မရှိချေ။ (၃) ၎င်းအမိန့်သည် တရားဥပဒေနှင့် ထင်ရှားစွာ ဆန့်ကျင်သောကြောင့် ပယ်ဖျက်လိုက်သည်။

ဦးကံညွန့်နှင့် ဒေသန္တရ အုပ်ချုပ်ရေး အတွင်းဝန် ပါ ၂ ဦး 93

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LIMITATION ACT, SCHEDULE (1), ARTICLE 132 —*No Specific time fixed for repayment of loan in a mortgage deed—Ss. 19 and 20, Limitation Act—Order 41, Rule 22 (1), Civil Procedure Code—Respondent in an appeal entitled to support the decree on grounds decided for and against him—When cross-objections necessary.* Where no specific time is fixed for the payment of a debt on a mortgage, the money does not become due and the cause of action does not arise until demand for payment is made by the mortgagee and refused by the mortgagor. *N. B. Natu and others* v. *Bharati and others*, I.L.R. 54 Bom. 495-57 I.A. 194, distinguished ; *M. Masttiar and others* v. *S. A. Mudaliar*, A.I.R. (1944) Mad. 172 , *Megah Nath and another* v. *The Collector, Cawnpore*, A.I.R. (1947) All. 7, referred to. A mortgage debt becomes " payable " within the meaning of Sch. I, Art. 132 of the Limitation Act, 1908 when a default on the part of the mortgagor has occurred, and the mortgagee exercises his option to enforce the mortgage or, it becomes " payable " at the expiry of the stipulated period. *Lasa Din* v. *Gulab Kunwar & Sons*, (1952) 59 I.A. 376-7 Luck. = 44 A.I.R (1932) (P.C.) 207, followed. Under Order 41, Rule 22 (1), Code of Civil Procedure, a Respondent in an appeal is entitled to support the decree on grounds decided in his favour and also on grounds decided against him, and even on grounds other than those taken by the trial Court. A cross-objection is competent only if the matter could have been taken by way of an appeal. *Raja Ram* v. *Lehna and another*, A.I.R. (1942) Lah. 87 ; *Kishan Kishore* v. *Din Mohamed and others*, A.I.R. (1929) Lah. 684 ; *Mahagu* v. *Nararan*, I.L.R. (1950) Nag. 679 ; *Sri Ranga Thatachariar* v. *Srinwasa Raghavachariar*, (1927) I.L.R. 50 Mad. 866, dissented from. *Ram Prasad Kalwar* v. *Musemat Ajanasia*, (1922) I.L.R. 44 All. 577 ; *Abinash Chandra Ghosh* v. *Narahari Mehtar*, (1930) I.L.R. 59 Cal. 889, followed.

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SINO-BURMESE BUDDHIST—*Law applicable—Posthumous adoption—Revocation of adoption—Position of an adopted son and that of a natural son not identical—Right of inheritance in grandparents' estate by the children of a dog son and by the children of an adopted son who has lost his status—Division of the estate of a deceased person among the surviving brothers and sisters—Fundamentals of Burmese Buddhist Law of Succession—Kinwun Mingyi's Digest Vol. (1) Inheritance, s. 310—The Attasankhepa Dhammathat, s. 211.* The Law of Succession applicable to the estate of a Sino Burmese Buddhist is Burmese Buddhist Law. *Tan Ma Shwe Zin* v. *Koo Soo Chong and others*, (1939) R.L.R. 542 (P.C.) ; *Cyong Ah Lin* v. *Daw Thike*, (1949) B.L.R (H.C.) 168 ; *Daw Thike* v. *Cyong Ah Lin*, (1951) B L.R. (S.C.) 123, followed. There can be no posthumous adoption under Burmese Buddhist Law. The adoption of an adult is made by the mutual consent of the adoptor and the adoptee and a revocation can similarly be made by such consent. The position of an adopted child is not identical for all purpose with that of a natural child. *Ma Kyin Sein* v. *Maung Kyin Htaik*, (1940) R.L.R. 783, referred to. In relation to the grandparents and the right of inheritance in their estate, the position of the children of an adopted child who has lost his status as such is different from that of the children of a natural child who had lost his right of inheritance as being a "dog son". In the latter case although the right of inheritance as a son is lost, the relationship of himself and his children to the grandparents continues, and thus the right of his children in the estate of their grandparents remains unaffected. But in the former case the adopted child loses his relationship and becomes completely cut off together with his own descendants from the adoptive parents. *U Sein* v. *Ma Poke*, I.L.R. 11 Ran. 158, referred to. The fundamentals of the Buddhist Law of Succession are firstly, the nearer excludes the more remote, and secondly, inheritance shall not ascend. On the death of a brother or sister without leaving a spouse or issue, the deceased's younger brothers and sisters inherit to the exclusion of the elders. Kinwun Mingyi's Digest, Vol. 1, Inheritance s. 310. Attasankhepa Dhammathat, s. 211. The fact that a parent may be alive at the time of a child's death, makes no exception to this rule. The main condition on which the rule excluding elder brothers and sisters depends is not the fact of parents being alive. The emphasis is on separate living after division of the parental estate which would give rise to the formation of a distinct and separate estate, only to which this rule would apply. *Mi Afruzan* v. *Mi Chumra*, (1872-92) S.J. and R., L B. 37 ; *Maung Tu* v. *Ma Chit*, I.L.R. Ran. 102, affirmed.

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SPECIAL LEAVE—*S. 6, Union Judiciary Act—Penal Code, s. 193—Complaint under Criminal Procedure Code, s. 476—Reasonable probability of conviction—Inordinate delay—Invariably a matter of discretion—To be made only in the interests of justice.* Respondents were prosecution witnesses in criminal regular trial No. 910 of 1949 of the Court of the 7th Additional Magistrate, Rangoon, in which the petitioner and another were prosecuted and charged under ss. 408 and 411, Penal Code, respectively. The charges were quashed by the High Court, on 28th November, 1950. On 21st March 1951, the petitioner moved the Magistrate under s. 476, Criminal Procedure Code to lay a complaint against the Respondents under s. 193, Penal Code. The application was dismissed by the Magistrate and on

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appeal under s. 476-B, Criminal Procedure Code, the High Court confirmed the order of dismissal, both the Courts following. *Hwe Gye Hain and one* v. *The King*, (1948) B.L.R. 40 ; *Jaau Nandar Singh* v. *Emperor*, (1910) I.L.R. 37 Cal. 250 ; *Mohamed Kaka and others* v. *The District Judge of Bassein*, (1937) R L.R. 276. The petitioner applied to the Supreme Court under s. 6, Union Judiciary Act for special leave to appeal. *Held :* Under s. 476, Criminal Procedure Code the responsibility for prosecution rests entirely upon the Court and this section must be exercised with great care and caution and only when necessary in the interests of justice. The matter under s 476 is not a piece of litigation between the private parties, but as a matter of public duty undertaken for vindicating and ensuring the purity of the administration of public justice. *Purna Chandra Dutt* v. *Shaikh Dhalu*, 34 C.W.N. 914 at 922, approved. It is invariably in the discretion of the Court to make a complaint under s. 476 and High Court, except in extraordinary cases are loath to interfere with the exercise of such discretion. *Sombhai Vallavbhai* v. *Aditbha Parshottam and others*, (1924) I.L.R. 48 Bom. 421 ; *Rajit Narayan Singh and others* v. *Babu Ram Bahadur Singh*, 27 Cr. L.J. 641, referred to. The Supreme Court will not grant special leave to appeal unless exceptional and special circumstances exist, or when substantial and grave injustice has been done or when the case presents features of sufficient gravity. *Pritan Singh* v. *The State*, 51 Cr.L J. 1270, referred to. The delay in making the application and a reasonable probability of conviction should be taken into consideration in deciding whether or not it is in the interest of justice to make a complaint under s. 476, Criminal Procedure Code. There was 4 months delay and both the Lower Courts are of opinion that there is no reasonable probability of conviction. The Supreme Court does not ordinarily constitute itself into a third Court over concurrent findings of fact. Special leave to appeal refused.

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URBAN RENT CONTROL ACT, s. 11 (*1*) (*b*) AND 14-A 6

URBAN RENT CONTROL ACT, ss. 12 (*1*), 19—*Fixation of standard rent—Application for, by whom competent—Method of application—Procedure in disposal. Held :* Standard rent may be fixed on application made by a *bona fide* occupier under s. 12 (*1*) of the Urban Rent Control Act. Or it may be fixed under s. 19 on application made either by a tenant or a landlord. An application by a person who is neither an occupier nor a tenant is misconceived.

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URBAN RENT CONTROL ACT, ss. 14-A, 22 54

WRIT OF CERTIORARI—*Ss. 14-A and 22, Urban Rent Control Act—Ss. 22, 25 and 153, Constitution of Burma—Fundamental rights, infringement—Ss. 4, 5, 6, 21, 23 and 27, Union Judiciary Act—Indian High Court Act, 1861 (24 and 25 Vic. C. 104) ss. 101, 107, Government of India Act, 1915—Government of India Act, 1935—S. 85, Government of Burma Act, 1935—S. 227 (1), Constitution of India—Whether Controller of Rents acting under s. 14-A*

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and the Judge acting under s. 22 of the Urban Rent Control Act a "Court"—Definition of "Court"—Interpretation of words in Statutes. Permission to file a suit for ejectment does not affect any of the fundamental rights guaranteed in the Constitution and therefore no writ or directions in the nature of Certiorari can issue under s. 25 of the Constitution. There is no other provision in the Constitution which confers upon the Supreme Court any power to issue such writs or directions. By s. 153 of the Constitution, the powers and functions of the Supreme Court and the High Court, established by the Constitution, are more fully provided in the Union Judiciary Act, and the provisions relevant to the Supreme Court are ss. 4, 5 and 6. By s. 4, the Supreme Court is given very wide and unlimited power of supervision over all Courts throughout the Union, and this power of supervision in s. 4 means very much the same thing as the power of superintendence in s. 27 of the Act The only difference between the two sections is whilst the power of superintendence of the High Court is restricted, the Supreme Court is not restricted or limited in any way whatsoever. The supervisory or superintending jurisdiction as provided in the Union Judiciary Act may be said to have its origin, so far as the concept is concerned, in the superintending jurisdiction of the superior Courts in England which, especially the Court of the King's Bench, used to exercise or do exercise even now over all inferior Courts in the realm. It is well settled law that the power of superintendence includes not only superintendence on administrative matters but also superintendence on the judicial side. This point will be brought out more clearly by a brief survey of the historical background. In England the Court of King's Bench, in exercise of this power of superintendence, interferes with the proceedings of inferior Courts by the issue of writs of certiorari or prohibition. The writ of certiorari is intended to bring into the superior Court the decision of an inferior Court in order that the former may be satisfied whether the decision of the latter is within its jurisdiction or not. The writ of prohibition is issued to prevent an inferior Court from exercising a jurisdiction which it does not possess. *Rex* v. *Electricity Commissioners*, (1924) 1 K.B. 171 ; *Rex* v. *Minister of Health*, (1929) 1 K.B. 619, referred to. The remedy under the Writ of Certiorari "is derived from the superintending authority which the sovereign's superior Courts, and in particular the Court of King's Bench, possess and exercise over inferior jurisdictions. This principle has been transplanted to other parts of the King's dominions, and operates within certain limits, in British India". *Ryots of Garabandho and other Villages* v. *Zemidar of Parlakimedi and another*, 70 I.A. 129 at 140, quoted. The power of superintendence includes the power of judicial interference in matters of jurisdiction exercisable by them in very much the same way as the Court of King's Bench in England exercises its power of superintendence. *Muhammed Suleman Khan and others* v. *Fatima*, 9 All. 104 F.B. ; *Gobind Coomer Chowdhry* v. *Kisto Coomar Chowdhry*, 7 W. R. 520 ; *Joy Ran* v. *Bulwant Singh*, 5 W.R. Misc. 3 ; *Manwatha* v. *Emperor*, 37 C.W.N. 201 ; *Sholapur Municipality* v. *Tuljaram Krishnasa Charan*, A.I.R. (1931) Bom. 582, referred to. S. 227 (1) of the Constitution of India, it has been held by all the High Courts in India that the High Courts have now judicial power of superintendence. *Abdul Rahim Naskar* v. *Abdul Jalbar Naska and others*, 54 C.W. N. 445 ; *Narendra Nath Sashmal* v. *Binode Behari Dey and others*, A.I.R. (1951) Cal. 138 ; *Sanotro Motor Service Ltd.* v.

Asansol Bus Association, A.I.R. (1951) Cal. 285 ; *Bimala Brosad Ray and another* v. *State of West Bengal*, A.I.R. (1951) Cal. 258 (S.B.); *Shridhar Atmaram Chadgay and another* v. *Collector of Nagpur*, A.I.R. (1951) Nag. 90; *Israil Khan* v. *The State*, A.I.R. (1951) Assam 106 ; *Ratilal Fulbhai* v. *Chuni Lal M. Kyas*, A.I.R. (1951) Sau. 15 ; *Mohamed Abdul Esoof and others* v. *State of Hydrabad*, A.I.R. (1951) Hyd. 50 ; *Piare Lal* v. *Wazir Chand and others*, A.I.R. (1951) Punj. 108; *Pandyan Insurance Co. Ltd.* v *K. J. Khanbatta and others*, (1955) 56 Cr.L J. 1039, referred to. S. 4 of the Union Judiciary Act confers upon the Supreme Court general power of supervision of the widest amplitude, unfettered and unlimited by any restriction whatsoever. This power of supervision or superintendence is confined not only to administrative matters. The purpose of the provisions in s. 4 of the Union Judiciary Act is to make the Supreme Court, having regard to the object of the constitution in regard to the role of the judiciary in a truly democratic Republic as established thereby, responsible for the entire administration of justice and to vest the Court with an unlimited reservoir of judicial powers which can be brought into play at any time it considers necessary. The use of this unlimited power should be more cautious and must be exercised in the same manner and to the same extent as in the exercise of superintendence by issue of directions or writs in the nature of Certiorari, prohibition or mandamus. *Manmatha Nath Biswas* v. *Emperor*, 60 Cal. 618, referred to. This power of supervision or superintendence should not be exercised unless there has been an unwarranted assumption of jurisdiction not possessed by the Courts concerned, or a gross abuse of jurisdiction possessed by them, or an unjustifiable refusal to exercise jurisdiction vested in them by law. Apart from matters relating to jurisdiction, this Court would also exercise this power when there has been a flagrant violation of the natural or elementary principles of justice, or a manifest error patent on the face of the record, or an outrageous miscarriage of justice which calls for redress. This power should not however be exercised when there is any other remedy open to the parties. It will not be justified for this Court under this power of superintendence to convert itself into a Court of Appeal. "This power of superintendence is entirely distinct from the jurisdiction to hear appeals. If the inferior Court, after hearing the parties, comes to an erroneous decision, either in law or in fact, on a matter within its jurisdiction, the Court having power of superintendence never interferes. The only mode of questioning the propriety of such a decision is by appeal." *Gopal Singh* v. *The Court of Awards*, (1867) 7 W.R. (C.R.) 430, 432, quoted and referred to. Neither the Controller of Rents acting under s. 14-A of the Urban Rent Control Act nor any Judge acting under s. 22 of the Act is under the Appellate Jurisdiction of the High Court and subject to the power of superintendence of the High Court. *Bal Krishna Hari* v *Emperor*, 57 Bom. 93 ; *Sheonadan Prasad Singh* v. *Emperor*, 3 Pat. L.J. (F.B.) 581 at 587 ; *Re. Allen Brothers & Co.* v. *Bando & Co.*, 26 C.W.R. referred to. Broadly speaking, a " Court " may be defined as an authority which exercises judicial as distinguished from executive or administrative functions. *Halsbury's Laws of England* (2nd. Edn.) Vol. (viii), p. 525, referred to. The word "Court" occurring in s. 6 of the Union Judiciary Act denotes only Courts in the strict sense of the term. For definitions of the words, " Judicial" and "quasi-judicial" see *Cooper* v. *Wilson and others*, (1937) 2 K.B. 309, 340 and for definition of the word "Court", see *U Htwe* (alias) *A. E. Madari* v. *U Tun Ohn and one*,

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(1948) B.L.R. (S.C.) 541; *Rex* v. *Electricity Commissioners*, L.R. (1924) K.B. 171. The exercise of the power of the Judicial control under s. 25 of the Constitution would apply *mutatis mutandis* to the exercise by the Supreme Court of its power of judicial supervision under s. 4 of the Union Judiciary Act. The function discharged by the Controller of Rents s. 14-A of the Urban Rent Control Act are quasi-judicial functions. *Mrs. D. M. Singer* v. *Controller of Rents and three others*, (1949) B.L.R. (S.C.) 143, reaffirmed. The functions discharged by a Judge under s. 22 of the Urban Rent Control Act are judicial functions. All tribunals discharge judicial or quasi-judicial functions fall within the meaning of the word "Court" in ss. 4 and 27 of the Union Judiciary Act. For the purpose of appeal under s. 6 of the Union Judiciary Act, the word "Court" denotes courts in the strict sense of the term, whilst for the purpose of exercising judicial superintendence under ss. 4 and 27 of the Act the word "Court" includes authorities or tribunals exercising judicial or quasi-judicial functions. It is a general rule of interpretation that the same meaning is implied in the use of the same expression in every part of an Act. But this general rule is not of much weight. The same word may be used in different senses in the same Statute and even in the same Section. *Maxwell's on Interpretation of Statutes*, 9th Edn. 323; *Craies' On Statute Law* (5th. Edn) at p. 159. Words without their context have no meaning. It is the context which is all important in the interpretation of a word. The meaning of a word is to be determined with reference to its context and also according to the subject or occasion of its use or the purpose for which it is used. The meaning of a word may vary according to the Context, subject, occasion or the purpose. The expression "Court" used in s. 195 of the Code of Criminal Procedure has been held to have a wider meaning than 'Court of Justice" in s. 20 of the Penal Code or even the expression "Civil, revenue or Criminal Court" used in s. 476 of the Code of Criminal Procedure. *Raghoo Buns Sahoys* v. *Kokil Singh*, 17 Cal. 872; *Nandalal Ganguli* v. *Khetra Mohan Chose*, 45 Cal. 585; *Re. Nanchand Shivchand*, 37 Bom. 365; *Rajaja Appaji Kote* v. *Emperor*, A.I R. (1946) Bom. 7; *Hari Charan Kundu* v. *Kanshiki Charap Day*, 44 C.W.N. 530, referred to. The word "Court" in s. 4 and s. 6 of the Union Judiciary Act does not mean exactly the same thing, otherwise the power of superintendence conferred upon the Supreme Court by s. 4 would be a mere superfluity. It is a cardinal principle of construction that the provisions in a statute must be construed to avoid tautology or superfluity and that they should be interpreted in such a way that they are consistent with one another and make a complete picture taken as a whole. For the purpose of exercising judicial supervision or superintendence by the Supreme Court, under s. 4 of the Union Judiciary Act, the Controller of Rents acting under s 14-A of the Urban Rent Control Act and the Judge acting under s. 22 of the Act fall within the meaning of the word "Court" in s. 4 of the former Act.

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WRIT OF CERTIORARI—*S. 167 (8), Sea Customs Act—A question of jurisdiction—Supreme Court practice—New ground of fact taken up neither in the lower Courts nor even in the application before the Supreme Court, but only in the course of argument before the Supreme Court—Entertainability.* The Writ of certiorari deals with the question of want of jurisdiction or excess of jurisdiction. If the authority whose order is impugned by

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means of the Writ of certiorari had jurisdiction to deal with a certain matter and dealt with it, the Supreme Court would not interfere even though it might not agree with the said authority on a question either of law or fact or of both. *Gwan Kee* v. *The Union of Burma*, (1949) B.L.R. (S.C.) 151 at 153, followed; *Dr. R. C. Das* v. *The Controller of Rents, Rangoon*, (1951) B.L.R. (S.C.) 225, referred to. The Supreme Court will not entertain and go into a new questions of fact not raised before the lower Courts, nor even in the application made to the Supreme Court, but taken only in the course of the argument before the Supreme Court. *Golinda Chandra Dakna* v. *Dinesh Chandra Maitra*, A.I.R. (1952) Cal. 100; *Govind Vinayak* v. *Additional Deputy Commissioner, Nagpur and another*, A.I.R. (1953) Nag. 250; *Maganlal Jivabhai Patel* v. *Government of Bombay*, A.I.R. (1953) Bom. 59, followed.

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WRIT OF HABEAS CORPUS—*S. 2 (2), (3) and (5), Public Property Protection Act, 1947—S. 7 (2) as amended by Act No. 48 of 1951—S. 7 (5) of the Act as amended by the Public Property Protection (Second Amendment) Act, 1951, Second Proviso to sub-s. 3—The Onus of showing order of detention invalid.* Where the returns show a competent exercise of authority; the onus of showing that the orders of detention are invalid rests upon the Petitioners. Where all that the prisoner says in effect is, "I do not know why I am interned, and I deny, that I have done anything wrong", that does not require any answer. *R.* v. *Home Secretary*, ex parte *Greene*, (1941) All England Law Reports, Vol. 3, 104 at 121; *Greene* v. *Secretary of State for Home Affairs*, (1941) All England Law Reports, Vol. 3, 388 at 394. A party applying for the Writ must lay a reasonable ground before the Court in order to induce them to grant it. *Hobhouse's case*, 106 English Reports 716 at 718.

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အမှုခေါ်စာချုပ်တော်—၁၉၄၈ ခုနှစ်၊ မြို့ပြဆိုင်ရာဌါးရမ်းခ အက်ဥပဒေပုဒ်မ ၁၁ (၁) (ခ) ၊ပုဒ်မ ၁၄ (က) နှင့် ဤပုဒ်မ၊ ပုဒ်ငယ် (၃)၊ ပုဒ်မ ၁၄ (က) အရလျော်ကျသာတွင်ဝန်မင်းသည်၊ထိုပုဒ်မအလိုဌါသင့်လျော်သလိုစစ်ဆေးစုံစမ်းပြီးလျှင်၊ အခွင့်ပေးသင့်ကြောင်း၊ မပေးသင့်ကြောင်းစီရင်ဆုံးဖြတ်ရမည်။ အချင်းဖြစ်အိမ်ကို မည်သူပိုင်ကြောင်းအငြင်းထွက်၍နေသေးသည်။ ထိုပြဿနာကိုလည်း မိမိမဆုံးဖြတ်နိုင်ဟူ ၍သာဆိုပြီး လျှောက်လွှာကို မပယ်နိုင်၊ ဤသို့သာဆိုပြီး လျှောက်လွှာကိုပယ်လျှင်၊ အဆိုပါ ပုဒ်မငယ် (၃) အရ၊ လိုက်နာဆောင်ရွက်ရန် ပျက်ကွက်ခြင်းဖြစ်မည်။ ဝန်မင်း၏ဆုံးဖြတ်ချက်သည် တရားရုံးများ လက်ခံလိုက်နာရမည့် ဆုံးဖြတ်ချက်မဟုတ်သည်ကားမှန်၏။ သို့ရာတွင် ဝန်မင်းသည်လည်း ဝန်မင်း၏စွမ်းရည်ရှိသလောက်စုံစမ်းပြီး မိမိ၏တာဝန်ကို ကျေပွန်အောင်ဆောင်ရွက်ရပေမည်။ ဤစကားရပ်၌လျှောက်လွှာမှာ တရားစွဲခွင့်အတွက်လျှောက်လွှာမျှသာဖြစ်ကြောင်း။ တရားစွဲခွင့်ရပြီးသည့်နောက် တရားမမှုစွဲဆိုသောအခါ သက်ဆိုင်ရာတရားမရုံးများသည် အချင်းဖြစ်အိမ်ကို မည်သူပိုင်ကြောင်း

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အကျယ်စစ်ဆေး ဆုံးဖြတ်ကြရဦးမည် ဖြစ်ကြောင်း။ ဝန်မင်းစစ်ဆေး စုံစမ်းချက်မှာရှေ့ပြေးအနေနှင့် တီးခေါက်ချကြည့်ခြင်းမျှသာ ဖြစ်ကြောင်း သတိပြုရပေမည်။ ဒေါ်ငွေတင်နှင့်ရန်ကုန်မြို့၊ မြို့ပြဆိုင်ရာ ဌါးရမ်းခကြီး ကြပ်ရေးဝန် ပါ ၂၊ B.L.R. 1951 (S.C.) 85 နှင့်အလွန်ကွာခြားသည်။

ကိုသာဒင်ပါ ၃ နှင့် ရန်ကုန်မြို့၊ မြို့ပြဆိုင်ရာဌါးရမ်းခကြီးကြပ်ရေးဝန် ပါ ၄ 9

SUPREME COURT

MESSRS. BALTHAZAR & SON (APPLICANT)

v.

ASSISTANT CONTROLLER OF RENTS AND ONE (RESPONDENTS).*

† S.C. 1954

Nov. 26.

Urban Rent Control Act, ss. 12 (1), 19—Fixation of standard rent—Application for, by whom competent.

Held : Standard rent may be fixed on application made by a *bonâ fide* occupier under s. 12 (*1*) of the Urban Rent Control Act. Or it may be fixed under s. 19 on application made either by a tenant or a landlord. An application by a person who is neither an occupier nor a tenant is misconceived.

Myint Toon for the applicant.

Ba Sein (Government Advocate) for the respondent.

The judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—The applicants Messrs. Balthazar & Son Ltd. accept goods for safe custody and these are stored in their warehouse situated in Strand Road. The Superintendent of Police Supplies, Rangoon deposited 206 bales of police clothing in this warehouse some three years ago on the agreed charges of 4 annas per bale per week. By the end of 1953 the number was reduced to 161 but some more bales were expected to arrive.

* Civil Misc. Application No. 71 of 1954.

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

S.C. 1954

MESSRS. BALTHAZAR & SON v. ASSISTANT CONTROLLER OF RENTS AND ONE.

Apparently the Superintendent wondered if he was paying too much. So he wrote to the Controller of Rents to make a recommendation. The Assistant Controller of Rents who dealt with the matter called upon his Inspector to make enquiries and on the basis of his report recommended the same rate that Messrs. Balthazars was charging *i.e.* Rs. 161 per month for the 161 bales still stored in the warehouse.

We would observe here that the procedure adopted by the Superintendent and the Assistant Controller was irregular. Rent control proceedings are quasi-judicial in nature and in the face of the procedure laid down in the Urban Rent Control Act it would have been more proper on the part of the Superintendent to have filed a regular application and for the Assistant Rent Controller to have made an open enquiry. However, to proceed with the recital of the events, the Superintendent by another letter dated the 6th March 1954 asked for a re-examination. This time the Assistant Rent Controller properly treated the letter as an application for fixation of Standard Rent and issued notice to Messrs. Balthazars to furnish particulars about measurements of the premises, names of tenants, rates of rent, etc. We note that Messrs. Balthazars contended that there were no tenants and that they had no desire to rent out any part of the premises. Nevertheless the Assistant Rent Controller passed an order fixing the Standard Rent at Rs. 161 per month for the floor space used for storage of 161 bales, which he calculated to be a 1/35th part of the entire premises.

Clearly the order cannot be allowed to stand. An application for standard rent can be made under section 12 (*1*) of the Act by a person who is not yet a tenant but who is in occupation of premises *bonâ fide* for residential or business purposes. Or it may

be made under section 19 by a landlord or by a tenant but this section envisages the existence of a tenancy. In the case before us no tenancy exists nor can it be said that the Superintendent of Police Supplies is an occupier of any part of Messrs. Balthazars' warehouse. His bales of clothing are in the premises by way of safe deposit. In these circumstances, the learned Assistant Controller was wrong in entertaining the Superintendent's application and in opening proceedings for fixation of Standard Rent. Therefore his order dated the 8th May 1954 in Proceedings No. 65-E of 1954 is quashed with costs; Advocate's fee 85 kyats.

SUPREME COURT.

†S.C. 1955

July 4.

CHANDULAL AND ONE (APPLICANTS)

v.

THE CHAIRMAN, SPECIAL INVESTIGATION ADMINISTRATIVE BOARD AND BUREAU OF SPECIAL INVESTIGATION AND ONE (RESPONDENTS). *

Writ of Habeas Corpus—S. 2 (2), (3) and (5), Public Property Protection Act, 1947—S. 7 (2) as amended by Act No. 48 of 1951—S. 7 (5) of the Act as amended by the Public Property Protection (Second Amendment) Act, 1951, Second Proviso to sub-s. 3—The Onus of showing order of detention invalid.

Where the returns show a competent exercise of authority, the onus of showing that the orders of detention are invalid rests upon the Petitioners.

Where all that the prisoner says in effect is, "I do not know why I am interned, and I deny, that I have done anything wrong", that does not require any answer.

R v. *Home Secretary* ex parte *Greene*, (1941) All England Law Reports, Vol. 3, 104 at 121; *Greene* v. *Secretary of State for Home Affairs*, (1941) All England Law Reports, Vol. 3, 388 at 391.

A party applying for the Writ must lay a reasonable ground before the Court in order to induce them to grant it.

Hobhouse's case, 106 English Reports 716 at 718.

Kyaw Min and *Dr. E Maung* for the applicants.

Ba Sein (Government Advocate) for the respondents.

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

U THEIN MAUNG.—The petitioners, who are father and son, have applied for writs of habeas corpus stating that their arrest and detention under

* Criminal Misc. Application Nos. 32 and 33 of 1955

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

the Public Property Protection Act, 1947, are illegal for the reasons which are set out in their respective affidavits as follows :

11. I say that since the 19th April 1955 the B.S.I. has been investigating my case and I understand the investigation is still proceeding and will take some time.

12. I say that detention under the Public Property Protection Act has been resorted to illegally whilst the investigation is still proceeding.

13. I say that except for arrest for the immediate purpose of putting me up before a Court of Law or at the instance of a Court of Law, my present arrest and detention is not in conformity with the law.

U Hla Thaung, Deputy Director of the Bureau of Special Investigation has stated in his returns that he arrested the petitioners under section 7 (*2*) of the Public Property Protection Act on the 21st May 1955 as, after investigation since the 19th April 1955, he suspected them of having committed a prejudicial act as defined in section 2 (ii) (*a*) and (*b*) of the said Act. He has further stated that the President of the Union to whom he had to report the fact of their arrest under section 7 (*3*) of the Act has, by order under section 7 (*3*) and (*5*) directed that they be detained for a period not exceeding two months with effect from the 21st May 1955 for the purpose of making an investigation. He has also filed certified copies of the President's order in support of his returns.

Section 7 (*2*) of the Act, as amended by Act No. 43 of 1951, provides :

" Any officer authorized in this behalf by general or special order by the President of the Union may arrest without warrant any person whom he suspects of having committed or of committing any prejudicial act. "

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CHANDULAL AND ONE v. THE CHAIRMAN, SPECIAL INVESTIGATION ADMINISTRATIVE BOARD AND BUREAU OF SPECIAL INVESTIGATION AND ONE.

U Hla Thaung has admittedly made an investigation since the 19th April 1955 *i.e.* over a month before the petitioners were actually arrested on suspicion; it is not the petitioners' case that he does not really suspect them; and as a matter of fact their learned Advocate U Kyaw Min has stated in the course of his argument: " We suspect that U Hla Thaung has suspected us on account of the goods we have stored in five godowns. "

Section 7 (5) of the Act as amended by the Public Property Protection (Second Amendment) Act, 1951, also provides:

> " On receipt of any report made under sub-section (3), the President of the Union may, by order, direct, subject to the second proviso to sub-section (3), that a person arrested under this section be detained for such period as he may deem necessary for the purpose of making an investigation. "

The second proviso to sub-section (3) is only " that no person shall be detained in custody under this sub-section for a period exceeding six months "; and in the present case the President has directed the petitioners' detention only for a period not exceeding two months for the purpose of making an investigation.

So the returns show a competent exercise of lawful authority and the onus of showing that the orders of detention are invalid rests upon the petitioners. [Cp. *R* v. *Home Secretary*, ex parte *Greene* (1) where Goddard, L.J. observed:

> " I am of opinion that, where, on the return, an order or warrant which is valid on the face is produced, it is for the prisoner to prove the facts necessary to controvert it, and, in the present case, this has not been done. I do not say that in no case is it necessary for the Secretary of State to file an

(1) (1941) All England Law Reports, Vol. 3, 104 at 121.

affidavit. It must depend on the ground on which the return is challenged, but, where all that the prisoner says in effect is, 'I do not know why I am interned, and I deny that I have done anything wrong', that does not require an answer, because it in no way shows that the Secretary of State had no reasonable cause to believe, or did not believe, otherwise."

Viscount Maugham agreed with His Lordship in *Greene* v. *Secretary of State for Home Affairs* (1). See also *Hobhouse's Case* (2) where Holroyd, J. quoted with approval Wilmot, L.C.J.'s dictum that a party applying for the writ must lay a reasonable ground before the Court in order to induce them to grant it.]

In the present case the only grounds on which the returns have been challenged are that the petitioners' arrest and detention are illegal as the investigation is still proceeding, they are not for the immediate purpose of putting them up before a Court of Law and they have not been effected at the instance of a Court of Law; and these grounds are not sustainable in view of section 7 (*2*), (*3*) and (*5*) of the Public Property Protection Act, 1947.

Dr. E Maung, who helped U Kyaw Min, the learned Advocate for the petitioners, and addressed the Court with its special permission, has argued that "a prejudicial act under section 2 (ii) (*a*) and (*b*)" is too wide and that the returns should set out at least the nature of the offence which the petitioners are suspected to have committed. However, it is not the petitioners' case that they are not aware of the nature of the offence which they are suspected to have committed. Their case is that they cannot be arrested and detained while investigation into the offence is proceeding. Besides, it is fairly clear from

(1) (1941) All England Law Reports, Vol. 3, 388 at 394.

(2) 106 English Reports 716 at 718.

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CHANDULAL AND ONE v. THE CHAIRMAN, SPECIAL INVESTIGATION ADMINISTRATIVE BOARD AND BUREAU OF SPECIAL INVESTIGATION AND ONE.

their own affidavits that the offence is in respect of the goods which they themselves have stored in five godowns.

So there is nothing to show that the petitioners' arrest and detention are not in accordance with law and the applications must be dismissed.

တရားလွှတ်တော်ချုပ်

ကိုသာဒင်ပါ၃ (လျှောက်ထားသူများ)
နှင့်
ရန်ကုန်မြို့၊ မြို့ပြဆိုင်ရာဌာနီးရမ်းခ ကြီးကြပ်ရေးဝန်ပါ၄ (လျှောက်ထားခံရသူများ)*

† ၁၉၅၅ ဇွန်လ ၂၇။

အမှုခေါ် စာဆွန်တော်—၁၉၄၈ ခုနှစ်၊ မြို့ပြဆိုင်ရာ ဌာနီးရမ်းခ အက် ဥပဒေပုဒ်မ ၁၁ (၁) (ခ)၊ပုဒ်မ ၁၄(က)နှင့် ဤပုဒ်မ၊ ပုဒ်မငယ်(၃)၊ပုဒ်မ ၁၄(က)အရ၊လျှောက်လွှာတွင် ဝန်မင်းသည် ထိုပုဒ်မအလို့ငှါ သင့်လျော်သလိုစစ်ဆေးစုံစမ်းပြီးလျှင် အခွင့်ပေးသင့်ကြောင်း၊ မပေးသင့်ကြောင်း စီရင်ဆုံးဖြတ်ရမည်—

အချင်းဖြစ် အိမ်ကို မည်သူ ပိုင်ကြောင်း အငြင်းထွက်၍ နေသေးသည်။ ထိုပြဿနာကိုလည်း မိမိမဆုံးဖြတ်နိုင်ဟူ၍သာဆိုပြီး၊ လျှောက်လွှာကိုမပယ်နိုင်။ ဤသို့သာဆိုပြီး၊လျှောက်လွှာကိုပယ်လျှင်၊ အဆိုပါပုဒ်မငယ်(၃)အရ လိုက်နာဆောင်ရွက်ရန် ပျက်ကွက်ခြင်းဖြစ်မည်။ ဝန်မင်း၏ ဆုံးဖြတ်ချက်သည်၊ တရားရုံးများ လက်ခံလိုက်နာရမည့်ဆုံးဖြတ်ချက်မဟုတ်သည်ကားမှန်၏။ သို့ရာတွင် ဝန်မင်းသည်လည်း ဝန်မင်း၏စွမ်းရည်ရှိသလောက် စုံစမ်းပြီးမှိမိ၏ တာဝန်ကို ကျေပွန်အောင်ဆောင်ရွက်ရပေမည်။

ဤစကားရပ်၌၊ လျှောက်လွှာမှာ တရားစွဲခွင့်အတွက် လျှောက်လွှာမျှသာ ဖြစ်ကြောင်း။ တရားစွဲခွင့် ရပြီးသည့်နောက် တရားမမှုစွဲဆိုသောအခါ၊ သက်ဆိုင်ရာ တရားမ ရုံးများသည်၊ အချင်းဖြစ် အိမ်ကို မည်သူ ပိုင်ကြောင်း အကျယ် စစ်ဆေး ဆုံးဖြတ်ကြရဦးမည်ဖြစ်ကြောင်း။ ဝန်မင်းစစ်ဆေးစုံစမ်းချက်မှာ ရှေ့ပြေး အနေနှင့် တီးခေါက်၍ ကြည့်ခြင်းမျှသာ ဖြစ်ကြောင်း သတိပြုရပေမည်။

ဒေါ်ငွေတင်နှင့် ရန်ကုန်မြို့၊ မြို့ပြဆိုင်ရာ ဌာနီးရမ်းခ ကြီးကြပ်ရေးဝန် ပါ ၂၊ B.L.R. 1951 (S.C.) 85 နှင့် အလွန်ကွာခြားသည်။

လွှတ်တော် ရှေ့နေကြီး မစ္စတာ ဂျီ၊ အင်(နှ)၊ ဘာနာဂျီ လျှောက်ထားသူများအတွက်။

အစိုးရလွှတ်တော်ရှေ့နေကြီး ဦးဘစိန် ပဌမနှင့် ဒုတိယလျှောက်ထားခံရသူများအတွက်။

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* ၁၉၅၄ ခုနှစ်၊ တရားမအမှုသေးလျှောက်လွှာနံပါတ် ၁၁၆။

† နိုင်ငံတော် တရား ဝန်ကြီးချုပ်၊ တရား ဝန်ကြီး ဦးမြင့်သိန်း နှင့် တရား ဝန်ကြီး ဦးဘိုကြီးတို့ ကြားနာသည်။

၁၉၅၅

ကိုသာဒင် ပါဂ

နှင့်

ရန်ကုန်မြို့၊ မြို့ပြ ဆိုင်ရာ ဌါးရမ်းခ ကြီးကြပ်ရေး ဝန်ပါ ၄။

လွှတ်တော်ရှေ့နေကြီး ဦးဘိုးဘ တတိယနှင့် စတုတ္ထလျှောက်ထားခံရသူများ အတွက်။

နိုင်ငံတော်တရားဝန်ကြီးချုပ်အမိန့်ချမှတ်သည်။

ဦးသိန်းမောင်။ ။ဤအမှုတွင်၊ မြို့ပြဆိုင်ရာဌါးရမ်းခကြီးကြပ်ရေး ဝန်၏ အမိန့်ကိုဘတ်ရှုခြင်းအားဖြင့်ငင်း၊ ရန်ကုန်မြို့တော် တရားမ တရားရုံး တရားသူကြီး ချုပ်၏ အမိန့်ကိုဘတ်ရှုခြင်းအားဖြင့်ငင်း၊ သူတို့၏ အကြောင်းပြချက် များသည် အထင်အရှား မှားယွင်းနေသည်ကို တွေ့မြင်ရသည်။ သို့ဖြစ်၍ သူတို့၏အမိန့်များ ကို၊ အမှုခေါ်စာချွန်တော်ဖြင့်ပယ်ဖျက်ပြီးလျှင်၊လျှောက်သူတို့၏မူလလျှောက်လွှာ ကို၊ မြို့ပြဆိုင်ရာ ဌါးရမ်းခကြီးကြပ်ရေး ဝန်ထံသို့ တရားဥပဒေနှင့် အညီ အရေး ယူဆောင်ရွက်ရန်ပြန်၍ ပေးပို့ရမည်။

လျှောက်သူတို့က၊ရန်ကုန်မြို့၊ရေကျော်လင်း၊ အိမ်နံပါတ် ၀၃ သည်၊မူလက ဒေါ်မြသင်ပိုင်သောအိမ်ဖြစ်ကြောင်း။ဒေါ်မြသင်သည်၊ ၁၉၅၂ ခုနှစ်၊ ဇူလိုင်လ တွင်၊ အနီစွရောက်ခဲ့ကြောင်း။ ဒေါ်မြသင်မှာ သားသမီး အမွေဆိုင်သုံးယောက် သာ ကျန်ရစ် ခဲ့ကြောင်း။ ၎င်းတို့မှာ (၁)မသန်းသန်း၊ (၂)ယခုလျှောက်သူ အမှတ် ၂ ကိုစိန်ဝင်းနှင့် (၃)ယခုလျှောက်သူအမှတ် ၃ မစိန်စိန်တို့ဖြစ်ကြောင်း။ ထိုသားသမီး အမွေဆိုင် သုံးယောက်အနက်၊ မသန်းသန်းသည်၊ ၁၉၅၃ ခုနှစ်၊ မေလတွင် အနီစွရောက်ခဲ့ကြောင်း။ မသန်းသန်း အနီစွရောက်သောအခါ၊ သူ၏ တဦးတည်းသော အမွေဆိုင်အဖြစ်နှင့် သူ၏ခင်ပွန်း ယခုလျှောက်ထားသူအမှတ် ၁ ကိုသာဒင်သာကျန်ရစ်ခဲ့ကြောင်း။တရားလွှတ်တော်က ၁၉၅၃ ခုနှစ်၊တရားမ အသေးအဖွဲလျှောက်လွှာအမှတ် ၈၀ တွင်၊ ဒေါ်မြသင်၏ အမွေပစ္စည်းအားလုံး အတွက် အမွေထိန်းစာကို၊ ကိုစိန်ဝင်းအား ပေးခဲ့ကြောင်း၊ ကိုစိန်ဝင်းကလည်း၊ ထိုအမွေထိန်းစာကိုရပြီးသည့်နောက်၊ ၁၉၅၃ ခုနှစ်၊ စက်တင်ဘာလ ၂၄ ရက်နေ့စွဲ ပါ မှတ်ပုံ တင်ထားသော စာချုပ်ဖြင့်၊ အချင်းဖြစ် အိမ်နှင့်အခြားပစ္စည်းများကို၊ ဒေါ်မြသင်၏ အမွေထိန်း အဖြစ်နှင့် ကိုသာဒင်၊ ကိုစိန်ဝင်းနှင့် မစိန်စိန် တို့အား လွှဲပြောင်း၍ပေးပြီးဖြစ်ကြောင်း။ ယခုသူတို့ သုံးဦးသည်၊ အချင်းဖြစ်အိမ် အပေါ် ထပ်ကို သူတို့ ကိုယ်တိုင် နေထိုင်ရန် သဘောရိုးနှင့် အကြောင်း သင့်စွာ အလိုရှိကြောင်း။သို့ဖြစ်၍ထိုအိမ်အပေါ်ထပ်ကို ၁၉၄၈ ခုနှစ်၊ မြို့ပြဆိုင်ရာဌါးရမ်းခ အက်ဥပဒေ ပုဒ်မ ၁၁ (၁) (စ)နှင့်အညီ၊ ပြန်၍ရနိုင်ရန် လျှောက်ထားခံရသူ ဦးခင်မောင်နှင့် ဒေါ်ချိန်တို့ အပေါ်၊ တရား စွဲလိုကြောင်း။ သို့တရားစွဲ နိုင်ရန် ထိုအက်ဥပဒေ ပုဒ်မ ၁၄(က)အရ၊တရားစွဲနိုင်ခွင့်အာဏာရလိုပါကြောင်း၊မြို့ပြ ဆိုင်ရာ ဌါးရမ်းခ ကြီးကြပ်ရေးဝန်ထံတွင် လျှောက်ထားခဲ့လေသည်။

၁၉၅၅
ကိုသာဒင်ပါ ၃ နှင့် ရန်ကုန်မြို့၊ မြို့ပြဆိုင်ရာ ဌါးရမ်းခ ကြီးကြပ်ရေး ဝန် ပါ ၄။

သို့လျှောက်ထားရာ၌၊ တရား လွှတ်တော်က ကိုစိန်ဝင်း အားပေး ခဲ့သော အမွေထိန်းစာနှင့် အမွေထိန်းက ကိုသာဒင်၊ကိုစိန်ဝင်းနှင့်မစိန်စိန်တို့အား အချင်း ဖြစ်အိမ်နှင့် အခြား အမွေပစ္စည်းများကို လွှဲပြောင်း၍ပေးသော မှတ်ပုံတင်ပြီး စာချုပ်ကိုလည်း တင်ပြခဲ့လေသည်။

လျှောက်ထားခံရသူ တို့က၊ ထိုလျှောက်လွှာကို ကန့်ကွက် ရာတွင်၊ အခြား အကြောင်းများ အပြင်၊ လျှောက်သူ တို့သည်၊ ဒေါ်မြသင်၏ အမွေဆိုင်များ မဟုတ်ကြောင်း။ ဒေါ်မြသင် အနိစ္စရောက်သောအခါ၊ ဒေါ်မြသင်၏ ခင်ပွန်း Mr. Lookman ကျန်ရစ်ခဲ့၍ Mr. Lookman သာလျှင်၊ထိုအိမ်ကို၊ဒေါ်မြသင် ထံမှ အမွေရပြီးပိုင်သူဖြစ်ကြောင်း။ လျှောက်သူတို့သည်၊ အချင်းဖြစ်အိမ်၏ပိုင်ရှင် များမဟုတ်ကြောင်း။ သို့ဖြစ်၍ သူတို့မှာ၊ တရားစွဲခွင့်အတွက် လျှောက်လွှာတင် နိုင်ကြို အခြေမရှိကြောင်းစသည်တို့ကို အကြောင်းပြခဲ့လေသည်။

သို့နှင့်၊ မြို့ပြဆိုင်ရာဌါးရမ်းခ ကြီးကြပ်ရေးဝန်က၊ အိမ်ကိုမည်သူပိုင်ကြောင်း အငြင်းထွက်၍ နေရာ၊ မိမိမှာ ထိုငြင်းနာကို စီရင်ဆုံးဖြတ် နိုင်ခွင့် မရှိကြောင်း။ သို့အတွက်လျှောက်သူတို့သည် ထိုပြဿနာကို စီရင်ဆုံးဖြတ်နိုင်သော တရားရုံးသို့ ပဌမသွား၍ ဆုံးဖြတ်စေကြသင့်ကြောင်း။ ထို့နောက်မှာ၊ ယခုလျှောက်လွှာမျိုးကို တင်သွင်းသင့်ကြောင်း၊ အကြောင်းပြပြီးလျှင်၊ လျှောက်သူတို့၏ လျှောက်လွှာကို ပယ်လိုက်လေသည်။

လျှောက်သူတို့ကမကျေနပ်၍၊ ရန်ကုန်မြို့တော်တရားမတရားရုံးတရားသူကြီး ချုပ်ထံသို့ စောဒကတင်ပြီးလျှင်၊ ထိုရုံးတော်တွင် Mr. Lookman ၏ကျမ်းကျိန် စာကိုလည်းတင်သွင်းကြလေသည်။ ထိုကျမ်းကျိန်စာတွင် Mr. Lookman က ဒေါ်မြသင်သည်၊၁၉၃၁ ခုနှစ်တွင်ပသီဘာသာကိုစွန့်လွှတ်ပြီး၊ ဗုဒ္ဓဘာသာဒေယျ ကိုပြန်၍ယူခဲ့သောကြောင့် ထိုနှစ်မှာပင် သူနှင့် ဒေါ်မြသင်တို့ လင်မယားအဖြစ်မှ ပြတ်စဲခဲ့ကြကြောင်း။ထိုသို့ပြတ်စဲခဲ့ပြီးသည်နောက်၊သူသည်နောက်အိမ်ထောင်ပြု၍ အောင်ဘန်းမြို့တွင်၊ ယခုအထိနေလျက်ရှိကြောင်း။ဒေါ်မြသင်သည်၊၁၉၅၂ ခုနှစ်၊ ရန်ကုန်မြို့တွင် အနိစ္စရောက်သောအခါ၊ဒေါ်မြသင်မှာ၊ မသန်းသန်း (သေသူ)၊ ကိုစိန်ဝင်းနှင့် မစိန်စိန်တို့သာလျှင် အမွေဆိုင်များ အဖြစ်နှင့်ကျန်ရှိခဲ့ကြောင်း။မိမိမှာ ဒေါ်မြသင်၏ အမွေကိုငှား၊အမွေ၏ တစိတ်တဒေသကိုဝယ်၊ ရပိုင်ခွင့်မရှိကြောင်း ကျမ်းကျိန်ဆို၍ထားသည်။ထိုကျမ်းကျိန်စာသည်လည်းကလောမြို့၊နယ်ပိုင်ရာ၁၀တ် တရားသူကြီး ရှေ့မှောက်တွင် ကျိန်ဆိုသော ကျမ်းကျိန်စာဖြစ်သည်။

၁၉၅၅

ကိုသာဒင်ပါ ၃ နှင့် ရန်ကုန်မြို့၊ မြို့ပြဆိုင်ရာ ဌါးရမ်းခကြိုးကြပ်ရေး ဝန် ပါ ၄။

သို့ပါလျက်၊ ပညာရှိတရားသူကြီးချုပ်က အဆိုပါအိမ်ကို မည်သူပိုင်ကြောင်း အငြင်းပွါးလျက်ပင် ရှိသေးကြောင်း အကြောင်း ပြုပြီးလျှင်၊ လျောက်သူ တို့၏ စောဒကလွှာကို စရိတ်နှင့်ကာကွ ပယ်လိုက်ပြန်သည်။

သို့အတွက်၊ လျောက်သူကိုသည် မြို့ပြဆိုင်ရာ ဌါးရမ်းခကြိုးကြပ်ရေး ဝန်၏ အမိန့်ကိုငင်း၊ ရန်ကုန်မြို့တော် တရားမတရားရုံး တရားသူကြီးချုပ်၏အမိန့်ကိုငင်း၊ ပယ်ဖျက်ရန် အမှုခေါ် စာချွန်တော်အတွက်၊ ဤနှုံးတော်သို့ လျောက်ထားကြရခြင်းဖြစ်သည်။

မြို့ပြဆိုင်ရာ ဌါးရမ်းခကြိုးကြပ်ရေးဝန်က၊ မိမိမှာ အိမ်ကိုမည်သူ ပိုင်ကြောင်း ဆုံးဖြတ်နိုင်ခွင့်အာဏာမရှိကြောင်းအကြောင်းပြရာ၌၊ ဤရုံးတော်၏စီရင်ထုံးတခု ကို အကိုးအကားပြုခဲ့သည်။ ထိုစီရင်ထုံးမှာ ဤရုံးတော်တွင် ၁၉၅၀ ပြည့်နှစ်က၊ တရားမအသေးအဖွဲ လျောက်လွှာ အမှတ် ၇၂၊ ဒေါ်ငွေတင်နှင့်ရန်ကုန်မြို့၊ မြို့ပြဆိုင်ရာ ဌါးရမ်းခကြိုးကြပ်ရေးဝန်ပါ ၂ ၏ အမှုက စီရင်ထုံးဖြစ်သည်။*

ထိုအမှုမှာ၊ မေရာဂနီက၊ မိမိသည် ဒေါ်ငွေတင်၏ အခန်း ၄ ခန်းတွင်၊ အိမ်ငှါးနေသူဖြစ်ကြောင်း၊ ထိုအခန်းများအတွက် အငွေများကို၊ ဒေါ်ငွေတင်က မိမိထံမှလက်မခံကြောင်း။ သို့အတွက်ထိုငွေများကို၊ထိုအက်ဥပဒေပုဒ်မ ၁၄ (ခ) (၁)အရ၊ မြို့ပြဆိုင်ရာ ဌါးရမ်းခ ကြိုးကြပ်ရေးဝန်၏ ရုံးတော်မှာ တင်ရွှေထားလိုကြောင်း လျောက်ထားခဲ့သည်။ သို့လျောက်ထားရာဝန်မင်းက ထိုငွေကိုမည်သည့်အတွက် လက်မခံထိုက်ကြောင်းထုချေရန်၊ ဒေါ်ငွေတင် ထံသို့၊ နှိုတစ်စာ ထုတ်ခဲ့လေသည်။ ထို့နောက် ဒေါ်ငွေတင်က၊ မေရာဂနီသည်၊ အခန်းတခန်း အတွက်သာလျှင် အိမ်ငှါးဖြစ်ကြောင်း။ ကျန်အခန်းများ၏အိမ်ငှါးမဟုတ်ကြောင်းငြင်းဆိုပါလျက်၊ ဝန်မင်းက မေရာဂနီသည်၊ အခန်းအားလုံးအတွက်အိမ်ငှါးဖြစ်သည်ဟု စီရင်ဆုံးဖြတ်လိုက်သည်။

သို့နှင့်၊ ဤရုံးတော်သို့ဒေါ်ငွေတင်ကအမှုခေါ်စာချွန်တော်အတွက်လျောက်သောအခါ ဤရုံးတော်က အောက်ပါအတိုင်း စီရင်ဆုံးဖြတ်လိုက်သည်။ထိုအက်ဥပဒေ ပုဒ်မ ၁၄ (ခ)မှာ ဌါးရမ်းခ တင်သွင်း လိုသော သူသည် အိမ်ငှါးနေသူ ဟုတ်မဟုတ် စစ်ဆေးရန်၊ ကြိုရွယ်ပြဋ္ဌာန်းသော ပြဋ္ဌာန်းချက်မဟုတ်။ ဝန်မင်းက လျောက်သူသည်၊အိမ်ငှါးနေသူ ဟုတ်မဟုတ် စစ်ဆေးရန်မလို။ အိမ်ငှါးခ တင်လာလျှင်၊ ဝန်မင်းသည်လက်ခံပြီး ထိုငွေကိုလက်ခံထားရှိကြောင်း၊ အိမ်ရှင်အား

* B. L. R. 1951 (S. C.) 85.

အကြောင်းကြားကိုသာရှိသည်။ အိမ်ရှင်သည်လည်း ထိုငွေကိုထုတ်ယူလိုက ထုတ်ယူနိုင်သည်။ မထုတ်ယူဘဲထားလိုက ထားနိုင်သည်။ သို့အတွက်၊ ဝန်မင်းသည်၊ အိမ်ရှင်အားမည်သည့်အတွက် ထိုငွေကို လက်မခံသင့်ကြောင်း အကြောင်းပြရန်၊ နှိုတစ်စာထုတ်ခဲ့ခြင်းသည် မှားယွင်းသည်။

၁၉၅၅
ကိုသာဒင်ပါ ၃ နှင့် ရန်ကုန်မြို့၊ မြို့ပြဆိုင်ရာ ဌါးရမ်းခကြီးကြပ်ရေး ဝန် ပါ ၄။

အထက်တွင် အကျဉ်းအားဖြင့် ဖေါ်ပြခဲ့သည့်အတိုင်း၊ ထိုအမှုမှာ ထိုအက်ဥပဒေပုဒ်မ ၁၄ (ခ) အရ၊ ဖြစ်သောအမှု၊ အိမ်ရှင်အားနှိုတစ်ထုတ်ရန်ပင်မလိုသောအမှု၊ စုံစင်းစစ်ဆေးရန်လည်းမလိုသောအမှု ဖြစ်ခဲ့သည်။

ယခုအမှုမှာမူကား၊ ထိုအက်ဥပဒေ ပုဒ်မ ၁၄ (က) အရ၊ တရားစွဲခွင့်တောင်းသောအမှုဖြစ်သည်။ ထိုပုဒ်မ၊ ပုဒ်မငယ် (၃) မှာလည်း၊ ဝန်မင်းသည်၊ ထိုပုဒ်မငယ်တွင်ဖေါ်ပြပါရှိသောအကြောင်းအချက်များနှင့်စပ်လျဉ်း၍၊ သင့်လျော်သလို စုံစမ်းစစ်ဆေးပြီး ကျေနပ်လျှင်၊ တရားစွဲခွင့်ပေးရမည်။ မကျေနပ်လျှင် လျှောက်လွှာကို ပယ်ရမည်ဟု အတည့်အလင်းပါရှိသည်။ သို့ဖြစ်၍၊ ဤအမှုသည်၊ ဒေါ်ငွေတင်၏ အမှုနှင့် အလွန်ကွာခြားသောအမှုဖြစ်သည်။

ထိုပုဒ်မ ၁၄ (က) အရ၊ လျှောက်လာလျှင် ဝန်မင်းသည် ထိုပုဒ်မ အလို့ငှါ သင့်လျော်သလို စစ်ဆေးစုံစမ်းပြီးလျှင် အခွင့်ပေးသင့်ကြောင်း၊ မပေးသင့်ကြောင်း စီရင်ဆုံးဖြတ်ရမည်။ ဤအမှုမှာကဲ့သို့ အချင်းဖြစ်အိမ်ကိုမည်သူပိုင်ကြောင်းအငြင်းထွက်၍နေသေးသည်။ ထိုပြဿနာ ကိုလည်း မိမိမဆုံးဖြတ်နိုင် ဟူ၍သာ ဆိုပြီး၊ လျှောက်လွှာကို မပယ်နိုင်။ ဤသို့သာ ဆိုပြီး လျှောက်လွှာကို ပယ်လျှင် အဆိုပါ ပုဒ်မငယ် (၃) အရ၊ လိုက်နာဆောင်ရွက်ရန်ပျက်ကွက်ခြင်းဖြစ်မည်။ ဝန်မင်း၏ ဆုံးဖြတ်ချက်သည်၊ တရားရုံးများလက်ခံလိုက်နာရမည့် ဆုံးဖြတ်ချက်မဟုတ်သည်ကားမှန်၏။ သို့ရာတွင် ဝန်မင်းသည်လည်း ဝန်မင်း၏စွမ်းရည်ရှိသလောက်စုံစမ်းပြီး မိမိ၏ကာဝန်ကို ကျေပွန်အောင်ဆောင်ရွက်ရပေမည်။

ဤစကားရပ်၌ လျှောက်လွှာမှာ တရားစွဲခွင့် အတွက် လျှောက်လွှာ မျှသာဖြစ်ကြောင်း။ တရားစွဲခွင့်ရပြီးသည့်နောက် တရားမမှုစွဲဆိုသောအခါသက်ဆိုင်ရာတရားမရုံးများသည် အချင်းဖြစ်အိမ်ကို မည်သူပိုင်ကြောင်း အကျယ်စစ်ဆေး ဆုံးဖြတ်ကြရပြီးမည်ဖြစ်ကြောင်း။ ဝန်မင်း စစ်ဆေး စုံစမ်းချက်မှာ ရွေ့ပြေးအနေနှင့် တီးခေါက်၍ကြည့်ခြင်းမျှသာ ဖြစ်ကြောင်း သတိပြုရပေမည်။

ယခုအမှုမှာ ဒေါ်မြသင်း၏အမွေအတွက် အုပ်ထိန်းစာကို တရားလွှတ်တော်က ကိုစိန်ဝင်း အားပေးပြီး ဖြစ်ခြင်း၊ ကိုစိန်ဝင်းကတဖန်၊ လျှောက်သူတို့အား အချင်း ဖြစ်အိမ်ကို လွှဲပြောင်းခွင့်ပေးပြီး ဖြစ်ခြင်း၊ အလျှောက် ခံရသူ တို့က

၁၉၅၅

ကိုသာဒင်ပါ ၃ နှင့် ရန်ကုန်မြို့၊ မြို့ပြဆိုင်ရာ ၄ ဦးရန်းခ ကြီးကြပ်ရေး ဝန် ပါ ၄။

Mr. Lookman သာလျှင်၊ ဒေါ်မြသင်၏ အမွေဆိုင် ဖြစ်ကြောင်း အကြောင်း ပြချက် ရှိသော်လည်း Mr. Lookman ကိုယ်ဘိုင်က ကန့်ကွက် ချက် မရှိခြင်း စသည်တို့ကို ထောက်ဆသောအားဖြင့်၊ ဝန်မင်းသည် ထိုအက်ဥပဒေ ပုဒ်မ ၁၄ (က) အရတရားစွဲဆိုနိုင်ခွင့်ပြုရုံမျှအတွက်မှာလျှောက်သူတို့သည်အချင်းဖြစ်အိမ်၏ ပိုင်ရှင်များဖြစ်ကြသည်ဟု ယူဆရန် အကြောင်းအာဆင်အရှားရှိခဲ့သည်။

ရန်ကုန်မြို့၊တရားမတရားရုံးတရားသူကြီးချုပ်မှာပူကားအတက်ပါအကြောင်း အချက်များအပြင် Mr. Lookman ၏ ကျင်းကျိန်စာပင် သူ၏ နွေမှောက်တွင် ရောက်ရှိနေခဲ့ပြီဖြစ်သောကြောင့် အိမ်ကိုမည်သူပိုင်သည်ဟု အငြင်းပွါးလျက်ပင် ရှိနေသေးသည်ဟု ယူဆရန်အကြောင်းဘစုံဘခုမျှမရှိခဲ့ချေ။ သို့ပါလျက် ပညာရှိ တရားသူကြီးချုပ်က အိမ်ကိုမည်သူ ပိုင်သည်ဟု အငြင်းထွက်၍ နေသေးသည်ဟု ဆုံးဖြတ်ခြင်းသည် အထင်အရှား မှားယွင်းသည်။

ထိုပညာရှိ တရားသူကြီးချုပ်သည် ပင်လျှင်၊ ဝန်မင်းမှာ [ပုဒ်မ ၁၄ (က) အတွက်ပင်] ထိုပြဿနာကို ဆုံးဖြတ်နိုင်ခွင့် မရှိဟူ၍၊ စီရင်ဆုံးဖြတ် ခဲ့ခြင်းသည်လည်း အထင်အရှားမှားယွင်းသည်။

သို့ဖြစ်၍၊ မြို့ပြဆိုင်ရာ၄ ဦးရန်းခကြီးကြပ်ရေးဝန်၏ အမိန့်နှင့် ရန်ကုန်မြို့တော် တရားမ တရားရုံး တရားသူကြီးချုပ်၏ အမိန့်ကို ပယ်ဖျက် ပြီးလျှင်၊ လျှောက်သူတို့၏ တရားစွဲ ခွင့်တောင်းလွှာကို မြို့ပြဆိုင်ရာ ၄ ဦးရမ်းခ ကြီးကြပ်ရေး ဝန်ထံသို့ ပြန်၍ပေးပို့လိုက်သည်။ ဝန်မင်းသည်၊ ထိုလျှောက်လွှာပေါ်တွင် တရားဥပဒေနှင့် အညီ စုံစမ်းစစ်ဆေး၍၊ တရားစွဲရန် ခွင့်ပေးသင့်မပေးသင့် စီရင်ဆုံးဖြတ်ရမည်။

၌ရုံးတော်တွင် လျှောက်သူတို့၏တရားစွဲလိုတ်ကို လျှောက်ထားခံရသူအမှတ် ၃ နှင့် ၄ တို့ကခံကြရမည်။ ရှေ့နေခမှာ ကျပ်တရာ (ကျပ် ၁၀၀) တိတိဖြစ်စေရမည်။

SUPREME COURT

LIM KAR GIM (APPELLANT)

v.

MRS. IRIS MAUNG SEIN AND ONE (RESPONDENTS).*

† S.C. 1955

Aug. 22.

Sino-Burmese Buddhist—Law applicable—Posthumous adoption—Revocation of adoption—Position of an adopted son and that of a natural son not identical—Right of inheritance in grandparents' estate by the children of a "dog son" and by the children of an adopted son who has lost his status—Division of the estate of a deceased person among the surviving brothers and sisters—Fundamentals of Burmese Buddhist Law of Succession—Kinwun Mingyi's Digest, Vol. (1) Inheritance, s. 310—The Attasankhepa Dhammathat, s. 211.

The Law of Succession applicable to the estate of a Sino-Burmese Buddhist is Burmese Buddhist Law.

Tan Ma Shwe Zin v. *Koo Soo Chong and others.* (1939) R.L.R. 542 (P.C.); *Cyong Ah Lin* v. *Daw Thike*, (1949) B.L.R. (H.C.) 168; *Daw Thike* v. *Cyong Ah Lin*, (1951) B.L.R. (S.C.) 123, followed.

There can be no posthumous adoption under Burmese Buddhist Law.

The adoption of an adult is made by the mutual consent of the adoptor and the adoptee and a revocation can similarly be made by such consent.

The position of an adopted child is not identical for all purpose with that of a natural child.

Ma Kyin Sein v. *Maung Kyi Htaik* (1940) R.L.R. 783, referred to.

In relation to the grandparents and the right of inheritance in their estate, the position of the children of an adopted child who had lost his status as such is different from that of the children of a natural child who had lost his right of inheritance as being a "dog son". In the latter case although the right of inheritance as a son is lost, the relationship of himself and his children to the grandparents continues, and thus the right of his children in the estate of their grandparents remains unaffected. But in the former case the adopted child loses his relationship and becomes completely cut off together with his own descendants from the adoptive parents.

U Sein v. *Ma Boke*, I.L.R. 11 Ran. 158, referred to.

The fundamentals of the Buddhist Law of Succession are firstly, the nearer excludes the more remote, and secondly, inheritance shall not ascend.

On the death of a brother or sister without leaving a spouse or issue, the deceased's younger brothers and sisters inherit to the exclusion of the elders.

Kinwun Mingyi's Digest, Vol. 1, Inheritance, s. 310; Attasankhepa Dhammathat, s. 211.

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* Civil Appeal Nos. 6, 7, 8, 9, 10 of 1954 against the decree of the High Court, Rangoon in Civil 1st Appeal Nos. 68, 69, 71, 73 and 75 of 1951.

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

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The fact that a parent may be alive at the time of a child's death, makes no exception to this rule.

The main condition on which the rule excluding elder brothers and sisters depends is not the fact of parents being alive. The emphasis is on separate living after division of the parental estate which would give rise to the formation of a distinct and separate estate, only to which this rule would apply.

Mi Apruzan v. *Mi Chumra*, (1872-92) S.J. and R., L.B. 37; *Maung Tu* v. *Ma Chit*, I.L.R. Ran. 162, affirmed.

Kyaw Myint for the appellant Chan Eu Ghee.

O. S. Woon for the appellant Lim Kar Gim.

Hoke Sein for the respondent No. 1.

Daw Aye Kyi for the respondent No. 2.

The judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—The five appeals before us, *viz.* Nos. 6 to 10 of 1954, have arisen out of four separate applications for letter of administration to the estate of Margaret Chor Pine who died in 1943. The four applicants were :—

(*a*) Lim Kar Gim, an elder brother of the deceased, in C.M. No. 140 of 1947 of the High Court;

(*b*) Mrs. Iris Maung Sein, a younger sister, in C.M. No. 2 of 1947;

(*c*) Mrs. Bella Orr, another younger sister, in C.M. 307 of 1947; and

(*d*) Chan Eu Ghee, a grandson of Chan Chor Khine, who claimed to be the adopted grandson of the deceased, in C.M. No. 488 of 1947. It is claimed by him that Margaret Chor Pine adopted the second son of Chan Chor Khine, namely, Georgie Chor Khine (who predeceased Margaret Chor Pine) as the son of her deceased husband and that Georgie Chor Khine in turn adopted him.

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In the course of the preliminary proceedings, seven nephews and nieces, children of a deceased brother, residing in Penang sought their share in the inheritance, and so did the deceased's mother Mrs. Lim Chin Tsong. Two nephews, children of a deceased sister, residing in Burma, namely Ronnie and Eric Kyi Lwin, claimed to be the adopted children of the deceased. The Penang nephews and nieces dropped out of the proceedings and Mrs. Lim Chin Tsong did likewise.

The petitions were converted into Civil Regular Suits and respectively became Civil Regular Suits 296, 294 and 295 of 1947 and Civil Regular Suit No. 49 of 1948. The last Suit with Chan Eu Ghee as plaintiff was directed against Iris Maung Sein, Lim Kar Gim and Bella Orr. In the other three suits the two brothers Kyi Lwin were made parties.

The suits were tried together and the learned Judge on the Original Side of the High Court rejected the claims of the two brothers Kyi Lwin and that of Chan Eu Ghee. He held that the estate of Margaret Chor Pine was divisible equally among her elder brother Lim Kar Gim and her younger sisters Iris and Bella. Letters of administration was granted jointly to Mrs. Iris Maung Sein and Lim Kar Gim. Mrs. Bella Orr was left out because of her residence outside Burma.

This order was taken up on appeal and thus from Civil Regular Suit No. 296 of 1947 arose Civil First Appeal No. 73 of 1954 and from Civil Regular Suit No. 294 of 1947 arose Civil First Appeal No. 75 of 1951. In both these appeals Mrs. Iris Maung Sein sought to set aside the portion of the judgment in which Lim Kar Gim was declared a joint heir. Chan Eu Ghee appealed against the orders in Civil Regular Suit Nos. 295 and 296 of 1947 and No. 49 of

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1948 and also in respect of the orders in Suit No. 294 of 1947, his appeals being Civil First Appeal Nos. 68, 69, 70 and 71 of 1951. The Kyi Lwin brothers did not appeal.

The appellate Court found that only the two younger sisters were the heirs and thus the portion of the trial Court's order granting letters to Lim Kar Gim was set aside and it was directed that Letters was to issue to Mrs. Iris Maung Sein alone.

The parties have now come to this Court and Appeal Nos. 6, 7 and 8 are those by Chan Eu Ghee against the orders in Civil First Appeal Nos. 68, 69 and 71 of 1951 and Nos. 9 and 10 are by Lim Kar Gim against Civil First Appeals Nos. 73 and 75 of 1951. The respondents in all the appeals are the sisters Mrs. Iris Maung Sein and Mrs. Bella Orr. The sisters have filed cross-objections in the appeals of Chan Eu Ghee.

At the beginning of this century two outstanding Chinese, Chan Ma Phee and Lim Chin Tsong had emerged as rich men in Rangoon. Chan Ma Phee was pure Chinese while Lim Chin Tsong was Sino-Burmese, (his mother being one Daw Po U) and both of them married Burmese ladies. Chan Ma Phee had three sons : Chor Lye, Chor Khine and Chor Pine. The last named married Margaret, a daughter of Lim Chin Tsong in 1919.

When Chan Chor Pine died on 9th July 1933 Chan Chor Khine remained the only surviving son and it is asserted by Mrs. Iris Maung Sein that at his instance, Margaret Chor Pine adopted Chan Chor Khine's younger son Chan Cheng Leong, more familiarly known as Georgie Chor Khine, as " the son of Chan Chor Pine deceased." This was by means of a registered deed which appears to have been lost and no copy is available due to circumstances arising out

of the war. On the same day by another registered deed, Georgie Chor Khine, who was an adult without issue then, adopted Chan Eu Ghee who was then a boy of two the younger son of his elder brother Chan Cheng Taik, also known as Willie Chor Khine. This deed dated the 20th July 1933 was produced as Exhibit I. On the same day a third deed was made (Exhibit O) with a one rupee stamp and duly registered. The deed is an agreement between Margaret and Georgie and the recital contains the following :

"Whereas the said Chan Cheng Leong has been adopted by the said Margaret Chor Pine as the son, successor and heir of the deceased Chan Chor Pine."

The clauses relating to the actual agreement run :

"(1) The said Chan Cheng Leong is the sole heir to the late Chan Chor Pine.

(2) In lieu of maintenance the said Margaret Chor Pine shall have a life interest in the whole estate of the said Chan Chor Pine and shall during the peroid of her life receive the nett rents and profits therefrom, provided always that such interest shall terminate upon the remarriage of the said Margaret Chor Pine.

(3) Subject to the said life interest of Margaret Chor Pine, all right title and claim in and to the estate of the late Chan Chor Pine is vested in Chan Cheng Leong."

Now there is no clear evidence as to how these three deeds came to be executed. Iris Maung Sein says that Chan Chor Khine forced Margaret Chor Pine to agree to their execution but the evidence is not conclusive. Judging from the evidence of Mr. Foucar, who prepared these documents, it would appear that not only was there unseemly haste so soon after the death of Chor Pine but there was something that was not quite satisfactory, for Mr. Foucar in his evidence said :

"If I may explain, Mr. Nicholas" (who by the way was a lawyer friend of the family) "and Chor Khine came to

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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 these instructions I drew up two deeds of adoption, one by Margaret Chor Pine and the other by Chan Cheng Leong."

Mr. Foucar was shown Exhibit O which is not a certified copy. Mr. Foucar's evidence was hazy on the point but the parties do not dispute that such a deed was executed even if they dispute its effect. The lower Courts have found and we consider it established that two adoption deeds and one agreement under which Margaret Chor Pine purported to take only a life interest in her husband's properties were executed and registered on the 20th July 1933.

The evidence does not reveal with any certainty the motive underlying the emergence of these deeds but a fair conjecture would be that the parties, even if they were Sino-Burmese Buddhists, considered themselves bound to follow the Chinese custom of perpetuating the family line and to carry on ancestor worship. And with the adoption of a son, even posthumously, the parties may have felt that male succession was ensured and thus the consequential attempt even to vest Chan Chor Pine's estate in the adopted son Georgie with the mother retaining merely a life interest by means of Exhibit O, was made.

It is obvious however that no effect was given to the terms embodied in Exhibit O for Margaret Chor Pine did not part with Chan Chor Pine's estate which she continued to enjoy and to administer with the help of her agent Chan Cyin Leong. She even disposed of some landed property. Some three years later Margaret discovered that Georgie had disposed of some 2 lakh rupees worth of Burma Oil Company shares. A dispute arose and two documents Exhibits B and C came to be executed.

Since the case turns really on Exhibit B, the contents are given below in some detail. It is designated as a "Deed of Release . . . made by Chan Cheng Leong" and in its recital it stated that by an Indenture dated the 20th July 1933 Margaret Chor Pine had "Purported to adopt the said Chan Cheng Leong to be a son to her husband Chan Chor Pine, then deceased." Then it went on to say that by another indenture of the same date it was agreed that Chan Cheng Leong was the sole heir to the estate of Chan Chor Pine subject to a life estate in favour of Margaret Chor Pine.

The fourth, fifth and sixth paragraphs of the recital are given in their entirety below:

"Whereas doubts and disputes have subsequently arisen between the abovesaid Margaret Chor Pine and Chan Cheng Leong whether posthumous adoptions recognized in ancient Chinese law is permissible under the Law in the Province of Burma, whether if such custom is legally enforceable, the requisites of a valid posthumous adoption were present in the transaction evidenced by the indenture above described of the 20th July 1933, whether the alleged adoptee, being *sui juris* under the general law in force in the Province of Burma, it was not necessary that in addition to or in lieu of an adoption, the alleged adoptee should have arrogated himself, with all the formalities prescribed by the Chinese Law for an arrogation, whether if the adoption was valid, the indenture of the 20th July 1933 is in law sufficient to divest the estate from Margaret Chor Pine and whether notwithstanding the indentures of the 20th July 1933 and 20th July 1933, Margaret Chor Pine is not the sole heir to the estate of the late Chan Chor Pine, deceased, and

WHEREAS the alleged adoptee Chan Cheng Leong being a nephew by blood of the late Chan Chor Pine and the parties are desirous of avoiding disputes in Courts of Law between close relatives and thereby safeguarding the family honour of compromising all doubtful claims and rights as against each other, and setting at rest all the disputes in regard to the estate of the late Chan Chor Pine,

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WITNESSETH that in consideration of settling and compromising all claims, doubts and disputes between the parties in respect of the estate left by the late Chan Chor Pine and in pursuance thereto by an indenture of 24th June 1936 made by Margaret Chor Pine whereby she grants and conveys absolutely to the Releasor herein of certain properties set out in the Schedule annexed to the said indenture, that notwithstanding anything to the contrary in the indentures of 20th July 1933 aboverecited, the Releasor releases all claims to 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) convenanting with her that notwithstanding 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."

It will be seen that reference is made to an indenture dated the 24th June 1936 and this is Exhibit C. Both deeds were registered on the 26th June. Under Exhibit C Margaret conveyed outright landed property valued at 2 lakhs of rupees, and it does seem that as from the 26th June Margaret Chor Pine and Georgie Chor Khine had very little to do with each other, not that they were very close even prior to that date. They did not even live together.

Georgie, who had been ailing for a long time, died on the 25th May 1938 (*vide* Exhibit 3 photograph of his tombstone). Iris Maung Sein's evidence that he died about 1936 is incorrect. He had been living with a lady Ma Hla Shwe, who was much older than himself, and by his will, Exhibit Y, which is dated 11th April 1937 he left his entire estate to Ma Hla Shwe whom he described as "my dear wife", thus bringing to rest all conjectures as to her status.

No reference was made to Chan Eu Ghee in the will, in which Georgie described himself as the son of Chan Chor Khine and the adopted son of Chan Chor Pine. On the tombstone erected on the grave (the photograph is Exhibit 3) the inscription " erected by his mourning son Eu Ghee " appears.

Nothing happened in regard to the estate held by Margaret Chor Pine after Georgie's death and for that matter nobody disturbed Daw Hla Shwe's enjoyment of Georgie's own estate which devolved on her, and it is not suggested that she has been disturbed at all, even to this day.

War came to Burma and Margaret evacuated to Dedaye where she died on 23rd July 1943. With the termination of the war—actually in 1947—applications for Letters in respect of her estate valued at nearly 13 lakhs were filed.

At one stage there was some consideration given to the question whether the adoptions were under Chinese Customary Law or whether they were under Burmese Buddhist Law but it is common ground now, on the authority of *Tan Ma Shwe Zin* v. *Koo Soo Chong and others* (1), *Cyong Ah Lin* v. *Daw Thike* (2) and *Daw Thike* v. *Cyong Ah Lin* (3) that it is the Burmese Buddhist Law which must be applied in regard to succession to this estate since all the parties involved are Sino-Burmese Buddhists. And it is not suggested by the parties before us or at any time during these proceedings that the case involves any special custom or usage which is at variance with the Buddhist Law prevailing in Burma.

The case has been fought diligently and ably by learned counsel appearing for the parties and every available attack and defence was put up at one stage

(1) (1939) R.L.R. 542 (P.C). (2) (1949) B.L.R. (H.C.) 168.
(3) (1951) B.L.R. (S.C.) 123.

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or other but at this final stage the points which require decision have crystallised as follows :

(i) Despite the release Exhibit B executed by Georgie Chor Khine, did he still remain until the time of his death, the adopted child of Chan Chor Pine and/or Margaret Chor Pine ?

(ii) If Georgie Chor Khine had relinquished his status as an adopted son does Chan Eu Ghee still retain the status of an adopted grandson of Chan Chor Pine and/or Margaret Chor Pine, thus entitling him to be the sole heir to Margaret Chor Pine's estate ?

(iii) If Chan Eu Ghee is not an heir to the exclusion of the other parties, is the estate of Margaret Chor Pine divisible equally among the surviving brother and sisters?

Before us, the point arose whether there can be a posthumous adoption under Burmese Buddhist Law. We know of no authority nor has any been cited to show that such a form can be contemplated and from the commonsense point of view, Margaret who had made the adoption, could not have acted as the agent of a dead person. The intention underlying the execution of the adoption deed was that Georgie should inherit what she was already holding and it may well be argued, as has been done before us, that the adoption, in effect, was one made by Margaret Chor Pine herself ; and since she was a Sino-Burmese Buddhist the only kind of adoption she could have made was under Buddhist Law. Georgie Chor Khine was already an adult and it was obvious that he consented to the adoption, a fact which is established by his action in adopting a son for himself at the same time. But acceptance of this position does not dispose of the matter for the further question arises as to what

was Georgie's position in regard to the estate which under Buddhist Law had already devolved upon his adoptive mother on Chan Chor Pine's death. True, there was that document Exhibit O of the same date declaring the estate vested in him but the agreement was never implemented and the estate remained in Margaret's hands. The indenture bore a one-rupee stamp and it was never the intention that it would act as a deed of gift of the estate to an adopted son during the mother's lifetime, and thus Georgie if he had become an adopted son, he was only an expectant heir who would inherit the estate only at the time of Margaret's death.

But Georgie was not fated to inherit and on 26th June 1936 by means of Exhibit B, and in consideration of an outright gift of property worth 2 lakhs rupees evidenced by document Exhibit C which contained the same recitals as in Exhibit B, he declared that he was not the adopted son of Chan Chor Pine and/or Margaret Chor Pine". He also waived all claims to the estate as an adopted son. This deed of gift was correctly stamped to cover the transfer fees amounting to Rs. 7,000 and duly registered along with Exhibit B.

After the execution of these two documents, the agreement embodied in Exhibit O, which in any case was never implemented, must be deemed to have been revoked by mutual consent. This is not disputed but it was submitted before us that Exhibit B is merely a release to his rights in the estate of Chan Chor Pine and there is no express revocation of his status as an adopted son. We regret we are unable to countenance this view since the deed contains Georgie's express declaration that he was not the adopted son of either Chan Chor Pine or Margaret Chor Pine. The adoption of an adult is

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made by the mutual consent of the adoptor and adoptee and a revocation can similarly be made by such consent. In consideration of receiving certain properties outright Georgie made this specific declaration. On Margaret's part, to revoke the adoption she parted with a substantial portion of her estate. Taking the two documents together we can see no reason to doubt that the intention of both Georgie and Margaret was to sever any adoptive tie which may have subsisted once and that such severance was effected by these two documents. We hold therefore that as from the date of these deeds, Georgie definitely lost his status as an adopted son. See *Ma Kyin Sein* v. *Maung Kyin Htaik* (1).

In regard to the question whether Chan Eu Ghee still retains the status of a grandson (assuming his adoption by Georgie in Kittima form is proved) we must bear in mind the well-known rule in Buddhist Law that the position of an adopted child, as pointed out in *Ma Kyin Sein* v. *Maung Kyin Htaik* (1), is not identical for all purposes to that of a natural child. In relation to the grandparents and the right of inheritance in their estate, the position of the children of an adopted child who has lost his status as such is different from that of the children of a natural child who has lost his right of inheritance as being a "dog son". In the latter case although the right of inheritance as a son is lost, the relationship of himself and his children to the grandparents continues, and thus the right of his children in the estate of their grandparents remains unaffected. See *U Sein* v. *Ma Boke and others* (2). But in the former case the adopted child loses his relationship and becomes completely cut off together with his own descendants from the adoptive parents. A Burmese adage says

(1) (1940) R.L.R. 783 (2) I.L.R. 11 Ran. 158.

that when a tree falls the topmost parts become faggots. What Georgie is cut off from, Chan Eu Chee cannot remain attached to. We therefore hold that Chan Eu Ghee, as an adopted child of Georgie Chor Khine does not retain the status of a grandson of Chan Chor Pine and/or Margaret Chor Pine.

We now come to the final question whether the estate is divisible among the surviving brother and sisters of the deceased.

Now, the fundamentals of the Buddhist Law of Succession are firstly, the nearer excludes the more remote, and secondly, inheritance shall not ascend. The three claimants are a brother and sisters of the deceased and each was equally near to her and the sole question to decide is whether the rule of non-ascent would exclude the elder brother.

There is a wealth of authorities to be found in Kinwun Mingyi's Digest Vol. I, Inheritance, section 310 and we give below extracts from various Burmese Codes which have found a place in this compilation. They are from Dhama, Manugye, Rajabala, Manu, Panam and Amwebon. We quote also from another work of the same learned author, the Attasankhepa Dhammathat, section 211 of which may well be taken as a summary of the legal position in regard to the issue before us.

ဓမ္မ။ ။အမွေဆန်ရာ မဆန်ရာသော ဘရားကား၊ သားသမီးတို့အမွေကို၊ သေသူ့သားသမီးမရှိသော်၊ သေသူ့သားသမီးတို့အောက်ညီမ၊ ညီငယ်မောင်တို့ ခံစားစေ။ အစ်မအစ်ကိုတို့မခံသာ။ ဤကားအမွေမဆန်ရာသော ဘရားဘည်း။

မနုကျော်၊ အခန်း ၁၀၊ ပုဒ်မ (၁၀)။ ။မိဘနှစ်ပါးသေပြီးနောက်၊ သား သမီး အသီးသီးနေရာတွင်၊ အမွေမဆန်ရာသောဘရားဟူသည်ကား၊ ထိုပေါက် ဖော်တို့သည် အသီးအခြားနေရာသေ၍၊ အမွေခံသားသမီး လင်မယားမရှိလျှင်၊ အစ်ကိုအစ်မတို့သို့ အမွေမဆန်စေနှင့်၊ သေသူ့အောက်ညီ၊ ညီမတို့သာခံစားစေ၊ သည်ကိုရည်၍၊ အမွေကိုမဆန်စေနှင့်ဆိုသတည်း။

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ရာဇမဟ္ဒ။ ။ညီ၊ ညီမတို့ရသင့်သော အမွေမှာကား၊ မိန်းမယောကျ်ား၊ လင်မယားနှစ်ဦးတို့သည်၊ သီးခြားနေကုန်သည်ဖြစ်၍၊ သားသမီး မရှိကုန်ဘဲ၊ အကယ်၍သေကုန်အံ့။ ညီ၊ ညီမတို့သာ အမွေဥစ္စာ ရရာသတည်း။ မိဘ အစ်ကို အစ်မတို့သည်၊ မရထိုက်ချေ။ ထို့စကားသင့်၏။ အမွေသည်မဆန်ရာတည်း။

မနု။ ။အမွေကို ခွဲခြားဝေဘန်ပြီးမှ၊ အိမ်သီးအိမ်ခြားနှိုက်၊ အကယ်၍ သေသည်ဖြစ်အံ့၊ ထိုအမွေကို၊ ညီငယ် နှမငယ် တို့သာလျှင်၊ စားကုန်ရာ၏။ အစ်ကိုကြီး၊ အစ်မကြီးအစရှိကုန်သော သူတို့သည်၊ ရသင့်သည်ဟုမဆိုသာချေကုန်။

ပါဏံ၊ အခန်း ၄၊ ပုဒ်မ (၁၃) (ခ)။ ။တတွေကြောင်းလျှား၊ ပေါက်ဘော်များတို့၊ သီးစားနေမြောက်၊ တယောက်ယောက်သား၊ သေပါတုံးငြား၊ မွေစားမရှိ၊ ဖြစ်တုံးဘိမှ၊ သေသူ့အောက်ကျ၊ ညီနှစ်မတည့်၊ စားရရကား။

အမွေပုံ။ ။အမိအဘသေနောက်၊ သားသမီးအသီး ဝေရာတွင် အမွေမဆန်ရာသော တရားဟူသည်ကား၊ ထိုပေါက်ဖေါ်တို့သည် အသီးစား၍ အခြားနေရာသေ၍၊ အမွေခံသားသမီး၊ လင်မယားမရှိလျှင်၊ အစ်ကိုအစ်မ ၎င်းတို့သည် အမွေမခံစေနှင့်၊ သေသူ့အောက်ညီ၊ ညီမတို့သာ ခံစားစေ၊ သည်ရည်၍ အမွေမဆန်စေနှင့်ဆိုသတည်း။

အင်္ဂသံခေပ၊ ၂၁၁။ ။အမွေဆန်သင့် မဆန်သင့်တရား။ ထိုမှတခြား၊ အမွေစားပြီး၊ သားမယားမဲ့၊ သူသေခဲ့က၊ အစ်မနောင်ကြီး၊ ဦးရီး အရီး၊ မိကြီး မိထွေး၊ ဘိုးဘေးမိဘ၊မရစကောင်း၊ နှောင်းညီအငယ်၊ နှမငယ်သာ၊ရာရာကေန်၊ မွေမဆန်ရှင့်၊ သို့မှန်တာပြီး၊ အောက်မရှိက မိဘပင်စား၊ ဟူရာန္ဓိက်၊ အမွေဆန်သင့်မဆန်သင့်တရားမှာ၊ အမွေခွဲဝေရယူပြီး၊ သားချင်းတို့အနက်၊ သားမယားအမွေခံမရှိသူ တစ်ဦးဦးသေလျှင်၊ ၎င်းသေသူ့ဘွင်၊ ညီငယ်ညီမငယ်ရှိအံ့၊ သေသူ့အမွေ အထက်သို့မဆန်စေနှင့်ဆိုရကား၊ အကိုကြီးအမကြီးတို့၊ မရသာပြီ၊ အမွေကို အောက်သို့ စုန်စေရမည် ဆိုသည့်အတိုင်း၊ ညီငယ်နှမငယ်တို့ကရစေ။ ၎င်းသေသူတွင်၊ ညီငယ်နှမငယ်မရှိက အောက်မရှိလျှင်၊ အထက်သို့ဆန်စေဆိုရကား၊ အကိုကြီး၊ အမကြီး၊ မိဘဘိုးဘွားတို့ပင်၊ ၎င်းသေသူ့အမွေကို ခံစံကြစေ။

The rule that is laid down in these passages is that on the death of a brother or sister without leaving a spouse or issue the deceased's younger brothers and sisters inherit to the exclusion of the

elders. Learned counsel for Lim Kar Gim however points to the passage in Manugye where reference is made to the death of the parents *i.e.* "မိဘနှစ်ပါးသေပြီးနောက်။" A similar reference appears in Amwebon as well and learned counsel contends therefore that for the rule of non-ascent to apply among collaterals one of the requisites is that the parents must be dead. He points out Mrs. Lim Chin Tsong the mother survived Margaret Chor Pine and advanced the argument that under archaic law of inheritance the elder children received larger shares in relation to the younger children and thus the exclusion of the elders in respect to a collateral's estate was a fair rule. Now that all children normally inherit equally in a parental estate, learned counsel suggests, exclusion at the present day would be meaningless and unfair.

We are however of the opinion that in the authorities above mentioned, when reference was made to the death of parents, such reference was made to emphasise the fact that the estate to which the rule of division is to apply, is the estate of a deceased brother or sister as distinct from an undivided estate of a parent in regard to which all children are entitled to their shares. We are of opinion also that the phrases "အမွေခွဲဝေဘန်ပြီးမှ" *i.e.* "after division of the parental estate" appearing in Manu was meant for similar emphasis. It will be noted that all the texts laid special emphasis on "living apart" *i.e.* အသီးသီးနေရာတွင်။ သီးကြားနေကုန်။ အိမ်သီးအိမ်ခြားနိုက်။ သီးစားနေမြောက်။ အသီးစား၍ အခြားနေရာ။

Living apart may be caused by various reasons but whatever may be the cause, separate living indicates the creation of a separate estate and it is in respect of such an estate that the rule of non-ascent even among brothers and sisters must prevail. The

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fact that a parent may be alive at the time of a child's death, in our judgment, would not make an exception to this rule.

The passage in Attasankhepa mentions that if there are none junior to the deceased then the inheritance will have to ascend to the " elder brothers or elder sisters and even to parents and grandparents." အစ်ကိုကြီး။ အစ်မကြီး။ မိဘတို့ဘွားပင်။ ၎င်းသေသူ့အမွေကို ခံစံကြစေ။" This suggests that the main condition on which the rule excluding elder brothers and sisters depends is not the fact of parents being alive. The emphasis is on separate living after division of the parental estate which would give rise to the formation of a distinct and separate estate, only to which this rule would apply.

Margaret Chor Pine had left the family in 1919 when she married and when she died in 1943, her estate was a separate estate unconnected with the estate of her parents; and on the weight of the authorities we have mentioned we must endorse the view of the appellate Court that her estate cannot ascend to her elder brother. Our conclusion is in line with the views expressed in *Mi Apruzan* v. *Mi Chumra* (1) where reliance was placed on section 18 of Manugye, despite the fact that a parent was alive, as in this case. The same dictum was followed in *Maung Tu* v. *Ma Chit (2).*

In the result, we dismiss the appeals of Chan Eu Ghee in Civil Appeals Nos. 6, 7 and 8 together with the cross-objections filed by the respondents. Similarly we dismiss the appeals of Lim Kar Gim in Civil Appeals Nos. 9 and 10.

In regard to costs we feel that none of the applications were frivolous and in fact all the parties had justifiable reasons to seek grant of Letters of

(1) (1872-92) S.J. & R.,L.B. 37. (2) I.L.R. 10 Ran. 162.

Administration and in these circumstances we consider that the costs incurred by them throughout the proceedings should come out of the estate. We therefore order that this should be so, with the limitation that each party will be entitled to only one set of advocates' costs. Such costs for appearance before this Court is fixed at K 510 for each party.

SUPREME COURT.

† S.C. 1955

Sept. 21.

LILHMICHAND SIRINIVAS (APPLICANT)

v.

1. THE FINANCIAL COMMISSIONER (COMMERCE).
2. THE COLLECTOR OF CUSTOMS (RESPONDENTS)*.

Writ of certiorari—S. 107 (8), Sea Customs Act—A question of jurisdiction—Supreme Court practice—New ground of fact taken up neither in the lower Courts nor even in the application before the Supreme Court, but taken only in the course of argument before the Supreme Court—Entertainability.

The Writ of certiorari deals with the question of want of jurisdiction or excess of jurisdiction. If the authority whose order is impugned by means of the Writ of certiorari had jurisdiction to deal with a certain matter and dealt with it, the Supreme Court would not interfere even though it might not agree with the said authority on question either of law or fact or of both.

Gwan Kee v. *The Union of Burma*, (1949) B.L.R (S.C.) 151 at 153, followed.

Dr. R. C. Das v. *The Controller of Rents, Rangoon*, (1951) B.L.R. (S.C.) 225, referred to,

The Supreme Court will not entertain and go into a new questions of fact not raised before the lower Courts, nor even in the application made to the Supreme Court, but taken only in the course of the argument before the Supreme Court.

Gobinda Chandra Dakna v. *Dinesh Chandra Maitra*, A.I.R. (1952) Cal. 100; *Govind Vinayak* v. *Additional Deputy Commissioner, Nagpur and another*, A.I.R. (1953) Nag. 250; *Magalal Jivabhai Patel* v. *Government of Bombay*, A.I.R. (1953) Bom. 59, followed.

V. S. Venkatram for the applicant.

Ba Sein (Government Advocate) for the respondents.

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* Civil Misc. Application No. 11 of 1955.

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

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LILHMI-CHAND SIRINIVAS v. 1. THE FINANCIAL COMMISSIONER (COMMERCE). 2. THE COLLECTOR OF CUSTOMS.

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 order of the second respondent by which seven bales of Cotton Dyed Crepe imported by the applicant has been confiscated under section 167 *(8)* of the Sea Customs Act and the order of the first respondent dismissing his appeal from the said order.

The applicant's case is that cotton dyed crepe is shirting and is covered as such by the Open General License No. XI.

However, both the respondents have held that it is not shirting. They have jurisdiction to decide the question; we see no reason to differ from them; and this Court has already observed in *Gwan Kee* v. *The Union of Burma* (1):

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

Besides, the orders of the respondents are not "speaking orders" in the sense that they are obviously wrong, to justify interference with them as such in accordance with the ruling of this Court in *Dr. R. C. Das* v. *The Controller of Rents, Rangoon* (2).

The learned Advocate for the applicant has further contended that if cotton dyed crepe be not shirting it must be cotton coatings and trouserings which are covered by Open General License No. XIV.

(1) (1949) B.L.R. (S.C.) 151 at 153. (2) (1951) B.L.R. (S.C.) 225.

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LILHMICHAND SIRINIVAS v. 1. THE FINANCIAL COMMISSIONER (COMMERCE). 2. THE COLLECTOR OF CUSTOMS.

However, this is a new ground which has been taken only in the course of argument in this Court. The question has not been raised before the respondents although it is one of fact and the ground has not been taken even in the application in this Court. So we cannot entertain this plea and go into this new question of fact. [Cp. *Gobinda Chandra Dakna* v. *Dinesh Chandra Maitra* (1); *Govind Vinayak* v. *Additional Deputy Commissioner, Nagpur, and another* (2); and *Magalal Jivabhai Patel* v. *Government of Bombay* (3)].

The application is dismissed but the parties must bear their own costs as the applicant appears to have been misled by the way in which the respondents referred to Customs House Notice No. 2 in their respective orders.

This notice was issued in connection with Open General License No. XI on the 18th December 1950 *i.e.* six days after the License itself was issued and about three years before the applicant indented for the goods in question. It merely shows that the applicant must have ordered the goods with full knowledge of the fact that the Collector of Customs would not treat them as shirting.

Incidentally, however, this notice is of Special importance as the Ministry of Commerce and Supply has issued a Press Communiqué re. Open General License Nos. XI and XII on the 15th December 1950, *i.e.* on the same date as the Open General License No. XI, in which it has stated:

> "To avoid mistakes, Importers are advised to ascertain from the Collector of Customs that the goods intended to be imported fall within the Tariff Items mentioned in the Open General Licences before indenting for the goods."

(1) A.I.R. (1952) Cal. 100. (2) A.I.R. (1953) Nag. 250.
(3) (1953) A.I.R. Bom. 59.

SUPREME COURT.

RANGOON COMMERCIAL HOUSE (APPELLANT)

† S.C. 1955

Sept. 5.

v.

SHAHJEHAN MUSKTIKHAN TRADING CORPORATION (RESPONDENT).*

Contract for Sale of goods—Ss. 222, 230, 233, Contract Act—Local agent for foreign principal—Personally liable and can be sued in his own name.

The Appellant as "Buyer" entered into a contract for Sale of goods with the Respondents as "The Sellers."

Upon failure to deliver the goods, the appellants filed a suit for breach of contract against the Respondents.

The Respondents' defence is that they acted as agents of certain firms in Japan and therefore they are not personally liable, nor can they be sued personally and in their own name.

Held : Unless a contrary intention appears from the Contract or from surrounding circumstances, the very fact that the Respondents entered into this contract, according to their own defence, as an agent for the firms in Japan raises a presumption that they agreed to bind themselves personally under s. 230, Contract Act.

Therefore a suit against them and in their own name would lie.

Miller, Gibb & Co. v. *Smith and Tyrer Ltd.*, (1917) 2 K.B. 141 at 150-151 referred to.

Where a person elects to hold the agent, who acts for a foreign principal, personally liable and sues him to judgment, as authorized by the provisions of s. 233 read with s. 230, the agent has a right to be indemnified against all the consequences of that suit by his foreign principal.

Pollock and Mullas' Indian Contract Act and Specific Relief Act (7th Edition) p. 592, referred to.

Mere mention of commission in the Contract is not in any way inconsistent with the relation between principal and principal.

Balthazar & Son v. *E. X. Abowath*, I.L.R. Ran. Vol. 5, 1, referred to.

Rada Kishanmal v. *Mangalal Bros.*, A.I.R. (1943) Cal. 206, discussed.

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* Civil Appeal No. 1 of 1955 against the decree of the High Court of Rangoon in Civil 1st Appeal No. 5 of 1952.

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

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RANGOON COMMERCIAL HOUSE v. SHAHJEHAN MUSKTIKHAN TRADING CORPORATION.

Kyaw Din for the appellant.

Dr. Ba Maw for the respondent.

Judgment delivered by

MR. JUSTICE CHAN HTOON.—This appeal from the High Court, Rangoon, raises the question whether the respondents, Shahjehan Musktikhan Trading Corporation, are personally liable and can be sued in their own name on a contract for sale of goods.

By this contract, which was expressed to be between the plaintiff-appellants, " Messrs. Rangoon Commercial House, No. 79 Maung Khine Street, Rangoon, hereinafter called the buyers " and the defendant-respondents " Shahjehan Musktikhan Trading Corporation, Rangoon, hereinafter called the Sellers " it was agreed that 30,000 yards of certain kind of cloth to be manufactured in Japan were to be delivered to the plaintiff-appellants before the end of December 1950 at the price of 29 cents per yard CIF Rangoon. Upon failure to deliver the goods the plaintiff-appellants filed a suit for breach of contract against the defendant-respondents. The suit was tried by the City Civil Court of Rangoon which gave judgment for the plaintiff-appellants. On appeal, the High Court reversed the judgment of the trial Court and dismissed the plaintiff-appellants' suit.

The main defence of the respondents is that they acted as agent of certain firms in Japan, namely, Messrs. Chugai Trading Co. Ltd., Osaka, Japan, in the first instance, and later Messrs. Asano Bussan Co., Osaka, Japan, and therefore they are not personally liable under the contract. They further contend that the suit as framed does not lie since they cannot be sued personally and in their own name.

Even on their own defence, there must be a judgment for the appellants, in view of the provisions in section 230 of the Contract Act, which provides:

"In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Such a contract shall be presumed to exist in the following cases:—

(1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;

(2) . . . . . .

(3) . . . . . ."

The very fact that the respondents entered into this contract, according to their own defence, as an agent for the firms in Japan raises a presumption that they agreed to bind themselves personally, unless of course a contrary intention appears from the contract or from the surrounding circumstances to be discussed later.

Therefore a suit against them and in their own name would lie. This becomes quite clear when we look at the reason of the law in this section. It seems to stem from a rule of law in England based upon a custom, which may be stated in the following words of Lord Swinfen Eady, in *Miller, Gibb & Co.* v. *Smith and Tyrer Ltd.* (1):—

"The custom to which the plaintiffs refer is a custom whereby the agent alone is liable to the exclusion of his principal. The foundation of the custom is the presumption that the agent has not power to pledge the credit of his foreign principal, and therefore that the foreign principal is not under any liability to the person with whom the commission agent is contracting. In this case the only liability of the foreign

(1) (1917) 2 K.B. 141 at 150-151.

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principal is to his own agent and the agent is alone liable to the person with whom he makes the contract."

Thus in England the agent alone is liable to the exclusion of his foreign principal, and the agent and not the principal must be sued for the breach of contract. The law in Burma is the same so far as the personal liability of the agent is concerned, provided that the other party to the contract elects to hold him liable and sues him as such. Section 233 of the Contract Act gives the right to a person dealing with an agent in a case of this kind to hold him or his principal or both of them liable. It reads as follows :

> " In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable."

There is no foundation whatsoever in the contention of the respondents as set out in paragraph 6 of their Concise Statement of Facts that section 230 of the Contract Act does not entitle the appellants to sue the respondents personally in their own name because that section " is plainly intended to protect . . . also the agent himself whose defence in the suit would be gravely prejudiced and his consequential claim against his foreign principal jeopardised if he were to be sued as such an agent." The fallacy of this plea becomes plain when we refer to the following provisions in section 222 of the Contract Act :—

> " The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him."

Where a person elects to hold the agent, who acts for a foreign principal, personally liable and sues him to judgment, as authorised by the provisions of section 233 read with section 230, then the agent has

a right to be indemnified against all the consequences of that suit by his foreign principal. Illustration (*b*) to section 222, with the words "at Singapore" substituted for the word "there", as suggested by Whitley Stokes, (1) will make this point clear, and will also go to support the view that in a case of this kind the local agent can be sued personally and in his own name.

"*Illustration* (*b*)—**B**, a broker at Calcutta, by the orders of **A** a merchant at Singapore, contracts with **C** for the purchase of 10 casks of oil for **A**. Afterwards **A** refuses to receive the oil, and **C** sues **B**. **B** informs **A** who repudiates the contract altogether. **B** defends but unsuccessfully, and has to pay damages and costs, and incurs expenses. **A** is liable to **B** for such damages, costs and expenses."

But the presumption that the agent of a foreign principal binds himself personally may be rebutted if a contrary intention appears from the contract itself or from the surrounding circumstances. In the present case the contract (Exhibit A) itself contains nothing to displace this presumption in any way. The respondents are described as the sellers in the body of the document and they also signed at the foot of the contract under the word "sellers." There is nothing in the contract to suggest that the respondents are to be excluded from liability. The respondents however contend that the mention of "3% indenting commission to be paid at the time of opening letter of credit" to them by the appellants takes the case out of the rule. But this arrangement to pay 3 per cent indenting commission to the respondents cannot be taken as amounting to an agreement to exclude them from liability altogether. It cannot even be taken as establishing them as

(1) Pollock and Mulla's Indian Contract and Specific Relief Act (7th edition) p. 592.

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agents. In *Balthazar & Son* v. *E. X. Abowath* (1), it was held that the mere mention of commission in the contract is not in any way inconsistent with the relation between principal and principal.

In the correspondence that passed between the parties, there is nothing to support the respondents' contention that they did not agree to bind themselves personally. On the contrary there is a definite assertion of personal responsibility in Exhibit G—a letter dated 18th December 1950 from the appellants to the respondents—where it is specifically mentioned that any failure on the part of the respondents or their manufacturers in Japan to fulfill the contract will be deemed as a breach of the contract for which the respondents "are solely responsible for any losses incurred". In fact, there is ample evidence to justify the finding of the learned trial Judge that the respondents acted as principals and not as agents at all.

We therefore hold that the defendant-respondents are personally liable and can be sued in their own name for the breach of contract, under section 230 and 233 of the Contract Act.

There is another defence put forward by the respondents to the effect that they are fully protected against any suit for damages for non-delivery of the goods by the terms in Clause 9 of the Contract (Exhibit A), which reads as follows:

"9. *Force majeure*, strikes, lock-outs, disputes, collision, accidents of any kind, war, lightning, storm, frost, flood, drought, riot, civil commotion, failure of supplies and/or manufacturers, . . . which may interfere with the execution of orders, shall exempt sellers from all responsibility in regard to late delivery and/or shipment and/or non-delivery . . . "

(1) I.L.R. Ran. Vol. 5, 1.

The respondents claim that the failure on the part of their principals in Japan to send the goods to Burma for the purpose of delivering the same under the contract, comes within the purview of this clause and that no suit lies for such non-delivery. In support of this contention learned counsel for the respondents cites the case of *Rada Kishanmal* v. *Mangalal Bros.* (1), where it was held that non-supply of the goods did not give rise to a cause of action for breach of contract, in view of the fact that a clause in the contract, which, after setting out a large number of causes beyond human control, provides that " it is also understood that this indent is null and void in case goods are not shipped or you do not supply for causes whatsoever without asking any reason ", was very wide and covered every possible reason for non-supply or non-shipment. But in the present case, clause 9 does not go so far as to exclude the sellers *viz.* the respondents and his principals, from liability for non-delivery or non-shipment for any cause whatsoever. On the contrary, it exempts from liability only where non-delivery or non-shipment were due to causes " which may interfere with the execution of orders ". There is nothing in the evidence to prove that non-shipment or non-delivery on the part of Chugai Trading Co. Ltd. or Asano Bussan Co. was due to any of the causes set out in clause 9 which in any way interfered with the manufacture or shipment of the goods. The defendants' statement, in re-examination, that Chugai Trading Co. had to assign the work of manufacturing the goods to Asano Bussan Co. as the goods were damaged by typhoon, stands completely uncorroborated. On the contrary, the evidence on record goes

(1) A I.R. (1943) Cal. 206.

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to support the finding of the learned trial Judge that this transfer was due to a revision of price by Chugai Trading Co. On the 29th September 1950 the respondents contracted to supply these goods at 29 cents per yard C.I.F. Rangoon. By a letter dated the 12th October 1950 (Exhibit 4) Chugai Trading Co. asked for revision of the price from 29 cents to 31·5 cents per yard. Only then it appears the respondents transferred the work to Asano Bussan Co., which accepted the same by telegram (Exhibit 6) dated the 24th November 1950 and confirmed by letter (Exhibit 2) dated the 28th November 1950 at the price of 29 cents per yard C.I.F. Rangoon.

We therefore agree with the learned trial Judge in holding that the breach of contract was not due to any of the causes mentioned in Clause 9 but due to the transfer of the work of manufacturing the goods from one company to another on account of the rise in the price of the goods.

The appeal is allowed and the judgment and decree of the High Court are set aside, and the judgment and decree of the trial Court are restored with costs throughout.

SUPREME COURT

CHAN CHOUNG SAN AND ONE (APPELLANTS)

v.

UNION OF BURMA (RESPONDENT).*

†S.C. 1955

Sept. 22.

Constitution of Burma, s. 90—S. 1 (iii), Foreign Exchange Regulation Act, 1947—Act expiring by effilux of time—Further extension of time by the President—Such extension, whether ultra vires *of s. 90 of the Constitution—Delegated or conditional legislation.*

S. 1 (iii) of the Foreign Exchange Regulation Act, 1947 which came into force on 1st August 1947, as subsequently amended reads :—

"It shall remain in force for five years only but the President of the Union may, by notification direct that it shall remain in force for a further period not exceeding five years."

The President directed that it would continue in force for five years beginning from 1st August 1952.

Held: The President in exercising his powers under s. 1 (iii) was not bringing into operation any new law, nor was he making any modifications or restrictions to the Act but was merely prolonging the life of the Act for a period within the allotted span. No delegated or conditional legislation was involved, and in effect he was merely bringing into operation the second instalment of the life of the Act.

Re. Kalayam Veerbhaddrya, I.L.R. (1950) Mad. 243 = (1949) 2 M.L.J. 663; *Chatturam and others* v. *Commissioner of Income-Tax, Bihar*, (1947) F.C.R. 116; *Jatindra Nath Gupta* v. *The Province of Bihar*, (1949) F.C.R. 175 = (1949), 2 M.L.J. 356 ; A.I.R (1951) (S.C.) 332, referred to.

Joylal Agarwala v. *The State*, A.I.R. (1951) (S.C.) 484 ; *Milan Chand* v. *Dwarka Das*, A.I.R. (1954) Rajasthan 252, approved.

Kyaw Myint for the appellants.

Tin Maung (Government Advocate) for the respondent.

Judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—The firm of Chen Khiun Hin of Hongkong, Dealers in Foreign Exchange, has a branch in 103 Crisp Street,

* Criminal Appeal No. 6 of 1955. Appeal from the order of the High Court Judge of Rangoon, dated the 17th day of September 1954, passed in Criminal Appeal No. 244 of 1954.

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

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Rangoon, which was run by the two appellants Chan Choung San and Nyan Yan. The other member was one Ah Moy, a domestic servant. Though the two appellants enjoyed meagre salaries of Kyats 120 a month, they seemed to have carried on extensive business by way of imports, dealing in foreign exchange and trading in gold bars. According to the books seized it would appear that for the period January to May 1952 the amount of Kyats paid out for cheques, drafts and currency in United States, Hongkong and Straits dollars amounted to over 18 lakhs. The correspondence seized also show that 1,521 bars of gold, each worth K 2,000, had got into their hands, out of which they had disposed of 250 bars prior to being found out.

Their operations came to light by a chance discovery of 20 bars of gold on the person of one Wong Choung Yaung who was stopped on suspicion by a surveillance police patrol on the 4th June 1952. He had been hawking these gold bars in Mogul Street. In consequence of his statements 103 Crisp Street was raided where the two appellants and Ah Moy were found. 1,251 gold bars were seized along with documents and account books. A sum of K 1,46,003 was also found, but only some currency notes to the value of K 345 were seized by the Police officer U Maung Maung Gyi with a view to test if they were counterfeit. The rest of the cash was put into a sealed suit case and left with a neighbour. The three men were arrested and the gold deposited in the Union Bank the same day. The neighbour was fearful that the money left with him might be robbed and so he interviewed the Commissioner of Police who accepted the suit case and had it deposited in the Union Bank (*see* Exhibit B). This was on the next day.

The case was handed to the Special Bureau of Investigation on 16th June 1952 and on 2nd September 1952 five cases relating to unauthorised deals in foreign exchange and one case for importing 1,251 gold bars (found in the shop) and 20 bars (found on Wang Chaung Yaung) a total of 1,271 bars. The appellants as well as the domestic servant Ah Moy and Wang Chaung Yaung were sent up but the latter two were discharged at an early stage and gave evidence for the prosecution.

They were found guilty in all the six cases and sentences aggregating 4½ years rigorous imprisonment were meted out to them in respect of a total of 12 charges for unauthorised deals in exchange and on one charge of importing gold. The gold and the cash were ordered to be confiscated. We take the opportunity to observe that a great deal of time and energy could have been saved by amalgamating these six cases into two cases at the most. Multiplicity of proceedings could have been avoided and the same measure of punishment could have been awarded without recourse to six cases, a procedure which led to the confusion of evidence and the necessity of examining busy public servants and other witnesses more than once in each of the six cases and culminating with award of punishment by way of sentences which had to be mostly concurrent. While it is legally permissible to prosecute a person for every single offence, the Criminal Procedure Code itself provides measures to avoid multiplicity of proceedings, which can only lead to congestion in the Courts Calendar and delay in their disposal. The six cases were tried together and took two years in the trial Court alone, a period which could have been shortened if the prosecution had concentrated its attention on the gold bar case and one other case in

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which three charges could have been framed. The nett result would have been the same.

The High Court has confirmed the sentences and the order of confiscation of the gold but in regard to the cash it was ordered that K 38,180.85, being the proceeds of sale of cotton yarn and not of gold, was to be returned to the firm of Chen Khiun Hin.

We have no reason to disturb the finding of facts in this case but special leave was granted in regard to two points, these being (i) whether section 1 (iii) of the Foreign Exchange Regulation Act, 1947 is *ultra vires* of section 90 of the constitution and (ii) whether the order of confiscation in respect of the cash was correct.

In regard to the first point the Act impugned came into force for five years from 1947 but its operation was extended by notification by the President for another period of five years. It was contended by the defence that the Act ceased to have effect by efflux of time and that the action of the President in making the extension amounted to legislation and therefore *ultra vires* because of section 90 which runs:

> "Subject to the provisions of the constitution the sole and exclusive power of making laws in the Union shall be vested in the Parliament."

Support is lent to this view by the ruling in *Re. Kalayam Veerbhaddrya* (1) where the enactment involved was the Maintenance of Public Order Act, 1947 and the point under review was whether the extension of the Act for another year (as provided for by the Act itself) was invalid. Satyanaraya, C.J. and Basheer Ahmed Sayeed, J. held that it was, the power of extension, being in their view, a legislative power which

(1) I.L.R. (1950) Mad. 243-(1949) 2 M.L.J. 663.

could not be delegated. Reliance was placed by the learned Judges upon the cases of *Chatturam and others* v. *The Commissioner of Income-Tax, Bihar* (1) and *Jatindra Nath Gupta* v. *The Province of Bihar* (2). In the first case Spens, C.J., Zafrulla Khan and Kania, JJ. held that the extension of the Indian Income Tax Amendment Act, 1939 by an Order in Council to an excluded area, under section 92 (*1*) of the Government of India Act, 1935 was in the exercise of the Governor's legislative powers. In the second case Kania, C.J., Fazl Ali, Patanjali Sastri, Mahajan and Murkerjee, JJ. dealt with the Bihar Maintenance of Public Order Act, 1947, the operation of which was limited by one year by sub-section (3) of section (1). There was however a proviso which could keep the Act in force for one more year by notification of the Provincial Government. The majority view was that the proviso amounted to delegation of legislative power and therefore *ultra vires*. The dissenting opinion of Fazl Ali, J. was that the proviso was merely a piece of conditional legislation.

In 1951 a reference was made by the President of India to the Indian Supreme Court (3). Three enactments were chosen to fit in with the three main stages in the constitutional development of India, these being:

(*a*) Section 7 of the Delhi Laws Act, 1912 which runs:

> "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 and any part thereof, any enactment which is in force in any part of British India at the date of such notification."

(1) (1947) F.C.R. 116.

(2) (1949) F.C.R. 175-(1949) 2 M.L.J. 356. (3) A.I.R. (1951) (S.C.) 332.

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(*b*) Section 2 of the Ajmer-Merwara (Extension of Laws) Act, 1947, which runs:

> "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."

(*c*) Section 2 of the Part C States (Laws) Act, 1950 which runs:

> "The Central Government may, by notification in the official Gazette, extend to any Part C State (other than Coorg and the Andaman and Nicobar Islands 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 (other than a Central Act) which is for the time being applicable to that Part C State"

The opinion of the Supreme Court was sought if any of these provisions or any part thereof were *ultra vires*. Kania, C.J. and Mahajan, J. reiterated their stand in *Jatindra Nath Gupta's case* (1) and held that in enacting these sections the legislature had virtually abdicated its legislative power in favour of the executive inasmuch as it permits the executive to apply to these states (*i.e.*, Delhi, Ajmer-Merwara and Part C States) laws enacted by other legislatures which could not make laws for these states, and which these states themselves were competent to make. The majority composed of Fazl Ali, Patanjali Sastri, Mahajan, Mukerjee, Das and Bose, JJ. held otherwise. Mukerjee and Bose, JJ. made a reservation that the last portion of section 2 of the Part C States, *i.e.*, the clause enabling repeal or

(1) (1949) F.C.R. 175 = (1949) 2 M.L.J. 356.

amendment of any corresponding law already applicable to Part C States was *ultra vires*. Bose, J. made a further reservation that the power to restrict or modify could only relate to minor matters.

The minority view has no application to the matter we are dealing with, for the Foreign Exchange Act, 1947 was a live Act whose life was made longer by the notification of the President. Further, no question of modification or restriction was authorised or attempted.

The case that is closest is that of *Joylal Agarwala* v. *The State* (1), a unanimous and later decision of Kania, C.J., Patanjali Sastri, Mukerjee and Chandasekhara Aiyar, JJ. The Act involved there was The Essential Supplies (Temporary Powers) Act, section 1 (*3*) of which provides that it shall cease to have effect on the expiry of the period mentioned in section 4 of the Indian (Central Government and Legislature) Act, 1946. This section 4 provides:

> " . . . the period mentioned . . . is the period of one year beginning with the date on which the proclamation of Emergency in force at the passing of this Act ceases to operate, or, if the Governor-General by public notification so directs, the period of two years beginning with the date— provided that if and so often as a resolution passed by the Dominion Legislature, the said period shall be extended for a further period of twelve months from the date on which it would otherwise expire so, however, that it does not in any case continue for more than five years from the date on which the proclamation of Emergency ceases to operate ".

The Proclamation of Emergency ceased to operate on Thirty-first March 1946, and the Governor-General acting under the second part of the section prolonged the life of the Act by two years, up to

(1) A.I.R. (1951) (S.C.) 484.

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Thirty-first March 1948. Later the Constituent Assembly acted twice under the proviso, each time prolonging it by twelve months.

Dealing with the validity of these extensions the Court said:

"The case of *Jatindra Nath Gupta* v. *The Province of Bihar* (1) has no application here. In the case before us the legislative has itself applied its mind and has fixed the duration of the Act, but has left the machinery to reach the maximum passed by instalments to be worked out in a particular manner. There is no question of delegation at all, much less delegation of any legislative power."

A later decision which followed Joylal Agarwala's case is *Milan Chand* v. *Dwarka Das* (2) in which Wanchoo, C.J. and Ranawat, J. doubted the correctness of the decision in *Re. Kalayam Veerbhaddrya* (3). The Act under question was the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 which has as its section (1) the following:—

"(1) This Act shall remain in force for a period of two years in the first instance:

Provided that the Rajpramukh may, if he considers it expedient to do so, from time to time extend, by order in the Rajasthan Gajatte, the duration of the Act by a further period not exceeding five years in the aggregate".

The extension was held to be valid.

The Foreign Exchange Regulation Act, 1947 which is being considered by us came into force on the 1st August 1947. Section 1 (iii) of the Act runs:

"It shall remain in force for five years only but the Governor may, by notification, direct that it shall remain in force for a further period not exceeding five years".

(1) (1948) F.C.R. 175-(1949) 2 M.L.J. 356.
(2) A.I.R. (1954) Rajasthan 252.
(3) I.L.R. (1950) Mad. 243-(1949) 2 M.L.J. 663.

With the transfer of Power in 1948, and under the Union of Burma (Adaptation of Laws) Order, 1948, the words " President of the Union " were substituted for the word " Governor ".

With the expiry of five years the President exercises the power vested in him under the latter part of section 1 (iii) and by Notification No. 276 of the Ministry of Finance and Revenue the life of the Act was extended by another period of five years. In doing so, the President was not bringing into operation any new law as was done by the Provincial and Central Governments of India in exercising their powers under the Delhi Laws Act or the Ajmer-Merwara Extension of Laws Act. Nor was he modifying or making restrictions to the Act, but he was merely prolonging the life of the Act for another five years, a period within the allotted span. The wording of section 1 (iii) shows that the Act was meant to last for ten years altogether at the most. It was visualised that it may be needless to prolong it after the first five years, but if the necessity to prolong it should still exist, a machinery was provided to lengthen its life for a further period not to exceed five years. Thus there is no question of delegated or even conditional legislation. The President in effect was merely bringing into operation the second instalment of the life of the Act, which was determined and embodied in the Act itself.

We respectfully agree with the observations in *Joylal Agarwala's case* (1) and we hold that the Foreign Exchange Regulation did not cease to have effect after the expiry of five years counting from 1st August 1947 but continued to be of full effect by virtue of Notification No. 276.

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(1) A.I.R. (1951) (S.C.) 484.

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The second point relates to the order of confiscation of the cash found at 103 Crisp Street. The prosecution case is that more than 1,271 bars had been imported. U Han Thein and U Kyin Maung stated the correspondence revealed 250 bars worth K 5 lakhs had already been disposed of prior to the raid. The trial Judge therefore presumed that the K 1,46,003 found formed part of the proceeds of this earlier disposal and confiscation was ordered. The Appellate Judge also concluded that the cash was part of the proceeds but took into consideration the evidence relating to a legitimate deal in cotton for which the firm had received K 38,180·75. This sum was ordered to be restored to the firm and the rest confiscated.

Now, the power of confiscation is given under section 24 of the Foreign Exchange Regulation Act but such confiscation can only be in respect of "currency, securities, gold or silver, or goods or other property in respect of which the contravention has taken place". The charge in this case relates only to 1,271 gold bars and these were rightly confiscated. But since the appellants were not charged in respect of the 250 bars already disposed of, section 24 is of no help. If confiscation of the cash is to be ordered, then it can only be under section 517 of the Criminal Procedure Code which runs:

"517 (1). When an inquiry or a trial in any criminal Court is concluded, the Court may make such order as it thinks fit for the disposal by destruction, confiscation, or delivery to any person claiming to be entitled to possession thereof, or otherwise, of any property or document produced before it and in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

. . . . . .

Explanation.—In this section the term 'Property' includes in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise."

The cash in this case may well be the proceeds of the sale of illegally imported gold bars in which case it will be "property" converted into money. But it does not appear to us that the matter was fully considered by the lower Courts nor was any opportunity given to the appellants or to the firm to explain about the cash. On the scanty materials on the record we are not prepared to come to a decision and we consider that the trial Court should go into the matter fully by opening proceedings under section 517 of the Criminal Procedure Code and calling upon the appellants and the firm to show cause in C.R. No. 60 of 1952 why the sum of K 1,46,003 should not be confiscated or otherwise disposed of. Opportunity should be given to the prosecution as well to make its submissions. To enable the trial Court to make a totally fresh approach we set aside the orders of both the lower Courts relating to the disposal of the cash or any part thereof. Apart from quashing these orders, we confirm the conviction and sentences passed in C.R. Nos. 55 to 60 of 1952 of the trial Court and upheld by the High Court in Criminal Appeal Nos. 239 to 244 of 1954. We confirm also the order confiscating the 1,271 bars of gold.

SUPREME COURT.

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Sept. 22.

D. D. GROVER (APPLICANT)

v.

A. C. KOONDA ... }
CONTROLLER OF RENT, } (RESPONDENTS).*
MANDALAY. }

Writ of Certiorari—Ss. 14-A and 22, Urban Rent Control Act—Ss. 22, 25 and 153, Constitution of Burma—Fundamental rights, infringement—Ss. 4, 5, 6, 21, 23 and 27, Union Judiciary Act—Indian High Court Act, 1861 (24 and 25 Vic. C. 104) ss. 101, 107, Government of India Act, 1915—Government of India Act, 1935—S. 85, Government of Burma Act, 1935—S. 227 (1) Constitution of India—Whether Controller of Rents acting under s. 14-A and the Judge acting under s. 22 of the Urban Rent Control Act a "Court"—Definition of "Court"—Interpretation of words in Statutes.

Permission to file a suit for ejectment does not affect any of the fundamental rights guaranteed in the Constitution and therefore no writ or directions in the nature of Certiorari can issue under s. 25 of the Constitution.

There is no other provision in the Constitution which confers upon the Supreme Court any power to issue such writs or directions.

By s. 153 of the Constitution, the powers and functions of the Supreme Court and the High Court, established by the Constitution, are more fully provided in the Union Judiciary Act, and the provisions relevant to the Supreme Court are ss. 4, 5 and 6.

By s. 4, the Supreme Court is given very wide and unlimited power of supervision over all Courts throughout the Union, and this power of supervision in s. 4 means very much the same thing as the power of superintendence in s. 27 of the Act. The only difference between the two sections is whilst the power of superintendence of the High Court is restricted, the Supreme Court is not restricted or limited in any way whatsoever.

The supervisory or superintending jurisdiction as provided in the Union Judiciary Act may be said to have its origin, so far as the concept is concerned, in the superintending jurisdiction of the superior Courts in England which, especially the Court of the King's Bench, used to exercise or do exercise even now over all inferior Courts in the realm. It is well settled law that the power of superintendence includes not only superintendence on administrative matters but also superintendence on the judicial side. This point will be brought out more clearly by a brief survey of the historical back

* Civil Misc. Application No. 36 of 1955.

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

ground. In England the Court of King's Bench, in exercise of this power of superintendence, interferes with the proceedings of inferior Courts by the issue of writs of certiorari or prohibition. The writ of certiorari is intended to bring into the superior Court the decision of an inferior Court in order that the former may be satisfied whether the decision of the latter is within its jurisdiction or not. The writ of prohibition is issued to prevent an inferior Court from exercising a jurisdiction which it does not possess.

Rex v. *Electricity Commissioners*, (192-) 1 K.B. 171 ; *Rex* v. *Minister of Health*, (1929) 1 K.B. 619, referred to.

The remedy under the Writ of Certiorari "is derived from the superintending authority which the sovereign's superior Courts, and in particular the Court of King's Bench, possess and exercise over inferior jurisdictions. This principle has been transplanted to other parts of the King's dominions, and operates, within certain limits, in British India".

Ryots of Garabandho and other Villages v. *Zemidar of Parlakimedi and another*, 70 I.A. 129 at 140, quoted.

The power of superintendence included the power of judicial interference in matters of jurisdiction exercisable by them in very much the same way as the Court of King's Bench in England exercises its power of superintendence.

Muhammed Suleman Khan and others v. *Fatima*, 9. All. 104 F.B ; *Gobind Coomer Chowdhry* v. *Kisto Coomar Chowdhry*, 7 W.R. 520 ; *Joy Ran* v. *Bulwant Singh*, 5. W.R. Misc. 3 ; *Manwatha* v. *Emperor*, 37 C.W.N. 201 ; *Sholapur Municipality* v. *Tuljaram Krishnasa Charan*, A.I.R. (1931) Bom. 582, referred to.

Under s. 227 (1) of the Constitution of India, it has been held by all the High Courts in India that the High Courts have now judicial power of superintendence.

Abdul Rahim Naskar v. *Abdul Jabbar Naska and others*, 54 C.W.N. 445 ; *Narendra Nath Sashmal* v. *Binode Behari Dey and others*, A.I.R. (1951) Cal. 138 ; *Sabitri Motor Service Ltd.* v. *Asansol Bus Association*, A.I.R. (1951) Cal. 285 ; *Bimala Brosad Ray and another* v. *State of West Bengal*, A.I.R. (1951) Cal. 258 (S.B.) ; *Shridhar Atmaram Chadgay and another* v. *Collector of Nagpur*, A.I.R. (1951) Nag. 90 ; *Israil Khan* v. *The State*, A.I.R. (1951) Assam 106 ; *Ratilal Fulbhai* v. *Chuni Lal M. Kyas*, A.I.R. (1951) Sau. 15 ; *Mohamed Abdul Raoog and others* v. *State of Hydrabad*, A.I.R. (1951) Hyd. 50 ; *Piare Lal* v. *Wazir Chand and others*, A.I.R. (1951) Panj. 108 ; *Pandyan Insurance Co. Ltd.* v. *K. J. Khanbatta and others*, (1955) 56 Cr. L.J. 1039, referred to.

S. 4 of the Union Judiciary Act confers upon the Supreme Court general power of supervision of the widest amplitude, unfettered and unlimited by any restriction whatsoever. This power of supervision or superintendence is confined not only to administrative matters.

The purpose of the provisions in s. 4 of the Union Judiciary Act is to make the Supreme Court, having regard to the object of the constitution in regard to the role of the judiciary in a truly democratic Republic as established thereby, responsible for the entire administration of justice and to vest the Court with an unlimited reservoir of judicial powers which can be brought into play at any time it considers necessary.

The use of this unlimited power should be more cautious and must be exercised in the same manner and to the same extent as in the exercise of

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superintendence by issue of directions or writs in the nature of Certiorari, prohibition or mandamus.

Manmatha Nath Biswas v. *Emperor*, 60 Cal. 618, referred to.

This power of supervision or superintendence should not be exercised unless there has been an unwarranted assumption of jurisdiction not possessed by the Courts concerned, or a gross abuse of jurisdiction possessed by them, or an unjustifiable refusal to exercise jurisdiction vested in them by law. Apart from matters relating to jurisdiction, this Court would also exercise this power when there has been a flagrant violation of the natural or elementary principles of justice, or a manifest error patent on the face of the record, or an outrageous miscarriage of justice which calls for redress. This power should not however be exercised when there is any other remedy open to the parties. It will not be justified for this Court under this power of superintendence to convert itself into a Court of Appeal.

"This power of superintendence is entirely distinct from the jurisdiction to hear appeals. If the inferior Court, after hearing the parties, comes to an erroneous decision, either in law or in fact, on a matter within its jurisdiction, the Court having power of superintendence never interferes. The only mode of questioning the propriety of such a decision is by appeal".

Gopal Singh v. *The Court of Awards*, (1867) 7 W.R. (C.R.) 430, 432, quoted and referred to.

Neither the Controller of Rents acting under s. 14-A of the Urban Rent Control Act nor any Judge acting under s. 22 of the Act is under the Appellate Jurisdiction of the High Court and subject to the power of superintendence of the High Court.

Bal Krishna Hari v. *Emperor*, 57 Bom. 93 ; *Sheonadan Prasad Singh* v. *Emperor*, 3 Pat. L.J. (F.B.) 581 at 587 ; *Re. Allen Brothers & Co.* v. *Bando & Co.*, 26 C.W.R., referred to.

Broadly speaking, a "Court" may be defined as an authority which exercises judicial as distinguished from executive or administrative functions.

Halsbury's Laws of England (2nd. Edn.), Vol. (viii), p. 525, referred to.

The word "Court" occurring in s. 6 of the Union Judiciary Act denotes only Courts in the strict sense of the term.

For definitions of the words, "Judicial" and "quasi-judicial" see—

Cooper v. *Wilson and others*, (1937) 2 K.B. 309, 340 and

For definition of the word "Court", see—

U Htwe (alias) *A. E. Madari* v. *U Tun Ohn and one*, (1948) B.L.R. (S.C.) 541 ; *Rex* v. *Electricity Commissioners*, L.R. (1924) K.B. 171.

The exercise of the power of judicial control under s. 25 of the Constitution would apply *mutatis mutandis* to the exercise by the Supreme Court of its power of judicial supervision under s. 4 of the Union Judiciary Act.

The function discharged by the Controller of Rents s. 14-A of the Urban Rent Control Act are quasi-judicial functions.

Mrs. D. M. Singer v. *Controller of Rents and three others*, (1949) B.L.R. (S.C.) 143, reaffirmed.

The functions discharged by a Judge under s. 22 of the Urban Rent Control Act are judicial functions.

All tribunals that discharge judicial or quasi-judicial functions fall within the meaning of the word "Court" in ss. 4 and 27 of the Union Judiciary Act.

For the purpose of appeal under s. 6 of the Union Judiciary Act, the word "Court" denotes courts in the strict sense of the term, whilst for the purpose of exercising judicial superintendence under ss. 4 and 27 of the Act the word "Court" includes authorities or tribunals exercising judicial or quasi-judicial functions.

It is a general rule of interpretation that the same meaning is implied in the use of the same expression in every part of an Act. But this general rule is not of such weight. The same word may be used in different senses in the same Statute and even in the same Section.

Maxwell's on Interpretation of Statutes, 9th Edn. 323 ; *Craies' On Statute Law* (5th Edn.) at p. 159.

Words without their context have no meaning. It is the context which is all important in the interpretation of a word.

The meaning of a word is to be determined with reference to its context and also according to the subject or occasion of its use or the purpose for which it is used. The meaning of a word may vary according to the Context, subject, occasion or the purpose.

The expression "Court" used in s. 195 of the Code of Criminal Procedure has been held to have a wider meaning than "Court of Justice" in s. 20 of the Penal Code or even the expression "Civil revenue Criminal Court" used in s. 476 of the Code of Criminal Procedure.

Raghoo Buns Sahoys v. *Kokil Singh*, 17 Cal. 872 ; *Nandalal Ganguli* v. *Khetra Mohan Chose*, 45 Cal. 585 ; *Re. Nanchand Shivchand*, 37 Bom. 365 ; *Rajaja Appaji Kote* v. *Emperor*, A.I.R. (1946) Bom. 7 ; *Hari Charan Kundu* v. *Kanshiki Charap Day*, 44 C.W.N. 530, referred to.

The word "Court" in s. 4 and s. 6 of the Union Judiciary Act does not mean exactly the same thing, otherwise the power of superintendence conferred upon the Supreme Court by s. 4 would be a mere superfluity.

It is a cardinal principle of construction that the provision in a statute must be construed to avoid tautology or superfluity and that they shoud be interpreted in such a way that they are consistent with one another and make a complete picture taken as a whole.

For the purpose of exercising judicial supervision or superintendence by the Supreme Court, under s. 4 of the Union Judiciary Act, the Controller of Rents acting under s. 14-A of the Urban Rent Control Act and the Judge acting under s. 22 of the Act fall within the meaning of the word "Court" in s. 4 of the former Act.

Kyaw Myint for the applicant.

Dr. E Maung for the respondent No. 1.

Ba Sein (Government Advocate) for the respondents Nos. 2 and 3.

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Choong Foung (Attorney-General) as *amicus curie*.

The judgment of the Court was delivered by

U CHAN HTOON, J.—This is an application for the issue of a writ or directions in the nature of certiorari to quash the order of the Sub-divisional Judge, Mandalay, in his Civil Miscellaneous Case No. 29 of 1954 under section 22 of the Urban Rent Control Act, which confirms the order of the Controller of Rents, Mandalay, in Revenue Proceedings No. 155/XIII of 1951-52 granting permission to the first respondent (landlord) to file a suit for ejectment against the applicant (tenant).

A preliminary objection has been raised by the learned counsel for the first respondent that this Court has no jurisdiction to issue a writ or directions in the nature of certiorari except under section 25 of the Constitution where fundamental rights guaranteed by Chapter II thereof are involved, and that a mere permission granted under section 14-A of the Urban Rent Control Act to file a suit for ejectment does not in any way infringe any of the fundamental rights. As this objection involves a very important question having regard to the jurisdiction of this Court, the Attorney-General himself appears, at the request of the Court, in addition to the Government Advocate, for the second respondent.

Section 25 of the Constitution empowers the Supreme Court "to issue directions in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari appropriate to the rights guaranteed in this Chapter"; the rights guaranteed therein refer to the fundamental rights. We are in entire agreement with the contention of the learned counsel that

the order of the Subdivisional Judge, Mandalay, or the order of the Controller of Rents, Mandalay, granting permission to file a suit for ejectment does not affect any of the fundamental rights guaranteed in the Constitution and therefore no writ or directions in the nature of certiorari can issue under section 25 of the Constitution. It may also be mentioned that there is no other provision in the Constitution which confers upon this Court any power to issue such writs or directions.

The matter, however, does not end here. Section 153 of the Constitution empowers the Parliament to "make provision by an Act for conferring upon the Supereme Court such supplemental powers not inconsistent with any of the provisions of this Constitution as may appear to be necessary or desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it by or under this Constitution". The powers and functions of the Supreme Court and the High Court, established by the Constitution, are more fully provided in the Union Judiciary Act. The provisions relevant to the Supreme Court for the present purpose are found in sections 4, 5 and 6, which are as follows :

Seat of the Supreme Court

"4. The Supreme Court shall be a Court of Record and shall have supervision over all Courts in the Union. It shall sit in the capital city of the Union and at such other place or places as the President may, after consultation with the Chief Justice of the Union from time to time, appoint.

Appeal from the High Court in certain cases.

5. Save where an appeal lies to the High Court itself under the provisions of section 20, an appeal shall lie to the Supreme Court from the judgment, decree, or final order of the High Court (whether passed before or after the

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commencement of the Constitution) in any civil, criminal, or other cases, if the High Court certifies—

(*a*) that the case involves a question as to the validity of any law having regard to the provisions of the Constitution, or

(*b*) that the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than ten thousand rupees, or

(*c*) that the judgment, decree, or final order involves directly or indirectly some claim or question respecting property of the like amount or value and where the judgment, decree, or final order appealed from affirms the decision of the Court immediately below in any case other than the one referred in clause (*a*), if the High Court further certifies that the appeal involves some substantial question of law.

Appeal by special leave from any Court in any case.

6. 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."

Section 5 deals with appeals from the High Court and section 6 with appeals from any Court by special leave. The most important provision in respect of the question under discussion is contained in section 4 where the Supreme Court is given very wide and unlimited power of supervision over all Courts throughout the Union. The High Court is also given a power "of superintendence over all Courts in the Union for the time being subject to its appellate jurisdiction". To our mind, the power of supervision as provided in section 4 means very much the same thing as the power of superintendence as provided in section 27 of the Act. The word

"supervise" means "to superintend the execution or performance of a thing or work of a person", whilst the word "superintend" means "to supervise the working or management of an institution or to exercise supervision over a person". (*See* The Shorter Oxford English Dictionary). The only difference between these two sections lies in that whilst the power of superintendence of the High Court is restricted and related only to the Courts which are for the time being under its appellate jurisdiction, the power of supervision of the Supreme Court is not restricted or limited in any way whatsoever.

We shall now proceed to examine what this general power of supervision or superintendence means. The supervisory or superintending jurisdiction as provided in the Union Judiciary Act may be said to have its origin, so far as the concept is concerned, in the superintending jurisdiction of the superior Courts in England which, especially the Court of the King's Bench, used to exercise or do exercise even now over all inferior Courts in the realm. It is well settled law that the power of superintendence includes not only superintendence on administrative matters but also superintendence on the judicial side. This point will be brought out more clearly by a brief survey of the historical back ground. In England the Court of King's Bench, in exercise of this power of superintendence, interferes with the proceedings of inferior Courts by the issue of writs of certiorari or prohibition. The writ of certiorari is intended to bring into the superior Court the decision of an inferior Court in order that the former may be satisfied whether the decision of the latter is within its jurisdiction or not. The writ of prohibition is issued to prevent an inferior Court from exercising a jurisdiction which it does

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not possess. See *Rex* v. *Electricity Commissioners* (1) and *Rex* v. *Minister of Health* (2). The remedy under the writ of certiorari, in the words of Viscount Simon L.C. in *Ryots of Garabandho and other Villages* v. *Zemidar of Parlakimedi and another* (3).

> "is derived from the superintending authority which the Sovereign's superior courts, and in particular the court of King's Bench, possess and exercise over inferior jurisdictions. This principle has been transplanted to other parts of the King's dominions, and operates, within certain limits, in British India".

Thus when the Supreme Courts were established by the British Parliament in the three presidency towns in India, *viz.*, Calcutta, Madras and Bombay, they were invested with the same power of superintendence. There was however no such power of superintendence conferred upon the superior Courts established by the East India Company, *viz.*, Sadar Dewany Adalats and Sadar Nizamat Adalats. By the Indian High Courts Act of 1861 (24 & 25 Vic. c. 104), the Supreme Courts at Calcutta, Madras and Bombay and the above-mentioned Sadar Dewany Adalats and Sadar Nizamat Adalats were to be replaced or superseded by the High Courts to be established under Letters Patent. Section 9 of the Act transferred to the new High Courts the power already exercised by such superior Courts. In addition to this, section 15 expressly enacted that "each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction". While this Act was in force the question as to the nature and extent of the jurisdiction conferred upon the High Courts under the power of superintendence came for decision

(1) (1924) 1 K.B. 171. (2) (1929) 1 K.B. 619.
(3) 70 I.A. 129 at 140.

before various High Courts in India. The views of the High Courts were to the effect that the power of superintendence included the power of judicial interference in matters of jurisdiction exercisable by them in very much the same way as the court of King's Bench in England exercises its power of superintendence. See *Muhammed Suleman Khan and others* v. *Fatima* (1), *Gobind Coomer Chowdhry* v. *Kisto Coomar Chowdhry* (2), *Joy Ran* v. *Bulwant Singh* (3), *Manwatha* v. *Emperor* (4) and *Sholapur Municipality* v. *Tuljaram Krishnasa Charan* (5).

The High Courts Act of 1861 was repealed by the Government of India Act, 1915. Section 107 of the Act was, however, similar in terms to section 15 of the Act of 1861. Thus the High Court of Judicature at Rangoon, when established by Letters Patent as provided for under section 101 of the Act, also came to have this power of superintendence under section 107 of the Act.

The Government of India Act, 1935, repealed the Government of India Act, 1915, and section 224 of the former Act replaced section 107 of the latter Act. But so far as Burma was concerned, it was section 85 of the Government of Burma Act, 1935, which replaced the said section 107. Sub-section (*2*) of section 224 of the Government of India Act, 1935, and sub-section (*2*) of section 85 of the Government of Burma Act, 1935, expressly took away the judicial powers of superintendence of the High Courts in India and the High Court of Judicature at Rangoon. Sub-section (*2*) of section 85 of the Government of Burma Act, 1935, provided that "nothing in this section shall be construed as giving to the High Court any jurisdiction to question

(1) 9 All. 104 F.B.
(2) 7 W.R. 520.
(3) 5 W.R. Misc. 3.
(4) 37 C.W.N. 201.
(5) A.I.R. (1931) Bom. 582.

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any judgment of any inferior court which is not otherwise subject to appeal or revision."

In the Constitution of India, section 227 (1) provides that "every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction." There is nothing in that section which corresponds in any way to sub-section (2) of section 224 of the Government of India Act, 1935. It has been held by all the High Courts in India before which this question has arisen that the High Courts have now judicial powers of superintendence. See *Abdul Rahim Naskar* v. *Abdul Jabbar Naska and others* (1), *Narendra Nath Sashmal* v. *Binode Behari Dey and others* (2), *Sabitri Motor Service Ltd.* v. *Asansol Bus Association* (3), *Bimala Brosad Ray and another* v. *State of West Bengal* (4), *Shridhar Atmaram Chadgay and another* v. *Collector of Nagpur* (5), *Israil Khan* v. *The State* (6), *Ratilal Fulbhai* v. *Chuni Lal M. Kyas* (7), *Mohamed Abdul Raoog and others* v. *State of Hydrabad* (8), *Piare Lal* v. *Wazir Chand and others* (9), *Pandyan Insurance Co. Ltd.* v. *K. J. Khanbatta and others* (10).

The provisions in section 4 of the Union Judiciary Act, conferring upon this Court general power to supervise over all the courts in the Union, are couched in a language which is of widest amplitude and which would vest the Court with a power that is not fettered with any restrictions and must consequently embrace all aspects or functions

(1) 54 C.W.N. 445.
(2) A.I.R. (1951) Cal. 138.
(3) A.I.R. (1951) Cal. 285 (S.B.)
(4) A.I.R. (1951) Cal. 258 (S.B.)
(5) A.I.R. (1951) Nag. 90.
(6) A.I.R. (1951) Assam 106.
(7) A.I.R. (1951) Sau. 15.
(8) A.I.R. (1951) Hyd. 50.
(9) A.I.R. (1951) Punj. 108.
(10) (1955) 56 Cr. L.J. 1039.

exercised by every court throughout the Union. It would therefore be absurd to suggest that the power of supervision or superintendence is confined only to administrative matters. There are no limits or fetters or restrictions placed on the power of supervision conferred upon this Court. The frame-work of the judiciary as contemplated by the Constitution and the purpose of the Union Judiciary Act seem to make the Supreme Court the custodian of justice throughout the Union, and thus the provisions in this section 4 of the Act appear to arm this Court with a weapon that can be wielded for the purpose of ensuring that justice is meted out fairly and properly by all the courts within the Union. To fulfil this function the power of supervision or superintendence of this Court over judicial matters is necessary, if not more important than over administrative matters. In fact the judicial function of a Court is more important than its administrative function. It would therefore be more important to rectify mistakes in judicial matters than defects in administrative matters. A judicial error might affect the rights, liberty and freedom of a citizen, whereas an administrative error of a Court might not do so. It is quite clear that supervision over judicial functions is a complement of superintendence over administrative functions. If the Supreme Court—or the High Court for that matter—is to discharge its duties and perform its functions as the custodian of justice efficiently and effectively, it must exercise both the powers. Otherwise the very power of superintendence will be crippled and what has been achieved on the administrative side might be lost on the judicial side. We have no doubt therefore in holding that the purpose of the provisions in section 4 of the Union

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Judiciary Act is to make this Court, having regard to the object of the Constitution in regard to the role of the judiciary in a truly democratic Republic as established thereby, responsible for the entire administration of justice and to vest this Court with an unlimited reservoir of judicial powers which can be brought into play at any time it considers necessary.

The fact that these unlimited powers are vested in the Supreme Court should make it more cautious in their exercise. This power is to be exercised in the same manner and to the same extent as in the exercise of superintendence by issue of directions or writs in the nature of certiorari, prohibition or mandamus. See *Manmatha Nath Biswas* v. *Emperor* (1). It is clear to us that (this power of supervision or superintendence should not be exercised unless there has been an unwarranted assumption of jurisdiction not possessed by the courts concerned, or a gross abuse of jurisdiction possessed by them, or an unjustifiable refusal to exercise jurisdiction vested in them by law. Apart from matters relating to jurisdiction, this Court would also exercise this power when there has been a flagrant violation of the natural or elementary principles of justice, or a manifest error patent on the face of the record, or an outrageous miscarriage of justice which calls for redress. This power should not however be exercised when there is any other remedy open to the parties. It will not be justified for this Court under this power of superintendence to convert itself into a Court of Appeal). As observed by Norman, J. in *Gopal Singh* v. *The Court of Awards* (2)—

"This power of superintendence is entirely distinct from the jurisdiction to hear appeals. If the inferior court

(1) 60 Cal. 618. (2) (1867) 7 W.R. (C.R.) 430, 432.

after hearing the parties, comes to an erroneous decision, either in law or in fact, on a matter within its jurisdiction, the court having power of superintendence never interferes. The only mode of questioning the propriety of such a decision is by appeal"

The learned counsel for the first respondent further argues that firstly, if the power of superintendence is exercisable by issue of writs or directions in the nature of certiorari, it should be done in the first instance by the High Court under section 27 of the Union Judiciary Act, and secondly, that even if the High Court were unable to exercise this power in view of the limited nature of its powers, this Court should not have recourse to section 4 of the Act as it has an unlimited power to entertain appeals by special leave under section 6 of the Act. As already pointed out, the difference between the power of superintendence exercisable by this Court under section 4 of the Act and the power exercisable by the High Court under section 27 lies in the fact that the powers of the latter relates only to courts which are for the time being under its appellate jurisdiction. Let us now see whether the Controller of Rents acting under section 14-A of the Urban Rent Control Act, is a court subject to the appellate jurisdiction of the High Court. The question whether either of these two authorities is a "Court" will be considered later. Let us assume, therefore, for the moment that both of them are courts for the purpose of sections 4 and 27 of the Union Judiciary Act. The learned counsel for the first respondent contends that if either of them is a court it must be either a civil court or a criminal court and then they would come under the appellate jurisdiction of the High Court as provided in

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sections 21 and 23 of the Act. These sections read as follows:

"21. The High Court shall be a Court of Appeal from all the civil Courts of the Union other than the Supreme Court.

Appeals from other civil Courts.

23. The High Court shall be a Court of Criminal Appeal from the criminal Courts subordinate thereto and from all other Courts for which the High Court shall be declared to be a Court of appeal by any law for the time being in force."

Appeals from criminal cases.

When he argues that a court must be either a civil court or a criminal court, he seems to forget that there may be courts which are neither civil nor criminal, *e.g.* ecclesiastical, military or Revenue Courts. We also have under section 6 of the Act the expression "of any Court . . . in civil, criminal or other case". Again in section 476 of the Code of Criminal Procedure the expression "any civil, revenue or criminal court" occurs. It seems therefore quite clear that the courts which are not civil or criminal courts do not fall under the appellant jurisdiction of the High Court by virtue of sections 21 and 23 of the Union Judiciary Act.

We cannot agree with the contention of the learned counsel that if both these two authorities are courts they must be held to be civil courts and as such are, in view of the provisions in section 21 of the Union Judiciary Act, under the appellate jurisdiction of the High Court. What section 21 provides for is that the High Court shall be the Court of appeal from all civil courts (other than the Supreme Court), for which the High Court is declared to be a Court of Appeal by law. This becomes quite clear when we refer to the difference in the language used in section 21 and section 27 of

the Act. In section 21 the High Court is to be a Court of Appeal "from all civil courts in the Union other than the Supreme Court", whereas in section 27 the High Court is to have superintendence over "all Courts in the Union for the time being subject to its appellate jurisdiction". If the intention of the Act is to place all the civil courts (other than the Supreme Court) in the Union under the appellate jurisdiction of the High Court, nothing would be easier for the Parliament than to use the same words as in section 21. It must be examined in each case whether the court concerned is placed by law under the appellate jurisdiction of the High Court.

Two classes of cases may arise in considering the question whether a court is subordinate to the appellate jurisdiction of the High Court. If the Court is one from which an appeal lies to the High Court, though in certain specific cases only, then the Court is subject to the appellate jurisdiction of the High Court. See *Bal Krishna Hari* v. *Emperor* (1). The power of superintendence would also be exercised "in cases which are not subject to appeal but the superintendence is over the courts and its exercise is not confined to cases where the right of appeal lies to the High Court", per Dawson Miller, C.J. in *Sheonadan Prasad Singh* v. *Emperor* (2). The position would be the same if the link between the subordinate court and the High Court was established through any court from whose decision an appeal lies to the High Court in some cases. See *Re. Allen Brothers & Co.* v. *Bando & Co.* (3).

There is nothing in the Urban Rent Control Act which would bring either the Controller of Rents or any Judge (acting under section 22) under any of the

(1) 57 Bom. 93. (2) 3 Pat. L.J. (F.B.) 581 at 587.
(3) 26 C.W.R. 845.

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categories mentioned above. Nor is there any question of appeal directly from the Controller of Rents or indirectly through the Judge. In the same way there is no appeal in any case from the Judge to the High Court. We therefore hold that neither the Controller of Rents acting under section 14-A of the Urban Rent Control Act nor any Judge acting under section 22 of the Act is under the appellate jurisdiction of the High Court, and consequently subject to the power of superintendence of the High Court.

The next question for consideration is whether the Controller of Rents acting under section 14-A of the Urban Rent Control Act, or the Judge acting under section 22 of the Act comes within the meaning of the term "Court" occurring in sections 4, 6 or 27 of the Union Judiciary Act. The answer to this problem would lie in the interpretation of the word "Court". Does the word "Court" occurring in these sections mean only Courts in the strict sense of the term or include such authorities as exercise judicial or quasi-judicial functions?

The meaning of the word "Court" has been explained in *Halsbury's Laws of England* (2nd Edn.) Vol. VIII, p. 525 as follows:

> "The term 'court' has (*inter alia*) the original meaning of the King's Palace and has acquired the meaning of the place where justice is administered, and thence again the meaning of the persons who exercise judicial functions under authority derived either immediately or mediately from the King . . . . . A tribunal may be a Court in the strict sense of the term although the chief part of its duties is not judicial."

Broadly speaking, a Court may be defined as an authority which exercises judicial, as distinguished from executive or administrative, functions.

In the Evidence Act, section 3 defines "Court" as follows:

"'Court' includes all Judges and Magistrates, and all persons, except arbitrators, legally authorised to take evidence."

(Arbitrators are excluded from the term as they exercise jurisdiction over persons, not by reason of the sanction of law, but merely by reason of voluntary submission to such jurisdiction). The definition in the Evidence Act is by no means exhaustive as it has been framed only for the purposes of the Act. The Code of Criminal Procedure contains no definition of the word "Court" but it is provided in section 4 (2) that "all words and expressions used herein and defined in the Penal Code, and not hereinbefore defined, shall be deemed to have the meanings respectively attributed to them by that Code". The only "Court" which is defined in the Penal Code is a "Court of Justice" in section 20 in the following terms:—

"The words 'Court of Justice' denote a Judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act as a body, when such Judge or body of Judges is acting judicially."

It should be borne in mind that definitions are of limited scope being framed only for the purposes of the Act in which they occur unless specifically extended.

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

The meaning of the word "Court" has been extended to include all authorities exercising, as mentioned above, judicial, as distinguished from

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administrative, functions. The definition of the words " judicial " and " quasi-judicial, " as contained in The Report of the Ministers' Powers Committee (Command Paper 4060 of 1932) page 73 (Section III, paragraph 3) which are cited with approval by Scott, L.J. in *Cooper* v. *Wilson and others* (1) are as follows:

" A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites :

(1) the presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between is a question of law, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law.

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

For the purpose of exercising its power of judicial control over the subordinate authorities by issue of writs or prohibition or certiorari, this Court has already defined the term " Court " in *U Htwe* (alias) *A. E. Madari* v. *U Tun Ohn and one* (2) as follows:

" Now, what is meant by a Court ? Having regard to a long series of English cases, there can hardly be any doubt that originally a Court, as used, was meant to mean a tribunal legally appointed to determine civil or criminal causes

(1) (1937) 2 K.B. 309, 340. (2) (1948) B.L.R. (S.C.) 541.

judicially. Subsequently, the meaning of the word 'Court' was expanded so as to include not only civil or criminal Courts, but also ecclesiastical, maritime or military Courts; see *Halsbury's Laws of England* (2nd Edition), Volume IX, page 830, and the cases quoted therein Since then, the term 'Court' has again been expanded so as to include not only the above-mentioned tribunals, but also other public bodies entrusted with quasi-judicial functions. What tribunal or body is to be deemed a Court so as to make it amenable to a writ of prohibition or a writ of certiorari is clearly and succinctly explained by Atkin, L.J., as he then was, in the case of *Rex* v. *Electricity Commissioners* (1) as follows:

> 'It is to be noted that both writs (writ of prohibition and writ of certiorari) deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as Courts of Justice. But the operation of writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognised as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, acts in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.' "

In the same case this Court further observed at page 550 that—

"Under section 133 of the Constitution, justice throughout the Union shall be administered in Courts established by the Constitution or by law and by Judges appointed in accordance therewith. The proviso to this section is section 150 of the Constitution.

Under section 150, any person or a body of persons, though not a Judge or a Court in the strict sense of the term, can be invested with power to exercise limited functions of a judicial nature. When so invested, that person or body of

(1) L.R (1924) K.B. 171.

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persons, when determining questions affecting the rights of the citizens of the Union, must do so, as provided by section 16, according to law. If it did not, it would at once render itself amenable to the jurisdiction of this Court, as provided in section 25. Therefore, when Atkin, L.J. used the phrase 'having the duty to act judicially' we must in relation to the Constitution construe it as 'having the duty to act according to law.'"

The above observations in relation to the exercise of the power of judicial control under section 25 of the Constitution would apply *mutatis mutandis* to the exercise by this Court of its power of judicial supervision under section 4 of the Union Judiciary Act.

In the light of the observations cited above, we shall now proceed to examine the extent of the judicial power exercised by the Controller of Rents, acting under section 14-A of the Urban Rent Control Act, and the Judge, acting under section 22 of the Act. Under section 14-A (3) the Controller is required to make an enquiry upon receipt of an application for permission under clause (*d*), (*e*) or (*f*) of section 11 and clause (*c*) of section 13 of the Act. It may, however, be observed that there is no particular procedure laid down by the Act for him to follow, but he has to conduct the enquiry in such a way as may be deemed proper or necessary by him. Under section 21, the Controller has the power for the purpose of an enquiry, to summon and enforce the attendance of any witness and to compel the production of any document "by the same means and, so far as may be, in the same way as provided in the case of a Court by the Code of Civil Procedure". He has also the power to require any person to furnish him with any information or to produce for his inspection any documents or books of accounts, etc. He also has the power to examine witnesses on oath. In all these cases the party against whom an

application is made is given notice to appear and answer, if he so desires. In fact the proceedings are conducted in very much the same way as in an ordinary civil matter; and after hearing both the parties, the Controller makes an order in writing as required by section 14-A (3). In making his decision, he is guided not by any extra-judicial discretion or by any matter of policy but he is required to decide judicially—not judiciously—, that is to say, he has to apply the law as laid down in section 11 or 13 as the case may be. The Controller of Rents, therefore, while acting under section 14-A of the Act, discharges quasi-judicial functions as defined according to the observations cited above. This is the view that has been taken by this Court in *Mrs. D. M. Singer* v. *Controller of Rents and three others* (1) where it was observed that " having regard to the provisions of sections 19-A, 20 and 21 of the Urban Rent Control Act, there is no doubt that the functions which the Controller has to discharge under the Act are of a quasi-judicial nature ". We again reaffirm the view taken therein.

The case of a Judge, acting under section 22 of the Act, is much stronger. He is given all the powers and functions of a Judge of a civil Court, following the procedure laid down for the regular trial of civil suits. Section 23 provides that " when disposing by reference any decision of the Controller, the Judge may in his discretion follow as nearly as possible either the procedure laid down for the trial of suits by the City Civil Court, Rangoon, or the procedure laid down for the regular trial of suits". We have therefore no hesitation to hold that the functions which the Judge has to discharge under section 22 of the Act are of a judicial

(1) (1949) B.L.R. (S.C.) 143.

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nature. To our mind there is both logic and necessity for the doctrine that the power of superintendence extends not only over the Courts in the strict sense of the term but also over the authorities exercising judicial or quasi-judicial functions. Therefore, all tribunals that discharge judicial or quasi-judicial functions fall within the meaning of the word " Court " in sections 4 and 27 of the Union Judiciary Act.

The learned counsel for the first respondent also contends that if the word " Court " occurring in section 4 of the Union Judiciary Act includes authorities or tribunals of judicial or quasi-judicial nature, the same construction should be extended to the word " Court " occurring in section 6, and consequently this Court should interfere with the orders in question by way of appeal and not by way of judicial superintendence. After a careful and anxious consideration we have come to the conclusion that for the purposes of appeal under section 6 the word " Court " denotes in the strict sense of the term, whilst for the purpose of exercising judicial superintendence under section 4 or 27 of the Act the word " Court " includes authorities or tribunals exercising judicial or quasi-judicial functions.

No doubt it is a general rule of interpretation that the same meaning is implied in the use of the same expression in every part of an Act. But, as pointed out in *Maxwell On Interpretation of Statutes* (9th Edition) at page 323, " The presumption is not of much weight. The same word may be used in different senses in the same statute and even in the same section". Again, in *Craies On Statute Law* (5th Edition) at page 159 it is observed :

" The presumption that the same words are used in the same meaning is however very slight and it is proper, if

sufficient reason can be assigned, to construe a word in one part of an Act in a different sense from that which it bears in another part of the Act."

These observations are based on many authorities cited therein. It is almost elementary to say that words without their context have no meaning. It is the context which is all importation in the interpretation of a word. The meaning of a word is therefore to be determined with reference to its context, and also according to the subject, occasion of its use and the purpose for which it is used.

It may perhaps be apposite to state here that the expression "Court" used in section 195 of the Code of Criminal Procedure has been held to have a wider meaning than "Court of Justice" in section 20 of the Penal Code, or even the expression "civil, revenue or criminal court" used in section 476 of the Code of Criminal Procedure. See *Raghoo Buns Sahovs* v. *Kokil Singh* (1) ; *Nandalal Ganguli* v. *Khetra Mohan Chose* (2) ; *In Re. Nanchand Shivchand* (3) ; *Rajaja Appaji Kote* v. *Emperor* (4) ; and *Hari Charan Kundu* v. *Kanshiki Charap Day* (5). The reason for the view held in the above-mentioned rulings arises from the expression used in sub-section (2) of section 195 to the effect that "the term 'Court' includes a civil, revenue or criminal court but does not include the Registrar or Sub-Registrar under the Registration Act." This, however, does not detract from the validity of the statement as mentioned above that the meaning of a word may vary according to the context, subject, occasion or the purpose for which it is used.

(1) 17 Cal. 872. (3) 37 Bom. 365.
(2) 45 Cal. 585. (4) A.I.R. (1946) Bom. 7.
(5) 44 C.W.N. 530.

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If the contention of the learned counsel for the first respondent that the word "Court" in section 4 and section 6 of the Union Judiciary Act means exactly the same thing and consequently this Court should interfere with the proceedings of the inferior Court by way of appeal only, were correct, then the power of superintendence conferred upon this Court by section 4 would be a mere superfluity. It is a cardinal principle of construction that the provisions in a statute must be construed, as far as possible, to avoid tautology or superfluity, and that they should be interpreted as far as possible, in such a way that they are consistent with each other and make a complete picture when taken as a whole.

In the result the preliminary objections are overruled. We hold that for the purpose of exercising judicial supervision or superintendence by this Court under section 4 of the Union Judiciary Act, the Controller of Rents, acting under section 14-A of the Urban Rent Control Act, and the Judge, acting under section 22 of the Act, fall within the meaning of the word "Court" in section 4 of the former Act.

As regards the merits of the case, the orders of the Judge and of the Controller of Rents cannot stand. It was under section 11 (*1*) (*f*) of the Urban Rent Control Act that the first respondent sought for permission to file a suit for ejectment against the applicant. Under the provisions of section 11 (*1*) (*f*) no decree for ejectment of a tenant can "be made or given unless the building or the part thereof to which the Act applies is reasonably and *bonâ fide* required by the owner for occupation by himself exclusively for residential purposes". But Dawood Ismail who was the agent of the first

respondent, definitely stated in his deposition before the Controller that the premises in question were required for the storage of chemicals. There is thus a manifest error patent on the face of the records.

We accordingly quash the orders of the Sub-divisional Judge and the Controller of Rents, Mandalay. The first respondent will pay the applicant's costs of these proceedings. Advocates' fees K 170.

SUPREME COURT.

† S.C. 1955 — *June 24.*

KOUGH WHEE LEEK
KOUGH WHEE KEEK } (APPLICANT)

v.

KO EU TAIK ....
SARKARAM CHETTYAR } (RESPONDENTS).*

Special Leave—S. 6, Union Judiciary Act, 1948—S. 193, Penal Code—Complaint under s. 476, Criminal Procedure Code—Reasonable probability of conviction—Inordinate delay—Invariably a matter of discretion—To be made only in the interests of justice.

The Respondents were prosecution witnesses in Criminal Regular Trial No. 910 of 1949 of the Court of the 7th Additional Magistrate, Rangoon, in which the petitioner and another were prosecuted and charged under ss. 406 and 411, Penal Code, respectively.

The charges were quashed by the High Court on 28th November 1950.

On 21st March 1951, the Petitioner moved the Magistrate under s. 476, Criminal Procedure Code to lay a complaint against the Respondents under s. 193, Penal Code. The application was dismissed by the Magistrate and on appeal under s. 476-B Criminal Procedure Code, the High Court confirmed the order of dismissal, both the Courts following :—

Hwe Gye Hain and one v. *The King*, (1948) B.L.R. 40 ; *Jadu Nandar Singh* v. *Emperor*, (1910) I.L.R. 37 Cal. 250 ; *Mohamed Kaka and others* v. *The District Judge of Bassein*, (1937) R.L.R. 276.

The Petitioner applied to the Supreme Court under s. 6 of Union Judiciary Act for special leave to appeal.

Held : Under s. 476, Criminal Procedure Code the responsibility for prosecution rests entirely upon the Court and this section must be exercised with great care and caution and only when necessary in the interests of justice.

The matter under s. 476 is not a piece of litigation between private parties, but as a matter of public duty undertaken for vindicating and ensuring the purity of the administration of public justice.

Purna Chandra Dutt v. *Shaikh Dhalu*, 34 C.W.N. 914 at 922, approved.

It is invariably in the discretion of the Court to make a complaint under s. 476 and High Court, except in extraordinary cases, are loath to interfere with the exercise of such discretion.

Somabhai Vallavbhai v. *Aditbha Parshottam and others*, (1924) I.L.R. 48 Bom. 401; *Rajit Narayan Singh and others* v. *Babu Ram Bahadur Singh*, 27 Cr.L.J. 641, referred to.

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* Criminal Misc. Application Nos. 10 and 11 of 1955.

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

The Supreme Court will not grant special leave to appeal unless exceptional and special circumstances exist, or when substantial and grave injustice has been done or when the case presents features of sufficient gravity.

Pritan Singh v. *The State*, 51 Cr.L.J. 1270, referred to.

The delay in making the application, and a reasonable probability of conviction should be taken into consideration in deciding whether or not it is in the interest of justice to make a complaint under s. 476, Criminal Procedure Code.

There was four months delay and both the Lower Courts are of opinion that there is no reasonable probability of conviction.

The Supreme Court does not ordinarily constitute itself into a third Court over concurrent findings of fact.

Special leave to appeal refused.

Dr. E Maung for the applicant.

Ko Eu Taik, N. R. Burjorjee for the respondents.

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

U THEIN MAUNG, C.J.—These are applications for special leave under section 6 of the Union Judiciary Act, 1948, to appeal from the judgments of the High Court in Criminal Appeals Nos. 535 and 536 of 1953, which are appeals under section 476-B of the Code of Criminal Procedure.

By those judgments the High Court dismissed the petitioner's appeals against the order of the learned 7th Additional Special Power Magistrate, Rangoon, refusing to lay complaints against the respondents Ko Eu Taik and Sarkaram Chettyar under section 193 of the Penal Code.

The petitioner moved the learned Magistrate on the 21st March, 1951, to lay complaints against them as they gave evidence for the prosecution in Criminal Regular Trial No. 910 of 1949 in his Court.

In that case Ko Eu Taik's wife Ma Pauk Sa prosecuted the petitioner and one C. Su Bin and the learned Magistrate framed a charge under section 406

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of the Penal Code against the petitioner and a charge under section 411 thereof against C. Su Bin. However, these charges were quashed by the High Court by order dated the 28th November 1950 in Criminal Revision Nos. 97-B and 98-B of 1950.

The learned Magistrate refused to lay complaints against the respondents as he was not satisfied that the evidence given by the respondents was false, there was no reasonable probability of a conviction and there was an inordinate delay in making the application under section 476 of the Criminal Procedure Code.

The learned Judge of the High Court, who, by the way, is the judge who quashed the charges against the petitioner in the said revision cases, dismissed his appeals under section 476-B of the Criminal Procedure Code as he agreed with the learned Magistrate that there had been inordinate delay in making the application and as he was by no means certain that there is any reasonable probability of the respondents being convicted if sent up for trial.

Both the learned Magistrate and the learned Judge have followed the ruling of the High Court in *Hwe Gye Hain and one* v. *The King* (1) which may be compared with the rulings in *Jadu Nandar Singh* v. *Emperor* (2) and *Mohamed Kaka and others* v. *The District Judge of Bassein* (3).

Now the responsibility for prosecution rests entirely upon the Court which makes a complaint under section 476 of the Criminal Procedure Code, whether it acts on its own motion or on the application of a party. So the power given by that section must be exercised with great care and caution and the Court should make a complaint only if the prosecution is necessary in the interests of justice. As

(1) (1948) B.L.R. 40. (2) (1910) I.L.R. 37 Cal. 250.
(3) (1937) R.L.R. 276.

Costello, J., has rightly pointed out in *Purna Chandra Dutt* v. *Shaikh Dhalu* (1) the Court should consider the matter under section 476 not as a piece of litigation between private parties but as a matter of public duty undertaken for the purpose of vindicating and ensuring the purity of the administration of public justice.

The question whether a complaint should be made under section 476 is almost invariably a matter of discretion and even High Courts are loath to interfere with the decision of lower Courts except in extraordinary cases. [See the observation of Macleod, C.J. in *Somabhai Vallavbhai* v. *Aditbha Parshottam and others* (2), which has been cited with approval by Bucknill, J. in *Rajit Narayan Singh and others* v. *Babu Ram Bahadur Singh* (3).]

As regards this Court, it will not grant special leave to appeal even in ordinary criminal cases unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against. [*Cp. Pritan Singh* v. *The State* (4)]. In the present case there are no exceptional or special circumstances and no substantial or grave injustice appears to have been done.

The application under section 476 of the Criminal Procedure Code was filed four months after the charges were quashed by the High Court and three months after the record was received in the trial Court; and delay in making the application must be taken into consideration in deciding whether it is in the interests of the administration of public justice or just for the purpose of satisfying a private grudge.

(1) 34 C.W.N. 914 at 922.
(2) (1924) I.L.R. 48 Bom. 401 at 404.
(3) 27 Cr.L.J. 641 at 646.
(4) 51 Cr.L.J. 1270.

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Besides, making a complaint under the said section cannot be in the interests of the administration of public justice unless there is a reasonable probability of conviction; and in the present case both the lower Courts are of opinion that there is no reasonable probability of the respondents being convicted. This Court does not ordinarily constitute itself into a third Court of fact; and in the present case the concurrent findings of fact are of special weight as the learned Judge of the High Court was conversant with all the relevant facts inasmuch as it was he who quashed the said charges, passed orders on the application of the respondent Sarkaram Chettyar's principal S.S.S. Chockalingam Chettyar in the connected suit *viz.* Civil Regular No. 51 of 1948 in the High Court and passed the consent decree therein.

Special leave to appeal is refused and the applications are dismissed.

SUPREME COURT.

MA THEIN SHIN AND FOUR (APPELLANTS)

v.

TAN KEET KHANG AND FOUR (RESPONDENTS).*

S.C. 1955

Nov. 14.

Limitation Act, Schedule (1), Article 132—No Specific time fixed for repayment of loan in a mortgage deed—Ss. 19 and 20, Limitation Act—Order 41, Rule 22 (1), Civil Procedure Code—Respondent in an appeal entitled to support the decree on grounds decided for and against him—When cross-objections necessary.

Where no specific time is fixed for the payment of a debt on a mortgage, the money does not become due and the cause of action does not arise until demand for payment is made by the mortgagee and refused by the mortgagor.

N. B. Natu and others v. *Bharati and others*, I.L.R. 54 Bom. 495-57 I.A. 194, distinguished. *M. Masttiar and others* v. *S. A. Mudaliar*, A.I.R. (1944) Mad 172 ; *Megah Nath and another* v. *The Collector, Cawnpore*, A.I.R. (1947) All. 7, referred to.

A mortgage debt becomes "payable" within the meaning of Sch. 1, Art. 132 of the Limitation Act, 1908 when a default on the part of the mortgagor has occurred and the mortgagee exercises his option to enforce the mortgage. Or, it becomes "payable" at the expiry of the stipulated period.

Lasa Din v. *Gulab Kunwar & Sons*, (1952) 59 I.A. 376-7 Luck. 44 A.I.R. (1932) (P.C.) 207, followed.

Under Order 41, Rule 22 (1), Code of Civil Procedure, a Respondent in an appeal is entitled to support the decree on grounds decided in his favour and also on grounds decided against him, and even on grounds other than those taken by the trial Court.

A cross-objection is competent only if the matter could have been taken by way of an appeal.

Raja Ram v. *Lehna and another*, A.I.R. (1942) Lah. 87 ; *Kishan Kishore* v. *Din Mohamed and others*, A.I.R. (1929) Lah. 684 ; *Mahagu* v. *Nararan*, I.L.R. (1950) Nag. 679 ; *Sri Ranga Thatachariar* v. *Srinwasa Raghavachariar*, (1927) I.L.R. 50 Mad. 866, dissented from. *Ram Prasad Kalwar* v. *Musemat Ajanasia*, (1922) I.L.R. 44 All. 577 ; *Abinash Chandra Ghosh* v. *Narahari Mehtar*, (1930) I.L.R. 59 Cal. 889, followed.

Ba Gyan for the appellants.

Hoke Sein for the respondents.

* Civil Appeal No. 11 of 1954 against the decree of the High Court of Rangoon in Civil 1st Appeal No. 17 of 1952.

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

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The judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—In Civil Regular Suit No. 3 of 1951 of the Distrtct Court of Pyapôn Tan Keet Khang and Tan Chong Awant sought to recover monies due on a mortgage of an electric generating plant against the heirs and representatives of their brother Tan Shu Yon who died on 24th December 1946. The mortgage deed was executed on 11th March 1931 and in regard to repayment it was set out in the deed that interest due together with Rs. 1,000 towads the principal sum of Rs. 65,000 were to be paid once every English Calendar month.

In paragraph 6 of the plaint, the contention was made that there were several payments towards the debt and that various acknowledgments of indebtedness were made by the deceased in his letters. In paragraph 8, the plaintiffs said:

> "The cause of action arose on 15th January 1949 at Pyapôn within the jurisdiction of this Hon'ble Court when the defendants failed to pay the amount due on the mortgage on demand from the plaintiffs."

The defendants in their written statement denied each and every allegation of the plaintiffs and also pleaded various legal defences. Several issues were framed, of which two were disposed of as preliminary issues in favour of the plaintiffs. Evidence was led and at its conclusion the defendants filed an additional written statement pleading limitation. This was objected to by the plaintiffs but the learned trial Judge pointed to section 3 of the Limitation Act and rightly held that the question should be gone into.

To come to a decision on this particular point he had to come to a finding on the initial question whether the deceased had in fact executed the deed.

This the learned Judge answered in the affirmative. He then held that since the mortgage deed made no mention as to when the debt was payable, it was payable forthwith and that therefore the 12 years limit prescribed by Schedule I, Article 132 of the Limitation Act counted from the date of its execution *i.e.*, as from 11th March 1951. He concluded therefore that the suit which was filed only in 1950 was *primâ facie* time barred. Next, the learned Judge considered the evidence relating to the alleged acknowledgments of liability for the debt by the deceased which, if established, would entitle the plaintiffs to compute the period of limitation from the date of such acknowlegments under section 19 and 20 of the Limitation Act. He found that there were none and consequently he dismissed the suit on the point of limitation, without going into the other legal defences pleaded.

The plaintiffs appealed and a Bench of the High Court held that the suit was within time as in their view the period of limitation commenced only with non-compliance of an actual demand for payment. The learned Judges relied upon a passage in the Privy council case of *N. B. Natu and others* v. *Bharati and others* (1) which runs:

> " In the second place there was no specific time fixed for the payment of the debt, and their Lordships are of opinion on the facts of this case that the money did not become due and the cause of action did not arise until demand for the payment of the mortgage debt was made by the mortgagee and it was refused by the mortgagor."

In further support *M. Masttiar and others* v. *S. A. Mudaliar* (2) and *Megah Nath and another* v. *The Collector, Cawnpore*, (3) were cited but both

(1) I.L.R. 54 Bom. 495-57 I.A. 194.
(2) A.I.R. (1944) Mad. 172. (3) A.I.R. (1947) All. 7

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these cases relate to a mortgagee's option to sue in case of default in payment of instalments, and the decisions were to the effect that such default and the mortgagee's failure to exercise his option did not start the period of limitation.

With respect we accept the principle laid down in Natu's case but it will be observed that it can only apply where there is no specific time fixed for the payment of the debt. In the case before us, the Courts below have held, erroneously in our view, that there was no such fixation of date for payment. For a clearer understanding of the terms of the deed, which is in Burmese, we set out the relevant passage below:

"အောက်ပါ စာရင်းပါ ပစ္စည်းရပ်များအားလုံးကို ယခုပဌမအပေါင်ပေးသွင်းထားပါမည်၊ ၎ငွေ ၁၀၀ ကို အတိုးတလလျှင် ၀ (တကျပ်) တိုးနှုန်းကျနှင့် ငွေရင်း ၆၅,၀၀၀ (ခြောက်သောင်းငါးထောင်ကျပ်) ချေးပါ၊ ၎င်းရင်းတိုးငွေမပြေမီ ထိုအပေါင်ဝင်ပစ္စည်းများကို အခြားသူထံ ထပ်မံပေါင်နှံရောင်းချပေးအပ်ခြင်း မပြုမလုပ်ပါ၊ ၎င်း၏အတိုးငွေကို အင်္ဂလိပ်လရက်ဖြင့်တွက်၍ လစဉ်တလတကြိမ်ပေးပါမည်၊ အရင်းငွေကိုလည်း လစဉ်တလတကြိမ် ငွေရင်း ၁,၀၀၀ (တထောင်ကျပ်) ကျ အဝင်ပေးဆပ်သွားပါမည်၊ ၎င်းကတိထားသည့် အတိုင်း မပျက်မကွက်ဘဲ မှန်ကန်စွာပေးဆပ်သွားပါမည်၊ ကတိမဘည်ပျက်ကွက်ခဲ့လျှင် တရားအတိုင်းပြုလုပ်ယူရာကို စရိတ်ပါကျခံပါမည်။"

The passage may be translated thus:

"The properties enumerated in the statement below are placed under first mortgage. The principal sum lent is Rs. 65,000 with interest at 1 per cent per mensem. It is undertaken that while the mortgage subsists there will be no further mortgage or sale to any other person. The interest will be paid every English Calendar month. The principal also will be paid by monthly payments of Rs. 1,000. Without default, regular payments will be made as promised. If this promise is not kept liability under the law as well as costs is accepted . . . . . ."

Now, while it is true that a date for payment is not specifically mentioned, the clear arrangement that is deducible from the clause quoted is that the entire debt, principal as well as interest, was to be liquidated in 65 months. This being the position, it cannot be said that no time for payment was fixed, and the principle laid down in Natu's case can have no application.

The principle that would apply to the case before is to be found in *Lasa Din* v. *Gulab Kunwar and others* (1), another ruling of the Privy Council. This principle is summarised in the headnote which reads as follows:

"Under the Limitation Act, 1908, Sch. I, Art. 132, a suit to enforce a mortgage for a stipulated period, although a default by the mortgagor has occurred during the period and by the terms of the mortgage the mortgagee thereupon had an immediate right to enforce the mortgage 'the money becomes payable' within the meaning of the above article when, either the stipulated period has expired, or a default having occurred, the mortgagee has exercised his option to enforce the mortgage."

In point of fact the case before us is similar to a certain degree to *Megah Nath*'s case (2) where a mortgage loan for Rs. 800 was contracted on the agreement that it would be liquidated in 32 annual instalments. A suit to recover the entire debt, which was instituted within 12 years, counting from the end of the stipulated period of 32 years, was held to be within time. But the difference between Megah Nath's case and the present one is that the plaintiffs did not institute their case in the District Court of Pyapôn within 12 years of the expiry of the stipulated period.

Tan Shu Yon executed the mortgage deed on 11th March 1931 and the stipulated period was 65

(1) (1952) 59 I.A. 376-7 Luck. 44-A.I.R. (1932) (P.C.) 207. (2) A.I.R. (1947) All. 7.

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months, which would make total payment due on 11th August 1936. The period of limitation of 12 years would commence from 11th August 1936 and expire on 10th August 1948. The suit was filed on 20th January 1950 and *primâ facie* it was filed out of time.

The appellate Court, on the surmise that the period of limitation commenced only with the actual demand for payment, did not consider the correctness or otherwise of the specific finding of the trial Court that there was no acknowledgment in writing of liability, which would give rise to fresh computations of limitation under sections 19 and 20 of the Limitation Act. We note also that counsel for respondents in the High Court was not permitted to attack the findings of the trial Court because no cross-objections were filed. The authority relied upon was *Raja Ram* v. *Lehna and another* (1) which enunciates that a respondent, under Order 41, Rule 22 (1) of the Code of Civil Procedure, can only support the *decision* of a lower Court and not to attack it. The earlier case of *Kishan Kishore* v. *Din Mohamed and others* (2) which was quoted and followed, said that what was not permissible for a respondent to attack without cross-objections, was the *decree* itself. In *Mahagu* v. *Nararan* (3) it was held that a respondent could not attack an adverse *finding*. All these restrictive interpretations of Rule 22 seem to have emanated from *Sri Ranga Thatachariar* v. *Srinwasa Raghavachariar* (4) in which a Bench of the Madras High Court had observed :

"Though the word 'decree' has been used in Rule 22, it is clear that what the rule contemplates really is the *decision* by the Court below and merely enables the decision

(1) A.I.R. (1942) Lah. 87.
(2) A.I.R. (1929) Lah. 684.
(3) I.L.R. (1950) Nag 679.
(4) (1927) I.L.R. 50 Mad. 866.

arrived at by the lower Court to be supported on grounds other than those on which the lower Court proceeded."

Rule 22 (1) reads as follows:

"Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the appellate Court may see fit to allow."

and as we read it, the first part enables a respondent to support the decree even on grounds decided against him. Naturally he would be able to rely upon grounds decided in his favour. But under the second part, if he wishes to attack the decree itself, then it could only be done by way of cross-objections. We can see no reason why the scope of the rule should be restricted nor can we see any justification why the word "decree" should be taken to mean either a "decision" or a "finding". To take the simplest example, in a suit for K 1,000, if a decree is passed for K 500 only, the respondent in appeal would be entitled to support the decree on grounds decided in his favour and also on grounds decided against him; but he will not be permitted to say that he really owed only K 250 or nothing at all. That would need cross-objections as the decree itself would be attacked.

Rule 22 permits a cross-objection only if it could have been taken by way of an appeal, and in a case like the one before us, when the decree was in favour of the respondents and the appellants' suit was totally dismissed, what necessity would there be for the successful party to appeal and upon what

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could such an appeal be based? In such cases surely the respondent must be entitled to support the decree on any ground, even on grounds other than those taken by the trial Court. This view finds support in *Ram Prasad Kalwar* v. *Musemat Ajanasia* (1) and *Abinash Chandra Ghosh* v. *Narahari Mehtar* (2).

We feel therefore that the respondents in the High Court were wrongly denied the opportunity of making full submissions in support of the decree in their favour, and this being the position, the appropriate order will be to set aside the judgment and the preliminary mortgage decree passed in Civil First Appeal No. 17 of 1952 and remand the case to the High Court for fresh hearing and disposal. We direct this to be done.

Costs in this Court will follow the final result.

(1) (1922) I.L.R. 44 All. 577. (2) (1930) I.L.R. 59 Cal. 889

တရားလွှတ်တော်ချုပ်

ဦးကံညွန့် .... (ဝဲလျှောက်ထားသူ)

နှင့်

ဒေသန္တရအတွင်းဝန် ပါ ၂ ဦး (လျှောက်ထားခံရသူများ)*

†၁၉၅၅ မတ်လ ၁၆။

၁၉၅၃ ခုနှစ်၊ ဒီမိုကရေစီဒေသန္တရအုပ်ချုပ်ရေး အက်ဥပဒေပုဒ်မ ၆—ကျေးရွာကောင်စီ အသီးသီး ပါဝင်ရမည့် ဌာနကြီးအရေအတွက်—၅ ဦးစီပါဝင်ရမည်ဟု နိုင်ငံတော် အစိုးရကသတ်မှတ်ခြင်း—အရွေးခံရသူ ၃ ဦးစီသာရှိပြီး ၎င်းအုပ်ချုပ်ရေးနည်းဥပဒေ ၂၆ (က) အရ၊ ကျေညာခဲ့ခြင်း၊ နည်းဥပဒေ ၅၄ အရ၊ ပဌမအကြိမ်အစည်းအဝေး ကျင်းပ၍ သူကြီးပါ လူကြီး ၄ ဦးတက်ရောက်လျက် ကျေးရွာကောင်စီမှ မြို့နယ်ကောင်စီသို့ တက်ရောက်ရမည့် ကိုယ်စားလှယ်တဦးကို နည်းဥပဒေ ၅၆-၅၇ အရ၊ တင်မြှောက်ကြခြင်း၊ မြို့နယ်ကောင်စီ ပဌမအကြိမ် အစည်းအဝေးကျင်းပပြီး ခရိုင်ကောင်စီသို့ တက်ရောက်ရန် ကိုယ်စားလှယ် ၄ ဦး တင်မြှောက်ကြခြင်း ၎င်း ၄ ဦးတွင် မူလကျေးရွာကောင်စီမှ ရွေးလွှတ်လိုက်သော ၃ ဦးအနက် တဦးသည် ဥက္ကဋ္ဌအဖြစ်နှင့် ပါဝင်လာလေသည်။ နည်းဥပဒေ ၅၉ အရ၊ နိုင်ငံတော်သမတထံ ခရိုင်ကောင်စီသို့ တက်ရောက်ရန် ကိုယ်စားလှယ်ရွေးချယ်ခြင်းကို အတည်ပြုသင့် မပြုသင့် ကျေညာရန် တင်ဆက်ရသည်။ ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေ ပုဒ်မ ၆၉ (၃)။

နိုင်ငံတော်အစိုးရက (၁) ကျေးရွာကောင်စီများတွင် ကောင်စီဝင်လူကြီးဦးရေ အပြည့်အစုံ မရွေးကောက်ရသေးသည့်အတွက် ထိုကျေးရွာကောင်စီများ၊ မိမိတို့၏ဥက္ကဋ္ဌနှင့် မြို့နယ်ကောင်စီသို့ တက်ရောက်ရန်ကိုယ်စားလှယ်များကို ရွေးချယ်ခြင်းမပြုနိုင်သေး၊

(၂) ဤသို့ရွေးချယ်ခြင်းမပြုနိုင်ဘဲလျက်၊ ရွေးချယ်တင်မြှောက်လိုက်သော ကိုယ်စားလှယ်များပါဝင်ခဲ့သော မြို့နယ်ကောင်စီ အစည်းအဝေးသည် ဥက္ကဋ္ဌ၊ ဒုတိယ ဥက္ကဋ္ဌနှင့် ကိုယ်စားလှယ်များ ရွေးချယ်ပိုင်ခွင့်မရှိကြောင်း၊

(၃) တရားမဝင်သောကျေးရွာကောင်စီမှ လွှတ်လိုက်သော ကိုယ်စားလှယ်များပါဝင်သော အခြားမြို့နယ်ကောင်စီ ပဌမအကြိမ် အစည်းအဝေးသည်လည်း တရားမဝင်သော မြို့နယ်ကောင်စီ အစည်းအဝေးဖြစ်၍ ပယ်ဖျက်လိုက်ခြင်း၊

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* ၁၉၅၄ ခုနှစ်၊ တရားမ အသေးအဖွဲမှု လျှောက်လွှာအမှတ် ၉၁။

† နိုင်ငံတော်တရားဝန်ကြီးချုပ် ဦးသိမ်းမောင်၊ တရားဝန်ကြီး ဦးမြင့်သိန်းနှင့် တရားဝန်ကြီး ဦးချန်ထွန်းတို့၏ရှေ့တော်တွင်။

၁၉၅၅

ဦးကံညွန့်
နှင့်
ဒေသန္တရ
အုပ်ချုပ်ရေး
အတွင်းဝန် ပါ
၂ ဦး။

ဤအမိန့်ကိုမကျေနပ်၍ ကျေးရွာကောင်စီမှ ဥက္ကဋ္ဌအဖြစ်ဖြင့် ရွေးချယ်ခံရသော ကိုယ်စား လှယ်က အမှုခေါ်စာချွန်တော် အမိန့်ထုတ်ပြန်ပေးစေရန်လျှောက်ရာ။

(၁) ဒီမိုကရေစီဒေသန္တရအုပ်ချုပ်ရေးဝန်ကြီးဌာန (နိုင်ငံတော်သမတ) သည် နည်းဥပဒေ ၅၉ (၂) အရ၊ အတည်ပြုရမည့် စီရင်ခွင့်အာဏာပိုင်ဖြစ်လေသည်။

(၂) ကျေးရွာကောင်စီများဆိုင်ရာ ရွေးကောက်ပွဲတွင် ကျေးရွာကောင်စီ တနုခု အတွက် လိုအပ်သည့် လူကြီးဦးရေ အပြည့်အစုံ ရွေးကောက်တင်မြှောက်ခြင်း မရှိခဲ့သော ကြောင့် ထိုရွေးပြီးသားသူများသည် ကျေးရွာကောင်စီကိုဖွဲ့စည်း၍ သက်ဆိုင်သည့် ကိစ္စများ ကို မဆောင်ရွက်နိုင်သေးဟုဆိုသော အကြောင်းသည် တရားဥပဒေနှင့်မညီညွတ်ပေ။ ဤသို့ လိုအပ်သည့် လူကြီးဦးရေ ပြည့်စုံစွာမရရှိသေးသမျှကာလပတ်လုံး ကျေးရွာကောင်စီသည် မိမိတာဝန်ဝတ္တရားများကိုမဆောင်ရွက်ဘဲ ဆိုင်းငံ့နေရမည်ဟုလည်း ပြဋ္ဌာန်းချက်မရှိချေ။

(၃) ဤအမိန့်သည် တရားဥပဒေနှင့်ထင်ရှားစွာဆန့်ကျင်သောကြောင့် ပယ်ဖျက် လိုက်သည်။

ဦးသန်းစိန် (လွှတ်တော်ရွှေနေကြီး) လျှောက်ထားသူအတွက်။

ဦးဘစိန် (အစိုးရရွှေနေကြီး) လျှောက်ထားခံရသူများအတွက်။

တရားဝန်ကြီးဦးချုန်ထွန်း အမိန့်ချမှတ်သည်။

လျှောက်ထားသူသည်၊ ကျောက်ဆည်မြို့နယ် (ဒီမိုကရေစီဒေသန္တရအုပ်ချုပ် ရေး) ကောင်စီ၏ ဥက္ကဋ္ဌအဖြစ်ဖြင့် ၂၆-၅-၅၄ နေ့တွင်ကျင်းပသော အဆိုပါ ကောင်စီ ပဌမအကြိမ် အစည်းအဝေးတွင် ရွေးကောက်တင်မြှောက်ခြင်း ခံရသူ ဖြစ်၏။ ထိုသို့မိမိအား ဥက္ကဋ္ဌအဖြစ်ဖြင့်ရွေးကောက်ခြင်းကို ပြည်သောင်စုမြို့နယ် ဒီမိုကရေစီဒေသန္တရအုပ်ချုပ်ရေး ဝန်ကြီးဌာနမှ ၁၀-၆-၅၄ နေ့စွဲဖြင့် ပယ်ဖျက်သည့်အမိန့်ကိုမကျေနပ်၍ ဤရုံးတော်သို့ အမှုခေါ်စာချွန်တော် အမိန့် ထုတ်ပြန်ပေးစေရန်အလို့ငှါ လျှောက်ထားလေသည်။

နိုင်ငံတော်အစိုးရသည် ကျောက်ဆည်ခရိုင်အတွင်းရှိ ကျေးရွာ ကောင်စီ အသီးသီးတွင် ပါဝင်ရမည့် လူကြီးအရေအတွက်ကို ၁၉၅၃ ခုနှစ်၊ ဒီမိုကရေစီ ဒေသန္တရအုပ်ချုပ်ရေး အက်ဥပဒေပုဒ်မ ၆ အရ၊ ၁-၃-၅၄ နေ့စွဲဖြင့် အမိန့် ထုတ်ပြန်၍ သတ်မှတ်ခဲ့၏။ ထိုအမိန့်အရ ကျောက်ဆည်မြို့နယ်ရှိ တောတွင်း ကျေးရွာကောင်စီနှင့် မင်းစုကျေးရွာကောင်စီတို့တွင် လူကြီးဦးရေ ၅ ဦးစီ ပါဝင် ရမည်ဟု သတ်မှတ်ထား၏။ ထိုရွာများတွင် လျှို့ဝှက်သော မဲဆန္ဒပေးပုံစံနှင့်ဖြင့် ရွေးကောက်ခန့်ထားခြင်းခံရသော ရွာသူကြီးအသီးသီးရှိပြီးဖြစ်သဖြင့်၊ အဆိုပါ အက်ဥပဒေပုဒ်မ ၆၊ ခြင်းချက်တွင်ပါရှိသည့်ပြဋ္ဌာန်းချက်များအရ ရွာသူကြီးများ

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ဦးကံညွန့် နှင့် ဒေသန္တရ အုပ်ချုပ်ရေး အတွင်းဝန် ပါ ၂ ဦး။

သည် သက်ဆိုင်ရာ ကျေးရွာကောင်စီဝင် လူကြီးအဖြစ်ဖြင့် ရွေးကောက်ဘင် မြောက်ပြီးဖြစ်သည်ဟု ယူဆရသောကြောင့် တောတွင်းကျေးရွာကောင်စီအတွက် ရွေးကောက်ရန် ၄ ဦးနှင့် မင်းစုကျေးရွာကောင်စီအတွက် ရွေးကောက်ရန် ၄ ဦး ကျန်ရှိလေသည်။ အဆိုပါကျေးရွာ ၂ ရွာအတွက် ရွေးကောက်ပွဲများကို ၂၈-၄-၅၄ နေ့တွင် ကျင်းပရန်သတ်မှတ်ထားသော်လည်း အရွေးခံရသူ ၃ ဦးစီ သာရှိသဖြင့်၊ ထိုသူများကို ၁၉၅၃ ခုနှစ်၊ ဒေသန္တရအုပ်ချုပ်ရေးနည်းဥပဒေ ၂၆ (က) အရ၊ ထိုကျေးရွာကောင်စီအသီးသီးအတွက် အရွေးခံရသည်ဟုကျေ ညာခဲ့၏။ ကျောက်ဆည်ခရိုင် အခြေခံဒေသန္တရအဖွဲ့များဆိုင်ရာ ရွေးကောက်ပွဲ များကို ကျင်းပပြီးသည့်နောက်၊ နည်းဥပဒေ ၅၄ အရ၊ အဖွဲ့အသီးအသီး၏ ပဌမ အကြိမ်အစည်းအဝေးကျင်းပရန်ရက်ကို ထိုကိစ္စအလို့ငှါ၊ နိုင်ငံတော်သမတက အာဏာအပ်နှင်းခြင်းခံရသော ခရိုင်ဝန်က ဆင့်ဆိုသတ်မှတ်၏။ ဤသို့ ဆင့်ဆို သတ်မှတ်သည့် ၁၂-၅-၅၄ နေ့တွင်ကျင်းပသော အစည်းအဝေးအသီးအသီးတွင် တောတွင်းရွာအတွက် ရွေးကောက်ခံရသူ ၃ ဦးစလုံးနှင့် သူကြီးပါ ပေါင်း ၄ ဦး၊ မင်းစုကျေးရွာအတွက် ရွေးကောက်ခံရသူ ၂ ဦးနှင့် ရွာသူကြီးပါ ပေါင်း ၃ ဦး အသီးအသီးတက်ရောက်ကြပြီးလျှင်၊ သက်ဆိုင်ရာကျေးရွာကောင်စီ၏ဥက္ကဋ္ဌ တဦးနှင့် မိမိတို့ကျေးရွာကောင်စီမှ ကျောက်ဆည်မြို့နယ်ကောင်စီသို့ တက်ရောက် ရမည့် ကိုယ်စားလှယ်တဦးစီကိုလည်း နည်းဥပဒေ ၅၆ နှင့် ၅၇ အရ၊ ရွေးကောက်တင်မြောက်ကြလေသည်။ ကျေးရွာကောင်စီအသီးအသီးနှင့်ရပ်ကွက် ကောင်မိတီအသီးအသီးမှတက်ရောက်ကြသော ကိုယ်စားလှယ်များ ပါဝင်သော ကျောက်ဆည်မြို့နယ်ကောင်စီ၏ ပဌမအကြိမ် အစည်းအဝေးကို ၂၆-၅-၅၄ နေ့တွင် ခရိုင်ဝန်က ချိန်းဆိုထားသည့်အတိုင်း ကျင်းပပြုလုပ်ပြီးလျှင် ထိုအစည်း အဝေးတွင် ဥက္ကဋ္ဌတဦး၊ ဒုတိယဥက္ကဋ္ဌတဦးနှင့် ခရိုင်ကောင်စီသို့တက်ရောက်ရန် ကိုယ်စားလှယ် ၄ ဦးကို ရွေးကောက်တင်မြောက်ကြလေ၏။ လျှောက်ထားသူ ဦးကံညွန့်သည် ဥက္ကဋ္ဌအဖြစ်ဖြင့် ထိုအစည်းအဝေးမှ ရွေးကောက်ခြင်းခံရသူဖြစ် သည်။ ထိုသို့ကျောက်ဆည်မြို့နယ် ဥက္ကဋ္ဌ၊ ဒုတိယဥက္ကဋ္ဌနှင့် ခရိုင်ကောင်စီသို့တက် ရောက်ရန် ကိုယ်စားလှယ်များ ရွေးချယ်ပြီးသည့်ကိစ္စနှင့်စပ်လျဉ်း၍ ခရိုင်ဝန်သည် နည်းဥပဒေ ၅၉ အရ၊ အတည်ပြုကျေညာရန်အလို့ငှါ နိုင်ငံတော်သမတထံသို့ တင်ပို့ခဲ့သည်။ ထိုသို့တင်ပို့သည့် အစီရင်ခံစာကိုရရှိသောအခါ အထက်ဖေါ်ပြပါ ၁၀-၆-၅၄ နေ့စွဲဖြင့် ထုတ်ပြန်သည့်အမိန့်ကို နိုင်ငံတော်အစိုးရသည် ချမှတ်ခဲ့၏။ ထိုအမိန့်တွင် ဖေါ်ပြပါရှိသည့် အရေးကြီးသောအချက်များမှာ တောတွင်းရွာနှင့် မင်းစုရွာအတွက် ကျေးရွာကောင်စီများတွင် ကောင်စီဝင်လူကြီးဦးရေ အပြည့်

၁၉၅၅

ဦးကံညွန့်
နှင့်
ဒေသန္တရ
အုပ်ချုပ်ရေး
အတွင်းဝန် ပါ
၂ ဦး။

အစုံမရွေးကောက်ရသေးသည့်အတွက် ထိုကျေးရွာကောင်စီများသည် မိမိတို့၏ ဥက္ကဋ္ဌများနှင့် မြို့နယ်ကောင်စီသို့တက်ရောက်ရန် ကိုယ်စားလှယ်များကို ရွေးချယ်ခြင်းမပြုနိုင်သေးကြောင်း၊ ထို့ပြင် ဤသို့ရွေးချယ်ခြင်းမပြုနိုင်ဘဲလျက် ထိုကျေးရွာကောင်စီများက ရွေးချယ်တင်မြောက်လိုက်သော ကိုယ်စားလှယ်များပါဝင်လျက် ကျင်းပပြုလုပ်ခဲ့သည့် ကျောက်ဆည်မြို့နယ် ကောင်စီသည်လည်း မိမိ၏ ဥက္ကဋ္ဌ၊ ဒုတိယဥက္ကဋ္ဌနှင့် ကိုယ်စားလှယ်များ ရွေးချယ်ပိုင်ခွင့်မရှိသေးကြောင်း၊ ထို့ကြောင့် "တရားမဝင်သောကျေးရွာကောင်စီမှ ကိုယ်စားလှယ်များတက်ရောက်ပြီး ကျင်းပသော မြို့နယ်ကောင်စီ ပဌမအကြိမ် အစည်းအဝေးမှာ တရားမဝင်သော မြို့နယ်ကောင်စီ အစည်းအဝေးဖြစ်သဖြင့် ပယ်ဖျက်သည်ဟုမှတ်ယူရန် ရည်ညွှန်းအပ်ပါသည်" ဟု ဖေါ်ပြထားရှိလေသည်။ အဆိုပါအမိန့်ကို ဤရုံးတော်က စာချုပ်တော်ဖြင့် ဝင်ရောက်စွက်ဖက်နိုင်ရန်မှာ ထိုအမိန့်ကိုချမှတ်ရာတွင် ဒီမိုကရေစီဒေသန္တရ အုပ်ချုပ်ရေးဝန်ကြီးဌာန (နိုင်ငံတော် သမတ)သည် စီရင်ပိုင်ခွင့် အာဏာမရှိဘဲနှင့်ဖြစ်စေ၊ ရှိသည့်စီရင်ပိုင်ခွင့်အာဏာထက် ကျော်လွန်၍ဖြစ်စေ ချမှတ်သည့်အမိန့် ဟုတ် မဟုတ်ဟူသော ပြဿနာအပေါ်တွင်သော်၎င်း၊ ကျိုးကြောင်းဖေါ်ပြ၍ ချမှတ်သောအမိန့်သည် တရားဥပဒေနှင့် ထင်ရှားစွာဆန့်ကျင်လျက် ရှိသည် မရှိသည် ဟူသောပြဿနာအပေါ်တွင်သော်၎င်း တည်လေသည်။ နိုင်ငံတော်သမတတွင် ဤအမိန့်မျိုးကို ချမှတ်နိုင်သည့် အာဏာ ရှိ မရှိဟူသော အချက်မှာ နည်းဥပဒေ ၅၉ တွင် ဤသို့ ဥက္ကဋ္ဌ စသည်တို့ကို မြို့နယ်ကောင်စီက ရွေးကောက်ပြီးသောအခါ စာရင်းပြုလုပ်၍ ခရိုင်ဝန်က နိုင်ငံတော်သမတထံသို့ အတည်ပြုကျေညာရန်ပို့ရမည်ဟု ပြဋ္ဌာန်းပါရှိသောကြောင့်နိုင်ငံတော်သမတသည် အတည်ပြုရမည့် အာဏာပိုင်ဖြစ်လေသည်။ ထိုသို့အတည်ပြုရမည့် အာဏာပိုင်ဖြစ်သည့်အတိုင်း အက်ဥပဒေနှင့်သော်၎င်း၊ နည်းဥပဒေနှင့်သော်၎င်း မည်ညွတ်လျှင် ထိုရွေးချယ်ခြင်းကိုပယ်ဖျက်၍ ပြန်လည်ရွေးချယ်ရန် ညွှန်ကြားဘို့အာဏာကို သမတအား နည်းဥပဒေ ၅၉ (၂)က ပေးအပ်ထားသောကြောင့် နိုင်ငံတော်သမတတွင် စီရင်ပိုင်ခွင့်အာဏာရှိသည်မှာ ငြင်းနိုင်ဘွယ်မရှိချေ။ အာဏာပင်ရှိလင့်ကစား ထိုစီရင်ပိုင်ခွင့်အာဏာကို သုံးစွဲဆောင်ရွက်၍ ချမှတ်သည့် ဤအမိန့်သည် တရားဥပဒေနှင့် ထင်ရှားစွာ ဆန့်ကျင်လျက် ရှိ မရှိဟူသောပြဿနာကို ဆက်လက်စဉ်းစားရန်လို၏၊ ကျေးရွာကောင်စီများဆိုင်ရာ ရွေးကောက်ပွဲတွင် ကျေးရွာကောင်စီတခုခုအတွက် လိုအပ်သည့်လူကြီးဦးရေအပြည့်အစုံရွေးကောက်တင်မြောက်ခြင်းမရှိခဲ့သောကြောင့် ရွေးကောက်ပြီးလူကြီးများဖြင့်ပင်လျှင် ကျေးရွာကောင်စီကိုဖွဲ့စည်း၍ ကျေးရွာကောင်စီနှင့် သက်ဆိုင်ရသည့် ကိစ္စများကို

၁၉၅၅

ဦးကံညွန့် နှင့် ဒေသန္တရ အုပ်ချုပ်ရေး အတွင်းဝန် ပါ၂ ဦး။

မဆောင်ရွက်နိုင်သေးဟု ပြဆိုထားသောအကြောင်းသည်၊ တရားဥပဒေနှင့်မညီညွတ်သည်ဟုမဆိုနိုင်ချေ။ ကျေးရွာကောင်စီရွေးကောက်ပွဲတွင်လိုအပ်သည့်လူကြီးဦးရေအောက်အရွေးခံရသည့် လူကြီးဦးရေက နည်းနေရုံတခါတရံတွင် ဖြစ်ပေါ်နိုင်သည်ကိုငဲ့၊ တနည်းနည်းအားဖြင့် ရွေးကောက်တင်မြှောက်ရမည့် လူကြီးဦးရေကိုပြည့်စုံအောင် တခါတရံတွင်ရနိုင်မည်မဟုတ်သည်ကိုငဲ့ ကြိုတင်သိမြင်သောအားဖြင့် နည်းဥပဒေများကို ပြုလုပ်သူအာဏာပိုင်များသည် နည်းဥပဒေ ၂၆(ခ)နှင့် နည်းဥပဒေ ၂၉ တို့တွင် ထိုကဲ့သို့အကြောင်းများပေါ်ပေါက်လျှင် မည်သို့မည်ပုံဆောင်ရွက်ရမည်ကိုဖော်ပြပြဋ္ဌာန်းထားရှိလေသည်။ သို့ရာတွင် ဤသို့လိုအပ်သည့်လူကြီးဦးရေပြည့်စုံစွာမရရှိသေးသမျှကာလပတ်လုံး ကျေးရွာကောင်စီသည် မိမိ၏တာဝန်ဝတ္တရားများကို မဆောင်ရွက်ဘဲ ဆိုင်းငံ့နေရမည်ဟု တနည်းနည်းအားဖြင့် ဖော်ပြသောပြဋ္ဌာန်းချက်မျိုး လုံးဝမရှိချေ။ "အမတ်နေရာများလစ်လပ်နေစေကာမူ မူခင်းကိစ္စများကို ဆောင်ရွက်နိုင်ရန် ပါလီမန်ဆိုင်ရာလွှတ်တော်တို့တွင် အာဏာရှိမည်" ဟု ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေပုဒ်မ ၆၉(၃) တွင်ပါရှိသည့် ပြဋ္ဌာန်းချက်မျိုးများ ဒီမိုကရေစီဒေသန္တရအုပ်ချုပ်ရေး အက်ဥပဒေတွင်ဖြစ်စေ၊ နည်းဥပဒေများတွင်ဖြစ်စေမပါရှိခဲ့သည်မှာမှန်၏။ ထို့သို့သော ပြဋ္ဌာန်းချက်မျိုး ပါရှိနေလျှင် ပိုမိုကောင်းမွန်၍ အငြင်းပွါးဘွယ်များ ကင်းလွတ်မည်မှာ မှန်၏။ သို့ရာတွင် အဆိုပါအက်ဥပဒေနှင့် နည်းဥပဒေများကိုခြုံ၍ကြည့်လျှင်မူကား၊ ဤသို့သောပြဋ္ဌာန်းချက်မျိုးမပါရှိသော်လည်း ရည်ရွယ်ချက်ရှိသည်မှာကားထင်ရှားလှပေသည်။ ရွေးကောက်ပွဲများကျင်းပပြီးနောက် ဒေသန္တရအဖွဲ့အသီးသီးသည် ပဌမအကြိမ် အစည်းအဝေးကို မည်သို့မည်ပုံကျင်းပရမည်ဟူသောကိစ္စနှင့်စပ်လျဉ်းသည့် ပြဋ္ဌာန်းချက်များသည် နည်းဥပဒေ ၁၄-၁၅ တို့တွင် ပါရှိသည်။ နည်းဥပဒေ ၁၄ အရ၊ နိုင်ငံတော်သမတက အာဏာအပ်နှင်းထားခြင်းခံရသော အရာထမ်းသည် အဆိုပါပဌမအကြိမ်အစည်းအဝေးကျင်းပရန် နေ့ရက်ကို ရွေးကောက်ကျင်းပပြီးသည့်နောက်တွင် ဆင့်ဆိုသတ်မှတ်ရမည် ဖြစ်သည်။ နည်းဥပဒေ ၁၅(၁)တွင် ဤကဲ့သို့ ကျင်းပသည့် ပဌမအကြိမ် အစည်းအဝေးတွင် လူကြီးဦးရေ မည်မျှတက်ရောက်မှ အစည်းအဝေး အထမြောက်စေရမည်ဟူသော ပြဋ္ဌာန်းချက်ပါရှိ၏။ ထိုပြဋ္ဌာန်းချက်အရဆိုလျှင် ဒေသန္တရအဖွဲ့ဝင် လူကြီးဦးရေ၏ထက်ဝက်ထက်ပိုသော လူကြီးများတက်ရောက်မှသာလျှင် အစည်းအဝေး အထမြောက်နိုင်မည်။ ဤသို့ရွေးကောက်တင်မြှောက်ပြီးသည့် လူကြီးများသည် ကျေးရွာကောင်စီဖွဲ့စည်းပြီးလျှင် ကျေးရွာကောင်စီ၏ အာဏာနှင့် တာဝန်ဝတ္တရားများကို သုံးစွဲဆောင်ရွက်ခြင်းမှ ဟန့်တားထားသည့် အခြားပြဋ္ဌာန်းချက်

၁၉၅၅

ဦးကံညွန့်
နှင့်
ဒေသန္တရ
အုပ်ချုပ်ရေး
အတွင်းဝန် ပါ
၂ ဦး။

လုံးဝမပါရှိချေ။ ယခုအမှုတွင်ဖြစ်ပေါ်သည့် ကိစ္စများနှင့်စပ်လျဉ်းသောတောတွင်း ကျေးရွာကောင်စီနှင့် မင်းစုကျေးရွာကောင်စီတို့၏ ပဌမအစည်းအဝေးသည် အာဏာအပ်နှင်းခြင်းခံရသောအရာထင်းက သတ်မှတ်သည့်နေ့တွင် ကျင်းပသော အစည်းအဝေးများဖြစ်သဖြင့် နည်းဥပဒေ ၅၄ နှင့် ညီညွတ်၏။ ထို့ပြင် တက်ရောက်ကြသောအဖွဲဝင်လူကြီးများမှာလည်း သတ်မှတ်ထားသည့် အဖွဲဝင်လူကြီး ဦးရေ၏ ထက်ဝက်ထက်ပိုနေသောကြောင့် ထိုသက်ဆိုင်ရာ အစည်းအဝေးများသည် နည်းဥပဒေ ၅၅ (၁)နှင့် ညီညွတ်သဖြင့် အထမြောက်သော အစည်းအဝေးများဟုမှတ်ယူရမည်ဖြစ်သည်။ ထိုသို့ နည်းဥပဒေများနှင့် ညီညွတ်သည့် အစည်းအဝေးတွင် ပြုလုပ်သောဆောင်ရွက်ချက်များသည် ပျက်ပြယ်စေရမည်ဟု ဆိုနိုင်ရန် အကြောင်း လုံးဝမရှိချေ။ ခရိုင်တခုလုံးတွင်ရှိသော ကျေးရွာကောင်စီ တခုခုအတွက် သတ်မှတ်ထားသည့် လူကြီးဦးရေရရှိရန် ဒေသန္တရအဖွဲများဆိုင်ရာ ရွေးကောက်ပွဲတွင် လူကြီးဘယောက်တည်း လိုနေသောကြောင့် ထိုသို့လူကြီးဦးရေ အပြည့်မရသောကျေးရွာအတွက် ကျေးရွာကောင်စီမဖွဲ့နိုင်ဟူ၍ငြင်း၊ ဖွဲ့ပြီးလျှင်လည်း ထိုဖွဲ့ပြီးသောကျေးရွာကောင်စီသည် ကျေးရွာကောင်စီ၏ အာဏာနှင့် တာဝန် ဝတ္တရားများကို မဆောင်ရွက်နိုင်ဟူ၍ငြင်း ပြောဆိုသော အချက်သည် တရားဥပဒေနှင့် ညီညွတ်မှန်ကန်သော အချက်ဖြစ်သည်ဟု အကယ်၍ဟူဆမည်ဆိုလျှင် ထိုသို့သောကျေးရွာပါရှိနေသည့် ခရိုင်တခုလုံးတွင် ဒီမိုကရေစီဒေသန္တရ အုပ်ချုပ်ရေးယန္တရားများ စတင်အလုပ်မလုပ်နိုင်ဘဲ ရှိကြမည့်ပြင်၊ ဒီမိုကရေစီ အုပ်ချုပ်ရေးအဖွဲအားလုံးအသက်ဝင်နိုင်တော့မည်မဟုတ်ချေ။ ကျေးရွာကောင်စီ တခုသည် လူကြီးဦးရေမပြည့်သဖြင့် တရားဝင်သည့်ကျေးရွာကောင်စီ မဖြစ်နိုင်လျှင်၊ ထိုကျေးရွာမှသက်ဆိုင်ရာမြို့နယ်ကောင်စီသို့ တက်ရောက်ရန်ကိုယ်စားလှယ် ရွေးနိုင်မည်မဟုတ်ချေ။ ထို့နောက် သက်ဆိုင်ရာမြို့နယ်ကောင်စီကို ဖွဲ့စည်းနိုင်မည် မဟုတ်သကဲ့သို့ပင်လျှင် သက်ဆိုင်ရာခရိုင်ကောင်စီကိုလည်း ဖွဲ့စည်းနိုင်တော့မည် မဟုတ်ချေ။ ဤကဲ့သို့သောအခြေမျိုးသို့ဆိုက်ရောက်ရန်မှာ အလွန်ပင်မနှစ်မြို့ဘွယ် ရာပင်ဖြစ်သည်၊ ဤကဲ့သို့သောအခြေမျိုးကိုလည်း ၁၉၅၃ ခုနှစ်၊ ဒီမိုကရေစီဒေသန္တရအုပ်ချုပ်ရေးအက်ဥပဒေနှင့် နည်းဥပဒေများကိုရေးဆွဲကြသည့် အာဏာပိုင်များသည် မည်သည့်နည်းနှင့်မျှ လိုလားကြမည်မဟုတ်သည်မှာ ထင်ရှား၏။ အဆိုပါအက်ဥပဒေနှင့် နည်းဥပဒေများတွင်ပါရှိသည့် ရည်ရွယ်ချက်နှင့် ပြဋ္ဌာန်းချက်များကိုရှု၍ သုံးသပ်သောအခါတွင်လည်း ဤကဲ့သို့သောအခြေမျိုးကို မလိုလားကြောင်းမှာ ထင်ရှားပြန်လေသည်။ ထို့ကြောင့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်အစိုးရ ဒီမိုကရေစီဒေသန္တရအုပ်ချုပ်ရေးဝန်ကြီးဌာနမှ ၁၀-၆-၅၄ နေ့

စွဲဖြင့် ချမှတ်သောအမိန့်သည် တရားဥပဒေနှင့်ထင်ရှားစွာ ဆန့်ကျင်လျက်ရှိသည်ဟုယူဆသည့်အတိုင်း ထိုအမိန့်ကိုပယ်ဖျက်လိုက်သည်။

ဤအမှုတွင် ဤရုံးတော်အတွက် နှစ်ဦးနှစ်ဘက် အမှုသည်များသည် မိမိတို့စရိတ်ကို မိမိတို့ကုန်ခံစေရမည်။

၁၉၅၅

ဦးကံညွန့်နှင့် ဒေသန္တရအုပ်ချုပ်ရေးအတွင်းဝန် ပါ၂ ဦး။

BURMA LAW REPORTS

HIGH COURT

1955

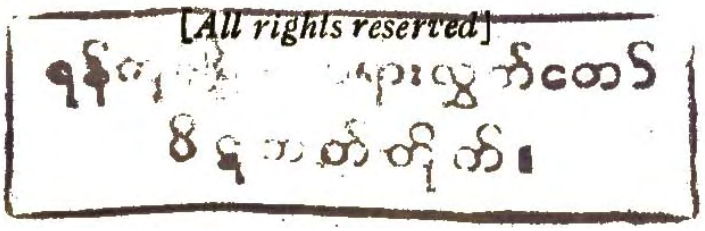
Containing cases determined by the High Court, Rangoon

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latter enactment. As it is both the enactments must be read together. *U Paw Tun Aung & Co.* v *Abdul Razak*, (1948) B.L.R. 182 ; *P. D. Patel and one* v. *Messrs. The Central Bank of India Ltd.*, Civil Revision No. 73 of 1948 of the High Court, referred.

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APPEAL UNDER S. 104, SUB-S. 1, CLAUSE (g)—*Ss. 24 and 95, Civil Procedure Code—Award of Compensation—Order XXXVIII, Rule 1, Civil Procedure Code, provisions mandatory—Arrest before Judgment—Order 43, Rule 1, Civil Procedure Code, appeal against order passed under Order 38, Rule 1, s. 11, Civil Procedure Code*, Res judicata—*Binding force of consent decrees.* The applicant sued the Respondent for recovery of a sum of K 5,610 and had him arrested before judgment under Order (XXXVIII), Rule 1, Civil Procedure Code. The Respondent offered to furnish security and accordingly he was released from custody on his furnishing security. The suit was eventually decreed on 4th September 1950. On 6th September 1950, the Respondent filed an application under s. 95, Civil Procedure Code for compensation from the applicant on the ground that the arrest before judgment was applied for on insufficient grounds. The trial Court awarded K 300 to the Respondent as compensation. On apppeal, it was contended by the applicant that the Respondent's application under s. 95, Civil Procedure Code was not maintainable in law as he furnished security for his due appearance in Court instead of showing cause why such security should not be furnished by him. *Held* : Upholding the contention, that the Respondent not only failed *to show cause why he should not furnish security for his due appearance* in Court but also offered security for such appearance. Therefore, the question whether or not he had been arrested on sufficient ground is *res judicata* and the same Court, namely, the 2nd Judge of the City Civil Court cannot make an order under s. 95 for the pavment of compensation on the ground that the arrest of the Respondent had been applied for on insufficient grounds. The Order of the trial Court set aside. *Rama Mudali* v. *Marappa Goundan*, A.I.R. (1934) Mad. 638, followed. *Ram Kirpal* v. *Rup Kuari*, 6 All. (P.C.) 269=11 A.I. 37; *Hook* v. *Administrator-General of Bengal and others*, 48 I.A. 187 ; *In Kasarabada Venkatachalapathi Rap* v. *Gadiraju Venkatappayya and another*, 55 Mad. 495, referred to. For the binding force of consent orders, reference is made up to : *Kalidar Chaudhuri* v. *Prasanna Kumar Das*, 47 Cal. 446 and also *Jago Mahton* v. *Khirodhar Ram*, 2 Pat. 759 ; *Mrs. Lall* v. *Rajkishore Narain Singh*, 13 Pat. 86 ; *Ramnarain* v. *Basudeo*, 25 Pat. 595 ; *Haji Bibi* v. *Mohamed Jawad Khorasamy and six others*, Civ. 1st Appeal No. 91 of 1952, referred to.

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APPLICATION UNDER s. 14 (*1*), URBAN RENT CONTROL ACT, 1948, FOR RESCISSION OF DECREE—*S. 11* (1) (d) *as a shield by landlord—Controller's Certificate under s. 14-A unnecessary.* The Respondents obtained a decree for ejectment and for K 545 as arrears of rent against the appellant who made an application under s. 14 (*1*) of the Urban Rent Control Act for the rescission of the Decree. Respondents opposed the application on the ground that the land was required by them *bonâ fide* for their own occupation. Trial Court held that the landlord could invoke s. 11 (*1*) (*d*) of the Urban Rent Control Act as a shield in a case where the tenant applied for rescission of an ejectment decree, which finding was upheld by the lower appellate Court. On second appeal it was contended by the appellant that in the absence of a Controller's Certificate under s. 14-A, the provision of s. 11 (*1*) (*d*) could not be used as a shield. *Held :* S. 14-A of the Urban Rent Control Act is explicit in that the Certificate mentioned therein is required only when the landlord files a suit for the ejectment of a tenant or a person permitted to occupy under s. 12 (*a*) on the ground specified in clauses (*d*), (*e*) or (*f*) of s. 11 or clause (*c*) of s. 13. When the provisions of clauses (*d*), (*e*) or (*f*) of s. 11 are invoked as a shield to an application under s. 14 (*1*) such a Certificate is not necessary. *Tai Chuan & Co.* v. *Chan Seng Chong*, (1949) B.L.R. 89, followed ; *U Ko Yin* v. *Daw Hla May*, Special Civil Appeal No. 1 of 1949, High Court.

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APPLICATION UNDER S. 523, CRIMINAL PROCEDURE CODE BEFORE MAGISTRATE HAD TAKEN COGNIZANCE OF THE CASE—*Omission by police to make a report as contemplated by s. 523 (1)—Enquiry by Magistrate at the instance of private parties and not of the police—Ss. 516-A, 517—Proceedings though irregular not illegal or without justification.* A first information report under s. 420, Penal Code was lodged against one Loo Shein Whet for fraudulently obtaining 1,000 tins of coconut oil from Tye Seng & Co. by posing himself as a representative of Nam Choung Co.—who also lodged a first information report against him for criminal misappropriation. The police seized the tins of oil from the 1st Respondent Shar Kyaung Hoe. No report was made of the seizure to the Magistrate as contemplated by s. 523 (1), Criminal Procedure Code. While the tins were still with the police and before the two cases against Loo Shein Whet were sent up and before he was arrested, three separate applications, *viz.* by Shar Kyaung Hoe, the 1st respondent by Maung Kyin Win and Lee Tuck, 2nd and 3rd respondents representing Nam Choung Co., and by Ah Tang representing Tye Seng & Co. the applicant, were filed before the 5th Additional Magistrate, Rangoon, under s. 523, Criminal Procedure Code, for the return of the tins of oil. The Magistrate returned the articles to the 1st respondent Shar Kyaung Hoe on security. The applicant filed an application for revision against the order. *Held:* (1) It is only at the instance of the police officer who seized the property under the circumstances set out in s. 523 (1), Criminal Procedure Code, can a Magistrate pursue the course prescribed therein affecting the disposal of the property seized by the police ; (2) It is the duty of the police officer seizing the property to report forthwith to the Magistrate concerned who is the only person competent to order the disposal of such property; (3) At the conclusion of a judicial proceeding which is neither an enquiry nor a trial, namely a proceeding in which evidence was taken in the absence of the accused under s. 512 of the Criminal Procedure Code, the order of the Magistrate affecting the disposal

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of the property connected with the case is one made, not under s. 517 but one under s. 523(4). Even if the Magistrate has passed an order not on the police report but at the instance of one of the parties interested in the possession of the property seized by the police, yet such an order can be considered to have been made under s. 523 of the Criminal Procedure Code ; (5) Unless failure of justice has been occasioned by the Magistrate's order, the Magistrate's order should not be disturbed. *Ghulam Ali* v. *Emperor*, (1945) A.I.R. (32) Lah. 47 ; *U Ba Hlaing* v. *Ballabux Sodani*, (1936—47) 14 Ran. I.L.R. 633 ; *Maung Po Tu* v. *The King*, (1938) R.L.R. 143 at 147 ; *Maung Han Thein* v. *The Commissioner of Police, Rangoon and two others*, (1950) B.L.R. (S.C.) 45, referred to.

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CHARGE UNDER S. 409, PENAL CODE—*Payment of Sales Tax—Dealer in goods not an agent of the Government—S. 23* (1) (6), *General Sales Tax Act, 1949—Recovery of Sale Tax.* Applicant, a dealer in cloths was charged under s. 409, Penal Code for failure to credit Sales Tax to Government. *Held :* A dealer of goods is not a Government servant and as such, he is not an agent of the Government. There was no provision in the Central Provinces and Berar Sales Tax Act, 1947, which constituted a dealer an agent of the Government, and this decision may be accepted in Burma, as the General Sales Tax Act, 1949 (Burma Act No. 60 of 1949) is more or less on the same principles as laid down in the Sale Tax Act of India. *Jethalal Virajlal* v. *The State of Madhya Pradesh*, A.I.R. (1953) Nag. 194, approved. The dealer, to recoup the Sale Tax increases the price to cover the Tax, and the Sales Tax becomes merged in the total amount paid by the purchaser and the price so obtained for selling those goods solely belong to the dealer and therefore there cannot be any entrustment of Sales Tax to him by the Government. The remedy that is open to the Government for recovery of the Sales Tax is by institution of recovery proceedings under s. 23 (*1*) (*6*) of the General Sales Tax, 1949.

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CHILD UNDER 6 YEARS OF AGE—*Conviction under s. 112, Railways Act—Ss. 82 and 83, Penal Code—Ss. 126 to 130, Railways Act.* The Respondent, a child of 6 years of age was convicted under s. 112, Railways Act. *Held:* S. 82 of the Penal Code declared that nothing is an offence which is done by a child under 7 years of age and although s. 130 of the Railways Act suspends the operation of ss. 82 and 83 of the Penal Code in respect of ss. 126 to 129 of the Railways Act, s. 130 of the Railways Act has no effect upon offences committed under s. 112 of the said Act. *Held:* The immunity of children under 7 years of age from Criminal liability extends to offences under any Special or local Law. The conviction is bad in law and is set aside. *The King* v. *Ba Ba Sein*, (1938) R.L.R. p. 227, followed.

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CIRCUMSTANTIAL EVIDENCE—MUST BE CONSISTENT—EVERY PIECE OF EVIDENCE WHICH MAKES A CHAIN MUST BE RECORDED—FAILURE OF ONE LINK DESTROYS THE CHAIN 146

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CIVIL PROCEDURE CODE, s. 47—"*Representative*"—*Third party obtaining occupation of premises during pendency of litigation in respect of it—Suit by third party against landlord decree-holder not maintainable. Held:* A third person who has stepped into the shoes of the tenant judgment-debtor and occupied the premises in the course of the execution of the ejectment decree against the latter can be taken as representative of the parties as contemplated in s. 47 of the Civil Procedure Code, and as such representative is barred from bringing a suit against the landlord decree-holder. *Ishan Chunder Sarkar and one* v. *Beni Madhub Sirkar*, I.L.R. 24 Cal. 62, followed. *Held also:* A landlord decree-holder can avail himself of the provisions of Order XXI, Rules 97 and 98, Civil Procedure Code when obstructed by a stranger to the suit for possession of the premises. *Babu Safarmal Tibrewala* v. *G. M. Latimour*, (1948) B.L.R. 113, referred to.

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CIVIL PROCEDURE CODE, s. 100—*Difference between clause* (a) *and clause* (d)—*Value of appeal, below and above Rs. 500 - Question of law and question of fact, what is, to bring s. 100, sub-s. 1, clause* (a) *into operation. Held:* As the value of the appeal does not exceed Rs. 500, the appellant can only succeed if he can bring his appeal within the ambit of clause (*a*), sub-s. 1 of s. 100 of the Civil Procedure Code, that is to say, unless he could show that the decision is contrary to law or to some usage having the force of law. Where the value of the subject-matter exceeds Rs. 500, however clause (*d*) of sub-s. 1 of s. 100 as inserted by Burma Act No. 17 of 1945 is applicable and the second appeal can be treated as if it were an appeal against the decree in an original suit. *Held also:* Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law, but the

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question whether the fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact. *Nafar Chandra Pal* v. *Shukur and others*, 45 I.A. p. 183 ; *Wali Mohammad and others* v. *Mohammad Bakhsh and others*, 57 I.A. 91; *Durga Choudrain* v. *Jawahir Singh Choudhri*, L. R. 17 I. A. 122, 127 ; *Midnapur Zamindary Co.* v. *U-ma Charan Mandal*, 23 Cal. W. N. 131, followed.

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CIVIL PROCEDURE CODE, ORDER VI, RULES 4 AND 5—*Further and better particulars—Fraud and collusion, allegations of—Arbitration proceeding—Interlocutory order, revision of, when justified. Held :* Where charges of fraud or misconduct against the other party have been alleged, the tribunal which is called upon to decide such issues should compel that litigant to place on record precise and specific details of these charges. A charge of fraud must be substantially proved as laid ; when one kind of fraud is charged, another kind cannot on failure of proof be substituted for it. *John Wallingford* v. *Mutual Society*, 5 A.C. 697 ; *Bharat Dhanra Syndicate* v. *Harish Chandra*, A.I.R. (1937) (P.C.) 146 ; *Abdul Hossein Zanail Abadi* v. *Charles Agnew Turner*, 11 Bom. 620 (P.C.), referred to. *Balaji Valad Raoji Colhe* v. *Gangadhar Ramkrishna Kulkarni*, 32 Bom. 255, referred to. *Held also :* The High Court will revise an interlocutory order only when irremediable injury will be done and a miscarriage of justice will ensue if the Court held its hand. *Mahomed Chootoo and others* v. *Abdul Hamid Khan and others*, 11 Ran. 36, followed.

M.C.T. CHIDAMBARAM CHETTYAR BY AGENT K.R.M. MUTHIAH ACHARI AND SIX *v.* V.L.S. CHOCKALINGAM CHETTYAR AND FIVE 116

CIVIL PROCEDURE CODE, ORDER XX, RULE 11 (2)—*Limitation Act, Article 175—Application by judgment-debtor for order to pay decretal amount by instalments—Limitation Act, s. 5, applicability of—Interference in revision, when justified. Held :* S. 5 of the Limitation Act does not apply to applications governed by Article 175 of the Act such as the present application for an order to pay a decretal amount by instalments filed six months after the decree had been passed. *Ma Naw Naw and one* v. *V.E.S.S.M. Somasundran Chetty*, I.L.R. 2 Ran 655; *Kali Prasad Tewari* v. *Parmeshwar Prasad Marwari*, A.I R. (1929) All. 127; *B. Narotam Das* v. *B. Bhagwan Dass*, A.I R. (1934) All. 314 ; *A.R.K.N. Ramanathan Chettyar* v. *Baldan Singh*, A.I.R. (1933) Ran. 110 ; *Veerayya* v. *Sreesailam*, A.I R. (1928) Mad. 556; *Ram Raj Dassundhi* v. *Mt. Umraji and another*, A.I.R. (1926) All. 345, referred to. *Held also :* The powers of the High Court under s. 25 of the City Civil Court Act are much wider than those

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exercisable under s. 115 of the Civil Procedure Code, and the High Court can interfere in revision where the City Civil Court has entertained an application clearly beyond the period prescribed by limitation. *Ma Than Yin* v. *Tan Kheat Kheng* (a) *Tan Keit Sein*, (1951) B.L.R. 161, distinguished. *Siva Dass Dey* v. *Ashabi and one*, I.L.R. 3 Ran. 471, followed.

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COMPLAINT DRAFTED BY LAWYER LAID BEFORE COURT—*Process under s. 307, Penal Code issued—Accused charged under ss. 352, 448 and 506, Penal Code, ultimately acquitted—Criminal Procedure Code, s. 250—Complainant called upon by Court to show cause against payment of compensation—Criminal Procedure Code, s. 476—Prosecution of complainant under Penal Code s. 211, petition by acquitted accused—Complaint by Court, requirements. Held:* When complaints under s. 476 are made, the officer making them must state the evidence on which he relies, otherwise the Magistrate to whom the case is referred has no means of ascertaining what the evidence is on which the prosecution is based. Similarly a Civil Court is bound to set forth the specific assignment of perjury; failure to do so is a material irregularity within the meaning of s. 115, Civil Procedure Code. *Shankar Sahai* v. *Emperor*, A.I.R. (1930) Oudh 404; *Emperor* v. *Kashi Shukul and another*, I.L.R. 38 All. 695, followed. *Held also:* Failure of a complainant to prove his case may result in the acquittal of the accused but it will not by itself warrant his prosecution for bringing a false case. *Jinilal Mandal* v. *Chandardeo Prasad and others*, A.I.R. (1941) Pat. 420, followed. *Held further:* Inordinate delay in making application for action under s. 476, Criminal Procedure Code, as well as where there is no reasonable probability of a conviction, and where the application is made not in the interests of justice but to satisfy a private grudge, are grounds for the Court to reject such an application. *Hwe Eye Hain* v. *The King*, (1948) B.L.R. 40, followed.

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CONTRACT ACT, S. 69—The appellants leased out a piece of land to the Respondents at a monthly rent of K 30. Subsequently, the area was occupied by the K.N.D.Os. and the appellants evacuated to Rangoon. The appellants sued the Respondents for arrears of rent accrued due amounting to K 411 during their absence. The

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Respondents pleaded that they had paid K 360 to the K.N.D.O. authorities during their occupation, and as such they were entitled to be reimbursed under s. 69 of the Contract Act. *Held :* For the application of s. 69, Contract Act, it is essential that there should be : (i) a person, who is bound by law to make certain payments ; (ii) another person who is interested in such payment being made and (iii) a payment by such last mentioned person. This section clearly applies to payments made *bonâ fide* for the protection of one's own interest, if a person, who paid the money was not actuated by a desire to protect his own interests, he certainly cannot make a claim under the Section. The words "compellable to pay" does not and cannot mean "compellable to pay through fear of physical violence" and the words "bound by law" do not mean "compellable to pay". Suit decreed in full with costs in all the Courts.

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CONTRACT ACT, s. 202 130

CONVICTION UNDER S. 302 (1) (*b*), PENAL CODE—*Circumstantial evidence —Nature, quantum and burden of proof. Held :* In a case of circumstantial evidence, the failure of one link destroys the chain so that it is of the utmost importance to get on the record every piece of evidence which makes a chain. *Sheo Narain Singh* v. *Emperor*, (1920) 58 Indian Cases, 457, followed. *Held further :* Circumstantial evidence must be consistent, and consistent only with the guilt of the accused, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. If the evidence is consistent with any other rational explanation, then there is an element of doubt of which the accused must be given the benefit. *Basangouda Yamanappa* v. *Emperor*, A.I.R (1941) Bom. 139 ; *Pir Hasan Din* v. *Emperor*, A.I.R. (1943) Lah. 56 ; *Sher Mohamed* v. *Emperor*, A.I.R. (1945) Lah. 27 ; *Ram Kala* v. *Emperor*, A I.R. (1946) All. 191 ; *Maung Maung Gyi* v. *The Union of Burma*, Criminal Appeal No. 452 of 1954 (H.C.), affirmed. *Held further :* A Judge is bound to ask himself whether there is any rational explanation of the evidence and such a reasonable explanation should not be rejected because it was not offered by the accused. *Basangouda Yamanappa* v. *Emperor*, A.I.R. (1941) Bom. 139, followed. *Held further :* An accused person owes no duty to anybody and the burden of proving his guilt remains throughout the trial with the prosecution who must prove such guilt beyond all reasonable doubt. *Sein Hla* v. *The Union of Burma*, (1951) B.L.R. 289, followed.

BENJAMIN XAVIER (*alias*) MAUNG TIN WIN *v.* THE UNION OF BURMA 146

CONVICTION UNDER S. 380, PENAL CODE BY A SECOND CLASS POWER MAGISTRATE—*Case submitted under s. 349 (1), instead of under the proviso to s. 562 (1), Criminal Procedure Code to the District Magistrate for action under s. 562—Transfer of case by District Magistrate to Second Additional Magistrate for disposal—Acquittal by Second Additional Magistrate—S. 380, Criminal Procedure Code—Burma Act No. XIII of 1945.* The Respondent was convicted under s. 380,

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Penal Code by a Second Class Power Magistrate, who submitted the case under s. 349 (1), Criminal Procedure Code to the District Magistrate for release on probation under s. 562. The District Magistrate transferred the case to the Second Additional Magistrate who recalled and examined three prosecution witnesses and acquitted the Respondent. On reference, *Held :* (i) Proceedings should be submitted under the proviso to sub-s. (1) of s. 562 and not under s. 349 (1), Criminal Procedure Code ; (ii) s. 349 (1) is applicable only to a case where a Magistrate of the Second Class is merely of the opinion that the accused is guilty of the offence charged but that he ought to receive a punishment different in kind from and more severe than that which the Magistrate is empowered to inflict. When the Magistrate considers that a person convicted by him should be released on probation of good conduct, s. 349 (1) of the Criminal Procedure Code is irrelevant ; (iii) A Magistrate to whom a criminal case has been referred under the proviso to section 562 can only dispose of it in the manner provided by s. 380, Criminal Procedure Code and treat the accused as an already convicted person. He is not empowered to set aside the conviction by the referring Magistrate and acquit him. ***Mi Thi Hla*** v. ***Mi Kin***, (1914-16) 2 U B.R. 55 ; ***Morali and six others*** v. ***King-Emperor***, (1907-08) 4 L.B.R. 277, dissented from ; ***The Public Prosecutor*** v. ***Malaipati Gurappa Naidu***, I.L.R. 57 Mad. 85, followed. (iv) By the deletion of s. 380, Criminal Procedure Code and inclusion of sub-s. (5) in s. 562, by Burma Act XIII of 1945, the Magistrate to whom a case is submitted under the proviso to sub-s. (1) of s. 562 cannot acquit the accused. The only thing he can do is to sentence him or to take such appropriate action as provided for in s. 562. The inquiry envisaged in sub-s. (5) is to be confined to the expediency or otherwise of releasing the offender on probation of good conduct or of releasing him after due admonition. Order of acquittal set aside and case remanded.

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CRIMINAL PROCEDURE CODE, s. 145 (4), PROVISO (1)—*Inquiry under sub-s. (4) mandatory.* It is erroneous to make an order under sub-s. (5) without having ever held an inquiry under sub-s. (4). An inquiry under sub-s. (4) is mandatory and that is a condition precedent to the making of an order under sub-s. (6). *Muhammad Aliyar Muhammed* v. *Shamsul Hao Pi Zialdin Shah and others*, A.I.R. (1940) Sindh, p. 33, followed ; *Vaidyaunatha Iyer and others* v. *Suppalu Aurmal and others*, 15 Cr. L.J. 669, discussed.

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——————————— ss. 349 (1), 380, 562 306

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CRIMINAL PROCEDURE CODE, s. 439—*Exercise of first class power by Second Class Power Magistrate appointed Subdivisional Magistrate under s. 13, Criminal Procedure Code—S. 36, Criminal Procedure Code—Explanation to s. 397, Criminal Procedure Code.* The respondent was sentenced to one year's rigorous imprisonment under sub-s. 6 of s. 123, Criminal Procedure Code for failure to give security for good behaviour by the Subdivisional Magistrate, who was only a Second Class Power Magistrate, appointed Subdivisional Magistrate under s. 13, Criminal Procedure Code. Can he exercise the powers of a First Class Magistrate by virtue of such appointment? *Held:* The moment the President appoints a Second Class Power Magistrate to be a Subdivisional Magistrate under s. 13 of the Criminal Procedure Code, such Magistrate gets all the ordinary powers of that office conferred by s. 36 of the Criminal Procedure Code and specified in the Third Schedule. *Held further:* Such punishment imposed under sub-s. 123, Criminal Procedure Code is more preventive than punitive and is not a sentence of imprisonment.

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CRIMINAL PROCEDURE CODE, ss. 516-A, 517, 523 260

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CRIMINAL PROCEDURE CODE, s. 562 (1)—*Release on probation of good conduct—"Instead of" other punishment. Held:* An order of release on probation of good conduct can be passed under s. 562 (1), Criminal Procedure Code only instead of sentencing a convicted offender to punishment.

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CRIMINAL REVISION BY PRIVATE PERSON—*Enhancement of sentence. Held:* There is nothing in the Criminal Procedure Code which either expressly or impliedly prevents the High Court from enhancing a sentence at the instance of a private person.

MAUNG PU AND MAUNG TIN MAUNG *v.* MAUNG KYI MAUNG AND MAUNG KYIN PO 203

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DECREE OF SUBORDINATE COURT—*Time fixed for payment of certain sum of money—Liability for non-compliance—Appeal, whether time fixed for payment enlarged—Difference between the effect of an appeal summarily dismissed and of an appeal giving judgment and decree confirming that of trial Court.* Plaintiffs sued defendant for ejectment from house and obtained judgment

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provided they pay Rs. 600 within one month on failure of which suit will stand dismissed. District Court confirmed the judgment and conditional payment on appeal; second appeal summarily dismissed by High Court. Plaintiffs then made the payment within a month of the High Court's order; the trial Court declined to accept it and dismissed the suit. Plaintiffs applied for revision of the order; High Court on a review of the twelve authorities cited. *Held:* If a decree in which time is given for payment of money is confirmed on appeal it has the effect of extending the time fixed under the decree thus confirmed so that time would run from the date of the decree confirming it. However, where an appeal is dismissed under Order XLI, Rule 11, Civil Procedure Code, the decree appealed from cannot be taken to have been confirmed under Rule 32 so that dismissal of the appeal leaves the decree untouched. *Ramaswami Kona* v. *Sundara Kona*, I.L.R. 31 Mad. 28; *Daulat and Jagjivan* v. *Bhukandas Manekchand*, I.L.R. 11 Bom. 172; *Satwaji Balajiraw Deshamukh* v *Sakharlal Atmaramshet*, I.L.R. 39 Bom. 175; *Dattatraya Vithal Garwara* v. *Wasudeo Anant Gargate and others*, I.L.R. 47 Bom. 956; *Bhola Nath Bhuttacharjee* v. *Kanti Chundra Bhuttacharjee*, I.L.R. 25 Cal. 311; *Bapu* v. *Vajir*, I.L.R. 21 Bom. 543; *Noor Ali Chowdhuri* v. *Koni Meah and others*, I.L.R. 13 Cal. 13; *Nam Narain Singh* v. *Lala Roghunath Sahai*, I.L.R. 28 Cal. 257; *Basanta Kumar Adak* v. *Radha Rani Dasi and another*, A.I.R. (1922) Cal. 329; *Lala Gobind Prasad* v. *Lala Jugdap Sahay*, I.L.R. 4 Pat. 345; *Panchu Sahu* v. *Muhammad Yakub and others*, A.I.R. (1927) Pat. 345; *Ghanshyam Lal* v. *Ram Narian*, I.L.R. 31 All. 379, referred to.

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DISMISSAL ORDER—WHETHER "FINAL ORDER" WITHIN AMBIT OF S. 5, UNION JUDICIARY ACT 299

DISPOSAL OF TENANCIES ACT, 1948—*Village Agricultural Committee—Expression "final" in Rule 8 (3) of the Disposal of Tenancies Rules, 1949, when applies—Suit for injunction against Village Agricultural Committee, whether lies. Held:* By the proviso to s. 3 of the Disposal of Tenancies Act, 1948, a suit can be maintained in a Civil Court for the purpose of ascertaining whether a Village Agricultural Committee or a District Agricultural Committee has jurisdiction to deal with a matter which it has decided. *Held also:* The expression "final" in Rule 8 (3) of the Disposal of Tenancies Rules, 1949 will apply only to a matter over which the Village Agricultural Committee or the District Agricultural Committee has jurisdiction directly or incidentally to deal with or pass orders therein. *The Secretary of State* v. *Fahamidannissa Begum and others*, I.L.R. 17 Cal. 590, followed.

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DIVORCE ACT, s. 17—*Confirmation of divorce—S. 12, Divorce Act, proof of absence of connivance or collusion between the parties.* A divorce proceeding affects the status of the parties, and the necessary conditions to justify a decree for dissolution of marriage should be complied with. The Divorce Act specifically lays down that certain facts must be proved before a Court has jurisdiction to pass a decree for dissolution of marriage. S. 12 of the Divorce Act enjoins that the Court must be satisfied of the absence of connivance or collusion between the parties ; and in the absence of satisfactory proof of such acts required by law in support of a petition for divorce, it would not be justified in granting a decree for divorce. *Ma Maw* v. *Maung Yan Han* ; *Maung Hla Myint* v. *Dorothy Hla Myint* ; *Ma Ngwe Aung* v. *Maung Kyaw Hla Aung*, I.L.R. 11 Ran. 68, referred to. Even though there be a statement that there is no collusion or connivance between the parties such statement will not absolve the court from its duty of ascertaining whether in the circumstances of a particular case there was no collusion or connivance between them. *Reverend Chit Pe* v. *Ma Khin Sein and one*, (1951) B.L.R. p. 131, followed.

MRS. M. TRUICTWEIN (*a*) MA AYE THWE *v.* MR. D. TRUICTWEIN 287

EJECTMENT SUIT—*Application by sub-tenant to be added as party—Relationship between landlord and sub-tenant—Necessary party, circumstances when sub-tenant becomes one. Held :* Under the Urban Rent Control Act, 1948 a sub-tenant is a tenant only in relation to the tenant-in-chief and he is not a tenant to the superior landlord, the owner of the premises. *Baban* v. *Champabai*, I.L.R. (1949) Nag. 432 ; *Makhan Lal Kela and another* v. *Girdhari Lal and another*, A.I.R. (1952) All. 421 ; *Ramkissendas and another* v. *Binjraj Chowdhury and another*, I.L.R. 50 Cal. 419, referred to. *Held :* When a landlord who has obtained a decree for ejectment against his tenant and is resisted by a third party who was not a party to the proceedings, the landlord can avail himself of the provisions of Order XXI, Rules 97 and 98 of the Civil Procedure Code. *Babu Safarmal Tibrewala* v. *G. M. Latimour*, (1948) B.L.R. 113, followed. *S. Periayya* v. *Kyaw Leong Tong Society*, (1947) B.L.R. 190, dissented from. *Messrs. Importers and Manufacturers Ltd.* v. *Pheroze Framroze Taraporewala and others*, A.I.R. (1953) (S.C.) India 73, followed. *Held further :* In a suit for ejectment based upon the fact of there being arrears of rent, the landlord must not only aver but must also prove that there had been in fact arrears of rent. As a sub-tenant is bound by the decree against the tenant he is vitally interested in seeing that there is no collusion between the landlord and the tenant : accordingly, a sub-tenant is not only a proper party but one the court should add as a party defendant under Order 1, Rule 10 (2), Civil Procedure Code. *Jatindra Mohan Das* v. *Khitpatinath Mitra and another*, 84 C.L.J. 263 ; *Rajani Kanto Das* v. *Daval Chand De and others*, A.I.R. (1950) Cal. 244, distinguished. *Bacha Shan Sunder Kuer* v. *Balgobind Singh*, I.L.R. 10 Pat. 90, followed.

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EVIDENCE OF CO-ACCUSED—WHETHER IT MAY BE USED TO FILL UP GAPS IN PROSECUTION EVIDENCE 321

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EVIDENCE ACT, s. 92—*Construction of words "between the parties to any such instrument."* The words refer to the persons who on the one side and the other came together to make the contract or disposition of property and would not apply to questions raised between the parties on the one side only of a deed. It will in no way prevent parties on one side of a deed to show by parol evidence their mutual relations, the one with the other so that it is open to one of the two persons in whose favour a deed of sale is purported to be executed to prove by parol evidence in a suit by him against the other that the defendant was not a real but a nominal party only to the purchase. *Ma Aye Tin* v. *Daw Thant*, A.I.R. (1941) Ran. 99 (not the same as officially reported in 1940 R.L.R. 831); *Mulchand and another* v. *Madho Ram*, 10 All. 421; *Shamsh-ul-jahan Begam and another* v. *Ahmed Wali Khan*, 25 All. 337, followed; *Maung Tun Gyaw* v. *Maung Po Shwe*, 11 L.B.R. 351, referred; *Mahammad Sultan Mohiden Ahmed Ansari* v. *Amthul Jalal*, A.I.R. (1927) Mad. 1102; *Lakshmana Sahu* v. *M. Simachala Patra*, A.I.R. (1941) Pat. 211, followed.

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EXECUTION OF DECREES OF ORIGINAL AND OF APPELLATE COURTS—*Time fixed for payment of money.* It is a fundamental principle of law that when the appellate Court makes a decree, the decree of the original Court is merged in that of the superior Court and it is the latter decree alone that can be executed. It is also settled law that when a time is fixed for payment by the decree of the lower Court, and the decree is affirmed on appeal, the decree capable of execution is that of the appellate Court. *Saiyid Jowal Hussain* v. *Gendan Singh and others*, A.I.R. (1926) (P.C.) 93; *S. M. Hashim* v. *J. A. Martin*, 4 Ran. 562; *Ram Charan* v. *Lakhi Kant*, (1871) 7 B.L.R. 704; *Chanshyam Lal* v. *Ram Narain*, (1909) I.L.R. Vol. 31, All. 379; *Ramaswami Kone* v. *Sundara Kone*, (1907) I.L.R. Vol. 31, Mad. 28; *Satwaji Balajiray Deshamukh* v. *Sakharlal Atmaramshet*, (1914) I.L.R. Vol. 39, Bom. 175; *Darubhai Mithabhai* v. *Bechar Desai*, (1925) Bom. 270; *Satwaji Balajirav Deshamukh* v. *Sakharlal Atmaramshet*, (1924) I.L.R. 4 Pat. 378; *Panchu Sahu* v. *Muhammed Yakub and others*, (1927) A.I.R. Pat. 345; *Noor Ali Chowdhuri* v. *Koni Meah and others*, (1886) I.L.R. 13 Cal. 13; *Nom Narain Singh* v. *Lala Roghunath Sahai*, (1895) I.L.R. 22 Cal. 467; *Rup Chand and others* v. *Shamsh-ul-Jahan*, (1889) I.L.R. 11 All. 467; *Maung Chit Maung and one* v. *Daw Saw*, Civil Revision No. 56 of 1952 of High Court, approved.

U JONE BIN *v.* N. B. SEN GUPTA 218

EXCISE ACT, s. 30 (*a*)—*Acquittal of accused without examining the Complainant or the prosecution witnesses as required by s. 244 (1), Criminal Procedure Code, Trial illegal, void and incurable—High Court's power in revision.* The Respondents were sent up under s. 30 (*a*), Excise Act and they pleaded not guilty to the charge. The trial Magistrate without examining the Complainant or taking any evidence of the prosecution witnesses as required under s. 244 (1), Criminal Procedure Code acquitted them. *Held*: That the acquittal of the Respondent by the trial Magistrate without examining the Complainant or taking the evidence of the prosecution witnesses in accordance with s. 244 (1), Criminal Procedure Code is illegal—an illegality

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which cannot be cured. *Held further :* The trial being illegal and void, the High Court in its revisional jurisdiction can set aside the order of acquittal. *Emperor* v. *Varadarajula Naidu*, 33 C.L.J. 274, followed.

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"FINAL", MEANING OF—IN RULE 8 (3) OF DISPOSAL OF TENANCY RULES 89

FOREIGNERS REGISTRATION ACT (BURMA ACT NO. 7 of 1940), s. 5—*Failure to register under Registration of Foreigners Rules, 1948—Exemption Order No. 4, dated the 16th December 1948—Foreigner in the service of the Union. Held :* By Act 35 of 1952, the Inland Water Transport Board is an organization of the Government : the applicant is in the service of the Board and therefore of the Union Government, and, as such, he is exempt from the provisions relating to the registration of foreigners contained in the Registration of Foreigners Rules, 1948.

KAWLI JANNA *v.* THE UNION OF BURMA 63

FOREIGN EXCHANGE REGULATION ACT, 1947—*S. 6 (1) and s. 24 (1)—S. 120-B, Penal Code—The term "accomplice"—S. 342, sub-s. (1), Criminal Procedure Code—S. 32* (3), *Evidence Act—Guiding principles in appeals against acquittals.* In the Court of the 1st Special Judge, (S.I.A B. & B.S.I.A. Act) Rangoon, S. J. Trivedi and G. M. Mehta were tried under s. 24 (*1*) of the Foreign Exchange Regulation Act, 1947 read with s. 120-B of the Penal Code. S. J. Trivedi was convicted. G. M. Mehta was acquitted. S. J. Trivedi appealed against his conviction and Sentence and the Union of Burma appealed against the order of acquittal. Both the appeals were heard together. *Held :* The correct proposition of the law relating to what the term "accomplice" connotes is that the term "accomplice" signifies a guilty associate in crime or a person who can be jointly indicted with the accused in the case. *Ramswami Goundan* v. *Emperor*, I.L.R. 27 Mad. p. 271; *Kailash Missir* v. *Emperor*, A.I.R. (1931) Pat. 105. An Officer of the B.S.I. appointed under Act 50 of 1951 is a police Officer when he investigates the offences mentioned in Schedule (1) annexed thereto. The Statement made to him is not admissible in evidence. S. 162 of the Criminal Procedure Code applies to the statement made to him in the course of investigation. *U Soe Lin* v. *The Union of Burma*, Criminal Revision No. 45-B of 1953, approved. Further, the B.S.I. Officer is a police Officer within the meaning of that term in s. 162 of the Criminal Procedure Code. *Maung San Myin* v. *King-Emperor*, I.L.R. 7 Ran. 771 ; *Ah Foong* v. *King-Emperor*, I.L.R. 46 Cal. 411 ; *Ameen Sharif* v. *Emperor*, I.L.R. 61 Cal. 607 ; *Nanoo Sheikh Ahmed and another* v. *Emperor*, I.L.R. 51 Bom. (F.B.) 78 ; *Bachoo Kandere* v. *Emperor*, A.I.R. (1938) Sindh (F.B.) 1, referred to ; *Re. Someshwar H. Shelat*, A.I.R. (1946) Mad. 430, approved. It is a fundamental principle that in a Criminal trial the burden of proof lies on the prosecution to establish the charge beyond reasonable doubt and that where an accused

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person should have been discharged for want of *primâ facie* case against him the Court should not use the evidence of a co-accused given under s. 342 (1) of the Code of Criminal Procedure to fill up the gaps in the prosecution. *Ba Pe and one* v. *The Union of Burma*, (1950) B.L.R. 178, followed. But when the prosecution has succeeded in establishing a *primâ facie* case against the accused before the other co-accused was examined on oath, then the evidence of the co-accused may be used against the accused, although the weight to be given to this evidence will depend in the circumstances of the case. *U Saw and nine others* v. *The Union of Burma*, (1948) B.L.R. 217, followed. A statement made by a person which would expose him to a criminal prosecution is admissible in evidence under s. 32 (3) of the Evidence Act. *Nga Po Yin* v. *King-Emperor*, (1904-06) 1 U.B.R. 3; *Maung Shin and two others* v. *The Union of Burma*, (1948) B.L.R. 425, referred to; *Achhailall* v. *King-Emperor*, 25 Pat. 347, dissented from. In appeals against acquittals, the High Court will always give proper weight and consideration to such matters as: (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. *Sheo Swarup and others* v. *King-Emperor*, 46 All. 645 (P.C.), followed; *Emperor* v. *Nga Mya Maung*, A.I.R. (1936) Ran. 90; *Puran* v. *The State of Punjab*, A.I.R. (1953) 459 (S.C.); *Chelloor Mankkal Narayan Ittiravi Nambudiri* v. *State of Travancore-Cochin*, A.I.R. (1953) 478 (S.C.); *Madan Mohan Singh* v. *State of Utta Pradesh*, A.I.R. (1954) 637 (S.C.), referred to.

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GENERAL POWER-OF-ATTORNEY—*Authentication and Registration.* There is no provision of law which requires the general power-of-attorney to be authenticated as well as registered to render it valid. If a party decides to register the power-of-attorney then, of course, authentication is required for the purpose of registration and not otherwise.

BADRU DUJA *v.* MUNSHI NESAR AHMED 269

GENERAL SALES TAX ACT, 1949, s. 23 (*1*) 364

HIGH TREASON ACT, s. 3 (*1*)—*Waging war against Government, continuing offence—Community of purpose and continuity of action—Conviction in three separate trials for three distinct offences—One consolidated trial only necessary—Criminal Procedure Code, s. 403*—Autre fois convict. *Held*: As there was community of purpose and continuity of action in the three incidents which formed the subject of the three separate trials, all the accused should have been tried in one case of the offence punishable under s. 3 (*1*) of the High Treason Act, for the offence

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of waging war against the Government is a continuing offence. *Gam Mallu Dora* (a) *Mallayya* v. *King-Emperor*, 49 Mad. 74, followed. *Held also :* As the accused have been convicted in one trial and the sentences having been confirmed, the convictions and sentences in the other two trials are set aside on the principle of *autre fois convict* as embodied in s. 403, Criminal Procedure Code.

BO OO SEIN AND FOUR OTHERS *v.* THE UNION OF BURMA ... 7

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LEASE OF HOUSE—*Term 3 years—No written instrument—Transfer of Property Act, ss. 106 and 107—Oral agreement with delivery of possession of premises, valid lease constituted—Mesne profits, suit for, maintainability of. Held :* S. 107 of the Transfer of Property Act is clear that a lease of immoveable property can be effected by an oral agreement accompanied by delivery of possession, and as a month's rent had been paid, a monthly tenancy has been created by implication of law under s. 106 of the Transfer of Property Act. *Chuni Lal Dutt and others* v. *Gopiram Bhotica*, (1927) A.I.R. Cal. 275 ; *Calcutta Landing & Shipping Co.* v. *Victor Oil Co. Ltd.*, (1944) A.I.R. Cal. 84 ; *Ram Kumar Das* v. *Jagdish Chandra Deo and others*, (1952) A.I.R. Vol. 39 (S.C.) 23, followed. *Held also :* As a monthly tenancy has been constituted, the defendants could not be said to be trespassers against whom a suit for mesne profits for use and occupation would lie.

MRS. D. RAEBURN *v.* MRS M. JOHNSTON AND ONE ... 103

LIFE INSURANCE POLICIES TAKEN OUT BY A BURMESE BUDDHIST HUSBAND DURING COVERTURE WITH HIS FIRST WIFE—*Remarriage on death of first wife—Claims between the children by his first wife and the second wife on his death—Money due on policy not* lettetpwa *property of the husband and his first wife—Issue of joint letters of administration to rival claimants not desirable.* A Burmese Buddhist husband took out three life insurance policies during the life-time of his first wife. On her death he remarried a second wife and later he died. The children by his first wife applied for letters of administration claiming the money as the *lettetpwa* property of their parents. The second wife also filed a cross application for letters of administration. The trial Court granted joint letters of administration. On appeal it was held money due on life insurance policy is paid either at maturity or

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on the death of the insured. Therefore the money due on the policies cannot be the *lettetpwa* property of the husband and his first wife. It is most inconvenient for the parties who are at loggerheads with each other to be granted a joint letters of administration.

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LIMITATION—*Review of judgment, time taken up in—Subsequent appeal, period of limitation permissible—Article 173, First Schedule, Limitation Act—Review application, deficit Court-fees—Date of payment of proper Court-fees relates back to date of presentation. Held :* The Allahabad decision in I.L.R. 12 All. 57 that time taken up in disposal of an application for review with deficit Court-fees cannot be excluded has been superseded by s. 149 of the Civil Procedure Code. Acceptance of the deficit Court-fees by the Court has the same effect and force as if the fees had been paid in the first instance. *Held also :* Time occupied by an application in good faith for review, although made upon a mistaken view of the law, should be deemed as added to the period allowed for presenting an appeal. *U Pyin Nya and another* v. *Maung Tun and another*, P.J.L.B. 515 ; *Brij Indar Singh* v. *Kanshi Ram and another*, 44 I.A. 218 ; *Devi Das* v. *Bushahr Sangh*, A.I.R. (1953) Himachal Pradesh 110, followed. *Held further :* There is no authority for the proposition that the period of 90 days under Article 173, First Schedule, Limitation Act should also be excluded in computing the period of limitation for the present appeal.

KO SAW MAUNG *v.* AYIN KU AND THREE OTHERS ... 70

LIMITATION ACT, s. 14 (*1*).—The plaintiff had sued the defendant in a previous case for ejectment and damages on the ground that the defendants were his licensees. His suit was dismissed on the ground that the defendants were not licensees but sub-tenants of the plaintiff. The plaintiff subsequently, obtained an order of the Assistant Rent Controller fixing the standard rent and filed a suit for rent against the defendant on the plea that they are his tenants for the period from 11th March 1950 to 31st December 1953. The plaintiff relies on s. 14 (*1*) of the Limitation Act for part of the claim barred by the Law of limitation. *Held :* A suit for recovery of arrears of rent is governed by Article 110 of the Limitation Act, and in a suit of this nature the period of limitation begins from the date on which such "arrears become due". S. 14 (*1*) of the Limitation Act requires that such a former proceeding must be founded upon the same cause of action as in the present suit. The cause of action set up by the plaintiff in the former suit was a license whereas in the present suit the cause of action alleged is one of tenancy. The two claims are inconsistent and are founded on different causes of action and the plea of exclusion of time under s. 14 of the Limitation Act cannot be sustained. *Ramkrishna Chettiar* v. *Javarama Iyer*,

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A.I.R. (1933) Mad. 778; *Dondoo Singh* v. *Sheo Narain Singh*, A.I.R. (1946) Oudh 155; *Harro Prasad* v. *Gopal Das*, 9 Cal. 255; *Nadesan Chettiar* v. *Shankaran Chettiar*, 5 Ran. 600, referred to.

HAJI HABIB PIRMOHAMED *v.* SEIN MOH CO. 273

LIMITATION ACT, ARTICLES 164, 181—*S. 2—Definition of "Defendant."* Order 1, Rule 3 and s. 146, Civil Procedure Code. The definition of the word "defendant" in s. 2 of the Limitation Act is not meant to be exhaustive, but includes within its ambit the meaning assigned to it in the Civil Procedure Code, except when otherwise provided by the Code or by any law for the time being in force. *S. Venkatasubbaiver* v. *S. Krishnamurthy*, 38 Mad. 442, relied on. *U E Maung* v. *P.A.R.P. Chettyar Firm*, 6 Ran. 494, distinguished.

ANNAMAL *v.* V.K.L. CHETTYAR FIRM 143

MAHOMEDAN, DEVOLUTION OF ESTATE OF—*Governed by Mahomedan Law—Burma Laws Act, s. 13—Right of succession, when accrues—Convert to Mahomedan religion, position of, in respect to succession—Representation, principle of, not recognised—Succession determined by independent right—Claim of Mahomedan heir, whether defeated by Buddhist father who died before accrual of right. Held:* Mahomedan Law will apply in respect of the estate of a person who was a Mahomedan at the time of his death, *vide* s. 13, Burma Laws Act. *C.V.N.C.T. Chedambaram Chettyar* v. *Ma Nyein Me and others*, (1928) I.L.R. 6 Ran. 243, followed. *Held:* The estate of a deceased Mahomedan devolves upon his heirs only at the time of his death and not earlier, see ss. 41, 52 and 56 of Mulla's Principles of Mahomedan Law. *Held:* A person may be a Mahomedan either by birth or by conversion; after the conversion, he is on the same footing as a natural born Mahomedan under Mahomedan Law. *Mitar Sen Singh* v. *Maqbul Hasan Khan and others*, 57 I.A. 313 A.I.R. (P.C.) (1930) p. 251 at 253, followed. *Held also:* A person acquires a share under Mahomedan Law on his or her own independent right which comes into existence only at the time of the death of the deceased; the principle of representation is foreign to the Mahomedan Law of inheritance. *Jaffri Begam* v. *Amir Muhammad Khan*, I.L.R. 7 All. 822, followed. *Held lastly:* As the claimant's father was already dead at the time when the right to succession accrued, the fact that he was a Buddhist and could not claim any share in the estate is immaterial as the nature of the claim can only be ascertained when the right accrued.

DAW PU *v.* AHMED ISMAIL SEMA AND FIFTEEN OTHERS ... 21

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MONEY LENDERS ACT, S. 9—*Registration as Money lender need not precede institution of suit.* He could file a suit before getting himself registered as a money lender and the registration need not precede filing of such a suit. S. 9 of the Money Lenders Act enacts that no Court shall pass a decree on a suit by a money lender for the recovery of a loan unless the money lender is registered under the Act and the registration is in force. It does not say that no Court shall entertain a suit by the money lender unless the money lender had registered himself under the Act.

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OFFENCES UNDER TWO DIFFERENT PENAL STATUTES—*S. 395, Penal Code —S. 17 (1), Unlawful Associations Act—Misjoinder of charges—Ss. 233, 234, 235, 236, and 239, Criminal Procedure Code—Effect on legality of trial—Acquittal under the Special Act cannot cure the illegality.* The appellant was convicted under s. 395, Penal Code and s. 17 (*1*) of the Unlawful Associations Act. Joinder of charges under a special law with a charge under the Penal Code has vitiated the trial as being in violation of s. 235, Criminal Procedure Code, especially in the absence of approximity in time the unity of purpose and continuity of action. The two criminal acts are not related in point of purpose as cause and effect or as principal and subsidiary acts so as to constitute one continuous act. *Raj Kishore Tewari and others* v. *Emperor*, A.I.R. (1949) All. 139, referred to. *Held*: There was a misjoinder of charges. 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. The trial is bad and no question of curing an irregularity arises under s. 537, Criminal Procedure Code. *K. Ramaraju Tevan and another* v. *Emperor*, A.I.R. (1930) Mad. 857 at 858; *N. A. Subramania Iyer* v. *Emperor*, (1902) 25 Mad. 61; *Abdul Rahman* v. *Emperor*, 5 Rang. 53 (P.C.); *Sein Hla* v. *Union of Burma*, B.L.R. (1951) 289; *Babulal Choukhani* v. *King-Emperor*, I.L.R. (1938) Cal. (P.C.) 295; *Pulukuri Kottaya* v. *King-Emperor*, I.L.R. (1948) Mad. (P.C.) 1; *Rex* v. *Daya Shanker Jaitly*, I.L.R. (1950) All. 1256 at 1274, referred. The acquittal of the appellant on the charge under the Special Act cannot cure this illegality, irrespective of the question whether there was any actual prejudice to the accused or not. *Jai Singh and others* v. *Emperor*, A.I.R. (1918) Lah. 148, referred. Retrial ordered.

MAUNG BA CHOKE (*alias*) BOH THAN-MA-NI *v.* THE UNION OF BURMA 184

PAROL EVIDENCE ADMISSIBLE TO PROVE MUTUAL RELATIONS BETWEEN PARTIES TO A DEED OF SALE 168

PARTIAL REDEMPTION—SUIT FOR—PRIOR SUIT FOR PARTITION NOT NECESSARY 160

PARTITION ON RE-MARRIAGE OF SURVIVING PARENT BY CHILDREN OF THE FIRST MARRIAGE. *Held*: It is only on the remarriage of the surviving parent and not before, that the right of children of the first marriage to claim a partition of property arises. They collectively acquire a vested interest in the joint property of the marriage to the extent of the deceased parent's share which is one half. *P.K.A.C.T. Chockalingam Chetty* v. *Yaung Ni and others*, 6 L.B.R. 170; *Maung Po Kin and two*

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others v. *Maung Shwe Bya*, 1 Ran. 405 ; *Maung Seik Kaung* v. *Maung Po Nyein*, 1 L.B.R. 23 at 28 ; *Maung Shwe Ywet and others* v. *Maung Tun Shein*, 11 L.B.R. 199 ; *Ma E Mya and another* v. *U Pe Lay and others*, 3 Ran. 281 at 287 ; *Shwe Po* v. *Maung Bein*, (1914) 8 L.B.R. 115 ; *Maung Po Kin and one* v. *Maung Tun Yin and two*, 4 Ran. 207 ; *Maung Sein Ba* v. *Maung Kywe and others*, 12 Ran. 55 , referred.

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PENAL CODE, ss. 34, 302 (1) (*b*), 364, 365 189

——— ss. 82, 83 304

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———s. 302 (1) (*b*) 146

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PENAL CODE, ss. 364, 302 (1) (*b*), 34—*Absence of murdered body—Strongest possible evidence of factum of murders essential—Offence under s. 364, when arises—S. 365, Penal Code.* Where the body of the person said to have been murdered is not forthcoming, strongest possible evidence as respect the factum of murder at the hand of the accused concerned is essential. *Adu Shikdar* v. *Queen-Empress*, (1885) I.L.R. 11 Cal. 635 ; *Bhandhu and another* v. *King-Emperor*, (1924) A.I.R. 11 All. 662 ; *Azam Ali* v. *Emperor*, A.I.R. (1929) All. 710 at 717, referred. The offence under s. 364 of the Penal Code arises only when the prosecution establishes the kidnapping of the person concerned with a view to that person being murdered or put in danger of being murdered. In the absence of such facts, the offence of mere kidnapping cannot fall within the purview of the said section. *Maung Han and other* v. *The King*, (1947) R.L.R. 371, referred to. Conviction altered to one under s. 365, Penal Code.

MAUNG BA HTU (*alias*) NGA HTU AND NGA MAUNG (*alias*) MAUNG MAUNG *v.* THE UNION OF BURMA 189

PENAL CODE, s. 406—*Accused's explanation, reasonable though incredible—Burden of proof.* The Complainant prosecuted the appellant under s. 406, Penal Code in respect of collections of money entrusted to him on behalf of the Sri Peria Palayathammam Temple. The appellant's defence was that the money received was spent in defraying the expenses of a festival held in connection with the Temple. A Complaint was lodged and subsequently the appellant produced the accounts before the Receiver of the Temple and its properties. Being dissatisfied, the Receiver filed a civil suit in the Rangoon City Civil Court, which was still pending. In the meantime, appellant was convicted

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and sentenced to 6 months' rigorous imprisonment. *Held on appeal:* It cannot be said that the account submitted by appellant as to how he had spent the money entrusted to him is unreasonable. If an accused person gives an explanation which may reasonably be true, even though it is not believed by the Court, he is entitled to an acquittal, because in such circumstances the onus of proving his guilt has not been discharged. Appellant acquitted. *Robert Stuart Wallchope* v. *Emperor*, (1934) I.L.R. Vol. 61, Cal 169, followed.

M. MUTHIAH SERVAI *v.* THE UNION OF BURMA 175

PENAL CODE, ss. 408, 411—*Seizure of property and the return of same by police to complainant—Proviso to s. 523 (1), Criminal Procedure Code—Absence of record of the existence or disposal of the exhibits in the case—The property so disposed of still within the jurisdiction of the Magistrate—S. 517 (1), Criminal Procedure Code subject to final orders of the Magistrate, whether under s. 517 or s. 523, Criminal Procedure Code—Exhibits though not produced before Court, deemed to be produced—Magistrate's full discretion of disposal inspite of the settled law that property must be returned to the possession of the person from whom it was seized.* The complainant Golyan Brothers prosecuted the respondents under ss. 408 and 411, Penal Code, respectively in respect of five bales of cotton yarn. The Police seized the bales from the applicant and returned them to the complainant on execution of a bond under the proviso to s. 523 (1), Criminal Procedure Code. Apparently the exhibits were never produced in Court, nor was there any mention of their existence or disposal recorded in the proceedings. On acquittal the Magistrate ordered the return of the exhibits to the applicant from whose possession they were first seized by the police and this order was set aside by the Sessions Judge. The applicant filed an application in revision. *Held:* (i) The return of the exhibits to the complainant on the execution of a bond is subject to the final orders of the Magistrate, whether under s. 517 or 523, Criminal Procedure Code; (ii) the property so disposed of by police did not cease to be within the jurisdiction of the Magistrate who had taken cognizance of the property. The term of s. 517 (1) of the Code would not exclude such property from the Magistrate's jurisdiction; (iii) the Magistrate to whom a report under s. 523 of the Code is made is the only person competent to make such order as he thinks fit regarding the disposal of the property seized by the Police; *Maung Han Thein* v. *The Commissioner of Police, Rangoon*, (1950) B.L.R. 45, followed; (iv) where the seizure was reported by the Police to the Magistrate and with the knowledge so derived from such report, the Magistrate proceeded to try the offence in respect of the said property it could be said that throughout the trial the said property was produced before it or was within its custody through the intermediary of the Complainant who had taken possession of the property under the bond executed by him; (v) a Magistrate has full discretion in the matter of disposal though ordinarily the property seized must be returned to the party from whom it was seized. He is not bound to return it to a party who apparently has no right or title to same. *V. K. Vaivapuri Chetti* v. *Sinniah Chetty*, A.I.R. (1931) Mad. 17; *Hoke Gwan* v. *Aung Wun Tan*, (1949) B.L.R. 647, referred to. The applicant has no right or title to the property. The application in revision is dismissed.

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PENAL CODE, S. 411—*S. 403 (1), Criminal Procedure Code—Appellant in possession of 3 pairs of ear-rings and wrist watch, one pair of ear-rings being her own—Convicted under s. 411, Penal Code in respect of one pair of ear-rings and a wrist watch—Appeal dismissed.* Appellant was again tried and convicted under s. 411, Penal Code in respect of the other pair of ear-rings by the Court of Special Judge. *Held :* In the absence of proof that the articles in the two cases were received by appellant on different dates, the dishonest receipt of these articles by the appellant is a single offence under s. 411, Penal Code. Conviction set aside under s. 403 (1), Criminal Procedure Code. *Ganesh Sahu* v. *Emperor,* L.R. Vol. 50, Cal. 594—L.R. Vol. 3, Pat. 503, followed.

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PENAL CODE, S. 452—*Criminal Procedure Code, s. 562.* The applicant was convicted under s. 452, Penal Code by a Second Class Power Magistrate who submitted the case under the proviso to s. 562 sub-s. (1) to the Subdivisional Magistrate for release on probation of good conduct. The Subdivisional Magistrate himself was only a Third Class Power Magistrate, not having been appointed under s. 13 of the Criminal Procedure Code. The Subdivisional Magistrate ordered the Respondent to be released on his executing a bond for K 100 with two sureties in like amount or in default thereof, to undergo 6 months rigorous imprisonment. *Held :* The order for imprisonment in default is wrong. The proper course is for the Magistrate to ascertain before passing an order under s. 562, whether the accused is likely to be able to give security immediately or within a reasonable time and if he fails to give security within a reasonable time, the Magistrate should pass sentence which should ordinarily be a nominal one. *King-Emperor* v. *Tun Gaung,* 3 L.B.R. 2, followed ; *Nasu Meah* v. *King-Emperor,* 2 Ran. 360, referred to. *Held further :* The order of the Subdivisional Magistrate is void as having been made without jurisdiction. It is not imperative on the High Court to set aside every void order, unless the aggrieved person move the Court to do so. *King-Emperor* v. *Ba Pe,* 4 L.B.R. 143, referred ; *King-Emperor* v. *Tha Byaw,* 4 L.B.R. 315 ; *Po Mya* v. *King-Emperor,* 7 L.B.R. 272, compared.

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PERSONAL COVENANT TO REPAY LOAN AND SIMPLE MORTGAGE BY FOREIGNER OF IMMOVEABLE PROPERTY—COVENANT SEPARABLE AND ENFORCEABLE 211

PETROL PUMP—*Whether immoveable property ?* " Immoveable property " as defined in s. 3 of the General Clauses Act includes " land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth ". The meaning of the words " things attached to the earth " is given in s. 3 of the Transfer of Property Act : (*a*) rooted in the earth as in the case of trees and shrubs; or (*b*) imbedded in the earth as in the case of walls of buildings ; or (*c*) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached. The petrol pump is a mere mechanical device set up on the road-side pavement for the purpose of retailing petrol under a license. The conditions of such a license require that the petrol tank supplying the pump should be constructed at a regulated depth beneath the pump. The whole contrivance, the reservoir of petrol below the surface

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of the public pavement and the mechanical pump above, is in the nature of a mere trade fixture. What is of real value to the defendants in the petrol pump is not the pump itself but the license under which they are permitted to retail petrol by its use within the limits of the city of Rangoon. This license together with the mechanical device by which the license is worked for profit cannot be considered to be immoveable property. Moreover, the pump can be moved about at convenience. Such an "attachment is merely for the beneficial enjoyment of the chattel itself, even though fixed for the time being so that it may be enjoyed. *S.P.K.N. Subramanian Firm* v. *M. Chidambran Servai*, A.I.R. (1940) Mad. 527 at 529, approved.

KAPURCHAND (BURMA) LTD. *v.* THE BURMESE NATIONAL REFORMING CO. AND OTHERS 278

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PRODUCTION OF ACCOUNT BOOKS—UNASKED FOR BY PLAINTIFF IN SUIT—NO INFERENCE CAN BE DRAWN OF NON-PRODUCTION ... 291

PROMISSORY NOTE, SUIT ON—*Money Lenders' Act, s. 15—Antedating, effect of—Amendment of plaint, when and in what circumstances permissible—Negotiable instrument, whether it is taken as sole consideration for loan or merely as collateral security for repayment—Normal and* prima facie *inference. Held:* S. 15 of the Money Lenders' Act, 1945 is explicit that a promissory-note on which the date of execution is stated incorrectly shall be void. *Walter Mitchell* v *A. K. Tennent*, 52 Cal. 677, referred to. *Held also:* An amendment of the pleadings can be allowed at any stage of the proceedings where the sole result of a refusal would be to force the plaintiff to another suit; but where the effect of the amendment would be to take away from the defendant a legal right which has accrued to him by lapse of time the amendment ought to be refused. *Maung Shwe Myat* v. *Maung Po Sin and one*, I.L.R. 3 Ran. 183; *Krishna Prasad Singh and one* v. *Ma Aye and others*, I.L.R. 14 Ran. 383; *Charan Das* v. *Amir Khan*, I.L.R. 48 Cal. 110; *Ranendramohan Tagore* v. *Kashebchandra Chanda*, I.L.R. 61 Cal. 433, referred to *Held further:* When a promissory-note has been lost the plaintiff can rely upon the original consideration when it has been taken as a collateral security for repayment of the loan which is a normal and *prima facie* inference, but when the negotiable instrument itself is the consideration for the loan the lender is restricted to his rights under the negotiable instrument by which he must stand or fall *Parvana Reena Samnathan and another* v. *Pana Lana Palaniappa*, (1913) I.A. 142; *Maung Chit and another* v. *Roshan N.M.A. Kareem Oomer & Co.*, I.L.R. 12 Ran. 500; *E Yar and one* v. *Teh Lu Pe*, (1950) B.L.R. (S.C.) 239, referred to.

LAL BIHARI JADO *v.* RABIDUTT PANDAY 81

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PROSECUTION UNDER S. 468, PENAL CODE AGAINST VILLAGE HEADMAN—*General Village proceedings opened by Deputy Commissioner through Township Officer—Direct complaint—S. 195 (1) (c) not applicable as Deputy Commissioner acting in village proceedings is not a Court—S. 28, Burma Village Act—Sanction required to prosecute village headman for acts done in discharge*

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of his official duties. Respondent, a villager petitioned against the applicant for an offence under s. 468, Penal Code to the Deputy Commissioner, Pegu, who opened General Village Proceedings through the Township Officer. On the Township Officer's report, the Deputy Commissioner directed that the Respondent could file a direct complaint and he did so. The trial Court dismissed the complaint for want of sanction under s. 195 (1) (*c*), Criminal Procedure Code and discharged the applicant. Thereupon the respondent filed an application in revision against the order of discharge before the Sessions Court, wherein the applicant raised two objections, *viz.* That the complaint was (1) barred by s. 195 (1) (*c*), Criminal Procedure Code and (2) not maintainable for want of Deputy Commissioner's sanction under s. 28, Burma Village Act. The Sessions Court set aside the order of discharge on ground No. 1 alone without going into ground No. 2 and ordered a retrial. Applicant then filed an application in revision against the order for retrial. *Held :* Neither the Deputy Commissioner, nor the Township Officer in General Village Proceedings acted as a "Court" within the meaning of s. 195 (1) (*c*), of the Criminal Procedure Code. *Chotalal Malthuradas*, 22 Bom. 936/939 ; *Mahabaleswarappa* v. *Gopalswami*, 36 Cr.L.J. 895 ; *Hari Charan* v. *Kanshiki* ,44 C.W.N. 530 (537), referred to. *Held further :* Sanction from the Deputy Commissioner under s. 28 of the Burma Village Act is essential to prosecute a village headman for commission of alleged offences in the discharge of his official duties. *Maung Po Thit* v. *Maung Pyu*, I.L.R. 8 Ran. 654, followed. Order for retrial set aside.

U THA PE *v.* U THEIN NWE 376

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RENT CONTROL ORDER NO. 1 of 1945, s. 6—*Claim for repairs voluntarily carried out by tenant, unrecoverable.* Everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy. *Saleh Ebrahim* v. *Cowasjee*, A.I.R. (1924) Cal. 57, distinguished ; *S. Raja Chetty and another* v. *Jagannathadas Govindas and others*, A.I.R. (37) (1950) Mad. 284, affirmed. Under the Assam Urban Areas Rent Control Act, 1949. A tenant can contract himself out of the privilege allowed to him. *Satish Chandra Ray Chaudhury* v. *Bimalendu Sen and another*, A.I.R. (38) (1951) Assam 27, referred to. A tenant cannot be reimbursed for repairs done voluntarily to premises on the ground that the Landlord has benefited by the said repairs.

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SANCTION—*Acquittal under s. 409, 409/114, Penal Code for want of—Subsequent prosecution under s. 4 (1) (d) read with s. 4 (2) of the Suppression of Corruption Act, 1948 with sanction—Applicability of principle of* autrefois acquit—*S. 403, Criminal Procedure Code.* The applicants who are police officers were prosecuted under s. 409, 409/114, Penal Code and were acquitted for want of sanction. They were subsequently prosecuted with sanction and charged under s. 4 *(1) (d)* and s. 4 *(2)*, Suppression of Corruption Act, 1948. On an application to quash the charge on the principle of *autrefois acquit. Held :* The former trial was no bar to the subsequent trial under s. 403, sub-s. *(2)* of the Criminal Procedure Code. *Maung Po Chit and one* v. *The Union of Burma*, (1948) B.L.R. 175, followed ; *Palani Goundan and another* v. *Emperor*, A.I.R. (1925) Mad. 711 ; *Emperor* v. *Munnoo*, A.I.R. (1933) Oudh 470, referred.

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SECOND APPEAL—*Findings of fact by lower appellate Court—Plaintiff's failure to ask defendant for production of account books—Inference by plaintiff or the Court.* In second appeal, findings of fact by the lower appellate Court are final *Ma Pyu* v. *K. C. Mitra*, I L.R. 6 Ran. 586, relied on. If a plaintiff never asked the defendant for the production of account books, neither he nor the Court is entitled to draw any inference for non-production of these account books. *Bilas Kunwar* v. *Desraj Rajit Singh and others*, I.L.R. 37 All. 557. ... ...

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SECOND-CLASS POWER MAGISTRATE—APPOINTED SUBDIVISIONAL MAGISTRATE UNDER S. 13, CRIMINAL PROCEDURE CODE—SUCH MAGISTRATE GETS ALL ORDINARY POWERS OF THAT OFFICE CONFERRED BY S. 36, CRIMINAL PROCEDURE CODE AND SPECIFIED IN THE THIRD SCHEDULE 248

SEPARATE TRIALS—CONVICTIONS UNDER—ONLY ONE CONSOLIDATED TRIAL NECESSARY 7

SIMPLE MORTGAGE—*Waiver of security—Suit on personal covenant to repay—S. 3, Transfer of Immovable Property (Restriction) Act, 1947—Separation of personal covenant from the mortgage—S. 24, Contract Act.* The appellant mortgaged his immoveable

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property to the respondent chettiar, a foreigner, who subsequently filed a simple money suit basing his claim on the personal covenant of the defendant to repay the loan. The Respondent's suit was decreed by the trial Court and confirmed by the lower appellate Court. On second appeal, it was contended that the suit transaction was initially void being in direct contravention of s. 3 of the Transfer of Immoveable Property (Restriction) Act, 1947, as the personal covenant to repay cannot be separated from the mortgage *Held :* The contract in this appeal is in two distinct parts ; (i) the personal covenant to repay the money was the first agreement and (ii) to proceed against the mortgaged property was the second agreement. The second agreement is a subsidiary agreement to be enforced only if the first agreement was not fulfilled. The first consideration, that is, the loan is a good one, and an agreement to repay a good loan is clearly enforceable and this good consideration must remain unaffected by the disability in the second part of the contract imposed by the Transfer of Immoveable Property (Restriction) Act. *Har Prasad Tewari* v. *Sheo Gobind Tewari*, A.I.R. (1922) All. 134 ; *A. P. Joseph* v. *E. H. Joseph*, A.I.R. (1926) Ran. 186 ; and *Mohammad Muzaffar Husain* v. *Madad Ali*, A.I.R. (1931) Oudh 309, distinguished. *Jarbandhan* v. *Badri Narain and Musammat Ram Rati*, 45 I.L.R. 621 ; *Mohammed Shakur* v. *Gopi*, 35 Indian Cases, 202 ; *Mohammad Khalilur Rahman Khan* v. *Mohammed Muzammilullah Khan*, 33 A.I.R. All. 466 ; *Dip Narain Singh* v. *Nageshar Prasad and another*, 52 I.L.R. All. 338, followed

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SUIT ON PROMISSORY-NOTE—*Signature of defendant in foreign language—Judgment based on comparison of signatures by Judge, whether sound. Held :* Though the signatures on the pronote, the written statement and the power of attorney are similar, it is unsatisfactory and dangerous to stake a decision in a case where there is a direct conflict of testimony between parties as to general character of a signature, on the correct determination of the genuineness of the signature by mere comparison with the admitted signatures, especially without the aid in evidence of microscopic enlargements or any expert advice. *Kessarbai* v. *Jethabhai Jivan*, A.I.R. (1928) (P.C.) 277; *Rudragouda Venkangouda Patil* v. *Rasangouda Danappagouda Patil*, A.I.R. (1938) Bom. 257, referred to.

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TRANSFER OF PROPERTY ACT, s. 53-A—*S. 58, clause* (c) *as amended by Amending Act 20 of 1929—Sale, house and site, by registered deed—Contemporaneous agreement for resale—Evidence, admissibility of, to prove transaction a mortgage—Husband of plaintiff, whereabouts unknown, not joined as party—Burmese Buddhist couple, not agent for each other—Co-ownership, extent of rights to property. Held:* By proviso to clause (*c*) of s. 58 of the Transfer of Property Act inserted by Amending Act 20 of 1929 no evidence is admissible to prove a sale of house and site by registered deed was converted into a mortgage by an agreement for resale executed contemporaneously. S. 53-A, Transfer of Property Act cannot be relied upon as a defence. *Maung Shwe Phoo and eight others* v. *Maung Tun Shin and three others*, 5 Ran. 644, referred to. *Held:* A Burmese Buddhist wife has a vested interest in property acquired by her husband but she is not a co-owner in the sense that during the subsistence of the marriage she can claim partition of the property. There is no presumption *de facto* or *de jure* that a Burmese Buddhist couple living together are authorized agents for each other. A Burmese Buddhist wife cannot file a suit for possession of property sold to her husband without joining her husband as co-plaintiff in the suit. *N.A.V.R. Chettyar Firm* v. *Maung Than Daing*, 9 Ran. 524, referred to.

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TRANSFER OF PROPERTY ACT, s. 54—*Sale of immoveable property below K 100 in value—Real delivery of possession and not constructive must be given—If registered necessity for registration must be determined by value of property involved and not by the consideration mentioned in the deed.* When a person already in possession of immoveable property worth below K 100 purchased that property the acts and declarations of delivery of possession must be unequivocal and for the purpose of s. 54 of the Transfer of Property Act, the delivery must be real and that some sort of constructive possession is not sufficient. *Mt. Sarja and another* v. *Mt. Julsi and another*, A.I.R. (1926) Nag. 93; *Biswanath Prasad* v. *Chandra Narayan Chowdhury*, 48 Cal. 509-48 Indian Appeals 127, referred. The necessity for registration must be determined by the value of the property involved and not by the amount mentioned in the deed. *Gopal Das* v. *Mst. Sakina Bibi*, 16 Lah. 177, followed. A point of law arising from facts admitted or proved beyond controversy, though not raised either in the trial Court or in the lower appellate Court can be raised for the first time in second appeal.

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TRANSFER OF PROPERTY ACT, s. 60—*Suit for partial redemption—Prior suit for partition not necessary—When all the necessary parties are fully impleaded in the suit.* When a mortgagee acquires a portion of the mortgaged property by inheritance the provisions of the last paragraph of s. 60 of the Transfer of Property Act are applicable so as to allow redemption of a portion only of the mortgaged property. *Hamida Bibi* v. *Ahmed Husain*, 31 All. 335 ; *Zafar Ahsan* v. *Zubaida Khatun*, A.I.R. (1929) All. 604, followed. Suit for partial redemption is a combination of a suit for redemption and a suit for contribution ; a decree for redemption on payment of proportionate share of the mortgaged money can be given when all the parties interested in the redemption are represented. *Thillai Chetti* v. *Ramanatha Avvan*, 20 Mad. 295, distinguished.

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TRANSFER OF PROPERTY ACT, s. 69 (2) (*a*) AND (*b*)—*Mortgagor and mortgagee—Relationship of agency—Sale of property, conditions requisite for exercise of right of sale by mortgagee—Three months' Notice, imperative—Municipal taxes in arrears—Agreement empowering mortgagee to sell in that event irrevocable—Contract Act, s. 202. Held :* The provisions of s. 69 (2) (*a*) of the Transfer of Property Act are imperative and the three months period provided therein cannot be curtailed by agreement between the parties that when the mortgagor is in arrears in respect of payment of interest or Municipal taxes the property mortgaged may be sold by the mortgagee without the intervention of the Court. *Babumiya Mohidin Shakkar and others* v. *Jehangir Dinshaw Belgaum Wallah*, A.I.R. (1941) Bom. 339, followed. *Held also :* Under s. 69 (2) (*b*) of the Transfer of Property Act interest amounting to at least Rs. 500 must be in arrears before the right of sale of property can be exercised. *Held further :* Where a party contends that the provisions of s. 69, Transfer of Property Act restricts the power of the parties to enter into a contract, the burden is on him to show that restriction. The law permits the greatest of freedom of contract between adult parties, and an agreement so made is irrevocable under s. 202 of the Contract Act. *Mulraj Virji* v. *Nainmal Pratapmal and others*, A.I.R. (1942) Bom. 46, followed.

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UNION JUDICIARY ACT, s. 5—*Certificate of fitness—S. 7, The National Emblems (Restriction of Display) Act, 1954, petition for Transfer and trial of cases to High Court under s. 135 (1) and (2) of the Constitution—Dismissal order, whether "final order" within the ambit of clause* (a) *of s. 5 of the Union Judiciary Act*—Obitum dictum, *not a "final decision" or "final order."* The applicants were prosecuted before the Western Subdivisional Magistrate, Rangoon under s. 7 of the National Emblems (Restriction of Display) Act, 1954. Pending the trial, they applied to the High Court for transfer and for trial of their cases in the High Court under s. 136 (2) of the Constitution. Their application was dismissed. The applicants then made an application under s. 5 of the Union Judiciary Act, 1948 for a Certificate of fitness to appeal to the Supreme Court against the dismissal order, urging that the said order tantamounts to "final order" within the ambit of Clause (*a*) of s. 5 of the Union Judiciary Act. *Held.* An appeal lies to the Supreme Court from "final order" of the High Court in a criminal case which involves the question of

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constitutionality of any legislative enactment. Observations made *obiter dictum* cannot be said to be a "final decision or final order." The only question concerned was whether the applicants' case was a fit case for transfer to the High Court under s. 135 (2) of the Constitution. The order rejecting the application is not a final order which involves the question as to the validity of any law having regard to the provisions of the Constitution within the ambit of clause (*a*) of s. 5 of the Union Judiciary Act. *Per* U SAN MAUNG, J.—The High Court does not have exclusive original jurisdiction in respect of any case involving a question as to the validity of any law having regard to the provisions of the Constitution, except as laid down in sub-s. (1) of s. 135 of the Constitution of the Union of Burma. When an application for transfer is made under sub-s. (2) of s. 135, what the Judge has to consider in the first place is whether *primâ facie* the case involves or is likely to involve such a question. If so satisfied, the case has to be transferred and tried in the High Court, and then and then only can there be a decision of the High Court regarding the validity of the law sought to be impugned as against the provisions of the Constitution. The order of the Judge refusing to transfer the case to the High Court cannot be a final order of the High Court.

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UNION JUDICIARY ACT, s. 5 (*b*) AND (*c*)—*Issue of certificate for leave to appeal to the Supreme Court—Civil Procedure Code, s. 109* (c) *—Union of Burma (Adaptation of Laws) Order, 1948. Held:* An application for the issue of a certificate to appeal to the Supreme Court will not lie under clauses (*b*) and (*c*) of s. 5 of the Union Judiciary Act in that the judgment and decree against which the appeal is to be laid was not in respect of or related to a subject matter the value of which is Rs. 10,000 or more. *Held also:* S. 109 of the Civil Procedure Code as modified by the Union of Burma (Adaptation of Laws) Order, 1948 was an earlier legislation as far as the Union Judiciary Act is concerned, and the plain meaning of the latter determines the application uninfluenced by the consideration whether s. 109, Civil Procedure Code has been repealed. *Sei Cheng* v. *U Thein*, (1948) B.L.R. 600, referred to.

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UNLAWFUL ASSOCIATION ACT, 1908, s. 17 (*1*)—*Burma Act LXI of 1954—The Unlawful Associations (Amendment) Act, 1954—Trial of warrant case as a summons case—Not merely an irregularity but an illegality incurable under s. 537, Criminal Procedure Code. Held:* The trial of a warrant case as a summons case is not merely an irregularity but an illegality, incurable by s. 537, Criminal Procedure Code or any of the curative provisions of the Code. The irregularity amounts to an illegality and vitiates the trial. *Sufal Golai* v. *Emperor*, A.I.R. (1938) Cal. 205; *Mangi Lal* v. *Emperor*, A.I.R. (32) (1945) All. 98, followed.

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URBAN RENT CONTROL ACT, s. 11 (1) (a —*Transfer of Property Act, s. 111* (g) (h)—*House, suit for declaration of ownership and possession—Absence of notice in writing to determine lease—Unauthorised extension to house not made specific ground for eviction. Held :* Though the house was extended at considerable cost as it was unauthorised, the extended building must be declared to be the property of the lessor. *Fakier Chan* v. *Kewal Ram and another,* (1912) 16 I.C. 633, followed. *Held :* In the absence of a notice in writing by the lessor to the lessee to determine the lease, the lessor cannot sue for and obtain possession of the leased house. *Held also :* As it was not made a basic ground for ejectment the unauthorised extension to the building cannot be invoked as ground under s. 111 (*h*) of the Transfer of Property Act for termination of the lease and ejectment of the lessee. *Maung Khin Maung* v. *Daw Hla Yin and one,* (1948) B.L.R. 481, discussed.

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URBAN RENT CONTROL ACT, s. 11 (1) (*a*)—*Transfer of Property Act, s. 106—Lease of rooms—Suit for eviction—Written notice, necessity of—Contract Act, s. 56—Frustration, when applicable to leases—Suit, determination of, on point not raised specifically in pleadings, not permissible. Held :* As a valid lease was admitted, possession of the suit premises can be obtained by filing a suit under s. 11 (*1*) of the Urban Rent Control Act after notice under s. 106, Transfer of Property Act. *T. H. Khan* v. *Dawood Yusoof Abowath and others,* (1947) R.L.R. 354 ; *Sahu Anand Sarup* v. *S. Taiyab Hasan,* A.I.R. (1943) All. 279, referred to *Held also :* It is only under very special circumstances that the doctrine of frustration applies to leases. Occupation of a town by insurgents is only a temporary phase not comparable to occupation by enemy forces, in which event the doctrine can be invoked, *K. M. Modi* v. *Mohammed Siddique and one,* (1947) R.L.R. 423 ; *Rangoon Telephone Co. Ltd.* v. *Union of Burma,* (1948) B.L.R. 527, followed. *Held further :* A party should be allowed to win or lose on a case set out in his pleading and it is not the function of a trial or an appellate Court to make out a case different from the one set out. *A S P S K R. Karuppan Chettyar* v. *A. Chokalingam Chettyar,* (1949), B.L.R. 46, referred to.

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URBAN RENT CONTROL ACT, s. 11 (1) (*d*)—*Expression " building or buildings " whether confined to residential or dwelling houses only—Expression " bonâ fide "—Meaning of, by reference to context. Held :* There is nothing in clause (*d*) of s. 11 (*1*) of the Urban Rent Control Act which would definitely suggest that the building must necessarily be a dwelling house or a place of rest and abode. *Sin Tek* v. *Lakhany Brothers,* Civil 1st Appeal No. 19 of 1951 (H.C.) ; *Richards* v. *Swansea Improvement and Tramways Co.* (1878) 9 C.D. 425 ; *Ko Wah Nah* v. *Ko Tun Sein and two others,* (1951) B.L.R. 188, followed. *Held also :* The expression " *bonâ fide* " in clause (*d*) of s. 11 (*1*) of the Urban

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Rent Control Act will have to be read in the context in which that expression appears to obtain its real meaning. *C. Ah Foung* (a) *Chow Fung Mee* v. *K. Mohamat Kaka and two others*, (1950) B.L.R. 346, followed.

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URBAN RENT CONTROL ACT, S. 14 (*1*)—*Compromise decree—Payment of future rents, whether an order within ambit of section—Discretion of Court, extent of, under s. 14. Held :* S. 14 (*1*) of the Urban Rent Control Act makes no provision for the payment of future rents, and the stipulation for the payment of future rents in the consent decree must be considered to be a matter extraneous to the purpose of s. 14. *Bhogee Ram* v. *U Ba So and one*,(1949) B.L.R. 565, followed. *Held also :* An order passed under s. 14 (*1*), Urban Rent Control Act is appealable both on fact and law *vide* s. 15, but no appeal lies against a consent decree *vide* s. 96 of the Civil Procedure Code. Where a compromise petition is filed the Court has no alternative except to pass a decree in terms of the compromise, but the Court under s. 14 (*1*) of the Urban Rent Control Act has a discretion to pass such order as it might think fit and reasonable. *In re South American and Mexican Co.*, (1895) 1 Ch. D. 37 ; *Neale* v. *Gordon Lennox*, (1902) A.C. 465, distinguished. *Held further :* S. 14 (*1*), Urban Rent Control Act confers a distinctive right upon the judgment-debtor, and a heavier burden than that provided by the section cannot be imposed upon him.

CHANDRABHAN SINGH *v.* KISHORE CHAND MINHAS ... 14

URBAN RENT CONTROL ACT, 1948, s. 16—*Its object—Relief must be specifically asked for—Court cannot spell out a new case different from the plaint—Monthly Leases (Termination) Act, 1946 (Burma Act No. XLIX/46)—S. 42, Specific Relief Act, Proviso—Consequential Relief—Payment of additional Court Fees before appellate Court—Order 21, Rule 63, Civil Procedure Code.* The Urban Rent Control Act, 1948 has a retrospective effect in view of the fact that the object of the Act was to provide relief and protection to the tenants. *Tai Chuan & Co.* v. *Chan Seng Cheong*, (1949) B.L.R. 86 (S.C.), referred to. No Court can give a plaintiff any relief which he has not specifically asked for nor can it make out a case for the plaintiff different from what he has set out in the plaint. *A.S.P.S.K.R. Karuppan Chettyar and one* v. *Chokkalingam Chettiar*, (1949) B.L.R. 46 (S.C.), followed. S. 42 of the Specific Relief Act is exhaustive of the cases in which a decree merely declaratory can be made, and the Courts have no power to make such a decree independently of that section. *P. C. Thevar* v. *Samban and others*, I.L.R. Ran. Vol. 6, 188, referred to. Proviso to s. 42 of the Specific Relief Act must be adhered to strictly and that its provisions are paramount and the consequences of non-compliance with them cannot be avoided. In a suit for a bare declaration of title to land in the possession of the defendant, the plaintiff is not entitled to convert his suit to one for possession by payment of additional Court Fees. *Chokalingapesiana Naicker* v. *Achivar and others*, I.L.R. 1 Mad. 40, affirmed. Even in suits under Order 21, Rule 63, Civil Procedure Code, the plaintiff's suit for bare declaration would be barred by the Proviso to s. 42 of the Specific Relief Act if he is able to seek further relief than a mere declaration and omits to do so. *U Po Thein and others* v. *O.A.O.K.R.M. Firm*, I.L.R. 5 Ran. 699,

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affirmed. The defects are fundamental and not merely technical. An appellate Court cannot make an order for payment of an additional Court Fee where no fees at all has been paid and where the original Court has not decided the question of valuation. *Muthu Erulappa Pillai and another* v. *Vunuku Thathayya Maistry*, A.I.R. (1917) Lower Burma 179 (2), affirmed. Permission for payment of an additional Court fee in appeal disallowed.

U TAW *v.* THE BANK OF CHETTINAD LTD., BY ITS MANAGER, S. ANNAMALAI CHETTIAR 368

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WARRANT CASE TRIED AS SUMMONS CASE—NOT MERE IRREGULARITY BUT ILLEGALITY INCURABLE UNDER s. 537, CRIMINAL PROCEDURE CODE 312

WITNESSES—EXAMINATION BY COMMISSION 123

WITNESSES IN INDIA—*Issue of commission for examination of—Application filed by defendant not same as one filed by plaintiff—Delay immaterial—Revision of order refusing application—S. 115, Civil Procedure Code and s. 25, City Civil Court Act. Held :* Delay is not material in considering the issue of a commission for the examination of a defendant. Failure to distinguish between applications for the issue of a commission on the part of the plaintiff and of the defendant is an irregular exercise of jurisdiction for which the High Court can interfere in revision. *Jagannatha Sastri* v. *Sarathambal Ammal and two others*, I.L.R. 46 Mad. 574 ; *M. Palaniappa Chettiar* v. *Narayanan Chettiar*, A.I.R. (1946) Mad. 331, referred to. *Rajagopalu Pillai* v. *Kasinisvanathan Chettiar*, I.L.R. (1933) Mad. 705, followed. *Held further :* Assuming that the High Court cannot interfere in revision against an interlocutory order of the subordinate Court relating to the issue of a commission under s. 115 of the Civil Procedure Code, the High Court can do so under s. 25 of the City Civil Court Act. *Ma Than Yin* v. *Tan Keat Kheng* (a) *Tan Keit Sein*, (1951) B.L.R. 161, referred to.

P. A. M. ABDUL KADER AND TEN OTHERS *v.* S. M. M. MOHIDEEN FIRM BY PROPRIETOR S. M. NAGOOR MEERA AND SIX OTHERS 123

APPELLATE CRIMINAL.

Before U Ba Thaung, J.

H.C. 1955

Feb. 2.

ABDUL SALAM (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Complaint drafted by lawyer laid before Court—Process under s. 307, Penal Code issued—Accused charged under ss. 352, 448 and 506, Penal Code, ultimately acquitted Criminal Procedure Code, s. 250—Complainant called upon by Court to show cause against payment of compensation—Criminal Procedure Code, s. 476—Prosecution of complainant under Penal Code, s. 211, petition by acquitted accused—Complaint by Court, requirements.

Held: When complaints under s. 476 are made, the officer making them must state the evidence on which he relies, otherwise the Magistrate to whom the case is referred has no means of ascertaining what the evidence is on which the prosecution is based. Similarly a Civil Court is bound to set forth the specific assignment of perjury; failure to do so is a material irregularity within the meaning of s. 115, Civil Procedure Code.

Shankar Sahai v. *Emperor*, A.I.R. (1930) Oudh 404; *Emperor* v. *Kashi Shukul and another*, I.L.R. 38 All. 695, followed.

Held also: Failure of a complainant to prove his case may result in the acquittal of the accused, but it will not by itself warrant his prosecution for bringing a false case.

Jinilal Mandal v. *Chandardeo Prasad and others*, A.I.R. (1941) Pat. 420, followed.

Held further: Inordinate delay in making application for action under s. 476, Criminal Procedure Code, as well as where there is no reasonable probability of a conviction, and where the application is made not in the interests of justice but to satisfy a private grudge, are grounds for the Court to reject such an application.

Hwe Eye Hain v. *The King*, (1948) B.L.R. 40.

Aung Min (1) for the appellant.

* Criminal Appeal No. 394 of 1954 being an appeal from the order of the 5th Addl. Magistrate, Rangoon, in Criminal Misc. No. 36 of 1954.

H.C. 1955

ABDUL SALAM v. THE UNION OF BURMA.

Ba Gyaw (Government Advocate) for the respondent.

U BA THOUNG, J.—The appellant filed a complaint against one U Shwe Hpaung under section 307, Penal Code in the Court of the 5th Additional Magistrate, Rangoon, in Criminal Regular Trial No. 225 of 1952. The learned Magistrate after issuing process under section 307, Penal Code was succeeded in his place by another Magistrate U Kan. U Kan in trying the case, charged the accused U Shwe Hpaung under sections 506, 448 and 352 of the Penal Code, and after trial acquitted the accused, classified the case as false, and called upon the appellant to show cause under section 250 of the Criminal Procedure Code why he should not pay compensation to the accused. After passing that order U Kan was transferred and another Magistrate U Saw Lwin succeeded U Kan as the 5th Additional Magistrate, Rangoon. While the matter under section 250 of the Criminal Procedure Code was pending, the accused U Shwe Hpaung applied under section 476 of the Criminal Procedure Code in Criminal Miscellaneous Trial No. 36 of 1954 of the same Court, asking for prosecution of the appellant under section 211 of the Penal Code. Then on the 3rd July 1954 the learned 5th Additional Magistrate called upon the appellant to show cause why he should not pay compensation to the accused, and on the same day he passed an order, in Criminal Miscellaneous Trial No. 36 of 1954, that an action should be taken against the appellant under section 211, Penal Code; and accordingly on the 8th July 1954 the 5th Additional Magistrate, Rangoon, filed a complaint before the District Magistrate, Rangoon, charging the appellant under section 211, Penal Code. The

complaint was forwarded to the Court of the 2nd Additional Magistrate, Rangoon, for disposal, and it is now pending there as Criminal Regular Trial No. 414 of 1954 as the appellant has come up on appeal against the order dated the 3rd July 1954, passed by the 5th Additional Magistrate, Rangoon, in Criminal Miscellaneous Trial No. 36 of 1954, for an action to be taken under section 211, Penal Code against the appellant.

It is to be mentioned here that neither the application filed by U Shwe Hpaung in Criminal Miscellaneous Trial No. 36 of 1954 nor the order dated the 3rd July 1954 passed in it by the learned Magistrate has specified or pointed out which of the statements of the appellant in Criminal Regular Trial No. 225 of 1952 were false and for which the appellant was to be prosecuted; and consequently the 2nd Additional Magistrate, Rangoon, before whom the case is now pending, has no means to ascertain on what evidence the prosecution has based it's case. In the case of *Shankar Sahai* v. *Emperor* (1), it has been held that:

"When complaints under section 476 are made, the officer making them must state the evidence on which he relies; otherwise the Magistrate to whom the case is referred for decision has no means of ascertaining what the evidence is on which the prosecution case is based."

It has been held also in the case of *Emperor* v. *Kashi Shukul and another* (2) that:

"When a Civil Court makes an order under section 476, Criminal Procedure Code directing that a person should be prosecuted for perjury, such court is bound to set forth in its order the specific assignment of perjury alleged against the accused. Failure to do so is a material irregularity within the meaning of section 115 of the Code of Civil Procedure."

(1) A.I.R. (1930) Oudh 404. (2) I.L.R. 38 All. p. 695.

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ABDUL SALAM v. THE UNION OF BURMA.

U BA THOUNG, J.

It appears from the order dated the 3rd July 1954 of the 5th Additional Magistrate, that he came to the conclusion that action under section 211, Penal Code should be taken against Abdul Salam (appellant) because none of the offences charged against U Shwe Hpaung was found to have been committed by the latter who was acquitted. This itself is not a sufficient ground to take action under section 211, Penal Code against the appellant, and I am fortified in this view by the case of *Jinilal Mandal* v. *Chandardeo Prasad and others* (1) where it has been held that :

> " The failure of a complainant to prove his case may result in the dismissal of his complaint, or at later stages in the discharge or acquittal of the accused ; but it will not by itself warrant his prosecution for bringing a false case."

In the present case it is true that U Shwe Hpaung was acquitted of the charges under section 506 (2), 448 and 352, Penal Code but it must be remembered that he was charged under those sections because there was a *primâ facie* case made out against him.

The next thing to be considered is whether the learned 5th Additional Magistrate (U Saw Lwin), in passing his order dated the 3rd July 1954 in Criminal Miscellaneous Trial No. 36 of 1954, has exercised his discretion properly to file a complaint under section 476, Criminal Procedure Code to take action under section 211, Penal Code against the appellant Abdul Salam ; and in this I am of the opinion that he has not and could not have exercised his discretion properly, because he was clearly under misapprehension that the appellant Abdul Salam laid the complaint against U Shwe Hpaung under

(1 A.I R. (1941) Pat. 419 at 420.

section 307, Penal Code with an *mala fide* intention that in the event of the Court taking cognizance against the accused under that section, the latter could not be enlarged on bail or at least that he would have little chance of being enlarged on bail. The learned Magistrate was not justified in surmising like that, because when the complaint was filed by the appellant against U Shwe Hpaung in Criminal Regular Trial No. 225 of 1952, the complaint was drawn up by his lawyer, and an ignorant person like the appellant could not have such intention, nor could he have named section 307, Penal Code under which the charge should be made against U Shwe Hpaung. In fact it will be seen from the facts stated in the written complaint that U Shwe Hpaung could only be tried under sections 506 and 352 of the Penal Code and the learned 5th Additional Magistrate (U Kan) should have issued process under those sections only and not under section 307, Penal Code. It was the mistake of both the appellant's lawyer and the Magistrate for issuing process under section 307, Penal Code, and the learned 5th Additional Magistrate U Saw Lwin who succeeded U Kan should not have been so biased against the appellant because in the first instance process was issued for an alleged offence under section 307, Penal Code.

U Shwe Hpaung stated in his evidence that he possessed a revolver or pistol and it also appears from the evidence of the defence witness Ko Than Nwe (DW 3) that U Shwe Hpaung abused the appellant and caught hold of the appellant's neck and pushed him and so what had been stated in the appellant's complaint that U Shwe Hpaung abused him, caught hold of the neck and pushed him is not without foundation and the appellant's complaint was not false as has been tried to be made out.

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ABDUL SALAM v. THE UNION OF BURMA.

U BA THOUNG, J.

Therefore judging from the facts of the case also, it is not probable that the prosecution would be successful, and as such the complaint should not have been filed. In the case of *Hwe Eye Hain* v. *The King* (1), it has been held that:

> "Where there has been inordinate delay in making application for action under section 476, Criminal Procedure Code the court should not entertain such an application. Complaint should not be filed unless there is a reasonable probability of conviction."

It can also be made out from U Shwe Hpaung's evidence that there has been an enmity and feeling of hatred between him and the appellant and so it will not be unreasonable to take it that U Shwe Hpaung moved the Court to prosecute the appellant, not in the interests of justice but in order to satisfy his grudge against the appellant as the latter had instituted criminal proceedings against him.

For the above reasons I set aside the order of the 5th Additional Magistrate, Rangoon, dated the 3rd July 1954 passed in Criminal Miscellaneous Trial No. 36 of 1954 and direct the withdrawal of the complaint.

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

APPELLATE CRIMINAL.

Before U San Maung and U Ba Thoung, JJ.

BO OO SEIN AND FOUR OTHERS (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

H.C. 1954

Nov. 0

High Treason Act, s. 3 (1)—Waging war against Government, continuing offence—Community of purpose and continuity of action—Conviction in three separate trials for three distinct offences—One consolidated trial only necessary—Criminal Procedure Code, s. 403—Autre fois convict.

Held: As there was community of purpose and continuity of action in the three incidents which formed the subject of the three separate trials, all the accused should have been tried in one case of the offence punishable under s. 3 (1) of the High Treason Act, for the offence of waging war against the Government is a continuing offence.

Gam Malin Dora (a) *Mallayya v. King-Emperor*, 49 Mad. 74, followed.

Held also: As the accused have been convicted in one trial and the sentences having been confirmed, the convictions and sentences in the other two trials are set aside on the principle of *autre fois convict* as embodied in s. 403, Criminal Procedure Code.

Myint Tun and *Aye Maung* for the appellants.

U Chit (Government Advocate) for the respondent.

The judgment of the Bench was delivered by

U SAN MAUNG, J.—In Criminal Regular Trial No. 65 of 1951 of the Sessions Judge, Yenangyaung, sitting as First Special Judge, Bo Oo Sein, Bo Kyar, Bo Mortar (*a*) Maung Aye, Bo Aye Saung, Bo Nyan Win (*a*) Saya Ba Than and Maung Hla Maung were convicted under section 3 (*1*) of the High Treason Act for committing high treason by waging war against the Union of Burma and were sentenced to death. On appeal by these accused to this Court against their convictions and sentences the conviction on Maung Hla Maung was altered to one under section 4 (*1*) of the High Treason Act and the sentence reduced

* Criminal Appeals Nos. 338 to 341 and 342 to 345 of 1954 against the orders of the Special Judge, Yenangyaung, in Criminal Regular Trial Nos. 66 of 1951 and 5 of 1952.

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BO OO SEIN AND FOUR OTHERS v. THE UNION OF BURMA.

U SAN MAUNG, J.

to ten years rigorous imprisonment, while the convictions and sentences on the rest of the accused were confirmed in Criminal Appeals Nos. 332 to 337 of 1954. There it was held that the action of Bo Oo Sein and four others, who were convicted under section 3 (*1*) of the High Treason Act, in seizing the town of Yenangyaung and setting up a parallel Government, constituted waging war against the Union of Burma, for which they were liable to punishment under section 3 (*1*) of the Act. In Criminal Regular Trial No. 66 of 1951 of the same Court Bo Oo Sein, Bo Kyar, Bo Mortar (*a*) Maung Aye, Bo Aye Saung and Bo Nyan Win (*a*) Saya Ba Than were again convicted under section 3 (*1*) of the High Treason Act for the clash between the White *Yebaws* and the Government Forces at Thitcho *en route* to Magwe which the White *Yebaws* seized on the 25th February, 1949, two days after the seizure of Yenangyaung. In Criminal Regular Trial No. 5 of 1952 of the same Court the same accused were convicted for a third time under section 3 (*1*) of the High Treason Act for waging war against the Union of Burma by the seizure of Magwe and the setting up of a parallel Government in that town. The accused have appealed against their convictions and sentences in these two cases and as the facts involved in them being closely connected and the point of law requiring consideration being the same, the two sets of appeal will be dealt with in the same judgment.

In Criminal Regular Trial No. 66 of 1951 the learned Special Judge prefaced his judgment with the following remarks : " The episode at Thit-cho is to be interpreted in the light of what had taken place at Yenangyaung and Magwe, *as it formed part of the general scheme in the insurrection of the White Band Yebaws.*" Therefore, it is obvious that the incidents

which occurred at Yenangaung, Thitcho and Magwe were in the course of the same transaction in that they were the various incidents occurring in the insurrection of the White Band *Yebaws*. The three incidents were also closely connected in point of time as Yenangyaung was seized on the 23rd of February, 1949, the incident at Thitcho occurred on the 24th of February, 1949 and Magwe was seized on the 25th of February, 1949. The community of purpose and the continuity of action disclosed in these three major incidents will be clearly appreciated if a brief resume of the facts is given.

In the year 1948 there was a split in the People's Volunteer Organization commonly known as the *Pyithu Yebaw Aphwe* into two sections, one known as the Yellow Band PVOs who were in support of the Government and the other known as the White Band PVOs who went underground. Later there were some negotiations between the Government and the White Band PVOs with a view to arrive at an agreement to resist the KNDOs who were regarded as the common enemy. In these circumstances some of the White Band PVOs, including the accused in the present cases, who had been underground, again made their appearance. About 7 days before the fall of Yenangyaung on the 23rd of February, 1949, there was a talk between the leaders of the White Band PVOs of Yenangyaung and the local administrative Officers regarding the help which the White PVOs should give the Government to resist the KNDOs who were at Meiktila. However, the Divisional Commissioner U Ba Sein and his deputies did not entirely trust the White PVOs, so that arrangements were made to bring the goods of the Civil Supplies Department lying at Kyaukpadaung to Yenangyaung. When this decision was

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USAN MAUNG, J.

made known to the White PVOs they came out in their true colours. The goods brought from Kyaukpadaung to Yenangyaung were intercepted by them *en route*. On the same evening the White PVOs under Bo Oo Sein and Bo Kyar who were reinforced by the contingent from Kyaukpadaung attacked the Myoma Police Station at Yenangyaung, seized arms and ammunition belonging to the Police, seized the Treasury also and the arms in the possession of the Union Military Police at Yenangyaung. The local Officers were put under house arrest. Thereafter, although there was some rapprochement for co-operation on the part of these Officers no workable arrangement could be arrived at, as the White PVOs insisted upon the Officers' renouncing their allegiance to the legal Government. Some of the Officers, as for instance the Additional Deputy Inspector-General of Police U Thin, were later put under close arrest. After the fall of Yenangyaung on the 23rd of February, 1949, the legal Government ceased to function in that town. On the next morning, namely 24th February, 1949, the White *Yebaws* left Yenangyaung for Magwe in about 50 buses and trucks. On arrival at Nyaungdo bridge, 5 miles to the south of Yenangyaung, the vehicles were stopped and arms distributed. In the meantime Bo Thein Maung, who was second in command of the levies stationed at Magwe, being anxious about the men whom he had sent for information from Yenangyaung left Magwe for Yenangyaung with two companies of levies. Near Thitcho he was ambushed from behind the trees and in the course of the encounter two or three persons from the opposite side were captured and they were found to be White *Yebaws*. Subsequently, Bo Thein Maung sent a messenger with a message on a Red Cross jeep to Bo Kyar because of a previous

understanding between the *Yebaws* and the Government Forces for mutual help in the fight against the KNDOs. This was followed by a meeting between Bo Thein Maung and Bo Kyar, Bo Oo Sein and Bo Mortar at which the White *Yebaw* leaders informed Bo Thein Maung that they had taken Yenangyaung and seized the firearms from the UMPs besides the money in the Treasury. While this conversation was in progress there was a fresh outbreak of firing between the White PVOs and the levies and the engagement lasted about 4 hours between 2 p.m. and 6·30 p.m. The levies then withdrew to Magwe while the *Yebaws* spent the night at Daung-thay, midway between Yenangyaung and Magwe. The next day, namely the 25th of February, 1949 the White *Yebaws* under Bo Oo Sein and Bo Kyar proceeded to Magwe. At that time U Hla, Circle Inspector of Police, was in charge of Magwe Police Station. He saw between 300 and 400 *Yebaws* bearing all sorts of arms come into the town on several motor vehicles. They announced by means of a loudspeaker that the *Yebaws* had come to an understanding with the Deputy Commissioner and District Superintendent of Police at Yenangyaung and that no resistance should be offered. A letter addressed to U Hla and written by U Thin to the effect that there was an understanding between the Government and the PVOs was also delivered. The Police Officers of Magwe were made to give up their firearms. All firearms held on private licence were also seized. Some of the Police Officers, including U Ba Ohn, S.D.P.O., Yenangyaung, also arrived. After the fall of the town it was immediately put under military administration. The Sub-Treasury and the Supplies Depot were seized and a People's Court presided by three Judges was set up. A parallel Government was

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also set up at Magwe on the same pattern as that at Yenangyaung.

From the above it is clear that the seizure of Yenangyaung, the incident at Thitcho and the seizure of Magwe were part of the same transaction, namely, waging war against the Union of Burma by the White Band PVOs. The question now for consideration is whether Bo Oo Sein, Bo Kyar, Bo Mortar, Bo Aye Saung and Bo Nyan Win had committed three separate offences punishable under the High Treason Act for these three distinct overt acts for which they could be tried separately and convicted or whether they had committed one offence of high treason punishable under section 3 (*1*) of the Act. There is no direct authority on the point, but the ruling in the case of *Gam Mallu Dora* alias *Mallayya* v. *King-Emperor* (1) is not inapposite. There it was held that the waging of war is a continuing offence and a charge against the accused under section 121 of the Indian Penal Code, specifying more than three offences committed in the course of the war, and spread over a period of more than one year, is not illegal. Spencer, C.J., with whom Krishnan, J., agreed on a difference of opinion between the learned Chief Justice and Reilly, J., has made the following observation :—

> " It was decided by Oldfield and Ramesam, JJ., in one of the appeals arising out of the Malabar rebellion, R.T. No. 80 of 1922, that the waging of war is essentially a continuing offence, in which several incidents, which may in themselves be separate offences, may be comprised. I see no reason to think it is otherwise. Rebellion implies a state of being rather than the doing of any act, although for a conviction it is necessary to prove that some overt act was committed by the offender. Rebellions and wars continue until they are suppressed by capture or destruction of the rebel forces

(1) 49 Mad.74.

or by rebels laying down their arms and making their submission as subjects to their sovereign and receiving his pardon."

In the cases now under consideration the several accused were animated by the desire to overthrow the legal Government by force or threat of arms and with this end in view they seized Yenangyaung and then Magwe and they came into a conflict with the Government Forces at Thitcho on their way to seize Magwe. The incidents at Magwe, Thitcho and Yenangyaung are the overt acts from which their intention could be gathered. All the accused could and should, in fact, have been tried in one case of the offence punishable under section 3 (*1*) of the High Treason Act, 1948. However, in framing charges against them the several incidents which took place on the 23rd, 24th and 25th of February, 1949, should have been enumerated in the charge in support of the fact that their intention was to wage war against the Government of the Union of Burma. The accused having been convicted of the offence under section 3 (*1*) of the High Treason Act in Criminal Regular Trial No. 65 of 1951 and their convictions and sentences having been confirmed on appeal, their convictions and sentences in Criminal Regular Trial No. 66 of 1951 and Criminal Regular Trial No. 5 of 1952 should be set aside on the principles of *autre fois convict* embodied in section 403 of the Criminal Procedure Code.

In the result the appeals of Bo Oo Sein, Bo Kyar, Bo Mortar (*a*) Maung Aye, Bo Aye Saung and Bo Nyan Win (*a*) Saya Ba Than succeed. Their convictions and sentences under section 3 (*1*) of the High Treason Act in Criminal Regular Trial No. 66 of 1951 and Criminal Regular Trial No. 5 of 1952 are set aside and they are acquitted and released so far as the charges therein are concerned.

APPELLATE CIVIL.

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

H.C. 1954

Nov. 22.

CHANDRABHAN SINGH (APPELLANT)

v.

KISHORE CHAND MINHAS (RESPONDENT).*

Urban Rent Control Act, s. 14 (1)—Compromise decree Payment of future rents, whether an order within ambit of section—Discretion of Court, extent of, under s. 14

Held: S. 14 (*1*) of the Urban Rent Control Act makes no provision for the payment of future rents, and the stipulation for the payment of future rents in the consent decree must be considered to be matter extraneous to the purpose of s. 14.

Bhogee Ram v. *U Ba So and one*, (1949) B.L.R. 565, followed.

Held also: An order passed under s. 14 (*1*), Urban Rent Control Act is appealable both on fact and law *vide* s. 15, but no appeal lies against a consent decree *vide* s. 96 of the Civil Procedure Code. Where a compromise petition is filed the Court has no alternative except to pass a decree in terms of the compromise, but the Court under s. 14 (*1*) of the Urban Rent Control Act has a discretion to pass such order as it might think fit and reasonable.

In re South American and Mexican Co., (1895) 1 Ch. D. 37; *Neale* v. *Gordon Lennox*, (1902) A.C. 465, distinguished.

Held further: S. 14 (*1*) Urban Rent Control Act confers a distinctive right upon the judgment-debtor, and a heavier burden than that provided by the section cannot be imposed upon him.

P. K. Basu for the appellant.

Aung Min (1) for the respondent.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The plaintiff-appellant Chandrabhan Singh instituted a suit under section 11 (*1*) (*a*) of the Urban Rent Control Act, 1948, for the ejectment of the defendant-respondent Kishore Chand Minhas from a room on the first floor of a building at No. 81/85, 37th Street, Rangoon, in Civil

* Special Civil Appeal No. 6 of 1953 against the decree of the High Court (Appellate Side) in Civil Misc. Appeal No. 27 of 1952.

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CHANDRABHAN SINGH v. KISHORE CHAND MINHAS.

U TUN BYU, C.J.

Regular Suit No. 855 of 1950 of the Rangoon City Civil Court.

Kishore Chand Minhas, however, denied that he was a tenant of Chandrabhan Singh; and he alleged that he had instead been a tenant of one Jatta Shankar Shukla since October, 1946. The parties however arrived at a compromise on the 29th September, 1951; and a decree was drawn up in these terms, which were in accordance with the compromise-petition filed by the parties.—

"This cause coming on the 20th day of September 1951 for final disposal before U Ba Kyaw, B.L., 4th Judge of the Court, in the presence of Mr. Roy for Mr. Modan on the part of the plaintiff, and Mr. N. Mohamed for U Aung Min (2) on the part of the defendant by consent, it is ordered that the defendant do quit vacate and give up peaceful possession of the suit room in question to the plaintiff, failing which he and anything found on the room shall be removed therefrom. Each party to the suit shall bear its costs. Upon reading the joint petition dated 30-8-51, following order passed :—

(1) That the arrears of rent and compensation for the suit room are due and payable for the period 1st January, 1948 to 31st July, 1951 at the rate of Rs. 45 (Rupees forty-five only) per month.

(2) That the defendant shall pay the above arrears in respect of the suit room at the rate of Rs. 45 (Rupees forty-five only) commencing from the 15th September 1951 and thereafter month by month on the same date.

(3) That in addition to the aforesaid payment of Rs. 45 every month the defendant shall also pay the current compensation of Rs. 45 every month along with payment towards the arrears on the same date.

(4) Thus the defendant shall pay, in view of the above terms, a total sum of Rs. 90 (Rupees ninety only) by way of monthly instalments commencing from 15th September 1951 until such time that all the aforesaid arrears are

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cleared and the current compensation paid month by month as aforesaid and there remains no arrears whatsoever.

(5) That on payment and clearance of all arrears and all current compensation in manner aforesaid the consent decree shall be rescinded.

(6) The aforesaid decree shall remain unexecutable so long as the defendant pays Rs. 90 (Rupees ninety only) every month in the manner and on the dates aforesaid.

(7) On the defendant paying all the arrears and the current compensation as it becomes due and on there being no arrears whatsoever the plaintiff shall assign the suit room in the name of the defendant provided the Controller of Rents, City of Rangoon allows such assignment ".

Kishore Chand Minhas subsequently defaulted in the payment of Rs. 90 per month, as required under the terms of the consent decree. On the 2nd January, 1952, Chandrabhan Singh, the decree-holder, applied for the execution of the decree obtained against Kishore Chand Minhas; and the latter in turn applied, under section 14 (*1*) of the Urban Rent Control Act, 1948, for the stay of the said execution proceeding. The application of Kishore Chand Minhas for stay of the execution proceeding made under section 14 (*1*) was later dismissed; and the relevant portion of the order, dismissing his application, so far as the present appeal is concerned, reads :—

" . . . . . .

In my opinion the compromise decree is a decree in accordance with section 14 (*1*) of the Urban Rent Control Act. Terms have already been imposed and the applicant J.D. had obtained an order for stay of execution by the compromise decree, on condition that he paid the instalments due on or before the 15th of every month from September 51. Admittedly he has failed to comply with the condition imposed. The Court holds therefore that the judgment-debtor

cannot apply again for stay of execution under section 14 (*1*) of the Urban Rent Control Act. J.D's application is therefore dismissed."

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Kishore Chand Minhas next preferred an appeal in the High Court; and his appeal was known as Civil Miscellaneous Appeal No. 27 of 1952. He was successful in his appeal before the High Court. The learned Judge on the Appellate Side held that the latter portion of the decree, which followed the operative part of the decree, was not in the nature of an order made under section 14 (*1*) of the Urban Rent Control Act, 1948. It has however been contended before us on behalf of the plaintiff-appellant that as the consent decree passed on the compromise-petition filed by the parties provided that the consent decree shall be rescinded if the arrears of rent had all been paid, it should, in effect, be regarded as being in the nature of an order made under section 14 (*1*) of the Urban Rent Control Act, 1948, but we are unable to see any real force in such contention. We ought to mention at once that there is nothing in the consent decree to suggest that it was made or purported to have been made under section 14 (*1*).

Section 14 (*1*) of the Urban Rent Control Act, 1948, makes no provision for the payment of future rents, and the stipulation for the payment of future rents in the consent decree must be considered to be a matter extraneous to the purpose of section 14 (*1*). The second portion of the consent decree cannot, therefore, be considered to be an order made under section 14 (*1*), in that the consent decree imposes on Kishore Chand Minhas a burden heavier than what was provided in section 14 (*1*). Thus, the second portion of the consent decree contains a matter, which was clearly unfair to the judgment-debtor so

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far as his interest or right under section 14 (*1*) is concerned. It was observed in *Bhogee Ram* v. *U Ba So and one* (1) :—

" . . . . . .

It has been argued by the learned Advocate for the appellant that the amount payable by the tenant for the period occupied by him after his tenancy has been terminated according to law must be regarded as mesne profits and that therefore, the Court was competent to impose the condition that the decree would be rescinded only if the mesne profits accruing in future were paid regularly on or before a date fixed by the Court. As to that, it seems clear to us that the words ' arrears of ' occurring before the words ' rent or mesne profits ' in sub-section (*1*) of section 14 of the Urban Rent Control Act, 1946, qualify both the word ' rent ' and the words ' mesne profits ' and that the words ' mesne profits ' had to be added to the word ' rent ' in order to provide for the cases of those from whom arrears of mesne profits would be due because they were persons permitted to occupy the premises in question under the provision of sub-section (*1*) of section 12 of the Urban Rent Control Act."

The Diary Order in Civil Regular No. 855 of 1950, dated the 20th September, 1951, under which the consent decree was drawn up were in these words :

" Roy for Modan for Plaintiff. Noor Mohamed for U Aung Min (2) for Defendant. Parties file joint petition of compromise. Let there be an order in terms of the compromise application."

It is thus clear that the second portion of the consent decree was not made in pursuance of the provisions of section 14 (*1*) of the Urban Rent Control Act, 1948, but in accordance with the compromise-petition; and it could not, in our opinion, be considered to be an order made under section 14 (*1*).

(1) (1949) B.L.R., p. 565 at p. 570.

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The order passed under section 14 (*1*) of the Urban Rent Control Act, 1948, is moreover appealable both on fact and law, *vide* section 15, whereas no appeal lies against a consent decree, which was passed in Civil Regular Suit No. 855 of 1950, *vide* section 96 of the Code of Civil Procedure. It appears to be clear also that the Court has no alternative, where a compromise-petition is filed as in the present case, except to pass an order for a decree to be recorded in terms of the compromise arrived at by the parties. The Court, on the other hand, has a discretion within the ambit of section 14 (*1*) of the Urban Rent Control Act, 1948, to pass such order as it might, in the circumstances of a particular case before it, consider to be reasonable.

Our attention has been drawn to certain observations made in *re. South American and Mexican Company* (1) and in *Neale* v. *Gordon Lennox* (2) to indicate that a consent decree passed on a compromise arrived at between the parties to a litigation should be considered to be final and conclusive, in that it embodied the terms voluntarily agreed upon by the parties themselves. What Earl Halsbury, L.C., observed in *Neale* v. *Gordon Lennox* (2) at page 470 was—

> " Where the contract is something which the parties are themselves by law competent to agree to, and where the contract has been made, I have nothing to say to the policy of law which prevents that contract being undone : the contract is by law final and conclusive."

Section 14 (*1*) of the Urban Rent Control Act, 1948, however, contains provisions which specifically enjoin that a decree is to be rescinded in certain circumstances indicated therein. A consent decree

(1) (1895) 1 Ch. D. 37. (2) (1902) A.C. p. 465.

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is clearly a decree within the meaning of section 14 (*1*) of the Urban Rent Control Act, 1948; and section 14 (*1*) will therefore apply to a consent decree. Moreover, section 14 (*1*) purports to confer a distinctive right upon a judgment-debtor, even after a decree has been passed.

The present appeal is for the reasons which we have set out above dismissed with costs, with Advocate's fee K 85.

APPELLATE CIVIL (FULL BENCH).

Before U Tun Byu, C.J., U Bo Gyi and U Chan Tun Aung, JJ.

DAW PU (APPLICANT)

v.

AHMED ISMAIL SEMA AND FIFTEEN OTHERS (RESPONDENTS).*

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Oct. 4

Mahomedan, devolution of estate of—Governed by Mahomedan Law—Burma Laws Act, s. 13—Right of succession, when accrues—Convert to Mahomedan religion, position of, in respect to succession—Representation, principle of, not recognised—Succession determined by independent right—Claim of Mahomedan heir, whether defeated by Buddhist father who died before accrual of right.

Held : Mahomedan Law will apply in respect of the estate of a person who was a Mahomedan at the time of his death, *vide* s. 13, Burma Laws Act.

C.V.N.C.T. Chedambaram Chettyar v. *Ma Nyein Me and others*, (1928) I.L.R. 6 Ran. 243, followed.

Held : The estate of a deceased Mahomedan devolves upon his heirs only at the time of his death and not earlier, see ss. 41, 52 and 56 of Mulla's Principles of Mahomedan Law.

Held : A person may be a Mahomedan either by birth or by conversion; after the conversion, he is on the same footing as a natural born Mahomedan under Mahomedan Law.

Mitar Sen Singh v. *Maqbul Hasan Khan and others*, 57 I.A. 313=A.I.R. (P.C.) (1930) p. 251 at 253, followed.

Held also: A person acquires a share under Mahomedan Law in his or her own independent right which comes into existence only at the time of the death of the deceased; the principle of representation is foreign to the Mahomedan Law of inheritance.

Jaffri Begam v. *Amir Muhammad Khan*, I.L.R. 7 All. 822, followed.

Held lastly: As the claimant's father was already dead at the time when the right to succession accrued, the fact that he was a Buddhist and could not claim any share in the estate is immaterial, as the nature of the claim can only be ascertained when the right accrued.

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* Civil Reference No. 3 of 1954 arising out of a Reference dated the 26th March 1954 by U SAN MAUNG, J. in Civil Revision No. 91 of 1953 of the High Court under Rule 25 of the Appellate Side Rules of Procedure (Civil) High Court Rules and Order Manual. (Reproduced below.)

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Than Sein for the applicant.

P. B. Sen and *G. N. Banerjee* for the respondents.

Aung Min (1) *Amicus Curiae.*

[This reference arose out of Civil Revision No. 91 of 1953 of this Court, where Mr. Justice San Maung being of the opinion that the question involved is of great importance and far reaching consequence referred to a Bench or a Full Bench the question, which appears, with the facts of the case, from the order reported below.]

U SAN MAUNG, J.—Civil Regular Suit No. 9 of 1940 of the District Court of Mandalay is one for administration, partition and accounts filed by Daw U who claimed to be the wife of S. A. Sema who died on 13th December, 1932. The defendants in the case were the two brothers and the legal representative of the sister of the deceased S. A. Sema and an alleged wife of the deceased whose status the plaintiff denied. The plaintiff claimed that she was entitled to half of the estate left by S. A. Sema as his partner and to one-fourth of the rest of the estate as his heir. As a partner she claimed accounts and as his heir and partner, partition and delivery of her share. It was dealt with by the then District Judge Mr. Gledhill who passed orders on the several preliminary issues raised therein. The learned District Judge held that the suit was bad for misjoinder and ordered amendment of the plaint so as to conform to the requirements of an administration suit, pure and simple. On appeal to the High Court it was held that there was no misjoinder of causes of action and that the plaintiff's suit as originally brought was maintainable. Thereafter the Japanese invaded Burma and in the chaos that followed the records of

the case were destroyed. After re-occupation the records were reconstructed and it was then found that two of the brothers of the deceased S. A. Sema, namely, I. A. Sema and E. A. Sema had died and that their legal representatives would have to be brought on the record. This was accordingly done. Among the defendants who contested the suit were defendants Nos. 12 to 15 who filed a joint written statement and defendant No. 16, the original third defendant E. M. Seedat who filed a separate written statement. The rest of the defendants did not appear and the case was ordered to be heard *ex-parte* as against them. The main defences raised by the defendants were that the plaintiff Daw U *alias* Mariam Bibi and Ma Tin were not lawfully wedded wives of the deceased S. A. Sema, that the properties left by the deceased S. A. Sema, in which Daw U claimed a share, were not acquired jointly by the deceased and Daw U and that Daw U was not entitled to any share thereof as a partner either. Subsequently Daw U herself died on the 12th October, 1952, and one Maung Pu claiming to be the nephew of Daw U applied to be brought on the record as a plaintiff, as legal representative of the deceased Daw U. This application was later withdrawn in view of the ruling of this Court in *Ko Aye and one* v. *Rasul Bibi and three others* (1) where it was held that a Buddhist cannot inherit from a Mohammedan. Subsequently, on the 30th January, 1953, one Daw Pu (the present applicant) claiming to be a niece of Daw U filed another application praying that her name be brought on the record as plaintiff because she is a legal representative of the deceased Daw U. In the meantime defendants Nos. 12 to 15 assigned their interest in the subject-matter of the suit to E. M. Seedat by a registered deed and

(1) (1950) B.L.R. 288.

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E. M. Seedat himself filed an application praying that he might be transposed as plaintiff in the suit as, if Daw U was a Mohammedan and widow of the deceased, he would be her heir.

The question therefore arose whether Daw Pu, the present applicant, can be regarded as a legal representative of the deceased Daw U. The deceased Daw U died a Mohammedan and the present applicant Daw Pu is also a Mohammedan. However, the learned District Judge, Mandalay, dismissed Daw Pu's application for the reasons occurring in a passage of his judgment reproduced below:

> " The point that now arises for consideration is whether under Mahomedan law Daw Pu is a person on whom the estate of Daw U or even part of the estate would devolve; if so, then there would be no impediment to her being brought on record as her legal representative. Daw Pu may be of the Mahomedan faith, but she claims to be Daw U's niece through her father who was a Burmese Buddhist and who died a Burman Buddhist. There is, therefore, a break in, so to say, the chain of heirship, which, in my opinion, places almost an insurmountable barrier to the claim put forward to her. Had U Po Tun been living he would certainly not have got any share in the estate of Daw U, and since the root through which Daw Pu has claimed is shown not to be entitled to any share, I am unable to see how the applicant Daw Pu can step in as legal representative of Daw U. See sections 74 and 75 of Principles of Mahomedan Law by Mulla, thirteenth edition, at pages 84-85. Daw Pu cannot be held to be a legal representative of the deceased Daw U as defined in Order 2 (12) of the Code of Civil Procedure."

The present is an application for revision of the order of the District Judge refusing to substitute the name of Daw Pu in the plaint as a legal representative of her deceased aunt Daw U.

The question involved is of great interest to the Mohammedan community in Burma and there are

no reported rulings either of this High Court or of any High Court in India. In Mulla's Principles of Mahomedan Law, 1950 Edition, the following passage occurs at page 55 under the caption " Impediments to inheritance " :—

" The *Sirajiyyah* sets out four grounds of exclusion from inheritance, namely, (1) homicide, (2) slavery, (3) difference of religion, and (4) difference of allegiance. Homicide, as an impediment to succession, is dealt with in the present section. The second impediment was removed by the enactment of Act V of 1843 abolishing slavery [*Ujmudin Khan* v. *Zia-ul-Nissa* (1)], and the third by the provisions of Act XXI of 1850 which abolished so much of any law or usage as affected any right of inheritance of any person by reason of his renouncing his religion. The bar of difference of allegiance disappeared with the subversion of the Mahomedan supremacy.

A person incapable of inheriting by reason of any of the above disqualifications is considered as not existing, and the estate is divided accordingly. According to the Sirajiyyah he does not exclude others from inheritance (*Sir*, 22—28). Thus if A dies leaving a son B, a grandson C by B, and a brother D, and if B has caused the death of A, B is totally excluded from inheritance, but he does not exclude his son C. The inheritance will devolve as if B were dead, so that C, the grandson, will succeed to the whole estate, D being a remote heir."

Therefore, it would appear that the fact that Daw Pu's father happened to die a Buddhist would not disbar Daw Pu from inheriting the estate of Daw U both she and her deceased aunt being Mahomedans by religion. However, I consider that the question should be decided by a larger Bench than that of a single Judge of this Court. Therefore, as provided in Rule 25 of the Appellate Side Rules and Procedure (Civil), as substituted by High Court Notification No. 4 (General), dated the 27th May, 1949, I would refer for the decision of a Bench of two Judges or of a

(1) (1879) 6 I.A. 137, 3 Bom. 422.

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Full Bench, as the Chief Justice may direct, the following question of Law :—

"Is a Mahomedan woman debarred from inheriting the estate of her aunt who died a Mahomedan by reason of the fact that her father through whom she claims kinship with the deceased, is a person of a different religion, namely, a Buddhist?"

The judgment of the Full Bench was delivered by

U TUN BYU, C.J.—Daw U instituted a suit for the administration, partition and accounts of the estate of one S. A. Sema, who was a Mahomedan, in Civil Regular Suit No. 9 of 1940 of the District Court, Mandalay. She alleged that she was the widow of the said S. A. Sema who died in 1932. She claimed one-half of the estate of the deceased S. A. Sema on the ground that she was a partner in the business which he carried on before his demise, and one-quarter of the remaining half share of the estate, as an heir of the deceased S. A. Sema. The first and second defendants, I. A. Sema and E. A. Sema denied that Daw U (*a*) Mariam Bibi, was *inter alia* a widow of the deceased S. A. Sema, or that she was a partner in his business. The third defendant E. M. Seedat, who was the executor of the deceased Rasool Bibi, a sister of S. A. Sema, also set out a similar defence. Subsequently, Ma Tin, who also claimed to be a widow of the deceased S. A. Sema, was added as the fourth defendant, and her defence was on the same lines as the other defendants. It might be mentioned, however, that none of the parties in the present litigation admitted that Ma Tin was a widow of the deceased.

I. A. Sema and E. A. Sema died subsequently, and their legal representatives had been made parties to

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the suit. Later, Daw U died in or about October, 1952, and one Maung Pu, who claimed to be a nephew of Daw U, applied to be brought on the record, but his application was withdrawn, apparently because he was a Buddhist. Thereafter, Daw Pu, who claimed to be a niece of Daw U, applied to have her name brought on the record. Daw U was a Mahomedan at the time of her death. Her niece Daw Pu is said to be a Mahomedan also, and this reference is heard on this basis. The learned District Judge dismissed the application of Daw Pu on the ground that she was not a person who would be entitled under Mahomedan law to claim any share in the estate of the deceased Daw U, in that her father U Po Tun, who was an elder brother of Daw U, was a Burmese Buddhist.

Daw Pu next filed an application for revision, known as Civil Revision No. 91 of 1953, in the High Court against the said order of the District Judge, Mandalay, dated the 25th June, 1953. The learned Judge before whom the application for revision was first heard has referred the following question for decision, namely :—

> " Is a Mahomedan woman debarred from inheriting the estate of her aunt who died a Mahomedan by reason of the fact that her father, through whom she claims kinship with the deceased, is a person of a different religion, namely, a Buddhist ?"

It seems to us that it will be more appropriate to make a slight verbal modification in the question, which has been referred to us, and we consider that the question referred should be read as follows :

> " Is a Mahomedan woman debarred from inheriting the estate of her aunt who died a Mahomedan by reason of the

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fact that her father is a person of a different religion, namely, a Buddhist ?"

It is not disputed that U Po Tun, the father of Daw Pu, died a Buddhist, and that he pre-deceased Daw U. Daw U was admittedly a Mahomedan at her death. Daw Pu is said to be a Mahomedan also. Mahomedan law will apply in respect of the estate of Daw U in that Daw U was a Mahomedan at the time of her death—*vide* section 13, Burma Laws Act, wherein the Court, in considering questions relating to succession, inheritance, marriage or caste, or any religious usage or institution, the Buddhist, Mahomedan or Hindu law, as the case may be, is to be applied where the parties are Buddhists, Mahomedans or Hindus. A decision to this effect will be found in the case of *C.V.N.C.T. Chedambaram Chettyar* v. *Ma Nyein Me and others* (1). The fact that the deceased Daw U was a convert will make no difference; and the observation of their Lordships in *Mitar Sen Singh* v. *Maqbul Hasan Khan and others* (2), was :

". . . In other words, when once a person has changed his religion and changed his personal law, that law will govern the rights of succession of his children. It may, of course, work hard to some extent upon expectant heirs, especially if the expectant heirs are the children and perhaps the unconverted children of the ancestor who does in fact change his religion, but, after all, it inflicts no more hardship in their case than in any other case where the ancestor has changed the law of succession, as, for instance, by acquiring a different domicile, and their Lordships do not find it necessary to consider any questions of hardship that may arise. . . . . ."

A person may be a Mahomedan either by birth or by conversion, and it appears to us that a convert is,

(1) (1928) I.L.R. 6 Ran. 243.

(2) (1930) 57 I A. 313 = A.I.R. (1930) (P.C.) 251 at 253.

after the conversion, on the same footing as a natural born Mahomedan under Mahomedan law. Our attention has not been drawn to any provision of law or decision which will indicate that a convert is not on the same footing as a person who is a Mahomedan by birth under Mahomedan law.

It has been strenuously contended before us during the arguments that as Daw Pu's father, who was a brother of Daw U, was a Burman, Daw Pu could have no claim to any share in the estate of the deceased Daw U, under Mahomedan Law, in that U Po Tun, brother of Daw U, could not himself claim any share in the estate of Daw U under Mahomedan law. Such argument involves, in our opinion, confusion of ideas in regard to the real effect of Mahomedan law in this aspect. The relevant portion of section 41 in Mulla's Principles of Mahomedan Law, (13th Edition), at page 32, is in these words:

> " Subject to the provisions of sections 39 and 40, the whole estate of a deceased Mahomedan if he has died intestate, or so much of it as has not been disposed of by will, if he has left a will, devolves on his heirs *at the moment of his death*, ..."

Thus, the estate of a deceased person devolves upon his heirs only at the time of his death, and not earlier. Section 56 in Mulla's Principles of Mahomedan Law gives the same indication, and it reads:

> " 'A vested inheritance' is the share which vests in an heir at the moment of the ancestor's death. If the heir dies before distribution, the share of the inheritance which has vested in him will pass to such persons as are his heirs at the time of his death. The shares therefore are to be determined at each death."

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Section 52 in Mulla's Principles of Mahomedan Law also leads us to the same conclusion, and it is in these terms :

" The right of an heir-apparent or presumptive comes into existence for the first time on the death of the ancestor, and he is not entitled until then to any interest in the property to which he would succeed as an heir if he survived the ancestor."

It is therefore clear that a person acquires a share under Mahomedan law on his or her own independent right, which comes into existence only at the time of the death of the deceased; and in the present case Daw Pu's father died before Daw U. It is probably for this reason that the theory of representation, speaking generally, was not recognised under Mahomedan law.

In *Jaffri Begam* v. *Amir Muhammad Khan* (1) it was observed :

" These authorities leave no doubt in my mind that the devolution of inheritance takes place *immediately* upon the death of the ancestor from whom the property is inherited. But I wish further to adopt certain tests to confirm my view. The first of them is an absolutely universal rule of the law of Muhammadan inheritance itself. The *jes representationis* being absolutely foreign to the Muhammadan law of inheritance, the question of the devolution of inheritance rests entirely upon the exact point of time when the person through whom the heir claims, died—the order of deaths being the sole guide in such questions."

There is a similar observation in Ameer Ali's Mohomedan Law, (5th Edition), at page 35, and it is in these words :

" As a general rule, neither the Sunnis nor the Shiahs recognise the principles of representation."

(1) I.L.R. 7 All. 822 at 834.

Thus, in no circumstance could it be asserted that Daw Pu, who claimed to be the legal representative of Daw U, was in reality claiming not in her own independent right but only through her father U Po Tun, whose death occurred long before Daw U. Daw Pu possesses, under Mahomedan law, a right independent of her father at the time Daw U died, and which right accrues to her only at the time of Daw U's death, by which time her father U Po Tun was already dead. The fact that U Po Tun was a Buddhist and that he could not, as a Buddhist, claim any share in Daw U's estate is, in our opinion, immaterial so far as Daw Pu's claim is concerned, as the nature of her claim can only be ascertained at the time of Daw U's death. It is difficult in the circumstances to appreciate the argument that because U Po Tun was incompetent to claim any share in Daw U's estate, Daw Pu should under Mahomedan law be considered to be also incompetent in respect of her claim to be the legal representative of Daw U under Mahomedan law, and section 606 (7) of Tyabji's Muhammadan Law, (3rd Edition), at page 840, reads:

"(7) A person incompetent to inherit, does not, except in so far as it is expressly so provided, exclude another or cause him to take a smaller share."

It cannot be disputed in the present case that the estate of Daw U will, under Mahomedan law, pass to the distant kindred, if there are no sharers or residuaries, and the relevant portion of section 68 in Mulla's Principles of Mahomedan Law, (13th Edition), reads:

"(1). Distant Kindred are divided into four classes, namely, (1) descendants of the deceased other than sharers and residuaries; (2) ascendants of the deceased other than sharers

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and residuaries : (3) descendants of parents other than sharers and residuaries; and (4) descendants of ascendants how high soever other than residuaries. . . . . ."

Daw Pu is a descendant of a parent other than sharers and residuaries, as indicated in item (3) above. It was however argued, in view of the wording in item (3) above, that her right to be a legal representative of Daw U must be considered to have been acquired through her father, and not independently of her parent. Daw Pu is a blood relation of Daw U, and she is a Mahomedan, and we do not consider that there is any real merit in this contention. It is clear that, under Mahomedan law, the estate of a deceased Mahomedan will devolve on his heirs from the moment of his death, and the interest of each heir, if there are more than one heir, comes into existence from that moment only. The answer to the question propounded will, for the reasons set out earlier in this judgment, be answered in the negative.

Each party will bear its own cost so far as this reference is concerned.

APPELLATE CIVIL.

Before U San Maung, J.

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Nov. 14.

DAW PU (APPELLANT)

v.

KO DON (RESPONDENT).*

Urban Rent Control Act, s. 11 (1) (a)—Transfer of Property Act, s. 106—Lease of rooms—Suit for eviction—Written notice necessity of—Contract Act, s. 56—Frustration, when applicable to leases—Suit, determination of, on point not raised specifically in pleadings, not permissible.

Held: As a valid lease was admitted, possession of the suit premises can be obtained by filing a suit under s. 11 (*1*) of the Urban Rent Control Act after notice under s. 106, Transfer of Property Act.

T. H. Khan v. *Dawood Yusoof Abowath and others*, (1947) R.L.R. 154; *Sahu Anand Sarup* v. *S. Taiyab Husan*, A.I.R. (1943) All. 279 referred to.

Held also: It is only under very special circumstanecs that the doctrine of frustration applies to leases. Occupation of a town by insurgents is only a temporary phase not comparable to occupation by enemy forces, in which event the doctrine can be invoked.

K.M. Modi v. *Mohammed Siddique and one*, (1947) R.L.R. 423; *Rangoon Telephone Co. Ltd.* v. *Union of Burma*, (1948) B.L.R. 527.

Held further: A party should be allowed to win or lose on a case set out in his pleading and it is not the function of a trial or an appellate Court to make out a case different from the one set out.

A.S.P.S.K.R. Karuppan Chettyar v. *A. Chokalingam Chettyar*, (1949) B.L.R. 46.

S. R. Chowdry for the appellant.

P. K. Basu for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 17 of 1951 of the Court of the Subdivisional Judge, Pyinmana, the plaintiff-appellant Daw Pu sued the defendant-respondent Ko Don for the recovery of possession of a building situated at Pyinmana,

* Civil 2nd Appeal No. 51 of 1952 against the decree of the District Court, Pyinmana, in Civil Appeal No. 1 of 1952.

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together with the fittings and furniture which she had put therein. Ko Don was the owner of the building having erected it on the land which he had leased from one Ali Hussein. The building consisted of six rooms let out to various tenants, Daw Pu being the tenant of two middle rooms on a monthly rental of Rs. 100 which was subsequently reduced to Rs. 80. The rooms were used by Daw Pu as a jeweller's shop after she had carried out certain improvements such as the erection of a loft and the equipment of fittings and furniture necessary for the purpose of her trade. On or about the 28th of January 1949, about two years after the commencement of the lease in favour of Daw Pu, the lady left Pyinmana for Rangoon when Pyinmana was threatened by the Karen insurgents who had already occupied Toungoo. Her brother Ohn Shwe *alias* Gafoor was kept in charge of the rooms but he was not given any express authority to pay the rents therefor. Daw Pu explained that this omission was due to the fact that she had thought that the occupation of Pyinmana by the insurgents would be only a temporary phase. However, when Pyinmana was left by the Karens after occupying it for a short period, it was subsequently held by the Communists until they were ultimately driven out by the Government forces about a year later. At the time of the Communists' entry into the town a fire broke out in the vicinity of the suit building so that Maung Ohn Shwe took the precaution of removing the roof for fear of the fire spreading to the building. This roof was later replaced by Ko Don who thereafter occupied the front part of the building, the rear portion being requisitioned by the Tenants Association. Maung Ohn Shwe himself in the capacity of a worker, and not as agent of his sister Daw Pu,

applied and obtained permission from the Communists to re-occupy the suit rooms for the purpose of plying his trade. However, he could not actually obtain possession as Maung Don refused to vacate them. Thereafter, when the Government forces occupied Pyinmana Maung Ohn Shwe made further attempts to obtain possession of the rooms but this was again resisted by Maung Don who continued to retain possession with the permission of the Subdivisional Officer, Pyinmana. The plaintiff-appellant therefore filed the suit now under appeal claiming that the lease in her favour was in the nature of a permanent one terminable only at her option, that she had made the improvements mentioned in her plaint with the knowledge and express consent of the defendant and that she was entitled to obtain possession not only of the rooms but also the fittings and furniture which she had put therein.

The defendant-respondent in his defence stated that the lease was from month to month only. He denied that the improvements and fittings, etc., done by Daw Pu were with his knowledge or consent and contended that he was entitled to resume possession of the rooms because of the failure of Daw Pu to pay arrears of rent due to him and for her abandonment of the rooms consequent on the occupation of Pyinmana by the insurgents.

The trial Court framed several issues as appearing in these proceedings but none of them relates to the frustration or otherwise of the contract of lease. It subsequently dismissed the suit mainly on the ground that the lease had been terminated under the provisions of section 4 of the Monthly Leases (Termination) Act, 1946, and by the principle of frustration as applied to leases as laid down in

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K. M. Modi v. *Mohammed Siddique and one* (1). On appeal to the District Court of Pyinmana by the plaintiff the learned District Judge pointed out that the provisions of section 4 of the Monthly Leases (Termination) Act, 1946, could not be applied to the case as the word "enemy" as defined in section 3 of the Act cannot be held to include the insurgents such as the Karens and the Communists. He, however, drew a parallel between the facts and circumstances occurring in the case under appeal and those in *K. M. Modi* v. *Mohammed Siddique and one* (1) and held that they are as exceptional as those appearing in *K. M. Modi*'s case and that the doctrine of frustration as applied to leases could be invoked in favour of the defendant-respondent. His findings are summarized in the passage which I reproduce below:

"The plaintiff-appellant had stated in her examination that she went away to Rangoon on the eve of the occupation of the town on a business trip. But she had admitted in her plaint as well as in her cross-examination that she purposely evacuated to Rangoon as the Karens had occupied Toungoo and were threatening to take Pyinmana also. She further admitted that when she left Pyinmana she had left no instructions nor any authority with her brother Maung Ohn Shwe (*a*) Gafoor to make payments of the rent to the defendant-respondent. In this connection it may be mentioned that the plaintiff-appellant had further admitted that she had not paid the rent of the premises for about 9 months before her evacuation to Rangoon. The total amount of rent thus due would be Rs. 720. Towards this amount the plaintiff-appellant had taken from her on credit one gold chain and a pendant valued at over Rs. 400 thereby leaving a balance of about Rs. 300 due by her. Besides this she had made no provision when she left Pyinmana for payment of rents. This is covenant which is the essence of the lease. It formed the very basis of the lease and its performance as fundamental to it. Moreover, in

(1) (1947) R.L.R. p. 423.

view of the conditions prevailing in the country at the time of the insurrections and the successes which the insurgents had made in occupying many of the important towns in the whole of middle and upper Burma, there is reason for the defendant-respondent to presume that the period of occupation of the town by the Communists would be of indefinite duration. It means in my opinion that the insurrections had interfered with the performance of the contractual obligations of the lease and that it had been terminated by frustration. I therefore agree with the decision of the lower Court on this issue and consider that the suit has been rightly dismissed."

In the result the suit of the plaintiff Daw Pu was dismissed with costs in both Courts. Hence this appeal under section 100 of the Civil Procedure Code by Daw Pu.

In the first place it has been urged by the learned Advocate for the plaintiff-appellant that both the Judges of the lower Courts have erred in deciding the case on a point which has not been pleaded by the defendant in his written statement, that is to say that the lease has been terminated because of frustration. I think there is ample force in this argument. The question whether a contract of lease is frustrated is one of mixed facts and law and if the defendant relied upon the doctrine of frustration he should have made a plea to this effect in his written statement. As pointed out by U Thein Maung, J., in *K. M. Modi*'s case (1) it is only under very special circumstances that the doctrine of frustration applies to leases. In this connection it is interesting to note the observations of the three learned Judges who had dealt with *K. M. Modi*'s case (1) in appeal. Roberts, C.J., said (at page 463) :

" With regard to the question of frustration, I have read the lucid analysis of the learned trial Judge and should hesitate long before I ventured to disagree with him in deciding that in very exceptional circumstances a demise for a term of

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years might possibly be frustrated. I should find the reasoning of Lord Simon and Lord Wright hard to resist. I am not quite so sure that the circumstances here, though in many ways exceptional, would necessarily terminate the demise : as Lord Wright pointed out, a temporary interruption of the tenants' use and occupation does not affect the covenants or chattel interest."

Sharpe, J., was even more cautious. He said (at page 468) :

"There remains the question of frustration. That issue loomed very large in the trial Court and indeed more than half the learned trial Judge's judgment is concerned with that topic ; I therefore feel it incumbent upon me to say something about it, even though, as I am in favour of the respondents on the question of forfeiture, it is unnecessary for me to decide the matter. It is indeed a difficult question to answer, whether the abstract proposition, that a lease can, in certain circum stances, be determined by events equivalent to frustration, can be maintained in law. The latest reported case in England dealing with this subject is one in the House of Lords in 1945, which, as regards the general proposition I have mentioned, terminated inconclusively, Lord Simon and Lord Wright being divided against Lord Russell of Killowen and Lord Goddard, with Lord Porter, the only other member of the House, declining to come down either on the one side or the other. To my mind this is so thorny a subject, and the ground out of which the thorns spring is itself so uncertain, that it is a matter upon which I myself would only be prepared to give a decision were circumstances such as absolutely to compel me to do so. *I would not care to say that the doctrine of frustration can apply to determine a lease unless I were confronted with a set of circumstances such as to produce the result that the lease had, in that particular case, been determined by frustration.*"

Blagden, J., the third Judge on the Bench, differed from the learned Judge on the Original Side, namely, U Thein Maung, J., in these words (page 470) :

"On the difficult question whether a lease can be frustrated I find myself also in agreement with my brother

Thein Maung. Such is the nature of a lease that it is admittedly difficult to imagine a case of its frustration by impossibility of performance. Even in the case of a subsidence of the earth, resulting in the demised premises being completely inundated by the sea, the tenant, during the remainder of his term, might, presumably, insist on the exclusive right of fishing in the area of water covering his tenement, for what that right might be worth. But—especially at the present time—I see no great difficulty about a lease being frustrated by supervening illegality : * * *

As at present advised, however, I have the misfortune to differ from my brother Thein Maung as to the applicability of the doctrine of frustration to the facts of this case."

I have given the above quotations with a view to emphasize the fact that it is quite unfair to spring a surprise on the opposite party a plea that a contract of lease has been terminated because of frustration only at the time when the case has to be argued. Such a difficult question of facts and law should be specifically pleaded and proved. In this connection I need only refer to the case of *A. S. P. S. K. R. Karuppan Chettyar and one* v. *A. Chokalingam Chettyar* (1) where the Supreme Court has ruled that " a party should be allowed to win or lose on a case set out in his pleading and it is not the function of a trial or an appellate court to make out a case different from the one set out in pleadings ". It is also observed therein :

" What particulars are to be stated in the plaint depends on the facts of each case but it is absolutely essential that the pleading in order that it may not be embarrassing to the defendants should state those facts which would put the defendants on their guard and tell them what case they have to meet when the case comes up for trial."

These observations apply equally well to written statements as they are to plaints in suits. However,

(1) (1949) B.L.R. p. 46.

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even assuming for the sake of argument that, though not pleaded by the defendant in his written statement, he could on the facts appearing in the evidence raise the plea that the contract of lease between him and Daw Pu had been terminated because of frustration, I cannot agree with the learned Judges of the lower Courts that in this particular case the doctrine of frustration is applicable. As pointed out by U Bo Gyi, J., in *Rangoon Telephone Company, Limited* v. *The Union of Burma* (1) the principle regarding the frustration of a contract is embodied in section 56 of the Contract Act, which reads :

> " An agreement to do an act impossible in itself is void.
>
> A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

On the facts found by the learned District Judge, as summarized in the paragraph of his judgment quoted above, I cannot see how any of the acts which the lessor and the lessee in this case had contracted to do became impossible of performance or unlawful owing to the occupation of Pyinmana by the insurgents. Daw Pu had never abandoned the premises as, although she left Pyinmana for fear of the insurgents, she kept her own brother to look after the rooms. If no rent could be recovered from her brother during the occupation of Pyinmana by the insurgents it could certainly be recovered from her on the re-occupation of the town by the Government forces. It cannot surely be anybody's case that the occupation of any town by the insurgents is anything but a temporary phase not to be compared to the

(1) (1948) B.L.R. p. 527.

occupation of a country by enemy forces as appearing in *K. M. Modi*'s case (1). For these reasons I hold that the contract of lease between Daẃ Pu and Ko Don had not been terminated because of the provisions of section 56 of the Contract Act.

The learned Advocate for the respondent has argued that there was no valid lease in favour of Daw Pu as she had alleged the existence of a lease for an indefinite period terminable only at her option, which could only be made by a registered instrument signed by the lessor. In this connection he has cited the case of *Sahu Anand Sarup* v. *S. Taiyab Hasan* (1) where the headnote reads :

" Where under a written agreement to lease, the parties reserve yearly rent a lease in pursuance of it can only be created by the execution by the lessor of a registered instrument inasmuch as a lease is a transfer of property and not a mere agreement or contract. In the absence of such instrument, there can be no lease. It is not open to the Court to infer a lease from the circumstances of the case on some terms other than those which can be inferred from the agreement to lease because a lease can be created only in the manner set forth in the provisions of the T.P. Act. The fact that the proposed lessees were in possession of the property does not mean that a valid lease was created in their favour or that the interest of lessees in fact passed to them. They being in possession of the property without any title thereto must be treated as licensees :"

However, the fact remains in this case that the defendant has himself pleaded that there was a valid lease from month to month subsisting as between him and the plaintiff and even if the plaintiff's plea of a lease terminable only at her option fails, the defendant's plea that there was a lease from month to month must be deemed to have been established by his own admission. Such being the case, the

(1) A.I.R. (1943) All. 279.

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defendant can only obtain possession of the suit premises by filing a suit under section 11 (*1*) (*a*) of the Urban Rent Control Act. In this connection the following observations of a Bench of the late High Court of Judicature at Rangoon in the case of *T. H. Khan* v. *Dawood Yusoof Abowath and others* (1) are apposite :—

> "This suit should have been brought under section 17 of the Rangoon City Civil Court Act, and it could not have been brought, unless the tenancy had been determined under section 106 of the Transfer of Property Act. The effect of the Urban Rent Control Act, 1946, on the situation is that the respondent would further be bound to show that the case came within the purview of clause (*a*) of section 11 of that Act, but he could not, by shewing that this was the case, evade the necessity of determining the tenancy before instituting his suit."

The defendant had neither terminated the lease in favour of the plaintiff in the manner required by the Transfer of Property Act, nor had he filed a suit under section 11 (*1*) (*a*) of the Urban Rent Control Act. He had taken the law into his own hand by invading the premises which were lawfully in the possession of his tenant Daw Pu. He is therefore in no better position than that of a trespasser who should be evicted in the suit under appeal.

As regards the furniture and fittings, I find it difficult in the circumstances appearing in this case to come to a definite conclusion that the defendant was responsible for their removal. They could very well have been removed by the Communists who were bent on confiscating the property belonging to the bourgeoisie including the plaintiff Daw Pu. In these circumstances I shall make no orders regarding them.

(1) (1947) R.L.R. 354 at 358.

In the result the appeal succeeds in so far as that part of the suit relating to the possession of the suit premises is concerned. The judgments and decrees of both the lower Courts are set aside and the appeal is allowed with proportionate costs throughout.

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APPELLATE CIVIL.

Before U San Maung, J.

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Nov. 6.

DAW SAR YI (APPELLANT)

v.

MA THAN YIN (RESPONDENT).*

Transfer of Property Act, s. 53-A—S. 58, clause (c) *as amended by Amending Act 20 of 1929—Sale, house and site, by registered deed—Contemporaneous agreement for resale—Evidence, admissibility of, to prove transaction a mortgage—Husband of plaintiff, whereabouts unknown, not joined as party—Burmese Buddhist couple, not agent for each other—Co-ownership, extent of rights to property.*

Held : By proviso to clause (*c*) of s. 58 of the Transfer of Property Act inserted by Amending Act 20 of 1929 no evidence is admissible to prove a sale of house and site by registered deed was converted into a mortgage by an agreement for resale executed contemporaneously. S. 53-A, Transfer of Property Act cannot be relied upon as a defence.

Maung Shwe Phoo and eight others v. *Maung Tun Shin and three others*, 5 Ran. 644, referred to.

Held : A Burmese Buddhist wife has a vested interest in property acquired by her husband but she is not a co-owner in the sense that during the subsistence of the marriage she can claim partition of the property. There is no presumption *de facto* or *de jure* that a Burmese Buddhist couple living together are authorized agents for each other. A Burmese Buddhist wife cannot file a suit for possession of property sold to her husband without joining her husband as co-plaintiff in the suit.

N.A.V.R. Chettyar Firm v. *Maung Than Daing*, 9 Ran. 524, referred to.

Hla Tun Pru and *Tun Hla* for the appellant.

Leong and *Thein* for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 8 of 1951 of the Subdivisional Court of Tharrawaddy, the plaintiff-respondent Ma Than Yin sued the defendant-appellant Daw Sar Yi for possession of the house and site in suit. Her case is that she is the

* Civil 2nd Appeal No. 120 of 1952 against the decree of the District Court, Tharrawaddy, in Civil Appeal No. 8 of 1952.

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wife of one U Tun Yon whom she married about 10 years ago after the death of his first wife Ma Han, that on the 2nd *lasan* of *Pyatho* 1309 B.E.(13-12-1947) U Tun Yon bought from Daw Sar Yi the house and site in suit for a sum of Rs. 2,000 by a registered deed Exhibit A that U Tun Yon was captured by insurgents in the year 1949 and has not been heard of since that time, and that by virtue of the fact that she is his wife she asked for a declaration that the house and site in suit belonged to her and for possession of the same. Among the various defences raised by Daw Sar Yi it was contended that the suit was bad for non-joinder of U Tun Yon and his *atet* children as parties to the suit and that although Exhibit A purports to be a sale it was, in fact, intended to be a mortgage as evidenced by the fact that contemporaneously with it an agreement Exhibit 1 was executed by U Tun Yon whereby he agreed to resell the property to her on payment of Rs. 2,500 within 2 years from the date of its execution. Of the several issues framed on the pleadings, the first three relate to the alleged non-joinder of parties, admissibility in evidence of the fact that the sale deed Exhibit A read in the light of Exhibit 1 was, in fact, a mortgage instead of a sale, and the admissibility of the plea that the agreement Exhibit A was a valid defence to a suit for possession. All these issues were answered by the learned trial Judge in favour of the plaintiff with the result that her suit was decreed. The learned trial Judge took the extraordinary step of invoking the provisions of Order I, Rule 8 of the Civil Procedure Code because he considered that it was appropriate in view of the absence of U Tun Yon.

On appeal by the defendant Daw Sar Yi to the District Court, the District Judge held that no evidence was admissible to show that the transaction evidenced

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by the documents Exhibit A and Exhibit 1 was, in fact, a mortgage and not a sale and that section 53-A of the Transfer of Property Act was inapplicable to the facts of the case. The learned District Judge observed that before him the learned Advocate for the appellant had abandoned all the grounds of appeal except those with which he had dealt. Among the grounds so waived would appear to be ground Nos. 1 and 2 which read as follows :

> "The Lower Court erred in law and procedure in holding that the respondent has right of suit based on the sale deed, which is in the name of another person living and not in the name of the respondent.
>
> That the Lower Court erred in law in holding that the respondent can file the suit on behalf of her husband, U Tun Yon."

However, in spite of this waiver the learned Advocate for Daw Sar Yi who has preferred this second appeal has tried to urge before me that the plaintiff-respondent's suit for possession is not maintainable in law and I have allowed him to raise this point because it cuts at the root of the whole case.

As regards the non-admissibility of evidence to show that the transaction evidenced by Exhibit A and Exhibit 1 was, in fact, a mortgage I need only refer to the proviso to clause (*c*) of section 58 of the Transfer of Property Act which has been inserted by the Amending Act 20 of 1929, 2 years after the decision in the case of *Maung Shwe Phoo and eight others* v. *Maung Tun Shin and three others* (1). I also agree with the learned District Judge that the provisions of section 53-A of the Transfer of Property Act could not be relied upon by the defendant in the circumstances of the case.

However, there is ample force in the contention of the learned Advocate for the appellant Daw Sar Yi

(1) 5 Ran. 644.

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that the plaintiff-respondent Ma Than Yin cannot bring a suit for possession of the house and site in suit. No doubt as a Burmese Buddhist wife she had a vested interest in the property acquired by her husband U Tun Yon *vide N.A.V.R. Chettyar Firm* v. *Maung Than Daing* (1). However, she is not a co-owner of the house and its site with her husband U Tun Yon, in the usually accepted connotation of the term co-ownership. One co-owner usually has a right to claim partition of the property jointly owned by him and another whereas during the subsistence of the marriage no Burmese Buddhist wife can claim partition of the joint property in which she has a vested interest. Therefore a Burmese Buddhist wife cannot, in my opinion, file a suit for possession of the property sold to her husband without joining her husband as a co-plaintiff in the suit. In the case now under consideration the plaintiff-respondent Ma Than Yin has not been shown to be authorized by her husband to file the present suit and there is no presumption *de facto* or *de jure* that a Burmese Buddhist couple, living together, are agents for each other or that the husband is deemed to consent to the acts of his wife or *vice versa.* Furthermore, the defendant Daw Sar Yi is not a mere trespasser. She is in possession of the house and site in suit under an agreement for its resale and there is no knowing whether U Tun Yon if he is present in Court would or would not file a suit for possession in the circumstances of this case. He might have honoured the agreement and at the same time grant Daw Sar Yi an extension of the time allowed in the agreement for the repurchase of the property.

In the result I hold that the suit has been wrongly decreed by the learned Judges of the lower Courts in

(1) 9 Ran. 524.

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the absence of U Tun Yon as a co-plaintiff in the case. The appeal succeeds. The judgment and decree of the District Court of Tharrawaddy, confirming those of the Subdivisional Court are set aside and the plaintiff-respondent's suit for possession, dismissed with costs throughout. Advocates' fee in this Court, 5 gold mohurs.

APPELLATE CIVIL.

Before U San Maung, J.

DAW SAW (APPLICANT)

v.

L. RAMANATHAN CHETTIAR (RESPONDENT).*

H C.
1955

Jan. 13.

Civil Procedure Code, Order XX, Rule 11 (2)—Limitation Act, Article 175—Application by judgment-debtor for order to pay decretal amount by instalments—Limitation Act, s. 5, applicability of—Interference in revision, when justified.

Held : S. 5 of the Limitation Act does not apply to applications governed by Article 175 of the Act such as the present application for an order to pay a decretal amount by instalment filed six months after the decree had been passed.

Ma Naw Naw and one v. *V.E.S.S.M. Somasundran Chetty*, I.L.R. 2 Ran. 655; *Kali Prasad Tewari* v. *Parmeshwar Prasad Marwari*, A.I.R. (1929) All. 127; *B. Narotam Das* v. *B. Bhagwan Dass*, A.I.R. (1934) All. 314; *A.R.K.N. Ramanathan Chettyar* v. *Baldan Singh*, A.I.R. (1933) Ran. 110; *Veerayya* v. *Sreesailam*, A.I.R. (1928) Mad. 556; *Ram Raj Dassundhi* v. *Mt. Umraji and another*, A.I.R. (1926) All. 345.

Held also : The powers of the High Court under s. 25 of the City Civil Court Act are much wider than those exercisable under s. 115 of the Civil Procedure Code, and the High Court can interfere in revision where the City Civil Court has entertained an application clearly beyond the period prescribed by limitation.

Ma Than Yin v. *Tan Khcat Kheng* (a) *Tan Keit Sein*, (1951) B.L.R. 161, distinguished.

Siva Dass Dey v. *Ashabi and one*, I.L.R. 3 Ran. 471, followed.

San Thein for the applicant.

Tin Hla for the respondent.

U SAN MAUNG, J.—In Civil Small Cause Suit No. 1064 of 1951 of the City Civil Court, Rangoon, the plaintiff Daw Saw, who is the applicant in the present application for revision, obtained a decree for a sum of Rs. 616 with costs as against L. Ramanathan

*Civil Revision No. 88 of 1952 against the order of the Chief Judge, City Civil Court, in Small Cause Suit No. 1064 of 1951.

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Chettiar. The decree was passed on the 2nd November 1951. On the 21st June 1952, more than 6 months after the date of the decree, the judgment-debtor filed an application under Order XX, Rule 11 (2) for an order allowing payment of the decretal amount by instalments. The application was opposed by the decree-holder Daw Saw. The learned Chief Judge of the City Civil Court, however, allowed the application and ordered that the decretal amount be paid by monthly instalments of Rs. 25. In this application for revision, it is urged that the learned Chief Judge of the City Civil Court was wrong in having allowed the application to be filed after the period of six months limitation prescribed in Article 175 of the Limitation Act as the provisions of section 5 of that Act are not applicable to such applications. In my opinion, this contention must be allowed to prevail.

Section 5 of the Limitation Act reads :

"Any appeal or application for a review of judgment or for leave to appeal, or any other application to which this section may be made applicable by or under any enactment for the time being in force, may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period."

Section 5 of the Limitation Act has not been made applicable by or under any enactment to applications governed by Article 175 of the Limitation Act.

In *Ma Naw Naw and one* v. *V.E.S.S.M. Somasundran Chetty* (1) it was held that the provisions of section 5 of the Limitation Act do not apply to an application to set aside an *ex-parte* decree, nor to an application to set aside an order of dismissal for default. This decision was followed by the Allahabad

(1) (1924) I.L.R. 2 Ran., p. 655.

High Court in *Kali Prasad Tewari* v. *Parmeshwar Prasad Marwari* (1) where it was held that section 5 of the Limitation Act was not applicable to applications for restoration of a case under Order IX, Rule 4 of the Civil Procedure Code as there is no expressed provision in that order which makes section 5 applicable to such applications. In *B. Narotam Das* v. *B. Bhagwan Dass* (2) a Bench of the Allahabad High Court held that section 5 of the Limitation Act did not apply to an application under Order XXI, Rule 90 of the Civil Procedure Code. See also the cases of *A.R.K.N. Ramanathan Chettyar* v. *Baldan Singh* (3), *Veerayya* v. *Sreesailam* (4) and *Ram Raj Dassundhi* v. *Mt. Umraji and another* (5).

The next point for consideration is whether this Court should interfere with the order of the Chief Judge of the City Civil Court in revision under section 25 of the City Civil Court Act. No doubt in *Ma Than Yin* v. *Tan Kheat Kheng* alias *Tan Keit Sein* (6) it was pointed out by U Bo Gyi, J. that merely because an erroneous decision has been arrived at by the lower Court there is no ground for holding that the Court when coming to the decision it did exercise its jurisdiction illegally or with material irregularity within the meaning of that phrase in section 115 of the Civil Procedure Code. However, it is clear that the powers of the High Court under section 25 of the City Civil Court Act are much wider than those exercisable under section 115 of the Civil Procedure Code. See *Siva Dass Dey* v. *Ashabi and one* (7), where in a case like the present the learned Chief Judge of the City Civil Court has entertained an application clearly beyond the period prescribed by

(1) (1929) A.I.R. All., p. 127.
(2) (1934) A.I.R. All., p. 314.
(3) (1933) A.I.R. Ran., p. 110.
(4) (1928) Mad., A.I.R., p. 556.
(5) (1926) A.I.R. All. 345.
(6) (1951) B.L.R. p. 161.
(7) 1925) I.L.R. 3 Ran. p. 471.

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limitation, I think, interference of his order for revision is called for.

For these reasons, I would set aside the order of the Chief Judge of the City Civil Court dated the 28th July 1952, allowing the respondent L. Ramanathan Chettiar to pay a decretal amount by monthly instalments of Rs. 25. There will be no order as to costs of this application.

APPELLATE CIVIL.

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

DAW THEIN KHIN (APPELLANT)

v.

ABDUL JABBER AND ONE (RESPONDENTS).*

H.C. 1954

Oct. 27.

Urban Rent Control Act, s. 11 (1) (d)—Expression "building or buildings" whether confined to residential or dwelling houses only—Expression "bonâ fide"—Meaning of, by reference to context.

Held: There is nothing in clause (*d*) of s. 11 (*1*) of the Urban Rent Control Act which would definitely suggest that the building must necessarily be a dwelling house or a place of rest and abode.

Sin Tek v. *Lakhany Brothers*, Civil 1st Appeal No. 19 of 1951 (H.C.); *Richards* v. *Swansea Improvement and Tramways Co.*, (1878) 9 C.D. 425; *Ko Wah Nah* v. *Ko Tun Sein and two others*, (1951) B.L.R. 188, followed.

Held also: The expression "bonâ fide" in clause (*d*) of s. 11 (*1*) of the Urban Rent Control Act will have to be read in the context in which that expression appears to obtain its real meaning.

C. Ah Foung (a) *Chow Fung Mee* v. *K. Mohamat Kaka and two others*, (1950) B.L.R. 346, followed.

Hla Thein for the appellant.

G. N. Banerji for the respondent No. 1.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The plaintiff-appellant Daw Thein Khin is a cigar manufacturer and she carries on her cigar manufacturing business at three different sheds or premises in Rangoon, namely, at Yegyaw, Bow Lane and Myaunggyi Road, respectively. In July, 1949 she purchased a piece of land, situated at No. 129/131, Stockade Road, measuring 50' X 99', for Rs. 8,000 under a registered sale deed. There were four huts on the land at the time Daw Thein Khin purchased it. Subsequently, Daw Thein Khin instituted four suits for the ejectments of the

* Special Civil Appeal No. 1 of 1952 against the decree of the High Court in Civil 1st Appeal No. 27 of 1951.

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defendants, who were said to be in occupation of those huts, under section 11 (*l*) (*d*) of the Urban Rent Control Act, 1948; and these suits were known as Civil Regular Suits Nos. 873, 874, 875 and 876 of 1950 of the Rangoon City Civil Court, respectively. Judgments and decrees were passed in favour of Daw Thein Khin in all the four suits. On appeal to the High Court, those judgments and decrees were however set aside, with the result that Daw Thein Khin obtained leave for the institution of the four special Appeals under section 20 of the Union Judiciary Act, 1948, namely Special Civil Appeals Nos. 1,2,3 and 4 of 1952. It is with these Special Civil Appeals that we now deal with.

Two common questions arise in all the four appeals now before us, namely whether the expression "building or buildings" in clause (*d*) of section 11 (*l*) of the Urban Rent Control Act, 1948, means residential or dwelling houses only, or not, and whether the plaintiff-appellant Daw Thein Khin can, in the circumstances of the present litigation, be said to require the land *bonâ fide* within the meaning of clause (*d*) of the section 11 (*l*)? It will be more convenient if we reproduce, at the outset, the relevant portion of the clause (*d*) of section 11 (*l*) of the Urban Rent Control Act, 1948, as is applicable to the present case, and it reads:

"11 (*l*). Notwithstanding any thing 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; or

. . . . . ."

It is not disputed, and we might add that it cannot on the evidence be disputed, that the land in question is a house-site within the meaning of section 11 (*l*) (*d*) of the Urban Rent Control Act, 1948. It was, however, contended on behalf of the defendant-respondents in all the four appeals now before us that the building which was to be constructed must, by reason of clause (*d*) of section 11 (*l*), be a dwelling or a residential house only. There is, in our opinion, no force in this contention. The expression "building or buildings" are clearly wide, and they ought to be given their ordinary meaning. It was observed in *Sin Tek* v. *Lakhany Brothers* (1) in these words:

" . . . . The expression 'house' in clause (*d*) ought, moreover, to be given its ordinary wide construction, including a place of business, in the absence of anything to indicate, more or less clearly, that it was intended to be used in a more restricted sense. James, L.J., in *Richards* v. *Swansea Improvement and Tramways Company* (2) observed—

Of course, the word 'house' does not mean, it seems to me, necessarily a mere dwelling house,

(1) Civil 1st Appeal No. 19 of 1951 of High Court, Rangoon.
(2) (1878) 9 C.D. 425 at 431.

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> or a house only used, or exclusively or principally used, for a residence; the word 'house' includes a shop or may consist of a shop.

There is nothing in clause (*d*) of section 11 (*1*) or in any part of the Urban Rent Control Act, 1948, which would definitely suggest that the building, which is to be constructed, must necessarily be a dwelling house, or a place of rest or abode. We might mention here that the word 'residential' which appears in clause (*f*) of section 11 (*1*) is not present in clause (*d*). If the Legislature had intended that the building or buildings that are to be constructed under clause (*d*) should be residential building or buildings only, we would in any case expect it to express its intention more precisely."

A similar observation occurred in an earlier case of *Ko Wah Nah* v. *Ko Tun Sein and two others* (1) and it was there observed—

> "It has been urged before us in this appeal that clause (*d*) of section 11 (*1*) of the Urban Rent Control Act, 1948 will not help the plaintiff-appellant, in that he desired to construct a building for himself and not for the purpose of letting it. There is, in our opinion, no substance in this contention. Clause (*d*) appears to us to be clear, in that it also allows the owner of land to have back the possession of the land which had been let out to a tenant if he requires it *bonâ fide* for erecting a building or buildings thereon, and no restriction is placed on the purpose for which a building might be constructed, so far as clause (*d*) is concerned."

The wording of the later portion of clause (*d*) of section 11 (*1*) of the Urban Rent Control Act, 1948, which prescribes the nature of the bond to be executed by the landlord cannot, in our opinion, control the plain meaning of the earlier portion of clause (*d*) on the fulfilment of which the owner is entitled to a decree for the ejectment of the tenant himself. It is difficult also to understand how the

(1) (1951) B.L.R. p. 188 at 189.

bond taken under clause (*d*) can be described as useless if the building, which was to be erected, was not in the nature of a dwelling or residential house, because the bond can be executed against the owner if he fails to construct the building within one year from the date the premises is vacated as required under the bond executed by him. It is true that the expression " reinstate " was used in the later portion of clause (*d*) of section 11 (*1*), but the presence of the expression " re-instate in the later portion of clause (*d*) does not necesssarily indicate or imply that it is only a dwelling house or residential building which can be constructed under clause (*d*) of section 11 (*1*). The bond is to be executed only after the judgment and decree are passed, and the terms of the bond to be taken under the later portion of clause (*d*) cannot in any case control the earlier portion of clause (*d*) under which the owner seeks to obtain a decree for ejectment. It seems to us that the expression " reinstate " in clause (*d*) has been used somewhat loosely.

In connection with the second question which arises in these four connected appeals, the expression " *bonâ fide* " in clause (*d*) of section 11 (*1*) will have to be read in the context in which that expression appears to enable us to obtain its real meaning. In *C. Ah Foung* (a) *Chow Fung Mee* v. *K. Mohamat Kaka and two others* (1) it was observed :

" It will thus be observed that what C. Ah Foung is required to prove for the purpose of clause (*d*) of section 11(*1*) of the Urban Rent Control Act, 1948, is that he requires the land, which is in the possession of the defendants-respondents, *bonâ fide* for constructing a building thereon. We might say at once that the motive which impelled C. Ah Foung to file a suit against the defendants-respondents does not, and cannot,

(1) (1950) B.L.R. p. 346 at 347.

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constitute a deciding factor in this matter, although it is a circumstance which the Court ought to take into consideration in attempting to find out, on the evidence which is produced before it, whether C. Ah Foung really requires the land in qustion *bonâ fide* for constructing a building thereon."

Daw Thein Khin stated that she required the land in question for building a shed or premises for her cigar manufacturing business, and we accept her statement in this respect. She has moreover filed a plan of the shed or premises she proposed to construct on the land in question. She has also examined Ko Po Kyaw, a carpenter, to show that she has made arrangements for him to construct the shed or premises on the land in question. There is therefore sufficient evidence on which the learned Judge of the Rangoon City Civil Court could come to the conclusion that Daw Thein Khin *bonâ fide* required the land in question for constructing a building thereon. The judgments and decrees passed in the Civil First Appeals No. 27 of 1951, No. 28 of 1951, No. 29 of 1951 and No. 30 of 1951 are set aside, and the judgments and decrees passed in the Rangoon City Civil Court will be restored. The judgment passed in this case will also be considered to be judgments for the other three connected Special Civil Appeals.

The Special Civil Appeals Nos. 1, 2, 3, and 4 of 1952 are therefore allowed with costs throughout, and Advocate's fees will be K 34 for each case in all the Courts.

U AUNG KHINE, J.—I agree.

APPELLATE CIVIL.

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

H.C. 1954 — *Nov. 3.*

HAJI ABDUL SHAKOOR KHAN (APPLICANT)

v.

THE BURMA PUBLISHERS LTD., RANGOON (RESPONDENT). *

Union Judiciary Act, s. 5 (b) *and* (c)—*Issue of certificate for leave to appeal to the Supreme Court—Civil Procedure Code*, s. 109 (c)—*Union of Burma (Adaptation of Laws) Order, 1948.*

Held : An application for the issue of a certificate to appeal to the Supreme Court will not lie under clauses (*b*) and (*c*) of s. 5 of the Union Judiciary Act if the judgment and decree against which the appeal is to be laid was not in respect of or related to a subject matter the value of which is Rs. 10,000 or more.

Held also : S. 109 of the Civil Procedure Code as modified by the Union of Burma (Adaptation of Laws) Order, 1948 was an earlier legislation as far as the Union Judiciary Act is concerned, and the plain meaning of the latter determines the application uninfluenced by the consideration whether s. 109, Civil Procedure Code has been repealed.

See Cheng v. *U Thein*, (1948) B.L.R. 600, referred to.

Messrs. Basu and *Venkatram* for the applicant.

P. N. Ghosh for the respondent.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—The applicant Haji Abdul Shakoor Khan, who was the defendant on the Original Side of the High Court, applied that a certificate might be issued to him, under section 5 of the Union Judiciary Act, 1948, to enable him to appeal to the Supreme Court against the judgment and decree passed in Civil First Appeal No. 97 of 1951, which

* Civil Misc. Application No. 26 of 1953.

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affirmed the judgment and decree of the Original Side of the High Court. The value of the appeal in Civil First Appeal No. 97 of 1951 was Rs. 7,710. The value of the appeal to the Supreme Court, for the purpose of the present application, would also be Rs. 7,710; and in any case, the value of the appeal to the Supreme Court, if any, would be less than Rs. 10,000. It is clear therefore that the application for a certificate to appeal to the Supreme Court will not lie under clauses (*b*) and (*c*) of section 5 of the Union Judiciary Act, 1948, in that the judgment and decree passed in the Civil First Appeal No. 97 of 1951 was not in respect of or related to any claim or subject-matter, which was of the value of Rs. 10,000 or more; and clause (*a*) of section 5 also does not apply in the present case.

It was contended on behalf of the applicant that the application for a certificate to appeal to the Supreme Court can be made, in the present case, under clause (*c*) of section 109 of the Civil Procedure Code. Clause (*c*) of section 109 of the Code of Civil Procedure includes, of course, cases, which cannot be brought under section 110 of the Code of Civil Procedure but which cases are fit cases for appeal as indicated in clause (*c*). In other words, it is not necessary for the purpose of clause (*c*) of section 109 that the value of the claim or subject-matter of the suit should at least be Rs. 10,000. We might observe here that section 109 of the Code of Civil Procedure, as modified by the Union of Burma (Adaptation of Laws) Order, 1948, was an earlier legislation so far as the Union Judiciary Act, 1948, is concerned, and section 5 of the Union Judiciary Act, 1948 reads :

" 5. Save where an appeal lies to the High Court itself under the provisions of section 20, an appeal shall lie to the

Supreme Court from the judgment, decree, or final order of the High Court (whether passed before or after the commencement of the Constitution) in any civil, criminal, or other case, if the High Court certifies—

(*a*) that the case involves a question as to the validity of any law having regard to the provisions of the Constitution, or

(*b*) that the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than ten thousand rupees, or

(*c*) that the judgment, decree, or final order involves directly or indirectly some claim or question respecting property of the like amount or value

and, where the judgment, decree, or final order appealed from affirms the decision of the Court immediately below in any case other than the one referred in clause (*a*), if the High Court futher certifies that the appeal involves some substantial question of law."

It will thus be observed that section 5 of the Union Judiciary Act, 1948, prescribes in what cases the High Court will issue certificates for appeal to the Supreme Court. U Thein Maung, Chief Justice of the High Court as he then was, observed in *Sei Cheng* v. *U Thein* (1) :

". . . . . Of the two certificates which are necessary for the purpose, one must be to the effect that the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal, was, and is, not less than Rs. 10,000, or that the judgment, decree or final order involves, directly or indirectly, some claim or question respecting property of the like amount or value ; and the other certificate must be to the effect that the appeal involves some substantial question of law."

seems to us to be clear that clause (*c*) of section 109 of the Code of Civil Procedure cannot exist side

(1) (1948) B L.R. 600

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by side with section 5 of the Union Judiciary Act, 1948 after the latter was enacted, otherwise it would mean that the High Court could grant a certificate to appeal to the Supreme Court in cases not covered by the provisions of section 5 of the Union Judiciary Act, 1948. It was argued on behalf of the applicant that if clause (*c*) of section 109 of the Code of Civil Procedure was to be considered as having been impliedly repealed by the provisions of section 5 of the Union Judiciary Act, it would mean that litigants had been deprived of their right of appeal under clause (*c*) of section 109, of the Code of Civil Procedure, which existed prior to the Independence. We cannot, however, permit such arguments to influence us as to what is the plain meaning of section 5 of the Union Judiciary Act. Moreover, there is section 6 of the Union Judiciary Act under which the applicant can apply for a grant of special leave to appeal to the Supreme Court so far as the present case is concerned. Section 6 of the Union Judiciary Act, 1948, applies, of course, to final orders only, but this circumstance cannot assist us to interpret as to the meaning of section 5 of the Union Judiciary Act, 1948 ; and so far as the applicant is concerned the provisions of section 6 will obviously apply. The meaning of section 5 of the Union Judiciary Act is quite plain ; and the application is therefore dismissed with costs, Advocate's fees K 85.

U AUNG KHINE, J.—I agree.

APPELLATE CRIMINAL.

Before U San Maung, J.

KAWLI JANNA (APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT).*

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Dec. 20.

Foreigners Registration Act (Burma Act No. 7 of 1940), s. 5—Failure to register under Registration of Foreigners Rules, 1948—Exemption Order No. 4, dated the 16th December 1948—Foreigner in the service of the Union.

Held : By Act 35 of 1952, the Inland Water Transport Board is an organization of the Government ; the applicant is in the service of the Board and therefore of the Union Government, and, as such, he is exempt from the provisions relating to the registration of foreigners contained in the Registration of Foreigners Rules, 1948.

—for the applicant.

Mya Thein (Government Advocate) for the respondent.

U SAN MAUNG, J.—In Criminal Summary Trial No. 3333 of 1953 of the Third Bench of Honorary Magistrates of Rangoon, the applicant Kawli Janna was convicted under section 5 of the Foreigners Registration Act (Burma Act 7 of 1940) for alleged failure to register at the office of the Foreigners Registration Department as required by the Registration of Foreigners Rules, 1948. He was sentenced to a fine of K 25 or in default 30 days' simple imprisonment. The fine has been paid. On application to the District Magistrate of Rangoon by Kawli Janna, the learned District Magistrate by his order of a reference in Criminal Revision No. 82 of 1953 has recommended that the conviction and sentence on Kawli Janna be set aside as the same

* Criminal Revision No. 187 (B) of 1954 being Review of the order of the Honorary Magistrates, Rangoon, in Criminal Summary Trial No. 3333 of 1953.

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was contrary to law. In making this recommendation, the learned District Magistrate has relied upon the provisions of clause (*a*) of paragraph 4 of the Exemption Order No. 4 under the Registration of Foreigners Act contained in Foreign Office Notification No. 130, dated the 16th of December 1948 published in Part I of the *Burma Gazette*, dated the 25th of December 1948. The relevant portion of this paragraph reads:

> " 4. The provisions of the rules, except Rule 2 and such of the provisions of Rules 4, 14,15 and 16 as apply to, or in relation to, passengers and visitors who are not foreigners, shall not apply to, or in relation to :—
>
> (*a*) any foreigner in the service of the Union ;"

The rules referred to therein are those contained in Foreign Office, Immigration Branch, Notification No. 129, dated the 16th of December 1948 published in the same volume of the *Burma Gazette*.

The question which arises for consideration is whether the applicant Kawli Janna is a foreigner in the service of the Union. He is admittedly a foreigner employed in the Rangoon Foundry of the Inland Water Transport Board and he possesses an Identity Card issued by the Board. Therefore if the Inland Water Transport Board is an organ of the Government of the Union of Burma, Kawli Janna must be deemed a foreigner in the service of the Union.

Now, the Inland Water Transport Board was a body constituted under the provisions of the Inland Water Transport Order, 1946 contained in Transport and Communications Department, Marine Branch, Notification No. 44, dated the 20th of May 1946 published in Part I of the *Burma Gazette*, dated the 25th of May 1946. From the provisions contained

therein, especially those relating to the advance of money by the Government to enable the Board to exercise its powers and functions, the appointments of the members of the Board and the submission of the agenda and minutes of all the meetings of the Board or any committee thereof to the Secretary to the Government in the Transport and Communications Department and the Finance and Revenue the exemption of members of the Board and officers or servants thereof from suit, prosecution or other proceedings in respect of anything done in good faith under the provisions of the Inland Water Transport Order, the vesting of all fund and property in the Government on the dissolution of the Board and the devolution upon the Government of all debts and liabilities of the Board, I consider that the Inland Water Transport Board as constituted under the Inland Water Transport Order, 1946 was nothing but an organ of the Government. This order was superseded by the Inland Water Transport Board Act (Act 35 of 1952). The provisions of that Act, especially, those relating to Budget and Accounts also leave no room for doubt that the Inland Water Transport Board continues to be an organ of the Government.

For these reasons, Kawli Janna must be considered to be a foreigner in the service of the Union and as such exempt from the provisions relating to the registration of foreigners contained in Registration of Foreigners Rules, 1948.

For these reasons, I would set aside the conviction and sentence on Kawli Janna in Criminal Summary Trial No. 3333 of 1953 of the Third Bench of Honorary Magistrates, Rangoon. The fine paid by Kawli Janna must be refunded to him.

APPELLATE CIVIL.

Before U San Maung, J.

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Dec. 15.

K. LUCHANNA (APPLICANT)

v.

BABOORAM BY AGENT CHAKRAPAN (RESPONDENT).*

Suit on promissory-note—Signature of defendant in foreign language—Judgment based on comparison of signatures by Judge, whether sound.

Held: Though the signatures on the pro-note, the written statement and the power of attorney are similar, it is unsatisfactory and dangerous to stake a decision in a case where there is a direct conflict of testimony between parties as to general character of a signature, on the correct determination of the genuineness of the signature by mere comparison with the admitted signatures, especially without the aid in evidence of microscopic enlargements or any expert advice.

Kessarbai v. *Jethabhai Jivan*, A.I.R. (1928) (P.C.) 277 ; *Rudragouda Venkangouda Patil* v. *Rasingouda Danappagouda Patil*, A.I.R. (1938) Bom. 257, referred to.

N. R. Majumdar for the applicant.

G. N. Banerji for the respondent.

U SAN MAUNG, J.—In Civil Small Cause Suit No. 965 of 1949 of the City Civil Court, Rangoon, the plaintiff-respondent Babooram by his agent Chakrapan sued the defendant-appellant K. Luchanna for the recovery of Rs. 702-8-0 being principal and interest due on the promissory-note in suit. The defence was a total denial, the defendant even contending that he never knew the plaintiff.

The learned trial Judge after the examination of witnesses cited by both parties and comparing the signature on the suit pro-note with the admitted

* Civil Revision No. 89 of 1952 against the decree of the 2nd Judge, Rangoon City Civil Court in Small Cause Suit No. 965 of 1949.

signature of the defendant came to the conclusion that the execution of the suit promissory-note has been proved. He accordingly gave the plaintiff a decree as prayed for. In the present application for revision it has been contended that the learned trial Judge was wrong in having relied upon his own comparison of the signatures as a piece of corroborative evidence especially as the learned Judge was not only not a handwriting expert but was not conversant with the language in which the signatures were written.

The question for determination in this application for revision therefore is whether the learned trial Judge's finding on fact is so erroneous that an interference in revision is called for.

Chakrapan in giving evidence said that he himself was present at the time of the loan which was given by his brother Babooram and that Sita Ram and Panchi Pal were also present at that time. Sita Ram (PW 1) in his examination-in-chief was able to state with exactitude that the suit pro-note was executed in his presence by the defendant at 4 p.m. on the 2nd day of June 1947. However, when cross-examined this witness had to admit that he did not know the English months and that he did not even remember the date on which he was married about a year ago. Furthermore, he stated that he came to Rangoon about four years ago and that the suit pro-note was executed about three years after his arrival there. In these circumstances the learned trial Judge, in my opinion, has been right in having discredited the evidence of this witness.

However, in contrast to the evidence of Chakrapan who seems to have told a straightforward story Luchanna's conduct in the witness-box was most unsatisfactory. Whereas in the written statement as

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U SAN MAUNG, J.

well as in the power of attorney given by him to his pleader he had admittedly signed his name as Kasami Latchanna he said that his name was Kasani Lakchamanna. Therefore, it is clear that he has been extremely evasive even as regards his own name. His version of the story is that he had borrowed Rs. 200 from the plaintiff's agent Chakrapan in the year 1947, that he had fully repaid the loan to Chakrapan and that this suit was a false one brought against him because of a quarrel which ensued when he asked Chakrapan to return the pro-note to him. He, however, had to admit that although he did not know the name Chakrapan had a brother who was working along with him at the B.O.C. before the War.

A comparison of the signature on the suit pro-note with those on the written statement and the power of attorney shows that there is considerable similarity between them. However, as pointed out by their Lordships of the Privy Council in *Kessarbai* v. *Jethabhai Jivan* (1): "It is unsatisfactory and dangerous to stake a decision, in a case where there is a direct conflict of testimony between parties as to general character of a signature, on the correct determination of the genuineness of the signature by mere comparison with the admitted signatures, especially without the aid in evidence of microscopic enlargements or any expert advice." [See also *Rudragouda Venkangouda Patil* v. *Rasangouda Danappagouda Patil* (2).]

However, in this case I do not think that the learned trial Judge was wrong in having preferred the evidence of Chakrapan to that of the defendant. Furthermore, Chakrapan has applied to the Court to have the evidence of a handwriting expert for the

(1) A.I.R. (1928) (P.C.) 277. (2) A.I.R. (1938) Bom. 257.

purpose of assisting the Court in arriving at a decision regarding the disputed signature and if the Court refused to examine such a witness Chakrapan can hardly be blamed for it.

For these reasons, I do not consider that the judgment and decree of the 2nd Judge of the City Civil Court call for any interference in revision. The application fails and must be dismissed with costs. Advocate's fee—3 (three) gold mohurs.

APPELLATE CIVIL.

Before U Bo Gyi, J.

H.C. 1954

Oct. 1.

KO SAW MAUNG (APPELLANT)

v.

AYIN KU AND THREE OTHERS (RESPONDENTS).*

Limitation—Review of judgment, time taken up in—Subsequent appeal, period of limitation permissible—Article 173, First Schedule, Limitation Act—Review application, deficit Court-fees—Date of payment of proper Court-fees relates back to date of presentation.

Held: The Allahabad decision in I.L.R. 12 All. 57 that time taken up in disposal of an application for review with deficit Court-fees cannot be excluded has been superseded by s. 149 of the Civil Procedure Code. Acceptance of the deficit Court-fees by the Court has the same effect and force as if the fees had been paid in the first instance.

Held also: Time occupied by an application in good faith for review, although made upon a mistaken view of the law, should be deemed as added to the period allowed for presenting an appeal.

U Pyin Nya and another v. *Maung Tun and another*, P. J. L. B. 515; *Brij Indar Singh* v. *Kanshi Ram and another*, 44 I.A. 218; *Devi Das* v. *Bushahr Sangh*, A.I.R. (1953) Himachal Pradesh 110, followed.

Held further: There is no authority for the proposition that the period of 90 days under Article 173, First Schedule, Limitation Act should also be excluded in computing the period of limitation for the present appeal.

Khin Maung for the appellant.

Maung Maung for the respondents.

U BO GYI, J.—This second appeal is against the judgment of the District Court of Thayetmyo, dated the 11th August 1952, dismissing the present appellant Ko Saw Maung's appeal on the ground that the appeal was barred by limitation. Ko Saw Maung had instituted Civil Suit No. 3 of 1951 in the Township Court of Allanmyo against the present four respondents for recovery of posssession of a house

* Civil 2nd Appeal No. 115 of 1952 against the decree of the District Court, Prome, in Civil Appeal No. 12-T of 1952.

site in Allanmyo as specified in the plaint on the ground that he had derived the land from the owner U Kyaw Tha, his father-in-law, through his wife Ma Ohn Hmin. U Kyaw Tha and Ma Ohn Hmin were dead at the date of institution of the suit. The 3rd and 4th respondents, Ko Tun Shein and Ma Mya who were the real contestants claimed to be owners of the land. Ko Saw Maung having stated that his father-in-law U Kyaw Tha had purchased the land from U Po Thin, respondents Ko Tun Shein and Ma Mya questioned U Po Thin's title to the land. One of the material issues framed in the suit was whether U Po Thin had the right to sell the land to U Kyaw Tha.

Altogether seven issues were framed and the learned trial Judge held that Ko Saw Maung had failed to prove that U Po Thin had the right to sell the land to U Kyaw Tha. He also found the other issues in favour of the respondents and dismissed the suit on the 12th November, 1951. On the 2nd January 1952, Ko Saw Maung filed an application for review of judgment, the application being stamped with a 12-anna Court Fee Stamp. Objection was raised by the respondents as to the sufficiency of the court-fees and on the 28th March 1952, Ko Saw Maung paid in court-fees to the value of K 50, evidently with the permission of the Court. The Township Court then on the 26th April 1952 dismissed the review application.

On the 5th June 1952, Ko Saw Maung filed the memorandum of appeal against the decree of the Township Court before the District Court of Thayetmyo. The learned District Judge held on the authority of the ruling in (1890) I.L.R. 12 All. 57 that since the application for review had been put in without sufficient court-fees the time taken up in the

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U BO GYI, J.

disposal of the review application could not be excluded in computing the period of limitation prescribed for the appeal and accordingly dismissed the appeal.

The Allahabad decision quoted by the learned District Judge has been superseded by the provisions of section 149 of the Code of Civil Procedure. Since the payment of the deficit court-fees was accepted by the learned Township Judge, the application for review had the same force and effect as if the fees had been paid in the first instance.

The next question that falls to be considered is whether in the above circumstances the period of time consumed by the review proceedings should be excluded in computing the period of limitation prescribed for the appeal. *U Pyin Nya and another* v. *Maung Tun and another* (1) it was observed that in the absence of special circumstances the time which may have been reasonably consumed in the application for a review of judgment as well as the time occupied by the Court in disposing of such application ought to be excluded in computing the period of limitation. The Privy Council in *Brij Indar Singh* v. *Kanshi Ram and others* (2) held that the time occupied by an application in good faith for review, although made upon a mistaken view of the law, should be deemed as added to the period allowed for presenting an appeal. Their Lordships did not consider the question, which was considered in the Printed Judgments, as to whether the time which may have been reasonably consumed in the application for a review of judgment should be excluded. The Privy Council decision has been followed in *Devi Das* v. *Bushahr Sangh* (3) where several authorities

(1) P.J.L B. 515. (2) 44 I.A. 218.
(3) A.I.R. (1953) Himachal Pradesh 110.

on the point at issue were discussed. I consider that it is only the time occupied by the Court in disposing of the application for review that should be excluded. It is contended on the appellant's behalf that the period of 90 days allowed under Article 173 of the first schedule to the Limitation Act should also be excluded in computing the period of limitation for the present appeal. I cannot find any authority in support of this contention and the learned Advocate himself admits that he can find no authority to support it. Unless there is strong authority in support of this contention I am unable to hold that the appellant should be allowed two periods of limitation, one for appeal and another for review of judgment and to add them up for computing the period of limitation for his appeal.

It has been contended that the application for review must be based on reasonable grounds. It seems to me that there were very good grounds for making the application for review. U Po Thin's title to the land had been challenged by the respondents and the trial Court held that Ko Saw Maung failed to prove such title. Ko Saw Maung then filed an application for review supported by an affidavit and producing two title deeds purporting to show that the land had been purchased by U Po Thin from its owner Ko Shwe Yi. Ko Saw Maung stated in his affidavit that these documents had been locked up in his wife's box and that it was only after the decision of the suit that he had found the documents in the box. The key to the box had been lost and he somehow managed to open the box because he wanted to offer some of his wife's properties to a pagoda in charity. In these circumstances, I am of opinion that Ko Saw Maung made his application for review on reasonable grounds.

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U BO GYI, J.

Now the Township Court of Allanmyo passed judgment on the 12th November 1951 and the appeal was not filed before the District Court till the 5th June 1952, that is to say till after the expiry of 205 days from the date of the judgment. The application for review of the judgment was filed on the 2nd January 1952 and was dismissed on the 26th April 1952; and 115 days were occupied in disposing of the application. The appellant has to account for 90 days. The certificate on the copy of the decree filed before the District Court shows that 11 days were occupied in obtaining the copy of the decree of the Township Court.

In the above circumstances, I must hold that the memorandum of appeal was filed long after the period of limitation allowed for the appeal had expired.

The appeal is accordingly dismissed with costs as time barred. Advocates' fees in this Court 3 gold mohurs.

APPELLATE CIVIL.

Before U San Maung, J.

KIM SOON AND ONE BY AGENT CHIN KAN (APPELLANTS)

v.

CHIN HWET (*a*) MAUNG SEIN (RESPONDENT).*

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Sept. 28.

Urban Rent Control Act, s. 11 (1) (a)—*Transfer of Property Act, s. 111* (g) (h)—*House, suit for declaration of ownership and possession—Absence of notice in writing to determine lease—Unauthorised extension to house not made specific ground for eviction.*

Held : Though the house was extended at considerable cost, as it was unauthorised, the extended building must be declared to be the property of the lessors.

Fakier Chan v. *Kewal Ram and another,* (1912) 16 I.C. 633, followed.

Held : In the absence of a notice in writing by the lessor to the lessee to determine the lease, the lessor cannot sue for and obtain possession of the leased house.

Held also : As it was not made a basic ground for ejectment the unauthorised extension to the building cannot be invoked as ground under s. 111 (*h*) of the Transfer of Property Act for termination of the lease and ejectment of the lessee.

Maung Khin Maung v. *Daw Hla Yin and one,* (1948) B.L.R. 481, discussed.

Sein Tun (1) for the appellants.

S. B. Leong for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 355 of 1950 of the City Civil Court, Rangoon, the plaintiff-respondent Chin Hwet (*a*) Maung Sein sued the defendant-appellants Kim Soon and Tan Ma for a declaration that he is the owner of the house in suit known as No. 81, 24th Street, Rangoon, and for Rs. 630 as mesne profits. The prayer for possession as a consequential relief was also added when an amended plaint was filed following an issue being raised by the Court *suo motu* whether a suit for declaration

* Civil 1st Appeal No. 13 of 1953 against the decree of the 3rd Judge, City Civil Court, in Civil Regular No. 355 of 1950.

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KIM SOON AND ONE BY AGENT CHIN KAN v. CHIN HWET (a) MAUNG SEIN.

U SAN MAUNG, J.

without a prayer for possession as a consequential relief was maintainable. The defence was a denial of the plaintiff's ownership of the house in question. It was contended by the defendants that this suit land was leased to Kim Soon at a rental of Rs. 6 per day and that the suit building was erected by Kim Soon and later extended by Tan Ma, who is now in possession as agent of the first defendant It would appear also that the plaintiff had in an earlier suit, namely Civil Regular No. 47 of 1949 of the City Civil Court, Rangoon, sought to eject Kim Soon and two others from the site which was already leased by Kim Soon but that suit was dismissed on the ground that the notice required to be given under section 11 (*1*) (*a*) of the Urban Rent Control Act was defective. Therefore, one of the defences raised in the present suit was that it was barred by the principle of *Res Judicata*. However, in our opinion this contention had been rightly rejected by the learned trial Judge. Even if the present suit had been one under section 11 (*1*) (*a*) of the Urban Rent Control Act, it would be maintainable as to hold otherwise would mean that once a suit is dismissed for want of notice or defect in the notice required to be given under that section, no other suit can be filed the tenant would virtually become the owner of the premises of which he is in occupation. Such a construction would not be in accord with justice and reason.

The present dispute arose on an application being made by the defendant Kim Soon to the Controller of Rents for the fixation of the standard rent of the site. Although the plaintiff claimed that the house also belonged to him, the Rent Controller fixed the standard rent for the land at Rs. 50 per mensem, leaving the question of ownership of the house open.

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U SAN MAUNG, J.

The plaintiff Chin Hwet in giving evidence said that when the premises were let to the defendant Kim Soon there was situated on the land a single storeyed building measuring 30 feet by 20 feet with corrugated iron roofing and walling. Later, while the house in the occupation of the second defendant Tan Ma and one Tan Chin Kan the latter demolished the back portion of the house and extended it by constructing a two-storeyed building to adjoin the suit house. He gave notice, Exhibit B, to Tan Chin Kan and received a reply from Tan Chin Kan to the effect that he had nothing to do with the premises in suit and that the plaintiff was at liberty to deal with Tan Ma, the agent of Kim Soon, in any manner he deemed fit. The notice and the reply thereto have been admitted as evidence as Exhibits B and C.

The plaintiff's story receives strong support in the evidence of Ko Pwint (PW 2), clerk of Messrs. Balthazar & Sons, from whom the plaintiff had taken a lease of the suit land. This witness stated that when Messrs. Balthazar & Sons re-opened in the year 1946, he inspected the suit land and found thereon the house in suit then in occupation of the plaintiff. The plaintiff was asked to sign a tenancy agreement, which he did. About a year before the date of suit this witness again visited the site and found some one making additions to the main building so that what was primarily a one-storeyed building became a two-storeyed one. Maung Sein Khin (PW 1), a resident of 24th Street, also supported the plaintiff's story and said that it was the defendant Tan Ma who extended the plaintiff's house by constructing a double storeyed structure at the back of and adjoining the original building. Dataram (PW 3), a Bill Collector of Messrs. Balthazar & Sons, said that there were

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three small huts on the land in the year 1946 and these were gradually converted by the plaintiff into two huts and then into one hut. This evidence is in accord with Bon Kyu (PW 4), the carpenter who said that what he had to build for the plaintiff were three small huts and that later he saw one hut in place of the original three. This witness did not know who built the new hut. But if Ko Pwint's evidence be believed, it is clear that the plaintiff was still in occupation after the 3 small huts had been converted into one large building.

The defendant Tan Ma, in giving evidence, stated that the first defendant Kim Soon took a lease of the site only from the plaintiff and that he erected a building thereon. At the time of lease there was an old hut which the plaintiff demolished and took away. The original building which he and Kim Soon erected on the land cost them Rs. 1,500. The later extensions were to the value of Rs. 9,000. This defendant's story finds support in the evidence of U Kyaw Din (DW 1), Ward Headman of 24th Street, U Ba Than (DW 2) an electrician, and Ko Ba Ba (DW 3), a merchant, living in the same street. Yeo Um Bak (DW 5), a carpenter, stated that he was engaged by the defendant Kim Soon to build the suit house, that on his first visit he saw a hut on the land which was no longer there two days later, and that he received Rs. 320 for constructing this suit building.

The learned trial Judge, who has had the opportunity of seeing the witnesses and of appraising their credibility, preferred to believe the story of the plaintiff strongly supported by that of Ko Pwint (PW 2) to the evidence of the defendants and their witnesses. He considered Ko Pwint more disinterested than the Ward Headman living in the locality.

Sitting as a Court of Appeal, we are not prepared to say that the learned trial Judge's appraisal of the evidence is unsound. The learned trial Judge had placed great reliance upon the notices B and C as showing consistency in the plaintiff's conduct. However, although Exhibit B is relevant to show that the plaintiff acted promptly when he found that the back portion of his house was being demolished, great weight should not be attached to reply Exhibit C, as it was made by a party who is a stranger to these proceedings and there is no evidence to show that the defendant-appellants were aware of the contents of Exhibit C.

However, on the evidence on record, we are of the opinion that the original building was that of the plaintiff and that it was extended by the defendants after their occupation at considerable costs to themselves. Therefore, in view of the decision in the case of *Fakier Chan* v. *Kewal Ram and another* (1) the plaintiff is entitled to a declaration that the house in suit belongs to him.

The decree for possession cannot however be allowed to stand. No doubt, the defendants had in the application before the Rent Controller set up a title adverse to the plaintiff by claiming title to the building. However, the lease cannot be regarded as determined under the provisions of section 111 (*g*) of the Transfer of Property Act in the absence of a notice in writing given by the lessor to the lessee of his intention to determine the lease. We have also considered whether the ruling in the case of *Maung Khin Maung* v. *Daw Hla Yin and one* (2) could be applicable to the facts of this case. There it was held that under section 11 (*a*) of the Urban Rent Control Act the obligations of the tenancy implied

(1) (1912) 16 I.C. p. 633. (2) (1948) B.L.R. p. 481.

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therein under section 108, clauses (*o*) and (*p*) of the Transfer of Property Act had been broken by the tenants and the lease had been terminated in accordance with law under section 111 (*h*) of the Transfer of Property Act and that the plaintiff was entitled to eject the defendants from the land in suit. However, in the present case, the plaintiff had not made the unauthorized extensions to his building a basic ground for the ejectment of the defendants. If such a stand had been taken by the plaintiff, questions of fact would arise whether or not the extensions were made on the implied consent of the plaintiff. This question cannot now be agitated in the absence of a specific issue thereon.

The decree for mesne profits also cannot be allowed to stand. Once it is established that the plaintiff is the owner of the house as well as the site, the plaintiff should approach the Rent Controller for the fixation of the standard rent for the house and the site. If he fails to recover the standard rent so fixed, he can file a suit for ejectment under section 11 (*l*) (*a*). He may also, if so advised, file a suit for the recovery of the rent.

In the result, the appeal succeeds in part. The decree of the trial Court in so far as it relates to mesne profits and the possession of the house in suit will be set aside. There will accordingly be a decree for declaration that the house in suit belongs to the plaintiff.

As the appeal succeeds in part, we would direct that each party bear its own costs throughout. Advocate's fees in this Court, 3 gold mohurs.

U BA THAUNG, J.—I agree.

APPELLATE CIVIL.

Before U San Maung and U Bo Gyi, JJ.

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Nov. 15.

LAL BIHARI JADO (APPELLANT)

v.

RABIDUTT PANDAY (RESPONDENT).*

Promissory note, suit on—Money Lenders' Act, s. 15—Antedating, effect of—Amendment of plaint, when and in what circumstances permissible,—Negotiable instrument, whether it is taken as sole consideration for loan or merely as collateral security for repayment—Normal and prima facie *inference.*

Held : S. 15 of the Money Lenders' Act, 1945 is explicit that a promissory-note on which the date of execution is stated incorrectly shall be void.

Walter Mitchell v. *A. K. Tennent*, 52 Cal. 677.

Held also: An amendment of the pleadings can be allowed at any stage of the proceedings where the sole result of a refusal would be to force the plaintiff to another suit ; but where the effect of the amendment would be to take away from the defendant a legal right which has accrued to him by lapse of time, the amendment ought to be refused.

Maung Shwe Myat v. *Maung Po Sin and one*, I.L.R. 3 Ran. 183 ; *Krishna Prasad Singh and one* v. *Ma Aye and others*, I.L.R. 14 Ran. 383 ; *Charan Das* v. *Amir Khan* , I.L.R. 48 Cal. 110 ; *Ranendramohan Tagore* v. *Kashebchandra Chanda*, I.L.R. 61 Cal. 433.

Held further : When a promissory-note has been lost the plaintiff can rely upon the original consideration when it has been taken as a collateral security for repayment of the loan which is a normal and *prima facie* inference, but when the negotiable instrument itself is the consideration for the loan the lender is restricted to his rights under the negotiable instrument by which he must stand or fall.

Pavana Reena Saminathan and another v. *Pana Lana Palaniappa*, (1913) I.A. 142 ; *Maung Chit and another* v. *Roshan N.M.A. Kareem Oomer & Co.*, I.L.R. 12. Ran. 500 ; *E Yar and one* v. *Teh Lu Pe*, B.L.R. (S.C.) 239.

G. N. Banerjee for the appellant.

Messrs. P. B. Sen and *B. K. Sen* for the respondent.

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* Civil 1st appeal No. 93 of 1952 against the decree of the 3rd Judge, Rangoon City Civil Court, in Civil Regular No. 1034 of 1949.

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LAL BIHARI JADO v. RABIDUTT PANDAY.

The judgment of the Bench was delivered by

U SAN MAUNG, J.—In Civil Regular Suit No. 1034 of 1949 of the City Civil Court, Rangoon, the plaintiff-respondent Rabidutt Panday sued the defendant-appellant Lal Bihari Jado for the recovery of Rs. 1,100 due on the promissory-note in suit. The defendant by his written statement denied having executed the suit promissory-note and contended that it was a forgery. When asked to give particulars why he considered the suit promissory-note to be a forgery, the defendant pointed out that the stamp which was used on the suit promissory-note was only issued to the public after the 1st October 1947, *i.e.* more than 9 months after the date appearing on the promissory-note in suit. The plaintiff then countered this allegation by saying that the original promissory-note on which the defendant borrowed the sum of Rs. 1,000, which was executed on the 15th March 1947, being lost he had requested the defendant to execute a fresh promissory-note which the defendant agreed to do. But when the new promissory-note came to be executed the date 15th March 1947 had to be put in because the defendant insisted that he would only sign a promissory-note bearing such a date lest the plaintiff might claim two sums under the two promissory-notes were they to bear different dates. When these particulars were given by the plaintiff the defendant filed an amended written statement wherein he still contended that the suit promissory-note was a forgery as the same was never executed by him. He also contended that in view of the plaintiff's own story that the promissory-note in suit was executed on a date subsequent to that appearing thereon the promissory-note is void under section 15 (*1*) of the Money Lenders' Act, 1945.

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The plaintiff himself in giving evidence stated that he knew the defendant since about 5 years before the institution of the case, that on the 15th March 1947 the defendant took from him a loan of Rs. 1,000 for which he executed a promissory-note, that later when the promissory-note was lost the defendant executed the suit promissory-note wherein the date 15th March 1947, which was the date of the original loan, had to be put in at the insistence of the defendant. He also said that the defendant besides signing the promissory-note affixed his thumb impression thereon. The plaintiff's story is supported by the evidence of Ram Prasad Panday (PW 1) and Babu Lal (PW 2). According to Ram Prasad Panday, he was a mutual friend of the parties and he had requested the plaintiff to lend Rs. 1,000 as the latter was in need of money. The defendant executed a promisorry-note bearing interest at the rate of 1 per cent per mensem for the loan of Rs. 1,000 which he received. About 7 or 8 months later, the plaintiff came to tell him about the loss of the promissory-note. He and the plaintiff then went to see the defendant who promised to execute a fresh promissory-note in lieu of the one said to be lost. On the appointed day, the defendant procured a printed form and stamp from Mogul Street. Thereafter, they went to Babu Lal who filled in the promissory-note, including the date thereon at the instance of the defendant, who said that he must be protected from paying twice for the same loan.

Babu Lal (PW 2), who is an unlicensed petition-writer, said that he typed out the promissory-note in the presence of the parties and Ram Prasad Panday (PW 1), that the date appearing therein was put in at the instance of the defendant and that the defendant executed the promissory-note in his

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presence. The thumb impression thereon was also taken by him.

In addition to the above evidence, there is the fact appearing in the evidence of Mr. J. Ross (PW 7), a Finger Print Expert, who stated that the thumb impression appearing on the suit promissory-note was identical with that of the defendant.

The defendant did not choose to appear in the witness-box to deny either his signature or the thumb impression appearing on the suit promissory-note. He was content merely to cite evidence to show that the stamp affixed to the promissory-note was issued only after the 1st October 1947.

This was in support of his contention that the promissory-note in suit was void under section 15 of the Money Lenders' Act, 1945. The learned trial Judge, however, did not accept this contention. He relied on the ruling in the case of *Walter Mitchell* v. *A. K. Tennent* (1). In his view the promissory-note was valid notwithstanding the fact that it bore a date prior to that on which it was actually executed. In our opinion, the learned Judge has entirely misinterpreted the provisions of section 15 of the Money Lenders' Act, 1945, which is entirely explicit on the point that a promissory-note on which the date of execution is stated incorrectly shall, be void. Faced with this, the plaintiff asked the permission of this Court to allow amendment of the plaint so as to base his claim on the original consideration as an alternative to that arising under the suit promissory-note. We have allowed him to do so in view of the rulings in the cases of *Maung Shwe Myat* v. *Maung Po Sin and one* (2) and *Krishna Prasad Singh and another* v. *Ma Aye and others* (3). In the first case, it was

(1) 52 Cal. 677. (2) (1924) I.L.R. 3 Ran. p. 183.
(3) (1936) I.L.R. 14 Ran. p. 383.

held that amendment of pleadings can be allowed at any stage of the proceedings, where the sole result of a refusal would be to force the plaintiff to another suit, to avoid which is one of the principal objects of the much wider rule as to amendment which has been introduced in the present Code of Civil Procedure, and that when the plaintiff filed a suit on a promissory-note the execution of which he failed to prove and the defendant, whilst denying execution of the note, admitted receipt of the original consideration the plaint could be amended any stage of the proceedings by the addition of an alternative plea so that the plaintiff may be given a decree on the original consideration after the necessary amendment on his plaint. In the latter case, Dunkley, J. has made the following observation at page 387:

". . . The principle for which learned counsel for the respondents contends is that leave to amend ought to be refused where the effect of the amendment would be to take away from the defendant a legal right which has accrued to him by lapse of time, and this general rule ought not to be departed from except in very exceptional cases. This is undoubtedly a correct statement of the law as laid down by their Lordships of the Privy Council in the case of *Charan Das* v. *Amir Khan* (1). It has been followed by a Bench of the Calcutta High Court in the recent case of *Ranendramohan Tagore* v. *Kashebchandra Chanda* (2). This latter case is exactly on all fours with the present case. There a suit was brought upon a promissory-note, and after a suit for recovery of debt was time barred an application to amend the plaint, so as to allow the plaintiff to sue for the original debt, was made and was allowed, and it was held by the Bench that under the circumstances the amendment was properly allowed. In fact, the decision is to the effect that in a case such as the one now before me an amendment of the plaint so as to permit of the suit being brought upon the original consideration is one of the exceptional cases to which reference was made by their

(1) (1920) I.L.R. 48 Cal. 110. (2) (1934) I.L.R. 61 Cal. 433.

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Lordships of the Privy Council in *Charan Das*'s case (1). It seems to me to be clear that that must be so, for in the original plaint an alternative claim based upon the original consideration could have been made, and then no question of limitation could have arisen, and it would be monstrous, to my mind, that the plaintiff should lose his money merely because of a technical error in the execution of the promissory-note, which is no more than a conditional payment and not a discharge of the debt.

The defendant has sought by an amended written statement to say that although he did execute a promissory-note on the 15th March 1947 for Rs. 1,000 in favour of the plaintiff, he did not receive any consideration therefor and that the suit promissory-note which was executed on the 19th October 1947 in lieu of the one said to be lost was in extinguishment of whatever debt or liability was due on the lost promissory-note. By this amended written statement he sought to contend that the promissory-note in suit being void could not be sued upon and there was no cause of action independent of the suit promissory-note as the same was executed in extinguishment of the debt or liability under the original promissory-note. The defendant has in our opinion now sought to set up a totally new and inconsistent defence, as will be obvious when his amended written statement is compared with that of the original where he had entirely denied executing the suit promissory-note and contended that it was a mere forgery.

From the facts and circumstances appearing in the case, we are convinced that the plaintiff did not take the suit promissory-note as in extinguishment of the debt or liability under the original promissory-note. Furthermore, as the original promissory-note is lost, the plaintiff can rely upon the original consideration for the relief which he seeks. In this

connection, the case of *Pavana Reena Saminathan and another* v. *Pana Lana Palaniappa* (1) is apposite. In that case where the plaintiff sued upon promissory-notes and the action failed owing to a material alteration in the notes and the plaintiff thereafter sued to recover a part of the consideration for which the promissory-notes had been given, their Lordships of the Privy Council held that although the claims in the two actions arose out of the same transaction, they were in respect of different causes of action and that the second action was maintainable. This is one of the rulings relied upon by a Full Bench of the late High Court of Rangoon in *Maung Chit and another* v. *Roshan N.M.A. Kareem Oomer & Co.* (2) where the learned Chief Justice, after an exhaustive review of the rulings on the subject, held that if the negotiable instrument is given by the borrower to the lender and the negotiable instrument is itself the consideration for the loan the lender is restricted to his rights under the negotiable instrument by which he must stand or fall, but that if it is agreed between the parties that the negotiable instrument is taken as merely collateral security for the repayment of the loan the lender is entitled to sue upon the original consideration independently of the security, and that normally and *primâ facie* a lender is regarded as taking a negotiable instrument only as a conditional payment and not in satisfaction of the loan. This case was cited with approval by the Supreme Court in *E Yar and one* v. *Teh Lu Pe* (3). In our opinion, the *primâ facie* presumption that the original promissory-note executed on the 15th of March 1947 by the defendant was taken by the plaintiff merely as collateral security has not been

(1) (1913) 41 I.A. 142. (2) (1934) I.L.R. 12 Ran. 500.
(3 (1950) B.L.R. (S.C.) 239.

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rebutted in any way. The plaintiff is entitled to file a suit on the original consideration.

In the result, and for reasons different from those given by the learned 3rd Judge of the City Civil Court, we would confirm that part of the decree relating to the payment of Rs. 1,100 by the defendant to the plaintiff. As regards costs, in view of the fact that the plaintiff is successful only because of the amended plaint filed before this Court, we consider that the ends of justice would be met if we direct each party to bear its own costs throughout. Order as to costs will, therefore, be made accordingly.

APPELLATE CIVIL.

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

MAUNG CHAW (APPELLANT)

v.

MA AYE MA AND THREE OTHERS (RESPONDENTS).*

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Dec. 15.

Disposal of Tenancies Act, 1948—Village Agricultural Committee—Expression "final" in Rule 8 (3) of the Disposal of Tenancies Rules, 1949, when applies—Suit for injunction against Village Agricultural Committee, whether lies.

Held: By the proviso to s. 3 of the Disposal of Tenancies Act, 1948, a suit can be maintained in a Civil Court for the purpose of ascertaining whether a Village Agricultural Committee or a District Agricultural Committee has jurisdiction to deal with a matter which it has decided.

Held also: The expression "final" in Rule 8 (3) of the Disposal of Tenancies Rules, 1949 will apply only to a matter over which the Village Agricultural Committee or the District Agricultural Committee has jurisdiction directly or incidentally to deal with or pass orders therein.

The Secretary of State v. *Fahamidannissa Begum and others*, I.L.R. 17 Cal. 590, followed

D. N. Dutt for the appellant.

Tun I for the respondents.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—Ma Aye Ma, Maung Tun Ya, Ma Htoo Ka and Ma Yit, who are the plaintiffs-respondents, own a piece of paddy land, known as Holding No. 9-A of 1940-41 in Kwanta Kwin No. 882, Paung Township, measuring 22·7 acres. It is said that in June 1950 the Kadonsi Village Agricultural Committee allotted 12 acres out of the said 22·7 acres to the defendant-appellant Maung Chaw for cultivation; and the Kadonsi Village Agricultural Committee

* Special Civil Appeal No. 10 of 1952 against the decree of the Appellate Side, High Court, in Civil 2nd Appeal No. 16 of 1951.

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U TUN BYU, C.J.

was said to have been constituted under the Disposal of Tenancies Act, 1948. On the 28th June, 1950 Ma Aye Ma, Maung Tun Ya, Ma Htoo Ka and Ma Yit instituted a suit in the Court of the Assistant Judge, Thatôn, known as Civil Regular Suit No. 18 of 1950, for a declaration that the Disposal of Tenancies Act was not applicable to the land in question and for injunction to restrain the defendants, including the Kadonsi Village Agricultural Committee, from interfering with the right of the plaintiffs to cultivate the said paddy land. The learned Assistant Judge held that a suit for injunction against the Kadonsi Village Agricultural Committee was not maintainable and dismissed the suit of the plaintiffs-respondents.

The latter appealed to the District Court against the said order of the learned Assistant Judge, and their appeal was dismissed by the learned District Judge on 31st January 1951. The plaintiffs-respondents next instituted an appeal against the said order of the learned District Judge in the High Court, known as Civil Second Appeal No. 16 of 1951, and they were successful in their appeal in the High Court, with the result that the orders passed against them in the Court of the Assistant Judge and in the Court of the District Judge, Thatôn, were set aside. The defendant-appellant Maung Chaw next filed an appeal under section 20 of the Union Judiciary Act, 1948, and the question which requires consideration, in the present appeal is, can the plaintiffs-respondents institute a suit in a civil Court for a declaration of the nature they have asked for. It has been argued on behalf of Maung Chaw that a civil suit is barred in view of the decision of the Village Agricultural Committee, which must be considered to be final, by reason of Rule 8 (3) of the Disposal of Tenancies

Rules, 1949, which provides that the order of the District Agricultural Committee shall be final. The expression "final" in Rule 8 (3) of the Disposal of Tenancies Rules, 1949, will apply, in our opinion, only to a matter over which the Village Agricultural Committee or the District Agricultural Committee has jurisdiction, directly or incidentally, to deal with or pass order therein. We desire, in this connection, to reproduce the observation made in a Privy Council case of *The Secretary of State* v. *Fahamidannissa Begum and others* (1), as it expressed the principle of law succinctly and accurately, and it is in these words :

> "Their Lordships cannot hold that the Board of Revenue can, by purporting to exercise a jurisdiction which they did not possess, make their order upon such a matter final, and exempt themselves from the control of the Civil Court."

We consider that a suit can be maintained in a civil Court for the purpose of ascertaining whether a Village Agricultural Committee or a District Agricultural Committee has jurisdiction to deal with a matter, which it has decided, particularly in view of the proviso to section 3 of the Disposal of Tenancies Act, 1948, which reads :

> "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."

We are unable to trace anything in the Disposal of Tenancies Act, which can be said to deprive the jurisdiction of a civil Court for this purpose,

(1) (1890) I.L.R. 17 Cal. 590 at 604.

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particularly in the light of the proviso to section 3 of the Disposal of Tenancies Act. The word "final" appearing in Rule 8 (3) of the Disposal of Tenancies Rules, 1949 will not apply to matters outside the jurisdiction of the Village Agricultural Committee or District Agricultural Committee. It is difficult to appreciate how a proceeding can be said to have been decided by a Village Agricultural Committee or District Agricultural Committee in a matter over which they have no jurisdiction. It is the Disposal of Tenancies Act that we have to look to in order to ascertain whether a Village Agricultural Committee or District Agricultural Committee has jurisdiction to entertain a particular proceeding before it or not. If the subject-matter falls outside the scope of the jurisdiction of a Village Agricultural Committee or District Agricultural Commmittee, it becomes obviously a matter which is outside the jurisdiction of the Committee concerned.

It has been also contended on behalf of Maung Chaw that a suit against the Kadonsi Village Agricultural Committee, who was made a second defendant, is barred by reason of section 9 of the Disposal of Tenancies Act, 1953 ; but it is clear from the wording of section 9 that it does not apply to the exercise of power over a subject-matter which the Village Agricultural Committee or the District Agricultural Committee has no jurisdiction to deal with, nor to a matter which is outside the scope of the Disposal of Tenancies Act. Moreover, so far as the present litigation is concerned, the Disposal of Tenancies Act, 1953 was enacted long after the suit was instituted in the Court of the Assistant Judge, Thatôn.

The decision of U Bo Gyi, J., passed in Civil Second Appeal No. 16 of 1951 must therefore be

considered to be correct. The case will go back to the trial Court to proceed with the hearing of the suit before it.

We desire to mention here that where the proviso to section 3 of the Disposal of Tenancies Act has been pleaded, it is necessary to consider whether proper evidence has been adduced to establish all the facts required for such purpose, and the parties should be given opportunity for adducing evidence.

This appeal is accordingly dismissed with costs with Advocate's fee K 85.

U AUNG KHINE, J.—I agree.

APPELLATE CIVIL.

Before U San Maung, J.

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Nov. 8.

MAUNG CHIT MAUNG AND ONE (APPLICANTS)

v.

DAW SAW (RESPONDENT).*

Decree of subordinate Court—Time fixed for payment of certain sum of money—Liability for non-compliance—Appeal, whether time fixed for payment enlarged—Difference between the effect of an appeal summarily dismissed and of an appeal giving judgment and decree confirming that of trial Court.

Plaintiffs sued defendant for ejectment from house and obtained judgment provided they pay Rs. 600 within one month on failure of which suit will stand dismissed. District Court confirmed the judgment and conditional payment on appeal; second appeal summarily dismissed by High Court. Plaintiffs then made the payment within a month of the High Court's order; the trial Court declined to accept it and dismissed the suit. Plaintiffs applied for revision of the order: High Court on a review of the twelve authorities cited.

Held: If a decree in which time is given for payment of money is confirmed on appeal, it has the effect of extending the time fixed under the decree thus confirmed, so that time would run from the date of the decree confirming it. However, where an appeal is dismissed under Order XLI, Rule 11, Civil Procedure Code, the decree appealed from cannot be taken to have been confirmed under Rule 32 so that dismissal of the appeal leaves the decree untouched. *Ramaswami Kona* v. *Sundara Kone*, I.L.R. 31 Mad. 28; *Daulat and Jagjivan* v. *Bhukandas Manekchand*, I.L.R. 11 Bom. 172; *Satwaji Balajiraw Deshamukh* v. *Sakharlal Atmaramshet*, I.L.R. 39 Bom. 175; *Dattatraya Vithal Garwara* v. *Wasudeo Anant Gargate and others*, I.L.R. 47 Bom. 956; *Bhola Nath Bhuttacharjee* v. *Kanti Chundra Bhuttacharjee*, I.L.R. 25 Cal. 311; *Bapu* v. *Vajir*, I.L.R. 21 Bom. 543; *Noor Ali Chowdhuri* v. *Kazi Meah and others*, I.L.R. 13 Cal. 13; *Nam Narain Singh* v. *Lala Roghunath Sahai*, I.L.R. 28 Cal. 257; *Basanta Kumar Adak* v. *Radha Rani Dasi and another*, A.I.R. (1922) Cal. 329; *Lala Gobind Prasad* v. *Lala Jagdap Sahay*, I.L.R. 4 Pat. 345; *Panchu Sahu* v. *Muhammad Yakub and others* A.I.R. (1927) Pat. 345; *Ghanshyam Lal* v. *Ram Narian*, I.L.R. 31 All. 379.

* Civil Revision No. 56 of 1952 against the decree of the Township Court of Kyauktan in Civil Regular No. 4 of 1951.

Tun On for the applicants.

Hla Pe for the respondent.

U SAN MAUNG, J.—This is an application for the revision of the order of the Township Court of Kyauktan, refusing to pass a decree for the ejectment of the defendant in Civil Regular Suit No. 4 of 1951. In that suit the plaintiffs Maung Chit Maung and Ma Thein Kyi, who have filed the present application for revision, obtained a conditional decree for the ejectment of the defendant-respondent Daw Saw, provided that a sum of Rs. 600 due to the defendant as balance of the purchase price of the house in suit was paid within one month from the date of the decree; failing which the suit would be dismissed with costs. The plaintiffs being dissatisfied with the judgment and decree of the trial Court appealed to the District Court of Hanthawaddy, but that Court after going into the merits of the case confirmed the judgment and decree of the trial Court and dismissed the appeal by a judgment dated the 6th November 1951. The plaintiffs then sought to agitate the matter further by preferring a second appeal to this Court but their appeal was summarily dismissed by this Court on the 30th January 1952. Thereafter, the plaintiffs filed on the 26th February 1952 an application praying that a decree for possession of the suit property be passed. At the same time they deposited in Court a sum of Rs. 742, being the total of Rs. 600 mentioned in the original decree and Rs. 142 as costs to be paid to the defendant. The trial Court, however, rejected the application as having been made beyond the period of one month prescribed in the original decree dated the 21st July 1951. In so doing, the learned trial Judge relied upon the ruling

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in the case of *Ramaswami Kona* v. *Sundara Kona* (1), the head-note of which reads as follows:

"The decree of the lower Court provided that 'on the plaintiff's paying into Court the balance of consideration, Rs. 10, within a month from this date,' defendant should execute a sale-deed of the suit land. The money was not paid within the month and the defendant preferred an appeal after the expiry of the month. The Appellate Court simply confirmed the decree of the lower Court and dismissed the appeal. Within a month of the appellate decree the plaintiff deposited Rs. 10; and applied for execution of the decree:

Held, that he was not entitled to execute the decree, as he had not made payment within the time fixed by the original decree and as the appellate decree cannot under the circumstances be held to have enlarged the time fixed by the original decree. The appellate decree simply confirming the original decree cannot be read as giving the plaintiff one month from the date of the decision on appeal. Such an extension can be claimed only if expressly or impliedly given by the Appellate Court."

Hence, the present application for revision.

I have taken considerable time to consider this matter as there is no reported decision either of this High Court or of the late High Court of Judicature. The High Courts in India seems to be at variance regarding the principle to be followed in such cases and in fact there seems no unanimity even in the decisions of the same High Court. In *Daulat and Jagjivan* v. *Bhukandas Manekchand* (2) where in a suit by a mortgagee on a mortgage, the decree of the Court of first instance directed payment of the mortgage-debt within two months from the date of the decree from which the defendants appealed, but which was confirmed by the appellate Court, it was held that:

"under the circumstances of the case, that it was the intention of the Appellate Court that the term of two months

(1) (1907) I.L.R. Vol. 31 Mad. p. 28. (2) (1886) I.L.R. 11 Bom. 172.

allowed for payment should be counted from the date of its own decision, and not from the date of the original decree."

The reason for the decision is that it was thought unlikely that the High Court in confirming the decree of the trial Court would not have dealt with the actual lapse of more than two months from the date of the original decision had it intended that the time of payment should be still within two months from the date of the original decree. In *Satwaji Balajiraw Deshamukh* v. *Sakharlal Atmaramshet* (1) the Bombay High Court went still further and held that—

> " the time for executing a decree *nisi* for possession ran from the date of the High Court's decree confirming the decree of the lower Court, for what was to be looked at and interpreted was the decree of the final appellate Court."

In that case, the plaintiff brought a suit to recover possession of property as purchaser from defendants 1—6 and to redeem the mortgage of defendant 7. The trial Court having dismissed the suit, the appellate Court, on plaintiff's appeal, passed a decree directing the plaintiff to recover possession on payment to defendants 1—6 of a certain sum of money within six months from the date of its decree and then to redeem defendant 7, and that on plaintiff's failure to pay within six months from the date of the decree he should forfeit his right to recover possession. All the parties to the case being dissatisfied with the appellate Court's decree, the plaintiff preferred a second appeal to the High Court while the two sets of defendants filed separate sets of cross objections. The High Court, however, confirmed the decree and within six months of the date of the High Court's decree the plaintiff deposited in Court the amount

(1) (1914) I.L.R. 39 Bom. 175.

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payable by him and applied for execution. The trial Court and the first appellate Court, however, upheld the contention of defendant 7 that the plaintiff having failed to comply with the terms of the decree of the first appellate Court, his right to recover possession was forfeited. The plaintiff then applied to the High Court with the result mentioned above. In *Dattatraya Vithal Garwara* v. *Wasudeo Anant Gargate and others* (1) the Bombay High Court makes a distinction between the summary dismissal of an appeal under Order XLI, Rule 11 of the Civil Procedure Code, and the confirmation of the judgment of the lower Court in appeal. It observes as follows:

> " No authority has been cited in support of the proposition that the time fixed under a decree appealed from is extended by such dismissal. There are decisions to the effect that where the appeal is admitted and heard on the merits, and where ultimately the decree appealed from is confirmed, it has the effect of extending the time fixed under the decree thus confirmed in appeal, and in such a case the time would run from the date of the decree confirming it. It will be enough to refer to the decision of this Court in *Satwaji Balajiraw Deshamukh* v. *Sakharlal Atmaramshet* (2). Several decisions have been referred to in the judgment of the learned Chief Justice in that case, but there is not a single one in which the summary dismissal of an appeal is held to have the effect which the appellant in this case contends for. The decision in *Bhola Nath Bhuttarcharjee* v. *Kanti Chundra Bhuttarcharjee* (3) is against the contention of the appellant ; and the observations in *Bapu* v. *Vajir* (4) also go to show that the dismissal of an appeal under Order XLI, Rule 11 cannot have the effect of extending the time as argued on behalf of the appellant. Speaking with reference to the dismissal under section 551 of the Civil Procedure Code of 1882, Farran, C.J. observes (p. 551) :
>
> ' The change of language made in 1888 in that section by the Legislature shows, we think, that it was

(1) (1923) I.L.R. 47 Bom. 956 at p. 958.
(2) (1914) I.L.R. 39 Bom. 175.
(3) (1897) I.L.R., 25 Cal. 311.
(4) (1896) 21 Bom. 543.

intended that there should be a difference between the results of a dismissal under it and of a confirmation under section 577; as, indeed, we think, there must be. Dismissing an appeal is, we think, refusing to entertain it as in the case of an appeal dismissed as being time-barred. Where an appeal is dismissed under section 551, there is no decree of the High Court which can be executed, and the reasoning in the cases to which we have been referred does not apply."

The rule as to the extension of time has been held to apply where the decree under which the time is fixed is confirmed in appeal. Where it is dismissed under Order XLI, Rule 11, the decree appealed from cannot be taken to have been confirmed under Rule 32. The dismissal of the appeal leaves that decree untouched."

In *Noor Ali Chowdhuri* v. *Koni Meah and others* (1) a decree which was one under section 52 of the Rent Act (Bengal Act VIII of 1869) provided that unless the arrears of rent with costs and interest were paid within 15 days of the date thereof, the tenant should be liable to ejectment from his holding. The decree was confirmed in appeal some 6 months afterwards, and within 15 days of the appellate Court's decree, the judgment-debtor deposited the necessary amount in Court. The decree-holder who had taken no steps to execute the original decree then made an application to be put in possession of the holding and the question arose whether the period of 15 days granted to the judgment-debtor should be computed from the date of the original or the appellate decree. It was held by the High Court that—

"inasmuch as the appellate decree must be presumed to incorporate the terms of the original decree, and was the only

(1) (1886) I.L.R. 13 Cal. 13.

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decree of which execution could be taken, the tenant (judgment-debtor) having paid the decretal amount within 15 days of the decree was protected from ejectment."

This decision was followed in *Nam Narain Singh* v. *Lala Roghunath Sahai* (1). In *Bhola Nath Bhuttarcharjee* v. *Kanti Chundra Bhuttarcharjee* (2), however, the Calcutta High Court distinguished the decision in *Noor Ali Chowdhuri* v. *Koni Meah and others* (3) and held that—

"Where, in a suit on a mortgage, the decree of the Appellate Court simply dismisses the appeal, leaving the decree of the first Court untouched, the time for redemption would run from the date of the decree of the first Court."

This later decision was followed in *Basanta Kumar Adak* v. *Radha Rani Dasi and another* (4), which was also a mortgage suit. The Madras High Court's decision in the case of *Ramaswami Kona* v. *Sundara Kona* (5) was followed and the Bombay High Court's decision in *Satwaji Balajiraw Deshamukh* v. *Sakharlal Atmaramshet* (6) was dissented from.

The Patna High Court in the earlier case of *Lala Gobind Prasad* v. *Lala Jugdap Sahay* (7) dissented from the Madras High Court and preferred to follow the decision of the Bombay High Court in *Satwaji Balajiraw Deshamukh* v. *Sakharlal Atmaramshet* (6). In a later decision, however, it dissented from the Bombay High Court and followed the decision of the Madras High Court. It is the case of *Panchu Sahu* v. *Muhammad Yakub and others* (8) where it was held that where a decree declares the right of the decree-holder to get possession of property subject to the

(1) (1895) I.L.R. 28 Cal. 257.
(2) (1897) I.L.R. 25 Cal. 311.
(3) (1886) I.L.R. 13 Cal. 13.
(4) (1922) A.I.R. Cal. 329.
(5) (1907) I.L.R. Vol. 31 Mad. p. 28.
(6) (1914) I.L.R. 39 Bom 175.
(7) (1924) I.L.R. 4 Pat. 345.
(8) (1927) A.I.R. Pat. 345.

right of the judgment-debtor to redeem the property by payment of a certain sum of money within 6 months from the date of the trial Court's decree and the judgment of the original Court was confirmed on appeal by the judgment-debtor, the time for the deposit of this amount by the judgment-debtor must be computed from the date of the trial Court's decree.

In *Ghanshyam Lal* v. *Ram Narian* (1) where a plaintiff claimed the principal sum of money due on a bond with interest at 30 per cent per annum and the decree of the trial Court directed that if the defendant deposited the money within 3 months from the date of its decree he would be liable to pay interest at the rate of 12 per cent per annum and would be exempted from further liability, and this decree was affirmed by the High Court and finally by the Privy Council on appeal by the judgment-debtor but the time of payment was not extended. It was held—

> "that the defendant having made default in the payment of the money within the time allowed by the first Court, he could not claim exemption from further liability and could not be allowed to pay the principal with interest at the rate of 12 per cent from the date of the Privy Council decree."

The decision in the case of *Noor Ali Chowdhuri* v. *Koni Meah and others* (2) was distinguished on the ground that it was a decision under section 52 of the Bengal Act VIII of 1869.

On a review of the authorities quoted above, it would appear to me that the High Courts in India are almost equally divided in opinion regarding the matter now under consideration. However, the most logical and reasonable view seems to be that expressed in *Satwaji Balajiraw Deshamukh* v. *Sakharlal Atmaramshet* (3) in the light of the subsequent decision

(1) (1909) I.L.R. 31 All. 379. (2) (1886) I.L.R. 13 Cal. 13.
(3) (1914) I.L.R. 39 Bom. 175

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of the Bombay High Court in *Dattatraya Vithal Garwara* v. *Wasudeo Anant Gargate and others* (1). If a decree in which time is given for payment of money is confirmed on appeal it has the effect of extending the time fixed under the decree thus confirmed so that time would run from the date of the decree confirming it. However, where an appeal is dismissed under Order XLI, Rule 11 of the Civil Procedure Code, the decree appealed from cannot be taken to have been confirmed under Rule 32 so that dismissal of the appeal leaves the decree untouched. Applying the principle so deduced to the case now under consideration, I am of the opinion that payment of Rs. 600 by the plaintiffs would have been in time only if it was made within one month from the 6th November 1951, which is the date of the decree of the District Court. The payment having been made only on 26th February 1952 was not a payment within time. Before I leave this case, I would like to observe that there is considerable force in the contention of the learned Advocate for the respondent that the order of the Township Court, dated the 7th April 1952, now sought to be revised, really relates to the execution of the decree and that it should therefore be treated as a matter coming under section 47 of the Civil Procedure Code.

In the result, this application for revision fails and must be dismissed with costs—Advocate's fees 3 gold mohurs.

(1) (1923) I.L.R. 47 Bom. 956 at p. 958.

APPELLATE CIVIL.

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

MRS. D. RAEBURN (APPELLANT)

v.

MRS. M. JOHNSTON AND ONE (RESPONDENTS).*

H.C. 1954

Dec. 1.

Lease of house—Term 3 years—No written instrument—Transfer of Property Act, ss. 106 and 107—Oral agreement with delivery of possession of premises, valid lease constituted—Mesne profits, suit for, maintainability of.

Held : S. 107 of the Transfer of Property Act is clear that a lease of immoveable property can be effected by an oral agreement accompanied by delivery of possession, and as a month's rent had been paid, a monthly tenancy has been created by implication of law under s. 106 of the Transfer of Property Act.

Chuni Lal Dutt and others v. *Gopiram Bhotica*, (1927) A.I.R. Cal. 275; *Calcutta Landing & Shipping Co.* v. *Victor Oil Co. Ltd.*, (1944) A.I.R. Cal. 84 ; *Ram Kumar Das* v. *Jagdish Chandra Deo and others*, (1952) A.I.R. Vol. 39 (S.C.) 23, followed.

Held also : As a monthly tenancy has been constituted, the defendants could not be said to be trespassers against whom a suit for mesne profits for use and occupation would lie.

Sein Tun (1) for the appellant.

Aung Min (1) for the respondent No. 2.

The judgment of the Bench was delivered by

U TUN BYU, C.J.—Mrs. D. Raeburn, who was the owner of a house known as " Kerry House ", at No. 4, Franklin Road, Rangoon, sued for the recovery of a sum of Rs. 4,560 from Mrs. M. Johnston and her husband E. H. Johnston, as mesne profits for the use of the said house for the period from the 1st August, 1947 to the 20th March, 1950.

* Civil 1st Appeal No. 94 of 1952 against the decree of the 2nd Judge, Rangoon City Civil Court, in Civil Regular Suit No. 555 of 1950

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Mrs. D. Raeburn subsequently sold "Kerry House" to one U Pauk on the 20th March, 1950, but this circumstance will not affect the present case, as the claim for mesne profits which Mrs. D. Raeburn made was for the period prior to the aforesaid sale.

The evidence shows that it was Mrs. M. Johnston alone, who negotiated for the lease of "Kerry House" from Mrs. D. Raeburn and that E. H. Johnston went and lived there only subsequently, *i.e.* in or about January, 1949. Mrs. M. Johnston's case is, *inter alia*, that Mrs. D. Raeburn agreed, verbally, to lease "Kerry House" to her for a period of 3 years, at a rental of Rs. 150 per month, that she, Mrs. M. Johnston, undertook to carry out the repairs that might be required at her own expense, that they agreed to reduce the terms of the lease, so arrived at between them, into writing, and that early in August 1947 she paid Rs. 150 to Mrs. D. Raeburn as advance-rent for the month of August 1947 and took possession of the house. Mrs. M. Johnston also alleged that she had carried out considerable repairs to the said house. No written lease was, however, executed. Mrs. M. Johnston was already in occupation of the house when a draft lease was prepared, which according to Mrs. M. Johnston contained new terms which were not contemplated by the parties at the time the verbal agreement was made; and she declined to approve it.

The learned 2nd Judge, Rangoon City Civil Court, held that a monthly lease had, in the circumstances of the present case, been constituted, and he also answered all the issues in favour of the defendants-respondents.

The real question which requires consideration in the present appeal, is, whether a lease had, in the circumstances of the case, been constituted or not ?

This is a question of mixed fact and law, and it will be necessary to examine the evidence closely also. What Mrs. D. Raeburn stated early in her examination-in-chief was :

" She (Mrs. Johnston) told me that she wanted to open a clinic there. Ultimately we came to an agreement that the 1st defendant was to take a lease of my house for 3 years and that she was to carry out all the necessary repairs to that house at her own cost and the rent would be Rs. 150 a month."

Towards the close of her examination, Mrs. D. Raeburn also said :

" All that I was interested was getting the rent from Mrs. Johnston and I was not anxious about the repairs personally. The main concern between me and Mrs. Johnston was that she should occupy the house and I was to be given the rent by her. Except this there were no other terms to be embodied between us.

. . . . . .

Mrs. Johnston wanted a written lease registered because the term was to be for the period of 3 years."

It will be observed from the statements which Mrs. D. Raeburn made in Court that she had, in effect, verbally agreed to lease " Kerry House " to Mrs. M. Johnston for a period of 3 years at a rental of Rs. 150 per month, that it was agreed that Mrs. M. Johnston was to carry out the necessary repairs at her own expense, and that she, Mrs. D. Raeburn, also agreed to have a written deed executed because Mrs. M. Johnston insisted on it, as the lease was to be for a period of 3 years. The statements which Mrs. D. Raeburn made, as reproduced above, entirely support the statement which Mrs. M. Johnston made when she was examined in Court; and the statement Mrs. M. Johnston made was to the same effect. According to Mrs. M. Johnston, she soon commenced to make

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repairs to the house and that she went into occupation in August 1947 and paid Rs. 150 to Mrs. D. Raeburn as advance-rent for the month of August 1947; and we accept Mrs. Johnston's statement.

It is true that Mrs. D. Raeburn alleged in her statements in Court that it had also been agreed between them that Mrs. M. Johnston was to occupy the house only after a written lease had been executed; but the learned Judge who heard the case in the Rangoon City Civil Court had not accepted her statement in this respect. We are also unable to entertain a different view. It is most unlikely that Mrs. M. Johnston would, without delay, commence to make repairs at "Kerry Houre" unless Mrs. D. Raeburn had verbally agreed to lease the house to her. It is also improbable that Mrs. D. Raeburn would have dismissed the durwan, who kept watch at "Kerry House" unless she had definitely agreed to lease the house to Mrs. M. Johnston, as alleged by the latter. It is only reasonable to conclude, in the circumstances of the present case, that there was, in effect, an oral agreement to lease "Kerry House" to Mrs. M. Johnston in the terms, as alleged by her in the present case.

Section 107 of the Transfer of Property Act makes it clear that a lease of immoveable property can, in certain cases, be effected also by oral agreement, accompanied by delivery of possession. In the case of *Chuni Lal Dutt and others* v. *Gopiram Bhotica* (1), where the facts are somewhat similar to the case now under appeal before us, Rankin, C.J., observed :

"But it is contended by Mr. Sircar that if this letter of the 22nd of March is regarded as a mere letter of instruction to the solicitor any verbal agreement to the same effect as this

(1) (1927) A.I.R. Cal. p. 275 at 276.

letter would be a verbal agreement intending to operate as passing a present interest in the land for three years. Accordingly, he says that being so, even a verbal arrangement would be nugatory in spite of the fact that if provided for the arrangement being subsequently embodied in the terms of a formal lease. It is said that such an oral arrangement would be intended to pass an immediate interest in the property and is by itself a lease within the meaning of the Transfer of Property Act, and although naturally an oral agreement cannot be hit by the Registration Act it would be entirely void because it would attempt to operate as such within the meaning of ss. 105 and 107 of the Transfer of Property Act. In my judgment, that is an argument which is not to be accepted at all and there are a great many cases in which oral agreements and terms such as these for leases have been specially enforced in this Court, and I am not prepared to say that an oral agreement to the effect in the present case would be a mere nullity notwithstanding the fact that the parties were intending a lease to be executed. In point of fact, it appears that the defendant some little time after paid a deposit and was allowed into possession on the strength of this verbal agreement."

The decision in the case of *Calcutta Landing & Shipping Co.* v. *Victor Oil Co. Ltd.* (1) was said to be to the same effect as in the case of *Chuni Lal Dutt* v. *Gopiram Bhotica* (2), but it does not appear that the point now before us was discussed in any detail there, where it was apparently conceded by the parties concerned that a verbal agreement for a lease for 3 years, accompanied by possession, constituted, in the absence of a written instrument, a month to month's tenancy, as contemplated in section 106 of the Transfer of Property Act. Mukherjea, J. also observed, at page 88 of the report,—

" . . . In the case before us there were negotiations between the parties for a three year's lease, and there was an agreement arrived at that the lease would be for a period of three years from 1st June 1936, and a formal instrument of

(1) (1944) A.I.R. C.L. p. 84. (2) (1927) A.I.R. C.L. p. 275 at 276.

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lease for that period would be executed and registered. No document was however executed, and the tenancy was constituted by the defendant's taking possession of the godown, and paying rents which were accepted by the plaintiff. According to the case made by the plaintiff in his plaint, there was a tenancy from month to month under s. 106, T.P. Act. Thus, there was no agreement between the parties regarding the period of the lease. As there was no agreement fixing the period, the tenancy has been taken to be from month to month under s. 106, T.P. Act which applies only where there is no agreement to the contrary."

We have already observed that in the present case now under appeal before us, no instrument of lease was, in fact, executed ; and section 9 of the Transfer of Property Act allows a transfer of property to be made without writing in all cases in which no written instrument was expressly required by law.

In *Ram Kumar Das* v. *Jagdish Chandra Deo and others* (1) B. K. Mukherjea, J. observed :

". . . The question now is, whether there was a contract to the contrary in the present case ? Mr. Setalvad relies very strongly upon the fact that the rent paid here was an annual rent and he argues that from this fact it can fairly be inferred that the agreement between the parties was certainly not to create a monthly tenancy. It is not disputed that the contract to the contrary, as contemplated by s. 106, T.P. Act, need not be an express contract ; it may be implied, but it certainly should be a valid contract. If it is no contract in law, the section will be operative and regulate the duration of the lease. It has no doubt been recognised in several cases that the mode in which a rent is expressed to be payable affords a presumption that the tenancy is of a character corresponding thereto."

The advance-rent which Mrs. M. Johnston paid to Mrs. D. Raeburn in the case now under appeal was as for the month of August, 1947, and it was thus

(1) (1952) A.I.R. Vol. 39, S.C., p. 23 at 26.

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in the nature of a monthly rent. We are of opinion that it could, in the circumstances of the case now under appeal before us, be said that a monthly tenancy had, by implication of law, been created by reason of section 106 of the Transfer of Property Act ; and the defendants could not therefore be considered to be trespassers against whom a suit for mesne profits would lie. The appeal must in the circumstances of the present case fail ; and it is dismissed with costs.

U AUNG KHINE, J.— I agree.

APPELLATE CIVIL.

Before U San Maung, J.

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Nov. 18.

MA KYIN TIN (APPLICANT)

v.

BANU NANIGRAM JAMNADASS FIRM AND ONE (RESPONDENTS).*

Ejectment suit—Application by sub-tenant to be added as a party—Relationship between landlord and sub-tenant necessary party, circumstances when sub-tenant becomes one.

Held : Under the Urban Rent Control Act, 1948, a sub-tenant is a tenant only in relation to the tenant-in-chief, and he is not a tenant to the superior landlord, the owner of the premises.

Baban v. *Champabai*, I.L.R. (1949) Nag. 432 ; *Makhan Lal Kela and another* v. *Girdhari Lal and another*, A.I.R. (1952) All. 421 ; *Ramkissendas and another* v. *Binjraj Chowdhury and another*, I.L.R. 50 Cal. 419, referred to.

Held : When a landlord, who has obtained a decree for ejectment against his tenant, is resisted by a third party who was not a party to the proceedings, the landlord can avail himself of the provisions of Order XXI, Rules 97 and 98 of the Civil Procedure Code.

Babu Safarmal Tibrewala v. *G. M. Latimour*, (1948) B.L.R. 113, followed.

S. Periayya v. *Kyaw Leong Tong Society*, (1947) B.L.R. 190, dissented from.

Messrs. Importers and Manufacturers Ltd. v. *Pheroze Framroze Taraporewala and others*, A.I.R. (1953) (S.C.), India 73, followed.

Held further : In a suit for ejectment based upon the fact of there being arrears of rent, the landlord must not only aver but must also prove that there had been in fact arrears of rent. As a sub-tenant is bound by the decree against the tenant, he is vitally interested in seeing that there is no collusion between the landlord and the tenant ; accordingly, a sub-tenant is not only a proper party but one whom the Court should add as a party defendant under Order 1, Rule 10 (2), Civil Procedure Code.

Jatindra Mohan Das v. *Khitpatinath Mitra and another*, 84 C.L.J. 263 ; *Rajani Kanto Das* v. *Daval Chand De and others*, A.I.R. (1950) Cal. 244, distinguished.

Bacha Sham Sunder Kuer v. *Balgobind Singh*, I.L.R. 10 Pat. 90, followed.

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* Civil Revision No. 102 of 1952 against the order of the 3rd Judge, Rangoon City Civil Court in Civil Regular No. 802 of 1952.

J. B. Sanyal for the applicant.

B. K. Dadachanji for the respondent No. 1.

U SAN MAUNG, J.—In Civil Regular Suit No. 802 of 1952 of the City Civil Court, Rangoon, the plaintiff Banu Nanigram Jamnadass Firm by its partner Tibrawalla sued the defendant-respondent Khoo E Sein for his ejectment from the premises in suit, namely, Room No. 3 in House No. 81/83, Sandwith Road, Rangoon, on the ground that he had been in arrears of rent for the period October 1951 to May 1952. As the defendant could not be found in the address given in the plaint substituted summonses were ordered to be issued against him and in the normal course of events, the suit would have proceeded *ex parte* against him. However, in the meantime one Ma Kyin Tin who is the applicant in the present application for revision intervened to say that Khoo E Sein had sub-let the premises to one Ko Ko Gyi with the knowledge and consent of the plaintiff, that she was the partner and agent of Ko Ko Gyi and that in her capacity as sub-tenant she has been paying rent direct to the plaintiff since about 1947 and for all times material to the suit. She therefore claimed to be a tenant of the plaintiff as defined in the Rent Control Act and stated that for a complete adjudication of all the questions involved in the suit her presence as a party-defendant was necessary. This application was objected to by the plaintiff and the learned trial Judge by his order dated the 15th September 1952, dismissed Ma Kyin Tin's application mainly on the ground that a sub-tenant was not a necessary party to a suit for ejectment of a tenant by his landlord. In this connection, the learned trial Judge relied mainly

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upon the rulings in the cases of *Baban* v. *Champabai and others* (1) and *Makhan Lal Kela and another* v. *Girdhari Lal and another* (2). In the first case it was held that under the Transfer of Property Act there was neither privity of contract nor privity of estate between a lessor and a sub-lessee. In the latter, which was a decision under the United Provinces (Temporary) Control of Rent and Eviction Act, 1947, it was held that a sub-tenant is a tenant only in relation to the tenant-in-chief and that he is not a tenant in relation also to the true owner of the accommodation. I have no observation whatsoever to make in regard to the decision in Champabai's case. However, as regards the case of *Makhan Lal Kela and another* v. *Girdhari Lal and another* (2), the decision seems to turn upon the definition of "landlord" therein which expressly say that "landlord" means a tenant in relation to his sub-tenant. The definition of landlord in the Urban Rent Control Act, 1948 (Burma Act, No. 6 of 1948) is not so specific in that it only says that " landlord " means a tenant who sub-lets any premises. However, when the definition of " landlord " is read in conjunction with the definition of " tenant " I have no doubt whatsoever that under the Urban Rent Control Act, 1948 also, a sub-tenant is a tenant only in relation to the tenant-in-chief and he is not a tenant to the superior landlord, namely, the true owner of the premises. However, this fact is not sufficient to dispose of the matter now under consideration. No doubt, it was held by the Calcutta High Court in *Ramkissendas and another* v. *Binjraj Chowdhury and another* (3) that a sub-tenant need not be made a party in an ejectment suit and that the decree

(1) I.L.R. (1949) Nag. 432. (2) A.I.R. (1952) All. 421.
(3) I.L.R. 50. Cal. 419.

against the original tenant is binding on him. Moreover, a Full Bench of this Court in *Babu Safarmal Tibrewala* v. *G. M. Latimour* (1) has held that when a landlord has obtained an order of ejectment against his tenant under section 17 of the Rangoon City Civil Court Act and in the course of the execution of the said order is obstructed by a third person who is not a party to the proceedings, the landlord can avail himself of the provisions of Order XXI, Rule 97 of the Civil Procedure Code and obtain an order under Rule 98 in appropriate cases. In coming to such a decision this Court dissented from the views expressed in *S. Periayya* v. *Kyaw Leong Tong Society* (2) where it was held that a decree of the Rangoon City Civil Court under section 17 against the defendant, cannot be executed by the eviction of a sub-tenant who has not been made a party to the proceedings. Therefore, it would seem that if there is a valid decree under section 11 (*l*) (*a*) of the Urban Rent Control Act for the ejectment of a tenant from the premises in suit the sub-tenant is also bound to be ejected whether or not he has been made a party to the proceedings. This view finds support in the observations of a Bench of the Supreme Court of India in *Messrs. Importers and Manufacturers Ltd.* v. *Pheroze Framroze Taraporewala and others* (3). There the Supreme Court observed as follows :

"Apart from that section, under the ordinary law a decree for possession passed against a tenant in a suit for ejectment is binding on a person claiming title under or through that tenant and is executable against such person whether or not he was or was not a party to the suit. The non-joinder of such a person does not render the decree any the less binding on him. It is in this sense, therefore, that

(1) (1948) B.L.R. 113. (2) (1947) B.L.R. 190.
(3) A.I.R. (1953) (S.C.), India 73.

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he is not a necessary party to an ejectment suit against the tenant. It is, however, recognised that such a person is, nevertheless a proper party to the suit in order that the question whether the lease has been properly determined and the landlord plaintiff is entitled to recover possession of the premises may be decided in his presence so that he may have the opportunity to see that there is no collusion between the landlord and the tenant under or through whom he claims and to seek protection under the Act, if he is entitled to any. Such a person may be joined as a party to the suit from the beginning of the suit or at any later stage of the suit if the Court thinks fit to do so."

These observations seem apposite to the case now under consideration. Under the Urban Rent Control Act, 1948, a landlord cannot eject his tenant except in the circumstances enumerated in section 11 (*1*). If a suit is based upon the fact of there being arrears of rent the landlord must not only aver but also prove that there had been in fact arrears of rent. As a sub-tenant is bound by the decree against the tenant he is vitally interested in seeing that there is no collusion between the landlord and the tenant, as, from the definition of "landlord" and "tenant", the tenant who is his own landlord cannot himself eject him except as provided in section 11 (*1*). Therefore, a sub-tenant is not only a proper party in a suit by a landlord against his tenant but one whom the Court should, under the provisions of Order I, Rule 10, sub-rule (2) add as a party defendant, when, as in this case the sub-tenant offers to prove to the Court that no arrears of rent were in fact due by the tenant to the landlord and that no decree for ejectment should therefore be passed.

The learned Advocate for the respondent Banu Nanigram Jamnadass Firm has cited the cases of *Jatindra Mohan Das* v. *Khitpatinath Mitra and*

another (1) and *Rajani Kanto Das* v. *Daval Chand De and others* (2). There it was held that a sub-tenant had no right to intervene and ask for a variation or rescission of the decree obtained by the landlord against his tenant. These cases are, in my opinion, distinguishable from the present case on facts. A case more in point is *Bacha Sham Sunder Kuer* v. *Balgobind Singh* (3). There it was held that an intervenor, who in a duly verified petition sets forth the allegation that he has purchased the holding and that the landlord has recognised him as his tenant, ought to be joined as a party and at the hearing of the rent suit, and not before the truth of the intervenor's allegations should be investigated.

In the result the application for revision succeeds. The order of the 3rd Judge of the City Civil Court, Rangoon, refusing the application of Ma Kyin Tin to join her as a party defendant as agent of the sub-tenant U Ko Ko Gyi is set aside and Ma Kyin Tin directed to be added as a party-defendant in her capacity as agent of U Ko Ko Gyi. The applicant is allowed costs of her application. Advocate's fees five gold mohurs.

(1) 84 C.L.J. 263. (2) A.I.R. (1950) Cal. 244.
(3) I.L.R. 10 Pat. 90.

APPELLATE CIVIL.

Before U San Maung, J.

H.C. 1955 — *Jan. 25.*

M.C.T. CHIDAMBARAM CHETTYAR BY AGENT K. R.M. MUTHIAH ACHARI AND SIX (APPLICANTS)

v.

V.L.S. CHOCKALINGAM CHETTYAR AND FIVE (RESPONDENTS). *

Civil Procedure Code, Order VI, Rules 4 and 5—Further and better particulars—Fraud and collusion, allegations of—Arbitration proceedings—Interlocutory order, revision of, when justified.

Held : Where charges of fraud or misconduct against the other party have been alleged, the tribunal which is called upon to decide such issues should compel that litigant to place on record precise and specific details of these charges. A charge of fraud must be substantially proved as laid ; when one kind of fraud is charged, another kind cannot on failure of proof be substituted for it.

John Wallingford v. *Mutual Society*, 5 A.C. 697 ; *Bharat Dhamra Syndicate* v. *Harish Chandra*, A.I.R. (1937) (P.C.) 146 ; *Abdul Hosscin Zanail Abadi* v. *Charles Agnew Turner*, 11 Bom. 620 (P.C.) ; *Balaji Valad Raoji Colhe* v. *Gangadhar Ramkrishna Kulkarni*, 32 Bom. 255, referred to.

Held also : The High Court will revise an interlocutory order only when irremediable injury will be done and a miscarriage of justice will ensue if the Court held its hand.

Mahomed Chootoo and others v. *Abdul Hamid Khan and others*, 11 Ran. 36, followed.

S. R. Chowdhury for the applicants.

Messrs. P. B. Sen and *B. K. Sen* for the respondents.

U SAN MAUNG, J.—In Civil Regular Suit No. 1 of 1951 of the District Court of Pegu, the plaintiff V.L.S. Chockalingam Chettyar sued his partners, the defendants 1 to 4 and the legal representative of a 5th partner, for a declaration that the award given by the arbitrators in an arbitration proceeding between him

* Civil Revision No. 53 of 1952 against the order of the District Court, Pegu, in Civil Regular No. 1 of 1951.

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and the aforesaid defendants was void and inoperative in law. The arbitrators were also impleaded in the suit as defendants Nos. 8 to 12. The ground on which the award was sought to be set aside was mainly fraud on the part of the arbitrators and collusion between them and the other parties to the arbitration proceedings. The defendants asked for particulars of the fraud and collusion which had been alleged against them and the learned Judge of the District Court (U Po On) by a well considered order dated the 11th April 1954 directed that the plaintiff must give particulars of the material facts constituting fraud, collusion or other misconduct which had been alleged against them. In so doing the learned Judge relied upon the provisions of Order 6, Rules 4 and 5 of the Civil Procedure Code and the famous dictum of Lord Selborne in *John Wallingford* v. *Mutual Society* (1) where the Lord Chancellor observed as follows:

> "With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any Court to understand what it was that was alleged to be fraudulent. These allegations, I think, must be entirely disregarded;"

The plaintiff had before the date of the order mentioned above given several particulars which in his opinion constituted acts of fraud and collusion on the part of the arbitrators. These the learned District Judge considered were not sufficient for the purpose. His successor (U Tun Tin) thought otherwise and by an order dated the 4th August 1952 now sought to be

(1) 5 A.C. p. 697.

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revised, the defendants were directed to file their written statements at an early date. Hence the present application for revision.

In *Bharat Dhamra Syndicate* v. *Harish Chandra* (1) it was held that where a litigant prefers that charges of fraud or other improper conduct against the other party, the tribunal, which is called upon to decide such issues should compel that litigant to place on record precise and specific details of these charges. Furthermore in *Abdul Hossein Zanail Abadi* v. *Charles Agnew Turner* (2) their Lordship of the Privy Council pointed out that it is a well-known rule, that a charge of fraud must be substantially proved as laid, and that when one kind of fraud is charged, another kind cannot, on failure of proof, be substituted for it.

Therefore if the plaintiff fails to give more particulars regarding fraud, collusion or other acts of misconduct than that which he had specifically stated he will not be allowed at the trial to adduce evidence in support of the acts of fraud in respect of which he had not given specific particulars. In this connection the observations of Chandavarkar, J., in *Balaji Valad Raoji Colhe* v. *Gangadhar Ramkrishna Kulkarni* (3) are apposite. There the learned Judge said :

> " It is an elementary rule of law that where fraud is set up, particulars of it must be given and it must be based upon a specification of the facts relied upon as constituting fraud. No such particulars being given in the plaint, the Subordinate Judge ought to have required the plaintiff to amend his plaint by specifying the fraud alleged ; and, in case of failure by him to amend, the Subordinate Judge ought to have refused to enter into the question. * * * * *. We desire to impress upon Subordinate Judges the supreme importance and necessity of insisting that a case of fraud shall not be the subject of a

(1) A.I.R. (1937) (P.C.) p. 146. (2) 11 Bom. p. 620 (P.C.).
(3) 32 Bom. p. 255.

mere vague allegation in the plaint or written statement, but that it shall be supported by particulars; and that if that condition is not complied with, the party relying on a case of fraud, shall not be allowed to raise that case in the form of an issue. It is generally advisable, indeed, when framing an issue on the point of fraud, to set forth in the issue itself a brief statement of the fraud alleged, or at least to refer to the passage in the pleadings where it is specified."

From the above observations, it is clear that the plaintiff will only be allowed to prove only those facts constituting fraud, collusion or other misconduct, as have been particularised in the plaint or in the further and better particulars furnished by him after the institution of the case.

The question which now arises for consideration is whether the order of the learned District Judge dated the 4th August 1952 should be revised. As it is an interlocutory order, the principles laid down in *Mahomed Chootoo and others* v. *Abdul Hamid Khan and others* (1) should be followed. There it was pointed out that the High Court will revise an interlocutory order only when irremediable injury will be done, and a miscarriage of justice will ensue if the Court held its hand.

I am not satisfied that such an irremediable injury will be done if I refuse to interfere at this stage. In fact it will be to the advantage of the defendants if the plaintiff does not give more and better particulars than those already given because in that event the plaintiff's suit will be in danger of being dismissed as unproven. Even if the plaintiff is successful in the District Court, the matter can be agitated in appeal against the judgment and decree of the District Court.

For these reasons, I shall dismiss the application for revision with no order as to costs.

(1) 11 Ran. p. 36.

APPELLATE CIVIL.

Before U San Maung and U Ba Thoung, JJ.

H.C. 1954.

Nov. 1.

MAUNG TIN WA (APPELLANT)

v.

S. E. I. DAWOODJEE AND ONE (RESPONDENTS).*

Civil Procedure Code, s. 47—"Representative"—Third party obtaining occupation of premises during pendency of litigation in respect of it—Suit by third party against landlord decree-holder not maintainable.

Held: A third person who has stepped into the shoes of the tenant judgment-debtor and occupied the premises in the course of the execution of the ejectment decree against the latter can be taken as representative of the parties as contemplated in s. 47 of the Civil Procedure Code, and as such representative is barred from bringing a suit against the landlord decree-holder.

Ishan Chunder Sarkar and one v. *Beni Madhub Sirkar*, I.L.R. 24 Cal. 62, followed.

Held also: A landlord decree-holder can avail himself of the provisions of Order XXI, Rules 97 and 98, Civil Procedure Code when obstructed by a stranger to the suit for possession of the premises.

Balu Safarmal Tibrewala v. *G. M. Latimour*, (1948) B.L.R. 113, referred to.

U Chit for the appellant.

M. M. Rafi for the respondent No. 1.

The judgment of the Bench was delivered by

U BA THOUNG, J.—In Civil Regular Suit No. 1120 of 1950 of the 3rd Judge of the City Civil Court, Rangoon, the 1st respondent S. E. I. Dawoodjee obtained an *ex-parte* decree for ejectment against the 2nd respondent A. Judah from room No. 3 of House No. 155, Sparks Street, Rangoon, and in execution of the deeree for ejectment, the appellant Maung Tin Wa

* Civil 1st Appeal No. 17 of 1953 against the decree of the Chief Judge, City Civil Court, in Civil Regular No. 63 of 1952.

was found to be in occupation of the said premises. The execution of the ejectment decree was then stayed with the consent of the parties for a month from the 15th November 1951 till the 15th December 1951; but on the 11th January 1952, the appellant Maung Tin Wa filed Civil Regular Suit No. 63 of 1952, in the Court of the Chief Judge of the City Civil Court, Rangoon, in which he asked for (1) declaration that the *ex-parte* decree obtained by the 1st respondent against the 2nd respondent in Civil Regular Suit No. 1120/50 was obtained in collusion and fraudulently, and that it was not binding on him as he was in occupation of the premises, and (2) for an order for perpetual injunction restraining the 1st respondent from executing the decree in Civil Regular Suit No. 1120/50.

The learned Chief Judge of the City Civil Court, Rangoon, held that the suit (Civil Regular Suit No. 63 of 1952) is barred by section 47 of the Code of Civil Procedure; that no fraud or collusion on the part of the plaintiff S. E. I. Dawoodjee has been proved in the suit, and that the appellant was not entitled to get the declaration and the injunction asked for, and the suit was dismissed with costs. Hence this appeal.

It is clear from the evidence of the appellant Maung Tin Wa in this case that he got the suit premises from the 2nd respondent A. Judah. He stated in his evidence that he could not say whether the Myingyan Association occupied the premises before or after the 1st respondent has obtained the ejectment decree against the 2nd respondent. So what has been set up by the defence in this case that the plaintiff-appellant was not in occupation of the premises at the time of the suit but that he occupied the premises only during the pendency of the suit may be taken as true. The appellant is therefore a 3rd person

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who has stepped into the shoes of the 2nd respondent A. Judah and occupied the suit premises in the course of the execution of the ejectment decree against A. Judah, and he can be taken as representative of the parties as contemplated in section 47 of the Code of Civil Procedure. See the case of *Ishan Chunder Sarkar and another* v. *Beni Madhub Sirkar* (1) with reference to the term " representative " as used in section 47 of the Code of Civil Procedure.

It has also been held in the case of *Babu Safarmal Tibrewala* v. *G. M. Latimour* (2) that when a landlord has obtained an order of ejectment against his tenant under section 17 of the Rangoon City Civil Court Act and in course of the execution of the said order is obstructed by a third person who is not a party to the proceedings under section 17, the landlord can avail himself of the provision of Order XXI, Rule 97, of the Code of Civil Procedure and obtain an order under Rule 98 if the facts would justify such a course. We are therefore of the opinion that the finding of the learned Chief Judge of the Rangoon City Civil Court that the appellant's suit is barred by section 47 of the Code of Civil Procedure is correct.

As regards the allegation by the plaintiff-appellant that the 1st respondent obtained the *ex-parte* decree for ejectment against the second respondent by collusion and fraud, there is no evidence whatever to support this. For the above reasons this appeal cannot be allowed and is dismissed with costs.

(1) I.L.R. 24 Cal. 62. (2) (1948) B.L.R. 113.

APPELLATE CIVIL.

Before U San Maung, J.

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Nov. 2.

P. A. M. ABDUL KADER AND TEN OTHERS (APPLICANTS)

v.

S. M. M. MOHIDEEN FIRM BY PROPRIETOR S. M. NAGOOR MEERA AND SIX OTHERS (RESPONDENTS).*

Witnesses in India—Issue of comission for examination of—Application filed by defendants not same as one filed by plaintiff—Delay immaterial—Revision of order refusing application—S. 115, Civil Procedure Code and s. 25, City Civil Court Act.

Held: Delay is not material in considering the issue of a commission for the examination of a defendant. Failure to distinguish between applications for the issue of a commission on the part of the plaintiff and of the defendant is an irregular exercise of jurisdiction for which the High Court can interfere in revision.

Jagannatha Sastri v. *Sarathambal Ammal and two others*, I.L.R. 46 Mad. 574; *M. Palaniappa Chettiar* v. *Narayanan Chettiar*, A.I.R. (1946) Mad. 331, referred to.

Rajagopalu Pillai v. *Kasivisvanathan Chettiar*, I.L.R. (1933) Mad. 705, followed.

Held further: Assuming that the High Court cannot interfere in revision against an interlocutory order of the subordinate Court relating to the issue of a commission under s. 115 of the Civil Procedure Code, the High Court can do so under s. 25 of the City Civil Court Act.

Ma Than Yin v. *Tan Keat Kheng* (a) *Tan Keit Sein*, (1951) B.L.R. 161, referred to.

R. Basu for the applicants.

Dr. Ba Han for the respondents.

U SAN MAUNG, J.—In Civil Regular Suit No. 753 of 1953 of the City Civil Court, Rangoon, the plaintiff S. M. M. Mohideen Firm by its alleged sole

* Civil Revision No. 4 of 1954 against the order of the Chief Judge, City Civil Court in Civil Regular No. 753 of 1953.

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proprietor S. M. Mohamed Nagoor Meera, sued the defendants P. A. M. Abdul Kader and 16 others for their ejectment from the premises in suit, namely, Room No. 4 of 237 of Tseekai Maung Taulay Street, of which the plaintiff alleged that he had been the tenant since the 1st of June 1946. It is the plaintiff's case that the defendants are in possession of the suit room as mere trespassers and that when he, by his agent Syed Aboo Backer, applied to the Controller of Rents, Rangoon, under section 16 (*a*) of the Urban Rent Control Act for permission to assign the room to one T. S. Shaul Hameed the defendants had filed an objection to the proposed transfer on the ground that they were the sub-tenants of the plaintiff. The defendants in their written statement contended *inter alia*, that S. M. M. Mohideen Firm was a partnership and that the plaintiff, who claims to be the sole proprietor of the firm and the tenant of the premises, was not entitled to file a suit for their ejectment. In order to prove their contention, the defendants have produced Exhibit 1, which is a Deed of Partnership dated the 2nd June 1946, and also cited as their witnesses two of the partners, who are now residing in Tinnevelly District of India. They also applied for the examination of a third witness residing in the same place, namely, O. S. Syed Hoosein, for the purpose of proving a Power of Attorney relevant for the case and the handwriting of one S. A. Syed Aboo Backer, who granted documents Exhibits 4 and 6, to the defendants. The application for the examination of these three witnesses on commission were, however, dismissed by the learned Chief Judge of the City Civil Court by his order, dated the 15th December 1953, as the learned Judge was of the opinion that there was sufficient material on record to decide the case

without the examination of these defence witnesses on commission. The learned Judge also gave as his view that even if the partnership had been in existence it must be deemed to have been dissolved on the expiry of the term mentioned in the Deed of Partnership, Exhibit 1.

In the present application for the revision of the order of the learned Judge, it is contended *inter alia* that the learned Chief Judge was not justified in assuming that the evidence of three witnesses, who were proposed to be examined on commission, was not necessary for the determination of the case and that the learned trial Judge had erred in considering that section 42 of the Partnership Act had any application in the circumstance of the case. Several authorities have been cited by the learned Advocate for the applicants in support of their contention that the learned trial Judge was wrong in having refused the issue of a commission to India. Of them, the most important is the case of *Jagannatha Sastri* v. *Sarathambal Ammal and two others* (1), where Wallace, J. held that—

> "Where a party asks for the examination on commission of a witness not under his control owing to the witness residing more than 200 miles from the Court-house, a commission should issue as a matter of right unless the Court is satisfied that the application is an abuse of the process of the Court, and that it is not for the Court to decide whether the party will be benefited by the issue of the commission or not; that is a matter entirely for the party."

This decision of Wallace, J. was however dissented from in *M. Palaniappa Chettiar* v. *Narayanan Chettiar* (2), where Bell, J. held that—

> "A commission cannot be issued as a matter of right. It is a matter of discretion for the Court in the circumstances

(1) (1922) I.L.R. 46 Mad. p. 574. (2) (1946) A.I.R. Mad. p. 331.

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of each particular case and amongst those circumstances must be included the question whether that evidence cannot be adduced save through the particular witness mentioned in the application."

However, the case most nearly in point seems to be that of *Rajagopalu Pillai* v. *Kasivisvanathan Chettiar* (1), where it was held that—

"The mere advantage of observing the defendant's demeanour in the witness-box is not a sufficient reason for refusing a commission for his examination. Delay is not material in refusing the issue of a commission for the examination of a defendant. Failure to distinguish between applications for the issue of a commission on the part of the plaintiff and of the defendant is an irregular exercise of jurisdiction in which the High Court can interfere in revision."

In the present case, the witnesses cited by the defendants seems to be material witnesses for the purpose of substantiating the defence that the plaintiff had no right of suit as against them. In the circumstances of the case, it can hardly be said that their application is not *bonâ fide* and the delay is not material in refusing the issue of a commission for the examination of the defence witnesses.

The learned advocate for the respondent S. M. M. Mohideen Firm has submitted that in view of the observation of the Full Bench of this High Court in *Ma Than Yin* v. *Tan Keat Kheng* (a) *Tan Keit Sein* (2) no revision lies against the order of the learned Chief Judge of the City Civil Court refusing the issue of a commission to India. However, in my opinion, even assuming that the decision in the Full Bench case is an authority for the proposition that the High Court cannot interfere in revision under section 115 of the Civil Procedure Code an interlocutory order of a subordinate Court relating to the issue of a

(1) (1933) I.L.R. Mad. p. 705. (2) (1951) B.L.R. p. 161.

commission, it is quite irrelevant for the consideration of the powers of the High Court under section 25 of the City Civil Court Act. A comparison of the language of this section and that of section 115, Civil Procedure Code, will make this point quite obvious. Furthermore, in Civil Revision No. 81 of 1952, I have already interfered in revision the order of the 3rd Judge of the City Civil Court, Rangoon, refusing the application of the 2nd defendant of Civil Regular Suit No. 970 of 1951 for the issue of a commission to examine him in Calcutta.

In the result, the application for revision succeeds. The order of the Chief Judge of the City Civil Court, refusing the application of the defendants for the issue of a commission to India is set aside and the learned Judge is directed to issue a commission as prayed for by them. The respondents must pay the applicants 3 gold mohurs as costs of this application.

APPELLATE CRIMINAL.

Before U Bo Gyi, J.

H.C. 1955

Jan. 6.

THE UNION OF BURMA (APPLICANT)

v.

KALU (RESPONDENT).*

Criminal Procedure Code, s. 562 (1)—Release on probation of good conduct—"Instead of" other punishment.

Held: An order of release on probation of good conduct can be passed under s. 562 (1), Criminal Procedure Code only instead of sentencing a convicted offender to punishment.

— for the applicant.

— for the respondent.

U BO GYI, J.—The accused in this case has been convicted under section 380 of the Penal Code by the Subdivisional Magistrate of Maungdaw who sentenced him to imprisonment till the rising of the Court and at the same time under section 562 (1) of the Code of Criminal Procedure directed his release on his entering into a bond to appear and receive sentence when called upon during the period of one year and in the mean time to keep the peace and be of good behaviour. The learned Subdivisional Magistrate appears to have overlooked the fact that an order of release on probation of good conduct can under section 562 (1) of the Code be passed only instead of sentencing a convicted offender to punishment. Here in this case, the learned Subdivisional Magistrate has directed the release of the accused on probation of good conduct in addition to sentencing

* Criminal Revision No. 1-B of 1955 being review of the order of the Subdivisional Magistrate, Maungdaw, in Criminal Regular Trial No. 35 of 1954.

him to punishment which was imprisonment till the rising of the Court. As the punishment has been suffered and for reasons given above, I direct on the recommendation of the learned Sessions Judge of Arakan Division that the order under section 562 (1) of the Criminal Procedure Code be set aside.

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THE UNION OF BURMA v. KALU.

U Bo Gyi, J.

APPELLATE CIVIL.

Before U San Maung, J.

H.C. 1954

Oct. 7.

U MIN SEIN (APPLICANT)

v.

MOHAMED SHAFI AND ONE (RESPONDENTS). *

Transfer of Property Act, s. 69 (2) (a) and (b)—Mortgagor and mortgagee—Relationship of agency—Sale of property, conditions requisite for exercise of right of sale by mortgagee—Three months' Notice, imperative—Municipal taxes in arrears—Agreement empowering mortgagee to sell in that event irrevocable—Contract Act, s. 202.

Held: The provisions of s. 69 (2) (*a*) of the Transfer of Property Act are imperative and the three months period provided therein cannot be curtailed by agreement between the parties that when the mortgagor is in arrears in respect of payment of interest or Municipal taxes the property mortgaged may be sold by the mortgagee without the intervention of the Court.

Babamiya Mohidin Shakkar and others v. *Jehangir Dinshaw Belgaum Wallah*, A.I.R. (1941) Bom. 339, followed.

Held also: Under s. 69 (2) (*b*) of the Transfer of Property Act interest amounting to at least Rs. 500 must be in arrears before the right of sale of property can be exercised.

Held further: Where a party contends that the provisions of s. 69, Transfer of Property Act restricts the power of the parties to enter into a contract, the burden is on him to show that restriction. The law permits the greatest of freedom of contract between adult parties, and an agreement so made is irrevocable under s. 202 of the Contract Act.

Mulraj Virji v. *Nainmal Pratapmal and others*, A.I.R. (1942) Bom. 46, followed.

J. B. Sanyal for the appellant.

M. Cassim for the respondents.

U SAN MAUNG, J.—In Civil Regular Suit No. 237 of 1952 of the City Civil Court, Rangoon, the plaintiff-respondent Mohamed Shafi sued the defendant-appellant U Min Sein and defendant-

* Civil Revision No. 60 of 1952 against the decree of the 4th Judge, Rangoon City Civil Court, in Civil Regular No. 237 of 1952.

H.C. 1954

U MIN SEIN v. MOHAMED SHAFI AND ONE.

U SAN MAUNG, J.

respondent Messrs. Balthazar and Son for an injunction restraining them to sell the property in suit except in accordance with law. The plaintiff's case was that on the 20th January 1951 he borrowed from the first defendant U Min Sein Rs. 2,200 at an interest of 5 per cent per mensem and executed a deed of mortgage in which the rate of interest was mentioned as only 1 per cent per mensem. On the 20th July 1951 the plaintiff was made to sign a second mortgage deed for Rs. 1,100 made up of interest at 5 per cent per mensem on Rs. 2,500 and other incidental charges. Later, the plaintiff came to know that the first defendant had without his knowledge and consent inserted a clause in the mortgage deeds giving the mortgagee power of sale without the intervention of the Court. Subsequently, by a letter dated 24th January 1952 the first defendant demanded from the plaintiff Rs. 3,600 as principal on the two mortgage deeds and Rs. 107 as interest due up to 20th January 1952, failing which the first defendant threatened to sell the property mortgaged through an auctioneer. The plaintiff, therefore, by a letter dated 7th February 1952 denied, among others, that he had ever agreed to give the first defendant power to sell his property. Nevertheless, the defendant appointed Messrs. Balthazar and Son as auctioneers and the latter then advertised in "The Nation" that the sale had been fixed for the 20th of February 1952. Hence the suit for an injunction had to be filed as even assuming for the sake of argument that the power of sale without the intervention of the Court had been given by the plaintiff, the defendants could not sell the property in question in contravention of the provisions of section 69 (*2*) (*a*) and (*b*) of the Transfer of Property Act. The first defendant in

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U MIN SEIN v. MOHAMED SHAFI AND ONE.

U SAN MAUNG, J.

his written statement denied the allegations that the rate of interest was at 5 per cent per mensem and that the second mortgage deed for Rs. 1,100 was in respect of the interest accruing on the mortgage deed for Rs. 2,500. He also denied that the clause relating to the power of sale without the intervention of the Court had been inserted in the mortgage deeds without the knowledge and consent of the plaintiff. As regards the contention that no sale in contravention of the provisions of section 69 (2) (*a*) and (*b*) of the Transfer of Property Act could take place, the first defendant contended that as he was acting *bonâ fide* as agent of the plaintiff in bringing the property to sale under the terms and conditions laid down in the mortgage deeds, no suit for injunction lay.

On the pleadings three issues were framed by the learned trial Judge, the plaintiff having been given leave to agitate in a later suit his contention that there was no cash consideration for the second mortgage and that the power of sale had been fraudulently inserted in the mortgage deeds:

1. Whether the defendants can sell the property mortgaged without the intervention of the Court in contravention of section 69 (*2*) (*a*) and (*b*) of the Transfer of Property Act ?
2. Whether the suit as framed is maintainable ?
3. Whether the plaintiff is entitled to the injunction prayed for ?

The learned trial Judge answered all these issues in favour of the plaintiff and directed in his judgment that a decree as prayed for should be granted to the plaintiff. However, when the decree was drawn up it took the form of a perpetual injunction restraining

the first defendant from ever exercising his power of sale because the relevant portion of the decree reads:

> ". . . it is ordered that the defendants be and they are restrained by an injunction from selling the property known as a piece or parcel of Rangoon Development Trust land situate in Block Yedwingon 'A' Theinbyu Circle, Rangoon Town District, known as 5th Class Lots Nos. 87 and 88 and do also pay Rs. 64-4-0 the costs of the suit."

In fact, even if the contention of the plaintiff that the sale advertised for the 20th February 1952 was in contravention of the provisions of section 69 (*2*) (*a*) and (*b*) of the Transfer of Property Act be correct, the only decree which could have been passed was that that sale or any other sale in contravention of the provisions of section 69 (*2*) (*a*) and (*b*) should be restrained. It was wrong to pass a decree perpetually restraining the first defendant from exercising the power of sale contained in the two mortgage deeds in suit.

Now, regarding the mortgage deeds in question, they seemed to be couched in very peculiar terms. In the first mortgage deed dated the 20th January 1951 it is mentioned that the mortgage amount would be repaid on the 20th July 1951 and that in the meantime the property would be kept covered by insurance and that Municipal taxes and land taxes would be regularly paid. If the money could not be repaid within the period of six months prescribed therein, the mortgagor would continue to keep the property covered by insurance and continue to pay the land and Municipal taxes as these fell due. If however there is a default in the payment of the monthly interest and in the payment of the land and Municipal taxes, the mortgagee has the power to sell the property

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mortgaged to him, either by public or private auction and for this purpose the mortgagee has been constituted an agent of the mortgagor. The recitals in the second mortgage deed for Rs. 1,100 are in similar terms except that in the second mortgage deed it is merely mentioned that the power of sale is to be exercised only on failure to pay the Municipal and land taxes.

As the first mortgage deed recites that the property may be sold on failure to pay the monthly interest, the power of sale without the intervention of the Court must be held to have been given by necessary implication. However, as held by Wadia, J., in *Babamiya Mohidin Shakkar and others* v. *Jehangir Dinshaw Belgaum Wallah* (1) the provisions of section 69 (*2*) (*a*) of the Transfer of Property Act are imperative and three months period provided therein cannot be curtailed by agreement of parties. Therefore, notwithstanding the fact that the mortgage deed contains a provision to the effect that power of sale may be exercised on failure to pay the monthly interest no power of sale can be exercised unless and until notice in writing requiring payment of the principal money had been served on the mortgagor or one of the several mortgagors and default has been made in payment of the principal money or of part thereof for three months after such service. It is an admitted fact that this has not been done. It is also not disputed that clause (*b*) of sub-section (*2*) of section 69 is not applicable as interest amounting to at least Rs. 500 was not in arrear and unpaid for three months after becoming due.

This is sufficient to dispose of the application. However, as it is mentioned in the affidavit filed by the first defendant U Min Sein in support of his

(1) A.I.R. (1941) Bom. 339.

objection to the issue of *ad interim* injunction that the ground rent due to the Rangoon Development Trust has been in arrears for the past 8 or 9 quarters—a fact which is denied by the plaintiff in his counter-affidavit—I would like to observe that there is nothing in the provisions of section 69 of the Transfer of Property Act to prohibit the mortgagor and the mortgagee to come to an agreement whereby power of sale can be exercised on the mortgagor failing to pay the taxes as they fell due. As observed by Kania, J., in *Mulraj Virji* v. *Nainmal Pratapmal and others* (1) where a party contends that the provisions of section 69 restrict in any way the power of the parties to enter into a contract, the burden is on him to show that the words of that section prevent an agreement between the parties as embodied in the document.

No doubt where interest is concerned section 69 of the Transfer of Property Act is explicit in that power of sale shall not be exercised until such interest as is mentioned in clauses (*a*) and (*b*) of sub-section (*2*) are due and for the period mentioned therein. However, there is nothing in section 69 to prevent the parties from inserting in the mortgage deed that the mortgagee may sell the property if land and Municipal taxes remain unpaid as it should be remembered that as between the adults the law permits the greatest freedom of contract unless it is expressly taken away. The power given to the mortgagee to sell the property in the event of the failure to pay the Municipal and land taxes is irrevocable under section 202 of the Contract Act, which enacts—

"Where the agent has himself an interest in the property which forms the subject-matter of the agency, the

(1) A.I.R. (1942) Bom. 46.

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U SAN MAUNG, J.

agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest."

The mortgagee undoubtedly has an interest in the property mortgaged and to terminate the agency would undoubtedly be to his prejudice. Therefore, the clause relating to the power of sale in the event of the taxes remaining unpaid is irrevocable.

However, it is not the defendant's case that he was exercising the power of sale for the failure on the part of the plaintiff to pay these taxes and no issue has been framed on this point. Therefore, the decree cannot be set aside on this score.

For the reasons given above the decree will be modified in the sense that the sale advertised for the 20th of February 1952 and those in contravention of the provisions of section 69 (*2*) (*a*) and (*b*) of the Transfer of Property Act shall not take place. This does not, however, apply to the sale for failure to pay the land and Municipal taxes. As the application succeeds in part I would direct that each party bear its own costs of this application. The order regarding payment of costs by the defendant in the lower Court will stand.

APPELLATE CIVIL.

Before U San Maung, J.

U SAN PE (APPELLANT)

v.

MA THIN KYI AND ONE (RESPONDENTS). *

H.C. 1954

Nov. 18.

Civil Procedure Code, s. 100—Difference between clause (a) *and clause* (d)—*Value of appeal, below and above Rs. 500—Question of law and question of fact, what is, to bring s. 100, sub-s. 1, clause* (a) *into operation.*

Held: As the value of the appeal does not exceed Rs. 500, the appellant can only succeed if he can bring his appeal within the ambit of clause (*a*) sub-s. 1 of s. 100 of the Civil Procedure Code, that is to say, unless he could show that the decision is contrary to law or to some usage having the force of law. Where the value of the subject-matter exceeds Rs. 500, however, clause (*d*) of sub-s. 1 of s. 100 as inserted by Burma Act No. 17 of 1945 is applicable and the second appeal can be treated as if it were an appeal against the decree in an original suit.

Held also: Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law, but the question whether the fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact.

Nafar Chandra Pal v. *Shukur and others*, 45 I.A. p. 183; *Wali Mohammad and others* v. *Mohammad Bakhsh and others*, 57 I.A. 91; *Durga Choudrain* v. *Jawahir Singh Choudhri*, L.R. 17 I.A. 122, 127; *Midnapur Zamindary Co.* v. *Uma Charan Mandal*, 23 Cal. W.N. 131, followed.

N. C. Sen for the appellant.

L. Kin Su (a) *U Ba Than* for the respondent No. 1.

U SAN MAUNG, J.—In Civil Regular Suit Nos. 6, 7 and 8 of 1951 of the Township Court of Pyu the plaintiff-respondent Ma Thin Kyi sued the defendant-appellant U San Pe and defendant-respondent Saya Pein for the recovery of various sums of money alleged to be due from them for timber supplied from time to time. Her case was that on the 10th *lazok*

* Civil 2nd Appeals Nos. 79 and 81 of 1952 against the decree of the District Court, Toungoo, in Civil Appeals Nos. 4 and 6 of 1952.

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U SAN PE v. MA THIN KYI AND ONE.

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of *Tabodwe* 1312 B.E. the two defendants came to her house together and the defendant U San Pe was introduced to her by Saya Pein as a sub-contractor engaged in the construction of some railway barracks at Pyu. At the request of both U San Pe and Saya Pein Ma Thin Kyi agreed to supply U San Pe with timber on credit. On Saya Pein standing as a surety in course of the first transaction, timber to the value of Rs. 1,333-8-0 was supplied for which she was paid Rs. 1,300 leaving a balance of Rs. 33-8-0. From the lst *lazan* of *Tagu* 1312 B.E. to the 3rd *lazan* of *Tagu* 1312 B.E., she supplied timber to the value of Rs. 321-2-0 as per bill annexed to the plaint in Civil Regular Suit No. 6 of 1951. From the 11th *lazan* of *Tagu* to the 8th *lazan* of *Kason*, she supplied timber to the value of Rs. 752-15-0 as shown in the bill annexed to the plaint in Civil Regular Suit No. 7 of 1951. From the lst *lazok* to the 11th *lazok* of *Kason* 1313 B.E., she supplied timber to the value of Rs. 309 as shown in the bill annexed to the plaint in Civil Regular Suit No. 8 of 1951. As she received no payment for these amounts she had filed the three suits. The defendant Saya Pein confessed judgment in all the three suits and decrees were passed against him on his own admission. The defendant U San Pe however denied that the contract was between him and the plaintiff and contended that the timber which he had received as agent of Mr. Awain of Moulmein was supplied by Saya Pein with whom Mr. Awain had a contract. On these pleadings the learned trial Judge framed almost identical issues in the three suits, the most important one being as regards the contention that the contract was between the plaintiff and the first and second defendants in the case. The evidence adduced by the plaintiff in all the three suits was practically the same. The

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U SAN MAUNG, J.

defendant U San Pe cited witnesses only in Civil Regular Suit No. 6 of 1951 but the evidence given by the defence witness in this suit was by the consent of the parties treated as evidence in the two other connected suits. The learned trial Judge after a careful discussion of the evidence of witnesses cited by both the parties held that the plaintiff had failed to prove that the contract for the supply of timber was between her and the first defendant U San Pe. He accordingly dismissed the suits in so far as this defendant was concerned. On appeal by the plaintiff Ma Thin Kyi against the judgment and decree of the trial Court, the learned District Judge of Toungoo by one judgment which he wrote in his Civil Appeal No. 4 of 1952 disposed of the three appeals. He held that the learned trial Judge was wrong in not having accepted the plaintiff's story that the contract for the supply of timber was between her and the defendant U San Pe and not between her and Mr. Awain as contended by the defendant. He accordingly gave the plaintiff a judgment and decree as prayed for by her. Hence, these second appeals. Of them Civil Second Appeal Nos. 79 and 81 are in respect of the judgment and decrees in Civil Regular Suits Nos. 6 and 8 of 1951. Civil Appeal No. 80 of 1951 in respect of which a separate judgment will be written is in connection with the judgment and decree in the Civil Regular Suit No. 7 of 1951. Now, as the value of subject matter of the suit in Civil Regular Suit Nos. 6 and 8 of 1951 does not exceed Rs. 500 the appellant U San Pe could only succeed if he could bring his appeal within the ambit of clause *(a)* sub-section 1 of section 100 of the Civil Procedure Code, that is to say, unless he could show that the decision is contrary to law or to some usage having the force of law.

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Where the value of subject matter of the original suit exceeds Rs. 500 however, clause (*b*) of sub-section 1 of section 100 as inserted by Burma Act No. 17 of 1945 is applicable and the second appeal can be treated as if it were an appeal against the decree in an original suit. Herein lies the difference between the provisions of clause (*a*) and clause (*d*) of the aforesaid section.

In my opinion, the decisions in Civil Suit Nos. 6 and 8 of 1951 turn on a pure question of fact as to whether or not the contract was between the plaintiff-respondent Ma Thin Kyi and the defendant-appellant U San Pe. The fact that the defendant had produced receipts signed by Saya Pein for the monies taken from Messrs. Awain and Sons and from him for the purchase of timber and that the learned District Judge of Toungoo had not given sufficient weight to these receipts, does not make any difference. In this connection two cases of the Privy Council may be referred to. In *Nafar Chandra Pal* v. *Shukur and others* (1) their Lordships of the Privy Council after observing that the questions of law and of fact are sometimes difficult to disentangle, that the proper legal effect of a proved fact is essentially a question of law but that the question whether the fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact went on to say in connection with the case then under consideration :

"This seems to be the keynote of the judgment, and apart from the suggestion of prejudice and unreasonable assumptions, for which their Lordships can find no justification, it really amounts to no more than a finding that upon the documents and evidence placed before the learned District Judge the High Court would have come to a different

(1) 45 I.A. p. 183.

conclusion, but it is precisely this revision of evidence which is excluded by the limited character of the appeal.

It may well be that before different tribunals the witnesses summoned and the documents used would have created an opinion upon the merits of the controversy different from that which was formed by the District Judge. But upon this the High Court was not competent to enter; their functions were completely circumscribed by the provisions of the statute passed for the express purpose of securing some measure of finality in cases where the balance of evidence, verbal and documentary, arose for decision."

In *Wali Mohammad and others* v. *Mohammad Bakhsh and others* (1) their Lorships made a review of the decisions of the Privy Council as to jurisdiction in a second appeal and observed as follows:

"Section 100 of the present Code of Civil Procedure has replaced section 584 of the Civil Procedure Code, 1882. These sections are substantially the same in their terms and have often been considered by the Board and the different High Courts in India. No doubt questions of law and fact are often difficult to disentangle, but the following propositions are clearly established:

(1) There is no jurisdiction to entertain a second appeal on the ground of erroneous finding of facts, however gross the error may seem to be; see *Durga Choudrain* v. *Jawahir Singh Choudhri* (2).

(2) The proper legal effect of a proved fact is essentially a question of law, but the question whether a fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact: see *Nafar Chandra Pal* v. *Shukur* (3)

(3) Where the question to be decided is one of fact, it does not involve an issue of law merely because documents which were not instruments of title or otherwise the direct foundations of rights, but were really historical materials,

(1) 57 I. A. p. 91. (2) L.R. 17 I.A. 122, 127.
(3) 45 I.A. p. 183.

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U SAN MAUNG, J.

have to be construed for the purpose of deciding the question: see *Midnapur Zamindary Co* v. *U-ma Charan Mandal* (1).

In the last cited case the question the Board had to decide was the date of the origin of an under-tenure. The first Appellate Court fixed the date from the contents of some documents. No oral evidence had been called in this case.

(4) A second appeal would not lie because some portion of the evidence might be contained in a document or documents, and the first Appellate Court had made a mistake as to its meaning: see *Nowbut Singh* v. *Chutter Dharee Singh* (2). The judgment in that case was delivered by Sir Richard Couch under section 372 of the Civil Procedure Code of 1859, but it has repeatedly been followed in decisions under the Civil Procedure Codes of 1882 and 1908."

Viewed in the light of these observations, it is clear that no second appeal lies against the judgment and decree of the lower Appellate Court, which reversed that of the trial Court in Civil Suit Nos. 6 and 8 of 1951. In the result, the appeals fail and must be dismissed with costs. Advocate's fee in this Court 3 gold mohurs in respect of each of these two appeals.

(1) 23 Cal. W.N. 131.

(2) (1873) 19 Suth. W.R. 222.

APPELLATE CIVIL.

Before U Chan Tun Aung, C.J. and U San Maung, J.

ANNAMAL (APPELLANT)

v.

V.K.L. CHETTYAR FIRM (RESPONDENT).*

H.C. 1955 — *Mar. 28.*

Limitation Act, Articles 164, 181—S. 2, Limitation Act—Definition of "Defendant".

Order (1), Rule 3 and s. 146, Civil Procedure Code.

The definition of the word, "Defendant" in s. 2 of the Limitation Act is not meant to be exhaustive, but includes within its ambit the meaning assigned to it in the Civil Procedure Code, except when otherwise provided by the Code or by any Law for the time being in force.

S. Vendatasubbaiver v. *S. Krishnamurthy*, 38 Mad. 442, relied on; *U E Maung* v. *P.A.R.P. Chettyar Firm*, 6 Ran. 494, distinguished.

Messrs. J. R. Chowdhury and *R. Jaganathan* for the appellant.

Nil for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 2003/1947 of the City Civil Court, Rangoon, an *ex parte* decree was passed in favour of V.K.L. Chettyar Firm as against S. Rayar (deceased) on the 17th of May 1950. On the 13th of August 1953 Annamal, the present appellant, as the wife and legal representative of the deceased Rayar, filed an application to set aside the *ex parte* decree. In the course of the enquiry into her application the appellant admitted that she received a notice for the payment of the decree as a legal representative of S. Rayar and that she had given a reply to the same in the year 1953. She also admitted

* Civil Misc. Appeal No. 3 of 1955, against the order of the 2nd Judge, City Civil Court of Rangoon in Civil Misc. Case No. 132 of 1953, dated the 9th December 1954.

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ANNAMAL v. V.K.L. CHETTYAR FIRM.

U SAN MAUNG, J.

that she arrived in Rangoon on the 14th of March 1953 but pleaded that she could not file her application for the setting aside of the *ex parte* decree earlier than the 13th of August 1953 because she had been busy trying to obtain a permit to stay in Burma permanently. The learned 2nd Judge of the City Civil Court, however, dismissed her application as time-barred under Article 164 of the Limitation Act as it was made about four or five months after she came to know of the decree.

In the present appeal by Annamal, her learned Advocate has contended that the Article of the Limitation Act applicable to her application is 181 and not 164 as held by the learned 2nd Judge of the City Civil Court.

For this contention he relies upon the definition of the word " defendant " occurring in section 2 of the Limitation Act. There the word " defendant " has been defined as including any person from or through whom a defendant derives his liability to be sued. From this he argues that legal representatives of a deceased defendant are not defendants within the meaning of that term in the Limitation Act.

However, in our opinion, the definition of the word " defendant " occurring in section 2 of the Limitation Act is not meant to be exhaustive, but includes within its ambit the meaning assigned to it in the Civil Procedure Code. Order 1, Rule 3 of that Code enacts that all persons may be joined as defendants against whom any right to relief in respect of or arising out of the same Act or transaction or series of Acts or transactions is alleged to exist and section 146 of the Code enacts that save as otherwise provided by the Code or by any law for the time being in force, where any proceeding may be taken against any person, then the proceeding

may be taken against any person claiming under him. Therefore legal representatives of defendants are in the same position as defendants in so far as the provisions of the Civil Procedure Code are concerned, except when otherwise provided by the Code or by any law for the time being in force.

We are fortified in the view which we have taken in this matter by the ruling in the case of *S. Venkatasubbaiver* v. *S. Krishnamurthy* (1). There it was held that where a decree was passed *ex parte* against the defendant who died seven days after the decree, and an application to set it aside was made by the executor of the deceased defendant more than thirty days after the passing of the decree, Article 164 and not Article 181 of the Limitation Act was applicable.

The case of *U E Maung* v. *P.A.R.P. Chettyar Firm* (2) cited on behalf of the appellant is clearly distinguishable. There the application to set aside the *ex parte* decree against a deceased person was made not by the legal representative of the deceased but by a Receiver appointed by the Court to administer the estate of the deceased. Consequently it was held that the Court had inherent power to set aside the *ex parte* decree under the special circumstances obtaining therein.

For these reasons we see no sufficient ground for admitting this appeal and the same is dismissed summarily.

U CHAN TUN AUNG, C.J.—I agree.

(1) 38 Mad. p. 442. (2) 6 Ran. p. 494.

APPELLATE CRIMINAL.

Before U San Maung and U Aung Khine, JJ.

B.C. 1955

Mar. 3,

BENJAMIN XAVIER (*alias*) MAUNG TIN WIN (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Conviction under s. 302 (1) (b), Penal Code—Circumstantial evidence—Nature, quantum and burden of proof.

Held : In a case of circumstantial evidence, the failure of one link destroys the chain so that it is of the utmost importance to get on the record every piece of evidence which makes a chain.

Sheo Narain Singh v. *Emperor*, (1920) 58 Indian Cases, 457, followed.

Held further: Circumstantial evidence must be consistent, and consistent only with the guilt of the accused, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. If the evidence is consistent with any other rational explanation, then there is an element of doubt of which the accused must be given the benefit.

Basangouda Yamanappa v. *Emperor*, A.I.R. (1941) Bom. 139; *Pir Hasan Din* v. *Emperor*, A.I.R. (1943) Lah. 56; *Sher Mohamed* v. *Emperor*, A.I.R. (1945) Lah. 27; *Ram Kala* v. *Emperor*, A.I.R. (1946) All. 191; *Maung Maung Gyi* v. *The Union of Burma*, Criminal Appeal No. 452 of 1954, High Court affirmed.

Held further : A Judge is bound to ask himself whether there is any rational explanation of the evidence and such a reasonable explanation should not be rejected because it was not offered by the accused.

Basangouda Yamanappa v *Emperor*, A.I.R. (1941) Bom. 139, followed.

Held further: An accused person owes no duty to anybody and the burden of proving his guilt remains throughout the trial with the prosecution who must prove such guilt beyond all reasonable doubt.

Sein Hla v. *The Union of Burma*, (1951) B.L.R 289, followed.

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* Criminal $\frac{\text{Appeal No. 45}}{\text{Reference No. 5}}$ of 1955, being Appeal from the order of U Tin Maung, Sessions Judge, sitting as 1st Special Judge of Mandalay, dated the 12th day of January 1955 passed in Criminal Regular Trial No. 1 of 1954.

Ba Shun, Advocate for the appellant.

Kyaw Thaung (Government Advocate) for the respondent.

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U SAN MAUNG, J.—In Criminal Regular Trial No. 1 of 1954 of the Sessions Judge, Mandalay, sitting as the 1st Special Judge, the appellant Benjamin Xavier (*a*) Maung Tin Win was convicted of the offence punishable under section 302 (1) (*b*) of the Penal Code and he was sentenced to death. As the facts of the case have been fully stated in the judgment of the learned Special Judge it is necessary for us to recapitulate the salient features only. The appellant and the deceased Khin Maung Thein (*a*) Wali Mohamed (*a*) Thein Thein were intimate friends. The deceased used to go out quite frequently with the appellant riding on the handle-bar of the latter's cycle. The deceased was fond of wearing jewellery on his person and he always used to wear a lady's gold chain besides a set of gold shirt-buttons, two rings and a rolled-gold wrist watch with gold bracelet. During the afternoon of the day of occurrence namely the 21st October 1953, the appellant came to the deceased's house and asked him to come along to a dinner party which was to take place at Myitnge that evening, Myitnge being several miles away from Mandalay. The deceased agreed to accompany him there. Thereupon the appellant borrowed from the deceased's sister Daw Tin Tin (PW 4) the exhibit bicycle which he had pledged with her. He came back at about 4-30 p.m. but finding that the deceased had not had his bath went away to return again at about 5 p.m. The deceased then accompanied the appellant by riding on the handle-bar of the cycle. At the time

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they went away the deceased took with him a sum of K 3,250 besides the jewelleries which he used to wear. This included a ring set with a *Mahuya* (Amethyst). Thereafter although the deceased promised to return home by about 10 p.m. he never came back.

At about 7-30 p.m. the next morning (22-10-53), U Aye Maung (PW 1), *Ywagaung* of Moktakhe Village on receiving information to the effect that a man was lying dead on the road to Rangoon went to inspect and found the body of a dead man in a trench on the east of Rangoon-Mandalay Road. There were injuries on the back of the head and on the left side of the mouth. This spot was about a mile away from Myitnge Police Station, where the matter was reported. U Tun Tin (PW 19), Sub-Inspector of Police, Myitnge, at once started to investigate. Finding that no one could identify the body, he had it photographed. Thereafter, it was sent to the Civil Hospital, Mandalay where a post-mortem examination was held by Dr. P. Sircar (PW 17). The doctor found no less than nine incised wounds on the region of the head and a depressed fracture of the skull at the junction of the left temporal, parietal and frontal bones. This particular injury was sufficient to cause death while the cumulative effect of all the injuries was necessarily fatal. As there was nobody to claim the dead body the same was removed from the hospital to Sinbyugan cemetery where it was buried.

On the very day the body was found, Daw Tin Tin (PW 4) and Daw Yin Yin (PW 10) sisters of the deceased being anxious for his safety went to the appellant's house to make enquiries. According to them, they were told by the appellant's mother Christina Ammal (DW 2) that the appellant failed to return home from the *pwe*. This fact was however denied by Christina Ammal in her evidence. After

a few days of waiting the sisters went and reported the disappearance of the deceased to U Maung Gale (PW 8), S.I.P. of Nyunbaungze Police Station and U Maung Gale ordered his Surveillance Head Constable Tun Tin (PW 15) to try and locate the appellant. Later, when the sisters received information that a man was found lying dead near Myitlaung Village they went to the hospital and found out that the dead body had already been buried at the Sinbyugan cemetery. The next day, namely 27th October 1953 they went to Myitnge Police Station and there identified the photographs of the deceased as that of their missing brother. When that dead body was subsequently exhumed it was identified to be that of the deceased Thein Thein by the two sisters as well as by U Kassim (PW 13).

Although suspicion fell on the appellant, he could not be arrested since he was found to have disappeared from Mandalay although he had been working as a laboratory assistant at the Civil Hospital, Mandalay. It would appear that he had been absent from duty since the afternoon of the 21st October 1953 and that about 3 days later his mother had sent a letter asking for leave of absence on the ground of his illness. He was finally arrested at his mother's house on the 22nd December 1953 exactly 2 months after the finding of the dead body. On the 30th December 1953 the appellant took U Tun Tin (PW 19) to the shop of Meher Chand (PW 7) a goldsmith, but since nothing incriminating was found there whatever statement the appellant might have made to the police prior to the visit to that shop is inadmissible in evidence. It is only when a fact which is relevant to the issue is discovered in consequence of some information given by the accused that the information which relates to

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the fact so discovered becomes admissible under section 27 of the Evidence Act.

According to Meher Chand (PW 7), about 2 months before the appellant brought the police to his shop the appellant brought to him a gold ring set with *Mahuya* stone for sale and he bought the gold only for a sum of K 41. This gold have since been melted down so that there was no means of identifying the ring. On the 2nd January 1954 the appellant took U Tun Tin to Lashio to the shop of Abdul Razak (PW 6), Proprietor of the White Star Cycle Mart. There the exhibit cycle was seized and the same was proved to have been sold to Dun Bahadur (PW 5) by the appellant for a sum of K 100 on the 26th October 1953 *vide* receipt Exhibit "ဆ". This cycle was subsequently identified to be that which the appellant had borrowed from Daw Tin Tin (PW 4) to whom it had been pledged by him.

This in effect was the sum-total of the evidence for the prosecution.

The appellant who gave evidence on oath on behalf of his own defence denied having gone to the deceased's house to take him away to Myitnge. He also denied that he had ever pledged the exhibit cycle to Daw Tin Tin. He alleged that he returned home from work on the 21st October 1953 after doing only half day's work because of indisposition. He then left his house for Namtu the next morning because he was angry with his mother who refused to give him the money which he had asked. He admitted having gone to Namtu, of having sold the exhibit cycle at Lashio and of having sold his own ring set with *Mahuya* stone to Meher Chand at Maymyo. His mother Christina Ammal stated in evidence that the exhibit cycle was taken away from her house by Manuel (DW 4) about 7 or 8 p.m. on

the 21st October 1953 and returned the same night at about 9 or 10 p.m. Manuel corroborated her on this point. She denied that the deceased's sisters came to make enquiries on the 22nd October 1953 and said that it was only 10 days later that they came. She also said that the appellant owned a *Mahuya* ring.

The learned Special Judge of Mandalay considered that in the circumstances of the case the circumstantial evidence on record was sufficient to warrant the conviction of the appellant under section 302 (1) (*b*) of the Penal Code. As regards the *Mahuya* ring sold to Meher Chand (P W 7) he observed :

> " According to Daw Tin Tin (PW 4) it would appear that one of the two rings worn by the deceased when he went along with the accused was a *mahuya* ring. There is reason to believe, therefore, that the ring sold by the accused at Maymyo belonged to the deceased, although it cannot be said to have been positively proved. The circumstances obtaining in this case raise a very strong presumption that the accused must have murdered the deceased."

We have carefully considered the evidence on record and we find ourselves unable to agree with the learned Special Judge that the prosecution had succeeded in proving the case against the appellant beyond reasonable doubt. Circumstances will be altogether different if the ring which the appellant admitted he had sold to Meher Chand at Maymyo has been definitely identified to be that of the deceased Thein Thein. As it is the learned Special Judge himself had to admit that the ring had not been proved to be that of Thein Thein. As observed by a Bench of the Allahabad High Court in *Sheo Narain Singh* v. *Emperor* (1) in a case of circumstantial evidence, the

(1. (1920) 58 Indian Cases, p. 457.

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failure of one link destroys the chain so that it is of the utmost importance to get on the record every piece of evidence which makes a chain. As regards the quantum of proof necessary to obtain a conviction in a case resting wholly on circumstantial evidence the observation of Beaumont, C.J. in *Basangouda Yamanappa* v. *Emperor* (1) is apposite. The learned Judge said :

> " In my opinion, the rule is that circumstantial evidence must be consistent, and consistent only with the guilt of the accused, and that if the evidence is consistent with any other rational explanation, then there is an element of doubt of which the accused must be given the benefit."

In *Pir Hasan Din* v. *Emperor* (2), it was held that in cases where the evidence is wholly circumstantial the rule is that in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. [See also *Sher Mohamed* v. *Emperor* (3) and *Ram Kala* v. *Emperor* (4)]. In *U Maung Maung Gyi* v. *The Union of Burma* (Criminal Appeal No. 452 of 1954), a Bench of this Court also observed :

> " It is a well-known principle that circumstantial evidence must be consistent only with the guilt of the accused ; if the evidence is consistent with any other rational explanation then there is an element of doubt of which the accused must be given the benefit."

Now bearing these observations in mind let us examine the circumstances in this case :

(i) There is evidence on record to show that the appellant came and called away the deceased Thein Thein to attend a dinner

(1) A.I.R. (1941) Bom. p. 139 at 142.
(2) A.I.R. (1943) Lah. p. 56.
(3) A.I.R. (1945) Lah. p. 27.
(4) A.I.R. (1946) All. p. 191.

party at Myitnge and that the deceased and the appellant left together on the exhibit cycle at about 5 p.m. on the 21st October 1953. However this fact does not conclusively prove that the appellant and the deceased left Mandalay together on the exhibit cycle much less that they were anywhere near the vicinity of Myitnge at or about the time when the murder could have taken place; Myitnge being more than 10 miles away from Mandalay.

(ii) The appellant told a lie when he denied having gone to invite the deceased to a dinner at Myitnge or having left together with the deceased on a cycle as alleged. This certainly is a point to be taken into consideration against him. However, the fact that he told a lie on this point can be reasonably explained by the fact that he did not want to admit that he had committed criminal breach of trust of the cycle which he had pledged with the deceased's sister Daw Tin Tin. By denying his visit to the deceased's house that day he also denied that he had borrowed the exhibit cycle which he had pledged with Daw Tin Tin for the purpose of going to Myitnge.

(iii) The *Mahuya* ring which the appellant had sold at Maymyo on his way to Namtu has not been proved to be that of the deceased. Futhermore the fact that the appellant was so hard up for money that he had to sell this ring for K 41

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does not go well with the theory that the appellant was a party to the robbery and murder of the deceased Thein Thein. His sister was definite in that the deceased had with him a sum of K 3,250 at the time he left the house with the appellant. If so the appellant would have been provided with a large sum of money if he had robbed the deceased. In these circumstances it would be the height of folly to have tried to dispose of a ring belonging to the deceased for such a paltry sum as K 41.

(iv) The appellant had sold at Lashio the cycle which he had pledged with Daw Tin Tin and had thus committed criminal breach of trust in respect of that cycle. It has been contended that the fact that the appellant had sold the cycle on which he went with the deceased to Myitnge shows that he must have been a party to the murder of the deceased. However as already pointed out above there is no conclusive proof of the fact that the appellant did go to Myitnge with the deceased. As regards the cycle, it cannot be presumed that the appellant could only have become possessed of it by murdering the deceased. In these circumstances, the fact that he sold the cycle at Lashio does not necessarily connect him with the crime of the murder of the deceased Thein Thein.

(v) The appellant no doubt left his job without giving any intimation to his superior and went away to Namtu.

> However, his sudden absence from home is also capable of another explanation than that of guilt of the murder of the deceased Thein Thein. The appellant was very much involved in debt according to Daw Tin Tin and it is quite possible that he tried to seek employment at Namtu where he would be away from his creditors. The fact that he came back on his own to his mother's house is a point telling in his favour.

Of course the appellant himself has not given the explanation sought to be made on his behalf in the paragraph mentioned above. However, as observed by Beaumont, C.J. in *Basangouda Yamanappa* v. *Emperor* (1), a judge is bound to ask himself whether there is any rational explanation of the evidence which is consistent with the innocence of the accused and if there is such an explanation he is not justified in convicting, and such a reasonable explanation of the evidence should not be rejected because it was not offered by the accused.

Furthermore, as held in *Sein Hla* v. *The Union of Burma* (2):

> "An accused person owes no duty to anybody and the burden of proving his guilt remains throughout the trial with the prosecution who must prove such guilt beyond all reasonable doubt."

On a review of the whole of evidence appearing in this case, we do not consider that the circumstantial evidence on record is such as to prove beyond reasonable doubt that it was the appellant and no other person who must have caused the death of the

(1) A.I.R. (1941) Bom. p. 139 at 142. (2) (1951) F.L.R. 289.

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deceased Thein Thein. The appellant is entitled to the benefit of the doubt on this point.

For these reasons we would set aside the conviction of the appellant under section 302 (1) (*b*) of the Penal Code and the sentence thereunder and direct that the appellant be acquitted and released in so far as this case is concerned.

U AUNG KHINE, J.—I agree.

APPELLATE CIVIL.

Before U San Maung, J. and U Bo Gyi, J.

DAW CHIT NGWE (APPELLANT)

v.

MAUNG THEIN AING AND OTHERS (RESPONDENTS).*

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Feb. 15.

Life insurance policies taken out by a Burmese Buddhist husband during coverture with his first wife—Re-marriage on death of first wife—Claims between the children by his first wife and the second wife on his death—Money due on policy not Lettetpwa *property of the husband and his first wife—Issue of joint Letters of Administration to rival claimants, not desirable.*

A Burmese Buddhist husband took out three life insurance policies during the life-time of his first wife.

On her death, he re-married a second wife and later he died.

The children by his first wife applied for Letters of Administration claiming the money as the *Lettetpwa* property of their parents.

The second wife also filed a cross application for Letters of Administration.

The trial Court granted joint Letters of Administration.

On appeal, it was held,—Money due on life insurance policy is paid either at maturity or on the death of the insured.

Therefore the money due on the policies cannot be the *Lettetpwa* property of the husband and his first wife.

It is most inconvenient for the parties who are at logger-heads with each other to be granted a joint Letters of Administration.

Tun Maung for the appellant.

Than Sein for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 10 of 1951 of the District Court of Mandalay, Daw Chit Ngwe, as the sole surviving widow of the deceased U Sein Aing, applied for Letters of Administration of the estate of the deceased comprising of the money

* Civil 1st Appeal Nos. 58 and 59 of 1952, against the decree of the District Judge's Court of Mandalay in Civil Regular Suit No. 10 of 1951, dated the 5th March 1952.

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due on three life insurance policies. The application was contested by Maung Thein Aing, the eldest son of U Sein Aing by his first wife Daw Ma Ma Lay who pre-deceased him. Maung Thein Aing's contention is that he and his younger brothers and sister are entitled to $\frac{3}{4}$ share of the money on the footing that the money due on the life insurance policies referred to in Daw Chit Ngwe's application is the *Lettetpwa* property of U Sein Aing and Daw Ma Ma Lay. Maung Thein Aing has also filed a cross application for Letters of Administration which has been dealt with in the connected Civil Regular Suit No. 11 of 1951. The learned Judge of the District Court after hearing the witnesses cited by both parties in Civil Regular Suit No. 10 of 1951 came to the conclusion that since both the rival claimants Daw Chit Ngwe and Maung Thein Aing were heirs to U Sein Aing's estate they should be given joint Letters of Administration. He accordingly directed that a joint Letters of Administration be issued to Daw Chit Ngwe and Maung Thein Aing on their paying the necessary Court fees equally and furnishing security for Rs. 5,000 with one surety each in the like amount. The present is an appeal by Daw Chit Ngwe against the granting of such a joint Letters of Administration.

A life insurance policy is essentially a contract between the insured and the Life Insurance Company usually to the effect that on payment of certain premium at certain interval the money due on the policy would be paid either at maturity if the insured is still alive at that date or on the death of the insured person. Therefore the money due on the life insurance policy of U Sein Aing can hardly be said to be the *Lettetpwa* property of U Sein Aing and Daw Ma Ma Lay. Furthermore, it is most inconvenient for the parties who are at logger-heads

with each other to be granted a joint Letters of Administration like the present. In our opinion the most convenient course to be taken is to grant Letters of Administration to the widow of the deceased. For these reasons we would set aside the order of the District Judge of Mandalay and direct that Letters of Administration be issued to Daw Chit Ngwe on her paying the necessary Court fees and furnishing security in the sum of Rs. 5,000 with one surety in the like amount. There will be no order as to costs of this appeal.

APPELLATE CIVIL.

Before U San Maung, J.

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Mar. 2.

DAW SAUNG AND FOUR OTHERS (APPELLANTS)

v.

MA THAN AND NINE OTHERS (RESPONDENTS).*

Transfer of Property Act, s. 60—Suit for partial redemption—Prior suit for partition not necessary when all the necessary parties are fully impleaded in the suit.

When a mortgagee acquires a portion of the mortgaged property by inheritance the provisions of the last paragraph of s. 60 of the Transfer of Property Act are applicable so as to allow redemption of a portion only of the mortgaged property.

Hamida Bibi v. *Ahmed Husain*, 31 All. 335 ; *Zafar Ahsan* v. *Zubaida Khatun*, A.I.R. (1929) All. 604, followed.

A suit for partial redemption is a combination of a suit for redemption and a suit for contribution ; a decree for redemption on payment of proportionate share of the mortgaged money can be given when all the parties interested in the redemption are represented

Thillai Chetti v. *Ramanatha Aiyan*, 20 Mad. 295, distinguished.

N. R. Mazumdar for the appellants.

Than Sein for the respondents.

U SAN MAUNG, J.—In Civil Regular Suit No. 7 of 1952 of the Township Court of Lewe the plaintiff Ma Than and five others sued the defendant Daw Saung and eight others for redemption of their share of the mortgage in suit. It would appear that in the year 1947 the deceased Daw Shwe Mi had mortgaged the suit land for Rs. 1,000 to the first defendant Daw Saung. Daw Shwe Mi had 4 children

* Civil 2nd Appeal No. 4 of 1953, against the decree of the District Court of Yamèthin at Pyinmana in Civil Appeal No. 23 of 1952, dated the 31st October 1952, arising out of the decree of the Township Judge, Lewe passed in his Civil Regular Suit No. 7 of 1952, dated 24th July 1952.

namely Ma Shwe Khin, Ko Po Sin, Ko Maung Pu, Ko Thein Maung and all of them are now dead. The plaintiffs are the children of Ko Maung Pu and Ko Thein Maung and their suit was based upon the ground that after the death of Daw Shwe Mi each of her children became entitled to a quarter share of the land and that the mortgagee Daw Saung herself being the widow of Ko Po Sin had also become entitled to a quarter share. Defendants 2 to 5 are the children of Daw Saung and Ko Po Sin and other defendants are the children of Ma Shwe Khin who had declined to become party plaintiffs in the case. The learned Judge of the trial Court after examining witnesses as regards the fact of the mortgage and of the relationship of the parties to the proceedings gave a preliminary decree for the redemption of the mortgage on payment of their proportionate share of the mortgage debt. On appeal by Daw Saung and her children to the District Court of Yamèthin the learned District Judge pointed out that although as a general rule redemption of a portion of the mortgaged property cannot be allowed, a suit for partial redemption lay in this particular case in view of the provisions contained in the last paragraph of section 60 of the Transfer of Property Act. This paragraph reads :

" Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except *only* where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor."

In *Hamida Bibi* v. *Ahmed Husain* (1), it was held by a Bench of the Allahabad High Court that when

(1) 31 All. p. 335.

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the mortgagee inherits a part of the property mortgaged to him the integrity of the mortgage must be deemed to have been broken. This decision was followed by another Bench of the Allahabad High Court in *Zafar Ahsan* v. *Zubaida Khatum* (1).

Therefore it is clear that the defendant-appellant Daw Saung having acquired a portion of the mortgaged property by inheritance the provisions of the last paragraph of section 60 of the Transfer of Property Act are applicable so as to allow redemption of a portion only of the mortgaged property.

It has been contended on behalf of the defendant Daw Saung and her children who have preferred this second appeal that a suit for partition of the mortgaged property among the several co-owners should have preceded the present suit for redemption. In this connection, reliance is placed upon the ruling in the case of *Thillai Chetti* v. *Ramanatha Avvan* (2). There it was held that when several owners of undivided shares in immovable property mortgage their share with possession to another undivided sharer, a smaller number than the whole body of co-mortgagors cannot sue to redeem the mortgage until there has been a partition of the property mortgaged among the several co-owners.

However, in the present suit all the persons having a share in the mortgaged property have been impleaded either as plaintiffs or as defendants. A suit for partial redemption being a combination of a suit for redemption and a suit for contribution there seems no reason why a decree for redemption on payment of proportionate share of the mortgaged money cannot be given in the present suit wherein all the parties interested in the redemption are represented. For these reasons I

(1) A.I.R. (1929) All. p. 604. (2) 20. Mad. p. 295.

consider that the learned Judge of the District Court of Yamèthin was right in having confirmed the judgment and decree of the trial Court. This second appeal fails and must be dismissed with costs. Advocate's fee in this Court three gold mohurs.

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APPELLATE CIVIL.

Before U San Maung, J.

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Mar. 15.

JAGAROUP (APPELLANT)

v.

JEET SINGH AND ONE (RESPONDENTS).*

Money Lenders Act, s.9—Registration as Money Lender need not precede the institution of suit.

A money lender could file a suit before getting himself registered as a money lender and the registration need not precede the filing of such a suit.

S. 9 of the Money Lenders Act enacts that no Court shall pass a decree on a suit by a money lender for the recovery of a loan unless the money lender is registered under the Act and the registration is in force.

It does not say that no Court shall entertain a suit by the money lender unless the money lender had registered himself under the Act.

Tun Aung (1), Advocate for the appellant.

Messrs. Leong and *Thein*, Advocates for the respondents.

U SAN MAUNG, J.—In Civil Regular Suit No. 39 of 1947-48 of the Court of the Assistant Superintendent for Civil Justice, Taunggyi, the plaintiff Jagaroup who is the appellant in the present appeal sued the defendant-respondents Jeet Singh and Daw May for the recovery of money due on a registered deed of mortgage. The main grounds for defence were (1) that the plaintiff's suit was barred by section 9 of the Money Lenders Act, 1945 and (2) that the mortgage deed in suit was void for want of consideration. Both these issues were answered in the plaintiff's

* Civil 2nd Appeal No. 15 of 1953, against the decree of U Thaung Pe, Resident, Southern Shan States, Taunggyi in Civil Appeal No. 2 of 1948-49, dated the 24th December 1952, arising out of the decree passed in Civil Regular Suit No. 39 of 1947-48, dated the 29th September 1948, by the Assistant Superintendent for Civil Justice, Taunggyi.

favour by the learned Judge of the trial Court but on appeal by the defendants to the Court of the Resident, Southern Shan States, Taunggyi, the learned Judge of the appellate Court held that the plaintiff was a money lender and as such the suit was not maintainable under section 9 of the Money Lenders Act because he had failed to register himself under the Act before the institution of the suit. The learned Judge also held that the mortgage deed in suit was void for want of consideration. He accordingly set aside the judgment and decree of the trial Court and dismissed the plaintiff's suit with costs; hence this appeal.

As regards the first point as to whether or not the plaintiff could file a suit before getting himself registered as a money lender, it is clear that the learned Judge of the appellate Court was wrong in the view taken by him that the registration must precede the filing of such a suit. Section 9 of the Money Lenders Act enacts that no Court shall pass a decree on a suit by a money lender for the recovery of a loan unless the money lender is registered under the Act and the registration is in force. It does not say that no Court shall entertain a suit by the money lender unless the money lender had registered himself under the Act. In the present case the plaintiff had registered himself as a money lender with effect from the 18th of June 1948 so that the learned Judge of the trial Court could have passed a decree in his favour on the 29th of September 1948 the date on which the judgment was passed by him.

As regards the second issue as to whether or not the mortgage deed was void for want of consideration I am inclined to agree with the learned Judge of the appellate Court that the plaintiff had failed to adduce satisfactory proof that the consideration alleged by

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him had been paid. No doubt his witness Ebrahim Kaka (PW 2) has said that he was present at the time Rs. 400 was paid by the plaintiff to the defendant Jeet Singh and that Jeet Singh then admitted to him that Rs. 1,100 had already been paid. However, it is significant that although both the plaintiff and his witness said that Jeet Singh gave a receipt for Rs. 1,100 no such receipt had been produced as evidence in Court. Similarly, in regard to the alleged payment of Rs. 1,200 in the presence of Dwaka (PW 3) the receipt which was said to have been signed by Jeet Singh in the presence of this witness has not been produced in Court. As regards the execution of the mortgage deed by the defendants there is a serious discrepancy between the plaintiff's evidence and that given by his witness Lachman Singh (PW 5). According to the plaintiff, Jeet Singh took him to Lachman Singh's house and there asked Lachman Singh to draw up the deed of mortgage. When the deed was drawn up, Jeet Singh signed it in the presence of Lachman Singh who then attached his signature as a witness to the deed. According to Lachman Singh (PW 5) however it was the plaintiff Jagaroo who came and asked him to write out a deed of mortgage for Rs. 4,300 and at the same time showing 3 receipts for money received to the amount of Rs. 4,300. By reference to the receipts and the maps which were also brought by the plaintiff he wrote out a deed of mortgage. Jeet Singh was named therein as mortgagor. He was not present at the time when Jeet Singh signed the deed of mortgage and he only signed as a witness when the plaintiff showed it to him saying that it had been duly signed by the parties concerned. The discrepancy between the evidence of the plaintiff and his principal witness Lachman Singh is irreconcilable and also lend

considerable colour to the defence story that the mortgage deed in suit was executed by the defendants without consideration and with a view to evade their creditors. The defendants did not go voluntarily to the registration office to have the mortgage deed registered. So, their presence had to be obtained by the issue of summons from the office of the Joint Registrar, Taunggyi. Although there is an endorsement on the deed to the effect that the defendants had admitted receipt of consideration the statements made by the defendants on oath to the effect that they told the Joint Registrar that the deed had been executed without receiving consideration therefor stands unrebutted. That this defence is not an afterthought is clear from the fourth paragraph of the written statement where the defendants contended that when they were summoned before the Joint Registrar they had denied receipt of any consideration. The plaintiff had not adduced any evidence to rebut this allegation.

For these reasons I consider that there is no sufficient ground for reversing the judgment and decree of the Court of the Resident, Southern Shan States, Taunggyi. In the result the appeal fails and the same is dismissed with costs. Advocate's fees three gold mohurs.

APPELLATE CIVIL.

Before U San Maung, J.

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Mar. 15.

KORBAN ALI (APPELLANT)

v.

ZORA BIBI (RESPONDENT). *

Evidence Act, s. 92—Construction of the words "Between the parties to any such instrument".

The words refer to the persons who on the one side and the other came together to make the contract or disposition of property and would not apply to questions raised between the parties on the one side only of a deed.

It will in no way prevent parties on one side of a deed to show by parol evidence their mutual relations, the one with the other so that it is open to one of the two persons in whose favour a deed of sale is purported to be executed to prove by parol evidence in a suit by him against the other that the defendant was not a real but a nominal party only to the purchase.

Ma Aye Tin v. *Daw Thant*, as reported in A.I.R. (1941) Ran. 99, not the same as officially reported in 1940 R.L.R. 831 ; *Mulchand and another* v. *Madho Ram*, 10 All. 421 ; *Shamsh-ul-jahan Begam and another* v. *Ahmed Wali Khan*, 25 All. 337, followed ; *Maung Tun Gyaw* v. *Maung Po Shwe*, 11 L.B.R. 351, referred ; *Mahammad Sultan Mohiden Ahmed Ansari* v. *Amthul Jalal*, A.I.R. (1927) Mad 1102 ; *Lakshmana Sahu* v. *M. Simachala Patra*, A.I.R. (1941) Pat. 211, followed.

Ba Than for the appellant.

Daw Khin Than for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 6 of 1952 of the Township Court of Tavoy, the plaintiff-appellant Korban Ali sued the defendant-respondent Zora Bibi for a declaration that the house-site in suit situated in Tanga Quarter, Tavoy was his exclusive property. The plaintiff and the defendant were husband and wife having married according to the Mohamedan rites in or about the

* Civil 2nd Appeal No. 19 of 1953, against the decree of the District Judge's Court of Tavoy in Civil Appeal No. 5 of 1952, dated the 10th day of December 1952, setting aside the judgment and decree of the Township Court, Tavoy in Civil Regular Suit No. 6 of 1952, dated the 5th day of September 1952.

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year 1931. At that time the plaintiff had an Indian wife living at Chittagong. In the year 1939 that is to say about 8 years after his marriage with the defendant, the plaintiff and his wife purchased the house-site in suit together with part of a house standing thereon for a sum of Rs. 160 *vide* registered deed of sale Exhibit A. The plaintiff, however, alleged that although the property was purchased in the joint name of himself and his wife, it belonged exclusively to him as he had paid the purchase money with a sum obtained by commutation of his pension he, having retired from Government service about two years before. The defendant on the other hand alleged that the property was exclusively hers as the purchase price of Rs. 160 was paid out of her savings, the plaintiff having taken away practically all the money he had obtained by commutation of pension to his wife in India. On the pleadings two issues were framed by the learned trial Judge of which the most important being the one relating to the ownership of the property in suit. The learned Judge after the examination of witnesses cited by both parties came to the conclusion that the plaintiff's story that he purchased the house-site with the money obtained by commutation of pension was credible and that therefore he was entitled to the declaration sought for by him. On appeal to the District Court of Tavoy by the defendant Zora Bibi, the learned District Judge held that on a review of the evidence adduced in the case the plaintiff had not satisfactorily discharged the burden of proving that the property was solely his and that therefore his suit ought to have been dismissed. He accordingly set aside the judgment and the decree of the trial Court and dismissed the plaintiff's suit with costs. Hence this appeal.

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This quarrel arose between the plaintiff and his wife Zora Bibi only because they had separated from each other in the year 1951 and that subsequent to this separation the defendant had served a notice on her husband claiming the house-site to be her sole property. It is common ground that the house-site in suit was originally purchased by one Ba Zi (since deceased) brother of the defendant for a sum of Rs. 160 and that the money advanced by Ba Zi was subsequently repaid. The plaintiff would have it that he had personally repaid this sum to Ba Zi but Ba Zi's widow Ma Mi Su (PW 5) contradicted in this respect by saying that it was the defendant Zora Bibi who had brought the money. However, Ma Mi Su went on to say that when Zora Bibi came to repay the debt she had mentioned that her husband was in funds having commuted his pension, thus implying that the money, which she had brought was part of the proceeds. Ebrahim (PW 2) father of the defendant Korban Ali also said that the plaintiff had told him that he had discharged the debt of Rs. 160 due to Ko Ba Zi after he had obtained money by commuting his pension. This statement although made by the defendant's own father, is regarding an admission made by the plaintiff in his own favour and as such is inadmissible in evidence against the defendant. Besides, even according to Ebrahim and other witnesses such as U Ba Hlaing (PW 3), the plaintiff himself had admitted that the property jointly belonged to him and his wife. This being an admission against his own interest, is admissible in evidence against him.

Although the defendant had been hard put to prove that the debt due to her brother Ba Zi for the purchase price of the property in suit was paid out of her own savings the probabilities are that the

plaintiff had purchased the property in the joint name of himself and his wife for their joint benefit, in view of the fact that he was taking away to India a considerable portion of the money obtained by the commutation of his pension. The plaintiff's story that he had protested to U Ba Zi regarding the inclusion of his wife's name as a joint owner in the sale deed and that he even voiced his protest at the Registration Office is quite incredible and may be safely rejected. At the time the suit property was purchased the plaintiff and his wife were apparently on the best of terms and there seems no reason why he should not have spent a comparatively small sum of Rs. 160 in the purchase of a piece of land for the joint benefit of himself and his wife. Therefore on the facts the judgment and decree of the learned Judge of the trial Court cannot be sustained and the same have been rightly reversed by the learned Judge of the lower appellate Court.

The learned District Judge has, however, in the concluding portion of his judgment observed :

> " In my opinion, it would run counter to the provisions of section 92 of the Evidence Act to allow the respondent to adduce oral evidence to show that the appellant was not a co-purchaser when the deed has a plain term to show that she is one."

The learned Advocate for the appellant Korban Ali relying to an observation of a Bench of the late High Court in *Ma Aye Tin* v. *Daw Thant* (1) has conceded that this statement of the law is correct. In *Ma Aye Tin*'s case, the learned Judges observed :

> " Schedules D and E contain a number of items of immovable property which were purchased in the joint names of Maung Than Tun and the respondent. The presumption therefore arises that Maung Than Tun and the respondent

(1) A.I.R. (1941) Ran. 99.

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were joint owners in equal shares of this property. This presumption has not been rebutted by the vague evidence called by the respondent to the effect that she paid the whole consideration for the purchase of each of these properties and that Maung Than Tun's name was mentioned in the deed as a joint purchaser merely in order that he should be able to present the documents for registration. Evidence of the latter category is clearly inadmissible under section 92, Evidence Act."

However, in the authorised report of the same case (1) this passage has been omitted and this omission seems to me to be significant owing to the importance of the point involved. It seems to indicate that the members of the Law Reporting Committee were not quite satisfied with the exposition of the law in Ma Aye Tin's case in so far as it relates to section 92 of the Evidence Act.

Now, in *Mulchand and another* v. *Madho Ram* (2) it was held that the words in section 92 of the Evidence Act "between the parties to any such instrument" refer to the persons who on the one side and the other came together to make the contract or disposition of property, and would not apply to questions raised between the parties on the one side only of a deed, regarding their relations to each other under the contract and that the words do not preclude one of two persons in whose favour a deed of sale purported to be executed, from proving by oral evidence in a suit by the one against the other, that the defendant was not a real but a nominal party only to the purchase, and that the plaintiff was solely entitled to the property to which it related.

This decision was followed by another Bench of the same High Court in *Shamsh-ul-jahan Begam and another* v. *Ahmed Wali Khan* (3). The head-note

(1) (1940) R.L.R. 831. (2) 10 All. 421.
(3) 25 All. 337.

in the case of *Maung Tun Gyaw* v. *Maung Po Shwe* (1) seems to indicate that the above decision of the Allahabad High Court have been entirely dissented from by the late Chief Court of Lower Burma. However, when the body of the judgment is looked at it is apparent that the learned Judges of the Chief Court only desired to qualify the statement of law enunciated in the above two cases of the Allahabad High Court. They observed as follows :

" He (Advocate for respondent) urges that section 92 of the Evidence Act has, therefore, no application, and he relies upon the case of *Mulchand* v. *Madho Ram* (2) which was followed in the case of *Shamsh-ul-jahan Begam* v. *Ahmed Wali Khan* (3). It was there held that the words in section 92 of the Evidence Act " between the parties to any such instrument " refer to the persons who on the one side and on the other came together to make the contracts or dispose of property and would not apply to questions raised between the parties on the one side only of the deed regarding their relations to each other under the contract,

We do not quarrel with this statement of the law, but in our opinion the Allahabad Court went too far if it intended to lay down that the parties on one side of a deed, as between themselves, were able to contradict, vary, add to or subtract from, its terms by means of parol evidence. We consider that the meaning of section 92 is clear, and that it has application to all parties to a document. Quite apart from section 92 of the Evidence Act, it would of course, be possible for the parties on one side of a deed to show by parol evidence their mutual relations the one with the other. That they should be able to show with reference to any transaction to which they are the parties on one side, that such transaction, though purporting to be a sale, is a mortgage, we are unable to hold."

The above decision of the Allahabad High Court was followed by the Madras High Court in

(1) 11 L.B.R. 351. (2) 10 All. 421.
(3) 25 All. 337.

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Mahammad Sultan Mohiden Ahmed Ansari v. *Amthul Jalal* (1) and by the Patna High Court in *Lakshmana Sahu* v. *M. Simachala Patra* (2). In my opinion, section 92 of the Evidence Act will in no way prevent parties on one side of a deed to show by parol evidence their mutual relations, the one with the other so that it is open to one of the two persons in whose favour a deed of sale is purported to be executed to prove by oral evidence in a suit by him against the other that the defendant was not a real but a nominal party only to the purchase and that he was solely entitled to the property to which it related. Of course, it will not be open to any of the persons in whose favour a deed of sale is purported to be executed, to prove by oral evidence either in a suit by one against the other purchaser, or in a suit by the vendor against either of them that what was purported to be a deed of sale was in fact a deed of gift or a deed of mortgage. That would be contradicting the terms of the deed and as such within the prohibition of section 92, Evidence Act.

For these reasons I would confirm the judgment and decree of the learned Judge of the District Court of Tavoy appealed against and direct that the present appeal be dismissed with costs. Advocate's fees in this Court three gold mohurs.

(1) A.I.R. (1927) Mad. 1102. (2) A.I.R. (1941) Pat. 211.

APPELLATE CRIMINAL.

Before U Bo Gyi, J.

M. MUTHIAH SERVAI (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

H.C. 1955

Feb 3.

Penal Code, s. 406—Accused's explanation, reasonable, though incredible—Burden of proof.

The Complainant prosecuted the appellant under s. 406, Penal Code in respect of collections of money, entrusted to him on behalf of the Sri Peria Palayathammam Temple.

The appellant's defence was that the money received was spent in defraying the expenses of a festival held in connection with the Temple.

A complaint was lodged and subsequently the appellant produced the accounts before the Receiver of the Temple and its properties. Being dissatisfied, the Receiver filed a Civil suit in the Rangoon City Civil Court, which was still pending.

In the meantime, appellant was convicted and sentenced to 6 months' rigorous imprisonment.

Held on appeal: It cannot be said that the account submitted by appellant as to how he had spent the money entrusted to him is unreasonable.

If an accused person gives an explanation which may reasonably be true, even though it is not believed by the Court, he is entitled to an acquittal, because in such circumstances the onus of proving his guilt has not been discharged.

Appellant acquitted

Robert Stuart Wallchope v. *Emperor*, (1934) Vol. 61, I.L.R. Cal. 169, followed.

G. N. Banerji, Advocate for the appellant.

U Chit (Government Advocate) for the respondent.

U BO GYI, J.—Appellant has been convicted under section 406 of the Penal Code on a private prosecution launched by complainant Velu and sentenced to 6 (six) months' rigorous imprisonment.

* Criminal Appeal No. 617 of 1954, being appeal from the order of the Eastern Subdivisional Magistrate of Rangoon, dated the 16th day of December 954, passed in Criminal Regular Trial No. 96 of 1952.

H.C. 1955

M. MUTHIAH SERVAI v. THE UNION OF BURMA.

U BO GYI, J.

It appears that in 1951 a suit was instituted in the High Court, Rangoon, for the removal of the trustees of the Sri Peria Palayathammam Temple and the Official Receiver was appointed Receiver of the Temple and its properties. Before the Receiver had time to take charge of the Temple and its properties a festival was held in connection with the Temple and collections were made in money and in kind from the worshippers. Rupees 979-12-0 was thus collected and the sale of offerings in kind fetched Rs. 50-8-0, and the total collections came to Rs. 1,030-4-0, the complainant and certain of his witnesses tried to make out that 106 silver pieces were also collected but the letter of authority Exhibit A filed in the case clearly shows that only the sum of Rs. 1,030-4-0, was received. It is said that this money was entrusted to the appellant with the direction that it should be deposited with a Bank or a Chettyar Firm. The appellant admits having received that money but states that the agreement was that only the surplus after defraying the expenses of the festival should be so deposited.

The complainant states in his evidence that he learnt that the appellant had used the money in his business, but he does not say how he had learnt about it. On the other hand, the appellant states that he spent the money in defraying the expenses of the festival and was out of pocket to the extent of Rs. 21. When the Official Receiver called upon him to account for the expenses he filed accounts. The Official Receiver was not satisfied with the accounts and therefore filed a suit against the appellant in the City Civil Court of Rangoon.

It would seem that the present complaint was lodged before the suit was instituted and the civil suit is still pending. In these circumstances it

cannot be said that the explanations given by the appellant in the shape of the accounts submitted by him as to how he had spent the money entrusted to him is unreasonable. It has been held in *Robert Stuart Wallchope* v. *Emperor* (1) that if an accused person gives an explanation which may reasonably be true, even though it is not believed by the Court, he is entitled to an acquittal, because in such circumstances the onus of proving his guilt has not been discharged. The learned Government Advocate concedes this point and states that he cannot support the conviction. Furthermore in the present case the evidence for the prosecution seems partisan and the differences among the worshippers were such that an order under section 144 of the Criminal Procedure Code had to be promulgated.

For the above reasons the conviction and sentence are set aside and the appellant will be acquitted and released so far as the present case is concerned.

(1) (1934) Vol. 61, I. L. R. Cal. p. 169.

APPELLATE CRIMINAL.

Before U San Maung, J.

H.C. 1955

Feb. 21.

MA MYA TIN (APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Penal Code, s. 452—S. 562 (1), Criminal Procedure Code.

The applicant was convicted under s. 452, Penal Code by a Second Class Power Magistrate who submitted the case under the Proviso to s. 562, sub-s. (1) to the Subdivisional Magistrate for release on probation of good conduct.

The Subdivisional Magistrate himself was only a Third Class Power Magistrate, not having been appointed under s. 13 of the Criminal Procedure Code.

The Subdivisional Magistrate ordered the Respondent to be released on his executing a bond for K 100 with two sureties in like amount or in default thereof, to undergo 6 months' Rigorous Imprisonment.

Held: The order for imprisonment in default is wrong. The proper course is for the Magistrate to ascertain, before passing an order under s. 562, whether the accused is likely to be able to give security immediately or within a reasonable time and if he fails to give security within a reasonable time, the Magistrate should pass sentence which should ordinarily be a nominal one.

King-Emperor v. *Tun Gaung*, 3 L.B.R. 2, followed; *Nasu Meah* v. *King-Emperor*, 2 Ran. 360, referred to.

Held further: The order of the Subdivisional Magistrate is void as having been made without jurisdiction. It is not imperative on the High Court to set aside every void order, unless the aggrieved person move the Court to do so.

King-Emperor v. *Ba Pe*, 4 L.B.R. 143, referred to; *King-Emperor* v. *Tha Byaw*, 4 L.B.R. 315; *Po Mya* v. *King-Emperor*, 7 L.B.R. 272, compared.

Mya Thein (Government Advocate) for the respondent.

U SAN MAUNG, J.—In Criminal Regular Trial No. 31 of 1954 of the Second Additional Magistrate, Bassein, the accused Ma Mya Tin was convicted of

* Criminal Revision No. 147 (B) of 1954, being Review of the order of the Subdivisional Magistrate of Bassein, dated the 6th day of May 1954, passed in his Criminal Regular Trial No. 9 of 1954.

the offence punishable under section 452 of the Penal Code for committing house trespass after making preparation for causing hurt. The trial Magistrate who was only Second Class Magistrate Powers however considered that the accused should be released on probation of good conduct. He accordingly submitted the case to the Subdivisional Magistrate under the proviso to sub-section (1) of the section 562 of the Criminal Procedure Code. However at the time of the submission of this case, the Magistrate who had been placed in charge of Bassein Subdivision was only a Magistrate of the Third Class. Therefore although he designated himself as a Subdivisional Magistrate he did not have the powers of a Subdivisional Magistrate as section 13 of the Criminal Procedure Code enacts that only a Magistrate of the First or Second Class in charge of a Subdivision can be legally designated as a Subdivisional Magistrate. It naturally follows that only such a Magistrate can exercise the powers of a Subdivisional Magistrate.

However the Subdivisional Officer, Bassein, being under the impression that he had the powers of a Subdivisional Magistrate, proceeded to pass orders in the case directing Ma Mya Tin to be released on probation of good conduct on her furnishing security for Rs. 100 with two sureties in the like amount for a period of 6 months. The order was passed on the 4th May 1954 and securities were in fact furnished and the bond under section 562 of the Criminal Procedure Code executed two days later. The Subdivisional Officer made yet another mistake in directing in the same order that the accused be sentenced to 6 months' rigorous imprisonment if she fails to furnish the requisite security. In this connection, the observations of Sir Herbert Thirkell

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U SAN MAUNG, J.

White, Chief Judge, in *King-Emperor* v. *Tun Gaung* (1) are apposite. There, it was pointed out that there is no authority for the view that if an accused person is ordered to give security under section 562 of the Code of Criminal Procedure and fails to do so, he should be detained in prison till the expiration of the period for which security is to be furnished. The proper course is for the Magistrate to ascertain, before passing an order under section 562, whether the accused is likely to be able to give security immediately or within a reasonable time and if he fails to give security within a reasonable time, the Magistrate should pass sentence which should ordinarily be a nominal one. See also *Nasu Meah* v. *King-Emperor* (2).

The order of the Subdivisional Officer, Bassein dated the 6th May 1954 is therefore void as having been made without jurisdiction. However it is not imperative on the High Court to set aside every void order that comes to its notice, when the persons aggrieved does not move the Court to do so. See *King-Emperor* v. *Ba Pe* (3). Compare *King-Emperor* v. *Tha Byaw* (4), *Po Mya* v. *King-Emperor* (5).

In the present case the period of 6 months for which Ma Mya Tin was ordered to keep the peace and be of good behaviour had already elapsed. Therefore it is not necessary for this Court to take any further action in the matter. Let the proceedings be returned to the Court concerned through the Sessions Judge, Bassein with these remarks.

The judgment in this case should be brought to the notice of the Government so that Third Class Magistrates may not be put in charge of Subdivisions in future.

(1) 3 L.B.R. p. 2.
(2) 2 Ran. p. 360.
(3) 4 L.B.R. p. 143.
(4) 4 L.B.R. p. 315.
(5) 7 L.B.R. p. 272.

APPELLATE CRIMINAL.

Before U Ba Thoung, J.

MA THAN MAY *(alias)* MA YIN MAY (APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT).*

H.C. 1954

Feb. 23.

Penal Code, s. 411—S. 403 (1), Criminal Procedure Code—Appellant in possession of 3 pairs of ear-rings and wrist watch, one pair of ear-rings being her own—Convicted under s. 411, Penal Code in respect of one pair of ear-rings and a wrist watch—Appeal was summarily dismissed.

Appellant was again tried and convicted under s. 411, Penal Code in respect of the other pair of ear-rings by the Court of Special Judge.

Held : In the absence of proof that the articles in the two cases were received by appellant on different dates, the dishonest receipt of these articles by the appellant is a single offence under s. 411, Penal Code.

Conviction set aside under s. 403 (1), Criminal Procedure Code.

Ganesh Sahu v. *Emperor*, L.R. Vol. 50, Cal. 594—L.R. Vol. 3, Pat. 503, followed.

Ba Kyaing (Government Advocate) for the respondent.

U BA THOUNG, J.—The appellant Ma Than May was sent up for trial before the Court of the Sessions Judge (sitting as special Judge), Thatôn, under sections 392/302/114 of the Penal Code in connection with the robbery committed by three *luzoes* at the houses of U Zaw Pha (PW 10), Ma Khin Nyun (PW 12) and Ma Mu (PW 16) at Pawdawmu Village on the night of the 12th May 1954, in the course of which one To No was shot dead by one of the robbers. As there was no evidence that the appellant took part in the robbery she was not charged under

* Criminal Appeal No. 603 of 1954, being Appeal from the order of U Ba Gyan, Session Judge (Sitting as Special Judge) of Thatôn, dated the 19th day of November 1954 passed in Criminal Regular Trial No. 15 of 1954.

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U BA THOUNG J.

sections 392/302/114 of the Penal Code, but she was charged under section 411 of the Penal Code for being found in possession of a pair of ear-rings which was identified to be one of the looted properties taken from the house of Ma Mu on the night of robbery, and the learned Special Judge convicted her under that section and sentenced her to six months' rigorous imprisonment. The pair of ear-rings found in her possession was produced by her under the following circumstances:—On the 17th May 1954 *i.e.* about 5 days after the said robbery, U Soe Tin (P W 2) heard that some *luzoes* were shot dead by the army and so he asked U Pe (PW 1) to make an enquiry about it. U Pe made an enquiry and learnt that Ma Than May (the appellant) who was the wife of a notorious dacoit Maung Aye had come back to the village and was staying at the house of one U Tha Po. U Pe went to that house and saw Ma Than May, when the latter told him that she came back from the jungle as her husband had been shot dead by the army. She produced 3 pairs of ear-rings and a wrist watch saying that one pair of ear-rings belonged to her while the other two pairs of ear-rings and the wrist watch were given to her by her husband Maung Aye, whom she admitted to be a dacoit. Ma Than May was handed over to the police officers together with the three pairs of ear-rings and the wrist watch produced by her.

It is to be mentioned here that the appellant Ma Than May has already been convicted under section 411, Penal Code and sentenced to suffer one year's rigorous imprisonment in Criminal Regular Trial No. 46 of 1954 of the Court of the 4th Additional Special Power Magistrate, Thatôn, in respect of one pair of ear-rings and a wrist watch produced by her as stated above. Her appeal to the Sessions

Court was summarily dismissed. She was again tried and convicted under section 411, Penal Code in respect of the other pair of ear-rings in this case Criminal Regular Trial No. 15 of 1954 of the Court of the Sessions Judge (sitting as Special Judge), Thatôn, and out of which this appeal arises.

This appeal must be allowed and the conviction and the sentence in Criminal Regular Trial No. 15 of 1954 must be set aside under the provisions of section 403 (1) of the Criminal Procedure Code, for it has not been proved by the prosecution that the retention of the pair of ear-rings in this case and the retention of the other pair of ear-rings and a wrist watch in the other case in Criminal Regular Trial No. 46 of 1954 in which the appellant has already been tried and convicted, were received by her on different dates, and so the dishonest receipt of these articles by the appellant is a single offence under section 411, Penal Code. In the case of *Ganesh Sahu* v. *Emperor* (1), it has been held that :

> " When there is no evidence that articles stolen from several persons were received on different dates, the dishonest receipt of the same is a single offence under section 411 of the Penal Code, and a person tried on a charge thereunder, in respect of the retention of some of the articles on a certain date, cannot be tried, on a similar charge, in respect of other articles of which he was in possession on such date. "

It has, similarly, been held in the case of *King-Emperor* v. *Bishun Singh* (2).

For the above reasons I set aside the conviction and the sentence passed on the appellant by the trial Court, and the appellant is acquitted so far as this case is concerned.

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(1) I.L.R. Vol. 50. Cal. p. 594. (2) I.L.R. Vol. 3, Pat. p. 503.

APPELLATE CRIMINAL.

Before U Aung Tha Gyaw, J.

H.C. 1954

May 20.

MAUNG BA CHOKE *(alias)* BOH THAN-MA-NI (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Offences under two different penal statutes—S. 395, Penal Code—S. 17 (1), Unlawful Associations Act—Misjoinder of charges—Ss. 233, 234, 235, 236 and 239, Criminal Procedure Code—Effect on the legality of trial—Acquittal under the Special Act cannot cure the illegality.

The appellant was convicted under s. 395, Penal Code and s. 17 (*1*) of the Unlawful Associations Act.

Joinder of charges under a special law with a charge under the Penal Code has vitiated the trial as being in violation of s. 235, Criminal Procedure Code, especially in the absence of approximity in time, the unity of purpose and continuity of action.

The two criminal acts are not related in point of purpose as cause and effect or as principal and subsidiary acts so as to constitute one continuous act.

Raj Kishore Tewari and others v. *Emperor*, A.I.R. (1949) All. 139, referred to.

Held: There was misjoinder of charges. If a mandatory provision of the Code has been unfringed in framing the charge, the Court must of necessity be held to have failed in administering justice to the accused. The trial is bad and no question of curing an irregularity arises under s. 537, Criminal Procedure Code.

K. Ramaraju Tevan and another v. *Emperor*, A.I.R. (1930) Mad. 857 at 858; *N. A. Subramania Iyer* v. *Emperor*, (1902) 25 Mad. 61 ; *Abdul Rahman* v. *Emperor*, 5 Ran. 53 (P.C.); *Sein Hla* v. *Union of Burma*, B.L.R. (1951) 289; *Babulal Choukhani* v. *King-Emperor*, I.L.R. (1938) Cal. (P.C.) 295; *Pulukuri Kottaya* v. *The King-Emperor*, I.L.R. (1948) Mad. (P.C.) p. 1 ; *Rex* v. *Daya Shanker Jaitly*, I.L.R. (1950) All. 1256 at 1274, referred to.

The acquittal of the appellant on the charge under the Special Act cannot cure this illegality, irrespective of the question whether there was any actual prejudice to the accused or not.

Jai Singh and others v. *Emperor*, A.I.R. (1918) Lah. 148, referred to.

Retrial Ordered.

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* Criminal Appeal No. 540 of 1954 being Appeal from the order of the Special Judge (Sessions) of Shwebo, dated the 30th day of September 1954 passed in the Special Judge Trial No. 5 of 1954.

H.C. 1954

MAUNG BA CHOKE *alias* BOH THAN-MA-NI *v.* THE UNION OF BURMA.

Ba Shun, Advocate for the appellant.

Ba Pe (Government Advocate) for the respondent.

U AUNG THA GYAW.—The appellant Ba Choke *alias* Boh Than-ma-ni was convicted of offences falling under section 395 of the Penal Code and section 17 (*1*) of the Unlawful Associations Act and was sentenced to transportation for life on the first charge, and to 3 months' rigorous imprisonment on the second charge. The date of commission of the offences is said to fall in the first week of July 1949 and clearly the charge brought against the appellant under section 17 (*1*) of the Unlawful Associations Act cannot be sustained. The charge-sheet itself makes no clear mention of the appellant's membership of any known illegal association. However, in the judgment reference is made to Ba Choke as being a member of the White P.V.O. Organisation. If this be so, no offence would appear to have been committed by the appellant as this Organisation was not declared illegal till 21st October 1953. See the *Burma Gazette*, dated 31st October 1953, Notification No. 758 of the Ministry of Home Affairs.

It has been put forward on the appellant's behalf that the joinder of the charge brought under a special law with the charge of dacoity punishable under the Penal Code has vitiated the trial of the appellant as being contrary to the mandatory provisions of sections 233, 234, 235, 236 and 239 of the Criminal Procedure Code. Section 233 prescribes that for every distinct offence of which any person is accused, there shall be a separate charge, and every charge shall be tried separately, except in cases mentioned in sections 234, 235, 236 and 239. Section 234 refers to a person accused of more offences than one

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U AUNG THA GYAW, J.

of the same kind committed within the space of twelve months. Section 236 refers to a single act or series of acts constituting one or more offences. Section 239 deals with joint trial of several persons. The section relevant for the present purpose would appear to be section 235. It reads:

"(1) 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.

(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences. . . . . ."

To justify the appellant being tried at one trial on two different charges it must appear that these offences were so connected together as to form the same transaction. Now, if the accused person was a member of the P.V.O. Organisation at the time he committed the offence of dacoity, his membership of the organisation must have commenced at some time antecedent to the venture in which the present offence of dacoity was committed. It cannot be said that joining the P.V.O. Organisation at some time anterior to the commission of the offence of dacoity by the appellant had any connection whatever with the said offence. If the formation of an illegal organisation was immediately followed by the commission of criminal offences, the approximity in time, the unity of purpose and continuity of action disclosed thereby might possibly justify the two different charges like the present being tried at the same trial under section 235 of the Code. But this cannot be said of the offences now alleged against the appellant. The two criminal acts

attributed to the appellant are not related in point of purpose as cause and effect or as principal and subsidiary acts so as to constitute one continuous act to justify the assumption that they form the same transaction. See *Raj Kishore Tewari and others* v. *Emperor* (1).

There is no doubt that there has been misjoinder of charges in the present case and it is necessary to consider what effect this would have on the legality of the appellant's trial. This point was dealt with in *K. Ramaraju Tevan and another* v. *Emperor* (2):

" No doubt ever since the pronouncement of the Judicial Committee in *N. A. Subramania Iyer* v. *Emperor* (3) 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 *Subramania Iyer* v. *Emperor* (3), in *Abdul Rahman* v. *Emperor* (4) 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. "

This Court following Abdul Rahman's case, took a similar view of the procedural error noticed in *Sein Hla* v. *Union of Burma* (5) it being held that the defect of procedure in that case was not so serious as to have occasioned a failure of justice or caused prejudice to the accused. But in *Babulal Choukhani* v. *King-Emperor* (6) the Privy Council observed :

" It has been taken as settled law on all sides throughout these proceedings that the infringement of section 239 (*d*) would if made out constitute an illegality, as distinguished

(1) A.I.R. (1949) All. 139.
(2) A.I.R. (1930) Mad. 857 at 858.
(3) (1902) 25 Mad. 61.
(4) 5 Ran. 53 (P.C.).
(5) B.L.R. (1951), 289.
(6) I.L.R. (1938) 2 Cal. (P.C.) 295.

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from an irregularity, so that the conviction would require to be quashed under the rule stated in *Subramania's case* as contrasted with the result of an irregularity, as to which *Abdul Rahman's* case is an authority."

The Privy Council next observed in *Pulukuri Kottaya* v. *The King-Emperor* (1):

"When a trial is conducted in a manner different from that prescribed by the Code (as in *N. A. Subramania Ayyar's* case) the trial is bad, and no question of curing an irregularity arises, but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under section 537, and nonetheless so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code."

In the present case, the trial was conducted in a manner not warranted by the Code of Criminal Procedure and as was noticed in *Subramania's case*, the irregularity went to the root of the trial which in the circumstances of the present case must be considered to be wholly bad irrespective of the question whether there was any actual prejudice to the accused or not. See *Rex* v. *Daya Shanker Jaitly* (2). The acquittal of the appellant on the charge under the special Act cannot cure this illegality—see *Jai Singh and others* v. *Emperor* (3). This being the case, the conviction and sentences passed on the appellant will be set aside and it is ordered that the appellant be re-tried in the Court of the Special Judge, Shwebo.

(1) I.L.R. (1948) Mad. (P.C.) p. 1. (2) I.L.R. (1950) All. 1256 at 1274.
(3) A.I.R. (1918) Lah. 148.

APPELLATE CRIMINAL

Before U Chan Tun Aung, C.J. and U San Maung, J.

MAUNG BA HTU (*alias*) NGA HTU AND ANOTHER (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

H.C. 1955 — *Apl. 5.*

Penal Code, ss. 364, 302 (1) (b), 34—Absence of murdered body—Strongest possible evidence of factum of murder essential—Offence under s. 364, when arises—S. 365, Penal Code.

Where the body of the person said to have been murdered is not forthcoming, strongest possible evidence as respect the factum of murder at the hand of the accused concerned is essential.

Adu Shikdar v. *Queen-Empress*, (1885) I.L.R. 11 Cal. 635 ; *Bhandhu and another* v. *King-Emperor*, (1924) A.I.R. 11 All. 662 ; *Asam Ali* v. *Emperor*, A.I.R. (1929) All. 710 at 717, referred to.

The offence under s. 364 of the Penal Code arises only when the prosecution establishes the kidnapping of the person concerned with a view to that person being murdered or put in danger of being murdered. In the absence of such facts, the offence of mere kidnapping cannot fall within the purview of the said section

Maung Han and others v. *The King*, (1947) R.L.R. 371, referred to.

Conviction altered to one under s. 365, Penal Code.

Than Sein for the appellants.

Ba Pe (Government Advocate) for the respondent.

The judgment of the Bench was delivered by

U CHAN TUN AUNG, C.J.—The two appellants Maung Ba Htu (*a*) Nga Htu and Nga Maung (*a*) Maung Maung were found to have been guilty of offences under section 364, and section 302 (1) (*b*) read with section 34 of the Penal Code for the alleged abduction and murder of one Nyan Bo, and each was

* Criminal $\frac{\text{Appeal No. } 92}{\text{Reference No. } 7}$ of 1955, being appeal from the order of the 1st Special Judge of Mergui in Criminal Trial No. 10 of 1954.

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sentenced to suffer 10 years' rigorous imprisonment on the first charge, and to suffer death on the second charge by the Special Judge, Mergui, in his Criminal Regular Trial No. 10 of 1954. The circumstances as disclosed by the prosecution leading to the conviction and sentence of the two appellants are briefly, as follows :

The two appellants belonged to Mazaw village within the jurisdiction of Mergui Police Station and so was the deceased Nyan Bo, who was a Karen. On the 5th of March 1954 at about noon while Nyan Bo was in the house of one Ma Bwint (PW 3) of the same village, appellant Nga Htu accosted Nyan Bo and asked Nyan Bo to accompany him for a stroll in the village. Nga Htu had a *dah* with him at that time. According to Ma Bwint (PW 3), Nyan Bo went down the house and went towards Nga Htu. As soon as these two persons got on the road Nga Htu was seen attacking Nyan Bo with the *dah* which he had brought with him. Nyan Bo then ran towards the house of one Ma Kyin Mya Shwe (PW 2) which was next door to Ma Bwint's. At that moment the second appellant Nga Maung appeared on the scene and he was seen going towards Ma Kyin Mya Shwe's house and bringing back Nyan Bo to the road. Thereafter, according to Maung Tin (PW 4), the three persons, namely the two appellants and the deceased Nyan Bo walked away towards the south of the village where there was a creek. Nyan Bo was in front while the two appellants followed him from behind, all walking at an ordinary pace. Since that day, Nyan Bo disappeared. He was no more to be found in the village of Mazaw. Karen Affairs Officer of Mergui, Saw Shwe Lay (PW 1), said to be the uncle of Nyan Bo, after making some enquiries from Ma Kyin Mya Shwe and Ma

Bwint lodged the First Information Report at the Mergui Police Station against Nga Htu and Nga Maung. The investigation of the case was taken up by U Hla Pe (PW 12) a Sub-Inspector of Police of Mergui Police Station. He examined Ma Kyin Mya Shwe (PW 2), Ma Bwint (PW 3), Maung Tin (PW 4) and some other witnesses, and after apprehending the appellants, sent up the case for trial. We may however note here that no attempt whatever was made by the investigating officer or by Saw Shwe Lay, the Karen Affairs Officer of Mergui, to find out the whereabouts of Nyan Bo, nor was any attempt made to examine the village stream towards which Nyan Bo was seen to have been led away by the two appellants. In fact, there is nothing on the record to indicate whether the stream and its neighbouring places had been properly searched and scoured with a view to find out whether Nyan Bo was really dead or alive. It appears to us that everybody had assumed that since Nyan Bo was not seen in the village again he had been done to death by the two appellants.

On the strength of the testimony of the eye-witnesses who spoke about seeing the attack made by Nga Htu on Nyan Bo, and also about Nga Maung, the second appellant, accompanying Nga Htu, and Nyan Bo when they walked away towards the village stream and on the assumption that Nyan Bo had been done to death by the two appellants—since he was not seen in the village again—the learned trial Judge charged the two appellants under two counts as aforesaid.

Both the appellants gave evidence on oath and their defence was a total denial. They also set up a plea of *alibi*. This defence was rejected and the trial Judge considered that a strong circumstantial

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evidence was available for holding that the two appellants after assaulting the deceased, abducted him and then took him into the jungle nearby and there murdered him. The trial Judge further held in effect that non-discovery of the dead body of Nyan Bo was immaterial to sustain the conviction of murder as against the appellants.

In this appeal it has been urged that the murder of Nyan Bo by the two appellants has not been conclusively proved. It is further contended that, in a case where the body of the person said to have been murdered is not forthcoming, strongest evidence as respect the factum of murder at the hand of accused concerned is essential before the accused can be convicted of the said offence.

In support of these submissions our attention has been drawn to the following decisions :—*Adu Shikdar* v. *Queen-Empress* (1), *Bhandhu and another* v. *King-Emperor* (2) and *Azam Ali* v. *Emperor* (3). There is considerable force in these submissions. A perusal of the decisions cited by the learned counsel leave us convinced that although by the absence of dead body or non-discovery of body of the murdered person, it might under certain circumstances, sustain a conviction of an accused person for murder; yet in the particular circumstances obtaining in the present case, and especially in view of the failure on the part of the authorities concerned in not even making an attempt to search the stream and its neighbourhood towards which Nyan Bo was last seen walk away leisurely with the two appellants, it will be impossible for us in a matter in which the life and death of accused persons are concerned, " to leap a gap in the prosecution evidence and to arrive by a

(1) (1885) I.L.R. 11 Cal. p. 635. (2) (1924) A.I.R. All. p. 662.
(3) A.I.R. (1929) All. p. 710 at 717.

process of speculation at a conclusion which there is no evidence to justify ".

Furthermore, what was seen by the so called eye-witnesses for the prosecution merely referred to their having seen appellant Nga Htu alone attack Nyan Bo and appellant Nga Maung joining him later when he and Nyan Bo walked away towards the jungle stream.

It appears to us to be very strange that even after the *dah*-attack made by Nga Htu, Nyan Bo was seen walking leisurely along with the two appellants. From this circumstance it seems to us that Nyan Bo did not receive any severe injury. There appears to be a bit of exaggeration on the part of some eye-witnesses for the prosecution. No doubt, since that incident Nyan Bo was absent from the village but it does not by that fact alone exclude the reasonable possibility of Nyan Bo being still alive; or even if it can be reasonably assumed that Nyan Bo is dead, it will not in our opinion be safe for us to conclude by a process of speculation—so to say—in the absence of strongest possible evidence that Nyan Bo has been murdered, and that the murder was perpetrated by the appellants. For the aforesaid reasons we are not fully satisfied beyond reasonable doubt, that the two appellants were concerned in causing the death of Nyan Bo, and that the charge of murder has been brought home against them. However, the question remains as to what offence the appellants have committed on the facts as deposed to by some of the prosecution witnesses. There can be no doubt that from the eye-witnesses' account of the incident the appellant Nga Htu first of all attacked Nyan Bo with a *dah* and then Nga Maung joined in, and that soon after both took away Nyan Bo towards south of the village. This forcible act on the part of the appellants certainly constituted an offence of abduction

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within the ambit of section 362 of the Penal Code. But this leave us the question whether in the circumstances obtaining in the case, an offence under section 364 or section 365 of the Penal Code has been made out against the two appellants. The offence under section 364 of the Penal Code arises only when the prosecution establishes the kidnapping of the person concerned with a view to that person being murdered or put in danger of being murdered. In the absence of such facts, the offence of mere kidnapping cannot fall within the purview of the said section—see *Maung Han and others* v. *The King* (1). As have been observed by us, in this case, there is no tangible evidence from which we can safely conclude that the two appellants had forcibly kidnapped Nyan Bo with a view to Nyan Bo being murdered or disposing him of by putting him in danger of being murdered. The most we can infer from available evidence is that the two appellants kidnapped Nyan Bo with a view to wrongful confinement within the mischief of section 365 of the Penal Code. That being our view of the case, we must set aside the conviction and sentence of 10 years' rigorous imprisonment under section 364 of the Penal Code and also the conviction and sentence of death under section 302 (1) (*b*) read with section 34 of the Penal Code imposed upon on each of the appellants, and in lieu thereof, we enter a conviction on each of them under section 365 of the Penal Code read with section 34 thereof, and we direct that each of the appellants do suffer 7 years' rigorous imprisonment.

U SAN MAUNG, J.—I agree.

(1) (1947) R.L.R. p. 371.

APPELLATE CRIMINAL.

Before U Ba Thoung, J.

MAUNG BA ZAN AND ANOTHER (APPLICANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

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Mar. 22.

Sanction—Acquittal under s. 409, 409/114, Penal Code for want of—Subsequent prosecution under s. 4 (1) (d) read with s. 4 (2) of the Suppression of Corruption Act, 1948, with sanction—Applicability of principle of autrefois acquit—*S. 403, Criminal Procedure Code.*

The applicants who are police officers were prosecuted under s. 409/409/114, Penal Code and were acquitted for want of sanction.

They were subsequently prosecuted with sanction and charged under s. 4 (1) (*d*)/4 (2), Suppression of Corruption Act, 1948

On an application to quash the charge on the principle of *autrefois acquit*,

Held: The former trial was no bar to the subsequent trial under s. 403, sub-s. (2) of the Criminal Procedure Code.

Maung Po Chit and one v. *The Union of Burma*, (1948) B.L.R. 175, followed; *Palani Goundan and another* v. *Emperor*, A.I.R. (1925) Mad. 711; *Emperor* v. *Munnoo*, A.I.R. (1933) Oudh 470, referred to.

Tha Tun Khine and *Tun Aung* (2) for the applicants.

U Chit (Government Advocate) for the respondent.

U BA THOUNG, J.—These Revision applications arise out of Criminal Regular Trial No. 24 of 1954 of the Court of the 3rd Additional (Special Power) Magistrate, Hanthawaddy in which the two applicants have been charged under section 4 (1) (*d*) read with section 4 (2) of the Suppression of Corruption Act,

* Criminal Revision No. 216 (B)/219 (B) of 1954 being Review of the Order of U Ko Ko Gyi, 3rd Additional Magistrate (Special Power) of Hanthawaddy, dated the 1st day of November 1954, passed in Criminal Regular Trial No. 24 of 1954.

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U BA THOUNG, J.

1948 (as amended by Act No. 16 of 1951) for having committed an act of misconduct in respect of 6½ drums of petrol entrusted to them.

In Criminal Regular Trial No. 94 of 1952 of the Court of the 2nd Additional (Special Power) Magistrate of Syriam, the same applicants and one Maung Myo Nyun were tried under section 409; 409/114 of the Penal Code and Maung Myo Nyun was discharged while the applicants Maung Ba Zan and Maung Pe Khin were acquitted.

The applicants have come up for revision to quash the charges framed against them under section 4 (*1*) (*d*) read with section 4 (*2*) of the Suppression of Corruption Act, 1948 (as amended by Act No. 16 of 1951) by the 3rd Additional (Special Power) Magistrate, Hanthawaddy in his Criminal Regular Trial No. 24 of 1954, on the ground that their acquittal under section 409; 409/114 of the Penal Code in Criminal Regular Trial No. 94 of 1952 has operated as a bar to the subsequent prosecution in the present case on the principle of *autrefois acquit* as contemplated in section 403 of the Criminal Procedure Code.

It cannot be denied that at the time the applicants were prosecuted under section 409/114 of the Penal Code in Criminal Regular Trial No. 94 of 1952 in the Court of the 2nd Additional Magistrate, Syriam, no sanction had yet been obtained to prosecute these applicants, under section 4 (*1*) (*d*)/4 (*2*) of the Suppression of Corruption Act, 1948, and therefore that Court was not competent to try the case against the applicants under the Suppression of Corruption Act, 1948 for want of sanction. Therefore I cannot accept the contention that Criminal Regular Trial No. 94 of 1952 would bar the prosecution against the applicants in the present case in Criminal Regular

Trial No. 24 of 1954. In the case of *Maung Po Chit and one* v. *The Union of Burma* (1) it has been held that where an accused person was acquitted in a trial for an offence under section 19 (*f*) of Arms Act, on the ground of the absence of sanction of the District Magistrate, section 403 of the Code of Criminal Procedure does not bar a subsequent prosecution with the sanction of the District Magistrate for the same offence, as the Court was not acting as a Court of competent jurisdiction when he took cognizance at the time of the first trial with sanction. In the above case the acquittal of the accused was for want of sanction and the subsequent trial of the accused was for the same offence after sanction had been obtained ; the present case is even stronger as the charge against the applicant although it relates to the same property, was in respect of a distinct offence for which sanction for prosecution had not yet been obtained. The applicants who are Police Officers were charged because after seizing 6½ drums of petrol they did not make a search list and they did not mention in the First Information Report about the property seized ; nor did they mention anything about them in their daily diaries in accordance with their duties, and for those accounts they were charged for an offence under section 4 of the Suppression of Corruption Act, 1948. The offences alleged against them in the present case are distinct from the offences of which they had been charged and acquitted in the other case in Criminal Regular Trial No. 94 of 1952. I am therefore of the view that section 403 clause (2) of the Criminal Procedure Code would be applicable in the present case, and that Criminal Regular Trial No. 94 of 1952 would not bar the subsequent trial of the

(1) (1948) B.L.R 175.

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applicants in Criminal Regular Trial No. 24 of 1954.

In the case of *Palani Goundan and another* v. *Emperor* (1) also, it has been held that section 403 clause (4) allows a second prosecution for an offence constituted by the same acts if the Court by which the first case was tried was not competent to try the offence subsequently charged, and that section 403 does not apply to such cases. It has also been held in the case of *Emperor* v. *Munnoo* (2) where three persons are at various times in possession of the stolen revolver, the fact that they are convicted in respect of its possession under section 411 I.P.C. or under section 414, I.P.C. is no bar to their being convicted in respect of it under section 19 (*f*), Arms Act, also. For the above reasons I hold that the Criminal Regular Trial No. 94 of 1952 of the Court of the 2nd Additional (Special Power) Magistrate of Syriam against the applicants would not bar their subsequent trial in Criminal Regular Trial No. 24 of 1954 of the Court of the 3rd Additional (Special Power) Magistrate, Hanthawaddy. These revision applications therefore fail and they are dismissed.

(1) A.I.R. (1925) Mad. 711.

(2) A.I.R. (1933) Oudh 470.

APPELLATE CIVIL.

Before U San Maung, J.

MAUNG CHIT PE (APPELLANT)

v.

U KYAW SHEIN AND ANOTHER (RESPONDENTS).*

H.C. 1955

Feb. 15.

Application under s. 14 (1), Urban Rent Control Act, 1948, for rescission of decree—S. 11 (1) (d) as a shield by landlord—Controller's certificate under s. 14-A unnecessary.

The Respondents obtained a decree for ejectment and for K 545 as arrears of rent against the appellant who made an application under s. 14 (*1*) of the Urban Rent Control Act for the rescission of the Decree.

Respondents opposed the application on the ground that the land was required by them *bonâ fide* for their own occupation.

Trial Court held that the landlord could invoke s. 11 (*1*) (*d*) of the Urban Rent Control Act as a shield in a case where the tenant applied for rescission of an ejectment decree, which finding was upheld by the lower appellate Court.

On second appeal, it was contended by the appellant that in the absence of a Controller's Certificate under s. 14-A, the provision of s. 11 (*1*) (*d*) could not be used as a shield.

Held : S. 14-A of the Urban Rent Control Act is explicit in that the Certificate therein mentioned is required only when the landlord files a suit for the ejectment of a tenant or a person permitted to occupy under s. 12 (*a*) on the ground specified in clauses (*d*), (*e*) or (*f*) of s. 11 or clause (*c*) of s. 13.

When the provisions of clause (*d*), (*e*) or (*f*) of s. 11 are invoked as a shield to an application under s. 14 (*1*) such a Certificate is not necessary.

Tai Chuan & Co. v. *Chan Seng Cheong*, (1949) B.L.R. 89, followed ; *U Ko Yin* v. *Daw Hla May*, Special Civil Appeal No. 1 of 1949 (H.C.).

Tun Aung (2) for the appellant.

Tun Maung for the respondents.

U SAN MAUNG, J.—In Civil Regular suit No. 143 of 1951 of the Township Court of Mandalay the plaintiff U Kyaw Shein and Daw Paw, who are the respondents in the present appeal, obtained a decree

* Civil 2nd Appeal No. 13 of 1953. against the decree of the District Court of Mandalay (Mr. K C. Singh) in Civil Appeal No. 29 of 1952 arising out of Civil Misc. Case No. 10 of 1952 of the Township Court of Mandalay.

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U SAN MAUNG, J.

for the ejectment of the defendant-appellant Maung Chit Pe from the land in suit and for recovery of Rs. 545 as arrears of rent. This decree was confirmed by the District Court on appeal. Subsequently, in Civil Miscellaneous case No. 10 of 1952 of the Township Court of Mandalay the appellant made an application under section 14 (*l*) of the Urban Rent Control Act for the rescission of the decree on such terms as to the payment of arrears of rent as the Court might impose. This application was opposed by the plaintiff-respondents on the ground that the land was required by them *bonâ fide* for the purpose of erecting a building for their own occupation. The learned Township Judge relying upon the *dictum* of the Supreme Court in *Tai Chuan & Co.* v. *Chan Seng Cheong* (1) held that the landlord could invoke the provisions of section 11 (*l*) (*d*) of the Urban Rent Control Act as a shield in a case where the tenant applied for rescission of the ejectment decree. On the facts the learned Judge held that the land was required *bonâ fide* by the plaintiff-respondent U Kyaw Shein for the purpose of erecting a building for his own occupation. He therefore dismissed the defendant-appellant's application for the rescission of the decree. On appeal to the District Court of Mandalay the learned District Judge relying on the observations of a Bench of this Court in *U Ko Yin* v. *Daw Hla May* (2) dismissed the appeal. Hence a second appeal to this Court by the defendant under the provisions of section 100 of the Civil Procedure Code.

It is contended on behalf of the appellant that the learned Judges of the two Courts below have failed to take into consideration the fact that the respondent has not yet obtained a certificate from

(1) (1949) B.L.R. p. 89. (2) Special Civil Appeal No. 1 of 1949 (H.C.).

the Controller under section 14-A of the Urban Rent Control Act that he was really in need of the land for the purpose of erection of a building and that in the absence of such a certificate the respondent should not have been permitted to use the provisions of section 11 (*l*) (*d*) as a shield. The same argument has, however been advanced by the learned Advocate for the appellant in *Tai Chuan & Co.* v. *Chan Seng Cheong* (1) before the Bench of which I happened to be a member and the same has been rejected by the Court. In this connection the following observations on page 93 of the report are apposite :—

"The learned counsel for the appellant company however submits that relief under section 11 (*l*) (*f*) can be given only in a suit filed by an owner for ejectment of a tenant or for recovery of possession of his building but before he can file such a suit he must get a certificate from the Controller as provided by section 14-A that he (the owner) really needs the building for his occupation as a residence. According to the learned counsel section 11 (*l*) (*f*) does not apply to a case where a tenant applies to have the order of ejectment passed against him rescinded or discharged. It is true that the Act is silent on this point but the general principle is that were there is an obligation there is always an implied remedy or relief. As pointed out above, the whole object of the Act is to give relief not only to tenants but to owners as well under certain circumstances, and if relief were to be denied under section 11 (*l*) (*f*) when the tenant applied to have the order of ejectment passed against him rescinded it would mean not only frustrating the object of the Act but a denial of justice to the owner. The Legislature in framing the Urban Rent Control Act, 1948, never intended to have such a result as contended for by the learned counsel for the appellant company. We are clearly of opinion that section 11 (*l*) (*f*) can not only be used, so to speak, for the purpose of offence in a suit filed by the owner but also as a shield in a case where the tenant applies to have the order of ejectment passed against him discharged or rescinded."

(1) (1949) B.L.R. p. 89.

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MAUNG CHIT PE v. U KYAW SHEIN AND ANOTHER.

U SAN MAUNG, J.

These observations apply equally well to a case where the landlord seeks to resist an application under section 14 (*l*) of the Urban Rent Control Act by recourse to the provisions of section 11 (*l*) (*d*).

Besides, section 14-A of the Urban Rent Control Act is explicit in that the certificate therein mentioned is required only when the landlord files a suit for the ejectment of a tenant or a person permitted to occupy under section 12 (1) on the grounds specified in clauses (*d*), (*e*) or (*f*) of section 11 or clause (*c*) of section 13. It does not say that when the provisions of clauses (*d*), (*e*) or (*f*) of section 11 are invoked as a shield to an application under section 14 (*l*) such a certificate is necessary.

In the result the appeal fails and must be dismissed with costs, Advocate's fees three gold mohurs.

APPELLATE CRIMINAL.

Before U Bo Gyi, J.

MAUNG PU AND ANOTHER (APPLICANTS)

v.

MAUNG KYI MAUNG AND ANOTHER (RESPONDENTS).*

H.C. 1955

Feb. 17.

Criminal Revision by private person—Enhancement of sentence.

Held : There is nothing in the Criminal Procedure Code which either expressly or impliedly prevents the Hight Court from enhancing a sentence at the instance of a private person.

Ba Shun for the respondents.

Kyaw Thaung (Government Advocate) for the applicants.

U BO GYI, J.—This is an application by private persons, U Maung Pu and Maung Tin Maung, father and son for enhancement of the sentences on respondents Maung Kyi Maung and Kyin Po who have been convicted by the 3rd Additional Magistrate, Toungoo, under section 324 of the Penal Code and sentenced to imprisonment till the rising of the Court and a fine of K 75 each or 6 months' rigorous imprisonment.

Originally, respondents' sister Ma Kyin Ki was sent up along with them but was acquitted. The brief facts of the case are that. On the 21st February 1954 about 1 p.m. applicant Maung Tin Maung was sent by his father U Maung Pu to get a

*Criminal Revision No. 203 (B) of 1954, being Review of the order of U Hla Tun, 3rd Additional Magistrate of Toungoo. dated the 31st day of July 1954 passed in Criminal Regular Trial No. 1 of 1954.

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MAUNG PU AND ANOTHER v. MAUNG KYI MAUNG AND ANOTHER.

U BO GYI, J.

sale deed of a piece of land signed by Daw E Byu whose house was about a furlong distant from his house. The house of the respondents was in between those two houses. Maung Tin Maung went off on a bicycle, and shortly afterwards returned with two *dah*-cuts on his person, one in the right cheek and the other in the right hand. There is reliable evidence to show that Tin Maung mentioned the names of the respondents to his father and within a few hours the latter laid a report at the Police Station. The headman U Sa Gyi (PW 6) together with other persons was at Tin Maung's house at the time and U Sa Gyi immediately went over to respondents' house to make enquiries. There are certain variations introduced in the prosecution evidence by certain witnesses, apparently from motives of their own, some saying that Tin Maung could only make inarticulate sounds and others that Tin Maung mentioned only respondent Kyi Maung and his sister Ma Kyin Ki. The fact that Tin Maung's father reported at the Police Station three hours after the incident that Tin Maung had been cut with *dahs* by the respondents clearly shows that Tin Maung denounced the respondents as his assailants.

The occurrence took place in broad daylight and I see no reason to distrust Tin Maung's evidence as to the identity of his assailants. Maung Ohn Pe (PW 4) who professes to have seen the attack on Tin Maung by the respondent has been disbelieved by the learned Magistrate. The reason given by the Magistrate for distrusting the evidence of this witness appears to me to be inadequate. In any case, however, I see no reason to distrust the evidence of Tin Maung which is corroborated by that of his father U Maung Pu who forthwith lodged a report with the Police.

The defence evidence has been adequately discussed by the learned Magistrate and I consider that it fails to rebut the case for the prosecution.

The learned Magistrate charged the respondent Kyi Maung under section 326 of the Penal Code and respondent Kyin Po under section 324 of the Code. At the close of the trial, however, he considered that the offence committed by Kyi Maung did not come within the ambit of section 326 of the Penal Code inasmuch as the injury received by Tin Maung in the cheek was not such as to disfigure his face permanently. The learned Sessions Judge disagreed with this view. The learned Magistrate had apparently overlooked the medical evidence that Tin Maung's life was in danger at the time of his admission to hospital because Tin Maung was suffering from a severe shock and bleeding profusely.

In this case, the Government has appeared and supported the recommendation of the learned Sessions Judge for enhancement of the sentences on the respondents and, furthermore, I consider that for the wanton attack made by the respondents on Tin Maung the punishment inflicted on them was manifestly inadequate both in respect of the merits of the case and as a deterrent. Consequently, while I am reluctant to enhance a sentence on revision, particularly at the instance of a private person, I feel that enhancement must be ordered in this case. There is nothing in the Criminal Procedure Code which either expressly or impliedly prevents the High Court from enhancing a sentence at the instance of a private person.

For all the above reasons, I direct that the sentences passed on the respondents be set aside and in lieu thereof the respondents will be sentenced to 25 (twenty-five) lashes of whipping each. The fine which have been paid in will be refunded to them.

CIVIL APPELLATE.

Before U Aung Khine, J.

H.C. 1953

Feb. 10.

N. K. VAIDYO (APPELLANT)

v.

MA THAN KHIN AND ANOTHER (by their duly constituted Agent Daw Thwai Yin) (RESPONDENTS).*

Rent Control Order No. 1 of 1945, s. 6—Claim for repairs voluntarily carried out by tenant, unrecoverable

Everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy.

Saleh Ebrahim v. *Cowasjee*, A.I.R. (1924) Cal. 57, distinguished ; *S. Raja Chetty and another* v. *Jagannathadas Govindas and others*, A.I.R. (37) (1950) Mad. 284, affirmed.

Under the Assam Urban Areas Rent Control Act, 1949. A tenant can contract himself out of the privilege allowed to him.

Satish Chandra Ray Chaudhury v. *Bimalendu Sen and another*, A.I.R. (38) (1951) Assam 27, referred to.

A tenant cannot be reimbursed for repairs done voluntarily to premises on the ground that the landlord has benefited by the said repairs.

P. B. Sen, Advocate for the appellant.

Tun I, Advocate for the respondents.

U AUNG KHINE, J.—This is a second appeal against the judgment and decree of the District Court of Amherst in Civil Appeal No. 7 of 1950, modifying the judgment and decree of the First Assistant Judge, Moulmein, in his Civil Regular Suit No. 13 of 1949.

It is not necessary for me to recapitulate the facts of the case in detail as both the trial Court and the lower appellate Court have exhaustively dealt

* Civil 2nd Appeal No. 28 of 1952, against the decree of the District Court of Amherst (K Ngvi Peik) in Civil Appeal No 7 of 1950, dated the 20th Febuary 1952, modifying the judgment and decree of the 1st Assistant Judge, Moulmein (U Hla Htoon), in Civil Regular Suit No. 13 of 1949, dated the 10th August 1950.

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N. K. VAIDYO v. MA THAN KHIN AND ANOTHER (BY THEIR DULY CONSTITUTED AGENT DAW THWAI YIN).

U AUNG KHINE, J.

with them. I will, therefore, set out now in this judgment only the salient facts and they are as follows: The appellant N. K. Vaidyo is the tenant of the respondents Ma Than Khin and Ma Mya Than, occupying a three-storeyed pucca building known as No. 275, Lower Main Road, Moulmein. The tenancy was created some time in October 1945 soon after World War Two. The premises then, as a result of the ravages of war, was in a state of disrepair and the owners were unwilling to defray the cost that would entail to have it restored to a habitable condition. However, on the stipulation that the appellant would himself do the necessary repairs to it, the house was rented out to him by the respondents. In the suit for ejectment and recovery of arrears of rent due the appellant filed a counter-claim of Rs. 2,081 being the amount he had spent in the repair of the house, together with his written statement. This counter-claim was disallowed by both the lower Courts.

The suit was strenuously contested and one of the main issues in it was whether there was an agreement between the parties that the appellant should repair the house at his own expense and adjust the cost thereof against the rent accruing. On this issue there has been a concurrent finding against the appellant.

The lower appellate Court also held that the counter-claim was barred by limitation.

It is contended now in this appeal that in spite of this concurrent finding on facts as regards the agreement relating to the reimbursement of the amount he had spent on repairs the appellant, in view of the provisions in section 6 of the Rent Control Order No. 1 of 1945, is legally entitled to a refund of the same.

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N. K. VAIDYO v. MA THAN KHIN AND ANOTHER (BY THEIR DULY CONSTITUTED AGENT DAW THWAI YIN).

U AUNG KHINE, J.

When this appeal came up before me some time in July 1952, it was submitted that the lower appellate Court failed to discuss the effect of the Rent Control Order No. 1 of 1945 in spite of a specific ground on this point raised in the memorandum of appeal. The case was remanded to the lower appellate Court to deal with the following issue:—

"In view of the Rent Control Order No. 1 of 1945, dated 10th December 1945, of the British Military Administration, was the alleged agreement between the parties by which the defendant N. K. Vaidyo undertook to defray the cost of repairs void initially?"

The lower appellate Court was directed to record the findings arrived at and to resubmit the proceedings to this Court. This course had to be adopted because at the time when this submission was made by the appellant the respondents were not yet represented in this appeal. The finding of the lower appellate Court is that the said agreement between the parties, in spite of the Rent Control Order No. 1 of 1945, was not void initially.

In this connection it is now submitted that the nature of the agreement was such that it had defeated the provisions of the Rent Control Order No. 1 of 1945. The learned advocate for the appellant has referred me to the case of *Saleh Ebrahim* v. *M. Cowasjee* (1), in which it was held that where the object of the lease is of such a nature that, if permitted, it would defeat the provisions of the Rent Act, the lease is void. I must, however, point out that the facts in the Calcutta case are different from those obtaining in this case. The main difference in the two cases is that whereas in the Calcutta case the lease was drawn up after the Rent Act had been in force; in the present case the

(1) A.I.R. (1924) Cal. 57.

agreement was entered into before the promulgation of the Rent Control Order No. 1 of 1945.

Even if the agreement was entered into after the passing of the Rent Control Order No. 1 of 1945, I do not think the appellant can take advantage of the provisions of section 6 of the said Rent Control Order. In *S. Raja Chetty and another* v. *Jagannathadas Govindas and others* (1), it was held that everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy. This was a case relating to a lease of a cinema hall. The lease expressly provided that if the rent remained unpaid for two tenancy months after it became payable the landlord would be entitled to re-enter upon the demised premises. In an application under section 7 (2) (i) of the Madras Act XV of 1946 by the lessor for eviction of the tenant on default of rent for one month, it it was held further that the Act did not apply as the parties had expressly entered into a contract inconsistent with it and that their rights would, therefore, be governed by their express contract.

A similar view was taken by the Assam High Court in the case of *Satish Chandra Ray Chaudhury* v. *Bimalendu Sen and another* (2). This was a case under the Assam Urban Areas Rent Control Act, 1949, and it was held in that case that there is nothing in the said Act which prevents the tenant from contracting himself out of the privilege allowed to him by the Act. Furthermore, as pointed out by the lower appellate Court, there is no provision in the Rent Control Order No. 1 of 1945 for its retrospective

(1) A.I.R. (37) (1950) Mad. 284. (2) A.I.R. (38) (1951) Assam 27.

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application. It cannot also be overlooked that there was no actual payment made by the appellant to the respondents for the repairs done to the house, and it is common ground that the repairs were done voluntarily by the appellant. The only justification pleaded for reimbursement is based on the fact that the landlords have benefited by the repairs carried out. However, I cannot persuade myself to hold that defraying cost of repairs voluntarily made is the same as payment made to the landlord for repairs done in addition to rent.

For these reasons I am of the opinion that the appellant is not entitled to get a refund of the money spent by him voluntarily in the repair of the house. Having come to this conclusion, there is no necessity for me to go into the question of limitation.

The appeal is dismissed, with costs.

APPELLATE CIVIL.

Before U Aung Khine, J.

H.C. 1955

S. SABIR HUSSAIN (APPELLANT)

v.

Mar. 1.

R. M. L. RAMANATHAN CHETTIAR (RESPONDENT).*

Simple mortgage—Waiver of security—Suit on personal covenant to repay—S. 3, Transfer of Immoveable Property (Restriction) Act, 1947—Separation of personal covenant from the mortgage—S. 24, Contract Act.

The appellant mortgaged his immoveable property to the Respondent Chettiar, a foreigner, who subsequently filed a simple money suit basing his claim on the personal covenant of the defendant to repay the loan.

The respondent's suit was decreed by the trial Court and confirmed by the lower appellate Court.

On Second appeal, it was contended that the suit transaction was initially void being in direct contravention of s. 3 of the Transfer of Immoveable Property (Restriction) Act, 1947, as the personal covenant to repay cannot be separated from the mortgage.

Held: The contract in this appeal is in two distinct parts:

(i) the personal covenant to repay the money was the first agreement and

(ii) to proceed against the mortgaged property was the second agreement.

The second agreement is a subsidiary agreement to be enforced only if the first agreement was not fulfilled. The first consideration, that is, the loan is a good one, and an agreement to repay a good loan is clearly enforceable and this good consideration must remain unaffected by the disability in the second part of the contract imposed by the Transfer of Immoveable Property (Restriction) Act.

Har Prasad Tewari v. *Sheo Gobind Tewari*, A I.R. (1922) All. 134; *A. P. Joseph* v. *E. H. Joseph*, A.I.R. (1926) Ran. 186 and *Mohammad Muzaffar Husain* v. *Madad Ali*, A.I.R. (1931) Oudh 309, distinguished.

Jarbandhan v. *Badri Narain and Musammat Ram Rati*, 45 I.L.R. All. 621; *Mohammed Shakur* v. *Gopi*, 35 Indian Cases, 202; *Mohammad Khalilur Rahman Khan* v. *Mohammad Muzammilullah Khan*, 33A.I.R. All. 466; *Dip Narian Singh* v. *Nageshar Prasad and another*, 52 I.L.R. All. 338, followed.

* Civil 2nd Appeal No. 14 of 1953, against the decree of the Resident, Southern Shan States, Court of Taunggyi in Civil Appeal No. 4 of 1953, dated the 28th day of January 1953.

H.C. 1955

S. SABIR HUSSAIN v. R.M.L. RAMANATHAN CHETTIAR.

Dr. Thein for the appellant.

K. R. Venkatram for the respondent.

U AUNG KHINE, J.—This second appeal is against the judgment and decree of the Court of the Resident, Southern Shan States, Taunggyi, confirming the judgment and decree of the Court of the Assistant Superintendent for Civil Justice, Taunggyi, in its Civil Regular Suit No. 5 of 1951-52.

The respondent R.M.L. Ramanathan Chettiar filed a suit for the recovery of Rs. 5,572-8-0, money due on a loan made on 6th November 1950 against the appellant S. Sabir Hussain. The loan made was Rs. 5,000 and Rs. 572-8-0 represents the interest due. The money was advanced on the security of an immovable property of a house lease for Lot Nos. 186 and 186-A situated in Kyaung Road, Alebaing Qr., Taunggyi Town, with all buildings standing thereon. The transaction as evidenced by Exhibit "A" was a simple mortgage but the respondent made no mention of it in his plaint and he simply based his suit on the personal covenant of the appellant to repay the loan with interest due. This could only mean that he has waived the security given altogether and has only claimed the repayment of his money by enforcement of the personal covenant. The main defence set up by the appellant is that as the transaction was void from its inception the money advanced was not recoverable. It is submitted that the transaction was void from the fact that the parties entered into an agreement which involved the transfer of immovable property in contravention of the provisions in the Transfer of Immovable Property (Restriction) Act, 1947. Section 3 of the Act reads as follows:

"Notwithstanding anything contained in any law for the time being in force, no transfer of immovable property or lease

of immovable 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."

The trial Court held that the transfer was not void because the respondent had filed his suit within one year from the date of the execution of the mortgage. This reasoning, of course, is unsound inasmuch as the restriction enforced is against transfer of any interest in immovable property to a Foreigner although the lease of such property for a term not exceeding one year is allowed. A mortgage is a transfer of interest in specific immovable property as security for the repayment of the debt and a lease is a transfer of a right to enjoy such property for a certain time, in consideration of a price paid or promised. Therefore it was incorrect to say that the Law has not prohibited the transfer of immovable property for a term not exceeding a year. Having taken the view that the mortgage was not invalid, the trial Court decreed the suit holding that the appellant was bound by his personal covenant to repay the loan with interest.

The lower appellate Court by a curious reasoning held that there was no transfer of the property as the obvious object of the mortgage Exhibit " A " was not to transfer the property to the respondent but simply to protect him from loss of his money. It is obvious that the lower appellate Court has but a hazy idea of what a mortgage under the Transfer of Property Act really means. There can be no doubt that the lower appellate Court was wrong in holding that there was no transfer of the property.

The gist of the appellant's submission in this appeal is that the suit transaction was initially void as it was made in direct contravention of the provisions of the Transfer of Immovable Property

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S. SABIR HUSSAIN v. R.M.L. RAMANATHAN CHETTIAR.

U AUNG KHINE, J.

(Restriction) Act and as the personal covenant to repay cannot be separated from the mortgage the money advanced cannot be recovered. In support of this contention the following cases were cited :—

1. *Har Prasad Tewari* v. *Sheo Gobind Tewari* (1),
2. *A. P. Joseph* v. *E. H. Joseph* (2), and
3. *Mohammad Muzaffar Husain* v. *Madad Ali* (3).

The respondent on the other hand submitted that the general rule deducible from the language of section 24 of the Contract Act is that where the illegal part of the covenant cannot be separated from the legal, the contract is altogether void but on the other hand where they can be separated the illegal part may be rejected while retaining the good. It is further contended that the contract in this case is in two distinct parts. The first part acknowledged the receipt of the loan and the promise to repay the loan and the second part contained the agreement offering a collateral security against which the mortgagee should proceed on failure of repayment of the loan. In support of this submission, the case of *Jarbandhan* v. *Badri Narain and Musammat Ram Rati* (4) is cited. In that case the defendant borrowed money from the plaintiff's father and executed a bond agreeing to repay it on a certain date. There was a further condition that if the money was not repaid on that date, the creditor could enter into possession of the defendant's cultivatory holding as a usufructuary mortgagee. The latter part of the agreement was contrary to the provisions of the Local Tenancy Act and was therefore found to be illegal. It was held that the whole contract was not illegal and the

(1) A.I.R. (1922) All. p. 134.
(2) A.I.R. (1926) Ran. p. 186.
(3) A.I.R. (1931) Oudh p 309.
(4) 45 I.L.R. All. p. 621.

plaintiff was entitled to a simple money decree notwithstanding the invalidity of the condition. This decision re-affirmed a former decision in the case of *Mohammed Shakur* v. *Gopi* (1). The case of *Mohammad Khalilur Rahman Khan* v. *Mohammad Muzammililullah Khan* (2) was also cited by the respondent to show that if a contract contains distinct covenants some of which are legal and others illegal, the Court can enforce the legal ones unless the covenants are not separable. It was also held that there is nothing in the terms of sections 23 and 24 of the Contract Act to prohibit the creditor from enforcing that part of the agreement which the borrower was competent to make.

The Rangoon Ruling purports to follow the decision in *Har Prasad Tewari* v. *Sheo Gobind Tewari* (3) and therefore it does not need to be discussed. The Allahabad case just quoted was a suit under section 68 of the Transfer of Property Act to recover the mortgaged money on the basis of a personal covenant; the transaction involved was a usufructuary mortgage of an occupancy holding. The Court held that the entire contract of the mortgage was void under section 24 of the Contract Act and therefore the personal covenant also fell along with the contract of mortgage. The primary object in the case was to put the mortgagee in possession and the right to recover the loan according to the terms of contract accrued only on failure to deliver possession. Thus it was agreed that it was only on the failure of the promisor to do an illegal act that the promisee could proceed to take action on the personal covenant.

The present case can be distinguished from the case of *Har Prasad Tewari* v. *Sheo Gobind Tewari*

(1) 35 Indian Cases p. 202. (2) 33 A.I.R. All. p. 466.
(3) A.I.R. (1922) All. p. 134.

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(3) in that the personal covenant to repay the money was the first agreement and to proceed against the mortgaged property was the second agreement. I consider the second agreement to be the subsidiary agreement to be enforced only if the first agreement was not fulfilled. The first consideration, that is the loan made, by the respondent was a good one. An agreement to repay a good loan should be clearly enforceable, and I take the view that this good consideration must remain unaffected by the disability in the second part of the contract imposed by the Transfer of Immovable Property (Restriction) Act. Here I may quote the observations of Sulaiman, J., in the case of *Dip Narian Singh* v. *Nageshar Prasad and another* (1) with which I most respectfully agree :

> "In most cases of simple mortgage there is a primary undertaking to repay the loan and there is a collateral security offered for the realisation of the amount in case of failure of payment. If the security offered includes non-transferable properties there is nothing to prevent the creditor from giving up the security altogether and claiming repayment of his money by enforcement of the personal covenant. Such a personal covenant is by no means illegal."

The transfer of immovable property in this case was purported to be made under the Transfer of Property Act and if such transfer, by the operation of the Transfer of Immovable Property (Restriction) Act, was void at its inception then there was really no mortgage and the transaction merely amounted to one of contract between the parties as evidenced by a registered document and that contract would be governed by the provisions of Contract Act. As it stands, in this case, the appellant cannot be deemed to have broken his contract so far as the Transfer of Property is concerned because of his failure to perform

(1) 52 I.L.R. All. p. 338.

that which he was by law not permitted to perform. The promise given with regard to the second portion of the agreement by which the security was offered was beyond the performance of the appellant to perform and therefore the disability in the contract was from his side. On the other hand the consideration passing from the respondent of hard cash was good and that in itself was not unlawful. I therefore do not see any reason why that part of the contract, which is the primary one and which is legal, cannot be enforced. I have striven to show that the facts in this case are just the opposite of the Allahabad case cited, in that the illegal part of the agreement in this case was to be enforced only on the failure of the lawful promise made.

For the reasons stated above, the respondent's claim to recover the loan with interest due must prevail and I am clearly of the opinion that in allowing his claim, it would not be defeating the provisions of any law.

As the mortgage was initially void, the loan cannot be held to be a secured loan. Therefore the interest allowed at the rate of 18 per cent per annum in the case is in order.

This appeal fails and it is accordingly dismissed with costs.

APPELLATE CIVIL.

Before U Pho Ohn, J.

H.C. 1955

Apl. 22.

U JONE BIN (APPELLANT)

v.

N. B. SEN GUPTA (RESPONDENT).*

Execution of decrees of original and of appellate Courts—Time fixed for payment of money.

It is a fundamental principle of law that when the appellate Court makes a decree, the decree of the original Court is merged in that of the superior Court and it is the latter decree alone that can be executed.

It is also settled law that when a time is fixed for payment by the decree of the lower Court, and the decree is affirmed on appeal, the decree capable of execution is that of the appellate Court.

Saiyid Jowal Hussain v. *Gendan Singh and others*, A.I.R. (1926) (P.C.) 93 ; *S. M. Hashim* v. *J. A. Martin*, 4 Ran. 562 ; *Ram Charan* v. *Lakhi Kant*, (1871) 7 B L.R. 704 ; *Chanshyam Lal* v. *Ram Narain*, (1909) I.L.R. Vol. 31, All. 379 ; *Ramaswami Kone* v. *Sundara Kone*, (1907) I.L.R. Vol. 31, Mad. 28 ; *Satwaji Balajiray Deshamukh* v. *Sakharlal Atmaramshet* (1914) I.L.R. Vol. 39, Bom. 175 ; *Darubhai Mithabhai* v. *Bechar Desai*, (1925) Bom. 270; *Satwaji Balajirai Deshamukh* v. *Sakharlal Atmaramshet*, (1924) I.L.R. 4 Pat. 378 ; *Panchu Sahu* v. *Muhammed Yakub and others*, (1927) A.I.R. Pat. 345 ; *Noor Ali Chowdhuri* v. *Koni Mea'i and others*, (1880) I.L.R. 13 Cal. 13 ; *Nom Narain Singh* v. *Lala Roghunath Sahai*, (1895) I.L.R. 22 Cal. 467 ; *Rup Chand and others* v. *Shamsh-ul-Jahan*, (1889) I.L.R. 11 All. 467 ; *Maung Chit Maung and one* v. *Daw Saw*, Civil Revision No. 56 of 1952 of High Court, approved.

Nyunt Han for the appellant.

Messrs. Sen and *Sen* for the respondent.

U PHO OHN, J.—In Civil Regular No. 7 of 1951 of the Court of Subdivisional Judge, Bassein, U Jone Bin, appellant-plaintiff, got a decree for ejectment

* Civil 2nd Appeal No. 27 of 1953, against the order of the District Court of Bassein in Civil Appeal No. 2 of 1953, dated the 5th March 1953, arising out of the order of the Subdivisional Court of Bassein in Civil Execution No. 9 of 1951, dated the 31st January 1953.

against N. B. Sen Gupta, respondent-defendant, in the following terms :—

"There will be a decree for ejectment with costs. However, under section 14 (*1*), Urban Rent Control Act, the defendant is ordered to pay the arrears of rent of Rs. 3,330 in five equal instalments monthly, each instalment being payable on or before the 10th day of each month with effect from the month of August, 1951. So long as the defendant complies with this order execution of the decree, if sought by the plaintiff, shall be stayed. If this condition is complied with by the defendant, the decree shall be rescinded."

Being dissatisfied with the judgment and decree the respondent appealed to the District Court, Bassein, (Civil Appeal No. 21 of 1951). On the 10th September 1951 the District Court confirmed the decree for ejectment but modified the amount of arrears of rent.

On the 22nd September 1951 the appellant took out an execution to recover costs and possession of the premises in dispute. (Civil Execution No. 9 of 1951).

On the 5th November 1951 the respondent came up to High Court for second appeal but his appeal was dismissed. (Civil Second Appeal No. 87 of 1951).

On the 14th January 1953 the Subdivisional Court, Bassein, directed the issue of warrant of ejectment on the application made by the appellant.

Before the warrant of ejectment could be executed, the respondent applied to the Subdivisional Court stating that he would pay the arrears of rent in five equal instalments as "ordered by High Court." At the same time he prayed that the warrant of ejectment might be withdrawn. His application was, however, thrown out by the Subdivisional Judge on the ground that he had broken the conditions of the original decree by making default in payments of three instalments.

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U PHO OHN, J.

Against this order the respondent appealed to the District Court.

Relying on the rulings in *Saiyid Jowal Hussain v. Gendan Singh and others* (1) and *S. M. Hashim* v. *J. A. Martin* (2) the learned District Judge held that as the original decree had been superseded by the decree of High Court and as the execution proceeding was stayed by the appellate Courts during the pendency of appeals, the respondent had not broken any condition; consequently he set aside the order of the Subdivisional Court and directed it to fix "fresh dates for payments of arrears of rent and in the meantime to give the respondent peaceful possession of the premises."

Hence, the present appeal.

It is a fundamental principle of law that when the appellate Court makes a decree, the decree of the original Court is merged in that of the superior Court and it is the latter decree alone that can be executed. I may here recall the lucid exposition given by Mr. Justice Dwarkanath Mitter in *Ram Charan* v. *Lakhi Kant* (3) of the true effect of the disposal of an appeal upon the decree of the primary Court:

> "If the decree of the lower Court is reversed by the appellate Court, it is absolutely dead and gone; if, on the other hand, it is affirmed by the appellate Court, it is equally dead and gone, though in a different way, namely, by being merged in the decree of the superior Court which takes its place for all intents and purposes; both the decrees cannot exist simultaneously."

It is also settled law that when a time is fixed for payment by the decree of the lower Court and the decree is affirmed on appeal, the decree capable of execution is the appellate decree. But the High Courts in India have no consistent decisions as

(1) A.I.R. (1926) (P.C.) 93. (2) 4 Ran. 562.
(3) (1871) 7 B.L.R. 704.

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U PHO OHN J.

to whether the time for the performance of the condition is extended or not. As far as I know there is no reported decision on the matter in Burma.

In *Chanshyam Lal* v. *Ram Narain* (1) the plaintiff claimed the principal sum of money due on a bond with interest at 30 per cent per annum and the decree of the Court of first instance directed that if the defendant deposited the money within three months from the date of its decree, he would be liable to pay interest at the rate of 12 per cent per annum and would be exempted from further liability. This decree was affirmed by the High Court and finally by the Privy Council but the time for payment was not extended.

It was held that the defendant having made default in the payment of the money within the time allowed by the first Court, he could not claim exemption from further liability and could not be allowed to pay the principal with interest at the rate of 12 per cent from the date of the Privy Council decree.

In *Ramaswami Kone* v. *Sundara Kone* (2) the decree of the lower Court provided that "on the plaintiff's paying into Court the balance of consideration, Rs. 10, within a month from this date" defendant should execute a sale deed of the said land. The money was not paid within the month and the defendant preferred an appeal after the expiry of the month. The appellate Court simply confirmed the decree of the lower Court and dismissed the appeal. Within a month of the appellate decree the plaintiff deposited Rs. 10; and applied for execution of the decree.

It was held that he was not entitled to execute the decree, as he had not made payment within the time fixed by the original decree and as the appellate decree cannot under the circumstances be held to

(1) (1909) I.L.R. Vol. 31, All. 379. (2) (1907) I.L.R. Vol. 31, Mad. 28.

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U PHO OHN, J.

have enlarged the time fixed by the original decree. The appellate decree simply confirming the original decree cannot be read as giving the plaintiff one month from the date of the decision on appeal. Such an extension can be claimed only if expressly or impliedly given by the appellate Court.

In *Satwaji Balajiray Deshamukh* v. *Sakharlal Atmaramshet* (1) the plaintiff brought a suit to recover possession of property as purchaser from defendants 1—6 and to redeem the mortgage of defendant 7. The trial Court having dismissed the suit, the appellate Court, on plaintiff's appeal, passed a decree directing the plaintiff to recover possession on payment to defendants 1—6 of a certain sum within six months from the date of its decree and then to redeem defendant 7, and on plaintiff's failure to pay within six months from the date of the decree he should forfeit his right to recover possession. All parties being dissatisfied with the decree, the plaintiff preferred a second appeal to the High Court and two sets of defendants filed separate sets of cross-objections. The High Court confirmed the decree and within six months of the date of the High Court's decree the plaintiff deposited in Court the amount payable by him and applied for execution. The original Court and lower appellate Court upheld the contention of defendant No. 7 that the plaintiff not having complied with the terms of the decree of the first appellate Court, his right to recover possession in execution was forfeited.

On second appeal by the plaintiff the Bombay High Court held that—

> "the time for executing a decree *nisi* for possession ran from the date of the High Court's decree confirming the decree of

(1) (1914) I.L.R. Vol. 39, Bom. 175.

the lower Court, for what was to be looked at and interpreted was the decree of the final appellate Court."

This decision was followed in *Darubhai Mithabhai* v. *Bechar Desai* (1).

In *Lala Gobind Prasad* v. *Lala Jugdip Sahay* (2) the Patna High Court preferred to follow the decision of the Bombay High Court in *Satwaji Balajiray Deshamukh* v. *Sakharlal Atmaramshet* (3) but dissented from the Madras High Court. In a later decision it dissented from the Bombay High Court and followed the decision of the Madras High Court. It is the case of *Panchu Sahu* v. *Muhammed Yakub and others* (4) wherein it was held that where a decree declares the right of decree-holder to get possession of property subject to the right of the judgment-debtor to redeem the property by payment of a certain sum of money within six months from the date of trial Court's decree and the judgment of the original Court was confirmed on appeal by the judgment-debtor, the time for the deposit of this amount by the judgment-debtor must be computed from the date of the trial Court's decree.

In *Noor Ali Chowdhuri* v. *Koni Meah and others* (5) the decree under section 52, Bengal Act VIII of 1869 provided that unless the amount due was paid within 15 days from the date thereof, the tenant (judgment-debtor) would be liable to ejectment. That decree was confirmed in appeal, no steps to execute it having been taken in the meantime. The tenant paid the decretal amount into Court within 15 days of the appellate decree.

It was held that inasmuch as the appellate decree must be presumed to incorporate the terms of the

(1) (1925) Bom. 270.
(2) (1924) I.L.R. 4 Pat. 378.
(3) (1914) I.L.R. Vol. 39, Bom. 175.
(4) (1927) A.I.R. Pat. 345.
(5) (1886) I.L.R. 13 Cal. 13.

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original decree, and was the only decree of which execution could be taken, the tenant (judgment-debtor) having paid the decretal amount within 15 days of that decree was protected from ejectment.

This decision was followed in *Nom Narain Singh* v. *Lala Roghunath Sahai* (1) and *Rup Chand and others* v. *Shamsh-ul-Jahan* (2).

It would thus appear that the balance of judicial opinion is in favour of the view that when time is fixed by the decree of the lower Court for payment of the money and the decree is affirmed in appeal, time runs from the date of the decree of the appellate Court. This view is more logical and reasonable; and the same view was held by U San Maung, J., in *Maung Chit Maung and one* v. *Daw Saw* (3).

The original decree under consideration fixed the dates for payments of arrears of rent not with reference to its date of decree but as the 10th of each month with effect from August 1951. This decree is " dead and gone ", as it had been superseded by the High Court's decree. There was no express direction in the original decree that execution should proceed in default of payment and this Court has also seizin of the matter. So, in the circumstances of the case and on the principle of law adduced above, fresh dates will have to be re-fixed under section 148 of the Code of Civil Procedure and it will be done in a moment. To avoid difficulty and complication this fixation of dates for payments should be done at the time of the disposal of appeals against the original decree.

I will now consider whether the respondent had broken the condition imposed under section 14 (*1*) of the Urban Rent Control Act, 1948. It was argued by the learned counsel for the appellant that the

(1) (1895) I.L.R. 22 Cal. 467. (2) (1889) I.L.R. 11 All. 67.
(3) Civil Revision No. 56 of 1952 of High Court.

respondent had committed the breach of conditions between the date on which the execution was taken out and the date on which the order was given by the High Court to stay the execution. This was also the finding of the Subdivisional Judge. On the 10th September 1951 the appeal against the original decree was dismissed by the District Court, Bassein. On the 18th September 1951 the respondent submitted to the Subdivisional Court that he would go up to High Court for second appeal and thereupon the Court gave him time till 20th October 1951 to get stay order. On the 22nd September 1951 the appellant took out the execution. But on the 20th October 1951 the Subdivisional Judge again gave the respondent another adjournment to produce the stay order. On the 30th October 1951 he recorded in his case diary that he would pass order in the execution case if the respondent could not produce the stay order by the 12th November 1951. In the circumstances it must be taken that between the 18th September 1951 and 12th November 1951 the execution case was stayed by the Subdivisional Judge himself. On the 7th November 1951 order to stay the execution was given by the High Court and it was received by the Subdivisional Court on the 10th November 1951.

So, there was no breach of condition even if the time for the performance of the condition was not extended by the supersession of the original decree by the District Court's decree.

The result is that the order of the District Court, Bassein, setting aside the order of the Subdivisional Judge for issue of warrant of ejectment is hereby confirmed. But the respondent is directed to pay the arrears of rent due by five monthly equal instalments, each instalment being payable on or before the 10th day of the month with effect from May 1955. In

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default of payment of any instalment, the appellant may proceed with his execution. But if the respondent complies with the condition, the decree for ejectment shall be discharged.

In the circumstances each party shall bear its own costs in this Court.

APPELLATE CIVIL.

Before U San Maung, J.

U LWIN (APPELLANT)

v.

MAUNG TIN AUNG (RESPONDENT).*

H.C. 1955 Mar. 2.

Partition on Re-marriage of surviving parent by children of the first marriage.

Held: It is only on the re-marriage of the surviving parent and not before, that the right of children of the first marriage to claim a partition of property arises.

They collectively acquire a vested interest in the joint property of the marriage to the extent of the deceased parent's share which is one half.

P. K. A. C. T. Chockalingam Chetty v. *Yaung Ni and others*, 6 L.B.R. 170; *Maung Po Kin and two* v. *Maung Shwe Bya*, 1 Ran. 405; *Maung Seik Kaung* v. *Maung Po Nyein*, 1 L.B.R. 23 at 28; *Maung Shwe Ywet and others* v. *Maung Tun Shein*, 11 L.B.R. 199; *Ma E Mya and another* v. *U Pe Lay and others*, 3 Ran. 281 at 287; *Shwe Po* v. *Maung Bein*, (1914) 8 L.B.R. 115; *Maung Po Kin and one* v. *Maung Tun Yin and two*, 4 Ran. 207; *Maung Sein Ba* v. *Maung Kywe and others*, 12 Ran. 55, referred to.

Tun Maung for the appellant.

Nil for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 61 of 1953 of the Township Court of Pegu, the plaintiff Maung Tin Aung who is the respondent in the present appeal sued the defendant-appellant U Lwin for a declaration that the house and site in suit belonged to him and not to his father U Nyun. It would appear that in Civil Execution No. 9 of 1953

* Civil 2nd Appeal No. 98 of 1954, against the decree of the Additional District Court of Pegu in Civil Regular Appeal No. 5 of 1954, dated the 26th June 1954 arising out of the Township Court of Pegu in Civil Regular Suit No. 61 of 1953, dated the 29th March 1954.

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of the same Court the defendant-appellant U Lwin had in execution of his decree against U Nyun attached the house and its site as the property of the judgment-debtor and an application for the removal of attachment had proved fruitless. It is the plaintiff's case that the house belonged to U Nyun and his mother (now deceased) and that when U Nyun contemplated a second marriage he had given the property orally to the plaintiff who was his only son. The learned Judge of the trial Court framed issues as to whether there was such an oral gift as alleged by the plaintiff and whether this gift was valid in law in view of section 123 of the Transfer of Property Act. Maung Tin Aung in giving evidence said that the gift was made in the presence of *lugyis* by his father about 7 years ago, prior to his second marriage. U Tun Hlaing (PW 1) and U Po Ohn (PW 2) stated that they were present at the time U Nyun made a gift of the house and its site to the plaintiff as he was desirous of contracting a second marriage. There is no rebutting evidence on this point. However, the learned Judge of the trial Court held that the provisions of section 123 of the Transfer of Property Act were applicable and that the gift could only be made by a registered document. On appeal by the plaintiff Maung Tin Aung to the Additional District Court of Pegu, the learned Additional District Judge held that the transaction was not really in the nature of a gift but that its was a partition of inheritance which could be done orally. For this view the learned Additional District Judge relied upon the rulings in *P. K. A. C. T. Chockalingam Chetty* v. *Yaung Ni and others* (1), and *Maung Po Kin and two others* v. *Maung Shwe Bya* (2). The learned Additional

(1) 6 L.B.R. 170. (2) 1 Ran. 405.

District Judge accordingly reversed the judgment and decree of the trial Court and gave a decree for declaration as prayed for by the plaintiff. Hence this second appeal by the defendant U Lwin.

On behalf of the appellant it is contended that at the time of the alleged transfer of the house and site by U Nyun to his son Maung Tin Aung, Maung Tin Aung did not have any right to claim partition of the property as his father had not yet contracted a second marriage. Furthermore, there is no specific evidence on record to show that the second marriage which U Nyun contemplated at the time of the transfer was in fact contracted. In my opinion, these contentions must be allowed to prevail. The right of children to claim a partition of property arises only on the remarriage of the surviving parent. In this connection the decisions in the following cases are apposite.

In *Maung Seik Kaung* v. *Maung Po Nyein* (1) a Bench of the Chief Court of Lower Burma has made this observation:

> " It may not be very clear from the Dhammathats now available that a son can claim a one-fourth share from his father when he lives separately and when the father does not marry again, but it is not open to reasonable doubt that when the father does marry again the eldest son, especially if he be the eldest child, can claim a one-fourth share of the general joint estate of the parents. "

In *Maung Shwe Ywet and others* v. *Maung Tun Shein* (2) it was held that while an *auratha* son cannot claim a one-fourth share of the property jointly acquired by his parents merely by reason of his mother's death, the re-marriage of his father gives him a right to claim the one-fourth share which he would not have if his father did not re-marry

(1) 1 L.B.R. p. 23 at 28. (2) 11 L.B.R. p. 199.

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In *Ma E Mya and another* v. *U Pe Lay and others* (1) Lentaigne, J., observed as follows :

"As pointed out above the claim which it is alleged that Maung Po Min had to one-quarter share on the re-marriage of his father was not a claim as *orasa* son arising on the death of a parent : but it was the entirely different claim of the eldest son to a quarter share on the re-marriage of the surviving parent.

The right to claim such quarter share on the re-marriage of the surviving parent was decided in the case of *Maung Seik Kaung* v. *Maung Po Nyein* (2) and was recognised by a Full Bench of the late Chief Court in the case of *Shwe Po* v. *Maung Bein* (3)."

In *Maung Po Kin and one* v. *Maung Tun Yin and two* (4) a Bench of the late High Court held that, at Burmese Buddhist Law, the eldest child, on the re-marriage of the surviving parents, becomes entitled to a quarter share in the joint estate of the parents, if he or she has not already taken a share as *orasa* and that on such re-marriage, the younger children become entitled collectively to a quarter share of the joint estate of the parents.

In *Maung Sein Ba* v. *Maung Kywe and others* (5), another Bench of the late High Court distinguished *Maung Po Kin*'s case and held that according to Burmese customary law on the re-marriage of a surviving parent the children of the former marriage acquire a vested interest in the joint property of that marriage to the extent of the deceased parent's share.

The effect of all these decisions is that it is only on the re-marriage of the surviving parent, and not before, that the children of the first marriage collectively acquire a vested interest in the joint

(1) 3 Ran. p. 281 at 287.
(2) 1 L.B.R. p. 23 at 28.
(3) (1914) 8 L.B.R. p.115.
(4) 4 Ran. p. 207.
(5) 12 Ran. p. 55.

property of the marriage to the extent of the deceased parent's share which is one-half.

Therefore, the transaction by which the plaintiff-respondent Maung Tin Aung made a claim to the ownership of the house and site in suit is an oral gift and not an oral partition on the re-marriage of his father, and as such invalid in law in the absence of a registered document. For these reasons I would set aside the judgment and decree of the Additional District Court of Pegu in Civil Regular Appeal No. 5 of 1954 and direct that the judgment and decree of the trial Court, dismissing the plaintiff-respondent's suit be restored with costs. Advocate's fee in this Court, three gold mohurs.

APPELLATE CRIMINAL.

Before U Aung Tha Gyaw, J.

H.C. 1955

May 18.

U LU MAW (APPLICANT)

v.

S. PURAN SINGH AND ANOTHER (RESPONDENTS).*

Penal Code, ss. 408, 411—Seizure of property and the return of same by police to Complainant—Proviso to s. 523 (1),—Criminal Procedure Code—Absence of record of the existence or disposal of the exhibits in the case—The property so disposed of still within the jurisdiction of the Magistrate—S. 517 (1), Criminal Procedure Code, subject to final orders of the Magistrate, whether under s. 517 or s. 523, Criminal Procedure Code—Exhibits though not produced before Court, deemed to be produced—Magistrate's full discretion of disposal in spite of the settled law that property must be returned to the possession of the person from whom it was seized.

The Complainant Golyan Brothers prosecuted the Respondents under ss. 408 and 411, Penal Code, respectively in respect of five bales of cotton yarn.

The Police seized the bales from the applicant and returned them to the Complainant on execution of a bond under the proviso to s. 523 (1), Criminal Procedure Code.

Apparently the exhibits were never produced in Court, nor was there any mention of their existence or disposal recorded in the proceedings.

On acquittal, the Magistrate ordered the return of the exhibits to the applicant from whose possession they were first seized by the police and this order was set aside by the Sessions Judge.

The applicant filed an application in revision.

Held : (i) The return of the exhibits to the Complainant on the execution of a bond is subject to the final orders of the Magistrate, whether under s. 517 or 523, Criminal Procedure Code ;

(ii) the property so disposed of by police did not cease to be within the jurisdiction of the Magistrate who had taken cognizance of the property. The term of s. 517 (1) of the Code would not exclude such property from the Magistrate's jurisdiction ;

(iii) the Magistrate to whom a report under s. 523 of the Code is made is the only person competent to make such order as he thinks fit regarding the disposal of the property seized by the Police. *Maung Han Thein* v. *The Commissioner of Police, Rangoon*, (1950), B.L.R. 45, followed ;

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* Criminal Revision No. 223 (B) of 1954, being Review of the order of U Tun Tin, Sessions Judge of Hanthawaddy, dated the 2nd day of November 1954 passed in his Criminal Revision Case No. 70 of 1954.

(iv) where the seizure was reported by the Police to the Magistrate and with the knowledge so derived from such report, the Magistrate proceeded to try the offence in respect of the said property it could be said that throughout the trial the said property was produced before it or was within its custody through the intermediary of the Complainant who had taken possession of the property under the bond executed by him ;

(v) a Magistrate has full discretion in the matter of disposal though ordinarily the property seized must be returned to the party from whom it was seized.

He is not bound to return it to a party who apparently has no right or title to same.

V. K. Vaivapuri Chetti v. *Sinniah Chetty*, A.I.R. (1931) Mad. 17 ; *Hoke Gwan* v. *Aung Wun Tan*, (1949) B.L.R. 647, referred to.

The applicant has no right or title to the property. The application in revision dismissed.

T. P. Wan for the applicant.

G. N. Banerji and *Ba Kyaw* (Government Advocate), for the respondents.

U AUNG THA GYAW, J.—This is an application in revision against the order of the learned Sessions Judge of Hanthawaddy passed in his Criminal Revision No. 70 of 1954 by which he had set aside an order of the 8th Additional Magistrate, Rangoon, who, in his Criminal Regular Trial No. 200 of 1951, directed at the conclusion of the trial the return of the exhibits, namely, five bales of cotton yarn, to the applicant in whose possession they were first seized by the police. The accused person in the criminal trial was Puran Singh who, according to the finding of the learned Magistrate had purchased the said five bales of cotton yarn from the Civil Supplies Department with his own money for the purpose of carrying out certain experiments on behalf of the complainant Golyan Brothers Burma Limited.

The cotton yarn of the variety bought by the accused Puran Singh was not found to be suitable for the purpose of being converted to cotton thread in

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the manufacture of which the complainant Golyan Brothers were interested and Puran Singh accordingly with the assistance of one Han Sein, now an inmate of the Mental Hospital at Tadagale, proposed to dispose of the five bales of cotton yarn before making any further purchase of cotton yarn of the suitable quality.

Han Sein accordingly contacted the present applicant who runs the Ludu Pweyone business engaged in buying and selling commodities on behalf of its clients. The five bundles of cotton yarn were left in deposit with the applicant but not before an advance of K 6,200 had been taken from the applicant by means of a cheque drawn on the applicant's bank. About half-an-hour later, after Puran Singh and Han Sein had left the applicant's premises, leaving behind the five bales of cotton yarn, the police, on a report lodged by one Ko Ko Lay, an Office Assistant in Golyan Brothers Burma Ltd., arrived on the applicant's premises and seized the five bundles of cotton yarn as property involved in the commission of the offence of criminal breach of trust.

Both Puran Singh and Han Sein were sent up for trial, one charged under section 408 of the Penal Code and the other for receiving stolen property under section 411 of the Code. In the course of the trial Han Sein went out of his mind and has since been under treatment in the Mental Hospital. The criminal proceedings, however, continued and at the conclusion of the trial Puran Singh was acquitted of the charge brought against him and the learned Magistrate ordered the return of the exhibits in the case to the applicant as being the party in whose possession they were first seized by the police.

Now, these exhibits were said to have been handed over by the police in the course of their

investigation to the custody of Golyan Brothers, the complainant in the case. Except for the order passed on 3rd December 1953 for the return of the exhibits to Ludu Pweyone, the numerous diary entries recording the progress of the trial made no mention of the fact of the existence or disposal of the exhibits in the case. The seizure of the exhibits would appear to have been reported to the Magistrate on 23rd May 1951, the day following their seizure, in the customary form (page 61 of the record) as required under section 523 (1) of the Code of Criminal Procedure and apparently acting under the proviso to this section, the police officer had arranged the return of the exhibit cotton yarn to the complainant company on the execution of a bond which, at the moment, is not traceable. Such an arrangement is, however, subject to the final orders of the Magistrate as set out in the proviso to the section. Although no order appears to have been passed by the Magistrate as required under the proviso, the property so disposed of by the police did not cease to be within the jurisdiction of the Magistrate, who, in the present case not only had cognizance of the existence of the property but also at the end of the proceedings passed his orders for its disposal. The terms of section 517 (1) of the Code would not exclude such property from the Magistrate's jurisdiction; for this section invests him with the power of passing orders in regard to the disposal of "any property or document produced before it or in its custody, or regarding which any offence appears to have been committed or which has been used in the commission of any offence."

The arrangement made by the police in regard to the disposal of the property in respect of which an offence is alleged to have been committed can never

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be regarded as final for both under sections 517 and 523 of the Code the power remains vested in the Magistrate regarding their final disposal.

The Magistrate to whom a report under section 523 of the Code is made is the only person competent to make such order as he thinks fit regarding the disposal of property seized by the police. [See *Maung Han Thein* v. *The Commissioner of Police, Rangoon* (1)]. Since the learned Magistrate had jurisdiction to pass his orders regarding the disposal of the property seized by the police, it is immaterial under which section he is deemed to have exercised his powers in the present case. Where the seizure was reported by the police to the Magistrate and with the knowledge so derived from such report, the Magistrate proceeded to try the offence in respect of the said property it could be said that throughout the trial the said property was produced before it or was within its custody through the intermediary of the complainant who had taken possession of the property under the bond executed by him.

The question which next calls for consideration is the legality of the interference exercised by the learned Sessions Judge with the order of disposal passed by the learned Magistrate. It is clear law that if no offence is found to have been committed in respect of the property seized by the police such property must, in the ordinary course, be returned to the party in whose possession it was seized; but this does not mean that the Magistrate is powerless to exercise his discretion in the matter. He is not bound to return the property to a party who apparently has no right or title to the same. For example, a person on whom the property was

(1) (1950) B.L.R. 45.

foisted. [See *V. K. Vaivapuri Chetti* v. *Sinniah Chetty* (1), *Lakshmana Dorai and others* v. *Arunagira Chetty* (2) and *Hoke Gwan* v. *Aung Wun Tan* (3)].

Now, the question is whether the learned Magistrate had, in passing his order as to the disposal of the exhibits in this case, delivered the property to somebody who was not obviously entitled to its possession. The applicant had the five bales of cotton yarn in his custody for a matter of half-an-hour. According to his evidence it was not he who was buying the cotton yarn from Puran Singh. It was Han Sein who was proposing to make the purchase and the sum of K 6,200 given to Han Sein as advance was in respect of the transaction which was being entered into between Puran Singh and Han Sein. The applicant was in the position of a gratuitous bailee in whose favour no right would appear to have been created in respect of the articles bailed. The applicant had the cotton yarn in his custody on Han Sein's behalf and since the temporary loan, the advance he gave to Han Sein was cancelled by him on the seizure of the articles by the police, he obviously cannot have any right or title to the property.

In these circumstances the learned Sessions Judge would appear to be correct in interfering with the discretion of the learned Magistrate over the matter of the disposal of the exhibits in this case. The application in revision will stand dismissed.

(1) A.I.R. (1931) Mad. 17. (2) A.I.R. (1932) Mad. 495
(3) (1949) B.L.R. 647.

APPELLATE CIVIL.

Before U San Maung, J.

H.C. 1955

Feb. 15.

U SAN HLAING AND ONE (APPELLANTS)

v.

THE BANK OF CHETINAD (RESPONDENT).*

Accrual of Interest (War-Time Adjustment) Act, 1947, s. 13—Money Lenders—Must be read together.

In enacting the Accrual of Interest (War-Time Adjustment) Act, 1947, the Legislature was fully aware of the provisions of s. 13 of the Money Lenders Act, 1945, and that if the provisions of s. 3 of the 1947 Act were not meant to be read with those of the Money Lenders Act this intention would have been made clear in the latter enactment. As it is both the enactments must be read together.

U Paw Tun Aung & Co. v. *Abdul Razak*, (1948) B.L.R. 182; *P. D. Patel and one* v *Messrs. The Central Bank of India Ltd.*, Civil Revision No. 73 of 1948 of the High Court of Judicature at Rangoon, referred to.

Mya Tin for the appellants.

Basu for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 5 of 1951 of the Subdivisional Court of Pagan, the plaintiff-respondent Bank of Chetinad by its Assistant Manager Chelliah Pillay sued the defendant-appellants U San Hlaing and Daw Yu for the recovery of Rs. 1,134 due on the promissory-note in suit. The learned Judge of the Subdivisional Court applying the provisions of section 3 of the Accrual of Interest (War-Time Adjustment) Act, 1947, gave a decree for only Rs. 416-14-0. On appeal to the District Court of Myingyan, the learned District Judge held that the

* Civil 2nd Appeal No. 128 of 1952, against the decree of the District Court, Myingyan, in Civil Appeal No. 5 of 1952.

provisions of section 3 of the aforesaid Act were inapplicable to the case under consideration and accordingly gave a decree to the plaintiff as prayed for by him. Hence this appeal by the defendant-appellants.

The facts giving rise to the case are these. On the 5th of December 1941, the defendants executed a promissory-note, Exhibit 1, in favour of the plaintiff's Bank. The loan was for a sum of Rs. 2,000 with interest at 1½ per cent per mensem. During the first three months of January, February and March 1942, the defendants paid up Rs. 90. Thereafter the plaintiff's firm evacuated to India on or about the 19th March 1942, owing to the outbreak of the II World War. On the termination of the War in Burma Chelliah Pillay, the Assistant Manager of the plaintiff's Bank returned to Burma in 1946 and was able to obtain a payment of Rs. 400 on the 25th January 1947 towards the interest due on the pro-note. A new pro-note, Exhibit A, was executed, the plaintiff having agreed to accept a sum of Rs. 400 only on account of the interest then due which amounted to Rs. 1,850. After this settlement of accounts and execution of the new pro-note the Accrual of Interest (War-Time Adjustment) Act, 1947 was published and it came into force on the 25th February 1947.

The question which arose for consideration was whether the payment of Rs. 490 as interest due for the period covered by section 3 of this Act should be taken into account in giving a decree on the suit promissory-note. The learned Judge of the Subdivisional Court considered that this amount should be deducted from the principal of Rs. 2,000 due on the first pro-note, Exhibit 1, that the principal due on Exhibit A was therefore Rs. 1,513 only and that

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U SAN MAUNG, J.

calculated on this basis, the amount still remaining to be paid on the pro-note, Exhibit A, was only Rs. 416-14-0. The learned District Judge, on the other hand, relying on the observations of U Thaung Sein, J. in *U Paw Tun Aung & Co.* v. *Abdul Razak* (1), considered that the payment of Rs. 490 being a settled transaction taking place before the Accrual of Interest (War-Time Adjustment) Act, 1947 came into force could not be taken into consideration in the computation of the amount due on the pro-note in suit, Exhibit A. In Paw Tun Aung's case (1 *supra*) U Thaung Sein, J. had held that Accrual of Interest (War-Time Adjustment) Act, 1947, applies only to outstanding debts and not to settled transactions that are settled before the Act came into force. This undoubtedly is good law and I may add that my decision in *P. D. Patel and one* v. *Messrs. The Central Bank of India Ltd.* (2) was to the same effect. In *Patel*'s case (2) where a suit was filed by Mr. Patel against the Central Bank of India Ltd. for the refund of the interest paid on a loan which had already been settled, I held that section 3 of the Act did not contemplate refund of interest already paid on loans which had been completely settled before the 25th February 1947 when the Act came into force.

However, the question now for consideration is whether in a case like the present the provisions of section 13 of the Money Lenders' Act, 1945 can be read together with those of section 3 of the Accrual of Interest (War-Time Adjustment) Act, 1947, so as to enable the Court to reopen any agreement purporting to close previous

(1) (1948) B.L.R. 182.

(2) Civil Revision No. 73 of 1948 of the High Court of Judicature at Rangoon.

dealings and to create new obligations for the purpose of giving the debtor relief in respect of interest due for the period mentioned in section 3 of the latter Act. It is an undisputed fact that Exhibit A was executed in respect of the sum due on the previous promissory-note, Exhibit 1, and that before Exhibit A was executed there was an agreement whereby the interest due on Exhibit 1 was settled by payment of Rs. 490. The argument against the reopening of the agreement under the provisions of section 13 of the Money Lenders Act, 1945 is that the Accrual of Interest (War-Time Adjustment) Act, 1947 was never in contemplation at the time of the enactment of the Money Lenders Act and that section 13 of the Act should therefore be applied only when *primâ facie* a debtor has been made liable in respect of interest in excess of 12 per cent per annum in the case of secured loan and 18 per cent per annum in the case of unsecured loan. However, I am of the opinion that in enacting the Accrual of Interest (War-Time Adjustment) Act, 1947, the legislature was fully aware of the provisions of section 13 of the Money Lenders Act, 1945 and that if the provisions of section 3 of the 1947 Act were not meant to be read with those of the Money Lenders Act this intention would have been made clear in the latter enactment. As it is both the enactments must be read together and I see no difficulty whatsoever in applying the provisions of section 3 of the Accrual of Interest (War-Time Adjustment) Act, 1947 to those of section 13 of the Money Lenders Act, 1945.

For these reasons I hold that the learned Judge of the Subdivisional Court was right in the decision arrived at by him that the sum of Rs. 487 should be deducted from the principal of Rs. 2,000 due on the

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first pro-note, Exhibit 1, and that on that basis the amount due to the plaintiff-respondents on the pronote, Exhibit A, was only Rs. 416-14-0. In the result, the appeal succeeds, the judgment and decree of the District Court of Myingyan appealed against are set aside and those of the trial Court are restored with costs throughout. Advocate's fees in this Court five gold mohurs.

APPELLATE CIVIL.

Before U San Maung, J.

U THA ZAN AND TWO OTHERS (APPELLANTS)

v.

U TUN ZAN AND ONE (RESPONDENTS).*

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Mar. 2.

Transfer of Property Act, s. 54—Sale of immoveable property below Rs. 100 in value—Real delivery of possession and not constructive must be given—If registered, necessity for registration must be determined by the value of the property involved and not by consideration mentioned in the deed.

When a person already in possession of immoveable property worth below Rs. 100 purchased that property, the Acts and declarations of delivery of possession must be unequivocal and for the purpose of s. 54 of the Transfer of Property Act, the delivery must be real and that some sort of constructive possession is not sufficient.

Mt. Sarja and another v. *Mt. Julsi and another*, A.I.R. (1926) Nag. 93; *Biswanath Prasad* v. *Chandra Narayan Chowdhury*, 48 Cal. 509-48 Indian Appeals 127, referred.

The necessity for registration must be determined by the value of the property involved and not by the amount mentioned in the deed.

Gopal Das v. *Mst. Sahina Bibi* 16 Lah. 177, followed.

A point of Law arising from facts admitted or proved beyond controversy, though not raised either in the trial Court or in the lower appellate Court can be raised for the first time in second appeal.

Hla Tun Pru for the appellants.

Kyin Htone for the respondents.

U SAN MAUNG, J.—In Civil Regular suit No. 5 of 1953 of the Township Court of Kyaikto the plaintiff-respondents U Tun Zan and Daw Hla May sued the defendant-appellants U Tha Zan, Ma Hla Kywe and Ma Sein Shwe for their ejectment from the garden land in suit. The plaintiffs' case is that they

* Civil 2nd Appeal No. 95 of 1953, against the decree of the (U TUN TIN) District Court of Thatôn in Civil Appeal No. 11 of 1953, arising out of Civil Regular No. 5 of 1953 of the Township Court of Kyaikto.

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are the owners of the suit land having purchased the same on the 29th December, 1951, by a registred deed of sale from the owners U Po Thin (PW 1) and his wife Ma Ah Ma and that the defendants had trespassed on the suit land and had erected a building thereon. The first and second defendants U Tha Zan and Ma Hla Kywe by their written statement contended that the suit land belonged to the estate of the late U Tun and Daw Shwe Thaw, a Burmese Buddhist couple, and as such devolved upon their five surviving sons, namely U Chet (DW 2), U Kala, the defendant U Tha Zan, U Po Mya and U Po Thin (PW 1) on their death. They also contended that the suit land being undivided inherited property in which the co-owners had a right of pre-emption, the sale by U Po Thin conveyed no title to the plaintiffs. They also contended that they could not be ejected as they were in possession of the land as co-owners thereof. The third defendant Ma Sein Shwe stated that she was there with the leave and licence of the first and second defendants and as such not a necesssary party to the suit. The plaintiffs in reply said that they had acquired a valid title from U Po Thin who had purchased the land from his mother Daw Shwe Thaw for a sum of Rs. 95 a few months before her death, Daw Shwe Thaw being the sole owner of the land on the death of her husband U Tun.

On the pleadings the trial Court framed issues as to whether the suit land was purchased for Rs. 600 by the plaintiffs from U Po Thin and his wife, whether it was an undivided inherited property of the defendants and U Po Thin and whether the land was in fact sold by Daw Shwe Thaw to her son U Po Thin shortly before her death. On the evidence on record the trial Court came

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to the conclusion that there were valid sales by Daw Shwe Thaw to U Po Thin and by U Po Thin to the plaintiffs. It accordingly decreed the plaintiffs' suit with costs.

On appeal to the District Court of Thatôn by the defendant-appellants the only point urged in favour of the appeal was that the sale of the land by Daw Shwe Thaw to U Po Thin not being accompanied by delivery of possession was invalid in law. The learned District Judge after a review of the evidence bearing on the subject came to the conclusion that U Po Thin was living with his mother Daw Shwe Thaw at the time of the alleged transaction but that there had been such appropriate declarations and acts as to convert the possession of U Po Thin as a licensee of his mother to that of a vendee. He accordingly dismissed the defendant-appellants' appeal with costs.

In this second appeal by the defendants I only wish to point out that although it is possible for a person in possession of property to purchase that property by a delivery of possession the acts and declarations must be so unequivocal as to make the delivery a real one. In this connection it is only necessary to cite the case of *Mt. Sarja and another* v. *Mt. Julsi and another* (1) where it was held following the observations of their Lordships of the Privy Council in *Biswanath Prasad* v. *Chandra Narayan Chowdhury* (2) that for the purposes of section 54 of the Transfer of Property Act there must be a real delivery of property and that some sort of constructive possession is not sufficient.

However, in this appeal there is something more fundamental in favour of the appellants. Although it is not pleaded in the written statement, there are

(1) A.I.R (1926) Nag. p. 93. (2) 48 Cal. 509-48 Indian Appeals 127.

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facts admitted or proved beyond controversy that the land in suit was worth about Rs. 600 at the time of the alleged sale by the mother to the son. U Po Thin (PW 1) from whom the plaintiffs themselves derived their title admitted that at the time of the sale of the land to him it was worth Rs. 600. Ko Chan E (PW 4), another witness cited by the plaintiffs, stated that it was worth Rs. 600 to Rs. 700. The defence witnesses gave the value as Rs. 400 to Rs. 500. U Than Nyunt (DW 1), the headman of Kyaikto Village, who wrote the deed of sale and was also present at its execution, said it was at his advice and with a view to evade the law relating to registration of documents that the value of the land was mentioned as Rs. 95 in the sale deed.

Now, section 54 of the Transfer of Property Act enacts that in the case of tangible immoveable property of a value less than one hundred rupees the transfer may be made either by a registered instrument or by delivery of the property and that in all other cases it can only be made by a registered instrument. In the case of *Gopal Das* v. *Mst. Sakina Bibi* (1) it was held that the necessity for registration must be determined by the value of the property involved and not by the amount or value of the consideration stated in the deed. No doubt in the generality of cases the price mentioned in a deed of sale will bear a close relation to the value of the property sold. However, in a special case like the present where the transaction is between mother and son and a property really worth Rs. 500 or Rs. 600 is purported to be sold for only Rs. 95 probably with a view to evade the requirements of the Transfer of Property Act the price mentioned in the instrument should be ignored and the real value of the property

(1) 16 Lah. 177

should be assessed with a view to consider whether the sale should or should not have been made only by a registered instrument.

Although this point has not been raised either in the trial Court or in the lower appellate Court, it is a point of law arising from facts which have been admitted or proved beyond controversy. There is ample authority for the proposition that such a point of law can be raised for the first time in second appeal.

In the result the appeal succeeds, the judgment and decree of the trial Court for the ejectment of the defendant-appellants are set aside and the plaintiff's suit is dismissed with costs throughout, Advocate's fees in this Court three gold mohurs.

APPELLATE CRIMINAL.

Before U Chan Tun Aung, C J.

H.C. 1955

May 3.

UNION OF BURMA (APPLICANT)

v.

MAUNG KYA NYO (RESPONDENT). *

Criminal Procedure Code, s. 439—Exercise of First Class Power by Second Class Magistrate appointed Subdivisional Magistrate under s. 13, Criminal Procedure Code—S. 36, Criminal Procedure Code—Explanation to s. 397, Criminal Procedure Code.

The Respondent was sentenced to one year's rigorous Imprisonment under sub-s. 6 of s. 123, Criminal Procedure Code for failure to give security for good behaviour by the Subdivisional Magistrate, who was only a Second Class Power Magistrate, appointed Subdivisional Magistrate under s. 13, Criminal Procedure Code.

Can he exercise the powers of a First Class Magistrate by virtue of such appointment ?

Held : The moment the President appoints a Second Class Power Magistrate to be a Subdivisional Magistrate under s. 13 of the Criminal Procedure Code, such Magistrate gets all the ordinary powers of that office conferred by s. 36 of the Criminal Procedure Code and specified in the Third Schedule.

Held further : Such punishment imposed under sub-s. 6 of s. 123, Criminal Procedure Code is more preventive than punitive and is not a sentence of imprisonment.

U Chit (Government Advocate) for the applicant.

Nil—for the respondent.

U CHAN TUN AUNG, C.J. Under section 439 of the Criminal Procedure Code this Court has *suo motu* opened a revision proceeding to consider the legality or otherwise of the sentence of one year's rigorous imprisonment imposed upon the respondent

* Criminal Revision No. 108-A of 1954 being Review of the order of the Subdivisional Magistrate of Syriam, dated the 16th day of March 1954 passed in his Criminal Misc. Trial No. 2 of 1954.

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Maung Kya Nyo by the Subdivisional Magistrate, Syriam, pursuant to sub-section 6 of section 123 of the Criminal Procedure Code for Maung Kya Nyo's failure to give security for good behaviour for one year in the sum of K 500 with two sureties. U Ba Swe was apparently a second class power Magistrate before he became Subdivisional Magistrate, Syriam. But he was appointed a Subdivisional Magistrate, Syriam, under section 13 of the Criminal Procedure Code and the question raised by the Deputy Registrar is whether by virtue of such appointment U Ba Swe can exercise the powers of a first class Magistrate. The answer to this question is to be found in section 36 of the Criminal Procedure Code, which reads as follows :

" All District Magistrates, Subdivisional Magistrates and Magistrates of the first, second and third classes, have the powers hereinafter respectively conferred upon them and specified in the third schedule. Such powers are called their 'ordinary powers' ".

A reference to the Third Schedule of the Criminal Procedure Code clearly shows that the "ordinary powers" of a Subdivisional Magistrate include, amongst others, the ordinary power of a Magistrate of the first class and also the power to require security for good behaviour under section 110 of the Criminal Procedure Code. It seems therefore clear that the moment the President appoints a second class power Magistrate to be a Subdivisional Magistrate under section 13 of the Criminal Procedure Code, such Magistrate gets all the ordinary powers of that office conferred by section 36 of the Criminal Procedure Code and specified in the Third Schedule. In my view the Subdivisional Magistrate U Ba Swe is fully competent to pass the order sentencing the respondent to one

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year's rigorous imprisonment for failure to execute the bond required of him. Furthermore, it should be noted that the punishment imposed upon a person to undergo a certain period of imprisonment simple or rigorous, as contemplated in sub-section 6 of section 123 of the Criminal Procedure Code for his failure to give security demanded of him is more in the nature of preventive rather than punitive, which normally happens when an accused person is convicted of a substantive offence.

This aspect is clarified if a reference is made to the Explanation to section 397 of the Criminal Procedure Code, which reads:

> "An order committing a person to prison under section 123 is not a sentence of imprisonment."

Therefore, the Subdivisional Magistrate U Ba Swe being fully competent to pass the order he did, namely, sentencing Maung Kya Nyo to one year's rigorous imprisonment for failure to execute a security bond demanded of him, the question for revision of the said order does not arise.

Return the proceedings with the above remarks.

APPELLATE CIVIL.

Before U Chan Tun Aung, C.J., and U Sin Maung, J.

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A. MUTHIA CHETTIAR (APPELLANT)

v.

Oct. 12.

M. R. ARUMUGAN CHETTIAR (RESPONDENT).*

Appeal under s. 104, sub-s. 1, Clause (g)—*Ss. 94 and 95, Civil Procedure Code—Award of Compensation—Order XXXVIII, Rule 1, Civil Procedure Code, provisions mandatory—Arrest before Judgment—Order 43, Rule 1, Civil Procedure Code, appeal against order passed under Order 38, Rule 1, s. 11, Civil Procedure Code,* Res judicata—*Binding force of consent decrees.*

The applicant sued the Respondent for recovery of a sum of K 5,610 and had him arrested before judgment under Order XXXVIII, Rule 1, Civil Procedure Code.

The Respondent offered to furnish security and accordingly he was released from custody on his furnishing security.

The suit was eventually decreed on 4th September 1950.

On 6th September 1950, the Respondent filed an application under s. 95, Civil Procedure Code for compensation from the applicant on the ground that the arrest before judgment was applied for on insufficient grounds.

The trial Court awarded K 300 to the Respondent as compensation.

On appeal, it was contended by the applicant that the Respondent's application under s. 95, Civil Procedure Code was not maintainable in law as he furnished security for his due appearance in Court instead of showing cause why such security should not be furnished by him.

Held : Upholding the contention, that the Respondent not only failed *to show cause why he should not furnish security for his due appearance* in Court but also offered security for such appearance. Therefore, the question whether or not he had been arrested on sufficeint ground is *res judicata* and the same Court, namely, the 2nd Judge of the City Civil Court cannot make an order under s. 95 for the payment of compensation on the ground that the arrest of the Respondent had been applied for on insufficient grounds.

The Order of the trial Court set aside.

Rama Mudali v. *Marappa Goundan*, A.I.R. (1934) Mad. 638 ; *Ram Kripal* v. *Rup Kuari*, 6 All. (P.C.) 269-11 A.I. 37 ; *Hook* v. *Administrator-General of Bengal and others*, 48 I.A. 187 ; *In Kasarabada Venkatachalapathi Rao* v. *Gadiraju Venkatappayya and another*, 55 Mad. 495, referred to.

For the binding force of consent orders, reference is made to :

* Civil Misc. Appeal No. 26 of 1953, against the order of the 2nd Judge of City Civil Court of Rangoon in Civil Misc. Application No. 181 of 1950, dated the 8th April 1953.

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Kalidas Chaudhuri v. *Prasanna Kumar Das*, 47 Cal. 446, and also *Jago Mahton* v. *Khirodhar Ram*, 2 Pat. 759; *Mrs. Lall* v. *Rajkishore Narain Singh*, 13 Pat. 86; *Ramnarain* v. *Basudeo*, 25 Pat. 595; *Haji Bibi* v. *Mohamed Jawad Khorasamy and six others*, Civ. 1st Appeal No. 91 of 1952, referred to

B. K. Sen, Advocate, for the appellant.

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

U SAN MAUNG, J.—This is an appeal under clause (*g*) of sub-section 1 of section 104 of the Civil Procedure Code against the order of the 2nd Judge of the City Civil Court, Rangoon, dated the 8th of April 1953, awarding a compensation of Rs. 300 with costs under section 95 of the Civil Procedure Code to the respondent M. R. Arumugan Chettiar for alleged wrongful arrest. The circumstances giving rise to the order appealed against are these :

In Civil Regular Suit No. 312 of 1948 of the City Civil Court, Rangoon, the present appellant A. Muthia Chettiar sued the respondent M. R. Arumugan Chettiar for the recovery of a sum of Rs. 5,610 alleged to be due to him on settlement of accounts following a dissolution of partnership. During the pendency of the suit, the plaintiff filed an application supported by affidavits for the arrest of the defendant M. R. Arumugan Chettiar on the ground that the defendant was about to leave Burma under circumstances affording reasonable probability that he (the plaintiff) would thereby be obstructed or delayed in the execution of the decree which might be passed against the defendant. This application was made under the provisions of Order XXXVIII, Rule 1 of the Civil Procedure Code. The plaintiff in his affidavit stated *inter alia* that the defendant was about to leave Burma by the next available steamer

sailing from Rangoon to Madras, or by air, that he had a passport and a permit for the purpose and had made arrangements already for leaving Burma, and that to the best of his information the defendant had transferred his business and stocks and had collected his outstandings so that his assurance that he would be back in Burma soon, could not be believed. S. S. Solamalai, who also gave an affidavit in support of the plaintiff's application, stated that he had been informed by the defendant that a passport and a permit had already been obtained to enable him to go back to his home in India and that to the best of his information the defendant had transferred or was about to transfer his business and stock-in-trade so that he was not likely to return once he left Burma. The affidavit of another person, S. Sangalin Thevar, was however of little consequence. On the strength of these affidavits, the 2nd Judge of the City Civil Court (U Shu Maung) who was then trying the plaintiff's suit issued a warrant for the arrest of the defendant M. R. Arumugan Chettiar. The defendant was brought before the Court under arrest on the 7th March 1948 and on that day he filed a petition in which he stated, *inter alia* that he had a good defence to the suit filed against him by the plaintiff, that he had not made any arrangements whatsoever to go to India and he had not even applied for a passport or an immigration permit. However, he did not file any counter-affidavits to controvert the statements contained in the affidavits filed by A. Muthia Chettiar and S. S. Solamalai. On the contrary, he offered to furnish security for his due appearance in Court. Security was duly furnished the next day and he was accordingly released from custody. Subsequently, after a protracted hearing, the suit against him was decreed on the 4th September 1950. The appeal

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against the judgment and decree was practically dismissed by this Court on the 6th November 1951 in Civil First Appeal No. 69 of 1950.

On the 6th September 1950, *i.e.* two days after the judgment of the City Civil Court was passed against him, the defendant M. R. Arumugan Chettiar filed an application, under section 95 of the Civil Procedure Code, for compensation on the ground that the plaintiff had applied for his arrest before judgment on insufficient grounds. In the affidavit in support of his application M. R. Arumugan Chettiar stated that the allegations made by the plaintiff in the application for the issue of his warrant of arrest were false to the plaintiff's knowledge, that he (the defendant) was carrying on a well established business at Rangoon at the relevant time and that he had not transferred his business nor had collected all his outstandings, that the allegations that he was leaving Burma with the intention of defeating or delaying the execution of the decree which might be passed against him was false, that even during the pendency of the suit he had paid income-tax in the sum of Rs. 4,784-14-0 for the period for which he and the plaintiff were partners and Rs. 955 as income-tax for the subsequent year and that because of the warrant of arrest which had been issued at the instance of the plaintiff he had been kept in custody from the 4th April 1948 till the 10th April 1948. The defendant therefore claimed Rs. 1,000 as compensation from the plaintiff. The plaintiff in his written objection denied that the allegations made by him in his application for the issue of warrant of arrest, under Order XXXVIII, Rule 1, were false and pointed out that the defendant was under arrest from 8 a.m. on the 7th April 1948 till 3 p.m. on the 8th April 1948 only, that he had not shown any

cause why he should not have been arrested before judgment, but on the contrary offered to furnish security for his due appearance in Court. In these circumstances, the plaintiff contended that he was not liable to pay any compensation to the defendant.

In the enquiry which followed, the defendant M. R. Arumugan Chettiar had to admit that he intended to leave Burma on or before the 20th of April 1948 and that he had inserted a notice in a vernacular paper of the 8th April 1948 requesting all his creditors to meet him before he left Rangoon. He, however, contended that his stock-in-trade at that time was Rs. 11,000, and that he had never tried todispose of themor to collect his outstandings as alleged by the plaintiff. One witness Kaliappan, who said that he had been working under M. R. Arumugan Chettiar at his shop in Phayre Street, gave supporting evidence. The plaintiff A. Muthia Chettiar, in giving evidence, said that M. R. Arumugan Chettiar had himself told him that he had obtained a passport and permit and that his allegations that the defendant had transferred his business and was collecting his outstandings were due to information given to him by Solamalai and Sangalin. These two persons he said could not be cited as witnesses as they were away in India. After the enquiry, the learned 2nd Judge of the City Civil Court (U Shwe Bin) awarded Rs. 300 to the defendant M. R. Arumugan Chettiar as compensation under section 95 of the Civil Procedure Code on the ground that the plaintiff had obtained the warrant of arrest on false averments to the effect that the defendant had transferred his business and stocks and collected his outstandings so that there was little likelihood of his returning to Burma.

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A. MUTHIA CHETTIAR v. M. R. ARUMUGAN CHETTIAR.

U SAN MAUNG, J.

In this appeal by the plaintiff A. Muthia Chettiar it is contended, firstly, that it was established that the defendant in fact intended to leave Burma at the time of his arrest and that the plaintiff's allegations that the defendant was not likely to return to Burma, was made to the best of his information and belief; secondly, that the defendant's application under section 95 of the Civil Procedure Code was not maintainable as he furnished security for his due appearance in Court instead of showing cause why such a security should not be furnished by him. The ruling of Beasley, C.J., in *Rama Mudali* v. *Marappa Goundan* (1) was cited in support of this contention. There the learned Chief Justice observed that where an attachment before judgment was ordered by the Court under Order 38, Rule 5 of the Civil Procedure Code and the property was attached an application for compensation could not be entertained unless the order of attachment was set aside.

In our opinion, this second contention must be allowed to prevail.

Now, section 94 of the Civil Procedure Code in so far as is relevant to this case enacts that in order to prevent the ends of justice from being defeated the Court may, *if it is so prescribed*, issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance and if he fails to comply with any order for security commit him to the civil prison. Section 95 prescribes, *inter alia*, that where in any suit in which an arrest has been effected under section 94 it appears to the Court that the arrest was applied for on insufficient grounds the defendant may apply to the Court, and the Court may upon

(1) A.I.R. (1934) Mad. 638.

such application award against the plaintiff compensation not exceeding Rs. 1,000.

The provision relating to the arrest before judgment is contained in Order XXXVIII, Rule 1 of the Civil Procedure Code, which says that if the Court is satisfied that the defendant is about to leave Burma under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit it may issue a warrant to arrest the defendant and bring him before the Court *to show cause why he should not furnish security for his appearance.* Order XXXVIII, Rule 2 makes it mandatory upon the Court to order the defendant either to deposit in Court money or other property sufficient to answer the claim against him or to furnish security for his due appearance on the defendant failing to show cause why he should not furnish security for his due appearance. The order of the Court is appealable under Order XLIII, Rule 1 of the Civil Procedure Code.

In the case under appeal, the defendant M. R. Arumugan Chettiar not only failed to show cause why he should not furnish security for his due appearance in Court but also offered security for such appearance. Therefore, the question whether or not he had been arrested for sufficient cause is *res judicata* and the same Court, namely, the 2nd Judge of the City Civil Court cannot make an order under section 95 for the payment of compensation on the ground that the arrest of the defendant had been applied for on insufficient grounds. In *Ram Kirpal* v. *Rup Kuari* (1) where a Court having jurisdiction decided in the course of execution

(1) 6 All. (P.C.) 269-11 A.I. 37.

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proceedings that the decree to be executed awarded mesne profits according to its true construction, their Lordships of the Privy Council held that this decision had become final between the parties not under section 13 of Act X of 1877 but upon the general principles of law as an interlocutory order in the suit. This principle was affirmed in a subsequent decision in *Hook* v. *Administrator-General of Bengal and others* (1) where it was pointed out that section 11 of the Civil Procedure Code, 1908, was not exhaustive of the circumstances in which an issue is *res judicata*. *In Kasarabada Venkatachalapathi Rap* v. *Gadiraju Venkatappayya and another* (2) a Bench of the Madras High Court observed :

> " Orders passed in the course of execution proceedings adjudicating on the rights of the parties are *res judicata* and could not be called in question by the parties or their representatives. When once the said orders become final, that effect could not be sought to be avoided by making allegations that the previous decisions were wrong on the merits because full facts were not placed before the Court or that all available evidence was not let in on the former occasion ; see *Ram Kirpal* v. *Rup Kuari* (3) ; *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (4) and *Raja of Ramnad* v. *Velusami Tevar* (5)."

As regards the binding force of consent orders, the observations in *Kalidas Chaudhuri* v. *Prasanna Kumar Das* (6) seem apposite. In *Jago Mahton* v. *Khirodhar Ram* (7) where the judgment-debtor objected to the execution of the decree on the ground that the application was barred by limitation and the objection was dismissed in default of the judgment-debtor it was held that the latter was not entitled in a subsequent application for execution to object that the previous application was time-barred.

(1) 48 I.A. 187.
(2) 55 Mad. 495.
(3) 6 All. (P.C.) 269-11 I.A. 37.
(4) I.L.R. 8 Cal. 51 (P.C.).
(5) L.R. 48 I.A. 45.
(6) 47 Cal. 446.
(7) 2 Pat. 759.

The decisions in *Mrs. Lall* v. *Rajkishore Narain Singh* (1) and *Ramnarain* v. *Basudeo* (2) were to the same effect.

In *Haji Bibi* v. *Mohamed Jawad Khorasamy and six others* (3) where certain persons who were not parties to the suit for the administration of an estate were ordered to be added as parties in the appeal on the ground that they were necessary parties to such a suit, it was held that some of the parties to the appeal who failed to appear to contest the application were debarred from re-agitating the matter at a later stage of the proceedings on the principles of *res judicata* as enunciated in *Ram Kirpal* v. *Rup Kuari* (4) and *Hook* v. *Administrator-General of Bengal and others* (5).

Bearing these authorities in mind, we hold that the application of the defendant M. R. Arumugan Chettiar under section 95 of the Civil Procedure Code is not maintainable in law.

In the result, the appeal succeeds. The order of the learned 2nd Judge of the City Civil Court appealed against is set aside with costs. Advocate's fees three gold mohurs.

U CHAN TUN AUNG, C.J.—I agree.

(1) 13 Pat. 86.
(2) 25 Pat. 595.
(3) Civ. 1st. Appeal No. 91 of 1952.
(4) 6 All. (P.C.) 269-11 I.A. 37.
(5) 48 I.A. 187.

APPELLATE CRIMINAL.

Before U Chan Tun Aung, C.J.

H.C. 1955

June 28.

AH TANG (APPLICANT)

v.

1. SHAR KYAUNG HOE
2. LEE EE TUCK .... (RESPONDENTS). *
3. NGAW HOE LAN (*a*) MAUNG KYIN WAN.

Application under s. 523, Criminal Procedure Code, before Magistrate had taken cognizance of the case—Omission by police to make a report as contemplated by s. 523 (1)—Enquiry by Magistrate at the instance of private parties and not of the police—Ss. 516-A, 517—Proceedings though irregular not illegal or without jurisdiction.

A first information report under s. 420, Penal Code was lodged against one Loo Shein Whet for fraudulently obtaining 1,000 tins of coconut oil from Tye Seng & Co. by posing himself as a respresentative of Nam Choung Co. —who also lodged a first information report against him for criminal misappropriation.

The Police seized the tins of oil from the 1st Respondent Shar Kyaung Hoe.

No report was made of the seizure to the Magistrate as contemplated by s. 523 (1), Criminal Procedure Code.

While the tins were still with the Police and before the two cases against Loo Shein Whet were sent up and before he was arrested, three separate applications:—namely (1) by Shar Kyaung Hoe, the 1st Respondent. (2) by Maung Kyin Wan and Lee Tuck, 2nd and 3rd Respondents, representing Nam Choung Co., and (3) by Ah Tang respresenting Tye Seng & Co., the applicant, were filed before the 5th Additional Magistrate, Rangoon under s. 523, Criminal Procedure Code for the return of the tins of oil.

The Magistrate returned the articles to the 1st Respondent Shar Kyaung Hoe on security.

The applicant filed an application in Revision against the order.

Held : (1) It is only at the instance of the police officer who seized the property under the circumstances set out in s. 523 (1), Criminal Procedure Code, can a Magistrate pursue the course prescribed therein affecting the disposal of the property seized by the police ; (2) It is the duty of the police officer seizing the property to report forthwith to the Magistrate concerned

* Criminal Revision No. 21 (B) of 1955, being Review of the Order of the 5th Additional Magistrate of Rangoon, dated the 27th day of January 1955 passed in his Criminal Misc. Trial No. 156 of 1954.

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who is the only person competent to order the disposal of such property; (3) At the conclusion of a judicial proceeding which is neither an enquiry nor a trial, namely a proceeding in which evidence was taken in the absence of the accused under s. 512 of the Criminal Procedure Code, the order of the Magistrate affecting the disposal of the property connected with the case is one made, not under s. 517 but one under s. 523; (4) Even if the Magistrate has passed an order not on the police report but at the instance of one of the parties interested in the possession of the property seized by the police, yet such an order can be considered to have been made under s. 523 of the Criminal Procedure Code; (5) Unless failure of justice has been occasioned by the Magistrate's order, the Magistrate's order should not be disturbed

Ghulam Ali v. *Emperor*, (1945) A.I.R. (32) Lah. 47; *U Ba Hlaing* v. *Ballabux Sodani*, (1936—47) 14 Ran. I.L.R. 633; *Maung Po Tu* v. *The King*, (1938) R.L.R. 143 at 147; *Maung Han Thein* v. *The Commissioner of Police, Rangoon and two others*, (1950) B.L.R. (S.C.) 45, referred to.

Ba Shun, Advocate, for the applicant.

San Thein and *Ba Than*, Advocates, for the respondents.

U CHAN TUN AUNG, C.J.—This application in revision is against the order of the 5th Additional Magistrate, Rangoon, who has under section 523 of the Criminal Procedure Code ordered the return of some tins of coconut oil seized by the Lanmadaw police in connection with their First Information Reports No. 530-A and No. 531-A of 1954 to the 1st respondent Shar Kyaung Hoe on furnishing security for K 30,000 with two sureties and for production of the same when called upon to do so by the Court.

The circumstances under which the coconut oil tins were seized by the police appear to be as follows: Tye Seng & Co. of No. 35 Maung Khine Street, by their manager Maung Lye Sein, lodged a report at the Lanmadaw Police Station on the 15th November 1954 (*vide* First Information Report No. 531-A of 1954) that 1,000 tins of coconut oil valued at K 30,960·21 were sold for cash payment to Nan Choung Co.; that Loo Shein Whet said to be a

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representative of the said company came and took delivery of the said tins and that when the demand for payment was made, it was found that the tins of oil had been taken by fraud as there was no one to be found in the Nam Choung Co., the manager of the said company having absconded with the money of the company. The police opened a case under section 420 of the Penal Code against Loo Shein Whet, but Loo Shein Whet was then said to be absconding. Again, on the 14th November 1954, Maung Kyin Wan (*a*) Ngaw Hoe Lan said to be a partner of Nam Choung Co. laid a First Information Report at the Lanmadaw Police Station against Loo Shein Whet for criminal misappropriation of 1,000 tins of coconut oil bought on credit in the name of the partnership from Tye Seng & Co. Accused Loo Shein Whet, who figured as accused in both the cases, was arrested about the end of December 1954. In the meantime, however, the police had seized the tins of oil from certain persons who had bought them from Shar Kyaung Hoe, the first respondent. While the tins of oil were in the custody of the police and before the two cases against Loo Shein Whet were sent up to the Court for trial and before Loo Shein Whet was apprehended, three separate applications, namely :—(1) by Shar Kyaung Hoe; (2) by Ah Tang representing Tye Seng & Co.; and (3) by Maung Kyin Wan and Lee Ee Tuck representing Nam Choung Co. were filed before the 5th Additional Magistrate for the restoration of the tins of oil to the respective applicant under section 523 of the Criminal Procedure Code. Thus there was a triangular contest for the restoration of tins of oil before the Magistrate has actually taken cognizance of the cases against Loo Shein Whet. As aforesaid, the learned 5th Additional Magistrate in his Criminal

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Miscellaneous Proceeding No. 156 of 1954 proceeded with the enquiry somewhat elaborately and passed an order against which the present revision is being filed at the instance of Ah Tang alone, impleading the other rival claimants as respondents. It will also be noticed that when Ah Tang moved this Court in revision, he has obtained an *ad interim* order from U Aung Khine, J., directing Shar Kyaung Hoe to deposit a sum of K 30,000 representing the price of the tins of oil now in dispute.

The Bailiff of the High Court has reported that the said sum has been deposited with him since the 25th February 1955. It will thus be seen that the subject matter of the claim for restoration, namely the oil tins is no more in their original state, but cash representing their value has been in the custody of the bailiff of this Court.

In this revision it is contended on behalf of the petitioner that the proceeding of the learned Magistrate under section 523, Criminal Procedure Code is illegal and without jurisdiction, in that it was initiated on petitions by private parties, and not on a report by the police concerned. It is further urged that even if the cases against Loo Shein Whet were sent up to him ultimately after the arrest of Loo Shein Whet, the Magistrate cannot pursue the enquiry under section 523 of the Criminal Procedure Code, but that he should have stopped it and taken steps available either under section 516-A, or section 517 of the Criminal Procedure Code. On the other hand on behalf of the respondents, particularly on behalf of Shar Kyaung Hoe who has deposited the sum of K 30,000 in the High Court, it is urged in support of the learned Magistrate's order that in the circumstances obtaining and in view of the fact that the Magistrate has already taken cognizance of the case;

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and that although the Magistrate's enquiry under section 523 is somewhat irregular, in that it was not initiated by the police concerned, the irregularity if any cannot be said to be one which has occasioned a failure of justice. It is further urged that since Shar Kyaung Hoe has already furnished cash security as directed by the High Court, the conflicting claims of the parties concerned would not in any way be prejudiced. In *Ghulam Ali* v. *Emperor* (1), under circumstances almost similar to those in the present case a horse was seized from the petitioner by the police and the case was sent up for trial; and without any report made by the police as contemplated in section 523 (1) of the Criminal Procedure Code, the Magistrate concerned, at the instance of the petitioner (Ghulam Ali) ordered the handing over of the horse to the petitioner on security; and then later, on an application filed by the respondent the horse was ordered to be restored to the respondent, it was held in revision that the original order passed by the Magistrate could not have been one passed under section 517 of the Criminal Procedure Code, but one which must be considered to have been made under section 523 of the Criminal Procedure Code. Blacker, J., who disposed of the revision observes:

> "Even that order [the first order] is not free from defect, because it would appear from a strict reading of the section [523, Criminal Procedure Code] that that order should be passed not on the application of the party but on a report by the police. It seems to me however, that though there should have been such a report in this case the absence of it has not occasioned any failure of justice. There are therefore no grounds for interference in revision with that order."

U Ba Hlaing v. *Ballabux Sodani* (2) referred to by the learned Magistrate is one where in consequence

(1) (1945) A.I.R. (32) Lah. p. 47. (2) (1936-47) 14 Ran. I.L.R. p. 633.

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of a first information report made to the police of criminal breach of trust in respect of certain paddy against an absconding accused, evidence was recorded by the Magistrate concerned under section 512 (1) of the Criminal Procedure Code, and the Magistrate after recording the evidence directed the respondent to deliver the paddy or pay its value to the applicant, it was held that an order affecting the disposal of the property produced before the Court at the conclusion of a proceeding under section 512 (1) of the Criminal Procedure Code is one made under the provisions of section 523 of the Code, and not under the provisions of section 517, and that therefore no appeal lies against such order to the Sessions Judge. This case was referred to in *Maung Po Tu* v. *The King* (1), wherein Baguley, J., delivering the judgment in revision points out that there may be judicial proceedings which are not inquiries or trials, and property produced before the Court in such judicial proceedings cannot be dealt with under section 517, but it must be dealt with under section 523 of the Criminal Procedure Code.

In *Maung Han Thein* v. *The Commissioner of Police, Rangoon, and two others* (2), the Supreme Court has held that section 523 (1) of the Criminal Procedure Code makes it mandatory for any police officer seizing property under circumstances stated therein to report forthwith to the Magistrate and the Magistrate to whom such a report is made is the only person competent to make such an order that he thinks fit regarding the disposal of the property or delivery thereof to the person entitled to the possession.

No other authorities could be cited which have a direct bearing on the question involved. From

(1) (1938) R.L.R., p. 143 at 147. (2) (1950) B.L.R. (S.C.) p. 45.

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a careful examination of the decisions quoted above, the following principles can be deduced:—

(1) It is only at the instance of the police officer who seized the property under the circumstances set out in section 523 (1), Criminal Procedure Code, can a Magistrate pursue the course prescribed therein affecting the disposal of the property seized by the police.

(2) It is the duty of the police officer seizing the property to report forthwith to the Magistrate concerned who is the only person competent to order the disposal of such property.

(3) At the conclusion of a judicial proceeding which is neither an enquiry nor a trial, namely a proceeding in which evidence was taken in the absence of the accused under section 512 of the Criminal Procedure Code, the order of the Magistrate affecting the disposal of the property connected with the case is one made, not under section 517 of the Criminal Procedure Code but one under section 523 of the Criminal Procedure Code.

(4) Even if the Magistrate has passed an order not on the police report, but at the instance of one of the parties interested in the possession of the property seized by the police, yet such an order can be considered to have been made under section 523 of the Criminal Procedure Code.

(5) Unless failure of justice has been occasioned by the Magistrate's order, the

Magistrate's order should not be disturbed.

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After a careful analysis of the facts and circumstances obtaining in the present case and especially in view of the fact that Shar Kyaung Hoe has, pursuant to the order of this Court, already kept a cash security of K 30,000, I do not see how the order of the Magistrate with regard to the disposal of the oil tins, despite certain irregularities, as pointed out above, can really be said to be illegal, and one which has occasioned a failure of justice. Though the police has not actually moved the Magistrate initially, as contemplated in section 523 (1), yet the Magistrate has taken cognizance of the two cases as against the same accused when the police sent up for trial at a later date. The learned Magistrate could have stopped the proceedings and commenced an enquiry, either under section 516-A of the Criminal Procedure Code, or await till the conclusion of the case as contemplated in section 517. He has chosen neither, but continued to proceed with the enquiry under section 523, and ultimately passed an order thereon. As observed above, the learned Magistrate's action in that regard might be said to be somewhat irregular; but I am unable to subscribe to the view, having regard to the principles deducible from the decisions quoted above, that the order made by the Magistrate under the circumstances of the case was an illegality which has occasioned a failure of justice.

In the result therefore, this application is dismissed. It should however be noted that since Shar Kyaung Hoe, the lst respondent, has furnished cash security of K 30,000 with the bailiff of this Court in lieu of the restoration of the coconut oil tins seized by the police, it is ordered that the said cash

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security shall remain in deposit with the bailiff until the final disposal of the criminal cases now pending before the 5th Additional Magistrate. The Magistrate shall at the conclusion of the cases make appropriate order as to the final disposal of the cash security in accordance with the relevant provisions of law laid down in the Criminal Procedure Code.

APPELLATE CIVIL.

Before U Aung Khine, J.

BADRU DUJA (APPELLANT)

v.

MUNSHI NESAR AHMED (RESPONDENT).*

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Sept. 15.

General Power-of-attorney—Authentication and Registration.

There is no provision of law which requires the general power-of-attorney to be authenticated as well as registered to render it valid. If a party decides to register the power-of-attorney then, of course, authentication is required for the purpose of registration and not otherwise.

Ba Shun, Advocate, for the appellant.

Tun Maung, Advocate, for the respondent.

U AUNG KHINE, J.—In Civil Regular Suit No. 1 of 1952 in the Court of the Subdivisional Judge, Maymyo, the respondent Munshi Nesar Ahmed filed a suit for the recovery of K 3,325 representing arrears of rent and for the ejectment of the appellant Badru Duja from the premises known as site No. 3, block No. 3, Lashio Road, Maymyo.

Prior to the filing of this suit, one Mr. Osmani claiming to be the agent of Munshi Nesar Ahmed, presented an application before the Controller of Rents, Maymyo, requesting that the standard rent for the suit premises may be fixed. The application was contested by the appellant Badru Duja. The Controller of Rents, after necessary investigation, fixed the standard rent of the suit premises at K 95 per mensem.

* Civil Misc. Appeal No. 7 of 1953, against the decree of the District Court of Mandalay in Civil Appeal No. 18 of 1952, dated the 4th day of December 1952.

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U AUNG KHINE, J.

In the trial Court, the appellant raised a question as to the validity of the proceedings before the Controller of Rents. He contended that the application made before the Controller of Rents was not by a person who was duly authorized by the respondent Munshi Nesar Ahmed. Mr. Osmani held a document, which is described as a special power-of-attorney, granted to him by the respondent. The learned Subdivisional Judge was of the opinion that the document in question is a general power-of-attorney and that as such it should have borne a stamp to the value of K 15 and that it should have been registered. As the document was neither stamped correctly nor registered, it was held that it was not a valid power-of-attorney. Thus the application made by Mr. Osmani could not be considered to be an application made by an authorized agent, and consequently the certificate issued by the Controller of Rents was in turn not a valid one. On this ground the suit was dismissed.

In the appeal before the District Court, Mandalay, the learned District Judge was not prepared to come to the conclusion that the certificate granted by the Controller of Rents, Maymyo, was invalid on the ground that the application for fixation of the standard rent was made by a person who was not a duly recognised agent of the appellant. The suit was remanded to the trial Court for disposal according to law.

It is against the order of this remand that the appellant Badru Duja has now appealed under Order XLIII, Rule 1 (*u*) of the Code of Civil Procedure. The first point taken up in this appeal is that the learned District Judge fell into an error in thinking that the document in question had been admitted in evidence in the trial Court. My attention was drawn

to the statement in that Court's judgment to the effect that Exhibit D was allowed to be filed for reference only. It is contended, therefore, that in the face of this explicit statement in the judgment it cannot be said that this document had been admitted in evidence. I have referred to the trial Court's record and I find on page 1 of the A.A. File the list of documents tendered in evidence. Exhibit D was shown as a document admitted on 6th May 1952 and that was the date on which the arguments were heard. If it was not the intention of the trial Court to receive this document in evidence, it should not have been marked as an exhibit; it should have been filed in the Process File.

To my mind, it does not affect the case one way or the other whether the document was admitted or not. It is the order of the Controller of Rents which was attacked as being irregular. The power-of-attorney presented by Mr. Osmani was considered good enough by the Controller of Rents. No objection was raised by the appellant then on this question of validity of the power-of-attorney filed by Mr. Osmani. Once the standard rent is fixed under section 19 of the Urban Rent Control Act, 1948, the party wishing to question the order has to file a reference before the competent authority under section 22. Such a reference indeed was made by the appellant but it was subsequently withdrawn. Now at this stage, I do not think it would be requitable to allow the appellant to raise the question regarding the validity of the power-of-attorney when he could have done so before the Controller of Rents. This same question could have been also raised in the Court of reference but it was not so raised and instead, the reference application was withdrawn. Now having allowed the order of

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the Controller of Rents to stand all along, it will be unconscionable to permit him now to question the validity of the order of the Controller of Rents.

Coming back to the question of the power-of-attorney, I am in entire agreement with the lower appellate Court that there is no provision of law which requires the general power-of-attorney to be authenticated as well as registered to render it valid. If a party decides to register the power-of-attorney then, of course, authentication is required for the purpose of registration and not otherwise. It is not contended that the respondent Munshi Nesar Ahmed did not grant the power-of-attorney at all to Mr. Osmani, the only objection raised being that the power-of-attorney so granted was not according to law. The defect, if there be any, is merely a technical one not affecting the merits of the case. For all these reasons, I must uphold the judgment and decree passed by the lower appellate Court. The appeal is dismissed with costs.

ORIGINAL CIVIL.

Before U Aung Tha Gyaw, J

HAJI HABIB PIRMOHAMED (PLAINTIFF)

v.

SEIN MOH CO. (DEFENDANT).*

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Aug. 24.

Limitation Act, s. 14 (1).

The plaintiff had sued the defendant in a previous case for ejectment and damages on the ground that the defendants were his licensees. His suit was dismissed on the ground that the defendants were not licensees but sub-tenants of the plaintiff.

The plaintiff subsequently obtained an order of the Assistant Rent Controller fixing the standard rent and filed a suit for rent against the defendant on the plea that they are his tenants for the period from 11th March 1950 to 31st December 1953.

The plaintiff relies on s. 14 (*1*) of the Limitation Act for part of the claim barred by the Law of limitation.

Held: A suit for recovery of arrears of rent is governed by Article 110 of the Limitation Act, and in a suit of this nature the period of limitation begins from the date on which such "arrears become due".

S. 14 (*1*) of the Limitation Act requires that such a former proceeding must be founded upon the same cause of action as in the present suit. The cause of action set up by the plaintiff in the former suit was a license whereas in the present suit the cause of action alleged is one of tenancy.

The two claims are inconsistent and are founded on different causes of action and the plea of exclusion of time under s. 14 of the Limitation Act cannot be sustained.

Ramkrishna Chettiar v. *Javarama Iyer*, A.I.R. (1933) Mad. 778; *Dondoo Singh* v. *Sheo Narain Singh*, A.I.R. (1946) Oudh 155; *Hurro Prasad* v. *Gopal Das*, 9 Cal. 255; *Nadesan Chettiar* v. *Shankaran Chettiar*, 5 Ran. 600, referred to.

M. Sulaiman, Advocate, for the plaintiff.

Ba Than, Advocate, for the defendant.

U AUNG THA GYAW, J.—The suit is one for recovery of K 21,805·85 as being due for arrears of rent in respect of Port Commissioners' Godown

* Civil Regular No. 67 of 1954.

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HAJI HABIB PIRMOHAMED v. SEIN MOH CO.

U AUNG THA GYAW, J.

No. C. 8, Lanmadaw of which the plaintiff became a tenant by virtue of an instrument of lease dated the 15th day of March 1949. Some time prior to March 1950, the defendants were said to have been permitted to occupy the said godown as a sub-tenant of the plaintiff. In Civil Regular Suit No. 1293 of 1950 of the City Civil Court of Rangoon, the plaintiff sued the defendants for ejectment and for damages alleging that the defendants were mere licensees of the plaintiff. The City Civil Court as well as the High Court on appeal, held that the defendants were not licensees but sub-tenants of the plaintiff with the result that the suit for ejectment failed in both Courts. The plaintiff thereafter obtained an order of the Assistant Rent Controller fixing the standard rent of the premises at K 477·50. He now seeks to recover from the defendants the sum aforementioned as being rent due by them for the period—11th March 1950 to 31st December 1953.

The tenancy alleged by the plaintiff is, however. denied by the defendants who further contend that part of the claim for rent is barred by the law of limitation.

The plaintiff in reply disputes the defendants' right to repudiate the relationship of landlord and tenant found against him in the decision of the appellate Court.

On these pleadings the following issues were fixed by consent :—

1. Are the defendants precluded from denying the tenancy alleged by the plaintiff by reason of this Court's judgment in its Civil First Appeal No. 73 of 1952 ?
2. Is part of the plaintiff's claim barred by limitation ?

3. What relief, if any, is the plaintiff entitled to ?

At the trial the learned Counsel appearing for the defendants concedes that in the face of the findings arrived at by the City Civil Court and by the High Court in Civil First Appeal No. 73 of 1952, the defendants are not entitled to deny the tenancy on which the claim for rent is now based. The first issue will accordingly be answered in the affirmative.

On the question of limitation the plaintiff relies upon the provisions of section 14 (*1*) of the Limitation Act. This provision reads :

> " In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. "

From the words used in this provision it is difficult to accede to the view put forward on the plaintiffs behalf that the time taken by the plaintiff for prosecuting the former suit before the City Civil Court and later, on appeal in the High Court, should be excluded from computing the period of limitation in the manner urged on his behalf. It is admitted that a suit for recovery of arrears of rent is governed by Article 110 of the Limitation Act and in a suit of this nature the period of limitation begins from the date on which such " arrears become due. " Ordinarily, if the premises were sublet to the defendants in March 1950 and if the rent was payable at the end of the month, the period of three years prescribed under the aforesaid article would begin from the month of April 1950.

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HAJI HABIB PIRMOHAMED v. SEIN MOH CO.

U AUNG THA GYAW, J.

The question then, is to consider whether time for purposes of computing the period of limitation would cease to run during the pendency of the litigation which the plaintiff was prosecuting in the City Civil Court and in the High Court on appeal. Section 14 (*1*) of the Limitation Act, however, requires that such a former proceeding must be founded upon the same cause of action as in the present suit. The cause of action set up by the plaintiff in the former suit was a license whereas in the present suit the cause of action alleged is one of tenancy.

In *Ramkrishna Chettiar* v. *Javarama Iyer* (1) it was held that the reliefs claimed in the two suits should be the same to attract the application of section 14 of the Limitation Act. The plaintiff is not entitled to appeal to the provisions of section 14 for the purpose of extending the period of limitation where the cause of action, set up in the subsequent suit though arising out of the same transaction, is different. [See *Dondoo Singh* v. *Sheo Narain Singh* (2) which dealt with the case of a landlord who, having without avail, tried to get his tenants ejected through the Revenue Courts, subsequently sought their ejectment in a Civil Court as trespassers.]

Where a plaintiff wrongly sued the tenant for ejectment and subsequently claimed the rent accrued during the pendency of the first suit, the time spent in the first unsuccessful suit could not be allowed to be deducted under section 14 of the Limitation Act. [See *Hurro Prasad* v. *Gopal Das* (3)]. A similar view prevailed in *Nadesan Chettiar* v. *Shankaran Chettiar* (4) where emphasis was laid on the fact that

(1) A.I.R. (1933) Mad. 778.
(2) A.I.R. (1946) Oudh 155.
(3) 9 Cal. 255.
(4) 5 Ran. 600.

a subsequent claim made by the plaintiff was on a totally distinct cause of action.

The plaintiff in the present case had sued for ejectment in the previous suit on the ground that the defendants were his licensees. He now seeks to recover rent from the defendants on the plea that they are his tenants. The two claims are inconsistent and are founded on different causes of action and the plea of exclusion of time asked for under section 14 of the Limitation Act cannot therefore be sustained. The findings of the appellate Court confirming the decision of the City Civil Court did not create a fresh cause of action for the plaintiff's suit. The decision merely confirmed the existence of the plaintiff's right to treat the defendants as his sub-tenants from the date on which they went into possession of the premises.

Accordingly, the contention raised on the defendants' behalf must be upheld and the second issue framed in the suit must be answered in the defendants' favour with the result that there will be a decree for the plaintiff against the defendants for three years' rent only calculated at the rate fixed in the Standard Rent Certificate, namely, K 477·50, amounting to a total of K 17,190 with proportionate costs.

ORIGINAL CIVIL.

Before U Aung Tha Gyaw, J.

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Sept. 1.

KAPURCHAND (BURMA) LTD. (PLAINTIFF)

v.

THE BURMESE NATIONAL REFORMING CO. AND OTHERS (DEFENDANTS).*

Petrol pump—Whether immoveable property?

"Immoveable property" as defined in s. 3 of the General Clauses Act includes "land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth."

The meaning of the words "things attached to the earth" is given in s. 3 of the Transfer of Property Act:

(*a*) rooted in the earth as in the case of trees and shrubs;

(*b*) imbedded in the earth as in the case of walls or buildings, or

(*c*) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached.

The petrol pump is a mere mechanical device set up on the road-side pavement for the purpose of retailing petrol under a license.

The conditions of such a license require that the petrol tank supplying the pump should be constructed at a regulated depth beneath the pump. The whole contrivance, the reservoir of petrol below the surface of the public pavement and the mechanical pump above, is in the nature of a mere trade fixture. What is of real value to the defendants in the petrol pump is not the pump itself but the license under which they are permitted to retail petrol by its use within the limits of the city of Rangoon. This license together with the mechanical device by which the license is worked for profit cannot be considered to be immoveable property.

Moreover, the pump can be moved about at convenience.

Such an "attachment is merely for the beneficial enjoyment of the chattel itself, even though fixed for the time being so that it may be enjoyed."

S.P.K.N. Subramanian Firm v. *M. Chidambran Servai*, A.I.R. (1940) Mad. 527 at 529, approved.

V. S. Venkatram, Advocate, for the plaintiff.

T. Wan Hock, Advocate, for the petitioners.

Po Dan, for the defendants.

U AUNG THA GYAW, J.—In Civil Regular Suit No. 110 of 1953, the respondent in this matter,

* Civil Regular No. 110 of 1953.

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KAPURCHAND (BURMA) LTD. v. THE BURMESE NATIONAL REFORMING CO. AND OTHERS.

U AUNG THA GYAW, J.

Kapurchand (Burma) Ltd., brought a suit against the Burmese National Reforming Co. Ltd. and its partners for recovery of K 1,53,348·16 as being due under a mortgage of moveable properties including a petrol pump. On the application of the plaintiff an *ad interim* Receiver was appointed in respect of the aforesaid properties on the 16th December 1953. This order appointing a Receiver was finally confirmed on the 14th February 1955. This order directed the defendants in the suit to deposit with the Official Receiver the sale proceeds realised from their shops. It would appear that the Civil Supplies Management Board has been a customer of the petrol pump which the defendants in the suit were permitted to manage. The Official Receiver accordingly called upon the Board to settle the petrol bills due to the Burmese National Reforming Co. Ltd.

The petitioner R. Lhila had on the 19th September 1952, entered into a partnership with the defendants for carrying on the petrol pump business of the defendants and had contributed a sum of K 15,000 to this purpose. He has now come forward with the claim that the order appointing a Receiver in respect of the petrol pump should be vacated or that in the alternative he, the petitioner, should be granted leave to file a suit against the Official Receiver for a declaration of his rights in respect of the said property. The petitioner has put forward three grounds in support of his claim. In the first place, it is contended that the petrol pump covered by the mortgage bond and described as moveable property is, in fact, immoveable property and consequently, in the absence of a registered deed, remains unaffected by the mortgage. Insisting that the petrol pump in question is immoveable

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property, it is next contended that as a foreigner the mortgage effected in the plaintiff's favour is void in law, and lastly, the petitioner attacks the mortgage transaction as being the sale of an import license and as such is illegal, unlawful and against public policy.

"Immoveable property" as defined in section 3 of the General Clauses Act includes "land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth." It is on this definition that the petitioner has anchored his hopes for the success of his plea. The meaning of the words "things attached to the earth" on which the petitioner has so pinned his faith, is given in section 3 of the Transfer of Property Act. "Attached to the earth" means: (*a*) rooted in the earth as in the case of trees and shrubs; (*b*) imbedded in the earth as in the case of walls or buildings; or (*c*) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached. It is seriously contended for the petitioner that because of the fact that the petrol pump in question has been attached to the petrol tank underneath, it has become immoveable property.

This contention has no substance whatsoever. The petrol pump in question is a mere mechanical device set up on the road-side pavement in front of the defendants' shop for the purpose of retailing petrol under a license. The conditions of such a license require that the petrol tank supplying the pump should be constructed at a regulated depth beneath the pump. The whole contrivance, the reservoir of petrol below the surface of the public pavement and the mechanical pump above, is in the nature of a mere trade fixture. What is of real value to the defendants in the petrol pump is not the pump itself but the license under which they are permitted

to retail petrol by its use within the limits of the city of Rangoon. This license together with the mechanical device by which the license is worked for profit cannot be considered to be immoveable property. The defendants have no interest whatsoever in that portion of the public street in which the pump is attached and moreover, the pump can be moved about at the defendants' convenience. Such an "attachment" in the words used in *S.P.K.N. Subramanian Firm* v. *M. Chidambran Servai* (1) "is merely for the beneficial enjoyment of the chattel itself, even though fixed for the time being so that it may be enjoyed." The chattel referred to consisted of an oil engine installed as part of a cinema hall owned by a third party. Due note was taken of the relevant English law on the subject and the result is further set out in these words: "In deciding whether or not a transaction relating to an engine is a transaction relating to immoveable property, one is entitled, I think, to have regard not merely to the nature of the attachment by which the engine is fixed on the ground but also to the circumstances in which it came to be fixed, the title of the person fixing it in the immoveable property and the object of the transaction by which the engine is transferred or bound . . . . . The object must from the very circumstances in which the installation was made be deemed to have been to utilize the machinery for their own profit so long as they had the use of the premises and to sell it if and when their lease terminated." Regard being had to the circumstances in which the petrol pump is fixed and used in this case the attack made on the validity of the mortgage bond in respect of the said pump must fail.

(1) A.I.R. (1940) Mad. 527 at 529.

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The further contention that the mortgage transaction amounts to a transfer of an import license appears to be somewhat far-fetched. The fact that the plaintiff in the suit is not a citizen of the Union cannot affect the validity of the mortgage bond.

The petitioner has next put forward the plea that under section 29 of the Partnership Act, the Official Receiver is entitled to receive only the defendants' share of the profits arising out of the partnership business. This contention also must fail for the reason that the partnership formed with the petitioner commenced many months after the mortgage was created. There are, therefore, no grounds for restraining the Receiver from taking charge of the petrol pump in question. The partnership is of three years' duration and will terminate within three weeks from this date if the petitioner has not exercised his option of continuing the same for two more years as provided in clause 3 of the partnership deed. If, on the termination of the partnership, the petitioner is entitled to reimbursement of any capital which he had invested in the business, he is at liberty to make his claim from the Official Receiver, if so advised.

APPELLATE CIVIL.

Before U Aung Khine, J.

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Sept. 9.

MA NGWE SHIN AND ONE (APPELLANTS)

v.

GAUNG BOKE (*a*) MAUNG LAUNG KYAMAR AND ONE (RESPONDENTS).*

Contract Act, s. 69.

The appellants leased out a piece of land to the respondents at a monthly rent of K 30. Subsequently, the area was occupied by the K.N.D.Os. and the appellants evacuated to Rangoon.

The appellants sued the respondents for arrears of rent accrued due amounting to K 411 during their absence.

The respondents pleaded that they had paid K 360 to the K.N.D.O. authorities during their occupation, and as such they were entitled to be reimbursed under s. 69 of the Contract Act.

Held : For the application of s. 69, Contract Act, it is essential that there should be—

(i) a person, who is bound by law to make certain payments ;

(ii) another person who is interested in such payment being made ; and

(iii) a payment by such last mentioned person.

This section clearly applies to payments made *bonâ fide* for the protection of one's own interests ; if a person, who paid the money was not actuated by a desire to protect his own interest, he certainly cannot make a claim under the section.

The words "compellable to pay" does not and cannot mean "compellable to pay through fear of physical violence" and the words "bound by law" do not mean "compellable to pay."

Suit decreed in full with costs in all the Courts.

Tun Maung, Advocate, for the appellants.

Tun I, Advocate, for the respondents.

U AUNG KHINE, J.—The appellants Ma Ngwe Shin and Ma Mya Shin are the owners of a piece of land known as Holding No. 27 of 1951-52, measuring

* Civil 2nd Appeal No. 51 of 1953, against the decree of the District Court of Thatôn, in Civil Appeal No. 15 of 1952, dated the 25th March 1953.

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U AUNG KHINE, J.

·130 acres in Bilin town. In 1947, the same was leased to the respondents Gaung Boke *alias* Maung Laung Kyamar and Ma San Kyin at a monthly rent of Rs. 30. The respondents constructed a building on the said land and were still in occupation of the said premises when the K.N.D.Os. occupied Bilin. As there had been a default made in the payment of rents, the appellants applied to the Assistant Rent Controller, Kyaikto, to fix the standard rent. The standard rent was fixed at Rs. 22-8-0 per mensem and the amount now claimed by the appellants is Rs. 411.

Soon after the K.N.D.O. occupation of Bilin, the appellants evacuated to Rangoon. The defence put up by the respondents in the trial Court was that the relationship of landlord and tenant had ceased from the time the appellants evacuated to Rangoon and that to safeguard the suit property, the respondents had to pay a sum of Rs. 360 to the K.N.D.O. authorities during their occupation of Bilin and as such, the appellants were not entitled to the rent in question. Both the two Lower Courts are in agreement that the tenancy between the parties had not ceased by the evacuation of the appellants to Rangoon. The trial Court decreed the full amount as claimed by the appellants, but the lower appellate Court held that as the respondents had paid Rs. 360 to the K.N.D.O. authorities, to safeguard the interests of the appellants, under section 69 of the Contract Act, the respondents were entitled to be reimbursed the amount paid by them.

The only point that calls for determination in this appeal is whether the application of section 69, Contract Act by the lower appellate Court to the facts of this case is correct or not. For the application of this section, it is essential that there should be

(i) a person, who is bound by law to make certain payments; (ii) another person, who is interested in such payment being made and (iii) a payment by such last-mentioned person. The last two ingredients are certainly present in the case, but the moot point is whether the appellants are bound by law to make this payment made by the respondents to the K.N.D.O. authorities. First of all, K.N.D.Os. are a band of lawless people, who have taken up arms against the government. Supposing the money paid in by the respondents were not paid, what would have been the result. The land would have been auctioned and bought by another person, but with the resumption of the legal government, that transaction would not be binding upon the appellants, who are the owners of the land. The property of the appellants is a piece of land which could not be removed in any way. Had the property been a house or any moveable property, that could be taken away, one might be constrained to hold that in order to preserve the same, money had been paid and it should be reimbursed. In this case, there has been no express or tacit understanding between the parties that the appellants should indemnify the respondents for any payment made by them during the period of K.N.D.O. occupation. Again, going through the evidence of Ma San Kyin, the 2nd respondent, it does appear that the sole object in paying the ground-rent to the K.N.D.O. authorities was actuated by a motive solely confined to protect the interests of the appellants. She stated that they were afraid that if no ground-rent was paid, the property might be put up for auction and to protect the interest of the appellants, the ground-rent was paid. This section clearly applies to payments made *bonâ fide* for the protection of one's own interests;

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if a person, who paid the money was not actuated by a desire to protect his own interests, he certainly cannot make a claim under the section. The lower appellate Court tries to justify the stand it has taken by saying that the words "bound by law" do not restrict the section to liabilities created by statute, and that as the appellants would undoubtedly be compelled to pay the same had they been present, the payment made by the respondents on their behalf came within section 69 of the Contract Act. He appears to have been led to form his opinion by construing the words "bound by law" to mean "compellable to pay."

A man may be compelled to pay liabilities created by statute and also liabilities which arise out of contract. Compellable to pay in this sense does not and cannot mean "compellable to pay through fear of physical violence."

For all these reasons, I am of the opinion that the construction put by the lower appellate Court on the words "bound by law" appears to be erroneous. In the result, the appeal is allowed and the suit of the appellants Ma Ngwe Shin and Ma Mya Shin are decreed with costs in all the Courts.

APPELLATE CIVIL.

Before U Chan Tun Aung, C.J., U San Maung, J. and U Ba Thoung, J.

MRS. M. TRUICTWEIN *(a)* MA AYE THWE (PETITIONER)

v.

MR. D. TRUICTWEIN (RESPONDENT).*

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Sept. 7.

Divorce Act, s. 17—Confirmation of divorce —S. 12, Divorce Act, proof of absence of connivance or collusion between the parties.

A divorce proceeding affects the status of the parties, and the necessary conditions to justify a decree for dissolution of marriage should be complied with.

The Divorce Act specifically lays down that certain facts must be proved before a Court has jurisdiction to pass a decree for dissolution of marriage.

S. 12 of the Divorce Act enjoins that the Court must be satisfied of the absence of connivance or collusion between the parties ; and in the absence of satisfactory proof of such acts required by law in support of a petition for divorce, it would not be justified in granting a decree for divorce.

Ma Maw v. *Maung Yan Han*; *Maung Hla Myint* v. *Dorothy Hla Myint*; *Ma Ngwe Aung* v. *Maung Kyaw Hla Aung*, I.L.R. 11 Ran. 68, referred to.

Even though there be a statement that there is no collusion or connivance between the parties such statement will not absolve the court from its duty of ascertaining whether in the circumstances of a particular case there was no collusion or connivance between them.

Reverend Chit Pe v. *Ma Khin Sein and one*, (1951)B.L.R. 131, followed.

Ba Pe (Government Advocate) as Proctor.

U CHAN TUN AUNG, C. J.—The District Judge of Magwe, sitting at Yenangyaung, has, in his Civil Regular Suit No. 3 of 1954, granted the petitioner the decree *nisi* for dissolution of marriage with the respondent. The case now comes before us for confirmation under section 17 of the Divorce Act. We regret that in the present state of the facts appearing on the record, we are not in a position to confirm the same. Though we have nothing to say about the

* Civil Reference No. 5 of 1955, against the decree of the District Court of Magwe in Civil Regular Suit No. 3 of 1954, dated the 2nd December 1954.

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MRS. M. TRUICTWEIN (a) MA AYE THWE v. MR. D. TRUICTWEIN.

U CHAN TUN AUNG, C.J.

form of the petition filed by the petitioner, yet it is highly desirable that, inasmuch as a divorce proceeding affects the status of the parties; the necessary conditions to justify a decree for dissolution of marriage should be complied with. The Divorce Act specifically lays down that certain facts must be proved before a Court has jurisdiction to pass a decree for dissolution of marriage. For instance, section 12 of the Divorce Act enjoins that the Court must be satisfied of the absence of connivance or collusion between the parties; and in the absence of satisfactory proof of such facts required by law in support of a petition for divorce, it would not be justified in granting a decree for divorce. (See *Ma Maw* v. *Maung Yan Han*. *Maung Hla Myint* v. *Dorothy Hla Myint*. *Ma Ngwe Aung* v. *Maung Kyaw Hla Aung* (1).)

Now, in the case before us we are not at all satisfied whether there is sufficient evidence to enable us to come to a conclusion that there was neither connivance nor collusion between the petitioner and the respondent. The petitioner Mrs. Truictwein was said to have been married to the respondent Mr. Truictwein in the year 1934, both being Christians. Two sons and a daughter were born to them. They resided at first at Yenangyaung and then moved on to Lanywa. The respondent was said to have deserted the petitioner in the year 1946, and thereafter went and lived with one Miss Noreen as husband and wife. The petitioner says that she knew that the respondent was carrying on with Miss Noreen even before his desertion from her. As soon as she found that her husband was carrying on with Miss Noreen she also committed adultery with one Mr. Gasper. Since then both the parties are leading adulterous life.

(1) I.L.R. (Rangoon Series) Vol. XI, p. 68

For some time the petitioner was living with Mr. Gasper at Mandalay. Next they went on to Syriam and then to Chauk. The respondent, on the other hand, is said to be living openly with Miss Noreen as husband and wife in Yenangyaung. The petitioner further states in her evidence that it was the respondent who allowed her to go with Mr. Gasper.

The respondent did not contest the application for divorce. He admitted having deserted the petitioner and then given her permission to marry whom she liked.

There were two witnesses cited by the petitioner. These witnesses only spoke about the petitioner and respondent having married in the year 1934 and separated in the year 1946. They did not know the reason why the petitioner and respondent got separated. No doubt, the petitioner in her petition asserts that there was no connivance or collusion. The respondent also averred to the same effect. It would thus appear that there is nothing before the Court to show beside the bare assertions of the parties that the petitioner and the respondent are not conniving at the adulterous life they are now leading for so many years. According to petitioner's own showing, the respondent committed adultery with Miss Noreen in the year 1946. She committed adultery with Mr. Gasper in the same year. But neither thought of moving the Court for dissolution of the marriage until 1954, *i.e.*, 8 years later. This delay in itself is most unsatisfactory and there should have been a thorough enquiry into the matter. The explanation given by the petitioner that she was away in Syriam till 1952 is somewhat unsatisfactory. Even if she had been away in 1952, why was there further delay for two years in presenting the petition for divorce. There is no explanation forthcoming in that regard.

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U CHAN TUN AUNG, C.J.

In *Reverend Chit Pe* v. *Ma Khin Sein and one*(1), this Court had pointed out that—

"Even though there be a statement that there is no collusion or connivance between the parties such statement will not absolve the Court from its duty of ascertaining whether in the circumstances of a particular case there was no collusion or connivance between them."

In that case the proceedings were sent back to the lower Court to be re-tried in accordance with law. Now, in the present case it is clear that, besides the bare assertion of the parties, there is nothing which can satisfy the Court to come to the conclusion whether there was no connivance or collusion. There has been a great delay in filing the petition by the petitioner. The adulterous acts were committed by both the parties at or about the same time, and yet none of them had taken steps to petition to Court for divorce. In view of the circumstances set out above, we consider that additional evidence is necessary as to whether the petitioner herself has not been conniving at or in any manner accessory to the adultery of the respondent; and *vice versa*.

We therefore direct that further enquiry be made and evidence taken in that regard, and after taking the evidence the records be sent back to this Court for determination on their merits, under section 17 of the Divorce Act.

(1) (1951) B.L.R. p. 131.

APPELLATE CIVIL.

Before U Ba Thoung, J.

SWEE CHWAN BEE RICE MILL CO. (APPELLANT)

v.

SUKRU NAHAG (RESPONDENT).*

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June 13.

Second appeal—Findings of fact by lower appellate Court—Plaintiff's failure to ask defendant for production of account books—Inference by plaintiff or the Court.

In second appeal, the findings of fact by the lower appellate Court are final.

Ma Pyu v. *K. C. Mitra*, I.L.R. 6 Ran. p. 586, relied on.

If a plaintiff never asked the defendant for the production of account books, neither he nor the Court is entitled to draw any inference for non-production of these account books.

Bilas Kunwar v. *Desraj Rajit Singh and others*, I.L.R. 37 All. p. 667.

N. C. Sen for the appellant.

Messrs P. B. Sen and *B. K. Sen* for the respondent.

U BA THOUNG, J.—The plaintiff-respondent Sukru Nahag sued the defendant-appellant Swee Chwan Bee Co. in Civil Regular Suit No. 1 of 1952 of the Court of the Subdivisional Judge, Bassein, for recovery of Rs. 1,500 as damages for breach of a contract executed between himself and the defendant-appellant Company. The plaintiff-respondent's case is that he entered into a contract with the defendant-appellant Company by executing an agreement Exhibit "A" under which he as a cooly-maistry was to supply coolies to work in the defendant-appellant's rice mill from 1st December 1951 to 31st December 1952; that

* Civil 2nd Appeal No. 29 of 1953, against the decree of the District Court of Bassein in Civil Appeal No. 14 of 1952, dated the 10th February 1953, arising out of decree passed in Civil Regular Suit No. 1 of 1952, dated 22nd September 1952 of the Court of the Subdivisional Judge, Bassein.

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in accordance with the terms of the said agreement he had to deposit Rs. 500 to the defendant-appellant so that if any loss is incurred to the defendant-appellant Company due to his inability to supply with sufficient coolies, the amount of loss incurred may be deducted from that deposit money; and that under the agreement Exhibit "A", the rates of payment of cooly wages were to be fixed subsequently as agreed by the parties. It is alleged by the plaintiff-respondent that he continued to work with the defendant-appellant Company up till the 9th December 1952 when he was suddenly turned out of his job by the defendant-appellant without any reason whatsoever. He has also alleged that in order to get sufficient number of coolies for the defendant-appellant Company for the contracted period, he had paid advances to several persons, and that he had also spent some amount in buying necessary materials such as baskets for the coolies for carrying paddy. He has also asserted that he would get a commission at the rate of 2 annas to 4 annas per 100 baskets of paddy which were carried by the coolies to the rice mill, and accordingly he claimed an amount of Rs. 1,500 as follows:

	Rs.	A.
(1) Amount of deposit	500	0
(2) Amounts given out for procuring coolies	325	0
(3) Cost of 138 baskets bought for the coolies	189	12
(4) Expenses of ferry fare in bringing coolies to the rice mill ...	289	4
(5) Loss of commission on the cooly wages	196	0
Total ...	1,500	0

The plaintiff-respondent has also asserted that he sent a lawyer's notice Exhibit "J" to the defendant-appellant asking the latter to allow him to continue

his work in accordance with the terms of the agreement or else to pay damages for breach of contract; but the defendant-appellant did not send any reply to the said notice.

The defendant-appellant did not deny about the deed of agreement Exhibit "A" being executed, but contended that the Exhibit "A" was an inchoate agreement as the rates of cooly wages were intentionally left blank to be settled later when the Managing Proprietor Hone Law, who was away in Rangoon at the time Exhibit "A" was executed, return from Rangoon and settle the matter. It was also contended that the plaintiff-respondent was brought to Hone Yoke, the younger brother of Hone Law and was introduced as the cooly-maistry who would take over the paddy work in the mill from the cooly-maistry Narainna; that the deposit of Rs. 500 was never received from the plaintiff-respondent although a deposit of Rs. 1,500 was made by the cooly-maistry Narainna, and that it was understood that Narainna took Rs. 500 from the plaintiff-respondent. The defendant-appellant also asserted that the plaintiff-respondent assigned his work to Maung Ohn Maung for supplying coolies to the mill and when he left the job, the deposit of Rs. 500 went to the credit of the said Maung Ohn Maung. The defendant-appellant has also asserted that the mill hirers Messrs. Kalayan Trading Company was responsible for payment of cooly wages and that the rates of wages given by the Kalayan Trading Company to the coolies were not the rates that were agreed between the plaintiff-respondent and the defendant-appellant. It was also contended that the deposit of Rs. 500 is recoverable from Narainna, and that Narainna and Maung Ohn Maung are necessary parties to the suit.

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The trial Court framed the following issues :—

(1) Did Hone Yoke have authority to enter into the written agreement mentioned in paragraph 1 of the plaint and was the written agreement binding on the defendant ?

(2) Did the defendant receive the deposit of Rs. 500 from the plaintiff ?

(3) Were the rates of cooly hire fixed subsequently and paid by the defendant from time to time up till 9th January 1952 ? or Are payments for cooly hire made to the plaintiff by Messrs. Kalayan Trading Company binding on the defendant ?

(4) Was the plaintiff turned out of his job as alleged by him in paragraph 3 of the plaint ? or Did the plaintiff assign his cooly work to another person and is he entitled to recover the deposit amount of Rs. 500 ?

(5) Did the plaintiff suffer any damages and if so, how much ?

(6) To what relief, if any, is the plaintiff entitled ?

The trial Court held that the agreement Exhibit " A " is binding on the defendant-appellant; that the defendant-appellant received the deposit of Rs. 500 from the plaintiff-respondent; that the payments of cooly hire made to the plaintiff-respondent by Messrs. Kalayan Trading Company are binding on the defendant-appellant; that the plaintiff-respondent was turned out of his job as alleged in paragraph 3 of the plaint; and that the plaintiff-respondent had suffered damages amounting to Rs. 1,739-12-0 and gave a decree with costs for that amount.

The defendant-appellant then went up on appeal to the District Court of Bassein and the lower appellate Court held that the Exhibit " A " agreement is not void, and that it is binding on the defendant-appellant. The lower appellate Court also held in agreement with the trial Court that the plaintiff-respondent was turned out of his job by the

defendant-appellant thereby making a breach of the agreement Exhibit "A". As regards the payment of a deposit of Rs. 500 by the plaintiff-respondent to the defendant-appellant Company and the receipt of which was denied by the latter Company, the lower appellate Court held that since the plaintiff-respondent could not produce any receipt for the same, the plaintiff-respondent has failed to prove the payment of this sum of Rs. 500 to the defendant-appellant or to any of his agents; and accordingly the lower appellate Court disallowed the claim of Rs. 500 made by the plaintiff-respondent. The lower appellate Court deducted the sum of Rs. 500 out of the amount of Rs. 1,739-12-0 allowed by the trial Court and modified the decree in favour of the plaintiff-respondent for a sum of Rs. 1,239-12-0 only, with proportionate costs and the defendant-appellants appeal was dismissed.

The defendant-appellant has now come up on second appeal against the judgment and decree of the District Court of Bassein modifying the judgment and decree of the Subdivisional Court, and the plaintiff-respondent has also filed a cross-objection against the judgment of the District Court in disallowing him as regards the sum of Rs. 500.

Both the lower Courts have held that the agreement Exhibit "A" executed by the plaintiff-respondent and the defendant-appellant Company is binding on the defendant-appellant. The learned counsel for the appellant argued that the Exhibit "A" represents an inchoate agreement because one of the terms under the agreement, namely, the fixation of the rates of cooly wages was left to be mutually fixed later and that no such fixation was made by the parties nor was it alleged in the plaint that the rates of cooly wages were mutually

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fixed later between the parties as contemplated by Exhibit "A" and therefore the plaintiff-respondent could not sue on the agreement Exhibit "A" as it is void for uncertainty. I do not agree with his contention. It is clearly stated in the agreement that the rates are to be fixed later by mutual consent and there is evidence that at the time of entering the agreement it was agreed that the rates of cooly wages would be as usual *i.e.* the old rates; and when subsequently Messrs. Kalayan Trading Company who hired the defendant-appellant's mill made payments of the cooly wages they were paid on the old rates and there was no dispute about it by the defendant-appellant Company. It must therefore be taken that the defendant-appellant has agreed to these rates. In section 29 of the Contract Act, Illustration (*e*) it says:

> "A agrees to sell to B 'one thousand maunds of rice at a price to be fixed by C.' As the price is capable of being made certain, there is no uncertainty here to make the agreement void."

In the present case also there is no uncertainty about the rates of cooly wages to be paid. In fact they were made certain when Kalayan Trading Company made payments at the old rates without dispute from the defendant-appellant Company and the plaintiff-respondent. I therefore cannot accept the contention that the exhibit agreement Exhibit "A" is void for uncertainty.

Regarding the issue whether the plaintiff-respondent was turned out of his job by the defendant-appellant, there are concurrent findings by both the lower Courts that the plaintiff-respondent was turned out of the job by the defendant-appellant thereby making a breach of the agreement Exhibit "A". These concurrent findings by both the lower

Courts must be accepted; besides, I am not prepared to interfere on second appeal, the findings of fact by the lower appellate Court. In this connection, I would point out the ruling in the case of *Ma Pyu* v. *K. C. Mitra* (1) where it has been held that—

> "Under the provisions of sections 100, 101, second appeals lie only if the decision is contrary to law or if the decision fails to determine some material issue of law or if there is any substantial error or defect in the procedure. Section 100 says nothing about the findings of fact, concurrent or otherwise, and therefore the finding of the first appellate Court upon a question of fact is final, if that Court had before it evidence in support of the finding, however unsatisfactory it might be if examined."

I therefore agree that the plaintiff-respondent is entitled to have damages for breach of the said agreement Exhibit " A " by the defendant-appellant. The trial Court has gone into carefully the evidence on record regarding the amounts given out by the plaintiff-respondent for procuring the coolies, the cost incurred by the plaintiff-respondent in buying materials such as baskets for the coolies, expenses for bringing the coolies to the rice mill and the amount of the loss of commission by the plaintiff-respondent on the cooly wages; these are all on facts and the lower appellate Court was in agreement with these amounts assessed as damages.

Regarding the claim of Rs. 500 alleged to have been given as deposit by the plaintiff-respondent to the defendant-appellant Company, I agree with the finding of the lower appellate Court that it has not been proved on the part of the plaintiff-respondent that he had paid this amount to the defendant-appellant or to any of his agents since he cannot produce any receipt in respect of the same. It was

(1) I.L.R. 6 Ran. p. 586.

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argued by the learned counsel for the plaintiff-respondent in his cross-objection regarding this amount that the account books kept by the defendant-appellant Company had not been produced, and the presumption is that if these account books were produced they would show about the payment of the sum of Rs. 500; but the plaintiff-respondent never asked for the production of these account books, and therefore neither he nor the Court is entitled to draw any inference for non-production of these account books. In the case of *Bilas Kunwar* v. *Desraj Rajit Singh and others* (1) it has been held that :

> " It is open to a litigant to refrain from producing any documents which he considers irrelevant ; and if the opposing litigant is dissatisfied, it is for him to apply for an affidavit of documents, and he can so obtain inspection and production of all that appear to him in such affidavit to be relevant and proper. If he fails to do so, neither he, nor the court at his suggestion, is entitled to draw any inference as to the contents of any such documents. It is for the litigant who desires to rely in the contents of documents to put them in evidence in the usual and proper way ; if he fails to do so, no inference in his favour can be drawn as to the contents of them."

I therefore agree with the lower appellate Court for disallowing the sum of Rs. 500 out of the claim made by the plaintiff-respondent, and in modifying the decree in favour of the plaintiff-respondent for a sum of Rs. 1,239-12-0 only.

For the reasons stated above, the appeal is dismissed with costs, and the cross-objection filed by the plaintiff-respondent is also dismissed with costs.

(1) I.L.R. 37 All. p. 557.

APPELLATE CRIMINAL.

Before U Chan Tun Aung, C.J., and U San Maung, J.

THAKIN LWIN AND TWO OTHERS (APPLICANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

H.C. 1955

Oct. 17.

Union Judiciary Act, s. 5—Certificate of fitness—S. 7, The National Emblems (Restriction of Display) Act, 1954—Petition for Transfer and trial of cases to High Court under s. 135 (1) and (2) of the Constitution—Dismissal order, whether "final order" within the ambit of clause (a) *of s. 5 of the Union Judiciary Act*—Obitum dictum, *not a "final decision" or "final order".*

The applicants were prosecuted before the Western Subdivisional Magistrate, Rangoon under s. 7 of the National Emblems (Restriction of Display) Act, 1954.

Pending the trial, they applied to the High Court for transfer and for trial of their cases in the High Court under s. 136 (2) of the Constitution.

Their application was dismissed.

The applicants then made an application under s. 5 of the Union Judiciary Act, 1948 for a Certificate of fitness to appeal to the Supreme Court against the dismissal order, urging that the said order tantamounts to "final order" within the ambit of clause (*a*) of s. 5 of the Union Judiciary Act.

Held: An appeal lies to the Supreme Court from "final order" of the High Court in a criminal case which involves the question of constitutionality of any legislative enactment.

Observations made *obitum dictum* cannot be said to be a "final decision or final order."

The only question concerned was whether the applicants' case was a fit case for transfer to the High Court under s. 135 (2) of the Constitution. The order rejecting the application is not a final order which involves the question as to the validity of any law having regard to the provisions of the Constitution within the ambit of clause (*a*) of s. 5 of the Union Judiciary Act.

Per U SAN MAUNG, J.—The High Court does not have exclusive original jurisdiction in respect of any case involving a question as to the validity of any law having regard to the provision of the Constitution, except as laid down in sub-s. (1) of s. 135 of the Constitution of the Union of Burma.

When an application for transfer is made under sub-s. (2) of s. 135, what the Judge has to consider in the first place is whether *primâ facie* the case involves or is likely to involve such a question.

* Criminal Misc. Application No. 20 of 1955. Application for a Certificate under s. 5 of the Union Judiciary Act.

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If so satisfied, the case has to be transferred and tried in the High Court and then and then only can there be a decision of the High Court regarding the validity of the law sought to be impugned as against the provision of the Constitution.

The order of the Judge refusing to transfer the case to the High Court cannot be a final order of the High Court.

Dr. U E Maung, Advocate, for the applicants.

C. C. Khoo, Advocate and *Kyaw Thaung* (Government Advocate) for the respondent.

U CHAN TUN AUNG, C.J.—This is an application under section 5 of the Union Judiciary Act, 1948, for a certificate of fitness to appeal to the Supreme Court against the order of a single Judge of the High Court dismissing the application for transfer and trial in the High Court of criminal cases in which the applicants are concerned.

The applicants are being prosecuted before the Western Subdivisional Magistrate, Rangoon, under section 7 of the National Emblems (Restriction of Display) Act, 1954. Pending the hearing of the said cases the applicants filed a petition in the High Court in its Original Criminal Jurisdiction in Criminal Miscellaneous Application No. 2 of 1955 for the transfer and trial in the High Court those pending cases by invoking the provisions of section 135 (2) of the Constitution. The application was heard by U Thaung Sein, J., who by his order, dated the 8th July, 1955, dismissed the application and the concluding portion of his order reads:

> "On the whole, therefore, I regret I am unable to persuade myself that this is a fit case for transfer to the High Court under section 125 (2) of the Constitution. Accordingly the application shall stand dismissed."

Dr. U E Maung appearing for the applicants has now urged before us that the order of U Thaung Sein, J. tantamounts to a "final order"; that it comes

within the ambit of clause (*a*) of section 5 of the Union Judiciary Act, and that it is a fit case for issue of a certificate for appeal to the Supreme Court. Section 5, clause (*a*) of the Union Judiciary Act reads :

> " Save where an appeal lies to the High Court itself under the provisions of section 20, an appeal shall lie to the Supreme Court from the judgment, decree, or final order of the High Court (whether passed before or after the commencement of the Constitution) in any civil, criminal, or other case, if the High Court certifies (*a*) that the case involves a question as to the validity of any law having regard to the provisions of the Constitution . . . . "

From the foregoing provisions of the Union Judiciary Act, it is quite clear that an appeal lies to the Supreme Court on a certificate of the High Court from a " final order " of the High Court in a criminal case which involves the question of constitutionality of any Legislative enactment. The question, therefore, for us to determine is whether U Thaung Sein's, J. order is a "final order "in the criminal case in question. U Thaung Sein, J. in rejecting the petitioners' application appears to have considered two grounds urged in support of the application for transfer, and those two grounds obviously appertain (1) to the alleged invalidity of section 3 of the National Emblems (Restriction of Display) Act, 1954, in that it was said to be one of " delegated legislation " contravening section 90 of the Constitution, and (2) the question of " arbitrary discrimination " between citizens of the Union of Burma contravening fundamental rights guaranteed by section 13 of the Constitution.

We have carefully considered the points raised by the applicants' counsel, and we find, however, that in the discussions the learned Judge had made

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U CHAN TUN AUNG, C.J.

touching upon the Constitutional questions referred to above, he was merely answering the grounds urged by the applicants in support of their application for transfer. We find that the learned Judge has not made any decision whatsoever which can be said to be a "final order" so far as it relates to the question involved in the criminal case in which the applicants are concerned. It appears to us that the learned Judge was merely trying to satisfy himself whether the criminal cases now pending in the inferior court involve substantial question of validity of any law having regard to the provisions of the Constitution as envisaged in sub-section (2) of section 135 of the Constitution. To our mind those observations he has made touching upon those questions are merely *obiter dictum* and they cannot properly be said to be a "final decision" or "final order" in the said criminal cases. The concluding portion of his judgment makes it very clear to us that the learned Judge was only concerned with the question as to whether the applicants' case was a fit case for transfer to the High Court under section 135 (2) of the Constitution. In that regard the learned Judge was satisfied that it is not a fit case for transfer and rejected the application. Such a rejection, in our opinion, is not a final order which involves the question as to the validity of any law having regard to the provisions of the Constitution within the ambit of clause (*a*) of section 5 of the Union Judiciary Act.

The application for issue of a certificate to appeal to the Supreme Court shall, therefore, stand rejected.

CRIMINAL MISCELLANEOUS APPLICATION NO. 20 OF 1955.

U SAN MAUNG, J.—I wish to add a few remarks to the judgment of the learned Chief Justice with whom I am in general agreement. Sub-section (1) of

section 135 of the Constitution of the Union of Burma says that the High Court shall have exclusive original jurisdiction (*a*) in all matters arising under any treaty made by the Union ; (*b*) in all disputes between the Union and a unit or between one unit and another ; and (*c*) in such other matters, if any, as may be defined by law. From this it is clear that the High Court does not have exclusive original jurisdiction in respect of any case involving a question as to the validity of any law having regard to the provisions of the Constitution.

However, sub-section (2) of section 135 enacts that if the High Court is satisfied that a case pending in any inferior Court involves or is likely to involve substantially a question of the validity of any law having regard to the provisions of the Constitution, the High Court shall transfer the case to itself for trial. Therefore, when an application is made to the High Court to transfer a case pending in an inferior Court to itself for trial, what the Judge, who has to deal with the application, has to consider in the first place is whether *primâ facie* the case involves or is likely to involve such a question. If he is so satisfied the case has to be transferred to the High Court to be tried in the exercise of its original jurisdiction. Then and then only can there be a decision of the High Court regarding the validity of the law sought to be impugned as against the provisions of the Constitution. The order of the Judge refusing to Transfer the case to the High Court as provided for in sub-section (2) of section 135 of the Constitution cannot, therefore, be a *final order* of the High Court as to the validity of any law having regard to the provisions of the Constitution within the ambit of clause (*a*) of section 5 of the Union Judiciary Act, 1948.

APPELLATE CRIMINAL.

Before U Ba Thoung, J.

H.C. 1955

Sept. 22.

UNION OF BURMA (APPLICANT)

v.

RASHIN (RESPONDENT).*

Child under 6 years of age—Conviction under s. 112, Railways Act—Ss. 82 and 83, Penal Code—Ss. 126 to 130, Railways Act.

The Respondent, a child of 6 years of age was convicted under s. 112, Railways Act.

Held: S. 82 of the Penal Code declared that nothing is an offence which is done by a child under 7 years of age and although s. 130 of the Railways Act suspends the operation of ss. 82 and 83 of the Penal Code in respect of ss. 126 to 129 of the Railways Act, s. 130 of the Railways Act has no effect upon offences committed under s. 112 of the said Act.

Held: The immunity of children under 7 years of age from Criminal liability extends to offences under any Special or local Law.

The conviction is bad in law and is set aside.

The King v. Ba Ba Sein, (1938) R.L.R. p. 227, followed.

Applicant: *Nil.*

Respondent: *Nil.*

U BA THOUNG, J.—The respondent Rashin, who is a child of 6 years of age, has been convicted under section 112 of the Railways Act and ordered to pay a fine of K 5 or in default, to undergo 7 days' rigorous imprisonment, by the first Additional Magistrate, Nyaunglebin. The conviction being undoubtedly against the provisions of section 82 of the Penal Code, the learned Sessions Judge, Pegu, in his Criminal

* Criminal Revision No. 97 of 1955.

Review of the order of the 1st Additional Magistrate of Nyaunglebin, dated the 16th day of February 1955, passed in Criminal Regular Trial No. 47 of 1955, on a recommendation by the Sessions Judge, Pegu, in his Criminal Revision No. 89 of 1955, dated the 20th June 1955.

Revision No. 89 of 1955 submitted the proceedings to this Court with a recommendation to set aside the conviction and sentence passed on the respondent.

Section 82 of the Penal Code declares that nothing is an offence which is done by a child under 7 years of age; and although section 130 of the Railways Act suspends the operation of sections 82 and 83 of the Penal Code in respect of sections 126 to 129 of the Railways Act, section 130 of the Railways Act has no effect upon offences committed under section 112 of the said Act. The conviction of the respondent is undoubtedly bad in law and it must be set aside. That the immunity of children under 7 years of age from criminal liability also extends to offences under any special or local law has been laid down in the case of *The King* v. *Ba Ba Sein* (1).

For the above reasons, I set aside the conviction and sentence passed on the respondent Rashin and acquit him. The fine, if paid by him, is to be refunded back to him.

(1) (1938) R.L.R. p. 227.

APPELLATE CRIMINAL.

Before U San Maung, J.

H.C. 1955

Dec. 10.

UNION OF BURMA (APPLICANT)

v.

MAUNG KHWE GYI (RESPONDENT).*

Conviction under s. 380, Penal Code by a Second Class Power Magistrate—Case submitted under s. 349 (1) instead of the Proviso to s. 562 (1), Criminal Procedure Code to the District Magistrate for action under s. 562—Transfer of case by District Magistrate to Second Additional Magistrate for disposal—Acquittal by Second Additional Magistrate—S. 380, Criminal Procedure Code—Burma Act No. XIII of 1945.

The Respondent was convicted under s. 380, Penal Code by a Second Class Power Magistrate, who submitted the case under s. 349 (1), Criminal Procedure Code to the District Magistrate for release on probation under s. 562.

The District Magistrate transferred the case to the Second Additional Magistrate who recalled and examined three prosecution witnesses and acquitted the Respondent.

On reference, *held*: (i) Proceedings should be submitted under the Proviso to sub-s. (1) of s. 562 and not 349 (1), Criminal Procedure Code;

(ii) S. 349 (1) is applicable only to a case where a Magistrate of the Second Class is merely of the opinion that the accused is guilty of the offence charged but that he ought to receive a punishment different in kind from and more severe than that which the Magistrate is empowered to inflict. When the Magistrate considers that a person convicted by him should be released on probation of good conduct, s. 349 (1) of the Criminal Procedure Code is irrelevant;

(iii) A Magistrate to whom a criminal case has been referred under the proviso to s. 562 can only dispose of it in the manner provided by s. 380 and treat the accused as an already convicted person. He is not empowered to set aside the conviction by the referring Magistrate and acquit him.

Mi Thi Hla v. *Mi Kin*, (1914—16) 2 U.B.R. 55; *Morali and six others* v. *King-Emperor*, (1907-08) 4 L.B.R. 277, dissented from; *The Public Prosecutor* v. *Malaipati Guruppa Naidu*, I.L.R. 57 Mad. 85, followed.

* Criminal Revision No. 166 (B) of 1954, being Reference made under s. 438 of the Criminal Procedure Code by the Sessions Judge, Myaungmya, (U Tin Maung), in his Criminal Revision No. 128 of 1954, dated the 27th August 1954, with the recommendation that the order dated the 26th March 1954 of the 2nd Additional Magistrate, Myaungmya, passed in his Criminal Regular Trial No. 2 of 1954, acquitting the respondent of an offence under s. 380 of the Penal Code, may be set aside.

(iv) By the deletion of s. 380, Criminal Procedure Code and inclusion of sub-s. (5) in s. 562 by Burma Act No. XIII of 1945, the Magistrate to whom a case is submitted under the proviso to sub-s. (1) of s. 562 cannot acquit the accused. The only thing he can do is to sentence him or to take such appropriate action as provided for in s. 562. The inquiry envisaged in sub-s. (5) is to be confined to the expediency or otherwise of releasing the offender on probation of good conduct or of releasing him after due admonition.

Order of acquittal set aside and case remanded.

Ba Kyaing (Government Advocate) for the applicant.

Nil for the respondent.

U SAN MAUNG, J.—I have read the order of the reference of the learned Sessions Judge, Myaungmya, in his Criminal Revision No. 128 of 1954. It would appear that in Criminal Regular Trial No. 119 of 1953 of the 1st Additional Magistrate, Labutta, the respondent Maung Khwe Gyi was convicted by the Magistrate of an offence punishable under section 380 of the Penal Code. However, the Magistrate, who was only exercising 2nd class magisterial powers, considered that Maung Khwe Gyi should be released on probation of good conduct under the provisions of section 562 of the Criminal Procedure Code. He therefore submitted the proceedings to the District Magistrate, Myaungmya, and in doing so he purported to act under section 349 (1) of the Criminal Procedure Code when in fact he meant to do so under the proviso to sub-section (1) of section 562. Herein lies the original mistake because section 349 (1) is applicable only to a case where a Magistrate of the second or third class is merely of the opinion that the accused is guilty of the offence charged but that he ought to receive a punishment different in kind from and more severe than that which the Magistrate is empowered to inflict. When the Magistrate considers that a

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U SAN MAUNG, J.

person convicted by him should be released on probation of good conduct, section 349 (1) of the Criminal Procedure Code is irrelevant.

The case was transferred by the District Magistrate, Myaungmya, to the 2nd Additional Magistrate, Myaungmya, for disposal although it is not known under what provision of law the learned District Magistrate acted in making this transfer. The 2nd Additional Magistrate, Myaungmya, relying upon the ruling in the case of *Mi Thi Hla* v. *Mi Kin* (1), recalled three of the prosecution witnesses for further examination by him and subsequently acquitted Maung Khwe Gyi classifying the case as "Mistaken." It would appear that in *Mi Thi Hla* v. *Mi Kin*'s *case* (1) the learned Judicial Commissioner of Upper Burma, referring with approval the observations of Irwin, O.C.J. in *Morali and six others* v. *King-Emperor* (2), held that a Magistrate to whom proceedings were submitted as provided by section 562 of the Criminal Procedure Code may pass such sentence or make such order, including order of acquittal, as might have been passed or made if the case had originally been heard by him. The decision in *Mi Thi Hla* v. *Mi Kin*'s *case* (1) has however been dissented from by the Madras High Court in *The Public Prosecutor* v. *Malaipati Gurappa Naidu* (3), where it was held that a Magistrate to whom a criminal case has been referred under the proviso to section 562 of the Criminal Procedure Code can only dispose of it in the manner provided by section 380, and that when an accused person comes before a Magistrate under section 380, he can only be treated as a convicted person and the Magistrate acting under that section is not empowered to set aside the

(1) (1914—16) 2 U.B.R. 55. (2) (1907—08) 4 L.B.R. 277
(3) I.L.R. 57 Mad. 85.

conviction already recorded by the referring Magistrate, and acquit him. The Madras view seems in my opinion to be the correct one and with respect I may say that the learned Judicial Commissioner in *Mi Thi Hla* v. *Mi Kin*'s *case* (1) had failed to observe the difference between the language of section 380 of the Criminal Procedure Code, when read in conjunction with section 562, and that of sub-section (2) of section 349 of the Criminal Procedure Code, when read in conjunction with sub-section (1) thereof. Section 562 of the Criminal Procedure Code refers to persons who have been convicted and section 380 says that a Magistrate to whom a case has been submitted under section 562 may pass such sentence or order as he thought fit. The order mentioned therein obviously is an order for the release of the offender on probation of good conduct, etc., instead of the sentence which would otherwise have to be passed. In sub-section (2) of section 349, however, the phrase "shall pass such judgment, sentence or order in the case as he thinks fit," is comprehensive enough to include judgment or order acquitting the accused.

However, whatever doubts there might have existed before seem in my opinion to have been resolved in favour of the Madras view by the deletion of section 380 from the Criminal Procedure Code by Burma Act No. XIII of 1945, and the inclusion of sub-section (5) of section 562 by the same enactment. Therefore, the relevant portion of section 562 now reads as follows:

"562. (1) When any person not under twenty-one years of age is convicted of an offence punishable with imprisonment for not more than seven years, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or transportation for life,

(1) (1914-16) 2 U.B.R. 55.

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U SAN MAUNG, J.

and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct, and in the meantime to keep the peace and be of good behaviour

Provided that, where any first offender is convicted by a Magistrate of the third class, or a Magistrate of the second class not specially empowered by the President in this behalf, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class or Subdivisional Magistrate, forwarding the accused to or taking bail for his appearance before such Magistrate, who shall dispose of the case in manner provided by sub-section (5).

* * * *

(5) Where proceedings are submitted to a Magistrate of the first-class or a Subdivisional Magistrate under the proviso to sub-section (1), such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself, or direct such inquiry or evidence to be made or taken by the Magistrate who tried the case."

It is clear therefrom that the Magistrate to whom a case is submitted under the proviso to sub-section (1) of section 562 of the Criminal Procedure Code cannot acquit the accused. The only thing he can do is to sentence him or to take such appropriate action as provided for in section 562. The inquiry envisaged in sub-section (5) is to be

confined to the expediency or otherwise of releasing the offender on probation of good conduct or of releasing him after due admonition.

In the result the order of the 2nd Additional Magistrate, Myaungmya, acquitting the respondent Maung Khwe Gyi is set aside and the case is remanded to the District Magistrate, Myaungmya, for action according to law in the light of the remarks made above.

APPELLATE CRIMINAL

Before U Ba Thoung, J.

H.C. 1955 — *June 2.*

UNION OF BURMA (APPLICANT)

v.

MAUNG NYUN (RESPONDENT).*

Unlawful Association Act, 1908, s. 17 (1)—Burma Act No.L XI of 1954, the Unlawful Association (Amendment) Act, 1954—Trial of warrant case as a summons case—Not merely an irregularity but an illegality, incurable under s. 537, Criminal Procedure Code.

Held: The Trial of a warrant case as a summons case is not merely an irregularity but an illegality, incurable by s. 537 Criminal Procedure Code or any of the curative provisions of the Code. The irregularity amounts to an illegality and vitiates the trial.

Sufal Golai v. *Emperor*, A.I.R. (1938) Cal. 205; *Mangi Lal* v. *Emperor*, A.I.R. (32) (1945) All. 98, followed.

Ba Gyaw (Government Advocate) for the applicant.

Nil for the respondent.

U BA THOUNG, J.—The respondent Maung Nyun and one Maung Sein Min (*a*) Sein Maung were prosecuted under section 17 (*1*) of the Unlawful Association Act, 1908, in the Court of the 6th Additional Magistrate, Mandalay, and the learned Additional Magistrate in his Criminal Trial No. 236 of 1954 convicted them under section 17 (*1*) of the said Act and sentenced them to undergo 4 months' rigorous imprisonment each. It appears that the learned Additional Magistrate was not aware that the provisions of section 17 (*1*) of the Unlawful

* Criminal Revision No. 26 (B) of 1955, being review of the order of the 6th Additional Magistrate of Mandalay, dated the 4th day of December 1954 passed in Criminal Trial No. 236 of 1954, as recommended by the Additional District Magistrate, Mandalay.

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U BA THOUNG, J.

Association Act, 1908 has been amended *vide* Burma Act No. LXI of 1954 and that the minimum sentence to be awarded in such cases is two years. An application for revision against the judgment of the trial Magistrate was therefore filed by the Court Prosecuting Inspector in the Court of the Additional District Magistrate, Mandalay. The learned Additional District Magistrate in his Criminal Revision No. 57 of 1954 has made a recommendation that the sentences of 4 months' rigorous imprisonment each, imposed on the respondent and on Maung Sein Min be enhanced to two years rigorous imprisonment each, and he has submitted the proceedings to this Court with the above recommendation under section 438 of the Code of Criminal Procedure, for orders. Notices were issued to the respondent as well as to Maung Sein Min, but the respondent Maung Nyun alone was duly served with notice whereas the notice issued to Maung Sein Min could not be served. It was therefore ordered by this Court that the revision case against Maung Nyun and Maung Sein Min be split up into two *i.e.* one against the respondent Maung Nyun and the other against Maung Sein Min, and that the hearing of the case against Maung Nyun be proceeded with, while the revision case against Maung Sein Min is to be heard and an order passed after he has been duly served with notice. Hence the order in this case concerns Maung Nyun only.

The Unlawful Association Act, 1908 has been amended *vide* the Burma Act No. LXI of 1954. The Burma Act No. LXI of 1954 *i.e.* The Unlawful Associations (Amendment) Act, 1954, came into force with effect from the 16th October 1954, and as the commission of the offence in the present case was on 2nd November 1954, the minimum sentence to be awarded to each of the accused in the present case is two

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years. The sentences imposed on the two accused by the trial Magistrate are therefore illegal. Apart from this, it is found on perusal of the trial Court proceedings that the case was tried as a summons case and not as a warrant case. No evidence was adduced by the prosecution and the trial was held as if it was a summons case and all that the trial Magistrate did was that he put the particulars of the offence to the accused and asked them to plead guilty or not guilty and he convicted them on their pleading "Guilty". The offence committed in the present case is liable to punishment with a minimum sentence of two years' rigorous imprisonment, and therefore it should not be tried as a summons case, but it should be tried as a warrant case. Thus the trial itself is illegal. In the case of *Sufal Golai* v. *Emperor* (1) it has been held that:

> "In considering whether the trial should be in accordance with the procedure of a summons case or of a warrant case, it is not pertinent to consider the nature of the offence, but only the measure of the punishment which may be inflicted. That constitutes the deciding factor.
>
> Where therefore in a prosecution under section 46 (*a*) Bengal Excise Act, it is apparent from the beginning that the accused is liable to imprisonment exceeding six months by reason of a previous conviction under the provisions of section 62 of the Act, the proper procedure for the Magistrate to adopt is that laid down for a warrant case. If in such a case, the Magistrate follows the summons case procedure instead of the procedure for warrant case, the irregularity is not a mere matter of form. The difference between the two forms of trial is of sufficient importance to lead to an almost indefeasible presumption of prejudice to the accused. The irregularity is of such a character that it cannot be cured by section 537, Criminal Procedure Code or any of the other curative provisions of the Code. The irregularity amounts to an illegality and vitiates the trial".

(1) A.I.R. (1938) Cal. 205.

In the case of *Mangi Lal* v. *Emperor* (1), it has been held that :

" A warrant case as defined by the Criminal Procedure Code is a case relating to an offence punishable with death, transportation or imprisonment for a term exceeding six months. An offence under Rule 81 (4), (Defence of India Rules, 1939) is punishable with imprisonment for a term which may extend to three years. Therefore a case relating to an offence under Rule 81 (4) would be a warrant case. Ordinarily such a case could not be tried summarily but under Rule 130 (4) it can be tried summarily but even then it has to be tried in accordance with the provisions of sections 262 to 265, Criminal Procedure Code. Section 262, Criminal Procedure Code is an imperative provision and a breach of it is not merely an irregularity but an illegality. Accordingly where in a summary trial of a warrant case relating to an offence under Rule 81 (4) the trial was held as if it was a summons case and all that the Magistrate did was that he put the particulars of the offence to the accused as soon as he was brought before him, asked him to plead guilty or not guilty and convicted him on his pleading guilty, and no attempt was made by the prosecution to adduce any evidence of any kind, the trial is illegal."

It further held that—

" Even if an application for revision by the accused was admitted by the High Court only on the question of sentence, the High Court is not prevented from considering the case as a whole and holding that there is an illegality in the trial and the sentences imposed upon the accused."

In the present case the Additional District Magistrate has recommended for the enhancement of the sentence only as he has not noticed the illegality of the trial itself, but I am not prevented from considering the case as a whole and holding that there is an illegality in the trial and the sentence imposed upon the accused.

(1) A.I.R. (32) (1945) All. 98.

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U BA THOUNG, J.

For the reasons stated above I set aside the conviction and the sentence passed on the respondent Maung Nyun by the 6th Additional Magistrate, Mandalay, in his Criminial Trial No. 236 of 1954, and order a re-trial of the case against him.

APPELLATE CRIMINAL.

Before U Ba Thoung, J.

UNION OF BURMA (APPLICANT)

v.

AH SHIN AND TWO OTHERS (RESPONDENTS). *

H.C. 1955

Oct. 13.

Excise Act, s. 30 (a)—*Acquittal of accused without examining the Complainant or the prosecution witnesses as required by s. 244 (1), Criminal Procedure Code, Trial illegal, void and incurable—High Court's power in revision.*

The Respondents were sent up under s. 30 (*a*), Excise Act and they pleaded not guilty to the charge.

The trial Magistrate without examining the Complainant or taking any evidence of the prosecution witnesses as required under s. 244 (1), Criminal Procedure Code acquitted them.

Held: That the acquittal of the Respondent by the trial Magistrate without examining the Complainant or taking the evidence of the prosecution witnesses in accordance with s. 244 (1), Criminal Procedure Code is illegal—an illegality which cannot be cured.

Held further: The trial being illegal and void, the High Court in its revisional jurisdiction can set aside the order of acquittal.

Emperor v. *Varadarajula Naidu*, 33 C.L.J. 274, followed.

Ba Kyaing (Government Advocate) for the applicant.

Ba Maung, Advocate, for the respondents.

U BA THOUNG, J.—The three respondents along with one Ma Tin Tin was sent up for trial under section 30 (*a*) of the Excise Act before the Court of the 1st Additional Magistrate of Paungde, and the learned trial Magistrate in his Criminal Regular Trial No. 206 of 1954 after explaining the charges to the four accused, asked them if there were any cause to show why they should not be convicted. Of the four

* Criminal Revision No. 67 (B) of 1955.

Review of the order of the 1st Additional Magistrate of Paungde, dated the 28th day of December 1954, passed in Criminal Regular Trial No. 206 of 1954 with the recommendation of the District Magistrate, Prome in Criminal Revision No. 59 of 1955, dated the 25th March 1955.

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U BA THOUNG, J.

accused, Ma Tin Tin pleaded guilty and the learned trial Magistrate convicted her on her own plea and sentenced her to pay a fine of K 120 or in default to undergo 1½ months' rigorous imprisonment. The remaining three accused who are the respondents in this case pleaded not guilty, and the learned trial Magistrate without examining the complainant or taking any evidence of the prosecution witnesses as required under section 244 (1) of the Criminal Procedure Code acquitted them. The case was called on revision by the District Magistrate of Prome and in his revision case No. 59 of 1955, the learned District Magistrate has remarked that the acquittal of the respondents in this case by the trial Magistrate without examining the complainant or taking the evidence of the prosecution witnesses in accordance with section 244 (1) of the Criminal Procedure Code is illegal; and he submitted the proceedings to this Court with a recommendation to order retrial of the case.

The recommendation of the District Magistrate must be accepted. Section 244 (1) of the Criminal Procedure Code clearly lays down that if the accused does not make an admission of the truth of accusation the Magistrate should proceed to hear the complainant (if any), and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence. The fact that the learned trial Magistrate acquitted the respondents in this case who had not pleaded guilty to the charge, without examining the complainant and taking the evidence of the prosecution witnesses in support of the prosecution, is clearly an illegality which cannot be cured and the order of acquittal must therefore be set aside.

It is contended by the learned counsel for the respondents that the order of acquittal could only be set aside on appeal on behalf of the Government made under section 417 of the Criminal Procedure Code and not by way of revision. His contention is correct where there is an acquittal after a proper trial, but in the present case the trial itself is illegal and void for not complying with the provisions of section 244 (1) of the Criminal Procedure Code. Such being the case, I am of the opinion that this Court in its revisional jurisdiction can set aside the order of acquittal by the trial Magistrate, and order a fresh trial.

I am fortified in this view by the ruling laid down in the case of *Emperor* v. *Varadarajula Naidu* (1) where it has been held that "it is not open to a Magistrate to acquit an accused person under section 245, Criminal Procedure Code, without examining the complainant and witnesses produced by him." The facts in that case are similar to the present one, and the High Court in revision set aside the order of the trial Magistrate and ordered a retrial of the case.

For the above reasons I set aside the order of the 1st Additional Magistrate, Paungde passed in his Criminal Regular Trial No. 206 of 1954 acquitting the respondents Ah Shin, Ma Khin Nyunt and Ah Shap, and order a retrial against them by any other Magistrate as the District Magistrate of Prome may direct.

(1) 33 C.L.J. 274

APPELLATE CRIMINAL.

Before U San Maung, J.

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Sept. 8.

UNION OF BURMA
S. J. TRIVEDI } (APPELLANT) (APPLICANT)

v.

G. M. MEHTA
UNION OF BURMA } (RESPONDENT).*

Foreign Exchange Regulation Act, 1947—S. 6 (1) and s. 24 (1)—S. 120-B, Penal Code—The term "accomplice"—S. 342, sub-s. (1), Criminal Procedure Code—S. 32 (3), Evidence Act—Guiding principles in appeals against acquittals.

In Criminal Regular Trial No. 27 of 1955 of the Court of the 1st Special Judge, (S.I.A.B. & B.S.I.A. Act) Rangoon, S. J. Trivedi and G. M. Mehta were tried under s. 24 (1) of the Foreign Exchange Regulation Act, 1947 read with s. 120-B of the Penal Code—

S. J. Trivedi was convicted.

G. M Mehta was acquitted.

S. J. Trivedi appealed against his conviction and Sentence and the Union of Burma appealed against the order of acquittal.

Both the appeals were heard together.

Held : The correct proposition of the Law relating to what the term "accomplice" connotes is that the term "accomplice" signifies a guilty associate in crime or a person who can be jointly indicted with the accused in the case.

Ramswami Goundan v. *Emperor*, I.L.R. 27 Mad. p. 271 ; *Kailash Missir* v. *Emperor*, A.I.R. (1931) Pat. p. 105.

An Officer of the B.S.I. appointed under Act 50 of 1951 is a police Officer when he investigates the offences mentioned in Schedule (1) annexed thereto. The statement made to him is not admissible in evidence. S. 162 of the Criminal Procedure Code applies to the statement made to him in the course of investigation.

U Soe Lin v. *The Union of Burma*, Criminal Revision No. 45-B of 1953, approved.

Further, the B.S.I. Officer is a police Officer within the meaning of that term in s. 162 of the Criminal Procedure Code.

Maung San Myin v. *King-Emperor*, I.L.R. 7 Ran. 771 ; *Ah Foong* v. *King-Emperor*, I.L.R. 46 Cal. 411 ; *Ameen Sharif* v. *Emperor*, I.L.R. 61 Cal. 607 ; *Nanoo Sheikh Ahmed and another* v. *Emperor*, I.L.R. 51 Bom. (F.B.) 78 ; *Bachoo Kandere* v. *Emperor*, A.I.R. (1938) Sindh (F.B.) 1, referred to ; *Re. Someshwar H. Shelat*, A.I.R. (1946) Mad. 430, approved.

* Criminal Appeal Nos. 145 and 155 of 1955. Appeal from the order of the Special Judge (1) (SIAB & BSIA) of Rangoon, dated the 5th day of February 1955 passed in Criminal Regular Trial No. 27 of 1953.

It is a fundamental principle that in a Criminal trial the burden of proof lies on the prosecution to establish the charge beyond reasonable doubt and that where an accused person should have been discharged for want of *primâ facie* case against him the Court should not use the evidence of a co-accused given under s. 342 (1) of the Code of Criminal Procedure to fill up the gaps in the prosecution.

Ba Pe and one v. *The Union of Burma*, (1950) B.L.R. 178, followed.

But when the prosecution has succeeded in establishing a *primâ facie* case against the accused before the other co-accused was examined on oath, then the evidence of the co-accused may be used against the accused, although the weight to be given to this evidence will depend in the circumstances of the case.

U Saw and nine others v. *The Union of Burma*, (1948) B.L.R. p. 217, followed.

A statement made by a person which would expose him to a criminal prosecution is admissible in evidence under s. 32 (3) of the Evidence Act.

Nga Po Yin v. *King-Emperor*, (1904-06) 1 U.B.R. p. 3; *Maung Shin and two others* v. *The Union of Burma*, (1948) B.L.R. p. 425, referred to; *Achhailall* v. *King-Emperor*, 25 Pat. p. 347, dissented from.

In appeals against acquittals, the High Court will always give proper weight and consideration to such matters as—

(1) the views of the trial Judge as to the credibility of the witnesses;

(2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial;

(3) the right of the accused to the benefit of any doubt; and

(4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.

Sheo Swarup and others v. *King-Emperor*, 56 All. p. 645 (P.C.), followed; *Emperor* v. *Nga Mya Maung*, A.I.R. (1936) Ran. p. 90; *Puran* v. *The State of Punjab*, A.I.R. (1953) p. 459 (S.C.); *Chelloor Mankkal Narayan Ittiravi Nambudiri* v. *State of Travancore-Cochin*, A.I.R. (1953) p. 478 (S.C.); *Madan Mohan Singh* v. *State of Utta Pradesh*, A.I.R. (1954) 637 (S.C.), referred to.

Dr. Ba Han for Union of Burma in Appeal No. 145.

Mon San Hline for the appellant in Appeal No. 155.

Kyaw Myint and *Basu* and *Venkatram* for the respondent in Appeal No. 145.

Dr. Ba Han for Union of Burma in Appeal No. 155.

U SAN MAUNG, J.—In Criminal Regular Trial No. 27 of 1955 of the Court of the 1st Special Judge, (SIAB & BSI Act), Rangoon, Nigel Wood (now

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deceased), S. J. Trivedi and G. M. Mehta were sent up for trial for being in a conspiracy to commit offences punishable under section 24 (*1*) of the Foreign Exchange Regulation Act, 1947, by making payments to or on credit of persons residing outside Burma in contravention of the provisions of sub-section 1 of section 6 of this Act. Nigel Wood ended his life by an over dose of sleeping draught the day after this case was sent up for trial against him. S. J. Trivedi was subsequently convicted by the learned trial Judge of the offences punishable under section 24 (*1*) of the Foreign Exchange Regulation Act, 1947, read with section 120-B of the Penal Code and was sentenced to two years' rigorous imprisonment. G. M. Mehta was however directed to be acquitted and released in so far as this case was concerned. Trivedi has now appealed against his conviction and sentence while the Government of the Union of Burma has appealed against the acquittal of G. M. Mehta, and these two appeals will be dealt with in the same judgment as they were practically heard together.

This case is the outcome of the activities of an international gang of racketeers dealing in the foreign exchange racket. *Modus operandi* of the racketeers was as follows:

There were in England two firms of exporters known as the Verulam Exporting Co. and the Hervo Engineering Co., both situated at No. 38, Bow Lane, London, E.C. 4. Both these firms were apparently owned by the same person who signed himself as the sole proprietor on the bills drawn on the exporters in Burma who were the Burma Engineering Supply Co. of No. 118, Phayre Street, Rangoon, Shan Electrical Trading Co., Main Road, Taunggyi, Hassanali Marmoojee & Sons, No. 26 B. Road, Mandalay & Lower Burma Electrical Mart, Lower

Main Road, Moulmein. The same persons were employed by both the Verulam Exporting Co. and the Hervo Engineering Co. as may be seen from the names appearing in the combined certificate of value, origin and invoice of goods. One Alice Joyce Wilson was supposed to be the Chief Invoice Clerk for both these companies, while a person by the name of W. Bunce appeared to be a subordinate employee. As regards the Burmese firms of exporters the Burma Engineering Supply Co. alone had an office situated at Rangoon, while the other associates, namely, Shan Electrical Trading Co., Hassanali Marmoojee & Sons, and Lower Burma Electrical Mart were all fictitious firms having no real address. Correspondence meant for these firms had to be sent care of Burma Engineering Supply Co. The brain behind the enterprise was one K. L. Gullestad of Norway, now absconding. It was he who had signed himself as C. E. Madha, Manager of Burma Engineering Supply Co. in Form A which was the form of application for foreign exchange for the purpose of paying for goods alleged to have been imported or to be imported into Burma. Gullestad's associate in Rangoon was Nigel Wood, the Assistant Manager in the Tyre Department, Harperink Smith & Co. Ltd., Rangoon. Nigel Wood in conspiracy with W. Stickland, now absconding, ex-Accountant of Grindlays Bank, Rangoon, and A. G. Simons, Second Officer of the Inward Bills Section, Mercantile Bank of India Ltd., Rangoon, had prior to the establishment of the Burma Engineering Supply Co. organised a firm known as the New Burma Trading Co. at No. 92 Pagoda Road, Rangoon, for carrying on activities similar to those of the Burma Engineering Supply Co. For his participation in the racket, A. G. Simons was convicted of the offence punishable under section 24

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(*l*) of the Foreign Exchange Regulation Act, read with section 120-B of the Penal Code in Criminal Regular Trial No. 28 of 1953 of the same Special Judge and was sentenced to three years' rigorous imprisonment. Maung Toe (PW 2), the main witness for the prosecution in this case, being a personal friend of Stickland was the head clerk of New Burma Trading Co. before its dissolution, a position similar to that which he occupied in the Burma Engineering Supply Co. after its establishment by Wood a few months after the dissolution of the previous company. S. J. Trivedi who was no stranger to Rangoon, having been employed successively in the firms of Tokersee Mooljee Co. of Mogul Street, Rangoon, and M. E. Patel and P. T. Patel of Rangoon, prior to the outbreak of the war in 1941, was a close friend of Gullestad having worked under him as Assistant Manager of the Shipping Department of Thorensen & Co. of Bangkok where Gullestad was the General Manager. At the time of the occurrence of this case both Gullestad and Trivedi had left that firm; Gullestad to become the representative of Verulam Exporting Co. of London and Trivedi to become an employee of Aryan Trading Co. of Bangkok, whose General Manager, M. C. Kothary was the son-in-law of one K. M. Mehta, proprietor of Aryan Trading Co. of Bombay, where Trivedi had also worked during the war years.

The prosecution case in brief was as follows: On the 19th September 1953, Gullestad sent a letter, Exhibit I, to Trivedi, care of Aryan Trading Co., Bangkok from Norway wherein he said that he was booked to leave for Rangoon on the 24th September 1953 *via* Bombay and that he expected to arrive in Rangoon on the 27th September 1953. He requested Trivedi

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to arrange to send his clothings to Rangoon and also to give introductions and such information as might be necessary to make his stay in Rangoon an enjoyable one. On the 22nd September 1953, *i.e.* three days after the date of Gullestad's letter to Trivedi, Verulam Exporting Co. of London wrote to the Burma Engineering Supply Co., Rangoon, saying that their representative Mr. Gullestad was leaving London on Thursday, the 24th of September *via* Bombay to Rangoon that he would arrive at Rangoon on Sunday, the 27th, and that one of the representatives of Burma Engineering Supply Co. should meet Gullestad at the Mingaladon Airport. Gullestad was apparently met at the Airport by Nigel Wood, Simon and a person by the name of Dick and was taken to the Strand Hotel where he put up from the 27th September 1953 till the 10th October 1953. On the 28th September 1953, the day after his arrival in Rangoon, Gullestad sent a telegram, Exhibit T, to Trivedi asking him when he would be arriving and Trivedi replied the next day that he would be arriving either on Friday or Saturday following and that accommodation should be reserved for him. Trivedi in fact arrived at Rangoon on the morning of Saturday, the 3rd October 1953 by air from Bangkok and he was at the Strand Hotel at about 11.30 a.m. that day. Gullestad with the help of Wood tried to get his own stay in Rangoon extended but no extension beyond the 13th October 1953 was granted to him by the Immigration Department and he finally left Rangoon on the morning of 11th October 1953. During his short stay in Rangoon Gullestad with the active assistance of Wood and Trivedi dealt with several banks in Rangoon and received bogus shipping documents to the total value of £ 51,196-0-7(K 6,82,613·72) from Verulam Exporting

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Co. and Hervo Engineering Co. of London and was successful in remitting a sum of £ 15,608-19-9 (K 2,09,069·18). For this purpose Gullestad forged several applications in Form A by signing himself in the name of a fictitious person C. E. Madha, General Manager of Burma Engineering Supply Co., acting for itself and for its associates. These applications are Exhibits 2H, 2J, 2U, 2V, 2W, 2X, 3H-1, 3J-1, 3N-1, 3-O-1, 3P-1, 3T-5, 3T-6, 3U-1 to 3U-4, 4B and 4B-1 to 4B-12. Trivedi's part in the conspiracy was to supervise the work of Maung Toe (PW 2) in depositing money in several banks in Rangoon in payment for the bills sent from the Verulam Exporting Co. and Hervo Engineering Co. of London and to receive the relevant shipping documents. At the time relevant in this case the O.G.L. system of importing goods into Burma was in vogue. According to this system the importers in Burma had to write to the foreign exporters for the supply of goods on the banks guaranteeing payment. The bills and the shipping documents were sent by the foreign exporters to the banks in Burma for collection of the money from the importers and for the delivery of the shipping documents to them. The Exchange Control Department of the Union Bank of Burma had given general permission to all the banks who are authorised dealers in foreign exchange to effect the remittance of the proceeds of these bills provided they were satisfied with the relevant documents sent to them. The importer who wished to make a remittance for the goods imported had to complete the form of application for foreign exchange (Form A) on the reverse of which he had to give an undertaking that Customs Bill of Entry would be produced to the Union Bank within three months from the date of remittance. This was for the purpose of

checking whether goods to the value of the amount remitted from Burma were received. The prosecution had established the fact that goods in respect of which foreign exchange had been applied for and obtained by the Burma Engineering Supply Co. and its associates never arrived and that therefore a fraud had been committed on the Exchange Control Department of the Union of Burma. As a result of the prompt action taken by the Controller on receipt of information from the B.S.I. regarding the activities of these companies some of the money to be remitted had been seized.

The case against the respondent G. M. Mehta rests mainly upon the evidence of Maung Toe (PW 2), Kyaw Myint (PW 6) and Than Tun (PW 10) corroborated by the circumstantial evidence on record. The evidence of these witnesses had been rejected by the learned trial Judge on the ground that they were accomplices in the crime for which Trivedi and Mehta had been charged and that their evidence relating to the part taken by Mehta on the 8th of October 1953 had been disproved by the fact that only one leather bag had been seized by the B.S.I. It is therefore necessary to scrutinise the evidence of these three witnesses with care with a view to see whether the evidence has rightly been rejected by the trial Judge.

Maung Toe (PW 2) came to know Stickland, the Accountant of Grindlays Bank when as an employee of the British Burma Film Co., Rangoon, he had to make daily visits to that bank for the purpose of depositing money. Ultimately, he became so intimate with Stickland that he called him by his Christian name of Wesley, while Stickland called him Charlie. It was because of Stickland that he became head clerk of the New Burma Trading Co. situated at Pagoda Road, Rangoon, of which Wood was the proprietor.

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Wood paid him a monthly salary of Rs. 350 and his duty was to receive letters addressed to New Burma Trading Co. and those care of that firm and to deposit moneys into the banks with a view to take delivery of the relevant bills and shipping documents. Some time during March 1953 about two days after he became an employee of New Burma Trading Co. Wood sent a telephone message to him to come to the British Council office. He went there and met G. M. Mehta who was introduced to him by Wood as Mr. Chatterjee. Mr. Wood took over from Mehta a leather bag similar to the one exhibited in the case and instructed him to go to the Mercantile Bank of India to deposit the money and to take delivery of certain bills. He therefore went to the Mercantile Bank with the leather bag wherein were over K 10,000 in cash and bank memos. showing the amount of money to be paid into the bank. He paid in the whole amount contained in the bag at the bank and in return received some documents which he delivered to Wood at the British Council. About a week later he went to the Strand Hotel where he was called by Wood and there met one Mr. Irani together with Wood. Wood gave him a leather bag with money and instructed him to make payment at the bank and to receive the relevant documents. He paid the money into the bank which he did not remember and obtained some documents in return. He then went to the Strand Hotel and there seeing Irani and Mehta but not Wood gave the bank documents to Irani. Stickland returned to England in May 1953 and the business of the New Burma Trading Co. was then wound up and Maung Toe's services therein terminated.

About June 1953 Maung Toe interviewed Wood and asked him for a job and in July 1953 Wood

offered the job of a clerk in the Burma Engineering Supply Co. at No. 118, Phayre Street, Rangoon, adjoining the Kawthaung Trading Co. At the first instance, Maung Toe was the only clerk appointed there. After his appointment he had to carry out the work of furnishing the office and of obtaining letter heads and rubber stamps for the Burma Engineering Supply Co. and its associates. These were done under instructions given by Wood. As directed by Wood he had to make payments to Habib Bank, Chinese Overseas Bank and Netherlands Bank and to take delivery of the relevant bank documents. Up to 4th October 1953 he considered Wood to be the boss of the firm. On that day, however, Wood told him that a new boss had come and he would be attending office the next day. On the 5th October 1953 the appellant Trivedi came to the office at about 11 a.m. and asked him if he was Maung Toe. At that time Kyaw Myint (PW 6), who was employed as a clerk in place of one Maung Maung who had resigned, was also present in the office. Trivedi took his seat at the manager's table. About 15 minutes later, Trivedi went with Maung Toe to the National Bank of India where he instructed Maung Toe to make a deposit in the bank. He gave Maung Toe a leather bag containing cash and a bank memo. Maung Toe paid the money into the National Bank while Trivedi went to the Chartered Bank. On his return to the National Bank Maung Toe handed over to him the bank documents which he had received. On the next day Trivedi and Maung Toe went to the Imperial Bank where Maung Toe paid in the deposit as instructed by Trivedi and obtained some documents which he handed over to Trivedi. On the 7th October 1953 Trivedi and Maung Toe went to the Netherlands Bank and there

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Trivedi paid in a certain sum of money. Maung Toe went to another bank, which he did not now remember, and paid in money and received the relevant bank documents which he handed over to Trivedi. In the meantime, Maung Toe approached Wood to give him an appointment at Harperink Smith & Co. Ltd. and received from Wood a letter, Exhibit 4D, dated 1st October 1953, appointing him a clerk/salesman in the Tyre Department at a salary of K 199 per month with effect from 12th October 1953.

On the 8th October 1953 the appellant Trivedi and the respondent Mehta came to the office of Burma Engineering Supply Co. at about 11 a.m. Maung Toe introduced Kyaw Myint (PW 6) to them after wishing them. Both Trivedi and Mehta sat at the manager's table and spoke in Indian language. Each of them had a leather bag with him. Trivedi took over the leather bag from Mehta and gave it to Maung Toe. It was the leather bag exhibited in the case. There were cash and bank memos. in it and Trivedi asked Maung Toe to go to the banks named by him and to take Kyaw Myint along with him. Maung Toe and Kyaw Myint first went to the Chartered Bank where Maung Toe paid in the money and left Kyaw Myint to receive the bank documents. Maung Toe alone went to the Mercantile Bank and there obtained some documents after payment of money. He next went to the Indian Overseas Bank and paid in money for which he obtained some documents. He returned to the Chartered Bank with the documents received and the exhibit leather bag. At the Chartered Bank he saw Kyaw Myint under arrest by U Aung Than (PW 1), an officer of the B.S.I. When U Aung Than asked Maung Toe to accompany him to the B.S.I. office, Maung Toe told U Aung Than to come with

him to the office of the Burma Engineering Supply Co. to interview his boss. U Aung Than then seized the leather bag and the documents contained therein together with a cash of K 2,200. The documents seized were those of Exhibits 3N series, 3-O series, 3Q series and 3S series—*vide* Search List, Exhibit 3M. About half an hour after their arrival at the office of the Burma Engineering Supply Co, Trivedi arrived and was interrogated by U Aung Than, who then took Trivedi, Maung Toe and Kyaw Myint to the B.S.I. office. On the same day Maung Toe went with U Aung Than to the address given by Trivedi which was the shop of Jewellers Manilal Virchand in Mogul Street, Rangoon. There Maung Toe went up the house and called the respondent Mehta who was known to him as Chatterjee. Mehta was brought back to the office of the B.S.I. by U Aung Than.

Kyaw Myint (PW 6) was a school mate of Maung Toe. Some time in April or May 1953 he secured a job at the New Burma Trading Co., Rangoon, as a clerk with the help of Maung Toe. His job in that office was to receive letters addressed to the New Burma Trading Co. and care of New Burma Trading Co. He had to hand over all such letters as were collected by him to Maung Toe, who in turn made them over to Wood whom they regarded as their boss. His salary at the firm was K 150 and he stayed on till it was wound up. On the 1st October 1953 he obtained a job as a clerk at the Burma Engineering Supply Co. at Phayre Street, Rangoon. About 3 or 4 days after the 1st October 1953 Trivedi arrived and took his seat at the manager's table. He used to come every morning and sometimes he handed over cash to Maung Toe in a leather bag with instruction to deposit the same at the bank. On the 8th October 1953 Trivedi came to the office with Mehta. Each

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of them had a leather bag. Maung Toe wished Mehta as Chatterjee and introduced him and Than Tun (PW 10) to Mehta. Both Trivedi and Mehta took their seats at the manager's table and Trivedi took over from Mehta a leather bag which he then gave to Maung Toe with instructions to credit the cash into the banks. It was the exhibit leather bag. Maung Toe took Kyaw Myint to the Chartered Bank where he paid in a certain deposit and left Kyaw Myint to receive the bank papers. Maung Toe then went to credit cash into the other banks. While he was away U Aung Than of the B.S.I. arrived and asked him if he belonged to the Burma Engineering Supply Co. He told him that he did belong to that company. Whereupon, U Aung Than put further questions to him. He suggested that U Aung Than should wait until Maung Toe returned. Maung Toe arrived some time about noon and U Aung Than spoke to him for a while before taking both of them to the office of the Burma Engineering Supply Co. Soon after Trivedi came and U Aung Than spoke to Trivedi. Thereafter, U Aung Than took Trivedi, Maung Toe and Kyaw Myint to the B.S.I. office. In cross-examination, this witness stated *inter alia* that at the time of introduction Maung Toe told him that Mehta (known as Chatterjee) was the manager. A point on which Maung Toe was silent.

Than Tun (PW 10) was never employed at the office of New Burma Trading Co. He was also a school mate of Maung Toe and through Maung Toe's good offices obtained a job at the office of the Burma Engineering Supply Co. on the 1st October 1953 at a monthly salary of K 150. It was also his duty to receive letters addressed to the Burma Engineering Supply Co. and those addressed care of Burma Engineering Supply Co. These letters had to be

delivered unopened to Wood through Maung Toe. On the 3rd October 1953 Trivedi alone came to office with a leather bag in his hand. He spoke to Maung Toe and thereafter he sat at the manager's table every day. Than Tun saw Trivedi instruct Maung Toe to go and deposit cash into the banks on two or three occasions prior to 8th October 1953. On the 8th October 1953 at about 10 or 10.30 a.m. Trivedi came to office with Mehta who was known as Chatterjee. Each of them had a leather bag with him. They sat at the manager's table. Trivedi took over the hand bag from Mehta and gave it to Maung Toe. He asked Maung Toe to go to the bank and make payments. Whereupon Maung Toe left in the company of Kyaw Myint. Trivedi and Mehta left the office about half an hour later. At about 11 a.m. U Aung Than of the B.S.I. came to the office and asked him where the clerks had gone. Than Tun told him that they were at the banks. Whereupon U Aung Than and his party left. Than Tun went for his meal. On his return at about 1 p.m. he saw Maung Toe and Kyaw Myint together with U Aung Than on the ground floor of the office building. They went up to the office to wait for Trivedi who arrived about 15 minutes later. U Aung Than spoke to Trivedi and then took all of them to the B.S.I. office.

The learned trial Judge had dubbed all these three witnesses as accomplices in the crime committed by Wood, Trivedi and others. It is a matter for consideration whether the learned trial Judge's finding on this point is tenable. In *Ramswami Goundan* v. *Emperor* (1) Subrahmania Ayyar, O.C.J., observed that the term " accomplice " signifies a guilty associate in crime or a person who can be jointly indicted with the accused in the case. This observation which was

(1) I.L.R. 27 Mad. p. 271.

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cited with approval in *Kailash Missir* v. *Emperor* (1) must, in my opinion, be regarded as a correct exposition of the law relating to what the term " accomplice " connotes. The question therefore for consideration is whether Maung Toe, Kyaw Myint and Than Tun are accomplices within the connotation of that term. No doubt, Maung Toe was intimate with Stickland, one of these associates of Wood in the New Burma Trading Co., and had occupied a position of considerable trust in the New Burma Trading Co. as well as in the Burma Engineering Supply Co. subsequently founded by Wood. His duty was to receive the letters addressed to these companies or care of these companies and also to make deposits into the banks in payments of the bills drawn on these companies. He was also responsible for procuring the letter heads and rubber stamps for the Burma Engineering Supply Co. and its associates. However, it is difficult to assume that from the circumstances disclosed in the evidence he must have been let into the secret regarding the operation of the foreign exchange racket perpetrated by the Burma Trading Co. and the Burma Engineering Supply Co. It has been contended that the bills and invoices related to the import into Burma of various kinds of goods such as electric motors, sewing machines and other kinds of machinery, old and new, that no such machines had arrived in Burma those two companies in which Maung Toe was concerned did not have the storage space for these machineries and that Maung Toe must therefore have known that no such machineries were meant to be imported into Burma. As to that it must be pointed out that Maung Toe has not been sufficiently long in the employment of either New Burma Trading Co. or the Burma Engineering

(1) A.I.R. (1931) Pat. p. 105.

Supply Co. to know that the machineries for which the shipping documents have been received would never arrive and that therefore he was paying moneys into the banks in exchange for spurious documents. Furthermore, it is not absolutely necessary that either Burma Trading Co. or the Burma Engineering Supply Co. should have storage space for the machinery to be imported into Burma as it is well-known that such machinery could be stored at the godowns of the Port Commissioners for short periods. Therefore, although I agree that Maung Toe's evidence must be scrutinised with care and not acted upon until found to be satisfactorily corroborated in view of his intimacy with Stickland, I am not prepared to go into the length of holding that he was an accomplice. As for Maung Kyaw Myint (PW 6) who was only a subordinate clerk in the offices of the New Burma Trading Co. and the Burma Engineering Supply Co., respectively, there is no reason for holding that he was an accomplice in the crime merely because he received a salary of K 150 a month for doing the job which he said he had to do. K 150, a month, after all, is not such a large sum to receive by a subordinate clerk in these days of high cost of living and it is not necessary for the purpose of a successful manipulation of foreign exchange racket by Wood and his associates that Kyaw Myint should be in the secret. On the other hand, for a successful operation of an enterprise of this nature it is essential that as few servants of the company as possible should have any inkling thereof. The same observations apply with much added force to Maung Than Tun who was never employed in the New Burma Trading Co. and who had only joined the Burma Engineering Supply Co. about a week before the arrest of Trivedi on the 8th October 1953. Therefore, the main reason given by the learned trial Judge

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for the rejection of the testimony of Maung Toe, Kyaw Myint and Than Tun is, in my opinion, quite untenable.

The next reason given by the learned trial Judge for discrediting the testimony of these three witnesses is given in a paragraph of his judgment which may be conveniently reproduced below:

"Now, Maung Toe, Kyaw Myint and Than Tun, as also Trivedi, have all identified the exhibit zip leather bag as the one carried by G. M. Mehta and later given to Maung Toe by Trivedi with money and connected papers in it. It will be seen that only one zip bag was seized by U Aung Than from the possession of Maung Toe at the B.S.I. on the 8th October 1953 under a search list (Exhibit 3M). There was no other leather bag with Trivedi, Kyaw Myint or Than Tun when they were brought to the B.S.I. It was only in the afternoon of the 8th October 1953, that Senior Investigator U Tun Shwe (P.W. 47) conducted a search in Room No. 104 of the Strand Hotel occupied by Trivedi, as the result of which another zip bag was found containing 4 sets of shipping documents (Exhibits 3H, 3J, 3K and 3L), which are unconnected with the payments made by Maung Toe under instruction from Trivedi on the same day (8-10-53). This will clearly disprove the evidence unanimously given by Maung Toe, Kyaw Myint, Than Tun, and Trivedi that there were two leather bags as between Trivedi and Mehta when they arrived at the firm in question. From Trivedi's evidence, it will be seen that, after departing from G. M. Mehta at the Union Bank, he went back to his firm, and there he was confronted by U Aung Than. If Trivedi had carried a leather bag then, it would sound plausible that the other bag seized from Maung Toe was that of G. M. Mehta. It is abundantly clear that there was only one leather bag as between Trivedi and Mehta when they came together to the office on the 8th October 1953 and that it was the bag belonging to Trivedi."

It must be mentioned in this connection that Trivedi in giving evidence under section 342 (1) of the Criminal Procedure Code on behalf of his own defence has supported the testimony of the above three

witnesses regarding the fact that on the 8th October 1953, Mehta had brought with him to the office of Burma Engineering Supply Co. a leather bag containing the money and the bank memos. He said :

" On Thursday, the 8th October 1953, I met Gullestad at the dining hall. After breakfast, I went to his room with him. I told Gullestad that I would go to the Custom House for my jewellery permit and then to the air booking office to arrange for my *visa* back to Bangkok and to reserve my seat. At about 10 a.m., G. M. Mehta came to Gullestad with money about Rs. ½ lakh. Gullestad gave me a list of names of banks for making payment. I then went to the Burma Engineering Supply Co. together with G. M. Mehta. This is the list of names of banks given to me by Gullestad (Exhibit 3R). This is in Gullestad's handwriting. At the B.E.S. Co., Maung Toe wished Mehta as Chattajee. Mehta and I sat at one table with Maung Toe standing by. Maung Toe gave me the National Bank document along with 3 unopen covers. I told Maung Toe to write down the names of the banks as mentioned in Exhibit 3R. I then passed from Mehta's hand the money bag to Maung Toe. I asked Maung Toe to go and make payment to the banks. I had my own zip bag with me in which I kept my passport and other papers. In my bag were also the National Bank documents and 3 unopened covers. This is Mehta's bag in which he brought the money (Exhibit 1). Maung Toe left the office to carry out my instructions with one of the office clerks. Mehta and I then went together to the Custom House. I was informed by the Custom officials to go to the Union Bank for my jewellery permit. We both then went to the Union Bank. There was a big rush of people, and Mehta suggested that we should come back later. Mehta departed me from the Union Bank. I next went to Inder Singh Air Booking Office in Merchant Street. By that time, it was past 12 noon. The firm people told me that it was too late to get *visa* and required me to come again on the following morning. Then, I went to Maung Toe in the B.E.S. Co. By the time, I reached the office, B.S.I. officers including U Aung Than were already there and I was placed under arrest. Maung Toe was also there. Maung Toe and I were taken to the B.S.I. office. U Aung Than interrogated me and I gave him the address of G. M. Mehta. I was detained in the B.S.I. In

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the evening, I went with U Aung Than to my room in the Strand Hotel. U Aung Than made a search in my room but found nothing. In my room, he searched my zip bag and seized the National Bank papers and 3 unopened covers. The signature on this search list (Exhibit 3G) is mine. These are the 3 unopened covers seized from my bag (Exhibts 3L-1, 3L-4 and 3L-6)."

Trivedi has never been cross-examined as to why he was not in possession of the leather bag which he had carried in the morning at the time of his second visit to the office of the Burma Engineering Supply Co. when he was arrested by U Aung Than. However, it seems clear to me that during the interval of time when he parted company with Mehta and his second visit to the Burma Engineering Supply Co. Trivedi had found time to visit the Strand Hotel to deposit his bag containing among other things the National Bank papers, which had been handed over to him by Maung Toe that morning and the three unopened covers, Exhibit 3L-1 addressed to Burma Engineering Supply Co., Exhibit 3L-4 addressed to Hassanali Marmoojee & Sons and Exhibit 3L-6 addressed to the Shan Electrical Trading Co. These covers contained bank memos. relating to the bills drawn by Hervo Engineering Co. and Verulam Exporting Co. on these firms. According to Trivedi, it was some time past noon when he went to Inder Singh Air Booking Office in Merchant Street. It was already about 1.15 p.m. when he arrived at the Burma Engineering Supply Co. *vide* evidence of Than Tun (PW 10). The Strand Hotel being quite close to Merchant Street where Inder Singh's Air Booking Office is situated it would only be a matter of minutes for Trivedi to get there before coming to the office of the Burma Engineering Supply Co. Therefore, the fact that Trivedi was not in possession of a leather bag at the time of his arrest

by U Aung Than does not disprove the statement of Maung Toe, Kyaw Myint and Than Tun that one leather bag each was carried by Trivedi and Mehta that morning. It is amply established by the evidence of U Tun Shwe (PW 47) that a leather bag containing the aforesaid documents was found inside Trivedi's room at the time of the search that very evening—*vide* search list Exhibit 3G.

Comment has been made by the learned trial Judge regarding the discrepancy between the evidence of Kyaw Myint (PW 6) and Maung Toe (PW 2) regarding the manner in which Mehta was introduced to Kyaw Myint. Whereas, according to Maung Toe, he merely introduced Mehta to Kyaw Myint as Chatterjee, Kyaw Myint said that at the time of the introduction Maung Toe told him that Chatterjee was the manager. However, this discrepancy is not, in my opinion, so serious as to discredit the story of Maung Toe regarding the introduction of Mehta. Both Maung Toe and Kyaw Myint were giving evidence several months after the alleged incident and it is likely that Kyaw Myint might have been under a mistaken impression that Chatterjee was introduced to him as the manager, Chatterjee being seated at that time with Trivedi at the manager's table. In this connection it is significant to note that Kyaw Myint's story that between the 3rd and 8th October 1953 he merely saw Trivedi coming to take his seat at the manager's table and talking to the head clerk Maung Toe. He, as a junior clerk, apparently had no occasion to talk to Trivedi prior to 8th October 1953. That seems to be the reason why Maung Toe stated that on the 8th October 1953 when Trivedi and Chatterjee came together to the office he introduced Kyaw Myint to them (meaning both Trivedi and Mehta) after wishing them.

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In the testimony of U Aung Than (PW 1) there is one statement given by him which if admissible in evidence would considerably strengthen the prosecution case in so far as Mehta is concerned. U Aung Than said :

> "I learnt from Maung Toe that one Chatterjee had brought money to the firm in the morning for payment into the bank but Trivedi pointed out that it was not Chatterjee but Mehta."

This would corroborate Maung Toe's story that it was Mehta who brought the money which was paid into the banks that day. However, in my opinion, this statement is not admissible in evidence as an officer of the B.S.I. appointed under Act 50 of 1951 is a police officer when he investigates the offences mentioned in schedule 1 annexed thereto. In the case of *U Soe Lin* v. *The Union of Burma* (1) U Aung Tha Gyaw, J., considered that in view of section 17 of the B.S.I. Act an investigation officer investigating an offence under the Act is bound by the provisions of law contained in section 162 of the Criminal Procedure Code. Or in other words, section 162 of the Criminal Procedure Code applies to the statement made to him in the course of the investigation. While respectfully agreeing with the view of the learned Judge, I would go further and say that the B.S.I. officer must be regarded as a police officer within the meaning of that term in section 162 of the Criminal Procedure Code. No doubt, it was held in *Maung San Myin* v. *King-Emperor* (2) that an Excise officer who had powers of arrest, search and the granting of bail under Burma Excise Act V of 1917 was not a police officer so that admissions made to him were not excluded by section 25 of the Evidence Act. However, this decision was mainly based upon

(1) Cr. Rev. No. 45-B of 1953. (2) I.L.R. 7 Ran. 771.

the ruling in the case of *Ah Foong* v. *King-Emperor* (1) which was subsequently over-ruled by a Full Bench of the Calcutta High Court in *Ameen Sharif* v. *Emperor* (2), where it was held that an Excise officer who in the conduct of an offence against the Excise, exercises the powers conferred by the Code of Criminal Procedure upon an officer in charge of a police station for the investigation of a cognizable offence, is a police officer within the meaning of section 25 of the Indian Evidence Act. See also *Nanoo Sheikh Ahmed and another* v. *Emperor* (3) and *Bachoo Kandere* v. *Emperor* (4). The case most nearly in point is that decided by the Madras High Court in *re. Someshwar H. Shelat* (5). There it was held that a special officer of the Commercial Tax Department who had been empowered by the Governor under section 12 (3) of the Hoarding and Profiteering Prevention Ordinance was a police officer within the meaning and for the purpose of section 162 of the Criminal Procedure Code and section 25 of the Evidence Act. Sub-section 3 of section 12 of the Ordinance reads :

"The Controller General and such inspectors or other officers as may be empowered by the Central or Provincial Government in this behalf shall, within the respective areas for which they are appointed, have power to investigate all offences punishable under this Ordinance, and in conducting any such investigation shall, within the said areas, have all the powers, duties, privileges and liabilities of an officer in charge of a police station under the Code of Criminal Procedure, 1898, when investigating a cognisable offence within the limits of his station."

These provisions are similar to those contained in section 17 of Act 50 of 1951.

(1) I.L.R. 46 Cal. 411.
(2) I.L.R. 61 Cal. 607.
(3) I.L.R. 51 Bom. (F.B.) 78.
(4) A.I.R. (1938) Sindh (F.B.) 1.
(5) A.I.R. (1946) Mad. 430.

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However, notwithstanding the fact that the statement made by Maung Toe to U Aung Than before he pointed out Mehta to the investigating officer is inadmissible in evidence the fact appearing in evidence that Maung Toe took U Aung Than promptly to the address given by Trivedi and there pointed out to Mehta is in corroboration of Maung Toe's story that it was Mehta who brought the bag containing the money and the bank memos. It has been argued on behalf of the respondent Mehta that Maung Toe had admitted that in the bag containing the money and the bank memos. there were applications in Form A although Maung Toe could not say for certain whether these applications were Exhibits 2U, 2V, 2W and 2X. Further that if these applications which had been signed by Gullestad were in the bag it stands to reason that the money bag must have been handed over to Gullestad by Mehta and that Gullestad had in turn handed it over to Trivedi along with the applications in Form A. However, if the applications in Form A signed by Gullestad were in the bag with bank memos. it does not prove that it was Trivedi who was carrying the bag when he and Mehta came to the office of Burma Engineering Supply Co. that morning. According to Trivedi, Mehta came to Gullestad at about 10 a.m. with about half a lakh of Kyats. There was nothing to prevent Gullestad then to make over the applications in Form A to Mehta to be taken to the Burma Engineering Supply Co. Admittedly, Trivedi had work to do at the Custom House and the Union Bank that morning so there was nothing to prevent Mehta carrying the money bag while Trivedi carried his own bag containing his passport and other papers.

Besides the evidence of Maung Toe, Kyaw Myint and Than Tun (PWs 2, 6 and 10) there is a piece of

circumstantial evidence which tends to connect the respondent Mehta with the offence with which he had been charged. On the 29th of September 1953, Gullestad signing himself as C. E. Madha, Manager of Burma Engineering Supply Co., wrote to the Manager of the Central Bank of India Ltd., Rangoon, with reference to Bills No. F.B.C./322 and 331. In this letter Exhibit 2Z-7 Gullestad said that they had written to their associates Messrs. Lower Burma Electric Mart and Messrs. Hassanali Marmooji & Sons informing them of the arrival of the bills and expected to receive a remittance from them in a few days time. Mehta who had left Burma for India for a visit on the 9th June 1953 arrived at Rangoon on the 1st October 1953 from Bombay *viâ* Calcutta and Akyab. On that day Gullestad again wrote to the Manager, Central Bank of India Ltd. regarding Bills No. F.B.C./322 and 331. In that letter Exhibit 2Z-8 he said that the bill would be paid the next morning. However, the next day, 2nd of October 1953, was a holiday in Mogul Street market on account of Mahatma Gandhi's Birthday. The bills referred to in these two letters were actually paid on the 3rd October 1953—*vide* Exhibits 2Z-9 and 2Z-10 forms of applications for foreign exchange submitted by Gullestad signing himself as C. E. Madha through the Central Bank of India Ltd. The connection between Mehta's arrival and the payment of these bills by Gullestad is apparent. This piece of circumstantial evidence should be considered in conjunction with the fact that Mehta called himself by an assumed name of Chatterjee in his dealings with Maung Toe and others who were not in the conspiracy.

A *primâ facie* case appears, therefore, to have been made out against Mehta by the prosecution even without taking into consideration against him the

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letter Exhibit 3 Z, which was written by the deceased Wood to one Mr. Ball, Manager of Harperink Smith & Co. Ltd., regarding the admissibility and the probative value of which I shall have more to say later.

After charges had been framed against the appellant Trivedi and the respondent Mehta, these accused gave evidence on behalf of their own defence as provided for in sub-section (1) of section 342, Criminal Procedure Code. As Trivedi's evidence implicates his co-accused Mehta, I must be guided in this matter by the principles laid down by this Court in *Ba Pe and one* v. *The Union of Burma* (1). There it was held that it is a fundamental principle that in a criminal trial the burden of proof lies on the prosecution to establish the charge beyond reasonable doubt and that where an accused person should have been discharged for want of *primâ facie* case against him, the Court should not use the evidence of a co-accused given under section 342 (1) of the Code of Criminal Procedure to fill up the gaps in the prosecution. However, in the case now under consideration I am clearly of the opinion that the prosecution has succeeded in establishing a *primâ facie* case against the respondent Mehta before Trivedi was examined on oath. Therefore as held in the case of *U Saw and nine others* v. *The Union of Burma* (2), the evidence of Trivedi may be used against his co-accused Mehta although the weight to be given to this evidence will depend on the circumstances of the case.

Trivedi, as already observed above, was employed in the firm of Aryan Trading Co., Bombay, during the war years and one K. M. Mehta of Bombay was connected with that firm. After the war he joined

(1) (1950) B.L.R. p. 178. (2) (1948) B.L.R. p. 217.

the firm of Aryan Trading Co., Bangkok after he had left the services of Thorensen & Co. of which Gullestad was then General Manager. K. C. Kothary, the General Manager of the Aryan Trading Co., Bangkok was the son-in-law of K. M. Mehta of Bombay. According to Trivedi he had to go to Rangoon from Bangkok by air on Saturday the 3rd October 1953 under instructions from his General Manager K. C. Kotary who had received a wire from Bombay on the 27th September 1953 to send him (Trivedi) to Rangoon. Kothary's instructions to him were to see Manilal Virchand Mehta at the address given by him in Rangoon. On the 28th September he received the wire from Gullestad (Exhibit T) asking when he would be arriving and he sent the reply (Exhibit U). He left Bangkok on the morning of the 3rd October 1953 and arrived at the Strand Hotel at about 11·30 a.m. on the same day. He found that no hotel accommodation had been reserved for him at the Strand Hotel by Gullestad. He therefore booked a room for himself at that hotel. At about 12·30 p.m. he came down to the bar and there met Gullestad. He asked him if he had seen Mehta. On his reply in the negative, Gullestad informed him that Mehta had reserved accommodation for him at the Orient Hotel. Subsequently Gullestad gave him Orient Hotel reservation ticket (Exhibit II) which was dated the 2nd October 1953. At about 1 p.m. Wood came to the Strand Hotel and was introduced to him by Gullestad. He told Gullestad that he wanted to see Manilal Virchand Mehta in Mogul Street. Accordingly Gullestad and Wood dropped him in front of M. V. Mehta's shop. Gullestad told him to go up to Mehta and find out how much money he could bring to him (Gullestad) on Monday the

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5th October 1953. He went upstairs and met Manilal Virchand Mehta to whom he introduced himself. Mehta then introduced him (Trivedi) to his son the respondent G. M. Mehta. Manilal Virchand Mehta told him in the presence of his son that they were making large payments into the banks and that he was called to Rangoon because they were in need of a trustworthy man. Mehta asked him to see that payments were properly made into the banks. He also asked him where Gullestad was and where he (Trivedi) was putting up. He told Mehta that he was putting up at the Strand Hotel. Mehta advised him to shift to the Orient Hotel where room had been reserved for him. That evening he had dinner with Mehta and after dinner the respondent G. M. Mehta took him back to the Strand Hotel in a trishaw. G. M. Mehta also told him that he would come to the Strand Hotel with the money on Monday to meet Gullestad. It was Sunday evening when he met Gullestad again at the Strand Hotel dining hall. He then told Gullestad that G. M. Mehta would be coming to him with money on Monday and asked Gullestad what business he had to do with the money. In the meantime Wood arrived at the hotel and Gullestad and Wood went out together telling him that they would meet him again on Monday when the matter about business and money would be explained to him. On Monday the 5th October 1953, Trivedi met Gullestad at breakfast. After breakfast both of them went to Gullestad's room where Gullestad had some work to do with his papers. At about 10 a.m., G. M. Mehta came to Gullestad's room with about half a lakh of money. They were all in ten-rupee currency notes. Gullestad told him (Trivedi) to go to the Burma Engineering Supply

Co. at No. 118, Phayre Street, Rangoon, where he would meet Maung Toe. Gullestad also told him that he had informed Maung Toe already that he (Trivedi) would be coming with the money. Gullestad gave him a leather bag with money and also a slip of paper mentioning the names of the Banks and the amounts to be paid in. He instructed him to see that Maung Toe paid in the money to the banks properly without undue delay. Trivedi then went to a Barr Street office with G. M. Mehta to register his arrival. After registration G. M. Mehta went away while he went to the Burma Engineering Supply Co. On seeing no signboard of the firm on the ground floor he went back to the Strand Hotel to inform Gullestad who then told him that he should go upstairs where he would find the signboard of the Burma Engineering Supply Co. and also Maung Toe. He went back to the firm and met Maung Toe on the pavement outside the entrance. Maung Toe called him from behind and asked him if he was Trivedi. They then went up together, he and Maung Toe sat at one table while the other table was occupied by two clerks. Maung Toe told him that he had been informed by Wood that he (Trivedi) would be bringing some money. Maung Toe suggested that they should go together to make payments into the banks. Accordingly, he and Maung Toe went to several banks, paid the money and got the documents. On arriving back at the hotel, he made over all the documents and the balance of money to Gullestad. After lunch that day he asked Gullestad what business it was which involved payments of money into the banks. He also asked Gullestad how he came to know Manilal Virchand Mehta, G. M. Mehta and Wood. Gullestad

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then informed him that K. M. Mehta of Bombay and one Irani had met him in Europe and had offered him a job in Rangoon for a couple of months to work together with Manilal Virchand Mehta of Rangoon and Wood. Gullestad also told him that old and second-hand machineries were being imported, that documents would be sent through the banks, and that Manilal Virchand Mehta would arrange the finance. He also informed him that in the past half a lakh of rupees had been swindled by the men in Rangoon and that he (Trivedi) was specially called to Rangoon to safeguard proper payments into the banks as a trustworthy man. That same evening Wood and G. M. Mehta arrived at the hotel, the latter bringing with him about half a lakh of rupees for the purpose of opening an account at the Mercantile Bank in the name of one S. K. Mitra. On the 6th October 1953, Trivedi met Gullestad at the dining hall at about 9 a.m. After breakfast Trivedi told Gullestad that he had no mind to work in Rangoon and that he wished to return to Bangkok. G. M. Mehta then came to the Hotel. Gullestad prevailed upon him to carry on until he could return to Bangkok. Gullestad then gave him specimen signature cards signed S. K. Mitra as proprietor of the Burma Engineering Supply Co. He asked him to see Mr. Dick at the Mercantile Bank where arrangements had already been made to open a current account. He gave him half a lakh of rupees to open the current account and also another half a lakh or so with bank slips to make payments. He (Trivedi) then went to Mercantile Bank and met Mr. Dick. He paid in money into the Cash Department as instructed by Mr. Dick who gave him a cheque book and a pay-in-slip. However, the Cashier Gopal Krishna told him that he wished

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to see the proprietor S. K. Mitra. He therefore told him that he would inform S. K. Mitra. He then went to the Burma Engineering Supply Co. and met Maung Toe with whom he went to several banks to make payments. Thereafter, he went to G. M. Mehta's shop for lunch and there showed him the cheque book, etc. of the Mercantile Bank. He told G. M. Mehta that the bank wanted to see the proprietor of the firm. G. M. Mehta replied that he would see Gullestad at the hotel in the evening. After returning to the office and taking over the documents and money from Maung Toe, Trivedi returned to the hotel and then made over all the documents, cheque book and the balance money to Gullestad. He also informed Gullestad that the bank wanted to see the proprietor. In the evening he met Gullestad again in his room where Wood had already arrived. Wood told Gullestad that the Mercantile Bank would not open the current account unless they saw the proprietor S. K. Mitra. G. M. Mehta arrived later and had tea with him. On the 7th October 1953 after breakfast he went to Gullestad's room and Gullestad told him that the bank would be returning the money to him as the current account could not be opened without the appearance of the proprietor of the firm. When Gullestad said this, A. G. Simons of the Mercantile Bank was in the room having arrived during the conversation. Trivedi therefore went to Mercantile Bank and received back K 19,695.11 out of the half lakh of rupees deposited, having utilised the difference in settling three or four bills. Gullestad had also given him half a lakh of rupees or thereabout which G. M. Mehta had brought and he made payments into the Netherlands Bank with Maung Toe. He told Maung Toe to bring the

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documents to the Netherlands Bank where he waited while Maung Toe went to other banks to make payments. Maung Toe later came back to him and brought the bank papers except those from the National Bank. The documents which he received from Maung Toe were made over to Gullestad at the Strand Hotel. At that time he told Gullestad that he would positively go back to Bangkok on Sunday. Then followed the events of 8th October 1953 which has already been narrated.

If Trivedi's evidence be believed there can be no doubt whatsoever that the respondent G. M. Mehta was involved in the conspiracy with which he had been charged. However the learned trial Judge rejected Trivedi's evidence as against G. M. Mehta on the following grounds:

(1) That Trivedi was an accomplice in the crime committed by Wood, Gullestad and others and that therefore his story should not be acted upon as against Mehta without independent corroboration.

(2) That until he gave evidence on oath Trivedi had all along maintained that he was innocent of the charge framed against him and that therefore Trivedi's story was in the nature of an after-thought.

(3) That Trivedi had not been frank with the B.S.I. officers regarding the part taken by Gullestad in the foreign exchange racket and that in consequence Gullestad had been allowed to escape from Burma. Trivedi had secreted Gullestad's letter from Norway (Exhibit I) and the list (Exhibit 3R) of the bills to be paid on the 8th October 1953.

(4) Trivedi produced, for the first time, the reservation ticket (Exhibit II) when he gave his evidence on the 4th November 1954, thus rendering probable Mehta's story that he lost this ticket while he was in custody along with Trivedi at the jail.

Trivedi no doubt tried to minimise the part taken by him in the conspiracy and said that he only came to suspect that some thing was wrong when Gullestad tried to open an account at the Mercantile Bank in the name of the non-existent proprietor of the Burma Engineering Supply Co. by the name of S. K. Mitra. In this connection, I am inclined to agree with the learned trial Judge that Trivedi knew more of the foreign exchange racket than he chose to tell the Court and that when he was arrested on the 8th October 1953 his first thoughts were for Gullestad, his friend, whom he allowed to escape by being reticent about Gullestad's part in the whole affair. However, I am not inclined to believe that Trivedi had invented the whole story in so far as the respondent G. M. Mehta and his father Manilal Virchand Mehta are concerned. G. M. Mehta's story in contrast to that of Trivedi's seems most improbable. According to him, he only met Trivedi at the Custom House on the morning of the 8th October 1953 when he went to make enquiries about tariff rates. At the request of Trivedi, he accompanied him to the Preventive Section of the Custom House to declare his gold ornaments and then to the Union Bank for the same purpose. On that day he went in the company of Trivedi to the Burma Engineering Supply Co. in Phayre Street, Rangoon, where he met Maung Toe whom he knew before and was introduced to Kyaw Myint and Than Tun. He remained in that firm

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for a short time while Trivedi spoke to Maung Toe. Trivedi had a leather bag with him, whereas he himself carried no bag at all. Later Trivedi and he went to the Union Bank for the purpose of making declaration for the jewelleries but owing to a big rush at the bank they agreed to go there again later. On the same day, U Aung Than of the B.S.I. came and arrested him.

On cross-examination, respondent Mehta said that he first came to know Trivedi when he met him at Bombay in 1947 and that the meeting at the Custom House on the 8th October 1953 was his second meeting with Trivedi. At that time he did not even recognise Trivedi who however reminded him of their previous acquaintanceship. If that were so, it seems to me to be very strange that Mehta would have gone to all the trouble of accompanying Trivedi to the Union Bank and to the office of the Burma Engineering Supply Co. that morning. Stranger still is the suggestion that Trivedi would have invented the story regarding G. M. Mehta's complicity in the conspiracy as it were in repayment for Mehta's act of friendliness in trying to help him on the morning of the 8th October 1953. Trivedi was examined on oath on the 4th and 5th November 1954 while Mehta was only examined on oath on the 19th November 1954. Mehta's witness U Ohn Ghine was examined on the 8th January 1954. In these circumstances, it seems surprising that the respondent Mehta cited neither his father Manilal Virchand Mehta to controvert the evidence of Trivedi nor his clerk Kirtilal to support his own story that the hotel reservation ticket (Exhibit II) was brought by Kirtilal by mistake when he only instructed Kirtilal to reserve a table on the night of the 2nd October 1953 for the purpose of entertaining friends. As it is, his story regarding the chance

meeting with Trivedi on the morning of the 8th October 1953 and the loss of the hotel reservation ticket (Exhibit II) from his pocket while in custody sounds too thin for acceptance.

The learned trial Judge has disbelieved the story regarding respondent Mehta's appearance at the office of the Burma Engineering Supply Co. with the money bag on the morning of the 8th October 1953 on the ground that even assuming that G. M. Mehta was in the conspiracy it would be ridiculous to believe that a man who had all the time remained behind the scene would be so foolish as to come out on a single occasion to expose himself to danger in the presence of the clerical staff of the firm. However although it is difficult to say what motive Mehta had in accompanying Trivedi to the office of the Burma Engineering Supply Co. on the morning of the 8th October 1953 it is evident from the facts disclosed in evidence that Wood who was originally in charge of the Burma Engineering Supply Co. was not entirely trusted on account of some considerable sum of money having gone astray, that Trivedi who was brought in from Bangkok in substitution for Wood was disinclined to stay long at Rangoon and was in fact due to return to Bangkok very soon. In these circumstances Mehta had probably thought that he would, in future, have to supervise the payments into the banks and had accordingly accompanied Trivedi to the office of the Burma Engineering Supply Co. on the morning of the 8th October 1953. After all no crime is ever foolproof and it is the little slips committed by criminals that have ultimately led to their downfall.

For the reasons given above, I am of the opinion that the prosecution had established the guilt not only of the appellant Trivedi but also of the respondent

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Mehta beyond all reasonable doubt. However before I leave this case I would like to touch upon the last piece of evidence tendered by the prosecution. It is no other than the letter (Exhibit 3Z) alluded to above. Regarding the admissibility of this letter in evidence and the weight to be attached thereto, there can be honest differences of opinion. In order to appreciate the purport and tenor of this letter, it would be necessary to take into consideration three other letters (Exhibits 3W, 3X and 3Y). Exhibit 3W is a letter dated the 16th October 1953 written by Wood to his friend Tony. There he tried to maintain that the foreign exchange racket which was referred to by Tony as a "dirty racket" was not so heinous as some people might think, that genuine dyes were being shipped on the "Salween" in April last as invoiced and that genuine goods would be on the next "Pretoria", "Pretoria" being one of the boats in which machineries were due to arrive. In the next letter dated the 17th October 1953 which was addressed to Mr. Ball, Manager of Harperink Smith & Co. Wood maintained that genuine dye-stuffs were shipped on the "Salween" and genuine goods would still arrive though by slow steamers in order to evade the condition regarding the check to be made against the Customs bill of entry. The next letter to Mr. Ball (Exhibit 3Y) dated the 19th October 1953 is in a somewhat different strain. Wood then seemed to realise that the dyes that came by the "Salween" was scrap and that therefore the Burmese Government had been cheated. He mentioned that he had informed the B.S.I. about the activities of Gullestad. He also complained that he had been let down by Stickland, former accountant of Grindlays. He mentioned the name of G. R. Irani as being involved in the conspiracy. In the letter (Exhibit 3Z) dated

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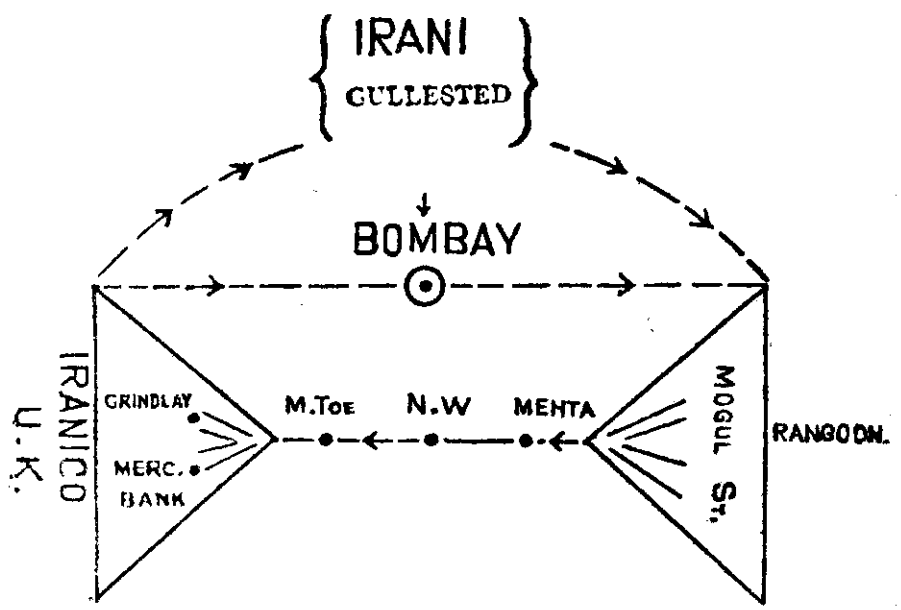
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the 9th November 1953, Wood made a clean breast of the part taken by him and others in the conspiracy. He stated *inter alia*:

"I do not know who the people are in Mogul Street but Gullestad seemed to think that the dealers in Bombay have associates or the same Co. in Rangoon. In other words the same syndicate is being used in both places. It is known that Gullestad met Mehta in Bombay in order to arrange with parties there the finance, and that the letter arrived two days after Gullestad. I only passed small amounts to Maung Toe for I was anxious to pay off the outstanding drafts and close up. The values weren't much more than a £ 1,000 or so. This money Gullestad obtained from Mehta in the Strand. The Norwegian taxied down to Mogul Street shop of Mehta too, in order to fix the cash. Taxi obtained from Strand I presume.

Irani used H.S. & Co. Ltd. as a guarantor in April with the Burmese Embassy in London so you can see the tie up he had on me in addition to the Woodland tag. I did not know that guarantor part until he told me in the Immigration (Foreigners Registration) Barr Street office. Now all this is double proof against them as are the cables I sent to Ebrahim, etc. and the



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boot is on the other foot. A. E. Irani stayed in Bombay too so the system looks the same and I think he also met Mehta there. At any rate I can tell you that at no time did A. E. Irani handle cash himself. He had it all arranged with Mehta and got it off his own dealers.

The money is half Irani's and half another's. They send it round the 3 countries and by the time it has returned the exchange profit is approximately 25 . Thus in April Irani and partner probably netted about £ 20,000 from the 14 lakhs paid into the banks.

The London side has all been exposed and Rangoon ends at Mehta. The fact that Irani and Gullestad stayed 2 days each in Bombay and met Mehta is sufficient to link the game up. Indians ran the show in London—Irani is a Parsi—and a fellow by the name of A. Merchant managed the Verulam office according to Gullestad."

In the letter Wood asked Mr. Ball to give an extract to the B.S.I. and also to show his letter to the British Embassy.

Now this letter (Exhibit 3Z) undoubtedly tends to expose Wood to a criminal prosecution for his complicity in the foreign exchange racket and is therefore admissible in evidence under section 32 (*3*) of the Evidence Act. [*See* also *Nga Po Yin* v. *King-Emperor* (1) and *Maung Shin and two others* v. *The Union of Burma* (2)]. The contrary view in *Achhailall* v. *King-Emperor* (3) does not appear to me to be good law. There it was held that the principle underlying section 32 (*3*) of the Evidence Act, 1872, is that when a person makes a statement rendering him liable to criminal prosecution, the statement is likely to be a true statement and that therefore a statement made by a person, against whom there is already in existence evidence which would lead to his prosecution and conviction, is inadmissible in evidence under the section. The letter

(1) (1904-06) 1 U.B.R. p. 3. (2) (1948) B.L.R., p. 425.
(3) 25 Pat., p. 347.

(Exhibit 3 Z) had been largely discounted by the learned trial Judge on the ground that from its tenor it appeared that Wood had no personal knowledge of either the London or the Rangoon side of the organization and the Mehta mentioned in the letter could not be said to be the respondent G. M. Mehta. As to that, it appears to me that even if Wood had no personal knowledge of the fact as to who were the persons organizing the exchange racket in London and in Rangoon he had been given certain information relating to this racket by Gullestad who was undeniably the brain behind the enterprise. Furthermore, I have little doubt in my mind that the Mehta referred to in the letter is the respondent G. M. Mehta who was admittedly at Bombay just before he came to Rangoon, who arrived in Rangoon two days after Gullestad's arrival and who used to bring money to Wood in connection with the foreign exchange racket. However, I am not relying on the letter (Exhibit 3Z) as establishing the guilt of the respondent Mehta but only as a mean of establishing by evidence from a different angle the operation of the foreign exchange racket which involved Rangoon, London and Bombay.

In so far as the appeal by the Government against the acquittal of the respondent G. M. Mehta is concerned I must be guided by the principles laid down in *Sheo Swarup and others* v. *King-Emperor* (1). There it was held that the High Court has full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed but that in exercising the power conferred by the Code, and before reaching its conclusion upon fact, the High Court should, and

(1) 56 All. p. 645 (P.C.).

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will, always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses ; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial ; (3) the right of the accused to the benefit of any doubt ; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. [*See* also *Emperor* v. *Nga Mya Maung* (1), *Puran* v. *The State of Punjab* (2), *Chelloor Mankkal Narayan Ittiravi Nambudiri* v. *State of Travancore-Cochin* (3) and *Madan Mohan Singh* v. *State of Utta Pradesh* (4)].

However after a careful consideration and apprisal of the evidence adduced in the case, I am convinced that the learned trial Judge was wrong in having acquitted the respondent Mehta and that his finding must be reversed.

As regards the appellant Trivedi, his real plea before this Court is for mercy on the ground that he only came to know of the conspiracy after his arrival in Rangoon and that in spite of his reluctance he had been persuaded to carry on by his former superior Gullestad.

I would set aside the order of the 1st Special Judge (SIAB & BSIA), in Criminal Regular Trial No. 27 of 1953 acquitting the respondent G. M. Mehta of the offence punishable under section 24 (*1*) of the Foreign Exchange Regulation Act, 1947, read with section 120-B of the Penal Code and direct that the respondent be convicted of the offence aforesaid. As regards the sentence, considering that even during the trial of the case Mehta had to be released on

(1) A.I.R. (1936) Ran., p. 90.
(2) A.I.R. (1953), p. 459 (S.C.).
(3) A.I.R. (1953), p. 478 (S.C.).
(4) A.I.R. (1954), p. 637 (S.C.).

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bail on the ground of ill-health, I consider the ends of justice as of mercy would be met if a sentence of one year's rigorous imprisonment is imposed upon him. He will therefore be sentenced accordingly.

As regards the appellant Trivedi his conviction and sentence will be confirmed and considering that his testimony had helped to strengthen the case against the co-accused Mehta his sentence will be reduced to 18 months' rigorous imprisonment.

APPELLATE CRIMINAL.

Before U Ba Thoung, J.

H.C. 1955

Sept. 16.

U AUNG DWE (APPLICANT)

v.

U CHAN AYE (RESPONDENT).*

Criminal Procedure Code, s. 145 (4), Proviso (1)—Inquiry under sub-s. (4) mandatory.

It is erroneous to make an order under sub-s. (5) without having ever held an inquiry under sub-s. (4).

An inquiry under sub-s. (4) is mandatory and that is a condition precedent to the making of an order under sub-s. (6).

Muhammad Aliyar Muhammed v. *Shamsul Hao Pi Zialdin Shah and others*, A.I.R. (1940) Sindh, p. 33, followed ; *Vaidyaunatha Iyer and others* v. *Suppalu Aurmal and others*, 15 Cr. L.J., p. 669, discussed.

San Myint, Advocate, for the applicant.

B. C. Guhoo, Advocate and *Ba Kyine* (Government Advocate), for the respondent.

U BA THOUNG, J.—This is an application to revise the order of the Eastern Subdivisional Magistrate, Rangoon, issuing an order under section 145 (4), proviso (1) of the Criminal Procedure Code to place the respondent in possession of the room in dispute in House No. 14, Nyeingyan-ye Quetthit, Kemmendine, Rangoon.

The respondent has been the tenant of the applicant in the abovementioned house, and on the 1st May 1955 he was asked by the applicant to move out of the suit premises for three days in order to enable the applicant to carry out some repairs to the

* Criminal Revision No. 99 (B) of 1955. Review of the order of the Eastern Subdivisional Magistrate of Rangoon, dated the 6th day of July 1955, passed in Criminal Misc. Trial No. 43 of 1955.

building. He moved out from the suit premises on the 7th May 1955 leaving behind some of his properties in the room. Then on the same day as it was raining, he went back to his room to cover up the properties left there by him, and the applicant told him not to enter the house. He reported the matter to the police who advised him to file an application in Court under section 145/146, Criminal Procedure Code, which he did. The learned Eastern Subdivisional Magistrate after examining the respondent, considered that the dispute between the respondent and the applicant was likely to cause a breach of the peace and issued an order under section 145 (1) of the Criminal Procedure Code calling upon the parties to put in their written statements in respect of their claims regarding the question of actual possession of the room in dispute. The written statements of the parties were filed, and the learned Eastern Subdivisional Magistrate without holding an enquiry, but relying on the written statements, issued an order directing to place the respondent in possession of the room in dispute until legally evicted.

Now it is contended by the learned counsel for the applicant that the learned Magistrate's order was passed without jurisdiction as it was passed without due enquiry by receiving evidence of the parties as required under sub-section (4) to section 145 of the Code of Criminal Procedure. I am in agreement with his contention. Sub-section (4) to section 145 of the Code of Criminal Procedure reads :

"The Magistrate shall then, without reference to the merits or the claims of any such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them respectively, consider the effect of such evidence, take such

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further evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject."

In the case of *Muhammad Aliyar Muhammed* v. *Shamsul Hao Pi Zialdin Shah and others* (1), it has been held that the words of sub-section (4): "the Magistrate shall then . . ." are mandatory; that the word 'then' refers to the stage when in compliance with the order under sub-section (1) the parties have put in their written statements and attended the Court; that on the completion of the inquiry under sub-section (4) a final order under sub-section (6) must follow, it being obvious that the holding of the said inquiry is a condition precedent to the making of the order under sub-section (6); that it is erroneous to make order under sub-section (6) without having ever held any inquiry under sub-section (4).

I respectfully agree with the decision in the above case that the holding of an inquiry under sub-section (4) is mandatory and that it is a condition precedent to the making of the order under sub-section (6).

The learned counsel for the respondent contends that the High Court should not, in Revision, interfere with the decision of the Magistrate when such decision was made on the merits after perusal of the written statements of the parties, and he cited the case of *Vaidyaunatha Iyer and others* v. *Suppalu Aurmal and others* (2). In that case the question whether the holding of an inquiry under sub-section (4) is mandatory or not had not been discussed, and it is to be pointed out that that case was decided in 1914 before the Code of Criminal Procedure (Act V of

(1) A.I.R. (1940) Sindh, p. 33. (2) Vol. XV Cr.L.J., p. 669.

1898) was amended in 1923 by the Criminal Procedure Code Amendment Act, XVIII of 1923; and the change in the Criminal Procedure Code Amendment Act of 1923 regarding sub-section (4) of section 145 is for the words "receive the evidence produced" the words "receive all such evidence as may be produced" were substituted, and it shows that the Magistrate is now bound to receive all the evidence produced by the parties and has no discretion to refuse any evidence. The case of Muhammad Aliyar Muham on the other hand, is a much later decision made by a Bench of two Judges and in it, discussion at length was made regarding the inquiry under sub-section (4) to section 145 of the Criminal Procedure Code.

For the reasons stated above I am of the opinion that the Magistrate has acted without jurisdiction in the present case in issuing the order directing to place the respondent in possession of the room in dispute without holding an inquiry as required under sub-section (4) to section 145, Criminal Procedure Code. I therefore set aside the order of the learned Eastern Subdivisional Magistrate and send the proceedings to the District Magistrate, Rangoon, with directions that the case be dealt with according to law by any Magistrate to whom he may choose to send it.

APPELLATE CRIMINAL.

Before U Ba Thoung, J.

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Sept. 22.

U NYI MAUNG (APPELLANT)

v.

UNION OF BURMA (RESPONDENT).*

Charge under s. 409, Penal Code—Payment of Sales Tax—Dealer in goods not an agent of the Government—S. 23 (1) (6), General Sales Tax Act, 1949—Recovery of Sale Tax.

Applicant, a dealer in cloths was charged under s. 409, Penal Code for failure to credit sales Tax to Government.

Held: A dealer of goods is not a Government servant and as such he is not an agent of the Government.

There was no provision in the Central Provinces and Berar Sales Tax Act, 1947, which constituted a dealer an agent of the Government, and this decision may be accepted in Burma, as the General Sales Tax Act, 1949, (Burma Act No. 60 of 1949) is more or less on the same principles as laid down in the Sale Tax Act of India.

Jethalal Virajlal v. *The State of Madhya Pradesh*, A.I.R. (1953) Nag. 194, approved.

The dealer, to recoup the sale Tax increases the price to cover the Tax, and the Sales Tax becomes merged in the total amount paid by the purchaser and the price so obtained for selling those goods solely belong to the dealer and therefore there cannot be any entrustment of Sales Tax to him by the Government.

The remedy that is open to the Government for recovery of the Sales Tax is by institution of recovery proceedings under s. 23 (*1*) (*6*) of the General Sales Tax, 1949.

W. Kyin Htone, Advocate, for the applicant.

Ba Kyaing (Government Advocate) for the respondent.

U BA THOUNG, J.—The applicant has been charged under section 409 of the Penal Code in Criminal Regular Trial No. 578 of 1953 before the Court of the

* Criminal Revision No. 107 (B) of 1955. Review of the order of the 5th Additional Magistrate of Rangoon, dated 18th day of June, 1955 passed in Criminal Regular Trial No. 578 of 1953, on the recommendation of the Session Judge, Hanthawaddy and Rangoon Town District, in his Criminal Revision No. 30 of 1955, dated the 23rd July 1955.

5th Additional Magistrate, Rangoon, under the following cirumstances :—

The applicant was the manager of a company known as "37 Company" Rangoon, in the year 1949-50, and as the manager of the said Company during that period, he sold umbrella cloths to the value of Rs 1,13,789-2-0 on which sales tax amounting to Rs. 7,111-13-0 were collected. As these sales tax have not been credited to the Government, he has been prosecuted under section 409 of the Penal Code.

After the framing of charge under section 409, Penal Code against him, the applicant applied for revision, in the Court of the Sessions Judge, Hanthawaddy, against the order of the 5th Additional Magistrate, Rangoon, and the learned Sessions Judge after going through the proceedings, considered that the charge against the applicant in this case under section 409, Penal Code, is misconceived, and he has submitted the proceedings to this Court with a recommendation that the charge be quashed.

I accept the recommendation of the learned Sessions Judge. The learned Government Advocate has rightly conceded in this case that the applicant is not a Government servant but only a dealer of goods and as such he is not an agent of the Government. This is also clear from the decision in the case of *Jethalal Virajlal* v. *The State of Madhya Pradesh* (1) where it has been held that there was no provision in the Central Provinces and Berar Sales Tax Act, 1947 which constituted a dealer an agent of the Government, and this decision may be accepted in Burma, as the General Sales Tax Act, 1949 (Burma Act No. 60 of 1949) is more or less on the same principles as laid down in the Sales Tax Acts of India.

1) A.I.R. (1953) Nag. 194.

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The dealer in goods is the person taxed for the goods he deals with, and in order to pay the tax levied on his goods, without loss to himself, he increases the price of his goods when he sells them to the purchasers, and the sales tax becomes merged in the total amount paid by the purchaser. It has been held in the case of *Bata Shoe Co. Ltd.* v. *Member, Board of Revenue, West Bengal* (1) that under the Bengal Finance (Sales Tax) Act, 1941, the sale price will include any amount charged and realised separately as "Sales Tax" by the dealer. Therefore as the goods or the price obtained for selling those goods solely belong to the dealer there cannot be any entrustment of sales tax to him by the Government. The remedy that is open to the Government for recovery of the sales tax from the dealer if he has not paid the same, is by way of instituting a recovery proceeding against him under section 23 (*1*) (*b*) of the General Sales Tax Act, 1949; and it may be mentioned here that such a proceeding has been opened against the applicant and two other members of the firm before the same Court of the 5th Additional Magistrate, Rangoon, in Criminal Regular Trial No. 7 of 1952 in respect of the same sales tax in question in the present case, and that case is still pending.

It is also apparent from the statement of the applicant in this case in Exhibit (o) that he did not deny of having collected sales tax amounting to Rs. 7,111-13-0 but he explained that a misunderstanding between him and some of the directors of the firm had prevented him from handing over the sale proceeds and the tax collected to the Company, which shows that there was no dishonest intention on his part which is an essential ingredient under section 409, Penal Code.

(1) 53. C.W.N. p 278.

For the reasons stated above I consider this to be a fit case in which the High Court should interfere in revision. I accordingly quash the charge framed against the applicant in Criminal Regular Trial No. 578 of 1953 of the Court of the 5th Additional Magistrate, Rangoon, and acquit the applicant so far as this case is concerned.

CIVIL APPELLATE.

Before U Aung Khine, J. and U Ba Thoung, J.

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Sept 26.

U TAW (APPELLANT)

v.

THE BANK OF CHETTINAD LTD., BY ITS MANAGER, S. ANNAMALAI CHETTIAR (RESPONDENT).*

Urban Rent Control Act, 1948, s. 16—Its object—Relief must be specifically asked for—Court cannot spell out a new case different from the plaint—Monthly Leases (Termination) Act, 1946 (Burma Act No. XLIX/46)—S. 42, Specific Relief Act, Proviso—Consequential Relief—Payment of additional Court Fees before appellate Court—Order 21, Rule 63, Civil Procedure Code.

The Urban Rent Control Act, 1948 has a retrospective effect in view of the fact that the object of the Act was to provide relief and protection to the tenants.

Tai Chuan & Co. v. *Chan Seng Cheong*, (1949), B.L.R. 86 (S.C.), referred to.

No Court can give a plaintiff any relief which he has not specifically asked for nor can it make out a case for the plaintiff different from what he has set out in the plaint.

A.S.P.S.K.R. Karuppan Chettyar and one v. *Chokkalingam Chettiar*, (1949) B.L.R. 45 (S.C.), followed.

S. 42 of the Specific Relief Act is exhaustive of the cases in which a decree merely declaratory can be made, and the Courts have no power to make such a decree independently of that section.

P. C. Thevar v. *Samban and others*, I.L.R. Ran. Vol. 6, 188, referred to.

Proviso to s. 42 of the Specific Relief Act must be adhered to strictly and that its provisions are paramount and the consequences of non-compliance with them cannot be avoided.

In a suit for a bare declaration of title to land in the possession of the defendant, the plaintiff is not entitled to convert his suit to one for possession by payment of additional Court Fees.

Chokalingatcshana Naicker v. *Achivar and others*, I.L.R. 1 Mad. 40, affirmed.

Even in suits under Order 21, Rule 63, Civil Procedure Code, the plaintiff's suit for bare declaration would be barred by the Proviso to s. 42 of the Specific Relief Act if he is able to seek further relief than a mere declaration and omits to do so.

* Civil 1st Appeal No. 56 of 1952 against the decree of the District Court of Mandalay in Civil Regular Suit No. 7 of 1947, dated the 31st January 1952.

U Po Thein and others v. *O.A.O.K.R.M. Firm*, I.L.R. 5 Ran. 699, affirmed.

The defects are fundamental and not merely technical.

An appellate Court cannot make an order for payment of an additiona Court Fee where no fees at all has been paid and where the original Court has not decided the question of valuation.

Muthu Erulappa Pillai and another v. *Vunuku Thathayya Maistry*, A.I.R. (1917) Lower Burma 179 (2), affirmed.

Permission for payment of an additional Court fee in appeal disallowed.

Ba Shun, Advocate, for the appellant.

K. R. Venkatram for the respondent.

U AUNG KHINE, J.—This appeal arises out of Civil Regular Suit No. 7 of 1947 of the District Court of Mandalay. The plaintiff's case is that he is the owner of the land known as Holding No. 24 of 1949-50, Block No. 837 of Shwe-phon-shein Quarter, measuring roughly about ·24 acre. Prior to the outbreak of the second world war, there were standing on it a two-storeyed wooden building with corrugated iron roofing and a big godown. In respect of these premises, the defendant was a monthly tenant paying a rent of Rs. 40 per mensem. When the war broke out, the Bank's Branch at Mandalay was closed down and its employees were evacuated to India in March 1942. When the new manager of the Bank returned to Mandalay in 1946 after the war, instead of the house and the godown, he found a cinema hall standing on the old site and it came to his knowledge that some of the materials from the old buildings were removed to Shanbwe Quarter where the defendant U Taw had put up a residential building. When questioned about the changes that had taken place, the defendant explained that the cinema business was a very paying one and that the construction of the cinema hall was of mutual advantage to both the plaintiff and the defendant. The defendant agreed to compensate for the removal of certain materials from the old

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buildings and also agreed to execute a document admitting the plaintiff's ownership of the cinema hall. He also agreed to take a lease of the cinema hall at a rental of Rs. 200 per mensem. Subsequently, the defendant went back on his words and set up his right of ownership to the cinema hall saying that there had been a contract of sale of the suit land together with the building standing thereon.

The plaintiff pleaded that the defendant's possession of the land after April/May 1942 was illegal and unlawful. As an alternative, he submitted that if it is considered that the defendant was still a tenant after that period he had renounced his character as a lessee by setting up a contract of sale and furthermore by dismantling the house and the godown, the defendant had rendered the tenancy impossible and thus he had forfeited the tenancy and on those grounds he was liable to be ejected. The defendant was asked to give up peaceful possession of the suit property by 31st March 1947 but he did not comply with the demand made. The plaintiff prayed for—

(1) a declaration of his ownership to the cinema hall and Rs. 10,000 as damages for materials removed or in the alternative for Rs. 25,000 as damages for the dismantling of the house and godown and conversion of materials.

(2) ejectment of the defendant in case if it is held that he is not the owner of the cinema hall ; its demolition.

(3) Rs. 4,600 for mesne profits or compensation for use and occupation of the premises and the site.

(4) Rs. 1,480 as rent for the house and godown and site if the defendant continued as

tenant during the period of occupation.

(5) all such other reliefs that the court may find the plaintiff is entitled to.

(6) costs of suit.

In the written statement the defendant admits that he ceased to occupy the building and godown from April 1942 onwards. It is his case that soon after Mandalay was occupied by the Japanese, all the materials of the building and godown were removed and stolen away. Therefore, it was not he who had dismantled and demolished the house and the godown. He says that the cinema hall belongs to him exclusively and therefore a suit for a declaration of title is not maintainable in the circumstances stated by the plaintiff. He also pleaded that in view of the provisions in section 16 of the Urban Rent Control Act, 1948, the plaintiff's suit for recovery of rent of the premises and buildings thereon without a certificate from the Controller of Rents cannot be filed in a Civil Court.

The question whether the suit was maintainable or not in view of the provisions of section 16 of the Urban Rent Control Act, 1948 was taken up as a preliminary issue. The learned District Judge answered the question in the affirmative holding that the provisions of section 16 of the Urban Rent Control Act, 1948 are applicable only in cases for recovery of rent which became due after the 17th January 1948, the date on which the Urban Rent Control Act, 1948 came into force. We have referred to section 16 of 1946 Act and also the amending Acts of 1947 and we find that the provisions similar to those of section 16 of 1948 Act had been there already in 1946 Act. We fail to understand how the learned District Judge could have held that the provisions in section 16 of 1948 Act are applicable

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only in cases for recovery which became due after the 17th January 1948. There is no doubt whatsoever now that 1948 Act has a retrospective effect in view of the fact that the object of the Urban Rent Control Act was to provide relief and protection to the tenants. [See *Tai Chuan & Co.* v. *Chan Seng Cheong* (1)].

In this case the plaintiff had asked for several reliefs including one for recovery of rents unpaid. It is therefore doubtful whether it would be justifiable to dismiss this suit outright merely because the plaint was not accompanied by a certificate from the Controller of Rents. In any case, the lower Court had disallowed the claim for rents.

On evidence there can be no doubt that the defendant did dismantle the old buildings on the suit land and constructed the cinema hall with the old materials and whatever extra materials there were they were removed to Shanbwe Quarter by him. On these findings, the learned District Judge declared the plaintiff to be the owner of the cinema hall and that he was also entitled to possession thereof.

It is this part of the judgment that has been severely attacked by the appellant. The learned Advocate for the appellant contended that the lower Court had fallen into grave error by giving the respondent a declaration he had sought for in spite of the fact that he had not paid any court-fees for such declaration. Secondly, although the respondent had not asked for possession of the cinema hall, the lower Court had granted a decree for possession of the same. On the first point we would hold that as the respondent had paid higher court-fees for the amount claimed as an alternative, that is in respect of the damages assessed at Rs. 25,000, we do not

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

think a separate court-fees for such a declaration should be insisted.

We find, however, much force in the second objection. No Court can give a plaintiff any relief which he has not specifically asked for nor can it make out a case for the plaintiff different from what he has set out in the plaint. [See *A. S. P. S. K. R. Karuppan Chettyar and one* v. *A. Chokkalingam Chettiar* (1)]. It is abundantly clear that possession of the cinema hall was not asked for from the fact that no *ad valorem* court-fees had been paid on the value of the suit premises. The lower Court was therefore clearly wrong to pass a decree declaring that the plaintiff was the owner of the cinema hall and that he was also entitled to possession thereof.

Furthermore, it has been the case of the defendant all along that the plaintiff's claim for declaration is not maintainable in the circumstances disclosed in the case. The relationship of landlord and tenant between the parties had ceased with the advent of the Japanese war some time in March 1942. By the operation of the Monthly Leases (Termination) Act, 1946 (Burma Act No. XLIX of 1946) the appellant's possession of the property was that of a trespasser and it is clear that a suit for declaration alone without a prayer for consequential relief is clearly not admissible under section 42 of the Specific Relief Act.

Section 42 of the Specific Relief Act is exhaustive of the cases in which a decree merely declaratory can be made, and the Courts have no power to make such a decree independently of that section. [See *P. C. Thevar* v. *V. Samban and others* (2)]. It follows therefore that proviso to section 42 of the Specific Relief Act must be adhered to strictly and that

(1) (1949) B.L.R. p. 46 (S.C.). (2) I.L.R. Ran. Vol. 6. p. 188.

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its provisions are paramount and the consequences of non-compliance with them cannot be avoided. The respondent had notice of the objection raised in the lower Court but he paid no heed to it and persisted in continuing with the suit as framed originally. Had he asked for permission from the lower Court for amending the plaint, there certainly would not have been any objection raised. In *Chokalingapeshana Naicker* v. *Achivar and others* (1), the plaintiff sued on a stamp of Rs. 10 for a declaration of his title to land worth Rs. 19,000 in the possession of the defendant, it was held in that case that the suit could not be maintained and that the plaintiff was not entitled to put in additional Stamp on the plaint and convert his suit to one for possession. Even in suits under Order 21, Rule 63 of the Civil Procedure Code, the plaintiff's suit, if it is a suit for declaration, would be barred by the proviso to section 42 of the Specific Relief Act if he is able to seek further relief than a mere declaration and omits to do so, [See *U Po Thein and others* v. *O.A.O.K.R.M. Firm* (2)].

The learned Advocate for the respondent says that no objection was raised in the lower Court on the point but it is clear from paragraph 9 of the written statement that the appellant had stated that the suit for mere declaration is not maintainable in the circumstances disclosed in the plaint. There was no effective reply to this. The learned Advocate for the respondent also contends that the suit should not be dismissed merely on a technical defect *vide* section 99 of the Civil Procedure Code and that he should be allowed to pay the requisite court-fees at this stage.

The defects are fundamental and not merely technical. Therefore the permission sought for to

(1) I.L.R. 1 Mad. p. 40. (2) I.L.R. 5 Ran. p. 699.

pay an additional court-fee here in appeal cannot be allowed. In *Muthu Erulappa Pillai and another* v. *Vunuku Thathayya Maistry* (1), it was held that an appellate Court cannot make an order for payment of an additional court-fee where no fee at all has been paid and where the original Court has not decided the question of valuation.

For these reasons, we are of the opinion that the suit as framed by the respondent in the lower Court was clearly not maintainable under the proviso to section 42 of the Specific Relief Act.

The lower Court has appointed a Commissioner to find out what were the materials removed by the appellant to his house out of the materials obtained by dismantling the buildings in suit, and their value and also as to the amount the respondent is entitled to as mesne profits or compensation for use and occupation of the premises from May 1946 to May 1947. The order relating to the appointment of the Commissioner for the purposes mentioned above will have to be vacated also in view of our decision that the suit is not maintainable.

In the result the appeal is allowed and the judgment and decree passed by the lower Court are set aside and the plaintiff's suit is dismissed with costs throughout.

U BA THOUNG, J.—I agree.

(1) A.I R. (1917) Lower Burma 179 (2).

APPELLATE CRIMINAL.

Before U Ba Thoung, J.

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June 2.

U THA PE (APPLICANT)

v.

U THEIN NWE (RESPONDENT).*

Prosecution under s. 468, Penal Code against Village Headman—General Village Proceedings opened by Deputy Commissioner through Township Officer—Direct complaint—S. 195 (1) (c) not applicable as Deputy Commissioner acting in Village Proceedings is not a Court—S. 28, Burma Village Act—Sanction required to prosecute Village Headman for acts done in discharge of his official duties.

Respondent, a Villager petitioned against the applicant for an offence under s. 468, Penal Code to the Deputy Commissioner, Pegu, who opened General Village Proceedings through the Township Officer.

On the Township Officer's report, the Deputy Commissioner directed that the Respondent could file a direct complaint and he did so.

The trial Court dismissed the complaint for want of sanction under s. 195 (1) (*c*), Criminal Procedure Code and discharged the applicant.

Thereupon the Respondent filed an application in revision against the order of discharge before the Session Court wherein the applicant raised two objections, *viz.*—That the complaint was :

(1) barred by s. 195 (1) (*c*), Criminal Procedure Code and

(2) not maintainable for want of Deputy Commissioner's sanction under s. 28, Burma Village Act.

The Sessions Court set aside the order of discharge on ground No. (1) alone without going into ground No. (2) and ordered a re-trial.

The applicant then filed an application in revision against the order for re-trial.

Held : Neither the Deputy Commissioner, nor the Township Officer in General Village Proceedings acted as a "Court" within the meaning of s. 195 (1) (*c*) of the Criminal Procedure Code.

Chotalal Malthuradas, 22 Bom. 936/939 ; *Mahabaleswarappa* v. *Gopalswami*, 36 Cr L. J. 895 ; *Hari Charan* v. *Kanshiki*, 44 C.W.N. 530 (537), referred to.

Held further : Sanction from the Deputy Commissioner under s. 28 of the Burma Village Act is essential to prosecute a Village Headman for Commission of alleged offences in the discharge of his official duties.

Maung Po Thit v. *Maung Pyu*, I.L.R. 8 Ran. 54, followed.

Order for re-trial set aside.

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* Criminal Revision No. 169 (B) of 1954, being Review of the order of the Sessions Judge of Pegu, dated the 17th day of July 1954 passed in Criminal Revision No. 89 of 1954.

Tun Maung, Advocate, for the applicant.

Ba Kyine (Government Advocate) for the respondent.

U BA THOUNG, J.—This is an application to revise the order of the Sessions Judge, Pegu, passed in his Criminal Revision No. 89 of 1954 setting aside the order of discharge of the applicant U Tha Pe by the 8th Additional Special Power Magistrate, Pegu, in Criminal Regular Trial No. 78 of 1953. The applicant was prosecuted in the latter Court under section 468, Penal Code on a direct complaint filed by the respondent U Thein Nwe under the following circumstances :—

The applicant is the headman of Kyaikme village who has to issue a certificate to every *bonâ fide* cultivator residing within his jurisdiction who wishes to sell his paddy through rice traders and millers to the State Agricultural Marketing Board. Rice traders and millers buy paddy for the State Agricultural Marketing Board from the cultivators who could produce *bonâ fide* cultivator's certificate. This procedure was adopted to prevent the underhand dealings by the middle men in the purchase of paddy by the State Agricultural Marketing Board, and with a view that the cultivators who sell their paddy get the full price paid by the Government through its agents, the State Agricultural Marketing Board. The village headman therefore has to issue a *bonâ fide* cultivator's certificate to every cultivator residing in his jurisdiction who wishes to sell paddy. The headman and the cultivator concerned have to put their signatures on the *bonâ fide* cultivator's certificate. Now it happened that during the 1952-53 paddy season, many cultivators of Kyaikme village were unable to obtain

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cultivator's certificates from their headman who is the applicant in this case. The applicant told them that no more certificates would be available as all have been issued. The cultivators numbering 39 who failed to obtain their certificates from the applicant then applied to the Deputy Commissioner, Pegu, to enquire into the matter against the applicant. The Deputy Commissioner then opened a General Village Proceeding No. 300 of 1953 and ordered the Township Officer, Thanatpin, to enquire into the matter. The Township Officer in his enquiry found that although 17 villagers had never received cultivator's certificates—the counterfoils of the certificates which were supposed to have been issued to them bore their signatures and as these villagers denied the signatures to be theirs, it appears that the applicant was disposing these certificates illegitimately by forging the signatures of those 17 villagers on the cultivator's certificates, and a report was accordingly made to the Deputy Commissioner. The Deputy Commissioner then informed these villagers that they could proceed against the applicant U Tha Pe in a Court of Law for forgery, and the respondent has thus filed a direct complaint against the applicant under section 468, Penal Code as stated above in the Court of the 8th Additional Magistrate, Pegu. It was contended by the applicant in that Court that the direct complaint filed by the respondent was barred under section 195 (1) (*c*) of the Code of Criminal Procedure, and the learned trial Magistrate accepted that contention and discharged the applicant U Tha Pe. The respondent U Thein Nwe then applied to the Sessions Court to revise the order of discharge. In the Court of the Sessions Judge, U Tha Pe contended firstly that he, being a village headman, could not be prosecuted without the sanction of the Deputy Commissioner

but it appears that this contention was abandoned and the learned Sessions Judge did not go into this question. The other contention raised before the Sessions Judge was that the direct complaint filed was barred under section 195 (1) (*c*) of the Code of Criminal Procedure. Section 195 (1) (*c*) of the Code of Criminal Procedure provides:

> " No Court shall take cognizance of any offence described in section 463 or punishable under section 471, section 475 or section 476 of the same Code, when such offence is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except on the complaint in writing of such Court, or of some other Court to which such Court is subordinate."

The learned Sessions Judge went into this question and relying on the case of *Chotalal Mathuradas* (1) where it has been held that " An Assistant Collector in holding a Departmental enquiry into the alleged misconduct of a subordinate is not a Court ", held that the Deputy Commissioner, Pegu, in opening the said village proceeding had not acted as a Court, nor the inquiry before the Township Officer, Thanatpin, could ever be regarded as a proceeding before a Court, and therefore section 195 (1) (*c*) of the Code of Criminal Procedure had no application in the present case and that the direct complaint filed in it was competent. The learned Sessions Judge has also quoted the cases of *Mahabaleswarappa* v. *Gopalswami* (2), and *Hari Charan* v. *Kanshiki* (3) which support his view. I consider the view taken by the learned Sessions Judge that the Deputy Commissioner,

(1) 22 Bom. 936 (939). (2) 36 Cr.L.J. 895.
(3) 44 C.W.N. 530 (537).

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Pegu, in opening a village proceeding had not acted as a Court and that the inquiry held by the Township Officer could not be regarded as a proceeding before a Court, is correct. The Deputy Commissioner had to open the said village proceeding so that an enquiry be made regarding the misconduct alleged against the headman and accordingly he ordered the Township Officer to hold that inquiry. In the inquiry proceedings before the Township Officer also, the witnesses were not examined on oath. This indicates that neither the Deputy Commissioner, Pegu, nor the Township Officer, Thanatpin, had acted as a Court. The learned Sessions Judge was therefore correct in holding that section 195 (1) (*c*) of the Code of Criminal Procedure is not applicable to the present case.

It is now contended by the learned counsel for the applicant that the applicant, being a village headman, could not be prosecuted without the sanction of the Deputy Commissioner, and that the prosecution by the respondent U Thein Nwe is vitiated for want of sanction from the Deputy Commissioner, Pegu. The learned Sessions Judge has not considered this question because it was not urged before him ; but it cannot be said that this contention is untenable. In the case of *Maung Po Thit* v. *Maung Pyu* (1), it has been held that :

> " Where a complaint for an offence under the Penal Code is filed against a village headman in respect of acts which are punishable also under the Burma Village Act, the Magistrate must reject the complaint if the complainant has not obtained authority from the Deputy Commissioner as required by section 28 of the Burma Village Act. The Magistrate should not himself take any steps to obtain such sanction.

(1) I.L.R. 8 Ran. p. 654.

The Deputy Commissioner should not specify the section of the Penal Code which is applicable, but should merely authorize the prosecution in respect of the acts concerned."

The complaint filed by the respondent U Thein Nwe against the applicant in this case is for an offence under section 468, Penal Code, and in view of the ruling laid down in the above case, sanction from the Deputy Commissioner, Pegu, under section 28 of the Burma Village Act is required to prosecute the applicant who is a village headman. Section 28 of the Village Act lays down that " no complaint against a Headman . . . . shall be entertained by any Court unless the prosecution is instituted by order of, or under authority from, the Deputy Commissioner." The allegation against the applicant is that he had forged the signatures of the cultivators on the cultivator's certificates and sold them to others. The applicant as the headman has to issue cultivator's certificates to the cultivators within his jurisdiction who wish to sell paddy to the Government, and so the offence alleged against him if committed must be deemed to have been committed in the discharge of his official duties. I therefore accept the contention made by the learned counsel for the applicant that sanction from the Deputy Commissioner, Pegu, is required in this case to prosecute the applicant.

For the reasons stated above I set aside the order passed by the Sessions Judge, Pegu, in his Criminal Revision No. 89 of 1954 dated the 17th July 1954, and order that the applicant be discharged in Criminal Regular Trial No. 78 of 1953 of the Court of the 8th Additional Special Power Magistrate, Pegu.