BURMA LAW REPORTS

(1956) B.L.R

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

BURMA LAW REPORTS

SUPREME COURT

1956

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

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HON'BLE JUDGES OF THE SUPREME COURT OF THE UNION OF BURMA DURING THE YEAR 1956

1. The Hon'ble Justice *Thado Thiri Thudhamma, Agga Maha Thray Sithu* U THEIN MAUNG, M.A., LL.B., *Barrister-at-Law*, Chief Justice of the Union.
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.

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SUPREME COURT.

Before U Thein Maung, Chief Justice of the Union, Mr. Justice Myint Thein and U San Maung, J.

S.C. 1955

Dec. 12.

HAJI ABDUL SHAKOOR KHAN (APPELLANT)

v.

THE BURMA PUBLISHERS LTD. (RESPONDENT).*

Companies Act—S. 6, Union Judiciary Act—Art. 112, Limitation Act—Question of law raised for the first time in a Court of last resort, entertainability.

Held: The mere passing of a resolution at a Board Meeting is not sufficient notice of call. The resolution has to be implemented by a formal call on the shareholder, and the period of limitation under Article 112 would begin only with this demand.

Dhanbhandan Coy. Ltd. v. *Fayzuddin Miya*, I.L.R. 59 Cal. 1186, affirmed.

A director who had assisted in passing a resolution for a call is estopped from disputing its validity.

A question of law raised for the first time in a Court of last resort would receive consideration only if it was based upon facts admitted beyond controversy.

Connecticut Fire Insurance Co. v. *Kavanagh*, (1892) A.C. 473 at 480; *M. E. Moola Sons Ltd.* v. *Burjorjee*, 10 Ran. 242; *A.R.M.N.A. Chettyar Firm* v. *R.M.V.S. Chettyar and others*, (1938) B.L.R. 256; *Bishwa Nath Rai* v. *Koshi*, (1948) B.L.R. 449, approved.

York Tramways Co. Ltd. v. *Willows*, (1881) Q.B.D. 685, referred to. *Phaure Electric Accumulator Co. Ltd.* v. *Pillipart*, (1888) 58 L.T.R. 525.

P. K. Basu for the appellant.

P. N. Ghosh for the respondent.

Judgment delivered by

MR. JUSTICE MYINT THEIN.—Early in 1946 the appellant-defendant approached some friends with the idea of starting a publishing company and it is clear that the original intention was to float a

* Civil Appeal No. 4 of 1955 against the decree of the High Court of Rangoon in Civil 1st Appeal No. 97 of 1951.

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private limited company with Rs. 1,000 shares. On this basis the appellant paid Rs. 3,000 for three shares but the Memorandum of Association, which was filed with the Registrar of Joint Stock Companies on the 29th October 1946, shows the value of each share as Rs. 500 and with the appellant as the owner of 20 shares

The suit is by the "Burma Publishers Ltd."—a name under which the company came to be registered—against the appellant for Rs. 7,000 being the balance of the price of the twenty shares *plus* interest calculated at Rs. 1-8-0 per mensem up to the date of the institution of the suit. The total claim is for Rs. 10,780.

Three pleas were raised in the trial Court, the first being that the Managing Director Hubdar Khan alone was not competent to institute the suit, there being two managing directors. The other was that the appellant had agreed to take only 3 shares of Rs. 1,000 each. The third was that the interest demanded was exorbitant and made only with a view to bring the claim into the jurisdiction of the Original Side of the High Court. The first plea was rejected on the ground that under Order 29, Rule 21 of the Code of Civil Procedure a pleading may be signed by a principal officer of the company. On the second plea the finding was that even if originally the promoters had arranged for Rs. 1,000 shares, the appellant had accepted the new arrangement under which he had agreed to take 20 shares of Rs. 500 each. On the third plea interest was allowed at 5 per cent per annum, this being the rate allowed under Article 14 of Table A of the Companies Act, an article specifically adopted by the company in their Articles of Association. The suit was decreed for Rs. 7,000 *plus* interest Rs. 710.

On appeal the same pleas were put up and were rejected. The additional plea of limitation raised in the Appellate Court was also rejected and the decree of the Original Side confirmed.

Leave to appeal under section 6 of the Union Judiciary Act was granted and the same pleas have been reiterated before us. In regard to the pleas that the appellant did not agree to take 20 shares and that the Managing Director was not competent to institute the suit, we see no reason to differ from the findings of the lower Courts. In regard to the plea of limitation we note that paragraph 8 of the plaint sets out that the cause of action arose on 1st September 1947 and subsequently on the first day of each month to and including 1st September 1950. Learned counsel who appeared before us were not responsible for the pleadings and counsel for the appellant took the stand that the call for the balance due on the shares was made by a resolution of the Board of Directors at their meeting held on 19th May 1947. He contends that under Article 112 of the Limitation Act, which allows three years from the date the money became payable, the suit is time barred as it was instituted only on 25th September 1950.

Our finding on this point must be against the appellant for on the authority of *Dhanbhandan Coy. Ltd.* v. *Fayzuddin Miya* (1) it is apparent that the mere passing of a resolution at a Board meeting is not sufficient notice of call. The resolution has to be implemented by a formal call on the shareholders. Among the documents exhibited in the trial, we note that a lawyer's notice dated the 18th September 1948 (Exhibit F) was sent, and thus the money became payable only by this demand,

(1) I.L.R. 59 Cal. 1186.

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and the period of limitation would begin only with this demand. We therefore endorse the finding of the Appellate Court which was against the appellant.

An entirely new plea was raised before us. It is contended that under Article 12 of Table A of the Companies Act, another article specifically adopted by the respondent company, the call for the full balance of Rs. 7,000 was invalid. Article 12 runs:

> "The directors may from time to time make calls upon the members in respect of any moneys unpaid on their shares, provided that no call shall exceed one-fourth of the nominal amount of the share, or be payable at less than one month from the last call; and each member shall (subject to receiving at least fourteen days' notice specifying the time or times of payments) pay to the company at the time or times so specified the amount called on his shares."

On the face of it, the plea is a substantial one in that a demand may be made only for 25 per cent of the value of the shares but the question is, should this Court as a Court of last resort permit the appellant to raise it?

The classic authority on this point is *Connecticut Fire Insurance Co.* v. *Kavanagh* (1) where it was observed:

> "When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea.
>
> The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the Court of ultimate review is placed in much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not in any case to be followed

(1) (1892) A.C. 473 at 480.

unless the Court is satisfied that the evidence upon which they are asked to decide, established beyond doubt that the facts if fully investigated would have supported the new plea."

This was followed in *M. E. Moola Sons Ltd.* v. *Burjorjee* (1), where a plea raised for the first time before the Privy Council was disallowed on the ground that the records did not show that the parties had agreed upon the facts. See also *A.R.M.N.A. Chettyar Firm* v. *R.M.V.S. Chettyar and others* (2) where it was held that a question of law raised for the first time in a Court of last resort would receive consideration only if it was based upon facts admitted beyond controversy. Also *Bishwa Nath Rai* v. *Koshi* (3) which reiterates this principle.

The respondents have naturally objected to this plea being raised before us, mainly on the ground that if it had been raised in the pleadings it would have been open to them to lead evidence to show that the calls had been made in accordance with Article 12 or, in the alternative, that the appellant and other directors had in fact agreed to pay their shares in full before the company was registered. The minutes of the Directors' meetings, which are exhibited as Exhibit B series, tend to support the suggestion that the promoters in fact had agreed at one stage to make immediate contributions towards their shares. It can thus be seen that the point of law raised for the first time before us is not based upon facts admitted by the parties or proved beyond controversy. Furthermore, the appellant in his capacity as a member of the Board of Directors, had even seconded a resolution (Exhibit B-3) which give a period of one month to defaulting shareholders to pay up, and it is doubtful if he can now be permitted to deny the validity of a call with

(1) 10 Ran. 242. (2) (1938) R.L.R. 256.
(3) (1948) B.L.R. 449.

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which he himself, in his capacity as a Director, was associated. In *York Tramways Co. Ltd.* v. *Willows* (1), a director who had participated in making a call was not permitted to plead a technicality to absolve himself of a liability into which he had entered with full knowledge of what he was doing. Similarly, it was held in *Phaure Electric Accumulator Co. Ltd.* v. *Pillipart* (2) that a director who had assisted in passing a resolution for a call was estopped from disputing its validity.

This being the position, we cannot say that the evidence upon which we are asked to decide, "established beyond doubt that if the facts are fully investigated, they would support the new plea", and in these circumstances it will not be justifiable for us to entertain it.

The appeal is therefore dismissed and the judgment and decree in Civil First Appeal No. 97 of 1951 of the High Court are confirmed. In regard to costs, the parties appear to have been actuated in their conduct by personal animosities and the plaintiffs have also grossly exaggerated their claim for interest despite the clear provisions of Article 12. We therefore order each party to bear its own costs in this Court.

(1) (1881) Q.B.D. 685 (2) (1888) 58 L.T.R. 525.

တရားလွှတ်တော်ချုပ်

မစ္စတာ လီအုံခွန်း (လျှောက်ထားသူ)
နှင့်
နိုင်ငံတော်ကောက်ပဲသီးနှံ ရောင်းဝယ်ရေးအဖွဲ့
(လျှောက်ထားခံရသူ)*

† ၁၉၅၅ ဩဂုတ်လ ၁။

၁၉၅၃ ခုနှစ်၊ အထူးတရားမရုံး အက်ဥပဒေပုဒ်မ ၅(ဂ)(၄) အံ့ယူခံဝင်ခွင့် အဓိပ္ပါယ်၊ ၁၉၄၈ ခုနှစ်၊ ပြည်ထောင်စုတရားစီရင်ရေး အက်ဥပဒေပုဒ်မ ၅-၆-၂၇ ပြည်ထောင်စုမြန်မာနိုင်ငံ ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေပုဒ်မ ၁၃၆(၃) ၁-၁၃၀၊ အိန္ဒိယနိုင်ငံဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေပုဒ်မ ၁၃၆(၁)၊ ၁၉၄၈ ခုနှစ်၊ပါလီမန်ရွေးကောက်ပွဲ အက်ဥပဒေပုဒ်မ ၄၂(၃)၊ ၁၉၄၉ ခုနှစ်၊ ဒီဒိုကရေစီဒေသန္တရအုပ်ချုပ်ရေး အက်ဥပဒေပုဒ်မ ၃၁(၇)၊ ၁၃၁၁ ခုနှစ်၊ ဝိနိစ္ဆယဌာနအက်ဥပဒေပုဒ်မ ၁၉၊ တရားဥပဒေဆိုင်ရာ လေဘေးအခြေပြုသိကောက်ယူပုံဥပဒေ။

ဤအမှုတွင် ၁၉၅၁ ခုနှစ်၊ အထူးတရားမရုံး အက်ဥပဒေအရ ဖွဲ့စည်းသည့် အထူးတရားမရုံးက ချမှတ်လိုက်သော စီရင်ချက်ဒွင့်ဒီကရီများကို ၁၉၄၈ ခုနှစ်၊ ပြည်ထောင်စုတရားစီရင်ရေး အက်ဥပဒေပုဒ်မ ၆ အရ တရားလွှတ်တော်ချုပ်တွင် အယူခံဝင်ရန် အခွင့်ထူးပေးရန် လျှောက်ထားသူက လျှောက်ထားသောအခါ လျှောက်ထားခံရသူများက ၁၉၅၁ ခုနှစ်၊ အထူးတရားမရုံး အက်ဥပဒေပုဒ်မ ၈(၄)တွင် မည်သည့်ရုံးတွင်မျှ အယူခံဝင်ခွင့်မရှိစေရဟု ပိတ်ပင်တားမြစ်သော်ငြားလည်း ကန့်ကွက်ကြသည်။

တရားလွှတ်တော်ချုပ်က ဆုံးဖြတ်လိုက်သည်မှာ—

ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေပုဒ်မ ၁၃၀ တွင် အယူခံဝင်ခွင့်မရှိစေရဟူသော စကားရပ်ပါရှိနေသော ကြောင့် ထိုစကားရပ်နှစ်ခုကိုပူးတွဲ၍ ဘတ်ရှ်သာလျှင် ရည်ရွယ်ချက်အဓိပ္ပါယ်ကို ပြည့်စုံစွာရနိုင်မည်အထူးတရားမရုံး အက်ဥပဒေပုဒ်မ ၈(၄)တွင် ဤကဲ့သို့သော စကားရပ်မျိုးမပါရှိသဖြင့် ယင်းပုဒ်မနှစ်ခုသည် တသဘောတည်း အဓိပ္ပါယ်သက်ရောက်သည်ဟုမဆိုနိုင်။

အထူးတရားမရုံး အက်ဥပဒေပုဒ်မ ၈(၄) တွင် ပါရှိသော အယူခံစစ်ခွင့်မရှိစေရဟူသော စကားရပ်သည် ဆိုင်သင့်ရာရာအမှုသည်တဦးဦး၏ အယူခံဝင်ပိုင်သော အခွင့်အရေးကိုသာ ရည်ညွှန်းဟန်တူသည်။

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* ၁၉၅၅ ခုနှစ်၊ တရားမသေးလျှောက်လွှာနံပါတ် ၅။

† တရားဝန်ကြီး ဦးချန်ထွန်းအဓိန္ဓိဌာန်မှတ်သည်။

၁၉၅၅

မစ္စတာလီအုံခူးနှင့် နိုင်ငံတော်ကောက်ပဲသီးနှံဈေးဝယ်ရေးအဖွဲ့။

တရားလွှတ်တော်ချုပ်အား ပြည်ထောင်စုတရားစီရင်ရေး အက်ဥပဒေပုဒ်မ ၆ က ပေးအပ်ထားသော မိမိသဘောအတိုင်း တရားရုံးတခုခု၏ စီရင်ချက်ကို အယူခံဝင်ရန် အခွင့်ထူးပေးနိုင်သောအာဏာကို ရည်ညွှန်းဟန်မတူချေ၊ ဆိုင်သင့်ရာရာ အမှုသည်တဦးဦးတွင် ရရှိမည့် အယူခံဝင်ခွင့်ကိုသာ တားမြစ်ပယ်ရှားရန် ရည်ညွှန်းသည်ဟုယူဆရန်ရှိသည်။

ထို့ကြောင့် အထူးတရားမရုံး အက်ဥပဒေပုဒ်မ ၇(၄)တွင် ပါရှိသော ပြဋ္ဌာန်းချက်သည် ပြည်ထောင်စုတရားစီရင်ရေး အက်ဥပဒေပုဒ်မ ၆ က တရားလွှတ်တော်ချုပ်သို့ ပေးအပ်ထားသောမိမိသဘောအတိုင်း အခွင့်ထူးပေးနိုင်သည့်အာဏာကို ဆန့်ကျင်ပယ်ဖျက်ပြယ်စေသည်ဟု မယူဆသင့်ချေ။ ဤအာဏာကိုထိခိုက်သည်၊ ဖိတ်ဖင်သည်၊ သို့မဟုတ် ရုပ်သိမ်းသည့်သဘောသို့ သက်ရောက်သည်ဟုယူဆရန် မသင့်ကြောင်း။

သခင်အေးမောင်နှင့် တရားဝန်ကြီးဦးအောင်သာကျော်၊ ၁၉၄၉ ခုနှစ်၊ မြန်မာနိုင်ငံစီရင်ထုံး တရားလွှတ်တော်ချုပ် စာမျက်နှာ ၁၈၈ ခြားနားသည်။

အက်ဥပဒေတခုတွင်ပါရှိသော ပြဋ္ဌာန်းချက်သည် အခြားအက်ဥပဒေတခုတွင် ပါသည့် ပြဋ္ဌာန်းချက်နှင့် မဆန့်ကျင်အောင် တတ်နိုင်သမျှသဘောအဓိပ္ပါယ်ကောက်ယူရမည်ဟူသော ဥပဒေကောက်ယူပုံအရ အထူးတရားမရုံး အက်ဥပဒေပုဒ်မ ၈'၄)ပါ ပြဋ္ဌာန်းချက်သည် ပြည်ထောင်စုတရားစီရင်ရေး အက်ဥပဒေပုဒ်မ ၆ ပါ ပြဋ္ဌာန်းချက်နှင့် မဆန့်ကျင်ဟူ၍ သဘောအဓိပ္ပါယ်ကောက်ယူရပေမည်။

ပြည်ထောင်စုတရားစီရင်ရေး အက်ဥပဒေသည် သာမန်ကိစ္စများနှင့် စပ်ယှဉ်၍ ပြုထားသည့် အက်ဥပဒေများထက် ပိုမိုလေးစားအပ်သောဥပဒေဖြစ်သည်။

လွှတ်တော်ရှေ့နေကြီး ပုဂံ ဦးဘချမ်းက လျှောက်ထားသူအတွက် လိုက်ပါဆောင်ရွက်၍၊

နိုင်ငံတော်ရှေ့နေချုပ် ဦးအုံးခင်(၂)၊ အစိုးရရှေ့နေကြီး ဦးစိန်ထွန်း(၂)တို့က လျှောက်ထားခံရသူအတွက် လိုက်ပါဆောင်ရွက်သည်။

တရားဝန်ကြီး ဦးချန်ထွန်း။ ။၁၉၅၁ ခုနှစ်၊ အထူးတရားမရုံး အက်ဥပဒေအရဖွဲ့စည်းသည့် အထူးတရားမရုံးက ချမှတ်လိုက်သော စီရင်ချက်နှင့် ဒီကရီများကို ၁၉၄၈ ခုနှစ်၊ ပြည်ထောင်စုတရားစီရင်ရေး အက်ဥပဒေပုဒ်မ ၆ အရ အယူခံဝင်ရန် တရားလွှတ်တော်ချုပ်တွင် အခွင့်ထူးပေးနိုင်သော အာဏာမရှိပါဟု လျှောက်ထားခံရသူများက ပြောဆိုကန့်ကွက်သောကြောင့် ၁၉၅၅ ခုနှစ်၊ တရားမသေးလျှောက်လွှာ အမှတ် ၅ နှင့် ၁၇ တို့ကို ပူးတွဲ၍ အဆိုပါကန့်ကွက်ချက်ကို ကြားနာကြသည်။ ဤသို့စဉ်းစားဆုံးဖြတ်ရန်အချက်မှာ အလွန်အရေးကြီးသော အချက်ဖြစ်၍ လျှောက်ထားခံရသူ နိုင်ငံတော်ကောက်ပဲသီးနှံဈေးဝယ်ရေးအဖွဲ့အတွက် အောက်ရုံးတွင် လိုက်ပါဆောင်ရွက်ခဲ့သူ အစိုးရရှေ့နေကြီးများအပြင် နိုင်ငံတော်ရှေ့နေချုပ်ကိုယ်တိုင် လာရောက်လျှောက်လဲရန်

ညွှန်ကြားသည့်အတိုင်း နှစ်ဘက်သောအမှုသည်များအတွက် ပညာရှိရွေးနေကြီးများစုံညီစွာ လျှောက်လဲချက်များ ပေးကြသည်ကိုကြားနာကြသည်။

၁၉၅၅

မစ္စတာလီအုံခွန်နှင့် နိုင်ငံတော်ကောက်ပဲ ဦးနုံရောင်းဝယ် ရေးအဖွဲ့။

ဤကိစ္စတွင် အရေးအကြီးဆုံးသောအချက်မှာ အဆိုပါ အထူးတရားမရုံး အက်ဥပဒေပုဒ်မ ၈ (၄) တွင်ပါရှိသည့် "အယူခံဝင်ခွင့်"ဆိုသော မြန်မာစကားရပ်တခုနှင့် စပ်လျဉ်းသည့် သဘောအဓိပ္ပါယ်ကောက်ယူချက်ပင် ဖြစ်လေသည်။

ပြည်ထောင်စုမြန်မာနိုင်ငံ ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေပုဒ်မ ၁၃၆ (၃) အရ တရားလွှတ်တော်မှတပါး အခြားတရားရုံးများ၏ စီရင်ချက်များကို တရားလွှတ်တော်ချုပ်က စစ်ဆေးဆုံးဖြတ်နိုင်သော အယူခံစီရင်ပိုင်ခွင့် အာဏာကိုငင်း၊ မည်သည့်တရားရုံးကချမှတ်သည့် စီရင်ချက်ကိုမဆို ပြည်ထောင်စုတရားစီရင်ရေး အက်ဥပဒေပုဒ်မ ၆ အရ အယူခံဝင်ရန် တရားလွှတ်တော်ချုပ်က အခွင့်ထူးပေးနိုင်သည့်အာဏာကိုငင်း၊ ၁၉၅၁ ခုနှစ်၊ အထူးတရားမရုံး အက်ဥပဒေပုဒ်မ ၈ (၄) တွင် မည်သည့်ရုံးတွင်မျှ အယူခံဝင်ခွင့်မရှိစေရဟု ပိတ်ပင်တားမြစ်သော ပြဋ္ဌာန်းချက်ကိုငင်း၊ စုပေါင်းဖွဲ့စည်းစားသောအခါ ဥပဒေသဘောအရ မည်သို့အဓိပ္ပါယ်ပေါ်ပေါက်လာမည်ဟူသော အချက်ကို စိစစ်သုံးသပ်ရမည်ဖြစ်သည်။ ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေပုဒ်မ ၁၃၆ (၃) တွင် ပါရှိသည်မှာ—

> "ဤအခြေခံဥပဒေရှိ အခြားပြဋ္ဌာန်းချက်များဖြင့် တရားလွှတ်တော်ချုပ်သို့ ပေးအပ်ထားသောအာဏာများကို မထိခိုက်စေဘဲ၊ ထို့ပြင် တရားဥပဒေက ပြဋ္ဌာန်းထားသော ခြွင်းချက်များ၊ စည်းမျဉ်းဥပဒေများနှင့် မဆန့်ကျင်သည် တရားလွှတ်တော်ချုပ်၌ တရားလွှတ်တော်၏ စီရင်ချက်အားလုံးကို စစ်ဆေးဆုံးဖြတ်နိုင်သော အယူခံစီရင်ပိုင်ခွင့် အာဏာများရှိရမည်။ ထို့ပြင် အခြားတရားရုံးများ၏ စီရင်ချက်များကို တရားဥပဒေက သတ်မှတ်ထားသည့်အတိုင်း စစ်ဆေးဆုံးဖြတ်နိုင်သော အယူခံစီရင်ပိုင်ခွင့်အာဏာများလည်း ရှိရမည်။"

အဓိပ္ပါယ်မှာ တရားလွှတ်တော်၏စီရင်ချက်အားလုံးကို စစ်ဆေးဆုံးဖြတ်နိုင်သော အယူခံစီရင်ပိုင်ခွင့်အာဏာသည် တရားလွှတ်တော်ချုပ်၌ အခြေခံဥပဒေအရတည်ရှိ၏၊ တရားလွှတ်တော်မှတပါး အခြားတရားရုံးများ၏ စီရင်ချက်များကို စစ်ဆေးဆုံးဖြတ်နိုင်သော အယူခံစီရင်ပိုင်ခွင့်အာဏာမှာမူ တရားလွှတ်တော်ချုပ်၌ အခြေခံဥပဒေအရ မတည်ရှိဘဲ အက်ဥပဒေတခုခုက ပေးအပ်မှသာလျှင် တည်ရှိရမည်ဖြစ်သည်။ ဤသို့ အခြေခံဥပဒေက ရည်ညွှန်းထားသည့် အတိုင်း

၁၉၅၅

မစ္စတာလိအုံခူးနှင့် နိုင်ငံတော်ကောက်ပဲသီးနှံရောင်းဝယ်ရေးအဖွဲ့။

အခြားတရားရုံးများ၏ စီရင်ချက်များကို စစ်ဆေးဆုံးဖြတ်နိုင်သော အယူခံစီရင်ပိုင်ခွင့်အာဏာကို တရားလွှတ်တော်ချုပ်အား ၁၉၄၈ ခုနှစ်၊ ပြည်ထောင်စုတရားစီရင်ရေး အက်ဥပဒေပုဒ်မ ၆ ပါ ပြဋ္ဌာန်းချက်များက အောက်ပါအတိုင်း ပေးအပ်ထားလေသည်။

> "ပုဒ်မ ၅ တွင် မည်သို့ပင်ပါရှိစေကာမူ၊ တရားမမှု၊ ရာဇဝတ်မှု၊ သို့တည်းမဟုတ် အခြားအမှုတွင် အခြေခံဥပဒေ စတင်အာဏာမတည်မီကဖြစ်စေ၊ တည်ဆဲမဖြစ်စေ၊ တရားရုံးတရားရပ်ကဆုံမှတ်သော စီရင်ချက်ကို ဒီကရီကို၊ သို့တည်းမဟုတ် အပြီးသတ်အမိန့်ကို အယူခံဝင်ရန် တရားလွှတ်တော်ချုပ်သည် ခွင့်မပြုသောအတိုင်း အခွင့်ထူးပေးနိုင်သည်။"

အဓိကယနိုင်ငံ ဖွဲ့စည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေပုဒ်မ ၁၃၆ (၁) တွင်ပါရှိသော ပြဋ္ဌာန်းချက်များသည် ပြည်ထောင်စုတရားစီရင်ရေး အက်ဥပဒေပုဒ်မ ၆ ပါ ပြဋ္ဌာန်းချက်များနှင့် ပေါင်းစပ်ဖွဲ့စည်းမှုဖြစ်လျက်ရှိသော အချက်မှာ စိတ်ဝင်စားဘွယ်ရာကောင်း၏။ မည်သည့်တရားရုံး၏ စီရင်ချက်ကိုမဆို စစ်ဆေးဆုံးဖြတ်နိုင်သော အယူခံစီရင်ပိုင်ခွင့်အာဏာကို အိန္ဒိယနိုင်ငံ၌ အခြေခံဥပဒေကပင်လျှင် တရားလွှတ်တော်ချုပ်အား ပေးအပ်ထားသဖြင့် မည်သည့် အက်ဥပဒေကမျှ ရုပ်သိမ်းနုတ်ခြင်း ထိပါးနှိုင်ခြင်းမရှိချေ၊ မြန်မာနိုင်ငံတွင်းကား အခြေခံဥပဒေက ရည်ညွှန်းထားရုံမျှဖြင့်လျက်၊ အက်ဥပဒေတခုဖြင့် ထိုအာဏာမျိုးကို တရားလွှတ်တော်ချုပ်အား ပေးအပ်ထားသဖြင့် အခြားတရားရုံးများ၏ စီရင်ချက်များကို စစ်ဆေးဆုံးဖြတ်နိုင်သော တရားလွှတ်တော်ချုပ်၏ အယူခံစီရင်ပိုင်ခွင့်အာဏာသည် ခြားနားသောအခြေခံတမျိုးပေါ်၌ တည်ရှိလေသည်။

ဤသို့ပြည်ထောင်စုတရားစီရင်ရေး အက်ဥပဒေဖြင့် ပေးထားသောအာဏာသည် အထူးတရားမရုံး အက်ဥပဒေပုဒ်မ ၈(၄)ပါ ပြဋ္ဌာန်းချက်နှင့် ဆန့်ကျင်သောကြောင့် ပျက်ပြယ်သည်ဟူ၍ငင်း၊ ပြည်ထောင်စုတရားစီရင်ရေး အက်ဥပဒေမှာ အချိန်ကာလအားဖြင့် ရှေးကျသည့်အပြင် အထွေထွေရိုးရာ အက်ဥပဒေဖြစ်လျက် အထူးတရားမရုံးအက်ဥပဒေမှာ အချိန်ကာလအားဖြင့် နောက်ကျသည့်အပြင် ကိစ္စတရပ်အတွက် ပြုလုပ်ထားသော အထူးအက်ဥပဒေဖြစ်သောကြောင့် အထူးတရားမရုံး အက်ဥပဒေတွင်ပါရှိသော ပြဋ္ဌာန်းချက်သည် ပြည်ထောင်စုတရားစီရင်ရေး အက်ဥပဒေတွင်ပါရှိသော ပြဋ္ဌာန်းချက်ကို ပယ်ဖျက်ပြီးဖြစ်သည်ဟူ၍ငင်း၊ ယူဆသင့်သည်ဟု လျှောက်ထားခံရသူများ၏ ပညာရှိရှေ့နေကြီးများက လျှောက်လဲကြလေသည်။

၁၉၅၅
မစ္စတာလီအုံခွန်း နှင့် နိုင်ငံတော် ကောက်ခံသိမ်းနှံ ရောင်းဝယ်ရေး အမှု။

အထူးတရားမရုံး အက်ဥပဒေပုဒ်မ ၈ (၄) တွင် ဝိတ်ပင်ဟူးဆိုးခြင်းခံရသော အရာမှာ " အယူခံဝင်ခွင့် " သင်္ကေတဖြစ်၍ " အယူခံ " ကိုဝိတ်ပင်ခြင်း မဟုတ်ပါဟူ၍ဆင်း၊ ဤအမှုများတွင် လျှောက်ထားသူများက " အယူခံဝင်ခွင့် " မရှိသည်ကို ဝန်ခံပါသည်၊ အယူခံဝင်ရန် တရားလွှတ်တော်ချုပ်က မိမိသဘော အတိုင်း (ပြည်ထောင်စုတရားစီရင်ရေး အက်ဥပဒေပုဒ်မ ၆ အရ) ပေးနိုင်သော အခွင့်ထူးကိုပေးပါရန် လျှောက်ထားခြင်းမျှသာ ဖြစ်ပါသည်ဟူ၍ဆင်း၊ အထူး တရားမရုံး အက်ဥပဒေပုဒ်မ ၈ (၄) ပါ ပြဋ္ဌာန်းချက်များသည် ပြည်ထောင်စု တရားစီရင်ရေး အက်ဥပဒေပုဒ်မ ၆ က တရားလွှတ်တော်ချုပ်သို့ ပေးအပ်ထား သော မိမိသဘောအတိုင်းပေးနိုင်သည့် အခွင့်ထူးကို ဝိတ်ပင်ရာမရောက်ပါဟူ၍ ဆင်း၊ လျှောက်ထားသူများ၏ ပညာရှိရှေ့နေကြီးများက လျှောက်လဲကြသည်။

အထူးတရားမရုံးအက်ဥပဒေပုဒ်မ ၈ (၄) တွင်ပါရှိသည့် " အယူခံဝင်ခွင့် " ဆိုသောစကားရပ်၏အဓိပ္ပါယ်သည် အယူခံဝင်ဝိုင်သော အခွင့်အရေးနှင့်သာဆိုင် သလော၊ သို့မဟုတ် အယူခံအားလုံးနှင့် ဆိုင်သလော ဟူသောပြဿနာသည် အရေးကြီးဆုံး စဉ်းစားဆုံးဖြတ်ရမည့် ပြဿနာ ဖြစ်သည်။

ယ္ခုစည်းအုပ်ချုပ်ပုံ အခြေခံဥပဒေပုဒ်မ ၁၃၈ တွင် " တရားလွှတ်တော် ချုပ်၏ စီရင်ချက်များသည် အမှုအားလုံးတွင် အပြီးအပြတ်ဖြစ်၍ အယူခံဝင်ခွင့် မရှိစေရ " ဟုပါရှိသဖြင့် မည်သည့် တရားရုံးတွင်မျှ အယူခံ မဝင်နိုင်ရန် ဝိတ်ပင် ထားကြောင်းမှာထင်ရှားဏ်။ ထိုပြဋ္ဌာန်းချက်တွင် ပါရှိသော စကားရပ်မှာလည်း " အယူခံဝင်ခွင့်မရှိစေရ " ဟူသော စကားရပ်ပင်ဖြစ်သဖြင့် အထူးတရားမရုံး အက်ဥပဒေ ပုဒ်မ ၈ (၄) တွင်ပါရှိသော စကားရပ်၏ အဓိပ္ပါယ်သည်လည်း ထိုပုဒ်မ ၁၃၈ မှာကဲ့သို့ သဘောသက်ရောက်သင့်ပါသည်ဟု လျှောက်ထားခံရ သူများ၏ ပညာရှိရှေ့နေကြီးများကပြောဆိုကြ၏။ အမှန်မှာ အဆိုပါပုဒ်မ ၁၃၈ တွင် " အယူခံဝင်ခွင့်မရှိစေရ " ဟူသော စကားရပ်၏ရှေ့တွင် တဆက်တည်း " အပြီးအပြတ်ဖြစ်၍ " ဟူသော စကားရပ်ပါရှိနေသောကြောင့် ထိုစကားရပ် နှစ်ခုကို ပူးတွဲ၍ဘတ်ရှုမှသာလျှင် ရည်ရွယ်ရင်းအဓိပ္ပါယ်ကိုပြည့်စုံစွာရှင်းပေမည်။ ပုဒ်မ ၈ (၄) တွင် ဤကဲ့သို့သော စကားရပ်မျိုးမပါရှိသဖြင့် ထိုပုဒ်မနှစ်ခုသည် တသဘောတည်းအဓိပ္ပါယ်သက်ရောက်သည်ဟု မဆင်နိုင်ချေ။

၁၉၄၈ ခုနှစ်၊ ပါလီမန်ရွေးကောက်ပွဲအက်ဥပဒေ ပုဒ်မ ၄၂ (၃) တွင် " နိုင်ငံတော်သမတ၏ အမိန့်သည် အပြီးသတ်အတည်ဖြစ်ရမည် " ဟုဆင်း၊ ၁၉၄၉ ခုနှစ်၊ ဒီဒိုကရေစီ ဒေသန္တရအုပ်ချုပ်ရေး အက်ဥပဒေ ပုဒ်မ ၃၁ (၇) တွင် " တရားမခရိုင်တရားသူကြီး၏ အဆုံးအဖြတ်သည် အပြီးသတ်အတည်ဖြစ်

၁၉၅၅

မန္တလေးအုပ်ချုပ်ရေးမှူး နှင့် နိုင်ငံတော်ကောင်စီဥက္ကဋ္ဌ ရောင်းဝယ်ရေး အမှု။

ရမည်'' ဟုငြင်း၊ ၁၃၁၁ ခုနှစ်၊ ဝိနိစ္ဆယဋ္ဌာန အက်ဥပဒေပုဒ်မ ၁၉ တွင် ''နိုင်ငံတော် ဝိနိစ္ဆယဋ္ဌာန၏အဆုံးအဖြတ်သည်အဆုံးသတ်အတည်ဖြစ်ရမည်'' ဟုငြင်း၊ မည်သည့်အယူခံမျိုးမျှ အခြားတရားရုံးတွင် မရှိနိုင်စေရန် သေချာတိကျစွာ ပိတ်ပင်သည့်စကားရပ်မျိုးကို ထိုအက်ဥပဒေများနှင့် အခြားအက်ဥပဒေ အမြောက်အမြားတို့တွင် တွေ့နိုင်သည်ကို သတိချပ်အပ်၏။

အထူးတရားမရုံး အက်ဥပဒေ ပုဒ်မ ၈ (၄) တွင် ပါရှိသော ''အယူခံဝင်ခွင့်မရှိစေရ'' ဟူသော စကားရပ်သည် ဆိုင်သင့်ရာရာ အမှုသည်တဦးဦး၏ အယူခံဝင်ပိုင်သော အခွင့်အရေးကိုသာ ရည်ညွှန်းဟန်တူသည်။

တရားလွှတ်တော်ချုပ်အား ပြည်ထောင်စု တရားစီရင်ရေးအက်ဥပဒေပုဒ်မ ၆ က ပေးအပ်ထားသော မိမိသဘောအတိုင်း တရားရုံးတခုခု၏ စီရင်ချက်ကို အယူခံဝင်ရန် အခွင့်ထူးပေးနိုင်သော အာဏာကို ရည်ညွှန်းဟန်မတူချေ။ ဆိုင်သင့်ရာရာ အမှုသည်တဦးဦးတွင် ရှိမည့် အယူခံဝင်ခွင့်ကိုသာ တားမြစ်ဖယ်ရှားရန် ရည်ရွယ်သည်ဟု ယူဆရန်ရှိသည်။ ထိုပုဒ်မတွင် ထုံးဖွဲ့ထားပုံဝါကျအသွားကို ကြည့်ခြင်းအားဖြင့် အခွင့်အရေးပိတ်ပင်ဖယ်ရှားခြင်းခံရသူမှာ ဆိုင်သင့်ရာရာ အမှုသည်သာလျှင် ဖြစ်သောကြောင့် ''ဆိုင်သင့်ရာရာအမှုသည်၌'' ဟူသောစကားရပ်ကိုဖြည့်သွင်းလိုက်လျှင်ထိုဝါကျ၏ ထုံးဖွဲ့ပုံမှာ ချောမောပြေပြစ်လွန်းက အဓိပ္ပါယ်ပြည့်စုံသွားချေမည်။ အကယ်၍တရားရုံးတခုခု၏ အခွင့်အရေးကို ပိတ်ပင်ဖယ်ရှားရန် ရည်ရွယ်ခဲ့ပါမူ ဝါကျထုံးဖွဲ့ပုံကို ပြောင်းလဲရပေလိမ့်မည်။ ''အယူခံဝင်ခွင့်မရှိစေရ''၊ ဟူသော စကားရပ်အစား ''အယူခံဝင်ခွင့်ပြုနိုင်သော အာဏာမရှိစေရ''၊ သို့မဟုတ် ''အယူခံဝင်ခွင့် ပေးနိုင်သော အာဏာမရှိစေရ'' သို့မဟုတ် ''အယူခံဝင်ခွင့်ပေးနိုင်ခွင့်မရှိစေရ'' စသော စကားရပ်မျိုးကို သုံးရမည်ဖြစ်သည်၊ တနည်းအားဖြင့်လည်း ဘရားရုံး၏ အာဏာကိုဖြစ်စေ၊ အမှုသည်၏အခွင့်အရေးကိုဖြစ်စေ၊ မရည်ညွှန်းဘဲ မည်သည့်အယူခံမျိုးမျှ မရှိစေရန် ရည်ရွယ်ခဲ့ပါလျှင် ယခုလက်ရှိ သုံးနှုန်းထားသောစကားရပ်ထက် ပိုမိုလွယ်ကူ တိုတောင်းသည့်စကားရပ်ဖြစ်သော ''အယူခံမရှိစေရ'' ဟူသော စကားလုံးကို ထည့်သွင်းသုံးနှုန်းရန်သာရှိသည်၊ ယခုမူကား ''အယူခံဝင်ခွင့်မရှိစေရ'' ဟူသောစကားရပ်ကို သုံးနှုန်းထားသဖြင့်ဆိုင်သင့်ရာရာတဦးဦး၏ အခွင့်အရေးကို ရည်ညွှန်းသည်မှာ ထင်ရှားသည်ဟု ဆိုသင့်ပေသည်။ ဆိုင်သင့်သူမှာ ဤဝါကျအသွားကို ကြည့်ခြင်းအားဖြင့် တဘက်တက်သော အမှုသည်သာလျှင် ဖြစ်ရချေမည်။ ထို့ကြောင့် အထူးတရားမရုံး အက်ဥပဒေ ပုဒ်မ ၈ (၄) တွင် ပါရှိသော ပြဋ္ဌာန်းချက်သည် ပြည်ထောင်စုတရားစီရင်ရေး အက်

ဥပဒေ ပုဒ်မ ၆ က တရားလွှတ်တော်ချုပ်သို့ ပေးအပ်ထားသော မိမိသဘော အတိုင်း အခွင့်ထူးပေးနိုင်သည့် အာဏာကို ဆန့်ကျင်ပျက်ပြယ်စေသည်ဟု မယူ ဆသင့်ချေ။

၁၉၅၅
မစ္စတာလီအုံ့ရူး နှင့် နိုင်ငံတော် ကောက်ပဲသီးနှံ ရောင်းဝယ်ရေး အဖွဲ့။

သခင်အေးမောင်နှင့် တရားဝန်ကြီး ဦးအောင်သာကျော်တို့၏ (၁၉၄၉ ခု၊ မြန်မာနိုင်ငံ စီရင်ထုံး တရားလွှတ်တော်ချုပ် စာမျက်နှာ ၁၈၈) အမှုတွင်ရုန်ကုန် မြို့နိုစီပါယ် အက်ဥပဒေ ပုဒ်မ ၁၅ (၃) ပါ ပြဋ္ဌာန်းချက်များ၏ ပိတ်ပင်မှုကြောင့် အယူခံဝင်နိုင်ခြင်း လုံးဝမရှိဟု ဤရုံးတော်က ချမှတ်သည့်စီရင်ချက်ကို သတိပြု ပါရန် လျှောက်ထားခံရသူများ၏ ပညာရှိရွှေနေကြီးများကညွှန်ကြားကြ၏။အဆို ပါ ပုဒ်မ ၁၅ (၃) တွင်ပါသည့်စကားရပ်များမှာ "The order.....shall be final and conclusive." "အမိန့်သည်....အဆုံးသတ်အပြီးအပြတ်ဖြစ်ရမည်" ဟူ၍ ပါရှိသဖြင့် ယခုအမှုတွင် သက်ဆိုင်သည့် စကားရပ်နှင့် ခြားနား လှပေ သည်။

အထူးတရားမရုံး အက်ဥပဒေ ပုဒ်မ ၈ (၄) တွင် ပါရှိသည့်ပြဋ္ဌာန်းချက်များ မှာ တရားလွှတ်တော်ချုပ်သို့ အယူခံဝင်ခြင်းကိုသာလျှင်တားမြစ်ရန် ရည်ရွယ်ခြင်း ဖြစ်သည်ဟု ယူဆသင့်ပါသည်ဟူ၍ငင်း၊ ထို့ပြင်အထူးတရားမရုံးကိုဖွဲ့စည်းရာတွင် လွှတ်တော်ချုပ်တရားဝန်ကြီးတဦးနှင့် လွှတ်တော်တရားဝန်ကြီး နှစ်ဦးပါရှိနေပါ၍ ထိုရုံးမှ ချမှတ်သည့်စီရင်ချက်နှင့် ဒီကရီများကို အခြားတရားရုံးသို့ အယူခံဝင်နိုင် ရန် အကြောင်းမရှိပါဟူ၍ငင်း၊နိုင်ငံတော်ရှေနေချုပ်က လျှောက်လဲသည်။ထိုမှတ ပါးလည်း တရားရုံးတခု၏ စီရင်ချက်ကို အခြားတရားရုံးတခုသို့ အယူခံဝင်နိုင် သောအခွင့်အရေးမျိုးသည် အက်ဥပဒေတခုခုက ပေးအပ်ထားမှသာလျှင် ရှိ နိုင်မည်ဖြစ်ရာ အထူးတရားမရုံးကချမှတ်သည့် စီရင်ချက်နှင့်ဒီကရီများကို အခြား တရားရုံးသို့ အယူခံဝင်နိုင်ရန် ထိုအက်ဥပဒေတွင် အတည့်အလင်း ဖေါ်ပြခြင်းမပြု လျှင် အခွင့်အရေးရှိမည်မဟုတ်သောကြောင့် ထိုကဲ့သို့သော အခွင့်အရေးမျိုးကို ပိတ်ပင်ရန်အလို့ငှါ ပုဒ်မ ၈ (၄) ပါပြဋ္ဌာန်းချက်များကရည်ရွယ်သည်ဟုဆိုနိုင်ပါ မည်လော။ မည်သို့မျှမဖေါ်ပြဘဲထားလျှင် အခွင့်အရေးပိတ်ပင်ပြီးဖြစ်မည် မဟုတ် ပါလော။ ထို့ကြောင့်ဤသို့ဖေါ်ပြခြင်းသည် ရှိနေသည့်အခွင့်အရေးကိုသာ ရည် ရွယ်ဟန်တူ၍ ထိုအခွင့်အရေးမှာ ပြည်ထောင်စုတရားစီရင်ရေး အက်ဥပဒေ ပုဒ်မ ၆ အရ တရားလွှတ်တော်ချုပ်က မိမိသဘောအတိုင်း အခွင့်ထူးပေးနိုင်သော အ ခွင့်အရေးမဟုတ်ပါသလော။ ဤပြဿနာများနှင့် စပ်လျဉ်း၍ အထူးတရားမရုံး အက်ဥပဒေ ပုဒ်မ ၅ နှင့်ပြည်ထောင်စုတရားစီရင်ရေးအက်ဥပဒေ ပုဒ်မ ၂၇ ပါ ပြဋ္ဌာန်းချက်များကို သုံးသပ်ဆင်ခြင်သင့်၏။ ပုဒ်မ ၅ တွင် အထူး တရားမရုံး

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မစ္စတာလီအုံခွန်း နှင့် နိုင်ငံတော် ကောက်ပဲသီးနှံ ရောင်းဝယ်ရေး အဖွဲ့။

သည် အမှုများကို စစ်ဆေးစီရင်သောအခါ တရားလွှတ်တော်က မူလမှုများကို စစ်ဆေးစီရင်သည့်အခါ ရရှိသုံးစွဲသောအာဏာများကို ရရှိသုံးစွဲရမည်ဟုပြဋ္ဌာန်းထားသောကြောင့် ထိုအထူးတရားမရုံးကို တရားလွှတ်တော်၏မူလ တရားစီရင်ရေးဌာနကဲ့သို့ယူဆပြီးလျှင် တရားလွှတ်တော်သို့အယူခံဝင်နိုင်ရန် ရှိ မရှိဟူသော သံသယမှဉာဉ်၊ ပြည်ထောင်စုတရားစီရင်ရေးအက်ဥပဒေပုဒ်မ ၂၇ အရ၊ ထိုအထူးတရားမရုံးသည် တရားလွှတ်တော်၏ ကြီးကြပ်အုပ်ချုပ်ပိုင်ခွင့် နှယ်အတွင်းသို့ ရောက်ရှိနေသည် မနေသည်ဟူသော သံသယမှဉာဉ်၊ ကင်းရှင်းစေရန် အလို့ငှါ အဆိုပါပြဋ္ဌာန်းချက်ကို ထည့်သွင်းထားသည်ဟု ယူဆနိုင်ရန်အကြောင်းရှိသည်။ ထို့ပြင်မည်သို့မျှ ပြဋ္ဌာန်းချက်မပြုလျှင် မည်သည့်ရုံးသို့မျှ အယူခံဝင်နိုင်သော အခွင့်အရေးရှိမည်မဟုတ်သော်လည်း ပိုမိုသေချာစိတ်ချနိုင်ရန်အလို့ငှါမကြာခဏ အက်ဥပဒေများတွင် ဤသို့သောပြဋ္ဌာန်းချက်များကို ထည့်လေ့ရှိ၏။ ဤအထူးတရားမရုံး အက်ဥပဒေပုဒ်မ ၈ (၄) တွင် ပါရှိသောပြဋ္ဌာန်းချက်မှာလည်း ဤကဲ့သို့ပင် အယူခံဝင်နိုင်သော အခွင့်အရေး ပိတ်ပင်ခြင်းကို ပိုမိုသေချာစိတ်ချနိုင်စေရန်အလို့ငှါ ထည့်သွင်းထားသည့်ပြဋ္ဌာန်းချက်ဟု ယူဆနိုင်ရန်အကြောင်းရှိသည်။

အက်ဥပဒေတခုခုတွင်ပါရှိသော ပြဋ္ဌာန်းချက်သည် အခြားအက်ဥပဒေတခုတွင်ပါရှိသောပြဋ္ဌာန်းချက်နှင့် မဆန့်ကျင်အောင်တတ်နိုင်သမျှ သဘောအမိပ္ပါယ်ကောက်ယူရမည်ဟူသော ဥပဒေသည် တရားဥပဒေဆိုင်ရာ သဘောအဓိပ္ပါယ်ကောက်ပုံပုံ ဥပဒေသတို့တွင် အထင်အရှားဆုံးတခုဖြစ်၏။ ဤသည်ကိုထောက်၍ လည်းအထူးတရားမရုံးအက်ဥပဒေပုဒ်မ ၈ (၄) ပါပြဋ္ဌာန်းချက်သည်ပြည်ထောင်စုတရားစီရင်ရေးအက်ဥပဒေပုဒ်မ ၆ ပါ ပြဋ္ဌာန်းချက်နှင့် မဆန့်ကျင်ဟူ၍ သဘောအဓိပ္ပါယ်ကောက်ယူခြင်းသည် သင့်လျော်သည်ဟု ယူဆရပေမည်။ ထို့ပြင် ပြည်ထောင်စုတရားဝိရင်ရေး အက်ဥပဒေသည် ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေနှင့် တပြိုင်တည်း အာဏာတည်ခဲ့သည်ကို သောက်သာ၍တကြောင်း၊ တိုင်းပြည်ပြုလွှတ်တော်ကပင်လျှင် ထိုအက်ဥပဒေကြီးနှစ်ခုသည် တခုနှင့်တခုယှဉ်တွဲဖက်စပ်၍ အထောက်အပံ့ဖြစ်စေရန် ရည်ရွယ်ပြီးပြဋ္ဌာန်းခဲ့သည်ဟုဆင်း၊ ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေပုဒ်မ ၁၃၆ (၃) တွင် '' အဖြည့်ခံ '' သဘောမျိုးဖြင့်ရည်ညွှန်း၍ ချန်လှပ်ခဲ့သည်ကို ပြည်ထောင်စုတရားစီရင်ရေး အက်ဥပဒေ ပုဒ်မ ၆ တွင် '' အဖြည့် '' သဘောမျိုးဖြင့် စုံစေ့ပြည့်ဝအောင် ပိတ်ဆို့လိုက်သည်ဟုဆင်း၊ ယူဆရန်ရှိသည်ကို ထောက်ထား၍တကြောင်း၊ ပြည်ထောင်စုတရားစီရင်ရေး အက်ဥပဒေသည် အခြားအက်ဥပဒေများနှင့် တတန်းတည်းမထားဘဲ ပိုမိုလေးစားသင့်သော အထူးအက်ဥပဒေကြီးတရုပ်ဖြစ်သည်ဟု သဘောထားသင့်ကြောင်းကို လျော်ထား

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မစ္စတာလီအုံခွူးနှင့် နိုင်ငံတော် ကောက်ခံသိမ်းနှုတ်ရောင်းဝယ်ရေးအဖွဲ့။

သူများ၏ ပညာရှိရှေ့နေကြီးများက ပြောဆိုလေသည်။ ဤအချက်သည် လေးစားသင့်သောအချက်ဟု ဆိုသင့်ပေသည်။ ဖွဲ့စည်းအုပ်ချုပ်ပုံအခြေခံဥပဒေ အရ တည်ထောင်သည့် ပြည်ထောင်စုမြန်မာနိုင်ငံတော်၏ သုံးခုသော အဓိကလုပ်ငန်းအဖွဲ့ကြီး၊ သို့မဟုတ် မဏ္ဍိုင်ကြီးများဖြစ်သည့် ဥပဒေပြုအဖွဲ့၊ အုပ်ချုပ်ရေးအဖွဲ့နှင့် တရားစီရင်ရေးအဖွဲ့တို့တွင် တရားစီရင်ရေးအဖွဲ့သည် အဓိကမဏ္ဍိုင်ကြီး တခုဖြစ်သောကြောင့် ထိုအဖွဲ့ကြီး၏တာဝန်ဝတ္တရားအခွင့်အရေးနှင့်အာဏာ စသည်များကို ပိုင်းခြားသတ်မှတ်သည့်အဆိုပါပြည်ထောင်စုတရားစီရင်ရေးအက်ဥပဒေသည် သာမန်ကိစ္စများနှင့်စပ်လျဉ်း၍ပြဋ္ဌာန်းသည့် အက်ဥပဒေများထက်ပိုမို လေးစားသင့်သည်မှာ ထင်ရှားသည်။

အထက်ပါအကြောင်းများကြောင့် ၁၉၅၁ ခုနှစ်၊ အထူးတရားမရုံး အက်ဥပဒေပုဒ်မ ၈ (၄)ပါ ပြဋ္ဌာန်းချက်သည်၊ ၁၉၄၈ ခုနှစ်၊ပြည်ထောင်စု တရားစီရင်ရေးအက်ဥပဒေ ပုဒ်မ ၆ အရ တရားလွှတ်တော်ချုပ်အား ပေးအပ်ထားသည့် (တရားရုံးတခုခုမှချမှတ်သော အမိန့်စီရင်ချက်ကို အယူခံဝင်ရန်) မိမိသဘောအတိုင်း အခွင့်ထူးပေးနိုင်သည့် အာဏာကိုထိခိုက်သည် ဝိတ်ပင်သည်၊ သို့မဟုတ် ရုပ်သိမ်းသည့်သဘောသို့ သက်ရောက်သည်ဟု ယူဆရန်မသင့်ကြောင်း ဆုံးဖြတ်ကြသည်။

SUPREME COURT.

Before U Thein Maung, Chief Justice of the Union, Mr. Justice Myint Thein and Mr. Justice Chan Htoon.

S.C. 1955

Dec. 22.

U MYA (APPELLANT)

v.

THE MUNICIPAL CORPORATION OF THE CITY OF RANGOON (RESPONDENT).*

S. 4, The Municipal Corporation of the City of Rangoon (Suspension) Act, 1943—Ss. 203 and 204 (1) (b)—The Municipal Corporation of the City of Rangoon Act—Administrator, his powers and functions—S. 5, Union Judiciary Act.

The appellant, an Assistant Engineer in the Rangoon Municipal Corporation filed a suit against the Municipal Corporation and its Administrator for damages for wrongful dismissal.

He obtained a decree against the Municipal Corporation, the claim against the Administrator having been waived.

The decree was set aside by the High Court on appeal.

Held: S. 4 of the Suspension Act provides a complete answer to the claim. This section vests in the Administrator appointed under s. 2 full powers to take such actions and adopt such procedure as he may consider practicable for the due exercise and discharge of the duties, powers and functions imposed upon him. The only limit set by the Suspension Act upon the free exercise of these wide powers is the control of the President, and subject to this he has unlimited and unrestricted powers to deal with all matters connected with the Corporation in any way he deems fit. All the rules framed under s. 235 (vi) (c), providing some procedure for departmental enquiry before any disciplinary action is taken are rendered nugatory by the provisions of s 4 of the Suspension Act.

The Administrator had the power to dispense with or terminate the services of the appellant and no action for wrongful dismissal would lie.

Held further: That the claim was time-barred under s. 204 (1) (b) and not maintainable under s. 203 of the Rangoon Municipal Act, as the Administrator acted in good faith and with due care and attention.

Dr. Thein for the appellant.

C. C. Khoo for the respondent

The judgment of the Court was delivered by

* Civil Appeal No. 2 of 1955 against the order of the High Court of Rangoon in Civil 1st Appeal No. 4 of 1952.

S.C. 1955

U MYA v. THE MUNICIPAL CORPORATION OF THE CITY OF RANGOON.

MR. JUSTICE CHAN HTOON.—This is an appeal from the judgment of the Appellate Side of the High Court setting aside the judgment in its Original Side. The plaintiff-appellant filed a suit against the Municipal Corporation of the City of Rangoon and its late Administrator U Tun Ohn for damages for wrongful dismissal.

On the outbreak of the last war an Act called The Municipal Corporation of the City of Rangoon (Suspension) Act, 1943 (hereafter to be referred to as the Suspension Act) was passed, under which the provisions of section 4 of the Municipal Corporation of the City of Rangoon Act (hereafter referred to as the Corporation Act) was suspended and "the Municipal Corporation of the City of Rangoon", which consisted mainly of elected members, was to be replaced by a person or persons appointed by the Governor or by the President of the Union after the 4th of January 1948. All the rights, privileges, duties, powers and functions which are by the Corporation Act vested in the Municipal Corporation of the City of Rangoon were also vested in the person or persons so appointed.

The person who was appointed under the Suspension Act was popularly known as the Administrator. At all times material to the present suit one U Tun Ohn was the sole Administrator. Under the Suspension Act very extensive powers were conferred upon the Administrator by section 4, which reads as follows :

> "Notwithstanding anything contained in the Act, the person or persons appointed under sub-section (*1*) of section 2 may, subject to the control of the Governor, adopt such procedure as may be deemed practicable for the due exercise and discharge of the duties, powers and functions imposed upon or vested in such person or persons."

S.C. 1955

U MYA v. THE MUNICIPAL CORPORATION OF THE CITY OF RANGOON.

The plaintiff-appellant U Mya, who was an Assistant Engineer in the employ of the Municipal Corporation of the City of Rangoon, received an order passed by U Tun Ohn dated the 25th March 1948 dispensing with his services with effect from the 1st of May 1948. The said order is as follows:

"I find U Mya, Assistant Engineer, is careless and greatly negligent in his duties. His actions are such that they are greaty detrimental to the good discipline and smooth working of the Corporation. I therefore dispense with his services with effect from the 1st of May 1948."

The plaintiff-appellant filed a suit on the 2nd of November 1950 against the Municipal Corporation of the City of Rangoon and U Tun Ohn as its late Administrator for damages for wrongful dismissal. A decree was granted against the Municipal Corporation the claim against U Tun Ohn having been waived by the plaintiff-appellant. On appeal to the Appellate Side of the High Court the decree was set aside and the suit was dismissed. Hence this appeal to this Court under section 5 of the Union Judiciary Act.

In our view the suit is entirely misconceived. Section 4 of the Suspension Act, as set out above, provides a complete answer to the claim. This section vests in the Administrator appointed under section 2 full powers to take such actions and adopt such procedure as he may consider practicable for the due exercise and discharge of the duties, powers and functions imposed upon him. The only limit set by the Suspension Act upon the free exercise of these wide powers is the control of the President, and subject to this he has unlimited and unrestricted powers to deal with all matters connected with the Corporation in any way he deems fit and proper. All the rules framed under section 235 (vi) (*c*),

providing some procedure for departmental enquiries before any disciplinary action is taken are rendered nugatory by the provisions of section 4 of the Suspension Act, even assuming that they are applicable to employees of the class to which the plaintiff-appellant belonged. We therefore hold that U Tun Ohn, exercising the powers of the Municipal Corporation of the City of Rangoon as provided in section 4 of the Suspension Act, had the power to dispense with or terminate the services of the plaintiff-appellant and that no action for wrongful dismissal would lie.

The learned Judges who dealt with the appeal in the High Court held that the suit was time-barred in view of section 204 (*1*) (*b*) of the City of Rangoon Municipal Act which reads as follows :

> " 204. (1) No suit shall be instituted against the Corporation or against the Commissioner or any other municipal officer or servant in respect of any act done in pursuance or execution or intended execution of this Act, or in respect of any alleged neglect or default in the execution of this Act—
>
> (*a*) * * * *
>
> (*b*) " Unless it is commenced within six months next after the accrual of the cause of action."

We are in entire agreement with this view. The learned counsel for the plaintiff-appellant contended that the provisions of this section do not apply to the present case as the defendant-respondent terminated the services of the plaintiff-appellant not " in pursuance or intended execution of the Act " but it was done knowingly and intentionally disregarding the rules which require the holding of enquiry. There can be no doubt whatsoever that U Tun Ohn passed the order in question dispensing with the services of the plaintiff-appellant in pursuance or intended

S.C. 1955

U MYA v. THE MUNICIPAL CORPORATION OF THE CITY OF RANGOON.

execution or discharge of the powers and functions conferred upon him by the City of Rangoon Municipal Act.

The learned Judges in appeal also came to a finding that U Tun Ohn acted in good faith and with due care and attention within the meaning of section 203 of the City of Rangoon Municipal Act and as such no suit is maintainable against the Corporation. There is ample evidence on record to show that he acted after consultation with and on the advice of the Legal Adviser and the Chief Engineer who was the head of the department to which plaintiff-appellant belonged. We are therefore in agreement with appellate Court's view. Section 203 reads as follows:

> "203. No suit shall be maintainable against the Corporation or any committee or the Education Board or officer or servant or any person acting under and in accordance with the directions of such authority, officer or servant or of a magistrate in respect of anything in good faith and with due care and attention done or intended to be done under this Act."

In the result this appeal must be, and is hereby dismissed with costs.

SUPREME COURT

AUNG KHIN LAT & SON (APPELLANTS)

v.

U KHIN MAUNG & CO. (RESPONDENTS).*

† S.C. 1955

Dec. 23.

"C.I.F." Contract of Sale—Breach of—Quantum of damages—Costs include customs duty.

Held: A "C.I.F." Contract is one for the sale of goods at a price which covers cost, insurance and freight. It is a well known term of trade usage which has a definite meaning.

Abdul Hamid v. *Torab Ali*, 5 L.B.R. 145 (1909-10), referred to.

Held also: In using the term, parties must be deemed to be aware of its meaning and that they would be bound by the usage of trade.

Held further: The Customs duty of 50 per cent on the C.I.F. value should be added to the C.I.F. price.

Ong Shein Woon for the appellants.

Dr. Ba Han for the respondents.

Judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—On the 3rd July 1950, by means of Exhibit E there was a contract of sale for 35,000 yards of printed shirting between the defendant-appellants Aung Khin Lat & Son who are described in the document as "Burma Representative of Daiichi Bussan Kaisha Ltd. Tokyo and Branches, Japan", and the respondents U Khin Maung & Co. The terms are set out in this document as "Shipment: August-September 1950.

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* Civil Appeal No. 6 of 1955, against the decree of the High Court of Rangoon in Civil 1st Appeal No. 28 of 1952.

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

S.C. 1955

AUNG KHIN LAT & SON v. U KHIN MAUNG & CO.

Price: U.S. $ 0.24 per yard C.I.F. Rangoon. Total amount: U.S. $ 8,400."

According to the Daily Import Lists issued by the Customs Department filed in this case, the appellants imported some 146,148 yards of shirting during the period August-October 1950 but nothing was delivered to the respondents. Correspondence passed between the parties culminating in a suit for the return of Rs. 12,000 paid as advance, interest amounting to Rs. 1,230 and for damages estimated at Rs. 47,600.

In decreeing the suit the trial Court ordered the repayment of the advance with interest as claimed but in regard to damages the trial Court held that the market wholesale price of 35,000 yards of printed shirting in September-October 1950 was K 1·75 per yard or in all K 61,250. The contract price being U.S. $ 8,400 or K 39,900 in Burmese currency, the damages were assessed at the difference between the contract price and the market price *i.e.* K 21,350. This sum was decreed also.

On appeal the decree was confirmed.

Before us the only point raised was the quantum of damages. It was submitted that the sale was "C.I.F." and that in computing damages the lower Courts should have taken into consideration the customs duty of 50 per cent on the C.I.F. value that the respondents would have to pay on taking delivery. The C.I.F. value being K 39,900, 50 per cent on this sum would be K 19,950. The cost to the respondents for the goods would therefore be K 59,850 and the difference between this sum and the market price of K 61,250, it was contended, should have been assessed as damages.

The point was raised by learned counsel for the

defence in the trial Court but it was rejected in the following terms :—

"Evidently the c.i.f. price stated in Exhibit E would mean a price inclusive of Custom duty which the defendants were liable to pay. If the plaintiffs were intended to be charged with this further cost of the shipment, the goods would undoubtedly have arrived in their name, in which event they would be bound to pay the Custom duty which fell due. As this note stands, it cannot be interpreted that the c.i.f. price mentioned therein does not include the Custom duty payable on the goods."

In endorsing the view that the price mentioned in Exhibit E was an all inclusive price, the appellate Court held that Exhibit E was not a "C.I.F." contract of sale, it being one "made with Aung Khin Lat and Son of Rangoon and not with a firm or company in Japan."

The learned Judges said further :

"Moreover, the printed white shirting which was to be delivered under the contract of sale consisted of goods that were to be purchased in Japan under the import license No. C/Y 404/J-50, which was issued to Aung Khin Lat & Sons . . . . the goods that were despatched from Japan under the import license No. C/Y 404/J-50, were all imported in the name of Aung Khin Lat & Sons."

We note that the lower Courts have laid stress on the fact that the goods were not shipped in the name of the respondents but we do not consider that any inference can be drawn from this, for under the system prevailing in Burma in 1950 all imports of textiles had to be under license, and since no license could be sold or transferred the shipment would have to be in the name of the licensee himself.

Our approach to the question must necessarily be on the basis that the term "C.I.F." is a well known term of trade usage which has a definite meaning. See *Abdul Hamid* v. *Torab Ali* (1). A "C.I.F."

(1 5 L.B.R. 145 (1909-10).

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contract is one for the sale of goods at a price which covers cost, insurance and freight. In using the term in Exhibit E it must be taken that each party was aware of its meaning and that each party would be bound by the usage of trade. The argument that in this particular contract the term must be considered meaningless because the sale was between parties resident in Rangoon, is clearly untenable as the goods were to be obtained in Japan and shipped from there to Rangoon by a specified date. It must be noted also that the sale was by Aung Khin Lat & Sons acting as the representative of a firm in Japan.

The plaintiffs themselves have in paragraph 1 of their plaint described the contract as "C.I.F. Rangoon" and it is not suggested that the term has any meaning other than that commonly understood in the trade. It appears to us that the parties must be bound by what they had agreed to and it will not be open to either of the parties to say now that no meaning should be assigned to the term.

This being our view, our finding is the price of K 39,900 covered only cost, insurance and freight and that it did not cover customs duty. We therefore accept the contention of the appellants that the Customs duty of 50 per cent on the C.I.F. value should be added to the C.I.F. price. This would bring the amount to K 59,850. Deducting this from the market price of K 61,250 the difference is K 1,400, which will be the correct measure of damages.

In the result there will be a decree for K 12,000 *plus* K 1,230 interest *plus* K 1,400 damages—a total of K 14,630 with costs throughout. The decree of the appellate Court in Civil First Appeal No. 28 of 1952 is varied in this sense.

SUPREME COURT

KARAM SINGH (APPLICANT)

v.

THE CONTROLLER OF IMMIGRATION (RESPONDENT).*

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June 25.

JOHN CHEW (*a*) MAUNG TAIK SOON (APPLICANT)

v.

THE CONTROLLER OF IMMIGRATION (RESPONDENT).*

TAN CHOON CHAUNG (APPLICANT)

v.

THE CONTROLLER OF IMMIGRATION (RESPONDENT).*

Immigration (Emergency Provisions) Act, No. XXXI of 1947—Ss. 3 (1), 4 (2), 7 (1), *13 and 14.*

The Controller of Immigration, professing to exercise powers under s. 7 (*1*) of the Immigration (Emergency Provisions) Act, No. XXXI of 1947 passed deportation orders against the three applicants.

The legality of these three deportation orders was assailed.

Held: The Act is an emergency measure meant to regulate the entry of foreigners into Burma immediately prior to her emergence as a sovereign state and also to impose conditions if considered necessary on a foreigner's stay in Burma. The Act does not provide in any way for the restriction or for expulsion of foreigners who were born in Burma or who had entered Burma prior to the enactment of the Act and who had continued to reside in Burma.

Held also: Under the Constitution of Burma and her citizenship laws mere birth in Burma or residence in Burma at the time she emerged as a sovereign state does not by itself confer Burmese nationality on a foreigner.

It is an internationally accepted principle that a sovereign state has the right to refuse admission to an alien to enter the country, to impose conditions

* Criminal Misc. Application Nos. 7, 8 and 9 of 1956.

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

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on his entry or stay, and to expel and deport even a friendly alien especially if it is considered that his presence is opposed to its peace, order and good Government, or to its social and material interest.

Attorney-General of Canada v. *Cain*, (1906) A.C. 542 at 546.

The abovementioned principle, followed by the comity of nations, is embodied in s. 3 of the Foreigners Act.

Kyi Chung York v. *The Controller of Immigration*, (1951) B.L.R. (S.C.) 197, referred to.

Held also: The Act would not bring within its scope the case of people who were born in Burma before the enactment of the Act; in the case of persons who were already in Burma before the enactment of the Act no question of a permit is involved.

Held also: An order of deportation under s. 7 (*1*) must have as its prop a punishment under some section of the Act and in the absence of any conviction or punishment the necessary prop did not exist.

It was contended that the order of deportation was in lieu of punishment.

Held: It is the Court and not the Controller who is competent to decide whether in fact a person has committed an offence or not. The order of deportation could not be "in lieu of or in addition to" what does not exist at all. In the absence of punishment, the deportation order cannot be in lieu of punishment.

S. 7 (*1*) can only be invoked in respect of persons brought to trial and punished under the Act.

Orders of deportation quashed.

N. R. Burjorjee for Karam Singh.

O. S. Woon for John Chew.

Saw Tun Taik for Tan Choon Chaung.

Ba Sein (Government Advocate) for the respondent.

Judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—We have heard these three applications together since the question involved is the same and relates to the action of the Controller of Immigration who claims to have exercised powers under the Immigration (Emergency Provisions) Act,

No. XXXI of 1947, delegated to him by the President.

The entry of foreigners into Burma is regulated by this Act, section 3 (*1*) of which provides that such persons may enter Burma only with a permit issued, or on a passport visaed by a competent authority. Permits and *visas* may impose conditions and under section 4 (*2*) breach of such conditions would render a foreigner liable to deportation. The detention and ultimate deportation of illegal entrants is also provided for by section 7 (*1*). Apart from this method of expulsion from the country, section 13 enumerates offences and penalties. Section 14 restricts the trial of cases under the Act to courts of First Class and Subdivisional Magistrates.

The Act is fairly comprehensive in its scope but as the title indicates it was an emergency measure meant to regulate the entry of foreigners into Burma immediately prior to her emergence as a sovereign state and also to impose conditions, if considered necessary, on a foreigner's stay in Burma.

Under the Constitution of Burma and her citizenship laws mere birth in Burma or residence in Burma at the time she emerged as a sovereign state does not by itself confer Burmese nationality on a foreigner, and therefore at the present day there are many foreigners who were born in Burma or who had entered Burma prior to the enactment of the Act, whose continued residence in Burma is in no way restricted nor their expulsion provided for by the provisions of this Act. In this respect there is a hiatus but such hiatus is of no great consequence, for it is internationally accepted that a sovereign state has the right to refuse admission to an alien to enter the country, to impose conditions as to his entry or stay and to expel and deport at pleasure even a friendly alien,

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especially if it is considered that his presence is opposed to its peace, order and good government, or to its social and material interest. See *Attorney-General of Canada* v. *Cain* (1). In *Kyi Chung York* v. *The Controller of Immigration* (2) this Court has observed that the above mentioned principle, followed by the comity of nations, is embodied in section 3 of the Foreigners Act which provides for the removal of a foreigner by order of the President.

The three applicants were detained at the instance of the Controller of Immigration for deportation. Two out of the three: Karam Singh and Tan Choon Chaung, are admittedly aliens but the third John Chew, maintains that he is a Burmese national.

The Controller had acted under section 7 (*1*) of the Immigration (Emergency Provisions) Act which runs as follows:

> "Any foreigner, who enters the Union of Burma, or who after entry remains in the Union of Burma, in contravention of the provisions of this Act or the rules made thereunder may, in lieu of or in addition to any punishment to which he may be subject under any other section of this Act, be detained in such manner as the President may direct, and whilst so detained shall be deemed to be in legal custody and shall be liable to be deported by an order of the President or of such authority as may be appointed by him on that behalf."

The legality of his order is assailed in all the three cases.

In Karam Singh's case the facts are, he was born in Burma in 1924 and has never left the country. In 1949 he sought to elect Burmese citizenship but before orders were passed he sought and obtained an Indian Passport. It would appear therefore that he has chosen to retain his Indian nationality. Karam Singh's troubles began with an intimation dated the 27th May 1954 from the Controller of Immigration

(1) (1906) A.C. 542 at 546. (2) (1951) B.L.R. (S.C.) 197.

to leave Burma by the 25th of June 1954. We do not know under what authority such an order was made, for the Immigration (Emergency Provisions) Act, as we have pointed out earlier, would not bring within its scope the case of people like Karam Singh who were born in Burma before the enactment of the Act. Our attention has not been drawn to any rule or to any other enactment. It is appreciated that in regard to entrants after the enactment of this Act they would be entering Burma under a permit which may, for example, limit their stay to one year, or it may be a permit for an indefinite stay. Such permits may be withdrawn or its conditions amended. But in the case of persons who were already in Burma before the enactment of the Act no question of a permit is involved.

However, to narrate the facts, Karam Singh protested but the final orders were that he should remove himself by the 30th June 1955. He did not leave Burma and as a result he was prosecuted under section 13 (*1*) of the Act before the 2nd Additional Magistrate, Bhamo, in C.R.T. No. 99 of 1955 at the instance of the Immigration Officer, Bhamo for illegal entry in contravention of the provisions of section 3 (*1*). This clearly was untenable for Karam Singh had not entered Burma without a permit and the prosecution had to shift its ground by maintaining that Karam Singh had contravened the provisions of section 4 (*2*) in that he had not observed the conditions of his stay in Burma. But the learned magistrate held that Karam Singh's advent into Burma was by birth and as he had not entered Burma with a permit or a *visa*, there were no conditions attached to his stay. Karam Singh was acquitted. Next, the Controller issued an order of deportation under section 7 (*1*) giving as the reason

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for his order that Karam Singh had committed an offence under section 13 (1). As his detention was also ordered he was kept in custody, first at Bhamo and later at Rangoon, until he was released on bail by an order of this Court. The Controller was fully aware of the order of acquittal and thus the statement in his order that Karam Singh had committed an offence under Rule 13 (1) was, to put it mildly totally unwarranted.

The order of the Controller cannot be allowed to stand. An order of deportation under section 7 (*1*) must have as its prop a punishment under some section of the Act and since Karam Singh was not convicted and no punishment was awarded the necessary prop did not exist. The order of deportation could not be "in lieu of or in addition to" what does not exist at all.

For these reasons the deportation order in respect of Karam Singh passed by the Controller dated the 30th May 1955 is quashed and the bail bond is cancelled.

In the case of John Chew the facts are, he was born in Burma, evacuated to China in 1942 returned to Burma in 1949 on an Identity Certificate issued by the Burmese Embassy at Nanking. No restrictions were placed on his stay in Burma at the time of his re-entry although it was after the enactment of the Act. All went well with him until he was asked by the Controller by his letter dated the 1st October 1954 to leave Burma by the 25th of that month. John Chew did not comply with this order and he was prosecuted under section 13 (*1*) in C.R.T. No. 686 of 1955 of the 7th Additional Magistrate, Rangoon. John Chew claimed Burmese nationality and led evidence to that effect. The learned magistrate held that he had committed no offence by not complying

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with the order to remove himself from Burma. The Controller nevertheless ignored the acquittal and passed an order similar to the one passed in Karam Singh's case, on the 16th January 1956. The next day an Immigration Officer ordered his detention and John Chew was placed in custody until he was released on bail by an order of this Court.

For the same reasons given in Karam Singh's case we quash the order of deportation dated the 16th January 1956 passed on him by the Controller. The bail bond is also cancelled.

Tan Choon Chaung's case differs from the others in that he was not prosecuted. He contends that he was born in Burma, spent the war years in China and came back in 1946. The Controller however contends that his unauthorised entry was in 1952, and therefore holding that he had committed an offence under section 13 (*1*), he ordered his deportation by an order dated the 23rd September 1955. He was placed in custody under the orders of an Immigration Officer and has been under detention ever since.

Before us it is contended on behalf of the Controller that the order of deportation is in lieu of any punishment to which Tan Choon Chaung may be subject for illegal entry. But this contention may be of substance if the Act empowers the Controller to decide, without recourse to a prosecution whether a person has in fact committed an offence. We can find nothing in the Act which would lend support to this view but, on the contrary, the enumeration of offences and penalties under section 13 (*1*) and the designation of the trial Court in section 14 suggest that only a Court would be competent to give a decision in case of a dispute. Furthermore, in the absence of punishment, the deportation order cannot

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be in lieu of punishment. At the most it is in lieu of a prosecution. A mere prosecution which may even end in an accused's acquittal is by no means a punishment. The construction that we would place upon section 7 (*1*) is that it can only be invoked in respect of persons brought to trial and punished under the Act.

For these reasons we quash the order of deportation dated the 23rd September 1955 passed by the Controller in respect of Tan Choon Chaung and we order his immediate release.

SUPREME COURT

M.S.M.P.S.K.R. FIRM (APPLICANT)

v.

ASSISTANT CUSTODIAN OF MOVEABLE PROPERTY, TOUNGOO AND ONE (RESPONDENTS).*

†S.C. 1955

Jan. 16.

Directions in the nature of Certiorari and Mandamus—S. 7 of Custodian of Moveable Property Act, 1945—Boiler, engine and machinery of a Rice Mill, whether moveable or immoveable property—S. 2 (4), the Lands Dispute (Summary Jurisdiction) Act, 1945—"Immoveable Property," s. 2 (29) General Clauses Act.

Held: For purposes of Custodian of Moveable Property Act, the property must be a moveable property at the time of relinquishment.

Boiler, engine and machinery of a Rice Mill being attached to the earth were immoveable property.

P. K. Basu for the applicant.

The judgment of the Court was delivered by

MR. JUSTICE CHAN HTOON.—The applicant was the owner of a rice mill at Zeyawaddy in Toungoo District and also in possession of the same, through his agent, until February 1942 when the said agent evacuated to India owing to circumstances arising out of the last war. On his return to Burma in or about March 1946 he found the mill to have been destroyed and all the machinery removed therefrom. He however came to learn that a boiler, an engine and certain machine parts had been removed by and kept in the possession of the second respondent. He therefore applied to the Deputy Commissioner, Toungoo, under section 7 of the Custodian of Moveable Property Act, 1945. The Deputy

* Civil Misc. Application No. 103 of 1955.

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

S.C. 1955

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Commissioner of Toungoo, who is the Custodian of Moveable Property for that district, after enquiry, passed an order dismissing the application on the ground that the property in question, namely the boiler, engine and machine parts, were not moveable property but were in law immoveable property. The applicant has therefore come to this Court for issue of a direction in the nature of Certiorari to quash this order or Mandamus.

There is no reason to disagree with the view taken by the Assistant Custodian. In fact the definition of " land " as given in The Lands Disputes (Summary Jurisdiction) Act, 1945, clearly supports this view when it provides in section 2 (*4*)—

> " ' land ' includes buildings, markets, fisheries, crops or other produce of land, and things attached to the earth or permanently fastened to anything attached to the earth. "

Under this Act any person who has relinquished possession or has been dispossessed, otherwise than in due course of law, of any land may have the same restored to him on application to an authority appointed for the purpose. Between these two Acts every person who has relinquished any property, either moveable or immoveable, owing to circumstances arising out of the war, could have the property restored to him in a summary manner as provided in the Acts.

The definition of " immoveable property " is laid down in section 2 (*29*) of the General Clauses Act would apply to the present case. It is as follows—

> " ' immoveable property ' shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth."

There is clearly nothing repugnant in the subject or context in the Custodian of Moveable Property Act

in order to take the present case out of this definition. For purposes of the Custodian of Moveable Property Act the property must be a moveable property at the time of relinquishment; but the boiler and machinery in the present case, which were admittedly attached to the earth, were clearly immoveable property.

The application is therefore dismissed.

SUPREME COURT

†S.C. 1956

Mar. 1.

NATH SINGH OIL CO. LTD. (APPLICANT)

v.

COURT OF INDUSTRIAL ARBITRATION AND ONE (RESPONDENTS).*

Constitution s. 25—Directions in the nature of Certiorari—Ss. 7 (5), 9, 10, Trade Disputes Act.

As a result of the negotiations conducted by a Conciliation Officer under s. 7 (5) of the Trade Disputes Act, the applicant Company and its employees, the 2nd Respondent arrived at a written agreement regarding their allowances.

Subsequently, the employees made certain new demands for increment of cost of living allowance by 25 per cent and also for an increase in the House allowance.

The Court of Industrial Arbitration made an award as demanded.

It was contended that in view of the Agreement the Court of Industrial Arbitration has no jurisdiction to make the award, varying the cost of Living Allowance.

Held : The provisions of s. 7 (5) mean that so long as the agreement lasts it is binding upon both parties to the dispute ; but they can preclude neither the employees from agitating the demand for a revision of the agreement or change of its terms nor the President from referring the dispute under s. 9 of the Act to the Court of Industrial Arbitration, nor the Court from making an award after due enquiry and consideration under s. 10 of the Act.

Held also : The prevailing rates of wages in the same or neighbouring localities, having regard to the similarity in the conditions and circumstances prevailing must be a determining factor in the fixation of rates of wages.

Held also : In the matter of principles which govern the fixation of wages in any industrial concern, the question should be approached in the manner indicated by the Fair Wages Committee (India). Living wage must therefore be paid by any employer irrespective of his capacity. Living wage may consist not only of money which the workers receive from the employers, but also, of the value of subsidies for housing, food and other essentials. It may also consist partly of what is called " Basic wage " and partly of what is known as " Cost of Living Allowance ". The costs of Living Allowance is therefore as much a part of the living wage as the basic wage itself.

P. K. Basu for the applicant.

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

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* Civil Misc. Application No. 61 of 1955.

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

Yan Aung, Advocate, for respondent No. 2.

Judgment of the Court was delivered by

MR. JUSTICE CHAN HTOON.—This is an application to quash the award made by the Court of Industrial Arbitration in Case No. 8 of 1953 on reference by the President of the Union of Burma under section 9 of the Trade Disputes Act, relating to the dispute between the Nath Singh Oil Company Ltd. and its employees. The employees of the applicant company made certain demands which included a demand for an increase of 25 per cent in the Cost of Living Allowance and for an increase in the House Allowance which they were receiving from the Company. After hearing the parties and their witnesses, the Court of Industrial Arbitration made an award to the effect that the Cost of Living Allowance paid to the employees by the Company be increased by 25 per cent and that the House Allowance paid to the members of its clerical staff and its labourers be increased by K 10 and K 5 respectively, with effect from 1st October 1953.

The learned counsel for the applicant Company contends that the Court of Industrial Arbitration has no jurisdiction to make the award varying the Cost of Living Allowance, which was being paid to the employees in consequence of an agreement arrived at and signed by the Company and the employees on 27th May 1950 as a result of the negotiations conducted by a Conciliation Officer under section 7 (*5*) of the Trade Disputes Act. This contention must be held to be misconceived. What the provisions of section 7 (*5*) mean is that so long as the agreement lasts it is binding upon both parties to the dispute; but they can preclude neither the employees from agitating the demand for a revision of the agreement

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or change of its terms, nor the President from referring the dispute under section 9 of the Act to the Court of Industrial Arbitration, nor the Court from making an award after due enquiry and consideration under section 10 of the Act.

It is further contended by the learned counsel that the Court of Industrial Arbitration acted illegally in fixing the rate of increase in the cost of Living Allowance and House Allowance on the basis of certain decisions given in previous cases. In Case No. 3 of 1952 the Court of Industrial Arbitration made an award, after careful consideration, increasing the then Cost of Living Allowance by 25 per cent and the House Allowance by K 10 for clerks and K 5 for labourers respectively, in respect of the employees of the Burma Oil Company Ltd. working at Dunneedaw and Syriam. In Case No. 12 of 1952, in respect of employees of the same Company working at Chauk and Lanywa, the Court followed the previous case and awarded similar increases. Again, in Case No. 2 of 1953, in respect of the employees of the Indo-Burma Petroleum Co. Ltd. working at Rangoon, the Court followed the previous cases and made similar increases. In the present case, the Court carefully examined the evidence before it and came to the conclusion that similar increases should also be made, having regard to the similarity in the conditions and circumstances prevailing in all these cases. We see no reason why the employees of the applicant Company should not be paid the same scale of Cost of Living Allowance and House Allowance as is prevailing in the other oil company operating in the same or neighbouring areas. In our view, the prevailing rates of wages in the same or neighbouring localities must be a determining factor in the fixation of the rates of wages.

The learned counsel for the applicant Company also argues that there is no justification for the Court of Industrial Arbitration to make the applicant Company, which is a much smaller concern and also running at a loss, pay the same rate of Cost of Living Allowance and House Allowance as paid by the Burma Oil Company Ltd. which is a much bigger and more prosperous concern. It may be pointed out here that the Court of Industrial Arbitration did not accept the case of the applicant Company that it was making no profits but running at a loss. This being a question of fact, the applicant Company cannot re-agitate this question of its incapacity to pay the allowances. In any case, we are of the view that the capacity of the applicant Company to pay is irrelevant in the present case. In the matter of the principles which govern the fixation of wages in any industrial concern, the question should be approached in the manner indicated by the Fair Wages Committee (India) in its report as follows:

> "The wages of an industrial worker must be such as would enable him to have not merely the means for bare subsistence of life but also for the preservation of his efficiency as a worker. For this purpose he must have means to provide for some measure of education, medical requirements and amenities. This is the minimum which he must have irrespective of the capacity of the industry or of his employer to pay."

Living wage must therefore be paid by any employer irrespective of his capacity. If any industrial concern cannot maintain its existence without cutting down the wages which are proper to be paid to its employees—at all events the wages which are essential for their well-being as indicated above—it would be better that it ceases to exist. It is conceded by the learned counsel for the applicant Company that living wage must be paid by any company in any case. It

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is fairly plain to see that living wage may consist not only of money which the workers receive from the employers but also, in varying degrees, of the value of subsidies for housing, food and other essentials. It may also consist partly of what is called "basic wage" and partly of what is known as "Cost of Living Allowance". The Cost of Living Allowance, or Dearness Allowance as is called in India and other places, is of recent development. It was first introduced when workers demanded an increase in wages because of the rise in the cost of living on account of war or other causes giving rise to widespread fluctuation of prices, but employers were anxious to distinguish between the customary or normal rates of wages and the increases, which they hoped would be temporary, to meet the increased cost of living. The Cost of Living Allowance is therefore as much a part of the living wage as the basic wage itself.

In the result the application must be and is hereby dismissed with costs. Advocate's fees for second respondent are fixed at Kyats one hundred and seventy.

SUPREME COURT

U HPYU (APPLICANT)

v.

SUPERINTENDENT, MANDALAY JAIL AND ONE (RESPONDENTS).*

† S.C. 1956

Feb. 21.

Directions in the nature of Habeas Corpus—S. 5-A (1) (b), The Public Order (Preservation) Act, XVI of 1947—Its validity in Shan State in 1954, due to constitutional change—S. 49 (1), 139, (1) (4), Government of Burma Act, 1935—Proclamation dated 10th December 1942—Frontier Area Administration Notification Nos. 288, 289, 290, dated 4th August 1947—S. 3, The Expiring Laws Continuance Act, XXXII of 1949—S. 92 (2), 222 (1), 226 (1) of the Constitution—Burma Independence Act, 1947—S. 372, Explanation (III) Indian Constitution—Theory of seed of destruction—The Adaptation of Laws Order, 1948.

The applicant was placed in detention under s. 5-A (*1*) (*b*), of the Public Order (Preservation) Act, XVI of 1947 by the Deputy Commissioner (Military Administration), Taunggyi on 1st July 1954.

After the withdrawal of the Military Administration the position was reviewed by the Resident, Taunggyi, who issued a fresh detention order on 20th August 1954.

A legal point was raised that the Public Order (Preservation) Act had ceased to have effect in the Shan State at the time of the detention order because of the Constitutional Change in Burma.

Held : The Expiring Laws Continuance Act, XXXII of 1949 is a complete answer to this point.

Held further : That on the 4th January 1948, the Public Order (Preservation) Act was "existing Law" the scope of which extended to the territory now known as the Shan State, and the enactment at a later date of the Expiring Laws Continuance Act made certain the retention of all "Existing Law".

Held further : That the Public Order (Preservation) Act, whatever may be its origin and however it came into being, found itself to be "existing Law" and continued to maintain its existence.

Dr. E Maung for the applicant.

Ba Sein (Government Advocate) and *Myint Too* for the respondents.

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* Criminal Misc. Application No. 49 of 1955.

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

S.C. 1956

U HPYU v. SUPERINTENDENT, MANDALAY JAIL AND ONE.

Judgment of the Court was delivered by

MR. JUSTICE MYINT THEIN.—By an order dated the 1st July 1954 passed by the Deputy Commissioner (Military Administration), Taunggyi, the applicant was placed in detention under section 5-A (*1*) (*b*) of the Public Order (Preservation) Act, XVI of 1947. After the withdrawal of military administration the position was reviewed by the Resident, Taunggyi, who issued a fresh detention order on the 20th August 1954, under which the applicant has been detained up to now in the Mandalay Jail.

The application is for a writ of habeas corpus. We have examined the records and in our judgment the Resident had before him substantial material to justify the order of detention, and we can see no ground for interference.

A point of law, however, is raised by Dr. E Maung, learned counsel for the applicant, who wishes us to determine if the Public Order (Preservation) Act had ceased to have effect in the Shan State at the time the detention order was passed, by reason of the constitutional change that had taken place in Burma.

To appreciate this point it is necessary to recall that with the advent of the second world war in Burma the constitutional machinery with which Burma was governed had failed and by a Proclamation dated the 10th December 1942 the Governor of Burma assumed all powers, inclusive of legislative powers, under section 139 (*1*) of the Government of Burma Act, 1935. Burma went through the occupation years during which period the legal government was in Simla. Even with its return in 1945, the constitutional machinery was not revived and the Governor continued to exercise his powers up to the time Burma became an Independent Sovereign Republic on the

4th January 1948. The Proclamation of the 10th December 1942 was not actually withdrawn but it ceased to have effect as from that date.

During the years the Governor exercised his powers he had enacted laws from time to time and the Public Order (Preservation) Act was one of them. As originally enacted the second clause of the Preamble recalls the Governor's assumption of powers on the 10th December 1942 while the third clause invokes these powers.

Under the Government of Burma Act, laws enacted had to be specifically extended under section 40 *(1)* to parts of Burma then known as the Scheduled Areas. The Public Order (Preservation) Act was made to apply to certain of these territories, including those comprising the Shan State of the present day, by Frontier Areas Administration Notification No. 288 of the 4th August 1947. The Resident at Taunggyi, along with similar officers in other localities, was empowered to exercise the functions under the Act by Notifications Nos. 289 and 290 of the same date.

Section 139 *(4)* of the Government of Burma Act, 1935 runs :

> "If the Governor, by a Proclamation under this section, assumes to himself any power of the Legislature to make laws, any law made by him in the exercise of power shall, subject to the terms thereof, continue to have effect until two years have elapsed from the date on which the Proclamation ceases to have effect, unless sooner repealed or re-enacted by Act of the Legislature, and any reference in this Act to Acts of the Legislature shall be construed as including references to such a law."

Dr. E Maung points to the time-limit of two years in this provision which, he suggests, is like a seed of destruction—a seed that would destroy the Act altogether in two years from the date the Governor's

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Proclamation ceases to have effect, that is to say, by the 4th January 1950. He urges us to accept the view that even if the Act does not specifically state in its provisions that it should last for only two years, such a meaning must be taken to be implied in any Act enacted under section 139 *(4)*.

Now, the Expiring Laws Continuance Act, XXXII of 1949, provides that Acts enacted with powers vested under section 139 *(1)* by the Governor in pre-independence days shall continue in force until repealed or amended by Parliament, and this Act would be a complete answer to the point raised by Dr. E Maung ; but he goes a step further and contends that while the Act may still be in force in the territories of the Union of Burma which do not form part of any constituent unit of the Union, its application to the Shan State is ineffective at the present day. He points to section 92 *(2)* of the Constitution which gives exclusive power of legislation to a constituent unit in any of the matters enumerated in the State Legislative List. He contends that since Article 3 of the List, which deals with security, makes mention of "preventive detention for reasons connected with the maintenance of public order", the mere continuance of the Public Order (Preservation) Act would not make it effective in the Shan State which would have to legislate for itself under the exclusive power of legislation which the Shan State has in regard to this particular subject.

The Proclamation of the 10th December 1942, it has been mentioned, was never withdrawn and if there had been no change in the status of Burma the Public Order (Preservation) Act would have remained alive until two years from the date the Proclamation is withdrawn. But there was a change in Burma's status and by the Burma Independence Act, 1947,

such change took place on the 4th January 1948 at which date the Government of Burma Act, 1935 ceased to have any effect. But the fact that the Government of Burma Act was repealed did not throw overboard all that had been done under the provisions of that Act, and in regard to the laws in existence prior to the attainment of independence by Burma, the Burmese Constitution which came into force at the same time contains this provision :

"226. (1) Subject to this Constitution and to the extent to which they are not inconsistent therewith, the existing laws shall continue to be in force until the same or any of them shall have been repealed or amended by a competent legislature or other competent authority.

(2) The President of the Union may, by Order, provide that as from such date as may be specified in the Order any existing law shall, until repealed or amended by the Union Parliament or other competent authority, have effect subject to such adaptations and modifications as appear to him to be necessary or expedient with due regard to the provisions of this Constitution."

The term "existing law" is defined in section 222 (1) as :

"any law, Ordinance, Order, bye-law, rule or regulation, passed or made before the commencement of this Constitution by any legislature, authority or person in any territories included within the Union of Burma being a legislature, authority or person having power to make such law, Ordinance, Order, bye-law, rule or regulation."

Thus on the 4th January 1948 the Public Order (Preservation) Act was "existing law" the scope of which extended to the territory now known as the Shan State ; and under section 226 it would remain in force in the areas to which it had applied, prior to the change in sovereignty.

It is interesting to note that in the Indian Constitution specific mention is made of temporary laws. Section 372, Explanation III, provides that no temporary law would continue beyond the date

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fixed for its expiration or the date on which it would have expired if the Constitution had not come into force. There is no such restrictive clause in the Burmese Constitution and the enactment at a later date of the Expiring Laws Continuance Act made certain the retention of all "existing law".

We have examined section 3 of the Expiring Laws Continuance Act which provides that the continuance of laws enacted with powers vested under section 139 (*1*) would not carry with such continuance the power of extending their application to the constituent units of the Union if no such extension had already been made. We have mentioned that the Public Order (Preservation) Act was extended to the then Scheduled areas as far back as 1947 and therefore this section has no relevance to the point in issue.

It remains for us to consider the theory of the seed of destruction. Because of its origin, despite section 226 of the Constitution, must an Act enacted under section 139 of the Government of Burma Act die after the allotted span of two years? We think not. In its effectiveness and scope while it lasts, an Act enacted under section 139 carries no inherent defect and it is on the same level as any other Act enacted in the normal way. It carried no seed of destruction, but what would kill the Act was the malignant influence of sub-section (*4*). However with the repeal of the Government of Burma Act itself, the malignant influence also disappeared, and the Public Order (Preservation) Act, whatever may be its origin and however it came into being found itself to be "existing law" and continued to maintain its existence. By the Adaptation of Laws Order, 1948, the President of the Union of Burma had exercised the powers vested in him under section 226 (2) and had made suitable modifications to the Act and

among such modifications were the deletion of the references in the Preamble to section 139 of the Government of Burma Act. Thus, even what might be construed as a reminder of taint was removed and as the Act stands today it is one that is in no way different in its effectiveness and scope from Acts enacted by constitutional machinery.

The application therefore is dismissed.

တရားလွှတ်တော်ချုပ်

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မတ်လ ၁၁။

ဦးဖူးညွန့် ပါ ၇ ဦး (လျှောက်ထားသူ)
နှင့်
ပဲခူးခရိုင် လယ်ယာမြေ နိုင်ငံပိုင်ပြုလုပ်ရေး ကော်မိတီ ပါ ၄ ဦး (လျှောက်ထားခံရသူများ) *

အမှုခေါ်စာခွန်တော် အမိန့်သဘောမျိုး ပါသောအမိန့် ကျေးရွာမြေယာကော်မိတီက လယ်မြေကို ကင်းလွတ်ခွင့်ပေးခြင်း၊ ခရိုင်မြေယာကော်မိတီက ကင်းလွတ်ခွင့်ပေးထားသောအမိန့်ကို၊ ဖျက်သိမ်းသင့်ကြောင်းကို လျှောက်ထားသူအပေါ် ထုခွေချက်တောင်းခြင်း၊ သက်သေတင်ပြရန် အခွင့်မပေးခဲ့ခြင်း၊ အမိန့်ကို ၁၉၅၃ ခုနှစ်၊ လယ်ယာမြေ နိုင်ငံပိုင်ပြုလုပ်ရေး အက်ဥပဒေပုဒ်မ ၃၅ အရ၊ နိုင်ငံတော်သမတက ပယ်ဖျက်ခြင်း။

ဆုံးဖြတ်ချက်။ ။ခရိုင်မြေယာကော်မိတီသည်၊ လျှောက်ထားသူအားပြန်လည်ချေပရန် အတွက် သက်သေတင်ပြရန် အခွင့်မပေးခဲ့သည်မှာ တရားဖြောင့်မတ်ရေး သဘာဝတရားကို ဆန့်ကျင်သော ပြုမူပင်ဖြစ်သည်။ ဦးပစ်နှင့်သဲကုန်းကျေးရွာ မြေယာချထားကော်မိတီ၊ ၁၉၄၈ ခုနှစ်၊ မြန်မာပြည် စီရင်ထုံး စာမျက်နှာ ၇၅၉ (၇၆၀) လိုက်နာသည်။

လွှတ်တော်ရွှေနေကြီး ဦးထွန်းမောင်က လျှောက်ထားသူအတွက် လိုက်ပါဆောင်ရွက်သည်။

အစိုးရရွှေနေကြီး ဦးဘဖေက လျှောက်ထား ခံရသူအတွက် လိုက်ပါဆောင်ရွက်သည်။

တရားဝန်ကြီး ဦးဘိုကြီး။ ။ဤရုံးတော်တရားမ အသေးအဖွဲလျှောက်လွှာအမှတ် ၆၆၊ ၅၆ (လျှောက်ထားသူ ဦးဖူးညွန့်)၊ ၆၇၊ ၅၆ (လျှောက်ထားသူ မသန်းရီ)၊ ၆၈၊ ၅၆ (လျှောက်ထားသူ ဒေါ်လှပွင့်)၊ ၆၉၊ ၅၆ (လျှောက်

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* ၁၉၅၆ ခုနှစ်၊ တရားမအသေးအဖွဲ့ လျှောက်လွှာအမှတ် ၆၆၊ ၆၇၊ ၆၈၊ ၆၉၊ ၇၀၊ ၇၁၊ နှင့် ၇၄။

† နိုင်ငံတော်တရားဝန်ကြီး ဦးမြင့်သိန်း၊ တရားဝန်ကြီး ဦးချန်ထွန်းနှင့် တရားဝန်ကြီး ဦးဘိုကြီးတို့၏ ရှေ့တွင်ကြားနာ၍၊ တရားဝန်ကြီး ဦးဘိုကြီးအမိန့်ချမှတ်သည်။

၁၉၅၇

ဦးဖူးညွန့် ပါ ၇ နှင့် ဝဲခူးခရိုင် လယ်ယာမြေနိုင်ငံပိုင်ပြုလုပ်ရေး ကော်မိတီ ပါ ၄။

ဆားသူ မောင်သိန်းလှ)၊ ၇၀၊ ၅၆ (လျှောက်ထားသူ ဦးဘသော်)၊ ၇၁၊ ၅၆ (လျှောက်ထားသူ မောင်အောင်ကြည်) နှင့် ၇၄၊ ၅၆ (လျှောက်ထားသူ မောင်လှအောင်) တို့က ပြည်ထောင်စု မြန်မာနိုင်ငံတော်အစိုးရ၊ လယ်ယာမြေနိုင်ငံပိုင်ပြုလုပ်ရေး ဝန်ကြီးဌာန (ကျေးလက်ကြီးပွါးရေး ဌာနခွဲ ၁) မှ အမှုတွဲအမှတ် ၂၁၁-ဈက-၅၆ ကို၊ အမှုခေါ်စာရွက်တော် အမိန့်သဘောမျိုးပါသော အမိန့်ဖြင့် ဤရုံးတော်သို့ဆင့်ခေါ်၍ မိမိတို့အပေါ်တွင် ချမှတ်သော နိုင်ငံတော်သမတ၏အမိန့်ကို ပယ်ဖျက်ပါမည့် အကြောင်းနှင့် လျှောက်ထားကြလေသည်။

အမှုဖြစ်ပွါးပုံမှာ၊ လျှောက်ထားသူ ဦးဖူးညွန့် ပါ ၇ ဦးတို့သည်၊ ဝဲခူးခရိုင်၊ တကောကန္ထတ်ကျေးရွာ မြေယာကော်မိတီသို့၊ မိမိတို့လုပ်ကိုင်နေသည်ဆိုသော လယ်ယာမြေအသီးသီးကို၊ ၁၉၅၃ ခုနှစ်၊ လယ်ယာမြေနိုင်ငံပိုင်ပြုလုပ်ရေး အက်ဥပဒေပုဒ်မ ၅ အရ၊ ပြန်လည်သိမ်းယူခြင်းမှ ကင်းလွတ်ခွင့်ပြုပါရန်၊ ယင်းအက်ဥပဒေပုဒ်မ ၆ (၁) (က) အရ၊ လျှောက်ထားရာ၊ ထိုကျေးရွာမြေယာကော်မိတီက စုံစမ်းပြီးလျှင်၊ လျှောက်ထားသည့်အတိုင်း ကင်းလွတ်ခွင့်ပြုခဲ့လေသည်။ ထိုနောက် ဝဲခူးခရိုင် မြေယာကော်မိတီက သက်ဆိုင်ရာအမှုဘွဲများကို ခေါ်ယူကြည့်ရှုပြီးလျှင်၊ ထိုလျှောက်ထားသူများအား၊ ကျေးရွာမြေယာကော်မိတီက ကင်းလွတ်ခွင့်ပေးထားသောအမိန့်များသည်၊ လယ်ယာမြေနိုင်ငံပိုင်ပြုလုပ်ရေး အက်ဥပဒေနှင့် မညီညွတ်သောကြောင့် ဖျက်သိမ်းရမည်ဖြစ်ရာ မည်သို့သော အကြောင်းကြောင့်၊ မဖျက်သိမ်းသင့်ကြောင်းကို အကြောင်းပြ၍ထုခေ့ရန် ဆင့်ခေါ်လေသည်။ လျှောက်ထားသူများက ချေပလွှာများတင်သွင်းလေသည်။

ခရိုင်မြေကော်မိတီသည်၊ အချင်းဖြစ်မြေများနှင့် စပ်လျဉ်း၍၊ သက်သေများ စစ်ဆေးပြီးလျှင်၊ သက်သေခံချက်များနှင့်တကွ အမှုတွဲများကို လယ်ယာမြေနိုင်ငံပိုင်ပြုလုပ်ရေး အက်ဥပဒေပုဒ်မ ၃၅ အရ၊ နိုင်ငံတော်သမတက အရေးယူပါရန် သက်ဆိုင်ရာ ဝန်ကြီးဌာနသို့ တင်ဆက်လေသည်။ ယင်းဌာနက နိုင်ငံတော်သမတ၏ အမည်ဖြင့်၊ အရေးယူဆောင်ရွက်ပြီးလျှင် ကျေးရွာမြေယာကော်မိတီက ကင်းလွတ်ခွင့်ပေးသော အမိန့်များကိုပယ်ဖျက်လိုက်လေသည်။

ယင်းသို့ပယ်ဖျက်ခြင်းမပြုမီ အတောအတွင်းတွင်၊ ယခုလျှောက်ထားသူများက လယ်ယာမြေနိုင်ငံပိုင်ပြုလုပ်ရေးခုံရုံးသို့ အယူခံဝင်လေသည်။ သို့ရာတွင် ကျေးရွာမြေယာကော်မိတီက မိမိတို့အားအနိုင်ပေးထားခဲ့သဖြင့်၊ ယင်းသို့အယူခံဝင်ရန်အကြောင်းမရှိချေ။

ဤအမှုတွင်ဆုံးဖြတ်ရန် အဓိကအချက်မှာ၊ ခရိုင်မြေယာကော်မိတီသည်၊ လျှောက်ထားသူများအား ပြန်လည်ချေပရန်အတွက် သက်သေတင်ပြရန် အခွင့်

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ဦးဖူးသွန် ပါ ၇ နှင့် ဝဲသူးခရိုင် လယ်ယာမြေနှင်ငံပိုင် ပြုလုပ်ရေး ကော်မိတီ ပါ ၄။

မပေးခဲ့သည်မှာ၊ တရားဖြောင့်မတ်ရေး သဘာဝတရားကို ဆန့်ကျင်သောပြုမှု ဖြစ်မဖြစ်ဆိုသည့် ပြဿနာပင်ဖြစ်သည်။ အစိုးရရှေ့နေကြီး ဦးဘဖေကလည်း၊ ယင်းသို့အခွင့်မပေးခဲ့ခြင်းသည် မှားယွင်းကြောင်းဝန်ခံလေသည်။

ဤရုံးတော်ကချမှတ်ခဲ့သော ဦးပဉ္စင်္နှင့်သဲကုန်းကျေးရွာ မြေယာချဆားရေး ကော်မိတီ * တွင် အောက်ပါအတိုင်းဆုံးဖြတ်ခဲ့၏။

" It is a rule of universal application and therefore of natural justice that no man can be a judge in his own cause. A person who has an interest in the matter arising for decision cannot constitute himself a judge at the hearing. Natural justice also requires that those entrusted with the power of adjudicating upon any dispute must act in good faith and give the parties an opportunity of being heard and stating their case and their viewpoint.

In the absence of any specific statutory provision to the contrary applicable to the proceedings of a quasi-judicial body, it is entitled to obtain information in any way it considers suitable, provided that those who are parties to the controversy before it are given a fair opportunity to correct or contradict any relevant statement or view to their prejudice. "

ယင်းသို့သော အကြောင်းများကြောင့်၊ ယခုသျှောက်ထားသူများအပေါ်၌၊ နိုင်ငံတော်သမတ၏အမည်ဖြင့် ချမှတ်ခဲ့သောအမိန့်များ အား လုံး ကို ပယ် ဖျက် လိုက်သည်။

* ၁၉၄၈ ခုနှစ်၊ မြန်မာမြေညီစီရင်ထုံး စာမျက်နှာ ၇၅၉ (၇၆၀)။

BURMA LAW REPORTS

HIGH COURT

1956

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

U TUN MAUNG, B.A., B.L., *Bar.-at-Law*, EDITOR.
DR. MAUNG MAUNG, B.L., LL.D., *Bar.-at-Law*, REPORTER.

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HON'BLE JUDGES OF THE HIGH COURT OF THE UNION OF BURMA DURING THE YEAR 1956

1. The Hon'ble Justice *Maha Thray Sithu* U CHAN TUN AUNG, B.A., B.L., *Barrister-at-Law*, Chief Justice.

   The Hon'ble Justice U SAN MAUNG, B.Sc., I.C.S. (Retd.).

3. The Hon'ble Justice U AUNG THA GYAW, B.A., B.L.
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8. The Hon'ble Justice U THEIN MOUNG, Advocate (from 1st January 1956 to 26th April 1956).
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order either by treating these as private applications in revision or as and by way of regular appeals. *King-Emperor* v. *U San Win*, (1932) I.L.R. 10 Ran. p. 315; *Emperor* v. *Bashir*, (1931) 32 Cr. L. J. p. 143, referred to.

BURMA IMMIGRATION (EMERGENCY PROVISIONS) ACT, 1947, S. 13 (*1*) AS AMENDED BY ACT NO. 40 OF 1948 AND ACT NO. 12 OF 1949—*S. 3, Kachin Hill Tribes Regulation.* The Respondent was a Yawyin from China temporarily residing in Kachin State. He was convicted under s. 13 (*1*), Burma Immigration (Emergency Provisions) Act, 1947. S. 3 of the Kachin Hill Tribes Regulation enacts that only that Regulation and the enactments thereto annexed should be applicable to members of a hill-tribe in a hill-tract. The question was whether the Respondent had been rightly convicted under s. 13 (*1*) of the Burma Immigration (Emergency Provisions) Act, 1947. *Held*: That the Respondent had committed the offence at the moment of entry into Burma without the necessary permit. The offence was complete at the moment of entry. *The King* v. *N'hkum Naw*, (1941) R.L.R. p. 403, distinguished.

BURMA INCOME-TAX ACT—*Reference under s. 66 (1—S. 10 (2) (ix), "Expenditure wholly and exclusively incurred for the purpose of business"—When once such deduction is allowed, the Income-Tax authorities have no further statutory power of determining its reasonableness—S. 10 (2) (viii-a) Burma Income-Tax Act—S. 10 (2) (xv) Indian Income-Tax Act.* For the Income-Tax year 1952-53, the Assessee declared an income of K 9,725. The Additional Income-Tax Officer assessed him at K 13,826 after having disallowed certain items, among which was a sum of K 3,000 alleged to be messing allowance for his two brothers who were employees of the assessee on a salary of K 150 per month, and the messing allowance claimed was K 125 per month. The Income-Tax Officer disallowed this expenditure on the ground that it does not come within the category of permissible expenditure under s. 10 (*2*) (ix) of the Burma Income-Tax Act. On appeal, the Assistant Commissioner of Income-Tax held that this sum was admissible under s. 10 (*2*) (ix), but reduced the amount of permissible expenditure from K 3,000 to K 1,200. The assessee again appealed to the Income-Tax Appellate Tribunal, which dismissed his appeal. The Assessee next moved the Appellate Tribunal to refer to the High Court two questions, contending that once the Income-Tax authority has accepted the amount as a permissible expenditure, it has no power to determine the reasonableness of the said expenditure. On reference, the High Court re-formulated the reference as follows:—Whether in applying s. 10 (2) (ix) of the Burma Income-Tax Act, after accepting that the expenditure has been incurred thereunder, is the Income Tax Department entitled to apply its mind to the question of reasonableness of the amount of expenditure claimed? *Held*: Prior to the Burma Income-Tax Amendment Act, 1953, the Commissioner who refers any question of law for decision by the High Court is competent to give his own opinion on the case referred to the High Court for decision, whereas under the law as it now stands the Appellate Tribunal is incompetent to do so. *Held further*: Once the Income Tax authorities have accepted that such expenditure is permissible expenditure within the purview of s. 10 (2) (ix) of the Burma Income-Tax Act, the Income-Tax authorities are incompetent to question and refix the amount

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Ba Thein v. *Ma Than Myint and others*, I.L.R. Vol 3 (Ran. Series) (1925) at p. 483 at p. 487, distinguished; *Ma Mya Me* v. *Maung Ba Dun*, L.B.R. Vol. 2 (1903-1904) p. 224; *Chinnaya* v. *U Kha*, I.L.R. (Ran. Series) Vol. 14 (1936-37) p. 11, referred to. *Held*: *Per* U SAN MAUNG, J.—Although the Respondent was allegedly adopted in the *Keittima* form, he could nevertheless bring a suit for inheritance on the footing that he was an *appatitha* adopted son. By "Buddhist Law" is meant the Customary Law of the Burman Buddhist, which can be gathered from the *Dhammathats* and from the decided cases and the prevailing customs and practice of Burmans. *Thein Pe* v. *U Pel*, 3 L.B.R. p. 175; *Ma Huin Zan* v. *Ma Myaing*, 13 Ran. 487, referred to. *Held further*: There is nothing in the Registration of *Keittima* Adoption Act to prevent a person abandoning the *Keittima* claim and from proving that he is an adopted son and making a claim as an *appatitha* child which can be established by other admissible evidence. ***Ma Ywet*** v. ***Ma Me***, 5 L.B.R. 118; ***Ma Tha Nyun*** v. ***Daw Shwe Thit***, 14 Ran. p. 557; ***Ma Kyi*** v. ***Ma Thon***, 13 Ran. p. 274; ***Ma Mya Me*** v. ***Maung Bo Dun***, 2 L.B.R. 224; ***Maung Bo Thein*** v. ***Ma Than Myint***, 5 Ran. p. 565, referred to.'

LIM CHIN NEO (*alias*) DAW KYIN NYUN *v.* LIM GEOK SOE (*alias*) MUTU 248

BURMESE BUDDHIST LAW—*Defence in suit based solely on* Keittima *adoption—Impropriety of Amendment of Written Statement by Court suo moto to an alternative claim based on* appatitha *adoption*. The appellant sued the Respondents for a declaration of title and possession of some moveable properties as being the nearest relatives and sole surviving heirs of Daw Hnyin, a Burmese Buddhist spinster. The 2nd Respondent resisted the claim based solely on *Keittima* adoption. On the conclusion of the trial and on the day fixed for delivery of judgment, the Court of its own accord and without any application from the 2nd Respondent for an amendment of her Written Statement gave her an opportunity to amend her Written Statement for an alternative claim based on *appatitha* adoption and subsequently decreed her claim as an *appatitha* daughter. *Held*: Amendment of Written Statement by Court *suo moto* and without any application from the party concerned is highly improper. In the absence of special circumstances and *bona fide* mistake amendment of Written Statement for alternative claim based on *appatitha* adoption should not be allowed. *Maung Gyi and one* v. *Maung Aung Pyo*, 2 Ran. p. 661, distinguished; *Maung Ba Thein* v. *Ma Than Myint and others*, I.L.R. 3 Ran. p. 483, affirmed.

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CIVIL PROCEDURE CODE—*S. 60 (1) (b)—Whether a photographer, an "Artisan", and the articles used for his photographic work are tools of artisan—Crucial time for claiming exemption from attachment*. The Respondent sued the applicant, a photographer for K 3,300 and obtained an order for attachment before judgment of the applicant's properties in the studio. Attachment was released on furnishing security by the applicant for the due production of the properties. The suit was decreed and the applicant was called upon to produce the properties in terms of the security bond. The applicant claimed exemption from attachment under s. 60 (1) (*b*), Civil Procedure Code on the ground that the properties are tools of artisan. The trial Court held:—That a

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photographer is an artisan and that the properties for carrying on the studio work of a photographer are exempted from attachment, under s. 60 (1) (*b*), Civil Procedure Code, but rejected the application for failure to raise the objection at the time of the attachment. Applicant filed an application in revision. *Held:* A photographer is an artisan and the articles such as cameras, photo drying frames, enamel trays, camera stands, stoves for drying films and other paraphernalia essential for making photographs are tools of artisan within the meaning of s. 60 (1) (*b*), Civil Procedure Code. *Ahmed Sayeed* v. *Kurus Zohra*, I.L.R. (1941) All. 278, relied on. *Held further:* The crucial time to raise the objection to the attachment was at the time of the attachment and not after the properties had been attached and a bond executed. Application dismissed.

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CIVIL PROCEDURE CODE, ORDER 2, RULE 2 – *Different causes of action —Suit for possession of immoveable property no bar to a subsequent suit for mesne profits—Continuing trespass—S. 12* (1), *Urban Rent Control Act—Statutory tenant, suit for damages against— Assessment of general damages by Court. Held:* A suit for possession of immoveable property is no bar to a suit for mesne profits, the causes of action in the two suits being different, the subsequent suit is not barred under Order 2, Rule 2, Civil Procedure Code. *Mayne's Treatise On Damages*, p. 471; *Mohamed Khalil Khan and others* v. *Mahbub Ali Mian and others*, A.I.R. (1949) P.C. 78; *Ma Myaing and one* v. *Maung Po Chit and three*, 4 Ran. 103; *Kupparakutti Adammeera* v. *Esoof* (a) *S. M Mohamed Esoof and one*, (1948) B.L.R. 411; *Ram Karan Singh* v. *Nachhad Ahir*, 53 All. 951; *Rama Kallappa Pujari* v. *Saidappa Sidrama Pujari and another*, 59 Bom. 454, referred to. *Held also:* A person in occupation of premises under s. 12, Urban Rent Control Act is a statutory tenant and his occupation thereof is lawful and no suit for damages is maintainable against him in respect of such occupation. *The Canadian Pacific Railway Company* v. *Roy*, (1902) A.C. 220; *Mrs. D M. Singer* v. *The Controller of Rents*, (1949) B.L.R 143 (S.C.), referred to. *Held further:* In awarding general damages, a Judge has to do his best in assessing the amount, however difficult such a task may appear to be. *Commissioners for Executing Office of Lord High Admiral of United Kingdom* v. *Owners of Steamship Susquehanna*, (1926) A.C. 655; *Chaplin* v. *Hicks*, (1911) K.B.D. 786; *Ratcliffe* v. *Evans*, (1892) Q.B.D. p. 524; *Fritz* v. *Hobson*, (1880) Chancery Division p. 542; *Mayne's Treatise On Damages*, p. 607, referred to.

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CIVIL PROCEDURE CODE, ORDER 21, RULE 95—*Whether Court competent to hold a summary enquiry—Order 21, Rule 35 and Rules 97, 98 and 103, Civil Procedure Code. Held:* Under Order 21, Rule 95, the Court has jurisdiction to make a summary enquiry. *Sobha Ram* v. *Tarsi Ram*, 46 All. 693 at 697, followed. *Held also:* Provisions under Order 21, Rule 95, Civil Procedure Code applied *mutatis mutandis* to the provisions of Order 21, Rule 35, Civil Procedure Code. *Held further:* A formal application under Order 21, Rule 97 would still lie, if and when delivery order is sought to be executed, and obstruction or resistance is encountered. The Court can then make such enquiry as it deemed fit and make an order under Order 21, Rules 98 and 99,

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allowed to be removed to Lu Bin Company's Godown at No. 159, 39th Street, on condition that the purchase price was to be paid that very day. The payment was deferred on several excuses for two days and then the Company's Managing Partner absconded A report to the Police resulted in the Managing Partner being sent up before the Eastern Subdivisional Magistrate, Rangoon, under s. 420, Penal Code, and the sale proceeds of the goods were eventually returned to the appellant the Bank of China on security, who had claimed that Lu Bin Company's Godown at No. 159, 39th Street and its contents belonged to them by virtue of a hypothecation bond executed by Lu Bin Company in their favour, in pursuance of which actual possession had been delivered to the Bank. Thereupon the 1st Respondent Ahmed Dadabhoy Bros. filed a suit for a declaration of ownership and their right to retain the sale proceeds, and the suit was decreed. On appeal by the appellant, the Bank of China. *Held :* That the property in the goods remained with the 1st Respondent although the delivery of the same was given to the appellant, as in the case of goods sold on approval, wherein the property does not pass until the buyer exercises his option to take them and pay cash in full. Until then the buyer holds the property in trust and the trust continues till the option is exercised and cash payment is made. *Khitish Chandra Deb Roy* v *Emperor*, 51 Cal. p. 796, approved ; *Scott and Hodgson, Limited* v. *Keshavlal Nathubhai Shah and others*, 54 Bom. p 862, disapproved. *Held further :* The intention of the parties is the decisive factor in determining the time when the property in the goods passes to the buyer, when that intention is expressed in the contract itself ; in the absence of express provision in the contract, the intention has to be gathered from the conduct of the parties and the circumstances of the case. *Hoe Kim Seing* v. *Maung Ba Chit*, 14 Ran. p. 1 at p. 7, followed. *Held also :* In a C.O.D. sale the delivery of goods is conditional on payment and the person to whom the goods had been delivered remained a trustee for the Seller. *Loeschman* v. *Williams*, (1815) K.B. 4 Camp. 181, referred to. *Held further :* That the property in the goods remained with the 1st Respondent Ahmed Dadabhoy Bros. (Burma) Limited, in spite of the delivery of goods to the 2nd Respondent Lu Bin Company. *Held also :* A contract of pledge is distinguished from the contract of hypothecation by the transfer of the possession or the actual delivery of the thing intended to be charged to the creditor. Stroud's Judicial Dictionary, p. 1496, Second Edition, referred to Hypothecation is a right which a creditor has over a thing belonging to another, and which consists in the power to cause it to be sold in order to be paid his claim out of the proceeds. Aiyer's Law Lexicon of British India, p. 537 of 1940 Edition, referred to. Therefore, where the contract was merely one of hypothecation, the burden of proof to show that it was a pledge lies on the appellant. *Held also :* Unless a clear intention is expressed or implied, a hypothecation bond does not effect after acquired property. *In the matter of Ambrose Summers*, 23 Cal. p. 592, referred to ; *Whitehern Brothers* v. *Davison*, (1911) 1 K.B. p 463, does not apply ; *Heap* v. *Motorists' Advisory Agency Limited*, (1923) 1 K.B. p. 577, referred to ; *Commonwealth Trust Limited* v. *Akotey*, (1926) Appeal Cases, p. 72 at p. 76, dissented from ; *Mercantile Bank of India Limited* v. *Central Bank of India*, (1938) Appeal Cases, p. 287, p. 298. Under the circumstances of the case a suit for a mere declaration without a consequential relief lies.

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distinction between cases in which the subsequent dispute relates to the fact of execution and cases in which the question relates to the testamentary capacity of the executant. The evidence of the Sub-Registrar has to be appraised with due regard to the physical and mental condition of the testatrix at the time. *Sadachi Ammal* v. *Rajathi Ammal and others*, A.I.R. (1940) Mad. 315, referred to. Every person of sound mind and not under any special disability is legally capable of making a Will. The question of sanity involved is a question of fact and there is no presumption in law that a testator or testatrix is sane until the contrary is shown. *Prima facie* the person propounding the will must show that a testator at the time of making the will understands the nature of the business in which he is engaged, possesses a clear recollection of the properties he intends to dispose of, and also of the persons who have a claim to be the object of his bounty, and the manner in which it is to be distributed. Cases referred:—*Pendock Barry Barry* v. *James Butlin*, 12 English Reports, 1089 at 1090; *Surendra Krishna Mondal* v. *Rani Dassi*, (1920) I.L.R. 47 Cal. 1043; *Sarat Kumari Debi* v. *Sakhi Chand*, (1929) I.L.R. 8 Pat. 382; *Vellasawmy Servai and others* v. *L. Sivaraman Servai*, (1930) I.L.R. 8 Ran. 179; *Eusoof Ahmed Sema* v. *Ismail Ahmed Sema and others*, A.I.R. (1938) Ran. 322; *Brajeswari Dasi* v. *Rasik Chandra Ghosh and another*, A.I.R. (1925) Cal. 739 at 741; *In the Estate of Holtam, Gillett* v. *Rogers*, (1913) 108 Law Times, 732. In determining the question as to whether the testatrix was of a sound and disposing mind at the time of the execution of her will, it is important that some satisfactory evidence should be given in regard to her physical and mental condition at the time of the actual execution of the Will. Taylor's Principles and Practice of Medical Jurisprudence, Volume (1), 10th Edition, p. 652, referred to. *Sajid Ali and another* v. *Ibad Ali*, (1896) I.L.R. 23 Cal. 1; *Suryanarayanamurthi* v. *Suramma and others*, A.I.R. (34) (1947), P.C. (169), referred to. When once it is proved that a will has been executed with due solemnities by a person of competent understanding, the burden of proving that it was executed under undue influence rests on the person who so alleges. It is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It is necessary also to prove by clear evidence in the particular case that the undue influence was in fact exercised, and that it was by means of the exercise of that power that the will has been produced. Cases referred:—*Baudains and others* v. *Richardson and another*, (1906) Appeal Cases, 169 at 184-185; *Bur Singh* v. *Uttam Singh*, (1911) I.L.R. 38 Cal. 355; *Ganpatrao Khandero* v. *Vasantrao Ganpatrao*, A.I.R. (1932) Bom. 588; *Ahmed Khan* v. *Mt. Murmuzi Khan and others*, A.I.R. (1921) Oudh 81; *Craig* v. *Lamoureux*, (1920) Appeal Cases, 349; *Leong Hone Wang* v. *Leon Ah Foon and others*, (1929) I.L.R. 7 Ran. 720; *Hampson* v. *Guy*, (1891) 64 Law Times 778. A person desiring to execute a Will need not consult anybody as to what properties he should leave to any particular beneficiary. Different considerations would apply on the question in cases where disposition of property has been made *inter vivos*, as in the case of gifts, and those made after death, as in the case of Wills. *Parfitt* v. *Lawless*, (1872) Law Reports, 2 P. & D. 462-27 Law Times 215, referred to. "A person may act foolishly and even heartlessly; if he acts with full comprehension of what he is doing, the Court will not interfere with the exercise of his volition." *Motibai Hormusjee Kanga* v. *Jamsetjee Hormusjee Kanga*, A.I.R. (1924) P.C. 28 at 33, referred to. The

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judgment of the High Court of Jaipur must be deemed to have been given on the merits of the case within the meaning of s. 13 (*b*) of the Civil Procedure Code. *Brijlal Ramjidas and another* v. *Govindram Gordhandas Seksaria and others*, A.I.R. (34) (1947) (P C) 192, referred to. The provisions of s. 82, Evidence Act relating to the admissibility of documents in England and Ireland, rather than the provision of s. 96, Evidence Act, should be held to apply to the production and admission of the Indian documents. *Held further :* That the suit was properly framed, bare declaration being enough and it was not necessary to ask for a cancellation and that the following rulings have no bearing on the point. Cases referred:— *Hukam Singh and others* v *Mussammat Gyan Devi and others*, (1916) 61 Pun. Record 266 ; *Raja Rajeswara Dorai* v. *A.L.A.R.M. Arunachellan Chettyar*, (1915) I.L.R. 38 Mad. 321 at 322; *Kalu Ram* v. *Babu Lal and another*, (1932) I.L.R. 54 All 812 ; *Akhlaq Ahmad and others* v. *Mt. Karam Llahi*, A.I.R. (1935) All. 207 ; *Lakshmi Narain Rai* v *Dip Narain Rai*, 55 All. 274 ; *Sri Krishna Chandra* v. *Mahalir Prasad*, 55 All. 791. In a partition suit, where the plaintiff has alleged in his plaint that he is in joint possession of the property, no *ad valorem* Court fee is payable on the value of the property involved. Cases referred:—*Fremananda* v. *Dhirendra Nath Ganguly and others*, A.I.R. (37) (1950) Cal. 397 ; *Kattiya Pillai and another* v. *Ramaswamia Pillai and others*, A.I.R. (1929) Mad. 396 ; *Kirty Churn Mitter* v. *Aunath Nath Deb*, (1882) I.L.R. 8 Cal. 757 ; *Sitbaran Jha Pandey* v. *Lokenath Missir*, (1924) I.L.R. 3 Pat. 618 ; *Bhagwan Appa Wani* v. *Shivalla Wani*, A.I.R. (1927) Nag. 48 ; *Kanhaiya Lal* v. *Baldeo Lal and others*, A.I.R. (1925) Pat. 703 ; *Kandunni Nair* v. *Ittunni Raman Nair and eight others*, (1930) I.L.R. 53 Mad. 540.

APPELLATE CRIMINAL.

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

H.C. 1955

July 13.

AUNG THEIN (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Penal Code, s. 302 (1) (b) s. 34—S. 302, sub-s. (2), s. 109, Penal Code—Conviction on vicarious liability.

The appellant and another man made a sudden raid at the teashop by firing the Sten-gun and the rifle which each of them had, in the course of which a villager was killed, and the gun shot wounds found on the deceased villager could either be caused by shots fired from a Rifle or from a sten gun, and the evidence as to who shot and actualiy killed the villager was very vague. Appellant was convicted under ss. 302 (*1*) (*b*) and 34, Penal Code and sentenced to death. The question is whether, in the circumstances a reasonable inference can be made that there was a pre-arranged plan or prior concert to kill the deceased so that either of the two persons could individually be made vicariously liable within the meaning of s. 34 of the Penal Code.

Held: Appellant cannot be vicariously convicted for the act of another person, nor can it be held that the killing by one of the appellant's company was in furtherance of a pre-concerted or pre-arranged plan.

The essence of joint liability under s. 34 of the Penal Code is the prior existence of a common intention or formation of a pre-arranged plan which can, under certain circumstances, be inferred, and then the doing of a criminal act in furtherance thereof.

Maung Myint v. *The Union of Burma*, (1948) B.L.R. 379, referred to.

It is not every combination of two or more persons making an attack upon another that one can infer from such joint attack, if the other is wounded or killed thereby the existence of a common intention to do a criminal act in furtherance of such intention within the ambit of s. 34. In other words to attract the provisions of s. 34 there must have been a prior meeting of minds. Several persons may simultaneously attack a man and each can have the same intention, namely, the intention to kill and each can individually inflict a separate blow, and yet none would have the common

* Criminal Appeal No. 233 of 1955 / Criminal Reference No. 16 of 1955. Appeal from the order of the Additional Sessions Judge sitting as Special Judge of Sandoway, dated the 28th day of May 1955 passed in Special Trial No. 8 of 1954.

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intention required under s. 34 of the Penal Code if there was no prior meeting of minds to form a pre-arranged plan. In such a case each, individually, would be liable for whatever injury he caused, but none could be vicariously, convicted for the act of any of the other persons.

Pandurang and others v. *State of Hyderabad*, A.I.R. (1955) S.C. 216, referred to.

Appellant was only an abettor. Conviction and sentence altered to one under s. 302 (2) read with 109, Penal Code and appellant sentenced to transportation for life.

Thein Han, Advocate, for the appellant.

Kyaw Thaung (Government Advocate) for the respondent.

U CHAN TUN AUNG, C.J.—This appeal is against the conviction and sentence imposed upon the appellant Aung Thein by the Special Judge of Sandoway. The appellant was said to have been concerned with another person, Chit Sein, in shooting and killing a villager named Tun Myaing on the 25th July 1953 at Maday village within the Sandoway Police Station jurisdiction.

It appears that on the 25th July 1953 at about 6 a.m. Police Constable Maung Ba Sein (PW 1), Rifleman Maung Ni (PW 11) and NCO E Maung U (P W 12) of the 1st U.M.P. stationed at Zalun outpost went to Maday village, which is about 2 furlongs away from that outpost, for the purpose of getting some foodstuffs. The party arrived at one Sein Pe's tea-shop at about 6·30 a.m. While they were having tea at the tea-shop, Abdul Sofi (PW 2), a motor bus driver, and Cassim (PW 9), who used to go along in Sofi's motor bus, came into the tea-shop after keeping the motor bus outside the tea-shop. According to Maung Ba Sein (PW 1), while he and the other two Military Police personnel E Maung U and Maung Ni were having tea, he saw the appellant and Chit Sein coming down the hill from a

distance of about 100 yards. Both these people were well known to Ba Sein. Aung Thein is said to belong to Zalun village, while Chit Sein belongs to Maday village. Aung Thein was armed with a sten-gun and Chit Sein had a rifle in his hand. As soon as they saw Ba Sein and his party, they told them not to run away and then Chit Sein started firing his rifle. The Military Police personnel ran helter-skelter taking different directions. The villager Tun Myaing who had accompanied the Military personnel also ran in the direction where Abdul Sofi's motor bus was standing. As soon as Tun Myaing got into the motor bus he lay down himself on his face in the body of the bus. Ba Sein and the other constables took their stand at a certain distance taking covers so that they could not be easily seen by Chit Sein and the appellant Aung Thein. In fact, Ba Sein hid himself in the garden behind Sein Pe's tea-shop some 20 yards away from the place where Abdul Sofi's motor bus was. From there Ba Sein saw Chit Sein go up to Tun Myaing and fire a shot from a distance of about 30 yards. The appellant Aung Thein was then said to be behind Chit Sein when Chit Sein fired the rifle at Tun Myaing. Next, Ba Sein heard three bursts of sten-gun shots.

Thus Ba Sein's account of what the appellant and Chit Sein actually did made references only to Chit Sein's having fired his rifle at Tun Myaing. In so far as what the appellant Aung Thein did it was none too clear. Ba Sein could only say that he heard three bursts of sten-gun shots when Chit Sein was firing at Tun Myaing and that the appellant had a sten-gun in his hand.

This part of Ba Sein's story has been substantially corroborated by Abdul Sofi (PW 2), according to whom, of the two persons who came to the tea-shop,

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one was no other than Aung Thein, the appellant, and he had a sten-gun with him. But Abdul Sofi could not say whether it was Aung Thein who shot at Tun Myaing because through fear, he said, he ran towards the *chaung* and hid himself there.

Cassim (PW 9), however, maintains that he was at the tea-shop when the two insurgents, one armed with a sten-gun and the other with a rifle, appeared suddenly there and started firing with their arms from a distance. However, he was not in a position to say definitely whether the appellant was one of the two persons whom he saw on the morning in question. He heard 25 or 30 shots being fired either from a sten-gun or from a rifle. He also heard the two armed persons shouting out to the people in the tea-shop not to run away. When the firing ceased he came out of the hiding place and saw Tun Myaing's dead body near the motor bus. Tun Myaing had gun-shot wounds on his person.

Maung Ni and E Maung U (PWs 11 and 12) maintain that of the two insurgents who came suddenly to the tea-shop the appellant Aung Thein was known to them and both of them recognised him. Aung Thein was with a sten-gun. Both these witnesses ran back to their outpost and reported about the incident to their superior Officer Bo Saw Bwa (PW 10).

Bo Saw Bwa himself gave evidence and stated before the Court that on the morning in question he heard the reports of gun from the direction of Maday village and that soon after Maung Ni came running back and informed him about the attack made by the appellant Aung Thein and one of his men at the tea-shop. E Maung U also came back running and informed him about the attack. He at once proceeded to the scene and there saw Tun Myaing's dead body

near the motor bus just in front of the tea-shop. The witness then wrote down a report which is filed in the proceedings as Exhibit C. The report was sent to the Sandoway Police who treated it as the First Information Report.

The dead body of Tun Myaing was removed to the Civil Hospital, Sandoway, and the Medical Officer Dr. R. Mukherjee (PW 7), who performed the post-mortem examination, found three separate gun-shot wounds on it, besides other internal injuries caused by the penetration of the bullets. He also recovered one bullet from the inner side of the right knee where he found a gun-shot wound $\frac{3}{4}$" by $\frac{1}{4}$" by 2".

The appellant surrendered himself on the 18th February 1954 to Bo Soe Myint (PW 8), a non-gazetted Officer of the 4th U.M.P. at Zalun. Chit Sein, the other companion of the appellant, is said to have absconded and proceedings under section 512 of the Criminal Procedure Code have been taken against him by the Second Additional Special Power Magistrate of Sandoway. Soon after his surrender, the appellant expressed a desire to make a confession and on the 25th February 1954 U Maung Maung Gyi, the 1st Additional Magistrate, Sandoway, recorded the confession of the appellant, Exhibit D.

We have carefully perused the so-called confession made by the appellant before the Magistrate and we are not at all satisfied that the so-called confession given by him is a confession of the crime he has committed. In other words, the appellant has not stated expressly in his confession that he participated in the crime with which he has been charged or that he has actually committed the crime attributed to him. In our view Exhibit D is not a confession at all. The appellant merely stated therein that one Bo Chet Gyi, said to be a leader of the Red Flag Communist

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insurgents stationed in Thaphangyaung village not far away from Maday village, to whose camp the appellant had joined, one day directed him and the other two insurgents, namely, Thein Shwe and Chit Sein, to go and shoot Government soldiers who used to frequent Maday village. On the morning in question he did accompany Thein Shwe and Chit Sein, but he did not go along with them right up to the tea-shop at Maday village, but remained behind in a sugar-cane grove at the top of a hill. Next he heard the firing of rifles and through fear he withdrew himself from hiding and went down the south away from the village.

It will thus be seen that the so-called confession of the appellant does not in any way implicate himself. It was what we would describe as an exculpatory statement and not a confession at all. However, on the strength of the evidence of the eye-witnesses who have deposed to having seen the appellant in the company of Chit Sein and seen him participating in the raid on the village, in the course of which Tun Myaing, one villager, was killed, the learned trial Judge charged the appellant under section 302 *(1) (b)* read with section 34 of the Penal Code holding that it was in furtherance of the common intention which the appellant's party had that Tun Myaing was killed and thereby held that the appellant was responsible along with the other absconding accused.

The appellant had chosen to give evidence on oath. He maintains that on the day in question he and the other two persons, namely, Chit Sein and Thein Shwe, proceeded from Myogwin village to Maday village for purposes of collecting funds for the Red Flag Communists. Myogwin is about 10 miles from Maday village. He and Chit Sein had a rifle each, whereas Thein Shwe was handling a

sten-gun. Half way, that is, when they got to Hingabaung hill, Thein Shwe and Chit Sein proceeded downwards towards Maday village while he remained behind at Hingabaung hill. About two betels-chew later he heard the reports of gun from the direction of Maday village. The two persons then came back and the three of them went together to Sindin village. Appellant denied having participated in the raid on the tea-shop at Maday village. He also denied Bo Chet Gyi, the Commanding Officer of the Red Flag Communists, having ordered him and the other people to go and shoot the Government people at Maday village.

From the facts stated above it will be seen that the appellant's complicity in the alleged shooting along with Chit Sein seems to be fairly established in view of the evidence given by the three Military Police personnel, Maung Ba Sein (PW 1), Maung Ni (PW 11) and E Maung U (PW 12). Though Bo Saw Bwa (PW 10) does not mention the appellant's name in his report to the Police, Exhibit C, which has been treated by the Police as the First Information Report, yet he maintains in his evidence that Maung Ni and E Maung U did mention Aung Thein as one of those who joined in the raid. While at this we may observe that no question was ever put to Bo Saw Bwa either in cross-examination or in examination-in-chief or by the Court why, in spite of what he had already heard concerning the appellant he did not think it fit to mention the appellant's name in his report, Exhibit C, sent to the Police. We consider that this omission is somewhat unsatisfactory. However, when the evidence of Maung Ba Sein (PW 1) is taken together with the supporting evidence given by Maung Ni and

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E Maung U, in addition to the statements made by Abdul Sofi and Cassim, we have not the slightest doubt that on the morning in question the appellant armed with a sten-gun in the company of Chit Sein went down to Maday village and suddenly attacked the people in the tea-shop, in the course of which one villager, Tun Myaing, was killed. The incident took place within the view of everybody and there can be no question of mistaken identity so far as the appellant Aung Thein was concerned, because the appellant had been known to some prosecution witnesses about 10 years before the date of the crime.

Three points have been urged in appeal on behalf of the appellant: Firstly, it is contended that Maung Ni, E Maung U and Ba Sein being all members of the U.M.P. are interested witnesses and that their assertion of having recognised the appellant should not be accepted. The next point urged is that the trial Court should not have relied upon the confession, Exhibit D, said to have been given by the appellant because it was not a confession. Thirdly, it is submitted that the conviction of the appellant on a vicarious liability, that is, under section 302 (1) (*b*) read with section 34 of the Penal Code, was illegal. There is no substance in the first contention at all. No doubt Maung Ni, E Maung U and Ba Sein belong to a unit of the U.M.P. But Tun Myaing, the deceased, was not a member of the U.M.P. He was a villager and we do not really see how U.M.P. personnel are interested witnesses in a case where the death of a villager is concerned. Besides, there is not a shred of evidence why these U.M.P. personnel should falsely swear the identity of the appellant. There is nothing on the record in the way of past animosity or retaliation for any past incident that had

taken place before the alleged crime between these witnesses and the appellant. Abdul Sofi and Cassim are undoubtedly independent witnesses. Though they did not actually say that the appellant was one of the insurgents who came to raid that morning, yet they supported Maung Ni, E Maung U and Ba Sein in that the attack upon the tea-shop was made by two insurgents, one armed with a sten-gun and the other with a rifle. Abdul Sofi was definite that one of the persons who was armed with a sten-gun was the appellant Aung Thein. No doubt these two witnesses never stated seeing the appellant shoot at anybody, but they heard the several shots fired from the guns of the insurgents while they were in hiding and that soon after they found Tun Myaing dead near the motor bus in front of the tea-shop.

As regards the second point, we are prepared to subscribe to the view that Exhibit D is not a confession at all. We have carefully read through it and we find nowhere in it the appellant making any statement implicating himself as one of the participants in the crime. What the appellant has stated is of an exculpatory nature. In effect what is stated there amounts to that he was not present when the alleged shooting took place, but he was away from the scene and that he ran away therefrom as soon as he heard the reports of guns. Furthermore, the sworn testimony the appellant gave before the Court is a total contradiction of what he stated in the so-called confession. Therefore, we must exclude from our consideration any statement made by the appellant in the document, Exhibit D. What we can consider is the sworn statement of the appellant made before the Court.

As regards the third point, there appears to be considerable force in it. When we carefully analyse

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the entire prosecution case we find that the appellant was readily recognised and that he was present when the shooting took place at Sein Pe's tea-shop. He was also seen armed with a sten-gun and sten-gun shots were fired. We also find that he was in Chit Sein's company when Chit Sein fired his rifle. Ba Sein (PW 1) was quite definite that he saw Chit Sein firing a shot at Tun Myaing from a distance of about 30 yards. On the body of Tun Myaing there were three gun-shot wounds. The Medical Officer who gave evidence stated that those gun-shot wounds could either be caused by shots fired from a rifle or from a sten-gun. But, as observed above, one bullet was said to have been extracted from injury No. 3, that is, from inside the right knee of the deceased, and that bullet is said to be the bullet Exhibit No. 4. We really do not know whether that bullet is a sten-gun bullet or a rifle bullet. When a reference is made to the list of exhibits filed at page 10 of the trial record we do not find any description about Exhibit No. 4. It merely recorded three items of things exhibited and nowhere the record shows anything concerning Exhibit No. 4 bullet. We would like to observe that the trial Judge was rather amiss in not taking proper care regarding the items which had been exhibited. Though he has referred in his judgment to Exhibit 4 a bullet, yet we do not find what that is about when a reference is made to the list of exhibits itself. We hope the learned trial Judge will exercise due care in such matters in future.

The essence of joint liability under section 34 of the Penal Code is the prior existence of a common intention or formation of a pre-arranged plan which can, under certain circumstances, be inferred, and then the doing of a criminal act in furtherance thereof.

See *Maung Myint* v. *The Union of Burma* (1). It is not every combination of two or more persons making an attack upon another that one can infer from such joint attack, if the other is wounded or killed thereby, the existence of a common intention to do a criminal act in furtherance of such intention within the ambit of section 34. In other words to attract the provisions of section 34 there must have been a prior meeting of minds. Several persons may simultaneously attack a man and each can have the same intention, namely, the intention to kill and each can individually inflict a separate blow, and yet none would have the common intention required under section 34 of the Penal Code if there was no prior meeting of minds to form a pre-arranged plan. In such a case each, individually, would be liable for whatever injury he caused, but none could be vicariously convicted for the act of any of the other persons. See *Pandurang and others* v. *State of Hyderabad* (2).

The question therefore for determination is whether from the facts established by the prosecution, excluding the so-called confession made by the appellant, can we necessarily infer and reasonably hold that, when the appellant and Chit Sein made a sudden raid at the tea-shop by firing the sten-gun and the rifle which each of them had, and in the course of which one villager Tun Myaing was killed, there was a pre-arranged plan or prior concert to kill the deceased so that either of these two persons, namely, the appellant and Chit Sein, could individually be made vicariously liable within the meaning of section 34 of the Penal Code. We have given anxious consideration in that regard and we feel constrained to observe that in the circumstances obtaining in this

(1) (1948) B.L.R. 379. (2) A.I.R. (1955) S.C. 216.

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case we find it difficult to hold that the appellant can be vicariously convicted for the act of another person; nor can we necessarily infer that the killing of Tun Myaing by one of the appellant's company was in furtherance of a pre-concerted or pre-arranged plan. Whatever view of the case is taken we feel that there is an element of doubt; and this doubt is accentuated when appellant's so-called confession is excluded from our consideration. The appellant had definitely denied in his testimony before the Court that the insurgent leader Bo Chet Gyi had instructed them to go and shoot the Government people. He however averred that they went down towards Maday village for collection of funds. Therefore, after a careful consideration of the entire case and on the strength of the testimony of the eye-witnesses we feel that we are justified in holding that the appellant was one of those who joined Chit Sein and company in shooting at the people found in and near about the tea-shop at Maday village, but that there is certain element of doubt as to whether the shooting was done in pursuance of a pre-concerted or a pre-arranged plan. We hold that the appellant did participate in the attack in the course of which Tun Myaing, a villager, was killed and that the evidence as to who shot and actually killed Tun Myaing, whether it was the appellant or Chit Sein, appears to us to be very vague. However, since the prosecution evidence indicates that two persons, namely, the appellant and Chit Sein were present when Tun Myaing was shot at, we feel that we are on surer grounds, doubtful as we are regarding the common intention, if we hold that the appellant was an abettor in the shooting of Tun Myaing. While at this we notice a curious remark by the Special Judge in his judgment to the following effect:—

" There having been no punishment provided for for the abettors, he (the appellant) must be given extreme penalty."

We really do not understand what the learned Special Judge means when he says no punishment is provided for abettors. If he is only minded to look into the Penal Code carefully he would come across many relevant sections whereby punishment has been provided for abettors of crimes. We do hope that the learned Special Judge would be more careful in future about the observations he made in his judgment especially when it relates to a capital offence.

Such being our view of the case we must set aside the conviction of the appellant Aung Thein under section 302 (1) (*b*) read with section 34 of the Penal Code and the sentence of death imposed upon him thereunder, and in lieu thereof we find him guilty under section 302, sub-section (2), read with section 109 of the Penal Code and we direct that he shall suffer the sentence of transportation for life.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

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

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Nov. 10.

DAW DAW THI (APPELLANT)

v.

U THEIN MAUNG & Co., LTD. AND ONE (RESPONDENTS).*

Urban Rent Control Act, 1948, s. 11 (i) (d), *as amended by Act XLII of 1952—Meaning of the words* "bonâ fide"—*The Rangoon Rent Control Act, 1920.*

The word "*bona fide*" means, in good faith, without fraud or deception; honestly as distinguished from bad faith; openly; sincerely.

In the determination of the question whether a landlord *bonâ fide* requires his land for the purpose of erecting a building thereon, the most vital point is landlord's state of mind at the relevant time.

In Bhulan Singh and others v. *Ganendra Kumar Roy Chodhury*, A.I.R. (1950) Cal. p. 74 at p. 76, followed.

In deciding whether the landlord does really entertain honest intention or not one cannot apply a subjective test, but it must be decided objectively in the context of facts and circumstances relevant in each case.

In so doing, the Court is entitled to evaluate all relevant facts and circumstances relating to the landlord's acts and conducts antecedent to the date of the filing of the suit and also to those at or about the time of the institution of the suit.

The Urban Rent Control Act, 1948, has made stringent provisions against landlords evicting tenants capriciously. The necessity to comply with the provisions in sub-s. (2) of s. 11 to execute a bond should dispel any *mala fide* on the part of the landlord in seeking ejectment of a tenant from his own land.

Messrs. Basu and *Venkatram*, Advocates, for the appellant.

* Civil 1st Appeal No. 23 of 1953 against the decree of the Chief Judge, City Civil Court of Rangoon in Civil Regular Suit No. 396 of 1952, dated the 28th day of November 1952.

Respondent No. 1 in person.

T. K. Boon, Advocate, for the respondent No. 2.

U CHAN TUN AUNG, C.J.—In Civil Regular Suit No. 396 of 1952 of the City Civil Court, Rangoon, the plaintiff-appellant filed a suit for ejectment of the defendants-respondents under section 11 (*1*) (*d*) of the Urban Control Act, 1948 from a piece of land known as Northern Portion of Lot No. 21 in Block No. D-II, measuring 41 '-8" by 60', on which there is a building known as No. 119/121, Sule Pagoda Road on the ground that she required the said land for constructing a building thereon.

It appears that the said land belongs to the plaintiff-appellant and there had been a lease in favour of the first defendant-respondent for 3 years at a rental of Rs. 500 per month. During the subsistence of the said lease, in the year 1946, the first defendant-respondent had constructed a one-storeyed pucca building thereon at a cost said to be about Rs. 19,295 and had sub-let the same to the second defendant-respondent. At the trial, the defendants-respondents contested the suit, denying that the plaintiff-appellant *bonâ fide* required her land for erection of a building thereon. After framing suitable issues, the trial Judge answered them in favour of the defendants-respondents and the plaintiff-appellant's suit was dismissed with costs. The main question for consideration in this appeal is whether Daw Daw Thi, the plaintiff-appellant has established her *bonâ fide* as contemplated in section 11 (*1*) (*d*) of the Urban Rent Control Act, 1948. Section 11 (*1*) (*d*) of the Urban Rent Control Act, 1948, as amended by Act XLII of 1952, reads :

"11(1). Notwithstanding anything contained in the Transfer of Property Act or the Contract Act or the Rangoon

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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, 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, and that he will give effect to such purpose within a period of one year from the date of vacation of the premises by the tenant ; ".

Now, it is an admitted fact that the plaintiff-appellant is the wife of U Ba Saing, *Barrister-at-Law*, a retired District and Sessions Judge, and is quite in affluent circumstances. There is also evidence on the record that U Tin, a well-known engineer, was asked to draw up a plan for the construction of a building on the site in question which would cost about a lakh and thirty thousand rupees. The plan was duly drawn by U Tin and the same was filed as Exhibit (ဣ) in the proceedings, though it had not yet been approved by the Municipal Corporation.

It also appears that in proceeding No. 168-W of 1948-49 of the Controller of Rents, Rangoon, the plaintiff-appellant, as far back as 1948, filed an application under section 14-A (3), read with section 11 (*1*) (*d*) of the Urban Rent Control Act, 1948, for permission to erect a building on the suit land, and annexed to her application, there was a plan of the building which was approved by the Municipal Corporation. The Controller of Rents, by his order dated 17th January 1950 gave the necessary permission to erect the building thereon, after issuing

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notices to the defendants-respondents calling for objection. The defendants-respondents were undoubtedly parties to the said proceeding and yet, they never questioned the permission granted to the plaintiff-appellant by the Controller of Rents, though they could have done so under section 22 (*1*) of the Urban Rent Control Act by making a reference to the Chief Judge of the City Civil Court, Rangoon.

At the trial, the learned trial Judge doubted the *bonâ fide* of Daw Daw Thi's assertion that she required the said land for erection of a building thereon. In the appraisal of her evidence, the learned trial Judge laid much stress on Daw Daw Thi's hostile attitude toward the second defendant-respondent inferrable from an incident whereby after the expiry of the 3 years' lease granted to the first defendant-respondent, the second defendant-respondent instead of approaching her, continued paying the rent of Rs. 1,000 a month to the first defendant-respondent for some time and had suddenly placed the matter before the Controller of Rents who ordered the reduction of rent of the land from Rs. 500 to Rs. 270, and that of the building constructed by the first defendant-respondent, from Rs. 500 to Rs. 460 per month. The learned trial Judge held that this action taken by second defendant-respondent had put out Daw Daw Thi, who thereafter became very bitter towards both the respondents. No doubt, as has been held in *C. Ah Foung* (a) *Chow Fung Mee (a) Chaw Fong Mee* v. *K. Mohamat Kaka and two others* (1), the fact that the landlord took proceedings out of spite because rent was reduced in Rent Control Proceedings may constitute a factor in judging the *bonâ fide* of the landlord. However to our mind, that circumstance alone is insufficient to draw

(1) (1950) B.L.R. p. 346.

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any hostile inference of *mala fide* on the part of the landlord. Other facts and circumstances must be taken into consideration. Stress was also laid on Daw Daw Thi's statement before the trial Court that the cost of construction of the house as per plan Exhibit (က) would be one lakh and thirty thousand rupees, and that she had not that amount. But on a careful scrutiny of the evidence given by Daw Daw Thi and also by U Tin, engineer, we found that though Daw Daw Thi said that she did not have in her hand one lakh and thirty thousand rupees, yet she said that she had the necessary means to build such a house. She stated very definitely as follows, in her examination-in-chief :

" ကျွန်မမှာ ဤ ၃ ထပ်တိုက်ဆောက်ရန်အတွက် ငွေအင်အား၊ ပစ္စည်း အင်အားများနှင့် ပြည့်စုံပါသည်။ "

In cross-examination, she states :

" ကျွန်မမှာငွေအဆင်သင့်ရှိပါသည် " (*vide* page 19 of the proceeding). U Tin also states as follows :

" တရားလို၌ဤအိမ်မျိုးဆောက်ရန် ငွေအင်အားရှိပါသည်။ "

It has been urged upon us that the plan Exhibit (က) was drawn only for the purpose of the suit and that the plaintiff-appellant had no serious intention of building the type of premises as delineated thereon. We regret we cannot subscribe to this view. As far back as 1948, in the proceeding before the Rent Controller, Rangoon, under section 14-A of the Urban Rent Control Act, the plaintiff-appellant submitted an approved plan for building a house on the site in question ; but the plan approved happened to be a two-storeyed building plan which, owing to some subsequent modifications in the Municipal Building Rules along Sule Pagoda Road, became useless, inasmuch as, the Rangoon Corporation thereafter, decided only to allow three-storeyed buildings along

the said Road. A plan to build a house was conceived by the plaintiff-appellant in 1948, which, owing to alterations of the Municipal Building Rules could not be given effect to, and in substitution thereof the plan Exhibit (∞) was drawn up. Surely, this chain of events would not have taken place, had the plaintiff-appellant's intention of erecting a building on her land in occupation of the defendant-respondents been otherwise than *bonâ fide*.

According to the Law Lexicon, the word "*bonâ fide*" means, in good faith; without fraud or deception; honestly as distinguished from bad faith; openly; sincerely. Therefore, in the determination of the question whether a landlord *bonâ fide* requires his land for the purpose of erecting a building thereon, the most vital point is landlord's state of mind at the relevant time. In that connection, the observation of Harries, C.J. in the case of *Bhulan Singh and others* v. *Ganendra Kumar Roy Chodhury* (1) is most apposite and it reads:

> "It appears to me that the premises are *bonâ fide* required by the landlord for the purpose of rebuilding, if the landlord honestly requires them for that purpose. The equivalent of the phrase "*bonâ fide*" is "honestly". It refers to the state of the landlord's mind. The landlord therefore will be entitled to possession as against the tenant if he established that he honestly requires the premises for rebuilding."

Thus, in deciding whether the landlord does really entertain honest intention or not we cannot apply a subjective test—for "devil himself knoweth not the mind of a man"—but it must be decided objectively in the context of facts and circumstances relevant in each case. In so doing, the Court is entitled to evaluate all relevant fact and circumstance relating

(1) A.I.R. (1950) Cal. p. 74 at 76.

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to landlord's acts and conducts antecedent to the date of the filing of the suit and also to those at or about the time of the institution of the suit.

In the two cases referred to by the learned trial Judge, we find that the facts and circumstances are different from those now obtaining in the present case. They were cases where the question of landlord's *bonâ fide* intention was considered with reference to demolition of old structures and re-building new ones thereon for the purpose of landlord's own occupation. Besides, the relevant provisions of the then Rangoon Rent Control Act, 1920 are not quite the same as those in the present Act, in that in the former Act no provision was made whereby the landlord had to execute a Bond to give effect to his intention. Now, in the case under appeal it is not the question of demolition of an old building belonging to the plaintiff-appellant, but it is a question of ejecting the defendant-respondents from her land after the termination of the lease. The first defendant-respondent admits that he has taken only the lease of the land from the plaintiff-appellant, and that the building thereon was constructed at his own expense and the same was sub-let to the second defendant-respondent on his own responsibility. He only pays ground rent of Rs. 500 to the plaintiff-appellant before the fixation of standard rent. He has taken a somewhat indifferent attitude by not seriously contesting the case either at the trial Court or in this appeal. He states in his written statement (*vide* paragraph 8) that it costs him Rs. 19,295 for building a structure on plaintiff-appellant's vacant land and that if that amount is paid to him as compensation, he has no objection to a decree for ejectment being passed against him. Therefore, on a careful appraisal of

all the facts and circumstances obtaining in the case we find the following to be established, tending to show what could have been plaintiff-appellant's state of mind :—

(1) She had in a previous proceeding before the Controller of Rents, as far back as 1948, filed an approved plan to put up a building on her land.

(2) Neither of the defendants-respondents challenged her application by a reference to the Chief Judge of the City Civil Court as permitted under section 22 (*1*) of the Urban Rent Control Act.

(3) A plan for three-storeyed building was drawn up by U Tin, a well-known Engineer, *vide* Exhibit (ω).

(4) Though she had not the ready cash with her, she had the necessary means to put up the building she being a quite well-to-do lady.

(5) She also owns an adjoining site from the sale or mortgage of which she can easily bring in the required sum to build a house.

The Urban Rent Control Act, 1941, has made stringent provisions against landlords evicting tenants capriciously. We have had referred to many other Rent Control Acts in force in India and we find that the provisions in sub-section (*2*) of section 11 of the Urban Rent Control Act are peculiar to Burma. It will been seen therefrom that a landlord has to execute a bond, to give effect to the purpose for which he seeks the eviction of his tenant, within one year from the date of vacation of the land by his tenant. The necessity to comply with this condition should dispel any *mala fide* on the part of the landlord in seeking ejectment of a tenant from his own land.

After giving careful consideration to the entire facts and circumstances of the case, and for the

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reasons stated above, we are of the view that the plaintiff-appellant does *bonâ fide* require the premises in question for erection of a building thereon. We therefore set aside the order of the trial Court, and the plaintiff-appellant Daw Daw Thi will be entitled to a decree for ejectment of the defendants-respondents from the land in question with costs. Since the first defendant-respondent has on his own responsibility put up quite a substantial building thereon, he is allowed reasonable time to remove all things that belong to him from the land in question. The plaintiff-appellant will be required to execute a bond to the satisfaction of the Court below in the sum of K 50,000 with one surety to give effect to the purpose of erecting a building as indicated in the plan Exhibit (ဃ) within a period of one year from the date the land in suit is vacated by the defendants-respondents.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

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

DAW HLA MAY (APPELLANT)

v.

U KO YIN (RESPONDENT).*

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Aug. 22

Appeal under s. 20, Union Judiciary Act—Suit instituted before Urban Rent Control Act came into force—Urban Control Act, 1946, Decree for ejectment—S. 14, rescission of Decree—The Urban Rent Control Act, 1948—Maintainability of execution of ejectment decree—S. 14-A, sub-s. (3), Urban Rent Control Act.

The only point in this appeal is whether the decree for ejectment could be executed without a written permit by the Controller of Rents under s. 14-A of the Urban Rent Control Act.

Held : To an application by a tenant for the rescission of a decree obtained by a landlord, the latter could invoke the provisions of s. 11 (i) (*f*) without a permit in writing from the Controller under s. 14-A of the Urban Rent Control Act, 1948.

Tai Chuan & Co. v. *Chan Seng Cheong*, (1949) B.L.R. p. 86, followed.

Daw Hla May v. *U Ko Yin*, (1951) B.L.R. p. 63 (S.C.), referred to.

S. 14-A of the Urban Rent Control Act only applies to a suit or proceeding by a landlord for ejectment or recovery of possession of any premises agains a tenant or a person permitted to occupy under s. 12 (*1*) on the grounds specified in clauses (*d*), (*e*) or (*f*) s. 11 or clause (*c*) of s. 13 as the case may be.

It has no application to a decree made under s. 14 (*1*) (*a*), *i.e.* to say a decree for ejectment given for non-payment of arrears of rent.

Therefore such a decree for ejectment can be executed without a permit from the Controller of Rents under s. 14-A.

Tun Aung (1), Advocate for the appellant.

Venkatram, Advocate, for the respondent.

U SAN MAUNG, J.—This is an appeal under section 20 of the Union Judiciary Act against the judgment and decree of this Court in Civil Second Appeal No. 52 of 1952 dismissing the appeal against the judgment and decree of the District Court of

* Special Civil Appeal No. 1 of 1955, against the decree of the High Court of Rangoon in Civil 2nd Appeal No. 52 of 1952, dated the 18th November 1954.

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U SAN MAUNG, J.

Mandalay in Civil Miscellaneous Appeal No. 10 of 1951. The facts of the case which have been fully set out in the judgment under appeal are briefly these.

The respondent U Ko Yin obtained a decree for the ejectment of the appellant Daw Hla May and for the recovery of arrears of rent in Civil Regular Suit No. 16 of 1946 of the Court of the 1st Assistant Judge, Mandalay, which was instituted before the Urban Rent Control Act, 1946 came into force. Subsequently, U Ko Yin applied for the ejectment of Daw Hla May and for recovery of the arrears of rent decreed in the aforesaid suit. In the meantime the Urban Control Act, 1946 came into force and Daw Hla May paid into Court the arrears of rent decreed against her and then made an application under section 14 of the Act for the rescission of the ejectment decree. However, neither the respondent U Ko Yin nor the appellant Daw Hla May proceeded with their respective applications and proceedings relating to them were closed. Subsequently, Daw Hla May made a fresh application for the rescission of the ejectment decree. This was dealt with by the 1st Assistant Judge, Mandalay, in Civil Miscellaneous Case No. 22 of 1947. U Ko Yin filed a written objection to Daw Hla May's application on the 22nd of May 1947. The Urban Rent Control Act, 1948 came into force on the 17th January 1948. On the 25th February 1948, U Ko Yin filed an application for possession of the premises on the ground that he required it *bonâ fide* for his residence. Thereafter, the learned Assistant Judge, after due enquiry into U Ko Yin's contentions, rejected Daw Hla May's application for the rescission of the ejectment decree on the ground that the premises were reasonably and *bonâ fide*

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required by U Ko Yin for his own occupation. The appellant Daw Hla May's appeal to the District Court of Mandalay against the order dismissing her application for the rescission of the decree being unsuccessful, she preferred a second appeal to this Court. She was successful in Civil Second Appeal No. 101 of 1948. The learned Judge, however, refrained from rescinding the decree but ordered that the decree for ejectment would be altered to the extent that it should not be executed for two years from the date of his order provided that Daw Hla May paid the rent regularly and was not guilty of conduct mentioned in section 11, clause (*c*) of the Urban Rent Control Act, 1946. U Ko Yin preferred an appeal under section 20 of the Union Judiciary Act against the judgment and decree of a Single Judge of this Court and a Bench of this Court in Special Civil Appeal No. 1 of 1949 set aside the judgment and decree in Civil Second Appeal No. 101 of 1948, thereby restoring the order of the Assistant Judge in Civil Miscellaneous Case No. 22 of 1947. The appeal by Daw Hla May to the Supreme Court was unsuccessful so that the order of the Assistant Judge, Mandalay, refusing to rescind the ejectment decree against Daw Hla May stood confirmed. Subsequently, U Ko Yin applied for execution of the decree obtained by him in Civil Regular Suit No. 16 of 1946 and the same was dealt with in Civil Execution Case No. 3 of 1951 of the Assistant Judge, Mandalay. Daw Hla May objected to the application for execution of the decree on various grounds set forth in the judgment under appeal. The learned Assistant Judge, however, disallowed the objection and ordered the execution to proceed on the decree-holder U Ko Yin executing a bond of Rs. 1,000 as required under section 13 (*l*)

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(*c*) of the Urban Rent Control Act, 1948, that the premises would be occupied by himself. Daw Hla May again appealed to the District Court of Mandalay and the learned District Judge upheld the order of the 1st Assistant Judge and dismissed the appeal. Daw Hla May, therefore, appealed against the judgment and decree of the District Court confirming the order of the Assistant Judge to proceed with the execution of the ejectment decree and the same was dealt with by this Court in Civil Second Appeal No. 52 of 1952. In that appeal only two grounds were urged by the learned Advocate for the appellant:

(1) That the application of U Ko Yin to execute the ejectment decree in Civil Regular Suit No. 16 of 1946 was incompetent without a permit by the Controller of Rents under sub-section (*3*) of section 14-A of the Urban Rent Control Act; and

(2) That the decree-holder U Ko Yin was estopped from executing the ejectment decree because he had been accepting Rs. 50 per mensem as rent from Daw Hla May since the passing of the ejectment decree against her.

Both these contentions were rejected by the learned Judge U Ba Thoung, J. who dismissed the appeal of Daw Hla May with costs.

The only point urged by the learned Advocate for the appellant Daw Hla May in this appeal is that the decree for ejectment obtained by the respondent U Ko Yin could not be executed without a permit in writing by the Controller of Rents under section 14-A of the Urban Rent Control Act.

What the learned Advocate contends is that, notwithstanding the fact that U Ko Yin was successful in resisting the application of Daw Hla May for the rescission of the ejectment decree on the ground that the premises were reasonably and *bonâ fide* required by him for his own occupation *vide* clause (*f*) of section 11 (*1*), Urban Rent Control Act, U Ko Yin would be precluded from carrying the ejectment decree into effect without producing the permit mentioned in section 14-A as the word "proceeding" occurring therein must be deemed to include proceedings in execution of a decree. In our opinion, this contention cannot be allowed to prevail. Sub-section (*2*) of section 14 of the Urban Rent Control Act, 1948 in so far as is relevant reads:

> "Where any order or decree of the kind mentioned in sub-section (*1*) of section 11 is made before the commencement of the Act and the order or decree has not been executed, and the Court is of opinion that such order or decree would not have been made or given if the provisions of section 11 were in force at the time when the order or decree was made, the Court shall, on an application by the tenant, rescind or alter the order or decree in such manner as it thinks fit for the purpose of giving effect to this Act; and the provisions of sub-section (*1*) of section 11 shall for the purpose of such application be deemed to be applicable to the suit or proceeding in which such an order or decree was made."

Therefore in considering the application of Daw Hla May for the rescission of the decree obtained by U Ko Yin in Civil Regular Suit No. 16 of 1946, that decree must be deemed to have been made under section 11 (*1*) (*a*) of the Urban Rent Control Act. The application was resisted by U Ko Yin on the ground mentioned in section 11 (*1*) (*f*) and as held in the case of *Tai Chuan & Co.* v. *Chan Seng*

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Cheong (1), U Ko Yin could invoke the provisions of clause (*f*) without a permit in writing from the Controller under section 14-A of the Urban Rent Control Act, 1948. In this connection, an extract of the judgment of the Supreme Court in *Daw Hla May* v. *U Ko Yin* (2) may be usefully quoted:

"Before us Dr. Ba Han for the appellant contended that the document exhibited by the respondent before the 1st Assistant Judge of Mandalay on the 25th February 1948 could not be acted upon by the Court in the absence of a certificate from the Controller under section 14-A of the Rent Control Act of 1948. He says that this document was intended to initiate a proceeding by a landlord for recovery of possession of the premises against a tenant on the grounds specified in clause (*f*) of section 11 of the Act and that in the absence of a certificate from the Controller the Court had no jurisdiction to determine the issue whether the premises are reasonably and *bonâ fide* required by the landlord for his residence. But when it was pointed out to him that the document is also reasonably capable of being treated as an objection made to the appellant's application for rescission of the decree, that the Courts below had in fact treated the document in that sense and that section 14 (*2*) of the Act clearly indicates that the Court on an application for rescission must decide whether the order or decree sought to be rescinded 'would not have been made or given if the provisions of section 11 were in force or applicable thereto at the time when the order or decree was made' the learned counsel frankly admitted that he could not contest the competence of the 1st Assistant Judge to reject the appellant's application for rescission on the grounds taken by that learned Judge. The decision of this Court in *Tai Chuan & Co.* v. *Chan Seng Cheong* (1) is clearly in point."

Having successfully resisted the application of Daw Hla May under section 14 (*2*), the decree obtained by U Ko Yin in Civil Regular Suit No. 16 of 1946 remains in full force and this decree must be deemed to be one under section 14 (*1*) (*a*)

(1) (1949) B.L.R. p. 86. (2) (1951) B.L.R. p. 63 (S.C.)

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of the Urban Rent Control Act, that is to say, a decree for ejectment given for non-payment of arrears of rent. To such a decree, section 14-A of the Urban Rent Control Act, 1948 has no application as it only applies to a suit or proceeding by a landlord for ejectment or recovery of possession of any premises against a tenant or a person permitted to occupy under section 12 (*l*) on the grounds specified in clause (*d*), (*e*) or (*f*) of section 11 or clause (*c*) of section 13 as the case may be. Therefore the decree for ejectment obtained by U Ko Yin in Civil Regular Suit No. 16 of 1946 can be executed without a permit from the Controller of Rents under section 14-A.

For these reasons the appeal fails and must be dismissed with costs. Advocate fees five gold mohurs.

U CHAN TUN AUNG, C.J.—I agree.

APPELLATE CRIMINAL

Before U Thaung Sein, J. and U Po On, J.

H.C. 1955

July 1.

HLA KYWE AND TWO OTHERS (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

Penal Code, ss. 302 (1) (b) 34, 376 and 326.

Held: It is a well established practice of the Court not to convict an accused of rape on the uncorroborated testimony of the woman alone.

Kyaw (1) and *Kyaw* (2), Advocates, for the appellants.

U Chit (Government Advocate) for the respondent.

U THAUNG SEIN, J.—These are three appeals by Maung Hla Kywe, Maung Kan Sein and Maung Tun Shwe who have each been convicted by the learned First Special Judge (Sessions Judge) Pyapôn on three counts under sections 302 (1)(*b*) read with section 34, 376 and 326 of the Penal Code and sentenced to Death, 5 years and 7 years rigorous imprisonment respectively on these charges. The case against them was that they had jointly murdered one Maung Aung Mya and also raped and inflicted grevious injuries on his wife Ma Lay Kyin.

The deceased Maung Aung Mya was the son of an ex-headman of Byaingazi village in Pyapôn District named U Ba Tun (PW 1). It appears that sometime in 1953 U Ba Tun who had served as headman for about five or six years was replaced by

* Criminal Appeal Nos. 225—227 of 1955. Appeal from the order of the 1st Special Judge of Pyapôn, dated the 19th day of May 1955 passed in Criminal Regular Trial No. 14 of 1954.

one U Aye Maung and that these two individuals have been on inimical terms ever since that date. According to U Ba Tun, the murder of his son and the rape of his daughter-in-law was the direct result of a foul plot engineered by U Aye Maung. It should be noted that U Aye Maung featured as a co-accused with the three appellants in the trial Court but fortunately for him, was acquitted by the learned Special Judge.

The facts leading up to the murder of Maung Aung Mya are briefly as follows. The deceased and his wife Ma Lay Kyin lived in a field hut outside Byaingazi village along with their two children the eldest of whom was only two years old. On the night of the 14th November 1954, this family retired to bed oblivious of the fate which awaited them. At about 7 a.m. of the following morning, the corpse of Maung Aung Mya was found at a little distance from the hut and covered with multiple injuries while his wife Ma Lay Kyin (PW 5) lay motionless in the cowshed attached to the hut. There is conflicting evidence as to whether she was conscious at the time when her father U Ba Tun (PW 1) and sister-in-law Ma Kalama (PW 2) and brothers-in-law Maung Sein Soe (PW 3) and Maung Shwe Maung (PW 4) arrived at the scene of crime. Ma Kalama, Maung Sein Soe and Maung Shwe Maung had gone to the field hut of the deceased Maung Aung Mya to reap paddy and were shocked to find Ma Lay Kyin prostrated in her cowshed and her husband missing from the hut. Word was sent to the father U Ba Tun who arrived in haste with several other villagers and before long the dead body of Maung Aung Mya was discovered in a neighbouring stream. According to U Ba Tun, Ma Lay Kyin was unconscious at the time and only regained her senses on receiving some

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first aid. He tried to modify this statement in the latter part of his evidence, but this modification can hardly be accepted as he repeated the former story in the F.I.R (Exhibit A) lodged at the Police Station shortly after the incident. On the other hand Ma Kalama and her group are emphatic that Ma Lay Kyin was in possession of her full senses but could not move owing to the severe *dah* cuts on her head and other parts of the body. They have deposed that, on questioning Ma Lay Kyin, they were shocked to learn that the three appellants Maung Hla Kywe, Kan Sein and Tun Shwe along with the headman U Aye Maung had visited the hut during the night armed with *dahs* and a gun and that in addition to murdering Maung Aung Mya, the three appellants had also raped Ma Lay Kyin and finally cut her with a *dah*. Oddly enough there was no mention of the two children who were presumably unhurt.

As might be expected, hurried arrangements were made to rush Ma Lay Kyin to the hospital at Pyapôn and she was brought to the village by boat. Here she was met by the headman U Aye Maung who according to her was one of the four nocturnal visitors to the hut. In the presence of a crowd of villagers she made a statement which was duly recorded by U Aye Maung (as per Exhibit B in the trial record) and denounced the appellant Maung Tun Shwe of having led away her husband Maung Aung Mya and cut him to death and also that the three appellants had raped and cut her. There was no mention of the headman U Aye Maung in that report and according to U Ba Tun, Ma Lay Kyin remarked that she would denounce the name of the fourth *lusoe* at the hospital. This was flatly denied by several *lugyis* who were present at the scene and heard the

report. Be that as it may, Ma Lay Kyin was taken to the hospital and so grave was her condition that a magistrate was called in to record her dying declaration. Fortunately for her, she recovered from the injuries and was thus able to give evidence in the trial Court as to what actually transpired on the fateful night of the 14th November 1954. As pointed out by the learned trial Judge the case for the prosecution rests almost entirely on her evidence and we propose therefore to examine her deposition in detail.

At the outset it may be noted that in so far as her denunciation of the headman U Aye Maung was concerned, this was not accepted by the learned trial Judge and hence the acquittal of this accused. She relates that on the night in question she fell asleep with her husband and two children beside her and woke up with a start at about 11 p.m. on hearing footsteps coming up the hut. There was no light inside the hut but Ma Lay Kyin is positive that she heard the intruders uttering abuses and she easily recognised the voice of the appellant Maung Tun Shwe who is well known to her. Besides this—so says Ma Lay Kyin—an electric torch was flashed by one of the *lusoes* and in the glow of that light she saw the face of the appellant Tun Shwe. She continues and states that Tun Shwe came up to her husband and demanded a gun saying that as the son of an headman he (Tun Shwe) must own such a weapon. Maung Aung Mya denied possession of a gun but to no avail and was led out with his hands tied behind his back. Meanwhile another *lusoe* entered the room with an electric torch and she recognised him as the appellant Hla Kywe. He came up to her and remarked that he was a politician (နိုင်ငံရေးသမား) and so saying raped her. He then left the room and yet

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another *lusoe* came in and Ma Lay Kyin recognised him as the appellant Maung Kan Sein. He also raped her and went out of the room only to find that the other appellant Maung Tun Shwe had returned and was apparently waiting his turn. Ma Lay Kyin deposes that he also came into the room and raped her. It is not clear where the children were during the successive rape by the appellants. To continue with the sequence of events, Ma Lay Kyin looked out of the window of her bedroom and to her surprise saw the headman U Aye Maung sitting calmly outside the hut. He did not however attempt to molest her in any way. A short while later the appellant Tun Shwe called out to her to come outside but she replied that the children could not be left alone. The appellant Maung Tun Shwe then explained that her husband was anxious to talk to her and she accordingly came out of the room. As she stepped into the cowshed adjoining the bedroom, the appellant Tun Shwe dealt her a terrific blow on the head with a *dah* and she fell unconscious on the ground. She regained consciousness at about 4 a.m. only on hearing her eldest child calling out " Mother. Mother " but she was unable to move and remained in that position till her relatives arrived at about 7 a.m. She asserts that immediately on the arrival of her relatives she denounced the three appellants and the headman U Aye Maung as the *lusoes* responsible for the murder of her husband and the rape of herself. From thence, she was taken before the headman U Aye Maung but obviously could not possibly denounce his name and therefore remarked that the name of the fourth *lusoe* would be disclosed to the doctor at the Pyapôn hospital. She remembers that her statement was duly recorded by U Aye Maung

but cannot understand why the portion relating to the fourth *lusoe* has been omitted.

That in short was the main gist of Ma Lay Kyin's account of the attack on her hut. Needless to say, in order to convict the appellants on her testimony there must be satisfactory corroboration of her evidence as the alleged recognition of the *lusoes* took place during a dark night. If she was raped as alleged by her then indeed she should have had no difficulty in recognising the ravishers especially if they were well known to her. Admittedly she was not medically examined as to signs of rape and from the evidence on record it is not clear whether she mentioned this fact to the doctor who attended on her. No doubt, her life was in danger at the time of her admission to the hospital and the cuts on her head and face needed more attention than any signs of rape. But at the same time we are unable to understand why the police made no attempt to seize the *longyi* worn by her on the night in question, for purpose of chemical examination. According to her, the *longyi* was only changed at the hospital. As far as we can see the police do not appear to have paid any serious attention to the charge of rape. Now, it is a well established practice of the Courts not to convict an accused of rape on the uncorroborated testimony of the woman alone. In the present case we have not been able to trace any corroboration of Ma Lay Kyin's evidence in so far as the charge of rape is concerned and this fact is not seriously disputed by the learned Government Advocate appearing for the Union of Burma.

The question then arises whether there is any reliable corroboration of Ma Lay Kyin's evidence in other respects ? It must be remembered that her father-in-law U Ba Tun (PW 1) and U Aye Maung

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the headman have been on the worst of terms for some time past. U Ba Tun has rather frankly admitted that he and U Aye Maung have resorted to charges and counter-charges of misconduct and misappropriation against each other before the Deputy Commissioner, Pyapôn. Besides this, some relatives of U Ba Tun have even been arrested by U Aye Maung on reports lodged by some of the appellants. Under the circumstances, the evidence of the witnesses on both sides will have to be received with caution. Take for instance, the story that in the earlier part of the night in question, the three appellants turned up at the house of one Maung Aye (PW 8) armed with two guns and tried to entice him into joining their party. They are supported by one Maung Aye Sin (PW 10) who is alleged to have visited Maung Aye's house and there met the three appellants. On the morning following the murder of Maung Aung Mya, Maung Aye reported to U Kaung Tone (PW 11) and U Chit Sein (PW 14) two *lugyis* of the village that the three appellants had attempted to compel him (Maung Aye) to accompany them during the night on a nefarious purpose. It was urged on behalf of the prosecution that this evidence goes to strengthen and corroborate Ma Lay Kyin's story of the attack on her hut. But the evidence of U Hla (PW 7) another *lugyi* and relative of Ma Lay Kyin clearly disproves the above story. According to this witness, all that Maung Aye reported was that the three appellants had approached him to buy them some liquor and he was unable to oblige them as his wife was ill. Add to this, that the wife of the appellant Maung Hla Kywe was in a critical condition at the time and it is absurd to suggest that he could have been roaming about in the village. That she was seriously ill was established

by the fact that she died a few days later. Then again, it is altogether incredible that the three appellants could have gone round the village carrying guns in full view of the villagers. In short, there is reason to believe that as a result of the enmity between U Ba Tun and U Aye Maung some of the villagers may be divided into hostile groups and that Maung Aye was a supporter of U Ba Tun.

Next, it is important to ascertain the exact nature of the denunciation by Ma Lay Kyin on the morning after the incident. She says of course that when Ma Kalama and other relatives arrived at the scene she was fully conscious and denounced the three appellants and the headman U Aye Maung. If that be so, it is inexplicable as to how her father-in-law U Ba Tun reported in the F.I.R. (Exhibit " A ") that according to his son Shwe Maung (PW 4) who was one of the early arrivals at the hut, the assailants were unknown and that Ma Lay Kyin was in a semi-conscious state. It is idle for Maung Shwe Maung and his relatives to try and make out that Ma Lay Kyin did in fact mention the names of the three appellants and U Aye Maung immediately on their arrival at the hut. That she did not make any such denunciation is borne out by Maung Tun Tin (PW 6) the father of Ma Lay Kyin who met Shwe Maung soon after his return from the hut and he is positive that the names of the *lusoes* were not disclosed to him.

After all, there were several neighbours of Ma Lay Kyin and among these was one Ma Pwa Kin. She was admittedly at the scene along with Shwe Maung and others and heard Ma Lay Kyin's report. But strangely enough, she was not examined as a witness though her name featured in the additional list of witnesses. It appears that she was

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U THAUNG SEIN, J.

waived by the prosecution and there is thus no independent witness to testify to the exact nature of the report by Ma Lay Kyin. The only individuals who support Ma Lay Kyin are her father-in-law and his children. But obviously they can hardly be relied upon as they were apparently bent on incriminating the headman U Aye Maung at any cost. It has been suggested by the defence that Ma Lay Kyin was tutored by U Ba Tun into denouncing U Aye Maung and the three appellants who are closely connected to the latter. From the evidence on record, it would appear that U Ba Tun and his children conferred at the hut before bringing Ma Lay Kyin to the headmam U Aye Maung's house. U Ba Tun was prepared to counter this suggestion and thus strenuously denied that he had accompanied Ma Lay Kyin in the boat from the hut to the headman's house but there is indisputable evidence which we need not reiterate to show that he was on that boat. On arrival at the headman's house, Ma Lay Kyin denounced the three appellants only despite U Ba Tun's prompting not to be afraid and to state all within her knowledge. It was only later that she added U Aye Maung's name at the hospital and there can be little doubt that this was due to tutoring by U Ba Tun. The addition of U Aye Maung's name among the *lusoes* was the worst move planned by U Ba Tun as it only helped to discredit Ma Lay Kyin. As pointed out by the learned trial Judge, it is impossible to accept her statements as regards the recognition of U Aye Maung whom she is alleged to have seen in the moonlight. In our opinion, Ma Lay Kyin is prone to exaggeration and in the habit of making wild and unfounded allegations *e.g.* the charge against the headman U Aye Maung.

On the whole, we consider that it would be altogether unsafe to place implicit faith in the evidence of Ma Lay Kyin especially as the three appellants have not been on good terms with U Ba Tun for some time past. In addition they are the followers of U Aye Maung and in all probability were suspected of the crime by U Ba Tun and his family. Under the circumstances, we are not prepared to hold that the case against the three appellants was proved beyond all reasonable doubt and the appeals must accordingly be allowed.

The appeals by Maung Hla Kywe, Maung Kan Sein and Maung Tun Shwe are accordingly allowed and the convictions and sentences passed on them are hereby set aside and they are acquitted and released so far as this case is concerned.

SPECIAL BENCH (APPELLATE CIVIL).

Before U Chan Tun Aung, Chief Justice, U San Maung and U Ba Thaung, JJ.

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Dec. 12.

IN THE MATTER OF MESSRS. L & T, A FIRM OF ADVOCATES.*

Bar Council Act—S. 10 (1)—Professional or other misconduct—Inquiry under s. 11—S. 42, Legal Practitioners' Act—Agreement for fees contingent on success—Unprofessional—Reason for the rule—Duty of Advocate—Reasonable remuneration—Fraud.

TH purchased a large quantity of imported matches from NAAFI. He was assessed with duties of about K 60,000 which included excise duty of K 20,000. TH approached L & T a firm of Adovcates for professional service. It was apparent or could be found with a little diligence that no excise duty was payable on imported matches. A written contract was entered into between TH and L & T. It provided that if TH was relieved of the excise duty of K 20,000 L & T would get a fee of K 10,000 but if the duty remained at K 20,000 L & T would get a fee of K 3,400. No mention was made of any other duty in the agreement. A fee of K 10,000 was paid. As the result of the action taken by L & T, TH was exempted from payment of excise duty but his total duty was increased to K 78,750. TH finding that the duty payable instead of getting decreased has increased considerably, asked for the return of K 6,600. L & T refused to return the sum on the ground that according to the terms of the written contract, TH had been exempted from the payment of the excise duty and therefore they were entitled to the full fees of K 10,000.

Held: The Advocates were guilty of professional misconduct on two counts—(*a*) They had entered into an agreement for fees contingent upon the success of the case and (*b*) Under the circumstances of the case, they by adhering to the letters of the contract had no right to retain the whole fee of K 10,000.

The Legislature by not defining "professional or other misconduct" mentioned in s. 10 of the Bar Council Act, intends to leave to the discretion of the High Court to judge whether the act complained of, is in accordance with the professional ethics or is likely to embarrass the administration of justice.

An Advocate is bound to conduct himself in a manner befitting the High and honourable profession to whose privilege he has been admitted and if he departs from the high standards which the profession has set for itself in professional manner, he is liable to disciplinary action.

An Advocate who earns a fee by entering into an agreement contingent upon the success or otherwise of the case with which he has been entrusted, acts very improperly and is unworthy of the legal profession. Such an agreement for fees smacks of a deviation from the high standard of professional ethics required of an Advocate of the High Court. Such an agreement amounts to a promise by a client not only to pay the lawyer a part of the subject-matter

* Civil Misc. Application No. 24 of 1954, In the matter of Messrs. L & T., Advocates, High Court.

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under litigation but the quantum of fees is made dependent upon the success or otherwise of the litigation.

If an Advocate were to refuse to accept a case unless assured of a certain percentage of the amount involved, he is insisting upon two factors which are of major consideration in legal ethics : first, he is placing remuneration above the rendering of service and second, he is tempted to win his case by unfair means in proportion as his prospective fees varies. It may tempt the lawyer to unnecessary litigation. The objection to contingent fee is that it subordinates his professional service as a lawyer as to the possibility of remuneration in the case they have taken up and thereby introducing gambling in litigation.

Though under s. 42 of Legal Practitioners' Act an Advocate is entitled to settle the terms of his engagement, the fixing of fees and settling of terms of engagement between a lawyer and his client are not without restrictions, and must be within the bounds of professional propriety. Their relationship between the client and the lawyer is one of a fiduciary character. The latter stands in a position to dominate the will of the former. Unless the transaction is on the face of it not unconscionable, the burden that the contract is free from undue influence is on the lawyer.

The paramount consideration for an Advocate is not the making of money or the earning of the fee for the work done by any means, but the promotion of administration of justice by fair and righteous means.

An Advocate is obliged to see that in addition to his fair and just remuneration he does not use his privileged position for the purpose of putting money improperly into his pocket.

In the matter of G. a Senior Advocate of the Supreme Court, A.I.R. (1954) S.C. p. 557 ; *Ganga Ram v. Devi Das*, 42 Pun. Record, (1907) p. 280 ; *In the matter of Moung Htoon Oung, an Advocate for the Record's Court at Rangoon*, D. Sutherland's Weekly Reporter, Vol. 21, p. 297, approved and followed.

In the matter of R., an Advocate, Madras, A.I.R. (1939) Mad. p. 772 ; Organization and Ethics of the Bench and Bar by Frederick C. Hicks, Professor of Law, Yale University at p. 304, quoted and referred to.

Allegation of fraud must be founded upon some definite evidence. Suspicion is not sufficient however grave it might be.

Central Bank of India Ltd. v. Guardian Assurance Company Ltd. and another, A.I.R. (1936) P.C. p. 179, followed.

Tun Aung, Advocate on behalf of the Bar Council.

Kyaw Din, Advocate, for the respondents.

Mya Thein (Assistant Attorney-General) as *Amicus Curiae*.

U CHAN TUN AUNG, C.J.—On complaints made by Tan Teong Hin, Manager of Bee Hwa Hin Company, No. 45 of 123rd Street, Rangoon (*vide*

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Exhibit (∞) to (1) the Attorney-General, Burma, President of the Bar Council; (2) the Honourable Chief Justice of the Supreme Court; (3) the Honourable Chief Justice of the High Court and (4) the Registrars of Supreme and High Courts, against the respondents Mr. L. & Dr. T, who are a Firm of Lawyers in partnership under the name and style of Messsrs. L. & T. for certain alleged professional misconduct, the Registrar of the High Court, in his letter No. 349/8 D.R-49, dated 17th June 1949 referred the matter to the Bar Council for enquiry under section 11 of the Bar Council Act. The Bar Council, after a lengthy enquiry lasting nearly 7 years, returned its finding to this Court upon seven charges framed by it against the Advocates concerned. We consider that for the proper understanding of the case, some antecedent facts leading to the complaint filed by Tan Tong Hin should be set out, and they are briefly as follows :

In the year 1945 soon after the reoccupation of Burma by the Allied Forces, a provision store generally called "NAAFI Store" was set up in Rangoon by the military authorities primarily for the purpose of supplying stores and provisions to the fighting forces. In the year 1947, owing to the abrupt termination of the War, the NAAFI Store found that there was a surplus of stores among which were some 20,000 gross foreign made matches of assorted brands. They therefore advertised, inviting tenders for the purchase of the surplus commodities including the twenty thousand gross of matches in the local papers, (*vide* Exhibit A). The notice sets out *inter alia* that the tenderers are advised that only custom duty as assessed by the Collector of Customs, Rangoon, would have to be paid before any goods could be removed from the Stores. Pursuant to this

notice, the applicant Tan Tong Hin, proprietor of Bee Hwa Hin and Company offered to buy the matches for a sum of Rs. 1,36,000 agreeing to abide by the terms for the payment of custom duty as set out therein. The matches being foreign matches the standard rate of duty payable for them under the Burma Tariff (Amendment) Act, 1946 (Act No. 37 of 1946) was as follows:

THE FIRST SCHEDULE.

SECTION XV.

Miscellaneous Commodities not Otherwise Specified.

Item No.	Name of article	Standard rate of duty
301	Matches, undipped splints and veneers—	
	(*a*) Matches—	
	(1) in boxes or booklets containing on an average not more than 40 matches.	The rate at which excise duty is for the time being leviable on such matches manufactured in Burma *plus* ten annas per gross of boxes or booklets.
	(2) in boxes or booklets containing on an average more than 40 but not more than 60 matches.	The rate at which excise duty is for the time being leviable on such matches manufactured in Burma *plus* fifteen annas per gross of boxes or booklets.
	(3) in boxes or booklets containing on an average more than 60 but not more than 80 matches.	The rate at which excise duty is for the time being leviable on such matches manufactured in Burma *plus* Rs. 1-4 per gross of boxes or booklets.

However, it appears that the Financial Commissioner, Commerce, Burma, had in his letter No. 562/595/4C-29/1946 as amended by letter No. 1/16/4C-29/1946, dated 2nd October, 1946, fixed the custom duty on the NAAFI Stores issued to civilian consumers at 20 per cent *ad valorem* and the NAAFI

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authorities therefore thought that Tong Hin was entitled to take delivery of the said matches on payment of the agreed purchase price and Rs. 27,200 custom duty on the basis of 20 per cent *ad valorem*. On a reference to the Chief Collector of Customs, the NAAFI authorities discovered that in addition to the custom duty at the amended rate of 20 per cent, the buyer was also to pay the excise duty. NAAFI also got the confirmation of this requirement when they made a reference to Mr. G. Samuel, I.C.S. (the then Collector of Rangoon) who pointed out that the sale of unbanderolled matches was prohibited under the Matches(Excise Duty) Act, and accordingly, instructions were issued to the custom authorities not to deliver the said matches to Tong Hin unless, in addition to the 20 per cent custom duty, the requirements of banderolling under Notification (Central Revenue) No. 8 of 16th June, 1934 issued under section 8, sub-section (2) of the Matches (Excise Duty) Act was complied with. Here, we may note that under section 8 of the Matches (Excise Duty) Act, 1934, banderolling on matches is a requirement which cannot only affect the matches manufactured in Burma but also the foreign matches after the issues of the Notification (No. 8) referred to. It appears that Notification No. 8, dated 16th June 1934 of the Finance Department (Central Revenue), as amended thereafter from time to time, though issued by the Government of India, yet it remained effective as existing Burma Law, not only by virtue of section 148 of the Government of Burma Act, 1935, read with Burma Laws Adaptation Act, 1940, but also by virtue of section 8 of the Union of Burma Adaptation of Laws Order, 1948 on Burma's attainment of independence. Therefore, matches of foreign origin are, in view of the Notification referred

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to, unless the government exempts the operation of the said Notification, under sub-section (*4*) of section 8 of the Matches (Excise Duty) Act, liable to be banderolled when they are being offered for sale or kept for sale, and the penalty for contravention of such direction is imposition of fine which may extend to Rs. 1,000 or Re. 1 for every packet or booklet of matches in respect of which the offence is committed [*vide* sub-section (*2*) of section 12 of the Matches (Excise Duty) Act]. Confronted with these demands, not only the custom duty of 20 per cent but also the demand from the Excise Authorities, which in all, according to Tan Tong Hin, amounted to nearly Rs. 60,000, he engaged the professional services of Messrs L. & T. on the 11th April, 1947 through one Tan Eng Kok, Assistant Manager of the Chinese Bank of Communication, for the exemption of the said duty by entering into a written agreement Exhibit (ω) set out hereunder. In the course of this order, we shall set out more fully how and under what circumstances applicant Tan Tong Hin got into contact with Messrs. L. & T. and eventually engaged them. The agreement reads :

" We Messrs. Bee Hwa Hin Company, No. 97, Godwin Road, Rangoon, agree to pay Messrs. Leong & Maung Thein, Advocates, 61, Barr Street, Rangoon, the following sums as their professional fees, re. excise duty on NAAFI matches :—

(1) If no excise duty whatever is payable on matches purchased, then Rs. 10,000 (Rupees ten thousand only).

(2) If only Rs. 20,000 is payable as excise duty, Rs. 3,400 (Rupees three thousand and four hundred only).

(Sd.) TONG HIN,

Rangoon, 11th April, 1947. *Messrs. Bee Hwa Hin & Co.*

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Pursuant to the said agreement, a sum of Rs. 10,000 was paid to Messrs. L & T who issued the receipt Exhibit (ခ), wherein it was acknowledged that the said sum of Rs. 10,000 was received from Tan Eng Kok. The Exhibit (ဃ) agreement was typed out in the office of Dr. T. and the same was handed over to Tan Eng Kok, who in turn had it signed by Tan Tong Hin. Having thus obtained a fee of Rs. 10,000 Dr. T interviewed the Assistant Collector of Customs, and presented an application for exemption of excise duty ; thereafter, he presented an appeal to the Commissioner of Excise before whom he was said to have argued on the 22nd April, 1947. Next, some time in May, he interviewed Mr. Rathbone, the then Secretary to the Financial Commissioner and ultimately, he argued the matter before the Hon'ble Thakin Mya and U Kyin, Secretary to the Finance Department It is also in evidence (*vide* Exhibit 10) that Dr. T issued a notice threatening the Government with a suit if they refused to refund the so-called custom duty in excess of Rs. 27,200. In consequence of these efforts, on the part of Dr. T, which were undoubtedly made in his professional capacity after accepting the fee of Rs. 10,000, the Government of Burma, Finance and Revenue Department, by their order dated 27th May, 1947 Exhibit (ဍ) ordered that, in addition to 20 per cent of the *ad valorem* duty on twenty thousand gross of matches bought by Tong Hin from NAAFI, which was Rs. 27,200 the full duty of Rs. 78,750 made up of Rs. 60,000 at Rs. 3 per gross and additional duty of Rs. 18,750 at 15 annas per gross, was payable by Tong Hin. The petitioner, being in no way relieved from the payment of duty whatsoever, and finding, instead of a reduction, an increased demand of duty, he naturally asked for the refund of the fee which had

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been paid to Messrs. L & T under two conditions. As will be observed from the terms of the agreement, there was an agreement to pay Rs. 10,000 if and when there was total exemption of the duty, but when there was payment of duty not exceeding Rs. 20,000 Messrs. L & T were to be paid only Rs. 3,400. Tong Hin demanded the refund of Rs. 6,600 under the second clause ; but Dr. T whom the petitioner met, refused to refund saying that there was a total exemption of excise duty, that since the Government had raised the custom duty, the increase demand was not their responsibility and that they, in these circumstances, were entitled to earn Rs. 10,000 in full, as stipulated in clause 1 of the agreement Exhibit (ဃ). Petitioner Tong Hin was dissatisfied with the attitude taken by Dr. T, and he was said to have told Dr. T that to him (the petitioner) there was no distinction between excise duty and custom duty. He maintains that when he engaged the services of Messrs. L & T his sole desire was to seek for the exemption of *duty*, call it excise, or custom, over and above the 20 per cent *ad valorem* levied. He further states that he implicitly trusted his lawyers in the matter and that when they refused to return the money, there was a betrayal of trust placed on them and also a wrongful deprivation of his money by " legal duplicity."

As soon as the Registrar of the High Court received the complaint from Tan Tong Hin, Messrs. L & T were called upon to explain and in response thereto, Mr. L & Dr. T jointly filed a reply, *vide* Exhibit 27(A), wherein they controverted the charges of misconduct alleged against them. Setting out what they had done in connection with the imposition of the excise duty, they maintained that they were entitled to the fee they had taken and that

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they had acted throughout with clear conscience in an honest belief that there was nothing unprofessional in what they had done. In particular, they asserted that in drawing up the agreement Exhibit (ω) at the instance of Tan Eng Kok who brought back the same duly signed by Tan Tong Hin, they realised that there were stipulations regarding payment of their fee, contingent upon success or otherwise of the case entrusted with them. Perhaps, not feeling sure whether such an agreement was proper or not, they however stated that they took the precaution of even referring to the Legal Practitioners Act and also to some judicial decisions on the subject, and that they ultimately formed the opinion, *bonâ fide*, that it would not be unprofessional to accept the terms of engagement as stipulated in the said agreement.

When the matter came up before the Bar Council Tribunal, the following charges were framad against the respondents :—

1. That you or either of you on or about the 11th day of April 1947 at Rangoon entered into an agreement to act as advocates for or on behalf of a firm known as Bee Hwa Hin Co. regarding a certain demand by the Government for payment of a further sum of Rs. 51,550 as excise duty in respect of about 20,000 gross of matches purchased by the said firm from the NAAFI and to accept your professional fees contingent upon the result of the case, *viz.* to accept as your professional fees Rs. 10,000 if the said demand was totally remitted or to accept as your professional fees Rs. 3,400 if the said demand was reduced to Rs. 20,000 and that you did receive and accept Rs. 10,000 on the said conditions on or about the 22nd day of April 1947

2. That you or either of you, personally or through or in collusion with one Tan Eng Kok,

represented or caused to be represented, or knew or had reason to believe that a representation has been made by the said Tan Eng Kok, to a firm known as Bee Hwa Hin Co. that you would be able to obtain an order from the Government or the authorities concerned exempting the putting of banderol on each box of matches and remitting the whole of the demand for a further sum of Rs. 51,550 by the Government as duty payable in respect of some matches purchased by the said firm from the NAAFI or reducing the said demand to Rs. 20,000 and thereby you or either of you persuaded or caused the said firm to agree to pay you as your professional fees Rs. 10,000 if no duty or if no excise duty was payable, or to pay Rs. 3,400 if only Rs. 20,000 was payable as duty in respect of the said matches.

3. That having duty to explain the terms of the agreement dated the 11th day of April 1947, you or either of you failed to explain the said terms to the proprietor of the aforesaid firm before the said proprietor signed the said agreement.

4. That before the terms of the aforesaid agreement were accepted by the said Bee Hwa Hin Co. or at any material time, you or either of you did not explain to the proprietor of the said firm or caused to be explained to him, or without any reason to believe that it had been understood by him you or either of you failed to explain to him, that under the law for the time being in force the duty payable in respect of the said matches would be the same in value whether payable as customs duty or excise duty, and that you entered into an agreement with the aforesaid firm that your fees would be Rs. 10,000 if no excise duty whatsoever was payable or Rs. 3,400 if only Rs. 20,000 was payable.

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5. That knowing or having reason to believe that the aforesaid firm would not have agreed to pay you Rs. 10,000 or Rs. 3,400 as your professional fees, if it had been explained to the proprietor of the said firm or if the proprietor had known that the amount of duty payable in law by him in respect of the said matches would be the same in value whether payable as customs duty or excise duty, you refused to return to the aforesaid firm either the whole amount of fees or any portion thereof although the said firm had to pay about Rs. 36,653-2-0.

6. That you refused to return to the said firm the whole of the fees, *viz.* Rs. 10,000 or any portion thereof, although the firm had to pay to the Government about Rs. 36,653-2-0 as duty, on the ground that this was not excise duty but only customs duty.

7. That the aforesaid agreement was unconscionable.

On the first charge, the Tribunal, in effect held that Exhibit (ω) agreement, though *prima facie* a contingent fee contract, or in other words a stipulation for back fee dependent upon the success or otherwise of the case entrusted with the respondents, yet the respondents were not guilty of professional misconduct. In coming to that conclusion, the Tribunal placed reliance upon section 42 of the Legal Practitioners Act and also upon the following decisions :—

Saw Hla Pru v. *Maung Po Htin* (1) ; *N. A. Christopher* v. *B. C. Galliara* (2) and *Shiv Narain Jafa* v. *Judges of High Court, Allahabad* (3).

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(1) A.I.R. (1931) Ran. p. 104. (2) A.I.R (1937) Ran. p. 299.
(3) A.I.R. (1956) P.C. p. 176.

As regards the second, third, fourth and fifth charges, the Tribunal held that Messrs. L & T, in collusion with Tan Eng Kok fraudulently demanded a fee of Rs. 20,000 from Tan Tong Hin, knowing full well that no excise duty was payable on the matches bought by him from NAAFI and that after obtaining the sum of Rs. 20,000 they shared the said amount between them, Tan Eng Kok taking Rs. 10,000 and Messrs. L & T taking Rs. 10,000 as their professional fee. Further, the Tribunal found that by failure to explain to Tan Tong Hin the law applicable to the case which was known to Messrs. L & T or which ought to have been known to them if they were discharging their professional duties honestly and conscientiously, that the amount of duty leviable on imported matches, if the standard rate were to be imposed, was the same as the excise duty, they acted unprofessionally.

Under the sixth and seventh charges, the Tribunal also found against the respondents and held that the agreement Exhibit (∞) was unconscionable, inasmuch as the applicant Tan Tong Hin had to pay a further sum of Rs. 36,653-2-0 as duty—call it custom or excise.

We have carefully perused the charges framed by the Tribunal, and we find that the seven charges framed overlap each other and they could have been reduced to the following three only :—

(1) That you or either of you on the 11th day of April, 1947 at Rangoon agreed to act as Advocates for the firm of Bee Hwa Hin and Company represented by Tan Tong Hin in the matter of demand by the Government for payment of excise duty in respect of about 20,000 gross of matches purchased by the said firm from NAAFI and pursuant to that agreement you agreed to accept and did accept professional fees

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contingent upon the result of the case as evidenced by Exhibit (ꝏ) and thereby acted unprofessionally.

(2) That you or either of you, having a duty to explain the terms of the agreement Exhibit (ꝏ) failed to explain the said terms to Tan Tong Hin, knowing that under the law for the time being in force, the duty payable in respect of said matches would be the same in value whether payable as custom duty or excise duty and in furtherance thereof, that you or either of you, in collusion with Tan Eng Kok fraudulently demanded and obtained a fee of Rs. 20,000 from Tan Tong Hin and shared the same between you all, Tan Eng Kok taking Rs. 10,000 and your firm taking Rs. 10,000 and thereby acted unprofessionally or otherwise misconducted yourself.

(3) That you or either of you, by refusal to return the fee of Rs. 10,000 or any portion thereof, although Tan Tong Hin representing Hee Hwa Hin Firm had to pay as duty to the Government much in excess of what had been stipulated in the agreement Exhibit (ꝏ) on the ground that there was no excise duty payable at all, but only custom duty, thereby acted unprofessionally and unconscionably in the discharge of professional duties.

We propose to consider the entire case against the respondents under the three charges set out above.

Regarding the first charge, it has been conceded before us that the Bar Council Tribunal was not made aware of the decision in *In the matter of Mr. G., a Senior Advocate of the Supreme Court* (1). It seems clear that the Tribunal's finding in that regard has been entirely based upon decisions which are not at all apposite to the facts and circumstances obtaining in the present case. In the cases relied upon by the Tribunal, what was held, in effect, was that

(1) A.I.R. (1954) S. C. p. 557.

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it is open for a lawyer, be he an Advocate or a pleader, by private agreement with his client, to settle the fee for his professional services ; that the fee may be whatever the lawyer concerned may choose to value it ; that the client can either accept the fee stipulated or if he thinks the fee is exorbitant, can go elsewhere ; and that such agreement can be impugned like any other contract. In none of these decisions, the question as to whether it would amount to professional misconduct within the meaning of sub-section (*l*) of section 10 of the Bar Council Act if an Advocate were to enter into an agreement with his client for payment of his professional fee contingent upon success or otherwise of the suit, with which the Advocate has been entrusted professionally was considered. In other words, the question as to whether an Advocate is guilty of professional misconduct if he agrees to accept contingent fee was never considered in these decisions. This brings us to the question what is a contingent fee ; why it is objected to, and whether it would be professional misconduct within the purview of section 10 (*l*) of the Bar Council Act on the part of a lawyer to accept cases under contingent fee system. What constitutes "professional or other misconduct" under section 10 (*l*) of the Bar Council Act has not been defined, and it seems obvious to us that from the reading we have had of the relevant provision of the Bar Council Act that the Legislature intends, by the use of the aforesaid words, to leave to the discretion of the High Court whether a particular act complained of as against an Advocate constitutes professional misconduct or other misconduct, having regard to professional ethics, and whether the act or conduct complained of in any way renders the Advocate concerned unfit to exercise his profession or is likely

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to hamper or embarrass the administration of justice by the law courts. So far as we are aware, there have been no judicial pronouncements by Courts in Burma regarding propriety or otherwise of demand for contingent fee by lawyers. What we are aware of are cases of lawyers agreeing with their clients to share in the fruits of litigation.

In England and in some States of America, a Barrister or a lawyer would be considered unprofessional should his professional fee be fixed contingent upon success or otherwise of the case entrusted to him. In fact, the members of the Bar of England are bound by the usage and rules of etiquette which they have to observe and not only contingent fees or back fees are considered to be improper and unconscionable being of gambling and speculative character, but champerty and maintenance are also not tolerated.

Now, in the case decided by the Supreme Court of India and referred to above, the Supreme Court of India has taken the view that it is highly reprehensible for an Advocate to stipulate for or receive a remuneration *proportioned to* the results of the litigation or a claim whether in the form of a share in the subject-matter or percentage or otherwise. In the decision of the said case, five Judges participated and the judgment of the Court was delivered by Bose, J., and they were unanimous in their view that an Advocate is bound to conduct himself in a manner befitting the high and honourable profession to whose privileges he has been admitted and that if he departs from the high standards which that profession has set for itself and demands of him in professional matters, he is liable to disciplinary action. In the said case, the Advocate concerned entered into an agreement with his client whereby the

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Advocate was to take 50 per cent out of the amount to be recovered from the defendant. The Advocate was paid to account Rs. 200 towards initial expenses. It was held that the contract of this kind, though not legally objectionable if no lawyer was involved, yet it being made with an Advocate, such an engagement amounted to professional misconduct, calling for disciplinary action. In the decision of the said case, we observe that reference was made, among important decisions of Madras, Bombay, Calcutta High Courts, to the case of *Ganga Ram* v. *Devi Das* (1) of the Punjab High Court which was a Full Bench decision of 9 Judges, on a reference made to it by two Judges. The question involved there was identical to the question now presented in this case, whether it was legal and proper for a legal practitioner to make his remuneration in a case contingent on the success of the case. After an exhaustive review of all available authorities on the date relevant thereto, the majority (2 Judges dissenting) held that agreements between legal practitioners and their clients, making the remuneration of the legal practitioner dependent upon the result of the case in which he is retained are illegal, being contrary to public policy and legal practitioners entering into such agreements are therefore guilty of professional misconduct and render themselves liable to disciplinary action. The two dissenting Judges (Lal Chand and Chatterji, JJ.) held the view that legal practitioners, other than members of the English Bar enrolled as Advocates under the then Practitioners' Act receiving a back fee was neither opposed to public policy nor improper. It appears that the two dissenting Judges were confining themselves only to the propriety or otherwise of acceptance of back fee by legal practitioners other

(1) 42 Pun. Record (1907) p. 280.

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than the Members of the English Bar. We observe that in arriving at the above decision, the Punjab High Court has also made a reference to a case from the Rangoon Recorder's Court—*In the matter of Moung Htoon Oung, an Advocate of the Recorder's Court at Rangoon* (1)—in which a Bench of 2 Judges of the High Court of Calcutta Couch, C.J. and Jackson, J. said of the practice of an Advocate of the Rangoon Recorder's Court being paid according to the result of the litigation out of the proceeds thereof " and the impropriety of such a practice there can be no doubt. If allowed, it may produce various mischiefs ; and though there may possibly be cases in which an Advocate, from the circumstances of the plaintiff, might be allowed to make some arrangement of that kind, they are so few and so easily confounded with cases in which he ought not to do anything of the kind that it is not fit or proper for the Courts to allow a transaction of such a nature to be entered into by Advocates practising in them."

Among the cases referred to with approval by the Supreme Court of India, a case which is particularly apposite to the present case is the case, *In the matter of R., an Advocate, Madras* (2). In that case, an Advocate enters into an agreement with his client whereby he is to take certain percentage of the proceeds of the suit as remuneration for his services contingent upon success thereof. It was held that it amounts to professional misconduct. Their Lordships (Leach, C. J. Gentle and Somayya, J.J.) in their judgment at page 774 observe :

" For an advocate to enter into an agreement of the nature [' no cure, no pay' *supra*] amounts to professional misconduct, and the Supreme Court is bound to take serious

(1) D. Sutherland's Weekly Reporter, Vol. 21, p. 297.
(2) A.I.R. (1939) Mad. p. 772.

notice of it. To allow a conduct of this nature to pass without punishment would only lead to the encouragement of agreements of this nature. The Courts must take steps to prevent Advocates speculating in litigation, and that is what the respondent has done."

In view of the decision of the Supreme Court of India and also those of other Courts, wherein an exhaustive analysis of professional ethic involved in contingent fee contract was considered, we feel that, though such decisions have no binding force upon us, yet they have such persuasive force as to lead us to the conclusion that an Advocate of the High Court, who earns his fee by entering into agreement contingent upon success or otherwise of the case with which he has been entrusted acts very improperly and that he is unworthy of the profession to which he belongs. We also consider that such a contract for fee smacks of a deviation from the high standard of professional ethics required of the Advocates of High Court who by virtue of Order 4, Rule 1 of the Supreme Court Rules are also entitled to appear in the Supreme Court.

This professional fee called contingent fee appears to be peculiar to legal profession. It is a promise by a client not only to pay the lawyer a part of the matter under litigation in certain cases but also the quantum of fee is made dependent upon success or otherwise of the litigation with which the Advocate has been entrusted by the client. In England, such payment of fee is regarded as undefensible and unethical. If an Advocate were to refuse to accept a case unless assured of a certain percentage of the amount involved, he is insisting upon two factors which are of major consideration in legal ethics. First, he is placing remuneration above the rendering of services in furtherance of administration of justice

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and second, he is tempted to win his case by unfair means in proportion as his prospective fee varies. Neither of these positions is defensible. There is what may be called a sporting chance and this very fact would undoubtedly tempt the lawyer to encourage litigation. Thus, the objection to the contingent fee, in our view is that it subordinates the professional services of lawyers to the possibility of remuneration in a case they have taken up, thereby introducing a gambling chance which we consider to be highly objectionable. In that connection, we feel tempted to quote the canon, with respect to contingent fee, adopted by Boston Bar Association and the Massachusetts Bar Association of the United States of America which is as follows :

" A lawyer should not undertake the conduct of litigation on terms which make his right to reasonable compensation contingent on his success, except when the client has a meritorious cause of action but no sufficient mean to employ counsel unless he prevails ; and a lawyer should never stipulate that in the event of success his fee shall be fixed percentage of what he recovers or a fixed sum, either of which may exceed reasonable compensation for any real service rendered.

Such practices tend to corrupt and discredit the Bar. Lawyers who try to get business by charging nothing unless they succeed, even though they leave the size of their fees to be determined by the amount and character of their services, are constantly tempted to promote groundless and vexatious suits . . . . . When making such a bargain the lawyer's superior knowledge and experience give him an advantage which tempts him to overreach his client. *By making it, he, in effect, purchases an interest in the litigation.* Consequently, unhappy conflicts between his own and his client's interest, in respect to the settlement of conduct of the suit, are always likely to arise ; his capacity to advise wisely is impaired ; and he is beset by the same temptations which beset a party to be dishonest in preparation and trial."—(1).

(1) See Organization and Ethics of the Bench and Bar by Frederick C. Hicks, Professor of Law, Yale University, at p. 304.

The learned counsel appearing for the respondents has however urged upon us that with the enactment of section 42 of the Legal Practitioners Act of 1926 (Act No. XXI of 1926) which also governs the Advocates enrolled under the Bar Council Act (*vide* section 38), a lawyer whether he be an Advocate of the High Court or a pleader, is competent to settle the terms of engagement and fix his fee by private agreement in whatever way he likes, like ordinary persons. In other words, it was contended that engagement of lawyers by their clients is now governed by the law of contract and not by any extraneous rules of professional ethics or conduct. We regret that we cannot accept this contention. In our view, the fixing of fee and settling terms of engagement between lawyers and clients are not without restriction if they were to affect the professional conduct of lawyers in view of section 13 (*f*) of the Legal Practitioners Act. Similarly, Advocates of the High Court enjoy the freedom in fixing their fee, and settling terms of employment to the extent which the High Court in exercise of disciplinarry jurisdiction as envisaged in section 10 (*1*) of the Bar Council Act, considers in its discretion to be within the bounds of professional propriety.

It has also been urged upon us that the agreement Exhibit (ဝ) is only an offer on the part of Tan Tong Hin, and that it has not resulted in a binding contract inasmuch as the respondents have not signed on it. There is no substance in this contention. It seems abundantly clear that having issued an acknowledgement receipt for Rs. 10,000, the respondents, in performance of the terms contained therein made appearances before some revenue authorities and also filed appeals and petitions. The very fact that Dr. T. had refused to surrender a portion of the

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fee saying that their Firm had done their work to earn the fee, militates against any suggestion that there was only an offer on the part of Tan Tong Hin to enter into contract as evidenced by document Exhibit (ဝ). We are not at all impressed with this argument and we cannot allow it to prevail. Therefore, on a careful perusal of the factual matter and also the law pertaining thereto, we cannot accept the finding of the Tribunal on the first charge. We are of the view that it is highly unprofessional and improper for an Advocate to enter into an agreement with his client on a contingent fee basis. We therefore hold that under the first charge the respondents are guilty of professional misconduct.

As regards the second charge, we have carefully appraised the evidence recorded in the proceedings both for the petitioner Tan Tong Hin and for the respondents and we are not at all convinced that there is sufficient evidence by which we can come to a definite conclusion that Messrs. L & T, in collusion with Tan Eng Kok defrauded the petitioner Tan Tong Hin and obtained the professional fee of Rs. 20,000. No doubt, Tan Eng Kok, as an Assistant Manager of the Chinese Bank of Communication, a standing client of Messrs. L & T, was responsible for the engagement of the respondents in their professional capacity, and indeed, he took a very active interest in the matter. In fact, the terms of engagement as evidenced by document Exhibit (ဝ) were the outcome of his suggestion to Dr. T. He played quite an active part and it appears to us that he did so not without a purpose. There are two reasons why he actively associated himself in introducing Tan Tong Hin to Messrs. L & T. They are (1) his position as an Assistant Manager of the Bank of Communication who are the standing

clients of Messrs. L & T and (2) the fact that in the purchase of matches from NAAFI by Tan Tong Hin, one Tan Soon Li was the financier with an overdraft which Tan Soon Li had obtained from the said Bank of Communication, to whom he offered his rice-mill and the matches Tong Hin had bought from NAAFI as securities. It also appears that at the time when Exhibit (ဃ) was drawn up, applicant Tong Hin was not present in the lawyers' office, but it was shown to him later and made to sign after Tan Eng Kok had got Rs. 20,000 from him. Tan Eng Kok in turn paid, instead of Rs. 20,000, Rs. 10,000 to Messrs. L & T who issued the receipt Exhibit (ခ), in the name of Tan Eng Kok. There is not a shred of evidence by which we can safely conclude that there was collusion between Messrs. L & T and Tan Eng Kok to defraud Tong Hin in obtaining the fee of Rs. 20,000. No doubt, Tong Hin paid out Rs. 20,000 as deposed to by Tan Soon Li and Tong Hin also thought that he had paid the fee of Rs. 20,000 to Messrs. L & T. He came to know that the fee demanded from him was not Rs. 20,000 but Rs. 10,000 only when he ultimately went over to Dr. T to ask for the refund of the fee. Tan Eng Kok also stated that he did obtain Rs. 20,000 from Tan Soon Li on Tong Hin's account and that he was paid that sum by Tan Tong Hin expressly *for the purpose of the case*. The expression for the purpose of the case "အမှုအတွက်" is significant. It appears to us that the fixing of exact amount of fee was left to his discretion. It was only when the difference arose between Tan Tong Hin and the respondents did Tong Hin know that the fee actually paid to respondents was Rs. 10,000 and not Rs. 20,000. Thus, from the facts and circumstances, it is difficult for us to infer that by collusion between Messrs. L & T on one part and Tan Eng Kok on

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the other, Tong Hin was defrauded of a sum of Rs. 20,000 each party sharing Rs. 10,000. Allegation of fraud must be founded upon some definite evidence. Suspicion is not sufficient however grave it might be. As has been held in the case of *Central Bank of India Limited* v. *Guardian Assurance Company Ltd. and another* (1) "where an issue of fraud is involved, the person who alleges fraud must establish by some thing more than grave suspicion. In other words, the charge of fraud ought to be clearly established by evidence."

It has been urged in support of the finding of the Tribunal on this charge that Rs. 20,000 appearing in Exhibit (ဃ) both in figures and words were not without purpose. It is submitted that this circumstance alone is highly suggestive of Tan Eng Kok and Dr. T having acted in collusion to obtain the fee of Rs. 20,000 as professional fee from the very outset. It is further urged that since Tong Hin does not know English words but only the figures, in parting away with the sum of Rs. 20,000 after signing Exhibit (ဃ), he was deliberately misled into believing that he was paying the fee as stipulated. In other words, it is urged that Tan Eng Kok, in collusion with Dr. T, purposely misled Tan Tong Hin to justify the initial receipt of Rs. 20,000 as fee which they shared among themselves, each taking Rs. 10,000. We do not see any merit in this submission. It completely ignores the fact that there are other figures besides Rs. 20,000 in document Exhibit (ဃ); and surely Tan Tong Hin must have known what the figures Rs. 10,000 and Rs 3,400 signified.

In support of the finding of the Tribunal, further assertion was made that the respondents could not offer satisfactory explanation why the figure Rs. 20,000

(1) A.I.R. (1936) P.C. p. 179.

appears in the document Exhibt (ဃ). Dr. T himself, it is submitted, conceded that these figures found their place in Exhibit (ဃ) at the suggestion of Tan Eng Kok, and that from that circumstance it would be justified to infer that Tan Eng Kok in collusion with Dr. T, defrauded Tan Tong Hin to part with a fee of Rs. 20,000. We are not at all impressed with this submission. It has been explained to us at the hearing that this figure of twenty thousand was arrived at, representing a third of the total amount of excise duty of Rs. 60,000, said to have been demanded from the applicant, and that as against that, there was a proportionate reduction in the fee Rs. 10,000 to a sum of Rs. 3,600 (a third of Rs. 10,000) should the demand for excise duty did not exceed Rs. 20,000 (a third of Rs. 60,000). This is a most plausible explanation. Therefore, we cannot attach any sinister significance to the appearance of the figure Rs. 20,000 in the agreement Exhibit (ဃ). We must therefore hold that the second charge of collusion to defraud the petitioner Tan Tong Hin in obtaining the fee of Rs. 20,000 by the execution of Exhibit (ဃ), as against the respondents, is not proved.

Now, we come to the third charge. We consider that if this charge is substantiated, there is certainly professional misconduct on the part of the respondents. In adjudging whether, after having agreed to accept the case in terms of Exhibit (ဃ) the respondents were justified in retaining the sum of Rs. 10,000 by asserting that they had fully succeeded in the case, we should not lose sight of the fact that the relationship between the client and the lawyer is one of fiduciary character and that the latter stands in a position to dominate the will of the former. Unless the transaction is on the face of it, not unconscionable the burden of proving that the transaction was free

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from the exercise of undue influence, coercion or fraud lies upon the person who ostensibly holds the dominant position. In the case now under consideration there can be no doubt that at the relevant time Messrs. L & T as lawyers held dominant position as against petitioner.

The Tribunal has found that the non-liability of imported matches to excise duty was an obvious fact and that when the respondents were engaged by the petitioner in terms of Exhibit (ဝ), they were so to say, hoodwinking the petitioner on the pretext that the work with which they had been entrusted involved a good deal of legal study and labour entitling them to the fee they demanded under two conditions. There is ample justification for this finding and we entirely concur in it. The NAAFI matches were foreign made matches and the petitioner, should be told by the respondents from the very beginning what exactly the legal position was with regard to the demand for excise duty over and above the custom duty. It appears to us that the respondents failed to examine the facts carefully and also failed to explain the exact legal position to the petitioner. The respondents must have thought that, here was a case in which they could have earned the fee easily, and accepted it under the terms, whereby their client was made to pay a sum of Rs. 10,000 as fee when there was a total exemption of excise duty. To lawyers of respondents' standing, non-liability of foreign matches to excise duty should have been an obvious fact, and even if a demand was made by the revenue authorities they (the respondents) must know that it was legally untenable. Therefore, to our mind, the stipulation for payment of professional fee based upon the aforesaid contingency in the circumstance stated is highly improper from professional point of view.

Moreover, had the respondents been discharging their duties conscientiously they would have found out that 20 per cent *ad valorem* special custom duty notified by the Financial Commissioner could not possibly apply to the matches bought by the petitioner. The special rate of 20 per cent *ad valorem* applied only to matches sold by NAAFI directly to the consumers and not to traders like the petitioner, who obviously bought them for resale at a profit to consumers at large. The respondents should have carefully studied this fact and explained to the petitioner when their services were engaged by the latter. This, they also failed to do so. According to their own showing, the respondents were only interested in finding-out some legal precedents, whether demand for fee based upon certain contingency was permissible under the Legal Practitioners Act. The respondents were thus motivated more by rapacity of getting a big fee with little or no amount of effort or labour on their part and without giving slightest thought as to the applicability or otherwise of special 20 per cent *ad valorem* rate meant for NAAFI sale directly to consumers than earning the fee by a true spirit of service in furtherance of administration of justice. This attitude on the part of the respondents, to our mind, is highly improper and not in accordance with the best traditions of legal profession.

Again, the respondents should have realised from the time of their engagement that the petitioner Tong Hin is an ordinary merchant and that he was only interested in getting the exemption of certain amount of duty imposed upon his goods. That the petitioner did not really know the distinction between excise duty and custom duty demanded in connection with his matches was clearly borne out by the fact that

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when he demanded from the respondents by a notice dated 8th August, 1949 through Messrs. Ghosh and Guha, Advocates, the refund of a sum of Rs. 8,300 and charge him Rs. 1,700 for the work done, he clearly assumed that there was no exemption of entire duty, but there had been an imposition of duty higher than Rs. 20,000 fixed in the agreement Exhibit (ω). If the petitioner knew full well the distinction between excise duty and custom duty inasmuch as Exhibit (ω) agreement, clause (1) stipulates, " if no excise duty is payable " the petitioner would not have demanded the refund of Rs. 8,300 out of the fee of Rs. 10,000. The very notice given by the petitioner on the 8th August, 1949 through his lawyer Mr. Salisbury Havock also supports the view that the petitioner was not at all aware of the distinction between payment of excise duty and payment of custom duty. To all the demands made by the petitioner for the refund of even a part of the fee of Rs. 10,000, the respondents maintained that they were perfectly entitled to retain the entire fee under clause (1) of the agreement contending that they had succeeded in getting the total exemption of *excise duty*. When U Aung Min, Advocate, on behalf of the respondents sent a reply [*vide* Exhibit (14)] to the demand made by Mr. Salisbury Havock, he asserted on behalf of his clients (the respondents) that the demand for additional duty from the petitioner was *custom duty* and *not excise duty*, and that since his clients had succeeded in setting aside the payment of excise duty, they were justified in the retention of the full fee of Rs. 10,000 as stipulated in clause (1) of Exhibit (ω). This to our mind is absolutely unconscionable. It appears to us to be a clever casuistry which betrays lack of scruple or conscience ordinarily expected of the members of the learned profession to which the

respondents belong. It is also a clear case of assertion on the part of the respondents adhering to the very letters and not to the spirit of the agreement Exhibit (ω). It amounts to telling their client (the petitioner) :

"You have executed an agreement agreeing to pay us the fee of Rs. 10,000 when no excise duty is imposed, and when excise duty is imposed and if it does not exceed Rs. 20,000, you agree to pay us Rs. 3,400. Now, when no excise duty is payable by you, but only custom duty of Rs. 16,000, we are entitled to the fee of Rs. 10,000 in full and you have no right to demand even under the second part of the agreement the refund of Rs. 6,400."

As noted above, the relationship between a client and his lawyer is one of delicacy in view of the dominant position a lawyer holds over his client, and the paramount question is not the making of money or earning the fee for the work done by any means but the promotion of administration of justice by fair and righteous means. In the case of *N. A. Christopher* v. *B. C. Galliara* (1) Roberts, C.J. observed :

"Where the relationship of Advocate and client subsists, an Advocate is always obliged to see that in addition to his fair and just remuneration he does not use the privileged and responsible position for the purpose of putting money into his own pocket. . . . "

With this observation, we respectfully concur. We are told that even after the petitioner had offered to pay Rs. 1,700 to the respondents for whatever work they had done [*vide* Exhibit (18)] there were attempts by him for an amicable settlement with the respondents, but all those were spurned at by the respondents by insisting upon their proverbial "pound of flesh" from the petitioner. There can be nothing more shocking to the conscience than this strict

(1) A.I.R. (1937) Ran. p. 299.

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demand made by the respondents by adhering to the very letter of the contract. To our mind, the petitioner's following assertion has some justification, and we cannot lightly brush it aside on the ground that he was not careful enough in entering into an agreement in the terms of Exhibit (ω) and that he was bound thereunder :—

> "Government might have made mistake and wrongly charged the duty as 'Excise Duty' and corrected the same by calling it 'Custom Duty.' All that we were interested is for the total remission or reduction of any duty whatsoever. All that we know was duty and as layman we were not aware of legal duplicity. In fact we implicitly trusted our lawyers and the action on their part in refusing to return our money amounts to betraying the trust placed upon them . . . . . "

As already observed above, we cannot apply strict legalism in the enforcement of the terms stipulated between a lawyer and the client in obtaining the former's professional services. We are of the view that what is permissible and not shocking to the conscience between ordinary persons shall, when it is one between a lawyer and his client, have to be examined, in adjudging whether it is permissible and not shocking to the conscience, "under the rigid rules of conduct enjoined by the members of a very close professional preserve so that their integrity, dignity and honour may be placed above the breath of scandal." See *In the matter of Mr. G., a Senior Advocate of the Supreme Court* (1). When examined in the light of above ethical standard, we are of the view that the respondents as lawyers of repute hanging on to the full fee of Rs. 10,000 contending against their client that they have fully earned it, not even surrendering a part of it as stipulated in the second clause of agreement Exhibit (ω), and strictly

(1) A.I.R. (1954) S.C. p. 557.

adhering to the very letter of the terms therein, are acting in a most improper manner and highly unethical in the discharge of their professional duties, thereby bringing them within the category of unprofessional misconduct as envisaged in section 10 (*1*) of the Bar Council Act. We therefore hold agreeing with the finding of the Tribunal that the third charge has been brought home against the respondents.

Now, coming to the question of punishment to be meted out to the respondents, we observe that the enquiry against the respondents before the Bar Council Tribunal lasted nearly seven years, and we are therefore not unmindful of the suspense and tension that prevailed for such a length of time, as if it were the sword of Damocles hanging on their heads. We also find on the evidence that petitioner's case entrusted with the respondents' firm was all along actively attended to by Dr. T who actually drew up the agreement Exhibit (ω) with Tan Eng Kok. Mr. L no doubt took some part at the initial stage of engagement. When, at a later stage, the petitioner demanded for the refund of the fee, Mr. L was said to have suggested the surrender of a part of it. But it appears that it was owing to Dr. T's stubborn attitude he yielded to the stand which they had taken up to the date of the institution of the complaint before the Registrar of High Court. We agree with the Tribunal that Mr. L, though a senior partner of the firm of Messrs. L & T, was not as blame-worthy as Dr. T.

We therefore find Dr. T guilty of professional misconduct set out in the first and third charges and not guilty of that set out in the second charge, and we direct that he be suspended from his practice of a period of six months from this date. We also find

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Mr. L as a senior partner of the firm guilty of professional misconduct as set out in the first and third charges and not guilty of that set out in the second charge; but in view of the finding of the Bar Council and also taking into consideration facts and circumstances set out above, we consider that a warning would be sufficient in his case and we therefore accordingly warn him to be careful in his future professional dealings.

The hearing before us has taken quite a long time and we order that the respondents do pay the costs of the advocates who represent the Bar Council in the hearing before us. We fix the Advocate's costs at K 750 (Kyats seven hundred and fifty only).

We would also like to observe that agreements entered into by Advocates of High Court such as in the form of Exhibit (ဝ) will not be tolerated in future and that the High Court will not take a lenient view of the same hereafter.

APPELLATE CIVIL.

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

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MA KHIN LAY MYINT AND TWO OTHERS (APPELLANTS)

v.

DAW SEIN YIN (RESPONDENT).*

Burmese Buddhist Law—Divorce—Degree of proof of re-union after valid Divorce—Onus of proof.

Under Burmese Buddhist Law once a divorce has been mutually effected a high degree of proof concerning renewal of conjugal relationship—nothing short of proving a valid marriage, is essential.

The onus of showing that there was a resumption of relationship of husband and wife lay heavily on the party who made that assertion.

Just as clear proof of marriage is required when question of marriage is in issue, so also, in the case of re-union after divorce same degree of proof is necessary to re-acquire the status of husband and wife.

Maung Lu Gyi and four others v. *Ma Nyun*, 2 U.B.R. (1892-96) p. 202; *Maung Po Lat* v. *Ma Ngwe Ma*, 3 U.B.R. 182 = (1920) 54 I.C. p. 575, followed.

Sein Tun and *Ba Than* (2), Advocates, for the appellants.

Kyaw Myint, Advocate, for the respondent.

U CHAN TUN AUNG, C.J.—This appeal is against the judgment and decree of the District Court of Hanthawaddy passed in Civil Regular Suit No. 6 of 1948. The suit was instituted by U Ohn Khin (deceased) as against Daw Sein Yin, the present respondent, for possession and recovery of certain immoveable and moveable properties valued at K 14,38,740, specifically set out in the schedule annexed to the plaint. U Ohn Khin claimed that they were the joint property of himself

* Civil 1st Appeal No. 28 of 1953 against the decree of the District Court of Hanthawaddy in Civil Regular Suit No. 6 of 1948, dated the 2nd day of December 1952.

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and his deceased wife Daw Sein Tin, who was no other than the younger sister of the present respondent Daw Sein Yin. He asserted that under the Burmese Buddhist Law, on Daw Sein Tin's death, which took place on the 6th June 1944, he (U Ohn Khin) became entitled to them as a surviving spouse. U Ohn Khin's plaint further disclosed that owing to some differences between him and Daw Sein Tin, the deceased, a sham (ဟန်ဆောင်) divorce took place on the 26th May 1942. The said divorce was said to have been effected on a written document, and the same has been filed along with the plaint before the District Court of Pyapôn before whom the suit was originally instituted. The said document was listed in the list of documents relied upon by U Ohn Khin and is marked " C "—*vide* page 54 of the proceedings of the Hanthawaddy District Court. The document bears the signatures of U Ohn Khin and Ma Sein Tin, and also those of the attesting witnesses, U Ba Win, (an Advocate of the High Court who died during the pendency of the suit) and one U Ba Maung. We may here note that the so-called sham divorce deed, apart from recording the fact that a mutual divorce had been effected between U Ohn Khin and Ma Sein Tin also contained partition of several items of property, movable and immovable, U Ohn Khin getting one-fifth of Ma Sein Tin *payin* property and Ma Sein Tin getting one-fifth of U Ohn Khin *payin* property. A list of such properties (in several sheets) was made out, and a division effected on the basis of those itemised property after due valuation. We found that both U Ohn Khin and Ma Sein Tin signed on every sheet and their signatures attested by U Ba Win and one U Ba Maung. U Ohn Khin further averred that after executing the sham divorce deed Daw Sein Tin left Pyapôn and went

away to stay separately from him at Dedaye with her sister, the present respondent Daw Sein Yin. U Ohn Khin asserted that despite this separation following the execution of the divorce deed the marital tie between him and Ma Sein Tin still remained, in that he visited Ma Sein Tin at Dedaye many times, and that the differences (if any) between him and Ma Sein Tin were eventually made up, followed by reconciliation and re-union as husband and wife until the death of Ma Sein Tin on the 6th June 1944. The present respondent Daw Sein Yin is said to be in possession of all the properties of Ma Sein Tin.

During the pendency of the suit before the District Court of Hanthawaddy, U Ohn Khin died after having given the evidence. His death took place on the 19th June 1952, and the present appellants claiming to be his legal representatives were brought on the record. Ma Khin Lay Myint is said to be another wife of U Ohn Khin, and so is Ma Myint Myint. The third appellant Khin Thi Da is said to be a minor daughter of deceased U Ohn Khin begotten of his marriage with one Ma Tin Ohn who predeceased him; and now in the present suit she is being represented by her grandmother, Daw Thein Nyunt.

Daw Sein Yin, the elder sister of the deceased Ma Sein Tin, on the other hand asserted that there was a legal and lawful divorce between U Ohn Khin and her sister Ma Sein Tin after serious quarrels as U Ohn Khin had many mistresses and taken many wives. The said divorce, according to her, was not a sham one, but a genuine divorce followed by partition of properties. She averred that she lived all along with her younger sister during her (Ma Sein Tin's) coverture with U Ohn Khin and that it

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was on the birth of a male child by one of U Ohn Khin's lesser wives, Ma Khin Lay Myint, a serious marital rift took place culminating in the execution of a mutual divorce deed, followed by partition of properties. She further stated that soon after the execution of the said divorce deed followed by partition of properties, Ma Sein Tin left the marital home at Pyapôn and thereafter stayed separate from U Ohn Khin in her own native town at Dedaye.

It will thus be seen that U Ohn Khin's case was that there was only a sham divorce between him and Ma Sein Tin followed by partition of properties and that even after Ma Sein Tin's departure from Pyapôn, where she had been living with him since their marriage, there was a re-union and reconciliation some time thereafter. Daw Sein Yin's case, on the other hand, was that there was a genuine mutual divorce between her sister Ma Sein Tin and U Ohn Khin; that there was no resumption of marital relationship between them; and that there was a complete severance of marital relationship up till the time of Ma Sein Tin's death.

At the trial the learned Judge framed altogether nine issues; but there are only two crucial issues, *viz.*: *(a)* Whether there was a mutual divorce between Ma Sein Tin and U Ohn Khin accompanied by partition of properties and whether such divorce was a sham (တန်ခေဆိုင်) divorce. *(b)* If there was a valid mutual divorce, whether there was a re-union and resumption of marital relationship.

As observed above, U Ohn Khin himself gave evidence before the trial Court and he cited some 20 witnesses in support of his assertion relating to sham divorce and also to incidents suggestive of re-union between himself and Ma Sein Tin some time between 1942 and

1944. He also recounted the part he played during Ma Sein's Tin's sickness and also at her funeral after her death that took place in the year 1944. It appears that U Ohn Khin was one of the children of U Thet Shay, a rich man of Pyapôn. U Thet Shay had three wives, and U Ohn Khin was one of the issues of U Thet Shay by his marriage with one Daw Mi. Besides U Ohn Khin, U Thet Shay had with Daw Mi two daughters and a son by the name of U Ba San. Ma Sein Tin was in fact the wife of U Ba San, who predeceased her, leaving a child who died subsequently. On the death of U Thet Shay, Ma Sein Tin claimed her husband (U Ba San's) share out of U Thet Shay's estate. The matter was settled out of Court by paying her a sum of one lakh of rupees. It was after the death of U Ba San and afer the settlement of Ma Sein Tin's claim against U Thet Shay's estate that U Ohn Khin married his sister-in-law Ma Sein Tin. U Ohn Khin himself received some ten lakhs worth of property as his share from U Thet Shay's estate. After their marriage U Ohn Khin and Ma Sein Tin came and lived in Rangoon; but U Ohn Khin's behaviour with other women seemed to be rather objectionable to Ma Sein Tin and they had frequent quarrels while at Rangoon. At one time the quarrel was so serious that Ma Sein Tin was said to have drawn up a divorce deed, *vide* Exhibit F, and had it sent to U Ohn Khin who was then living separately from Ma Sein Tin in his lesser wife's house, one Ma Khin Lay Myint. The prepared divorce deed was not made effective and no explanation was forthcoming as to why it so happened. However, there appeared to be then a sort of reconciliation between the couple and they left Rangoon and went and stayed in U Ohn Khin's

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house at Pyapôn. Not long after their arrival at Pyapôn trouble started again. Ma Sein Tin came to know that U Ohn Khin had brought his lesser wife Ma Khin Lay Myint over to Pyapôn. In fact, she was found to be staying in one of the ancestral homes of U Ohn Khin not far away from the place where he and Ma Sein Tin were living. A son was born to Ma Khin Lay Myint while Ma Sein Tin had no issue with U Ohn Khin. This incident greatly infuriated Ma Sein Tin and it appears that she became determined to effect a divorce with U Ohn Khin, and in pursuance thereof two written deeds were executed. The first deed, Exhibit 1, was executed on the 6th *Lasan* of *Nayone*, 1304 B.E., in the presence of two lawyers U Ba Nyo and U San U, who also attested the same. The document reads as follows:

၁၃၀၄ ခု၊ နယုန်လဆန်း ၆ ရက်နေ့၊ ဖျာပုံမြို့အရပ်၌၊ ကိုအုန်းခင်နှင့် မစိန်တင်တို့သည် ယခုနေ့ကစ၍ လင်ခန်းမယားခန်းပြတ်စဲကြပါသည်။ ပစ္စည်းခန်း များမူ၊ မစိန်တင်မှ ပါလာသောသက်ရှိသက်မဲ့၌ ပစ္စည်း၏ငါးပုံတပုံကို ကိုအုန်း ခင်သို့ပေးရမည်။ ကိုအုန်းခင်မှပါလာသော သက်ရှိသက်မဲ့ ပစ္စည်း၏ငါးပုံတပုံကို မစိန်တင်သို့ပေးရမည်။

(ပုံ) အုံးခင်။
(ပုံ) မစိန်တင်။

စာရေးသူအသိ။
(ပုံ) တင်ကြီး။
အသိ။
(ပုံ) မောင်ဘညို။ (ပုံ) မောင်စံဦး။

It will be observed that so far as the properties are concerned, the said document stipulates that Ma Sein Tin is to get one-fifth of U Ohn Khin's property and U Ohn Khin is to get one-fifth of Ma Sein Tin's property. A few days after the execution of this deed of divorce, it appears, as could be seen from paragraph 3 of U Ohn Khin's plaint, that another

deed, characterized by U Ohn Khin as evidence of a *sham deed* only (ဟန်ဆောင်), was executed between the parties; and the significance of that document is that it not only recites the fact that there had been a divorce between them by mutual agreement, but also contains a clause that in pursuance thereof the parties are effecting a division of their joint properties. As we have observed above, the document sets out various items of property with their values and also records such items of properties as are allotted to each other. Both U Ohn Khin and Ma Sein Tin signed it, attested by U Ba Win and U Ba Maung. The genuiness of this document is not denied, except that U Ohn Khin had, as already observed, characterized it as *(evidence of a sham divorce only)*. This document should, we consider, be read supplementary to Exhibit 1 and the relevant portion, especially the portion which recited the previous divorce reads as follows :

ဗျာပုံမြို့၊ကမ်းနားလင်းနေ ဦးသက်ရှေ၏သား ဦးအုန်းခင်နှင့် ဦးရွှေအုန်း၏ သမီး ဒေါ်စိန်တင်တို့သည်၊ ဗုဒ္ဓဘာသာထုံးစံအရ အကြင်လင်မယားအဖြစ်နေ ထိုင်ခဲ့ကြရာ၊ ယခုအခါတွင်တဦးနှင့်တဦး သဘောချင်း မညီညွတ်ကြသဖြင့်၊ လင်ခန်းမယားခန်းပြတ်စဲကြရန် အရပ်ရပ်ပစ္စည်းမှာကို နှစ်ဦးသဘောတူခွဲဝေ ကြသည်မှာ ဦးအုန်းခင်ပိုင်ပစ္စည်းအားလုံးကို ဒေါ်စိန်တင်က ငါးပုံတပုံယူ၍ ဒေါ်စိန်တင်ပိုင်ပစ္စည်းအားလုံးကို ဦးအုန်းခင်က ငါးပုံတပုံယူ၍ သဘောတူ နပ်စွာခွဲယူကြပြီး ၁၃၀၄ ခု၊ နယုန်လဆန်း ၁၃ ရက် နေ့တွင်အောက်ပါ လက်မှတ်ရေးထိုးသူ သက်သေများ ရှေ့တွင်နှစ်ဦးသဘောတူ လက်မှတ်ရေးထိုး ပြတ်စဲကြပါကြောင်း။

(ပုံ) အုံးခင်။
(ပုံ) မစိန်တင်။

အသိသက်သေ။

၁။ (ပုံ) ဘဝင်း။
၂။ (ပုံ) ဘမောင်။

(ပုံ) အုံးခင်။
(ပုံ) မစိန်တင်၊

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After the execution of the said deeds of divorce Ma Sein Tin left U Ohn Khin taking away all her properties, including jewellery and some title deeds to lands, and stayed at Dedaye while U Ohn Khin remained behind at Pyapôn. But it is alleged by U Ohn Khin that in May 1942 and in early 1944 he started visiting Dedaye and meeting Ma Sein Tin off and on and that eventually they had reconciled themselves.

We notice that the trial Judge had very carefully gone into the question as to whether the written deed of divorce was a sham one or not, and he came to the conclusion that it was not a sham one; but a genuine one executed by U Ohn Khin with full knowledge and intention of effecting a divorce. We are in complete agreement with his conclusion in that regard. U Ohn Khin himself in his evidence in answer to a question, whether by document Exhibit 1 he purported to effect a divorce and a partition, stated:—"it was effected for that purpose, but to appease her". Now, this document Exhibit 1 appears to have been executed in duplicate, and though U Ohn Khin had failed to produce his counter-part, yet from the very tenor of the document produced by U Ohn Khin, namely the document affecting the division of properties filed along with his plaint dated the 13th *Lasan* of *Nayone* 1304, B.E., it clearly goes to show that U Ohn Khin did, in fact, intend to have a divorce and also the partitioning of properties as set out in the said document. To us, those two documents written in very formal manner attested by lawyers of some standing, including the late U Ba Win a brother-in-law of U Ohn Khin, can only lead to the conclusion that they are not sham ones, but genuine ones with due intent and purpose of effecting a

mutual divorce and also of division of properties pursuant thereto. Confronted with these very important documents, the execution of which had been admitted by U Ohn Khin, the learned counsel for the appellants has wisely conceded before us that he cannot challenge the finding of the trial Court so far as the divorce effected thereunder was concerned; but he urged strenuously that from several incidents that took place between his client and Ma Sein Tin a few years after effecting the written divorce, namely in the years 1942, 1943 and 1944, we can conclude that there had been a resumption of marital relationship between U Ohn Khin and Ma Sein Tin and that thereafter they had lived as husband and wife. We have carefully gone through the evidence disclosing those alleged incidents; and we must say that we are in complete agreement with the finding of the learned trial Judge that they did not have the significance of re-union and cohibition as husband and wife between U Ohn Khin and Ma Sein Tin. Much stress has been laid by the appellants' counsel about the visits of U Ohn Khin to Ma Sein Tin's house at Dedaye during the said years, and also the part he played during her sickness and at her funeral. According to U Ohn Khin, on or about 10th July 1942 he went to Dedaye and he visited Ma Sein Tin with some other persons. He was then serving in a sort of commission sponsored by the Japanese during their occupation of Burma. But from these mere visits alone we cannot infer anything. We should not lose sight of the fact that Ma Sein Tin was no other than a sister-in-law of U Ohn Khin; and surely paying visits to her at her house at Dedaye when U Ohn Khin happened to be there could not in the least have the significance of resumption of marital

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relationship. It appears that during the Japanese occupation, *i.e.* in the year 1943, U Ohn Khin made two further visits to Ma Sein Tin's house. One was in company of a *pongyi* and the other was in the company of U Than Daing (PW 13), District Superintendent of Police. During these two visits also we find nothing of significance from which we can infer that there was a re-union at all. During the visit with the *pongyi* he did not even spend the night there, but he came back the same evening. On his own showing, U Ohn Khin, on this visit exchanged his 7 carat diamond ring with the three houses in Pyapôn allotted to Ma Sein Tin. On the 27th March 1944, U Ohn Khin again visited Dedaye and during this visit he said he had to endorse an application made by Ma Sein Tin (*vide* Exhibit M) for purpose of mutating their joint names in some landed properties to that of Ma Sein Tin alone. This action on the part of U Ohn Khin, in our view, indicated that even two or three years after the so-called sham divorce, he was willing to have the properties that stood in their joint names, set apart and mutated to their respective names. U Ohn Khin tried to explain that in so consenting to the mutation of name, he was persuaded to do so by one Maung Tin Maung, who has not been cited as witness, and also with a view to please Ma Sein Tin and thus win her forgiveness. Here, if any credence can be given to what U Ohn Khin stated, it appeared that up to the 27th March 1944, there was no reconciliation or re-union at all between the parties. Again, great reliance was placed upon another visit made by U Ohn Khin on or about April 1944. On this occasion, he was said to have been accompanied by U Maung Maung (PW 1), U Soe Hlaing (PW 2) and U Than Daing (PW 13), high Government

officials of Pyapôn. It was asserted that during that visit U Ohn Khin slept in the same bed with Ma Sein Tin for three nights and that it was during this visit that there was a complete re-union between the husband and wife. In that connection, we have taken considerable pains to check up the evidence of U Maung Maung (PW 1), U Soe Hlaing (PW 2) and U Than Daing (PW 13) and also the evidence given by Daw Sein (PW 12), Maung Taloke Gyi (PW 15), Ma Than (PW 17) and Ma Sein Tin (PW 20). Records of Pyapôn. He said that he accompanied U Ohn Khin to Dedaye and that they put up in U Tin Maung's house, U Tin Maung being a cousin of Ma Sein Tin. But, he was told by U Ohn Khin that he would go and sleep in Ma Sein Tin's house. U Ohn Khin came back only on the next morning. Before departure from Dedaye, on the next day, U Ohn Khin and he visited Ma Sein Tin's house and there they had coffee. He said that while having coffee he joked with Ma Sein Tin and U Ohn Khin that if there was a re-union he would not be satisfied with mere coffee. This witness thought the parties had been reconciled.

U Maung Maung (PW 1), a retired Income-tax Officer who was also in the company of U Ohn Khin when the latter visited Dedaye, gave evidence in similar strain. This witness said that U Ohn Khin did not sleep in U Tin Maung's house; but he was told that U Ohn Khin went and slept in Ma Sein Tin's house. In the morning, he, in the company of U Soe Hlaing, went over to Ma Sein Tin's house where they had coffee. U Ohn Khin was seen there, and jokingly they asked for *gebo* from both U Ohn Khin and Ma Sein Tin. When this joke was made Ma Sein Tin did not say anything, but she merely smiled. Witness also referred

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to an incident that took place in the morning when their party was about to leave Dedaye. He and two other persons went and wished U Ohn Khin "good-bye" and there, they met U Ohn Khin in Ma Sein Tin's house at about 7 a.m. U Ohn Khin was seen to have come down from upstairs and when asked where his wife (Ma Sein Tin) was, U Ohn Khin was said to have told them that as Ma Sein Tin had no sleep the previous night she could not come down. The party then had coffee and the joke for paying *gebo* was again repeated; and then they left Dedaye leaving behind U Ohn Khin.

U Than Daing (PW 13) also gave evidence to similar effect. He stated that on the last occasion when he, U Maung Maung, U Soe Hlaing and U Ohn Khin visited Dedaye they put up in *zegaung* U Tin Maung's house. That night all the rest of the party slept at U Tin Maung's house but U Ohn Khin was absent. Only on the following morning, he learnt that U Ohn Khin slept in the house of Ma Sein Tin. U Ohn Khin then took them to Ma Sein Tin's house where they had their morning coffee. Ma Sein Tin was present and when, by way of joke, the visitors demanded *gebo* Ma Sein Tin did not say anything but kept on smiling. On the second night also U Ohn Khin did not sleep with them at U Tin Maung's house, but slept in Ma Sein Tin's house.

It will thus be seen that what these witnesses could merely testify was that they were told by U Ohn Khin that he slept the night with Ma Sein Tin, and that they had coffee at Ma Sein Tin's house where U Ohn Khin was also present, and when they jokingly asked U Ohn Khin for *gebo* in the presence of Ma Sein Tin, Ma Sein Tin merely kept on smiling

saying nothing. None of them could say whether there was a complete re-union and resumption of relationship of husband and wife between U Ohn Khin and Ma Sein Tin known to all and sundry either in Dedaye or in Pyapôn, at the relevant time or at any time thereafter.

Now, let us examine what the other witnesses had to say on this point of alleged resumption of marital relationship. Daw Sein (PW 12) who was said to be present in Ma Sein Tin's house during U Ohn Khin's visit, was not definite whether U Ohn Khin slept with Ma Sein Tin when he visited them. She said that she saw U Ohn Khin sleeping on the ground floor on a *kut-pyit* during the last visit, that is, on the first day of his last visit to Ma Sein Tin. Even on the second night she could not say where U Ohn Khin slept. On the third night she saw U Ohn Khin alone early in the morning in Ma Sein Tin's bed, but she did not know whether Ma Sein Tin slept in her bed at all that night.

Ma Than (PW 17), said to be a neice of U Ohn Khin, spoke about re-union or *pyanpaung* between U Ohn Khin and Ma Sein Tin. She said that at the relevant time she was living in her brother's house opposite to Ma Sein Tin's house at Dedaye, and that she saw one morning U Ohn Khin washing his face in Ma Sein Tin's house. When she met him she asked *gebo* and she was given Rs. 10.

Ma Sein Tin (PW 20), said to be a cousin of U Ohn Khin, said that on U Ohn Khin's last trip to Dedaye she saw U Ohn Khin eating and sleeping in Ma Sein Tin's house. She assumed that there was thus a re-union between Ma Sein Tin and U Ohn Khin and even demanded *gebo*. She also saw U Ohn Khin and Ma Sein Tin talking together. She supported Ma Than that Rs. 10 was given to

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her when Ma Than demanded *gebo*. Two days after U Ohn Khin's departure, this witness went and visited Ma Sein Tin and asked her if there had been a re-union and the reply she got was in the affirmative.

Maung Taloke Gyi (PW 15) gave evidence to the effect that when he met U Ohn Khin at Ma Sein Tin's house, he asked U Ohn Khin သင့်မြတ်ကြီးလား U Ohn Khin was said to have told him သင့်မြတ်ကြပြီ. Ma Sein Tin was also said to have told the witness to the same effect. These are all what we could gather from the testimony of the witnesses so far as they relate to the so-called re-union or *pyanpaung*. To the assertion of U Ohn Khin that he cohabited with Ma Sein Tin during his last visit to Dedaye, the respondent Daw Sein Yin had emphatically denied it *in toto*. She stated that she was in the best position to know what the actual relationship between Ma Sein Tin and U Ohn Khin was on those visits. Great significance has been attached to U Ohn Khin's last visit because there was the demanding of *gebo*; but we find that none of the witnesses could definitely say whether there was a resumption of marital relationship from which we can safely infer that the relationship of husband and wife was completely and fully established to the knowledge of all and sundry just as their divorce which was effected with all the solemnity and publicity to the knowledge of all and sundry.

Aside these incidents attaching to visits, our attention was also drawn to the conduct of U Ohn Khin during the illness of Ma Sein Tin and the part he played at her funeral soon after her death. Reliance was placed on a letter Exhibit G, dated 24th June 1944, written by one U Tin Maung wherein it was stated that it was the wish of

Ma Sein Tin that U Ohn Khin should come to her. The writer of the note has not been called as a witness and we do not know how this letter could be produced by the plaintiff U Ohn Khin himself without calling the writer. We cannot attach any significance to this letter. It can easily be one written by U Tin Maung himself or by some other person just after the filing of the case. Neither can we attach any importance to the obituary notice Exhibit E wherein the plaintiff U Ohn Khin's name was mentioned as the husband of the deceased Ma Sein Tin. Admittedly, *pongyis* were fed and some charities were given at the funeral in the name of Ma Sein Tin. These to our mind having taken place after the death of Ma Sein Tin do not materially help U Ohn Khin's claim. He might have done those charitable deeds either to acquire merits for himself or with an ulterior motive of getting something out of Ma Sein Tin's estate in the guise of her re-united husband. Furthermore, we should not lose sight of the fact that Ma Sein Tin was after all a sister-in-law of U Ohn Khin, she having married U Ba San the elder brother of U Ohn Khin. U Ohn Khin himself being quite a well-known figure much respected by all the people in that part of the country, he would naturally act as the chief host at the funeral of Ma Sein Tin, there being no other male member closely related to the deceased.

There is a dearth of rulings under the Burmese Buddhist Law as to what facts are essential to establish that a couple after effecting a mutual divorce re-unites again as husband and wife. In *Maung Lu Gyi and four others* v. *Ma Nyun* (1) it was held that when a divorce has taken place

(1) U.B.R. Vol. 2. (1892-96) p. 202.

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between husband and wife and a re-union is set up by the former wife, on the death of the former husband, in order to support a claim to his estate, strict proof is required of the renewal of connubial relations, just as clear proof of marriage in the first instance is required, when the question is whether the status of wife has been acquired at all. Again, in *Maung Po Lat* v. *Ma Ngwe Ma* (1) it was held that mere physical re-union with a divorced wife is not sufficient to revive the status of marriage. Neither a clandestine intercourse after a divorce was sufficient to revive a marriage. The re-union or resumption of marital relationship must be one of such a nature that had there been no divorce it would have amounted to a valid marriage.

Thus, from these decisions, it appears that under the Burmese Buddhist Law once a divorce has been mutually effected, a high degree of proof concerning renewal of conjugal relationship—nothing short of proving a valid marriage, is essential. We are also of the view that where a husband and wife had effected a mutual divorce by a written document followed by partition of property which was also effected by a written document, the onus of showing that there was a resumption of relationship of husband and wife lay heavily on the party who made that assertion. Now, in this appeal all the evidence that could be adduced on behalf of U Ohn Khin concerned with some visits made by him to Ma Sein Tin's house before her death, and also about Ma Sein Tin having received him at her house at Dedaye and having taken some food there with his friends. No doubt U Ohn Khin was seen in Ma Sein Tin's house on few occasions, but nobody would come forward and state definitely

(1) U.B.R. Vol. 3, p. 182 = I.C. (1920) Vol. 54, p. 575.

whether there was a public re-union or resumption of marital relationship, known to all the people at Dedaye or to all the friends at Pyapôn where they once resided. The divorce was said to have taken place three or four years before the death of Ma Sein Tin, and there is not a shred of evidence to show that after their alleged resumption of marital relationship, U Ohn Khin and Ma Sein Tin were living together as husband and wife. Thus, the evidence adduced by U Ohn Khin falls far short of the necessary proof of re-union so as to nullify the mutual divorce already effected between him and Ma Sein Tin. Just as clear proof of marriage is required when question of marriage is in issue, so also, in the case of re-union after divorce same degree of proof is necessary to re-acquire the status of husband and wife. After a careful review of the entire facts and circumstances obtaining in this case, we are in complete agreement with the trial Judge that the evidence of re-union alleged to have taken place between the parties is most unsatisfactory. Besides the alleged visits made by U Ohn Khin to Ma Sein Tin at her house in Dedaye, the circumstances attendant upon partition of properties effected under the deed, dated 13th *Lasan* of *Nayone*, 1304 B.E., namely, the consent endorsed by U Ohn Khin in the mutation of names of joint properties to the name of Ma Sein Tin, and the exchange of a diamond ring for the three houses in Pyapôn allotted to Ma Sein Tin strongly tended to show that an effective mutual divorce had taken place. In our view, from the mere fact that there were some visits paid to Ma Sein Tin, and from the mere fact of her having remained silent with a broad smile on her face when the visitors joked about *pyanpaung* and demanded *gebo*

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we are unable to conclude that there had been re-union or resumption of marital tie between the parties.

We, therefore, hold that this appeal fails, and it is dismissed with costs.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

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

MA SAW TIN (APPELLANT)

v.

SAYA SIN AND TWO OTHERS (RESPONDENTS).*

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Oct. 13.

Manipuri Hindus or "Ponnas"—Law of Succession applicable—Hindu Law (Dayabhaga School) and the Ponna Customary Law—S. 13 (1), Burma Law Act, 1898—Mulla's Principles of Hindu Law, 10th Ed. ss. 154, 155, 156, 157 and 158—Succession to the estate of a Hindu widow, either as a Sapinda *or as a heir to succeed* stridhana *property.*

The Law applicable to Manipuri Hindus or "Ponnas" so far as it relates to the question of Succession and heirship is the Hindu Law (Dayabhaga School) and the Ponna Customary Law

But no evidence was adduced in the case to show what the Ponna Customary Law was, and therefore the existence of Customary Law of inheritance among the Manipuri Ponnas in Burma was never established.

U San Byu, Purna Dass, Ma Me, Ton Ma and Ma Aung v. *Maung Lu Thit*, U.B.R. (1892-1896) p. 420, referred to.

Consequently Dhayabhaga School of Hindu Law was applied.

It is common to all School Hindu Law, that on failure of her (Hindu widow) husband's heirs, the *stridhana* of a widow goes to her blood relation in preference to the Crown (s. 158, Mulla's Hindu Law).

Even, if the rule of succession, rather than escheat applies, the succession to several classes of *stridhanas* of a Hindu widow clearly shows *inter alia* that only the widows husband's younger brother ; brother's son ; sister's son ; and daughter's husband, (mostly males) has right to succeed. (S. 154, Mulla's Hindu Law).

Mulla's Principles of Hindu Law, 10th Ed. s. 154 to 158, referred to.

Kanakammal v. *Ananthamathi Ammal and two others*, I.L.R. (1914) 37 Mad. 293, referred to.

Held, that only in the absence of Daw Thein's husband's heirs, and Daw Thein's issues can Daw Thein's *stridhana* go to her blood relations and that if there are none of these heirs, her estate escheats to the Crown (The Government).

Held further : That in view of the accepted relationship between the 1st Respondent and Daw Thein's father U Sandanet, the 1st Respondent's claim to Daw Thein's estate is quite established as a *Sapinda*.

Therefore, the 1st Respondent's right of succession viewed from whatever aspect of Hindu Law, either as a *Sapinda*, or as an heir to succeed *stridhana's* property is better than that of the appellant.

Appeal dismissed.

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* Civil 1st Appeal No. 20 of 1953 against the decree of the District Court of Mandalay in Civil Regular Suit No. 12 of 1950, dated the 9th September 1952.

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MA SAW TIN v. SAYA SIN AND TWO OTHERS.

G. N. Banerjee, Advocate, for the appellant.

R. Chaube, Advocate and *S. L. Verma,* Advocate, for the respondents.

U CHAN TUN AUNG, C.J.—This appeal is against the judgment and decree of the District Judge of Mandalay who has dismissed the plaintiff-appellant's suit filed *in forma pauperis* against the defendant-respondents for the administration of the estate of one Daw Thein, who died on or about 3rd of March 1942. The parties are Manipuri Hindus or, as they are commonly called, "Ponnas"; and the deceased Daw Thein was also a Manipuri Hindu. Plaintiff-appellant Ma Saw Tin alleged that Daw Thein died without leaving any direct heirs leaving an estate valued at K 36,135, the details of which are set out in Schedules A, B and C annexed to her plaint. She claimed that she and the 3rd defendant-respondent Ma Toke were the nearest surviving blood relations of Daw Thein (deceased) and as such they were entitled in law, to share the deceased's estate. Her relationship to the deceased was said to be through Ma Lay an aunt of the deceased. Ma Toke, the 3rd defendant-respondent was also said to be one of the descendants of Ma Si an aunt of the deceased. The plaintiff-appellant further asserted that the defendant-respondents Saya Sin and U Ba Soe *alias* U Tun Tin had no interests whatever in the estate of Daw Thein and that after Daw Thein's demise, they had been intermeddling her estate. The defendant-respondents Saya Sin and U Ba Soe (*a*) U Tun Tin filed a joint written statement. They claimed that the property set out in Schedule A was the property acquired by Daw Mala (deceased), the mother of Daw Thein, and Daw Thein herself jointly, and that as Daw Mala was a Manipuri Hindu married to one U

Sandanet, her share in the said joint property on her death, vested with Daw Thein and thereafter on Daw Thein's death, the entire interest devolved upon them as surviving heirs and *sapinda* of deceased U Sandanet under the Hindu law of Dayabhaga School. So far as the properties set out in Schedules B and C of the plaint are concerned, these two defendants-respondents contended that they were *stridhana* properties of the deceased Daw Thein acquired through her own effort during her widowhood and that consequently on her death, those properties passed to the 1st defendant-respondent Saya Sin, being the son of Daw Hla May a sister of deceased Daw Thein's husband U Shwe Toe. They therefore averred that the plaintiff-appellant had no right to share in the estate of Daw Thein, deceased.

We may here note that all the parties concerned conceded in their pleadings that the law applicable to them, so far as it relates to the question of succession and heirship to Daw Thein's estate, is the Hindu Law (Dayabhaga School) and the Ponna Customary Law.

The 1st and 2nd defendant-respondents further claimed that Daw Thein in her lifetime being childless, adopted the 1st defendant-respondent, Saya Sin. The 3rd defendant-respondent Ma Toke took an indifferent attitude in the case. She admitted all the allegations by the plaintiff-appellant except the quantum of share.

Four issues were framed and the only issue of importance from which the present appeal has arisen is :

> Who is or who are the legal heirs entitled to inherit Daw Thein's estate under the Dayabhaga and the Ponna Customary Law ?

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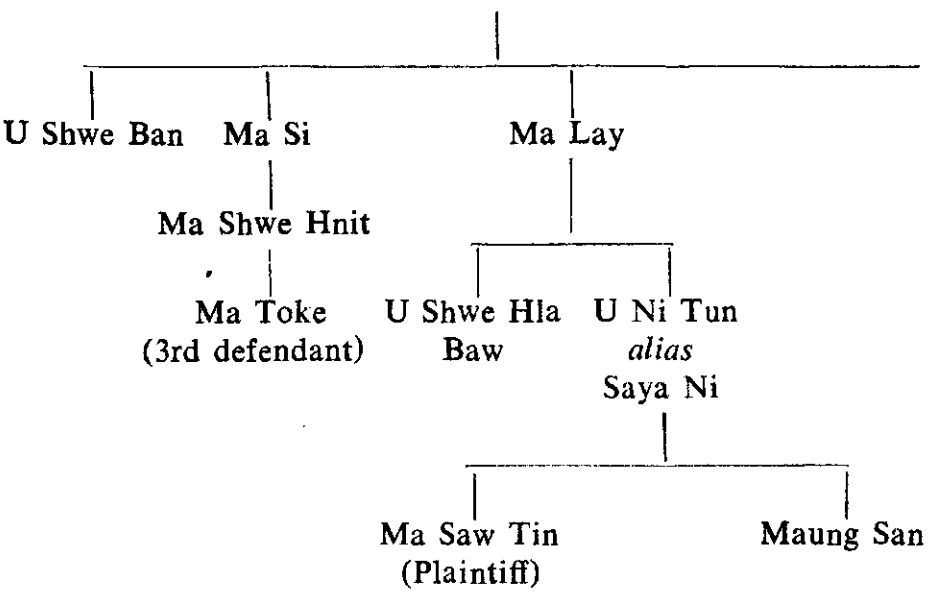
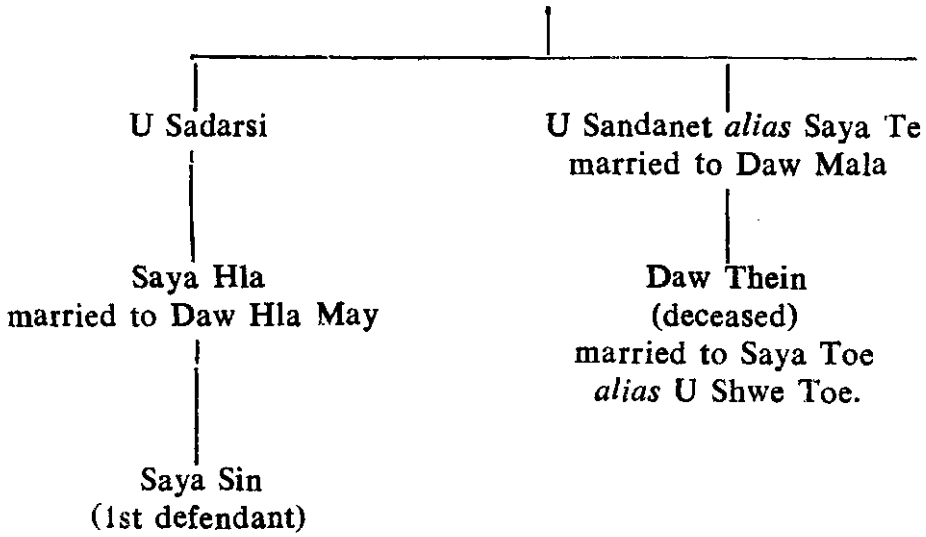
In the appeal before us no serious arguments have been addressed to us on the findings of other issues and the only crucial point that is involved in the present appeal is the question as to what law is applicable to the parties regarding the succession and inheritance to the estate of the deceased Daw Thein. As has already been observed above, the parties conceded to the applicability of the Hindu Law and also to the Ponna Customary Law. Now, before we consider the rights of each contending parties it may be necessary to set out a genealogical tree showing the relationship claimed by the plaintiff-appellant on one hand, and the 1st defendant- respondent on the other, to Daw Thein (deceased).

The plaintiff- appellant's, as well as Daw Toke's (3rd defendant-respondent) relationship to Daw Thein (deceased) as has been found established by evidence at the trial, is as follows :



The 1st defendant-respondent's relationship to the deceased Daw Thein found to have been

established by evidence adduced at the trial is, as hereunder :



Now, one most significant fact that has struck us in this case is that, although the contending parties asserted throughout the trial that the law applicable to the question in issue was the Bengal Hindu Law, *i.e.*, the Dayabhaga School of Hindu Law and the Ponna Customary Law ; yet not a shred of evidence was adduced to show what the Ponna Customary Law was. We found that at the trial many elderly Manipuri *Ponnas* were cited by the parties concerned. If there exists amongst the *Ponna* community in Upper Burma a Customary Law of succession and inheritance either opposed to or modifying the Hindu Law which ordinarily governs the *Ponnas*, these witnesses would surely depose what this Customary Law is. None of the parties had chosen to ask any question touching upon that point whatsoever. None of these witnesses stated any where the existence of a custom or usage as respects succession and inheritance which would otherwise override the Hindu Law to which they are ordinarily governed. It is quite clear from the provisions of section 13 (*1*) of the Burma

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Law Act, 1898, that ordinarily where a Court is to decide any question regarding succession, inheritance, marriage or caste or any religious usage or institution, the Hindu Law shall apply in cases where the parties are Hindus, except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law. Here, in the present case under appeal, the existence of a Customary Law of inheritance among the Manipuri *Ponnas* in Burma has never been established at all by evidence or otherwise. The case of *U San Byu, Purna Dass, Ma Me, Ton Ma and Ma Aung* v. *Maung Lu Thit* (1) cited by the trial Judge is of no help to us, and the trial Judge has rightly pointed out that the finding therein does not solve the question in issue in the present case. The Ponna Customary Law that was considered in that case was in respect of appointment of priests to the charge of temples or religious endowments so far as it concerned the community of *ponnas* or Manipuri Brahmins settled in Upper Burma. No other authority, or any authoritative treatise on the subject has been cited before us. Therefore, in the determination of the question as to who is the rightful heir to the estate of Daw Thein, we must of necessity have recourse to the Dayabhaga School of Hindu Law, in the absence of Ponna Customary Law. From the foregoing genealogical tree it would be seen that the plaintiff-appellant Ma Saw Tin and the 3rd defendant-respondent Ma Toke are the issues of Ma Si (deceased) and Ma Lay (deceased) who were the sisters of Daw Mala (deceased), the mother of Daw Thein. Whereas Saya Sin the 1st defendant-respondent is one of the descendants of U Sadarsi, (deceased) a brother of U Sandanet *alias* Saya Te

(1) U.B.R. (1892-1896), Vol. II, p. 420.

(deceased) the husband of Daw Mala. Again, Saya Sin's mother Daw Hla May was also found to be a sister of Saya Toe *alias* U Shwe Toe to whom Daw Thein was married and who predeceased her by several years.

The correctness of the two genealogical trees as set out above has not been in dispute. It will thus be seen that the plaintiff-appellant Ma Saw Tin's and the 3rd defendant-respondent Ma Toke's claims as rightful heirs to Daw Thein's estate are through their grandmothers Ma Si and Ma Lay, who were the sisters of Daw Mala, mother of Daw Thein. Whereas Saya Sin the 1st defendant-respondent's claim of inheritance to Daw Thein's estate is (1) through his grandfather U Sadarsi who was the brother of U Sandanet, the husband of Daw Mala and (2) through his mother Daw Hla May a sister of Saya Toe *(a)* U Shwe Toe, the husband of Daw Thein.

There is also clear evidence on the record to show that U Shwe Toe (*a*) Saya Toe, the husband of Daw Thein was a brother of Daw Hla May the mother of the 1st defendant-respondent Saya Sin. In this appeal, our attention has been drawn to the evidence of one Ma Aye Tin (PW 9) who is obviously a half-sister of Saya Sin the 1st defendant-respondent. She stated that her mother was Ma Thi Da, another wife of Saya Hla, in addition to Daw Hla May the mother of Saya Sin. This witness only spoke about her grandfather by the name of Nawbawshan, who was not at all related to U Sandanet (*a*) Saya Te, the husband of Daw Mala. Ma Aye Tin's evidence does not help the plaintiff-appellant's case at all, so far as Saya Sin's relationship to U Sandanet and Daw Hla May's relationship to Saya Toe are concerned. She only spoke about the relationship between Ma Thi Da's father Nawbawshan and U Sandanet (*a*) Saya

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Te and not about U Sadarsi, her paternal grandfather. Thus, Nawbawshan was Ma Aye Tin's maternal father, whereas U Sadarsi was Saya Sin's paternal father, *i.e.*, Saya Hla's father.

Now, having come to the conclusion that Dayabhaga School of Hindu Law applies to question in issue, the next question is whether the trial Judge's finding that Saya Sin has a better claim to the estate of Daw Thein in preference to Ma Saw Tin is in consonance with the said Law. We have carefully examined the relevant Hindu Law under two aspects, namely, (1) under the rules relating to succession to *stridhana* as laid down in sections 154, 155, 156, 157 and 158 of Mulla's Principles of Hindu Law, 10th Edition and (2) right of succession as a *Sapinda*. It is significant that the rule in section 158 which is common to all schools of Hindu Law states that on failure of her (Hindu widow) husband's heirs, the *stridhana* of a widow goes to her blood relations in preference to the Crown. See *Kanakammal* v. *Ananthamathi Ammal and two others* (1). From this rule it follows that only in the absence of Daw Thein's husband's heirs, and Daw Thein's issues, can Daw Thein's *stridhana* go to her blood relations, and that if there are none of these heirs, her estate escheats to the Crown, (the Government). Now, even if the rule of succession, rather than escheat applies to the present case, the succession to several classes of *stridhanas* of a Hindu widow, as set out in section 155, clearly shows *inter alia* that only the widow's husband's younger brother; brother's son; sister's son; and daughter's husband, (mostly males) has right to succeed. Now, it is fully conceded and admitted by all the parties in this case, that the only heir of Daw Thein's husband, U Shwe Toe *alias* Saya

(1) (1914) I.L.R. 37 Mad. 293.

Toe was Daw Hla May, a sister of the said Saya Toe and the mother of the 1st defendant-respondent. Thus, under section 155 of Hindu Law as well as under section 158 which is the rule common to all schools of Hindu Law relating to succession of *stridhana's* estate the 1st defendant-respondent Saya Sin is entitled to succeed to Daw Thein's estate.

Now, the second aspect is the right of succession as a *sapinda*. Here again, the order of succession as set out in Article 88 of the Hindu Law lays down that the paternal uncle's son's son, comes seventeenth in the order of succession. And it has been urged on behalf of the 1st defendant-respondent that he being a *sapinda* of the deceased Daw Thein's father U Sandanet her property should devolve upon him. There is considerable force in this submission. Even if we don't accept the rule relating to succession of *stridhana's* property as set out above, the 1st defendant-respondent's claim to Daw Thein's estate is quite established as a *sapinda*, in view of the accepted relationship between himself and Daw Thein's father U Sandanet. Therefore, the 1st defendant-respondent's right of succession viewed from whatever aspect of Hindu Law, either as a *sapinda* or as an heir to succeed *stridhana's* property we are fully satisfied that he has a better claim than the plaintiff-appellant. On this ground alone, and for the reasons we have stated above, this appeal must fail, and is therefore dismissed with costs.

U SAN MAUNG, J.—I agree.

APPELLATE CRIMINAL.

Before U San Maung, J.

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Dec. 23.

MAUNG BA MAUNG (APPELLANT)

v.

UNION OF BURMA (RESPONDENT).*

Unlawful Association Act, s. 17 (2)—Conviction by 1st Additional Magistrate (S.P.) who is also Additional Sessions Judge and Special Judge—Whether appeal lies to the Sessions Judge, Sagaing or to High Court.

Held : That appeal lies to the Sessions Judge, provided the Magistrate tried the case as a Magistrate and concluded it as a Magistrate.

Additional Sessions Judge *cum* Magistrate should try as a Special Judge all criminal cases triable by him in the exercise of his powers as special judge.

The Union of Burma v. *Ma Ah Ma*, (1951) B.L.R. p. 1 (F.B.), explained.

For $\frac{\text{Appellant}}{\text{Applicant}}$ *Nil.*

Ba Kyaw (Government Advocate) for the respondent.

U SAN MAUNG, J.—U Pe Thein who was a 1st Additional Special Power Magistrate at Mawlaik, convicted one Maung Ba Maung of the offence punishable under section 17 (*2*) of the Unlawful Associations Act and sentenced him to three years rigorous imprisonment in his Criminal Regular Trial No. 2 of 1955. The accused then appealed to the Sessions Judge of the Sagaing Division and the learned Sessions Judge has, by his order in Criminal Appeal No. 48 of 1955, referred the proceedings to

* Criminal Revision No. 120 (B) of 1955. $\frac{\text{Appeal from}}{\text{Review of}}$ the order of the 1st Additional Magistrate (S.P.) Magistrate of Mawlaik, dated the 17th day of June 1955 passed in Criminal Regular Trial No. 2 of 1955.

this Court on the ground that U Pe Thein was also Additional Sessions Judge and *ex-officio* Special Judge of Upper Chindwin and that therefore the appeals from criminal cases tried by him lay not to the Sessions Judge, Sagaing Division, but to the High Court. For this view the learned Sessions Judge relied upon the decision in the case of *The Union of Burma* v. *Ma Ah Ma* (1). However, the learned Sessions Judge, in my opinion, has misinterpreted the law as laid down in that case. The matter which was then under consideration was succinctly put by U Bo Gyi, J., in the following paragraph of his judgment:—

"The crux of the question in my opinion is whether U Hla Maung *qua* Magistrate is a different personality from U Hla Maung *qua* Special Judge. I see no reason in principle why U Hla Maung cannot be regarded as exercising criminal powers in a dual capacity. Under section 6 of the Code of Criminal Procedure, as amended, besides the four classes of Criminal Courts in the Union of Burma there may be other Courts such as the High Court and Courts constituted under any law other than the Criminal Procedure Code. It is clear therefore that the Court of a Magistrate constituted under the Code of Criminal Procedure is distinct from the Court of a Special Judge constituted under the Special Judges Act. A Magistrate who is also a Special Judge can therefore as Magistrate preside over the Court of the Magistrate and as Special Judge preside over the Court of the Special Judge. But when he has started trying a case in the capacity of a Magistrate he must finish it as Magistrate. Similarly, if he has started a case as Special Judge he must conclude it as Special Judge."

It is clear therefrom that although U Pe Thein might be an *ex-officio* Special Judge at Mawlaik, it was open to him to try as a Magistrate a case under section 17(*2*) of the Unlawful Associations Act as amended by Act No. 56 of 1954. It may seem

(1) (1951) B.L.R. p. 1 (F.B.)

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rather incongruous that an appeal from a case tried by U Pe Thein who also happened to be an Additional Sessions Judge should lie to the Sessions Judge.

In order to prevent such incongruity, the Additional Sessions Judge *cum* Magistrate, should in future try as a Special Judge all criminal cases which can be tried by him in the exercise of his powers as Special Judge.

Let the proceedings be returned to the Sessions Judge, Sagaing.

APPELLATE CRIMINAL.

Before U Chan Tun Aung, C. J.

MAUNG BO KYA (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

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July 5.

Penal Code, s. 304-A.

Held : For purposes of liability under s. 304-A, Penal Code it is to find out whether the death of a person in question is one directly caused by the rash and negligent Act of the person charged therewith, or in other words whether the death of the person in question was the proximate and effective cause of accused's rash and negligent Act without *actus interveniens* of a third person's negligence.

A very high degree of negligence is required to be proved before an accused person can be charged under s. 304-A of the Penal Code.

Tun Maung, Advocate, for the appellant.

Ba Kyaing (Government Advocate) for the respondent.

U CHAN TUN AUNG, C.J.—This is an appeal against the conviction and sentence imposed upon the appellant for an offence under section 304-A of the Penal Code by the 6th Additional Magistrate, Rangoon. The offence is said to be one for causing the death of one Maung Nyein Hlaing in consequence of appellant having rashly and negligently plied his sampan in the Rangoon River on the 29th May 1954 at about 10·30 a.m.

It appears that while Jala Ahmed (PW 1) the serang of a steam launch bearing No. 135 was steaming down the Rangoon River from Kanaungtoe to Rangoon tugging alongside a cargo barge, the appellant's sampan with two passengers Maung Nyein Hlaing (deceased) and Maung Hla Win (PW 3) came close to the moving cargo barge, despite the

*Criminal Appeal No. 165 of 1955. Appeal from the order of the 6th Additional Magistrate of Rangoon, dated the 7th day of March 1955 passed in Criminal Regular Trial No. 397 of 1954.

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U CHAN TUN AUNG, C.J.

warnings of the serang. As appellant's sampan got sufficiently close to the barge, Hla Win, the passenger, swung a rope on to the barge and he himself (Hla Win) jumped on to it. But within a few seconds after the rope had been tied on to the moving vessel, the rope snapped and the appellant's sampan with the remaining passenger, Maung Nyein Hlaing, capsized and sank in the river, and Maung Nyein Hlaing was drowned. Maung Nyein Hlaing was no other than an uncle of the appellant, and his body was ultimately recovered by the police concerned. From the Medical Officer U Maung Maung Taik's (PW 6) evidence, there can be no doubt that Maung Nyeing Hlaing died due to drowning. It seems the appellant himself narrowly escaped drowning by his extraordinary ability in swimming.

The learned trial Magistrate found that the appellant was responsible for the death of Maung Nyein Hlaing by his rash and negligent act in plying his sampan towards a moving steamer, and convicted and sentenced him as aforesaid. The appellant has chosen to give evidence on his own behalf at his trial and he averred that it was Maung Hla Win (PW 3) who tied the rope on to the steamer and that it was done not at his instance, but at the instance of deceased Maung Nyein Hlaing himself in spite of the appellant's objection thereto. The learned trial Magistrate, however, holds that the action of Maung Hla Win was immaterial and that the appellant being the sampan plier in charge of the sampan was " responsible for the proper navigation of his vessel"; and consequently the appellant was convicted under section 304-A of the Penal Code.

In appeal, the learned counsel for the appellant has urged that the conviction was entirely illegal and that the alleged rash and negligent act, if any, was

committed not by the appellant, but by Maung Hla Win. Further, it is contended that the appellant had objected to tying the rope of the sampan on to a moving launch, and that in spite of his objection it was the deceased who insisted upon tying, saying "ကိစ္စမရှိပါဘူး". Thus, the learned counsel submits that in these circumstances, the death of Maung Nyein Hlaing cannot be attributed to the rash and negligent act of the appellant or in other words that the appellant was not the person who caused the death of Maung Nyein Hlaing, but it was Maung Hla Win's rash act, acquiesced by the deceased himself that led to his death. There is considerable force in this contention. I have carefully examined the evidence of Maung Hla Win (PW 3), and I found that it was at the instance of the deceased Maung Nyein Hlaing that the sampan went up close to the moving launch and that it was the deceased himself who suggested tying up the rope on to the launch, despite protestation by the appellant. Maung Hla Win states that he even told Maung Nyein Hlaing "ဖြစ်ပါ့မလားဗျ" and that only when Maung Nyein Hlaing said "ဖြစ်ပါတယ်" did he throw up the rope on to the moving launch from which a certain Burman caught hold of it and tied it on to some thing on the launch. Maung Hla Win succeeded in jumping on to the launch. The moment he got on to the launch the rope snapped and the sampan capsized. Thus it is very clear, that if at all a fatality had occasioned by the snapping of the rope with the resultant turning turtle of the sampan, it could not be directly attributable to the appellant. It could be attributable to the act of Maung Hla Win who had acted at the suggestion of the deceased himself.

The finding of the learned trial Magistrate that the ultimate responsibility rests with the appellant

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who was in charge of the sampan is, I am afraid, rather untenable. What we are concerned for purposes of liability under section 304-A, Penal Code is to find out whether the death of a person in question is one directly caused by the rash and negligent act of the person charged therewith, or in other words whether the death of the person in question was the proximate and effective cause of accused's rash and negligent act without *actus interveniens* of a third person's negligence. A very high degree of negligence is required to be proved before an accused person can be charged under section 304-A of the Penal Code. Here, from the facts that have been brought out by the prosecution itself it appears that though the appellant was in charge of the sampan, yet he cannot properly be said to have any control over the acts of his passengers. If a passenger chooses to sit in his sampan in a dangerous position and then jump on to a moving launch, despite his objection, I fail to see how for such act of a passenger, the sampan plier can be said to have committed a rash and negligent act if any fatality was occasioned thereby. Therefore, after careful review of the evidence, I am of the view that the unfortunate consequence that has ensued in this case cannot rightly be attributed to the appellant. The consequence, if at all attributable to the appellant is, in my view and in the circumstances of the case, too remote to justify his conviction under section 304-A of the Penal Code.

For the above reasons, I set aside the conviction and sentence imposed upon the appellant by the trial Court and I direct that the appellant be acquitted so far as this case is concerned.

APPELLATE CRIMINAL.

Before U Thaung Sein, J. and U Po On, J.

H.C. 1955

Nov. 7.

MAUNG KHAM PANG (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Penal Code, s. 302 (1) (b), 302 (1) (b)/34—S. 2 (d), 4 (1) 5 (a), Idemnity Act, 1950—Want of Sanction—Trial Void ab initio—The Burma Indemnity and Validating Act (Burma Act No. 18 of 1945).

The appellant was convicted and sentenced to death in three separate trials under s. 302 (1) (*b*) and 302 (1) (*b*)/34, Penal Code.

It was contended on appeal that the trial was void *ab initio* for want of requisite sanction under s. 4 (2) of the Indemnity Act.

The Respondent's reply to this was that the prosecution in question was launched by and on behalf of the Government of the Union of Burma as all prosecutions are in the name of the State and that under s. 5 (*a*) of the Indemnity Act, no sanction is required.

Held : The Government of the Union of Burma did not in fact initiate the proceedings against the appellant and that they were launched at the instance of the relatives of the deceased.

Held further : The sanction of the President was a condition precedent for the prosecutions under s. 4 (2) of the Indemnity Act, 1950. The absence of such sanction renders the proceedings void *ab initio.*

The Union of Burma v. *San Tin*, (1948) B.L.R. 339, followed.

U Nyun, Advocate, for the appellant.

Ba Pe (Government Advocate) for the respondent.

U THAUNG SEIN, J.—The appellant "Bo" Kham Pang a member of the Union Military Police force has been convicted by the learned Special Judge (Additional Sessions Judge), Pakôkku in three separate trials, on seven counts of murder and sentenced to death on each count. By means of the present appeal and Criminal Appeals No. 373 and

* Crimial Appeal No. 372 of 1955. Appeal from the Order of the Special Judge (Additional Sessions Judge) of Pakôkku, dated the 29th day of August 1955 passed in Criminal Regular Trial No. 5 of 1955.

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374 of 1955 he seeks to have those convictions and sentences set aside. To be more explicit, the present appeal is against the convictions and sentences for the alleged murder of four villagers while Criminal Appeal No. 373/55 is against the conviction and sentence for the murder of one villager and Criminal Appeal No. 374/55 is in respect of the murder of two villagers. The main defence put forward on his behalf is that the acts of the appellant were covered by the Idemnity Act, 1950 [၁၉၅၀ ပြည်နှစ်၊ ကင်းလွတ်ချမ်းသာခွင့်နှင့် တည်မြဲရေး အက်ဥပဒေ] and that the trials before the learned Special Judge, Pakôkku were void *ab initio* as there was no formal sanction by the President of the Union of Burma for the prosecutions. Before we discuss the material facts involved we propose to set out the relevant provisions of the Indemnity Act, 1950.

Section 2 (*d*) defines "insurrection period" as follows :

"၂။ (ဃ) 'သောင်းကျန်းမှု ကာလအပိုင်းအခြား' ဆိုသည်မှာ အရပ်ဒေသတခုခုနှင့်စပ်လျဉ်း၍ ၁၉၄၈ ခုနှစ်၊ မတ်လ ၂၀ ရက်နေ့မှ ဤအက်ဥပဒေကိုစွဲအလို၄၊ နိုင်ငံတော် သမတက အမိန့်ကြော်ငြာစာဖြင့်၊ ထိုအရပ်ဒေသအတွက် သောင်းကျန်းမှု ကာလအပိုင်းအခြား ကုန်ဆုံးသည့်နေ့ဟု သတ်မှတ်သည့်နေ့အထိ ကာလအပိုင်းအခြားကို ဆိုလိုသည် "။

During such period members of the army, navy, air force and others in the service of the Union or a Constituent State are indemnified in respect of certain acts as laid down in section 4 of the above Act which reads :

"၄။ (၁) ရေတပ်သားအဖြစ်ဖြင့်ဖြစ်စေ၊ ကုန်းတပ်သားအဖြစ်ဖြင့်ဖြစ်စေ၊ လေတပ်သားအဖြစ်ဖြင့်ဖြစ်စေ၊ မြို့ဘက်ဆိုင်ရာ အမှုထမ်း အရာထမ်း အဖြစ်ဖြင့်ဖြစ်စေ၊ ပြည်ထောင်စုမြန်မာနိုင်ငံ၏၊ သို့တည်းမဟုတ် ပြည်ထောင်စု မြန်မာနိုင်ငံအဖွဲ့ဝင် ပြည်နယ်တခုခု၏အမှုကို ထမ်းရွက်သူကသော်၎င်း၊ ယင်းသို့ အမှုထမ်းရွက်သူ၏ အခွင့်အာဏာအရ အခြားဆောင်ရွက်သူ တဦးတယောက်

က သော်ငင်း၊ ပြည်ထောင်စုမြန်မာနိုင်ငံအတွင်း၌ဖြစ်စေ၊ ပြည်ထောင်စု မြန်မာ နိုင်ငံ ပြင်ပ၌ဖြစ်စေ၊ သောင်းကျန်းမှု ကာလအပိုင်းအခြားအတွင်း—

(က) ဗိမိဇ်၏တာဝန်ဝတ်တရားများကို ဆောင်ရွက်ရာ၌ သော်ငင်း—

(ခ) သောင်းကျန်းမှုကို နှိမ်နင်းရန်အတွက်သော်ငင်း—

(ဂ) ငြိမ်ဝပ်ပိပြားရေး တည်မြဲစေရန်အတွက်၊ သို့တည်းမဟုတ် ပြည်လည်ရရှိရန်အတွက်သော်ငင်း—

(ဃ) ပြည်သူ့လုံခြုံမှုရရှိအောင် ဆောင်ရွက်ရန် အတွက်သော်ငင်း—

သဘောရိုးဖြင့် အပြုအမူတခုခုကိုပြုလျှင်၊ သို့တည်းမဟုတ် ပြုသည့်သဘောဖြင့် ဆောင်ရွက်လျှင်၊ ထိုအပြု အမူ အတွက်၊ သို့တည်းမဟုတ် ထိုအပြုအမူကို အကြောင်းပြု၍၊ သို့တည်းမဟုတ် ထိုအပြုအမူနှင့်စပ်လျဉ်း၍ မည်သည့်တရားရုံး တွင်မျှ တရားမကြောင်းဖြင့်ဖြစ်စေ၊ ရာဇဝတ်ကြောင်းဖြင့်ဖြစ်စေ၊ အမှုအခင်းစွဲဆို ခြင်းကို၊ သို့တည်းမဟုတ် လက်ခံစစ်ဆေးခြင်းကိုမပြုရ။

(၂) ပြည်ထောင်စုမြန်မာနိုင်ငံအတွင်း၌ဖြစ်စေ၊ ပြည်ထောင်စုမြန်မာ နိုင်ငံပြင်ပ၌ဖြစ်စေ၊ သောင်းကျန်းမှု ကာလအပိုင်းအခြားအတွင်း၊ ပုဒ်မခွဲ (၁) တွင် ဖော်ပြထားသည့်တဝ်သား၊ သို့တည်းမဟုတ် မှုထမ်းရာထမ်းအဖြစ်ဖြင့် ဆောင်ရွက်သူတဦးတယောက်က၊ထိုပုဒ်မခွဲတွင်၊ သီးခြားဖော်ပြထားသည့် အခြေ အနေများအရ၊ ထိုပုဒ်မခွဲတွင် ဖော်ပြထားသည့်အကြောင်းတခုခုအတွက်ပြုသည့်၊ သို့တည်းမဟုတ် ပြုသည့်သဘောဖြင့် ဆောင်ရွက်သည့် အပြုအမူတခုခုကို သဘောရိုးဖြင့် ပြုခဲ့သည်မဟုတ်ကြောင်းဖြင့်၊ စွပ်စွဲလျှင်၊ ထိုအပြုအမူအတွက်၊ သို့တည်းမဟုတ် ထိုအပြုအမူကို အကြောင်းပြု၍၊ သို့တည်းမဟုတ် ထိုအပြုအမူနှင့် စပ်လျဉ်း၍ နိုင်ငံတော်သမတ၏ အခွင့်အမိန့်ကို ကြိုတင်မရရှိဘဲ၊ တရားမကြောင်း ဖြင့်ဖြစ်စေ၊ ရာဇဝတ်ကြောင်းဖြင့်ဖြစ်စေ၊ စွဲဆိုသည့်အမှုအခင်းကို မည်သည့် တရားရုံးတွင်မျှ လက်ခံစစ်ဆေးခြင်းမပြုရ ''။

The appellant's case is that the accusations levelled at him were in respect of acts performed by him in his capacity as a " Bo " of the Union Military Police and for the purposes mentioned in section 4 (*1*) of the Indemnity Act and hence no court is competent to take cognisance of them without the

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sanction of the President under section 4 (*2*). Admittedly, at the time when the incidents under consideration took place *i.e.* in 1949, the appellant was a "Bo" in charge of a unit of the Union Military Police stationed in Pakôkku District. There can be no doubt also that these incidents occurred during the "insurrection period" which commenced on the 28th March 1948 and has not been terminated up-to-date by a notification by the President under section 2 (*d*) of the Indemnity Act.

It will be recalled that in early 1949 there was wide-spread insurrection in Pakôkku District and several areas including Pakôkku Town itself fell into rebel hands. Among the areas affected was Laungshe village in Saw Township where the murders in question took place. In or about February 1949 while the insurrection was at its height the appellant "Bo" Kham Pang arrived at that village with a posse of about forty Union Military Police personnel made up mainly of Shans. The unit was quartered at the inspection bungalow outside the village and it is alleged that within a month or so of their arrival there began a reign of terror and bloodshed for the villagers. No doubt the situation in and around the village was exceedingly tense at the time and the appellant and his unit were in grave danger of attacks by rebels and "fifth-columnists". To all appearances the unit lived in constant dread of insurgents and were obsessed with the fear of rebel agents and spies. It was during this period that seven unfortunate villagers of Laungshe were killed by the appellant's unit probably under the suspicion or belief that they were rebel agents or spies. We do not consider that it would be desirable to enter into any detailed discussion as to the circumstances under which these villagers were killed as we are of the opinion that the

convictions and sentences passed on the appellant will have to be set aside for want of requisite sanction by the President for the prosecutions and there is every likelihood of the appellant being retried later with the necessary sanction. In other words, we are anxious to avoid any expression of opinion on the facts which might prejudice the appellant at his retrial if any.

Now, the main defence set up by the appellant both in the trial court and before us is that the acts complained of were committed by him in his capacity as a "Bo" in the Union Military Police and for the purpose of suppressing the insurrection and for maintaining or restoring law and order in the area as laid down in section 4 *(a)*, *(b)*, *(c)* and *(e)* of the Indemnity Act, 1950. If these acts were performed in good faith and for the purposes mentioned above then indeed, no prosecution could be launched against the appellant. In this connection it may be interesting to note that during the last World War the then Government of Burma enacted The Burma Indemnity and Validating Act "to indemnify servants of the Crown and other persons in respect of acts and things ordered or done or purporting to have been ordered or done in the reasonable belief that such acts and things were necessary for the execution of their duty or for the purpose of prosecuting the war or maintaining or restoring order or for enforcing discipline or ensuring public safety or maintaining supplies and services essential to the life of the community or the defence of Burma or otherwise in the public interest". See The Burma Indemnity and Validating Act (Burma Act No. 80 of 1945). There can be little doubt that this Act served as a model for the Indemnity Act of 1950 as evidenced by the striking similarity in the definition of the terms "war

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period " and " insurrection period " and the provisions of sections 4 and 5 of the latter Act with sections 3 and 6 of Act 18 of 1945. Sub-section (*2*) of section 3 of Act 18 of 1945 is in the following strain :—

" 3. (2) Where it is alleged that any act done during the war period whether within or without British Burma and done or purporting to be done in the circumstances specified in sub-section (*1*) by a person acting for any of the purposes and in any of the capacities therein described was not done in good faith, no suit, prosecution or other legal proceeding shall be maintained in any Court for or on account of or in respect of the act complained of unless instituted with the previous sanction of the Governor. "

This corresponds to section 4 (*2*) of the Indemnity Act, 1950 and the Courts are at present debarred from entertaining any allegation of bad faith without the sanction of the President of the Union of Burma.

No formal sanction for the prosecutions of the appellant as required by section 4 (*2*) of the Indemnity Act is traceable in the trial records. However the learned Government Advocate is of the opinion that the prosecutions were in order in view of section 5 (*a*) of the Act which reads :

" ၅။ ။ဤအက်ဥပဒေပါ မည်သည့်အချက်ကမျှ—

(က) ပြည်ထောင်စု မြန်မာနိုင်ငံတော် အစိုးရကဖြစ်စေ၊ ပြည်ထောင်စု နိုင်ငံတော် အစိုးရ၏ ကိုယ်စားဖြစ်စေ၊ ပြည်ထောင်စုအဖွဲဝင် ပြည်နယ်အစိုးရကဖြစ်စေ၊ ပြည်ထောင်စုအဖွဲဝင် ပြည်နယ် အစိုးရ၏ ကိုယ်စားဖြစ်စေ တရားမကြောင်းဖြင့်၊ သို့တည်းမဟုတ် ရာဇဝတ်ကြောင်းဖြင့် အမှုစွဲဆိုခြင်းကိုသော်၎င်း

ထိခိုက်သည်ဟု မမှတ်ယူရ "။

According to him the prosecution launched against the appellant must be deemed to have been instituted by or on behalf of the Government of the Union of Burma as all prosecutions are in the name

of the State. A check of the trial records reveals that the Government of the Union of Burma did not in fact initiate the proceedings against the appellant and that they were launched at the instance of the relatives of the deceased villagers. We regret therefore that we are unable to agree with the learned Government Advocate that the prosecutions in question were launched by or on behalf of the Government of the Union of Burma. Under the circumstances, it is clear that the sanction of the President was a condition precedent for the prosecutions *vide* section 4 (*2*) of the Indemnity Act, 1950. The absence of such sanction renders the proceedings void *ab initio* and if any authority be required in support of this view reference is invited to *The Union of Burma* v. *San Tin* (1). That was a case under section 19 (*f*), Arms Act which cannot be instituted without the prior sanction of the District Magistrate concerned under section 29 of that Act. This sanction was not filed at the time the accused was sent up for trial and the prosecution sought to cure that defect by filing it later. It was held that lack of requisite sanction at the time the prosecution was launched rendered the trial void *ab initio*. So also in the present case, the prosecutions launched against the appellant were void *ab initio* and there is no alternative except to set aside the convictions and sentences. It is still open however to the authorities concerned to obtain the necessary sanction of the President and to prosecute the appellant once again on the same facts.

Accordingly, the convictions and sentences passed on the appellant are hereby set aside and he is discharged and released so far as this case is concerned.

(1) (1948) B.L.R. 339.

APPELLATE CRIMINAL.

Before U Ba Thoung, J.

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Aug. 1.

MAUNG LU MIN (APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Penal Code, s. 302—Application for bail under s. 498 (1), Criminal Procedure Code (Temporary Provisions) Act, 1954 (Act No. VII of 1954).

Held : Premature application for bail is not a sufficient ground to dismiss a bail application.

What the learned Sessions Judge has to consider is, whether on the materials placed before him there are reasonable grounds for believing that the applicant has been guilty of the offence for which he stands charged, and if there are no such reasonable grounds on the materials placed before him, to believe that the applicant has committed the offence with which he stands charged *and if his case is considered to be an exceptional one* he may be released on bail.

T. C. Torrens for the applicant.

Ba Kyaw (Government Advocate) for the respondent.

U BA THOUNG, J.—This is an application for bail under section 498 of the Criminal Procedure Code. The applicant Maung Lu Min is standing trial along with the first accused Maung Saw Min for an offence under section 302, Penal Code, in Criminal Regular Trial No. 9 of 1955 of the Court of the Sessions Judge, Hanthawaddy and Rangoon. On the 30th May 1955 the applicant applied to the Sessions Judge to release him on bail pending his trial, and the learned Sessions Judge dismissed his application. He has now applied to this Court under section 498 of the Criminal Procedure Code to release him on bail.

* Criminal Misc. Application No. 14 of 1955. Application for bail under s. 498 of the Code of Criminal Procedure.

The applicant was arrested and sent up by the police with a supplementary charge sheet on the 25th May 1955, that is about a fortnight after the first accused was sent up.

Altogether three witnesses have been examined in this case including the Investigating Officer U Kyaw Sint who has been examined at length.

I see no tangible evidence on the materials placed before me now implicating the applicant in this case. The learned Sessions Judge who dismissed his application for bail remarked in his order thus :

"I have no knowledge what other witnesses besides P.S.O. U Kyaw Sint the Investigating Officer, will testify in the case. I cannot therefore foresee how the applicant will be involved circumstantially or otherwise."

The learned Sessions Judge dismissed the application merely because he considered it to be premature, but I do not think this is a sufficient ground to dismiss the application. What the learned Sessions Judge has to consider is, whether on the materials placed before him there are reasonable grounds for believing that the applicant has been guilty of the offence for which he stands charged, and if there are no such reasonable grounds, on the materials placed before him, to believe that the applicant has committed the offence with which he stands charged and if his case is considered to be an exceptional one he may be released on bail.

Section 498 of the Code of Criminal Procedure (Temporary Provisions) Act, 1954 (Act No. VII of 1954) reads :

"Section 498 of the Code shall have effect as if for sub-section (1) thereof the following were substituted, namely :—

(1) The High Court or Court of Session may in any case, whether there be an appeal on conviction

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or not, direct that any person be admitted to bail, unless there are reasonable grounds for believing that the accused has been guilty of an offence under section 122 of the Penal Code or of any of the offences mentioned in clauses (i) to (vii) of sub-section (1) of section 497, or direct that the bail required by a police officer or Magistrate be reduced."

In the present case on the materials placed before me now, I do not see any reasonable ground to believe that the applicant has committed the offence with which he stands charged. The learned Government Advocate merely contends that the application is premature. He could not say what further evidence is forthcoming against the applicant, and it is not suggested that the applicant is likely to abscond or tamper with the prosecution witnesses if he is released on bail. Under the circumstances I consider this to be an exceptional case in which bail should be granted.

For these reasons, I would direct that the applicant be released on bail during the pendency of his trial on his furnishing security for K 5,000 (five thousand) with two sureties in the like amount.

APPELLATE CRIMINAL.

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

MAUNG SEIN TUN AND ONE (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

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Aug. 17.

Penal Code, s. 302 (1) (b) 34—First Information Report—S. 145, Evidence Act—Omission is not contradiction—Falsus in uno, falsus in omnibus, *a dangerous maxim—S. 162 (2), Criminal Procedure Code, relating thereto.*

Held: A First Information Report usually does not contain a detailed account of every point in the case and the police officer who records it cannot go into the length of examining the informant in the way a witness is examined in Court. Because a certain allegation as against an accused concerned has not been mentioned in the First Information Report although the main features of the case have already been incorporated therein, one cannot conclude that the witness (informant) is a false witness and that his evidence in Court should be rejected *in toto* on that account.

S. 145, Evidence Act clearly prescribes that if it is intended to contradict a witness by his former statement which is in writing, his attention must be called to that part of the statement which is to be used to contradict him. Every omission does not amount to contradiction. The very word "contradict" connotes "to speak against" or "to gainsay". A witness cannot be confronted with the unwritten record of an unmade statement.

The old maxim "*Falsus in uno falsus in omnibus*", is a dangerous maxim.

If a witness is not found to have told the truth in one or two particulars the whole of his statement cannot be ignored. The Court must sift the evidence, separate the grain from the chaff and accept that which it finds to be true and reject the rest. His testimony has to be considered in the context of the entire facts and circumstances obtaining in the case.

Maung Po Gyaw v. *Maung So*, A.I.R. (1923) Ran. p. 30; *Emperor* v. *Muzaffar Hussain*, A.I.R. (1944) Lah. p. 97; *Nandia and others* v. *Emperor*, A.I.R. (1940) Lah. p. 457, referred to.

There is no legal obligation either on the public prosecutor or on the Court to advise the accused to request the Court to refer to the statement of any witness to the Police under s. 162, Criminal Procedure Code.

Nga Tha Aye and another v. *Emperor*, A.I.R. (1935) Ran. p. 299, dissented from.

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* Criminal Appeal Nos. $\frac{241}{293}$ of 1955. Criminal Reference No. 20 of 1955. Appeal from the order of the Sessions Judge sitting as Special Judge, Shwebo, dated the 31st day of May 1955 passed in Special Judge Trial No. 21 of 1954.

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It is only on the request of the accused or his counsel can the Court direct the furnishing of copies of police statement of a witness for purposes of using it in the manner provided in s. 145, Evidence Act, as is plainly provided in sub-s. 2 to s. 162, Criminal Procedure Code.

King-Emperor v. *Nga Lun Thoung*, I.L.R. 13 Ran. p. 570, followed.

Ba Shun, Advocate, for the 1st appellant.

Tun Aung (2), Advocate, for the 2nd appellant.

Ba Pe (Government Advocate) for the respondent.

U CHAN TUN AUNG, C.J.—The two appellants are the son and the father, and they have been convicted and sentenced to death for the alleged murder of one Maung Tun Thwin under section 302 (1) (*b*) read with section 34 of the Penal Code by the Special Judge, Shwebo, in his Criminal Trial No. 21 of 1954.

The occurrence took place on the evening of the 17th July 1954 (2nd *Lasoke* of *Waso*, 1316 B.E.) in Kya (South) village which is a few miles away from Shwebo. In order to fully appreciate the case for the prosecution it is necessary to keep in mind the following factual background which are not in dispute; namely, (1) the existence of two sections of people in the village rendering some sort of social service, one composed of young persons known as the Fire Brigade, and the other known as the Village Defence Force under the leadership of the headman of the Kya North village, (2) the deceased Maung Tun Thwin belonged to the Village Fire Brigade of which he was the secretary, (3) the appellant Sein Tun and his father Maung Po Maung, were at the relevant time in charge of the Village Defence Force, (4) there was an outcry against the appointment of appellant Maung Po Maung as a "ywagaung" of Kya South village in place of

U Tun Pe the old incumbent. This appointment was resented to by the younger persons who were mostly members of the Village Fire Brigade, (5) the geographical positions of the three villages, namely, the North, Middle and South Kya villages and also the respective positions of the houses of the witnesses and the appellants, delineated on the map Exhibit (o) drawn by the Revenue Surveyor U Chit Saya (PW 15). This map also indicates the positions of some of the important prosecution witnesses at or about the time the crime was committed. It should also be borne in mind that the three Kya villages, (north, middle and south) are at the relevant time in charge of headman U Tu (PW 10) who lives in the North village and who is admittedly a relation of both the appellants. U Tu's wife is no other than the sister of Maung Po Maung's wife and Sein Tun being his own nephew.

The case for the prosecution was that on the evening of the 17th July 1954 U Aung Myat (PW 14), at the instance of headman U Tu, went round the Kya South village as a village-crier, announcing that appellant Maung Po Maung had been appointed as *ywagaung* in place of U Tun Pe. This appointment was not approved by the villagers of Kya South village including the members of the village fire brigade of which Maung Tun Thwin, the deceased, was the secretary. It seemed that at the instance of the members of the fire brigade and also of some villagers U Aung Myat was again sent round at about 5 p.m. for the second time accompanied by some 30 villagers to announce that the villagers of South Kya village did not want Maung Po Maung as their *ywagaung*. In fact it was not only U Aung Myat who made the announcement as the village-crier, but the 30 villagers who accompanied

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him also shouted repeatedly all over the village "ဦးဘိုးမောင်ကို အလိုမရှိ". The whole village was resounding with these shouts and yellings during the entire evening. While under such tense situation Maung Tun Thwin, the deceased, accompanied by Maung Ba Thaung (PW 20) went to close the north gate of the village which was just close to Ko Sunt's (PW 1) house. After closing the gate Maung Tun Thwin remained in Ko Sunt's house; but his companion Maung Ba Thaung returned home. Not long after the closure of the village gate by Maung Tun Thwin, the appellant Sein Tun armed with a *dah* and accompanied by three or four persons came near the north gate, opened it and went into Ko Sunt's compound. There he met Maung Tun Thwin and telling him "မင်းအကြောင်းသိမယ် လိုက်ခဲ့" took him by the hand and walked away from Ko Sunt's compound. Ko Sunt was quite clear that it was appellant Sein Tun who pulled away the deceased from his compound. The direction they took after they left Ko Sunt's compound was southward. Not long after their departure many people heard Maung Tun Thwin cry out several times "မောင်စိန်တွန်း သားအဖ ကျွန်တော့်ကို သတ်ကုန်ပါပြီ". In particular such cries were heard by Ma Ohn Sein (PW 3) the mother of the deceased, by Maung Ba Thaung (PW 20), Maung Aye Saung (PW 2), Ma Ngwe Sein (PW 4) and Ma Lay Me (PW 11). On hearing these cries the village alarm was sounded by Maung Ba Thaung (PW 20) and the members of the fire brigade Maung Aung Kyi, Hla Maung and U Po Shan (PWs 7, 8 and 9) and others rushed out towards Maung Po Maung's compound whence the cries for help by the deceased came. In the compound of Maung Po Maung there are two houses, one on the north-western corner and

the other on the south-eastern corner. The one in the south-western corner is Maung Po Kun's and the other in the south-eastern corner is that of appellant Maung Po Maung. When Maung Aung Kyi and his companions got near Maung Po Kun's house they found the gate shut. Maung Po Kun was asked to open the gate but he refused to do saying " မင်းနှားမလည်ပါဘူးကွ၊ မင်းပြန်သာ ပြန်ပါ ". Similar reply was given to the members of the fire brigade saying " မင်းတို့ လူငယ်များကို ဖွင့်မပေးနိုင်ဘူး ". The villagers then fetched two village elders, U Lu Han and U Tun Maung (PWs 5 and 6) and came back to the scene of crime. Po Kun then opened the gate and when the villagers entered Po Maung's compound they found Maung Tun Thwin already dead with several *dah* cut injuries not far away between Po Kun's and Po Maung's houses. They examined the dead body and they were quite positive that at that time there was nothing whatsoever in the way of weapon either in the hand of the deceased or near about him. That very night, after midnight U Sunt (PW 1) accompanied by Maung Aung Kyi (PW 7), Maung Shwin (PW 19) and other villagers left for Shwebo police station arriving there about 7 a.m. in the morning and lodged the First Information Report Exhibit (ဃ). The report was duly signed by him and we observed that only appellant Maung Sein Tun was denounced as the person who forcibly pulled away Maung Tun Thwin from Ko Sunt's house on the evening in question and that soon after they heard Tun Thwin's cries for help from the south-eastern corner of the village. The police officer in charge of Shwebo police station, Maung Htay Maung (PW 16) did not visit the scene of crime till 21st July 1954 and even when he went there on the 21st July 1954 he did not

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stay long at the village. He arrived at the village at about 8 a.m. and returned at about 3 p.m. on the same day after examining some witnesses. However, it appears that on the 18th July 1954, *i.e.* the next morning after the occurrence Ko Aung Zan (DW 5), a Head Constable in charge of the police outpost at Myingatha was informed about the murder of Maung Tun Thwin. He visited the scene of crime and there he found Maung Tun Thwin's dead body in Maung Po Maung's compound. He also found some damage done to furniture in Maung Po Maung's house. He next directed the dead body to be removed to the civil hospital at Shwebo. He also met U Tu the village headman who gave him a live handgrenade, saying that it was found tuck up at the waist in the fold of the *longyi* worn by the deceased. The same was taken and handed over to the police station on the 19th July.

Dr. Emanuels (PW 17) who performed the post-mortem examination of the deceased Maung Tun Thwin found no less than 6 injuries. Five of which are incised wounds the remaining one being a punctured wound $\frac{1}{2}'' \times \frac{1}{4}'' \times \frac{1}{6}''$ on the left side of the chest just below the outer side of the nipple. Injury No. 1, which was incised wound $9'' \times 2'' \times 5\frac{1}{2}''$ across the back of the neck was the most serious injury and the medical officer discovered that it had completely severed the spinal column and the chord. The injury No. 6, was according to him one that could have been caused by the use of a spear or some sharp-pointed weapon. From the serious incised wounds found on the deceased and from the different nature of the wounds found on him it can safely be inferred that at least two different kinds of weapons had been used in causing his death.

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When the investigating officer Maung Htay Maung visited the scene of crime on the 21st July 1954, he examined Ma Lay Me (PW 11) and others; and he then arrested appellant Maung Sein Tun and Maung Po Kun, the latter being the person near whose house the deceased body was found on the evening in question. Maung Po Kun was discharged at the trial as there was no sufficient evidence to warrant his trial any further. The investigating officer did not stay in the Kya village to complete the examination of all the witnesses but he went back the very evening. Perhaps, the situation in the village being tense he thought that for his own safety he should not stay in the village and that he should send for the witnesses from the police station and examine them there. Therefore, he sent for the remaining witnesses and examined them at the Shwebo police station on the 23rd July 1954. He examined U Lu Han, U Tun Maung, Ko Lu Shwe, Ko Shwin, Ko Po Shan. On 24th, 25th and 26th July he examined several other persons such as Ma Pyu, Ma Chit Htay, Ko San Aye, Ko San Wai, etc. It was not until the 27th July 1954 did he examine Ma Ngwe Sein (PW 4) and Maung Aye Saung (PW 2). He arrested the appellant Maung Po Maung on the 28th July 1954.

In support of the prosecution story that the two appellants were concerned in the murder of Maung Tun Thwin, four witnesses namely, Ko Sunt (PW 1), Maung Aye Saung (PW 2), Ma Ohn Sein (PW 3) and Ma Ngwe Sein (PW 4), figured most prominently. In addition, there are also witnesses who deposed to having heard the denunciations made by deceased at or about the time of occurrence denouncing the names of Sein Tun and Po Maung as his assailants.

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Ko Sunt (PW 1) who lodged the first information report the very next day after the occurrence specifically denounced appellant Sein Tun as the person who took away the deceased on the evening in question accompanied by some village defence members. He was also definite that soon after Tun Thwin was taken away by Sein Tun he heard Tun Thwin's cries for help and that the sound came from the direction of Maung Po Maung's house. He also met as he rushed out to the scene of crime witnesses Maung Aye Saung and Ma Ngwe Sein (PWs 2 and 4) who told him that Maung Tun Thwin was lying dead in Maung Po Maung's compound. He also met Ma Ohn Sein, who was crying and shouting out that her son had been killed by Maung Po Maung and Sein Tun. However, there is one significant fact about his first information report to the police in that he made no mention whatsoever about appellant Maung Po Maung being involved in this crime. He mentioned therein only Sein Tun. In his cross-examination before the Court he admitted having met Ma Ngwe Sein and Aye Saung directly after the incident. He explained that though he knew that Maung Po Maung was also concerned in the alleged murder before he left for the police station, yet he did not mention Maung Po Maung's name as he was afraid of reprisals,—Maung Po Maung's followers being members of the village defence force who were fully armed. This explanation for reasons which we shall set out hereinafter appears to be quite plausible. The omission of Maung Po Maung's name in the First Information Report to our mind does not substantially affect the material facts concerning the case inasmuch as there are some other materials besides this witness's testimony which

substantially connect the crime with the two appellants.

Maung Aye Saung (PW 2) professes to be an eye witness and he lives just near the scene of crime as could be seen on the map Exhibit (o). On the evening in question he heard the villagers yelling out ဦးတိုးခမောင်ကို အလိုမရှိ၊ ဦးထွန်းဖေကိုသာအလိုရှိတယ်။ Scarcely had these shouts and yelling of villagers subsided when he went down to close his gate, and near there he saw the appellants Maung Po Maung and Sein Tun, father and son, one on each side of Maung Tun Thwin taking away Tun Thwin towards Maung Po Maung's house. He also saw some armed men behind these three persons. Maung Po Maung was seen armed with a spear while Sein Tun was armed with a *dahshe*. He next saw Tun Thwin being taken into Maung Po Maung's compound and there Sein Tun cut Tun Thwin with a *dahshe* while Po Maung speared him. He heard Tun Thwin cry out that he was being cut by Maung Po Maung and Sein Tun. We find that in his cross-examination he had to admit that when examined by the police he did not speak of seeing Po Maung and Sein Tun cut the deceased; but he maintained that he told the police that he saw Sein Tun and Maung Po Maung pull away Tun Thwin just by the side of his gate, that is before they entered Maung Po Maung's compound.

Ma Ohn Sein (PW 3) on the other hand, the mother of the deceased, averred that she saw Sein Tun take away her son from Ko Sunt's house just before she heard her son's cries for help to the effect that he was being cut by Sein Tun and Maung Po Maung. On hearing these cries she and Ko Sunt went across towards Maung Po Maung's house and on the way they met Maung Aye Saung (PW 2) and Ma Ngwe Sein (PW 4) from whom she

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learnt that her son had been killed by Po Maung and Sein Tun. She attributed having recognized Sein Tun as the person who took away her son to the sunlight as it was about dusk. The learned Special Judge, however rejected her testimony as being untrustworthy because, according to some of the prosecution witnesses, recognition of Sein Tun was not by sunlight but by the moonlight. Whether her recognition of Sein Tun was by the moonlight or by the sunlight is, to us, immaterial. By this discrepant statement alone she could not be discredited, inasmuch as the fact that Sein Tun was the person who took away her son from Ko Sunt's house had been fully established by the testimony of Ko Sunt himself and there could be no doubt about it whatever. We are unable to appreciate the reason given by the Special Judge in rejecting her (Ma Ohn Sein's) testimony *in toto* on the ground that there has been a serious discrepancy in her statement regarding the visibility on the evening in question,—whether there was moonlight or evening sunlight. One should remember that the incident happened in a July evening, the time was between 7 and 7-30 p.m. In a northern town like Shwebo it is common knowledge that the twilight of the evening sun would be there even after 7 p.m. And again being 2nd *Lasok* of *Waso*, it was quite possible that both the sunlight (twilight) and the moonlight would be available to enable a person recognizing another. Be that as it may, even if Ma Ohn Sein's testimony is rejected as untrustworthy, yet there remains the eye witness Ma Ngwe Sein (PW 4) who appears to us to be a very independent witness, and the trial Judge who has had the opportunity of appraising her statement carefully, having seen her in the witness-box, considered her as being one who had struck

him as being an honest witness. She is no other than a niece of the appellant Maung Po Maung and she lives just a few feet away from the north-eastern entrance of Maung Po Maung's compound a little beyond Maung Aye Saung's house. Her house is marked as (c) on the map Exhibit (o). According to her, at about 7 p.m. as she was about to close the compound gate she saw Maung Po Maung and Sein Tun one on each side of deceased Tun Thwin and taking him away towards Maung Po Maung's house. She saw Sein Tun armed with a *dahshe*. She also saw a man with a fire-arm behind Po Maung and Sein Tun. She was definite that it was Po Maung and Sein Tun who pulled away Tun Thwin in the moonlight. She also heard not long after Tun Thwin's cries that he had been cut by Sein Tun and Po Maung. She further testifies that after having heard these cries by Tun Thwin she heard the voices of people and saw the people running away from the scene. She says that the voices she heard were those of Sein Tun and Po Maung.

The learned Special Judge has thought it fit in the interest of justice to examine the headman U Tu (PW 10) though he was not cited as a witness. He was examined under section 450 of the Criminal Procedure Code thus giving a chance to both the prosecution and the defence for cross-examination. This witness being related to Maung Po Maung, having married Maung Po Maung's wife's sister, and Sein Tun being his own nephew, was not unnaturally biased towards the appellants. He tried to make out that at or about the time of occurrence Sein Tun and his father were not in the South Kya village but in his village. The North and South Kya villages are not far apart. In trying to

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support the plea of *alibi* set up by the two appellants he fails rather miserably, because some of the witnesses did not actually support his testimony. For instance, Maung Ngwe Than (DW 3) who is no other than a son of Maung Po Maung tried to maintain that he was present when the villagers came into his father's compound and started destroying weaving loom and furniture in the house. He says that he was hiding behind a tree and he saw the incident that took place from there. He maintains that his father Maung Po Maung had already run away to North Kya village leaving him behind to report to the headman before the villagers came into the compound. But U Tu would have it that when Maung Po Maung came to North Kya village Maung Ngwe Than (DW 3) was along with him. Furthermore, U Tu did not visit the scene of crime, as he ought to do, that very night; but he preferred to remain in his own house till the next morning. Even when he visited the scene of crime, he did not examine the dead body; but he was rather anxious to note down the extent of damage said to have been done to furniture and weaving loom in Maung Po Maung's house. He also recorded the fact that on the night in question when the uproar, in the village had subsided, some village defence members handed over to him a handgrenade said to have been found beside the dead body of Maung Tun Thwin. He also wrote down the report Exhibit (ə) somewhat in detail, being his version of the case. It is addressed to U Aung Zan (DW 5), Head Constable of Myingatha outpost. Though the report is signed by him, it does not make any reference as to how the foul murder of Tun Thwin had taken place. Significantly enough the report does not give the witness's own account of what he had

seen and heard, but recounted hearsay informations given to him by others. However, he had to admit in Court that on the very next morning after the crime, Ma Ohn Sein (PW 3) did report to him that her son had been killed by Po Maung and Sein Tun. He also had to admit that he put down that report in writing; but he could not explain why he failed to bring that report to Court or produced the same to the police. We are therefore of the view that U Tu's evidence has not much value, except that it reveals that Ma Ohn Sein, the mother of the deceased, did denounce to him that the assailants of her son were the two appellants.

On the strength of these prosecution witnesses, the learned trial Judge considered it to be sufficient for framing charges against the appellants under section 302 (1) (*b*) read with section 34 of the Penal Code. He finds that there was a deliberate dragging away of Tun Thwin by Sein Tun and Po Maung into the latter's compound wherein Tun Thwin was done to death and that from the surrounding circumstances he inferred that in so dragging and cutting Tun Thwin to death the appellants had acted in furtherance of a common intention, hence a premeditated crime. The two appellants were informed about the provisions of section 342 (1) of the Criminal Procedure Code as regards the right to give evidence on oath; but it appears that they declined to go into the witness-box and give evidence on their behalf. They however chose to be examined under section 342 (2) of the Criminal Procedure Code and in their examination by Court they totally denied having cut and killed the deceased. Both of them set up a plea of *alibi*. They also alleged that Ko Sunt, Ma Ngwe Sein and Maung Aye Saung had given false evidence against them. The pleas of *alibi* have been closely

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analysed by the learned trial Judge and we entirely accept his finding that they were concocted with the help of the headman, U Tu. The North Kya village and the South Kya village are not far distanced and "the split second *alibi*" so to say, went to pieces when it was examined closely. Apart from *alibi*, the defence placed great reliance at the trial on the evidence of U Ko Ko (DW 1), Subdivisional Officer, and U Aung Zan (DW 5).

U Ko Ko (DW 1) maintains that when he went to South Kya village on the 25th July, that is some 7 days after the occurrence, to make enquiry whether some of the members of the village defence force were involved in the murder. He then met U Sunt (PW 1), but U Sunt did not denounce any one to him, as having been involved in the murder of Tun Thwin.

U Aung Zan's (DW 5) testimony does not help much, except that U Tu handed over to him the report Exhibit (ə). He also spoke about Maung Po Maung having told him that villagers attacked his house on the night in question. The learned trial Judge does not consider that failure on the part of U Sunt to mention the appellants' names to U Ko Ko was of any significance; because the Subdivisional Officer went over to the village to find out not the culprits concerned, but whether the defence force members were involved in the alleged murder. This finding, to our mind, is perfectly justified. Surely, U Ko Ko as the Subdivisional Officer of Shwebo, the moment an important crime was committed in his jurisdiction would have been promptly informed by the police concerned. Therefore, he must have already known that Ko Sunt's First Information Report lodged at the Shwebo police station on the 18th July morning implicated Sein Tun as one of the persons concerned in the alleged crime.

It has been strenuously urged before us, on behalf of both the appellants, that Ko Sunt (PW 1), Maung Aye Saung (PW 2), Ma Ohn Sein (PW 3) and Ma Ngwe Sein (PW 4) are false witnesses and that they should not be relied upon. It is urged that in view of part of their testimony having been rejected as unreliable by the trial Judge, their entire testimony should be treated likewise. It is also urged that the prosecution has not proved the case beyond reasonable doubt that the appellants were the real persons concerned in the murder of the deceased. We have given anxious thoughts to these submissions and we are afraid that we cannot accept them. The oral testimony of these witnesses has to be examined as a whole in the full context of facts and circumstances that preceded the crime, and those available directly thereafter. Ko Sunt (PW 1) no doubt, when he made the First Information Report, denounced appellant Sein Tun alone. Maung Po Maung's name was not mentioned as the person involved in the alleged murder. For this omission we cannot reject his entire evidence before the Court. He might have known when he lodged the First Information Report that Po Maung was involved in the murder. But it should be borne in mind that a First Information Report, as it usually is, never contains a detailed account of every point in the case and the police officer who records it cannot go into the length of examining the informant in the way a witness is examined in Court. From the mere fact that a certain allegation as against an accused concerned has not been incorporated in the First Information Report although the main features of the case have already been incorporated therein, we cannot conclude that the witness (the informant) is a false witness and that his evidence in Court should be rejected *in*

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toto on that account. We have, as observed above, to consider his evidence in the light of other evidence available in the case. It should further be noted that every omission does not amount to contradiction. The very word "contradict" connotes to "speak against" or "to gainsay". Section 145 of the Evidence Act clearly prescribes that if it is intended to contradict a witness by his former statement which is in writing his attention must be called to that part of the statement which is to be used to contradict him. It will be idle to suggest that one is contradicting a witness by the writing when what he really wants to do is to contradict him by pointing out the omission in the writing. Surely, a witness cannot be confronted with the unwritten record of an unmade statement. Therefore, we are unable to appreciate the merits of the contention of the learned counsel for the appellants that Ko Sunt's evidence should be rejected *in toto* because of his failure to implicate Maung Po Maung at the time he made the First Information Report (ω). Maung Aye Saung's testimony has also been impeached on the ground that he has stated before the Court more than what he has stated to the police when the police examined him a few days after the crime. Here again, Aye Saung has given the reason why he refrained from disclosing the names of the two appellants. He says he was afraid that if he disclosed that fact earlier he would be killed by the members of the defence force and that he therefore decided to disclose the fact only before the Court. In the tense atmosphere the villagers found themselves at the relevant time, especially when there was a conflict between the members of the defence force, who were in possession of fire-arms, and the younger folks of the fire brigade who were without fire-arms, the

explanation offered by this witness is not unreasonable. It is urged by the learned counsel for the appellants that this witness has embellished his statements and that his evidence should be rejected.

As regards Ma Ngwe Sein, another eye witness, it is submitted that notwithstanding that she is a close relative of Maung Po Maung she is somewhat interested to protect one Maung San Wai (a member of the Fire Brigade) who happened to be her husband and from whom she was divorced some 15 years ago. There was some allegations against Maung San Wai that he entered Maung Po Maung's compound with other members of the fire brigade. It is contended that Ma Ngwe Sein was trying to shield her former husband by siding with the younger members of the village. We regret that we cannot accept this submission. It seems to us to be a rather too remote a reason for swearing falsehood as against very influential persons, namely the two appellants. Here again, the learned counsel for the appellants pointed out some minor contradictions in her statement. It is asserted that in certain part of her examination this witness said that she met U Sunt (PW 1) on the night in question and that later when she was recalled and examined she said to the following effect : ထိုညက ကျမ ကိုစန့်နှင့်တွေ့သောအခါ ထွန်းသွင်ကို ဦးတိုးမောင်တို့ သားအဘ ဆွဲသွားပြီး သတ်ခဲ့ကြောင်းကို ပြောလိုက်ပါသည်။ For these contradictory statements it is urged that her entire testimony should be rejected as false. As far as we can make out, the contention of the learned counsel for the appellants, in impugning the testimony of Ko Sunt, Maung Aye Saung and Ma Ngwe Sein, appears to be this, that since there are certain contradictions in parts of their testimony the whole should be rejected as false. In other words, the learned counsel for the appellants emphasizes the

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applicability to the present case of the old maxim—*falsus in uno, falsus in omnibus.* We need hardly point out that this is somewhat a dangerous maxim. There are several decisions to the effect that this maxim should not be pushed too far. If the entire testimony of a witness was to be rejected because the witness is speaking untruth in one or more particulars which are not very material to the point, it is to be feared that witnesses will have to be dispensed with entirely. In many cases the evidence of some of the witnesses, especially of such untutored types as the simple villagers are found somewhat embroidered with some sort of embellishment or falsehood, however true the main part of the story they are unfolding may be. No doubt, the false part of the story should be considered in weighing the evidence given by the particular witness. There may sometimes be some glaring or substantial discrepancies so as to affect the very foundation of the prosecution case and utterly destroy confidence in the witness altogether. But when there is reason to believe that the main part of the deposition is true, we consider that it will not be justified to arbitrarily reject the entire story because of some discrepancy in minor points. In other words, if a witness is not found to have told the truth in one or two particulars the whole of his statement cannot be ignored. The Court must sift the evidence, separate the grain from the chaff and accept what it finds to be true and reject the rest. See *Maung Po Gyaw* v. *Maung So* (1); *Emperor* v. *Muzaffar Hussain* (2) and *Nandia and others* v. *Emperor* (3). We regret therefore that we are unable to see any merits in the contentions put forth by the learned counsel for the appellants.

(1) A.I.R. (1923) Ran. p. 30. (2) A.I.R. (1944) Lah. p. 97.
(3) A.I.R. (1940) Lah. p. 457.

Furthermore, the testimony of these witnesses should not be appraised by themselves alone. Their testimony has to be considered in the context of the entire facts and circumstances obtaining in the case and also with the background we have set out in the early part of this judgment. Apart from the direct testimony of seeing the appellants lead away the deceased forcibly, the later episode namely; the cries of the deceased heard by some of the prosecution witnesses immediately after he had been dragged away by the two appellants, justified the acceptance of the testimony of the three witnesses, namely Ko Sunt, Maung Aye Saung and Ma Ngwe Sein. Besides, there are independent witnesses who deposed to having heard the deceased denounce the names of the two appellants. Ma Lay Me (PW 11) and Maung Ba Thaung (PW 20) deposed to having heard the deceased shout out that he had been attacked by Sein Tun and his father. Besides, Ma Ohn Sein, mother of the deceased, herself had on the very next morning when she met the headman U Tu denounced that the two appellants had done her son to death.

The learned counsel for the appellants have also addressed us at some length that although certain questions were put to some prosecution witnesses as to their statements made to the police by the defence counsel, yet no police statements were filed as exhibits as contemplated in section 162 of the Criminal Procedure Code read with section 145 of the Evidence Act for the purpose of contradicting such witnesses. Our attention was drawn to the decision by a single Judge, Dunkley J., in *Nga Tha Aye and another* v. *Emperor* (1) wherein the head-note reads:

"As soon as a defence pleader asks the witness a question covering his statement to the police it is the bounden duty of

(1) A.I.R. (1935) Ran. p. 299.

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the Sessions Judge to ask the pleader whether he wishes to have a copy of this witness's statement to the police supplied to him, or not."

It is submitted that the learned Special Judge had failed in his duty in not putting on the record the police statement of these important witnesses. We are unable to appreciate this submission. So far the law relating to the use of police statement under section 162 of the Criminal Procedure Code is concerned it is clearly laid down in the Full Bench case of *King-Emperor* v. *Nga Lun Thoung* (1). That decision is a complete answer to the submissions made by the learned counsel on behalf of the appellants. There is no legal obligation either on the public prosecutor or on the Court to advise the accused to request the Court to refer to the statement of any witness to the police under section 162 of the Criminal Procedure Code, though the public prosecutor under certain circumstances should not allow the Court or the jury to place reliance unwittingly upon the evidence of a witness who to his knowledge made a contradictory statement to the police in the course of the investigation.

It should be noted that it is only on the request of the accused or his counsel can the Court direct the furnishing of copies of police statement of a witness for purpose of using it in the manner provided in section 145 of the Evidence Act. This is as plain, as could be seen in sub-section (2) to section 162 of the Criminal Procedure Code which reads :

"When any such statement as aforesaid has been reduced to writing the Court shall, on the request of the accused direct that accused be furnished with a copy thereof."

(1) I.L.R. 13 Ran. p. 570.

We must hold in that regard that there is no substance in the submission made by the learned counsel for the appellants.

Next, it has been urged upon us that if we are disposed to accept the testimony of the prosecution witnesses and hold that the two appellants are the real persons concerned in attacking the deceased and doing him to death, there is no premeditation or common intention attributable to them and as such they should not be given the penalty as prescribed in section 302 (1) (*b*) of the Penal Code. We have given anxious consideration to this aspect of the case. Having regard to the tense atmosphere created by the members of the fire brigade which was composed of younger folks of the village and of which the deceased Tun Thwin was the secretary, and also the stubborn way they had behaved in shouting out slogans in the village, we see that there is some force in this submission. We could visualise how high the feeling was when the authority of the elders was being flouted especially when elderly headman U Tu's order was ignored. It appears to us to be highly probable that in the thick of tense atmosphere the two appellants must have returned from the North Kya village back to the South Kya village and accidentally met the deceased at the gate of the South Kya village and there and then took him in a southerly direction along the village lane and then to Maung Po Maung's compound where he was ultimately done to death. These incidents, to our mind, took place in quick succession, almost a continuous transaction, without any appreciable interval of time during which the passion inflamed by the antagonistic behaviour of the younger folks of the village had subsided or cooled off giving sufficient time for reflection to the appellants when the foul deed was committed.

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Therefore on a careful review of all the facts and circumstances, we have considerable doubt whether there was either common intention as contemplated in section 34 of the Penal Code, or a premeditation when the alleged murder was committed by the two appellants. Such being our view, we feel that we cannot justifiably maintain the convictions of the two appellants under section 302 (1) (*b*) read with section 34 of the Penal Code and also the death sentences imposed upon them by the trial Court. We therefore set aside the convictions and sentences of the two appellants under the aforeasid sections of the Penal Code and in lieu thereof we find them guilty as follows: (1) Sein Tun is guilty under section 302 (2) of the Penal Code and (2) Maung Po Maung is guilty under section 302 (2) read with section 109 of the Penal Code, and we direct that each of them shall suffer sentence of transportation for life.

U SAN MAUNG, J.—I agree.

APPELLATE CRIMINAL.

Before U San Maung, J.

MAUNG THAN (APPLICANT)

v.

THE UNION OF BURMA (U THAN TIN) (RESPONDENT).*

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July 20.

Restriction of Bribery and Corruption Act, 1948, s. 4 (2)—Granting of Sanction under s. 6 whether in judicial or an executive capacity.

Held: When the authority mentioned in clauses (ന) and (ə) of s. 6, Restriction of Bribery and Corruption Act, 1945, gives the Sanction requisite for prosecution under s. 4 (2) of the Act, it acts not in a judicial but in an administrative capacity.

In the matter of Kalagava Bapiah, I.L.R. Vol. 27, Mad. Series p. 54; *Kakaila Chinna Chendraya* v *Maddukkuri Subbarayudu*, Cr.L. J. Vol. 24 (1923) p. 116; *Ali Hussain Khan* v. *Harcharan Das*, I.L.R. Vol. 11 Lah. (1921) p. 305, referred to.

C. C. Khoo on behalf of Mr. Beecheno & Horrocks for the applicant.

Tin Maung, Advocate, for the respondent.

U SAN MAUNG, J.—This is an application for revision of the order of the Special Judge, Tavoy, in his Criminal Regular Trial No. 1 of 1954 taking cognizance of the offence punishable under section 4 sub-section (2) of the Restriction of Bribery and Corruption Act, 1948, against the applicant Maung Than. Section 6 of the Act enacts that no cognizance shall be taken of the offence punishable under section 4 (2) except with the sanction of the President when the accused is a Minister of the Union or of the

* Criminal Revision No. 227 (B) of 1954. Review of the order of the Special Judge (U TUN TIN) of Tavoy, dated the 5th day of November 1954 passed in Criminal Regular Trial No. 1 of 1954.

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State Government and of the appointing authority when the accused is a public servant other than a Minister. In the present case, the accused Maung Than is the assistant Bailiff of the District and Sessions Judge, Tavoy and Mergui. So he can only be prosecuted with the prior sanction of the District Judge concerned. Such a sanction was in fact given by the District Judge. However, it is contended on behalf of the applicant that the sanction is invalid in law as it was not given by the District Judge in the exercise of his free and unfettered discretion, the Judge himself having mentioned that it was given under the instructions of the High Court.

As the facts giving rise to the present application for revision have been fully stated in the order of the learned Special Judge, Tavoy, in his order dated the 5th November 1954, it is not necessary for me to repeat them here. It would appear that the learned District Judge (U Mya Yin) who had made a departmental enquiry into the loss of exhibits was of the opinion that no blame could be attached to Maung Than for the loss of these exhibits. He even moved the High Court by telegram to address the government to withdraw the prosecution of the assistant Bailiff. However the High Court to which he had also made a reference by letter dated the 27th October 1953 had advised him that under the circumstances appearing in the case it would be better if the matter was thrashed out in a Court of Law and that sanction for the prosecution of the assistant Bailiff should be given. This advice is contained in letter No. 196/14 (ခ) 4 (53), dated the 10th November 1953 signed by the Deputy Registrar, General Department, on behalf of the Registrar, High Court, acting on the strength of this letter the District Judge gave the necessary sanction under section 6 of the

Restriction of Bribery and Corruption Act, 1948 for the prosecution of the assistant Bailiff Maung Than as aforesaid.

It is clear, that, if in granting the sanction under section 6 of the Act, the learned District Judge, Tavoy had acted in a judicial capacity the sanction would be void and he was apparently acting under the advice of the High Court and not, strictly speaking, in the exercise of his individual judgment. However, in my opinion, when the authority mentioned in clauses (ന) and (ခ) of section 6, Restriction of Bribery and Corruption Act, 1948, gives the sanction requisite for prosecution under section 4 (*2*) of the Act, it acts not in a judicial but in an administrative capacity; in coming to this conclusion I am amply supported by an authority.

In the matter of *Kalagava Bapiah* (1), it was held that the government in according or withholding sanction, under section 197 of the Criminal Procedure Code (as it stood before the 1923 amendment) for the prosecution of a public servant in respect of an offence alleged to have been committed by him as such public servant, acted purely in its executive capacity. This decision was followed in another case of the Madras High Court ; *Kakaila Chinna Chendraya* v. *Maddukkuri Subbarayudu* (2). In *Ali Hussain Khan* v. *Harcharan Das* (3), it was observed as follows :

"One of the objections urged on behalf of the respondent is that the order is an executive and not a judicial order, and that, therefore, the present application is not maintainable. In my opinion this objection is correct. The granting of sanction under section 197 is clearly not a judicial but an executive act where the authority granting the sanction is the Government, and it is difficult to see how it can assume a

(1) I.L.R. Vol. 27 Mad. Series. p. 54. (2) Cr.L. J. Vol. 24 (1923) p. 116.
(3) I.L.R. Vol. 11 Lah. (1921) p. 305.

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different character if the sanction is granted by a Court. Courts exercise executive as well as judicial functions, for instance in imposing fines upon ministerial officers under section 36 of the Courts Act."

As the District Judge, Tavoy (U Mya Yin) was acting in an executive capacity in granting sanction for the prosecution of the applicant Maung Than, there was nothing to prevent him for deferring to the opinion of the High Court and to hold that sanction for the prosecution of Maung Than should be given although he had originally thought that the case against Maung Than should be withdrawn.

The sanction is accordingly valid in law. The application for revision is accordingly dismissed.

APPELLATE CRIMINAL.

Before U Bo Gyi, J. and U Thaung Sein, J.

PO BWINT *(alias)* HTAW KA LO (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

H.C. 1955

Jan. 31.

Penal Code, s. 302 (1) (c)—Offence committed within Pa-an Police Station jurisdiction and accused sent up before Court of Special Judge, Thatôn—Pa-an became part of Karen State during trial—Jurisdiction to continue with the hearing of the case—S. 10, Constitution.

Held. The offence was committed in Pa-an Township before it became part of the newly-formed Karen State and at the time of the transfer of Pa-an Township to the Karen State the appellant was at Thatôn in the Custody, in point of law, if not in fact, of the Court of the Special Judge, Thatôn, and under s. 10 of the Constitution, in the absence of anything to show to the contrary, he must be deemed to be a citizen of the Union of Burma. It must be held therefore that the Court of the Special Judge, Thatôn was competent to try the appellant and that the appeal from his conviction lies to this Court.

Emperor v. *Mahabir and others*, I.L.R. 33 All. p. 578; *Emperor* v. *Ram Naresh Singh and others*, I.L.R. 34 All. p. 118 ; *Emperor* v. *Ganga*, I.L.R. 34 All. p. 451, followed.

Min Han for the appellant.

Ba Pe (Government Advocate) for the respondent.

U BO GYI, J.—Appellant Po Bwint (*a*) Htaw Ka Lo, aged 37, has been convicted of the offence of murder for causing the death of one Hussein in the course of committing robbery on him contrary to the provisions of section 302 (1) (*c*) of the Penal Code and sentenced to death.

The offence was committed on the 28th July 1953 near Khalaukno village some four miles from

*Criminal Appeal No. 615 of 1954. Appeal from the order of U Ba Gyan, Special Judge of Thatôn, dated the 6th day of December, 1954 passed in Criminal Regular Trial No. 9 of 1953.

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PO BWINT (*alias*) HTAW KA LO *v.* THE UNION OF BURMA.

U BO GYI, J.

Pa-an town within the jurisdiction of the Pa-an Police Station. The appellant was arrested the next day at Khalaukno village and was sent up for trial before the Court of Special Judge, Thatôn, on the 18th August 1953. During the pendency of the trial, Pa-an township became part of the Karen State which was inaugurated on the 1st June 1954. The question arises therefore whether the Special Judge, Thatôn, had jurisdiction to continue with the hearing of the case against the appellant. This point is covered by authority. In *Emperor* v. *Mahabir and others* (1) where an offence was committed within British India and certain persons were convicted thereof and appealed against their convictions to the appropriate court in British India and the place where the offence had been committed was constituted part of an independent native State during the pendency of the appeal, it was held that the subsequent transfer of territory did not deprive the court in which the appeal had been filed of its jurisdiction to hear it. This case was followed in *Emperor* v. *Ram Naresh Singh and others* (2) and *Emperor* v. *Ganga* (3). In the present case also the offence was committed in Pa-an township before it became part of the newly-formed Karen State and at the time of the transfer of Pa-an township to the Karen State the appellant was at Thatôn in the custody, in point of law if not in fact, of the Court of the Special Judge, Thatôn, and under section 10 of the Constitution, in the absence of anything to show to the contrary, he must be deemed to be a citizen of the Union of Burma. It must be held therefore that the Court of the Special Judge, Thatôn was competent to try the appellant and that the appeal from his conviction lies to this Court.

(1) I.L.R. 33 All. p. 578. (2) I.L.R. 34 All. p. 118.
(3) I.L.R. 34 All. p. 451.

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PO BWINT (*alias*) HTAW KA LO *v.* THE UNION OF BURMA.

U BO GYI, J.

The facts, briefly, are that on the 28th July 1953 early in the morning the deceased man Hussein left his house at Pa-an on a bicycle to buy fowls at Khalaukno village about four miles away and when he did not return home at night, his wife Daw Rahima (PW 4) sent a report to the Police Station. The next day she went to the Pa-an Police Station on learning that her husband's dead body had been brought there and she identified the dead body as that of Hussein's. On the morning in question at about cooking time appellant, Ne Kya Kho, Hla San and Nyun Yin had drinks together at the 15th prosecution witness Ma Nan Htaw Ohn's house at Khalaukno village. They called two Indians who were seated in front of the house and the Indians joined them. Thereafter the owner of the house Ma Nan Htaw Ohn went into her kitchen room and later found that all six men had left her house.

A little later in the morning, at about 11 a.m. Nan Tha Mein (PW 5) and Ma Ngwe Yin (PW 6) who were selling eatables at a roadside stall on the outskirts of Khalaukno village noticed an Indian, who turned out to be the deceased man Hussein, sitting in the stall near them. He had brought a bicycle with him. Shortly afterwards appellant came to the stall together with five companions, two of whom, Nyein Shwe (*a*) Hla San and Thaung Kyaw were his co-accused at the trial. The remaining three men were Kyawt Man (*a*) Saw Man, Nyun Yin and Ne Kya Kho who have absconded. Appellant and one of his companions ate *mohinga* (vermicelli) at the stall. Meanwhile, Yat Pye and Hla Ku (PWs 10 and 11) passed by the stall on their way to their mountain cultivation, Yat Pye holding a *dahma*. Appellant called to them and told them to come along with him. When they tried to excuse themselves

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on the ground that they had to go to their work appellant would not hear of their excuse and insisted on their coming along with him. Appellant was, or at any rate had recently been, a peace guerilla and was at the time armed with a rifle. The area had been under insurgent occupation and although Government had retaken the area it was still being looked after by peace guerillas led by Bo Dah. It is in evidence that people living in those parts went in fear of a man like the appellant who used to go about armed with a rifle. Appellant and his five companions together with Yat Pye, Hla Ku and the deceased man Hussein left the stall. It is not clear whether Hussein resisted at the time and since he apparently went off quietly with appellant and others it is likely that he had been told that he would be shown places where he could get fowls cheap. On the way when they all came near the 7th prosecution witness Ma Nan Kya I Kho's house appellant detached himself from his companions and went into the house and took away a length of rope. He rejoined the others and then tied Hussein's hands with the rope and led Hussein along towards the cemetery which was a short distance away. At the cemetery appellant took the *dahma* from Yat Pye and cut Hussein with it several times. Hussein died on the spot and under appellant's orders his companions buried the dead body in an old grave and covered it up with earth. Appellant and his companions then left the cemetery.

The same day at about lamp lighting time Hla Ku and Yat Pye went to U San Yin Tha (PW 8), a ten house *gaung* of their village Khalaukno and reported to him that appellant had taken them forcibly to a cemetery where he killed an Indian. The ten house *gaung* did not dare to take action immediately as

appellant was armed with a rifle and the next morning when he learnt that the rifle had been taken away from the appellant, he went and reported to his headman Tan Po Toh (PW 3). The headman with the help of peace guerilla Saw Mya Po (PW 2) arrested the appellant at his house and took him to the Pa-an Police Station where he laid a first information report. Appellant took the headman and the police to his house at Khalaukno where a bicycle was found and seized. He then took them to the cemetery and pointed out a mound. When the mound was dug up, Hussein's dead body together with the rope with which he had been tied and his helmet was found. The rope has been identified by Ma Nan Kya I Kho (PW 7) as the one which the appellant had taken away from her house on the day in question. It was made by herself and she identifies it by the two knots on it and by the way she had joined the pieces together. Daw Rahima (PW 4) identifies the helmet as belonging to her husband but cannot identify the bicycle. In all the circumstances of the case, however, and since the appellant has not claimed the bicycle as his own it must be held that the bicycle belonged to Hussein.

Appellant's wife Ma Chit Yin (PW 12) states that it was Hla San, one of appellant's co-accused who had brought the bicycle to her house; but she is naturally interested in appellant's defence and has stated to the police, *vide* Exhibit (∞) that appellant and Ne Kya Kho had brought the bicycle to her house. The fact remains that the bicycle was found at appellant's house shortly after its owner had been murdered.

The medical evidence is that the deceased had received four incised wounds of which the one in the neck was necessarily fatal whoever was responsible

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for Hussein's death must therefore be imputed with the intention at least of causing injury sufficient in the ordinary course of nature to cause death.

Appellant confessed before the Subdivisional Magistrate, Pa-an on the 10th August 1953. There is nothing to show that his confession has been improperly induced and it must be taken as having been voluntarily made. In his confession appellant states that at the cemetery he cut Hussein with a *dah* once and then Thaung Kyaw and Ne Kya Kho gave the deceased two blows each with the *dah*. He also admits having taken Rs. 70 from Hussein before the latter was cut down. In his evidence before the trial Court appellant admits having been to the stall where eatables were sold and having gone with Hussein and others to the cemetery where Hussein was put to death. But he put the whole blame on Ne Kya Kho who has been absconding and gave himself the role of an unwilling spectator of the murder. His co-accused Nyein Shwe (*a*) Hla San and Thaung Kyaw have also confessed and given evidence before the Court but they have all along exculpated themselves. Since they have been acquitted by the trial Court nothing need be said about them.

Now, Yat Pye and Hla Ku are not accomplices in the crime. Their evidence which is corroborated by that of Nan Tha Mein and Ma Ngwe Yin (PWs 5 and 6) clearly shows that they were unwilling to go along with the appellant but had to follow him because conditions were still unsettled at their place and appellant who was or had very recently been a peace guerilla was still armed with a rifle. Almost immediately after the crime they reported to their ten house *gaung*. In point of fact appellant's learned Advocate admits that these two witnesses are not accomplices; and the evidence of these witnesses

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shows that it was the appellant alone who cut Hussein to death with Yat Pye's *dah*. It is also in evidence that Hussein was deprived of his bicycle on the way to the cemetery and appellant in his confession admits having taken money from Hussein just before the murder. In all these circumstances the learned trial Judge's conclusion that the appellant murdered Hussein in the course of a robbery on him is justified.

The sentence of death passed on the appellant is confirmed and his appeal is dismissed.

APPELLATE CIVIL.

Before U San Maung, J.

H.C. 1955

July 20.

S.P.V.E.V. VALAI SAMI (APPELLANT)

v.

A. R. CHINNAYA (RESPONDENT).*

Suit for rendition of accounts—Preliminary decree under Order 20, Rule 60, Civil Procedure Code, unnecessary when facts are very simple—Final Decree—Findings of fact by the first appellate Court is final.

Held : That the general rule is that in suits for an account, a preliminary decree directing accounts to be taken should be passed before passing a final decree; yet in cases where the facts are so simple as to afford a ready decision, a final decree may be passed without any preliminary decree.

Velliyappa Chetti v. *Vellayappa Chetti*, 53 Mad. p. 475 ; *Hurronath Roy Bahadoor* v. *Krishna Coomar Pukshi*, 13 I.A. p. 123, referred to.

Held further : The findings of fact of the first appellate Court is final had that Court before it evidence in support of that finding, however unsatisfactory it might be if examined.

Ma Pyu v. *K. C. Mitra*, 6 Ran. 586, followed.

Leong, Advocate, for the appellant.

For respondent *Nil.*

U SAN MAUNG, J.—In Civil Regular Suit No. 2 of 1951 of the Subdivisional Court of Myingyan, the plaintiff S.P.V.E.V. Valai Sami sued the defendant A. R. Chinnaya for rendition of accounts. The case for the plaintiff was that on or about the 24th April 1940 when he had occasion to go down to Rangoon and remained there for some time, the defendant had consented to act as his agent and carry on his money lending business at Myingyan during his absence. He, therefore, handed over to the defendant the properties enumerated in paragraph 3 of the plaint. In due course on his

* Civil 2nd Appeal No. 45 of 1955, against the decree of the District Court of Myingyan in Civil Appeal No. 4 of 1954, dated the 28th day of February 1955.

return from Rangoon he demanded the rendition of true and full accounts of his affairs during his absence; but the defendant failed to give such a rendition of accounts. The defendant by his written statement admitted having consented as the plaintiff's agent during his absence. He, however, disputed that the properties entrusted to him were those mentioned in paragraph 3 of the plaint. He gave his own particulars of the properties entrusted to him and further alleged that on a rendition of accounts made on the 21st January 1950 the plaintiff was found to owe him a sum of Rs. 105-7-0. On the pleadings the following issues were framed :—

(1) Whether the defendant promised to act as the plaintiff's agent and if so, what were the terms of the agency ?
(2) What were the properties entrusted by the plaintiff with the defendant ?
(3) Has the defendant rendered true and full accounts to the plaintiff ?
(4) To what relief is the plaintiff entitled ?

On these issues the learned trial Judge heard the evidence led by both parties and dismissed the plaintiff's suit. He held that the accounts rendered by the defendant was a true account of what had taken place. On appeal to the District Court of Myingyan by the plaintiff the learned Judge of the District Court concurred with the findings of the trial Judge as to the terms of the agency, the properties entrusted to the defendant and the rendition of accounts by the defendant. He accordingly dismissed the appeal. In this second appeal by the plaintiff it is contended that the Judges of both the Courts below have erred in not passing a preliminary decree for accounts as provided for in Order 20, Rule 60 of the Civil

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U SAN MAUNG, J.

Procedure Code. However, in this connection the ruling of a Bench of the Madras High Court in *Velliyappa Chetti* v. *Vellayappa Chetti* (1) seems apposite. There it was held following the observations of their Lordships of the Privy Council in *Hurronath Roy Bahadoor* v. *Krishna Coomar Bukshi* (2) that though the general rule is that in suits for an account, a preliminary decree directing accounts to be taken should be passed before passing a final decree, yet in cases where the facts are so simple, either by admission or proof, as to afford a ready decision, so that the taking of accounts will be unnecessarily lengthening the proceedings, without any benefit to the parties, a final decree may be passed, without any preliminary decree.

I have carefully read the judgments of both the Courts below and I am of the opinion that this is a fit case for the Courts below to pass a final decree without first passing a preliminary decree for accounts. The facts are so simple as to afford a ready decision by the Courts below. The points in dispute could very well have been decided without reference to a Commissioner for taking accounts.

As regards the findings of fact it is clear from the ruling in the case of *Ma Pyu* v. *K. C. Mitra* (3) that the finding of the first appellate Court is final had that Court before it evidence in support of the finding, however unsatisfactory it might be if examined. It can hardly be contended that the first appellate Court did not have before it evidence in support of the finding arrived at by that Court.

I therefore see no reason for admitting this appeal and the same is dismissed summarily.

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(1) 53 Mad. p. 475. (2) 13 I.A. p. 123.
(3) 6 Ran. 586.

APPELLATE CRIMINAL.

Before U San Maung, J.

THE UNION OF BURMA (APPLICANT)

v.

A. C. AKHOON (*a*) U E MAUNG (RESPONDENT).*

H.C. 1955

July 7.

Control of Imports and Exports (Temporary) Act, 1947, s. 5 (1)—Confiscation and sale of goods seized by public auction-sale proceeds to be credited to Government—Payment, out of sale proceeds to investigating officers as rewards—Validity.

Held: There is nothing in the provision either of the Burma Act No. LVI of 1947 or in the Criminal Procedure Code, to allow the Court to pass an order regarding payment out of the fine or of the sale proceeds of the property which had been seized, as rewards to investigating officers and others in the prosecution of the accused.

Tin Maung (Government Advocate) for the applicant.

For respondent *Nil.*

U SAN MAUNG, J.—In Criminal Regular Trial No. 8 of 1953 of the 1st Special Judge, (SIAB & BSIA), Rangoon, one A. C. Akhoon (*a*) U E Maung was convicted under section 5 (*1*) of the Control of Imports and Exports (Temporary) Act, 1947 (Burma Act No. LVI of 1947) on three charges and was sentenced to suffer rigorous imprisonment for 2 years on each charge, the sentences to run concurrently. At the time of passing sentence on Akhoon, the learned Special Judge also directed that all the consignments of porcelain ware which

* Criminal Revision No. 77 (B) of 1955. Review of the order of the 1st Special Judge, SIAB & BSIA of Rangoon, dated the 15th day of January 1955 passed in Criminal Regular Trial No. 8 of 1953.

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U SAN MAUNG, J.

had been unlawfully imported by him into Burma then seized by the Bureau of Special Investigation be confiscated and sold by public auction and the sale proceeds credited to Government. Akhoon appealed against the conviction and sentence but the High Court confirmed the conviction and reduced the sentence from 2 years to 18 months. It further confirmed the order regarding the confiscation of the consignments of porcelain which had been seized.

On or about the 8th December 1954 the consignments of porcelain were sold by public auction to the highest bidder for K 76,000. On the 15th January 1955 on an application being made to the Special Judge by U Than Tin of the Bureau of Special Investigation, the learned Special Judge passed what he purported to be an Office Order directing that out of the sale proceeds of K 76,000, K 10,000 should be made available for payment as rewards to U Than Tin, U Po Thant and to the officers who contributed their services in the investigation of the case. The Government has now come up to this Court to set aside this order in revision as the learned Special Judge had no power whatsoever to pass such an order.

There is nothing in the provisions either of the Burma Act No. LVI of 1947 or in the Criminal Procedure Code, allowing the Court to pass an order regarding payment out of the fine or of the sale proceeds of the property which had been seized, as rewards to investigating officers and others concerned in the prosecution of the accused. Therefore the order passed by the learned Special Judge on the 15th January 1955 is invalid in law and must be set aside. Consequently if the sum of K 10,000 is not yet credited to Government it must be credited forthwith into the Treasury.

Let a copy of this order be sent to the Director of the Bureau of Special Investigation for necessary action as I am informed that the sum of K 10,000 is in his possession.

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U SAN MAUNG, J.

APPELLATE CRIMINAL.

Before U San Maung, J.

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Dec. 13.

UNION OF BURMA (APPLICANT)

v.

LAMYA BAW (RESPONDENT).*

Burma Immigration (Emergency Provisions) Act, 1947, s. 13 (1) as amended by Act No. 40 of 1948 and Act No. 12 of 1949—S. 3, Kachin Hill Tribes Regulation.

The Respondent was a Yawyin from China temporarily residing in Kachin State. He was convicted under s. 13 (*1*), Burma Immigration (Emergency Provisions) Act, 1947.

S. 3 of the Kachin Hill Tribes Regulation enacts that only that Regulation and the enactments thereto annexed should be applicable to members of a hill-tribe in a hill-tract.

The question was whether the Respondent had been rightly convicted under s. 13 (*1*) of the Burma Immigration (Emergency Provisions) Act, 1947.

Held: That the Respondent had committed the offence at the moment of entry into Burma without the necessary permit. The offence was complete at the moment of entry.

The King v. *N'hkum Naw*, (1941) R.L R. p. 403, istinguished.

Ba Gyaw (Government Advocate) for the applicant.

For respondent *Nil*.

U SAN MAUNG, J.—In Criminal Regular Trial No. 33 of 1955 Lamya Baw was convicted of an offence punishable under section 13 (*1*) of the Burma Immigration (Emergency Provisions) Act, 1947 as amended by Acts No. 40 of 1948 and Act No. 12 of 1949 on his plea of guilty and he was sentenced to

* Criminal Revision No. 115 (B) of 1955. Review of the order of the Subdivisional Magistrate of Sadon, dated the 15th day of April 1955 passed in Criminal Regular Trial No. 33 of 1955 recommended by the Additional District Magistrate, Myitkyina in Criminal Revision No. 34 of 1955, dated the 29th July 1955.

4 months' rigorous imprisonment. The Additional District Magistrate of Myitkyina who had called the case on revision on his own motion has now recommended to this Court that the conviction and the sentence on Lamya Baw be set aside as he was a Yawyin from China temporarily residing in Kachin Hills. The undisputed facts of the case as set out in the order of reference of the Additional District Magistrate, Myitkyina are that Lamya Baw who was a Yawyin having his residence in China was found by Maran Gam, a Police Constable of Sadon Police Station, at Sadonpa Village without any permit from the Immigration authorities either to enter or to remain in Burma. The learned Additional District Magistrate, Myitkyina, however, held that in view of section 3 of the Kachin Hill Tribes Regulation the conviction of the respondent under section 13 (*1*) of the Burma Immigration (Emergency Provisions) Act, 1947 could not be sustained as section 3 of the Regulation enacts that only that Regulation and the enactments thereto annexed should be the only enactments applicable to members of a hill-tribe in a hill-tract; provided that the President made by notification in the Gazette declare any other enactments to be applicable. The Burma Immigration (Emergency Provisions) Act, 1947 is not such an enactment.

For this view the learned Additional District Magistrate has relied upon the ruling in the case of *The King* v. *N'hkum Naw* (1). There it was held by Mosely, J., that the Kachin Hill Tribes Regulation was made applicable to certain hill-tribes in all the hill-tracts of the Bhamo District, *e.g.*, Kachins, the emphasis being on the race of the persons in question, and that therefore the accused who was a Kachin

(1) (1941) R.L.R. p. 400.

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UNION OF BURMA v. LAMYA BAW.

U SAN MAUNG, J.

from China temporarily residing in one of the hill-tracts could not be dealt with under section 9 (*a*) of the Opium Act for being in possession of something under 25 tolas of opium, but should be charged, if at all, under section 31 of the Regulation.

In my opinion, the facts of the case reported in *The King* v. *N'hkum Naw* are quite distinguishable from the present. There the accused N'hkum Naw, who was a Kachin from China temporarily residing in Burma was alleged to have committed an offence if any, under the Opium Act while residing in Burma. In the present case the accused Lamya Baw had admittedly committed the offence punishable under section 13 (*1*) of the Burma Immigration (Emergency Provisions) Act, 1947 at the moment of entry into Burma without the necessary permit. The offence was complete at the moment of entry although he might be subsequently apprehended and prosecuted. The accused has therefore been rightly convicted and sentenced of the offence punishable under section 13 (*1*) of the Burma Immigration (Emergency Provisions) Act, 1947 as amended.

Let the proceedings be returned to the Additional District Magistrate, Myitkyina with these remarks.

APPELLATE CRIMINAL.

Before U Chan Tun Aung, C. J.

UNION OF BURMA (APPLICANT)

v.

MAUNG AYE AND TWO OTHERS (RESPONDENTS). *

H.C. 1955

June 28.

Burma Forest Act, Rules 22 and 70/98—Summons case—Acquittal—Ss. 244 and 245 (1), Criminal Procedure Code—Prosecution not given opportunity to lead evidence—Revision against acquittal under ss. 438 and 439 (5), Criminal Procedure Code.

Whether an application in revision lies against an acquittal order ?

Held, an appeal lies against an acquittal order and an application in revision of such order is barred under sub-s. (5) of s. 439, Criminal Procedure Code.

Held further : In spite of the bar in sub-s. (5) of s. 439, Criminal Procedure Code, the High Court had entertained such applications in revision against acquittal order either by treating these as private applications in revision or as and by way of regular appeals.

King-Emperor v. *U San Win*, (1932) I.L.R. 10 Ran. p. 315 ; *Emperor* v. *Bashir*, (1931) 32 Cr. L. J. p. 143, referred to.

Ba Kyaing (Government Advocate) for the applicant.

For respondent *Nil.*

U CHAN TUN AUNG, C.J.—The District Magistrate, Prome, has under section 438 of the Criminal Procedure Code moved this Court for the re-trial of the respondents who were acquitted by the 1st Additional Magistrate, Paungde. The respondents were alleged to have committed the offences under Rule 98, read with Rules 22 and 70 of the Burma Forest Act. It appears that the Forest Range

* Criminal Revision No. 27 (B) of 1955. Review of the order of the 1st Additional Magistrate of Paungde, dated the 18th day of December 1954 passed in Criminal Regular Trial No. 157 of 1954.

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UNION OF BURMA v. MAUNG AYE AND TWO OTHERS.

U CHAN TUN AUNG, C.J.

Officer (U Thein Tin), Paungde, laid a complaint against the present respondents and one Maung Kyaw Zay before the 1st Additional Magistrate, Paungde. The learned Magistrate in his Criminal Regular Trial No. 157 of 1954 proceeded with the trial of the aforesaid accused persons adopting the procedure for summons cases laid down in Chapter 20 of the Criminal Procedure Code. When the accused were brought before him the particulars of the offences were stated to each of them. Accused Maung Kyaw Zay admitted the offence, whereas each of the respondents on examination, denied any knowledge about the finding of the illicit timber in the backyard of Maung Tun Tin's house; and apparently having been satisfied with the explanation offered by the respondents, the trial Magistrate found Maung Kyaw Zay alone guilty of the offence with which he has been charged, and convicted him to 3 months' rigorous imprisonment. He entered acquittal in favour of the other accused, namely the present respondents, as provided in section 245 (1) of the Criminal Procedure Code. The District Magistrate has in recommending revision, submitted that the learned Magistrate has in the trial of the respondents failed to comply with the provisions of section 244 (1) of the Criminal Procedure Code in that no opportunity was given to the prosecution to lead evidence as contemplated therein. Before I consider the procedural defect pointed out by the learned District Magistrate, I wish to draw his attention that the respondents are *acquitted* of the offences for which they have been sent up and not merely *discharged*, as contemplated in section 245 (1) of the Criminal Procedure Code. The question then arises whether a revision can be entertained against an acquittal order in view of sub-section (5) of section 439,

Criminal Procedure Code. Now sub-section (5) of section 439 reads :—

> " Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed. "

This provision seems to be in the way of the District Magistrate's recommendation. The District Magistrate could have, instead of acting under section 438 of the Criminal Procedure Code, moved the Government to appeal against the acquittal. This, he has not done so. Even if he were minded to do so now, I fear, the appeal is time barred. However, there are cases, where in spite of the bar in sub-section (5) of section 439 of the Criminal Procedure Code, the High Court has entertained the applications in revision against acquittal order either by treating them as private applications in revision or as and by way of regular appeals. [Vide *King-Emperor* v. *U San Win* (1) and *Emperor* v. *Bashir* (2)]. Even treating the present application as an appeal, I do not see any justification to interfere with the acquittal orders passed in favour of the respondents. The offences the respondents are alleged to have committed are those falling under the Forest Act :—namely, for cutting timbers without saw-pit licence and/or for alleged contravention of the Forest Rules pertaining to cutting, sawing, felling timbers from public forest lands and/or for establishing unlicensed saw-pits. The complaint by the Forest Officer U Thein Tin merely states that he found some illicit timbers behind the respondent Maung Tun Tin's house, and when he asked Maung Tun Tin he was told that they were stacked up at the instance of Maung Sein Nyo, Maung Aye

(1) (1932) I.L.R. 10 Ran. p. 315. (2) (1931) 32 Cr. L.J. p. 143.

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and Maung Kyaw Zay. Getting this information, U Thein Tin went and enquired from Maung Sein Nyo who told him that he merely accompanied Maung Aye and Maung Kyaw Zay to the backyard of Maung Tun Tin's house when they went and stacked the timbers. Maung Aye on one hand stated before the Court that he merely went with Maung Kyaw Zay as his companion. Maung Kyaw Zay on the other hand admitted that the timbers were his and that the other accused had nothing to do with them.

In the circumstances, as disclosed by the complainant himself, I fail to see how the trial Magistrate could in any way be benefited or be the wiser in the appraisement of the cases against the accused persons concerned even if he had followed strictly the procedure laid down in section 244 of the Criminal Procedure Code. The complainant himself never asserted that the accused persons have jointly committed the offences or have conspired together in the commission thereof. That was never the complainant's case. In my view, therefore, the trial Magistrate was justified in entering an order of acquittal in favour of the respondents having regard to the facts and circumstances disclosed in the complaint itself and also to the statements given by the respective respondents. As stated above, the order that has been made by the trial Magistrate was in fact an order acquitting the respondents; and from such an order an appeal would lie, an application in revision being barred by sub-section (5) of section 439 of the Criminal Procedure Code could not be entertained. However, treating the present application as an appeal I find no justification whatsoever to order a re-trial or to set aside the acquittal order, and therefore the recommendation of the District Magistrate, Prome for revision stands rejected.

APPELLATE CRIMINAL

Before U San Maung, J.

THEIN AUNG (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

July 6.

Suppression of Brothels Act, s. 7 (1) (c)—Criminal Procedure Code, ss. 110 to 126-A—General repute.

Held: Evidence of general repute is admissible in respect of all the clauses of s. 110 of the Criminal Procedure Code. It is also admissible to prove that a person lives wholly or partly on the earning of a prostitute.

A man's general reputation is the reputation which he bears in the place in which he lives amongst the inhabitants of that place.

Crown v. *Nga Nyein*, I.L.R.V. p. 90; *Rai Isri Pershad* v. *Queen-Empress*, I.L.R. 23 Cal. 621; *King-Emperor* v. *Nga Shwe U*, 2 L.B.R. p. 166; *King-Emperor* v. *Po Yin and one*, 2 Ran. 686; *King-Emperor* v. *Nga Po*, 5 L.B.R. p. 72 (F.B.), referred.

A proceeding under s. 7 (*1*) (*c*) of the Suppression of Brothels Act, 1949 read with s. 110 of the Criminal Procedure Code should be treated as a Criminal Miscellaneous case.

For appellant *Nil.*

Ba Pe (Government Advocate) for the respondent.

U SAN MAUNG, J.—In the so called Criminal Regular Trial No. 809 of 1954 the appellant Thein Aung was directed to be detained in prison for failure to enter into a bond for a sum of K 300 with two sureties in the like amount to be of good behaviour for a period of one year. This order was made under the provisions of section 7 (*1*) (*c*) of the Suppression of Brothels Act, 1949 (Act No. XXIV of 1949) read with the provisions of sections 110 to 126-A of the Criminal Procedure Code. The

* Criminal Appeal No. 182 of 1955. Appeal from the order of the 7th Additional Magistrate of Rangoon, dated the 14th day of March 1955 passed in Criminal Regular Trial No. 809 of 1954.

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question now for consideration is whether the evidence on record is sufficient to justify the making of this order.

Section 7 (*1*) (*c*) of the Suppression of Brothels Act, 1949 in so far as is relevant for the purpose of these proceedings, provides that where a person depends for his living wholly or partly on the earnings of a prostitute, proceedings can be taken against him as provided in section 110 *et seq* of the Criminal Procedure Code. So the position is as if section 7 (*1*) (*c*) of the Suppression of Brothels Act, 1949 has been engrafted into those of section 110 of the Criminal Procedure Code. Consequently, the provisions of section 117 (4) of the Criminal Procedure Code are applicable *mutatis mutandis*. This sub-section reads as follows :

> " For the purposes of this section the fact that a person is an habitual offender or is so desperate and dangerous as to render his being at large without security hazardous to the community may be proved by evidence of general repute or otherwise."

Before the amendment of this sub-section by the addition of the words " or is so desperate and dangerous as to render his being at large without security hazardous to the community " there was considerable doubt as to whether evidence of general repute was admissible in so far as clause (*f*) of section 110 was concerned. However, as the law now stands evidence of general repute is admissible in respect of all the clauses of section 110 of the Criminal Procedure Code. Hence evidence of general repute is also admissible to prove that a person lives wholly or partly on the earnings of a prostitute.

Now, what is evidence of general repute ? This question is important as the learned 7th Additional Magistrate who tried this case does not seem to

have any idea what constitutes evidence of general repute. He does not seem to have referred to the relevant rulings on this point.

In *Crown* v. *Nga Nyein* (1) it was held by Fox, J. following the dictum in *Rai Isri Pershad* v. *Queen-Empress* (2) that a man's general reputation is the reputation which he bears in the place in which he lives amongst the inhabitants of that place. In *King-Emperor* v. *Nga Shwe U* (3) the same learned Judge observed as follows:

> " If it is proposed to prove by evidence of general repute that a person called on to give security is an habitual offender of one of the types mentioned in section 110, the form which the chief question put to the witnesses should take should be ' What, as far as you know, is the repute of the accused amongst the body of villagers of the village in which he has been living ? '. "

The learned Judge pointed out further that in order to satisfy himself that the accused's general repute is that of an habitual offender of one of the types mentioned, a Magistrate should require more evidence than that of policemen and village authorities and that if possible the inquiry should be conducted in the place where the accused has lived and the Magistrate should himself pick out at haphazard some of the villagers and examine them as to the accused's general repute.

These observations were generally approved by a Bench of the late High Court in *King-Emperor* v. *Po Yin and one* (4). In *King-Emperor* v. *Nga Po* (5) Hartnoll, J. observed as follows:

> " In my opinion the admissible evidence on the record was sufficient to place Maung Po on security. When the

(1) 1 L.B.R. p. 90.
(2) I.L.R. 23 Cal. 621.
(3) 2 L.B.R. p. 166.
(4) 2 Ran. p. 686.
(5) 5 L.B.R. p. 72 (F.B.)

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witnesses said that Maung Po had the repute of attacking boats and committing thefts from them and that this repute was currently spread in the town, to my mind they clearly meant that this was the general repute in which Maung Po was held by the community."

Bearing these observations in mind let us examine the evidence in this case. Ko Hlaing (PW 1) is the officer who arrested the accused on the 25th of September 1954. At the time of the accused's arrest he also arrested several girls, apparently from the same place. He did not give any evidence as regards the reputation of the accused.

Ko Thein Pe (PW 2) who was the *yat-kwet-ok* of the locality said that there were frequent visitors to the house of the accused. He never stated that the accused bore a general reputation of living on the earnings of prostitutes. The next witness is U Myint (PW 3). He is also an *ayat lugyi* of the locality. He said that he received information to the effect that the accused kept prostitutes at his house. When recalled for cross-examination he said that the house where the accused lived had the reputation of harbouring prostitutes.

The next witness Ko Tha San did not know anything about the accused. From the above it is clear that the only person who could give some sort of evidence against the accused was U Myint (PW 3). However, his statement that he received information that the accused kept prostitutes at the house is not evidence of general repute to the effect that the accused lived on the earnings of prostitutes. His later statement that the house in which the accused lived had the reputation of harbouring prostitutes is also not to the same effect.

For these reasons I consider that there is no sufficient evidence on record to justify an order being

passed against the appellant Maung Thein Aung that he should give security for his good behaviour. The order of the learned Magistrate appealed against is accordingly set aside and the accused is directed to be set at liberty.

I would draw the attention of the Magistrate to Instruction No. (5) of Instructions for keeping Criminal Register No. II (Register of Criminal Miscellaneous No. II). It reads as follows :

> "In this register shall be entered all criminal miscellaneous cases, of which those of most frequent occurrence are specified :—
>
> Security for good behaviour, section 109 or 110, Code of Criminal Procedure and cognate proceedings under the Burma Habitual Offenders Restriction Act, the Burma Opium Law Amendment Act, or the Burma Gambling Act."

A proceeding under section 7 (*1*) (*c*) of the Suppression of Brothels Act, 1949 read with section 110 of the Criminal Procedure Code should be treated as a criminal miscellaneous case.

APPELLATE CRIMINAL.

Before U San Maung, J.

H.C. 1955

Aug. 13.

U BA DIN (APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Suppression of Corruption Act, 1948, s. 4 (2) 4 (1) (c)—Non-compliance with ss. 424 and 367, Criminal Procedure Code.

The applicant was convicted under s. 4 (2) read with s. 4 (1) (c), Suppression of Corruption Act, 1948.

On appeal, the learned Additional Sessions Judge dealt with the case in the following words :—

"I have thoroughly gone through the evidence of the Lower Court and I am satisfied that the evidence for the prosecution is, under the circumstances, sufficient for a conviction".

Held : In *Bagh* (alias) *Maung Po Sein* v. *King-Emperor*, 1 Ran. 301.

"The provisions of s. 424, read with s. 376, Code of Criminal Procedure, are imperative and should be complied with in such a manner as to indicate clearly that the evidence has been gone into and tested, extrinsically as well as intrinsically, and that the Appellate Court has arrived at an independent opinion for itself. Its judgment should not appear to be in the nature of a supplement to the judgment of the trial Court, but should without being a long and elaborate one be adequate in itself to enable the High Court to dispose of a petition in revision without the necessity of going through the trial record."

Jamait Mullick v. *Emperor*, 35 Cal. 188; *In re Bonthu Appadu and others*, A I.R. (1943) Mad. 66; *Ram Lal Singh* v. *Hari Charan Ahir*, 37 Cal. 194; *Dalip Singh* v. *The Crown*, 2 Lah. 308; *Bansidhar and others* v. *Emperor*, A.I.R. (1940) All. 18; *Abdul Karim Mohamed Saleh* v. *Emperor*, A.I.R. (1940) Sind 113; *Mohd. Mustaquim* v. *Sukhraj and others*, A.I.R. (1945) Oudh 52, referred to.

The learned Additional Sessions Judge had entirely failed to comply with the provisions of s. 424 read with s. 367, Criminal Procedure Code.

Order set aside and appeal remanded for re-hearing.

For applicant *Nil.*

Tin Maung (Government Advocate) for the respondent.

* Criminal Revision No. 34 (B) of 1955. Review of the order of the Additional Sessions Judge, Northern Shan States of Lashio, dated the 21st day of January 1955 passed in Criminal Appeal No. 1 of 1954, arising out of Criminal Regular Trial No. 2 of 1953-54 of the Court of the Assistant Resident, Northern Shan States, Lashio.

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U SAN MAUNG, J.—In Criminal Regular Trial No. 2 of 1953-54 of the Court of the Assistant Resident, Northern Shan States, Lashio, the appellant U Ba Din was convicted of an offence punishable under section 4 (*2*) read with section 4 (*1*) (*c*) of the Suppression of Corruption Act, 1948, and was sentenced to 1½ years' rigorous imprisonment. The appellant filed an appeal against the conviction and sentence and the same was dealt with by the Additional Sessions Judge, Northern Shan States, in his Criminal Appeal No. 1 of 1954. In that appeal it was urged, firstly, that the Assistant Resident had no jurisdiction to try a case punishable under section 4 (*2*) of the Suppression of Corruption Act, 1948, and, secondly, that there was no evidence to support the conviction against the applicant. The learned Additional Sessions Judge after having rejected the first ground of appeal by holding that the Assistant Resident had been empowered under section 30 of the Code of Criminal Procedure and was therefore competent to try a case under section 4 (*2*) of the aforesaid Act, dealt with the second ground of appeal in the following words :—

> "Now, the second ground of appeal is that there is no sufficient evidence against the two appellants for a conviction.
>
> I have thoroughly gone through the evidence of the lower Court and I am satisfied that the evidence for the prosecution is, under the circumstances, sufficient for a conviction."

It ought to be mentioned that one Maung Maung who had been convicted jointly with U Ba Din for an offence under section (*2*) of the Suppression of Corruption Act read with section 114 of the Penal Code was the other appellant in the case.

The appeal was not dismissed summarily but in fact decided after due notice to the parties and after

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elaborate written arguments had been filed by the learned Advocate for the appellants and by the learned Government Advocate for the Union of Burma. Therefore, the observations of U May Oung, J., in *Bagh* (alias) *Maung Po Sein* v. *King-Emperor* (1) are apposite. The learned Judge said:

> "The provisions of section 424, read with section 376, Code of Criminal Procedure, are imperative and should be complied with in such a manner as to indicate clearly that the evidence has been gone into and tested, extrinsically as well as intrinsically, and that the Appellate Court has arrived at an independent opinion for itself. Its judgment should not appear to be in the nature of a supplement to the judgment of the Trial Court, but should without being a long and elaborate one be adequate in itself to enable the High Court to dispose of a petition in revision without the necessity of going through the trial record."

In *Jamait Mullick* v. *Emperor* (2) a Bench of the Calcutta High Court held that the judgment of an Appellate Court must show on the face of it that the case of each accused has been taken into consideration, and reasons should be given, as far as may be necessary, to indicate that the Court has directed judicial attention to the case of each accused and that the Appellate Court's judgment cannot be read in connection with, and as supplementary to, the judgment of the Court of first instance, but must be quite independent and stand by itself.

In *In re Bonthu Appadu and others* (3) it was observed that it is even more essential that an appellate Court should give reasons for its orders than that the trial Court should do so; for in the latter case the accused has a remedy by way of appeal before a tribunal which has to consider questions of fact as well as of law and that in revision where

(1) 1 Ran. 301. (2) 35 Cal. 188.
(3) A.I.R. (1943) Mad. 66.

findings of fact are ordinarily accepted, the revisional Court must be satisfied that the appeal was properly disposed of as well as heard.

See also *Ram Lal Singh* v. *Hari Charan Ahir* (1), *Dalip Singh* v. *The Crown* (2), *Bansidhar and others* v. *Emperor* (3), *Abdul Karim Mohamed Saleh* v. *Emperor* (4) and *Mohd. Mustaquim* v. *Sukhraj and others* (5).

As the learned Additional Sessions Judge, Northern Shan States, had entirely failed to comply with the provisions of law contained in section 424 read with section 367 of the Code of Criminal Procedure, his order confirming the conviction and sentences on the applicant U Ba Din and his co-accused Ko Maung Maung is set aside and the appeal remanded to him for re-hearing and fresh disposal according to law. Ko Maung Maung has apparently served his sentence of one year's rigorous imprisonment. As for the applicant U Ba Din, he should be released on bail if he can give sufficient security to the Additional Sessions Judge during the re-hearing of the appeal.

(1) 37 Cal. 194
(2) 2 Lah. 308.
(3) A.I.R. (1940) All. 18.
(4) A.I.R. (1940) Sind 113.
(5) A.I.R. (1945) Oudh 52.

APPELLATE CRIMINAL.

Before U Ba Thoung, J.

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Dec. 6.

U BA MAUNG (APPLICANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Penal Code, s. 380/447—Judgment ; ss. 366 and 367, Criminal Procedure Code—Written Order of discharge not necessary under sub-s. (1) of s. 253, but necessary under sub-s. (2) s. 512, Criminal Procedure Code.

The Respondent filed a complaint under s. 380/447, Penal Code against the Applicant and 3 others. Except the applicant, the other three accused did not appear in Court.

The Magistrate after examining the complainant and his four witnesses discharged the applicant and the three other accused who had never appeared at the trial.

The Sessions Judge set aside the order of discharge and ordered a retrial.

Held : The order of discharge passed by a trial Magistrate under s. 253 sub.-s. (2) of the Criminal Procedure Code is not a "judgment" within the meaning of s. 367, Criminal Procedure Code.

The word "Judgment" is not defined in the Criminal Procedure Code, but it is sufficiently clear from ss. 366 and 367 that it is intended to indicate the final order in a trial terminating in either the conviction or acquittal of the accused.

Ohn Hlaing v. *The King*, (1947) R.L.R. p. 40, referred to ; *Emperor* v. *Maheswara Kondaya*, I.L.R. 31 Mad. p. 543, followed.

"The Legislature does not render the writing of reasons necessary when the Magistrate discharges the accused person under sub-s (1) after he has heard all the evidence for the prosecution. It is only when he discharges under sub-s. (2) without hearing all the evidence that he is bound to record reasons. But even in the former case the Magistrate should record his reasons, having regard to the fact that the order is final".

Uttamrao Shripat Bhutekar v. *Asru Hanwanta Bhutekar and another*, 49 Cr. L.J. (1948), p. 519, referred to.

Held further : The trial Magistrate was wrong in ordering the discharge of three accused from the case, when they never appeared at the trial. Proceedings should have been taken against them under s. 512, Criminal Procedure Code.

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* Criminal Revision No. 85-B of 1955. Review of the order of the Sessions Judge of Tavoy, dated the 11th day of June 1955 passed in Criminal Revision No. 93 of 1954, setting aside the order dated the 5th November 1954 of the Headquarters Magistrate, Tavoy, in Criminal Regular Trial No. 72 of 1954.

The order of discharge of applicant upheld and trial of the three other accused confirmed.

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U BA MAUNG v. THE UNION OF BURMA.

Ba Than, Advocate, for the applicant.

Ba Kyaing (Government Advocate) for the respondent.

U BA THOUNG, J.—In Criminal Regular Trial No. 72 of 1954 of the Court of the Headquarters Magistrate, Tavoy, the complainant Mr. C. Su Saing by filing a direct complaint prosecuted the petitioner U Ba Maung and 3 other persons, namely Maung Ba Din, Maung Nyun Pe and Ali, under sections 447 and 380 of the Penal Code for trespassing into his mines and removing therefrom some iron ores. The three accused Maung Ba Din, Maung Nyun Pe and Ali could not be served with any form of process, and the trial Magistrate proceeded with the hearing of the case against Maung Ba Maung (petitioner) only. After examining the complainant and his 4 witnesses the learned trial Magistrate considered that no *prima facie* case had been made out against any of the accused, and he discharged not only Maung Ba Maung (petitioner) but also the three other accused who had never appeared at the trial. Then Mr. C. Su Saing filed an application before the Sessions Judge, Tavoy, for revision of the order of discharge passed by the trial Magistrate and the learned Sessions Judge in his Criminal Revision No. 93 of 1954, set aside the order of the trial Magistrate and directed a re-trial of the case by another Magistrate. The learned Sesssions Judge considered the order of discharge, passed by the trial Magistrate, to be a judgment and that it has not complied with the provisions of section 367 of the Code of Criminal Procedure, for failing to deal with the points necessary

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U BA THOUNG, J.

for the determination of the case. He relied on the case of *Ohn Hlaing* v. *The King* (1); but I do not think that the learned Sessions Judge was correct in considering the order of discharge passed by the trial Magistrate to be a judgment. The word "judgment" is not defined in the Criminal Procedure Code, but it is sufficiently clear from sections 366 and 367 that it is intended to indicate the final order in a trial terminating in either the conviction or acquittal of the accused. In the case of *Emperor* v. *Maheswara Kondaya* (2), a Bench of the Madras High Court has held that :

> "An order of discharge is not a 'judgment'. A 'judgment' is an order in a trial terminating in either the conviction or acquittal of the accused.
>
> The principle of *autrefois acquit* can have no application when an accused is discharged under section 253, as there can be no trial when the accused is discharged."

In the present case the trial Magistrate in his order discharging the 4 accused has stated as follows :

> "It is an admitted fact that the mining areas worked by the complainant is within the jurisdiction of the insurgents and no government servant could go that side and is proved by the P.S.O. Kyaukmedaung."

The prosecution witnesses on the other hand could not also prove that the accused Ba Maung or the other three absent accused had committed the offence punishable under section 380/447 of the Penal Code. I am therefore of the opinion that I am unable to frame a charge against any of the four accused.

Under the circumstances, I am of opinion that no case has at all been made out against any of the four accused and for these reasons, the four

(1) (1947) R.L.R. p. 40. (2) I.L.R. 31 Mad. p. 543.

accused Ba Din, Ba Maung, Nyun Pe and Ali are discharged. Case mistaken.

The learned trial Magistrate has examined the complainant and his 4 witnesses and only after considering all their evidence that he recorded the reasons that the prosecution witnesses could not prove that the accused Ba Maung or the three other absent accused had committed the offence under section 380/447, Penal Code. Therefore it appears that the learned trial Magistrate discharged the accused under section 253 (1) of the Criminal Procedure Code, and for a discharge under section 253 (1) of the said Code it is not necessary for the Magistrate to discuss at length in the order of discharge. Under the heading "*Recording reasons*" in the Code of Criminal Procedure (1) regarding the discharge of accused under section 253, it is stated thus:

> "The Legislature does not render the writing of reasons necessary when the Magistrate discharges the accused person under sub-section (1) after he has heard all the evidence for the prosecution. It is only when he discharges under sub-section (2) without hearing all the evidence that he is bound to record reasons. But even in the former case the Magistrate should record his reasons, having regard to the fact that the order is final."

In the present case, I consider that the reasons recorded by the trial Magistrate in his order are sufficient enough even for a discharge under section 253 (2) of the Criminal Procedure Code for it can be gathered from his order the reasons which motivated the discharge of the accused.

In the case of *Uttamrao Shripat Bhutekar* v. *Asru Hanwanta Bhutekar and another* (2), it has been

(1) Mitras on the Code of Criminal Procedure, 11th Edition, p. 828.
(2) 49 Cr.L.J. (1948) p. 519.

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held that "under section 253 (2) the reasons need not be recorded in any particular form and it would be enough if the reasons which motivated the discharge of the accused can be gathered from the order, but reasons there must be some form or other. There must be enough material in the order to satisfy the High Court that the discharge was for good and proper causes. Omission to record reasons is not curable irregularity."

For the reasons stated, I do not consider that the learned Sessions Judge was correct in setting aside the order of discharge passed by the trial Magistrate and ordering a fresh trial so far as the applicant-accused U Ba Maung is concerned. I therefore set aside the order of the Sessions Judge in ordering a re-trial of the case against the applicant U Ba Maung.

I however, agree with the order of the Sessions Judge in setting aside the order of discharge by the trial Magistrate regarding the three other accused, namely Maung Ba Din, Maung Nyun Pe and Ali. These three accused appear to be absconding as process could not be served on them and they never appeared at the trial. The learned trial Magistrate was wrong in ordering a discharge of these three accused from the case. Instead he should have taken an action against them under section 512 of the Criminal Procedure Code. I therefore uphold the order of the Sessions Judge in setting aside the order of discharge passed by the trial Magistrate regarding these three accused, and in ordering a new trial against them.

APPELLATE CRIMINAL.

Before U Aung Khine, J., U San Maung, J. and U Ba Thoung, J.

H.C. 1955 — *July 25.*

U KYAW MYINT
U KYAW THEIN } (APPLICANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

The Special Crimes (Tribunal) Act, 1947 (Burma Act No. LIII of 1947) s. 8—Penal Code, 120-B—S. (1) (d), *Restriction of Bribery and Corruption Act, 1948—Rules 6 and 113, Mineral Concession Rules—Criminal Revision—Findings of facts—Interference by High Court—Evidence of conspiracy—Public Property Protection Act, 1947—Whether Mines, "Public property"—Revisional Powers of High Court.*

Held: In criminal revisions, findings of facts are not to be disturbed unless they are patently perverse or manifestly unjust.

U Pandita v. *Maung Tint*, A.I.R. (1938) Ran. p. 103; *Mir Allahbuxkhan* v. *Emperor*, A.I.R. (1929) Sind p. 90; *Bishambhar Nath and another* v. *Emperor*, A.I.R (1941) Oudh p. 476; *Pannalal Shaw and another* v. *Nanigopal Biswas*, A.I.R. (1949) Cal. p. 103; *Jumman* v. *Emperor*, A.I.R. (1944) Nag. p. 285, referred to.

In most cases of conspiracy, direct evidence can seldom be obtained and the agreement between the conspirators has to be inferred from circumstances arising from their conduct both prior and subsequent to the act, raising a presumption of common concerted plan to carry out the unlawful design. The unlawful design at the outset must necessarily have been conceived by one subsequently taken up by others.

Held further: That the High Court in exercise of its revisional power can set aside a conviction and sentence, but it will not do so unless the record show that the evidence is not capable of sustaining the conviction and sentence.

Re. S. R. Raja Rao and another, A.I.R. (1945) Mad. p. 111, approved.

Kyaw Myint, Advocate, for U Kyaw Myint.

P. K. Basu and *Kyaw Khin*, Advocates, for U Kyaw Thein.

Dr. Ba Han for the respondent.

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* Criminal Revision No. $\frac{175(B)}{176(B)}$ of 1954. Review of the order of the Special Tribunal of Rangoon, dated the 24th day of July 1954, passed in Special Trial No. 1 of 1953.

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U AUNG KHINE, J.—These two revision applications arise out of Special Trial No. 1 of 1953 before the Bench of the Special Tribunal (Rangoon) constituted under the Special Crimes (Tribunal) Act, 1947 (Burma Act No. LIII of 1947).

On the complaint made by U Tin Aung, Assistant Director, Bureau of Special Investigation, Burma, Rangoon, the two applicants U Kyaw Thein and U Kyaw Myint, who were formerly the Secretary to the Government and Minister, respectively, in the Ministry of Industry and Mines, were made to stand their trial on two alternative counts under section 102-B of the Penal Code read with section 4 (*1*) (*d*) of the Restriction of Bribery and Corruption Act, 1948. After a lengthy trial, the Tribunal found that the two applicants were guilty of having conspired to commit an act of misconduct as defined in section 4 (*1*) (*d*) of the Restriction of Bribery and Corruption Act and sentenced each of them to suffer one year's rigorous imprisonment. In view of the restriction embodied in the proviso to section 8 of the Special Crimes (Tribunal) Act, the two applicants were precluded from filing their appeals and hence these revision applications before us.

As the Tribunal has in its judgment dealt with the facts of the case rather comprehensively we do not intend to recapitulate them.

The circumstances which led to the prosecution of the two applicants revolved around the question of propriety in the grant of a license to prospect minerals in certain areas known as Namyen mines in Bokpyin Township, Mergui District. Namyen mines, it has been established, is rich in mineral resources and the first person to apply for prospecting licenses for that area was Ah Fat, a prominent figure, who has earned for himself quite a notoriety

over this affair. In May 1947 he was alone before the Collector, Mergui with three applications for issue of prospecting licenses. There were five other applicants including U Tha Win, chief rival of Ah Fat and one Aun Sit Yein who were also eager to work the said Namyen mines. They presented their applications only in the year 1948. Unlike Ah Fat who had merely applied for a prospecting license, U Tha Win applied for the issue of a mining lease straight away.

Now, in the matter of granting concessions, adherence to the rules framed by the President known as Mineral Concession Rules is strictly compulsory. For instance, no concession can be granted except to a person holding a Certificate of Approval. To keep it alive and valid from year to year, annual renewal of the same is necessary. In the event of there being more than one applicant, the prior right to the concession, subject to any order which the President may pass, is with the applicant who had been the first to file his application; the President, however, can in his absolute discretion grant the concession to any of the applicants. (See Rule 113).

In the year 1948 Ah Fat held no Certificate of Approval and that was one of the reasons given by the then Minister in charge U Tun Myint in rejecting his application and at the same time granting a mining lease to U Tha Win by his order dated the 13th August 1948.

It is the case of the prosecution that after the Minister had recorded his minutes of 13th August 1948, applicant U Kyaw Thein in conformity with an illegal design to help Ah Fat had dexterously made use of the opportunities available to him as the Secretary of the Ministry concerned to nullify his Minister's order.

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In this connection, the Tribunal, in the assessment of the evidence, reached certain conclusions, which showed up the two applicants rather in a bad light. The learned Counsel for the applicants say that these findings are not justified by the evidence on record and they made attempts to go minutely into the evidence. We may, at this stage, point out that in revision applications, findings of facts are not to be disturbed unless they are patently perverse or manifestly unjust. This well known and salutary principle of law has long been accepted in the High Court as well as in the Indian High Courts.

See *U Pandita* v. *Maung Tint* (1), *Mir Allahbuxkhan* v. *Emperor* (2), *Bishambhar Nath and another* v. *Emperor* (3), *Pannalal Shaw and another* v. *Nanigopal Biswas* (4) and *Jumman* v. *Emperor* (5).

Now, it appears to us that U Tun Myint's order, dated the 13th August 1948 did not meet with U Kyaw Thein's approval. We find that he put in a rather dubious note questioning the legality of the order. He had to be pointed out that under Rule 113, the Minister had absolute discretion in the matter of granting concessions.

Exactly a fortnight later, Sir Paw Tun on behalf of Ah Fat presented before the Minister an application claiming that he had a prior right over U Tha Win to the concession. The Minister was not entirely ignorant of this rule regarding the prior right and had well considered the same together with other aspects of the case before passing the order he did.

There is a dispute regarding what actually took place after Sir Paw Tun had interviewed the Minister.

(1) A.I.R. (1938) Ran. p. 103.
(2) A.I.R. (1929) Sind. p. 90.
(3) A.I.R. (1941) Oudh p. 476.
(4) A.I.R. (1949) Cal. p. 103.
(5) A.I.R. (1944) Nag. p. 285.

According to U Tun Myint, he told Sir Paw Tun that the application of Ah Fat had been rejected and shortly after that he sent for U Kyaw Thein and instructed him to send a suitable reply in accordance with law. On the application itself he wrote—

"အတွင်းဝန်သို့
သင့်တော်သလိုအကြောင်းပြန်ကြားပါရန်။
(ပုံ) ထွန်းမြင့်—၂၇-၀-၄၀"

Instead of sending the reply as envisaged by the Minister, U Kyaw Thein made the following noting in Exhibit ည-12 :—

"(1) Ack. and inform that a further communication will be made.
(2) Forward papers to Attorney-General for favour of advice whether the hearing on this will fall under rule 34 (xi) or any other rule of the Mineral Concession Rules.
(3) Add that at the hearing if it is fixed later it is proposed to ask for the attendance of the Attorney-General or any suitable officer deputed by him.
(Intd.) K.T., —28/8 "

U Kyaw Thein on this point stated that U Tun Myint did not tell him that Ah Fat's application had been dismissed. His explanation for Exhibit ည-12 noting is that he thought the Minister wanted him to take further action as the matters raised in Ah Fat's application needed clearing up.

This explanation does not have a ring of truth. The words "အကြောင်းပြန်ကြားပါရန်" convey only one meaning and that is "to send a reply". It would have appeared rather odd to U Kyaw Thein if he really thought the Minister was re-opening the matter again so soon after he had passed a clear and definite order. If at all he was in doubt he could very well

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have seen the Minister to satisfy himself as to what the latter's intentions really were.

U Tun Myint was never in two minds as to whom the concession should be granted. His actions prior and subsequent to the date on which Sir Paw Tun saw him, *i.e.*, 27th August 1948 give clear indication that he never intended to re-open Ah Fat's claim to mineral concessions basing on his prior right.

Therefore in this connection we are of the view that the Tribunal was quite justified in accepting the statement of U Tun Myint in preference to that of applicant U Kyaw Thein.

Thus the Tribunal, found, " That in the teeth of his Minister's order which was clear and precise U Kyaw Thein took steps to have the matter of Ah Fat's claim to mineral concessions re-opened". The justification of this finding lies in the fact that U Kyaw Thein did not inform his Minster that he had sought for Attorney-General's advice in the matter and after he had written to the Attorney-General, he did not put up the case again to the Minister who consequently remained in the dark about the action taken on his order to send a suitable reply to Ah Fat.

The Tribunal has taken a serious view of U Kyaw Thein's action in seeking legal opinion as to whether Ah Fat's claim would fall under rule 34 (xi) of the Mineral Concession Rules. The Tribunal clearly saw that so far as Ah Fat's application is concerned rule 34 (xi) was entirely irrelevant. It has also not escaped the notice of the Tribunal that when he forwarded Ah Fat's application to Attorney-General's office U Kyaw Thein suppressed the fact that the Minister had already passed definite orders in respect of Namyen mines. This was taken as an

indication that U Kyaw Thein wanted to conceal this most essential fact from the Attorney-General. In this aspect of the case we are of the same mind as the Tribunal that U Kyaw Thein's conduct in this instance was highly reprehensible. Had U Tin Maung, Government Advocate, known that definite orders had been passed in the case, we have no doubt that he would have advised against the re-opening of the matter.

U Tun Myint at one stage of the proceedings, on the application of U Tin Aung, agent of U Tha Win had agreed to the early issue of the mining lease. This information was directed to be given immediately but somehow this direction was never carried out.

The suggestion of the prosecution that U Kyaw Thein had always in his mind the possibility of U Tha Win's mining lease being cancelled and prospecting licenses issued to Ah Fat is borne out by the way he wrote to the Financial Commissioner in Exhibit ၁၁-17 which runs as follows, "Will F.C. kindly see H.M.'s orders on S.M. below and allow U Tha Win if he has no objection to enter upon mining operation pending the issue or refusal of a mining lease as has been done in certain other cases." The prosecution would have it that the inclusion of the words "or refusal" in the note was made with a sinister design. U Kyaw Thein's explanation for the inclusion of these words is that he had used them merely by way of caution. This explanation did not impress the Tribunal at all in view of the fact that the Minister's order was for the immediate issue of the mining lease to U Tha Win and thus there could not have been any possibility of a refusal after this order. The above order of the Minister was not communicated to U Tha Win or his agent as directed. U Kyaw Thein's prevarication in this

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matter stands in striking contrast to the way he promptly attended to Ah Fat's applications whenever they came up before him.

U Kyaw Thein in his evidence stated that U Tun Myint before demitting office told him to put up the whole matter again before his successor for his own decision. U Tun Myint had denied this and stated that he never told U Kyaw Thein that his order should be reconsidered. In view of U Tun Myint's consistent course of conduct in this matter throughout as revealed by the documents tendered in evidence, we are entirely in agreement with the Tribunal that it was never his intention to leave the matter open.

The Tribunal also took into account many other instances whereby U Kyaw Thein decidedly showed his bias in favour of Ah Fat. For instance, after U Tun Myint had been succeeded by U Kyaw Myint and after U Kyaw Myint had decided to hear the parties, it never occurred to U Kyaw Thein to ask U Tha Win or his advocate to be present at the hearing. It was only at the instance of the Government Advocate that U Tha Win's advocate was called in at the next hearing.

The notings in Exhibits ည-3 and ည-51 submitted by U Kyaw Thein at different times showed how, as time progressed, he had departed from his stand of strict neutrality only to throw his entire weight behind Ah Fat. After a careful scrutiny of Exhibit ည-51, we are not at all surprised that the Tribunal has come to the conclusion that it was but a special pleading for Ah Fat.

The two applicants were charged and convicted of having conspired to commit an act of misconduct. It is submitted by their Counsel that the evidence does not disclose any case of conspiracy. They contend that conspiracy connotes prior agreement

and that there is no evidence whatsoever to show that any agreement had been reached between the two applicants. It is however common knowledge that in most cases of conspiracy direct evidence can seldom be obtained and the agreement between the conspirators has to be inferred from circumstances arising from their conduct both prior and subsequent to the act, raising a presumption of common concerted plan to carry out the unlawful design. The unlawful design at the outset must necessarily have been conceived by one and subsequently taken up by others. The prosecution case is that the unlawful design originated from U Kyaw Thein and it was subsequently taken up by U Kyaw Myint and that U Kyaw Thein cleverly manoeuvred the re-opening of the case with the ultimate object of not only having the concession granted to U Tha Win cancelled but also to admit the claims of Ah Fat. It is impossible for the prosecution to say with any preciseness the stage at which U Kyaw Myint fell in with U Kyaw Thein's plans.

The persistent efforts made by U Kyaw Thein to nullify U Tun Myint's order were eventually crowned with success. It is to be considered in the light of events following the appointment of U Kyaw Myint to succeed U Tun Myint, whether there was any privity between him and U Kyaw Thein to bring about U Kyaw Thein's original objective mentioned above.

Now the first thing which strikes us as highly suspicious in the conduct of U Kyaw Myint is the unseeming haste in which he passed his orders by which he admitted the claim made by Ah Fat. The order is dated 2nd April 1949 and this date has a great significance for on the day previous, U Kyaw Myint, in company with certain of his colleagues, had tendered his resignation to the Prime Minister.

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This order contains many unsatisfactory features, for instance :

(1) The order was written in U Kyaw Myint's house on an office note paper. In view of the rival claims put up by different parties, complicated issues of law and facts had arisen in the case. In fairness to the parties and to the State, U Kyaw Myint should have had the proceedings before him before he passed such an important order, so that all points at issue could be touched upon. We have no hesitation in saying that the order in question was a most perfunctory one.

(2) There can be no dispute that U Tun Myint's order was a well considered one without any legal flaw. It was clear and concise giving straight-forward reasons for preferring U Tha Win's claim as against those of other applicants. U Kyaw Myint in his order did not furnish any cogent reasons why he considered it necessary to supersede his predecessor's orders.

(3) The applicants stated that when U Tun Myint demitted office, it was his intention to leave the matter at large. If that was true we cannot understand why the claims of other applicants besides U Tha Win and Ah Fat were not even mentioned in the order. The matter to all intents and purposes had assumed a dispute solely between Ah Fat and U Tha Win in the minds of the applicants. U Kyaw Thein as the Secretary had not drawn his Minister's attention to this at any time. The very heading of the order which reads :—Re Ah Fat v. U Tha Win / Claim for mineral concessions pin points to this fact.

(4) The fact that Ah Fat held no Certificate of Approval for 1948-49 was not mentioned in the order. That he held no Certificate of Approval was known to U Kyaw Myint at the time of passing the order.

In this connection U Tha Win had raised two points of objection which were duly noted by the Minister and who wanted to be satisfied about them before passing his orders. And yet without the clarifications he himself sought for, he passed the order.

(5) It was doubtful whether the Certificate of Approval could have been obtained readily in view of the vehement objections U Tha Win was putting up regarding Ah Fat's citizenship. In view of the complications which had arisen over his citizenship matter, the note of warning sounded by the Government Advocate regarding section 219 of the Constitution should have been taken into account.

These unsatisfactory features in the order of U Kyaw Myint coupled with U Kyaw Thein's machinations in the affair from the early stages of the proceedings have led the Tribunal to come to the conclusion that the two applicants have indeed conspired to commit an offence under section 4 (*1*) (*d*) of the Restriction of Bribery and Corruption Act.

It is submitted on behalf of U Kyaw Thein that no person should be convicted of conspiracy unless he himself was capable of committing the overt act. It is claimed that U Kyaw Thein could not in his capacity as the Secretary, have passed any order in the case and that the matter rested solely with the Minister. This is a contention which we cannot subscribe to. In most conspiracy cases, the master brain seldom is in the forefront in the commission of the plan to carry out the unlawfnl design.

Another technical objection taken up is that Namyen mines cannot be deemed to be public property within the meaning of the Restriction of Bribery and Corruption Act, 1948. Reference has been made to the definition given in the Public

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Property Protection Act, 1947, which runs as follows:

" ' Public property ' means any store or equipment or *any other property* whatsoever belonging to, or consigned to, or intended for the use of the army, naval or air forces serving in Burma or *belonging to*, or consigned to, or intended for the use of, *the Government of Burma* or any local authority or any Board or body constituted under any law ; "

The words italicised in the above definition coupled with the provisions of rule 6 of the Mineral Concession Rules show clearly that the property concerned, that is Namyen mines, is public property.

It is further submitted that the property in question has not been entrusted to the applicants as defined in section 4 (*1*)(*d*) of the Restriction of Bribery and Corruption Act, 1948. Admittedly no evidence of actual entrustment can be forthcoming but this will have to be inferred from the very wide powers given to the Minister to deal with the property in the manner he thinks proper. Rule 113 of the Mineral Concession Rules shows that the sole authority to grant concession or otherwise in respect of the land is the Minister himself. In these circumstances the contention put forward by the Counsel for the applicants on this point is clearly untenable.

We have studied the evidence in the case with utmost care and patience and we find that it has been fairly discussed and we cannot say that exception can be taken to anything that has been said in the Tribunal's judgment.

Finally we quote with respect and aproval the view of Leach, C.J. in *re S. R. Raja Rao and another* (1) that although the High Court in the exercise of its revisional powers can set aside a conviction and sentence, it will not do so unless the record shows

(1) A.I.R. (1945) Mad. p. 111.

that the evidence is not capable of sustaining the conviction and sentence.

The two applications of U Kyaw Thein and U Kyaw Myint therefore fail and they are dismissed

U BA THOUNG, J.—I agree.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL (FULL BENCH).

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

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U MAUNG MAUNG AND ONE (APPLICANTS)

v.

MAUNG MAUNG (RESPONDENT).*

Limitation Act, s. 4—S. 2, Special Limitation and Accrual of Interest (Adjustment) Act, 1950 (Act No. 19 of 1950)—S. 9, Proclamation of Martial Law Ordinance 1948 (No. 5 of 1948) temporary enactment under s. 110, Constitution—Notification No. 2 of 1951 published in the Burma Gazette, *Part (1), dated the 19th May 1951 at p. 311—Permanent Act of Parliament—Present War Termination Definition Act (Act No. XII of 1946)—Judicial Department Notification No. 48, dated the 5th February 1947.*

The question referred to the Full Bench is as follows:

Are the Courts in Mandalay to be deemed to be closed within the meaning of s. 4 of the Limitation Act on the 21st January 1952 in view of the provisions of s. 2 of Act 19 of 1950?

Held. S. 2 of Special Limitation and Accrual of Interest (Adjustment) Act, 1950 (Act No. XIX of 1950), definitely requires the issuance of a Notification by the President prescribing a date declaring the Civil Courts to be re-opened for any relevant area.

The Martial Law Ordinance was a temporary enactment promulgated by the President under s. 110 of the Constitution and it was only for such duration of time as the President with the consent of both Chambers of Parliament might extend from time to time.

Act XIX of 1950 is a positive enactment of the Legislature and it is permanent until repealed by an act of Parliament.

Where a positive enactment of Legislature by specific provision requires the notification, by the President, of a date for a particular purpose, the requirement of such statutory provision cannot be said to have been complied with until and unless a notification appointing such a date is published by the President in the Official Gazette.

In the absence of the issuance of such a notification, it cannot be said that the positive statutory requirements have been complied with, much less by implication, by the mere issue of a Notification of similar purport under a different temporary enactment.

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*Civil Revision No. 112 of 1952 against the decree of the District Judge's Court of Mandalay in Civil Appeal No. 14 of 1952, dated the 25th day of August 1952.

Acceptance of such a principle of construction of statute law would lead us to a dangerous situation whereby the express conditions imposed or prescribed by a positive enactment of legislature could easily be avoided.

Held further : The President has not yet notified a date fixing the period of time within which Civil Courts in Mandalay are deemed to be closed for the purpose of s. 4 of the Limitation Act. Until such a date is prescribed the Civil Courts in such area shall be deemed to be closed within the meaning of s. 4 of the Limitation Act from the date of the temporary withdrawal of Civil administration under the Lawful Government.

Than Sein, Advocate, for the applicants.

Ba Shun, Advocate, for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 23 of 1948 of the Court of the First Assistant Judge, Mandalay, respondent Maung Maung who was the plaintiff in that suit obtained a decree for a sum of Rs. 2,700 with costs against the defendant-appellants Maung Maung and Daw Ma Ma Lay. In Civil Execution Case No. 47 of 1948 of the same Court, the respondent executed the decree and the Execution Case was closed on the 17th January 1949 with a note to the effect that the decree had been satisfied in part. On the 21st January 1952, that is to say 3 years and 4 days after the closure of Civil Execution Case No. 47 of 1948, the respondent applied for the execution of the decree for the balance amount. This application was dealt with by the Subdivisional Court of Mandalay as successor of the Court of the First Assistant Judge in Civil Execution Case No. 16 of 1952. The learned Subdivisional Judge held that the application for execution having been made more than 3 years after the closure of Civil Execution Case No. 47 of 1948 was barred by limitation. The respondent being dissatisfied with the order of the Subdivisional Judge appealed to the District Court of Mandalay and the District Judge by his judgment in Civil Appeal No. 14

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U SAN MAUNG, J.

of 1952 held that the application was in time. The learned District Judge considered that in calculating the period of limitation the learned Judge of the Subdivisional Court had misunderstood the effect of the provisions of section 2 of Act 19 of 1950 which enacts that in any area occupied by insurgents, Civil Courts shall be deemed to be closed within the meaning of section 4 of the Limitation Act from the date of the withdrawal of the Civil Administration of the lawful Government till such date as the President of the Union of Burma may, by notification, fix for that area or till the President declares the Civil Courts to re-open for that area. It would appear that while Military Administration was still in force in the Mandalay District, the Supreme Commander of the Union Forces had allowed Civil Courts in the Mandalay District to function with effect from the 6th February 1950 *vide* his Military Administration Proclamation No. 1 of 1950.

However the learned District Judge was of opinion that the Civil Courts in the Mandalay District must be deemed to have been closed for the purpose of limitation only till such date as the President of the Union of Burma by notification declares the Civil Courts to be re-opened for that area. No such notification has yet been published.

Therefore the question which now arises for consideration is whether the learned District Judge's views in this matter is correct. As the matter is of great importance and no decision on this point has yet been given by this Court I consider that the question should be decided by a larger Bench than that of a single Judge. Therefore I would under the provisions of Rule 25 of the Appellate Side Rules of Procedure, Civil, submit the following question of law for the decision of a Bench or a Full

Bench as may be constituted by the learned Chief Justice :—

" Are the Courts in Mandalay to be deemed to be closed within the meaning of section 4 of the Limitation Act on the 21st January 1952 in view of the provisions of section 2 of Act 19 of 1950 "?

U CHAN TUN AUNG, C.J.—It appears that on the 18th May 1948, the respondent Maung Maung (hereinafter referred to as Decree Holder) obtained a decree in Civil Regular Suit No. 23 of 1948 of the first Assistant Judge, Mandalay, against the first applicant Maung Maung for a sum of Rs. 2,700 with costs. In Civil Execution Case No. 29 of 1948 of the said Court, the decree-holder sought for the execution of the said decree against the first applicant Maung Maung and in the course of the said execution, he obtained a sum of Rs. 500 from the first applicant, and the second applicant Daw Ma Ma Lay who is no other than the mother of the first applicant stood surety for payment of the balance decretal amount. As there was default in payment, another execution proceedings, Civil Execution Case No. 47 of 1948, was— instituted and the final order in that case was passed on the 17th January 1949, in the following terms :—

" Rs. 1,000 paid out of Court and case is closed with a note of part satisfaction of Rs. 1,000. "

In the meantime the first Assistant Judge's Court of Mandalay was succeeded by the Subdivisional Court of Mandalay and on the 21st January 1952, the decree-holder again applied for the execution of the balance decretal sum in Civil Execution Case No. 16 of 1952 of the said Court. Notice was issued to the present applicants (judgment-debtors) and in response thereto the first applicant appeared and contended, *inter alia*, that

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U CHAN TUN AUNG, C.J.

the application for execution was barred by limitation. The Subdivisional Judge accepted this contention and dismissed the execution application. An appeal was preferred against the said order and the District Judge of Mandalay in Civil Appeal No. 14 of 1952 held that the application was not barred by limitation.

In arriving at the above conclusion, the learned District Judge has apparently relied upon the provisions of section 2 of Act XIX of 1950 (၁၉၅၀ ပြည်နှစ်၊ အထူးကာလ စည်းကမ်းသတ်နှင့် အတိုး ကန့်သတ်ရေး အက်ဥပဒေ). The Subdivisional Judge's finding was, however, as far as we can ascertain from his order dated the 31st December 1952, based upon the provision of section 9 of the Proclamation of Martial Law Ordinance (No. 5 of 1948) and also upon certain military administration proclamations issued by the Supreme Commander of the Armed Forces for the Union of Burma pursuant to some provisions of the Martial Law Ordinance No. 5 of 1948. We may here observe that the Martial Law Ordinance was promulgated by the President under section 110 of the Constitution, and therefore, it was a temporary enactment, never meant to endure without limit of time.

The applicants then applied to the High Court for revision of the said order of the District Judge in Civil Revision No. 112 of 1952, and the main ground taken was that the learned District Judge's finding regarding the absence of a notification contemplated under section 2 of Act XIX of 1950 was wrong. They also asserted that the notification by the President withdrawing his proclamation vesting the administration of Mandalay District with military authorities (*vide* Notification No. 2 of 1951 published in the *Burma Gazette*, Part I, dated the 19th May 1951 at page 311) should be treated as one

contemplated by section 2 of Act XIX of 1950 and that therefore the Civil Courts should be deemed to have been re-opened with effect from the date of the said notification, that is, with effect from the 1st of June 1951.

We also observe that there is a Bench decision of this Court, (*vide* Civil Miscellaneous Appeal No. 70 of 1952) wherein a similar question having arisen, it was held that a notification by the President withdrawing the military administration pursuant to Martial Law Ordinance could not but mean the restoration of civil administration, and that by so notifying the civil administration having been restored automatically, the promulgation of a notification as contemplated in section 2 of Burma Act XIX of 1950 was unnecessary. In other words, the finding of the Bench as far as we can make out is that the proclamation issued by the President in the relevant area (it was Pyinmana Subdivision) is deemed to be a notification under section 2 of Act XIX of 1950.

In view of this Bench ruling, U San Maung, J. has perhaps, thought it fit to refer to a wider Bench. The question referred to us for decision is as follows:

"Are the Courts in Mandalay to be deemed to be closed within the meaning of section 4 of the Limitation Act on the 21st January 1952 in view of the provision of section 2 of Act XIX of 1950 ?"

The provision of section 2 of Act XIX of 1950 reads as follows:

"သောင်းကျန်းသူများ၏လက်တွင်းသို့ ကူးရောက်သော မည်သည့် အရပ်ဒေသတွင်မဆို၊ တရားမဲ့ုးများသည်၊ တရားဝင်အစိုးရ၏ ပြုပြင်ဆိုင်ရာအုပ်ချုပ် ရေးကို ခေတ္တရပ်ဆိုင်းသည့်နေ့မှစ၍၊ နိုင်ငံတော်သမတက ထိုအရပ်ဒေသအတွက် အမိန့်ထုတ်ပြန်သတ်မှတ်သည့်နေ့အထိ၊ ကာလစည်းကမ်းသတ် အက်ဥပဒေပုဒ်မ ၄ ၏ အနက်အဓိပ္ပါယ်အရ၊ ပိတ်ထားသည်ဟု မှတ်ယူရမည်။"

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It may be noted that Act XIX of 1950 came into force with effect from 19th August 1948 (*vide* section 1). However, plain construction put upon section 2 as enacted, definitely requires the issuance of a notification by the President prescribing a date declaring the civil courts to be reopened for any relevant area. Until such a date is prescribed the civil courts in such area shall be deemed to be closed within the meaning of section 4 of the Limitation Act from the date of the temporary withdrawal of civil administration under the lawful Government. We are afraid, however, there have been some confusion of thoughts in considering the plain provisions of this section along with those of section 9 of the Proclamation of Martial Law Ordinance, 1948 which reads :—" civil courts within any area in respect of which a proclamation under section 2 has been issued shall be deemed to be closed within the meaning of section 4 of the Limitation Act until such time as the proclamation has been revoked."

The Martial Law Ordinance as observed above was a temporary enactment promulgated by the President under section 110 of the Constitution and it was only for such duration of time as the President with the consent of both chambers of parliament, might extend from time to time. In fact, the Ordinance was extended for six months at a time for not less than seven times, the last extension being notified on the 8th day of September 1951 (*vide Burma Gazette*, Part I, page 575). Therefore the Martial Law Ordinance was in force from the date of its promulgation, (*i.e.*), 19th August 1948 till the 1st of March 1952, and thereafter it expired. When the Martial Law Ordinance, 1948, was still in force, and so long as the general administration of a particular area was vested in the military authorities

by a proclamation of the President under section 2 thereof, all the civil courts in such area were deemed to be closed within the meaning of section 4 of the Limitation Act until the said proclamation was revoked. This is quite plain from the provision of section 9 of the Martial Law Ordinance. Now, in the case under reference the proclamation under section 2 of the Martial Law Ordinance was withdrawn on the 1st June 1951 (*vide* proclamation No. 2 of the President of the Union of Burma published in *Burma Gazette*, Part I, dated the 19th May 1951, page 311). Therefore, it appears to us that for the duration of time the Martial Law Ordinance was alive, and for so long as the proclamation vesting the military authorities with the administration of Mandalay district remained unrevoked, a party to a civil litigation would have the benefit of section 4 of the Limitation Act; and in case his right of claim was barred by limitation within the period when the civil courts were deemed to be closed, then he would have to prefer his claim—be it a suit, an application or an appeal—on the very next day after the revocation of the said proclamation (see Civil Miscellaneous Appeal No. 89 of 1953 of the Supreme Court). But the Martial Law Ordinance was alive only up to the 1st of March 1952 so that thereafter section 9 of the said Ordinance had no effect. But Act XIX of 1950 is a permanent statute duly enacted by the parliament, and it came into force retrospectively with effect from the 19th August 1948. The Act is entitled (၁၉၅၀ ပြည်နှစ်၊ အထူးကာလ စည်းကမ်းသတ်နှင့် အတိုးကန့်သတ်ရေး အကျဉ်းပဒေ) [Special Limitation and Accrual of Interest (Adjustment Act, 1950)].

This Act serves two purposes, (i) saving of limitation by deeming that the civil courts are closed

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within the meaning of section 4 of the Limitation Act for the period between the date of temporary withdrawal of civil administration and the date notified by the President for a particular area; (ii) stopping the accrual of interest payable on any loan or mortgage, other than usufructuary mortgage, made in any area before the withdrawal of civil administration in respect of the period between the date of withdrawal of the civil administration and the date to be notified by the President under section 3. It will thus be seen that the said Act confers the benefit of section 4 of the Limitation Act upon the creditors and also the benefit of non-accrual of interest upon the debtors, for the period between the date of withdrawal of civil administration, and the date notified by the President in that behalf for the relevant area.

Now, in the case under reference, as far as we can gather from the facts disclosed, we find that Maung Maung (the decree-holder) obtained the decree against the first applicant for a sum of Rs. 2,700 with costs on the 18th May 1948 and after some attempts to realise a portion of it and in fact, he did realise something he renewed his application for the balance decretal amount on the 21st of January 1952. Thus, it is clear that on the said date (*i.e.*) 21st January 1952, the decree-holder had the benefit of two statutory enactments for purposes of section 4 of the Limitation Act. One, under section 9 of the Proclamation of Martial Law Ordinance, 1948 and the other, under section 2 of the Special Limitation and Accrual of Interest (Adjustment) Act, 1950. But the benefit given under section 9 of the Martial Law Ordinance could not be invoked by him inasmuch as the proclamation vesting the administration of the Mandalay district with the military authorities had

already been withdrawn on the 10th May 1951. Therefore the decree-holder was left with the benefit given under section 2 of the Special Limitation and Accrual of Interest (Adjustment) Act, 1950 which came into force with effect from 19th of August 1948. The said Act is a positive enactment of the Legislature and it is permanent until repealed by an act of parliament. So far as we are aware there has been no repealing Act.

We need hardly point out that where a positive enactment of legislature by specific provision requires the notification, by the President, of a date for a particular purpose, the requirement of such statutory provision cannot be said to have been complied with until and unless a notification appointing such a date is published by the President in the official Gazette. For instance, in the Present War Termination Definition Act (Act XII of 1946) section 2 required the President to declare what date is to be treated as the date of termination of the last World War. In pursuance thereof, a date was notified in the *Burma Gazette* and that date was accepted for all purposes as the date of the termination of the last World War (*vide* Judicial Department Notification No. 48, dated the 5th February 1947).

With due respect we must point out that the Bench which decided Civil Miscellaneous Appeal No. 70 of 1952 was in error in deeming the notification dated the 7th January 1949 issued by the President notifying the withdrawal of military administration from Pyinmana area pursuant to Proclamation of Martial Law Ordinance, 1948 as one notified under section 2 of the Special Limitation and Accrual of Interest (Adjustment) Act, 1950. Where as observed above, a positive statutory enactment of legislature prescribes the issuance of a notification

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fixing a certain date for a specific purpose it cannot be said that the positive statutory requirements have been complied with, in the absence of the issuance of such a notification, much less by implication, by the mere issue of a notification of similar purport under a different temporary enactment. Acceptance of such a principle of construction of statute law would lead us to a dangerous situation whereby the express conditions imposed or prescribed by a positive enactment of legislature could easily be avoided. As at present advised, and as has been conceded to us by the learned Government Advocate, who appears before us as (*amicus curiæ*) it appears that no notifications prescribing such dates as are contemplated under sections 2 and 3 of the Special Limitation and Accrual of Interest (Adjustment) Act, 1950 have been issued by the President. In civil Revision No. 33 of 1952 of this Court where a similar question arose, but was undecided, the learned Advocate Mr. G. N. Banerji appearing for the applicant was informed by the Judicial Ministry about the non-issue of a notification fixing the date as contemplated in section 2 of the said Special Limitation and Accrual of Interest (Adjustment) Act, 1950. The reply received by him is filed at page 12 (process file) of the said proceedings. A perusal of that reply from the Judicial Ministry [*vide* Memo. No. ၁-၈၈၈-၅၃ (၁၂၀၄), dated the 26th September 1953] leave us without doubt, that the President has not yet notified a date fixing the period of time within which civil courts in Mandalay are deemed to be closed for the purposes of section 4 of the Limitation Act. Therefore, in the absence of such a notification we must hold that when Maung Maung the decree-holder filed his execution application on the 21st January 1952, that is to say, more than three

years after his last application, his application cannot be said to have been barred by limitation as the Civil courts in Mandalay are still deemed to be closed. His application must therefore be held as being in time. The learned District Judge's finding to that effect is perfectly correct.

The above being our view, the answer to the question propounded is in the affirmative. Each party is to bear its own costs in this reference.

U AUNG THA GYAW, J.—I agree.

U SAN MAUNG, J.—I agree.

U SAN MAUNG, J.—This is an appeal by U Maung Maung and Daw Ma Ma Lay for the revision of the judgment and decree of the District Court of Mandalay in Civil Appeal No. 14 of 1952 setting aside the order of the Subdivisional Judge, Mandalay, in Civil Execution Case No. 16 of 1952 dismissing the respondent U Maung Maung's application for execution of the decree in Civil Regular Suit No. 23 of 1948 of the Assistant Judge, Mandalay. The facts leading to this application for revision have been fully set out in my order dated the 17th February 1955 referring to a Bench or a Full Bench this question " Whether the Courts in Mandalay were to be deemed to be closed within the meaning of section 4 of the Limitation Act on the 21st January 1952 in view of the provisions of section 2 of Act No. XIX of 1950 ". In view of the answer of the Full Bench contained in the judgment dated the 4th August 1955 in Civil Reference No. 3 of 1955, this application for revision must be dismissed. Accordingly the application is dismissed with costs. Advocates fees 5 gold mohurs.

APPELLATE CIVIL.

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

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Oct. 11.

U MYAT THA DUN AND ONE (APPELLANTS)

v.

THE MALUNZE RICE OFFERING SOCIETY BY ITS SECRETARY TAN BYAN SENG (RESPONDENT).*

Civil Procedure Code, Order XXIII, Rule 1 (2) (b)—Payment of costs, condition precedent to filing of a fresh suit—Failure to pay, a bar to filing of fresh suit or suits.

The appellants instituted a suit in the District Court of Prome, being Civil Regular Suit No. 1-P of 1946.

This suit was transferred to the High Court of Judicature at Rangoon, and registered as Civil Regular Suit No. 213 of 1947.

The appellants withdrew this suit with permission to file a fresh suit "on condition that prior to instituting any suit under leave now given, the plaintiffs pay to the defendant the costs to this date of the suit".

The appellants again instituted in the District Court of Prome against the same Respondent in respect of the same subject matter, being Civil Regular Suit No. 4-P of 1948.

The District Court dismissed this suit for failure to comply with the condition precedent for payment of costs as ordered by High Court.

The appellants again brought a fresh suit against the Respondent in respect of the same subject-matter in Civil Regular Suit No. 2-P of 1952 in the District Court of Prome. The District Court dismissed the suit holding that the appellants' failure to pay the costs before the institution of Civil Regular Suit No. 4-P 1948 not only bars the institution of that suit, but also bars the institution of any fresh suit thereafter, that is, institution of a third or a fourth suit in respect of the same subject-matter.

It was contended on appeal, that the costs awarded against the appellants were paid by them subsequent to the institution of Civil Regular No. 4-P of 1948 and that in filing Civil Regular No. 2-P of 1952, it should be deemed that the costs have been paid, entitling them to file a fresh suit.

Held: Where the plaintiff is allowed to withdraw his suit with liberty to file a fresh suit under Order XXIII, Rule 1 (2) of the Civil Procedure Code on condition that on or before a specified date or before the institution of a fresh suit he pays the costs of the first suit to the defendant, then the payment of costs is a condition precedent and if he fails to fulfil the condition the second suit, if filed, is void *ab initio*.

* Civil 1st Appeal No. 45 of 1953, against the decree of the District Judge's Court of Prome in Civil Regular No. 2-P of 1953, dated the 18th February 1953.

Ma San Myint v. *U Tun Sein*, (1939) R.L.R. 749, approved.

It is quite settled that the effect of non-observance of condition under which a suit is allowed to be withdrawn with liberty to bring a fresh suit under Order XXIII, Rule 1 of the Code of Civil Procedure is to render the second suit void *ab initio* and that the payment of costs after the institution of the suit would not in the least alter the situation. A suit rendered void cannot survive again by subsequent compliance with the condition imposed.

Shidramappa Mutappa Biradar v. *Mallappa Ramchandrappa Biradar*, I.L.R. 55 Bom. 206 (1931), followed.

The permission granted by the High Court extends to the filing of a fresh suit and fresh suit alone and not to the filing of a number of fresh suits.

Appeal dismissed.

Kyaw Htoon for the appellants.

Messrs. P. B. Sen and *B. K. Sen* for the respondent.

U CHAN TUN AUNG, C.J.—The only question for determination in this appeal is whether the order of dismissal of plaintiff-appellants' suit from which the present appeal has arisen owing to their failure to pay the costs, which was a condition precedent to the filing of a fresh suit when their first suit was withdrawn, in accordance with the provisions of Order XXIII, Rule 1 (2) (*b*), Civil Procedure Code is sustainable in law or not.

The plaintiff-appellants claiming to be the heirs of one Daw Hmu (deceased), (the 1st appellant being the son-in-law of the said Daw Hmu, and the second plaintiff-appellant being her grand-daughter) asserted that by a trust deed, dated the 8th May, 1934, a piece of garden land with a residential building and a granary thereon and 114·20 acres of paddy land situate in Thegon Township, Prome District, were conveyed under a Trust deed to the defendant-respondent Society for some charitable purposes. The said Trust deed was said to contain, apart from vesting the properties in the said Society, a number of specified charitable purposes.

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U CHAN TUN AUNG, C.J.

The defendant-respondent Society, it is alleged, did not give effect to the terms of the Trust; that they had mismanaged the same; and the plaintiff-appellants sought for their removal, rendition of accounts and appointment of new trustees. The defendant-respondent Society, represented by one Tan Byan Seng of Rangoon, said to be the duly appointed Agent of its President U Ba Ohn and the Secretary U Ba Hein contested the plaintiff-appellants' suit and asserted *inter alia* that there was already a previous suit between the same parties on the same subject-matter and as such the suit was not maintainable in law. This question of non-maintainability is the only question of importance which has arisen in the present appeal; and in order to appreciate it fully we may have to refer to some previous suits on the same subject-matter instituted by the plaintiff-appellants as against the defendant-respondent Society.

The first suit was instituted in the District Court of Prome, and the same was registered as Civil Regular Suit No. 1-P of 1946. Under the orders of the High Court of Judicature at Rangoon, as it then was, the said suit was transferred to the said High Court, and the same was registered therein as Civil Regular Suit No. 213 of 1947. While the case was pending in the High Court, the plaintiff-appellants, on the 5th December, 1947 asked for permission to withdraw the suit with permission to file a fresh suit; and the permission sought for was granted by the Judge in the following terms :—

". . . . The plaintiffs' application for permission to withdraw the suit is granted. The plaintiffs' further application that to this permission to withdraw the suit should be attached liberty to institute a fresh suit is granted, on condition that, prior to instituting any suit under leave now given, the plaintiffs pay to the defendants the costs to this date of the

suit. Advocate's fees inclusive of *ad valorem* costs will be fifty (50) gold mohurs."

It is conceded by the plaintiff-appellants' counsel that the above order was passed in accordance with the provisions of Order XXIII, Rule 1 (2) (*b*) of the Code of Civil Procedure. However, on the 26th July, 1948, the plaintiff-appellants again instituted in the District Court of Prome against the same defendant-respondent Society in respect of the same subject-matter, Civil Regular Suit No. 4-P of 1948, and the District Judge by his order, dated the 7th May, 1952, dismissed the suit, inasmuch as the plaintiff-appellants' had failed to fulfil the condition precedent for payment of costs to the defendant-respondent Society as ordered by the High Court in Civil Regular Suit No. 213 of 1947. The plaintiff-appellants, then brought a fresh suit as against the defendant-respondent Society in respect of the same subject-matter in Civil Regular Suit No. 2-P of 1952 in the District Court of Prome and the District Judge again dismissed the said suit. It is against the dismissal order in the last suit, the present appeal has been preferred. The learned District Judge in dismissing the plaintiff-appellants' suit held that the plaintiff-appellants' failure to pay the costs before the institution of Civil Regular Suit No. 4-P of 1948, not only bars the institution of that suit, but also bars the institution of any fresh suit thereafter, that is, institution of a third or a fourth suit in respect of the same subject-matter. In giving that decision the learned District Judge has placed reliance upon the case of *Ambubai Hanmantrao* v. *Shankarsa Nagosa* (1) about which we shall discuss hereafter.

It has been urged before us that the lower Court was wrong in applying the principle of law enunciated

(1) A.I.R. (1925) Bom. 272.

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in the said decision, inasmuch as the costs awarded against the plaintiff-appellants were paid by them subsequent to the institution of the said suit, namely, Civil Regular Suit No. 4-P of 1948 and that it should be deemed that in the filing of the suit, namely, No. 2-P of 1952, from which the present appeal has arisen, the costs have been paid, thus entitling them to file a fresh suit.

There can be no doubt that so far as the dismissal of the plaintiff-appellants' Civil Regular Suit No. 4-P of 1948 is concerned, the finding of the District Judge was absolutely correct in view of the decision in *Ma San Myint* v. *U Tun Sein* (1), wherein it was held that where the plaintiff is allowed to withdraw his suit with liberty to file a fresh suit under Order XXIII, Rule 1 (2) of the Civil Procedure Code on condition that on or before a specified date or before the institution of a fresh suit he pays the costs of the first suit to the defendant, then the payment of costs is a condition precedent and if he fails to fulfil the condition the second suit, if filed, is void *ab initio*.

However, we are unable to accept the submission of the learned counsel for the appellant-plaintiffs that, because the costs directed to be paid had been paid after the dismissal of the first suit, his clients are entitled to file a fresh suit as against the same party on the same subject-matter. There is a clear decision on a similar question, with which we respectfully agree. It is held that where a plaintiff is allowed to withdraw his suit under Order XXIII, Rule 1 and leave is granted to bring a fresh suit on condition that the plaintiff pays the defendant costs, the plaintiff is precluded from bringing a second suit, unless the costs are paid before the institution of the second suit. If a second suit is instituted without paying the costs of the first

(1) (1939) R.L.R. 749.

suit and even if leave is granted to withdraw that suit with liberty to bring a fresh suit, such leave will not be valid and the fresh suit will not be maintainable even if the costs of the first suit are paid before the institution of the fresh suit. See *Shidramappa Mutappa Biradar, Minor, by His Guardian Nagawa Kom Muttappa (original Defendant No. 5)* v. *Mallappa Ramchandrappa Biradar, Minor, by Guardian Shidramappa Goudappa Biradar and another (original plaintiff and defendant No. 1)* (1).

In the light of the two decisions cited above it appears to us to be quite settled, so far as our Courts are concerned that the effect of non-observance of condition under which a suit is allowed to be withdrawn with liberty to bring a fresh suit under Order XXIII, Rule 1 of the Code of Civil Procedure is, rendering the second suit void *ab initio*, and that the payment of costs *after* the institution of the suit would not in the least alter the situation. In other words, a suit rendered void cannot survive again by subsequent compliance with the condition imposed. The case of *Ambubai Hanmantrao* v. *Shankarsa Nagesa* (2) which has been relied on by the learned District Judge is quite apposite to the facts and circumstances obtaining in the case. This ruling clearly lays down that once the plaintiff has suffered dismissal of his suit in view of non-compliance of the condition precedent for paying the costs as contemplated under Order XXIII, Rule 1 (2) (*b*), he is no more entitled to bring a third suit in respect of the same subject-matter. The soundness of this view can be seen from the fact that the plaintiffs' suit having been found to be void *ab initio*, inasmuch as he had refused to comply with the condition, on which alone he could file the second suit, he cannot with justification claim compliance

(1) I.L.R. 55 Bom. 206 (1951). (2 A.I.R. (1925) Bom. 272.

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with the original permission for filing a third suit, once he has breached it. Now, in the present case, how can it be said that permission given to the appellant-plaintiffs by the High Court remains in force for ever despite a breach of the condition attaching to the permission. We must hold that the permission given to them by the High Court no longer remains in force. If the learned counsel's contention were to prevail, we would be illegally condoning the breach of the condition specifically imposed upon them, and would thus confer upon them the liberty of harassing the defendant-respondent Society in a succession of suits.

The permission granted by the High Court in our view, extends to the filing of a fresh suit and fresh suit alone, and not to the filing of a number of fresh suits. We are clearly of the view that when the plaintiff-appellants failed to comply with the condition on which alone they should file a second suit, namely No. 4-P of 1948, they can no longer avail themselves of the original permission of the High Court to file a third suit, namely, the present suit under appeal (No. 2-P of 1952). There is, thus, no substance in this appeal and it is therefore, dismissed with costs.

U SAN MAUNG, J.—I agree.

APPELLATE CRIMINAL.

Before U San Maung, J.

U THAN TINT (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

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July 2.

Penal Code, s. 409—S. 4 (2), Restriction of Bribery and Corruption Act, 1948—S. 6 (1) Public Property Protection Act, 1947—S. 24, Penal Code.

The appellant was a Deputy Director of the Department of Films and Stage, and as such, he had retained Rs. 30,190 in his possession not only for purchasing goods which could not be purchased otherwise than for cash but also for the purpose of incurring expenditure which would not be sanctioned by the Accountant-General.

Normally, Government would have been entitled to be credited with an amount of Rs 30,190 and made to be credited with an amount of Rs. 30,190 and made to disburse only the money drawn on Contingent Bills, which could be passed by the Accountant-General.

He did not spend for his own personal use a single rupee out of the sum entrusted to him.

He was convicted under s. 409, Penal Code and sentenced to six months' R.I.

Held: This is not a case of mere retention of Government's money but of retention of that money for a dishonest purpose as defined in s. 23 of the Penal Code.

The retention of the money in the manner done by the appellant and for the purpose envisaged by him has in fact caused wrongful loss of the money by Government, wrongful loss being defined in s. 22 of the Penal Code as the loss by unlawful means of property to which the person losing it is legally entitled.

Held further: When a Deputy Director of a department of Government is charged by the Government with the duty of drawing money from the Accountant-General on Contingent Bills there is a contract necessarily implied that he will make use of the money in accordance with the rules and regulations prescribed by the Government. If there is no dishonesty, non-observance of rules and regulations will give rise to civil liability. If there is an element of dishonesty, Criminal breach of trust as defined in s. 405 must be deemed to have been committed.

Lala Raoji Mahale v. *Emperor*, A.I.R. (1928) Bom. p. 205; *Rex* v. *Krishnan*, A.I.R. (1940) Mad. 329, distinguished.

Appeal dismissed.

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* Criminal Appeal No. 602 of 1954, appeal from the order of the Special Judge (2) U Ba Swe (S.I.A.B. & B.S.I.A.) of Rangoon, dated the 11th day of October 1954 passed in Criminal Regular Trial No. 6 of 1954.

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Mon San Hlaing, Advocate, for the appellant.

Tin Maung (Government Advocate) for the respondent.

U SAN MAUNG, J.—In Criminal Regular Trial No. 6 of 1954 of the Special Judge (S.I.A.B. & B.S. I.A.), Rangoon, the appellant U Than Tint was sent up for trial for an offence punishable either under section 4 (*2*) of the Restriction of Bribery and Corruption Act, 1948 or under section 6 (*1*) of the Public Property Protection Act, 1947. The learned trial Judge however held that none of these acts was applicable to the facts of this case. He however convicted the appellant of the offence punishable under section 409 of the Penal Code for committing criminal breach of trust as a public servant, and sentenced him to 6 (Six) months' rigorous imprisonment.

The facts of the case which lie within a comparatively narrow compass may be briefly stated as follows:

The appellant U Than Tint was a Deputy Director of the Department of Films and Stage of which his immediate superior U Nyana was the Director. The studio run by the Department was situated at 35-A, Hermitage Road where U Nyana also resided. Although U Nyana was in charge of the department he had no experience of administrative work as he was a play-wright before he was appointed to Government service. So, U Than Tint who had held the post of Secretary at two Municipalities and a Town Committee was kept almost in sole charge of the day to day administration of the department. As the department was organised more or less in a great hurry on the eve of the Independence of Burma U Nyana who abhorred

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U SAN MAUNG, J.

red tape, was given a more or less free hand by the Minister in charge who was then no other than the Prime Minister U Nu himself. He received a Budget Grant of over 4 Lakhs of rupees for the purchase of stores and equipments and for the production of films during the financial year 1947-1948. On the 4th January, 1948 when Burma attained independence, pictures relating to the transfer of power were taken by the Department of Films and Stage and it became urgently necessary to develop the films with a view to their early screening throughout the Union of Burma. It was then that the idea of having an air-conditioned room for the greater efficiency in the process of developing films, was first conceived and put into execution. For this purpose U Thein Maung (PW 15) also known as Kandaw Meik U Thein Maung was engaged to construct the air-conditioned room for a sum of Rs. 7,000. While the work of construction was in progress U Thein Maung submitted to U Than Tint a bill Exhibit (∞-ɔ) wherein he charged the Director of Films and Stage costs for the following in addition to the sum agreed upon for the construction of the air-conditioned room :—

	Rs.
Lead lined dishes for developing, fixing and washing baths etc; with accessories	15,000
Erection of one Store Room 15′ × 6′ × 10′	3,000
Insulation and overhead main electric Installations of Dark Room, Printing-Room and Editing Room	5,000

Besides these three smaller items were also charged for but they are not important for the purpose of these proceedings.

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U SAN MAUNG, J.

On the receipt of this bill which is dated 14th January 1948 U Than Tint prepared a Contingent Bill Exhibit (∞) for a total sum of Rs. 31,935 to cover the amount charged for in U Thein Maung's bill. In that bill all the items contained in (∞-ɔ) were detailed. U Than Tint made an endorsement to the effect that payment should be made to U Thein Maung, Proprietor, Kandaw Meik Company, Royal Lakes, Rangoon. The bill was however sent to U Thein Maung with a covering letter Exhibit (∞) wherein U Thein Maung was requested to present the same at the counter of the Accountant-General, Burma, for payment. This bill was passed on the next day by the Accountant-General and a Cross-cheque was given to U Thein Maung who credited the same into his accounts at Grindlays Bank Limited on the same day. U Thein Maung gave U Than Tint a cheque Exhibit (3) for a sum of Rs. 24,935 which represented the amount drawn from the Accountant-General less the sum of Rs. 7,000, which was the price agreed upon for the construction of the air-conditioned room. This amount of Rs. 24,935 which was refunded by U Thein Maung was not credited by U Than Tint into Government's account as should have been done but into his personal account at Messrs. A. Scott and Company.

On the 11th February 1948, U Thein Maung (PW 15) submitted to the Director of Films and Stage a bill Exhibit (ʂ-ɔ) for a sum of Rs. 7,935 for the supply of three Developing Tanks. On the 16th February 1948, U Than Tint drew up a Contingent Bill Exhibit (ʂ) for this amount wherein he again made an endorsement to the effect that payment should be made direct to U Thein Maung. This bill was forwarded to U Thein Maung the same day with a covering letter Exhibit (ʂ) and was presented

at the counter of the Accountant-General for payment. U Thein Maung received a cheque for Rs. 7,935 from the Accountant-General, which he credited into his accounts at Grindlays Bank on the 18th February 1949. U Thein Maung gave a cheque Exhibit (၀) to U Than Tint for Rs. 4,935 retaining for himself a sum of Rs. 3,000 which according to him was not for the supply of the Developing Tanks shown in the bill (၄-ခ) but for some other work for which he should have deducted from the first bill but which he had omitted to do so when he gave the cheque for Rs. 24,935 to U Than Tint. This second cheque Exhibit (၀) was again paid into Messrs. A. Scott and Company by U Than Tint to be credited to his accounts instead of being refunded to Government. It is in respect of the sums represented by these two cheques and a further sum of Rs. 320 refunded by U Thein Maung to U Than Tint that the appellant U Than Tint was charged with having committed a criminal breach of trust to the extent of Rs. 30,190.

The appellant U Than Tint has explained in the evidence given by him on behalf of his own defence that not a single rupee of this large sum was appropriated by him for his own personal use but had been expended by him on behalf of the Government under instructions either express or implied from his immediate superior U Nyana and the learned Special Judge who tried the case has accepted this defence. In the schedule annexed to the judgment is a detailed account of the manner in which this money was spent. It reads as follows:

			Rs.
1. U Nyana ...	For general expense in the Studio.	17-1-48	1 000
2. U Khin Maung Thet.	Price of Generator	21-1-48	1,300

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			Rs.
3. Col. Hodgkinsin.	Price of Camera and equipment.	21-1-48	4,850
4. U Nyana ...	For general expense in the Studio.	22-1-48	5,000
5. Kandaw Meik U Thein Maung (PW 15).	For making roof and walling of Air-Conditioned Room.	22-1-48	650
6. U Tun Lwin	Painting Charges for 4 Vans.	22-1-48	1,200
7. U Sein Yoe	Cost of a Barrack Ver.	23-1-48	2,500
8. U Ba Shin	Cost of a Room and Ver. walling.	23-1-48	1,500
9. U Thein Maung & Co. Ltd. (Motor-Car Co).	Price of a Truck for Shan States Unit.	27-1-48	2,500
10. U Ba Shin	Store room near staircase.	29-1-48	1,500
11. Sydney Webster Co. Ltd.	One generator ...	4-2-48	1,500
12. U Sein Yoe	Cost of Stage ...	2-3-48	1,400
13. U Tun Yi	Cost of Projector ...	10-3-48	1,000
14. U Hla Maung	2 Portable Generators	4-3-48	1,600
15. U Maung Maung.	Cost of Engineers Quarters by U Ba Shin. Painting Charges to U Tun Lin.	7-4-48	2,700

From this Schedule it will be seen that among the items particularised therein U Nyana was given two sums of Rs. 1,000 and Rs. 5,000 respectively on the 17th January 1948 and on the 22nd January 1948 for which no proper account could be given by this witness. All that this witness could state was that he had spent the money by paying those persons who should be paid including one U Thein Pe Myint

who was a play-wright. In the evidence of U Ba Hein (DW 10) a witness cited by the appellant himself, there appears a statement which goes to suggest that part of this money was spent in constructing a house for the accommodation of U Thein Pe Myint and that the house had to be constructed by U Nyana at the request of the Prime Minister himself. However, that may be it is clear from the schedule annexed to the judgment that U Than Tint had utilized the sum of Rs. 30,190 in incurring expenditure of a nature never contemplated in the Contingent Bills Exhibit (∞) and Exhibit (ʒ).

U Than Tint's own explanation as to why he drew the money shown in the Contingent Bills in excess of requirement appears at pages 5 and 17 of his deposition. He stated in one place that it was necessary to have some cash in hand in order to be able to purchase goods which would be difficult to purchase otherwise than by cash. In another place he stated that he did not follow the usual procedure of submitting a Contingent Bill to the Accountant-General before making payment but utilised the money in his possession because he knew that the Accountant-General would never give his sanction for the expenditure such as the construction of unauthorised buildings namely U Thein Pe Myint's house and the drivers' quarters.

U Thein Maung (PW 15) when examined in chief made a very damaging statement against U Than Tint as to the manner in which the Contingent Bill Exhibit (∞) came to be drawn. According to him he had to receive from the Director of Films and Stage a sum of Rs. 7,000 only for the air-conditioned room and Rs. 1,925 for the supply of racks and reels. The three items shown in the bill namely Rs. 15,000 for the supply of Lead Lined Dishers, Rs. 3,000 for

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the erection of a Store room, and Rs. 5,000 for electric installations were entirely fictitious in so far as he was concerned. U Thein Maung however tried to minimise the effect of this statement by saying in his cross-examination that these were the goods and services which he had originally agreed to supply and perform but which he could not owing to the difficulty in procuring raw materials and labour. However, the circumstances are such as to belie his statement regarding the existence of a contract in respect of these goods and services. The refund which he had made to U Than Tint by cheque Exhibit (3) on the same day the Contingent Bill was drawn, the failure of the department of Films and Stage to sue him for breach of contract and the fact that none of the money refunded to U Than Tint by cheque Exhibit (3) was subsequently spent for the purpose mentioned in the Contingent Bill are sufficient reasons for holding this view. However as U Thein Maung (PW 15) is a witness cited for the prosecution itself, I am not prepared to say that the learned Judge of the trial Court was wrong in having given the appellant the benefit of the doubt regarding the existence of a conspiracy between the appellant and U Thein Maung (PW 15) to draw money from the Accountant-General by the submission of a fictitious bill.

The question now for consideration is whether on the facts as found by the learned Special Judge an offence punishable under section 409 of the Penal Code has been established as against the appellant U Than Tint. No doubt he did not spend for his own personal use a single rupee out of the sum of Rs. 30,190 entrusted to him. However it is clear from his own admission that he had retained the money in his possession not only for purchasing goods which could not be purchased

otherwise than for cash but also for the purpose of incurring expenditure which would not be sanctioned by the Accountant-General.

Therefore this is not a case of mere retention of Government's money but of retention of that money for a dishonest purpose as defined in section 24 of the Penal Code. Normally Government would have been entitled to be credited with an amount of Rs. 30,190 and made to disburse only the money drawn on Contingent Bills which could be passed by the Accountant-General. The retention of the money in the manner done by the appellant and for the purpose evisaged by him has in fact caused wrongful loss of the money by Government, wrongful loss being defined in section 23 of the Penal Code as the loss by unlawful means of property to which the person losing it is legally entitled. The fact that U Than Tint had in fact spent on behalf of the Government the sum of Rs. 30,200 that is to say Rs. 10 in excess of the sum originally retained by him is no sufficient answer to the charge of criminal breach of trust which is defined in section 405 of the Penal Code as dishonest disposal of the property entrusted to a person in violation of any legal contract express or implied which he has made touching the discharge of the trust. There is no doubt whatsoever in my mind that when a Deputy Director of a department of Government is charged by the Government with the duty of drawing money from the Accountant-General on Contingent Bills there is a contract necessarily implied that he will make use of the money in accordance with the rules and regulations prescribed by the Government. If there is no dishonesty non-observance of rules and regulations will only give rise to a civil liability. If there is an element of dishonesty,

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as is present in this case, criminal breach of trust as defined in section 405 must be deemed to have been committed.

The learned Advocate for the appellant has relied upon the ruling in the case of *Lala Raoji Mahale* v. *Emperor* (1) for the contention that mere retention of money will not suffice to constitute the offence of criminal misappropriation. The ruling in the case of *Rex* v. *V. Krishnan* (2) is to the same effect. However as pointed out above the present case is distinguishable in that the retention of money is for a dishonest purpose.

No doubt, U Nyana (PW 2) in giving evidence for the prosecution stated that his department could not have functioned if there had been strict adherence to the rules and regulations of the Government in view of the fact that goods and services could not have been obtained except by payment of cash and that he had often told his subordinates that if non-observance of departmental rules and regulations would result in a criminal offence being committed he would be prepared to take the risk provided that the money was used for the good of the country. This fact may be a good ground for the mitigation of the offence committed by the appellant U Than Tint but is not sufficient excuse for the offence however technical it might have appeared to him or to his superior officer U Nyana.

As a matter of fact the circumstances in which the offence was committed seem to be such that a nominal term of imprisonment would have been sufficient to meet the case, the provisions of section 562 of the Criminal Procedure Code being inapplicable in view of the offence being punishable with imprisonment for more than 7 (seven) years. However, as

(1) A.I.R. (1928) Bom. p. 205. (2) A.I.R. (1940) Mad. 329.

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the appellant has already served the term of imprisonment imposed upon him, the question of sentence is only academic.

For these reasons I would direct that the conviction and sentence on the appellant be confirmed and the appeal dismissed.

APPELLATE CIVIL.

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

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Dec. 13.

YEIK SHAN LONE & CO. (APPELLANT)

v.

T. S. MOHAMED SULTAN (RESPONDENT)*.

Licensee or tenant—Determination—Not words but the substance of the agreement to be looked at—Exclusive possession.

Held: Whether a written instrument operates as a lease or as a license, has to be determined not by the words of the agreement but by its substance.

Smith v. *The Overseas of St. Michael, Cambridge*, 121 English Reports (K.B.) p. 486, referred to.

Another point to be taken into consideration in the determination of such a question is whether the occupant has been allotted exclusive right of occupation. If so, he is a lessee and not a tenant.

Gurbachan Singh Bindra v. *Jos E. Fernando*, (1951) B.L.R. (S.C.) p. 255, referred to.

R. Jaganathan for the appellant.

N. Bose for the respondent.

U CHAN TUN AUNG, C. J.—The question involved in this appeal is fairly simple, and it may shortly be put thus; whether the respondent in occupation of a stall along with which there is also the right to use a Saw Bench in the appellants' saw-mill premises, in terms of the written agreement, dated 24th May 1947, is a licensee or a tenant of the appellants. The appellants are carrying on business as saw millers at No. 31, Strand Road, Ahlone, Rangoon, and the respondent Mohamed Sultan is said to be one who has hired one of their circular saw benches jointly with one M.S.K. Sakkarai Meera Rawther at a monthly rent of Rs. 1,500. Along with

* Civil 1st Appeal No. 76 of 1952, against the decree of the City Court of Rangoon in Civil Regular Suit No. 173 of 1952, dated the 15th May 1953.

the saw bench the appellants also let out to the respondent a stall No. 8 for the storage of timber that are converted at the saw bench at a rent of Rs. 50 per month. This transaction is set out in full in a written agreement, dated the 24th May 1947, which has been filed in the trial Court's proceedings. The respondent has not denied the terms under which the use of the saw bench and the stall annexed to the appellants' mill has been allotted to him, among other allottees (as lessees). Our reading of the agreement, dated the 24th May 1947, shows that the respondent and other persons have been permitted by the appellants to occupy respective stall and also to operate a saw bench each as *lessees* of the appellants. We also notice that under clause 2 of the said agreement the respondent is liable to pay Rs. 1,500 per mensem for the use of the saw bench and Rs. 50 per mensem for the use of the stall " irrespective of whether he operates it or not." We also notice, particularly under clause 9 of the said agreement, that the permission to operate, or as put by the appellants themselves, for the use and occupation of the saw bench and the stall was to be for a period of one year commencing from the date on which the mill was put into effective operation with an option for the renewal of the said term for a further term of another year, should the respondent observe all the terms contained in the said agreement.

Alleging that the respondent was a mere licensee and that his right of operating the saw bench and the occupation of the stall was not a lease but it was only a license, the appellants sought to evict the respondent from the said stall. They asserted that the stall in question was allotted to the respondent contingent upon his operation of the saw bench and

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that since the respondent had failed to use the saw bench the appellants were also entitled to evict the respondent under the terms of the agreement. They also maintained that they had given due notice to the respondent terminating the permissive occupancy and to give up possession thereof; but that the respondent had failed to comply with their demand, hence they sought for a decree for ejectment.

The respondent, on the other hand, asserted that he was not a permissive occupier or a licensee so far as that part of appellants' premises (saw-mill) which has been allotted to him under the agreement, dated the 24th May 1947, was concerned. He claims that he is a monthly tenant of the appellants in respect of the saw bench and the stall paying a monthly rent of Rs. 1,500 for the saw bench and Rs. 50 for the stall.

The trial Court considered altogether four issues; but the only issue which requires consideration is whether the respondent is a tenant or a permissive occupier of the appellants; and in that regard we observe that the trial Judge has, after carefully examining the terms of the agreement, come to the conclusion that the respondent is a tenant and not a permissive occupier or licensee of the appellants. Now, the same point has been urged before us in appeal contending that the agreement, dated the 24th May 1947, should be read in its entire substance in considering whether the respondent was a licensee or a lessee of the stall and the saw bench in question. We fully agree in the submission that the question whether a written instrument operates as a lease or as a license has to be determined not by the words of the agreement but by its substance. [*Smith* v. *The Overseers of St. Michael, Cambridge* (1).]

(1) 121 English Reports (K.B) p. 486.

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However, in the present case under appeal the terms of the agreement itself containing as it does the liability of the respondent (who has been described as lessee) to pay a monthly rent of Rs. 1,500 for the use of the saw bench and Rs. 50 per month for the occupation of the stall, irrespective of whether the respondent operates the saw bench or not and also such other terms as right of renewing the lease on the termination of the first year of the lease, lead us to the conclusion that the substance of the agreement is more in the nature of a lease than that of a license.

Another point which should be considered in the determination of the question involved in the case is, whether the respondent has been allotted by the appellants, in spite of some reservations and restrictions found in the agreement, exclusive right of occupation of the stall and also operation of the saw bench along with it. If it is found that the respondent has been given the exclusive right of occupation of the stall and also the use of the saw bench along with it, there can be no doubt that he is a lessee and not a licensee of the said stall and the saw bench. [See the case of *Gurbachan Singh Bindra* v. *Jos. E. Fernando* (1).] In this connection we asked the appellants' Counsel whether the respondent could be evicted from the stall in question if he were paying the rent of Rs. 1,500 per month for the saw bench and Rs. 50 per month for the stall in terms of clause 2 of the agreement. He conceded—and rightly too—that the respondent could not be evicted if he paid the rents regularly, as stipulated. He also conceded that the respondent was entitled, as long as he pays the stipulated rent regularly, to the exclusive occupation of the stall and

(1) (1951) B.L.R. (S.C) p. 255.

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also the use of the saw bench in question. In these circumstances therefore, it would be idle to contend that the respondent in occupation of the stall and in use of the saw bench in the premises of the appellants' saw-mill in terms of the agreement, dated the 24th May 1947, is a licensee and not a tenant. Our attention has also been drawn to the notice, dated the 23rd June 1951, sent by the appellants' lawyer to the respondent. There again, the very words used in the notice clearly indicate that the appellants have treated the respondent, all along, as their tenant.

Therefore, having regard to the entire agreement and also to the fact that has been conceded to by the appellants' Counsel, that the respondent has the exclusive right of occupation of the stall and along with it the operation of the saw bench, it is impossible for us to escape from the conclusion that the respondent is a tenant of the appellants and not a bare licensee. We see no good ground to interfere with the finding of the trial Court, and this appeal is therefore dismissed with costs.

APPELLATE CRIMINAL.

Before U San Maung, J.

H.C. 1955

July 22.

YUNOOSE (APPLICANT)
v.
RAJ MOHAMED AND THREE OTHERS (RESPONDENTS) *.

Penal Code, s. 341—S. 522 (1) (3), Criminal Procedure Code.

Held : That in order to make s. 522 applicable to immoveable property, it is not necessary that force should be an ingredient of the offence of which the accused is convicted. However, in such a case, it must appear from the evidence that there was use of force.

A. B. Adeju Reddi v. *K. Ramayya*, (1921) I.C. p. 414.

When Criminal force is not an ingredient of the offence there must be a clear finding on the part of the trial Court that a person has been dispossessed by Criminal force or show of force or by criminal intimidation before that Court can restore property to the person dispossessed as provided for in s. 522 (1) of the Criminal Procedure Code. In the absence of such a clear finding the Court of appeal or revision should exercise the powers under s. 522 (1) read with sub-s. (3) only if the evidence on record clearly establishes the fact that the person had been dispossessed by force or show of force or by criminal intimidation.

Held further : The power under s. 522 (3) can not only be exercised by the Court of appeal or revision, dealing with the accused's conviction ; the High Court could also make an order for possession in a proper case.

Savlaram Sadoba Navle v. *Dnyaneshwar Vishnu Chinke*, A.I.R. (1942) Bom. 148 ; *Said Umar* v. *Abdulkadir*. 38 Cr. L. J. 333 ; *Fida Hussain* v. *Sarfaraz Hussain*, 12 Pat. 787 ; *Rameshwar Singh* v. *Emperor*, 4 Pat. 438 ; *Emperor* v. *Nihal Singh*, I.L.R. (1939) All. 863 ; *Abdul Razzan* v. *Emperor*, A.I.R. (1947) Oudh 1 ; *Ramnath Sheonarayan* v. *Sonaji Krishnaji*, A.I.R. (1948) Nag. 250.

Kyaw Khin, Advocate, for the applicant.

P. N. Ghosh and *R. Jaganathan*, Advocates and *Ba Gyaw* (Government Advocate), for the respondents.

U SAN MAUNG, J.—In Criminal Summary Trial No. 339 of 1952 of a Bench of Honorary Magistrates,

* Criminal Revision No. 224 (B) of 1954. Review of the order of the Sessions Judge of Hanthawaddy, dated the 29th day of September 1954 passed in Criminal Revision No. 61 of 1954.

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U SAN MAUNG, J.

Rangoon, the accused Raj Mohamed and Khaja Mohideen were convicted of the offence punishable under section 341 of the Penal Code for wrongfully restraining the complainant Yunoose and were each sentenced to a fine of K 50 or in default one week's simple imprisonment. Certain properties exhibited in the case, namely, one Lister engine, one compressor and two tanks were ordered by the Magistrates to be returned to one S. Mohamed Mohideen from whom they had been seized. Subsequently, the complainant Yunoose filed an application before the Sessions Judge, Hanthawaddy, for the revision of the order of the Honorary Magistrates returning the exhibits to S. Mohamed Mohideen. He also contended that the learned Magistrates were wrong in not having passed an order under section 522 of the Criminal Procedure Code restoring to him the possession of the premises in respect of which the offence has been committed. The learned Sessions Judge dismissed the application on the ground that in so far as the exhibits were concerned S. Mohamed Mohideen was the proper respondent and that no permission could be given to Yunoose to amend the application so as to make S. Mohamed Mohideen a party to the proceedings. The learned Sessions Judge, however, failed to pass any orders under section 522 (1) of the Criminal Procedure Code although Raj Mohamed and Khaja Mohideen had been properly named in the application as the respondents in the case.

The facts as they appear from the judgment of the learned Honorary Magistrates are briefly these. Yunoose the complainant in the case, was a person in possession of a motorcar workshop situated at No. 187, Thompson Street. On the day this case occurred, he went to Theingyize to buy some medicine. On his return at about 12 noon he was

told by his neighbours that the two accused and 14 unknown men came to the workshop and after driving out the workmen locked the door. Yunoose verified this fact from some of his workmen before proceeding to the accuseds' house to ask them to open the door for him. On their refusal he reported the matter to the police.

Now, as already mentioned above, the case was tried summarily by the Honorary Magistrates and there is nothing in their judgment to show that any person who had actually seen the workmen being driven out of the premises, had been examined as a witness. In fact the judgment shows that the workmen themselves could not be examined as they could not be traced. Therefore there is no evidence on record to show clearly that the offence committed by the accused was attended by the use of force or by show of force or criminal intimidation to the person dispossessed of immoveable property.

In *A. B. Adepu Reddi* v. *K. Ramayya* (1), it was held by Oldfield, J. that in order to make section 522 applicable to immoveable property it is not necessary that force should be an ingredient of the offence of which the accused is convicted, provided the use of force appears from the evidence. In my opinion, when criminal force is not an ingredient of the offence there must be a clear finding on the part of the trial Court that a person has been dispossessed by criminal force or show of force or by criminal intimidation before that Court can restore property to the person dispossessed as provided for in section 522 (1) of the Criminal Procedure Code. In the absence of such a clear finding the Court of appeal or revision should exercise the powers under section 522 (1) read with sub-section

(1) (1921) I.C. p. 414.

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(3) only if the evidence on record clearly establishes the fact that the person had been dispossessed by force or show of force or by criminal intimidation.

Although this point has not been raised by any of the parties to the present proceedings it is necessary to consider whether the power under section 522 (3) can only be exercised by the Court of appeal or revision if there is an appeal or revision application against the accused's conviction. In this connection the observations of Beaumont, C.J. in *Savlaram Sadoba Navle* v. *Dnyaneshwar Vishnu Chinke* (1) seems apposite. The learned Chief Justice said :

"The real point which arises is whether we have jurisdiction to make the order section 522 (3). It may be said on the one hand that the reference in sub-section (3) of section 522 to a 'Court of appeal or revision' is to a Court hearing an appeal or revision application against the accused's conviction, when no doubt, an order could be made under section 522 (3), and that it is illogical on an application to revise an order of the Magistrate refusing possession under section 522 (1) to hold that the order was perfectly right, but that this Court ought nevertheless to make an order substantially in the terms of the order which the Magistrate had refused. That is the view taken by a Judge of the Peshawar Judicial Commissioner's Court in *Said Umar* v. *Abdulkadir* (2). But after all legislation is not necessarily founded on logic, and it may be that the legislature intended that whilst a Magistrate must make an order within a limited time, it should be open to a Court of appeal or revision to make an order after that time, which the Magistrate himself could not have made. That is the view adopted by the Patna High Court in *Fida Hussain* v. *Sarfaraz Hussain* (3) and in *Rameshwar Singh* v. *Emperor* (4) and by the Allahabad High Court in *Emperor* v. *Nihal Singh* (5). In those cases it was held that, notwithstanding that there was not before the Court any

(1) A.I.R. (1942) Bom. 148.
(2) 38 Cr.L.J. 333.
(3) 12 Pat. 787.
(4) 4 Pat. 438.
(5) I.L.R. (1939) All. 863.

application in appeal or revision against the conviction of the accused, and notwithstanding that the Magistrate had rightly dismissed the application for an order for possession under section 522 (1) because made more than a month after the conviction and although that order was the only brought up in revision, still the High Court could under sub-section (3) of section 522 make an order for possession in a proper case."

See also *Abdul Razzan* v. *Emperor* (1) and *Ramnath Sheonarayan* v. *Sonaji Krishnaji* (2).

The next point for consideration is whether this Court should interfere with the order of the Honorary Magistrates returning the exhibits to S. Mohamed Mohideen. As regards these exhibits there is nothing in the judgment of the learned Honorary Magistrates to show that the applicant Yunoose should be entitled to their possession. In these circumstances, I am not prepared to say that the learned Honorary Magistrates were wrong in having returned them to the person from whom they had been seized.

For these reasons I consider that there is no ground for interference by this Court either under section 520 or 522 (3) of the Criminal Procedure Code. The application for revision fails and is dismissed.

(1) A.I.R. (1947) Oudh 1. (2) A.I.R. (1948) Nag. 250.

APPELLATE COURT.

Before U Aung Khine, J. and U Ba Thoung, J.

H.C. 1956

Jan. 9.

DAW PWA KHIN (APPELLANT)

v.

KO TIN SHWE AND ONE (RESPONDENTS).*

Burmese Buddhist Law—Defence in suit based solely on Keittima *adoption—Impropriety of Amendment of Written Statement by Court* suo moto *to an alternative claim based on* appatitha *adoption.*

The appellant sued the Respondents for a declaration of title and possession of some moveable properties as being the nearest relatives and sole surviving heirs of Daw Hnyin, a Burmese Buddhist spinster.

The 2nd Respondent resisted the claim based solely on *Keittima* adoption.

On the conclusion of the trial and on the day fixed for delivery of judgment, the Court of its own accord and without any application from the 2nd Respondent for an amendment of her Written Statement gave her an opportunity to amend her Written Statement for an alternative claim based on *appatitha* adoption and subsequently decreed her claim as an *appatitha* daughter.

Held : Amendment of Written Statement by Court *suo moto* and without any application from the party concerned is highly improper. In the absence of Special circumstances and *bona fide* mistake amendment of Written Statement for alternative claim based on *appatitha* adoption should not be allowed.

Maung Gyi and one v. *Maung Aung Pyo*, 2 Ran. p. 661, distinguished.

Maung Ba Thein v. *Ma Than Myint and others*, I.L.R. 3 Ran. p. 483, affirmed.

Kyaw Htoon, Advocate, for the appellant.

Ba Tun for the respondents.

Judgment of the Court was delivered by

U BA THOUNG, J.—In Civil Regular Suit No. 2 of 1952 of the Additional District Court of Pegu, the plaintiff-appellant Daw Pwa Khin and her brother U Tha Way sued the defendants-respondents Ko Tun Shwe and his wife Ma Thein Shwe for a declaration of their title to, and for possession of

* Civil 1st Appeal No. 83 of 1954, against the decree of the Additional District Court of Pegu in Civil Regular Suit No. 2 of 1952, dated the 26th July 1954.

moveable properties consisting of jewelleries valued at K 5,560 belonging to the estate of one Daw Hnyin, a Burman Buddhist spinster who died in May 1944. The plaintiffs-appellants claimed that they are the nearest relatives and sole surviving heirs of Daw Hnyin. They also sued the defendants-respondents in Civil Regular Suit No. 3 of 1952 of the same Court for a declaration of their title to an immoveable property, *viz.* a building and a house site valued at K 2,750 belonging to the same estate. During the pendency of these two suits U Tha Way died, and Daw Pwa Khin filed an amended plaint in both the suits, suing in her personal capacity and as the legal representative of her deceased brother U Tha Way. By consent of the parties and on their application, Civil Regular Suit No. 3 was decided on the same evidence recorded in Civil Regular Suit No. 2.

The plaintiff-appellant's case is that Daw Hnyin, a Burmese Buddhist spinster and Daw Hnin Mai were sisters. The plaintiff Daw Pwa Khin, U Tha Way and U Ba Shin were the children of Daw Hnin Mai who predeceased Daw Hnyin. The 2nd defendant Ma Thein Shwe and her sister Ma Khin Than were the daughters of U Ba Shin who died in 1283 B.E. U Ba Shin's wife, the mother of Ma Thein Shwe and Ma Khin Than, died in 1281 B.E., and after her death, Ma Thein Shwe and Ma Khin Than lived with their grandmother Daw Hnin Mai who was then living with Daw Hnyin and Daw Pwa Khin (the plaintiff-appellant). Daw Hnin Mai died about 4 months after the death of U Ba Shin ; and Ma Thein Shwe and Ma Khin Than, the daughters of U Ba Shin, were looked after by their aunt Daw Pwa Khin, and they all lived together with Daw Hnyin. Then when war broke out and Pegu was

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bombed in 1943, Ma Thein Shwe, the 2nd defendant-respondent and her husband Maung Tun Shwe (the 1st defendant-respondent) evacuated to Thanatpin with Daw Hnyin. Daw Pwa Khin remained behind at Pegu to look after the house. Then on the 11th May 1944, Daw Hnyin, while living with the defendants-respondents at Thanatpin, died leaving Daw Pwa Khin and U Tha Way as her nearest relatives.

In the case out of which this appeal arises the plaintiff-appellant and her brother U Tha Way asked for a declaration of title and for possession of some items of jewelleries which formed part of the estate of Daw Hnyin. The defendants-respondents contested the claim on the ground that the 2nd defendant-respondent Ma Thein Shwe is the *keittima* adopted daughter of Daw Hnyin, and as such on the death of Daw Hnyin, she alone is the sole heir and legal representative entitling to the estate. The defendants-respondents also denied the existence of the immoveable properties claimed in the plaint except for one item mentioned therein.

The trial Court framed the following issues :—

(1) Are the plaintiffs sole surviving heirs of Daw Hnyin, deceased ?

(2) Is the 2nd defendant *keittima* adopted child of Daw Hnyin ?

(3) Did Daw Hnyin leave the various articles of jewelleries mentioned in paragraph 2 of the plaint ?

(4) If so, whether they are now in defendants' possession ?

(5) To what relief, if any, are the plaintiffs entitled ?

Then when the plaintiff-appellant, with the permission of the Court, filed an amended plaint on 12th November 1953 substituting the figures K 8,910

for K 5,560 as the market value of the properties mentioned in the plaint, an additional issue was framed as follows :

> What was the market value of the properties shown in paragraph 2 of the plaint at the date of the filing of the amended plaint ?

The trial Court then proceeded with the case and after a protracted hearing and after all evidence had been led for both sides, the case was put down for argument of the Counsel on no less than six occasions, *viz.*, 23rd March 1954; 31st March 1954; 9th April 1954; 26th April 1954; 5th May 1954 and 7th May 1954, as the Counsel for both sides were not able to appear for one reason or another. Then on the last occasion fixed for argument of the Counsel on 7th May 1954, arguments were heard and judgment was reserved for delivery on 20th May 1954. On that day, *i.e.*, 20th May 1954, which was fixed for delivery of judgment, the learned Additional District Judge on his own accord passed the following diary order :—

> "On a careful consideration of the case I am of opinion that the 2nd defendant should be given an opportunity to amend her written statement so as to make her defence also into an alternative one of *appatitha* adoption and I hereby give this opportunity to her to file amended written statement in both cases on 3rd June 1954."

The learned trial Judge in allowing the claim of *keittima* adoption to be amended to *appatitha* adoption has relied on the case of *Maung Gyi and one* v. *Maung Aung Pyo* (1). An additional issue was then framed as Issue No. 2A thus :—

> "If the 2nd defendant is not *keittima* adopted child of deceased Daw Hnyin, is she the *appatitha* adopted child of the said Daw Hnyin as claimed in paragraph 2 of the 2nd amended written statement ?"

(1) 2 Ran. p. 661.

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The parties were then given an opportunity to adduce fresh evidence on this additional issue but they declined to do so and a date for final argument on the case was fixed, arguments were heard and judgment was passed holding that the 2nd defendant-respondent was not *keittima* adopted child of Daw Hnyin but her *appatitha* adopted child, and a decree in favour of the plaintiff-appellant Daw Pwa Khin for declaration of her title to and for possession of half of the properties shown in the plaint or their value K 1,150 was given with proportionate costs. It is against this judgment and decree that the plaintiff-appellant has now come up on appeal.

At the outset we must remark that the procedure adopted by the learned Additional District Judge in giving an opportunity to the 2nd defendant-respondent to amend her written statement claiming in the alternative to be an *appatitha* adopted child of Daw Hnyin, although the 2nd defendant-respondent had not moved the Court asking for such opportunity, purely on the Judge's own initiative after he had reserved a date for delivery of judgment, is highly improper because it is bound to create an adverse reflection on him.

Now, turning to the merits of the case, the learned Additional District Judge, after considering the evidence on record, has held that the 2nd defendant-respondent Ma Thein Shwe has not been proved to be the *keittima* adopted child of Daw Hnyin but that she has been proved to be her *appatitha* adopted child, and holding that the articles of jewellery left by Daw Hnyin which are in possession of the 2nd defendant-respondent are items 1, 2, 3, 4 and 7 as mentioned in the plaint, and valuing them at K 2,300, gave a decree in favour of the plaintiff-appellant Daw Pwa Khin for declaration

of her title to and for possession of half of those items of jewelleries or their value K 1,150. The main ground of attack by the appellant in this appeal is that the trial Judge should not have allowed, and has erred in law in allowing, the 2nd defendant-respondent to have her claim of *keittima* adoption amended to *appatitha* adoption relying solely on the case of *Maung Gyi and one* v. *Maung Aung Pyo* (1), inasmuch as in the present case there were no special circumstances and *bona fide* mistake in the claim of *keittima* adoption as in that case, and that in the present case the 2nd defendant-respondent had deliberately chosen to take her stand that she was the *keittima* adopted child of Daw Hnyin by a registered deed which was disbelieved. The learned Counsel for the appellant has relied on the case of *Maung Ba Thein* v. *Ma Than Myint and others* (2) where the plaintiff claimed to be a *keittima* adopted child of one U Myat San deceased, and in his plaint no alternative cause of action on an *appatitha* adoption was pleaded. On the suit being dismissed, leave was sought on an appeal to amend the plaint by the addition of an alternative claim on an *appatitha* adoption ; and it was held that "while the right of amendment of pleadings has been largely increased in the present Civil Procedure Code—and amendment is now much more freely granted—it remains a matter for discretion, and that discretion must be exercised with regard to all the facts and circumstances of the case." It was further held that "the causes of action which the claims to be a *keittima* son and an *appatitha* son are based being widely different, the Court of Appeal by allowing the amendment would be practically ordering a new suit to be commenced afresh and that should not be permitted."

(1) 2 Ran. p. 651. (2) 1 L.R. 3 Ran p. 483.

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We are of the opinion that the present case out of which this appeal arises stands exactly on the same footing as in the case of *Maung Ba Thein* v. *Ma Than Myint* (2) quoted above which has been distinguished from the case of *Maung Gyi and one* v. *Maung Aung Pyo* (1). In the present case the 2nd defendant-respondent had deliberately chosen her stand on the allegation that she was adopted as a *keittima* child of Daw Hnyin by a registered deed. The deed of adoption could not be produced as being lost and the oral evidence adduced was not believed by the trial Judge. She made no effort to set up any other claim, and she claimed to be entitled to the whole estate, and there were no special circumstances and *bona fide* mistake in her claim of *keittima* adoption. For these reasons we accept the contention of the appellant that the learned Additional District Judge should not have allowed the claim of *keittima* adoption by the 2nd defendant-respondent to be amended to *appatitha* adoption. The judgment and decree of the lower Court must therefore be set aside. As the plaintiff-appellant is not disputing the value of the properties, found by the trial Court, and as the 2nd defendant-respondent has not filed a cross appeal about it, the plaintiff-appellant must be given a decree for declaration of title and for possession of the entire properties mentioned in items 1, 2, 3, 4 and 7 in the plaint or their full value K 2,300.

In the result the appeal is allowed. The judgment and decree of the lower Court is set aside and there shall be a decree in favour of the plaintiff-appellant for declaration of title to and for possession of items 1, 2, 3, 4 and 7 as mentioned in the plaint or their value K 2,300 with costs throughout.

U AUNG KHINE, J.—I agree.

(1) 2 Ran. p. 661. (2) I.L.R. 3 Ran p. 483.

APPELLATE CIVIL.

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

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Aug. 31.

HAJI BIBI (APPELLANT)

v.

MOHAMED JAWAD KHORASANY AND SIX OTHERS (RESPONDENTS).*

Administration Suit—Whether a person who was not a party to the original suit could be impleaded as a party in appeal—Order XLI, Rule 20, Order (1), Rule 10, s. 107, Civil Procedure Code—Matter not res integra*—Order XXIII, Rule 3, Civil Procedure Code—Lawful compromise, duty of Court to record—In exceptional cases, a Court of appeal would take notice of facts arising subsequent to the appeal—Amendment of pleadings.*

Held: Though various views had been held by the different High Courts in India as to whether persons who are not parties to the original suit could or could not be made parties to an appeal, this matter is not *Res Integra.*

Cases referred to:—*Shiam Lall Joti Prasad* v. *Dhanpat Rai*, 47 All. p. 853; *Noor Mohamed and others* v. *Zainul Abdin and others*, A.I.R. (1940) All. p. 399; *Monjiram Indrachandra* v. *Sheth Maneklal Mansukhbhai*, I.L.R. 53 Bom. p. 598; *Baluswami Aiyer* v. *Lakshamana Aiyar and others*, I.L.R. 44 Mad. (F.B.) p. 605; *Gyanananda Asram* v. *Kristo Chandra Mukherji and others*, 8. Cal. W.N. 404; *Sri Mati Hemangini Debi* v. *Haridas Banerjee*, 3 Pat. L.J. p. 409; *Surjya Kanta Jana and others* v. *Tarak Nath Jana and others*, 44 Cal. L.J. p. 243; *Ram Kirpal Shukull* v. *Musshmat Rup Kuari*, 11 I.A. p. 37; *Hook* v. *Administrator-General of Bengal*, 48 I.A. p. 187.

Held also: It is the bounden duty of the Court and not a mere discretion to record a lawful compromise or adjustment made under Order XXIII, Rule 3 of the Civil Procedure Code.

Sourendra Nath Mitra and others v. *Tarubala Dasi*, (1930) I.A. Vol. 57, p. 133, referred to.

Held further: When some of the parties to a suit take part in a compromise, the compromise will be recorded as a lawful adjustment of the suit under Order (XXIII), Rule 3, Civil Procedure Code, in so far as they are concerned.

Kandhe and others v. *Jhajan Lal and others*, A.I.R. (1936) All. 1, referred to.

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* Civil 1st Appeal No. 91 of 1952, against the decree of the Original Side of this Court in Civil Regular Suit No. 105 of 1951, dated the 15th July 1952.

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Held also : That only in very exceptional cases, such as shortening litigation and attaining the ends of justice will a Court of appeal in considering the correctness of the judgment of the Court below will take notice of any fact arising subsequent to the appeal, and if necessary order amendment of pleadings.

Ram Ratan Sahu v. *Bishum Chand*, 11 Cal. W.N. p. 732 ; *Mandliprasad* v. *Ramcharanlal and others*, (1947) I.L.R. Nag. p. 848 at 850, referred to.

P. K. Basu for *M. M. Rafi* for the appellant.

G. N. Banerji for the 1st and 2nd respondents.

M. Cassim and *A. Hussain* for the 3rd respondent.

Judgment of the Court was delivered by

U SAN MAUNG, J.—In Civil Regular Suit No. 105 of 1951 of the Original Side of this Court the appellant Haji Bibi sued the defendant-respondents Nos. 1 to 5 for the administration of the estate of one Mariam Sultan *(a)* Ma Mi, who died in Rangoon on or about the 13th July 1951. There were five defendants in the suit of whom the 2nd, 4th and 5th defendants Bibi Jan, Noori Jan and Zahra Bibi are the sisters of the plaintiff. The 1st defendant M. J. Khorasany, who is the husband of Bibi Jan, and the 3rd defendant U Po Kaung are the executors of the two wills alleged to have been executed by Mariam Sultan during the years 1941 and 1951 respectively, and one of the reliefs asked for in the administration suit is a declaration to the effect that the wills were invalid and of no effect in Mohamedan Law. The 1st, 2nd and 3rd defendants alone contested the suit, the 4th and 5th defendants having made common cause with their sister the plaintiff Haji Bibi. It was contended that the plaintiff and the 2nd, 4th and 5th defendants were not the heirs of the deceased as they were only nieces of Haji Bibi and therefore excluded by her two consanguine

brothers Aga Jan Sheerazee and Golam Ali Sheerazee. A preliminary issue regarding the maintainability of the suit was therefore framed and the same was decided by the learned Judge on the Original Side against the plaintiff on the ground that she was not an heir to the deceased and not interested in law in the deceased's estate and that therefore she could not be permitted to seek the administration of the same.

During the pendency of the appeal, Aga Jan Sheerazee and Golam Ali Sheerazee filed an application to this Court to be made parties to the appeal on the ground that they were necessary parties to the suit for the administration of the estate of the deceased Mariam Sultan. Notices were issued to all the parties in the appeal to show cause why these two persons should not be added as respondents in the appeal. Although notices were duly served, the 1st, 2nd and 3rd respondents did not appear to contest the application. The learned Advocate for the appellant and for the 4th and 5th defendant-respondents consented to the application of Golam Ali Sheerazee and Aga Jan Sheerazee and the learned Judges (U Thaung Sein and U Bo Gyi, JJ.) who were dealing with the appeal ordered that they should be added as parties respondents. It was noted in the diary of the proceedings that this order was made with the consent of the parties who were then present before the Court. Subsequently, the plaintiff-appellant Haji Bibi and her two sisters, the 4th and 5th defendant-respondents Noori Jan and Zahra Bibi, filed a joint application with the newly added 6th and 7th respondents for an order recording their compromise in the terms set out in the application and for a decree in terms of the compromise. It is mentioned *inter alia* that these parties had composed their differences as between themselves and had

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arrived at a compromise to the effect that Haji Bibi, Noori Jan, Zakra Bibi, Golam Ali Sheerazee and Aga Jan Sheerazee should divide equally among themselves the estate of Mariam Sultan which may come into the hands of Golam Ali Sheerazee and Aga Jan Sheerazee, as the heirs of the deceased, on the termination of the suit, after first deducting therefrom such expenditure as may have been incurred in connection with the said estate. The other prayers in the joint application are to the effect that Noori Jan, Zahra Bibi, Golam Ali Sheerazee and Aga Jan Sheerazee be transposed as co-plaintiffs in the suit, and that the suit be remanded for trial on its merits. The question relating to the invalidity or otherwise of the two wills still remains to be adjudicated upon and the petitioners are jointly interested in the result of this adjudication. The 1st, 2nd and 3rd defendant-respondents strongly objected to the application to record the compromise on the ground that under the Shia Mohamedan Law Haji Bibi, Noori Jan and Zahra Bibi were not heirs of the deceased and therefore could not be a party to a lawful compromise with Golam Ali Sheerazee and Aga Jan Sheerazee, that the application to record the compromise was misconceived and not maintainable in law, and that the 6th and 7th respondents were not necessary parties to the appeal and could not be made parties to the suit at this stage of the proceedings.

Many authorities have been cited to show that persons who are not parties to the suit cannot be made parties to the appeal. In *Shiam Lall Joti Prasad* v. *Dhanpat Rai* (1) it was held by the Allahabad High Court that under Order XLI, Rule 20 of the Code of Civil Procedure, the appellate

(1) 47 All. p. 853.

Court had power to implead in the appeal a person who was a party to the suit but who had not been made a party to the appeal, but that under that rule a Court had no power to implead a person who was no party to the original suit at all. This decision of the Allahabad Court was followed in *Noor Mohamed and others* v. *Zainul Abdin and others* (1) and *Monjiram Indrachandra* v. *Sheth Maneklal Mansukhbhai* (2). On the other hand the Madras High Court has observed in *Baluswami Aiyer* v. *Lakshmana Aiyar and others* (3) that the powers of the Court to add parties in appeal are not exhausted by Order XLI, Rule 20 of the Civil Procedure Code as Order I, Rule 10 also applies to appeals by force of section 107. The decisions in *Gyanananda Asram* v. *Kristo Chandra Mukherji and others* (4), *Sri Mati Hemanigini Debi* v. *Haridas Banerjee* (5) and *Surjya Kanta Jana and others* v. *Tarak Nath Jana and others* (6) are to similar effect. The Calcutta and Patna High Courts also held that inherent powers of the Court could be invoked besides the provisions of Order I, Rule 10. However, in our opinion, this matter is not *res integra*. So far as the respondents M. J. Khorasany, Bibi Jan and U Po Kaung are concerned, the diary order dated 15th September 1953 must be deemed to be an *ex parte* order under Order I, Rule 10 of the Civil Procedure Code read with section 107, adding the 6th and 7th respondents in the appeal. This order is therefore binding upon them at the later stage of these Appellate proceedings. Cf. *Ram Kirpal Shukull* v. *Musshmat Rup Kuari* (7) and *Hook* v. *Administrator-General of Bengal* (9).

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(1) A.I.R. (1940) All. p. 399.
(2) I.L.R. 53 Bom. p. 598.
(3) I.L.R. 44 Mad. (F.B.) p. 605.
(4) 8 Cal. W.N. p. 404.
(5) 3 Pat. L.J. p. 409.
(6) 44 Cal. L.J. p. 243.
(7) 11 I.A. p. 37.
(8) 48 I.A. p. 187.

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U SAN MAUNG, J.

The next question for consideration is whether the present compromise should be recorded as it does not involve all the parties to the appellate proceedings. Order XXIII, Rule 3 of the Civil Procedure Code enacts that where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, the Court shall order such agreement or compromise to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit. In *Sourendra Nath Mitra and others* v. *Tarubala Dasi* (1) it was held that under Order XXIII, Rule 3, the Court has a duty, not a discretion, to record a lawful compromise, subject possibly to an inherent power of refusal where a substantial injustice would be worked. The compromise now under consideration is undoubtedly, in our opinion, lawful in so far as the subject-matter alluded therein is concerned. The position created thereby is as follows :—

There is a suit for administration in the estate of the deceased Mariam Sultan, in which the parties claiming administration are the nieces of the deceased except the defendant-respondent Bibi Jan, and the consanguine brothers of the deceased. Their interests were at first at variance because the nieces claimed that they were the heirs of the deceased to the exclusion of her consanguine brothers. Subsequently, they have composed their differences and have agreed to share the estate among them. The parties, who originally contested the suit and are still contesting, are the executors of the alleged wills of deceased Mariam Sultan who claimed that the whole of the immoveable properties of the deceased were Waqf property, and therefore not available for distribution

(1) (1930) I.A. Vol. 57, p. 133.

among the heirs of the deceased. The nieces except Bibi Jan and the consanguine brothers of the deceased having joined forces, the only contest is as regards the validity of the wills. (It must be mentioned in passing that during the pendency of the present appeal the 1st, 2nd and 3rd defendant-respondents had obtained an *ex parte* order at the District Court of Pakokku for probate of the two wills alleged to be executed by Mariam Sultan in the years 1941 and 1951).

It has been strenuously contended by the 1st, 2nd and 3rd respondents that the compromise cannot be recorded as all the parties in the appeal have not participated therein. However, there is clear authority in the proposition that when some of the parties to a suit take part in a compromise the compromise will be recorded as a lawful adjustment of the suit under Order XXIII, Rule 3 of the Civil Procedure Code in so far as they are concerned. See *Kandhe and others* v. *Jhajan Lal and others* (1).

In the case now under consideration the compromise between the plaintiff-appellant Haji Bibi and the 4th, 5th, 6th and 7th respondents have put an end to the controversy as to who are entitled to share the estate of the deceased Mariam Sultan. Therefore, the only question outstanding is as to what properties are comprised in the estate. This in turn involves the consideration of the validity of the two wills of the deceased.

No doubt it is true that as a general rule a Court of Appeal in considering the correctness of the judgment of the Court below will confine itself to the state of the case at the time such judgment was rendered and will not take notice of any facts which

(1) A.I.R. (1936) All. p. 1.

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may have arisen subsequently. However, it is almost equally settled that the Court will in exceptional cases depart from this rule, specially where by so doing, it can shorten litigation and best attain the ends of justice. See *Ram Ratan Sahu* v. *Bishum Chand* (1) and *Mandliprasad* v. *Ramcharanlal and others* (2).

As the recording of the compromise and the remand of the suit for the purpose of trying the remaining issues would involve amendment of the pleadings, it is also for consideration whether such an amendment should be allowed. In this connection, it must be noted that whereas the 1st, 2nd and 3rd defendant-respondents had originally met the plaintiff Haji Bibi's suit successfully on the ground that she had no *locus standi* to file a suit for administration the compromise, if recorded, would entirely alter the situation as the plaintiff Haji Bibi jointly with the 4th, 5th, 6th and 7th respondents, would have an interest in the estate of the deceased. To shorten litigation and as an exceptional case, such an amendment of the pleadings should, in our opinion, be allowed, subject to the condition that the plaintiff-appellant Haji Bibi should pay the 1st, 2nd and 3rd respondents all the costs incurred by them in the suit and in the appeal up-to-date of this order. This, in our opinion, will be sufficient compensation for them in having to meet the plaintiff's case as amended.

For these reasons, we would order—

firstly, that the compromise be recorded,

secondly, that in terms of the compromise there will be a decree declaring that the plaintiff Haji Bibi is entitled to share the

(1) 11 Cal. W.N. p. 732. (2) (1947) I.L.R. Nag. p. 848 at 850

estate of the deceased jointly with Noori Jan, Zahra Bibi, Golam Ali Sheerazee and Aga Jan Sheerazee,

thirdly, that the plaintiff be allowed to amend the plaint in the manner indicated in the joint petition for compromise on her paying the 1st, 2nd and 3rd defendants the costs so far incurred by them and

fourthly, that on such amendment of the plaint having been effected the suit be remanded to the Original Side of this Court for trial on its merits.

Subject to what has been ordered above regarding the payment of costs to the 1st, 2nd and 3rd defendants, there will be no order as to costs of this appeal.

U CHAN TUN AUNG, C.J.—I agree.

APPELLATE CIVIL.

Before U San Maung, J.

H.C. 1956 — *Feb. 2.*

K. C. MUSA KUTTY (APPELLANT)

v.

ABDUL RASHID (RESPONDENT). *

Limitation Act, s. 5—Appeal filed in wrong Court—Allowance of exclusion of time—S. 11, Burma Courts Act, 1950—Exercise of due care and attention.

An appeal against the judgment and decree of the Township Court of Akyab, valued at K 550 was filed before the Additional District Court, Akyab, in time and in the absence of the Additional District Judge, the Subdivisional Judge, Akyab who had power to receive such appeals during such absence accepted it for the Additional District Judge.

On his return, the Additional District Judge found it to be beyond his pecuniary jurisdiction and returned it to the appellant's Counsel, who again presented it to the District Court, and the appeal was then time-barred by 20 days.

It was contended that had the Additional District Judge returned earlier the mistake would have been discovered for the presentation of the appeal in time before the District Court.

Held: The plea was irrelevant. Under s. 5, Limitation Act, the error must be one which might easily occur in spite of due care and attention.

If the appellant's Advocate had acted with ordinary diligence, he would find that under s. 11, Burma Courts Act, 1950, appeal lies not to the Additional District Court but to the District Court.

Tin Tin Nyo and others v. *Maung Ba Saing and one*, I.L.R. (Ran. Series) Vol. 1, p. 584; *J. N. Surty* v. *T. S. Chettyar Firm*, 4 Ran. p. 265; *U Shwe Kyu and four others* v. *Ma Tin U*, (1948) B.L.R. p. 606, referred to.

Ba Gyaw, Advocate, for the appellant.

Nil for the respondent.

U SAN MAUNG, J.—This is an appeal against the judgment of the District Court of Akyab, dismissing the appeal against the judgment and decree of the

* Civil 2nd Appeal No. 87 of 1955, against the decree of the District Court of Akyab in Civil Appeal No. 6 of 1955, dated the 1st July 1955, arising out of the decree of the Township Court, Akyab in Civil Regular Suit No. 58 of 1954, dated the 7th March 1955.

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Township Court of Akyab in Civil Regular Suit No. 58 of 1954 as having been presented beyond the period of limitation prescribed by law. The facts are briefly these :—

In Civil Regular Suit No. 58 of 1954 of the Township Court of Akyab, the present appellant K. C. Musa Kutty sued one Abdul Rashid for the recovery of K 286 as damages for use and occupation of the premises in suit and for the ejectment of the defendant. The suit was valued for the purpose of Court-fee and jurisdiction at K 400. The learned Township Judge dismissed the suit mainly on the ground that the defendant was the tenant of a Receiver appointed in a suit by the High Court of Calcutta. Thereafter, the appeal against the judgment and decree of the Township Court was filed by the Advocate for the appellant before the Subdivisional Judge, Akyab, who had the power to receive such appeals during the absence of the Additional District Judge at Kyaukpyu. The appeal was valued at K 550 for the purpose of jurisdiction and Court-fees and it was sought to be filed in the Court of the Additional District Judge. This Judge, who was away at Kyaukpyu did not however come to Akyab till the 7th of June 1955. On examining the memorandum of appeal which had been accepted on his behalf by the Subdivisional Judge of Akyab, he found that it was beyond the pecuniary jurisdiction of his Court. He therefore returned the memorandum of appeal to the appellant's Advocate, who then presented it to the District Court of Akyab on the 9th June 1955, *i.e.*, 94 days after the delivery of the judgment and 91 days after the signing of the decree by the Trial Judge. Excluding the time requisite for obtaining the copy of the judgment and decree, the appeal was nevertheless more than 20 days beyond the period

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of limitation prescribed by law. However the delay was sought to be excused on the ground that had the Additional District Judge come to Akyab during the month of May, the mistake would probably have been discovered for the presentation of the memorandum of appeal in time before the District Court of Akyab. This plea was, however, rejected by the learned District Judge.

In the case of *Tin Tin Nyo and others* v. *Maung Ba Saing and one* (1), where the delay was due to the appeal having been filed in the wrong Court, it was held that in order that the provisions of section 5 of the Limitation Act may be invoked in favour of an appellant, it must be found that the error was one that might easily have occurred even if reasonably due care and attention had been exercised by his Advocate. This dictum was approved in *J. N. Surty* v. *T. S. Chettyar Firm* (2).

In *U Shwe Kyu and four others* v. *Ma Tin U* (3), a suit on a mortgage bond for a claim of Rs. 7,000 was decreed by the trial Court and an appeal filed in the District Court of Myingyan was successful. On second appeal, the High Court reversed the decision of the District Court on the ground that the District Court had no jurisdiction to entertain the appeal of the value of over K 5,000. Another appeal was then filed in the High Court and even if allowance was made for the time spent in the District Court, the appellants were still out of time by about 10 days due to inability to raise necessary funds. It was held by the High Court that the delay should be excused in the special circumstances prevailing in the mofussil, where copies of local acts and enactments

(1) I.L.R. (Ran. Series) Vol. I p. 584. (2) 4 Ran. p. 265.
(3) (1948) B.L.R. p. 606.

were not readily available to members of the Bar for easy reference.

In the case now under consideration, Courts Act of 1950 prescribe the forum of appeal against the decision of the Township Court and a reference to section 11 thereof would make it clear that appeal would lie to the Additional District Court only if it was of a value of K 500 and under for the purpose of jurisdiction. The learned District Judge has in his order now under appeal pointed out that a number of copies of Courts Act of 1950 were available for reference at Akyab and that all the Civil Courts in Akyab were provided with a copy each. There is nothing to controvert him on this point. Therefore, if only the learned Advocate for the appellant had acted with ordinary diligence, he would have discovered that the appeal lay not to the Additional District Court, but to the District Court. In these circumstances, the observation in the case of *Tin Tin Nyo and others* v. *Maung Ba Saing and one* (1) is more apposite for the purpose of this case. The contention that if the learned Additional Judge had come to Akyab earlier, the mistake would have been discovered in time for the memorandum of appeal to the District Court is clearly beside the point. In *Tin Tin Nyo and others* v. *Maung Ba Saing and one* (1), Robinson, C.J. had this to say of a similar excuse: "In extenuation of his mistake he (Advocate) calls attention to the fact that the error had escaped the attention of the counsel for the respondents and also that of the learned Divisional Judge. I cannot see that the error of the counsel and the omission of the Divisional Judge affect the matter in the slightest degree." For these reasons, I would dismiss this appeal. There will be no order as to costs.

(1) I.L.R. (Ran. Series) Vol. I, p. 584.

APPELLATE CIVIL.

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

H.C. 1956 — *Feb. 2,*

LIM CHIN NEO (*alias*) DAW KYIN NYUN (APPELLANT)

v.

LIM GEOK SOO (*alias*) MUTU (RESPONDENT).*

Burmese Buddhist Law—Suit by a Keittima *adopted child for half share of an estate as an* appatitha *child, maintainability—Claim, whether inconsistent or contradictory—S. 5,* Keittima *Registration of Adoption Act, 1939, Interpretation of the words "The fact of the adoption"—S. 13, Burma Laws Act—The term "Buddhist Law"—Proof of adoption.*

The Respondent based his suit as a *Keittima* adopted son, but there being no registered deed of adoption as required under s. 5 of *Keittima* Registration of Adoptions Act, 1939 he made a claim for one-half share as an *Appatitha* child.

Held : Per U CHAN TUN AUNG, C.J., the expression "The fact of the adoption" in s. 5 of the *Keittima* Registration of Adoptions Act, 1939, clearly refers to the fact of the adoption in *Keittima* form, and that it cannot possibly refer to adoption in any other form.

Held further : The Respondent is not seeking to make a claim inconsistently or putting forward a contradictory claim. But he is making a definite claim as an *Appatitha* child in view of the absence of a written deed of adoption as a *Keittima* child. The Respondent was perfectly justified in making the claim in the form he had made.

Maung Ba Thein v. *Ma Than Myint and others*, I.L.R. Vol. 3 (Ran. Series) (1925) at p. 483 at p. 487, distinguished.

Ma Mya Me v. *Maung Ba Dun*, L.B.R. Vol. 2 (1903-1904) p. 224 ; *Chinnaya* v. *U Kha*, I.L.R. (Ran. Series) Vol. 14 (1936-37) p. 11, referred to.

Held : Per U SAN MAUNG, J.—Although the Respondent was allegedly adopted in the *Keittima* form, he could nevertheless bring a suit for inheritance on the footing that he was an *appatitha* adopted son.

By "Buddhist Law" is meant the Customary Law of the Burman Buddhist, which can be gathered from the *Dhammathats* and from the decided cases and the prevailing customs and practice of Burmans.

Thein Pe v. *U Pet*, 3 L.B.R. p. 175 ; *Ma Hnin Zan* v. *Ma Myaing*, 13 Ran. 487, referred to.

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* Civil 1st Appeal No. 63 of 1953, against the decree of the Original Side (U AUNG THA GYAW) High Court of Rangoon in Civil Regular Suit No. 7 of 1951, dated the 3rd April 1953.

Held further: There is nothing in the Registration of *Keittima* Adoption Act to prevent a person abandoning the *Keittima* claim and from proving that he is an adopted son and making a claim as an *appatitha* child which can be established by other admissible evidence.

Ma Ywet v. *Ma Me*, 5 L.B.R. 118; *Ma Tha Nyun* v. *Daw Shwe Thit*, 14 Ran. p. 557; *Ma Kyi* v. *Ma Thon*, 13 Ran. p. 274; *Ma Mya Me* v. *Maung Ba Dun*, 2 L.B.R. 224; *Maung Ba Thein* v. *Ma Than Myint*, 5 Ran. p. 565, referred to.

Messrs. Basu and *Venkataram, P. B. Sen* and *B. K. Sen*, Advocates, for the appellant.

Hla Sein, Advocate, for the respondent.

Judgment of the Court was delivered by

U CHAN TUN AUNG, C.J.—In Civil Regular No. 72 of 1951 of this Court, the respondent Lim Geok Soo (*a*) Mutu, a minor, by his next friend Lim Kyin Taik (his natural father) sued the appellants for the administration of the estate of a Sino-Burmese Buddhist spinster Lim Kway Ma (*a*) Ma Khway Ma (*a*) Lim Bee Taik hereafter referred to as Lim Bee Taik who died intestate at Rangoon on 7th June 1950.

Originally the suit was filed against two persons; namely:—Lim Chin Neo (*a*) Daw Khin Nyun, a surviving sister of Lim Bee Taik (deceased), and their mother Twan Thet May (*a*) Daw Thet May. But the latter died during the pendency of the case, and hence the case proceeded against the present appellant in her personal capacity as well as in her capacity as a legal representative of Daw Thet May (deceased). The respondent's suit was that he was the *keittima* adopted child of Lim Bee Taik; but that there being no written deed of adoption as required under the Registration of *Keittima* Adoptions Act, 1939, he claimed one-half share in the estate of the said Lim Bee Taik as her *Appatitha* child. This

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assertion is quite specific from paragraph 5 of his plaint which reads :

> " That although the deceased adopted the plaintiff as a *keittima* son, for want of a registered deed of adoption as required by law under the Registration of *Keittima* Adoption Act, 1939, the plaintiff now claims a definite one-half share in the estate of the deceased as an *appatitha* son under the Burmese Buddhist Law."

To this definite assertion, the appellant, in her written statement contended that the respondent's claim was inconsistent or contradictory, in that he could not be allowed in law to claim as an *appatitha* son when his case was based upon a claim that he had been adopted as a *keittima* son. In reply to this, the respondent averred :

> " That the plaintiff is advised to submit that he is making a definite claim for half-share in the deceased's estate as an *appatitha* child and that there is nothing inconsistent or contradictory about it." (*Vide* paragraph 3, respondent's written reply dated 22nd November, 1951).

It appears to me that because of respondent's definite assertion that he was basing his claim as an *appatitha* son, the learned trial Judge framed an issue simpliciter whether the respondent was adopted by the deceased Lim Bee Taik, and not whether there was *keittima adoption.* The respondent's claim was resisted at the trial on two grounds. The first ground taken was that in view of different legal consequences that ensue from *keittima* adoption and from *appatitha* adoption in that the *keittima* adoption is one in which the adoptive parent adopts the child with the intention that the child shall inherit from the adoptive parent, and whereas in the case of an *appatitha* adoption it may be done without any intention expressed on the part of the adoptive parent that the child shall inherit, the

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respondent was debarred from preferring a claim as an *appatitha* child when he had definitely asserted that he was adopted as a *keittima* child. The second ground taken was that the evidence regarding factum of adoption was most unsatisfactory and that it could not in any event, be held that adoption had been proved or established either in fact or in law. Both parties had led voluminous evidence on the second question; and after quite an exhaustive survey of the evidence adduced in that regard, and also the legal aspect as to the maintainability of the suit in the form the plaintiff has set out in the plaint, the learned trial Judge came to the conclusion that the respondent could maintain the suit and that there was sufficient evidence establishing the fact that Lim Bee Taik had adopted him ; and accordingly a preliminary administration decree (as *appatitha* child) was passed in favour of the respondent. Hence this appeal.

Mr. Basu, on behalf of the appellant has again assailed the judgment of the trial Court on grounds that were taken at the trial. Regarding the alleged contradictory or inconsistent claim put forth by the respondent what he submits, so far as I can apprehend, amounts to this.

Section 5 of the *Keittima* Registration of Adoption Act, 1939, debars claim for inheritance as *keittima* child without a registered deed of adoption. The respondent has claimed to be a *keittima* adopted child in his plaint, and when he sought to adduce evidence regarding this factum of *keittima* adoption at the trial, section 5 of the Act operates as a bar, and he should be shut out from proving the factum of adoption not only of *keittima* adoption, but also of adoption in any other form. He further contends that the expression appearing in section 5 *namely*:

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"the fact of the adoption" includes all forms of adoption. I regret I am unable to accept this contention. Section 5 reads :

"No dispute as to the right of any person to inherit as or through a *keittima* son or daughter shall be entertained by any Court unless the fact of the adoption, if it was effected after the 1st April, 1941, is evident by an instrument :

(i) executed by the person making the adoption and (*a*) by the person who is adopted if not less than 18 years of age at the time of such execution aforesaid, or (*b*) if less than that age, then by the person or persons, if any, whose consent to the adoption is required by the Burmese Buddhist Law, and

(ii) attested by at least two witnesses, and

(iii) etc. etc. etc. etc."

It appears to me quite plain from the reading of the said provisions in the context of the whole enactment that the expression, "the fact of the adoption" clearly refers to the fact of the adoption in *keittima* form, and that it cannot possibly refer to adoptions in any other form. I agree, as has been pointed out in *Maung Ba Thein* v. *Ma Than Myint and others* (1), that the claims based upon *keittima* form of adoption and those based upon *appatitha* form of adoption are widely different, and that different considerations govern the question of these two distinct forms of adoption. But in the case before us, as far as I can ascertain from his plaint, the respondent is not seeking to make a claim inconsistently or putting forward, what may be described, as a contradictory claim. Nor, is he seeking as an alternative claim which he is perfectly entitled to, in law. [See *Ma Mya Me* v. *Maung Ba Dun* (2)]. But he is making a definite claim as an *appatitha* child in view of the absence of a written deed of

(1) I.L.R. Vol. 3 (Ran. Series) (1925) at p. 483 at p. 487.

(2) L.B.R. Vol. 2 (1903-1904) p. 224.

adoption as a *keittima* child. Therefore, I am of the view that the respondent was perfectly justified in making the claim in the form he had made before the trial Court, and I really do not see any merits in the submissions made by the appellant's counsel. At least I do not see the equity of shutting out the plaintiff from asserting that, because he could not put his case high enough on the basis of cause of action which can only support a *keittima* adoption as there was no written registered deed, he is making his claim as an *appatitha* adopted child. What was decided in *Maung Ba Thein* v. *Ma Than Myint and others* (1) is clearly distinguishable from the facts and circumstances obtaining in the present case. In that case the plaintiff having claimed to be a *keittima* adopted child of one person, and there being no alternative claim in his plaint as an *appatitha* adopted child, his suit was dismissed at the trial. He then preferred an appeal, and in the appellate Court he sought for leave to amend his plaint by the addition of the alternative claim as an *appatitha* child. It was held that such an amendment could not be allowed and that the causes of action on which the claims as *keittima* son and *appatitha* son were based were widely different. I do not see any analogy between the facts and circumstances obtaining in the case under appeal and those in the case just cited. In fact the ruling cited does not help the appellant at all.

Now, as regards the evidence adduced at the trial concerning the adoption of the respondent by Lim Bee Taik deceased, it is submitted that the evidence is quite inconsistent with the story of adoption asserted by the respondent. In order to appreciate this submission it would perhaps be considered

(1) I.L.R. Vol. 3 (Ran. Series) (1925) at p. 183 at p. 487.

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necessary to evaluate the testimony of each and every witness both for the appellant and the respondent in the light of the entire background upon which the respondent has based his claim. But, the learned trial Judge has, to my mind, very carefully dealt with each and every one of such witness and I do not propose to go over them again at length, unless I entirely disagree with him in the appraisal he has made of the testimony of such witness. The background of the respondent's case is that his natural father Lim Kyin Taik and the deceased, Lim Bee Taik became closely associated as neighbours before his birth. Lim Kyin Taik lived under the protection of Lim Bee Taik from about the age of 15, their parents being quite friendly to one another. Owing to the circumstances of the war they evacuated to North of Burma. They then stayed at Monywa, when Lim Kyin Taik was given in marriage to one Ma Thet May of Aungtha village after his separation from one Ma Than Tin of Tatkon village in the beginning of 1945. The present respondent was born to Ma Thet May in or about the year 1946 in Aungtha village. Lim Bee Taik, (the deceased) happened to be then at Monywa and on paying a visit to Aungtha village and seeing a new born child she expressed the desire to adopt him as her own son. There is abundant evidence in the proceedings which shows that the relationship between Lim Bee Taik (deceased) and Lim Kyin Taik were like brother and sister, and that the deceased preferred to stay with Lim Kyin Taik during the evacuation rather than with her own natural mother, Daw Set May, or her elder sister the present appellant. Daw Set May took refuge in a monastery at Mohnyin, while Lim Bee Taik and Lim Kyin Taik stayed apart from Daw Set May and the present appellant, by taking up a separate residence with Lim

Kyin Taik in Aungtha village as aforesaid. From the analysis of the detailed evidence that had been led before the trial Judge, I find that the facts and circumstances upon which the respondent seeks to establish the factum of adoption falls roughly under the following heads :—

(1) The actual giving away in adoption to Lim Bee Taik, by the natural father and mother of the respondent at Aungtha village in or about the year 1946, a few days after his birth.

(2) The fact that the deceased Lim Bee Taik brought over the respondent to Rangoon and his having stayed with her throughout, up to the time of her death.

(3) The fact that the deceased personally brought up the respondent in her own home in 17th Street.

(4) The fact that the respondent boy was *Shinbyued* by the deceased, along with other boys.

(5) The fact that the deceased herself put the respondent boy in a Chinese school in the Register of which he was described as the son of the deceased.

(6) The fact that on the death of Lim Bee Taik the respondent boy acted as a chief mourner wearing a sack cloth according to Chinese Custom and also holding the "Leik-pya-ain."

Overwhelming evidence has been led in support of all these assertions, both oral and documentary. However it has been contended that the evidence falls far short of the required proof in such cases. In particular, it is urged that it was highly improbable that the deceased, a spinster, would adopt a child of

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tender years. Other facts and circumstances such as the admission into the Chinese school, the deceased being described as the mother of the respondent in the School Register, the respondent acting as a chief mourner on her death and also holding of the "Leik-pya-ain" were, it is contended, evidence created just for bolstering up his claim with the machination of his natural father Lim Kyin Taik and that they ought not to be accepted. On the other hand, what the appellant could adduce to counter the respondent's claim of adoption, to my mind is only negative in character, and is not of much substance to out-weigh the preponderant evidence that has been adduced by the respondent. What the appellant could establish was that she never knew or heard Lim Bee Taik adopting any child. The witnesses cited by her were mostly from Monywa, and they merely repeated what appellant had to say about the adoption. They stated that Lim Bee Taik was never known to have adopted any child. This sort of testimony to my mind, is most unconvincing. Much capital has been made about the omission of respondent's name in the obituary notices concerning the death of Lim Bee Taik appearing in the Local Burmese newspapers (Exhibits 2 and 3). These insertions were said to have been made by one Maung Po (DW 1) who had to admit that when he stayed with Lim Bee Taik for a certain period the respondent boy used to sleep with her and that he also saw Lim Bee Taik taking the respondent boy to the school. He also had to concede that the respondent was then seen wearing gold bangles and chain given to him by Lim Bee Taik. Regarding, the obituary notices, I cannot attach any significance to them. They appear to me to be appellant's stray belated attempt at counterblasting a strong and consistent claim of the respondent. There

is ample evidence that there had been litigation between Lim Bee Taik and the mother Daw Set May on one hand and the appellant and her husband on the other, and that since then their relationship had been somewhat estranged. It appears therefore, that the appellant did not take much interest in the personal or private affairs of Lim Bee Taik until the latter's death when she and the mother had to be sent for from Monywa. The funeral of Lim Bee Taik took place only on the 5th day after her death and from a course of conduct between the deceased and the young respondent and from what the neighbours knew of their relationship, the appellant probably realized the *bonâ fide* of the respondent's claim, she being away from Lim Bee Taik all the time. She then had the obituary notices inserted without the respondent's name. I fully concur with the learned trial Judge in his conclusion that the preponderance of other evidence indicating the adoption of respondent by the deceased completely outweigh the contrary effect sought to be attached in the omission of his name in the obituary notices. Next, due weight must be given to preferential treatment accorded to the respondent when he was put into monastic order as a *Koyin* with four other boys. The deceased herself performed the *Ye-set-cha* ceremony. There is definite evidence of U Dhammathaya (PW 12), who says that three or four days in succession prior to the *Shinbyu* ceremony, the deceased herself brought over the respondent to the monastery for instructions in the rituals appertaining to donning of yellow robe as a novice. This witness identified the respondent correctly in Exhibit L photograph hung up in the monastery. No explanation of any kind is forthcoming from the appellant as to why this distinctly preferential

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treatment was accorded to the respondent by the deceased. There is also the Chinese School Headmistress, Tan Eng Swee (PW 7) quite a disinterested witness who has come forward to give evidence to the effect that the respondent was admitted into her school on the 20th October, 1950 at the age of five, and that the boy was brought by the deceased Lim Bee Taik herself. She also produced the school register wherein all particulars, relating to the respondent are entered. From the documentary evidence that is now on the record, I have not the slightest doubt that the respondent was admitted into that school as the son of the deceased Lim Bee Taik. There are other evidence, aside the *Shinbyu* ceremony and the admission of the respondent into Chinese school, which show that Lim Bee Taik brought up the respondent with greatest difficulty on artificial milk-food and tender care given to him while a baby in her arms. Such evidence forthcoming as they do from disinterested neighbours I find it difficult to brush them aside as untrustworthy.

As regards the respondent acting as chief mourner and holding the "Leik-pya-ain" at the funeral, one cannot ignore the fact that under the Chinese custom, the existence of which has been conceded to by the appellant, only a son of the deceased is entitled to hold the "Leik-pya-ain" and act as a chief mourner and that if there is no son the "Leik-pya-ain" has to be laid on the coffin. If the respondent was not accepted as Lim Bee Taik's adopted child, her funeral having taken place only on the fifth day, the appellant would certainly have objected to respondent taking the role of the chief mourner and also his holding the "Leik-pya-ain"; but the appellant had to concede that no objection was made by anybody either before or during the

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funeral. Much capital has been made that the deceased Lim Bee Taik, a spinster as she all along was, would not have agreed to accept a somewhat untenable position of an adoptive mother of a child. We do not see any substance in this contention. There are many cases among the Burmese Buddhist spinsters adopting a child either as *keittima* or *Appatitha*. From a review of the entire evidence, I am disposed to agree with the trial Judge that there is sufficient evidence not only of the giving and taking in adoption of the respondent but also of a course of conduct between the deceased Lim Bee Taik and the respondent from which adoption can legitimately be inferred. I have also carefully examined the evidence adduced on behalf of the appellant showing facts and circumstances inconsistent with the respondent's assertion of adoption by the deceased ; but I must say that they do not impress me as much as the positive evidence led by the respondent in support of his claim. I need hardly point out what weight should be attached to the conclusions of facts arrived at by the trial Court, as laid down in *Chinnaya* v. *U Kha* (1). The oral evidence given in this case before the trial Court for and on behalf of the respective parties are somewhat conflicting. Witnesses on one side said there was adoption and relied upon a catena of facts and circumstances to that effect, while those on the opposite side denied adoption and relied upon facts and circumstances inconsistent with the adoption. The trial Judge who hears and sees the witnesses draws conclusion in favour of the respondent, and I do not think it would be proper for the appellate Court to interfere with the decision of fact arrived at by the trial Court in that regard.

(1) I.L.R. (Ran. Series) Vol. 14 (1936-37) p. 11.

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This appeal is therefore dismissed with costs.

CIVIL FIRST APPEAL NO. 63 of 1953.

U SAN MAUNG, J.—I have had the advantage of reading the judgment of the learned Chief Justice, and I agree with him that in the case under appeal there is sufficient evidence not only of the giving and taking in adoption of the respondent but also of a course of conduct between the deceased Lim Bee Taik and the respondent Lim Geok Soo from which adoption can be inferred. However, I would like to give my own reasons for coming to the conclusion that although Lim Geok Soo was allegedly adopted by the deceased in the *keittima* form, he could nevertheless bring a suit for inheritance on the footing that he was an *appatitha* adoptive son.

Section 13 of the Burma Laws Act enacts that in any suit in which it is necessary for the Court to decide any question regarding succession, inheritance, etc., the Buddhist Law shall form the rule of decision where the parties are Buddhists, except in so far as such Law has by enactment been altered or abolished. By Buddhist Law is meant the Customary Law of the Burman Buddhist, which can be gathered from the *Dhammathats* and from the decided cases and the prevailing customs and practice of Burmans. See *Thein Pe* v. *U Pet* (1) and *Ma Hnin Zan* v. *Ma Myaing* (2). According to the Burmese Buddhist Law as it stood prior to the coming into force of the Registration of *Keittima* Adoptions Act (Act XIV of 1939) the fact of *Keittima* adoption can either be proved as having taken place on a distinct and specified occasion, or may be inferred from a course of conduct which is inconsistent with any other supposition. See *Ma Ywet* v. *Ma Me* (3). This rule of Buddhist Law is,

(1) 3 L. B.R. p. 175. (2) 13 Ran. p. 487.
(3) 5 L.B.R. p. 118.

however, altered by the statutory provisions contained in section 4 of the Registration of *Keittima* Adoptions Act which enacts that a *keittima* son or daughter is one who is adopted with the express intention that he or she shall inherit according to the Burmese Buddhist Law.

Section 5 of the aforesaid Act reads:

"No dispute as to the right of any person to inherit as or through a *Keittima* son or daughter shall be entertained by any Court unless the fact of the adoption, if it was effected after the 1st April, 1941, is evidenced by an instrument:

(i) executed by the person making the adoption and (*a*) by the person who is adopted if not less than 18 years of age at the time of such execution aforesaid, or (*b*) if less than that age, then by the person or persons, if any, whose consent to the adoption is required by the Burmese Buddhist Law, and

(ii) attested by at least two witnesses, and

(iii) registered in Book 4 of the books referred to in sub-section (*1*) of section 51 of the Registration Act."

Therefore, it would appear that even when a person has been adopted with the express intention that he or she shall inherit the fact of such an adoption cannot be proved unless it is evidenced by a registered instrument conforming to the requirements of section 5 of the Registration of *Keittima* Adoptions Act.

However, the question now for consideration is when a person has been adopted with the express intention that he or she shall inherit whether the fact of adoption cannot be proved at all by any other means unless there is a a registered instrument.

Now, an *appatitha* child is one who has been adopted casually and without any intention expressed on the part of the adoptive parent that the child shall

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inherit. See *Ma Than Nyun* v. *Daw Shwe Thit* (1). The fact of *appatitha* adoption is usually inferred by a course of conduct which is inconsistent with any other supposition than that a person is an adoptive son. Therefore, in my opinion, there is nothing in the Registration of *Keittima* Adoptions Act to prevent a person from proving that he is an adoptive son although the fact that he has been adopted in the *keittima* form cannot be proved owing to the provisions of section 5 of the Registration of *Keittima* Adoptions Act.

Some analogy is afforded by the case of *Ma Kyi* v. *Ma Thon* (2). There it was held that when a person had in fact mortgaged his property under an oral mortgage which by law must be created by a registered instrument, he cannot sue for redemption of his property but he can fall back upon another cause of action and sue for possession relying on his title.

In the case now under consideration although according to the plaintiff he was in fact adopted as a *keittima* son he cannot file a suit on that cause of action, his adoption not having been effected by a registered instrument. He seeks to fall back upon the fact of adoption as evidenced by a course of conduct inconsistent with any other supposition than that he was an adoptive son. There seems no reason why he should not be allowed to sue on this alternative cause of action.

It has been pointed out in *Ma Mya Me* v. *Maung Ba Dun* (3) and *Maung Ba Thein* v. *Ma Than Myint* (4) that a claim as an *appatitha* child can be made in the alternative to a claim as a *keittima* child. If so, I see no reason why a claim as a *keittima* child

(1) 14 Ran. p. 557.
(2) 13 Ran. p. 274.
(3) 2 L.B.R. p. 224.
(4) 5 Ran. p. 565.

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which cannot be proved because of legal impediment cannot be abandoned in favour of a claim as an *appatitha* child which can be established by other admissible evidence.

For these reasons I hold that the plaintiff-respondent has been rightly allowed to sue as an *appatitha* son of the deceased Lim Bee Taik. I therefore agree that the appeal must be dismissed with costs.

APPELLATE CIVIL.

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

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Jan. 10.

MA KHIN MYA (APPELLANT)

v.

KALA (*alias*) MAUNG HLA SHWE (RESPONDENT).*

Burmese Buddhist Law—Suit for divorce and partition—Automatic divorce—No period fixed for exercise of act of volition—Mere lapse of time does not automatically dissolve the marriage tie.

Held: The marriage tie of a Burman Buddhist couple is not dissolved automatically without an act of volition on the part of one of the spouses showing his or her intention to determine the marriage relation.

No period of time is fixed to exercise such an act of volition and it is not dissolved automatically by the mere lapse of the prescribed period for desertion.

Dr. Tha Mya v. *Daw Khin Pu*, (1951) B.L.R. (S.C.) p. 108, followed. *Ma San Myint and others* v. *Ma Thein Nwe*, (1933) A.I.R. Ran. 374, referred to.

Saw Hla Pru, Advocate, for the appellant.

Tun Aung (*I*) for the respondent.

Judgment of the Court was delivered by

U CHAN TUN AUNG, C.J.—This is the plaintiff's appeal against the judgment and decree of the District Court of Myaungmya dismissing her suit filed *in forma pauperis* against the respondent-defendant Kala (*a*) Maung Hla Shwe for divorce and partition of property valued at K 35,000, being one-third share in the first prize won by the respondent in the State Lottery drawn in April 1952. The plaintiff was said to have married the defendant, both being Burman Buddhists, at Myaungmya in or

* Civil 1st Appeal No. 21 of 1953 against the decree of the District Court of Myaungmya in Civil Regular Suit No. 2 of 1952, dated the 8th day of November 1952.

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about the year 1944 and a child was born to them in the year 1945. The plaintiff alleged in her plaint that 3 years after the birth of the child, the defendant without her consent married one Ma Tin Nyun, and that thereupon, in the year 1949 she claimed maintenance for herself and her child under section 488 of the Criminal Procedure Code against the defendant before the Headquarters Magistrate, Myaungmya, who on filing a compromise petition duly signed by both the plaintiff and the defendant ordered the latter to pay Rs. 25 a month for the maintenance of the plaintiff and her child. It is not in dispute that since the passing of the said order in terms of the compromise petition, the defendant has been paying the maintenance allowance to the plaintiff, and the plaintiff herself in paragraph 6 of her plaint says :—

"ဤကဲ့သို့အမိန့်ချပေးပြီးနောက်၊ တရားခံက စားစရိတ်များကို လစဉ်ပေးကမ်းထောက်ပံ့လာခဲ့ပါသဖြင့် တရားလိုနှင့် တရားခံတို့သည် ယနေ့ အထိ လင်ခမ်း မယားခမ်း ပြတ်စဲခြင်းမရှိ တည်မြဲလျက်ပင် ရှိပါသေးသည်။"

The plaintiff further asserted that although the defendant's financial position had greatly improved with the winning of the first prize in the State Lottery, yet that paltry maintenance given for herself and her child remained unchanged. She next alleged a matrimonial fault, that the defendant had married Ma Tin Nyun without her consent; and on that ground she asked for divorce and partition of the property.

The respondent-defendant admits the marriage with the plaintiff and the giving birth of a child in the year 1945; but he contends that he married Ma Tin Nyun in 1949 after the dissolution of marriage with the plaintiff who deserted him in the year 1945. But in paragraph 3 of his written statement the defendant, while admitting the payment of

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maintenance to the plaintiff and her child, pursuant to the order of the Headquarters Magistrate, Myaungmya, contends "that the plaintiff decided not to sue for divorce, *but to condone matrimonial fault, if any*, on the part of the defendant and elected to take maintenance . . . . . ." It will thus be seen that the defendant has taken two grounds in resisting the plaintiff's suit for divorce and partition. The first ground is that there was already a dissolution of marriage by plaintiff's desertion, and by her having stayed apart from him for more than one year without his having contributed anything towards her maintenance. The second ground, which appears to be an alternative to the first, is that even if he had committed a matrimonial fault by marrying Ma Tin Nyun without plaintiff's consent, there was condonation by the plaintiff in that the plaintiff had elected to receive maintenance from him throughout up to the date of the filing of the suit.

The trial Court framed four issues besides the preliminary issues which are not very material to present appeal. Out of the four issues, the issue whether there has been a dissolution of marriage between the plaintiff and the defendant by reason of the plaintiff's desertion or whether the marriage between the plaintiff and the defendant still subsists was answered against the plaintiff. The issue whether there was condonation of matrimonial fault does not find a place. However, in that regard, the parties appeared to have accepted that the general issue which reads "Is the plaintiff entitled to the relief claimed ?" was sufficient to cover the particular point in controversy.

On facts the trial Judge found that the plaintiff after marriage with the defendant Maung Hla Shwe lived with him at Myaungmya for about six months.

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Maung Hla Shwe was not quite well-off, being an apprentice goldsmith working under U Tun Gyaw and Ma Khlay Ma. Maung Hla Shwe stayed for about six months in Myaungmya and along with U Tun Gyaw and Ma Khlay Ma, he came over to Rangoon where they opened a goldsmith shop in Mogul Street. The plaintiff was then left behind at Myaungmya, and only when Maung Hla Shwe learnt that the plaintiff had given birth to a child in Myaungmya, did he go back there and fetch his wife back to Rangoon. They stayed in Mogul Street for some time; but the plaintiff was unwilling to stay in Rangoon, and one morning while Maung Hla Shwe was asleep, she left Rangoon taking the Myaungmya motor boat. It appears that, since then, for the past nearly three years, that is, up to the date of the filing of the suit, except providing the maintenance allowance ordered by the Court, Maung Hla Shwe has been staying apart from the plaintiff. It was during this separation that the second marriage with Ma Tin Nyun took place. It may be observed that the maintenance allowance ordered by the Court was in consequence of a joint petition filed by the plaintiff and the defendant, and significantly it recites—(*vide* Criminal Miscellaneous Trial No. 20 of 1949 of the Headquarters Magistrate, Myaungmya) that Maung Hla Shwe and his wife Ma Khin Mya agreed to pay and accept Rs. 10 for the maintenance of Ma Khin Mya, and Rs. 15 for the maintenance of the child—total Rs. 25 effective from the date 10th May 1949. Maung Hla Shwe also agreed to pay the legal cost of Rs. 2-12. On these facts the trial Judge, relying upon *Ma San Myint and others* v. *Ma Thein Nwe* (1) and *Daw Khin Pu* v. *Dr. Tha Mya* (2) concludes that there has been a dissolution

(1) (1933) A.I.R. Ran. 374. (2) (1949) B.L.R. 283.

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of marriage between the plaintiff and the defendant. But strangely enough in deciding the general issue "what relief the plaintiff is entitled to" the learned trial Judge makes the following remarks quite contrary to his finding that there has been a dissolution of marriage:—"It is an admitted fact that the defendant Maung Hla Shwe has *two wives and it is not disputed that the two wives are of equal status*—each wife has an interest in one-sixth of the amount—K 17,500. The plaintiff is not entitled to K 35,000 as claimed, but she can claim K 17,500 only." With these observations, he dismissed the plaintiff's suit. We regret we are unable to apprehend what the learned trial Judge's real decision was. If, as he has found on the materials obtaining in the case and placing reliance upon the decisions quoted above that there has been a dissolution of marriage tie, how can it be said that Maung Hla Shwe (the defendant) has "two wives" and that the two wives are of "equal status". Perhaps, the learned trial Judge found himself difficult to reconcile the two contentions put forth by the defendant, namely, the assertion of dissolution of marriage tie by the desertion, and the plea of condonation of matrimonial fault by plaintiff's acceptance of the maintenance up to the time of the filing of the suit. It is obvious that from the evidence that has been adduced before the Court and from the pleadings themselves that the plaintiff has been and is still receiving the maintenance from the defendant even after the defendant's second marriage with Ma Tin Nyun. How can it therefore be said that the plaintiff is no more the wife of the defendant? Even if the plaintiff had filed the maintenance application after defendant's marriage with Ma Tin Nyun, the fact that

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she continues to receive the maintenance allowance and the fact that she and the defendant filed a joint petition wherein her position as the defendant's wife (ဇေယျ) was expressly admitted lead us to conclude that she still elects to be defendant's wife and that the matrimonial fault, committed by the defendant has been condoned. This is clearly made plain by her own assertion in her plaint in paragraph 6, already referred to above. In our view the plaintiff's suit for divorce and partition is entirely misconceived, and it appears to be one animated more by the desire of getting a share of the sweepstake money won by the defendant, than a vindication of her marital rights for the alleged matrimonial fault of the defendant having taken a second wife. This is apparent from what she has asserted in paragraphs 9 and 10 of her plaint. She stated that the first prize in the State Lottery was won by the defendant while the relation of husband and wife between herself and the defendant was still subsisting and that the defendant had been paying the maintenance to her and her child up to the date of filing the suit. There is thus, a clear disclosure in the plaint that the marriage tie between the plaintiff and the defendant is still subsisting and the matrimonial fault alleged against the defendant has been condoned by plaintiff's acceptance of maintenance from the defendant. Such being our view, the defendant's alternative assertion of condonation must be accepted and the plaintiff's suit must therefore fail.

However, we have yet to make some observations in connection with the finding of the trial Court on the question of dissolution of marriage on grounds of desertion. Here, the learned trial Judge has clearly misdirected himself the proposition of law laid down in *Daw Khin Pu* v. *Dr. Tha Mya*

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(1) which has been more or less affirmed by the Supreme Court [vide *Dr. Tha Mya* v. *Daw Khin Pu* (2)]. We regret to note that the learned trial Judge merely satisfied himself by quoting a portion of the head-notes of the Full Bench decision of the High Court in *Daw Khin Pu* v. *Dr. Tha Mya* (1). If he was only minded to read the following further findings of the Full Bench he would have found, *inter alia*, that payment of maintenance allowance to the wife in compliance with the decree or order for payment thereof is regarded as contribution towards the maintenance of the wife within the purview of section 17 of Manugye, Book V, thereby keeping the marriage tie subsisting :—

"(2) A man against whom legal proceedings are instituted by his wife (who at the time of the institution thereof is living separately from him) for maintenance of herself and the child by him, cannot be deemed to have deserted her from the date of the institution thereof, merely because he does not call upon her to return and cohabit with him.

(3) Payment of maintenance allowance to the wife in compliance with a decree or order for payment thereof should be regarded as a contribution to her maintenance within the purview of s. 17 of Manugye, Book V.

(4) Maintenance allowance which is realized by execution of a decree or order for its payment also falls within the purview of the said section."

It appears that the trial Judge has distinguished the facts and circumstances obtaining in the present case under appeal from those in *Daw Khin Pu* v. *Dr. Tha Mya* (1) stating that the order for maintenance passed in Daw Khin Pu's case was within the prescribed period, *i.e.*, the period of desertion which entitles a Burman Buddhist spouse to claim for divorce; whereas in the case under appeal the order for maintenance was passed after

(1) (1949) B.L.R. 283. (2) (1951) B.L.R. (S.C.) p. 108

the prescribed period. The learned trial Judge further observed that the fact that the defendant was paying maintenance allowance to the plaintiff by the order of the Court did not affect the dissolution of the marriage which had already become complete before the maintenance suit was filed. We regret we cannot appreciate this reasoning. It appears to us that the learned trial Judge has entirely misconceived the law laid down in the Full Bench case. It should have been clear to him, if the learned trial Judge has fully appreciated the law laid down in the said case, that the marriage tie of a Burman Buddhist couple is not dissolved automatically without an act of volition on the part of one of the spouses showing his or her intention to determine the marriage relation. The Full Bench decision, with respect, does not lay down that the act of volition on the part of the aggrieved party should be exercised within a certain period of time. What it lays down, among others, is that the exercising of such act of volition is entirely at the option of the deserted spouse. Therefore, in our view, a marriage tie is not dissolved automatically by the mere lapse of the prescribed period for desertion.

Now, in the case under appeal, we find that there is complete absence of any act of volition on the part of the deserted spouse (the defendant) showing his intention to dissolve the marriage tie with the plaintiff-appellant, or "a conduct revealing a desire for divorce". On the contrary, whatever act of volition there is on his part, inasmuch as he chooses to pay the maintenance allowance for the plaintiff and her child all along, indicates unmistakably, that the defendant does not desire to exercise his option of dissolving the marriage tie with the plaintiff. How can it, therefore, under these

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circumstances be said that there has been a dissolution of marriage between the plaintiff and the defendant ? In other words, since under the Burmese Buddhist Law we do not recognise automatic dissolution of marriage, the finding of the lower Court that the continued payment of maintenance allowance by the defendant to the plaintiff under an order of the Court is ineffective and does not revive the marriage tie already dissolved, begs the very question of automatic dissolution of marriage. This finding clearly goes counter to the decision of the Full Bench referred to above. We must, therefore, hold that the trial Judge's view of the law as regards the dissolution of marriage tie between the plaintiff and the defendant is entirely wrong.

Therefore, having regard to the facts and circumstances obtaining in the case, and also having regard to the law applicable thereto, we find that the marriage tie between the plaintiff-appellant and the defendant-respondent still subsists, and that the plaintiff-appellant is not entitled to maintain the suit for divorce and partition in the form she has made. On the facts available, we must also hold that from her continued receipt of maintenance allowance from the defendant-respondent, whatever matrimonial fault the latter might have committed, the plaintiff-appellant has condoned, and that the assertion of the defendant-respondent in that regard must be allowed to prevail.

Hence, this appeal is dismissed with costs.

U SAN MAUNG, J.—I agree.

APPELLATE CRIMINAL

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

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MAUNG AYE MAUNG (APPELLANT)

v.

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THE UNION OF BURMA (RESPONDENT).*

Penal Code, s. 302 (1) (b)—Approver—Accomplice in the guise of prosecution witness—Ss. 133 and 114, Illustration (b), Evidence Act—Unless corroborated in material particulars, a person could not be convicted on the uncorroborated evidence of an approver or accomplice in the guise of a prosecution witness.

The appellant was convicted of murder and sentenced to death solely on the testimony of an approver and two accomplices without any extraneous evidence to support them in material particulars.

Held: The question whether a witness is or is not an accomplice is a question of fact in each case.

S. 133, Evidence Act must be read in conjunction with Illustration (*b*) of s. 114, both being on the same subject in the same enactment.

There is a presumption against the trustworthiness of an accomplice, and unless there are exceptional circumstances a person should not be convicted on the uncorroborated evidence of an accomplice.

This principle in the evaluation of testimony of an approver and/or an accomplice in the guise of a prosecution witness has received judicial sanction by a *catena* of decisions of our Courts.

Kyaw Hla Aung and one v. *The Union of Burma*, (1949) B.L.R. 582; ***Ali Meah*** v. ***The Union of Burma***, Criminal Appeal No. 3 of 1954 of the Supreme Court of the Union of Burma, referred to.

Nga Pauk v. *The King*, A.I.R. (1937) Ran. 513, distinguished.

The King v. *Nga Myo*, (1938) R.L.R. 190 at 212, referred to.

Appellant acquitted.

Sein Hoke for the appellant.

Ba Pe (Government Advocate) for the respondent.

U CHAN TUN AUNG, C.J.—The appellant Aye Maung and 9 other accused :—(i) San Tun (*a*) Thamada, (ii) Ba Maung, (iii) Maung Lu, (iv) Maung Gale, (v) Mya Din, (vi) Aung Shein, (vii) U Pe Than

Criminal Appeal No. 495 of 1955.

Criminal Reference No. 37 of 1955.

* Appeal from the order of U Ne Lin, 2nd Special Judge of Tharrawaddy, dated the 22nd day of November 1955, passed in Criminal Regular Trial No. 19 of 1953.

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Nyun, (viii) Maung Tin Maung, and (ix) Maung Pu Lay, were tried before the 2nd Special Judge, Tharrawaddy, in his Criminal Regular Trial No. 19 of 1953 for the alleged murders of one Maung Nyein and 6 other persons, namely, Maung Saw (1), Maung Saw (2), Maung Su (*a*) Wet Gyi, Tin Ya, Kyaw Aye and Maung Shein, on the 6th of August 1953. The appellant was charged and tried under section 302 (1) (*b*) of the Penal Code, while the other accused were charged and tried under section 302 (1) (*b*) read with sections 34 and 109 of the Penal Code. The deceased persons were said to be members of a Village Defence Unit which was stationed at Kyibinsingaung Village in Nattalin Township. Accused U Pe Than Nyun is the Member of Parliament for Nattalin, and also the Chairman of the local AFPFL and ABPO Organizations. Accused Maung Ba Maung is a "Myeya-Wundanhmu" of the Nattalin ABPO of which accused Maung Tin Maung is the Secretary. The trial of these accused lasted more than two years and ultimately accused Mya Din, Aung Shein and Pu Lay were discharged, while the remaining accused San Tun (*a*) Thamada, Ba Maung, Maung Lu, Maung Gale, U Pe Than Nyun, and Maung Tin Maung were acquitted. The appellant alone was found guilty of the offence of premeditated murder for causing the death of the 7 persons above-named. He was sentenced to death. Hence this appeal; and also the usual reference for confirmation of the death sentence under section 374 of the Criminal Procedure Code.

The case for the prosecution as could be gathered from the trial proceedings is shortly this. About the middle of 1953 owing to the prevalence of general lawlessness in the wake of insurgency in certain parts of Paungde and Nattalin Townships, Bo Ye Chit (PW 10) with a section of "Sitwundans" was detailed

for duty by the War Office in Rangoon for restoration of law and order in those places. This assignment not only included active military operation, but also re-organization and regrouping of some Village Defence Units to which, where necessary, Bo Ye Chit was authorized to issue fire-arms. One of the Village Defence Units which was re-organized by Bo Ye Chit was the one comprising the 7 murdered persons of whom Maung Saw (1) was said to be the leader, and in July 1953 this Unit was sent to Thayagon and Kyibinsingaung villages for duty. Maung Saw (1) (deceased) was also a Joint Secretary of the ABPO, Nattalin, and the evidence shows that he and his people fell foul with the appellant and the other accused, owing to personal animosity said to be existing between Bo Aung Din (PW 1), the Secretary of the Nattalin AFPFL, and U Pe Than Nyun, M.P. (Nattalin) and the President of Nattalin AFPFL. According to Bo Aung Din (PW 1), Bo Ye Chit (PW 10) was ordered by the War Office to restore law and order in the relevant areas and that he and Bo Ye Chit re-organized various Village Defence Units of which the Unit composing deceased Maung Saw (1) and 6 other persons was one. Arms were also issued to this Unit under the direction of Bo Ye Chit. He stated that this Unit led by Maung Saw (1) was a recognized unit lawfully constituted under the direction of the War Office as well as by the local AFPFL and the Army stationed in the area. He, however, asserted that U Pe Than Nyun did not approve of the formation of Maung Saw's Village Defence Unit under the direction of Bo Ye Chit and himself and the reason, as could be gathered from Bo Aung Din's statement, appears to be that Bo Aung Din had made some serious allegations against U Pe Than Nyun to the Parliamentary Secretary U Tin

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Maung, M.P. from Paungde, to the effect that U Pe Than Nyun was responsible for the formation of a unit called "Mahtoo Tat" which was engaged in unlawful activities, such as dacoity and kidnapping in and around Paungde and Nattalin. It thus appears that the relationship between Bo Aung Din and his followers on one hand, and U Pe Than Nyun, M.P., and his followers on the other was anything but cordial. The alleged misdeeds of U Pe Than Nyun were said to have been reported even to the Central AFPFL, Rangoon, but without results. Reports were sent in to the Tapun Police Station by some of the accused that Maung Saw and his men were "rebels" and that they were masquerading with illicit arms round about Thayagon; but the police took no action on those reports, because they found that Maung Saw's group was no other than the one reorganized by Bo Ye Chit with the approval of Bo Aung Din. The police were perhaps unaware of the strained relationship existing between Bo Aung Din, the Secretary of the local AFPFL, and U Pe Than Nyun, the Chairman thereof. On or about the 22nd July 1953 a meeting of the Executive Committee of the Nattalin ABPO was held presided by U Pe Than Nyun; and there were present, among others, U Tha Hsan (PW 6), accused Maung Ba Maung, accused Maung Gale, accused Maung Tin Maung, and also the deceased Maung Saw (1). At that meeting, the prosecution story goes, a decision was made that Maung Saw's Village Defence Unit stationed at Kyibinsingaung should be disarmed, that the arms be surrendered to Bo Ye Chit, and that the Unit itself should go back to Paukkon Village. But, Maung Saw (1) refused to give effect to the decision arrived at, saying that he would take orders only from Bo Ye Chit who had constituted the Defence Unit.

Maung Saw's refusal greatly annoyed U Pe Than Nyun, and the evidence shows that on the 28th July 1953, U Pe Than Nyun in his capacity as the Chairman of the Nattalin ABPO sent the letters, Exhibits "ဝ" and 3 to Maung Saw informing him that the Nattalin ABPO would have nothing to do with him and his men any more, and that they would be treated as "rebels" with effect from 23rd July 1953. Copies of the above letters were also sent to the Police Stations, Nattalin and Tapun, and also to the Army stationed at those places. Maung Saw and his Unit, however, refused to comply with the demand and continued to stay on at a *phongyi kyaung* which was on the northern end of Kyinbinsingaung Village. The "ammunition" of Maung Saw's Unit was said to be two Sten-guns, 8 rifles and a *dah*, and the personnel, 13 rank and file.

At this stage the prosecution story will be told in the way Maung Than Maung (PW 2), an approver in the case, has unfolded at the trial Court. He happened to meet Chit Tun (an absconding accused) at Tapun on the 4th of August 1953 at about 7 a.m. Chit Tun took him to Kyin Shwe's house where he met the accused Maung Gale. The four persons, namely, Kyin Shwe, Maung Gale, Chit Tun and Than Maung, then went to Nattalin and met U Pe Than Nyun at his house. While at that house they met the appellant Aye Maung, accused San Tun (*a*) Thamada, Ba Maung, Maung Lu, and other unknown persons. At U Pe Than Nyun's house a discussion to do away with Maung Saw's Unit took place. U Pe Than Nyun was said to have told his men, while having a drink in his house "ကျီးပင်ဆင်ခဂါဒ်းမှာ ဗိုလ်အောင်ဒင်၏ဘဝ်သားမောင်စောတို့ရှိတယ်၊ မင်းတို့သွားပြီးတိုက်ရမယ်။ ချောင်းကမ်းပါးက ကာကွယ်ရေးတဝ်သားတွေကိုခေါ်ပြီးဇီးပင်ကွေ့ဗိုလ်ရုံကိုသွား၊ ဗိုလ်ရုံမှာစစ်သားများကို အကူအညီပို့ထားတယ်။" When they received this

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instruction from U Pe Than Nyun, Chit Tun was said to have asked U Pe Than Nyun what they should do with those men if they were arrested; and U Pe Than Nyun was said to have told that since Maung Saw's men had been declared to be rebels they were not to be brought back, but they were to be killed. Having received this instruction, Maung Hla Than (PW 15) and Maung Khant (PW 16) accompanied by some other villagers who belonged to the Village Defence Unit and others, including the approver Than Maung, proceeded to Zibingwai Bungalow, and they contacted the 22nd UMP and also Peace Guerrilla Force stationed there. These people numbering about 60, including the appellant and other accused, marched towards Kyinbinsingaung Village at about 2 a.m. the following morning, Kyibinsingaung being about 3 miles to the north of Zibingwai Bungalow. When they arrived at a spot about 4 furlongs away from the village, at about 5 a.m., the party split into groups and commenced attacking Maung Saw's party who were then said to be asleep in the *phongyi kyaung*. Maung Saw's party was then composed of Maung Saw (1), Maung Saw (2), Maung Su (*a*) Wet Gyi, Tin Ya, Kyaw Aye, Maung Nyein, Maung Sein and Tun Aye (PW 12). The attacking party fired for about 20 minutes and not long afterwards Maung Saw and his men surrendered dropping all their arms and ammunition. Maung Saw and his men were captured and taken to the house of one Daw On Nyun said to be the mother-in-law of the absconding accused Chit Tun. They were all tied up with ropes, except one person because of a wound on his thigh. The captured men got to Daw On Nyun's house at about 7 a.m. and the appellant Aye Maung came upon the scene at about 1 p.m. and then fastened more ropes upon the captured men. The appellant,

together with Chit Tun and Ye Aung (the absconding accused), was said to have ordered the 7 captured men to be taken down towards the south of Kyibinsingaung Village. The appellant was also said to have ordered the approver Than Maung (PW 2), Maung Hla Than (PW 15) and Maung Khant (PW 16) to accompany him while marching down the captives towards the south of Kyibinsingaung Village. The captives were taken to the bank of a *chaung*, about 2 miles towards the south of the village, and there the appellant was said to have cut Maung Su *(a)* Wet Gyi with a *dah*, while the other accused were said to have surrounded the captives from a short distance. After cutting Maung Su *(a)* Wet Gyi, the appellant cut two other captured men whose hands were tied up together. The absconding accused Chit Tun and Ye Aung commenced firing at the captives with their Sten-guns. The wounded man on seeing the fate of his comrades jumped into the *chaung*, but he was also shot down by the absconding accused Ye Aung. The appellant was then said to have ordered Maung Hla Than (PW 15) to pull down the captured men whom he had cut into the *chaung*. Hla Than did so. The appellant and his party then went back to Zibingwai Bungalow where the appellant was said to have warned the other accused and his followers not to divulge anything about the incident that had taken place to anybody. This is the gist of what the approver Than Maung had to say about the alleged murders of Maung Saw and his men by a group of persons led by the appellant and other accused.

The prosecution case further reveals that soon after the commission of the alleged murders, one U Tha Hsan (PW 6), an Executive Committee Member of the Nattalin ABPO, conveyed the news to Bo Aung Din (PW 1) and Bo Ye Chit (PW 10)

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who at once contacted the UMP officers at Zibingwai Bungalow. They met Bo Maung Maung (UMP officer), at the Bungalow and enquired from him about the fate of Maung Saw and his men. Next, with the help of Captain Hpaw Htaw Htang (PW 3) of the 2nd Kachins Battalion stationed at Paungde and with the aid of some local police and members of the Village Defence Unit, Bo Aung Din and his party made searches in and around Kyibinsingaung Village for the bodies of the murdered persons. Only the dead body of Maung Nyein was discovered about 3 furlongs away from the scene of crime. The dead body was duly identified, *vide* the Exhibit "∞" photograph. The dead bodies of other persons were not recovered. From the number of injuries found on the dead body of Maung Nyein, incised wounds and gun-shot wounds, we have not the slightest doubt that he had been murdered. On the very day Maung Nyein's dead body was discovered, *i.e.*, 8th August 1953, Bo Aung Din (PW 1) lodged the First Information Report, Exhibit "∞" at the Nattalin Police Station. Captain Hpaw Htaw Htang (PW 3) also seized the Sten-guns, rifles and other locally-made guns, together with ammunition (now in exhibits) from Bo Maung Maung at Nattalin, which were said to have been those given up by Maung Saw and his men when they were attacked and captured on the day in question. Inspector U Saw Tha (PW 36) of the Criminal Investigation Department took up the investigation of the case and on 12th August 1953 the appellant Aye Maung, accused San Tun (*a*) Thamada (since acquitted) and accused Ba Maung (since acquitted) were arrested. Accused Maung Lu and Maung Gale (since acquitted) were arrested on 19th August 1953. Accused Mya Din (since discharged) was arrested on 22nd August

1953. Accused Aung Shein (since discharged) was arrested on 19th September 1953. Approver Than Maung was arrested on 28th September 1953 and he was produced before the 2nd Additional Magistrate, Zigôn, before whom he gave the confession, Exhibit "ခ." Accused U Pe Than Nyun (since acquitted) was arrested on the 3rd November 1953, while the remaining accused Tin Maung (since acquitted) and Pu Lay (since discharged) were arrested on 9th November 1953.

The conviction of the appellant Aye Maung by the trial Court is found to have been based upon the evidence of approver Than Maung (PW 2), U Po Hnit (PW 4), Maung Tun Aye (PW 12), Maung Hla Than (PW 15) and Maung Khant (PW 16). U Po Hnit (PW 4) could merely speak about seeing the captured men, including Maung Saw, being taken away to the south of Kyibinsingaung Village, by some persons in uniform; but he was unable to identify any one of those persons in uniform. Maung Tun Aye (PW 12) is said to be a member of Maung Saw's party, who escaped from being captured by the appellant's party. He could neither identify the appellant nor any of the appellant's men. He could only say that some UMP personnel attacked Maung Saw's men and they had to surrenderto them. Maung Hla Than (PW 15) and Maung Khant (PW 16) are admittedly persons who accompanied the appellant, when the appellant was said to have killed two of the captives near the *chaung*. These two witnesses stated before the Court that they even surrounded the captured men so as to prevent them from running away, while they were being hacked to death. They also admitted that they even helped in the disposal of the murdered men by throwing them into the river at the behest of the appellant. They

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were threatened not to disclose what they had seen to anybody on pains of death. They did not disclose what they had seen to any one until the police questioned them. According to the police officer U Saw Tha (PW 36) who investigated the case, Maung Khant was examined on 23rd August 1953 at Nattalin and Hla Than was examined on 27th September 1953 at Tapun. The approver was said to have given his first statement on 28th September 1953 at Tapun Police Station where he was in custody for some time. It was not until the next day was he produced before the Magistrate for recording of confession. There is nothing in the evidence of the investigation officer concerning the movements of Maung Hla Than (PW 15) and Maung Khant (PW 16) either before or after they had given their statements, or whether they had opportunity to meet Than Maung, the approver, any time before or after giving his confession. It has been urged upon us in appeal by the appellant's Counsel that the conviction of the appellant having been solely based upon the approver's statement, and the evidence of Hla Than (PW 15) and Maung Khant (PW 16) who are in fact, accomplices, it is unsustainable. In other words, it is contended that the approver's testimony, so far as the appellant's complicity is concerned, was uncorroborated, except by the testimony of the two accomplices and that as such, the conviction of the appellant was entirely wrong. There is much substance in this submission, and we are prepared to fall in line with it. We have carefully analysed the evidence of Maung Hla Than (PW 15) and Maung Khant (PW 16) and we have not the slightest doubt that they are accomplices in the crime. It is clear from their own testimony given before the trial Court that they accompanied the appellant right up to the

place where the alleged murders were committed, that they surrounded the captives so that they might not escape while the alleged cutting took place, and that they even helped in the disposal of the bodies soon after the alleged murders. They also conceded that atrocious crimes were committed to their knowledge and in their immediate presence, but that they failed to disclose the fact to persons in authority. The only excuse they could offer for their silence was that their lives had been threatened should they disclose to any one. We are unable to agree with the learned trial Judge in his finding that these two witnesses are not accomplices; and we regret to note that the learned trial Judge has not fully appreciated the material facts and circumstances set out in *Kyaw Hla Aung and one* v. *The Union of Burma* (1). No doubt, the question whether a witness is or is not an accomplice is a question of fact in each case. But in the context of the facts and circumstances available in the present case under appeal we cannot hold otherwise than that the two witness in question are accomplices. In *Kyaw Hla Aung and one* v. *The Union of Burma* (1) the witnesses who were found to be accomplices of the crime merely accompanied the appellant Kyaw Hla Aung to the side of a creek, they then went across the creek with the murdered persons; and they did not run away at the time of the murder or after the murder, but helped to dispose of the dead bodies. These acts and omissions on their part were held to be sufficient to brand them as accomplices being accessories after the fact. Now in the case under appeal the two witnesses Hla Than and Maung Khant were not mere passive onlookers, but they actively concerned themselves by surrounding the captives—keeping them

(1) (1949) B L.R. 582.

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at bay so to say—while the appellant and his henchmen were engaged in cutting and shooting them. They also helped in the disposal of the dead bodies by throwing them into the *chaung*. They fully knew that they had done something in the commission of atrocious crimes by the appellant and his people; and yet they remained silent until they were traced by the police before whom they gave their respective statements. Having regard to all these facts and circumstances, we have no hesitation in holding that these two witnesses are accomplices.

Section 133 of the Evidence Act lays down that an accomplice is a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. But section 114, Illustration (*b*) of the Evidence Act lays down that the Court is entitled to presume that an accomplice though a competent witness is not worthy of credit unless he is corroborated in material particulars. It has been repeatedly held that section 133 of the Evidence Act must be read in conjunction with Illustration (*b*) of section 114, both being on the same subject in the same enactment. Invariably, we start with the presumption against the trustworthiness of an accomplice; and unless there are exceptional circumstances, we refuse to convict an accused person on the uncorroborated evidence of an accomplice. This principle in the evaluation of testimony of an approver and/or an accomplice in the guise of a witness for the prosecution has, we may say, received judical sanction by a *catena* of decisions of our Courts, the latest of which being *Ali Meah* v. *The Union of Burma* (1). As have already been observed

(1) Criminal Appeal No. 3 of 1954 of the Supreme Court of the Union of Burma.

by us, besides the evidence of the approver and that of the two accomplices Maung Hla Than and Maung Khant, there is not a shred of evidence to connect the appellant with the alleged murder of Maung Saw and 6 other persons. The evidence that has been led by the prosecution in so far as it affects the appellant is only up to the stage when he was seen in the company of other accused, and when the captives were being tied with ropes and huddled together on a bench below Daw On Nyun's house, Daw On Nyun being the mother-in-law of one of the absconding accused. Beyond that stage no independent witnesses, except the three accomplices, including approver Than Maung, ever testified regarding what appellant had done in the alleged murders.

The appellant himself gave evidence on oath at the trial and he denied *in toto* ever participating in the alleged murders. He maintained that the UMP stationed at Zibingwai Bungalow and some Village Defence Units were responsible for the apprehending of Maung Saw and his people.

The learned Government Advocate appearing on behalf of the respondent drew our attention to the decision in *Nga Pauk* v. *The King* (1) and on that authority he contended that Hla Than and Maung Khant could not be treated as accomplices by mere assistance given in the disposal of the dead bodies. We have examined the facts and circumstances in the said case and we must hold that they are clearly distinguishable from those obtaining in the present case. There the facts clearly indicate that the witnesses concerned did nothing beyond the disposal of the dead bodies; but in the present case in view of the facts already indicated above the two witnesses

(1) A.I.R. (1937) Ran. 513.

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are on their own showing guilty associates in the commission of the crimes in question, and that they had a conscious hand in perpetrating them. We cannot therefore accept the contention of the learned Government Advocate. It is also urged upon us by the learned Government Advocate that the evidence of the two witnesses, even if they could be treated as accomplices, should be relied upon because they could not be said to have colluded in making the statements they have done before the Court, so far as the appellant's complicity was concerned, and he relies upon the full Bench decision in *The King* v. *Nga Myo* (1). We are unable to accept this contention either. There is no evidence whatsoever on the record to enable the Court to arrive at a clear finding that there was no opportunity for collusion between the accomplice before they gave their evidence. The Investigating Officer was never examined on this point and in the absence of such evidence we cannot presume that opportunity for collusion has been totally excluded to enable us to safely rely upon the testimony of the accomplices. Roberts C.J. who delivered the judgment of the Full Bench in *The King* v. *Nga Myo* (1) observed:

> " Finally, we are of opinion that, in all cases in which the prosecution relies upon the evidence of two or more accomplices or approvers and it is likely that the Court will be asked to convict upon their statements because the circumstances show that they were made without collusion, there must be on the record sufficient evidence from which the Court can arrive at a clear finding on this point: in such cases the evidence of the investigating officer will often be extremely useful."

After a careful survey of the whole case, we are constrained to hold that besides the testimony of the accomplices, including that of the approver Than

(1) (1938) R. L. R. 190 at 212

Maung (PW 2), there is no other independent testimony from extraneous sources to support in material particulars the evidence of these three persons, and we feel that it will be extremely unsafe to convict the appellant on their testimony alone.

Therefore, the conviction and sentence of death passed upon the appellant Aye Maung under section 302 (1) (*b*) of the Penal Code are set aside, and he will be acquitted so far as this case is concerned.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

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

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Jan. 16.

MAUNG MAR (*alias*) MAUNG MYINT (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

High Treason Act, 1948, ss. 2, 3 (1) —S. 395, Penal Code—Criminal Procedure (Temporary) Amendment Act, 1947.

The only overt act proved against the appellant was that he was a member of White *Ychaws* who had disarmed and robbed the police out-post of some arms and ammunition.

He was convicted and sentenced to death under s. 3 (*1*), High Treason Act, 1948.

The question is whether from this fact alone the appellant could be held guilty of High Treason as defined in s. 2 of the High Treason Act, 1948.

Held: From this fact alone, it cannot be inferred that the object was to wage war against the Union of Burma or of its Constituent Units. It is not what a number of persons are dubbed, but what their intention is that makes them rebels.

In order to constitute an offence under s. 3 of the High Treason Act, the purpose and intention must be of a general public nature as contradistinct from a private one and the prosecution must prove that the object of the multitude is of a general public nature as distinguished from a merely private one.

Ba Maung v. *The Union of Burma*, (1950) B.L.R. p. 131, followed.

Gyo Ker v. *The Union of Burma*, (1950) B.L.R. p. 300, referred to.

Ba Boo and others v. *The Union of Burma*, (1952) B.L.R. p. 83, distinguished.

S. A. A. Pillay, Advocate, for the appellant.

Ba Kyaing (Government Advocate) for the respondent.

U SAN MAUNG, J.—In Criminal Regular Trial No. 18 of 1954 of the Special Judge, Myingyan,

* Criminal Appeal No. 1 of 1956. Appeal from the order of the Special Judge of Myingyan, dated the 16th day of December 1955 passed in Criminal Regular Trial No. 18 of 1954.

the appellant Maung Mar (*a*) Maung Myint was convicted of the offence punishable under section 3 (*1*) of the High Treason Act, 1948 and was sentenced. The facts of the prosecution case which may be gathered mainly from the evidence of U Po Yi (PW 9), the then Police Station Officer of Kamye Police Station, are briefly these :—

On the 22nd of Februray 1949 when the town of Myingyan was occupied by certain insurgents Government administration practically came to an end in Myingyan District. The police officers who were stationed at Kamye evacuated to Thabutsu village. With them were about 60 armed levees. With the cooperation of the village elders the police personnel set up a temporary police station in a place known as Letsutkya jungle. However, about 10 days later, the levees had to be sent to Myingyan under the orders of superior authorities. Therefore only ten or twelve police constables were left behind at Letsutkya jungle. About ten days after the levees had left, a group of White *Yebaws* estimated at about a hundred strong and led by Bo Soe Naing and the appellant Maung Mar came and surrounded the police party and disarmed them after making them assemble at Ywathit Monastery. A Sten-gun, a Tommy-gun and several rifles were seized in addition to hand-grenades and ammunition. As Maung Hla Thein and Maung Yone, two of the constables were away at Lehoung village, U Po Yi had to accompany the appellant Maung Mar and the group of *Yebaws* to that village to seize a Bren-gun and a rifle from them. After seizing the arms and ammunition the appellant Maung Mar went away with the *Yebaws* and was not seen again till he surrendered to the District Superintendent of Police, Myingyan, Mr. R. P. Kirkham (DW 6) when civil administration was

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restored to Myingyan in the year 1949. Maung Mar was given a certificate to the effect that amnesty had been granted to him. On the 13th of May 1951, however, U Po Yi lodged a First Information Report relating to the seizure of the arms and ammunition by the White *Yebaws* including Maung Mar led by Maung Mar and Bo Soe Naing, and Maung Mar who was subsequently arrested in Toungoo was sent up for trial in 1954 for an offence punishable under section 395 of the Penal Code. This case, which was Criminal Regular Trial No. 34 of 1954 of the 2nd Additional (Special Power) Magistrate, Myingyan, was however withdrawn and the present one under section 3 (*1*) of the High Treason Act, 1948, was subsequently instituted against him.

Maung Mar's defence was that he joined the White *Yebaws* of Myingyan District after the disruption of civil administration consequent on the occupation of Myingyan town by the communists. He said that his object in joining the White *Yebaws* was to get his revenge against the communists who were responsible for the death of his wife, that the White *Yebaw* group of which he was a member cooperated with the Government forces in reoccupying Myingyan and that he himself surrendered to the police as soon as civil administration had been restored to Myingyan. He admitted having accompanied Bo Soe Naing when the latter went to disarm the police under Police Station Officer U Po Yi but pleaded that he merely did so as a follower of Bo Soe Naing and that the object in taking away the arms from the police officer was to fight the communists.

The learned Special Judge, however, came to the conclusion that the appellant Maung Mar joined the White *Yebaws* who were in open revolt against the Government and that on the authority of the ruling

in *Ba Boo and others* v. *The Union of Burma* (1) the appellant must be deemed to be guilty of the offence punishable under the High Treason Act.

However, the only overt act which had been proved against the group of White *Yebaws* of which the appellant Maung Mar was a member was that they had disarmed the police party who were temporarily stationed at Letsutkya jungle. The question is whether from this fact alone it can be inferred that the group of White *Yebaws* led by Bo Soe Naing and Maung Mar had committed offence of high treason as defined in section 2 of the High Treason Act, 1948. There is no evidence adduced by the prosecution to show who were the insurgents responsible for occupying Myingyan town in February 1949 and thereby disrupting civil administration in Myingyan District. Maung Mar's story is that the communists were responsible for this and there is nothing in the prosecution story to the contrary. U Po Yi (PW 9) and other witnesses for the prosecution referred to the group of White *Yebaws* led by Bo Soe Naing and the appellant as "ဆောင်းကျိန်းသူ". However, it is not what a number of persons are dubbed but what their intention is proved to be, that makes them rebels. As held in *Ba Maung* v. *The Union of Burma* (2) under section 3 of the High Treason Act in order to constitute an offence under the Act the purpose and intention must be of a general public nature as contradistinct from a private one and the onus is upon the prosecution to show that the object of the multitude which rise and assemble to attain the same by force and violence is of a general public nature as distinguished from a merely private one. [See also *Gyo Ker* v. *The Union of Burma* (3)].

(1) (1952) B.L.R. p. 83. (2) (1950) B.L.R. p. 131.
(3) (1950) B.L.R. p. 300.

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In the case now under consideration the group of White *Yebaws* led by Bo Soe Naing and Maung Mar did no doubt obtain arms from a small group of police officers who were stationed in Letsutkya jungle by a show of arm. However, by that act alone it cannot be inferred that the object was to wage war against the Union of Burma or any constituent Unit thereof or to overthrow an organ of the Union of Burma or of its Constituent Units. The police party appears to be more or less in hiding in the jungle and it may be that the White *Yebaws* led by Bo Soe Naing and Maung Mar thought the arms in the possession of the police might be better utilized in fighting the communists. Whatever it may be it cannot be said that in the present case the prosecution has proved anything beyond the fact that the intention of the White *Yebaws* led by Bo Soe Naing and Maung Mar was any other than robbing a small group of police officers who were then stationed in the jungle. The case of *Ba Boo and others* v. *The Union of Burma* (1) is distinguishable, as in that case it was an admitted fact that the group in which Ba Boo and others were found were insurgents up in arms against the Government.

For these reasons we would set aside the conviction and sentence of the appellant under section 3 (*1*) of the High Treason Act and instead convict him of an offence under section 395 of the Penal Code. As the offence was committed while the Penal Code and Criminal Procedure (Temporary) Amendment Act, 1947 (Burma Act No. LXII of 1947) was in force, the only punishment for an offence under section 395 of the Penal Code was death or transportation for life. Therefore, although in our view the appellant deserves lenient punishment in view of the fact that he not

(1) (1952) B.L.R. p. 83.

only surrendered promptly after the restoration of the civil administration but induced the surrender of several other White *Yebaws*, we have no option but to sentence him to transportation for life. He will therefore be sentenced accordingly.

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U CHAN TUN AUNG, C.J.—I agree.

APPELLATE CRIMINAL.

Before U Aung Khine, J.

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Jan. 19.

MAUNG MAUNG MYA AND ONE (APPLICANTS)

v.

THE UNION OF BURMA AND ONE (RESPONDENTS).*

Public Property Protection Act—S. 6 (1) read with s. 9—S. 239, Criminal Procedure Code—Joint trial.

The two applicants and the 2nd Respondent were jointly tried under s. 6 (*1*) read with s. 9 of the Public Property Protection Act. They threw the blame on each other and the two applicants' petition for a separate trial to the Trial Magistrate and the Sessions Judge failed. They applied in revision to the High Court.

Held: S. 239, Criminal Code is inapplicable.

A separate trial is the rule and joint trial is the exception and if there be any risk of a misjoinder of charges by several accused being tried together, separate trial should be ordered.

Samiullah Sahib and others v. *King-Emperor*, A.I.R. Mad. 177; *Po Lan* v. *The King*, (1947) R.L.R. 379.

Order of the Sessions Judge set aside.

P. K. Basu, Advocate, for the applicants.

Ba Kyaing (Government Advocate) for the respondents.

U AUNG KHINE, J.—The two applicants Maung Maung Mya and A. M. Sherazee together with the 2nd respondent U Sein were sent up for trial under section 6 (*1*) read with section 9 of the Public Property Protection Act in Criminal Regular Trial No. 77 of 1955 in the Court of the Second Additional Magistrate, Mandalay. The applicants

* Criminal Revision No. 167 (B) of 1955. Review of the order of the Sessions Judge of Mandalay, dated the 3rd day of October 1955 passed in Criminal Revision No. 27 of 1955, arising out of the order of the 2nd Additional Magistrate, Mandalay, in his Criminal Regular Trial No. 77 of 1955, dated the 13th July 1955.

are contractors and builders and they hold several contracts for building several Government structures. The respondent U Sein is a timber merchant and he had entered into an agreement with the applicants to supply them with teak and *In* timber required by the applicants.

On 20th January 1955 in the possession of the applicants were found some quantity of timber alleged to belong to the State. The applicants claimed that the timber so found was supplied by the respondent U Sein and produced vouchers to substantiate their claim. U Sein, on the other hand, denied this and said that the vouchers were faked ones. On these facts obtained in the case a prosecution was launched jointly against the applicants and the respondent U Sein.

In the trial Court the applicants filed a petition praying that for reasons given by them they and U Sein be tried separately. Their petition was dismissed and their attempt to get the order of the learned Magistrate set aside before the Sessions Court also met with failure. Hence their revision application.

It is obvious from the set of facts set out above that in their respective defence the parties are bound to throw the blame on each other. The learned Sessions Judge has expressed his opinion that it will be better to wait and see whether they would actually do so eventually. If such course were adopted much time and labour would have been wasted by them if eventually they do put the blame on each other. From this stage it has become really a matter of doubt whether all the three persons concerned could be tried together.

The provisions governing the joint trial of accused persons are to be found in section 239 of

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U AUNG KHINE, J.

the Criminal Procedure Code. In view of the attitude adopted by the respective parties from the early stages, it is doubtful whether section 239 would be applicable. In *Samiullah Sahib and others* v. *King-Emperor* (1) it was pointed out that under the general rules whenever the applicability of section 239 is doubtful, it is far better that it should not be applied and that accused should be tried separately. In *Po Lan* v. *The King* (2) Gledhill, J. observed that when the two accused throw the blame upon each other, their joint trial is bad for misjoinder. There is another factor which strikes me as pertinent to this case is that the applicants may wish to examine the respondent U Sein as their witness. They will not be able to do so if U Sein is tried jointly with them. It is true that U Sein may elect to give evidence but there is no guarantee that he will do so. It is a rule of law that whenever an accused person is sent up for trial he should not, in any way, be hampered or prejudiced in his defence. A separate trial is the rule and a joint trial is the exception and if there be any risk of a misjoinder of charges by several accused being tried together, separate trials should be ordered.

In the circumstances outlined above I would set aside the order of the learned Sessions Judge, Mandalay, confirming that of the Second Additional Magistrate, Mandalay, and direct that the two applicants Maung Maung Mya and A. M. Sherazee be tried separately from the respondent U Sein.

(1) A.I.R. (1927) Mad. 177. (2) (1947) R.L.R. 379.

APPELLATE CRIMINAL.

Before U Ba Thoung, J.

MAUNG PAN SAING AND ONE (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

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Jan. 5.

Penal Code, s. 302 (2)—S. 32 (1), Evidence Act—Statement made by a deceased person, when alive about the cause of death of another person is inadmissible in evidence.

An eye witness denounced the appellant to certain witnesses as being the murderer of the deceased and also lodged a First Information Report to the Police, denouncing the Appellant, but died before he could give any evidence in Court.

The Sessions Judge admitted this statement under s. 32 (*1*), Evidence Act and convicted the appellant on this sole denunciation.

Held : The statement of one dead person is not a relevant fact with respect to the question about the death of another person and is inadmissible in evidence under s. 32 (*1*), Evidence Act.

Kunwarpal Singh and another v. *Emperor*, A.I.R. (35) (1948) All. p. 170, approved.

Nil for the appellant.

Ba Pe (Government Advocate) for the respondent.

U BA THOUNG, J.—The appellants were convicted under section 302 (2) of the Penal Code for the murder of one Maung Aung Se at Ingone village, Magwe district on the 6th November 1950 and sentenced to suffer transportation for life by the Sessions Judge, Magwe.

The murder of Maung Aung Se took place in 1950, but as the accused were absconding, action was taken under section 512 of the Criminal Procedure Code

* Criminal Appeal No. 136 of 1955. Appeal from the order of the (U PE THANI Sessions Judge, sitting as 1st Special Judge of Yenangyaung, dated the 24th day of December 1954 passed in Criminal Regular Trial No. 20 of 1954.

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and their trial took place before the Sessions Judge only in July 1954. The most material witness Maung Kyaw Sein, who himself was a victim of attack along with the deceased Maung Aung Se, died about two months after the occurrence and after he had been discharged from the hospital where he received treatment for injuries received by him. This witness gave the first information report Exhibit (ဃ) at Taungdwingyi police station, but he died before he could give any evidence in Court. It appears from the evidence of Maung Phyo Saung (PW 2), that on the night of the occurrence, Kyaw Sein and Aung Se went to the paddy fields at Kyaunggone which is on the north-east of Ingone village, and that at about 8 or 9 o'clock that night, Kyaw Sein came back with *dah* cut injuries and told him that he was cut by Khin Maung, Kalagyi and Pan Saing ; and Kyaw Sein asked him to call for the headman. The headman U Maung Ko was sent for, and Kyaw Sein told the headman that as he and Aung Se were catching fish at the head of the stream, Pan Saing, Khin Maung and Kalagyi who were also catching fish at the lower part of the stream became unsatisfied, and hence he was cut by Kalagyi while Aung Se was cut by Pan Saing and that Khin Maung held the lamp while they were being cut, and that he came running back while Khin Maung, Kalagyi and Pan Saing were going after Aung Se. He told the headman to go after Aung Se, to be carried back to the village, and so Maung Chit Tin (PW 3) and Maung Po Hte (PW 4) were sent to carry Maung Aung Se. Maung Phyo Saung also deposed that Maung Kyaw Sein died about two months after the occurrence.

Maung Chit Tin (PW 3) deposed about Kyaw Sein who came running home that night about 8 or 9 o'clock and telling them that he had been cut with *dah*

by Kalagyi and that Aung Se had been cut by Pan Saing and Khin Maung. He told them to go after Aung Se, and so he (witness) and others went in search for Aung Se. They found the dead body of Aung Se in the field of Ko Po Hte and they brought the dead body to the village in a cart. Ko Po Hte (PW 4) gave similar evidence like Maung Chit Tin.

U Maung Ko (PW 5) the headman of Ingone village deposed that on being called by Maung Phyo Saung, he went with him and saw Maung Kyaw Sein with *dah* cut injuries on the head and on the hand; on enquiry Kyaw Sein told him that while he and Aung Se were catching fish, Khin Maung, Kalagyi and Pan Saing came and cut them with *dah*, that he was cut by Kalagyi and Aung Se by Pan Saing, while Khin Maung was holding the lamp; Kyaw Sein asked him to go and help Aung Se whom he could not say was still alive, as Kalagyi, Pan Saing and Khin Maung were still after Aung Se. He deposed that when the dead body of Aung Se was discovered, he went to have a look at the dead body which was lying with *dah* injuries in the paddy field of Po Hte. Dr. U Ba Tun (PW 9) who held the post mortem examination gave evidence that Aung Se received no less than fifteen injuries all incised wounds, caused by such a weapon like *dah* and that injuries Nos. 1, 2, 8 and 9 were sufficient to cause death in the ordinary course of nature. He gave evidence also that Kyaw Sein received three incised wounds caused by *dah* and that Kyaw Sein was discharged from hospital as cured on the 3rd December 1950.

These are all the evidence in this case as against the appellants. The rest of the witnesses are not important. The appellants gave evidence on oath denying that they cut Aung Se or that they went to the scene of occurrence at all.

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It will thus be seen that Maung Kyaw Sein, the most material witness in this case as he was the only one who actually witnessed the incident, could not give any evidence in Court, as he died about two months after the occurrence ; and it is to be considered whether his statements made to Maung Phyo Saung, Maung Chit Tin and the headman U Maung Ko on the night of the occurrence could be admitted in evidence under section 32 (*1*) of the Evidence Act. Section 32 (*1*) of the said Act reads :

* * * *

" Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases :—

(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

* * * *

In the case of *Kunwarpal Singh and another* v. *Emperor* (1) which was decided by a Bench of the Allahabad High Court, Raghubar Dayal, J. observed as follows :

" Section 32 (*1*), Evidence Act, makes the statement of a person who is dead a relevant fact when the statement is made by a person as to the cause of his death or as to any of the

(1) A.I.R. (35) (1948) All. p. 170.

circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. It follows that the statement of one dead person is not a relevant fact with respect to the question about the death of another person " ; and it was held that :

> " The statement of one dead person is not relevant fact with respect to the question about the death of another person and is not therefore admissible in evidence with respect to the incident of the attack which resulted in the death of such other person."

I respectfully agree with what has been laid down in the above case that the statement of one dead person is not a relevant fact with respect to the question about the death of another person and therefore it is not admissible in evidence with respect to the incident of the attack which resulted in the death of such other person.

In the present case the appellants were charged and convicted for the murder of Maung Aung Se solely on the statements made by Maung Kyaw Sein to Maung Phyo Saung, Maung Chit Tin and the headman U Maung Ko about the attack made by the appellants Maung Pan Saing, Maung Khin Maung and the absconder Kalagyi on Maung Aung Se. Maung Kyaw Sein died before he could give any evidence in Court although he had lodged the first information report, and the appellants never had a chance to cross examine him. I therefore hold that the statements made to Maung Phyo Saung, Maung Chit Tin and U Maung Ko by Maung Kyaw Sein who is now dead, about the attack made by the appellants on Maung Aung Se is not admissible in evidence. The learned Government Advocate also agrees with my view. Under these circumstances as the prosecution has not established the case against the appellants for the

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murder of Maung Aung Se, they must accordingly be acquitted.

The convictions and the sentences passed on the appellants Maung Pan Saing and Maung Khin Maung by the trial Court are therefore set aside, and they are acquitted so far as this case is concerned.

APPELLATE CRIMINAL.

Before U Ba Thoung, J.

MAUNG THEIN ZAN AND ONE (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

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Dec. 23

Unlawful Associations Act, s. 17(1)—Evidence Act, ss. 53, 67—A photographed copy of original letter, admissibility.

Held: A photographed copy of an original letter is inadmissible in evidence as secondary evidence, unless the original is proved.

Tun Tin for the appellants.

Ba Kyaing (Government Advocate) for the respondent.

U BA THOUNG, J.—The appellants have been convicted under section 17 (*1*) of the Unlawful Association Act and sentenced to undergo two years, rigorous imprisonment each by the Eastern Subdivisional Magistrate, Rangoon; they have appealed against their convictions.

The Communist Party (Burma) and the Red Flag Cultivators' Union were declared to be unlawful Associations, within sub-section (*2*) of section 15 of the Unlawful Associations Act by a Government Notification No. 53 which appeared in the *Burma Gazette* dated the 25th January 1947 (Exhibit A is a true copy); and the case against the appellants is that they are members of the Communist Party (Burma) and that they had assisted in the operations of the Unlawful Associations by distributing leaflets relating to the Tripartite Alliance of the Communist

*Criminal Appeal No. 318 of 1955. Appeal from the order of the Eastern Subdivisional Magistrate of Rangoon, dated the 7th day of May 1955 passed in Criminal Regular Trial No. 430 of 1954.

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Party, Burma, the Peoples Volunteer Organization and the Red Flag Communist Party.

It is alleged by the prosecution that on the 19th October 1954, U Tun Kyin (PW 2) the ward headman of U Wisara Quetthit received a written information from Police Station Officer U Kyaw Lin to the effect that Communist leaflets would be distributed in U Wisara Quetthit area on that night; and U Tun Kyin was asked to lie in wait with witnesses for the prosecution of those persons distributing the leaflets. U Tun Kyin along with the witnesses U Ba Thaw (PW 3) and U Sein Pe (PW 4) laid in wait near Maung Mya Maung's roadside stall, and at about 10 p.m. the two appellants came walking along Okkalapa Street in U Wisara Quetthit. The 2nd appellant Maung Soe Thein was alleged to be carrying a shan bag containing the leaflets, and it is alleged that the 1st appellant Maung Thein Zan dropped two leaflets at each stall. U Tun Kyin and U Sein Pe (PW 4) then went through the 6th lane while U Ba Thaw (PW 3) and U Ba Shin went through the 7th lane in U Wisara Road and they overtook the two appellants at the front of Maung Pwa's tea shop at the top of the 7th lane; two or three leaflets (Exhibit B) were found with the 1st appellant and two or three hundred of the same leaflets were found in the shan bag of the 2nd appellant. The two appellants were then taken to the Police Station. U Tun Kyin (PW 2), U Ba Thaw (PW 3) and U Sein Pe (PW 4) gave evidence as stated above. The leaflets (Exhibit B) relates to the joint statement made by the Communist Party (Burma), the P.V.O. and the Red Flag Communist Party (Burma) about their Tripartite alliance.

It is to be considered first whether the prosecution has established beyond doubt that the appellants

were found with the leaflets (such as Exhibit B) and distributing them in that locality on the night of the 19th October. In this respect the prosecution been relied on the evidence of U Tun Kyin, U Ba Thaw and U Sein Pe ; but the learned trial Magistrate has remarked that the evidence of these witnesses are not sufficiently strong or reliable to support a conviction in this case ; and I think the learned Magistrate was right in drawing the above conclusion from the evidence as appeared on record. No search list was made in this case, and the written information alleged to have been received by U Tun Kyin from P.S.O. U Kyaw Lin, could not be produced and U Kyaw Lin was not cited as a witness to show that he had given the written information to U Tun Kyin as alleged by the latter. Although these factors would not materially affect the case, they have at least caused some doubt as to the truth of the statements made by these prosecution witnesses.

The appellants are students of a night school at U Wisara Quetthit and their defence is that on the night of the 19th October 1954, they returned from their school about 9 p.m. with their companions. The 1st appellant Maung Thein Zan had some books in his hands while the 2nd appellant Maung Soe Thein had his books and other school paraphernalia in his shan bag. On reaching near Maung Pwa's tea shop Maung Thein Zan left Maung Soe Thein and his companion there and went away. A little later while Maung Soe Thein and his companions were in the tea shop, U Tun Kyin came along and asked for Maung Thein Zan. Maung Soe Thein replied that Thein Zan had gone home, and U Tun Kyin picking up the shan bag of Maung Soe Thein asked him whether it was his bag. When Maung Soe Thein said that it was his bag, U Tun Kyin,

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holding Maung Soe Thein's shan bag in one hand, put in some papers which he held in the other hand, and at the same time telling Maung Soe Thein that he arrested him for distributing the Communist leaflets. Maung Thein Zan was arrested from his house and both Maung Thein Zan and Maung Soe Thein were taken away to the Police Station. The appellants denied that they are members of any unlawful association and denied that they had distributed the leaflets. Their defence story is fully supported by the evidence of their defence witnesses. Maung Tin Shwe (DW 5) and Maung Maung Aye (DW 9) corroborated the 2nd appellant Maung Soe Thein that U Tun Kyin had a roll of leaflets in one hand when he picked up Maung Soe Thein's shan bag from the table, and their evidence lend support to the defence version that the leaflets were planted on Maung Soe Thein by U Tun Kyin. Besides, it is remarkable that not a single stall holder from the locality where the Communist leaflets were alleged to have been distributed by the appellants, has been cited as a witness to prove the distribution of those leaflets (Exhibit) by the appellants. Considering the evidence as a whole I am convinced that it has not been proved that the appellants were found with the leaflets (like Exhibit) and that they distributed the same on the night of the 19th October 1954. The learned Government Advocate has also conceded that this has not been proved beyond doubt.

Now the learned trial Magistrate convicted the two appellants solely on the Exhibit C. The Exhibit C is a photographed copy of a letter supposed to have been written by one Maung Aung Khin of the Rangoon Headquarters of the Red Flag Communist Party to one Maung Sein Min (*a*) Sein Maung of the Mandalay branch of the same party. It was dated

22nd November 1954 *i.e.* after the arrest of the two appellants in this case. In that letter it was stated that Yeni Thein Zan and Yeni Soe Thein have been arrested. The original of that letter was seized by an Inspector of Police U Tin Win from Maung Sein Min when the latter was arrested, and a case against whom is pending in one of the Courts at Mandalay ; and it is alleged that the original of that letter was filed as an exhibit in that case. The complainant U Myaing (PW 1) Deputy Superintendent of Police gave evidence to that effect, but he could not tell the numbers of the case against Sein Min, nor could he say in which Court it was instituted nor could he say whether the case has been decided or not. U Tin Win, who seized the original of that letter from Sein Min was not cited as a witness either. The original of the letter (Exhibit C) has not been proved, because the signature of Maung Aung Khin on the original letter has not been proved to be that of Maung Aung Khin, nor the writing on that letter has been proved to be in the hand writing of Maung Aung Khin as required under section 67 of the Evidence Act. The Exhibit C which is only the photographed copy of the original letter is therefore not admissible in evidence. The learned trial Magistrate admitted the Exhibit C in view of the first illustration to section 63 of the Evidence Act which reads : " A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original ". But the learned trial Magistrate has lost sight of the fact that the original of the letter Exhibit C itself has not been proved, and hence the photographed copy of that original letter which has not been proved could not be admitted as secondary evidence. The learned trial Magistrate has therefore erred in admitting the letter

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Exhibit C in evidence and in convicting the appellants relying on the Exhibit C.

For the reasons stated the convictions and the sentences passed on the appellants are set aside and they are acquitted so far as this case is concerned.

APPELLATE CIVIL.

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

NANAN DUBE (APPELLANT)

v.

SHREE KALI TEMPLE (RESPONDENT).*

H.C. 1956

Jan. 16.

Union Judiciary Act, s. 20—S. 11 (1) (a), *Urban Rent Control Act, 1948—Breach of a Condition under Consent Decree—Application under s. 14, Urban Rent Control Act—A condition incorporated in a Consent Decree is not an order made under s. 14* (1) *of the Urban Rent Control Act—The Court to exercise an independent discretion.*

Held : Breach of a condition of a Consent decree by judgment-debtor is no bar to his application under s. 14 of the Urban Rent Control Act.

A consent decree is a decree within the meaning of s. 14 (*1*) and in spite of the existence of such a Decree the Court has yet to exercise its independent judgment on an application made under this Section.

When the Court had already passed an order for stay of execution under s. 14 (*1*) of the Urban Rent Control Act, 1948, imposing a certain condition, a tenant who had broken that condition cannot again apply for stay of execution under s. 14 (*1*) of the Urban Rent Control Act, 1948.

K. S. Abdul Kader v. *Sri Kali Temple Trust*, (1949) B.L.R. 175, distinguished.

Chandra Bhan Singh v. *Kishore Chand Minhas*, Special Civil Appeal No. 6 of 1953, affirmed.

P. B. Sanyal for the appellant.

V. S. Venkatram for the respondent.

Judgment of the Bench was delivered by

U SAN MAUNG, J.—This is an appeal under section 20 of the Union Judiciary Act against the Judgment of U Ba Thoung, J., dismissing the appellant Nanan Dube's appeal against the

* Special Civil Appeal No. 1 of 1954, against the decree of U Ba Thoung, Judge, High Court of Rangoon in Civil Misc. Appeal No. 15 of 1952, dated the 26th September 1952.

H.C. 1956

NANAN DUBE v. SHREE KALI TEMPLE.

U SAN MAUNG, J.

respondent, the Trustee of Shree Kali Temple in Civil Miscellaneous Appeal No. 15 of 1952 of this Court. The facts are briefly these:

In Civil Regular Suit No. 1374 of 1950 of the City Civil Court, Rangoon, the plaintiff T. P. Pande, Managing Trustee of Shree Kali Temple sued the defendant-appellant Nanan Dube for his ejectment from Room No. 8 in House No. 296-306, Edward Street for non-payment of arrears of rent. The suit was one under section 11 (*1*) (*a*) of the Urban Rent Control Act, 1948. On the 31st of January 1951 the following order was recorded by the 4th Judge of the City Civil Court:

> "Counsel Present. Settlement effected. By consent there will be a decree as prayed for against the defendant on uncontested scale. Execution to be stayed so long as the defendant pays one month's rent towards the arrears of rent and cost along with the current rent on or before 8th of every month commencing from February 1951."

Thereafter the defendant-appellant defaulted payments due for the months of April, May and June so that an application for execution was filed by the plaintiff on the 20th of July 1951. The defendant then made three payments in July 1951 *i.e.*, on the 9th of July 1951, 25th of July 1951 and the 27th of July 1951. However, the learned 4th Judge of the City Civil Court by his order dated the 24th of October 1951 directed the execution of the decree for ejectment to proceed thereby rejecting the objection of the defendant that the application for execution should be dismissed. On the 20th of November 1951 the defendant filed an application under section 14 of the Urban Rent Control Act asking the Court to allow him to pay up the arrears of rent due and to rescind the decree for ejectment. The learned 4th Judge of the City Civil Court,

however, rejected this application by an order, the relevant portion of which reads :

" On 31st January 1951, for non-payment of the arrears of rent, by consent an order of ejectment had been passed against the applicant-judgment-debtor. Also, by consent, execution of the order of ejectment has been stayed so long as judgment-debtor pays one month's rent towards the arrears of rent and costs along with the current rent on or before the 8th of every month commencing from February 1951.

On 20th July 1951 the respondent-decree-holder applied for execution of the order of ejectment as judgment-debtor had failed to pay the instalment as ordered by the Court on 31st January 1951. As the Court finds that the applicant-judgment-debtor had failed to fulfil the terms of the consent order passed on 31st January 1951, the Court on 24th October 1951 has allowed the application of the respondent-decree-holder to execute the order of ejectment.

On 20th November 1951 judgment-debtor makes this application to allow him to pay all the arrears of rent and to have the order of ejectment rescinded. In my opinion this application cannot be allowed :—The applicant-judgment-debtor had obtained an order for stay of execution of a decree for his ejectment on a certain condition, passed on 31st January 1951. In C.E. No. 594 of 1951 of this Court it has been held that he had broken the aforesaid condition, and application to execute the order of ejectment had been granted on 24th October 1951. The tenant applicant cannot file an application after another and claim a concession upon concession. [*See* the case of *K. S. Abdul Kader* v. *Sri Kali Temple Trust* (1)]. For the aforesaid reasons, in view of my order dated 24th October 1951 passed in C.E. No. 594/1951 this application must be rejected. Tenant cannot be allowed to reagitate the same question. The application is dismissed with costs. Pleader's fee Rs. 10 allowed."

On appeal by the defendant-appellant Nanan Dube, the learned Judge on the Appellate Side dismissed the appeal. In so doing the learned Judge observed :

" It is quite apparent from the above that it is a consent decree and the appellant has no right to go behind this decree.

(1) (1949) B.L.R. 175.

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The appellant did not take any action to have it set aside, or to have an order under section 14 of the Urban Rent Control Act. The appellant cannot contend that it was an unlawful decree, because there is nothing in section 14 of the Urban Rent Control Act which says that the suit for ejectment could not be compromised and a consent decree passed in it."

In this appeal it is contended by the learned Advocate for the appellant that the learned Judge's decision is wrong in view of the observations of a Bench of this Court in *Chandra Bhan Singh* v. *Kishore Chand Minhas* (1) which confirmed the judgment of a single Judge of this Court in Civil Miscellaneous Appeal No. 27 of 1952. In that case a decree for the ejectment of the defendant for non-payment of arrears of rent was passed on a compromise between the parties and one of the conditions was that the decree should remain unexecutable so long as the defendant paid a certain portion of the arrears of rent along with the current rent, wrongly designated as mesne profits. It was held that this condition which was incorporated in the decree could not be considered to be an order made under section 14 (*1*) of the Urban Rent Control Act. The Bench observed as follows:

> "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 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."

Further the Bench observed that a consent decree was a decree within the meaning of section 14 (*1*) of the Urban Rent Control Act, 1948 and that notwithstanding the existence of a consent decree the Court

(1) Special Civil Appeal No. 6 of 1953.

must exercise its independent judgment under section 14 (*1*) on an application being made to it by a judgment-debtor. The principles underlying the decisions in the case of *Chandra Bhan Singh* v. *Kishore Chand Minhas* (1) are applicable to the facts of the present case. It is common ground that both the decree for ejectment and the condition for the stay of execution of the decree on payment of a portion of the arrears of rent along with the current rent, were by consent of parties. Therefore the Court has yet to exercise an independent judgment on an application being made to it under section 14 (*1*) of the Urban Rent Control Act.

The case of *K. S. Abdul Kader* v. *Sri Kali Temple Trust* (2) relied upon by the 4th Judge of the City Civil Court and by the learned Judge on the Appellate Side is clearly distinguishable from the present. There, the court had already passed an order under section 14 (*1*) of the Urban Rent Control Act, 1948 on an application being made to it and the question for consideration was whether a tenant who had obtained an order for stay of execution of a decree for his ejectment on a certain condition imposed upon him by the Court, could, after he had broken that condition apply again for stay of execution under section 14 (*1*) of the Act.

In the result the appeal succeeds. The order of the learned 4th Judge of the City Civil Court dated the 14th of January 1952 dismissing the application of the appellant Nanan Dube under section 14 (*1*) of the Urban Rent Control Act, 1948 is set aside and the learned Judge is directed to deal with the application according to law in the light of the above remarks. The respondent must pay the appellant's costs incurred by him in this appeal as well as in

(1) Special Civil Appeal No. 6 of 1953. (2) (1949) B.L.R. 175.

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NANAN DUBE v. SHREE KALI TEMPLE.

U SAN MAUNG, J.

Civil Miscellaneous Appeal No. 15 of 1952. Advocate's fee before us will be five Gold Mohurs.

U CHAN TUN AUNG, C.J.—I agree.

U BA THOUNG, J.—This is an appeal against the order dated the 14th January, 1952 of the 4th Judge, Rangoon City Civil Court in Civil Regular Suit No. 1374 of 1950. In that suit, a consent decree was passed on 31st January 1951 for ejectment of the judgment-debtor appellant for non-payment of arrears of rent; and execution of the decree was also by consent stayed so long as the judgment-debtor pays one month's rent towards the arrears of rent plus costs along with the current rent on or before the 8th instant of every month commencing from February, 1951.

The judgment-debtor failed to pay the instalments and so the decree holder applied on 20th July 1951 for execution of the decree for ejectment of the judgment-debtor appellant. The Court allowed the application for execution in Civil Execution No. 594/1951 on 24th October 1951.

Then on 20th November 1951, the judgment-debtor appellant filed an application to the Court to allow him to pay all the arrears of rent and to have the decree rescinded, but the learned 4th Judge of the Rangoon City Civil Court rejected the application on 14th January 1952, holding that a tenant cannot file an application after another and claim a concession upon concession. The learned Judge relied on the case of *K. S. Abdul Kader* v. *Sri Kali Temple Trust* (1).

The learned counsel for the appellant contended that the order dated 31st January 1951 was not an

(1) (1949) B.L.R. 175.

order passed under section 14 of the Urban Rent Control Act, and that the right and jurisdiction of the Court to grant relief under section 14, Urban Rent Control Act was not affected by that order. I do not agree with his contention. The order dated 31st January 1951 in Civil Regular Suit No. 1374 of 1950 reads :

"Counsel present. Settlement effected. By consent there will be a decree as prayed for against the defendant on uncontested scale. Execution to be stayed so long as the defendant pays one month's rent towards the arrears of rent and cost along with the current rent on or before 8th of every month commencing from February 1951."

It is quite apparent from the above that it is a consent decree and the appellant has no right to go behind this decree. The appellant did not take any action to have it set aside, or to have an order under section 14 of the Urban Rent Control Act. The appellant cannot contend that it was an unlawful decree, because there is nothing in section 14 of the Urban Rent Control Act which says that the suit for ejectment could not be compromised and a consent decree passed in it.

The case of *K. S. Abdul Kader* v. *Sri Kali Temple Trust* (1), relied upon by the learned Judge of the Rangoon City Civil Court, is an authority that where the tenant has obtained an order for stay of execution of a decree for ejectment on a certain condition, he cannot, after he has broken that condition, apply again for stay of execution under section 14 (*1*) of the Urban Rent Control Act. It is totally applicable to the present case, as the two cases are exactly similar.

For these reasons, the appeal is dismissed with costs.

(1) (1949) B.L.R. 175.

ORIGINAL CIVIL.

Before U Aung Tha Gyaw, J.

H.C. 1952

Feb. 7.

SARASWATI AND TWO OTHERS (PLAINTIFFS)

v.

MANIKRAM BALABUX BAJAJ (DEFENDANT).*

Execution of Wills—Proof—Sound and disposing mind—Undue influence—S. 63, Succession Act—Ss. 13 and 14, Civil Procedure Code, Foreign judgments—Ss. 78, 82, 86, Evidence Act.

In Gangamoyi Debi v. *Troilukhya Nath Chowdhury*, I.L.R. 33 Cal. P.C. 537, it was laid down:

"The registration of a document is a solemn act to be performed in the presence of a competent official appointed to act as Registrar, whose duty it is to attend the parties during the registration and see that the proper persons are present, and are competent to act, and are identified to his satisfaction, and all things done before him in his official capacity and verified by his signature will, unless it be shown that a deliberate fraud on him has been successfully committed, be presumed to be done duly and in order."

Held: The evidence of the Sub-Registrar as to his personal knowledge of the fact of execution is conclusive of the fact that the Will was executed, and was duly presented and registered.

As the testatrix affixed her thumb impression on the reverse of the document in the presence of the Sub-Registrar, the Will must be held to be properly attested.

Sarada Prasad Tej v. *Triguna Charan Roy*, A.I.R. (1922) Pat. 402, referred to.

There is a well marked distinction between cases in which the subsequent dispute relates to the fact of execution and cases in which the question relates to the testamentary capacity of the executant. The evidence of the Sub-Registrar has to be appraised with due regard to the physical and mental condition of the testatrix at the time.

Sadachi Ammal v. *Rajathi Ammal and others*, A.I.R. (1940) Mad. 315, referred to.

Every person of sound mind and not under any special disability is legally capable of making a Will. The question of sanity involved is a question of fact and there is no presumption in law that a testator or testatrix is sane until the contrary is shown. *Prima facie* the person propounding the will must show that a testator at the time of making the will understands the nature of the business in which he is engaged, possesses a clear recollection of the properties he intends to dispose of, and also of the persons who have a claim to be the object of his bounty, and the manner in which it is to be distributed.

* Civil Regular No. 27 of 1941.

Cases referred :—*Pendock Barry Barry* v. *James Butlin*, 12 English Reports, 1089 at 1090 ; *Surendra Krishna Mondal* v. *Rani Dassi*, (1920) I.L.R. 47 Cal. 1043; *Sarat Kumari Debi* v. *Sakhi Chand*, (1929) I.L.R. 8 Pat. 382; *Vellasawmy Servai and others* v. *L. Sivaraman Servai*, (1930) I.L.R. 8 Ran. 179 ; *Eusoof Ahmed Sema* v. *Ismail Ahmed Sema and others*, A.I.R. (1938) Ran. 322; *Brajeswari Dasi* v. *Rasik Chandra Ghosh and another*, A.I.R. (1925) Cal. 739 at 741 ; *In the Estate of Holtam, Gillett* v. *Rogers*, (1913) 108 Law Times, 732.

In determining the question as to whether the testatrix was of a sound and disposing mind at the time of the execution of her will, it is important that some satisfactory evidence should be given in regard to her physical and mental condition at the time of the actual execution of the Will.

Taylor's Principles and Practice of Medical Jurisprudence, Volume (1) 10th Edition, p. 652, referred to.

Sajid Ali and another v. *Ihad Ali*, (1896) I.L.R. 23 Cal. 1; *Suryanarayanamurthi* v. *Suramma and others*, A.I.R. (34) (1947) P.C. 169, referred to.

When once it is proved that a will has been executed with due solemnities by a person of competent understanding, the burden of proving that it was executed under undue influence rests on the person who so alleges.

It is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It is necessary also to prove by clear evidence in the particular case that the undue influence was in fact exercised, and that it was by means of the exercise of that power that the will has been produced.

Cases referred :—*Baudains and others* v. *Richardson and another*, (1906) Appeal Cases 169 at 184-185; *Bur Singh* v. *Uttam Singh*, (1911) I.L.R. 38 Cal. 355 ; *Ganpatrao Khandero* v. *Vasantrao Ganpatrao*, A.I.R. (1932) Bom. 588; *Khwaja Ahmed Khan* v. *Mt. Murmuzi Khan and others*, A.I.R. (1921) Oudh 81; *Craig* v. *Lamoureux*, (1920) Appeal Cases 349; *Leong Hone Waing* v. *Leon Ah Foon and others*, (1929) I.L.R. 7 Ran. 720; *Hampson* v. *Guy*, (1891) 64 Law Times, 778.

A person desiring to execute a Will need not consult anybody as to what properties he should leave to any particular beneficiary. Different considerations would apply on the question in cases where disposition of property has been made *inter vivos*, as in the case of gifts, and those made after death, as in the case of Wills.

Parfitt v. *Lawless*, (1872) Law Reports, 2 P. and D 462 = 27 Law Times 215, referred to.

" A person may act foolishly and even heartlessly ; if he acts with full comprehension of what he is doing, the Court will not interfere with the exercise of his volition."

Motibai Hormusjee Kanga v. *Jamsetjee Hormusjee Kanga*, A.I.R. (1924) P.C. 28 at 33, referred to.

The judgment of the High Court of Jaipur must be deemed to have been given on the merits of the case within the meaning of s. 13 (*b*) of the Civil Procedure Code.

Brijlal Ramjidas and another v. *Govindram Gordhandas Seksaria and others*, A.I.R. (34) (1947) P.C. 192, referred to.

H.C. 1952

SARASWATI AND TWO OTHERS v. MANIKRAM BALABUX BAJAJ.

The provisions of s. 82, Evidence Act relating to the admissibility of documents in England and Ireland, rather than the provision of s. 96, Evidence Act, should be held to apply to the production and admission of the Indian documents.

Held further : That the suit was properly framed, bare declaration being enough and it was not necessary to ask for a cancellation and that the following rulings have no bearing on the point.

Cases referred:—*Hukam Singh and others* v. *Mussammat Gyan Devi and others*, (1916) 61 Punj. Record 266 ; *Raja Rajeswara Dorai* v. *A.L.A.R.R.M. Arunachellan Chettyar*, (1915) I.L.R. 38 Mad. 321 at 322; *Kalu Ram* v. *Babu Lal and another*, (1932) I.L.R. 54 All. 812; *Akhtaq Ahmad and others* v. *Mt. Karam Llahi*, A.I.R. (1935) All. 207; *Lakshmi Narain Rai* v. *Dip Narain Rai*, 55 All. 274; *Sri Krishna Chandra* v. *Mahabir Prasad*, 55 All. 791.

In a partition suit, where the plaintiff has alleged in his plaint that he is in joint possession of the property, no *ad valorem* Court fee is payable on the value of the property involved.

Cases referred :—*Premananda* v. *Dhirendra Nath Ganguly and others*, A.I.R. (37) (1950) Cal. 397 ; *Kattiya Pillai and another* v. *Ramaswamia Pillai and others*, A.I.R. (1929) Mad. 396 ; *Kirty Churn Mitter* v. *Aunath Nath Deb*, (1882) I.L.R. 8 Cal 757; *Sitbaran Jha Pandey* v. *Lokenath Missir*, (1924) I.L.R. 3 Pat. 618; *Bhagwan Appa Wani* v. *Shivalla Wani*, A.I.R. (1927) Nag. 248; *Kanhaiya Lal* v. *Baldeo Lal and others*, A.I.R. (1925) Pat. 703; *Kandunni Nair* v. *Ittunni Raman Nair and eight others*, (1930) I.L.R. 53 Mad. 540.

Messrs. Basu and *Venkatram* for the plaintiffs.

S. R. Chowdhury and *J. B. Sanyal* for the defendant.

U AUNG THA GYAW, J.—The plaintiff Manikram Hanumanbux Bajaj, since deceased, and now represented by his legal representatives (1) Saraswati, (2) Hanumanbux Hariprasad Bajaj, and (3) Hanumanbux Kanzalal Bajaj, sued his elder brother Manikram Balabux Bajaj of No. 71/75, 30th Street, Rangoon, for partition and separate possession of his share in the moveable and immoveable properties alleged to have been left behind by their deceased mother Anchi Bhai.

The suit was brought in the late High Court of Judicature at Rangoon on 4th February 1941, within 3 weeks of the death of Anchi Bhai, the mother, in Fatehpur, her native place in India. The

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plaint sets out that the parties were sons of one Gulraj Manikram Bajaj, since deceased, and as Hindus, are governed by the Mitakshre School of Hindu Law: that the father of the parties came to Burma as far back as 60 years ago and carried on business in Rangoon under the name and style of Gulraj Manikram Bajaj and acquired considerable properties in this country; that this business was a Joint Hindu Family business and was dissolved in the year 1925 by an agreement dated 1st August 1925 (Exhibit 1); that under the said agreement the properties in suit were said to have been allotted to their mother Anchi Bhai as her separate and exclusive property; and that Anchi Bhai, the mother, always or mostly lived with the defendant her eldest son, who looked after her properties as her agent. Anchi Bhai is also said to have possessed a considerable quantity of jewellery locked up in two boxes then, *i.e.*, at the time of the filing of the suit, in the custody of the Mercantile Bank of India, Rangoon. The plaintiff claims that on his mother's death he is entitled to a half share in all the properties left behind by her. On 25th January 1941 the defendant is alleged to have published in the *Rangoon Daily News* a notice stating that by means of two wills executed by the deceased Anchi Bhai, she had bequeathed all her properties to him to the utter exclusion of the plaintiff. The plaintiff questions the genuineness and validity of the two wills set up by the defendant and contends that at the time of their purported execution the deceased Anchi Bhai was not of sound mind, memory and understanding. She was a *purdanashin* lady and was illiterate. Her mental capacity was said to have been severely affected by her ill-health and her old age. She was said to have been in a semi-conscious state due to

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degeneration of the brain and had been paralysed for many years. At all times the said deceased Anchi Bhai was under the immediate control, domination and influence of the defendant. The deceased was not, therefore, a free agent and that the said two wills were not executed of her own free will and accord, such execution having been obtained by the defendant by exercise of wrongful control, domination and influence, by taking advantage of her old age, weak mental and physical condition, impaired memory, and her inability to articulate or communicate with others by means of speech. The deceased did not have any independent advice and was not in a position to give instructions for the execution of the alleged wills. The plaintiff alleges that in order to forestall the making of two wills, he had applied to the Court for an order of inquisition under the Lunacy Act for determination of the sanity of his mother Anchi Bhai. But the defendant had, apprehending an enquiry, frustrated his purpose by removing her from the jurisdiction of the Court. The plaintiff claims that he is entitled to a declaration that the aforesaid wills, even if their execution by the deceased be proved, are void and as such are not binding on him. He values his claim for his share of the rents and profits at Rs. 25,000, and prays for a declaration that he is entitled to a half undivided share and interest in all the properties, moveable and immoveable, left behind by his mother; for partition and separate possession of the same; for an enquiry as to what properties are comprised in his mother's estate, as to the rents and profits due to him; and for the appointment of a Receiver.

The defendant by his written statement denies that he possessed and exercised a great deal of influence over his mother Anchi Bhai, or that she

died possessed of a considerable amount of jewellery, as alleged by the plaintiff, or that such jewelleries were kept in two boxes deposited with the Mercantile Bank of India, the contents of the same being his own exclusive property. He states that the documents, jewelleries and other valuables belonging to Anchi Bhai, along with the keys, documents, jewelleries and other valuables belonging to the defendant and his wife, including the receipt granted by the Mercantile Bank of India in respect of two boxes, were in a steel trunk and a leather suit-case which the plaintiff wrongfully took possession of on the 27th February 1940, the date of his mother's arrival at Rangoon from India, and which he subsequently misappropriated. The defendant admits that his mother was illiterate and was further deprived of the power of speech owing to an attack of paralysis which affected the use of her tongue. He denies that his mother was enfeebled in either mind or body so as to be incapable of executing the two wills in suit, or that the execution of the said documents was obtained by him through the exercise of any improper control, domination or influence. He denies that the plaintiff is entitled to the declaration sought for in respect of the said wills, or that the plaintiff is entitled to any share or interest in the properties left behind by their mother. In regard to the claim for rents and profits, the defendant contends that the same is barred by the law of limitation. The defendant further contends that the valuation of the suit set out by the plaintiff is not in accordance with law, and that the suit as framed is not maintainable.

On these pleadings the following issues were framed by consent :—

1. Did Anchi Bhai execute the two wills, one on the 28th March 1940 at Rangoon

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and the other on the 15th May 1940 at Fatehpur ?

2. Was she not in a sound and disposing mind at the time she made both or either of the said two wills and whether the said wills made by her were the result of undue influence exercised by the defendant, as alleged in the plaint ?
3. Has there been a final decision regarding the validity of the will dated the 15th May 1940 by the Court of the Judicial Officer, Sikar, and is the said decision conclusive between the parties to this suit as claimed by the defendant ?
4. Is the suit as framed not maintainable ?
5. Is the claim for rents and profits and for accounts thereof barred by limitation ?
6. Is the suit not properly valued ?
7. What relief, if any, is the plaintiff entitled to ?

Before dealing with the points raised in the above issues it may not be out of place here to take note of a few facts which would appear to furnish a back-ground to this long standing family litigation. Previous to 28th May 1925, the date of the letter (Exhibit 2) purported to have been sent by Graham's Trading Co., Ltd., to Gulraj Manikram Bajaj, the father of the parties in the suit, some disagreement would appear to have arisen between the father on the one hand and the plaintiff Hanumanbux Bajaj on the other, a result of which Gulraj Manikram Bajaj instructed Graham's Trading Co., Ltd., in person to treat the power-of-attorney granted by him to his son as cancelled. The plaintiff appears to have contended that as a partner of the Joint Family business he did not need a power-of-attorney from his father to

act on behalf of the firm—see Exhibit 2 (*a*). Exhibit 2 (*b*) dated 2nd June 1925, written by Graham's Trading Co., Ltd., to Gulraj Manikram Bajaj, still referred to the dispute between the father and son. Thus came about, according to the defendant, the execution of the Deed of Partition (Exhibit 1), on 1st August 1925.

On 10th November 1925 [Exhibit 2 (*c*)], the plaintiff was still demanding compliance with some requests which he made four days before, stating that failing to obtain satisfaction he would file a suit for dissolution of partnership and for accounts. Exhibit 3 dated 27th March 1938 is another communication by the plaintiff to his father stating that the latter had been guilty of suppression and secretion of various assets belonging to the Joint Undivided Family with a view to exclude him from his rightful share in the same. Exhibit 4, the reply made to the above communication, explains the reason why the partition of the Joint Family business had to be effected in 1925. This letter explains further that, as a partner actively assisting in the conduct of the family business, there was nothing that could be suppressed from the knowledge of the plaintiff. The letter describes the plaintiff's conduct, after two years' acquiescence, as frivolous.

Exhibit 5 dated 5th March 1926, the Deed of Dissolution of Partnership, was executed between the father and the two sons, and under clause 3 (*a*) of this Deed the plaintiff agreed to carry on business in the premises known as No. 50, Merchant Street, under any name he chose except the name of Gulraj Manikram Bajaj and Sons; whereas under clause 2 (*a*) the defendant was permitted to carry on business at No. 31, Merchant Street, or any other place he chose, under the name of Gulraj Manikram Bajaj.

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Exhibit 6 (*a*) is a photostatic copy of what purports to be a will left behind by Manikram Bajaj and executed on 29th November 1934, Exhibit 6 being the official translation made on 25th October 1935. The last part of this document states that Hanuman separated in 1926 and that he shall have nothing to do with the testator's estate. In regard to the lands and buildings at Fatehpur, their native place in India they are said to have been held jointly by the two sons Balabux and Hanumanbux and they can partition the same if they want to at any time after his death. The lands and buildings standing in the names of Manikram, Hanchi, Balabux and Jaideyee are to be administered and kept according to the rules in the name of Gulraj Manikram, the income to be spent according to the wishes of these persons. No mention whatsoever is made of the interest of his other son, the plaintiff Hanumanbux, in these properties. These apparently referred to those not in Fatehpur but in Rangoon.

Gulraj Manikram, the father, died sometime in 1935, before Exhibit 8 (*b*) dated 7th November 1935 was received from India in respect of the rents payable for the Dharamsala, or rest house, which had been built there in the life time of Manikram Bajaj. The letter suggested that the defendant "Balabux should see his way to maintain his father's memory in a very desirable manner without the least delay," by keeping the buildings in proper repair.

After Manikram's death, his widow Anchi Bhai, in about 1936-1937, suffered from an attack of paralysis affecting her face and under medical treatment she recovered sufficiently to be able to perform her normal domestic duties. Then in about 1938 she set out on a tour of pilgrimage to Delhi, Fatehpur, Gaya and Tarakeswar, and several other holy places,

along with the defendant. At Tarakeswar, the old Dharamsala was demolished and a new one was rebuilt in its place costing as much as Rs. 38,000 to Rs. 40,000. The party returned to Burma in about the month of April 1939.

Just before their return, the plaintiff Hanumanbux Bajaj underwent the experience of a criminal trial in which he was sentenced to six month's imprisonment under section 193 of the Penal Code—an incident reported in the newspapers (Exhibit 9). It is alleged that in view of this criminal conviction, the mother Anchi Bhai, who was a devout Hindu, practically regarded her son Hanumanbux as an outcast and refused to speak or communicate with him.

Then again in 1940, in connection with the marriage of Balabux's daughter in India, Anchi Bhai had occasion to take a trip across the seas, and on her return on a steamer from Calcutta to Rangoon in February 1940, she was overtaken by a second stroke of paralysis which this time affected the whole of the right side of her body, including her face. She also lost the use of her tongue. Hariprasad, Hanumanbux's son (PW 1), also came on the same steamer along with Anchi Bhai. It would appear that he was looking after her on the voyage as the Steamship Company's records would show that both of them travelled Second Class B on that occasion. (See Exhibits P and Q).

On arrival of the party at Rangoon, the plaintiff Hanumanbux met them at the wharf, and took Anchi, along with the defendant and his wife and some personal baggage consisting of a leather suit-case and a tin box alleged to belong to the defendant, to his house (Exhibit 11). While Anchi Bhai was lying ill in his house the plaintiff obtained the services of

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Drs. Sharma and Kundu to attend upon her and also the service of a Mohamedan nurse named Amina Bee Bee (Exhibits 2-L, 2-N, 2-Q, and Exhibit A). On or about the 3rd March 1940, after her condition was first examined by Dr. Bhansali (DW 2), Anchi Bhai was moved to her own residence on the opposite side of the road at No. 71/75, 30th Street.

On 5th March 1940, two days later, the plaintiff inserted a notice in the *Rangoon Daily News* (Exhibit B), informing the public that he was one of the heirs to the estate of his mother Anchi Bhai and that anybody dealing with her estate without notice to him would do so at his risk. Three days later, in the issue of the same newspaper of 8th March 1940 he informed the public that his mohter Anchi Bhai was so seriously ill that she could not even speak, and that there were two heirs to her estate. Having seen these advertisements, the defendant sought legal advice and sent the letter (Exhibit D) to the plaintiff asking him to return the leather suit-case and tin box containing valuables which were removed by him at the time he took his mother Anchi Bhai to his house on her arrival at Rangoon from Calcutta, and also repudiating the insinuation that the defendant had any intention to deal fraudulently with his mother's properties.

This letter was replied to in Exhibit 14 where the plaintiff stated that the leather suit-case and the tin box referred to in the defendant's letter belonged to his son Hariprasad. He further stated that his mother Anchi Bhai was old, infirm and not in a proper state of mind, and that he apprehended that the defendant would take undue advantage of her state of health and cause some sort of document to be executed by her in his favour, and that if

any such documents were executed, he said he would contest their validity in a Court of law. Furthermore, reference was made to the defendant's management of their parental estate and of his failure to furnish the plaintiff with an account of such management.

On 8th March 1940 the defendant, through his legal adviser, addressed a complaint to the Commissioner of Police, Rangoon, regarding the plaintiff's conduct in regard to the moveable properties alleged to have been taken and retained by the plaintiff after the return of their mother Anchi Bhai from India (Exhibit 12). The Commissioner of Police declined to take any action holding that the brothers were merely having a family dispute over their properties (Exhibit 13).

In Exhibit 15 dated 18th March 1940 the defendant denied that he had any intention of dealing unfairly with the plaintiff who, he said, had taken possession of his property, *i.e.*, the valuables contained in the two boxes by means of a trick. He states that although Anchi Bhai was old and unable to speak, she was in her perfect senses, and as the plaintiff lost her favour by his tactics, he would appear to be apprehensive that she would bequeath all her properties to her more dutiful son, the defendant. He denies that the plaintiff was entitled to claim any account of his management of the family properties as the parties had separated from their father by a Deed of Partition as far back as 1925.

To this the plaintiff replied by his letter (Exhibit 16) where he insisted that his mother was still very ill and not in her proper senses, and that the defendant removed her to his house with the object of exercising his influence over her for the purpose of obtaining her properties. He also insisted that he

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was entitled to an account in respect of the parental estate managed by the defendant. In Exhibit 17 dated 26th March 1940 the defendant denied that he had made any attempt to take advantage of his mother's alleged physical disability in order to enrich himself. He, however, warned the plaintiff that he was in great disfavour with his mother because of his tactics. He was agreeable to settle any differences there might be between them if the plaintiff would admit that he had with him the two boxes and their contents.

Two days later, on 28th March 1940, the first will (Exhibit 19) was said to have been executed by the mother Anchi Bhai, bequeathing all her properties, both in Burma and India, to the defendant, her eldest son, for him to hold the same upon the Trust declared by her, and disinheriting her youngest son the plaintiff, Hanumanbux Bajaj, for disobeying her and treating her cruelly. The Trust declared by her was in respect of opening a Mixed Primary School for Marwari boys and girls in her house and spending a sum of Rs. 100 per month on their education.

On the following day, the plaintiff sent the letter (Exhibit 28) stating that he saw the Sub-Registrar of Rangoon visit the defendant's place and presumed that some documents had been executed in the defendant's favour by his mother Anchi Bhai; he drew attention to the fact that the defendant had been forewarned in respect of such transactions both by public notices and by his letters. He alleged that his mother was mentally deranged and that the defendant had taken advantage of her mental infirmity and suggested that she should be examined by a specialist as to her mental condition.

On 30th March 1940, the plaintiff, by his letter (Exhibit 30), asked the defendant to furnish him with

certain information in respect of the properties acquired by his parents and of the rents and profits derived therefrom since the year 1925. On 1st April 1940 the plaintiff would appear to have also written the letter (Exhibit 51) addressed to his mother, asking her to furnish him with particulars as to where she and her husband obtained the money to buy the properties in Rangoon and other places in Burma; what profit and income were made out of their business subsequent to 7th August 1925; and what taxes were paid to the Income-tax Office up to 1939. He also told her that he wanted to have her mental condition examined by a specialist as his brother Balabux was taking advantage of her condition and was taking his (plaintiff's) share of her properties. On 2nd April 1940 the defendant wrote back to the plaintiff denying the allegations made in regard to his mother's mental condition and refusing to enter into any further correspondence with him in the matter. On 9th April 1940 the plaintiff presented his petition to the High Court for an order of inquisition under the Lunacy Act for determination as to whether his mother Anchi Bhai was of unsound mind and incapable of managing her affairs (Exhibit E).

Meanwhile, a similar dispute in regard to the family properties would appear to have been started in India. On 10th April 1940 the defendant received the telegram (Exhibit 27) from one Yudister Prasad of Fatehpur, stating that the defendant's presence there for one day was urgently necessary. On 11th April 1940 the defendant despatched the telegram (Exhibit 33) to one Goolraj Jagannath Singhama at Fatehpur, his native place, stating that the estate in India belonged to him and his mother and that his brother Hanumanbux had no right to the same. Then on 22nd April 1940 the plaintiff sent

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the telegram (Exhibit 32) to the defendant, warning him that he would be held responsible for anything happening to the mother who, despite her illness, was being taken by the defendant to India on the following day. The mother Anchi Bhai was taken to India where on 15th May 1940 she executed the second will [Exhibit 34=60 (*a*)] bequeathing her properties to the defendant to the exclusion of the plaintiff. She also executed on the same day the Power-of-Attorney [Exhibit 36=61 (*a*)]. On 15th January 1941 Anchi Bhai died at her native place in Fatehpur and an obituary notice to this effect appeared in the *Rangoon Daily News* of the 25th January 1941 (Exhibit 2-D). On 4th February 1941the plaintiff brought the present suit in this Court.

The *1st Issue* in the case relates to whether the two wills in exhibit were executed by the deceased Anchi Bhai. one on the 28th March 1940 at Rangoon and the other on the 15th May 1940 at Fatehpur. The Rangoon will (Exhibit 19) was drafted by Mr. S. R. Das, *Bar.-at-Law*, and its execution has been attested by him as well as by Dr. Das Gupta, one J. Chowdhury, a Court Interpreter, and two other persons named Radha Kishen Kothari and Bhagwanlal P. Josri. Mr. Das's evidence on oath was not available at the hearing of this suit. He is said to be practising in the Calcutta High Court and attempts made to persuade him to come to Burma for the purpose of giving his evidence in this case appear to have proved unsuccessful. An affidavit sworn by him on 13th June 1941 (Exhibit 26) in connection with a Receivership matter arising out of the present suit has been filed instead to support the story of the due execution of the Rangoon will (Exhibit 19). Mr. Das stated in his affidavit that he was called to Anchi Bhai's house at

No. 71/75, 30th Street, Rangoon, to receive instructions from her for the preparation of the said will, that she was in a fit and proper mental condition both at the time the instructions were received and at the time the will was read over and explained to her and when her execution was obtained to the same. The testatrix was unable to speak but she was perfectly able to understand questions put to her and to express her acceptance or disapproval thereof by signs and gestures. He was satisfied that she clearly understood the contents of the will as explained to her in Hindustani by the interpreter Mr. Chowdhury.

Another affidavit of Mr. Das (Exhibit G) has also been filed by the plaintiff. In this affidavit Mr. Das mentions the presence of Dr. S. K. Das Gupta, an attesting witness. He further states that the testatrix Anchi Bhai was in a sound state of mind and that to the best of his belief she executed the will of her own free will and pleasure.

Maung Maung (DW 5) has testified to the effect that his father Mr. Chowdhury's signature appears as an attesting witness in the will (Exhibit 19). He also identifies the signature in Exhibit 21, the receipt granted by Mr. Chowdhury, as that of his father.

Dr. S. K. Das Gupta (DW 6) has been brought from his post of duty at Hazaribagh, Bihar in India, and he has deposed to the fact that he attested the will (Exhibit 19) as a witness on the 28th March 1940.

The Sub-Registrar, U Aung Mya, who has since retired from his office, has deposed to the effect that on invitation he visited the defendant's house where, in his presence, the testatrix placed her thumb impression on page 2 of the will after its contents had been read out and explained to her by the interpreter, one Chowdhury. Witness remembers that all the other persons who attested the document

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did so in his presence. After the execution of the document the same was presented to him by the testatrix through the assistance of a third person one Kishen Kothari, whose name appears on the back of the document as the identifier. Witness remembers taking his thumb impression as well. The testatrix, when questioned as to whether she understood the contents of the document replied to him in the affirmative by nodding her head. The witness also visited the house a second time for the execution of a Power-of-Attorney (Exhibit 46) by the same old lady Anchi Bhai. This Power-of-Attorney has been endorsed by the witness as having been executed by Anchi Bhai in his presence. Possibly, the witness might have confused the occasion of the execution of the will with the occasion of the execution of the Power-of-Attorney. But witness is positive that the testatrix perfectly understood what she was doing and was in full possession of her senses and that nothing was wrong with her mind as far as he could make out. Witness has deposed to facts which took place nearly 12 years ago, but the circumstances in which he had to visit the defendant's house were somewhat unusual. The testatrix was a paralysed person who was deprived of her power of speech and she was giving away all her property to her eldest son in preference to the plaintiff. Besides the presence of a barrister-at-law, witness also noticed a doctor and a Court interpreter. All these unusual details of the incident could possibly have created a fairly lasting impression on the witness's memory, and there are no reasons whatever, apart from mere lapse of time, for questioning the veracity of this witness.

"The registration of a document is a solemn act to be performed in the presence of a competent official appointed

to act as Registrar, whose duty it is to attend the parties during the registration and see that the proper persons are present, and are competent to act, and are identified to his satisfaction, and all things done before him in his official capacity and verified by his signature will, unless it be shown that a deliberate fraud on him has been successfully committed, be presumed to be done duly and in order."

See *Gangamoyi Debi* v. *Troiluckhya Nath Chowdhury* (1). This evidence of the Sub-Registrar as to his personal knowledge of the fact of execution is conclusive of the fact that the Rangoon will was executed by Anchi Bhai and was duly presented and registered.

The execution of the Rangoon will by the deceased Anchi Bhai is thus clearly proved.

Exhibit 59 is a photostatic copy of the Indian will which was filed in Suit No. 5 of 1940-41 of the Judicial Officer, Sikar. This will (Exhibit 60) appears to be written in Hindi and Urdu. Its execution appears to have been witnessed in English by B. M. Doctor of Fatehpur Hospital. The translation [Exhibit 60 (*a*)] shows the name of Ranglal Bajaj as another attesting witness. The document was duly registered by the Sub-Registrar, Fatehpur, whose signature appears on the reverse of the document.

The doctor who attested the document, Dr. Bhaiyalal, was examined on commission in India. He give the certificate (Exhibit 68) as to the physical and mental condition of Anchi Bhai. He also admitted attesting the will (Exhibit 60). The testatrix indicated by signs and, according to the witness, everybody present could understand her gestures. The contents of the will were explained to her before her thumb impression was put on the document. In the suit filed by the plaintiff against the defendant and his mother Anchi Bhai in India, the latter was

(1) I.L.R. 33 Cal. (P.C.) 537.

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examined on commission as a witness on 20th October 1940 and a translated copy of her deposition given before the Commissioner appears in Exhibit 39; the Vernacular copy is Exhibit 39 (*a*). Anchi Bhai has clearly admitted in her deposition that she had executed the Indian will (Exhibit 60). There can therefore be no question whatsoever that this will (Exhibit 60) was executed by her on 15th May 1940 at Fatehpur, as alleged by the defendant.

The evidence of the Sub-Registrar before whom the deed was registered at Fatehpur was not available. The Commissioner appointed to record the evidence of this witness made an attempt to procure his evidence, but from his report dated 23rd October 1941, it would appear that this Sub-Registrar one Mr. Debi Singh, did not want to repeat the statement (Exhibit 43) which he had already made in the Sikar Court as a witness. Exhibit 43 (*a*) is a translation of the copy of his evidence. From the contents of this it would appear that the Sub-Registrar, before registering the Indian will in Fatehpur, fully satisfied himself as to the fact of the execution of the will by the testatrix Anchi Bhai. As the testatrix affixed her thumb impression on the reverse of the document in the presence of the Sub-Registrar, the will must be held to be properly attested. See *Sarada Prasad Tej* v. *Triguna Charan Roy* (1). In any case, Anchi Bhai, as a Hindu, had fulfilled the formalities laid down in section 63 of the Succession Act in regard to the making of the will. The medical witness Dr. Bhaiyalal and the Sub-Registrar have given their evidence that the testatrix made her acknowledgment and signed the will in their presence, and they themselves had signed the document as witnesses. Due execution of this Indian will is thus proved, and the

(1) A.I.R. (1922) Pat. 402.

1st Issue will accordingly be answered in the affirmative.

Both the wills had undoubtedly been properly registered in Rangoon and Fatehpur, but, as was held in the case of *Sadachi Ammal* v. *Rajathi Ammal and others* (1), though the importance of the registration of a will during the lifetime of a testator cannot be under-estimated, still in assessing the significance of that fact, there is a well marked distinction between cases in which the subsequent dispute relates to the fact of execution and cases in which the questions relates to the testamentary capacity of the executant. The evidence of the Sub-Registrar has to be appraised with due regard to the physical and mental condition of the testatrix at the time. This latter question will now be dealt with in the next issue.

The *2nd Issue* falls into two parts and relates to the questions (1) as to whether Anchi Bhai was of a sound and disposing mind at the time when she made both or either of the said two wills, and (2) whether the said wills were made by her as a result of undue influence exercised by the defendant, as alleged in the plaint.

Before going into the evidence relevant to this part of the inquiry, it is necessary to keep in mind the broad principles applicable to the questions so raised.

Every person of sound mind and not under any special disability is legally capable of making a will. The question of sanity involved is a question of fact and there is no presumption in law that a testator or testatrix is sane until the contrary is shown. *Prima facie* the person propounding the will must show that a testator at the time of making the will understands

(1) A.I.R. (1940) Mad. 315

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the nature of the business in which he is engaged, possesses a clear recollection of the properties he intends to dispose of, and also of the persons who have a claim to be the objects of his bounty, and the manner in which it is to be distributed.

"The party propounding a Will must in every case satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable Testator."

[See *Pendock Barry Barry* v. *James Butlin* (1)].

"Mere ability to sign one's name does not necessarily imply the possession of the full mental powers requisite for a valid disposition of the property. Nor is it sufficient to show that the testator was conscious when he executed the instrument. It is sufficient that there is enough mental powers left to enable the testator clearly to discern and discreetly to judge of all those things which enter into the nature of a rational, fair and just testament."

[See *Surendra Krishna Mondal* v. *Rani Dassi* (2)].

"In all cases in which a will is prepared under circumstances which raise the suspicion of the Court that it does not express the mind of the testator, it is for those who propound the will to remove that suspicion, and it is only when that has been done that the onus is thrown on those who oppose the will to prove fraud or undue influence."

[See *Sarat Kumari Debi* v. *Sakhi Chand* (3)].

"Where a will is propounded by the chief beneficiary under it, who has taken a leading part in giving instructions for its preparation and in procuring its execution, probate should not be granted unless the evidence removes suspicion and clearly proves that the testator approved the will."

[See *Vellasawmy Servai and others* v. *L. Sivaraman Servai* (4)].

"If a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of

(1) 12 English Reports, 1089 at 1090.
(2) (1920) I.L.R. 47 Cal. 1043.
(3) (1929) I.L.R. 8 Pat. 382.
(4) (1930) I.L.R. 8 Ran. 179.

the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."

[See *Eusoof Ahmed Sema* v. *Ismail Ahmed Sema and others* (1)].

"In order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom by his will, he is excluding from all participation in that property; and that the protection of the law is in no cases more needed, than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid, as to shut out all others that might require consideration."

[See *Brajeswari Dasi* v. *Rasik Chandra Ghosh and another* (2)].

Other principles of equal import are found quoted in this case. *In the estate of Holtam, Gillett* v. *Rogers* (3), where as testatrix, who was incapable of speaking or writing owing to an apoplectic stroke, only assented by nods of her head and several pressures of her hand in answer to questions put to her by the person drawing the will, and made a mark with a pen in lieu of a signature, the will was upheld on the ground that it was drawn up in accordance with the wishes of the testatrix.

Regarding her testamentary capacity, evidence has been led on behalf of the plaintiff to show that about the time the will in question is alleged to have been executed in Rangoon, *i.e.*, 28th March 1940, the testatrix Mussamat Anchi Bhai was in such a

(1) A.I.R. (1938) Rn. 322. (2) A.I.R. (1925) Cal. 739 at 741.
(3) (1913) 108 Law Times, 732.

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state of bodily infirmity that she could not be in possession of her full senses or be fully aware of the effect of her actions. It is common ground that Anchi Bhai suffered from a second stroke of paralysis while on her voyage back to Burma from India, and that when she arrived in Rangoon, she was in a very weak state of health and was incapable of speech by reason of the said paralytic stroke.

After her arrival in Rangoon, and while under the care of the plaintiff, she was said to have been treated by Dr. M. L. Kundu, then a Civil Surgeon attached to the Rangoon General Hospital as Third Physician. Dr. Kundu's evidence was taken on commission in May 1948—8 years after he saw and treated his patient. He remembers visiting Anchi Bhai professionally in consultation with another doctor named B. L. Sharma. He found the lady suffering from " Hemiplegia " of long standing due to degeneration of the brain. " Hemiplegia " is the medical term applied to complete paralysis of one side of the body. At the time he paid his visit to the lady he found that her brain was not functioning properly and that she was not responding to the questions put to her, and the words and expressions used by her in reply were found to be incoherent. In his view, in the state in which he found her at the time of his visit, she could not have sufficient mental capacity to understand and to decide as to how she should deal with her property in the manner shown in the will (Exhibit 19).

In his cross-examination Dr. Kundu stated that he got the history of the case from Dr. Sharma, who was a Licensed Medical Practitioner, and was the Visiting Physician of the patient Anchi Bhai whom he was taken to see on 1st March 1940. While Dr. Sharma, in his affidavit (Exhibit 2-Q), swore to the

fact that Anchi Bhai was unconscious and entirely of unsound brain, Dr. Kundu was of the view that she was not entirely unconscious but was in a semi-conscious condition when he examined her. The affidavit of Dr. Sharma was sworn on 29th March 1941 and Dr. Kundu's certificate was made out on 8th March 1941 after the present suit was filed by the plaintiff in this Court.

The evidence of Dr. Kundu and the statement made by Dr. Sharma in his affidavit have been put to other medical witnesses who saw and examined Anchi Bhai subsequent to the date of Dr. Kundu's visit. The first of them was Dr. Bhansali (DW 2). He was taken to see Anchi Bhai by the defendant in order to find out whether she could be removed from the plaintiff's house to her own house on the opposite side of the road, and on the strength of the certificate granted by him, it would appear that Anchi Bhai was removed to her own house on or about 3rd March 1940, the date on which witness granted the receipt (Exhibit 10) for the visiting fee received by him. Both the brothers, the plaintiff and the defendant, were present at the time this witness paid his visit, and from the questions put to her and the replies made by signs and gestures he understood that she wanted to be moved back to her own house. He was satisfied that no haemorrhage had taken place in her brain and consequently she did not suffer at the time from any mental degeneration or mental defect in any way. Witness has been able to remember this incident as he observed at the time that there was a serious difference of opinion between the two brothers as to whether their mother should be removed from one house to the other.

Dr. Das Gupta (DW 6) was a private Medical Practitioner at the time he was asked to see Anchi

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Bhai in her house a week or 10 days before the will (Exhibit 19) was executed by her. As a result of his examination of her physical and mental condition he granted the certificate (Exhibit 18). At the time he saw her she was suffering from paralysis of the tongue and slight Paresis of the right side of the body. The discrepancy noticed by the witness between the contents of the certificate granted by him and those of the certificate granted by Dr. Kundu, is sought to be explained by the fact that Anchi Bhai had considerably improved under medical treatment between lst March 1940, the date of Dr. Kundu's visit, and 20th March 1940, the date on which witness made his examination of the patient. That such improvement could have taken place within a period of 3 weeks is said to be supported by eminent medical authorities whose writings, extracts of which were read out by witness, are collected in a text book on Medicine and Surgery compiled by Dr. Price.

The statement made by this witness has been corroborated by his affidavit (Exhibit 47) which he swore previously on the same subject. This witness is said to be related by marriage to the lawyer Mr. S. R. Das who prepared the will (Exhibit 19), and on the day the will was executed, witness was again invited to examine Anchi Bhai, and this he did to satisfy himself that she was in full possession of her senses and was mentally capable of understanding the contents of the will which she was executing in his presence. The witness has stated that to satisfy himself that Anchi Bhai was of a sound and disposing mind and had sufficient mental capacity to understand the nature and consequences of her act, he questioned her as to the number of her heirs, the extent of her property, and such other questions as he found necessary to test her mental condition.

After he was so satisfied as to her testamentary capacity he took part in the attestation of the will after he had seen the contents of the will read out, interpreted and agreed to by her.

Thus, as far as medical testimony is concerned, we have on the one hand the evidence of Dr. Kundu, an eminent physician in affluent practice in 1940, who, however, saw the patient through his consultant Dr. Sharma, who actually was in attendance upon the patient, and the physical and mental condition about which Dr. Kundu has deposed was of a paralytic who had suffered a stroke a few days before these conditions were noticed. On the other hand, Dr. Bhansali, a doctor called in by the defendant, saw the old lady Anchi Bhai two days later on 3rd March 1940, and Dr. Das Gupta saw her condition on 20th March 1940. Dr. Kundu did prescribe, according to him, some medicine to relieve his patient's condition, and it is to his credit that she improved sufficiently on 3rd March 1940 to be able to express her wish that she should be moved back to her own house.

There is no medical evidence given to indicate in what physical condition Anchi Bhai was before she was overtaken by her second stroke of paralysis on her voyage back from India. According to the defendant, apart from a slight trace of facial paralysis, she was well enough to carry out her domestic duties. She was in such a state of good health that she performed a pilgrimage in India which involved an all-round journey of several thousand miles in different modes of conveyance. She was well enough to pay a second visit to India shortly before the attack in order to be present at her grand-daughter's wedding in her native place. Therefore, the opinion given by Dr. Kundu and Dr. Sharma that the paralytic

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condition "hemiplegia" which Anchi Bhai was suffering from at the time of their visit was of long standing, does not actually correspond to the truth. The attack evidently was a recent one and, as deposed to by Dr. Das Gupta on the authority of the expert medical opinions read out by him from Dr. Price's book, Anchi Bhai's condition was capable of speedy improvement, though not of a perfect cure. Persons suffering from Motor Aphasia, as Anchi Bhai was in this case, may be able to make perfectly valid wills. See J. P. Modi's Medical Jurisprudence and Toxicology, page 378. Thus, as far as medical testimony is concerned, there is no satisfactory proof that Anchi Bhai was not of a sound disposing mind at the time she executed her Rangoon will.

Some evidence of a circumstantial nature is sought to be adduced, in order to support the plaintiff's allegation that his mother Anchi Bhai was not of a sound and disposing mind about the time of the execution of the will in March 1940. In his letter (Exhibit 51) addressed to his mother, dated 1st April 1940, the plaintiff suggested that that she was mentally deranged and that her mental condition should be examined by a specialist. This letter was later followed by a petition made in the High Court of Judicature at Rangoon for an order of inquisition under the Lunacy Act for the purpose of determining whether his mother was of a sound mind and capable of managing her affairs. On 23rd April 1940 the defendant removed the mother Anchi Bhai from the jurisdiction of the Court by taking her to India with him.

This conduct of the defendant appears to be explained by the march of events elsewhere. As has previously been set out, trouble was also brewing in India about this time, as on 8th April 1940 the

defendant received a telegraphic communication from India stating that his presence was urgently necessary there (Exhibit 27). To this Exhibit 33 was the reply despatched by the defendant. This reply, despatched on 11th April 1940, discloses the nature of the dispute between the two brothers. He stated that the plaintiff had no right to the property in India owned by him and his mother jointly. He also described the manner in which he and his mother were deprived of jewellery, sovereigns, papers and keys by the plaintiff on her arrival from India. As a matter of fact the plaintiff had, through his agent in India, already brought a suit there against his mother and the defendant for his share of the family property (Suit No. 5 of 1940). Placed in the circumstances in which he found himself, it was impossible for the defendant to leave behind his mother when he had to hurry back to India to attend to the dispute which the plaintiff was raising there in regard to the family property. It is significant to note in this connection that when his mother arrived in India to contest the suit brought by him, the plaintiff did not persist in making any further allegations that she was not of sound mind, and made no attempt whatsoever to get a guardian *ad litem* appointed to conduct the suit on her behalf.

Now, in determining the question as to whether the testatrix was of a sound and disposing mind at the time of the execution of her will, it is important that some satisfactory evidence should be given in regard to her physical and mental condition at the time of the actual execution of the will, and this has been furnished by the evidence of Dr. Das Gupta who examined Anchi Bhai shortly before the will was read over, interpreted and acknowledged by her; and, moreover, he was actually present when this was

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being done and, in his opinion, Anchi Bhai was perfectly in her senses and that she was capable of understanding the contents of her will and the consequences of its provisions upon the plaintiff.

"It has been said truly that the evidence on this matter of the medical attendant who was present at the time of the execution of the will is of greater value than the opinions of experts or of witnesses who may have seen the testator at other times and in other circumstances. The capacity for making a will does not depend solely upon the testator's sanity or insanity, but rather upon the proof of competency or incompetency on the part of the testator at the time when he made the will."

(See Taylor's Principles and Practice of Medical Jurisprudence, Volume I, 10th Edition, at page 652.)

"Although the mental faculties of a person suffering from partial paralysis may have been affected by his physical weakness, he may still be capable of devising and of executing a will of a simple character, although unfit to originate or to comprehend all the details of a complicated settlement."

[See *Sajid Ali and another* v. *Ibad Ali* (1)]. See also [*Suryanarayanamurthi* v. *Suramma and others* (2)].

Thus, the effect of the evidence given in the case would show that at the time the Rangoon will was executed Anchi Bhai was of a sound and disposing mind.

The second will was executed by her in India in her native place at Fatehpur on 15th May 1940— nearly two months after the making of the first will in Rangoon. About her physical and mental condition then, the Fatehpur doctor, Dr. Bhaiyalal, has given evidence on commission. He also granted the certificate (Exhibit 68) in which the result of his examination made on 15th May 1940 is stated. According to him, she was suffering from paralysis

(1) (1896) I.L.R. 23 Cal. 1. (2) A.I.R. (34) (1947) P C. 169.

of her tongue as a result of which she could not talk and she had a slight paresis on the right side of her face and senile Arthritis of both shoulders. Barring speech she was fully in her senses and could answer every question by signs and by touching her person. The witness admits signing the will (Exhibit 60) as a medical witness. The contents of the document were read over and explained to the testatrix in his presence. The witness was positive that the paralysis from which Anchi Bhai suffered at the time of his examination could not have any effect on her brain. Dr. Bhaiyalal's evidence stands uncontradicted and it must be held that, as the Government doctor in charge of the Hospital at Fatephur at the time of the execution of the will, his testimony given in the case is *prima facie* trustworthy and would justify the conclusion that the testatrix was of a sound and disposing mind at the time she executed her second will in India.

The next question deals with the alleged exercise of undue influence by the defendant on his mother Anchi Bhai in order to procure for himself the benefits given in the wills.

"To be undue influence there must be coercion. . . . . It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do that it is undue influence. , . . . , It is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It is necessary also to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power that the will, such as it is, has been produced." [See *Baudains and others* v. *Richardson and another* (1)].

"Even if there be undue influence by the beneficiary under a will, there must be clear evidence that the undue

(1) (1906) Appeal Cases, 169 at 184-185.

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influence was in fact exercised, or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property."

[See *Bur Singh* v. *Uttam Singh* (1)]. [See also *Ganpatrao Khandero* v. *Vasantrao Ganpatrao* (2)]. [See also *Khwaja Ahmed Khan* v. *Mt. Murmuzi Khan and others* (3)]:

"when once it is proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence rests on the person who so alleges. That burden is not discharged by showing merely that the beneficiary had the power unduly to overbear the will of the testator; it must be shown that in the particular case the power has been exercised, and that execution of the will was obtained thereby."

[See *Craig* v. *Lamoureux* (4)].

"To establish a *prima facie* case of undue influence as regards the execution of a will, it is not enough to show merely that the eldest son was entirely disinherited and another son given the whole estate."

[See *Leong Hone Waing* v. *Leon Ah Foon and others* (5)].

"Where there is evidence tending to show some mental incapacity, and also evidence tending to show some undue influence, it is easier to satisfy the Court that undue influence has been exercised, inasmuch as the degree of influence required to induce a person of strong mind and in good health to do any act is much greater than that which would induce a a person of feeble mental capacity and in a weak state of health."

[See *Hampson* v. *Guy* (6)].

In view of the allegation made in the plaint that the testatrix Anchi Bhai had no independent advice

(1) (1911) I.L.R. 38 Cal. 355.
(2) A.I.R. (1932) Bom. 588.
(3) A.I.R. (1921) Oudh 81.
(4) (1920) Appeal Cases, 349.
(5) (1929) I.L.R. 7 Ran. 720
(6) (1891) 64 Law Times, 778.

in the preparation of the two wills, it is necessary here to state that different considerations would apply on the question in cases where disposition of property has been made *inter vivos*, as in the case of gifts, and those made after death, as in the case of wills. A person desiring to execute a will need not consult anybody as to what properties he should leave to any particular beneficiary.

"Natural influence exerted by one who possesses it to obtain a benefit for himself is undue *inter vivos*, so that gifts and contracts *inter vivos* between certain parties will be set aside, unless the party benefited can show affirmatively that the other party could have formed a free and unfettered judgment in the matter; but such natural influence may be lawfully exercised to obtain a will or legacy. The rules, therefore, of Courts of equity in relation to gifts *inter vivos* are not applicable to the making of wills."

[See *Parfitt* v. *Lawless* (1).

Judged in the light of the principles laid down in the above decisions, it is difficult to say in this case that the defendant had exercised undue influence in the matter of his mother's execution of the two wills in suit.

No doubt, as compared to the plaintiff who had separated from the family and had established his own home in another building and carried on his business separately from the mother, the defendant, who lived and worked with her, was placed in an advantageous position in the matter of receiving her bounty. Apart from separate living, the plaintiff's conduct towards his parents, as has already been set out, had not been that of a dutiful and obedient son. He had had differences with his father before the family business was partitioned. Although definite proof has been lacking, a charge of unlawful detention

(1) (1872) Law Reports, 2 P. and D. 462 = 27 Law Times, 215.

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of two boxes containing valuables and documents was made against him by the defendant shortly after the mother was brought back to her house from the plaintiff's place.

Immediately after the mother was restored to the care of the defendant, the plaintiff lost no time in publishing the fact that he was one of her heirs. The suggestion that the defendant was contemplating fraudulent disposition of her property was repudiated by the latter in his letter dated 8th March 1940 (Exhibit 11), where also for the first time, the defendant alleged that the plaintiff had taken possession of his suit-case and tin box containing valuables and documents and had refused to return them on demand made by the defendant. On the same day the defendant, through his lawyers, made a report to the Commissioner of Police, Rangoon, regarding the unlawful detention of his two boxes by the plaintiff. On 16th March 1940 the defendant repeated his complaint to the Commissioner of Police, stating further that the plaintiff was making arrangements to commit an assault on the defendant.

The reply made by the plaintiff, through his lawyers, on 9th March 1940 sought to justify the action he took in publishing the defendant's intention regarding his mother's property. He claimed that the leather suit-case and the tin box, referred to by the defendant, belonged to his son Hariprasad. Reference was also made to his mother's bodily infirmity and unsoundness of mind and apprehension was expressed that the defendant might take advantage of her condition and get some sort of document executed by her in his favour with regard to her property. A further question was raised as to the manner in which the defendant had managed the joint estate of the parents for the last 15 years.

In view of the defendant's complaint to the Commissioner of Police that the plaintiff was likely to commit a breach of the peace, it was not surprising that the defendant should refuse to permit the plaintiff and his son to have direct access to his mother. The estrangement between the two brothers which followed the removal of the mother from the control of the plaintiff to the care of the defendant, was thus directly due to the plaintiff's own conduct. He was unwilling to permit his mother to return to her house to be placed in the defendants care, and Dr. Bhansali had to be called in to certify that she was in a fit state to be removed to her house. The two boxes which were left behind in the plaintiff's house were then claimed by the plaintiff as the property of his son Hariprasad. The plaintiff then published advertisements in the papers insinuating that the defendant was going to do something to deprive him of his rightful share in his mother's property. Subsequently, he made the suggestion that his mother was so seriously ill as not to be in a sound state of mind.

Now, it has been clearly brought out in the evidence of the defendant's witnesses that the mother Anchi Bhai's powers of sight and hearing were normal, and although her power of speech was totally affected by her paralytic stroke, she could be made to understand what was happening in her house and outside it. On or about 20th March 1940, the date on which Dr. Das Gupta saw her, Anchi Bhai had sufficiently recovered from her paralytic stroke to be able to understand questions put to her and communicate her wishes by means of gestures. If she understood the cause of the estrangement between the two brothers, it was very likely that her mind would be very much prejudiced against the

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plaintiff. He had in the past been wanting in filial affection and had brought about the partition of the Joint Family business, and had also been imprisoned for perjury. Now, he has made his claim to the valuables contained in the two boxes retained by him in his house after her arrival from India. The value of the contents of these two boxes has been described by the defendant almost in astronomical figures. If, as the defendant alleges, these properties were of great value, it was but natural that his mother should so dispose of her property as to compensate the defendant for the loss he suffered. The fact that the deeds of transfer by which the Rangoon properties of Anchi Bhai were acquired by her husband were executed in two parts in respect of two separate portions of the properties, has been suggested as indicating the original desire on the part of the parents to benefit the two sons equally. It is, however, noticed that the values stated in the two deeds of transfer are discrepant and unequal, and the explanation that properties were acquired in this manner by Marwari traders with a view to facilitate the raising of loans on equitable mortgages on their properties, would appear to be a more reasonable explanation of this fact. Thus, the circumstances in which the Rangoon will was executed are such as to remove the suspicion that the defendant had exercised any undue influence on his mother in order to obtain the whole of her property for himself.

Then, after this will was executed, the plaintiff apparently after noticing the Sub-Registrar's visit to his mother's place, came to the conclusion that a document of some sort had been executed by his mother adversely affecting his rights to her property. He accordingly filed his petition in the High Court of Judicature at Rangoon for an inquisition under the Lunacy Act

with a view to get his mother examined to see whether she was of a sound mind and capable of managing her own affairs. If this action on his part was understood by his mother, as she probably did, it must have given her further cause for dissatisfaction with his claim to her affections. Then came the telegraphic communication from India stating that the plaintiff had also started making some sort of a claim to the family property in India. After she was taken to Fatehpur, she was served with a summons by the Sikar Court on 3rd May 1940 (Exhibit 37). The summons was in respect of a suit for partition of property valued at Rs. 90,000 brought against Anchi Bhai and Balabux, the defendant. It would appear that this suit had been filed on 3rd March 1940 (see Exhibit 42). The summons in question was issued against Anchi Bhai to show cause against the application made by the plaintiff for taking an inventory of moveable properties involved in the dispute. Then, on 15th May 1940 the second will was said to have been executed by Anchi Bhai in Fatehpur repeating the same disposition of her property in favour of the defendant, to the utter exclusion of the plaintiff.

The validity of this will was contested in the Sikar Court in India, and it would appear from the copies of Judgments filed in this case on behalf of the defendant (Exhibits 40 and 42), that this question was decided against the plaintiff in that suit. Considering that Anchi Bhai herself gave evidence at considerable length on commission about the execution of this will, a fact admitted by Hariprasad (PW 1), it is not surprising that the plaintiff's efforts to question its validity did not meet with any success. Her deposition made before the Commissioner in the presence of opposing lawyers removed any doubt

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whatsoever as to whether the defendant had exercised any undue influence upon her for the purpose of procuring the said will from her.

"A person may act foolishly and even heartlessly; if he acts with full comprehension of what he is doing the Court will not interfere with the exercise of his volition."

[See *Motibai Hormusjee Kanga* v. *Jamsetjee Hormusjee Kanga* (1)]. Her deposition would clearly show that she perfectly understood what she had done and the consequences of her actions on her two grandsons by the plaintiff who had become disinherited under her will.

The evidence of the medical witness who attested the document in Fatehpur removes all possibility of doubt that Anchi Bhai was not freely exercising her volition when she executed the said will. Although it is open to conjecture that the defendant, as the sworn enemy of his younger brother, was bent on depriving the latter of his rightful share in his mother's property, it has not been shown that the defendant had exercised such control and influence over his mother as to compel her to execute the will in his favour. This being the case, the questions raised in the 2nd Issue must be answered in the negative.

The *3rd Issue* raises the question as to whether a final decision in regard to the validity of the Indian will dated 15th May 1940 had been arrived at by the Courts in India, and whether such a decision is conclusive on the point as between the parties to this suit. Duly certified copies of judgments, one of the Court of the Judicial officer, Sikar (Exhibit 40), and the other of the judgment of the High Court of Jaipur (Exhibit 42), have been produced in evidence on the defendant's behalf in support of his contention that the question of the validity of the will executed in Fatehpur was

(1) A I.R. (1924) P.C. 28 at 33.

finally decided by these Courts as between him and the plaintiff. The plaintiff's son Hariprasad has given evidence in this case and has admitted that he and his father (since deceased) filed a suit in the Court at Sikar against his grandmother Anchi Bhai and the defendant (Suit No. 5 of 1939-40), but he professes not to know what sort of order the Judicial Officer at Sikar had passed in that case. He admits, however, that an appeal was preferred against this judgment in the Jaipur High Court and that this appeal preferred by him and his father was dismissed with costs. He also admits that the High Court at Jaipur had decided that the lower Court's decision regarding the will of Anchi Bhai was correct. (Page 12 and 12 reverse of his deposition.)

Now, under section 13 of the Civil Procedure Code, the foreign judgments which are now produced in evidence on the defendant's behalf are held to be conclusive as to any matter directly adjudicated upon between the same parties, or between parties under whom they or any of them claim, litigating under the same title. Under section 14 of the Civil Procedure Code, the Court has to presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record.

It has, however, been contended on the plaintiff's behalf that the provisions of section 13 can have no application to the matter now in dispute between the parties as the Judge of the Sikar Court as well as that of the High Court of Jaipur did not have before them the question of the validity of the will directly in issue in the dispute between the parties. The judgment (Exhibit 40) would show in what manner the validity of the second will of Anchi Bhai came

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to be disputed between the parties in the former suit in which they were engaged in the Sikar Court. During the pendency of the suit in India the mother Anchi Bhai died at Fatehpur and Balabux the defendant set up the second will in this case as having been executed by his mother in his favour bequeathing all the properties to him. It was this defence that the defendant set up which brought the additional issue regarding the validity of the will within the scope of the enquiry before the Sikar Court and the additional issue on this question was framed in these terms:

> "Whether Mst. Anchi Bhai, deceased, had bequeathed her share in the properties, moveable and immoveable, in favour of Balabux by means of a will; and, if so, what is its effect on the shares of the parties?"

The Court found that the will in question was executed by Mst. Anchi Bhai in favour of the defendant. However, it was of the further view that the will did not affect the shares of the parties as no evidence had been given to show what properties, moveable or immoveable, were actually possessed by the testatrix as her separate property. It was this finding which the plaintiff took up on appeal to the High Court of Jaipur, and the appeal was disposed of towards the end of the judgment in a few words to the effect that the appeal had no force and must be dismissed with costs. This decision of the High Court of Jaipur must therefore be deemed to have been given on the merits of the case within the meaning of section 13 (*b*) of the Civil Procedure Code. See *Brijlal Ramjidas and another* v. *Govindram Gordhandas Seksaria and others* (1).

Besides the contention that section 13 of the Civil Procedure Code is not applicable to the Indian

(1) A.I.R. (34) (1947) P.C. 192.

judgments it has also been pointed out that as the copies of the two judgments now filed as exhibits in this case have not been properly authenticated, as required under section 78 of the Evidence Act, the Court cannot presume the same, under section 86, to be genuine and accurate. Under section 78 (*6*) of the Evidence Act, documents of a foreign country may be proved either by the production of the original or by a copy certified by the legal keeper thereof, with a certificate under the seal of a Notary Public, or of a diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the documents according to the law of the foreign country.

The force of this objection appears to be off-set by the admission made by the plaintiff's son Hariprasad as to the correctness of the nature of the decision passed by the Indian Court on the question of the validity of the will in dispute, and also by the fact that political changes conferring the status of independence to the two countries had taken place quite recently and that the same legal system has been in force thereafter. In view of this latter fact, it might be reasonably contended that until reciprocal arrangements are completed in this regard, the provisions of section 82 relating to the admissibility of documents in England and Ireland, rather than the provisions of section 86, should be held to apply to the production and admission of the Indian documents filed in the present case.

The defendant himself has sworn to the fact that the copies of judgments (Exhibits 40 and 42*)* are those of the Court of the Judicial Officer of Sikar and of the High Court of Jaipur. I do not, therefore, consider that the objections taken to the admissibility of these documents should prevail.

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Accordingly, the 3rd Issue is answered in the affirmative.

4th, 5th and 6th Issues.—On behalf of the defendant a number of objections have been taken to the frame of the suit as well as to the levy of Court-fees due upon the plaint. A further objection has also been taken to the effect that the claim for rents and profits and for accounts thereof is barred by limitation.

The objection to the frame of the suit rests upon the view taken in the case of *Hukam Singh and others* v. *Mussammat Gyan Devi and others* (1), where it was held that after the death of the testator the will had become operative and consequently the plaintiffs could not ask for a mere declaration in respect of it but must ask for its cancellation. Reliance is also placed on the decision made in the case of *Raja Rajeswara Dorai* v. *A.L.A.R.R.M. Arunachellan Chettyar* (2), where it was held that a unilateral expression of a rescission of a contract by one of the parties to the same does not relieve him from his obligation to have the contract rescinded by Court under the substantive law of the land, if he wants the assistance of the Court in obtaining certain reliefs on the basis that the contract has ceased to exist.

Clearly this decision has no bearing on the point raised by the defendant in this suit. The same reason would exclude the consideration of the principles of law laid down in *Kalu Ram* v. *Babu Lal and another* (3). A registered instrument of mortgage, unlike a will, would require formal cancellation by the Court before any relief can be given on the basis that it has no legal effect. The case of *Akhlaq*

(1) (1916) 51 Pun. Record 266. (2) (1915) I.L.R. 38 Mad. 321 at 322.
(3 (1932) I.L.R. 54 All. 812.

Ahmad and others v. *Mt. Karam Llahi* (1) is not really in favour of the view put forward on the defendant's behalf. It was there held that it is open to a plaintiff to sue for a declaration that a document is void or voidable without making it a suit falling within the purview of section 39, Specific Relief Act; and also for the purposes of court-fee, it was there held that it is not open to a Court to say that the plaintiff must be taken to have done what he should have done, though he persists in saying that he does not sue for cancellation. This view of the law in regard to court-fees was based on the decisions made in *Lakshmi Narain Rai* v. *Dip Narain Rai* (2), and *Sri Krishna Chandra* v. *Mahabir Prasad* (3). There is, therefore, nothing vitally wrong with the frame of the present suit.

In regard to court-fees payable on the plaint, there is abundant authority for the view that where in a partition suit the plaintiff has alleged in his plaint that he is in joint possession of the property, no *ad valorem* court-fee is payable on the value of the property involved. This view has been taken on the ground that the question as to what court-fees are payable on the plaint is to be decided on the allegations made in the plaint and on the nature of the relief claimed.

See *Premananda* v. *Dhirendra Nath Ganguly and others* (4). See also *Kattiya Pillai and another* v. *Ramaswamia Pillai and others* (5). Both the points raised by the defendant in regard to the frame of the suit as well as the court-fees payable on the plaint are found dealt with in this Madras decision, in which it was categorically stated that it was not

(1) A.I.R. (1935) All. 207.
(2) 55 All. 274.
(3) 55 A.I. 791.
(4) A.I.R. (37) (1950) Cal. 397.
(5) A.I.R. (1929) Mad. 396.

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incumbent upon the plaintiff to sue for cancellation of the will which was in the way of the plaintiff's claim to his share of the property, and that the court-fee payable in a suit of the present nature falls under section 17A (*1*). The same view was taken in regard to court-fees in the case of *Kirty Churn Mitter* v. *Aunath Nath Deb* (1).

The authorities cited by the defendant to the contrary, *viz.*, *Sitbaran Jha Pandey* v. *Lokenath Missir* (2), *Bhagwan Appa Wani* v. *Shivalla Wani* (3), *Kanhaiya Lal* v. *Baldeo Lal and others* (4), and *Kandunni Nair* v. *Ittunni Raman Nair and eight others* (5), did not deal with cases where the plaintiff had, in asking for partition, alleged joint possession of the property sought to be partitioned, as has been done in the present case. Accordingly, the objection raised to the frame of the suit and to the payment of court-fees on the plaint cannot prevail.

On the question of limitation, the plaintiff has thought fit to make a claim for accounts commencing from the year 1925 when he separated from the rest of the members of the family. This claim has been made on the strength of the plea that the defendant had all along acted as his mother's agent. As the deceased Anchi Bhai, the mother, was at liberty to manage her own affairs and expend the profits derived therefrom in whatever manner she thought fit during her lifetime, the mere fact that the defendant had assisted her in the management of her properties would not make him liable to render accounts to the plaintiff in respect of any share to which the latter may be entitled in the mother's property after her death. The claim for accounts in

(1) (1882) I.L.R. 8 Cal. 757.
(2) (1924) I.L.R. 3 Pat. 618.
(3) A.I.R. (1927) Nag. 248.
(4) A.I.R. (1925) Pat. 703.
(5) (1930) I.L.R. 53 Mad. 540.

respect of the period prior to the death of Anchi Bhai would clearly be barred by these considerations. The plaintiff's claim for rents and profits and for accounts thereof is clearly outside the scope of this claim for partition and separate possession of his share of the mother's property, and it is unnecessary therefore to consider what particular Article in the Limitation Act would apply to the plaintiff's claim for accounts.

The two wills in suit purport to dispose of both the moveable and immoveable properties belonging to the deceased Anchi Bhai, and accordingly it is hardly necessary to enquire into the real ownership of the two boxes and their contents which are in deposit with the Mercantile Bank of India, Rangoon, and to which the Official Receiver now holds the keys. Exhibit H, a copy of the receipt granted by the Bank at the time the deposit was made, would show that these properties were held by the Bank in favour of the defendant and his son-in-law Dibriwallah. *Prima facie*, therefore, even if the plaintiff had been successful in the attack made by him on the validity of the two wills in suit, it would still be difficult, in view of the terms of the receipt (Exhibit H), to hold the view that ownership of these properties ever rested with the deceased Anchi Bhai.

In the result the plaintiff's suit will stand dismissed, with costs.

APPELLATE CIVIL.

Before U Aung Khine and U Ba Thoung, JJ.

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Feb. 8.

TAN PAN KONG (APPELLANT)

v.

DAW KHIN KHIN (RESPONDENT).*

Right to ancient light and air—Infringement, when actionable—Nuisance.

Held : To be actionable for infringement to ancient light and air, the deprivation must be substantial and must amount to a nuisance. It is not enough to prove obstruction or that the light was less than before.

Colls v. *Home and Colonial Stores, Limited*, (1904) Appeal Cases, p. 179, followed.

Balthazar & Sons v. *M. A. Patail*, A.I.R. (1919) Lower Burma, p. 75, affirmed.

B. S. Ammani Ammal v. *T. S. Ranganayaki Ammal*, A.I.R. (1926), Mad., p. 898 ; *The Delhi and London Bank Limited* v. *Hem Lall Dutt*, I.L.R. 14 Cal., p. 839, referred to.

Hla Pe, Advocate, for the appellant.

San Hlaing, Advocate, for the respondent.

Judgment of the Court was delivered by

U AUNG KHINE, J.—This is an appeal against the judgment and decree passed on the 15th June 1953 by the Chief Judge of the Rangoon City Civil Court in his Civil Regular Suit No. 1288 of 1951.

The plaintiff-appellant Tan Pan Kong's suit for declaration of right to ancient light and air and for injunction or for damages valued at K 8,000 against the defendant-respondent Daw Khin Khin was dismissed with costs.

The facts of the case are simple and briefly stated, they are these : Tan Pan Kong is the owner of House

* Civil 1st Appeal No. 102 of 1953, against the decree of the Chief Judge, City Civil Court of Rangoon in Civil Regular Suit No. 1288 of 1951, dated the 15th June 1953.

No. 116, Crisp Street, Rangoon, having purchased the same from the previous owners Daw Aye and Maung Tin Htoo in July 1946. Originally the building belonged to one U Chit Hla who bought the site on which the building stands in the year 1902 at a Court auction sale. Later he put up the said building and probably on his death the house was inherited by his daughter Ma Saw Tin who sold it away to Daw Aye and Maung Tin Htoo.

The house is a three-storeyed building facing west and the top floor had three windows facing south. It would appear that since the construction of this building the inmates of the house had been in continuous enjoyment of unobstructed light and air coming through these windows.

Prior to 1951 there was a small house built of timber to the south of the plaintiff's building and the roof of which did not come up to the level of the three windows on the top floor of the plaintiff's building. This small house was dismantled and its owner the defendant-respondent Daw Khin Khin constructed a two-storeyed brick building some time in the middle of the year 1951. In putting up the building the rules as laid down by the Rangoon Municipality had to be adhered to. According to these rules, the height restrictions in respect of the buildings are that the first floor has to be at least 14 feet from the base of the house and the second floor not less than 12 feet. In conforming to these rules as laid down by the Rangoon Municipality, the defendant could not avoid closing up the bedroom window completely and the sitting-room window partially on the second floor of the plaintiff's building. It appears that the parties made attempts to settle the matter amicably even while the defendant's house was still under construction and before it had reached the

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window level on the plaintiff's house. But somehow no effective settlement was arrived at.

On the ground that by the construction of the defendant's house his household had been deprived of his ancient light and air in the third storey of the house causing thereby substantial and serious discomfort, inconvenience, trouble and annoyance as well as health, the plaintiff filed his suit against the defendant in the manner stated above. The defendant-respondent's case is that of a denial of the plaintiff's right to enjoy the light and air coming through these windows ; and even if he was so entitled she had not caused any obstruction that would give rise to a cause of action.

The lower Court found that the plaintiff-appellant had been in enjoyment of the ancient light and air to the casement of which he was entitled and that the defendant had obstructed the said light and air coming through these windows. The lower Court, however, declined to pass a decree in favour of the plaintiff-appellant on the ground that the said obstruction had not rendered the rooms on the second floor useless or unfit for sleeping purposes and that it had not interfered materially with the physical comfort of the plaintiff and that the plaintiff had not been prevented from using these rooms as beneficially as he had done before.

Now in this appeal as the findings of the lower Court on facts are not in dispute we are confined only to the question of law to be applied to these facts. The leading case on the subject is *Colls* v. *Home and Colonial Stores, Limited* (1). The principles laid down therein that "To constitute an actionable obstruction of ancient lights it is not enough that the light is less than before. There must be a substantial

(1) (1904) Appeal Cases, p. 179.

privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and (in the case of business premises) to prevent the plaintiff from carrying on his business as beneficially as before " are not challenged. Furthermore, it is also agreed at the Bar that the infringement caused to the ancient light and air must amount to a nuisance to be actionable.

Each case must be judged in the light of circumstances pertaining to it and therefore in this case apart from the facts already stated we must look further into the evidence to find out whether the obstruction caused by the defendant's action amounted to a nuisance. The appellant in his evidence stated that his bedroom has become dark owing to the obstruction caused. Light and air have been denied so much so that electric light and fan have to be used. Owing to this denial of light and air he and his wife together with their children often became ill. In this, he is supported by his wife Wat Hun (PW 9), his nephew G. Ah Shein (PW 5) and C. Narujee (PW 8). The last witness, it appears later, was informed about the sickness in the house by a doctor. It does seem strange, however, that the doctor who attended on the family was not cited as a witness.

The maidservants, according to the plaintiff, lived in the first floor of the house where there is no side window at all on the south. There is no complaint of sickness amongst the servants. That the first floor of the house has sufficient light and air for the comfortable living has been deposed to by Ma Saw Tin (PW 2), the previous owner of the house. It must therefore be assumed that even now the second floor must have better light and air than the first floor after the windows had been obstructed. U Tin (PW 3), a retired building engineer admitted that due

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to height the second floor will have better light and air than the first floor although the two windows are closed. The window in the sitting room is not entirely rendered useless and furthermore there is still another window a little higher up from where light and air can stream through to both the rooms.

Deducing from the facts that have been established, we are of the opinion that although the rooms have become less comfortable than before they are still sufficiently lighted and ventilated for the ordinary purposes of inhabitancy. This case now under consideration is almost on all fours with that of *Balthazar & Sons* v. *M. A. Patail* (1) dealt with by the late Chief Court of Burma. Adhering to the principle as laid down in *Colls* v. *Home and Colonial Stores, Limited* (2) it was held in that case that the plaintiff had no cause of action although there certainly had been an obstruction.

The plaintiff's right to the enjoyment of ancient light and air is not in dispute ; however, the obstruction caused by the defendant was not to that extent of total denial of either light or air. There are still other few sources from which light and air have been and are still drawn. In his presentation of the case before us, the learned Advocate for the appellant has laid more stress on the loss of air than on the loss of light although he claimed that artificial light has to be used more frequently now in the rooms. He claimed that as the entire bedroom window has been completely put out of use the appellant has been deprived of the precious south breeze which usually comes through that window. He referred us to the Madras case of *B. S. Ammani Ammal* v. *T. S. Ranganayaki Ammal* (3) in which a permanent

(1) A.I.R. (1919) Lower Burma, p. 75. (2) (1904) Appeal Cases, p. 179.
(3) A.I.R. (1926) Mad., p. 898.

injunction was given against the obstruction of windows and aperture through which the south breeze, much valued in that country, flowed. The importance of the south breeze for the comfort of the people in that part of the world was emphasized therein. The answer to this aspect of the case by the Advocate for the respondent is that there is no such right as a right to the uninterrupted flow of south breeze as such and in support of this contention he cited the case of *The Delhi and London Bank Limited* v. *Hem Lall Dutt* (1). The breeze from the south as far as we know comes periodically only in this country and therefore when the wind is from elsewhere there cannot be much difference at all in the atmosphere of the rooms concerned. Thus taking all the circumstances of the case into consideration, we are of the opinion that the plaintiff-appellant has not sufficiently established that the obstruction caused by the defendant-respondent really amounted to a nuisance thus giving rise to an actionable claim.

We affirm the lower Court's judgment and decree and accordingly the appeal is dismissed with costs.

(1) I.L R. 14 Cal., p. 839.

APPELLATE CIVIL.

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

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Jan. 9.

THE BANK OF CHINA, LIMITED (APPLICANT)

v.

AHMED DADABHOY BROS. (BURMA) LIMITED (RESPONDENTS).*

Sale of Goods Act, 1930, ss. 19, 30 (2)—Goods sold on approval—Property in the goods does not pass until the option is exercised—Till then buyer only a trustee for the Seller—Intention, decisive factor—Hypothecation and pledge, distinction—Evidence Act, ss. 114 (g), 101—Factors Act, 1889.

Lu Bin Company purchased C.O.D., 15 tons of groundnut oil from Ahmed Dadabhoy Bros. (Burma) Limited.

The goods on arrival were allowed to be removed to Lu Bin Company's Godown at No. 159, 39th Street, on condition that the purchase price was to be paid that very day.

The payment was deferred on several excuses for two days and then the Company's Managing Partner absconded.

A report to the Police resulted in the Managing Partner being sent up before the Eastern Subdivisional Magistrate, Rangoon, under s. 420, Penal Code, and the sale proceeds of the goods were eventually returned to the appellant the Bank of China on security, who had claimed that Lu Bin Company's Godown at No. 159, 39th Street and its contents belonged to them by virtue of a hypothecation bond executed by Lu Bin Company in their favour, in pursuance of which actual possession had been delivered to the Bank.

Thereupon the 1st respondent Ahmed Dadabhoy Bros. filed a suit for a declaration of ownership and their right to retain the sale proceeds, and the suit was decreed.

On appeal by the appellant, the Bank of China.

Held : That the property in the goods remained with the 1st respondent although the delivery of the same was given to the appellant, or in the case of goods sold on approval, wherein the property does not pass until the buyer exercises his option to take them and pay cash in full. Until then the buyer holds the property in trust and the trust continues till the option is exercised and cash payment is made.

Khitish Chandra Deb Roy v. *Emperor*, 51 Cal., p. 796, approved.

Scott and Hodgson, Limited v. *Keshavlal Nathubhai Shah and others*, 54 Bom., p. 862, disapproved.

Held further: The intention of the parties is the decisive factor in determining the time when the property in the goods passes to the buyer, when that intention is expressed in the contract itself ; in the absence of

* Civil 1st Appeal No. 136 of 1953, against the decree of the (U AUNG THA GYAW) Original Side, High Court of Rangoon in Civil Regular Suit No. 8 of 1953, dated the 13th October 1953.

express provision in the contract, the intention has to be gathered from the conduct of the parties and the circumstances of the case.

Hoe Kim Seing v. *Maung Ba Chit*, 14 Ran., p. 1 at p. 7, followed.

Held also: In a C.O.D. sale the delivery of goods is conditional on payment and the person to whom the goods had been delivered remained a trustee for the Seller.

Loeschman v. *Williams*, (1815) K.B. 4 Camp. 181, referred to.

Held further: That the property in the goods remained with the 1st respondent Ahmed Dadabhoy Bros. (Burma) Limited, in spite of the delivery of goods to the 2nd Respondent Lu Bin Company.

Held also: A contract of pledge is distinguished from the contract of hypothecation by the transfer of the possession or the actual delivery of the thing intended to be charged to the creditor.

Stroud's Judicial Dictionary, p. 1496, Second Edition, referred to.

Hypothecation is a right which a creditor has over a thing belonging to another, and which consists in the power to cause it to be sold in order to be paid his claim out of the proceeds.

Aiyer's Law Lexicon of British India, p. 537 of 1940 Edition, referred to.

Therefore, where the contract was merely one of hypothecation, the burden of proof to show that it was a pledge lies on the appellant.

Held also: Unless a clear intention is expressed or implied, a hypothecation bond does not effect after acquired property.

In the matter of Ambrose Summers, 23 Cal., p. 592, referred to.

Whitehorn Brothers v. *Davison*, (1911) 1 K.B., p. 463, does not apply.

Heap v. *Motorists' Advisory Agency Limited*, (1923) 1 K.B., p. 577, referred to.

Commonwealth Trust Limited v. *Akotey*, (1925) Appeal Cases, p. 72 at p. 76, dissented from.

Mercantile Bank of India Limited v. *Central Bank of India*, (1938) Appeal Cases p. 287, p. 298.

Under the circumstances of the case a suit for a mere declaration without a consequentialrelief lies.

Zeya, W T. Shan and *Chaung Po*, Advocates, for the appellant.

Soorma and *P. K. Basu*, Advocates, for No. 1 respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 8 of 1953 of the Original Side of this Court the plaintiffs Ahmed Dadabhoy Brothers (Burma) Limited who are the respondents in the present appeal sought a declaration of ownership of 15 tons of groundnut oil in dispute and of their right to

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retain the sale proceeds thereof. In the connected Civil Regular Suit No. 12 of 1953, S. M. Haji Suleman & Co. sought a similar declaration against the present defendant-appellants and Messrs. Lu Bin Company in respect of 500 bags of flour and their sale proceeds.

It would appear that the 1st defendant Lu Bin Company who has not filed any appeal against the judgment and decree of the Original Side, purchased from the plaintiffs Ahmed Dadabhoy Bros. (Burma) Limited, 88 drums of groundnut oil weighing about 15 tons under the terms of a contract entered through the intermediary of a broker by the name of M. A. Khalik (PW 2). Under the terms of the contract the goods were to be taken delivery of by Lu Bin Company after due weighment at the wharves on arrival from India and cash was to be paid against delivery (C.O.D.). The goods arrived by S.S. "Jalamohan" on or about the 23rd of July 1952 and weighment was made under the supervision of Mr. H. J. Howson (PW 4) of Ellerman's Arracan Rice & Trading Co. through whom the goods were indented for by the plaintiffs. Although the Cash Memos. (Exhibits F and G) were prepared while the weighment was in progress, the goods were allowed to be taken in the meantime to the 1st defendants' godown at No. 159, 39th Street, on the assurance that the purchase price would be given that very day. However, when the cash Memos. were presented for payment at the 1st defendants' office premises at No. 382, Strand Road, Rangoon, the same evening, the 1st defendants' Managing Partner Gaw Shu Bin (*a*) Khaw Sin Ching asked for time for payment till the next morning on the ground that it was too late to arrange for the necessary cash. The demand for payment made on

the following morning was again put off till the afternoon when Gaw Shu Bin offered to settle the price due by giving a cheque. When the plaintiffs' bill collector, on the instruction from the plaintiffs, declined to accept the payment by cheque he was asked to call again for payment the following day, namely, the 25th of July 1952. Payment was, however, never received as the plaintiffs' bill collector found on the 25th July 1952 that the partner of the 1st defendant firm had absconded The statement of the plaintiffs' bill collector Ebrahim Mohamed Karodia (PW 6) as to the manner in which the 1st defendants' Managing Partner Gaw Shu Bin tried to defer payment of the goods delivered to the firm on C.O.D. terms is fully corroborated by the evidence of Abdul Sattar (PW 3), assistant of the broker Mr. M. A. Khalik (PW 2).

A report was made to the Pabedan Police that very night against Gaw Shu Bin charging him with the offence of cheating and as the 26th of July 1952 happened to be a Saturday, the police were only able to obtain a warrant for the search and seizure of the goods on the 28th of July 1952. As the First Information Report mentioned the fact that the goods were stored in the godown of the 2nd defendant-appellants' Bank situated in No. 159, 39th Street, the Manager of the Bank Mr. Y. F. Hu (DW 1) was called upon to produce the keys. Mr. Y. F. Hu on legal advice refused to give the keys so that the godown was broken open and the 88 drums of oil seized by the police and handed over to the plaintiffs on their furnishing security. Subsequently with the permission of the Eastern Subdivisional Magistrate, Rangoon, before whom the case against Gaw Shu Bin under section 420 of the Penal Code was pending, the goods were sold

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by the plaintiffs by retail vend and the sale proceeds, namely, K 33,633·71 pyas retained by them on their furnishing security to produce the same whenever required by the Court. Thereafter, the second defendant obtained an order from this Court for the return of the goods to them on their furnishing security to the extent of K 47,000. The Eastern Subdivisional Magistrate thereupon directed the plaintiffs to return the goods which had been delivered to them by the police. Hence the present suit.

The 1st defendant Lu Bin Company did not appear to contest the suit and hence it was heard *ex-parte* against them. The 2nd defendant Bank, however, claimed that they had been in physical possession of the 1st defendants' godown at No. 159, 39th Street, Rangoon and of its contents in pursuance of a hypothecation bond, dated the 30th July 1951 executed by the 1st defendants in their favour in respect of the overdraft to the extent of K 2 lakhs permitted to the 1st defendants. The defendant Bank also claimed that the goods had been delivered to Lu Bin Company by the plaintiffs and that Lu Bin Company had in turn given possession of the same to the Bank in pursuance of the hypothecation bond and that therefore the plaintiffs were not entitled to make any claims for the goods, the defendant Bank having received the same from Lu Bin Company in good faith. The 2nd defendants further contended that the goods having been returned to the plaintiffs by the police without lawful authority, the plaintiffs' retention of the same was unlawful and therefore a suit for a mere declaration without prayer for possession of the goods or their sale proceeds by way of consequential relief was not maintainable in law.

On the pleadings the following issues were framed by the learned Judge on the Original Side by consent of the parties to the suit :—

1. Were the goods in suit sold and delivered by the plaintiffs to the 1st defendant on the terms set out in the Bought Note, Exhibit B ?
2. Did the property in the goods remain with the plaintiffs after such delivery by reason of the non-payment of the price due therefor ?
3. Did the goods in suit get into the legal custody and possession of the 2nd defendant under the Hypothecation Bond executed in their favour by the 1st defendant ?
4. Was the possession of the goods illegally restored to the plaintiffs ?
5. Are the plaintiffs not entitled to the declaration sought for without asking for legal possession of the goods and is the suit under-valued on that account ?
6. What relief, if any, are the plaintiffs entitled to ?

The learned trial Judge after a careful appreciation of the evidence on record answered the first and second issues in the affirmative, the third in the negative, and the fourth and fifth issues in the sense that what the plaintiffs sought for being a declaration in respect of their right to the goods prior to the intervention of the police under the search warrant issued by the District Magistrate, it was unnecessary for them to ask for any consequential relief if they succeeded in establishing the fact of their legal possession of the goods before the irregularities had occurred in the Criminal Court.

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In the result the plaintiffs' suit for a declaration was decreed with costs. Hence this appeal.

Before us, it was contended firstly that the learned Judge on the Original Side was wrong in holding that in the circumstances obtaining in this case the property in the goods remained with the plaintiff-respondents. Secondly, the learned Judge on the Original Side was wrong in not holding that in the circumstances of the case, the goods were in the possession of the second defendant-appellants in pursuance of the terms of the hypothecation bond (Exhibit 5) dated the 30th July 1951 and that therefore the provisions of section 30 (*2*) of the Sale of Goods Act, 1930 operated in favour of the defendant Bank. Thirdly that the learned Judge on the Original Side was wrong in holding that in the circumstances a suit for a mere declaration was maintainable in law.

As regards the first point the learned Judge on the Original Side has observed that the evidence adduced by the plaintiffs established the fact that the property in the goods remained with the plaintiffs although delivery of the same was given to the lst defendants and that the facts were similar to those dealt with in *Khitish Chandra Deb Roy* v. *Emperor* (1). In that case it was held that when a person takes goods on approval under an agreement that property therein was to pass only if he exercissd his option to take them and paid cash in full for certain articles and in part for others, the buyer holds the property in trust and the trust continues till the option is exercised and cash payments made. The learned Advocate for the appellants has, however, cited the case of *Scott and Hodgson, Limited* v. *Keshavlal Nathubhai Shah and others* (2) in support of his

(1) 51 Cal. p. 796. (2) 54 Bom. p. 862.

contention that any contract to the effect that the property in the goods was to remain with the seller until full payment was made therefor was invalid. However, this case is no longer good authority in view of the provisions of section 19 of the Sale of Goods Act, the relevant portion of which reads :

" Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred and that for the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case."

As held by their Lordships of the Privy Council in *Hoe Kim Seing* v. *Maung Ba Chit* (1) the intention of the parties is the decisive factor in determining the time when the property in the goods passes to the buyer when that intention is expressed in the contract itself; although some difficulty may arise where the contract contains no express provision and the intention has to be gathered from the conduct of the parties and the circumstances of the case.

In the present case it is an undeniable fact that one of the terms of the contract was cash on delivery. As delivery of goods is made on such terms it is only conditional and the person to whom the goods had been delivered remained a trustee for the seller, *vide Loeschman* v. *Williams* (2). The learned Advocate for the appellants has, however, contended that in view of the fact that payment for the goods was allowed to be postponed in the manner set out above the sale was no longer on C.O.D. terms and that it was in fact a credit sale. However, in our opinion, there is no substance in this contention. The goods were delivered by the plaintiffs to the 1st

(1) 14 Ran., p. 1 at p. 7. (2) (1815) K.B. 4 Camp. 181.

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defendants only on the express undertaking of its Managing Partner Gaw Shu Bin that payment for the goods would be made that very evening. The evidence of Azam Esoof Dadabhoy (PW 1), the Manager of the plaintiff firm to this effect is corroborated by Abdul Sattar (PW 3), although there is some slight discrepancy as to whether payment was promised for that very evening or for next day. On the next day payment was again demanded and Gaw Shu Bin offered to pay the sale price by cheque. This was refused and Gaw Shu Bin promised to pay cash on the following day. No payment was made on the 25th July 1952 as Gaw Shu Bin and his confederates had by then absconded.

In these circumstances we consider that the learned Judge on the Original Side was right in having answered the second issue in the sense that the property in the goods remained with the plaintiffs Ahmed Dadabhoy Bros. (Burma) Ltd. in spite of the delivery of the goods to the 1st defendant Lu Bin Company.

In this view of the case, it is a matter now for consideration whether the defendant-appellants are protected by the provisions of sub-section (2) of section 30 of the Sale of Goods Act, the relevant portion of which reads :

> " Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods; the delivery by that person of the goods under any pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have effect as if such lien or right did not exist."

In order to get the benefit of this section, the defendant-appellants must prove that the goods were in their possession as hypothecatees under the bond and

that they received the same in good faith and without notice of the plaintiffs' lien or any other right.

In our opinion the learned Judge on the Original Side has, in his answer to the third issue, given very cogent reasons for coming to the conclusion that the defendant-appellants were not hypothecatees in possession of the goods under the hypothecation bond. In this connection it is important to note that in the hypothecation bond (Exhibit 5) the defendant-appellants were mentioned as hypothecatees and not pledgees of the goods in the godown at No. 159, 39th Street, Rangoon.

Now, a contract of pledge is to be distinguished from the contract of hypothecation by the transfer of the possession, or the actual delivery, of the thing intended to be charged to the creditor, *vide* Stroud's Judicial Dictionary, page 1496 of the Second Edition. Hypothecation is a right which a creditor has over a thing belonging to another, and which consists in the power to cause it to be sold in order to be paid his claim out of the proceeds, *vide* Aiyer's Law Lexicon of British India, page 537 of 1940 Edition.

Therefore, where the contract Exhibit 5 says that the contract was merely one of hypothecation the burden of proof would lie upon the defendant-appellants to show that it was a pledge.

The learned Advocate for the appellants has contended that the learned Judge on the Original Side was wrong in not giving due weight to the fact that in the First Information Report (Exhibit R) given by the plaintiffs to the police and in the search warrant (Exhibit L) issued by the District Magistrate it was shown that the goods were stored in the appellants' godown. However, it seems to us that the plaintiffs' Manager Azam Esoof Dadabhoy (PW 1) was under

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a misconception when he lodged the First Information Report. His explanation was that he had merely told the police officer what had transpired, namely that when he visited the godown he saw a durwan standing outside the door and that on enquiry he was told that he was sent by the Bank of China to watch the godown. However it may be that Dadabhoy himself was at that time led to think that the godown was that belonging to the Bank of China. Therefore the implied admission on his part must not be taken as conclusive proof of the fact that the Bank was in possession of the godown. As for the statement contained in the warrant issued by the District Magistrate, it is apparent that the learned District Magistrate, had acted on the information given to him by the Police Station Officer concerned who had in turn relied upon the statement contained in the First Information Report.

The learned Judge on the Original Side has, in our opinion, given very cogent reasons for coming to the conclusion that the godown and the goods therein were not in the possesion of the Bank. He said that whereas according to Mr. Y. F. Hu, Manager of the Bank, there was a signboard showing the name of the Bank above the door, the photograph (Exhibit H) taken soon after the occurrence shows that there was no such signboard in existence. We have carefully looked at the photograph (Exhibit H) and we are of the opinion that if there was a signboard above the door it should be discernible although what was written on it might not be legible. Besides, there is specific evidence to the contrary given by two witnesses T. G. Desai (PW 10) and Cassim Ebrahim Patail (PW 11). Desai lived in a house just opposite the godown and he had, on several occasions, come very close to the door of the godown. He did not notice any

signboard above it as he should have done if there was one in existence. Similarly Cassim Ebrahim Patail living on the second floor of the same house as Desai, did not see any signboard above the door of the godown although he had been passing by at least four times a day.

The learned Judge has laid considerable stress upon the fact that the appellants had failed to produce the register of pledges which they had admittedly maintained. He observed that if the goods lying in 1st defendants' godown were at any time hypothecated with the 2nd defendant Bank with possession in spite of the terms of the bond (Exhibit 5) to the contrary, the fact should be capable of clear and certain proof and that the means by which such proof could be tendered, namely, the register of pledges having been deliberately withheld by the 2nd defendant-appellants, the ordinary presumption would arise that such evidence of the transaction as the defendant Bank possessed would not, if produced, support their claim. There cannot, in our opinion, be any answer to an argument which is founded upon Illustration 9 to section 114 of the Evidence Act. Added to this there is the fact that whereas the amount outstanding against the 1st defendant Lu Bin Company was K 1,40,000 or thereabout the defendant Bank had allowed the stocks in the godown to go so low that after the police had removed from the godown goods to the value of K 80,000 as being involved in the allegedly fraudulent transactions of the 1st defendants in the few days prior to the disappearance of Gaw Shu Bin, the stocks that remained had realised only K 8,000. If the godown and the goods therein were put in the possession of the Bank and the goods could only be taken out by Lu Bin Company under the supervision of the employees of the Bank, the

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stocks in that godown could not, in our opinion, have fallen so low. Undoubtedly Mr. Y. F. Hu could not have any personal knowledge of the removal of the goods from the godown even if the Bank had been in possession. However, his failure to cite as witnesses Mr. Y. K. Ho who was in charge of the business, and the clerks assisting this gentleman, strongly militates against the truth of his assertions.

The failure to produce the keys of the godown or to cite the durwan or durwans who were supposed to be looking after the godown though seemingly insignificant when considered by itself acquires great significance when viewed in the light of the facts stated above. It tends to support the plaintiff-respondents' case that the godown and the goods therein were in fact never in the possession of the defendant Bank.

From the language of the hypothecation bond itself, it would appear that it was meant to cover the goods stored in the 1st defendants' godown at the time of the execution of the bond, namely, the 30th July 1951. However Mr. Y. F. Hu for the defendant Bank has contended that it was in respect of a running account between the Bank and Lu Bin Company and was therefore intended to cover future goods. In this connection the observation of Mr. Justice Sale *In the Matter of Ambrose Summers* (1) seems apposite. There the learned Judge observed quoting Fisher on Mortgage that where a security by moveable property is concerned, a clear intention must be expressed or implied to affect after-acquired property and that the hypothecation bond in that case which was in terms similar to those of the present, did not cover after-acquired property.

(1) 23 Cal., p. 592.

For these reasons we hold that the defendant-appellants have failed to prove that the goods now in dispute were in their possession as hypothecatees under the provisions of the bond (Exhibit 5). In this view of the case it is unnecessary to consider on whom the burden of proving good faith would lie. However, we would observe that the case of *Whitehorn Brothers* v. *Davison* (1) cited by the learned Advocate for the appellants is not apposite as it is a decision based upon the principles underlying section 23 of the English Sale of Goods Act which is in terms similar to section 29 of the Sale of Goods Act, 1930. Section 30 (*2*) is a statutory exception to the ordinary rule that a transferee of property does not obtain a title better than what the transferor himself possesses. The burden of proving good faith will lie on the person seeking to affirm the transaction falling within the ambit of this sub-section. This is the ordinary rule as laid down in section 101 of the Evidence Act.

See also *Heap* v. *Motorists' Advisory Agency, Limited* (2) where it was held that under the Factors Act of 1889, section 2, sub-section (*1*), proviso, the onus is on the person taking under the disposition of the goods made by the mercantile agent of proving that he acted in good faith and without notice of the agent's want of authority. Section 2, sub-section (*1*) of the Factors Act corresponds to section 27 of the Sale of Goods Act, 1930.

The observations of their Lordships of the Privy Council in the *Commonwealth Trust Limited* v. *Akotey* (3) that "to permit goods to go into the possession of another, with all the insignia of possession thereof and of apparent title, and to leave

(1) (1911) 1 K.B., p. 463. (2) (1923) 1 K.B., p. 577.
(3) (1926) Appeal Cases, p. 72 at p. 76.

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it open to go behind that possession so given would be inconsistent with law" have been held in a subsequent case to be too wide and unsafe to follow. [See *Mercantile Bank of India, Limited* v. *Central Bank of India, Limited* (1).]

The last point for consideration is whether the learned Judge on the Original Side was wrong in coming to the conclusion that a suit for mere declaration would lie. The learned Judge has held that the learned District Magistrate had committed a technical error in having issued a warrant for the seizure of the goods in question as "stolen property" as defined in section 410 of the Penal Code, does not include property the possession of which had been obtained by the commission of the offence of cheating. However, had the circumstances of the case been as stated in the First Information Report, we are not prepared to say that an offence of criminal breach of trust rather than of cheating would not have been committed by the Managing Partner of Lu Bin Company. As already pointed out above the property in the goods remained with the plaintiff-respondents and if Lu Bin Company had dishonestly converted these goods which had been entrusted to them, an offence of criminal breach of trust would have been committed. However, whatever may be the view of the law it is established that the plaintiffs had been able to recover possession of the goods through the intervention of the police and that the possession had been subsequently confirmed by the order of the Eastern Subdivisional Magistrate who had seizin of the case against Gaw Shu Bin. The goods have since been sold and it is impossible in the circumstances, for the plaintiffs to claim for their

(1) (1938) Appeal Cases, p. 287 at p. 298.

possession as a consequential relief. The law does not require the impossible to be done and in the circumstances the plaintiffs' end would be served by a declaration of their ownership of the goods in question. A suit for a mere declaration was therefore maintainable in law.

In the result the appeal fails and must be dismissed with costs. Advocate fees ten gold mohurs.

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APPELLATE CIVIL (FULL BENCH).

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

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Feb. 20.

THE CHAIRMAN, INCOME-TAX APPELLATE TRIBUNAL (APPLICANT)

v.

Y. E. ABOO (RESPONDENT).*

Burma Income-Tax Act—Reference under s. 66 (1)—S. 10 (2) (ix) "Expenditure wholly and exclusively incurred for the purpose of business"—When once such deduction is allowed, the Income-Tax authorities have no further statutory power of determining its reasonableness—S. 10 (2) (viii—a) Burma Income-Tax Act—S. 10 (2) (xv), Indian Income-Tax Act.

For the Income-Tax year 1952-53, the Assessee declared an income of K 9,725. The Additional Income-Tax Officer assessed him at K 13,826 after having disallowed certain items, among which was a sum of K 3,000 alleged to be messing allowance for his two brothers who were employees of the assessee on a salary of K 150 per month, and the messing allowance claimed was K 125 per month.

The Income-Tax Officer disallowed this expenditure on the ground that it does not come within the category of permissible expenditure under s. 10 (2) (ix) of the Burma Income-Tax Act.

On appeal, the Assistant Commissioner of Income-Tax held that this sum was admissible under s. 10 (2) (ix), but reduced the amount of permissible expenditure from K 3,000 to K 1,200.

The Assessee again appealed to the Income-Tax Appellate Tribunal, which dismissed his appeal.

The Assessee next moved the Appellate Tribunal to refer to the High Court two questions, contending that once the Income-Tax authority has accepted the amount as a permissible expenditure, it has no power to determine the reasonableness of the said expenditure.

On reference, the High Court re-formulated the reference as follows :

> Whether in applying s. 10 (2) (ix) of the Burma Income-Tax Act, after accepting that the expenditure has been incurred thereunder, is the Income-Tax Department entitled to apply its mind to the question of reasonableness of the amount of expenditure claimed ?

Held : Prior to the Burma Income-Tax Amendment Act, 1953, the Commissioner who refers any question of law for decision by the High Court is competent to give his own opinion on the case referred to the High Court for decision, whereas under the law as it now stands the Appellate Tribunal is incompetent to do so.

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* Civil Reference No. 1 of 1955. Reference made by the Chairman, Income-Tax Appellate Tribunal, Burma, under s. 66 (1) of the Burma Income-Tax Act.

Held further : Once the Income-Tax authorities have accepted that such expenditure is permissible expenditure within the purview of s. 10 (2) (ix) of the Burma Income-Tax Act, the Income-Tax authorities are incompetent to question and refix the amount adopting their own standard of reasonableness in the absence of any statutory provision to that effect. Such a course is clearly not within the purview of s. 20 (2) (ix) of the Burma Income-Tax Act.

The Newtone Studios Ltd. v. *Commissioner of Income-Tax, Madras*, Income-Tax Reports, (1933), Vol. 28, p. 378, followed.

Eastern Investments Ltd. v. *Commissioner of Income Tax, Madras*, (1951) 20 I.T.R., p. 1 ; *Royaloo Iyer & Sons* v. *Commissioner of Income-Tax, Madras*, (1954) 26 I.T.R., p. 265 ; *Craddock* v. *Zevo Finance Co., Ltd.* (1946) 27 Tax Cases, p. 267, referred to.

Cape Brandy Syndicate v. *Commissioners of Inland Revenue*, (1921) 12 Tax Cases, p. 358 at p. 366 ; *R. A. Goodsir & Co., Madras* v. *Commissioner of Excess Profits Tax, Madras*, (1948) Income-Tax Reports, Vol. XVI, p. 367, approved.

Reference answered in the negative.

Kyaw Thaung (Government Advocate) for the applicant.

F. C. Fisher, Advocate, for the respondent.

U CHAN TUN AUNG, C.J.—This is a reference under section 66 (*1*) of the Burma Income-Tax Act, made by the Appellate Tribunal arising out of the assessment of income-tax for the year 1952-53 of one Y. E. Aboo, a dealer in hardware and mill stores of No. 66, 26th Street, Rangoon. The questions referred to us for determination are :

(1) Whether in applying section 10 (*2*) (ix) of the Burma Income-Tax Act, the Income-Tax Department is entitled to apply its mind to the question of reasonableness of the amount claimed ?

(2) Whether there was any evidence whatsoever to justify the disallowance of a portion of the messing allowance claimed ?

However, having regard to the fact that the Additional Commissioner of Income-Tax, before whom the assessee took up the first appeal against the order of

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the Additional Income-Tax Officer, Bazaar Circle, Section I, has accepted that the deduction claimed by the assessee comes within the admissible business expenditure as laid down in section 10 (*2*) (ix) of the Income-Tax Act, and also in view of the fact that the Appellate Tribunal has confirmed the said order of the Assistant Commissioner of Income-Tax, we consider that the first question has not been accurately formulated, and we have accordingly recast the same as follows :

(1) Whether in applying section 10 (*2*) (ix) of the Burma Income-Tax Act, after accepting that the expenditure has been incurred thereunder, is the Income-Tax Department entitled to apply its mind to the question of reasonableness of the amount of expenditure claimed ?

Before setting out the facts of the case, we would like to point out that under section 66 (*1*) of the Burma Income-Tax Amendment Act before its amendment by Burma Income-Tax Amendment Act, 1953 which created the Appellate Tribunal, when the Commissioner of Income-Tax either on his own motion or on a reference from any Income-Tax authority subordinate to him, refers to the High Court for decision of a case, he is required to draw up a statement of the case, and also give *his opinion* thereon. But now, after the constitution of the Appellate Tribunal pursuant to the Amendment Act, 1953, the Appellate Tribunal is empowered to refer any question of law for decision by the High Court by drawing up a statement of the case only, and no provision has been made for the giving of Tribunal's own opinion thereon. Thus, under the old law, the Commissioner who refers any question of law for decision by the High Court is competent to give his

own opinion on the case referred to the High Court for decision, whereas under the law as it now stands, the Appellate Tribunal has no such power ; but it only draws up a statement of the case and refers it for decision to the High Court. Reading through the order of reference made by the Appellate Tribunal to this Court, we observe that the Tribunal has gone far beyond the statutory powers conferred upon it by giving its opinion quite compendiously on certain points of law arising in the case. This we may say, under the law as it now stands, the Tribunal is incompetent to do so.

The material facts can be stated briefly :—The assessee Y. E. Aboo is a dealer in hardware and millstores and he was assessed to income-tax for the year 1952-53 by the Additional Income-Tax Officer, Bazaar Circle, Section I, Rangoon, at K 13,826 as against a declared income of K 9,725 filed before the Income-Tax Officer for the said year. This disparity in figures was owing to the disallowance by Income-Tax Officer of certain items of expenditure, among which was a sum of K 3,000, said to have been the messing allowance for the assessee's two brothers, Osman Esoof Aboo and Esmail Esoof Aboo. These two persons were employees of the assessee, working as his assistants in his shop at a monthly salary of K 150 each. The assessee claimed that the monthly messing allowance paid to each of these two persons was K 125. The Income-Tax Officer disallows this expenditure on the ground that it does not come within the category of permissible expenditure under section 10 (*2*) (ix) of the Burma Income-Tax Act ; and this is made clear from the following remarks in his order :

"In this connection it is to be noted that they are the assessee's brothers and they were also paid a salary of K 150

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each. In view of that the messing allowance paid as an extra remuneration appears to be an extravagance rather than a necessity. The assessee may have his duty towards his brothers to look after them, but this is only his personal matter. He may give his brothers a salary equivalent to a King's ransom if he so pleases and if he can so afford but it does not mean that it would be a reasonable amount of expenditure for his business or *that it constitutes an allowable sum for the purpose of income-tax assessment.*"

The assessee appealed to the Assistant Commissioner of Income-Tax, Eastern and Western Ranges, Rangoon claiming, *inter alia*, the relief for setting aside the order of the Income-Tax Officer totally refusing the deduction of K 3,000 paid as messing allowance to his two brothers. The Additional Assistant Commissioner, set aside the order of the Income-Tax Officer, and allowed the deduction as being one admissible under section 10 (*2*) (ix) ; but at the same time, he reduced the amount of permissible expenditure from K 3,000 to K 1,200, *i.e.*, he allowed at the rate of K 50 per month as messing fee for two brothers instead of K 125 per month as originally claimed. The relevant order of the Additional Assistant Commissioner reads :—"I have made enquiries in this matter in relation to usual practice among similar traders. Considering the extent and the volume of business done by the appellant during 1951-52 relevant to 1952-53 assessment, under appeal, and also in view of experience gained by the appellant's two brothers during the course of business carried on for some years past, I am of opinion that the remunerations for each of them would be not less than K 200 per month or a total of K 4,800 per annum. As they had been allowed K 3,600 under salaries, I think it would only be reasonable to allow a further sum of K 1,200 out of the claim of K 3,000 under messing charges. It will be done so."

The assessee next preferred an appeal to the Appellate Tribunal before which the findings of the Income-Tax Officer and the Additional Assistant Commissioner were challenged. There, the assessee asserted that the sum of K 3,000 claimed as messing allowance was solely incurred for the purpose of his business within the purview of section 10 (2) (ix) of the Income-Tax Act, and that as such, it should be allowed as permissible deduction. The Appellate Tribunal, however, for reasons not quite clear to us, came to the conclusion that the amount of messing allowance of K 50 per month allowed by the Assistant Commissioner of Income-Tax appeared to be adequate, and that it did not call for further modification ; and accordingly dismissed the appeal. It is significant that in its order dismissing the appeal, the Appellate Tribunal has expressed the doubt whether these messing charges were really incurred by the assessee. It says, *inter alia* : . . . . . .

> " We have not been told convincingly how this gratuitous provision of food to these two brothers had increased their efficiency. No doubt it might be an incentive to make them apply themselves to the work better and if that be the reason we have not been able to understand why of the four employees in the shop only these two should have been selected for this purpose, for it cannot be denied that if all the employees become more efficient they would be in a position to contribute more for the benefit of the business.
>
> In claiming K 125 as messing allowance for each of his two brothers the appellant-assessee must have been influenced by other consideration such as brotherly love and affection apart from his consideration for retention of their services. "

Again, in the order of reference made to us, the Tribunal observed that assuming that the expenditure was a genuine one, it had to come to the conclusion that the assessee, in incurring that expenditure was not with the purpose of earning profit or gain, but

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must have been motivated by pure brotherly love and affection rather than for the purposes of his business efficiency having regard to the relationship existing between the assessee and the two persons. However, coming back to the facts of the case the assessee next moved the Tribunal to refer to the High Court four questions of law; but he finally conceded that only two questions as formulated above were really involved, and hence this reference.

It is not in dispute that for assessment year 1952-53, the law applicable is Burma Income-Tax Act before its amendment in October, 1953, the relevant section of which reads :

> " 10. (*1*) The tax shall be payable by an assessee under the head ' Business ' in respect of the profits or gains of any business carried on by him.
>
> (*2*) Such profits or gains shall be computed after making the following allowances, namely:—
>
> . . . . . .
>
> (ix) Any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains : "

And, as far as we can appreciate, the Appellate Tribunal itself has accepted that the claim for messing allowance is governed by the aforesaid section; but what the assessee has contended before the Appellate Tribunal from which the present reference has arisen is that, unlike the provisions of section 10 (*2*) (viii-*a*) of the Burma Income-Tax Act, wherein payments of bonus or commission to the employees can be treated as permissible expenditure, provided the amount paid as such is found to be *reasonable* having reference to the considerations set out in clauses (*a*), (*b*) and (*c*) thereunder, section 10 (*2*) (ix) of the Act does not allow the Income-Tax Authority to determine the reasonableness of expenditure claimed thereunder, once the Income-Tax Authority has accepted it as a

permissible expenditure. It appears to us that the Tribunal appreciated the force of the submission made by the assessee; but we must observe that in the reference order made to us, it cited various authorities which, in our opinion, do not really help the point for decision referred to us. The cases cited are Indian cases and they deal mostly with the question whether the expenditure claimed for deduction falls within the ambit of the relevant section 10 (2) (xv) of the Indian Income-Tax Act at, what we may describe, the *initial stage*—that is, whether the expenditure claimed is one wholly and exclusively for the purpose of the business. Section 10 (2) (xv) reads :

" 10. (2) Such profits or gains shall be computed after making the following allowances namely :

. . . . . .

(xv) Any expenditure [not being an allowance of the nature described in any of the clauses (i) to (xiv) inclusive and] (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of such business, profession or vocation.]"

The Tribunal has also referred to " The Law of Income-Tax in India, " (7th Edition) by V. S. Sundaram, and the observations made by the learned author at page 537. There again, what the learned author has to say in connection with the *bonâ fide* or otherwise of the deductible amount from taxable profit, as far as we can apprehend, concerns only with the initial stage of the determination, whether such item of expenditure was wholly or exclusively laid out for the purpose of the business or not. To us, it is clear that the Income-Tax Authority is fully competent to determine the *bonâ fide* nature of any item of expenditure by having regard, among other relevant

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considerations of facts, to the quantum or reasonableness of the expenditure in order to find out whether such expenditure was incurred wholly and exclusively for the business. We do not find anywhere, either in the decisions cited by the Appellate Tribunal, or in the notes of the learned author V. S. Sundaram, at the page above referred to, any authoritative statement that after having accepted that a particular expenditure was an expenditure " wholly and exclusively incurred for the purpose of business ", or " incurred solely for the purpose of earning such profits or gains " as provided in the Burma Income-Tax Act, the Income-Tax Authority can again fix the quantum claimed, by adopting a subjective standard of reasonableness. Our attention has been drawn to a decision of the Madras High Court in *The Newtone Studios Ltd.* v. *Commissioner of Income-Tax, Madras* (1) wherein the question as to whether the Income-Tax Authority, in deciding a claim for deduction under section 10 (*2*) (xv) of the Indian Income-Tax Act, after accepting the genuineness of the expenditure so incurred, is competent to determine the reasonableness of the amount claimed was considered. In that case, the assessee (The Newtone Studios Limited) was a private limited company, engaged in production of motion pictures. There were six shareholders, among whom was one managing director, two technician directors and a technician. The remuneration of these four persons was fixed in the year 1938 at about Rs. 250 each and a commission at a certain percentage on net profits. In 1944-45, the salary paid to these persons was a total of Rs. 18,000 a year. In 1946, their salary was increased to Rs. 59,100. Because of increased profits, the Income-Tax Authorities allowed

(1) Income-Tax Reports, (1955), Vol. 28, p. 378.

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Rs. 36,000 out of Rs. 59,100 as business expenditure; but refused to allow the balance, Rs. 23,100. The question that was referred to a Bench of the Madras High Court for decision was whether the disallowance of the sum of Rs. 23,100 out of the expenses incurred by the assessee for payment of remuneration to the managing director and other technician directors was permissible under the provisions of section 10 (*2*) (xv) of the Indian Income-Tax Act. It was held that it was not open to the Income-Tax authorities to adopt a subjective standard of reasonableness of the amount paid; and that on the facts and circumstances of the case, the whole expenditure of Rs. 59,100 incurred by the assessee for payment of remuneration to the managing director and other technician directors should be allowed. The facts clearly disclose that the genuineness of the payment of the amount of Rs. 59,100 was never in dispute. The point in issue therefore was whether the reduction or refixing of the permissible expenditure which had been accepted as genuine expenditure from Rs. 59,100 to Rs. 36,000, or at Rs. 36,000 by a refusal to allow the portion of Rs. 23,100 was correct or not. In their judgment, the learned Judges after making references to *Eastern Investments Ltd.* v. *Commissioner of Income-Tax* (1), *Royaloo Iyer and Sons* v. *Commissioner of Income-Tax, Madras* (2) and also to an English case *Craddock* v. *Zevo Finance Co., Ltd.* (3) conclude that in deciding whether a claim for deduction under section 10 (*2*) (xv) of the Income-Tax Act should be allowed or not, the Income-Tax Authority can consider whether the expenditure is justified on grounds of commercial expediency; but that it does not provide for any subjective standard of reasonableness to be adopted

(1) (1951) 20 I.T.R. p. 1. (2) (1954) 26 I.T.R. p. 265.
(3) (1946) 27 Tax Cases, p. 267.

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by the taxing authority; and at page 385, they observed:

"Under our taxing system, it is for the assessee to conduct his business, and in his wisdom or otherwise to fix the remuneration to his staff. The Income-Tax Act does not clothe the taxing authority with any power or jurisdiction to determine the reasonableness of the amount so fixed and paid by the assessee. The only test for the deductibility of such remuneration is whether the expenditure has been incurred solely and exclusively for the purpose of the business. If the reality of the payment is challenged or is in dispute different considerations arise; so also in cases where the tax authorities are able to point to some consideration other than the purpose of the business as accounting for any portion of the payment made. In such cases, of course, such portion of the amount claimed, which is either not held to have been paid or is held to have been paid for reasons other than business expediency, could and should be disallowed; but the reason for the disallowance is because either the portion disallowed is not paid, or because the expenditure is not solely and exclusively for the business, and not on the ground that in the opinion of the Income-Tax Officer or other taxing authority the remuneration is 'unreasonably' high—either because the employee—does not, in the authority's opinion, deserve so much, or because the assessee could have secured other employees on more favourable terms."

With these observations, we respectfully concur. Here, in the case under reference, the facts so far conceded by the parties clearly show that the Income-Tax Authorities have accepted that the messing charges were really incurred and this is clearly borne out by the Additional Assistant Commissioner's acceptance of the applicability of section 10 (2) (ix) of the Burma Income-Tax Act. In other words, the Income-Tax authorities had accepted that it was a permissible expenditure within the purview of section 10 (2) (ix) of the Burma Income-Tax Act. The question therefore resolves itself into, whether after having accepted that the particular expenditure is a

permissible expenditure within the purview of the said section, the Income-Tax authorities are competent to question and refix the same at a sum or quantum which he deemed reasonable in the absence of any statutory provision to that effect, *cf.*, section 10 (*2*) (viii). We need only quote the well-established canon of construction with reference to taxing law laid down by Rowlatt, J. in *Cape Brandy Syndicate* v. *Commissioners of Inland Revenue* (1), which was quoted with approval by the Madras High Court in *R. A. Goodsir & Co., Madras* v. *Commissioner of Excess Profits Tax, Madras* (2). The observation is as follows :

> " Now of course it is said . . . . that in a taxing Act clear words are necessary to tax the subject. But it is often endeavoured to give to that maxim a wide and fanciful construction. It does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the Crown in such Acts. It means this, I think ; it means that in taxation you have to look simply at what is clearly said. There is no room for any intendment ; there is no equity about a tax ; there is no presumption as to a tax ; you read nothing in ; you imply nothing, but you look fairly at what is said and at what is said clearly and that is the tax. "

Applying this canon of construction to section 10 (*2*) (ix), we must say that there is no specific provision therein, as in clause (viii-*a*) of the said section, to justify the adoption of a subjective test of reasonableness by the taxing authorities, once they accepted that a particular business expenditure comes within its ambit of deductibility. No doubt, while the taxing authorities are considering whether a particular expenditure falls within the provisions of the said section, they are competent to examine whether that particular item was incurred *bonâ fide*

(1) (1921) 12 Tax Cases, 358 at 366.

(2) (1948) Income-Tax Reports, Vol. XVI, p. 367.

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or not, by having regard to the quantum or other surrounding circumstances, or to information which the taxing authorities could gather from sources connected with such business. But these considerations apply only before acceptance by the Income-Tax Authorities as permissible expenditure under section 10 (*2*), clause (ix) of the Act. Once the Income-Tax authorities have accepted that such an expenditure is permissible expenditure, within the ambit of the said provisions of law, they are incompetent to increase or reduce the amount adopting their own standard of reasonableness. This is clearly not within the purview of section 10 (*2*) (ix) of the Income-Tax Act. If it has such intendment, specific words would have been found to that effect, just as in clause (viii-*a*) of the said section.

Therefore, the answer to the first question referred to in the form we have recast above is in the negative. In view of our answer to the first question, the answer to the second question does not arise. The assessee will be entitled to costs of this reference. Advocate's fee K 150.

U BA THOUNG, J.—I concur.

CIVIL REFERENCE NO. 1 OF 1955.

U SAN MAUNG, J.—I have read the order proposed to be passed by the learned Chief Justice. While I am in general agreement with him, I would like to say that the observations of the learned Judges of the Madras High Court in *The Newtone Studios Ltd.* v. *Commissioner of Income-Tax, Madras* (1) at page 385 of the Report are so apt that I would like to adopt them as my own. In this

(1) Income-Tax Reports, (1955), Vol. 28, p. 378.

connection, I would like to lay special emphasis upon the following sentences :

" If the reality of the payment is challenged or is in dispute different considerations arise ; so also in cases were the tax authorities are able to point to some consideration other than the purpose of the business as accounting for any portion of payment made. In such cases, of course, such portion of the amount claimed, which is either not held to have been paid or is held to have been paid for reasons other than business expediency, could and should be disallowed ; but the reason for the disallowance is because either the portion disallowed is not paid, or because the expenditure is not *solely and exclusively* for the business, and not on the ground that in the opinion of the Income-tax Officer or other taxing authority the remuneration is " unreasonably " high either because the employee does not, in the authority's opinion, deserve so much, or because the assessee could have secured other employees on more favourable terms."

I agree that the answer to the question proposed, as recast by the learned Chief Justice, should be in the negative.

APPELLATE CIVIL (FULL BENCH).

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

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THE INCOME-TAX APPELLATE TRIBUNAL (APPLICANT)

v.

THE FIRM OF THE UNION OF BURMA (FAR EAST) COMPANY (RESPONDENT).*

Burma Income-Tax Act—Reference under s. 66 (1)—Whether a partner can be employee of the Firm of which he is a partner—Special qualification and technical knowledge—Salaries and bonuses paid to partners-cum-employees and contribution made by the Firm, whether permissible deduction under s. 10 (2) (viii-a) or s. 10 (2) (ix) of the Income-Tax Act—S. 13, Partnership Act—Statutory Force of Form Income Tax 11—Similarity between s. 10 (2) (ix) Burma Income-Tax Act and s. 10 (2) (xv) Indian Income-Tax Act—Meaning of the expression, "incurred solely for the purpose of earning such profits or gains".

The assessees returned an income of Rs. 2,16,345-10-0 for the assessment year 1952-53.

The Income-Tax Officer assessed the income at K 3,20,342 after disallowing certain items of expenditure among which were—

(i) Two sums of K 9,600 and K 6,400 paid as salaries to U Tin and U Maung Maung Leigh respectively and

(ii) K 16,000 paid to them as bonus—total K 45,000.

(iii) K 38,462 being "contribution" made by the Assessees to the Government of the Union of Burma, representing 10 per cent of the difference between the purchase price paid by the Assessees to the State Agricultural Marketing Board for rice and its products allotted to them by the Board and the selling price obtained by them, holding that this deduction did not come within the ambit of s. 10 (2) (ix) of the Income-Tax Act.

The Income-Tax Officer's finding was confirmed on appeal by the Assistant Commissioner of Income-Tax, who in determining the assessable income found that a sum of K 22,000 paid to U Kyaw Thaung, namely K 4,500 salary and K 16,000 bonus was paid to him *as a partner* of the Assessees' Firm and therefore disallowed this deduction and increased the assessable income from K 3,20,342 to K 3,42,472.

The Assessees thereupon appealed again to the Income-Tax Appellate Tribunal, which dismissed the appeal holding that the items of expenditure above referred to were not permissible income within the purview of s. 10 (2) (ix) of the Burma Income-Tax Act.

* Civil Reference No. 8 of 1955.

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Under s. 66 (*1*) of the Burma Income-Tax Act, the Assessees moved the Appellate Tribunal to state a case for the decision of the High Court on the following two questions :—

(1) Whether in the circumstances of the case, the salaries and bonuses amounting to K 70,400 paid to the three working partners of the Applicant firm were admissible as deductions under s. 10, Burma Income-Tax Act as it stood before its amendment in 1953, in computing the income, profits and gains of the applicant firm for the purpose of assessment for the assessment year 1952-53.

(2) Whether, in the circumstances of the case the payment to State Agricultural Marketing Board of the sum of K 38,462 which represented ten per cent of the difference between the purchase price of rice paid by the Appellants to the State Agricultural Marketing Board and the selling price obtained by the appellants from the sale of such rice was an expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning the profits and gains of the applicants' business as laid down in s. 10 (2) (ix) Burma Income-Tax Act, as it stood before its amendment in 1953 ?

The assessees contended that U Tin, U Maung Maung Leigh and U Kyaw Thaung were working partners within the meaning of s. 13 of the Partnership Act and that their salaries and bonuses should be treated as permissible expenditure either under s. 10 (*2*) clause (viii-*a*) or as one solely incurred for the purpose of business under s. 10 (2) (ix), Income-Tax Act.

Per U CHAN TUN AUNG, C.J.—*Held :* Payments made to the three partners are made not in their capacities as employees of the Assessees' Firm, but as Executives-*cum*-agents. What clause (viii-*a*) to sub-s. (2) to s. 10 permits as deductible expenditure is payment of bonus or commission to employees *as such*. It does not speak about payment of other kinds to persons other than employees.

Salaries paid to partners of a firm are not permissible expenditure within the meaning of s. 10 (2) (ix) of the Burma Income-Tax Act, unless they possess special qualifications or technical knowledge, justifying such deduction.

The Electric and Dental Stores Lahore v. *The Commissioner of Income-Tax*, (1931) I.L.R. 12 Lah., p. 663 ; *The Commissioner of Income-Tax, Madras* v. *Vegaraju Venkatsubaya Garu*, (1922) 1 Income-Tax Cases, p. 176, referred to.

Rules and the notes annexed to the Income-Tax Return Form I.T. 11 have statutory force, specifically enjoining that the salaries and drawings of the partners should be added back in the computation of profits or gains of a business or trade.

The first question is answered in the negative.

The three essential conditions that should be fulfilled in order that an expenditure may be allowed under clause (ix) of s. 10 (*2*) of the Income-Tax Act are :

(1) It must be an expenditure.

(2) It must not be of a capital nature.

(3) It must be an expenditure solely incurred for the purpose of earning such profits or gains.

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Held further : The "Contribution" of K 38,462 which represented the 10 per cent difference between purchase price and the selling price partook the nature of mere sharing of profits between the Assessees and the State Agricultural Marketing Board. Under the Income-Tax Laws income tax attaches as soon as profit accrue, and it is not concerned with the destination and application of the profits.

The contribution of 10 per cent made by the Assessees for the founding of the State Agricultural Bank was in the nature of capital and not revenue—an expenditure laid out for the enduring benefit of the Assessees' business and as such not a permissible deduction.

Re. The Commissioner of Income-Tax, Burma v. *N.S.A.R. Concern*, (1938) R.L.R. p. 346 ; *Pondicherry Railway Co.* v. *Commissioner of Income-Tax, Madras*, 58 I.A. 239 at 251-2 ; *Indian Radio and Cable Communications Co. Ltd.* v. *Income-Tax Commissioner, Bombay Presidency and Aden*, (1937) 3 All. E.R. 709 at 713-4 ; *Tata Hydro Electric Agencies Ltd.* v. *Income-Tax, Commissioner, Bombay*, (1937) A.C. 685 ; *Messrs. Assam Bengal Cement Co. Ltd.* v. *Commissioner of Income-Tax, West Bengal*, A.I.R. (1955) S.C. 89 ; *Atherton* v. *British Insulated and Helsby Cables Ltd.*, (1926) Appeal Cases, 205, referred to.

The expression "incurred solely for the purpose of earning such profits or gains" in S. 10 (2) (ix) of the Burma Income-Tax Act means that "the disbursement must be for the purpose of earning the profits".

Strong & Co. of Romsey, Limited v. *Woodifield*, (1906) A.C. 448, approved.

Smith's Potato Crisps, (1929) Ltd. v. *I.R.*, (1948) A.C. 508, referred to.

Bentleys, Stokes and Lowless v. *Beeson, Inspector of Taxes*, (1952) All E.R. Vol. 11, p. 82, approved.

Held further : That the contribution or "Donations" of K 38,462 by the Assessees to the State Agricultural Marketing Board is not an expenditure solely incurred for the purpose of earning profits or gains of the Assessees' business.

The second question answered in the negative.

Per U SAN MAUNG, J.—The question whether or not in a particular case a partner can or cannot be an employee of the firm of which he is a partner is a mixed question of both fact and law.

From the very definition of Partnership, when a person is employed for carrying on the business of the partnership he remains a partner.

Therefore, normally speaking a partner cannot be an employee in the firm of which he is a partner because no one can employ himself, save in very exceptional cases, such as a doctor, though a partner in a motor car manufacturing firm was employed to look after the health of its employees. Mere payment of salaries is not a criterion for judging whether a person is an employee.

Chief Commissioner of Income-Tax (Board of Revenue), Madras v. *Vegaraju Venkatasubbaya Garu*, (1886-1925), Vol. 1, Income-Tax Cases, p. 176 ; *The Electric and Dental Stores, Lahore* v. *The Commissioner of Income-Tax*, 12 Lah., p. 663 ; *Ramakrishna Ramnath* v. *Commissioner of Income-Tax, Central Provinces and Berar*, (1930) 4 Income-Tax Cases, 171 ; *Seodoyal Khemka* v. *Joharmull Manmull*, 50 Cal., p. 549 ; *Brojo Lal Saha Banikya* v. *Budh Nath*

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Pyari Lal Das, A.I.R. (1928) Cal., p. 148 ; *In the matter of Jai Dayal Madan Gopal*, 54 All., p. 846 ; *Raghunandan Nanu Kothare* v. *Hormasjee Bezonjee Bamjee*, 51 Bom., p. 342 at 348, referred to.

Held further : Though under clause (*a*) of s. 13 of the Partnership Act, there can be a contract between the partners by which one of them can be remunerated for taking part in the conduct of the business such a remuneration is not deductible expenditure under s. 10 (2) (ix) of the Income-Tax Act.

Such an expenditure cannot be allowed after the amendment of this clause by the Burma Income-Tax Amendment Act, 1953.

Rules in Form I.T. 11, prescribed by the Financial Commissioner under S. 59, Income-Tax Act enjoins such payments to be added back for the purpose of assessment to income-tax, and by sub-s. (5) of s. 59 these rules have effect as if enacted in the Act itself.

The proper canon of construction of such rules is to read the original Act and the subordinate legislation together as if they were one Act and the rule must be enforced if there is no inconsistency between it and the principal Act.

Institute of Patent Agents v. *Joseph Lockwood*, (1894) Appeal Cases, p. 347 ; *Baker* v. *Williams*, (1898) 1 Queen's Bench Division, p. 23, referred to.

The proviso now added to clause (ix) as amended by the Burma Income-Tax Act, 1953, was *ex abundanti cautela* in so far as the remuneration paid by a firm to any partner is concerned.

First question answered in the negative.

Held : As regards the second question, the contribution was admittedly a donation to the State Agricultural Marketing Board and as soon as the purpose for which the payment was made became bifurcated the payment can no longer be regarded as an expenditure incurred solely for the purpose of earning profits.

Second question answered in the negative.

Per U BA THOUNG, J.—The question as to whether or not in a particular case, a partner can or cannot be an employee of the firm of which he is a partner is a mixed question of both fact and law and the finding of the Income-Tax Appellate Tribunal on such a question is not final. A reference can be made to the High Court.

Kyaw Thoung (Government Advocate) for the applicant.

Wan Hock, Advocate, for the respondent.

U CHAN TUN AUNG, C.J.—Under section 66 (*1*) of the Burma Income-Tax Act the Income-Tax Appellate Tribunal has referred the following questions to this Court for decision in connection with the assessment of income-tax for the year 1952-53 of a registered partnership firm at Rangoon

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known as the Union of Burma (Far East) Company—a firm whose activities are mainly concerned with the export of rice and rice products from Rangoon to countries in the Far East:

(1) Whether, in the circumstances of the case, the salaries and bonuses amounting to K 70,400 paid to the three working partners of the applicant firm were admissible as deductions under section 10, Burma Income-Tax Act as it stood before its amendment in 1953, in computing the income, profits and gains of the applicant firm for the purpose of assessment for the assessment year 1952-53 ?

(2) Whether, in the circumstances of the case, the payment to the State Agricultural Marketing Board of the sum of K 38,462 which represented ten per cent of the difference between the purchase price of rice paid by the Appellants to the State Agricultural Marketing Board and the selling price obtained by the appellants from the sale of such rice was an expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning the profits and gains of the applicants' business as laid down in section 10 (*2*) (ix), Burma Income-Tax Act, as it stood before its amendment in 1953.

The material facts relevant to this reference are these :—The Union of Burma (Far East) Company is a concern which was formed under a partnership deed, dated the 24th May 1951, a

copy of which is marked "A" in the reference proceedings. This firm was formed for the purpose of working as exporters of paddy, rice and rice products to Far Eastern countries to be allotted to it from time to time by the State Agricultural Marketing Board. According to clauses C and D of the partnership deed, the conduct of the partnership business was vested in the three nominees made by the permanent Board of Direction consisting of three representatives from three parties forming the Partnership, namely:—(1) the Union Corporation Limited of 666, Merchant Street, represented by its Directors—(i) U Tha Tun Aung, (ii) U Ohn, and (iii) U Kyaw Thaung, (the First Party); (2) All Burma Rice Industrialists' Association of 569/577, Merchant Street, represented by—(i) U Wan Hock, (ii) U Maung Maung Leigh, and (iii) U Myat Thein, (the Second Party); and (3) the Union of Burma Exporters Federation of 231/237, Mogul Street, represented by—(i) U Ba Thwin (Pegu), (ii) U Tin (I.C.S. Retd.), and (iii) U Ba Thein, (the Third Party).

For the assessment year 1952-53 in respect of accounting period from May 1951 to 31st December 1951, the Union of Burma (Far East) Company, hereinafter referred to as assessees, returned an income of K 2,16,345-10-0; and the Income-Tax Officer, Central Circle, who dealt with the return, by his order dated 1st September 1953, fixed the assessees' income at K 3,20,342 after disallowing certain items of expenditure among which were the two sums of K 9,600 and K 6,400 paid to U Tin and U Maung Maung Leigh respectively as salaries and also K 16,000 paid to each of these two gentlemen as bonus. Thus the total sum disallowed under these four items was K 48,000. The Income-Tax

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Officer also disallowed another item of expenditure claimed by the assessees; and that relates to what is known as "contribution" by the assessees to the Government of the Union of Burma of a sum of 10 per cent of the difference between the purchase price paid by the assessees to the State Agricultural Marketing Board for rice and rice products allotted to them by the Board, and the selling price obtained by them from the sale of such rice and rice products in the Far Eastern countries. It is not in dispute that this contribution was made not only by the assessees but also by other firms and companies who, like the assessees themselves, having agreed to abide by the direction that would be given from time to time by the State Agricultural Marketing Board regarding the export business of rice and rice products, were accepted by the State Agricultural Marketing Board as their "Authorized Distributors". It is also not in dispute that the sums realized from these contributions were for the purpose of founding the State Agricultural Bank by the Government. So far as the assessees are concerned, the sum which represented this 10 per cent contribution for the relevant assessment year was found to be K 38,462. The Income-Tax Officer also disallowed the deduction claimed on that account holding that it did not come within the ambit of section 10 (*2*) (ix) of the Income-Tax Act.

On appeal, the Assistant Commissioner of Income-Tax accepted the Income-Tax Officer's finding; but in determining the amount of assessable income, the learned Assistant Commissioner of Income-Tax found that a sum of K 22,400 said to have been paid to one U Kyaw Thaung, representing the Union Corporation Limited as salary and bonus was, in fact, salary and bonus paid to the Union Corporation

Limited as one of the partners of the assessees' firm; and as such he added back this amount (namely, K 6,400 salary and K 16,000 bonus) to the income of the assessees for the relevant period, thereby increasing the assessable income from K 3,20,342 to K 3,42,742.

The assessees then preferred an appeal against the said order to the Appellate Tribunal which by its order, dated 28th February 1955, dismissed the appeal holding that both the items of expenditure referred to above were not permissible expenditure within the purview of section 10 (*2*) (ix) of the Burma Income-Tax Act. The assessees then moved the Tribunal to state a case for the decision of the High Court on the two questions formulated above, under section 66 (*1*) of the Burma Income-Tax Act.

Now, on the first question, Mr. Wan Hock appearing for the assessees contended before us that U Tin, U Maung Maung Leigh, and U Kyaw Thaung (representing the Union Corporation, Limited) were working partners of the firm, that section 13 of the Partnership Act allows partners to work as working partners, and that therefore, the expenditure incurred in paying out their salaries and bonuses should be treated as permissible expenditure either under section 10 (*2*) clause (viii-*a*) or as one solely incurred for the purpose of the business as contemplated in section 10 (*2*) (ix) of the Burma Income-Tax Act.

The learned Government Advocate appearing on behalf of the Income-Tax Authorities, on the other hand, contends that from the facts and circumstances obtaining in the case, the salaries and bonuses amounting to K 70,400 paid to the three partners were not permissible deductions either under section 10 (*2*) clause (viii-*a*) or under section 10

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(*2*) (ix) but there were, in fact, sharing of profits among the partners. He further submits that the form of return prescribed under section 22 read with rules made under section 59 of the Income-Tax Act, namely, Form I.T. 11, clearly enjoins the adding back of drawings or salary of proprietor, drawings of partners and salary of partners to the income, profits or gains in any Profit and Loss Account for any relevant period, that the requirements of filing a return in the form prescribed have statutory force; and that as such, the Income-Tax Act does not at all intend treating expenditure now sought to be deducted as permissible expenditure under section 10 (*2*) (ix) of the Act.

We shall first deal with the submissions made on behalf of the assessees. Now, clause (viii-*a*) of sub-section (*2*) of section 10 of the Burma Income-Tax Act allows deduction of any sum paid to any employee as bonus or commission for services rendered, provided the amount of bonus or commission is a reasonable amount. But the payments made to the three partners are, according to the partnership agreement itself, payments made not in their capacities as employees of the assessees' firm, but as executives-*cum*-agents in whom the management of the firm is vested. We cannot accept the assessees' contention that the three partners were employees of the firm as against the finding of fact already arrived at by the Income-Tax Authorities that they were partners. What clause (viii-*a*) permits as deductible expenditure is payment of bonus or commission to employees as such for services rendered. It does not speak about payment of other kinds to persons other than employees.

Now, coming to the second limb of the submission made by the assessees' Counsel, the question is:—If

the expenditure claimed does not fall within the purview of clause (viii-*a*), then does it come within that of clause (ix) as one incurred solely for the purpose of earning such profits or gains? The assessees' Counsel cited before us the case of *The Electric and Dental Stores, Lahore* v. *The Commissioner of Income-Tax* (1) in support of his contention that the Income-Tax Act does recognize the dual capacity of a partner-*cum*-employee (working partner) and that expenses incurred for payment of salary to them are under certain circumstances permissible expenditure within the meaning of section 10 (*2*) (xv) of the Indian Income-Tax Act which is similar to section 10 (*2*) (ix) of the Burma Income-Tax Act. However, we observe that in the very ruling cited by the learned Counsel, the following passage taken from V. S. Sundaram's Law of Income-Tax in India appears:

> "If, however, a particular partner or partners possess special qualifications for which they are paid a salary irrespective of the existence of profits and over and above their share of the profits, the salaries could be allowed as a deduction. The dual capacity of a partner-*cum*-employee, though suspect, is possible and to the extent that the person is in truth an employee the salary is deductible from the profits of the partnership."

This ruling refers to a case of the Madras High Court, *Commissioner of Income-Tax, Madras* v. *Vegaraju Venkatsubaya Garu* (2) wherein a similar question, whether salaries paid to the partners of a firm are deductible expenditure or not in the computation of the profits of the firm arose; but the Madras High Court was quite definite that the salaries so paid to the partners of the firm are not permissible deductions. Here, in the case under

(1) (1931) I.L.R. 12 Lah., p. 663.
(2) (1922) 1 Income-tax Cases, p. 176.

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reference the income-Tax Authorities have already found as of fact that the three partners do not possess *special qualifications* or *technical knowledge* which would justify their drawings on that account; and we cannot therefore go against that finding of fact. The ruling cited by the learned Counsel for the assessees does not at all help him, especially when it has been found as of fact by the Income-Tax Authorities that the three partners to whom the payments in question have been made do not possess special qualifications. Added to this, there is the dual capacity of two partners (partner-*cum*-employee) which is suspect. We therefore find that there are no merits in the contentions put forth by the learned Counsel for the assessees, and we are unable to accept them.

On the other hand, there is considerable force in the submission made by the Government Advocate that the rules and the notes annexed to the Income-Tax Return Form I.T. 11 have statutory force. We find that the rules have been published in the *Burma Gazette*, as required under sub-section (*5*) of section 59 of the Income-Tax Act, *vide* Part IV of the *Burma Gazette*, dated 22nd April 1939—Notification No. 37 of the Financial Commissioner, dated 21st April 1939, p. 325. Sub-section (*5*) of section 59 provides that the rules made under the Income-Tax Act shall have the effect as if enacted by the Act when published in the Gazette. Moreover, in the *Commissioner of Income-Tax* v. *A.R.A.N. Chettyar Firm* (1) and *Commissioner of Income-Tax, Burma* v. *P.K.N.P.R. Chetty Firm* (2) it has been definitely held that the particulars required to be filled in the form of return prescribed under section 22 (*2*) of the Burma Income-Tax Act read with Rule 19 and the notes thereunder are part of the Rules and that as such they have as

(1) 6 Ran. 21. (2) 8 Ran. 209.

much statutory force as the Income-Tax Act itself. Therefore, in view of the specific statutory provisions which require that the salaries and the drawings of the partners should be added back in the computation of income, profits or gains of a business or trade, the answer to the first question referred to us must be in the negative. We may note that by the Amendment Act of 1953 a proviso has been added to section 10 (*2*) (ix), which reads :

> " Provided further that nothing in clause (ix) shall be deemed to authorize any allowance in respect of any payment by way of interest, salary, commission or remuneration made by a firm to any partner of the firm. "

And, it is further urged upon us that this amendment was made, because prior to its amendment, payments to partners as salaries, commission or remuneration were permissible deductions. We cannot accept this submission, in the view we hold concerning the statutory force of the provisions made in Form I.T.11. It may equally be that with a view to remove any doubt that may arise in interpreting section 10 (*2*) (ix) or owing to some conflicting decisions on that point, this proviso has been added by the Amendment Act of 1953.

Now, coming to the second question under reference it is conceded, both by the assessees' Counsel and the learned Government Advocate that for the relevant assessment period the law applicable is section 10 (*2*) clause (ix) of the Income-Tax Act before its amendment by the Amendment Act of 1953. It may, however, be observed that the provisions of clause (ix) are almost identical to those of the Indian Income-Tax Act before its amendment by the Amendment Act of 1939. Therefore, some of the rulings of the Indian High Courts in that regard may

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be quite useful for the determination of the reference now made to us.

The three essential conditions that should be fulfilled in order that an expenditure may be allowed under clause (ix) of section 10 (*2*) of the Act are :

(1) it must be an expenditure ;
(2) it must not be of a capital nature ;
(3) it must be an expenditure *solely* incurred for the purpose of earning such profits or gains.

Referring to this clause and comparing it with the corresponding provision in the English Act, Dunkley, J. in *Re. The Commissioner of Income-Tax, Burma* v. *N.S.A.R. Concern* (1) said that the English provision has a far wider meaning than the Burma Act. The corresponding provision of the English Act reads :

"In computing the amount of profits or gains to be charged, no sum shall be deducted in respect of—

(*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation."

It will thus be seen that the provision of the English Act is in negative form, whereas its counterpart in the Burma Act is in the positive form.

Now, we propose to examine the applicability or otherwise of the first and second conditions together to the facts and circumstances already found by the Income-Tax Authorities, so far as they relate to the second question under reference. In the first place, can we say that the contribution of K 38,462 which represented the 10 per cent of the difference between the purchase price of rice paid by the assessees to the State Agricultural Marketing Board and the selling

(1) (1938) R.L.R., p. 346.

price obtained by the assessees from such sales, is an expenditure incurred for the purpose of the assessees' business and not a mere sharing of the profits ? We are definitely of the opinion that on the facts stated it partakes of the nature of sharing of profits. It is conceded that the 10 per cent payment by the assessees is not out of any other sum, but out of an income derived from the difference in buying and selling prices. Under the Income-Tax Laws, income-tax attaches as soon as profits accrue, and it is not concerned with the destination and application of the profits. In that regard Lord Macmillan's following observations in the case of *Pondicherry Railway Co.* v. *Commissioner of Income-Tax, Madras* (1) are most apposite :

> " A payment out of profits, and conditional on profits being earned, cannot accurately be described as a payment made to earn profits. It assumes that profits have first come into existence. But profits, on their coming into existence, attract tax at that point, and the revenue is not concerned with the subsequent application of the profits."

Again, in *Indian Radio and Cable Communications Co., Ltd.* v. *Income-Tax Commissioner, Bombay Presidency and Aden* (2) Lord Maugham observed :

> " It is not universally true to say that a payment, the making of which is conditional on profits being earned, cannot properly be described as an expenditure incurred for the purpose of earning such profits. The typical exception is that of a payment to a director or a manager of a commission on the profits of a company."

No doubt, in the two cases above referred to the profits under consideration were nett profits. However, in the case under reference the contribution of 10 per cent made to the State Agricultural Marketing Board was out of the gross profit earned by the assessees,

(1) 58 I.A., 239 at 251-2. (2) (1937) 3 All. E.R., 709 at 713-4.

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and we do not see any difference whatsoever so far as the applicability of clause (ix) is concerned.

In *Tata Hydro-Electric Agencies Ltd.* v. *Income-Tax Commissioner, Bombay* (1) the question for determination was as to the deductibility of certain commission paid to a third party as expenses incurred in earning the profits of the assessees. The appellants Tata Hydro-Electric Agencies Ltd. had purchased a business of managing agents, taking over all benefits and liabilities ; the vendors, for services rendered to them had covenanted to pay 25 per cent of the commission they received for managing a third company to persons who had lent them money. By a new and identical agreement a novation was effected whereby the appellants had taken the place of the vendors. The appellants claimed before the income-tax authorities that the share of the commission which they had to pay was an expense incurred in earning their profits and therefore an admissible deduction in arriving at their taxable profits. It was held by the Judicial Committee of the Privy Council that this payment was an application of profit already earned and not a cost of earning the profits.

In a recent ruling of the Supreme Court of India, *Messrs. Assam Bengal Cement Co., Ltd.* v. *Commissioner of Income-Tax, West Bengal* (2), the applicability of the provision of section 10 (2) (xv) of the Indian Income-Tax Act, which is similar to section 10 (2) (ix) of the Burma Income-Tax Act, came up for consideration. The point involved was whether " protection fees " paid by the assessees under certain clauses of agreements in respect of a group of quarries whereby the lessor undertook in consideration of the said " protection fees " paid by the assessees not to grant any lease, permit or prospecting licence,

(1) (1937) A.C., 685. (2) A.I.R. (1955) S.C., 89.

regarding those quarries to any other person, were expenditure of capital or revenue nature. After an exhaustive review of several English cases and Indian cases, including the cases already cited above, which laid down the criterion for the proper determination of the question involved, it was held that the "protection fees" paid were expenditure made for acquiring or bringing into existence an asset or advantage for the enduring benefit of the assessees' business and that as such properly attributable to capital, and was of the nature of capital expenditure. In fact, the test applied in the said case was one laid down by Viscount Cave in *Atherton* v. *British Insulated and Helsby Cables Ltd.* (1), namely, whether the expenditure claimed is one whichcan be put against any particular work or whether it is to be regarded as an enduring expenditure to serve the business as a whole. In other words, "whether the sum in question is a proper debit item to be charged against the incomings of the trade when computing the profits." Thus, the expenditure in the way of "protection fees" incurred by the assessees company was held to be not an allowable deduction under section 10 (2) (xv) of the Indian Income-Tax Act.

If we are to apply the test laid down in the decision referred to above to the case now under reference, the only conclusion we can arrive at on the facts found by the Income-Tax Authorities, is that the contribution of 10 per cent made by the assessees for the founding of the State Agricultural Bank was in the nature of capital and not revenue—an expenditure which was laid out for the enduring benefit of the assessees' business and as such not a permissible deduction.

(1) (1926) Appeal Cases, 205.

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Now, as regards the applicability of the third essential condition to the facts stated, English judicial decisions concerning the ascertainment of true intendment of the expression "wholly and exclusively laid out or expended for the purposes of the trade . . ." to be found in the English Act, the counterpart of which in the Burma Income-Tax Act being "incurred solely for the purpose of earning such profits or gains," will no doubt be of immense help to us. Apropos, we must refer to the celebrated dictum of Lord Davey in *Strong & Co. of Romsey, Limited* v. *Woodifield* (1), which has been repeatedly accepted and applied by English Courts, and which has become a veritable rule of law. The point in issue in the said case was whether the appellants' brewery company could deduct in the computation of their assessable profits the damages and costs incurred by them through a chimney falling on and injuring a customer at one of their houses. The deduction was refused by the House of Lords, and Lord Davey enunciated the following principle :

> "I think that the payment of these damages was not money expended 'for the purpose of the trade.' These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc., I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made of the profits of the trade. It must be made for the purpose of earning the profits."

It will thus be seen that the meaningful words in Lord Davey's principle are " the disbursement must be for the purpose of earning the profits."

On behalf of the assessee company, to counter Lord Davey's principle, our attention was drawn to the observations of Lord Cave in *Atherton* v. *British*

(1) (1906) A.C. 448.

Insulated and Helsby Cables Ltd. (1) which was as follows :

"A sum of money expended, not of necessity and with a view to direct and immediate benefit to the trade but voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of a business, may yet be expended wholly and exclusively for the purposes of the trade."

But, the learned Counsel for the assessees is perhaps unaware of the fact that this view of Lord Cave was rejected by Lord Porter as a mere *obiter* in *Smith's Potato Crisps, (1929) Ltd.* v. *I.R.* (2). Other Lords, including Lord Simonds, accepted Lord Davey's test as one to be always kept firmly in mind in the consideration of such cases.

Again, in a more recent English case, *Bentleys, Stakes and Lowless* v. *Beeson, Inspector of Taxes* (3) the question as to whether certain sums spent by a firm of solicitors in entertaining their clients to lunch during which their business was also discussed was a permissible expenditure as one being wholly and exclusively laid out or expended for the purposes of the trade or profession arose for consideration and Romer, L.J., delivering the judgment observed (at page 84) :

"The sole question is whether the expenditure in question was 'exclusively' laid out for business purposes, that is : What was the motive or object in the mind of the two individuals responsible for the activities in question ? It is well established that the question is one of fact ; and again, therefore, the problem seems simple enough. The difficulty, however, arises, as we think, from the nature of the activity in question. Entertaining involves inevitably the characteristic of hospitality : giving to charity or subscribing to a staff pension fund involves inevitably the object of benefaction : an undertaking to guarantee to a limited amount a national

(1) (1926) Appeal Cases, 205. (2) (1948) A.C. 508.
(3) (1952) All E.R., Vol. II, p. 82.

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exhibition involves inevitably supporting that exhibition and the purposes for which it has been organized. But the question in all such cases is : Was the entertaining, the charitable subscription, the guarantee, undertaken *solely* for the purposes of business, that is, solely with the object of promoting the business or its profit-earning capacity ? "

This decision is noteworthy in that it throws a flood of light on the problem when and under what circumstances an expenditure can be said to be solely incurred for the purposes of earning profits or gains. If the expenditure is motivated by charitable, hospitable or is incurred with the object of benefaction or for some other kindred purpose, though such purpose may be coupled with the purpose of advancing the activities of one's business or its profit-earning capacity, the learned observations above of Romer, L.J., have made it plain to us that such expenditure cannot be said to have been incurred *solely* for the purpose of earning profits or gains of one's business, there being two purposes or motive underlying the activity. In the present case under reference before us it is abundantly clear from the facts already found by the income-tax authorities, and also from the statement given by one of the partners before the Income-tax Officer that when the firm was given right to do the business by the Government, they were asked to contribute 10 per cent of their gross receipts towards the founding of the State Agricultural Bank, and that the firm agreed to do so, and the sum of K 38,462 was a contribution of 10 per cent out of gross income earned by the firm in their business of rice export to the Far Eastern countries. Moreover, the assessees themselves called this contribution as " donations " when they addressed a letter to the Government of Burma, Ministry of Agriculture and Forests, on 31st July 1951.

Therefore, on the facts and circumstances stated to us we must hold that the payment of K 38,462 by the assessees to the State Agricultural Marketing Board is not an expenditure solely incurred for the purpose of earning profits or gains of the assessees' business; and our answer to the second question is in the negative. The assessees shall pay the costs of this reference to the Income-Tax Authorities; Advocate's fee is fixed at K 200.

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U SAN MAUNG, J.—I have had the advantage of reading the order proposed to be passed by the learned Chief Justice. However, owing to the importance of the questions involved I would like to give my own reasons for concurring in the answers to the questions propounded by the Income-Tax Appellate Tribunal.

The first question involves the answer to the question as to whether a partner can be an employee of the firm of which he is a partner. If so, there seems no reason why the salaries and bonuses paid to him should not be treated for the purpose of deductions under section 10 (*2*) of the Income-Tax Act in the same way as salaries and bonuses paid to other employees of the firm. Two divergent views have been expressed by the Madras and the Lahore High Courts. In *Chief Commissioner of Income-Tax (Board of Revenue), Madras* v. *Vegaraju Venkatasubbaya Garu* (1) it was held that the salaries paid to the partners of the firm are not admissible as deductions in the computation of the profits of the firm for income-tax purposes under the Income-Tax Act of 1918. It would appear that the argument of the assessee in that case was that

(1) (1886-1925), Vol. 1, Income-Tax Cases, p. 176.

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if persons other than the owners of the firm had been employed for the work looked after by the owners, the salaries paid to those other persons would have been admissible as deduction from profits and that therefore no distinction should have been made because the payments were made to the owners themselves. In refuting this argument the Chief Commissioner of Income-Tax, who referred the case to the High Court, observed as follows :

"If the Company were a regular company and not a firm there would no doubt be some force in the appellant's contention but the practice in this Presidency (and it is believed also in England) has always been to treat all drawings of the partners of a firm as a part of the profits whether they be described as interest, salary or profits. The reasons underlying this practice are probably as follows :

(1) Where there are profits to divide it is immaterial how the partners decide to allot them amongst themselves. The whole sum for allotment is profit and taxable as such and any sum allotted to any one partner as salary does not become the less profit because of the method on which its appropriation is decided.

(2) Where there are no profits to divide, *e.g.*, in a year where losses occur, notwithstanding any clause in the agreement to the contrary, it is impossible for the partners to pay themselves salaries except by advancing them out of their own capital. Such advances can only be recouped again out of earned profits which are taxable as such.

(3) If any other view be held of this problem it would be possible for any firm to allot the whole or more than the whole of its estimated profits in each year as so-called salaries to its partners and show no profits for assessment. It is true that the salaries will themselves be taxable as such but this will be at a lower rate and a loss of revenue will occur.

(4) In this case the agreement has been drawn up with special intention of presentation in this reference and must be viewed accordingly.

(5) In the present case the amount payable as salaries are K 1,000 a month to one of the partners and K 500 each to two other partners. It has not been suggested that the partners have any special qualification to justify such large rates and it is quite arguable that these sums represent not 'salaries' in the real sense of the term, but additional shares of profits of these three partners as compared with the share of the fourth and sleeping partner."

With these observations the learned Judges who composed the Bench of the Madras High Court seems to have concurred entirely.

In the case of *The Electric and Dental Stores, Lahore* v. *The Commissioner of Income-Tax* (1) where one of the questions referred was whether the salaries charged by the working partners were not legal expenses incurred for the purposes of earning profits within the meaning of section 10 (2) (ix) of the Income-Tax Act, 1922, Addision, J., who delivered the judgment of the Bench, observed :

"As regards the second question, it appears to me to be one of fact. I am of opinion that the decision of the Madras High Court, *Commissioner of Income-Tax, Madras* v. *Vegaraju Venkatasubbaya Garu* (2), that salaries paid to the partners of a firm are not admissible as deductions in the computation of the profits of the firm, is stated too broadly. A similar question came before the Judicial Commissioners of the Central Provinces and Berar and their decision is reported in *Ramakrishna Ramnath* v. *Commissioner of Income-Tax, Central Provinces and Berar* (3). In that case the Commissioner of Income-Tax in referring the question said :—"A partner might conceivably do business in his individual capacity and in that capacity might render services to the

(1) 12 Lah., p. 663. (2) (1922) 1 Income-Tax Cases, 176.
(3) (1930) 4 Income-Tax Cases, 171.

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firm in consideration of which the firm might pay him a remuneration which would be a legitimate deduction from the assessable income of the firm. But obviously considering the opportunities for fraud that any such alleged arrangement would offer, very strict proof would reasonably be required of the existence of such an arrangement.' "

The learned Judge also said quoting Sundaram's Law of Income-Tax in India that " the dual capacity of a partner-*cum*-employee, though suspect, is possible and to the extent that the person is in truth an employee the salary is deductible from the profits of the partnership. "

In my own opinion the question whether or not in a particular case a partner can or cannot be an employee of the firm of which he is a partner is a mixed question of both fact and law. Now, what is a partnership governed by the Partnership Act of 1932? It is defined as the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Therefore, in my opinion, when a person is employed for carrying on the business of the partnership he remains a partner. Although persons who have entered into partnership with one another are collectively called a firm, that firm is not a legal person.

In the case of *Seodoyal Khemka* v. *Joharmull Manmull* (1) Page, J., observed that a partnership firm is not a person but is merely a collective name of the individuals who are members of the partnership and as such cannot be a partner in another firm. This dictum was quoted with appeal in *Brojo Lal Saha Banikya* v. *Budh Nath Pyari Lal Das* (2) and *In the matter of Jai Dayal Madan Gopal* (3). Therefore, in this respect the

(1) 50 Cal., p. 549. (2) A.I.R. (1928) Cal., p. 148.
(3) 54 All., p. 846.

law in India and Burma were the same as England and the following passage at page 4 of Lindley on Partnership, 11th Edition, is apposite:

"One feature peculiar to the English law of partnership, and distinguishing it from the laws of other European countries and of Scotland, was the persistency with which the firm, as distinguished from the partners composing it, was ignored both at law and in equity. As no one can owe money to himself, it was held that no debt could exist between any member of a firm and the firm itself; and although Courts of Equity, in winding up the concerns of a firm, treated the firm as the debtor or creditor of its members, as the case might be, yet this was only for purposes of book-keeping, and in order to arrive at the net balance to be paid to or by each of the partners on the ultimate settlement of their accounts."

Therefore, normally speaking a partner cannot be an employee in the firm of which he is a partner because no one can employ himself. However, there may be exceptional cases when a partnership firm has to employ a partner as an employee not because he happens to be a partner but in spite of the fact that he is a partner. For example, a firm of motor car manufacturers has a partner who is by profession a doctor. The firm employs many persons and for the purpose of looking after the health of these employees it is deemed expedient that a doctor should be employed and the partner is employed for this purpose. Here, the employment of the partner as a doctor to look after the health of the other employees is so remotely connected with the business of the firm that to all intents and purposes the partner who happens to be a doctor cannot be considered as carrying on the business. Different considerations would apply if the partnership was for the purpose of carrying on the business of a manufacturing chemist and druggist.

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If in such a business a doctor who is also a partner is employed he must be considered to be acting as a partner.

Mere payment of salaries is not a criterion for judging whether a person is an employee. In this connection the observations of Marten, C.J., in *Raghunandan Nanu Kothare* v. *Hormasjee Bezonjee Bamjee* (1) may be usefully quoted. The learned Judge said:

> "Next we come to the main point, *viz.*, the question about sharing the profits. My personal view is that partners can agree to share those profits in any way they like. They may agree to share them equally. They may also agree, in my opinion, that one partner is to receive a fixed annual or monthly sum in lieu of a sum varying in accordance with the profits actually earned. Take this case for instance. Would not the difficulties pointed out by the plaintiff disappear here, if the agreement had been drafted in this form, that out of the profits of the patnership the defendant should be paid a preferential K 500 a month, but that if and in so far as the profits of the business should be insufficient to pay that sum, then the plaintiff would pay the deficiency to the defendant out of his own pocket ? I do not think any objection could have been taken on such an agreement, if it had been entered into, as not coming within the express words in section 239. But, in my opinion, that is what the parties have substantially agreed on here when they said that 'in lieu of his share of profits' the defendant was to get a particular fixed sum. In other words, the defendant thus became a salaried partner which is an expression we are quite familiar with not only in England but also in Bombay."

No doubt, there can be a contract between the partners by which one of them can be remunerated for taking part in the conduct of the business, *vide* clause (*a*) of section 13 of the Partnership Act. The question which therefore arises is whether such a remuneration would be deductible under clause (ix)

(1) 51 Bom., p. 342 at 348.

of section 10 (*2*) of the Income-Tax Act as expenditure incurred solely for the purpose of earning such profits or gains. There can be no doubt that such an expenditure cannot be allowed after the amendment of this clause by the Burma Income-Tax Amendment Act, 1953, as the proviso to that clause reads:

> " Provided further that nothing in clause (ix) shall be deemed to authorize any allowance in respect of any payment by way of interest, salary, commission or remuneration made by a firm to any partner of the firm. "

It has been contended that had clause (ix) of sub-section (*2*) of section 10 as it stood before the coming into force of the Burma Income-Tax Amendment Act, 1953, been wide enough to cover the remuneration made by a firm to any partner of the firm, the proviso to that clause as amended would have been wholly superfluous. I would have been inclined to agree with this contention had it not been for the fact that in the form prescribed by the Financial Commissioner in exercise of his powers under section 59 of the Income-Tax Act it is prescribed that such payments must be added back for the purpose of assessment to Income-Tax. Sub-section (*5*) of section 59 enacts that Rules made under this section shall be published in the Gazette and shall thereupon have effect as if enacted in the Act and there is no dispute regarding the fact that the relevant Rules have been published in the *Burma Gazette*, *vide* Notification No. 37 of the Financial Commissioner, dated the 21st of April, 1939, at page 325 of the *Burma Gazette,* Part IV, dated the 22nd April, 1939. In regard to such Rules the proper canon of construction is to read the original Act and the subordinate legislation together as if they were one Act and the rule must be enforced if there is no inconsistency between it and the principal Act. [See

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the *Institute of Patent Agents* v. *Joseph Lockwood* (1) and *Baker* v. *Williams* (2).] There being nothing expressly provided for in section 10 (2) of the Income-Tax Act that remuneration to a partner of the firm is a deductible expenditure, there seems nothing inconsistent in the rule made by the Financial Commissioner that such remuneration should be added back for the purpose of assessment to income-tax, the Financial Commissioner being empowered by section 59 to make rules not only for the carrying out of the purposes of the Act but also for the ascertainment and determination of any class of income.

In this view of the case I consider that the proviso now added to clause (ix) as amended by the Burma Income-Tax Act, 1953, was *ex abundanti cautela* in so far as the remuneration paid by a firm to any partner is concerned.

For these reasons the answer to the first question propounded by the Income-Tax Appellate Tribunal must be in the negative.

As regards the second question, I have no doubt that the amount involved was meant to be a donation by the assessees to the State Agricultural Marketing Board for the purpose of founding a State Agricultural Bank. It was treated as such by both the parties. It may be that one of the reasons why the assessees gave the donation was to curry favour with the State Agricultural Marketing Board and thus obtain more and more rice for sale. However, it cannot be said that it was an expenditure incurred solely for the purpose of earning profits as the assessees might have thought that it was a good thing to have a State Agricultural Bank and with that end in view donated the amount. As soon as the purpose for

(1) (1894) Appeal Cases, p. 347.
(2) (1898) 1 Queen's Bench Division, p. 23.

which the payment was made became bifurcated the payment can no longer be regarded as an expenditure incurred solely for the purpose or earning profits. This result necessarily follows from the application of the principle enunciated by Lord Davey in *Strong & Co. of Romsey, Limited* v. *Woodifield* (1) where His Lordship observed:

"It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits."

For these reasons I consider that the answer to the second question must also be in the negative.

I concur in the order regarding the payment of costs.

CIVIL REFERENCE NO. 8 OF 1955.

U BA THOUNG, J.—I have had the privilege of reading the judgment of the learned Chief Justice and that of my learned brother U San Maung, J. and I concur in the answers to the questions propounded by the Income-Tax Appellate Tribunal. I would only add that the question as to whether or not in a particular case, a partner can or cannot be an employee of the firm of which he is a partner, is, in my opinion also a mixed question of both fact and law; and the finding arrived at by the Income-Tax Appellate Tribunal on such a question when it arises, cannot be regarded as final, but it can be referred to the High Court.

(1) (1906) Appeal Cases, p. 448.

APPELLATE CRIMINAL.

Before U San Maung, J.

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Feb. 6.

U BA HAN (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Penal Code, ss. 411 and 412—S. 403, Criminal Procedure Code—Autrefois Convict—*Properties forming parts of different crimes found in possession of accused at the same time and place—Only one offence of receiving committed.*

Jewelleries forming part of a dacoity were found together with some currency notes forming part of another ransom case at the same time and at the same place and in the same "Lipton Tea" tin.

The appellant was sent up before the 3rd Additional Special Power Magistrate, Tavoy, for trial under s. 412, Penal Code, in respect of the jewelleries in Criminal Regular Trial No. 19 of 1954 and was convicted but eventually acquitted by High Court.

The appellant was also sent up for trial before the Sessions Judge, Tavoy, sitting as a Special Judge under s. 411 Penal Code in respect of the Currency Notes in Criminal Regular Trial No. 7 of 1954 and was convicted.

On appeal, the principle of *autrefois convict* was raised.

Held: That, unless there is evidence to prove the properties received by a person are at different times or from different persons, a person found in possession of stolen property containing a number of articles identified as belonging to different owners cannot be convicted of several offences of receiving in respect of property identified by each owner.

The essence of an offence under s. 411 or 412, Penal Code, is the Act of receiving or retaining stolen property. It is a single offence and not a number of offences.

Ishan Mucht and others v. *The Queen-Empress*, (1888) I.L.R. 15 Cal. 511; *Emperor* v. *Sheo Charan*, (1923) I.L.R. 45 All., 485; *Ganesh Sahu* v. *Emperor*, (1922) I.L.R. 50 Cal., 595; *Hayat* v. *The Crown*, (1929) I.L.R. 10 Lah., 158; *King-Emperor* v. *Bishun Singh*, (1924) I.L.R. 3 Pat., 503; are followed.

Nil for the appellant.

Ba Kyaw (Government Advocate) for the respondent.

U SAN MAUNG, J.—This is an appeal by U Ba Han, the 3rd accused in Criminal Regular

*Criminal Appeal No. 419 of 1955. Appeal from the order of U Tha Doe, Special Judge of Tavoy, dated the 14th day of September 1955, passed in Criminal Regular Trial No. 7, of 1954.

Trial No. 7 of 1954 of the Sessions Judge, Tavoy, sitting as a Special Judge, against his conviction and sentence under section 411 of the Penal Code. The facts of the case as they appeared in the judgment under appeal are briefly these. On the 27th May 1954 at about 11 a.m. a motor schooner carrying 20 passengers and goods was on its way from Tavoy to Thagyettaw Village about 30 miles below the river, when it was attacked by seven *lusoes* armed with firearms. After indiscriminate looting of the properties belonging to the passengers the *lusoes* allowed the schooner to depart without some of its passengers, including U Sit Lit, who were detained for the purpose of being held to ransom. A demand for K 30,000 for the return of U Sit Lit was sent with Ma Paw, Ma Than Tin and Maung Ngwe Din who were the three persons detained along wtih U Sit Lit. The amount demanded was paid in two instalments of K 5,000 and K 25,000 and U Sit Lit was eventually released.

On the 4th of June 1954 U Ba Than (PW 12), Sub-Inspector of Police of Tavoy Police Station, searched the house of the appellant U Ba Han who was the father-in-law of the absconding accused Pe Kyi. In the front room of U Ba Han's house a "Lipton Tea" tin was found under a table about two cubits away from U Ba Han's bed. Inside that tin K 2,500 in currency notes which were identified to be some of the notes paid as the ransom for the release of U Sit Lit, were found together with certain articles of jewellery, namely, one white stone gold comb with silver hair pin, three pairs of white stone gold ear studs, red stone gold rings, and white stone gold and silver hairpin. These jewelleries were later identified to be among the properties which had been taken away by the dacoits when the

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houses of Maung Tun, Maung Din and Maung Saing Po of Thagyettaw Village was attacked on the night of the 23rd May 1954.

In connection with this dacoity the absconding accused Pe Kyi was sent up for trial under section 395 of the Penal Code and the present appellant Ba Han was also sent up for trial under section 412 of the Penal Code for receiving stolen property, knowing or having reason to believe to have been transferred by the commission of dacoity. It was dealt with by the 3rd Additional Special Power Magistrate, Tavoy, in his Criminal Regular Trial No. 19 of 1954 and U Ba Han was convicted and sentenced to one year's rigorous imprisonment under section 412 of the Penal Code. The conviction and sentence were confirmed by the Sesssions Judge on appeal by U Ba Han but they were set aside by U Ba Thoung, J. in Criminal Revision No. 110 (B) of 1955 of this Court. The reasons given by the learned Judge appeared in the following paragraphs of his judgment:

"The applicant in his defence stated that he had no knowledge of the existence of the jewelleries and cash to the value of K 2,500 kept in a "Lipton Tea" tin which was found near his bed until his house was searched by the police party. The learned trial Magistrate took the view that since the jewelleries and cash were found in a "Lipton tea" tin near Maung Ba Han's bed, and as these properties were satisfactorily identified to be the dacoited properties taken from the houses of Maung Tun, Maung Din and Maung Saing Po, the applicant must have retained these properties with the guilty knowledge that they were the dacoited properties, and hence he convicted the applicant Maung Ba Han under section 412 of the Penal Code. The applicant appealed to the Sessions Judge, Tavoy, and the learned Sessions Judge took the view that as Maung Ba Han is the head of the family in his house, and as the jewelleries and cash in the "Lipton Tea" tin were found not far from his bed it must be presumed that

he was aware of the existence of these properties and that they were dacoited properties. He therefore agreed with the finding of the learned trial Magistrate that the charge against the applicant under section 412 of the Penal Code has been proved, and he upheld the conviction but reduced the sentence from one year's rigorous imprisonment to one of 8 (eight) month's rigorous imprisonment.

I have gone through the proceedings very carefully in this case, and I cannot find any evidence to support the view taken by the lower Courts that Maung Ba Han was aware of the existence of the cash and jewelleries in the " Lipton Tea " tin found near his bed. Besides, there is ample evidence on record to show that the applicant was bed-ridden at the time of the search made at his house. The confession of his son-in-law Maung Pe Kyi given before the Headquarters Magistrate in Criminal Regular Trial No. 7 of 1954 also reveals that he had the " Lipton Tea " tin containing jewelleries and cash at the house of his father-in law Maung Ba Han. The evidence on record also shows that this " Lipton Tea " tin was placed among other articles under a table not far from the bed of Maung Ba Han. There is evidence to show that Maung Pe Kyi visited his father-in-law Maung Ba Han's house before it was searched, and it is quite likely that Maung Pe Kyi went and kept this " Lipton Tea " tin at the house of his father-in-law, Maung Ba Han, in a casual manner so as not to create any suspicion, and so that if a search is made at the house where he lived nothing may be found to incriminate him in this dacoity case. On looking at the evidence on record, I find nothing to convince me that the applicant Maung Ba Han was aware of the existence of the cash and jewelleries in the " Lipton Tea " tin which was placed near his bed, until it was discovered by the police party at the time of search. "

In the case now under consideration the learned Sessions Judge, Tavoy, in his capacity as Special Judge, convicted U Ba Han for the same reasons that he had given in confirming the conviction and sentence on U Ba Han under section 412 of the Penal Code. He also observed that the conviction of U Ba Han under section 412 of the Penal Code in Criminal Regular Trial No. 19 of 1954 of the Court

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of the 3rd Additional Special Power Magistrate, Tavoy, was on review in the High Court at the time he convicted U Ba Han under section 411 of the Penal Code in respect of the sum of K 2,500.

In this appeal one of the grounds raised was that the conviction of U Ba Han under section 411 of the Penal Code in Criminal Regular Trial No. 7 of 1954 was bad in law on the principles of *autrefois convict* as embodied in section 403 of the Criminal Procedure Code. In my opinion, this contention must be allowed to prevail. In the case of *Ishan Muchi and others* v. *The Queen-Empress* (1) where the accused were convicted of dishonestly receiving stolen property, first under section 411, in respect of the goods belonging to one person, and, second, in respect of goods belonging to another and there was no proof against them except the fact that the goods found in their possession were stolen from different persons and were found in their possession under such circumstances as to prove a guilty knowledge on their part, it was held that the accused should have been convicted of only one offence of retention of stolen goods, knowing or having reason to believe that they were stolen.

This case was followed by the Allahabad High Court in *Emperor* v. *Sheo Charan* (2). There it was held that a person found in possession of stolen property identified as belonging to different owners cannot be convicted of several offences of receiving in respect of property identified by each owner, unless there is evidence to prove that they were received by him at different times. In this connection, the Bench observed:

"The essence of an offence under section 411 or 412 is the act of receiving or retaining stolen property. If a thief

(1) (1888) I.L.R. 15 Cal. 511. (2) (1923) I.L.R. 45 All., 485.

hands over to the accused a bundle containing a number of articles, the offence committed by the accused in receiving those articles is a single offence, and not a number of offences, and it makes no difference whether the articles belonged to a single owner or to different owners. If there were evidence that the accused received the articles at different times or from different persons, the case would be different but the Court cannot presume this against the accused in the absence of any evidence."

Both these cases were referred to with approval by the Calcutta High Court in *Ganesh Sahu* v. *Emperor* (1). In *Hayat* v. *The Crown* (2) where a person was found in possession of stolen property belonging to different owners and there was no evidence that he had received the same at different times, it was held that he could not be convicted under section 411 separately in respect of property identified by each owner and that the onus in each case lies on the prosecution to establish that the property was received by the accused at different times and that it is not for the accused to prove that he had received the same at one time.

In *King-Emperor* v. *Bishun Singh* (3) three items of stolen property, namely, a quantity of unused postage stamps, some carpets and some buckets and padlocks, were found in the house of two brothers. These properties were said to have been derived from three different thefts but there was no evidence to show that the stamps and carpets had been received by the brothers on different dates. The police, however, sent up the accused under three charge sheets. In one case one of the brothers was convicted under section 411 on a charge of dishonestly retaining the carpets. In the proceedings against them under section 411 in respect of dishonest

(1) (1923) I.L.R. 50 Cal. 595. (2) (1929) I.L.R. 10 Lah., 158.
(3) (1924) I.L.R. 3 Pat., 503.

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retention of the stamps the accused pleaded that as the stamps had been discovered at their house on the same date and at the same place as the carpets only one offence in respect of these two items of property had been committed and that as they had already been tried in respect of the carpets they could not be tried in respect of the stamps. This plea was accepted by the trial Court and they were acquitted on the ground that the principle of *autrefois convict* as embodied in section 403 of the Criminal Procedure Code was applicable. On appeal by the government against the acquittal a Bench of the Patna High Court, after an exhaustive survey of the law, held that the acquittal of the accused was correct.

In the case now under consideration the sum of K 2,500 was found at the same time and at the same place and in the same "Lipton Tea" tin as the properties involved in Criminal Regular Trial No. 19 of 1954 of the 3rd Additional Special Power Magistrate, Tavoy. The accused Ba Han having been convicted in that case could not be convicted again by the Sessions Judge, Tavoy, sitting in his capacity as Special Judge, Tavoy, in his Criminal Regular Trial No. 7 of 1954. The principle of *autrefois convict* as enunciated in section 403 of the Criminal Procedure Code is applicable. For these reasons, the conviction and sentence on the appellant U Ba Han are set aside and he is acquitted and released in so far as this case is concerned. I may note in passing that since the appellant was sentenced to four months' rigorous imprisonment only he must have already undergone his term of imprisonment by now.

APPELLATE CIVIL.

Before U Chan Tun Aung, Chief Justice and U Ba Thoung, J.

C. K. CHIN (APPELLANT)

v.

HAJEE E. M. SEEDAT (RESPONDENT).*

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Auction sale by Receiver under orders of the Court—Order under Order 21, Rule 92 (2), Civil Procedure Code, erroneously made as if in execution proceedings, due to the quotation of the Section of the Law under which the application was filed—Completed contract of Sale—Completed contract to sell—True position of Receiver vis-á-vis *the Court—Control by Court of Sales by Receiver—Nature and status of Receiver in relation to property entrusted to him*—Custodia legis—*Summary relief or a regular suit against the action of Receiver, when lies—Receiver, an officer of the Court and not its agent.*

An auction sale of certain properties was held by a Receiver under orders of the Court and the appellant was declared to be the highest bidder.

The Respondent thereupon filed an application under Order 21, Rule 90 of the Civil Procedure Code to set aside the sale alleging certain serious irregularities in the conduct of the sale; the objection by the appellant was also under the same Order; and the Trial Court set aside the sale under Order 21, Rule 90 (2), Civil Procedure Code, as if the sale by the Receiver was a sale in execution of a decree.

On appeal, the order of the Trial Court was challenged by the appellant on the following grounds, *viz.*,

(i) Since Order 21, Rule 90 (2) is inapplicable to the proceedings before him, the Trial Court had acted without jurisdiction.

(ii) Since there is a completed contract to sell in favour of the appellant, the Trial Court had no jurisdiction to set aside the sale, but to direct the Respondent to seek his remedy by way of a regular suit.

(iii) The Receiver being an agent of the Court, the action of the Receiver is binding on the Court.

Held: The mere fact that a party quotes a wrong section of the Civil Procedure Code and the Court purports to pass an order under the wrong section cannot on that ground alone hold that the Court has acted without jurisdiction.

It is the substance of the application that matters and not the section quoted in the application.

Ram. Narain Sahoo v. *Bandi Pershad*, 31 Cal. (1904) (I.L.R.) p. 737; *Ankayya* v. *Subhadrayya and others*, A.I.R. (1932) Mad. 223, followed.

Held also: A Receiver is a mere *custodia legis* of whatever properties he has been directed to take charge of, and whatever he does as directed by the Court in matters arising out of his office as such the Court which appoints him has control over his actions.

* Civil Misc. Appeal No. 64 of 1955 against the order of the District Court of Mandalay in Civil Misc. No. 53 of 1951, dated the 31st August 1955.

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Woodroffe on Receivers, 3rd Edition, p. 4 ; *Po Shan and another* v. *Maung Gyi*, 5 L.B.R. (1910) p. 213 at p. 215 ; *Maung Ohn Tin* v. *P.R.M.P.S.R.M. Chettyar Firm and others*, 7 Ran. I.L.R. (1929) p. 425; *Eastern Mortgage and Agency Co., Ltd. and T. C. Tweedie* v. *Muhammad Fuzlul Karim and another*, (1925) I.L.R. 52 Cal. p. 914 ; *Ma Joo Tean and another* v. *The Collector of Rangoon*, 12 Ran. p. 437 at p. 440, referred to.

Held further : There was no completed contract of sale of the property, but there was only a *completed contract to sell* voidable at the option of one of the parties with distinct legal consequences ; if there is a complete contract of sale, *i.e.* a completed transaction confirmed by the Court followed by execution and registration of necessary conveyance deed on full payment of the price vesting possession of the property in the buyer, the redress for any wrong can only be by way of regular suit.

A sale or lease of any immoveable property made by a Receiver is in fact, a sale or lease of the Court, and as such, sale or lease is not complete until confirmation is given by the Court. It is the acceptance of the Court that completes the transaction in these matters.

Ratnasami Pillai v. *Sabapathy Pillai and others*, A.I.R. (1925) Mad. p. 318, referred to.

But, where there has been only a completed contract to sell the party affected by it can seek a summary relief in the proceedings of the Court which appoints the Receiver.

Krista Chandra Ghose v. *Krista Sakha Ghose*, 36 Cal. I.L.R. (1909) p. 52 ; *Surendro Keshib Roy* v. *Doorgasoondery Dossee and another*, 15 Cal. I.L.R. (1888) p. 253, referred to.

One who feels aggrieved at the conduct of the Receiver must seek redress against the Receiver initially in a proceeding of the Court, in which the Receiver was appointed. That has been the English practice and it has been followed in India and Burma as well.

The Trial Court was fully competent to accept the application.

Searle v. *Choat*, (1884) 25 Chancery Division p. 723 ; *Kamatchi Ammal* v. *Sundaram Ayyar*, (1903) I.L.R. 26 Mad. p. 492 ; *Minatoonnessa Bibee and others* v. *Khatoonnessa Bibee and others*, (1894) I.L.R. 21 Cal. p. 479 ; *A. B. Miller* v. *Ram Ranjan Chakravarti*, I.L.R. (1884) 10 Cal. 1014 ; *K. K. Secunder* v. *J. A. M. Kasiyar & Co.*, 1 Ran. I.L.R. (1923) p. 138, referred to.

Held also : The true legal position of the Receiver *vis-à-vis* the Court which appoints him does not bear a complete analogy to the relationship which exist between a principal and an agent as prescribed in the Contract Act.

So far as certain transactions done by the Receiver as *Custodia Legis* under the direction of the Court are concerned, the Receiver being just a hand and an officer of the Court, the rules of implied authority under the Contract Act cannot be made available to him.

Held also : The auction sale is not above suspicion or trickery or unfairness. The order of the Trial Court upheld.

Mohamed Kala Meah v. *A. V. Harperink and others*, 5 L.B.R. (1909-10) p. 25 at 33 ; *Gor Kyin Sein* v. *U Kyaw Din and others*, (1952) B.L.R. (H.C.) p. 162, followed.

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Dr. U E Maung for the appellant.

P. K. Basu for the respondent.

U CHAN TUN AUNG, C.J.—This is an appeal against the order of the District Judge of Mandalay, setting aside the auction sale of the following immoveable properties together with the buildings thereon, held on the 7th August, 1955 by the Receiver appointed by the Court:—

A piece of freehold land known as Holding No. 27 of 1952/53, Block No. 591, Chan-e-Thazan Ward, Yondawgyi Quarter, Mandalay, together with 5 houses standing thereon.

The brief facts leading to the passing of the aforesaid order are as follows:

In administration suit, Civil Regular No. 9 of 1940 of the District Court of Mandalay, relating to the estate of one Sulaiman Ahmed Sema who died on the 13th December 1932 at Mandalay, leaving considerable properties, both moveable and immoveable, and a number of heirs, a Receiver, in the person of U Ba Thin, Higher Grade Pleader, was appointed by the Court with the consent of the parties on the 30th May, 1952. Under the orders of the Court, U Ba Thin duly notified to the public the proposed sale by auction of certain lands and buildings belonging to the estate, and the relevant portion of sale notice reads:—

"Notice.

SALE OF LANDS AND BUILDINGS.

U Ba Thin, Higher Grade Pleader, (Receiver) has been ordered by the District Court, Mandalay, in its Judicial Department Memo. No. 1258/Suit 9-40, dated the 4th June, 1955.

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To sell by Public auction.

Of the undermentioned immoveable properties in accordance with the preliminary decree passed in its Civil Regular Suit No. 9 of 1940 of the District Court, Mandalay, passed on the 2nd June, 1955, belonging to the estate of late Mr. S. A. Sema of Mandalay on the following dates commencing each day at 9 a.m. at the site of the lands.

On Sunday, the 7th August, 1955, at 9 a.m.

1. A piece of freehold land known as Holding No. 27 of 1952/53 Block No. 591, Chan-e-thazan Ward, Yondawgyi Quarter, Mandalay, with five houses standing thereon.

2. A piece of freehold land known as holding No. 29 of 1952/53 Block No. 591 Chan-e-thazan Ward, Yondawgyi Quarter on 84th Aungsan Street, Mandalay.

3. * * * *

4. * * * *

5. * * * *"

On the day fixed, *i.e.* 7th August 1955 the respondent Hajee E. M. Seedat, who is the plaintiff in the main suit and who is also an assignee to the extent of three-fifths of the entire estate by virtue of assignment effected in his favour by other heirs, was present at the auction sale. Beside him, there were other persons present, including the present appellant C. K. Chin. Hajee E. M. Seedat alleged that the Receiver, instead of auctioning Holding No. 27 first in the order listed in the sale notice on the day fixed, *i.e.* 7th August at 9 a.m. he first started auctioning Holding No. 29, and the same was sold to the highest bidder C. K. Chin, the present appellant for a sum of K 80,500. The respondent also participated in the bid but he offered up to K 40,000. The monthly rents accruing from this property is said to be K 150 per month. Next, the Receiver went into the compound of Holding No. 27 which is not far distant from Holding No. 29, but said to be almost adjoining Holding No. 29 and started auctioning it. The rent receivable from the tenants

in occupation of the premises thereon was said to be more than K 300 a month. At this auction sale the respondent alleged there were only three persons present, namely :—the respondent, one Albert and the present appellant C. K. Chin. The bid by C. K. Chin was K 10,000 whereas the bid by the respondent was K 15,000. At this juncture the Receiver was said to have asked the respondent whether he could produce the Citizenship Certificate, and on getting a reply that he (the respondent) could not produce one there and then as the same was in Rangoon, the Receiver debarred the respondent from bidding further, and the property was ultimately sold to C. K. Chin as the highest bidder for a sum of K 10,500. The respondent asserted that he was ready with the cash to pay up to K 50,000 for the said site and premises. Further, he maintained that despite the assurance given by his Advocate Mr. B. M. Sarkar who was present at the auction that he had already obtained a Citizenship Certificate and that he (Mr. Sarkar) had seen it when the deed of assignment executed by the legal representatives of the late S. A. Sema was registered in favour of the respondent and also when it was produced before the former District Judge Mr. Singh for bringing the respondent's name on the record as assignee, yet the Receiver ignored the assurance given by a responsible person. It is further asserted that when the Receiver started the sale of Holding No. 27, there were only two bidders beside the respondent and that the persons who were present at the first auction, namely, about 9 persons were not present, they being not made aware of the auction that was being held inside the compound of Holding No. 27.

To all these allegations the Receiver and C. K. Chin the present appellant filed their replies. The

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Receiver's reply shows that when the sale in respect of Holding No. 29 took place, there were 9 persons present, including the respondent, and the successful bidder was C. K. Chin. It also reveals that the respondent made a bid to buy Holding No. 29 for K 40,000. But as there was none to question whether he had a Citizenship Certificate the Receiver did not call upon him to produce the same. But in respect of Holding No. 27, the Receiver conceded that the auction took place inside the compound and that beside Seedat, there were only two others, namely, one Albert and the present appellant C. K. Chin. He further averred that it was at the instance of C. K. Chin that he asked Seedat whether he had a Citizenship Certificate, and as Seedat was unable to produce the Certificate despite the assurance given by Seedat himself and by his lawyer that Seedat had a Citizenship Certificate, he considered it improper to act upon verbal statement of the lawyer and disallowed Seedat to bid at the auction. There were thus only two bidders, namely C. K. Chin and one Mr. Albert and as there was no request for postponement of the sale, the Receiver says, he auctioned the property in question. The reply of C. K. Chin more or less supports what the Receiver says. One striking feature of the auction sale of these two properties is that the property Holding No. 29 which fetches a monthly rental of K 150 was sold for K 80,500, whereas the property, namely Holding No. 27, which fetches a monthly rental of K 300 or more was sold for K 10,500 only. There is also another significant fact which has not been controverted regarding the sale of Holding No. 27 and that is, when C. K. Chin offered K 10,000 there was an immediate offer of K 15,000 by the respondent, and yet the Receiver proceeded with the auction with

only two bidders beside the respondent by excluding the latter on the ground of non-production of a Citizenship Certificate there and then.

On these averments the learned District Judge has set aside the sale of Holding No. 27 and directed resale of the same. The learned District Judge considers that no sufficient publicity was given when the auction sale took place with the consequence that there were only two bidders, that it was improper on the part of the Receiver in requiring Seedat to produce a Citizenship Certificate only after permitting him to make a bid and that the amount realised by sale, namely the sum of K 10,500 was too small a sum highly detrimental to the interest of the estate. We may here note that the application before the District Judge for setting aside the sale of the Receiver was made under Order 21, Rule 90, Civil Procedure Code, and the objection by the appellant was also taken under the same Order as if the sale by the Receiver was a sale in execution of a decree. The learned District Judge also treated the matter as if in execution; and in setting aside the sale, he appears to have acted under Order 21, Rule 92.

In the appeal before us, a preliminary objection was taken by the respondent that in the context of facts and circumstances obtaining in this case, no appeal lay as against the order of the District Judge, setting aside the sale of the Receiver, that appeal could lie only as respects setting aside the sale or refusing to set aside the sale in execution proceeding as envisaged in Order 21, Rules 72 or 92 of the Civil Procedure Code. However, this objection was not pressed further by the respondent, inasmuch as, it was conceded later that wide powers of superintendence which this Court has over all the subordinate

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Courts under section 27 of the Union Judiciary Act, coupled with the revisional jurisdiction it enjoys under section 115 of the Civil Procedure Code, could be invoked to entertain the present application.

The appellant has urged before us that the learned District Judge, in setting aside the sale has acted without jurisdiction in that his order was one made under Order 21, Rule 92 (2) which was obviously inapplicable to the proceeding before him. It was also urged that since there had been a completed contract to sell in favour of the appellant, the District Judge had no jurisdiction to order the setting aside of the sale; but that he should have referred the respondent to file a regular suit for setting aside the sale. In our view, the enquiry by the learned District Judge into the matter under Order 21, and the rules thereunder was occasioned by the act of the parties to the proceeding having under misconception of law treated the same as if it was a proceeding in execution. We notice that the respondent himself set out in his application that he was moving the Court under Order 21, Rule 90. The learned Judge also assumed that he had the jurisdiction, and no serious objection was taken by the appellant either. Furthermore, the substance of respondent's application is clearly one which seeks to set aside the sale of the Receiver and had no relation to any execution proceedings. In such a situation, we consider that we should be guided by what has been laid down in *Ram Narain Sahoo* v. *Bandi Pershad* (1). It was held therein that in order to decide under which section of the Civil Procedure Code a case came, the Court should look into the true nature of the application with reference to the relief sought and the parties before it. A party could not be permitted

(1) 31 Cal. (1904), I.L.R. p. 737.

to oust the jurisdiction of the Court by a mere statement that his case was under one section of the Civil Procedure Code and not another, and thereby defeat the just rights of the other party, when in fact the matter ought to be dealt with under the other section. Similarly, in *Ankayya* v. *Subhadrayya and others* (1) it was pointed out that Courts should not consider applications only with reference to the section under which it was purported to be filed. If the Courts have got inherent power to entertain an application and grant the relief prayed for therein, the circumstance that a wrong section is quoted should not be taken too much into account when the High Court is asked to exercise its powers of revision in such matters. Therefore, by the mere fact that the party affected by Receiver's sale in seeking redress by an application to the Court which appoints the Receiver, quotes a wrong section of the Civil Procedure Code, and the Court purports to pass an order under the wrong section, we cannot on that ground alone hold that the Court has acted without jurisdiction. It is the substance of the application that matters, and we are not to be guided solely by the section quoted in the application. We do not therefore consider that the learned District Judge was acting without jurisdiction in entertaining the respondent's application and giving a decision thereon. In any event, the learned District Judge was fully competent to deal with the application by the exercise of inherent powers under section 151 of the Civil Procedure Code.

Coupled with the submission that the acceptance of the Receiver the bid made by the appellant constituted a completed contract to sell and the learned trial Judge had no jurisdiction to entertain

(1) A.I.R. (1932) Mad. 223.

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the objection filed by the respondent but to refer him to a regular suit was another submission, that the Receiver being in the position of an agent of the Court, and applying the laws of agency, the Court ought to be held bound by what the Receiver had done within the scope of his authority. These submissions, though attractive, are found to be not in consonance with the accepted judicial pronouncements touching the question, and we are unable to subscribe to the views propounded by the learned Counsel for the appellant. The facts and circumstances in the case clearly show that there was no completed contract of sale of the property in question; but there was only a *completed contract to sell*. The question therefore resolves itself into whether the Court can in the circumstances be justified in setting aside the uncompleted sale and order a fresh sale. Here, the answer is to be found by ascertaining the exact position of the Receiver *vis-à-vis* the Court, which appoints him, and the scope of powers vested in Court with reference to disowning or owning what the Receiver has done whilst in the discharge of his function *qua* Receiver. In this connection, the observations of their Lordships of the Privy Council in *Mohamed Kala Meah* v. *A. V. Harperink and others* (1) is most apposite and with due respect, we consider that it correctly lays down how a Court should act as respects sales effected by a Receiver under its direction. The observation is as follows:

"It has been laid down again and again that in sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. The Court, it is said, must at any rate not fall below the standard of honesty which it exacts

(1) 5 L.B.R. (1909-10), p. 25 at p. 33

from those on whom it has to pass judgment. The slightest suspicion of trickery or unfairness must affect the honour of the Court and impair its usefulness. It would be disastrous, it would be absolutely shocking, if the Court were to enforce against a purchaser misled by its duly accredited agents a bargain so illusory and so unconscientious as this."

The above principle of Court's control over the Receiver's action is found to have been accepted in *Gor Kyin Sein* v. *U Kyaw Din and others* (1).

The true nature and status of the Receiver in relation to the property entrusted with him has been, from time to time, enunciated in various decisions of our Courts as follows :

"The status of a receiver is merely that of an officer o the Court. He is sometimes referred to as the 'hand of the Court'. He acquires no proprietary rights or interest in the property of which he is appointed receiver. Having no title to the property he cannot convey or assign any title to it to any other person.

A receiver has no proprietary rights or interest whatever. Notwithstanding his appointment the proprietary rights in the estate remain in the persons who are by law entitled to the estate. The receiver's possession is not a possession by any personal right. It is the possession of the Court and he is totally devoid of any interest in the property."

(Woodroffe on Receivers, 3rd edition, page 4.)

[By Sir Charles Fox in the case of *Po Shan and another* v. *Maung Gyi* (2).]

"A receiver is merely an officer of the Court, he acquires no proprietary rights or interest in the property of which he is appointed receiver."

[As per Rutledge, C.J. and Brown, J., in the case of *Maung Ohn Tin* v. *P.R.M.P.S.R.M. Chettyar Firm and others* (3).]

(1) (1952) B.L.R. (H.C.) p. 162. (2) 5 L.B.R. (1910), p. 213 at p. 215.
(3) 7 Ran. I.L.R. (1929), p. 425.

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"The nature of the office of a receiver is simply this, that he is an impartial person appointed by the Court to collect and receive pending the proceedings the rents, issues and profits of land or personal estate or other things in question which it does not seem reasonable to the Court that either party should collect or receive. The object sought by the appointment of a receiver is the safeguarding of property for the benefit of those entitled to it. His possession is on behalf and for the benefit of all the parties to the suit in which he is appointed, and is the possession of all the said parties according to their titles. The property in his hands is in *custodia legis* for the person who can make a title to it. The title of the real owner is in no way affected either in theory or in principle by his appointment. He collects and receives the rents, issues and profits not upon his own title but upon the title of some persons, parties to the action."

[As per Mukerji, J. in *Eastern Mortgage and Agency Co. Ltd. and T. C. Tweedie* v. *Muhammad Fuzlul Karim and another* (1) quoted with approval by Page, C.J. in *Ma Joo Tean and another* v. *The Collector of Rangoon* (2).]

From these observations, it seems clear to us that a Receiver is a mere *custodia legis* of whatever properties he has been directed to take charge of, and it is a necessary consequence that whatever he does as directed by the Court, whether be it a sale or a lease of certain immoveable property, or disposal of certain moveable property, collection of rents, issuing of lease, or any other incidental matters arising out of his office as such, the Court which appoints him has a control over his actions. We also find that one who feels aggrieved at the conduct of the Receiver must seek redress against the Receiver initially in a proceeding of the Court, in which the Receiver was appointed. That has been the English practice and it has been followed in India and Burma as well.

(1) (1925) I.L.R. 52 Cal. p. 914.

(2) 12 Ran. p. 437 at p. 440.

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[See *Searla* v. *Choat* (1) ; *Kamatchi Ammal* v. *Sundaram Ayyar* (2) ; *Minatoonnessa Bibee and others* v. *Khatoonnessa Bibee and others* (3) ; *A. B. Miller* v. *Ram Ranjan Chakravarti* (4); *K. K. Secunder* v. *J. A. M. Kasiyar & Co.* (5).]

Regarding the question whether the Receiver's acceptance of appellant's bid, in the circumstances stated, constitutes a completed contract of sale and oust the jurisdiction of the Court to entertain the respondent's application, we are of the view that the transaction in question has not resulted in a complete sale vesting possession of the property in question with the appellant-buyer, which event would ordinarily follow, had there been an execution of sale-deed on full payment of the price followed by registration thereof. As the matter now stands there is only a completed contract to sell voidable at the option of one of the parties, and therefore, the Court which has complete control over the action of the Receiver can either accept his sale or refuse to accept it if it considers just and reasonable to do so in the interest of the estate and the parties interested therein. In our view there is a clear distinction in the legal consequences that ensue so far as what a Receiver does in a matter of sale or lease of immoveable property in his charge. If the transaction is a completed transaction followed by execution and registration of necessary conveyance deed with complete delivery of possession to the buyer or the lessee, then the summary relief available before the Court that appoints the Receiver will not be given to a party affected by the action of the Receiver ; but he should seek his remedy by way of a regular suit.

(1) (1884) 25 Chancery Division, p. 723.
(2) (1903) I.L.R. 26 Mad. p. 492.
(3) (1894) I.L.R. 21 Cal. p. 479.
(4) I.L.R. (1884) 10 Cal. 1014.
(5) 1 Ran. I.L.R. (1923), p. 138.

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But as already observed, such are not the facts and circumstances in the case now before us. In *Krista Chandra Ghose* v. *Krista Sakha Ghose* (1), it has been held that where a lease had been already granted by the Receiver acting under an order of the Court and possession of the property had been given to the lessee and subsequently, certain parties applied to the Court for a declaration that the lease was invalid and for certain other reliefs against the Receiver and the lessee, it was held that no summary order could be passed to set aside the lease by the Court which appoints the Receiver. The proper remedy would be by a suit against the Receiver and also against the lessee. But, where a contract by the Receiver is still at the stage of contract to lease, and no lease-deed had been executed, it was held that the Court appointing the Receiver has complete power to enforce summarily the contract made by the Receiver. [See *Surendro Keshib Roy* v. *Doorgasoondery Dossee and another* (2)]. The facts in the said case were, the Court directed the Receiver to accept the offer made by a person for lease to him of certain properties of the estate. The offer was accepted by the Receiver under the direction of the Court and the proposed lessee deposited certain sums of money as security for due performance of the covenant contained in the lease, and also paid the Receiver advance rent towards the lease. The proposed lessee obtained possession of the property, and the Receiver also obtained rent from him, but no lease deed was executed. In that situation, one of the parties to the original case preferred an appeal resulting in the dismissal of the suit, thereby upsetting all the previous arrangements made by the Court in respect of properties of the estate in the custody of the

(1) 36 Cal. I.L.R. (1909) p. 52 (2) 15 Cal. I.L.R. (1888) p. 253.

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Receiver. One of the matters that fell for determination before Mr. Justice Trevelyan was whether the Court could entertain an application by the proposed lessee with whom a contract for lease had been made for the execution of the lease or whether it was necessary that in order to enforce his right, he should bring a suit for specific performance. This question was decided in the following terms :—

"The Court in managing property pending suit, and in managing property which is being administered by the Court, has occasionally to sanction leases, and to require the execution of such leases. Summary orders are made in England for the execution of leases not only by the parties to the suit, but also by the lessee, and I find that in a case cited at page 1063 of Daniell's Chancery Practice—*Carne* v. *Brancker* (1)—an enquiry was directed as to the damages which a lessee who had repudiated his contract should pay. On reference to the report of that case I find that the lessee happened to be a party to the suit, but this circumstance I do not think makes any difference. In that case the Master of the Rolls declined to order Specific performance, but damages afforded apparently a complete remedy against the lessee. The contract for a lease is made with the Court, and as pointed out by Lord Justice Giffard in the case I have mentioned, the approval by the Judge of the offer constitutes the contract. I think that a Court has complete power to enforce summarily a contract made by it when managing or administering an estate, whatever that contract may be."

From this observation of Trevelyan, J. it seems clear to us that where there has not been a completed lease, but a mere agreement to lease, the party affected by it can seek summary relief in the proceeding of the Court which appoints the Receiver. But, if there has been a completed lease, the situation is quite different. The redress for any wrong suffered can only be by way of a regular suit. If that is

(1) 17 W.R. (Eng.) 342, 837.

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applicable to the agreement to lease, it must equally apply to agreement to sell or contract to sell immoveable property. In the light of the principle of law enunciated in the above cases we must therefore hold that the learned District Judge was fully competent to accept the application filed by the respondent, challenging the auction held by the Receiver.

As regards the contention that the Receiver is an agent of the Court and as such, whatever he does binds the Court under the rules of agent and principal as embodied in the Contract Act, we are afraid that this is a too wide and sweeping contention which directly conflicts with the sound accepted principles laying down the true position of a Receiver in relation to the Court that appoints him. True, under certain circumstances the law relating to principal and agent may apply, yet so far as certain transactions done by the Receiver as *custodia legis* under the direction of the Court are concerned, especially in matters of sale or lease, the Receiver being just a hand of the Court, his power is not larger than what the Court grants him. He is only an officer of the Court, and whatever powers he exercises must be expressly given to him by the Court, and the rules of implied authority which would be obtainable in agency under the Contract Act cannot be made to be available to him. A sale or lease of any immoveable property made by a Receiver is *in fact*, a sale or lease of the Court, and as such, sale or lease is not complete until confirmation is given by the Court. It is the acceptance of the Court that completes the transaction in the matters. [See *Ratnasami Pillai* v. *Sabapathy Pillai and others* (1).] Therefore, we are of the view that the true legal position of the Receiver *vis-à-vis* the Court which

(1) A.I.R. (1925) Mad. p. 318.

appoints him does not bear a complete analogy to the relationship which exists between a principal and agent as prescribed in the Contract Act. We are therefore unable to accept the contention put forth in that regard on behalf of the appellant.

Now, regarding the merits of the case, on the facts, we are fully satisfied, after going through the affidavits filed by respective parties, that there was no justification whatsoever for the Receiver to act in the manner he had acted in regard to the actual auction sale of the property in question. Mr. Sarkar the Advocate appearing for the respondent assured the Receiver that the respondent had already obtained a Citizenship Certificate and that he was fully aware of that fact when a deed of assignment of certain properties of the estate was effected and approved by the then District Judge, Mandalay, before whom the case was pending. This assurance coming from such a responsible person should have at least deterred the Receiver from a precipitous auction sale, especially when there were only two bidders left when the auction sale of the property in question took place. No good ground has been shown why the Receiver did not adhere to the order of sale as proclaimed in the sale-notice. On Receiver's own showing, there were about 9 bidders when Holding No. 29 was auctioned and it is most surprising why there were only two bidders when Holding No. 27 was auctioned. No satisfactory explanation was forthcoming why 9 bidders were present when the property (Holding No. 29) which, according to the sale notice, should have been auctioned as a second item was sold first, and why only two persons were present when Holding No. 27 which was to have sold as first item was sold later as a second item. One Albert beside the appellant was said to be present.

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There is nothing to show whether this man Albert is otherwise not connected with the appellant himself, and whether he actually participated in the bid. We do not also understand why no objection concerning respondent's citizenship was raised when he participated in the bid when the auction sale of Holding No. 29 took place. It is said that Holding No. 27 and Holding No. 29 are not far distant, and here again, no explanation is forthcoming why those 9 persons present at the first auction sale could not be present at the second auction. The respondent Seedat is also an interested heir to the estate as he holds three-fifth share of the estate in question. He has thus a paramount interest in the estate properties and is naturally anxious that the sale shall fetch the highest possible price. He says he is willing to offer over K 50,000 for the property in question and yet, the same had been hammered down in favour of the appellant in the sum of K 10,500. That in itself shows that there was unfair dealing on the part of the Receiver. In the light of what has been laid down by their Lordships of the Privy Council in *Mohamed Kala Meah* v. *A. V. Harperink and others* (1), and followed in *Gor Kyin Sein* v. *U Kyaw Din and others* (2), we must hold that the auction sale of the property in question in favour of the appellant is not above suspicion or trickery or unfairness, and under these circumstances, we must uphold the order of the District Judge, setting aside the auction sale of the property in question.

In the result therefore, this miscellaneous appeal is dismissed with costs. Advocate's fee K 75.

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(1) 5 L.B.R. (1909-10) p. 25 at p. 33. (2) (1952) B.L.R. (H.C.) p. 162.

APPELLATE CIVIL.

Before U Chan Tun Aung, Chief Justice and U Ba Thoung, J.

KODAI RAM (APPELLANT)

v.

PARDESHI (RESPONDENT).*

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Dec. 13.

Partnership Act, s. 69, sub-s. (1) and (2) registration of partnership firm—S. 42, Partnership Act, dissolution of partnership—S. 69, sub-s. (3) Clause (a)—S. 9, Money Lenders Act only prohibits the passing of a decree and not the institution of a suit—S. 69 (2), Partnership Act—S. 214, Succession Act.

The appellant and his brother were partners. The Respondent took two loans, by executing two promissory-notes, dated 4th June 1949 and 1st November 1949 respectively.

Appellant's brother died in 1950. After his death, appellant filed a suit against the Respondent for recovery of K 5,200 due on these two promissory-notes.

The Trial Court dismissed the suit under s. 69, sub-s. (2) holding that the suit was not maintainable as the partnership was not registered.

On appeal, it was contended that sub-s. (*1*) and (*2*) of s. 69 is inapplicable and that the suit falls within the exception of clause (*a*) of sub-s. (*3*) of s. 69 as the partnership was dissolved under s. 42 by the death of the other partner.

Held : That unless there is a contrary term, if two persons were to constitute a partnership and if one of them dies, no partnership remains with the death of one of such partners. The intention of the Legislature to inflict disability for non registration is only during the subsistence of partnership. Once a partnership is dissolved either by death of a partner or under any other circumstances set out in s. 42 of the Partnership Act, the disability which existed during the continuance of the partnership is removed and under the provision of s. 69 (*3*), especially in the enforcement of any right or power to realize the property of a dissolved firm by one of the partners is not affected by non-registration as contemplated in sub-s. (*2*) of s. 69.

Held, the suit comes within the exception in Clause (*a*) of sub-s. (*3*) of s. 69 of the Partnership Act.

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* Civil 1st Appeal No. 21 of 1954 against the decree of the 2nd Judge, City Civil Court of Rangoon (U SHWE BIN, J.) in Civil Regular Suit No. 741 of 1952, dated the 4th February 1954

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Appaya Nijlingappa Hattargi v. *Subrao Babaji Teli and others*, (1938) I.L.R. Bom. p. 102; *Sheo Dutt and others* v. *Pushi Ram and others*, A.I.R. (1947) All. 229; *Shanmugha Mudaliar* v. *P. L. Rathina Mudaliar and another*, A.I.R. (1948) Mad. 187; *Mt. Sughra and others* v. *Babu*, A.I.R. (1952) All. 506, referred to.

Held further: S. 9 of the Money Lenders Act only prohibits the passing of a decree on a suit by a money-lender who has not been registered as a money-lender. It does not say that no suit shall be instituted by a money-lender for the recovery of a loan unless he has registered under the said Act.

Appeal allowed.

P. K. Basu, Advocate, for the appellant.

Hone Kyan, Advocate, for the respondent.

U CHAN TUN AUNG, C.J.—This is plaintiff's appeal against the judgment and decree of the Second Judge of the Rangoon City Civil Court, dismissing his suit for the recovery of a sum of K 5,200 against the respondent. The plaintiff, claiming himself as the Manager of a joint Hindu family consisting of himself and his deceased brother, one Jewit Ram, sued the defendant (respondent) on two promissory-notes, namely, one dated 4th June 1949 for K 2,000 and one dated 1st November 1949 for K 1,450. The respondent denied execution of the first promissory-note, and while admitting execution of the second promissory-note, averred that the amount due thereon was only K 30. He further contended that Jewit Ram was not plaintiff's brother; that Jewit Ram had not died; and that Jewit Ram and the plaintiff never constituted a joint Hindu family, but that they constituted an ordinary firm of private individuals, or in other words a partnership. It was also asserted that the suit was not maintainable inasmuch as the partnership was not registered under the Partnership Act. The Trial Court framed altogether seven issues. On all those issues, except

on the following two, the Trial Court found against the respondent:—(1) Were the plaintiff and Jewit Ram brothers and members of a Joint Hindu Family carrying on joint family business in the name and style of Jewit Ram and Kodai Ram or were they merely partners; (2) if they were merely partners, is the suit liable to be dismissed for want of registration of the partnership under the Partnership Act? With regard to the aforesaid two issues, after going into material evidence adduced by both the parties, the Trial Court found that the appellant and deceased Jewit Ram were not members of a joint Hindu family doing joint family business, though they were found to have been doing the business together. It further held, as of fact, that the business run by Jewit Ram and the appellant constituted a partnership and that as such, the requirements under section 69 (*2*) of the Partnership Act having been not complied with, namely the partnership being not a registered partnership, the appellant could not maintain the present suit against the respondent. Consequently, the suit was dismissed.

The respondent has, however, purporting to act under Order 41, Rule 22 of the Code of Civil Procedure filed a cross-objection dated the 25th May, 1954 against the judgment and decree of the learned Trial Judge on certain grounds. However, in appeal before us the learned Counsel for the respondent very properly admitted that since the Trial Court's decree has been entirely in respondent's favour,—there being a dismissal of the entire suit of the appellant as against him—there was nothing for him to make any objection which can be treated as a cross-objection within the purview of this rule, and he withdrew the so-called cross-objection filed on behalf of the respondent. Thus, we find no necessity

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to consider the grounds taken up in the cross-objection, which in fact was not a cross-objection within the ambit of Order 41, Rule 22 of the Civil Procedure Code.

In appeal before us, the appellant's Counsel has assailed the Lower Court's judgment as being legally unsustainable, having reference to the applicability of section 69 of the Partnership Act. It is contended that after finding as of fact that Jewit Ram had died, that the said Jewit Ram and the appellant did not constitute a joint Hindu family, but a partnership of two private individuals, and also in view of the fact that there being no contract to the contrary, the Trial Judge should have held under section 42 of the Partnership Act that the partnership had been dissolved as from the date of Jewit Ram's death and that the prohibition—against an unregistered partnership laid down in sub-section (*2*) of section 69 of the Partnership Act has no application. It is submitted that the present suit, filed by the appellant as against the respondent falls within the exceptions laid down in Clause (*a*) of sub-section (*3*) of section 69 and does not attract the bar of suit containing in sub-sections (*1*) and (*2*) thereof. In support of this submission, the judgment of Sir John Beaumont, Chief Justice of the Bombay High Court in *Appaya Nijlingappa Hattargi* v. *Subrao Babaji Teli and others* (1), the decision of a Bench of Allahabad High Court in *Sheo Dutt and others* v. *Pushi Ram and others* (2), that of Madras High Court in *Shanmugha Mudaliar* v. *P. V. Rathina Mudaliar and another* (3) and another Bench decision of Allahabad High Court in *Mt. Sughra and others.* v. *Babu* (4) were cited by the learned Counsel for the appellant.

(1) (1938) I.L.R. Bom. p. 102.
(2) A.I.R. (1947) All. 229.
(3) A.I.R. (1948) Mad. 187.
(4) A.I.R. (1952) All. 506.

Now, accepting the findings of facts arrived at by the Trial Judge, inasmuch as they have not been seriously challenged, by the respondent, we must hold, having regard to the authorities just cited that unless there is a contrary term, if two persons were to constitute a partnership and if one of them dies, no partnership remains with the death of one of such partners. The general rule is, as laid down in section 42 of the Partnership Act, that a partnership is dissolved after the death of a partner, and the proviso, subject to contract to the contrary, can only apply when the original partnership consists of more than two partners, so that if the term of the partnership is to the effect that the partnership will not be dissolved by the death of one party, it then means that the partnership will continue between the surviving partners even after the death of a partner. In the case however, of the partnership consisting of *only two partners*, no partnership remains on the death of one of them. Thus, in the instant case, Kodai Ram and Jewit Ram being found to be two persons constituting a partnership and there being no contract to the contrary, it must be held that the partnership that was in existence became dissolved as from the date of Jewit Ram's death, *i.e.*, from the year 1950.

The next question for consideration is whether under the aforesaid circumstances, the prohibition laid down in sub-section (*2*) of section 69 of the Partnership Act is at all applicable or not. We may note here that the Trial Judge's attention has apparently been not drawn to the exceptions laid down in sub-section (*3*) of the said section. Sub-sections (*1*) and (*2*) of section 69 of the Partnership Act no doubt prohibit the filing of a suit to enforce a right arising from a contract in respect of a partnership when the partnership is not registered. But

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sub-section (*3*) of section 69 however lays down that the provisions of sub-sections (*1*) and (*2*) shall not affect any right or power to realise the property of a *dissolved firm*. Thus, the Partnership Act does not forbid any unregistered partnership seeking enforcement of any right or power to realise the property of a *dissolved firm*. The wording of sub-section (*3*) of section 69 is undoubtedly very wide; and the present appellant in filing his suit as against the respondent after the death of the other partner Jewit Ram is clearly exercising the continuing authority as a partner of a dissolved firm to realise the property of the firm, namely the sums realisable on the two promissory-notes executed in favour of the partnership itself and as such, it clearly comes within the exceptions as laid down in clause (*a*) of sub-section (*3*) of section 69 of the Partnership Act. The learned Counsel for the respondent has not been able to cite any authority whereby the decisions referred to have been dissented from. In fact, though we have given him time to look into the matter, he has not been able to show us any authority to the contrary. Neither are we aware of any decision of weight to persuade us to hold the contrary view. In our view, the provisions of section 69 are quite plain and the intention of the Legislature to inflict disability for non-registration is only during the subsistence of partnership once a partnership is dissolved either by death of a partner or under any other circumstances set out in section 42 of the Partnership Act, the disability which existed during the continuance of the partnership is removed and under the provisions of section 69(*3*), especially in the enforcement of any right or power to realise the property of a dissolved firm by one of the partners is not affected by non-registration as

contemplated in sub-section (2) of the said section. Thus, the Trial Judge's dismissal of the suit for non-registration of the partnership is, in our opinion, entirely erroneous.

On behalf of the respondent, it has been urged that even if the dismissal order of the Trial Judge is set aside, yet the appellant being admittedly a professional money-lender at or about the relevant time, and having not registered the firm under section 9 of the Money Lenders Act, no decree can be passed as against the respondent. There is clear evidence on the record, and the same has not been challenged by the respondent, that the appellant had himself registered as a money-lender during the pendency of the suit before the decree was passed. To be more specific, we find that the appellant got himself registered as a money-lender on the 12th November 1952, though he instituted his suit on the 30th May, 1952. The judgment and decree dismissing his suit were however passed on the 4th February, 1954. Thus, we do not see any merit in the submission of the respondent's Counsel. What section 9 lays down is 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 Money Lenders Act. This section only prohibits the passing of a decree on a suit by a money-lender who has not been registered as a money-lender. It does not say that no suit shall be instituted by a money-lender for the recovery of a loan unless he has registered under the said Act. It is elementary rule of construction that the statute law must be read as it stands, and that we cannot read into an enactment words which are not there. Clearly, if the intention of the Legislature were to make it a condition precedent that the money-lender should have registration certificate

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before the institution of a suit, clear words to that effect would be there. For instance, if we look at sub-section (*2*) of section 69 of the Partnership Act, we find the following provisions:

"69 (*2*). No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered . . . . . ."

Here, the intendment of the enactment is quite clear that registration is a condition precedent to enable the partnership or the firm institute a suit; whereas under section 9 of the Money Lenders Act, it only says that no Court shall pass a decree on a suit unless the money-lender is registered. Comparison may be also made with provisions in section 214 of the Succession Act which lays down: "(1) No Court shall (*a*) pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased person or to any part thereof, or (*b*) . . . . expect on the production, by the person so claiming of—(i) a probate or letters of administration . . . . . ." We do not want to burden our judgment with numerous decisions which go to support the view that the production of a succession certificate as required under this section is not a condition precedent to the institution of a suit against a debtor. It is sufficient if the certificate is produced at any time before the decree is made. From the wording of this provision, there is nothing which requires that succession certificate must be filed along with the plaint. Therefore, we are unable to accept the submission of the learned Counsel for the respondent regarding his interpretation of section 9 of the Money Lenders Act.

In the result therefore, this appeal should succeed with costs; and the dismissal order by the Trial Judge must be set aside. There shall accordingly be a decree in the sum as claimed by the appellant in the Trial Court with usual costs.

U BA THOUNG, J.—I agree.

APPELLATE CIVIL.

Before U San Maung, J.

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Sept. 29.

M. A. SUBHAN (APPLICANT)

v.

GERMANI KUMAR NATH (RESPONDENT).*

Civil Procedure Code, Order 21, Rule 95—Whether Court competent to hold a summary enquiry—Order 21, Rule 35 and Rules 97, 98 and 103 Civil Procedure Code.

Held: Under Order 21, Rule 95, the Court has jursidiction to make a summary enquiry.

Sobha Ram v. *Tursi Ram*, 46 All. p. 693 at p. 697, followed.

Held also: Provisions under Order 21, Rule 95, Civil Procedure Code applied *mutatis mutandis* to the provisions of Order 21, Rule 35, Civil Procedure Code.

Held further: A formal application under Order 21, Rule 97 would still lie, if and when delivery order is sought to be executed, and obstruction or resistance is encountered. The Court can then make such enquiry as it deemed fit and make an order under Order 21, Rules 98 and 99, Civil Procedure Code. The aggrieved party could exercise his right of suit under Order 21, Rule 103, Civil Procedure Code.

Kironi Soshi Dasi v. *Official Assignee of Calcutta*, A.I.R. (1933) Cal. p. 246; *Santoba and others* v. *Madhavarao and others*, A.I.R. (1953) Hyd. p. 276, referred to.

H. Subramanyam for the applicant.

N. C. Sen for the respondent.

U SAN MAUNG, J.—In Civil Regular Suit No. 96 of 1952 of the Township Court of Bassein West, the plaintiff M. A. Subhan who is the applicant in the present application for revision obtained an *ex parte* decree against one U. L. Nath for his ejectment from the premises in suit on the ground that U. L. Nath was a tenant who was liable to be ejected for not

* Civil Revision No. 57 of 1953 against the order of the Township Judge's Court of Bassein West in Civil Execution Case No. 2 of 1953, dated the 5th May 1953.

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paying his arrears of rent, the suit obviously being one under section 11 (*1*) (*a*) of the Urban Rent Control Act. Subsequently in Civil Execution Case No. 2 of 1953 of the same Court the decree-holder M. A. Subhan sought to execute the decree which he had obtained in Civil Regular Suit No. 96 of 1952. The mode in which the assistant of the Court was sought was the issue of notice to the judgment-debtor U. L. Nath to vacate the premises and to pay the costs awarded in the aforesaid suit or in default to issue the delivery order directing the Bailiff to deliver the property by removing the judgment-debtor and any other person occupying the premises on behalf of the judgment-debtor. Subsequenlty the decree-holder M. A. Subhan filed an application in which he alleged that the judgment-debtor U. L. Nath had kept two persons by the name of J. M. Nath and I. C. Nath in the premises in question and that these persons were holding the same on behalf of the judgment-debtor and not on their own account. He prayed for the issue of the notice for the said J. M. Nath and I. C. Nath to show cause why they should not be ejected from the house. These two persons appeared in Court in response to the notices issued to them and contended that they were not holding the house on behalf of the judgment-debtor U. L. Nath. They stated that J. M. Nath was in possession as the tenant of one Ma Hla Yin while L. C. Nath occasionally looked after the house on behalf of J. M. Nath. An enquiry was accordingly made by the learned Township Judge who subsequently came to a finding that J. M. Nath and U. L. Nath were not in possession on behalf of the judgment-debtor U. L. Nath. He therefore dismissed the decree-holder M. A. Subhan's petition in so far as it relates to the eviction of these two persons in execution of the decree for possession

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obtained in Civil Regular Suit No. 96 of 1952. The decree-holder M. A. Subhan being dissatisfied with the order of the Township Judge as now applied to this Court to set it aside on revision on the ground that the Township Judge had no jurisdiction to make an enquiry whether or not J. M. Nath and I. C. Nath were liable to be evicted as bound by the decree for possession obtained against U. L. Nath in the aforesaid suit. What he contends is that until and unless these persons had resisted or obstructed the execution of the ejectment decree no enquiry could be made *vide* Order XXI, Rule 97 of the Civil Procedure Code and such resistance and obstruction cannot occur until and unless a delivery order has been issued under Order XXI, Rule 35.

Now, Order XXI, Rule 35 of the Civil Procedure Code in so far as it is relevant for the purpose in hand reads:

> "Where a decree is for the delivery of any immoveable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, *by removing any person bound by the decree who refuses to vacate the property.*"

That being the provision relating to the issue of a delivery order what the decree-holder had sought to obtain by the application which he filed subsequent to the application for the execution of the decree, was to obtain a direction from the Court whether or not the person found in possession should be removed on the ground that they were bound by the decree. There seems no reason why some sort of enquiry cannot be held by the Court with this end in view. In this connection, the observation of Sulaiman, J.,

in *Sobha Ram* v. *Tursi Ram* (1) are apposite. The learned Judge said :

" It has been strenuously contended by Dr. Sen, on behalf of the respondents, that a court has no jurisdiction to make any inquiry when an application under Order XXI, Rule 95, is made. His argument is that the court while acting under that rule is simply acting in its administrative capacity and not a judicial one, and that the order passed by the court must be passed automatically. Examining the rule, however, one is bound to hold that the court cannot pass an order delivering possession of the property to the auction-purchaser as against a person other than the judgment-debtor who is holding property on his behalf or claiming title under him, unless the court is satisfied that he is such a person. I fail to see how an order can be passed under that rule against such a person unless either that person admits that he holds the property in that capacity or the court is otherwise satisfied that he is holding as such. It may be that no thorough inquiry need be made under rule 95, but there is nothing under that rule which prevents the court from being satisfied on *prima facie* evidence as to whether this other person is holding the property on behalf of the judgment-debtor and claiming title under him or not. If the court is satisfied that he is so holding the property, the order can be passed forthwith. If, however, the court comes to the conclusion that he is holding the property on his own account, there is no option to the court but to dismiss the application under rule 95. Rule 97, however, contemplates that where the holder of a decree for the possession of immoveable property, or the purchaser of any such property sold in execution of a decree, is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the court complaining of such resistance or obstruction. It is clear to my mind that an application under rule 97 cannot be made until the decree-holder or the auction-purchaser has been resisted or obstructed in obtaining possession of the property. It is only then that he files an application complaining of such resistance or obstruction. Of course no resistance or obstruction can be said to have taken place before any attempt to obtain possession has been made. It follows, therefore to my mind

(1) 46 All. p. 693 at p. 697.

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that an application under rule 95 asking for possession against a person alleged to be holding the property on behalf of the judgment-debtor is not necessarily an application complaining that resistance or obstruction has been offered by such a person. In my opinion the provisions of rule 97 come into operation only when either the delivery of possession has been ordered by the court, or, at any rate, an attempt to obtain possession has been made by the decree-holder out of court. Unless either of these contingencies has occurred, it is difficult to see how it can be said that the auction-purchaser or the decree-holder has been resisted or obstructed in obtaining possession."

These observations although made in connection with Order XXI, Rule 95 of the Civil Procedure Code applied *mutatis mutandis* to the provisions of Order XXI, Rule 35, Civil Procedure Code.

The case of *Sobha Ram* v. *Tursi Ram* (1) was referred to by Rankin, C.J., in *Kiron Soshi Dasi* v. *Official Assignee of Calcutta* (2) in the following passage of his judgment:—

"The case of *Sobha Ram* v. *Tursi Ram* (1), has been pressed in argument before us. In my judgment, the position of the matter under the Code is as follows: If a person has in a suit succeeded in getting a decree for possession of certain property, he is entitled to get an order from the Court for delivering that property to him by way of execution against any person who is bound by the decree. In like manner, if a person is an auction-purchaser of a property in a suit constituted in a certain way, he is entitled to get possession of that property at the hands of the Court by way of execution against persons who are bound by the sale. When in either of such cases the decree-holder or the auction-purchaser desires the assistance of the Court to put him into possession he need not invoke the Court's assistance if he can get possession peaceably without it, he has to make up his mind as to the kind of possession he is entitled to claim and whether he is entitled by way of mere execution to get possession against the other party at all; for example, to take the case which is the present case before us—the case of a person who has purchased a

(1) 46 All. p. 693 at p. 697. (2) A.I.R. (1933) Cal. p. 246.

property under a mortgage decree if he cannot for one reason or another get possession, he has to make up his mind whether he will on the strength of his title bring a suit against whoever is in possession or whether he will get a mere summary and equally successful remedy by execution. If he wants execution, he has to make up his mind whether, having regard to the persons whom he desires to remove and having regard to the persons who are likely to object to his getting possession, the case is one within Rule 95 or Rule 96.

If it is not, that is to say, if some one is in possession who is under no duty to obey the decree in the particular suit, that is a fact which he has to take into account before making up his mind to apply for execution at all. That is a fact which points to this that he is unlikely to get an effective remedy merely by executing his decree or the sale certificate. In these circumstances, it may very well be that the proper course is not to attempt to recover in execution without bringing an independent suit. It is only if he is prepared to say that the case is one within Rule 95 or Rule 96 that the certificate-holder or decree-holder has any business to approach the Court in that suit for execution and when he does apply, it appears to me that the order he ought to get is an order of the character in form No. 39 in App. E of the Code, not an order directed against any particular person but a general order directing the officer of the Court to put him into possession with a general direction to remove any person who refuses to vacate; else it will be purely a general order of the character specified in Rule 96. Having in that way invoked the assistance of the Court to put him into possession of two things one or the other will happen; either he will get or he will fail to get possession because of the resistance or obstruction of somebody and when that happens it appears to me that it is open to him to apply under Rule 97. In that case, the Court will investigate the question of the character of the possession or the claim of right of the party objecting to the execution and will make an order under Rule 98 or Rule 99 the consequence of which will be that the order will be final subject always to the bringing of a suit such as is contemplated by Rule 103, Order 21."

No doubt in the *Santoba and others* v. *Madhavarao and others* (1) a Full Bench of the Hyderabad

(1) A.I.R. (1953) Hyd. p. 276.

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High Court held that Order 21, Rule 97, Civil Procedure Code, comes into operation only when an obstruction is raised by the judgment-debtor or any third party to the delivery of possession when the decree-holder goes to take possession of the property. Therefore, where there is no application for delivery of possession as contemplated by Order 21, Rule 35 it cannot be said that there was any obstruction to possession which had to be removed and therefore, there can be no application, as such, for removal of obstruction under Order 21, Rule 97.

However, this does not mean that where the decree-holder himself invites the Court to hold an enquiry to be satisfied *prima facie* that the persons in possession were those bound by the decree, the Court has no power to hold such an enquiry. As a matter of fact, if the enquiry held by the Township Judge of Bassein West in the case now under consideration had resulted in favour of the decree-holder, he would have asked the Court to give a direction that in executing the delivery order an attempt should be made to remove J. M. Nath and I. C. Nath if they were found to be in possession of the premises in suit. Only because the result of the enquiry was not in favour of him did he completely make a *volte face* and say that the Court had no jurisdiction to make that enquiry which he had himself invited.

However, this does not mean that the decree-holder is precluded from asking the Court to issue a delivery order directing the Bailiff to deliver the premises in suit to him if and when that delivery order is sought to be executed and obstruction or resistance is encountered a formal application under

Order XXI, Rule 97 would still lie. It would then be open to the Court to make such enquiry as it deemed fit and make an order either under Order XXI, Rule 98 or 99 of the Civil Procedure Code. This would leave the party aggrieved with the right of suit under Order XXI, Rule 103 of the Civil Procedure Code.

As matters now stand, I am unable to hold that the Court has no jurisdiction to make a summary enquiry of the nature spoken of by Sulaiman, J., in *the Sobha Ram* v. *Tursi Ram* (1). In the result the application for revision fails and is dismissed with costs. Advocate's fee three gold mohurs.

(1) 46 All. p. 693 at p. 697.

APPELLATE CIVIL.

Before U San Maung, J.

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Jan. 8.

MA THAN (APPELLANT)

v.

U SAUNG (RESPONDENT).*

Petition for pauperism, Order 33, Rule 2, Civil Procedure Code—Verification—Rejection of petition if not so verified, old rule—Order 33, Rules 3 and 4 as amended—No rejection clause—Omission of verification, mere formality capable of rectification by amendments.

Held: The law before the present Order 33, was that unless a petition for pauperism was verified the Court must reject the same.

Nassiah and two others v. *Vythalingam Thingandar*, 6 L.B.R. 117, referred to.

Held further: The present Rule 3 of Order 33 nowhere stated that the petition shall be rejected if not properly verified, and that the verification is a formality the omission of which can be rectified by way of amendments.

K. Singh, Advocate, for the appellant.

U Saung (Personally) respondent.

U SAN MAUNG, J.—Two questions arise for consideration in connection with this application for revision:

(1) Whether the petition under Order XXXIII, Rule 2 of the Civil Procedure Code for leave to sue as a pauper should be verified in the manner prescribed for the verification of pleadings, and

(2) Whether the Court is bound to reject the petition after it is not so verified.

In the case of *Nassiah and two others* v. *Vythalingam Thingandar* (1) a Bench of the late

* Civil Revision No. 2 of 1956.

Application for Civil Revision against the order passed in Civil Misc. Case No. 16 of 1956 of the District Judge of Shwebo.

(1) 6 L.B.R. 117.

Chief Court of Lower Burma held that a petition for leave to sue as a pauper must be verified in accordance with the verification prescribed for pleadings and that if not so verified the Court must reject the same. This was the law before Order XXXIII of the Code of Civil Procedure was replaced by the present Order XXXIII.

As regards the verification of the petition the law remains the same. Rule 2 of Order XXXIII (Old) in so far as is relevant to the purpose in hand enacts that the petition shall be signed and verified in the manner prescribed for the signing and verification of pleadings. The present Rule 2 relating to the subject of verification, is also the same.

Rule 5 of Order XXXIII (Old) provides *inter alia* that the Court shall reject an application for permission to sue as a pauper where it is not framed and presented in the manner prescribed by Rules 2 and 3.

The present Rule 3 of Order XXXIII reads as follows :

" 3. Subject to the jurisdiction of the Court to allow amendment to be made, the Court shall reject the petition in any of the following cases :—

(*a*) where the plaint is not in the form prescribed ;

(*b*) where the plaint does not disclose a cause of action within the jurisdiction of the Court ;

(*c*) where the claim appears to be barred by any law ;

(*d*) where the applicant has within two months next before the presentation of the petition disposed of any property fraudulently or in order to be entitled to plead pauperism ;

(*e*) where the applicant has entered into any agreement with any person whereby such person has or will have an interest in the proceeds of the suit."

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It is nowhere stated therein that the petition shall be rejected if not properly verified. It therefore necessarily follows that it is within the competence of the Court to allow the petition to be amended in the manner in which it thinks fit.

Besides Rule 4 of Order XXXIII requires the Court to make an enquiry into the truth or otherwise of the statements made in the petition. Therefore the verification of the statements contained in the petition is a formality the omission of which, can in my opinion be allowed to be rectified by way of amendments.

The application for revision therefore fails and is dismissed without cost.

APPELLATE CIVIL.

Before U San Maung, J.

MAUNG OHN MAUNG AND ONE (APPLICANTS)

v.

MA NET PON AND THREE OTHERS (RESPONDENTS).*

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Oct. 23.

Arbitration reference to—Award given—Failure of one party to abide by the terms of the award—Suit by the other party—Maintainability—Ss. 14, 17 and 32, Arbitration Act, 1944—S. 9, Civil Procedure Code.

The applicants and the Respondents referred their dispute to an arbitrator, who duly gave an award.

The Respondents later filed a suit against the applicants for ejectment alleging that the applicants had failed to abide by the terms of the award.

The applicants raised the point that the suit was not maintainable under s. 32 of the Arbitration Act, 1944.

The Trial Court held that the suit was maintainable, relying on : *Maung Po It and another* v. *Ma Bu Li*, (1937), B.L.R. 225.

On revision, held,—The ruling in question dealt with the Law prior to the Arbitration Act, 1944.

The suit is not maintainable under s. 32, Arbitration Act read with s. 9, Civil Procedure Code.

What the Respondents should have done was to have asked the Arbitrator to file the award in Court under s. 14 and to pass judgment in terms of the award under s. 17 of the Arbitration Act, 1944.

Moolchand Jothajee v. *Rashid Jamshed Sons & Co.*, A.I.R. (1946) Mad. 346; *Ramchander Singh and others* v. *Munshi Mian*, A.I.R. (1950) Pat. 48 ; *Ratanji Virpal & Co.* v. *Dhirajlal Manilal*, A.I.R. (1942) Bom. 101 ; *Lutufallah Khudabakhsh Khan and others* v. *Muhammad Sidik Sobho Bhati and others*, A.I.R. (1946) Sind 117, referred to.

Tun Aung (1), Advocate, for the applicants.

Kyaw Htoon, Advocate, for the respondents.

U SAN MAUNG, J.—In Civil Regular Suit No. 26 of 1953 of the Township Court of Shwebo plaintiff

* Civil Revision No. 105 of 1953 against the order of the Township Court of Shwebo in Civil Regular No. 26 of 1953, dated the 7th day of October, 1953.

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U SAN MAUNG, J.

Ma Net Pon and three others, who are the respondents in the present application for revision, sued the defendant-appellants Maung Ohn Maung, Ma E Kin and four others for their ejectment from a certain piece of land in suit. It is the plaintiff's own case that the matter in dispute had already been referred to an arbitrator in the person of a Pleader by the name of U Lu Dan and that U Lu Dan had given an award. However, the plaintiff had chosen to file the present suit alleging that the defendants had failed to abide by the terms of the award given by U Lu Dan. One of the defences raised was that the suit was not maintainable in view of the provision of section 32 of the Arbitration Act of 1944. This defence was, however, brushed aside by the learned Township Judge relying upon the ruling in the case of *Maung Po It and another* v. *Ma Bu Li* (1). There it was held that " a valid award operates to merge and extinguish all claims embraced in the submission, and gives rise to a fresh cause of action upon which a suit can be filed and that the Civil Procedure Code envisages the filing of a regular suit on an award apart from an application to file it under the Second Schedule of the Code." The learned trial Judge has, however, overlooked the fact that this ruling dealt with the law relating to arbitration prior to the coming into force of the Arbitration Act, 1944, section 32 of which reads as follows :

" Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of any arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act. "

(1) (1937) B.L.R. 225.

In *Moolchand Jothajee* v. *Rashid Jamshed Sons & Co* (1) it was held by a Bench of the Madras High Court that the Arbitration Act of 1940 (corresponding to the Arbitration Act of 1944 which is in force in Burma) was intended to consolidate and amend the law of India relating to arbitration matters and that the scheme of the Act was to prevent the parties to an arbitration agitating questions relating to the arbitration in any manner other than that provided by the Act. Where, therefore, a party to an award given on 17th September 1940, instead of asking the arbitrators to file it in Court, files on 2nd May 1941, a suit in a civil Court to enforce it, it was held that the suit raised the question with regard to the existence and validity of the award and so was expressly barred by section 32 of the Act of 1940 though such a remedy was available under the Act of 1889 and that the provision of section 32 of the Specific Relief Act did not override the provisions of section 32 of the Arbitration Act. This decision of the Madras High Court was followed by the Patna High Court in *Ramchander Singh and others* v. *Munshi Mian* (2) : see also *Ratanji Virpal & Co.* v. *Dhirajlal Manilal* (3).

In *Lutufallah Khudabakhsh Khan and others* v. *Muhammad Sidik Sobho Bhati and others* (4), it was held that a valid award operates to merge and extinguish all claims embraced in the submission, and that after an award has been made, the submission and award furnish the only basis by which the rights of the parties can be determined, and constitute a bar to any action on the original demand.

Therefore, what the plaintiff in this case should have done was to have asked the arbitrator to file

(1) A.I.R. (1946) Mad. 346.
(2) A.I.R. (1950) Pat. 48.
(3) A.I.R. (1942) Bom. 101.
(4) A.I.R. (1946) Sind 117.

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the award in Court as provided for in section 14 of the Arbitration Act, 1944 and to ask the Court to pass judgment in terms of the award as provided for in section 17. The present suit should have been dismissed as not maintainable in view of section 32 of the Arbitration Act read with section 9 of the Civil Procedure Code. The learned Advocate appearing for the respondents admits that this revision should be allowed for the reasons given above. In the result, the application for revision is allowed, the order of the Township Judge of Shwebo directing the suit to proceed as maintainable in law is set aside and the suit is dismissed with costs. Advocate's fee in this Court two gold mohurs.

APPELLATE CIVIL.

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

H C.
1956
Oct. 31.

MESSRS. KESHAVLAL BROTHERS & CO. (APPELLANT)

v.

THE STATE AGRICULTURAL MARKETING BOARD (RESPONDENT).*

Passing of property in goods on sale—Agreed mode of "delivery not synonymous to passing of property"—S. 23 (1), Sale of Goods Act—S. 19 (1) (.) and (3), Sales of Goods Act, rules for determining when property in goods passes from the buyer to the seller depends on intention—Rules for ascertaining the intention of the parties—True construction of terms of the contract as a whole.

The Appellant Company sued the Respondent Board for recovery of K 21,568·19 pyas, being the price of rice and bran due on two contracts alleging that the property in the goods has passed to the Board.

The Board denied it's liability.

The Trial Judge holding that there was non-compliance with the agreed mode of delivery dismissed the suit.

On appeal it was contended that the question as to whether the property in goods have passed to the Board should be decided under s. 23 (*1*) of the Sale of Goods Act.

Held : The term "Delivery" is not synonymous to "passing of property."

S. 19, Sale of Goods Act, lays down that the time of passing of the property in goods from the buyer to the seller depends on the intention of the parties.

Sub-s. (*1*) provides that if there is a clear intention expressed in the terms of the contract that is the decisive factor in determining this issue.

If not, sub-s. (*2*) provides that in ascertaining the intention of the parties, regard must be had (1) to the terms of the Contract, (2) to the conduct of the parties and (3) to the circumstances of the case.

The rules in ss. 20 to 24 of the Sale of Goods Act are all subject to "unless a different intention appears", and the correct way of ascertainment of the intention turns upon the true construction of terms of the relevant contract read as a whole.

Held also : S. 23 (*1*) Sale of Goods Act is not relevant and that the precise time of passing of the property in the goods is only after the buyer has notified his acceptance of delivery on the Sellers' presentation of delivery order.

* Civil 1st Appeal No. 23 of 1956, against the decree of the High Court of Rangoon (U THEIN MAUNG, J.) in Civil Regular Suit No. 28 of 1955, dated the 20th February, 1956.

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Re Anchor Line (Henderson Brothers) Limited, Law Reports Chancery Division (1937) p. 1, referred to.

James Wilsher Alridge against *Patrick Johnson*, 119 English Reports, p. 476 ; *Elizabeth Langton* v. *Higgins* 157 English Reports, Exchequer, p. 869 ; *Healy* v. *Howlett & Sons*, (1917) 1 K. B.D. p. 337 ; *M. Siddique & Co.* v. *P. L. Rangiah Chettiar*, (1948) A.I.R. Mad. p. 122 ; *Dan Singh Bisht* v. *Firm Janki Saran Kailash Chander Dhampur*, (1948) All. A.I.R. p. 396 ; *Badische Anilin Und Soda Fabrik* v. *Hickson*, (1906) A.C. p. 419, referred to and held irrelevant to the case.

Held therefore : That the property in goods had not passed to the buyer, and the appellant have no right of claim for their price. Appeal dismissed.

P. K. Basu, Advocate, for the appellant.

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

U CHAN TUN AUNG, C.J.—This is plaintiffs' appeal from the judgment and decree passed in Civil Regular Suit No. 28 of 1955 on the Original Side of this Court, and the main question involved is whether the property in the goods, namely, certain quantity of rice and rice-products which had been milled, bagged, stitched and stacked in the appellants' rice-mill in pursuance to terms of written contracts, entered into between the appellants and the defendant-respondent, the State Agricultural Marketing Board (hereinafter referred to as " the Board ") had passed to the defendant-respondent Board, and whether the Board is liable to pay for their price. The price claimed by the appellant is K 21,568·19 pyas. There were two written contracts entered into between the appellants and the Board for the said purpose. Contract No. 33/10, dated the 24th March, 1952 stipulates for the sale by the appellants and purchase by the Board at Letpadan of 300 tons of N/N.S.M.S. rice at the rate of K 762·50 per hundred baskets of 75 pounds each. Contract No. 33/11, dated the 24th March, 1952 stipulates for the sale of 25 tons of white bran by the appellants in favour of

the Board at the rate of K 100 per hundred baskets of 45 pounds each. The true copies of these contracts are to be found as Exhibits (ဣ) and (ဥ) in the Lower Court proceedings.

On or about 26th March, 1952 the appellants sent milling notices to the Board intimating that they would start the milling. On receipt of the notices the respondents' agent, the Executive Officer of the Zone sent its *Sircar* to the appellants' mill for the purpose of marking the bags and also to supervise milling, checking, weighing, sewing, etc., the gunny bags and jute-twines being supplied by the Board in accordance with one of the terms of the contract. By this process, 945 bags were milled, marked, weighed and stacked; but it appears that only 735 bags out of 945 bags were stacked under the direction of the Officers of the Board. Three hundred and twelve bags of bran under Contract No. 33/11 were similarly treated by the Board's Officer, who was present at the appellants' mill. On the 28th March, 1952, owing to insurgent activities, the mill was gutted by fire and in the fire, the bags of rice and bran also perished. Up to this point, the facts are not seriously in dispute between the parties. As stated above, the appellants claim that the property in the rice and rice-products have, in these circumstances passed to the Board and that they are entitled to recover from the latter the price totalling K 21,568·19 pyas, the particulars of which are set out in their plaint.

The Board however denied its liability. It is contended that regard being had to the terms and conditions of the written contract, the conduct of the parties and the circumstances of the case the property in the contract goods, namely rice and bran had not passed to the Board and that the Board is not liable

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to pay for their price. At the trial, the parties joined issues on the following three questions :—

(1) Is the property in rice and bran passed to the defendant ?

(2) If so, is the plaintiff entitled to recover K 21,568·19 pyas for the contract Nos. 33/10 and 33/11 ?

(3) To what relief, if any, is the plaintiff entitled ?

The Trial Judge found Issue No. 1 against the appellants and dismissed the suit. With due respect to the learned Trial Judge, we may observe that there appears to be somewhat confused thinking in ascertaining whether the property in the goods have passed from the appellants to the respondents. The learned Trial Judge made a reference to Clause 6 of the agreement which prescribed the mode of delivery by the seller to the buyer and he concluded that since the mode prescribed having been not complied with by the appellants, inasmuch as no delivery order had been presented to the buyer on the completion of every 100 tons of rice, there was no passing of the property from the appellants to the Board. Here with due respect, the learned Judge is clearly under a misconception. He is treating the compliance or non-compliance with the agreed mode of delivery as if it had all the legal incident of passing of property in goods. In other words, the learned Trial Judge had, so to say, treated the terms under " delivery " as synonymous to " passing of property."

In appeal before us, it has been urged that on admitted facts the question as to whether the property in goods have passed to the Board should be decided

under section 23 (*1*) of the Sale of Goods Act. Section 23 (*1*) reads :

"23 (*1*). Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made."

We are afraid, we cannot accept this submission. The rules for determining as to whether the property in goods passes from the buyer to the seller are to be found in section 19 of the Sale of Goods Act, sub-section (*1*) of which provides that in the case of a contract for sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties intend it to be transferred. Thus, if there is a clear intention expressed in the terms of the contract, that is the decisive factor in determining this issue and no difficulty arises, but when the contract does not contain any express terms regarding intention, then recourse must be had to the provision in sub-section (*2*) which provides that for purposes of ascertaining the intention of the parties regard must be had—(1) to the terms of the contract ; (2) to the conduct of the parties ; and (3) to the circumstances of the case. However, in sub-section (*3*), it is provided that *unless a different intention appears*, the Rules contained in sections 20 to 24 are Rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. It will thus be seen that the Rules for ascertaining the intention of the parties, appearing in sections 20 to 24 of the Sale of Goods Act, are all subject to " unless a different intention

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appears." The question therefore really turns upon the true construction of terms of the relevant contract read as a whole. If from such construction, we are able to find out what the intentions of the parties are, then the provision of section 23 (*1*) of the Sale of Goods Act sought to be applied by the learned Counsel for the appellants are not at all relevant. The terms of the contract both for the sale of rice and for rice-products are identical and we reproduce the relevant clauses hereunder :

" * * * *

(6) Delivery to be taken by Buyers at K. Bros. & Co. Rice Mill No. 33, mill or its godown at Minhla station on completion of milling of every 100 tons and on presentation of Delivery Order for the same by Sellers; provided that the quality of stocks in question is provisionally acceptable to Buyers with or without cut and subject to any further cuts in respect of quality that may be imposed by the Board of Surveyors and provided also that the stocks in question are stored in Sellers' godowns under conditions affording reasonable protection against weather, leakage from roofs and damp floor.

(7) Payment will be made as soon as possible after acceptance of delivery as mentioned in Clause 6 above.

(8) All risks of fire, and reasonable damage by rats or other vermin and reasonable loss in weight as may be determined by the Board from time to time, and deterioration in quality arising from natural causes will be borne by Buyers from the time of acceptance of delivery.

(9) The stock will be stored in Sellers' godowns until such time as Buyers are in a position to remove the same and Buyers agree to pay godown rent at the rate of Rs. 0-2-0 (annas two) per ton per week after the first 30 days' free storage.

(10) Sellers shall take all reasonable care of the stock stored in their godowns until Buyers are able to remove the same and Sellers shall be responsible for any loss or shortage caused to Buyers due to the negligence or default of Sellers or their Agents or servants to afford such reasonable precautions or for any unreasonable loss or shortage.

(11) Sellers shall give Buyers every possible facility, assistance and co-operation in the checking, verification, reconditioning, rebagging, refilling, removal, etc., of the stocks while they are in storage at their mills and/or when they are removed therefrom.

(12) Buyers may either cancel the contract or defer delivery for security reasons by giving three days' notice in writing ; provided that delivery of the stocks already milled on or before such notice shall be taken in accordance with Clause 6."

It will thus be seen that Clause 6 lays down the mode and the place of delivery. It also prescribes that on completion of milling of every hundred tons of rice *and* on presentation of delivery order by the Seller to the Board, the Board is to take delivery at the Sellers' mill or godown at Minhla. Clause 7 fixes the time for payment, which is to be made only after acceptance of delivery by the Buyer. Clause 8 sets down who is to bear the loss, damage or destruction by fire or other causes. Clauses 9, 10, 11 and 12 relate to Sellers' undertakings as bailees in respect of the rice milled after acceptance of delivery by the buyer. It appears that the sellers from that moment become bailees of the purchased stocks and they have to look after them as such. They are also paid godown charges for storage, and made responsible for any shortage caused owing to negligence or default or of their agents or servants. Now, reading the contract as a whole, we can gather the following incidents :—

(1) That the sellers to present delivery order to the buyer on milling every hundred tons and delivery to be taken by the buyer only on presentation of the delivery order by the sellers;

(2) That payment is to be made to the sellers after acceptance of delivery by the buyer, and that

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only after such acceptance of delivery will all risks as respects the goods purchased pass from the sellers to the buyer.

(3) That after acceptance of delivery, the sellers' position is relegated to that of the bailee so long as the rice-bags delivered by them are placed in their godown for custody; rents being given to them at the rate of 2 annas per ton per week after the first 30 days' free storage. The sellers are also under an obligation to exercise due care and attention while the rice-bags are in their custody as bailees thereof.

From the foregoing analysis of the terms of contract and the incidents attaching to them, it appears that only after acceptance of delivery as contemplated in clause (8) the risk of loss or destruction to goods has to be borne by the buyer, and that the sellers are relegated from that time onward to the position of bailees to take charge of the rice-bags milled for which they are paid certain sums at certain rates. We must say that these are the terms indicating the intention that the precise time of passing of the property in the goods is only after the buyer has notified his acceptance of delivery on the sellers' presentation of delivery order. This to our mind is the correct way of ascertaining the intention of the parties as to passing of the property in the goods and it has the support of the judicial decision. In *re Anchor Line (Henderson Brothers) Limited* (1), the question for ascertaining the intention of the parties under sections 17 and 18 of the English Sale of Goods Act, 1893, the provisions of which are identical to those of section 19 of our Sale of Goods Act, arose for consideration with reference to certain terms of contract found in the correspondence that

(1) Law Reports Chancery Division (1937) p. 1.

passed between Messrs. Alfred Holt and Coy. and the Anchor Line Coy. The decision was a Court of Appeal decision by a Bench of four Judges as against the judgment of Eve, J. in Chancery Division. In the said case, the purchasing company agreed to buy a crane for a deferred purchase price of £ 4,000 and had agreed to pay annual amount for interest and depreciation which were to be deducted from the price of £ 4,000 Meanwhile, the purchasing company were to have entire charge and responsibility for the crane. Three years later the company went into liquidation and the liquidator sold the assets, including the crane, to a new company. The vendors claim that the property had not passed and that the liquidator must continue the payments and accept the responsibility under the contract or return the crane. Eve, J. decided in favour of the liquidator. However, on appeal to the Court of Appeal, Their Lordships, reversing the finding of Eve, J. held that section 18 of the English Sale of Goods Act, which has opening phrase "unless a different intention appears", and which sets out the rules for ascertaining the intention of the parties as to the passing of the property in the goods do not apply, having regard to the terms of the contract read as a whole. Their Lordships found that from those terms the parties had different intention, namely, that the property in the crane should not pass until the purchase was completed by the payment of the purchase price. Here, in this appeal from the facts and circumstances obtaining in the case and also from the term referred to above, we must hold that different intention appears as to when the property in the goods is to pass to the buyer, thus debarring the application of the rule for ascertaining the intention of the parties set out in section 23 (*1*) of the Sale of Goods Act.

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We are, therefore, unable to accept the contention put forth on behalf of the appellants.

James Wilsher Alridge against *Patrick Johnson* (1); *Elizabeth Langton* v. *Higgins* (2); *Healy* v. *Howlett & Sons* (3); *M. Siddique & Co.* v. *P. L. Rangiah Chettiar* (4); *Dan Singh Bisht* v. *Firm Janki Saran Kailash Chander Dhampur* (5) and *Badische Anilin Und Soda Fabrik* v. *Hickson* (6) and also other English and Indian cases were cited before us by the appellants' Counsel. We have carefully examined them and we must say that they are not relevant to the facts and circumstances obtaining in the present case. Those authorities had reference only to cases where intention of the parties could not be ascertained having regard to the terms of the contract; the conduct of the parties and the circumstances of the case, thereby attracting the rule for ascertaining the intention as laid down in the relevant provisions of both the English and Indian Sale of Goods Acts. We do not therefore desire to burden our record with a detailed discussion of those cases. It has also been urged before us that the conduct of the parties, especially the conduct of the Board's agents, the *Sircar* and the milling-clerk, such as putting the marks "S.A.M.B." on the bags, bagging the rice after milling, stitching and stacking them, amounted to appropriation and that from that conduct alone, we must infer that the property in goods has passed to the Board. In other words, it has been sought to contend before us that those acts and conducts should be accepted as acceptance of the goods in question by the Board, and that as from that precise time, the property in goods has passed to it and along with

(1) 119 English Reports, p. 476.
(2) 157 English Reports, Exchequer, p. 869.
(3) (1917) 1 K.B.D. p. 337.
(4) (1948) A.I.R. Mad. p. 122.
(5) (1943) All. A.I.R. p. 396.
(6) (1906) A C. p. 419.

the passing of property the risk thereto. We are unable to appreciate this contention, because the appellants have never put forth in their plaint that these conducts and events tantamount to acceptance by the Board, overriding the express terms incorporated in Clauses 6 and 8 of the Contract. In fact, U Hla Tin, the Milling Clerk who had been cited as a witness by the appellants had to admit that he had no authority whatsoever either express or implied for acceptance of delivery of the goods in question for or on behalf of the Board, much less prescribe any mode of acceptance in deviation from those already incorporated in the written Contract. Therefore, we cannot attach any significance whatsoever to these events. From the facts and circumstances fully set out above and also having regard to the terms of the contract read as a whole, we must therefore hold that the property in goods in question had not passed to the buyer, the Board, and that the appellants have no right of claim for their price.

There is thus no merit in this appeal and it must be dismissed. We would however note that though the conclusions we have arrived at in this appeal are based upon considerations of facts and circumstances somewhat different from those taken by the learned Trial Judge, the result, however, being the same usual costs will follow with this dismissal.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

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

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Oct. 9.

MOHAMED ISMAIL DOODHA AND TWO OTHERS (APPELLANTS)

v.

THE OFFICIAL RECEIVER AND THREE OTHERS (RESPONDENTS).*

Receiver, order of appointment under s. 69-A Transfer of Property Act—Order, whether appealable and is a "Judgment" within the meaning of s. 20 of the Union Judiciary Act—Appointment of Receiver under s. 69-A not the same as the appointment of Receiver under Order 40, Rule 1, Civil Procedure Code—Receiver appointed under s. 69-A, Transfer of Property Act is merely an agent of the Mortgagor—No Right of appeal against such appointment order.

Held: The word "Judgment" in s. 20 of the Union Judiciary Act must be given the same connotation as is given to the word "Judgment" found in Clause 13 of the Letters Patent under which the previous High Court of Judicature at Rangoon exercised the appellate jurisdiction.

The word "Judgment" as is used in Clause 13 of the Letters Patent (which is also to be found in s. 20 of the Union Judiciary Act) means "a decree in a suit by which the rights of the parties at issue in the suit are determined."

In Re Dayabhai Jiwandas and others v. *A.M.M. Murugappa Chettiar*, (1935) I.L.R. 13 Ran. p. 457; *U Ohn Kin* v. *Daw Sein Yin*, (1949) B.L.R. p. 201, referred to.

An order passed under s. 69-A does not decide or determine any rights of the parties at issue in a suit. The rule of the Court is merely that of a forum where the parties can obtain opinion, advice or direction respecting the management or administration of the mortgaged property other than questions of difficulty or importance not suitable for summary disposal.

The legal consequence ensuing from a mortgage with power of sale given to the mortgagee by virtue of s. 69 of the Transfer of Property Act is that the mortgagee can appoint a private Receiver of the mortgaged property, who is to act as an agent of the mortgagor under certain circumstances.

A Receiver under s. 69-A, Transfer of Property Act is not the same as a Receiver contemplated in Order 40, Rule 1, Civil Procedure Code.

Held therefore: The order under appeal is in the nature of direction or advice or mere assistance given to the mortgagee and does not tantamount to a judgment in suit within the meaning of s. 20 of the Union Judiciary Act much less an Order 40, Rule 1, Civil Procedure Code.

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* Civil Misc. Appeal No. 15 of 1954, against the order of the High Court of (U AUNG KHINE, J.) in Civil Misc. No. 164 of 1953, dated the 21st January 1954.

The right of appeal from any decision of a judicial forum or tribunal is a creation of Statute. An appeal does not exist in the nature of things, unless it is expressly given by an Act of legislature.

Order not appealable and appeal dismissed.

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MOHAMED ISMAIL DOODAH AND TWO OTHERS v. THE OFFICIAL RECEIVER AND THREE OTHERS.

San Thein and *R. Chaube*, Advocates, for the appellants.

Than Sein and *Ba Nyunt*, Advocates, for the respondents.

U CHAN TUN AUNG, C.J.—This appeal is against the order of the learned Judge of this court sitting in the exercise of its original jurisdiction in civil miscellaneous suit No. 164 of 1953, wherein at the instance of the first respondent, a Receiver was appointed under section 69-A of the Transfer of Property Act in respect of the following properties said to have been mortgaged by the appellants with power of sale in favour of (1) C. Lone Shwe and his wife Daw Thike and (2) U Mya and his daughter Ma Mya Yin:—

Premises known as Nos. 672/676, Merchant Street, and Nos. 7/15 in 28th Street, Rangoon.

The said mortgage was effected at Rangoon under a duly registered deed on the 13th June, 1941 to secure a sum of K 30,000 advanced to the appellants by the aforesaid respondents jointly and there is no dispute about it. The mortgagees are being represented by the Official Receiver, (the 1st respondent) so far as C. Lone Shwe's and Daw Thike's interests are concerned and by U Ba Glay, (the 2nd respondent) Daw Ohn Shin, (the 3rd respondent) and Daw Sein Khin, (the 4th respondent) so far as U Mya's and his daughter Ma Mya Yin's interests are concerned. There is also no dispute that the mortgage effected in favour of the respondents was one with power of sale as contemplated in section 69 of the Transfer

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of Property Act. Taking advantage of this power of sale the Official Receiver, the 1st respondent, filed an application under section 69-A of the Transfer of Property Act for appointment of a Receiver. He was purporting to exercise the right conferred upon the mortgagee so far as C. Lone Shwe's estate was concerned, *i.e.*, half of the mortgage interest in the said property. The application was resisted by the present appellants relying upon certain provisions of the liabilities (War Time Adjustment) Act, 1945 contending *inter alia* that in the absence of leave of the Court such an application seeking for the realization of the loan as against the security was not maintainable. It appears that necessary leave was subsequently sought for by the 1st respondent, but the appellants persisted in their objections. The objection was however overruled and the appointment of a Receiver under section 69-A was confirmed by the learned Judge in the Original Side. Hence this appeal.

A preliminary question has arisen as to whether the order passed by the learned Judge in the Original Side purporting to be under section 69-A of the Transfer of Property Act is an appealable order either under the Civil Procedure Code or under section 20 of the Union Judiciary Act. The learned Counsel appearing for the appellants contends that the order of the learned Judge under the said section is a "judgment" within the meaning of section 20 of the Union Judiciary Act and that as such, it is appealable. He however conceded that the right of appeal from orders which do not amount to judgments is regulated by the provisions of the Civil Procedure Code and that his present appeal is not based upon any provision of the Code. In other words, he fully concedes that the appointment of Receiver under section 69-A is not the same as

appointment of Receiver as contemplated in Order 40, Rule 1 of the Civil Procedure Code. We are unable to accept the contention of the appellant's counsel that an order under section 69-A of the Transfer of Property Act amounts to a judgment. In our view the word " judgment " appearing in section 20 of the Union Judiciary Act must be given the same connotation as is given to the word " judgment " found in Clause 13 of the Letters Patent under which the previous High Court of Judicature at Rangoon exercised the appellate jurisdiction. In *in re Dayabhai Jiwandas and others* v. *A.M.M. Murugappa Chettiar* (1), a Full Bench of the late High Court of Judicature has fully propounded, what the word "judgment" in Clause 13 of the Letters Patent means for purposes of prefering appeal, and the decision in that case has been accepted by us so far, and we have no good reason to depart from that decision. (See *U Ohn Kin* v. *Daw Sein Yin*) (2). The right of appeal from any decision of a judicial forum or tribunal is a creation of Statute. An appeal does not exist in the nature of things, unless it is expressly given by an Act of legislature. Here, what section 20 of the Union Judiciary Act permits is only the appeal from a *judgment* of a single Judge of the High Court, sitting in the exercise of its orginal jurisdiction, and according to the Full Bench referred to above the word " judgment " as is used in Clause 13 of the Letters Patent (which is also to be found in section 20 of the Union Judiciary Act) means "a decree in suit by which the rights of the parties at issue in the suit are determined," and that the term " suit " includes suits instituted by a plaint or by an originating summons in the manner prescribed by the rules of the

1) (1935) I.L.R. 13 Ran. p. 457. (2) (1949) B.L.R. p. 201.

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Court. Now, when we examine the order passed under section 69-A of the Transfer of Property Act it is quite apparent that the learned Judge, in passing the said order was not deciding or determining any rights of the parties at issue in a suit, nor was he making any order in a proceeding initiated by an originating summons. What he was doing was merely to appoint a Receiver, who is deemed to be the agent of the mortgagor in a proceeding which is of a summary nature. Section 69-A of the Transfer of Property Act is a new amendment, inserted by amendment Act XX of 1929, which closely follows section 109 of the English Law of Property Act, 1925. The legal consequence ensuing from a mortgage with power of sale given to the mortgagee by virtue of section 69 of the Transfer of Property Act is that the mortgagee can appoint a *private Receiver* of the mortgaged property, who is to act as an agent of the mortgagor under certain circumstances. The section merely aims at facilitating the powers of sale conferred on the mortgagee in case of default on the part of the mortgagor by appointment of a Receiver seeking the direction of the Court. The Receiver thus appointed acts as an agent of the mortgagor, and this is what is expressly provided in sub-section (*3*) thereof. Though the appointment of Receiver is made by the mortgagee, yet the Receiver is an agent of the mortgagor, and the mortgagor is made responsible for the acts and defaults of the Receiver unless the mortgage deed provides otherwise, or unless the acts or defaults of the Receiver are due to improper intervention of the mortgagee. Our reading of the entire section 69-A, especially with reference to the provisions containing in sub-section (*10*) thereof, is that in the appointment of a Receiver thereunder the role of the Court is

merely that of a forum, where the parties can obtain opinion, advice or direction respecting the management or administration of the mortgaged property other than questions of difficulty or importance not suitable for summary disposal. Therefore, in the view we hold we must say that the order of the learned Judge on the Original Side against which the present appeal is preferred is an order which does not in any sense partake of the nature of a judgment within the connotation as used in section 20 of the Union Judiciary Act. It is simply an order in the nature of direction or advice or mere assistance given to the mortgagee for the benefit of the mortgagors so far as the mortgaged properties are concerned in the given circumstances. Therefore, that order does not tantamount to a judgment in suit within the meaning of section 20 of the Union Judiciary Act much less an order under Order 40, Rule 1 of the Civil Procedure Code. The preliminary objection must be allowed to prevail and we must hold that the order is not appealable.

This appeal is therefore dismissed with costs Advocate's fee 3 gold mohurs.

U SAN MAUNG, J.—I agree.

APPELLATE CIVIL.

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

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Sept. 6.

TAN CHOO KHENG AND TWO OTHERS (APPELLANTS)

v.

SAW CHAIN POON AND ANOTHER (RESPONDENTS).*

Civil Procedure Code—Order 2, Rule 2—Different causes of action—Suit for possession of immoveable property no bar to a subsequent suit for mesne profits—Continuing trespass—S. 12 (1), Urban Rent Control Act—Statutory tenant, suit for damages against—Assessment of general damages by Court.

Held : A suit for possession of immoveable property is no bar to a suit for mesne profits, the causes of action in the two suits being different, the subsequent suit is not barred under Order 2, Rule 2, Civil Procedure Code.

Mayne's Treatise on Damages, p. 471 ; *Mohamed Khalil Khan and others* v. *Mahbub Ali Mian and others*, A.I.R. (1949) P.C. 78 ; *Ma Myaing and one* v. *Maung Po Chit and three*, 4 Ran. 103 ; *Kupparakutti Adammeera* v. *Esoof* (a) *S. M. Mohamed Esoof and one*, (1948) B.L.R. 411 ; *Ram Karan Singh* v. *Nakchhed Ahir*, 53 All. 951 ; *Rama Kallappa Pujari* v. *Saidappa Sidrama Pujari and another*, 59 Bom. 454, referred to.

Held also: A person in occupation of premises under s. 12, Urban Rent Control Act is a statutory tenant and his occupation thereof is lawful and no suit for damages is maintainable against him in respect of such occupation.

The Canadian Pacific Railway Company v. *Roy*, (1902) A. C. 220 ; *Mrs. D. M. Singer* v. *The Controller of Rents*, (1949) B.L.R. 143 (S.C.), referred to.

Held further : In awarding general damages, a Judge has to do his best in assessing the amount, however difficult such a task may appear to be.

Commissioners for Executing Office of Lord High Admiral of United Kingdom v. *Owners of Steamship Susquehanna*, (1926) A C. 655 ; *Chaplin* v. *Hicks*, (1911) K.B.D. 786 ; *Ratcliffe* v. *Evans*, (1892) Q.B.D. p. 524 ; *Fritz* v. *Hobson*, (1880) Chancery Division, p. 542.

K. R. Venkatram for the appellants.

Kyaw Khin for the respondents.

U SAN MAUNG, J.—In Civil Regular Suit No. 30 of 1950 of the Original Side of this Court, the plaintiff

* Civil 1st Appeal No. 24 of 1955, against the decree of the Original Side, High Court of Rangoon in Civil Regular Suit No. 30 of 1950, dated the 7th February 1955.

Saw Chain Poon who is the 1st respondent in the present appeal, sued the defendant-appellants Tan Choo Kheng, Tan Sek Kong and the deceased Chan Yin Yean as partners of Sun Hin & Company for damages to the amount of Rs. 52,200 made up of two sums of Rs. 45,000 and Rs. 7,200. His case was that he was entitled to receive Rs. 45,000 as damages for being wrongly kept out of the premises known as the ground floor of room No. 695/697 Dalhousie Street, Rangoon, which he had been occupying for many years before the War with Japan, as vendor of electrical stores and Rs. 7,200 as damages for the use by the defendants of the furniture and fittings which he had kept in that room. The facts of the case have been clearly set out in the judgment of the learned Judge on the Original Side ; however, for the purpose of completeness these facts will be briefly recapitulated below :

The plaintiff Saw Chain Poon was prior to the war with the Japanese, a dealer in electrical stores at the above mentioned premises of which he was a tenant of the owner Daw Saw Saw Sim. In December 1941, when the first Japanese bombing of Rangoon took place, the plaintiff went to Sagaing after leaving his shop under lock and key, and making arrangements with his landlady for the regular payment of the rent which fell due during his absence from Rangoon. One Saw Htain Hwee, father-in-law of his nephew Chan Han Choung was looking after the shop premises during Saw Chain Poon's absence. About June 1943 Saw Htain Hwee gave permission to the defendants to enter into possession of the premises in suit upon payment to him of a sum of Rs. 1,000 as tea money and the defendant had since then managed to be in possession of the suit premises where they carried on their present business. They

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also had the tenancy of the premises changed into their names and used the furniture and fittings found in the premises. When the plaintiff returned to Rangoon and asked the defendants to vacate they refused to do so and this led to a suit for their ejectment under section 17 of the City Civil Court Act. That suit failed because the relationship of landlord and tenant was not held to have been established as between the plaintiff and the defendants. Plaintiff then filed a suit on the Original Side of this Court, namely Civil Regular Suit No. 114 of 1947 for the recovery of the shop premises and the furniture, etc. and the suit was decreed on the footing that the defendants were mere trespassers. This decision was confirmed by a Bench of this Court in Civil First Appeal No. 8 of 1949. After the decision of the appeal, the defendants obtained a permit under section 12 (*l*) of the Urban Rent Control Act on the 1st of August 1949, and the attempt by the plaintiff to have the proceedings before the Rent Controller quashed on the ground that he had no jurisdiction to entertain an application for such a permit was unsuccessful, the Supreme Court holding that the decision of the High Court that the defendants were trespassers was binding not only on them but also on the plaintiff. See *Saw Chain Poon and one* v. *Assistant Controller of Rents, Rangoon* (1). The attempt of the plaintiff Saw Chain Poon to execute his decree for the ejectment of the defendants, also failed because it was held that a permit under section 12 (*l*) of the Urban Rent Control Act had the effect of stopping, or at least staying the execution proceedings for such period as the permit remains in force. Hence the present claim by the plaintiff.

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

In the suit under appeal the plaintiff alleged that because of the defendants' act of trespass he had been deprived of the legitimate use for the shop premises and the furniture and fittings therein, since June 1943 uptil the date of the suit, namely 26th April 1950 and that prior to the war he was a dealer in electrical goods, a business involving a capital of Rs. 50,000 and yielding a nett annual income of Rs. 15,000. It was his intention had the premises been available to him, to do the same business with the same amount of capital and his inability to do business owing to the lack of premises meant a loss of Rs. 15,000 per annum in profit. He therefore claimed a sum of Rs. 45,000 in respect of the period of 3 years prior to the date of the suit and Rs. 7,200 as damages in lieu of rent for having been deprived of the use of the furniture and fittings for the same period. The defendants by their written statement denied that the plaintiff had sustained any loss of business by reason of their action, as their possession of the premises in suit had nothing to do with the losses and damages alleged to be suffered by the plaintiff. They also contended that the damages claimed by the plaintiff are both excessive and remote, and that the plaintiff had made no effort to take away the furniture and fittings although they were ever ready and willing to return them. They, moreover, contended that the plaintiff's title to the premises in suit had been determined by the Monthly Leases Termination Act, 1946 and that in any event the defendants became statutory tenants of these premises by reason of the grant to them of the permit under section 12 (*1*) of the Urban Rent Control Act.

It may be mentioned in passing that one Tan Choo Keng who was the co-plaintiff in Civil Regular Suit No. 114 of 1947 refused to be a plaintiff in the

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present suit and was accordingly made a pro former defendant. He took no interest in the suit and the suit was virtually dismissed so far as he was concerned.

The following issues were framed by consent of parties:—

(1) Did the plaintiff cease to be a tenant after June 1943 by reason of the passing of the Monthly Leases Termination Act, 1946?

(2) Were the defendants relieved from liability to pay damages by reason of the certificate granted to them by the Rent Controller in August 1949?

(3) What damages, if any, is the plaintiff entitled to?

On the first issue the learned Judge of the Original Side held that it was barred by *res judicata* by reason of the decision in Civil Regular Suit No. 114 of 1947. This decision has now been accepted by the defendant-appellants and the plaintiff may therefore be regarded in law to be the tenants in respect of the premises in suit.

As regards the second issue, the learned Judge held that a permit under section 12 (*1*) of the Urban Rent Control Act would be a good defence had the suit been one by the owner of the premises in suit but that having regard to the independent and superior right of a lawful tenant thereto, whose rights have been trespassed upon, the permit holder cannot use it as a shield to protect himself from the legal consequences of his trespass. To quote the words of the learned Judge, "the Rent Controller's permit from the wording of section 12 (*1*) would appear to be concerned with the occupier of the premises and

the owner or landlord of the same, and as such the Rent Controller's permit can afford protection to the defendants only at the hands of the owner of the premises or the landlord to the extent permitted under the Act. The permit cannot be used to defeat the claims of third parties whose rights the defendants had invaded."

As regards the third issue, the learned Judge said that there was nothing in the evidence adduced by the plaintiff to indicate that subsequent to his return to Rangoon after the war, he was at any time ready and willing to start afresh his trade in electrical goods, that although business premises were hard to come by in post-war Rangoon it should not have been impossible for the plaintiff to obtain one if he had made a real attempt to do so, that although it was possible for the plaintiff to make local purchases of the goods which he wanted to sell in the shop, a merchant investing Rs. 50,000 in his business was unlikely to refrain from taking advantage of the facilities obtained by having a licence to import electrical goods into the country and that therefore there was no real basis for the plaintiff's claim that he had suffered a loss of profit to the exent of Rs. 15,000 a year for three years prior to the institution of the suit.

Having held thus, the learned Judge proceeded to assess the damages due to the plaintiff at Rs. 3,000 a year in the following words :—

"But for being kept out of his shop premises he is nevertheless entitled to damages of a general nature the quantum of which in the absence of other evidence would rest in the discretion of the Court. The premises in suit are said to be in the heart of the business centre of the city and the consequent loss to the plaintiff resulting from his failure to re-establish his old trade and goodwill in the same must be considerable. Damages to the tune of K 3,000 a

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year would not in the circumstances of the case, be too excessive."

As regards the damages in lieu of rent for the use of the furniture and fittings, the learned Judge assessed it at the rate of Rs. 900 per annum. Accordingly there was a decree in favour of the plaintiff against the defendant-appellants for damages to the extent of Rs. 11,700 with proportionate cost; hence this appeal by the 1st to 3rd defendants.

The learned Advocate for the appellants has taken an additional ground in appeal that the suit is barred by reason of the provisions of Order II, Rule 2 of the Civil Procedure Code as it arose out of the same cause of action as the one dealt with in Civil Regular Suit No. 114 of 1947. However, in our opinion, there is no merit in this ground of appeal. The continuing of a trespass from day to day is considered in law a separate trespass on each day so that the right to sue for damages will continue from day to day until the trespasser vacates the premises. In Mayne's Treatise on Damages, the learned author has this to say at page 471 of the Eleventh Edition:

> "The action for mesne profits is in origin an action of trespass, brought after a judgment in ejectment to recover damages for the previous occupation of the land. It may be brought against the person actually in possession of the land, at any time during the existence of the plaintiff's title."

In *Mohamed Khalil Khan and others* v. *Mahbub Ali Mian and others* (1) it was held that the cause of action means every fact which will be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment, and that if the evidence to support the two claims is different, then the causes of action are also different.

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(1) A.I.R. (1949) P.C. 78.

The evidence to support the claim for the ejectment of the defendants in Civil Regular Suit No. 114 of 1947 is different from the evidence in support of the claim for the damages against them, inasmuch as in a suit for damages the period for which the plaintiff has been kept out of possession the injuries suffered by him, etc. are additional facts which have to be taken into consideration. In *Ma Myaing and one* v. *Maung Po Chit and three* (1) it was held that a suit for possession of immoveable property does not bar a suit for mesne profits arising before the institution of the first suit. This was one of the decisions relied upon in *Kupparakutti Adammeera* v. *Esoof* (a) *S. M. Mohamed Esoof and one* (2) where it was held that suit for possession and suit for mesne profits do not arise out of the same cause of action that causes of action in the two suits being different a subsequent suit for mesne profits was not barred under Order II, Rule 2 of the Code of Civil Procedure that in a suit for possession the plaintiff need only to prove possession within 12 years and defendants' occupation without the right, but that for mesne profits he has to prove in addition the duration of the dispossession, its termination and the amount he is entitled to as damages. See also *Ram Karan Singh* v. *Nakchhed Ahir* (3); *Rama Kallappa Pujari* v. *Saidappa Sidrama Pujari and another* (4) both of which have been referred to in *Kupparakutti Adammeera's* case.

The next ground of appeal is that the learned Judge of the Original Side was wrong in taking into consideration for the purpose of assessing damages the period subsequent to the 1st of August 1949 as it was covered by the permit under section 12 (*1*) of the

(1) 4 Ran. 103.
(2) (1948) B.L.R. 411.
(3) 53 All. 951.
(4) 59 Bom. 454.

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Urban Rent Control Act. In our opinion, this contention must be allowed to prevail.

Section 12 (*1*) of the Urban Rent Control Act enacts *inter alia* that the Controller of Rents on being satisfied that a person who is not already a tenant of any premises is in occupation thereof *bonâ fide* for residential or business purposes, shall on the person making a written declaration of his willingness to pay the standard rent of such premises, issue a written order to the said applicant permitting him to continue in occupation of the said premises and shall send a copy of his order to the landlord. Now, the word "landlord" according to section 2 (*c*) of the Urban Rent Control Act means not only a person who rents out premises belonging to him, but also every person deriving title under him as for example a tenant in relation to a sub-tenant. In the case now under consideration the plaintiff Saw Chain Poon is in law the original tenant of the premises in suit. He has been dispossessed wrongly by the defendants, but on the strength of the fact that they were trespassers of these premises they obtained a permit under section 12 (*1*). Therefore, the defendants are what may be termed the *statutory tenants* of the plaintiff himself. If they had been made to pay the standard rent direct to the owner instead of to the plaintiff this fact does not make any real difference. They must be regarded as paying the standard rent to the owner of the premises for and on behalf of the plaintiff Saw Chain Poon.

Therefore, the distinction sought to be drawn by the learned Judge on the Original Side between the owner of the premises in suit, who according to him would have no right of suit as against the defendants, and the plaintiff Saw Chain Poon who is thought to have a claim even in respect of the period covered

by the permit, is a distinction without any real difference.

In this connection the following cases are apposite. In the *Canadian Pacific Railway Company* v. *Roy* (1) where a question arose whether a railway company, authorized by statute to carry on their railway undertaking in the place and by the means that they do carry it on, are responsible in damages for injury not caused by negligence, but by the ordinary and normal use of their railway, the Lord Chancellor observed :—

> " The Legislature is supreme, and if it has enacted that a thing is lawful, such a thing cannot be a fault or an actionable wrong. The thing to be done is a privilege as well as a right and duty ;"

In *Mrs. D. M. Singer* v. *The Controller of Rents* (2) the Supreme Court has held that a person who is permitted under section 12 of the Urban Rent Control Act, to occupy any premises is a statutory tenant. His occupation of the premises is therefore lawful and no suit for damages is maintainable in respect of such occupation.

The next ground of appeal is that the learned Judge on the Original Side, having found that the plaintiff had not made any attempt to find new premises and was not in sufficient funds for carrying on the business after the war had erred in allowing Rs. 3,000 a year as damages for loss resulting from his failure to re-establish his trade, there being no real basis for coming to such a figure. Among the cases cited is the *Commissioners for Executing Office of Lord High Admiral of United Kingdom* v. *Owners of Steamship Susquehanna* (3). In that case an oil tanker belonging to Admiralty which was engaged in

(1) (1902) A. C. 220. (2) (1949) B.L.R. 143 (S.C.).
(3) (1926) A.C. 655.

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supplying fuel to the Fleet, was damaged in collision with the defendants' steamship. The liability was admitted by the defendants so that damages were referred to the registrar for assessment. The registrar awarded the Admiralty £ 200 per diem in respect of loss of use of the tanker during the time occupied by the repairs, a sum based on her commercial value if she had been let on hire. It was held by the House of Lords that the damages ought not to have been assessed on the footing that the tanker should be treated as a ship to be let out to a mercantile trader but should be assessed on the principal of the dredger "Greta Holme."

However, the facts in the case cited by the learned Advocate for the appellants are quite different from those appearing in the suit under appeal. There is evidence to show that the premises in suit were in the heart of the business centre of the city of Rangoon. The plaintiff's statement on oath that it was impossible to get premises comparable to those in suit, stands unrebutted. The learned trial Judge had no doubt animadverted upon the plaintiff's failure to make real efforts to get a substitute building or to apply for import licences. However, we see no reason why the plaintiff should make a real start to rehabilitate his business without suitable premises and it is a well known fact that premises in the business centre of Rangoon cannot be had merely for the asking.

As regards the quantum of damages awarded to the plaintiff the learned Advocate for the appellants has contended that it was the result of a pure piece of guess work on the part of the learned trial Judge. However, the learned Judge seems, in our opinion, to have based his assessment upon the probability of a profit accruing to the plaintiff had he been able to

start business on any scale remotely approaching that maintained by the plaintiff prior to the war. That the plaintiff was in business in a big way cannot be gainsaid. There is abundant evidence given by his various customers to that effect. In *Chaplin* v. *Hicks* (1), the plaintiff sued the defendant for damages for loss of a chance of winning a prize. The defendant in a newspaper competition had offered theatrical engagement to 12 of the 50 contestants securing the largest number of popular votes. The plaintiff was one of the chosen 50 from whom the prize winners were to be selected but the defendant failed to offer a reasonable opportunity of being interviewed in accordance with the advertised rules and the jury returned a verdict for £ 100. Defendant appealed, and the Court of Appeal confirmed the judgment awarding £ 100 to the plaintiff. In this connection Vaugham Williams, L.J., observed :

" Then came the point that was more strenuously argued, that the damages were of such a nature as to be impossible of assessment. It was said that the plaintiff's chance of winning a prize turned on such a number of contingencies that it was impossible for any one, even after arriving at the conclusion that the plaintiff had lost her opportunity by the breach, to say that there was any assessable value of that loss. It is said that in a case which involves so many contingencies it is impossible to say what was the plaintiff's pecuniary loss. I am unable to agree with that contention."

Fletcher Moulton, L.J., puts the matter more succintly as follows :

" Then the learned counsel takes up a more hopeful position. He says that the damages are difficult to assess, because it is impossible to say that the plaintiff would have obtained any prize. This is the only point of importance left for our consideration. Is expulsion from a limited class of competitors an injury. To my mind there can be only one

(1) (1911) K.B.D. 786.

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answer to that question; it is an injury and may be a very substantial one. Therefore the plaintiff starts with an unchallengeable case of injury, and the damages given in respect of it should be equivalent to the loss. But it is said that the damages cannot be arrived at because it is impossible to estimate the quantum of the reasonable probability of the plaintiff's being a prize-winner. I think that, where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case."

In *Ratcliffe* v. *Evans* (1) it was held that in an action for defamation where damages are asked for general loss of business as distinct from the loss of particular known customers, evidence of such general loss of business is admissible and sufficient to support the action.

In *Fritz* v. *Hobson* (2) where the plaintiff who was the owner of a curio shop sued the defendant for damages for loss of business because the defendant's lorries used to block the passage to his shop during a building operation. Fry, J., observed:

"What then has been the result of these operations to the plaintiff? I have come to the conclusion that the plaintiff has proved that he has sustained considerable loss in his business as a dealer in old curiosities in consequence of the defendant's operations, and although it is very difficult to assess the amount of that loss, I have, sitting as a Judge of fact, arrived at the conclusion that he has sustained loss to the extent of £60."

These cases are instructive as showing that the Judge has to do his best in assessing the amount to be awarded as general damages, however difficult such a task may appear to be. In this connection the following passage in Mayne's Treatise on Damages at

(1) (1892) Q.B.D. p. 524. (2) (1880) Chancery Division, p. 542.

page 607 of the Eleventh Edition may also be referred to :

" A mere general loss may well be announced in the same general way as that in which alone it can be proved. An action was brought for not performing a contract to let a house, whereby plaintiff had sustained loss, and been obliged to hire other premises at great cost and expense for rent and charges. It appeared that the premises, which were in Regent Street, had been taken for the millinery business, for which they were well suited, and that the plaintiff, not being suffered to occupy them, had sustained considerable loss from the passing by of the profitable season of the year. It was held that this evidence was admissible; Richards, C.B., said there was, in fact, no special damage as thus proved. The object of the witness's testimony was to show that the plaintiff had suffered inconvenience. Graham, B., remarked, that loss of customers, and general damage occasioned thereby, might have been given in evidence under the declaration, for it charged general loss, without specifying any particular individual whose custom had been lost; and it was competent to the plaintiff to show certain damage sustained by breach of the agreement, without stating his loss more specifically in the declaration."

For these reasons we consider that the plaintiff should be awarded damages for being denied the opportunity of re-establishing his business thus resulting in the loss of customers. The period which should be taken into consideration in this connection must be that anterior to the 1st of August 1949. We thus assess the damages at K 7,000. As for damages in lieu of rent for the use of furniture and fittings we assess the same as K 2,100. Accordingly there will be a decree in favour of the plaintiff as against the 1st and 3rd defendants for damages to the extent of K 9,100 with proportionate costs in the trial Court. As the defendants are partly successful in this appeal, we would direct that each party should bear its own costs.

U CHAN TUN AUNG, C. J.—I agree.

APPELLATE CIVIL

Before U Ba Thoung, J.

H.C. 1956

Oct. 26.

TANMONI (APPELLANT)

v.

AH WAY *(alias)* LI KYAN HLYET (RESPONDENT).*

Transfer of Property Act, s. 113, illustration (1)—Acceptance of rent after expiration of notice to quit—Whether Waiver of notice.

Held : That under s. 113, Transfer of Property Act, the person giving the notice must have an intention in any of his acts to treat the lease as subsisting and if there is no such intention it cannot amount to a waiver of notice.

It merely relates to an act showing an intention to treat the lease as subsisting but not to an act without such an intention.

Mere acceptance of rent by Lessor cannot be treated as a waiver of his notice when there is no intention on his part to treat the lease as subsisting.

Khuman v. *Sukley Lal*, A.I.R. (1952) All. 579 ; *Kam Lapat Sahai* v. *M.T. Mantio Bibi*, A.I.R. (1948), Oudh p. 127, relied on.

Held further : In order to establish waiver of a notice to quit, the tenant must prove that there was an agreement between the parties to treat the lease as subsisting, for waiver is an agreement not to assert the right.

Panchanan Ghose v. *Haridas Banerjee*, A.I.R. (1954) Cal. p. 460.

Mon San Hlaing for the appellant.

Nil for the respondent.

U BA THOUNG, J.—The appellant who is the owner of the suit land situated in Taroketan quarter, Prome, rented it out to the respondent on a monthly rental of K 250. The rent was reduced later to K 150 per month by mutual consent. After about 7 years, as the appellant required the said land for the purpose of constructing on it a substantial and fire-proof building of his own, he applied to the

* Civil 2nd Appeal No. 56 of 1956 against the decree of the District Judge's Court of Prome in Civil Appeal No. 13-P of 1955, dated the 3rd August 1956, arising out of the Subdivisional Court of Prome in Civil Regluar Suit No. 1 of 1956 dated the 7th November 1955.

Assistant Controller of Rents for permission to sue the respondent for ejectment as the latter refused to vacate the suit land. His application was rejected by the Assistant Rent Controller, but on a reference made to the Subdivisional Judge, Prome, the order of the Assistant Rent Controller was set aside and the appellant was given permission to file a suit for ejectment against the respondent. The respondent then went up on appeal to the Supreme Court against the order of the Subdivisional Judge, but the Supreme Court upheld the order of the Subdivisional Judge. Consequently the appellant sent a notice to the respondent to vacate the suit land by the 31st December 1954, and as the latter refused to vacate it, he filed the suit for ejectment. The trial Court gave a decree in favour of the appellant for ejectment, but on appeal to the District Court, the learned District Judge, relying on section 113 Illustration (*a*) of the Transfer of Property Act, set aside the judgment and decree of the trial Court on the ground that the appellant had accepted rents from the respondent after the expiration of the notice, and that the notice was therefore waived. The appellant has now filed this appeal against the order of the District Court.

Section 113 Illustration (*a*) of the Transfer of Property Act on which the learned District Judge relied, runs as follows:

> "A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived."

Ordinarily the above illustration shows that the acceptance of rent after the expiration of the notice amounts to a waiver of the notice. But section 113

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must be carefully looked into. Section 113 of the Transfer of Property Act reads:

"A notice give under section 111, clause (*h*), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting."

From the section itself it is clear that the person giving the notice must have an intention in any of his acts to treat the lease as subsisting and if there is no such intention it cannot amount to a waiver of the notice.

Section 113 only relates to an act showing an intention to treat the lease as subsisting but not to an act without such an intention. Now, mere acceptance of rent by the lessor cannot be treated as a waiver of his notice when there is no intention on his part to treat the lease as subsisting. He may have accepted the money from the lessee for use and occupation of the suit land during the pendency of the suit. Therefore it does not follow that such an acceptance of money shows an intention on his part to treat the lease as subsisting. I am fortified in this view by the decision in the cases of *Khumani* v. *Saktey Lal* (1) and *Kam Lapat Sahai* v. *M. T. Manho Bibi* (2). In the former case it was held that:

"If the landlord actively continues the prosecution of the case or appeal with regard to the ejectment of the tenant, mere acceptance of rent by him cannot be treated as waiver so as to deprive him of the right of ejectment in pursuance of the decree which he had obtained."

In this case also although rent was received by the appellant after the expiration of his notice to respondent, he filed the suit for ejectment against the

(1) A.I.R. (1952) All. p. 579. (2) A.I.R. (1948) Oudh, p. 127.

respondent after receiving the rent from the latter and continued with the prosecution of his case against the respondent. Therefore the mere acceptance of rent by the appellant after the expiration of his notice and during the pendency of his case against the respondent for ejectment cannot be treated as a waiver of the notice. In the case of *Kam Lapat Sahai* v. *M. T. Manho Bibi* (1) also it was held that:

"Once a suit for ejectment has been instituted, it cannot possibly be said that any act of the lessor shows an intention to treat the lease as subsisting unless he withdraws the suit."

In the present case also the appellant had not only continued with the prosecution of his case against the respondent after he had accepted the rent from the latter but had actually obtained an ejectment decree. Hence it cannot be said that there was any intention on the part of the appellant when accepting the rent from the respondent to treat the lease as subsisting.

Then again in order to establish waiver of a notice to quit, the tenant must prove that there was an agreement between the parties to treat the lease as continuing, for waiver is an agreement not to assert the right. I am fortified in this view by a Bench decision of the Calcutta High Court in the case of *Panchanan Ghose* v. *Haridas Banerjee* (2) where it was laid down thus:

"In order to establish waiver of a notice to quit, the tenant must prove that there was an agreement between the parties to treat the lease as continuing.

Waiver is contractual, it is an agreement not to assert a right. That is the proposition which is embodied in section 113, Transfer of Property Act and, ordinarily, as illustration (*a*) to the section shows, acceptance of rent which has become

(1) A.I.R. (1948) Oudh, p. 127. (2) A.I.R. (1954) Cal: p. 460.

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due since the expiration of the notice is conclusive evidence of such an agreement.

Where, however, such payment of rent is made to ensure protection against ejectment under any rent control law, and is accepted by the landlord, mere acceptance of rent does not lead to an inference that the parties intend to re-establish the relationship of landlord and tenant. In such a case, mere acceptance of rent, in the absence of any other evidence, does not operate as a waiver of the notice to quit under section 113, Transfer of Property Act."

This case is apposite to the present case under consideration. In the present case also it has not been established that the acceptance of rent by the appellant landlord from the respondent was due to an agreement to treat the lease as continuing. For the reasons stated I must hold that there was no waiver on the part of the appellant. I therefore set aside the judgment and decree of the District Court and restore the judgment and decree of the Subdivisional Court of Prome with costs throughout.

APPELLATE CRIMINAL

Before U Chan Tun Aung, Chief Justice.

H.C. 1957

Jan. 8.

U BA CHIT TIN (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Suppression of Corruption Act, s. 4 (1) (d)/4 (2)—Meaning of the expression "in respect of public property entrusted to him"—S. 405, Penal Code—The words "entrusted" and "entrustment" their meaning—S. 5 (1) (c), Prevention of Corruption Act (India Act 11 of 1947).

Held: The expression "in respect of public property entrusted to him" in s. 4 (*1*) (*d*), Suppression of Corruption Act, 1948, means public property which is in the possession or under the control of the public servant.

The expression has the same connotation as in s. 405 of the Penal Code, except that in view of the absence of qualifying words "in any manner", it has a much more restrictive scope than what is contemplated in s. 405 of the Penal Code. To complete an offence under s. 4 (*1*) (*d*) of the Suppression of Corruption Act, 1948, it is an essential condition that the public property either immoveable, moveable or cash, which is the subject-matter of the offence, must have been entrusted to the public servant concerned.

The word "entrusted" with reference to cash or money means that such cash or money has been transferred to the accused and remains in the possession or control of the accused *as a bailee in trust* for the complainant who holds the position of bailor.

N. N. Burjorjee v. *Emperor*, A.I.R. (1935) Ran. p. 453; *Lake* v. *Simmons*, (1927) A.C. p. 487 at p. 499; *Thakarsi* v. *King-Emperor*, I.L.R. Nag. (1949) p. 620, referred to.

Ba Swe for the appellant.

Tin Maung (Government Advocate) for the respondent.

U CHAN TUN AUNG, C.J.—The appellant U Ba Chit Tin was at the material time the Superintendent, Botataung Traffic Office (Inland Water Transport

* Criminal Appeal No. 387 of 1956, appeal from the order of the Special Judge (2) (SIAB & BSIA) Act of Rangoon, dated the 7th day of September 1956 passed in Criminal Regular Trial No. 26 of 1955.

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Board). He has been found guilty of the offence under section 4 (*1*) (*d*) of the Suppression of Corruption Act by the Special Judge (2), (SIAB & BSI Act), Rangoon, and has been sentenced to undergo concurrently four months' rigorous imprisonment on three heads of charge which reads:

(1) That you as a public servant to wit, as Superintendent of Botataung (I.W.T.) was enjoined by Circular Order Exhibit-o to receive the cash collected by the Inward Freight Clerk (Cashier) and that you failed to do so regarding Trip No. 304 of "Maha" Steamer which arrived at Botataung on 19th June 1954 and thereby there was a delay of 14 to 15 days in depositing the freight charges K 6,534·95, as shown in Exhibit J-oo which is an act of misconduct in respect of the said public property which is deemed to be entrusted to you as defined in s. 4 (*1*) (*d*) and proviso thereto of the Suppression of Corruption Act.

(2) That you as a public servant to wit, as Superintendent, Botataung (I.W.T.) was enjoined by Circular Order Exhibit-o to receive the cash collected by the Inward Freight Clerk (Cashier) and that you failed to do so regarding Trip No. 306 of "Mingyi" Steamer which arrived on 26th June 1954 at Botataung and thereby there was a delay of 10 to 14 days in depositing the freight charges K 6,732·20, as shown in Exhibit J-o which is an act of misconduct in respect of the said

public property which is deemed to be entrusted to you as defined in s. 4 (*1*) (*d*) and the proviso thereto of the Suppression of Corruption Act.

(3) That you as a public servant to wit, as Superintendent, Botataung (I.W.T.) was enjoined by the Circular Order Exhibit-o to receive the cash collected by the Inward Freight Clerk (Cashier) and that you failed to do so regarding Trip No. 329 of "Mindone" Steamer which arrived at Botataung on 14th September 1954 and thereby there was a delay of 7 to 11 days in depositing the freight charges K 4,157·15 as shown in Exhibit ၂-ဓ which is an act of misconduct in respect of the said public property which is deemed to be entrusted to you as defined in s. 4 (*1*) (*d*) and the proviso thereto of the Suppression of Corruption Act.

The facts and circumstances leading to the appellant's prosecution are briefly, as follows:

The appellant was the Superintendent of Botataung Traffic Office from 29th December 1949 to 13th March 1955, and in his charge there was the "Inward Section" dealing with freight receipts from big steamers that ply between Rangoon and Mandalay. Under him, there were a cashier and two freight clerks. The cashier's post was held by one U Maung Maung Tin who died on or about the 10th of May 1955 after a short illness. For some time the Botataung Traffic Office was entirely in charge of the appellant. It was not until the 1st February 1951 that a cashier's post was sanctioned by the Head Office, and one

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U Ba Tu was appointed to hold the said post on a salary of K 330—15—450. The cashier has to deposit K 5,000 cash security and also furnish immoveable property security to the value of K 10,000. U Ba Tu held the post of cashier up to the year 1952 when he was succeeded by U Maung Maung Tin. From the Botataung Traffic Office, the appellant was next transferred to Labour Supervision Department at the Main I.W.T. Office on or about the 14th of March 1955. The fact that there was no post of cashier in Botataung Traffic Office prior to 1st February 1951 was conceded by the General Manager U Hmyin (PW 2) of the Main I.W.T. Office, who states that it was only on his recommendation that the post of cashier on a salary of K 330—15—450 was created in Botataung Traffic Office and that the first cashier was U Ba Tu who had to furnish K 5,000 cash deposit and a security to the value of K 10,000 in immoveable property. On appellant's transfer to the Main Office, he was succeeded by U Nyun (PW 6).

On the death of U Maung Maung Tin, the account books maintained by him were checked up as against freight collections relating to the three steamers, "Mintha", "Mingyi" and "Mingale", and it was found that there was a shortage of K 39,149·70. The matter was reported to the Traffic Manager U Hla Baw (PW 3) who directed his assistant U Ba Yin (PW 11) to inquire into the matter and also to go into the accounts thoroughly. U Hmyin (PW 2), General Manager, was also informed about the shortage, and he directed the Chief Accountant U Ba Thu (PW 5) to investigate into the matter. After examining all the relevant accounts and entries relating to the freight receipts, U Ba Thu, the Chief Accountant, found a shortage of K 39,149·70. The shortages in freight collections were as shown

hereunder in relation to trip number of each steamer :

		K
(1) "Mingale" ...	Trip No. 392 ...	1,407·45
(2) "Mintha" ..	Trip No. 393 ...	19,328.70
(3) "Mingyi" ...	Trip No. 394 ...	18,413·55

Besides these shortages, the check also revealed that freight collections were not promptly remitted to the authorities concerned. There were delays for several days. In particular, it was found that though in trip No. 388 "Mingyi" was shown to have arrived on 12th April 1955, her earnings of cargo freights were found to have been remitted to the Main Office 4 to 7 days later. Mr. Manickham (PW 7), Superintendent of the Freight Section in the Main I.W.T. Office, who at the instance of the Chief Accountant, checked the accounts found that the account books for the year 1953 showed invariably delays in the remittance of the freight collections, and the delays were in some cases up to 7 days. During 1954 the delays extended to about two weeks. Such delays were also detected for the year 1955. But in the year 1953, one Mr. Gastin (PW 4) took upon the duties of Traffic Manager and he issued instructions for the guidance of the Superintendent of Botataung Depot and these instructions were embodied in Exhibit-o.

Captioned "Botataung Depot, Inland Water Transport Board (Irrawaddy Section)", Exhibit-o contains some six pages of closely typewritten matters divided into four sections. The first section "A" deals with the scope and responsibility of the staff concerned. Section "B" lays down detailed procedure for checking books and cargo discharged, and also collection and disposal of discharged cargo receipts. Section "C" sets out maintenance of

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registers, records and returns concerning freight cash receipts and cargo weight, etc. Section "D" prescribes the duties of the staff, whereby the Superintendent of Botataung Traffic Office is entrusted with overall responsibility of running the office. He is also enjoined to receive cash in following terms:—

> "He will receive the cash collected by the Inward Freight Clerk (Cashier) and check it in the manner laid down in paragraph 6, Section A. He is prohibited from delegating this particular duty to anyone without authority from the Management."

This instruction Exhibit-o is said to be an approved one, that is, approved by the I.W.T. Board itself, and issued with the concurrence of the Accounts Department duly signed by the Traffic Manager Mr. Gastin. But curiously enough, in section "D" the following passage appears:—

> "You will therefore endeavour to achieve that when possible. It is considered that at present, with small upward cargo offering, at least one Flat can be turned round."

This passage strikes one as if the instructions in question are addressed to a particular person. Though it is suggested that the instructions are meant for all those concerned in the Botataung Depot, yet the wordings of this clause militate against such suggestion. Be that as it may, the significant point to be noted is that, although the instructions require the Superintendent of the office to receive the cash collection of the Inward Freight Clerk (Cashier), yet nothing is mentioned about the disposal of the cash collected. In that connection, I would set down here the very words deposed to by U Hmyin (PW 2), General Manager and U Ba Thu (PW 5), Chief Accountant of the I.W.T. Office.

"ငွေထိန်းခန့်ထားခြင်းမပြုမီက ဦးဘချစ်တင်က ငွေများကို စစ်ဆေးပြီး ရုံးကြွေးသို့ပို့ပါသည်။ ငွေထိန်းခန့်ပြီးနောက် ဦးဘချစ်တင်က ရုံးကြွေးသို့ မပို့ တော့ပါ။ ငွေကို ရုံးကြွေးမှနေ၍ ငွေထိန်းထံမှ တိုက်ရိုက်သိမ်းယူပါသည်။" (*Vide* U Hmyin's evidence).

"ငွေများကို ကျွန်တော် သွားသိမ်းသောအခါ ငွေထိန်းထံမှ တိုက်ရိုက် လာပါသည်။ ဆိပ်ကမ်းမှူးမှတဆင့် တခါမှ မသိမ်းဘူးပါ။ ။ ။ ။ ။ ဤအမှုဖြစ်သည့်နေ့ထိ ငွေများကို ငွေထိန်းထံမှ တိုက်ရိုက် သိမ်းယူပါသည်။ ။ ။ ။ ။ ဤအမှုမဖြစ်ခင်ကငွေများကို ကက် (ရှ) ယာ ထံမှ တိုက်ရိုက်ပေးနေပါသည်။ ဦးဘချစ်တင်မှတဆင့် ကျွန်တော်တခါမှ ငွေ များမရဘူးပါ။ ဤကဲ့သို့ ငွေသွင်းနေကြောင်းကို ပ-ရ-သ-ဖ ရုံးကြွေးတရုံးလုံး သိကြပါသည်။" (*Vide* U Ba Thu's evidence).

It will therefore appear that since the appointment of a cashier, that is with effect from the 1st of February 1953, despite the instruction dated 18th May 1953 *vide* Exhibit-o issued by the Traffic Manager, the Superintendent of Botataung Traffic Office had not received any cash collected by the Inward Freight Clerk—that is to say, either from U Ba Tu or his successor U Maung Maung Tin. The (I.W.T.) Head Office was, apparently, quite satisfied with this procedure of collecting the cash direct from the cashier. In other words, for nearly two years either the Chief Accountant or the Traffic Manager or persons responsible for checking the daily freight receipts from the main office never questioned the procedure adopted by the Botatung Traffic Office, nor did anybody inquire into whether the Traffic Manager's instructions, if they were at all in force, had been complied with or not. It appears that the instructions were not followed, and the appellant as a Superintendent of the Botataung Traffic Office never received cash collected by the Inward Freight Clerk. It may also be noted that although responsible persons, namely, the General Manager, U Hmyin, and the Chief

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Accountant U Ba Thu, were aware of the infringement of the so called instructions issued by the Traffic Manager, yet it is an admitted fact that they never took any action whatsoever either as against the appellant, or as against the cashier U Maung Maung Tin at any time prior to the actual institution of the present case. Only on the death of U Maung Maung Tin, as observed above, did the authority wake up and try to enforce the instructions (Exhibit-o) drafted by the Traffic Manager. Even after the appellant's transfer and later when he was succeeded by U Nyun (PW 6) on the 21st March 1955, U Nyun never received cash freight receipts from the cashier. In that connection U Nyun deposes :

"တန်ဆာခင္ဗေများနှင့်ပတ်သက်၍ ကွန်တော်ဘာမှ မလုပ်ရပါ။ ကွန်တော်စာရင်းစစ်ခြင်း၊ ငွေကိုလက်ခံခြင်း၊ ငွေကိုအပ်ပေးခြင်း တစုံတရာမပြုလုပ်ရပါ။"

Thus, during the relevant period, cash collections by the cashier were kept in cashier's hand who dealt directly with the Head Office by remitting them straight to the Head Office, and that the Head Office was satisfied collecting cash from the hands of the cashier alone.

It is also observed that although according to the First Information Report the appellant was responsible for the shortage of K 39,149·70 pyas yet the three heads of charge under which he was tried and convicted set out that the appellant was responsible for cashier's delay in the surrendering of freights collected by him in respect of specific earnings from trips made by respective steamers and that the total sum so collected with consequential delays was said to amount to K 17,424·30 pyas although it is conceded that the same has been remitted to the Head Office.

The facts set out above are not seriously disputed

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by the appellant, except that he maintained that the instructions (Exhibit-o) said to have been issued by the Traffic Manager were not in force at the relevant time and that they were merely tentative. He further asserted that even if they were in force the Traffic Department in Botataung had never followed them since the appointment of a cashier and that therefore there was no entrustment of cash with him.

The trial Judge, however, did not accept these contentions. The trial Judge's view was to the effect that owing to appellant's non-observance of the instructions (Exhibit-o) cashier's daily collections had not been paid in regularly since 1953 thereby enabling the latter to temporarily misappropriate the said collections. For these laches on the part of the appellant, the trial Judge holds that the appellant was "vicariously" responsible. Here, I propose to quote the very words appearing in the lower Court's judgment:

> "As things stand the accused cannot be held directly responsible for the loss of K 39,149·70, for it is not proved that the losses occurred actually while he was Superintendent of Botataung. From all showing the losses seem to have occurred after he had demitted the office and during the time of his successor. But he may be vicariously held responsible for the losses inasmuch as it might be said that he did not collect the cash from the cashier or that he did not check the regisier as laid in the Circular Instructions Exhibit-o. In these circumstances, it appears to me that the accused is more concerned with that part of the complaint where it is alleged that on account of laches on the part of the accused, there had been no regularity in making over the daily collections since July 1953."

From these observations it seems clear that offence of "misconduct" with which the appellant stands convicted is one for laches in not collecting the cash from the cashier in contravention of the so

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called circular instructions containing in Exhibit-ဝ. Having found so, the trial Judge next proceeded to consider at a later stage of his judgment:

> " Whether the failure on the part of the accused to observe the instructions falls within the definition of misconduct as given in the proviso to section 4 (*1*) (*d*) of the Suppression of Corruption Act."

To this question, notwithstanding clear admissions of U Hmyin (General Manager) and U Ba Thu (Chief Accountant) that cash freight receipts were not collected from the appellant but from the cashier, the trial Judge readily answered that appellant's failure to follow the instructions (Exhibit-ဝ) constitutes connivance with the cashier in the commission of " misconduct " within the meaning of section 4 (*1*) (*d*) of the Suppression of Corruption Act read with the explanation. As regards the question whether there was entrustment of money with the appellant the trial Judge found in these terms:

> " It has been urged for the accused by his learned counsel that there was no entrustment of money with the accused. But by virtue of the duties cast on the accused in the circular instruction, it must be held that the accused had been entrusted with the money by the departmental instructions and consequently in law."

Therefore, so far as I can comprehend the judgment of the learned trial Judge, the appellant has been convicted of the offence of misconduct under section 4 (*1*) (*d*) of the Suppression of Corruption Act in respect of cash (public property) which he never collected but which was " deemed to have been entrusted to him ", (*vide* three heads of charge) because he failed to collect them from the cashier as enjoined by the departmental instructions containing

in Exhibit-o. In fact, the trial Judge himself, probably assailed by some doubts, conceded at the conclusion of his judgment that the offence committed by the appellant "*seems to be a technical one*".

In appeal, it is contended, firstly, that there was no proper sanction accorded in the prosecution of the appellant. Secondly, it is urged that no offence of misconduct has been made out against the appellant within the purview of section 4 (*1*) (*d*) of the Suppression of Corruption Act. A sustained argument has been advanced in this connection that no public property had been entrusted to the appellant with respect to which he could be held in law to have committed the offence of misconduct within the purview of that sub-section read with the explanation thereto. Thirdly, it is urged that the circular instructions Exhibit-o were merely tentative and had not been brought into force. Now, the relevant portion of section 4 (*1*) (*d*) of the Suppression of Corruption Act reads:

> "4 (*1*). A public servant is said to commit the offence of criminal misconduct in the discharge of his duties—
>
> (*d*) If he commits any fraud to the detriment of public interest or commits in respect of public property entrusted to him, either an act of misappropriation or misconduct."

Added to this sub-section is an explanation which is in Burmese. I have had occasion to point out as a member of the Bench in Criminal Reference No. 16 of 1956 that there are three classes of cases where an act or omission of a public servant can be said to come within the purview of sub-section 4 (*1*) (*d*) of the Suppression of Corruption Act, namely:

> (*a*) If he commits fraud to the detriment of public interest;

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(*b*) If he commits in respect of *public property entrusted to him* an act of misappropriation ; and

(*c*) If he commits in *respect of public property entrusted to him*, an act of misconduct, *i.e.* mismanagement, wrongful act or omission or for doing some thing which ought not to be done or not doing some thing which ought to be done in the given circumstances. (*Vide* Amendment Act No. XVI of 1951).

With regard to sanction it is contended that the sanction does not specifically set out the facts of the offence alleged against the appellant and that as such it was defective. Reliance was placed upon the decision of the Supreme Court in Miscellaneous Application No. 108 of 1956 (*Union of Burma* v. *U Kyaw Nu*). It was urged that inasmuch as the sanction Exhibit-c being defective in that there being no evidence as to whether the sanctioning authority was fully apprised of the entire aspect of the case, the prosecution of the appellant on that ground alone is illegal. I am not disposed to accept this contention. I have carefully examined the sanction Exhibit-c and I am fully satisfied that the sanctioning authority was fully aware of the facts and the nature of the offence with which the appellant has been charged. The sanction itself contains all the necessary particulars. I must hold that there is no substance in this submission, and I cannot allow it to prevail.

Now, I propose to deal with the third contention rather than the second contention. The third contention relates to the enforcement of instructions contained in Exhibit-o. There is, I am afraid, very unsatisfactory evidence in that regard. Mr. Gastin maintains that the instructions are already in force, whereas the Chief Accountant conceded that he was not aware of the existence of these instructions or

their enforcement prior to the case. He was made aware of it only after the case and he did not know from which date it came into force. No wonder therefore, he deposed to the fact that all cash collections from Botataung Traffic Office were not received from the appellant U Ba Chit Tin, but from the cashier all along. I have set out above the salient parts of the instructions and it is most surprising that although the Traffic Manager and the responsible heads of the Department in the Head Office are aware of the fact that freight collections from Botataung are received or otherwise collected by the Head Office directly from the cashier and not from U Ba Chit Tin (the appellant) no step of any kind was taken against anybody at all for enforcement of the instructions. Under these circumstances it is very difficult to conclude that these rules have become effective from a certain date. Moreover, the peculiar wordings in some parts of the rules indicate that they are being addressed to a particular person tentatively; and to me they do not give the impression that they have been finally approved and made effective from a certain date. Even assuming that they are effective, the most important question for determination is whether in the circumstances set out above, the appellant can be said to have been entrusted with the cash collections, namely, the cash freight. This brings me to the sheet-anchor of the appellant's contention. The relevant portion of the instruction merely says that the Superintendent of Botataung Traffic Office has overall responsibility for running Inward Section of the Depot; that he will receive the cash collected by the Inward Freight Clerk and check in the manner laid down in paragraph 6. But the instructions are completely silent as to what the Superintendent should do after the receipt of the

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cash from the cashier. Neither do they contain what the cashier should do with the cash he has collected. The Head Office (I.W.T.), for nearly two years, collected the cash not from the appellant but from the cashier direct, and can it therefore be said that the appellant has been entrusted at all material times with the cash in question?

I am of the view that under the circumstances the appellant cannot be said to have been entrusted with the cash collected by the cashier. In my view, the expression "in respect of public property entrusted to him" appearing in section 4 (*1*) (*d*), Suppression of Corruption Act means public property which is in the possession or under the control of the public servant in question. It has the same connotation as is to be found in section 405 of the Penal Code without the qualifying words "in any manner". Thus to bring home an offence under this sub-section, it is an essential condition that the public property either immoveable or moveable property or cash which is the subject matter of the offence must have been entrusted to the public servant. The word "entrusted" with reference to cash or money means that such cash or money has been transferred to the accused and remains in the possession or control of the accused *as a bailee in trust* for the complainant who holds the position of bailor. In *N. N. Burjorjee* v. *Emperor* (1), it was pointed out (Mya Bu and Baguley, JJ.) that the term "entrustment" with reference to section 405 of the Penal Code is not necessarily a term of law. It may have different implications in different contexts. In its most general signification, all it imports is the handing over of the possession for some purpose which may not imply the conferring of any proprietary

(1) A.I.R. (1935) Ran. p. 453.

right at all. This decision makes a reference to the House of Lords' case in *Lake* v. *Simmons* (1), wherein Viscount Haldane in considering the import of the word "entrusted" with reference to a Lloyds' insurance policy containing a clause exempting the insurer from liability in the case of "loss by theft or dishonesty committed by . . . . any customer or broker's customer in *respect of goods entrusted to them* by the assured" observed:

"It may have different implications and different contexts. In its most general significance all it imports is a handing over the possession of some purpose which may not imply the conferring of any proprietary right at all. I hand my umbrella to a servant to enable me to be free of it while I am taking off my coat. In a very general sense I entrust him with the umbrella. . . . . Entrusting may, of course, introduce a bailment, conferring some definite but restricted proprietary right. It is a question, then, of the contract entered into. And whether there is such a contract depends on more than a bare parting with possession."

In *Thakarsi* v. *King-Emperor* (2) the connotation of the word "entrusted" in section 405, Penal Code, was considered and it was pointed out that—

"In order that money is 'entrusted' to the accused person within the meaning of section 405, Indian Penal Code, it should be transferred to him in circumstances which show that, notwithstanding its delivery, the property in it continues to vest in the prosecutor and the money remains in the possession and control of *the accused as a bailee*, and in trust for the prosecutor as a bailor, to be restored to him or applied in accordance with his instructions."

Having regard to the meaning of the word "entrusted" as given in the aforesaid decisions, I am of the view that in order to make an accused person liable within the purview of section 4 *(1)* *(d)*,

(1) (1927) A.C. p. 487 at p. 499. (2) I.L.R. Nag. (1949) p. 620.

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Suppression of Corruption Act, the wordings of which are much more restricted than those appearing in section 405 of the Penal Code or those appearing in section 5 (*1*) (*c*) of the Prevention of Corruption Act (India Act 11 of 1947) there must be actual entrustment of the public property with the accused person, or in other words, the accused person concerned must have possession or control of the property, be it cash or be it other moveable property.

Now, from the facts and circumstances obtaining in the present case, it is abundantly clear that the appellant has never, at all material times, since the appointment of a cashier, received the cash, nor did he at all handle the same, though such failure on his part might be contrary to the instructions contained in Exhibit-o. How can he therefore be said to have committed the offence of misconduct with respect to the property which never came into his possession or control or which he had never received them ? There was thus, to my mind, no entrustment of cash so far as the appellant was concerned. Apparently, the trial Judge himself realized this difficult aspect and no wonder therefore, he has strained the relevant law by charging the appellant, not with the offence of misconduct in respect of property entrusted with the appellant, but with the offence of " misconduct " in respect of property *deemed to have been entrusted to him*. This is clearly not within the contemplation of section 4 (*1*) (*d*) of the Suppression of Corruption Act. There is thus considerable force in submission made by the appellant's counsel in that regard, and it must be allowed to prevail. Moreover, if a comparison is made with the relevant provision of the Indian Suppression of Corruption Act, 1947, above referred to, it would be seen that the scope and meaning of the word " entrusted " appearing in

section 5 (*l*) (*c*) of the said Indian Act in its proper context—is much wider than that appearing in section 4 (*l*) (*d*) of our Suppression of Corruption Act. We cannot widen the scope of a penal statute; and it is an elementary rule of construction that a penal statute must always be construed strictly. Therefore, I must hold that under the facts and circumstances obtaining in the case no offence under section 4 (*l*) (*d*) of the Suppression of Corruption Act has been made out against the appellant, and I must set aside the lower Court's conviction and sentence and acquit appellant so far as this case is concerned.

APPELLATE CIVIL.

Before U Ba Thoung, J.

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Oct. 26.

U PO THAUNG (APPLICANT)

v.

U KAUNG (RESPONDENT). *

Civil Procedure Code, s. 60 (1) (b)—Whether a photographer, an "Artisan", and the articles used for his photographic work are tools of artisan—Crucial time for claiming exemption from attachment.

The Respondent sued the applicant, a photographer for K 3,300 and obtained an order for attachment before judgment of the applicant's properties in the studio. Attachment was released on furnishing security by the applicant for the due production of the properties.

The suit was decreed and the applicant was called upon to produce the properties in terms of the security bond.

The applicant claimed exemption from attachment under s. 60 (*1*) (*b*), Civil Procedure Code on the ground that the properties are tools of artisan.

The Trial Court held—That a photographer is an artisan and that the properties for carrying on the studio work of a photographer are exempted from attachment, under s. 60 (*1*) (*b*), Civil Procedure Code, but rejected the application for failure to raise the objection at the time of the attachment.

Applicant filed an application in revision.

Held : A photographer is an artisan and the articles such as cameras, photo drying frames, enamel trays, camera stands, stoves for drying films and other paraphernalia essential for making photographs are tools of artisan within the meaning of s. 60 (*1*) (*b*), Civil Procedure Code.

Ahmed Sayeed v. *Karuz Zohra*, I.L.R. (1941) All. 278, followed.

Held further : The crucial time to raise the objection to the attachment was at the time of the attachment and not after the properties had been attached and a bond executed.

Application dismissed.

Tun Lwin for U Ba Nyunt for the applicant.

Kyaw Htoon for the respondent.

U BA THOUNG, J.—The respondent U Kaung sued the petitioner U Po Thaung in the City Civil

*Civil Revision No. 72 of 1953, against the order of the Second Judge, City Civil Court of Rangoon in Civil Execution No. 961 of 1952, dated the 22nd July 1953.

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Court of Rangoon, for arrears of rent amounting to Rs. 3,300; and before judgment, he applied for and obtained an order for attachment of the petitioner's properties at the latter's photo studio. The petitioner furnished security for production of the said properties when required by the Court and the attachment was released. After the decree was passed for Rs. 3,300 against the petitioner, the petitioner was asked to produce the properties in terms of the security bond executed by him. The petitioner filed an objection on the ground that the properties in his photo studio are tools of artisans and as such are exempted from attachment under the provision of section 60 (*b*) of the Civil Procedure Code. The learned Second Judge of the City Civil Court, after hearing the arguments, held that a photographer comes within the meaning of the word "artisan" and that as the properties in the petitioner's photo studio are mostly articles which are used for taking photographs, they are articles which are necessary for carrying on the studio work of a photographer and are therefore exempted from attachment under section 60 (*b*) of the Civil Procedure Code; but he held further that as the petitioner had not raised his objection at the time of attachment that his properties at the studio were not liable to attachment being exempted under section 60 (*b*) of the Civil Procedure Code, and as the petitioner had already furnished security for their production when called upon by Court, the petitioner's objection could not be accepted. The petitioner's objection was accordingly rejected, and he has filed this application in revision against that order. The respondent also has filed a cross objection stating that the lower Court has erred in holding that the petitioner is an "Artisan" within

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the meaning of section 60 (*b*) of the Civil Procedure Code and that his properties attached before judgment are " tools of artisan " and exempted from attachment.

I agree with the view taken by the learned judge of the trial Court that a photographer comes within the meaning of the word " artisan ", and I am fortified in my view by relying on the case of *Ahmed Sayeed* v. *Karuz Zohra* (1), where the learned Judge in holding that a tailor who uses a sewing machine is an " artisan " and the sewing machine is a " tool " of an artisan, within the meaning of section 60 (1) (*b*) of the Civil Procedure Code, has quoted with approval the definition of an artisan from Webster's New International Dictionary as, " One trained to manual dexterity in some mechanical art or trade ; a handicraftsman ; a mechanic." A photographer can be said to be a handicraftsman as he is trained in the art of making photographs and it is his part of the trade, and to carry on his trade he has to use cameras and other paraphernalia essential for making photographs. I therefore hold that a photographer is an " artisan " and the articles used for his photographic work in his studio such as cameras, photo drying frames, enamel trays, camera stands, stoves for drying films and other paraphernalia usually used in a photo studio for carrying on photographic work are tools of artisan.

The next point to be considered is whether the petitioner could raise an objection that his properties in the studio are exempted from attachment under section 60 (*b*) of the Civil Procedure Code after these properties had been attached, and after he had executed a bond and furnished security undertaking to produce these properties in Court when called

(1) I.L.R. (1941) All. 278.

upon to do so. This objection should have been made at the time of attachment of the properties when it can be decided whether the properties were liable to attachment or were exempted from the attachment under section 60 (*b*) of the Civil Procedure Code and that is the crucial time to make an objection. No authority could be cited by the learned counsel for the appellant that such an objection could be made even after the properties had been attached. In the present case, the petitioner had already executed a bond and furnished security to produce the attached properties when required by the Court, and the object of executing the bond and furnishing security was to meet the decretal amount of the decree holder.

For the reasons stated this application is dismissed with costs. Advocate's fees fixed at K 51. The cross objection of the respondent is also dismissed, but there will be no order as to costs in the cross objection.

APPELLATE CRIMINAL.

Before U Aung Khine, J.

H.C. 1956

Oct. 11.

U TUN YEE (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

Suppression of Corruption Act, 1948, s. 4 (1) (c)/4 (2)—S. 133, Evidence Act—A police decoy is not an accomplice.

Held : An accomplice is a guilty associate in crime, but a trap witness is not an accomplice but merely a police decoy.

Nyun Han, Advocate, for the appellant.

Tin Maung, Advocate, for the respondent.

U AUNG KHINE, J.—This appeal arises from Criminal Regular Trial No. 33 of 1955 in the Court of the Special Judge (1) (SIAB & BSI Act) Rangoon in which the appellant U Tun Yi, Additional Commercial Tax Officer, was held guilty under section 4 (*1*) (*c*)/4 (*2*) of the Suppression of Corruption Act, 1948, and sentenced to suffer one year's rigorous imprisonment.

The case against the appellant was that he on or about the 21st day of July 1955, while holding the post of an Additional Commercial Tax Officer, Rangoon, committed criminal misconduct by obtaining for himself an illegal gratification of K 400 from U Tin Saing, the complainant in the case.

U Tin Saing is the uncle of one Mimi Yee, the owner of Diamond Mineral Water Factory. Pending before the appellant were sales proceedings against Mimi Yee for the years 1950 and 1951. Notice was issued to Mimi Yee to appear before the appellant

* Criminal Appeal No. 276 of 1956, appeal from the order of the Special Judge (1) (B.S.I.A. & S.I.A.B.) Act of U Hla Gyaw of Rangoon, dated the 2nd day of May 1956, passed in Criminal Regular Trial No. 23 of 1955.

in person or by an agent and to produce or cause to be produced any evidence in support of the returns either submitted or to be submitted later. U Tin Saing appeared before the appellant together with the Exhibit B, Daily Sales Register. The appellant told U Tin Saing to leave the Exhibit B register and to send Aboor Baka, the husband of the owner of the factory. The appellant himself visited the factory and met Aboor Baka who promised to call on him at his office. However, it was U Tin Saing, who went to see the appellant again in office and on this occasion U Tin Saing told the appellant that vouchers and account books for the year 1950-51 were not available. At this the appellant said that there could be an assessment of K 18,000 for two years. He further told U Tin Saing to pay K 1,000 if lenient assessment was desired. Two days later, U Tin Saing again received another notice, Exhibit C, and also Exhibit D to produce all the necessary papers. U Tin Saing went to see the appellant in his office and the appellant told him again to send Aboor Baka. When informed by U Tin Saing that Aboor Baka was out on tour he told U Tin Saing to send Aboor Baka to him as soon as he returned.

On 27th June 1955 Aboor Baka went and saw the appellant in his office and the appellant did not hide the fact that he wanted K 1,000 from him and that in consideration thereof the assessment would be made to his liking. Aboor Baka beat down the demand and finally the appellant agreed to accept K 400. After this Aboor Baka went and saw his lawyer U Hla Sein and after some conversation U Hla Sein suggested to him that if he was not satisfied with what had taken place he could make a report to the B.S.I.

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Aboor Baka had previously told the appellant that he would come with the money on 5th of July 1955 but on the appointed day he did not go to see the appellant. However, the appellant went to the mineral water factory and saw Aboor Baka and wanted to know why he did not turn up as promised. Thereupon Aboor Baka pacified the appellant by saying that he would call on him a few days later. As Aboor Baka did not go and see the appellant within the next few days the latter called on Aboor Baka again on 14th July 1955 and Aboor Baka told him that his uncle would call at the appellant's office on the 15th July 1955. On that day U Tin Saing and Aboor Baka went to the B.S.I. and there made a report about the demand made by the appellant.

At the suggestion of the B.S.I. Officers U Tin Saing went to the appellant and told him that he would be bringing the money either on the 21st or 22nd of July 1955. On the 21st July 1955 U Tin Saing went to the B.S.I. office with 3, Hundred Kyat notes and 10, Ten Kyat notes, which he made over to one of the officers at the B.S.I. office. These currency notes were then taken to U Hla Baw (PW 3), the Deputy Director, Scientific Bureau. He treated these notes with luminous paint and then noted down their numbers. After that the notes were given back to U Tin Saing.

Together with some of the officers of the B.S.I. he went to the office of the appellant. He alone went to the appellant and it was arranged that after money had been paid he should signal out to B.S.I. officers of the fact. U Tin Saing went to the appellant and he told the latter that he had brought the money and made over the same. The money was taken by the appellant and put into his trouser

pocket. Then a signal was given and the B.S.I. Officers with witnesses came in. The B.S.I. Officers told the appellant who they were and informed him that they wanted to make a search. The appellant then said that there was no need to search and admitted that he got the money. So saying, he produced the money from his trouser pocket. They were the very notes made over by U Tin Saing to him earlier. After the production of the currency notes the Search List, Exhibit E, was prepared and it was signed by the witnesses U Lone Pe (PW 8) and U Yin Shwe (PW 7), the search witnesses taken to the place by the B.S.I. Officers.

It is alleged by the prosecution that the appellant himself wrote in his own hand on Exhibit E search list that the money seized from him was the money which he had borrowed. After due investigation of the case the appellant was sent up to Court and on the materials available, as stated, he was found guilty and sentenced.

Now, in this appeal it is contended that the statements of U Tin Saing (PW 1) and Aboor Baka (PW 2) should not have been accepted without corroboration in material particulars on the ground that they were accomplices. Under section 133 of the Evidence Act, an accomplice is a competent witness against the accused person and a conviction based on his testimony alone is not illegal. But as a rule of prudence, corroboration of his statement is looked for in all cases before a conviction is entered. However, it is for consideration whether these two witnesses are to be treated as accomplices or not. Strictly speaking, an accomplice is a guilty associate in crime. In this case, no offence has yet been committed when U Tin Saing went and made a report about the demand of a bribe made by the

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appellant. In order to set a trap against the appellant, U Tin Saing was sent out with the money to go and see the appellant. As a matter of fact, he had not committed any crime and he was merely acting as a decoy. Therefore, he cannot be treated as an accomplice. The same reasoning may be applied also in the case of Aboor Baka. Aboor Baka did not take part in handing over the money. He was dissatisfied with the conduct of the appellant and as such he made a complaint regarding the same to his lawyer U Hla Sein. At the instance of U Hla Sein he and U Tin Saing went and made a report about the case to the B.S.I. Officers.

It is also contended that U Yin Shwe (PW 7) was not a competent search witness because of the fact that he is a Block Elder and therefore the search conducted by the B.S.I. Officers must be considered illegal. I am not prepared to accept this contention. U Yin Shwe and U Lone Pe, the other search witness, were taken away from the house where a wedding ceremony was taking place. Apparently, the officers who went to call them did not know that U Yin Shwe was a Block Elder. The fact of his being a Block Elder should not make his evidence unacceptable. On the other hand, Block Elders must be considered respectable people. Unless they are respected in the locality the authorities concerned naturally would not appoint them so. Besides the B.S.I. Officers have very little to do with Block Elders in their work.

Now, these search witnesses U Yin Shwe and U Lone Pe clearly stated that the appellant produced the money from his trouser pocket. And there is no reason why these two witnesses should perjure themselves as they have no interest whatsoever in the outcome of the case. The appellant stated that

it was true U Tin Saing offered the money but he refused to accept the same and he pushed the notes back towards U Tin Saing who was seated in front of him, and it was at this juncture that the B.S.I. Officers came in. The appellant's statements run counter with the version as given by U Tin Saing, the two search witnesses and U Pa Kyin (PW 9) who went along with the search witnesses to the office of the appellant. The weight of evidence therefore is certainly against the appellant.

The prosecution alleges that on the search list, Exhibit E, the appellant wrote in Burmese a sentence, saying that the money produced by him was the money which he had borrowed. The appellant denied that he ever wrote anything on Exhibit E. U Hla Baw, the Deputy Director, Scientific Bureau, stated that he had made a comparison between the handwritings on Exhibit E alleged by the prosecution to have been written by the appellant and the specimen handwriting of the appellant taken in Court, Exhibit M, and he was of the opinion that the writings on the two exhibits were written by one and the same person. U Hla Baw has vast experience in this line and has been a handwriting expert since 1933. A mere opinion given by him will most probably remain an opinion in the absence of any other evidence. But here, there is definite evidence to show that the writings on Exhibit E was written by the appellant and the testimony of U Hla Baw tends to show that the evidence of other witnesses in this respect is true.

After carefully studying the case in all its bearings, I am of the opinion that the prosecution has proved its case beyond doubt. In the result, the appeal is dismissed.

APPELLATE CRIMINAL.

Before U San Maung, J.

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Feb. 4.

UNION OF BURMA (APPLICANT)

v.

(1) MAUNG PYO THAUNG (*alias*) MAUNG THAUNG AND (2) MAUNG MYA AUNG (RESPONDENTS).*

Criminal Procedure Code—Order under ss. 562 (1) and 562 (1) (A)—Not a sentence—Four orders under ss. 562 (1) and 562 (I-A), Criminal Procedure Code passed in seriatim *on the same day in four trials against the Respondents—Legality of such orders.*

The 1st Respondent was convicted under s. 379, Penal Code in each of four trials on the same day and was released on probation of good conduct in all the four cases under s. 562, (1) Criminal Procedure Code. The 2nd Respondent was convicted under s. 411, Penal Code in each of two cases and released after due admonition under s. 562 (1) (A), Criminal Procedure Code.

Held: An order either under s. 562 (1) or 562 (I-A) of the Criminal Procedure Code is not a sentence.

Held further: When orders were passed in the 2nd, 3rd and 4th cases the 1st Respondent was no longer a person without a conviction having been previously convicted of an offence in the first case.

Similarly the 2nd Respondent was no longer a person without a previous conviction, having been previously convicted in the first case.

Order of the Trial Magistrate set aside and in lieu thereof, the 1st Respondent was sentenced to twenty lashes of whipping and the second Respondent to a fine of K 50 or in default one month's R.I. under s. 562 (3), Criminal Procedure Code.

Ba Pe (Government Advocate) for the applicant.

R. Singh, Advocate, for the respondents.

U SAN MAUNG, J.—These proceedings in revision are the result of the recommendation of the learned District Magistrate of Mandalay in his

* Criminal Revision No. 7-B, 8-B, 9-B and 10-B of 1956. Review of the order of the Western Subdivisional Magistrate, Mandalay, dated the 28th July 1956, passed in Criminal Regular Trial Nos. 167, 168, 169 and 170 of 1956.

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U SAN MAUNG, J.

Criminal Revision Case No. 50 of 1956 for the retrial of Criminal Regular Trials No. 167, 168, 169 and 170 of the Western Subdivisional Magistrate, Mandalay.

In Criminal Regular Trial No. 167 of 1955, the respondent Pyo Thaung (*alias*) Maung Thaung was convicted of an offence punishable under section 379 of the Penal Code for the theft of a bicycle worth about K 300 while it was kept locked outside Taingchit School, Mandalay on the 11th of July 1955. The respondent pleaded guilty to the charge and the learned trial Magistrate by his order dated 28th of July 1956 directed that the respondent be released on probation of good conduct on his entering into a bond with two sureties for K 500 to be of good behaviour for a period of one year.

In Criminal Regular Trial No. 168 of 1955, the respondents Maung Pyo Thaung *alias* Maung Thaung and Maung Mya Aung were convicted under section 379 of the Penal Code and section 411 of the Penal Code respectively; Maung Pyo Thaung on his plea of guilty, Maung Mya Aung on rejection of his defence that he had pledged the cycle for Maung Pyo Thaung thinking that it belonged to Maung Pyo Thaung. The property involved in this case was theft of a cycle worth K 150 and it was stolen on the 27th of July 1955 while it was kept locked outside Taingchit School, Mandalay. The learned trial Magistrate by his order dated the 28th of July 1956, directed that the respondent Maung Pyo Thaung be released on probation of good conduct on his entering into a bond with two sureties for K 500 to be of good behaviour for a period of one year. As regards the respondent Maung Mya Aung, he was released after due admonition as provided for in section 562 (1) (A) of the Criminal Procedure Code.

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U SAN MAUNG, J.

In Criminal Regular Trial No. 169 of 1955, respondent Maung Pyo Thaung (*alias*) Maung Thaung, was convicted of an offence punishable under section 379 of the Penal Code for the theft of a bicycle worth K 200 while it was kept locked outside Taingchit School, Mandalay on the 11th of September 1955. The respondent pleaded guilty to the charge and the learned trial Magistrate, by his order dated the 28th of July 1956 directed that the respondent be released on probation of good conduct on his entering into a bond with two sureties for K 500 to be of good behaviour for a period of one year.

In Criminal Regular Trial No. 170 of 1955 the respondents Maung Pyo Thaung (*alias*) Maung Thaung and Maung Mya Aung, were convicted under section 379 of the Penal Code and section 411 of the Penal Code respectively; Maung Pyo Thaung on his plea of guilty Maung Mya Aung on the rejection of a defence that he had pledged the cycle for Maung Pyo Thaung not knowing that it was stolen property. The property involved in this case was theft of a cycle worth K 200 and it was stolen on the 6th of September 1955 while it was kept locked outside Taingchit School, Mandalay. The learned Magistrate by his order dated the 28th of July 1956, directed that the respondent Maung Pyo Thaung be released on probation of good conduct on his entering into a bond with two sureties for K 500 and to be of good behaviour for a period of one year. As regards the respondent Maung Mya Aung, he was released after due admonition as provided for in section 562 (1) (A) of the Criminal Procedure Code.

The learned District Magistrate who had submitted these proceedings to this Court, thought that the learned trial Magistrate had passed concurrent sentences upon Maung Pyo Thaung (*alias*) Maung

Thaung in respect of his convictions under section 379 of the Penal Code in four cases abovementioned, and concurrent sentences upon Maung Mya Aung in respect of the convictions under section 411 of the Penal Code in two of these four cases. However, the phrase "instead of sentencing him at once to any punishment," occurring in both section 562 (1) and section 562 (1) (A) of the Criminal Procedure Code makes it clear that the order for the release of an accused person on probation of good conduct or after due admonition is not a sentence of punishment.

However, the learned trial Magistrate was technically wrong in having released Maung Pyo Thaung (*alias*) Maung Thaung on probation of good conduct in Criminal Regular Trials No. 168, 169 and 170, and in having released Maung Mya Aung after due admonition in Criminal Regular Trial No. 170 of 1955. Even although order was passed on the same day against Maung Pyo Thaung (*alias*) Maung Thaung in all the four cases in which he was involved, on the assumption that the cases were taken up *seriatim* when orders were passed in Criminal Regular Trials No. 168, 169 and 170, respondent Maung Pyo Thaung (*alias*) Maung Thaung was no longer a person without a previous conviction, having been previously convicted of an offence under section 379 of Penal Code in Criminal Regular Trial No. 167 of 1956. Similarly when order was passed against Maung Mya Aung in Criminal Regular Trial No. 170 of 1955, he was no longer a person without a previous conviction, having been previously convicted of an offence under section 411 of the Criminal Procedure Code in Criminal Regular Trial No. 168 of 1955.

The question now for consideration is whether this Court should in exercise of the powers conferred upon it by section 562 (3) Criminal Procedure Code

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interfere with the order of the learned trial Magistrate in the above cases.

Maung Pyo Thaung (*alias*) Maung Thaung has been proved to have committed theft of bicycles on four occasions during the period of about 14 months. He is about 22 years of age and was old enough to know better. Therefore I consider that he should be punished in at least one of the above cases. Therefore, for his conviction under section 379 of the Penal Code in Criminal Regular Trial No. 170 of 1955 I would set aside in revision the order of the learned trial Magistrate releasing him on probation of good conduct and direct that he be sentenced to twenty lashes of whipping.

As for Maung Mya Aung who is about 19 years of age he had knowingly assisted Maung Pyo Thaung by pledging the stolen bicycles on two occasions. He should therefore be punished although the punishment need not be too severe. Therefore, for his conviction under section 411 of the Penal Code in Criminal Regular Trial No. 170 of 1955, I would set aside the order releasing him on due admonition and direct that he should pay a fine of K 50 or in default suffer one month's rigorous imprisonment.

The orders passed by the learned trial Magistrate in Criminal Regular Trials No. 168 and 169 although technically illegal, need no interference.

APPELLATE CRIMINAL.

Before U Chan Tun Aung, Chief Justice.

W. A. RAYMOND (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

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Nov. 22.

Suppression of Corruption Act, 1948—S. 4 (1) (c) read with s. 4 (2)—Original Charge under s. 4 (1) (d) read with s. 4 (2)—Alteration to one under s. 4 (1) (c) / 4 (2) under s. 237, Criminal Procedure Code at the time of pronouncement of judgment—Non-Compliance with ss. 227 (2) and 228, Criminal Procedure Code, neither failure of justice nor prejudicial to accused—Ss. 236 and 237, Criminal Procedure Code, their application—Extension of Validity of sanction accorded in respect of one offence to cover another offence under an altered Charge—S. 230, Criminal Procedure Code—Ingredients of an offence under s. 4 (1) (d) of the Suppression of Corruption Act—S. 423 (1) (b), Criminal Procedure Code.

The appellant was sent up for trial before the Special Judge (11), (S.I.A. B. & B.S.I. Act), Rangoon under s. 4 *(1) (d)/4 (2)* of the Suppression of Corruption Act after obtaining the necessary sanction to prosecute him.

The trial Court, at the time of the delivery of judgment, purporting to act under s. 237, Criminal Procedure Code altered the charge from one under s. 4 *(1) (d)* to one under s. 4 *(1) (c)*, without complying with the provisions of s. 227 (2) and 228 of the Criminal Procedure Code and sentenced him to one year's R.I.

Held : The sanction accorded in respect of an offence under s. 4 *(1) (d)* of the Suppression of Corruption Act covered the altered charge under s. 4 *(1) (c)*, and s. 230, Criminal Procedure Code is a complete answer inasmuch as sanction has been already accorded for a prosecution on the same facts as those on which the new or altered charge is founded, and there is no necessity for obtaining a fresh sanction to cover the offence under the altered charge.

S. 237 of the Criminal Procedure Code is supplementary to s. 236. The provisions of s. 237 are applied only in case which is governed by s. 236. The unframed charge for which an accused can be convicted under s. 237 must be with respect to an offence for which charge could have been framed against him under s. 236. Only after framing a charge in the alternative as contemplated in s. 236, and only when it appears in evidence in the course of the trial that the accused is found to have committed a different offence can he be convicted for that offence, although he was not charged with it.

Held also: That unless the non-compliance with the provisions of s. 227 (2) and s. 228 of the Criminal Procedure Code is prejudicial to the appellant or

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* Criminal Appeal No. 114 of 1956, appeal from the order of the Special Judge (11) (S.I.A.B. & B.S.I. Act) of Rangoon, dated the 2nd day of March 1956, passed in Criminal Regular Trial No. 3 of 1954.

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have occasioned a failure of justice, the defects or irregularities in the framing of a charge are curable under s. 437, Criminal Procedure Code.

An Appellate Court has ample power under s. 423 (*1*) (*b*) to alter the finding of the trial Court, while maintaining the sentence.

The ingredients of an offence under s. 4 (*1*) (*d*) of the Suppression of Corruption Act is misconduct in the nature of—

(1) Fraud to the detriment of public interest, or

(2) Misconduct in respect of public property entrusted to the accused which may be either (*a*) An act of mis appropriation, or

(*b*) misconduct as set out in the explanation added thereto.

CRIMINAL REFERENCE No. 16 OF 1956.

The Union of Burma v. *U Nyo*, referred to.

Appellant acquitted, as the prosecution failed to establish its case beyond reasonable doubt.

Kyaw Min, Advocate, for the appellant.

Tin Maung (Government Advocate) for the respondent.

U CHAN TUN AUNG, C.J.—The appellant W. A. Raymond was at the material time Personal Assistant to the Director of Telecommunications and he has been found guilty of an offence under section 4 (*1*) (*c*) read with section 4 (*2*) of the Suppression of Corruption Act, 1948, and sentenced to undergo one year's rigorous imprisonment by the Special Judge (II), (SIAB & BSI Act) Rangoon. The prosecution was launched at the instance of the Bureau of Special Investigation on the 15th February 1954, and not until the 2nd of March 1956, after a very protracted trial, was the judgment convicting the appellant delivered. The bulk of the prosecution evidence and also part of the examination of the appellant, (as accused) was recorded by the then Special Judge, U Ba Swe, who was next succeeded by the present Special Judge, U Pe Than. U Pe Than could examine some defence witnesses and was able to render judgment only on the 2nd March 1956.

Originally, the appellant was charged under section 4 (*1*) (*d*) read with section 4 (*2*) of the Suppression of Corruption Act and he was called upon to plead on that charge. On his plea of not guilty he was allowed to enter his defence; and having chosen to give evidence, he cited some defence witnesses the last of whom was examined on the 22nd December 1955. But it appears that the learned Special Judge, who succeeded U Ba Swe when writing the judgment from which the present appeal has arisen, thought that the charge framed by U Ba Swe was not in accord with the facts and circumstances obtaining in the case, and without reading out and explaining to the appellant the altered charge, as contemplated in section 227 (2) of the Criminal Procedure Code, nor adopting, in his discretion, any of the steps as laid down in section 228 of the Criminal Procedure Code, and purporting to act under the provisions of section 237 of the Criminal Procedure Code, altered the charge from one under section 4 (*1*) (*d*) to one under section 4 (*1*) (*c*) of the Suppression of Corruption Act, and entered the conviction of the appellant under the latter charge. The concluding portion of his judgment is most remarkable in that it indicates how he has misconceived the relevant procedural law laid down in the Code. In my view, the learned trial Judge has clearly misapplied the provision of sections 236 and 237 of the Criminal Procedure Code. Section 236 of the Criminal Procedure Code enables the trial Court, where, if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute the offence, to charge the accused with having committed all or any of such offences, or in the alternative of having committed some one of the said

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offences; whereas section 237 enables the trial Court where, if in the case mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of section 236, to convict the accused person for the offence which he is shown to have committed, although he was not charged with it. If these two sections are read together, it is quite clear that one provides the framing of an alternative charge when certain acts or omissions are of such a nature that it is doubtful which of the several offences the facts which can be proved constitute an offence, and the other, if on proceeding with the trial of such offence, it appears in the evidence that an altogether different offence has been committed, then the Court is competent to convict the accused for such an offence *although he has not been charged with that offence.* However, such is not the case in the present appeal. In that connection the learned Special Judge's remarks may be reproduced :

> " The charge as framed appears to me not in full conformity with the facts obtaining in the case. The loss sustained by the Government became a windfall to the Oceanic Co. While retaining the four sub-headings, it seems to me that the last para. of the charge should be altered. The learned Advocate appearing for the prosecution suggested the alteration of the charge in his arguments. On the facts adduced by the prosecution, there is no proof of fraud to the detriment of public interest or the commission of an act of misappropriation or of misconduct in respect of public property entrusted to him. The more appropriate charge would be one under S. 4 (*1*) (*c*) read with S. 4 (*2*) of the Suppression of Corruption Act, and the last para. of the altered charge would read : ' In consequenee of your abuse of office as a public servant the Oceanic Trading Co. was able to obtain a pecuniary advantage to the tune of K 3,28,447·90 from public property.' Whether such alteration is feasible or not may be answered by

looking to S. 237, Criminal Procedure Code which reads: 'If, in the case mentioned in section 236, the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.' An offence under S. 4 (*1*) (*c*) and an offence under S. 4 (*1*) (*d*) of the Suppression of Corruption Act are slightly different from each other. By altering the charge and convicting the accused under S. 4 (*1*) (*c*), it appears to me that he would not be prejudiced in his defence or that it would result in failure of justice, as the two sections are under the same act, and deal with the same matter more or less. Accordingly the charge is altered to one under S. 4 (*1*) (*c*) of the Suppression of Corruption Act with the above-mentioned modifications in the last para. of the charge."

It will thus be seen, from the above remarks that the learned Special Judge was clearly wrong in looking into section 237 of the Criminal Procedure Code to justify the alteration of the charge *at the time of the delivery of the judgment*. I need hardly point out that section 237 of the Criminal Procedure Code is supplementary to section 236. The provisions of section 237 are applied only in case which is governed by section 236. The unframed charge for which an accused can be convicted under section 237 must be with respect to an offence for which charge could have been framed against him under section 236. Only after framing a charge in the alternative as contemplated in section 236, and only when it appears in evidence in the course of the trial that the accused is found to have committed a different offence can he be convicted for that offence, although he was not charged with it. For the proper appreciation of the prosecution case, I reproduce hereunder the original charge framed against the appellant :

"That you between 28-11-52 and 29-5-53 at Rangoon in your capacity as the Personal Assistant of the

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Director of Telecommunications did the following act, which you should not have done :

(1) No tenders were called for or that you failed to point out to the Director of Telecommunications that tenders should be called for in purchasing the wires in question, in view of the warning given by the Controller of Posts and Telecommunications in his letter (၈) and the express verbal order of U Ba Cho (PW 2);

(2) Yet you stated, in your letter (၀-၁၆ and ၈၀) in reply to the letters exhibits (၀-၁၅ and ၈) issued by the Controller of Posts and Telecommunications, that tenders were called for;

(3) You refused or you failed to point out to the Director of Telecommunications to accept the lowest quotations of Bawa and Company or of N. L. Muhury and Company, without sufficient cause (*vide* Exhibit ၀-၂၀) ;

(4) You also made a false statement in Exhibit (၀-၂၀) that the wires supplied by the Oceanic Company, the exhibits in this case, conformed to the specifications in spite of the fact that they were in torn bits of short length.

In consequence of your misconduct, as stated above, the Superintendent of Stores, Telecoms Department had or was able to accept such torn bits of wire, entailing a loss about K 3,28,447·90 to the Union Government of Burma and thereby you have committed an offence of criminal misconduct, punishable under S. 4 (*1*) (*d*) read with S. 4 (*2*) of the Suppression of Corruption Act."

However, it is now conceded by the learned Government Advocate appearing for the respondent that the learned trial Judge was in error in altering the charge to one under section 4 (*1*) (*c*) of the Suppression of Corruption Act and entering a conviction thereunder without complying with the provisions of section 227 (2) and 228 of the Criminal Procedure Code; but he maintains that by such failure, neither failure of justice has been occasioned, nor the

appellant materially prejudiced in his defence. Incidentally with this, the question of validity of sanction to prosecute the appellant also arose for consideration. The appellant, being a public servant, the Government sanction to prosecute him (Exhibit ə) accorded in compliance with the provisions of section 6 (*b*) of the Suppression of Corruption Act, is only in respect of the offence under section 4 (*1*) (*d*) of the Suppression of Corruption Act. The question then is whether the trial and conviction of the appellant on an altered charge, namely, a charge under section 4 (*1*) (*c*) of the Suppression of Corruption Act, is valid, and can it be said to cover the new charge under section 4 (*1*) (*c*) of the Suppression of Corruption Act?

As regards the first question concerning the non-compliance with the provisions of section 227 (2) and section 228 of the Criminal Procedure Code, the learned Counsel appearing for the appellant has very properly conceded that in the stand the appellant is now taking, he would not seriously question this procedural irregularity, inasmuch as the appellant's defence is a total denial of having committed the offence of misconduct or having been concerned in it with any person; and also in view of the fact that the defence which he has set up to meet the charge under section 4 (*1*) (*d*), as originally framed, will in any event be the same as he would have set up in rebuttal to a charge under section 4 (*1*) (*c*) of the Suppression of Corruption Act. He submits that no failure of justice has been occasioned by the irregularity committed by the learned trial Judge in the matter of charge. He further maintains that the trial being a protracted one, and since he came to know about the alteration of the charge only when the judgment was pronounced, he thought it would serve no useful

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purpose to agitate the matter before the trial Court and that it would be well advised to challenge the sustainability of the conviction under either section 4 (*1*) (*d*) or section 4 (*1*) (*c*) of the Suppression of Corruption Act in the appellate Court. I think, the learned appellant's Counsel has taken a correct stand. The defects or irregularities in the framing of a charge are curable under the provisions of section 437 of the Criminal Procedure Code ; and since the appellant has not been prejudiced in any way, nor has there been any failure of justice, I need not therefore dwell at length on this question.

As regards validity of sanction accorded, the answer is to be found in the latter part of section 230 of the Criminal Procedure Code which lays down that unless sanction has been already accorded for a prosecution on the same facts as those on which the new or altered charge is founded, there is no necessity for obtaining a fresh sanction to cover the offence under the altered charge.

It is clear in this case, and the appellant has not seriously contested it, that the facts and circumstances which led to the giving of the sanction under section 4 (*1*) (*d*) are also the same as those on which the conviction of the appellant under section 4 (*1*) (*c*) is based. Therefore, the provision of section 230 is a complete answer to the question as to the validity or otherwise of the sanction accorded in the prosecution of the appellant.

Having disposed of these preliminary questions, I now propose to set out briefly the facts and circumstances that led to the prosecution of the appellant, as could be gathered from the trial Court proceedings.

The appellant was a Personal Assistant to the Director of Telecommunications U Ba Cho, who

figured as Prosecution Witness No. 2. This directorate of Telecommunications as the name would show is responsible for the proper running of telecommunications and telegraph lines throughout the Union of Burma and, as such, they were entrusted *inter alia* with the work of installation, maintenance and running of the telegraph lines. Albeit charged with these onerous duties as a major Government Department of which U Ba Cho (PW 2) is the head, yet it appears that the Department has no Office Manual setting out detailed distribution of works among its administrative officers. It is an admitted fact that the appellant, who was at the relevant time employed as Personal Assistant to the Director, has no specific duties assigned to him for which he had to assume complete responsibilities. While in this state of affairs, the Department was in pressing need of telegraph copper wires to restore the telecommunications along the railway line as part of the Pyidawtha Scheme. It was in connection with the purchase of some copper wires for the said purpose that the appellant has been prosecuted and convicted as aforesaid. Substantial part of the prosecution case rested on documentary evidence, and quite a many of them has been filed before the trial Court rather haphazardly. From a maze of these documents both for the prosecution and for the defence, I have been able to gather, with great difficulty, the events that led to the purchase of the copper wires in question, and how the prosecution tried to establish on the basis of these documents that the appellant was guilty of misconduct within the meaning of section 4 (*1*) (*c*) of the Suppression of Corruption Act.

It appears that as far back as 22nd November 1952 the Director of Telecommunications, U Ba Cho, had asked his two assistants U Sein Ban,

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Superintendent of Telecoms Stores and U Myo Thaw, who was then his Personal Assistant, to go and examine copper wire held by one private owner Chit Oo & Co. It may, however, be noted that the expression "wire" in question was "Cu weld wires". The fact that U Ba Cho was already in touch with the prospective sellers of the copper weld wires was amply borne out by the evidence of U Myo Thaw (PW 4), because he says in his evidence that it was at his (U Ba Cho's) instructions that he and U Sein Ban had to go and inspect the copper weld wires in Chit Oo & Co. He also avers that he saw with U Ba Cho in U Ba Cho's Office room a person whom he thought to be from Chit Oo & Co. to whom U Ba Cho introduced him, and that this was confirmed by the fact that, later on, U Chit Oo himself took U Myo Thaw and the rest of the inspection team to a place in Tamwe Quarter where the copper weld wires were stored in a godown. Furthermore, Exhibit (o-ɔ) the inspection notes by U Sein Ban and U Myo Thaw also supports the fact that U Ba Cho was already in contact with some prospective sellers of the copper weld wires, inasmuch as, the first line of the report specifically sets out the fact that U Ba Cho himself had verbally instructed them to inspect the copper weld wires held by private owners U Chit Oo & Co. No doubt, as stated above, the necessity for procurement of the copper weld wires must have been felt earlier, and to that effect U Ba Cho has personally deposed. In any event, this inspection team which went and inspected earlier the copper weld wires held by U Chit Oo & Co. indicates that U Ba Cho must have already contacted U Chit Oo & Co. or their representative, who must have told him that they held a stock of those copper weld wires.

Now, according to the "Line Construction Code" misdescribed by the learned trial Judge as "Line Instruction Code", which guides the technical side of the telegraph lines lays down *inter alia* the specifications of generally approved list of copper weld wires for the departmental use in paragraphs 269 to 272. Under these provisions the department's requirement appears to be as regards gauge of the copper weld wire, either *8 S.W.G.* or *10 S.W.G.* It is significant that acting on the instruction of U Ba Cho himself, when they inspected the stock held by U Chit Oo & Co. the inspection team found that the size of the copper weld wire in question was 12 S.W.G. I need not speak about the other specifications, but suffice to say that U Ba Cho himself knew all about them when the report was submitted to him, because he initialled the report affixing the date 22/11. He must have also known by then that U Chit Oo & Co. held only 12 S.W.G. copper weld wire and not either 8 S.W.G. or 10 S.W.G. It will be also observed from that report that the inspection team could not undertake the test regarding transmission equivalent due to limited testing facilities. However, the report reveals that the copper weld wires in question were originally bought over from the American Army and brought down from Myitkyina and it also presumes that the wires were for "Carrier Working". The report also says that from the observations made and from results of the test the wires could well be utilized for what was necessary under the Pyidawtha programme. As regards the gauge, it says that the particular gauges which the Telecommunications Department requires appears to be uncertain and might not cope with the immediate work as the rehabilitation programmes were being put into effect. Further, the report added that the

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stock held by the department being low and, in the circumstances set out in the report, it would recommend procurement of particular copper weld wire from local sources. The details of this report have been obviously seen by U Ba Cho himself as he has initialled it. According to U Ba Cho he instructed the appellant verbally to call for tenders from the approved list of tenderers registered with the Department. But according to the appellant, U Ba Cho instructed him to call for quotations as was wont to do by the Department when doing local purchases, there being an approved list of tenderers desiring to do business with the Department. Accordingly, cyclostyled letters calling for quotation under the subject "Enquiry" were sent out to various tenderers, including Messrs. Oceanic Trading Co., U Chit Oo & Co., Messrs. Chakrabarty Bros. and several others. The approved letter-form calling for so-call tenders as issued by the Department is filed as Exhibit (o-ϱ) bearing the date "Nov. 1952". It is quite significant that the appellant signed it for the Director of Telecommunications and under the caption "Subject :—ENQUIRY" the tenderers whose names appeared on the said letter were asked to submit "quotation for the under-mentioned items on or before 24th December 1952 of stores price including delivery to the Superintendent of Telecoms Stores, Botataung, Rangoon :—

Copper Weld Wire ,	8 S.W.G. ...	Nos.	400	tons.
,, ,, ,, ,	10 S.W.G. ...			,,
,, ,, ,, ,	12 S.W.G. ...			,,

(Preference will be given to copper weld wires)

The last paragraph of the letter contains a specific reminder that the letter seeks quotations and not tenders from the business firms concerned.

Now, admittedly several of these forms were issued to several tenderers and the prosecution relying on U Ba Cho's (PW 2) evidence contends that the issuance of these forms was the doing of the appellant unknown to U Ba Cho—an assertion which I am not prepared to accept, as it will be seen later, that U Ba Cho fully knew the issue of these letters. When he stated before the trial Court that he never knew about them, he was clearly telling untruth. Twelve tenderers responded to the inquiry, including N. L. Muhury, Oceanic Trading Co., Bawa Trading Co. and U Chit Oo & Co. A comparative statement showing the price wanted by each firm together with an analysis (Exhibit 2) made by U Myo Thaw (PW 4) was submitted to U Ba Cho on the 22nd December 1952. U Myo Thaw has given a heading to Exhibit 2 as "Analysis of Cu/Weld Wire Quotations" and in that analysis U Myo Thaw made a recommendation for the final approval of U Ba Cho of four tenderers, namely, (1) N. L. Muhury & Co. who quoted Rs. 1,200 per ton, delivery between 5 weeks to 6 months, (2) Oceanic Trading Co. (Ex Stock) who quoted Rs. 2,600 per ton, delivery within 7 days, (3) Bawa Trading Co. who quoted Rs. 1,080 per ton, delivery 3/4 weeks to 6 months and (4) U Chit Oo (Ex Stock) who quoted Rs. 2,750 per ton, delivery one week. So far as N. L. Muhury & Co. was concerned it seems that the source of supply was of unknown origin, whereas Bawa Trading Co. was of Austrian origin. U Myo Thaw recommended that "ex stock" holders should be given preference to others who would have to depend upon import from abroad.

Now, I would pause here to point out another significant fact to which the Judge below has not given any thought and that is when U Myo Thaw prepared

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the analysis of the quotations, Exhibit 2, dated 27th December 1952 and when he recommended to U Ba Cho that preference should be given to only "ex stock" holders, such as: Oceanic Trading Co. and U Chit Oo & Co. a fact clearly borne out by the word "speak" written by U Ba Cho himself against the Oceanic Trading Co., the appellant Raymond was not in Rangoon. It is an undisputed fact that he was away in India on leave; his leave being from 15th December 1952 till about the 7th January 1953, as could be seen from the leave notifications in the *Burma Gazette*, Exhibits 20 and 21. U Myo Thaw (PW 4) was appointed as Personal Assistant, while appellant was away on leave. It may also be noted here that when the quotations were called for *vide* Exhibit (ဝ-၄) it was pointed out that preference will be given to 8 and 10 S.W.G. copper weld wires; yet when above-named two tenderers were recommended by U Myo Thaw and approved by U Ba Cho it is significant that the quotations by them were in respect of 12 S.W.G. copper weld wire, and no mention of 8 or 10 S.W.G. copper weld wires was ever made by them. It appears from this that U Ba Cho himself was not very particular about the gauge, be it 8, 10 or 12 S.W.G. In fact, in the test report (Exhibit ဝ-၁) made by U Sein Ban and U Myo Thaw they stated that the availability of particular gauges required by the Department, namely, 8 and 10 S.W.G., was uncertain and that since they were in immediate need and since there was acute shortage of it, they recommended for immediate purchase of 12 S.W.G. which from "observation and test results indicate that they can well be utilized." U Ba Cho himself saw the description of the gauges in the analysis prepared. He has seen from U Myo Thaw's note

(Exhibit 2) that the purchase was not by tender, but by calling quotations. Yet, it has been suggested that he never knew that quotations were called for instead of tenders. Be that as it may, having received these quotations from four sources, U Ba Cho again held a meeting with 3 or 4 officers under him; and here I may note that I do not find any significance about these meetings. They were more or less meetings of the Director and his subordinates for arriving at certain decisions. These meetings have no legal basis and they were held merely at the whims and fancy of U Ba Cho, perhaps just to get the complex that whatever U Ba Cho decided to do in the matter of important purchase or undertaking, he had the support of his subordinates. Pursuant to the decision arrived at one of this meetings where they considered the quotations made by the four above-named companies, the appellant, U Maung Maung the Deputy Engineer, Telecoms, U Sein Ban, Superintendent of Telecoms Stores, Rangoon, were deputed to go and inspect the copper weld wires held by those persons and give a report thereon. The three, namely, the appellant, U Maung Maung and U Sein Ban, went to the place where the copper weld wires were said to have been stored and gave an inspection note dated 12th January 1953 to U Ba Cho. The report is filed as Exhibit (ဝ-ဘ). It appears that by that time the appellant had returned from India and U Myo Thaw (PW 4) was not in the inspection party. The report is rather comprehensive and contains a detailed account of what they found at the godown where the copper weld wires were stored. The most significant part reads :

" The inspection party then proceeded to the business premises of Messrs. Oceanic Trading Coy., from where the Proprietor took us to his store godown situated at No. 4 East

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Race Course Road, Tamwe. We found the copper weld wire in two lots, one lot is apparently new and unused and the second lot has tarnished probably due to exposure. The Superintendent, Telecoms. Stores explained that he had already earlier inspected this store of copper weld wire which was said to be the source of supply by U Chit Oo and that they had brought away with them the coil of this same copper weld wire to the Telecoms. Stores Depot for test. . . . , We were also informed that Messrs. N. L. Muhury have also taken samples of copper weld wire from the godown at No. 4 East Race Course Road, Tamwe. *It is therefore apparent that the source of supply as far as Messrs. N. L. Muhury, Messrs. U Chit Oo and Messrs. Oceanic Trading Coy., are concerned is one and the same* i.e. from No. 4 East Race Course Road, Tamwe. The ownership of these copper weld wires stored at 4 East Race Course Road, Tamwe is claimed by Messrs. Oceanic Coy., and if that claim is established we recommend that purchase of the newer lot of copper weld wire be made to avoid further delay as the price quoted by them (Messrs. Oceanic Coy.) is Kyat 150 cheaper than that by Messrs. U Chit Oo."

Further, the inspection note had a foot-note appended as follows :—

"NOTE.—Mr. Muhury called at my office yesterday at 1430 hours and stated that he would have to collect his stock of copper weld wire from up-country and that he did not hold any stock at Rangoon."

This inspection note clearly shows that the source of supply, namely, the godown at 4, East Race Course Road, Tamwe, is obviously one in which either Messrs. U Chit Oo & Co. or Messrs. Oceanic Trading Co. had certain interests, and the copper weld wire in question must be the property of these firms jointly or that each had a definite interest in them. It also appears that the copper weld wires are not direct imports by these firms ; but they were American Army surplus stock, and were in that place for a long time. U Ba Cho himself

must have known this, because there is no firm in Rangoon or in Burma which deals in such wires as agents of the American copper weld wire Company. After having seen this inspection note, U Ba Cho called another meeting of his subordinates and the minutes of the said meeting are filed as Exhibit (o-၂ o). The minutes of that meeting were recorded by the appellant himself and though it is dated 20th January 1952 it is really 21st January 1953. It has been conceded by the appellant's counsel that at that meeting U Ba Cho, U Maung, U Myo Thaw, U Sein Ban, U Ba Tha, U Ba Htay and the appellant were present. The note reads as follows:

> "*Re.* Cu weld wire procurement. We will wait reply from N. L. Muhury & Co. for a couple of days more as per our letter. We will later approach Govt. for purchase of 200 tons from Oceanic Coy. which is our requirement for year for cu weld wire."

The Department did await the reply from N. L. Muhury & Co. which ultimately came in on the 21st January 1953—*vide* (Exhibit o-၁o), but a careful reading of this letter shows that their quotation relates to "welded copper wire" and not "copper weld wire." The appellant, therefore, noted this fact on their letter—"Unreliable and is likely to evade the issue. Put up for Department's consideration" and he initialled it on 23rd January. This letter from Muhury was seen by U Ba Cho, because his initials appear on it. Similarly, the quotation sent in by Bawa Trading Co. relates to Austrian Copper coated iron wires and the shipment from Austria by monthly tonnage of 60 tons, commencing three or four weeks after the acceptance of quotations. Thus, only Oceanic and U Chit Oo & Co. were found to be in competition. The price quoted by U Chit Oo was K 2,750 whereas Oceanic Trading

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Co. was K 2,600 (Ex Stock) per ton, thus, the quotation of Oceanic Trading Co. being K 150 less than U Chit Oo & Co., the Department decided to purchase from Oceanic Trading Co.

It was on the basis of these facts that U Ba Cho himself, after approving the draft Exhibit (ဂ-၂၆), addressed a letter to the Government, Ministry of Transport and Communications, seeking sanction to purchase the copper weld wire in question—*vide* Exhibit (ဂ-၂၇), and the letter is dated 27th January 1953. Paragraph (1) and the last sentence of paragraph (3) of the said letter are worthy of attention. Paragraph (1) reads :

"၁။ လုံးပတ်အမှတ် ၁၂ ရှိသော ကြေးနီအုပ်သံမဏိ ဝိုင်ယာကြိုး (Copper weld wire No. 12 gauge) တန်ပေါင်း ၂၀၀ ကို၊ တတန်လျှင် ငွေ ၂,၆၀၀ ကျပ်ဈေးနှုန်း ရန်ကုန်မြို့၊စစ်ကဲမောင်ထော်လေးလမ်း၊ အမှတ် ၂၂၀၊ အိုရှန်နစ်ရောင်းဝယ်ရေး ကုမ္ပဏီမှဝယ်ယူရန်အတွက် အုပ်ချုပ်မှုဆိုင်ရာ သဘော တူညီချက်နှင့်တကွ ၎င်းဝယ်ယူရေးအတွက် ကုန်ကျမည့်ငွေပေါင်း ၅,၂၀,၀၀၀ ကျပ်ကို၊ သုံးစွဲနိုင်ရန် ဘဏ္ဍာရေးခွင့်ပြုချက်များကို ဆောလျင်စွာချမှတ်ပေးပါရန် တောင်းခံအပ်ပါသည်။"

and the last sentence of paragraph (3) reads :

"၎င်းဝိုင်ယာကြိုးများကို တင်ဒါစံနှုန်းဖြင့် ဝယ်ယူခြင်းဖြစ်ပါကြောင်း။"

From the above letter, it will be seen that the sanction sought for was the purchase of 200 tons of copper weld wire (No. 12 gauge) at K 2,600 per ton from the Oceanic Trading Co., No. 220, Tseekai Maung Taulay Street. It also shows that the purchase was by tender system. The Government accorded sanction as per letter Exhibit (c) and it certainly covers for the purchase of "Copper weld wire No. 12 gauge." The sanction was dated 20th March 1953 and paragraph 3 of that letter clearly shows that a copy of it was sent to the Controller of

Posts and Telecoms, Accounts, Burma. This sanction also made a specific reference to the Director of Telecommunications' letter seeking sanction, namely, Exhibit (ဝ-၂၇). When the sanction letter was received, the appellant made a note on it that the purchase order should issue quickly as balance of copper wire was nearly exhausted. To this note U Ba Cho passed an order "Issue" on 26th March 1953. The trial Judge has commented that both the Government letter sanctioning the purchase and the order of U Ba Cho did not mention from whom the purchase was to be made. I do not quite follow what the learned Judge really means. The letter Exhibit (ဝ-၂၇) makes a specific mention of the fact that purchase of that particular brand of wire at a certain price was to be made from the Oceanic Trading Co. and that the purchase was by tender system. The Government sanction is the sanction with reference to the Director's letter Exhibit (ဝ-၂၇) and on receipt of the sanction from the Government when the Director passed the order for the purchase of the particular wires, I really do not understand how in the context of these two events can it be said that the purchase in question was to be made from a company other than the Oceanic Trading Co. Neither do I understand the suggestion that the sanction of the Government and the letter addressed to the Government asking for sanction do not contain any specification regarding the copper weld wire required by the Department. The expression "12 S.W.G. Copper Weld Wire" must have been accepted as being quite sufficient for the purpose in hand inasmuch as U Ba Cho himself was fully aware of such description throughout. Had he felt the necessity of more detailed specification U Ba Cho would have reacted to it and given a full

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description when he addressed the Government on the subject in Exhibit (၀-၂၇). In that connection, I find that the trial Judge made certain references to what he described as "the Line Instruction Code." U Ba Cho in giving evidence also makes reference to that book calling it "Line Instruction Code." But the book they referred to was in reality the Line Construction Code. I have carefully looked into it, and the relevant paragraph dealing with the varieties of wire used in Telecoms Department is paragraph 269. The wire has been described as "Copper Weld Wire." Regarding the gauge, paragraph 272 makes reference to 8 S.W.G. and 10 S.W.G and there was no mention of 12 S.W.G. Therefore, I do not see any significance in the omission of specification of the variety of copper wire known as "copper weld wire," and when the Department asked for sanction to purchase "12 S.W.G. copper weld wire," every technician in that Department, including the Director himself, understands what that particular variety of wire is.

Necessary purchase orders were issued and the Oceanic Trading Co. were directed to supply the required copper weld wire as per letter Exhibit (၀-၁၄) dated 28th March 1953. The quantity first asked to be supplied was for 100 tons and they were directed to deliver to the Superintendent, Telecoms Stores, Botataung, Rangoon. The Oceanic Trading Co. made the necessary supply and the bill for the sum of K 2,600 per ton of copper weld wire was sent to the Telecoms Department on the 17th April 1953—*vide* Exhibit (၃၀) and payment was made to them by cheque Exhibit (၉). A further supply of 58 tons 6 cwt. 2 qtrs. and 15 lbs. of copper weld wire was made, for which they billed the Department and were paid for—*vide* Exhibits (၄) and (၃). I may

here note that the delivery was accepted by the Superintendent of Stores U Sein Ban, and the appellant had nothing to do with it. Thus, it appears, that some 160 tons of copper weld wire were supplied to the Telecoms Department by the Oceanic Trading Co. However, on 9th April 1953 *vide* Exhibit (ရ) U Kyaw Than (PW 5), Supervisor in the Stores Depôt, reported that the wires supplied by the Oceanic Trading Co. were found to be cut pieces and asked whether they should be accepted or not. Since then, U Sein Ban refused further acceptance. On receipt of these copper weld wires they were sent out to the different out-stations and in the months of June and July 1953 complaints were received from these out-stations that the wires sent were in short cut pieces.

Mr. Banerji (PW 13), who was in charge of Toungoo Subdivision, ordered some 24,100 lbs. of copper weld wire on 17th April 1953 from the Telecoms Stores and on inspection both he and his subordinate U Thaw Ta (PW 14) found that the wires were cut pieces. Some coils had 8 to 10 cuts and others had 12 to 15. The out-stations then made a complaint to U Ba Cho. But U Ba Co did not make any investigation into the matter knowing as he did who the suppliers of these wires were; but merely contented himself by addressing letters to Subdivisional Officer, Toungoo Telecoms, and also to U Thaung, Divisional Engineer, North Burma Division, Maymyo, *vide* Exhibits (ဃ) and (ဇ-၁) to the effect that the wires must be used and construction continued by jointing them. In fact to U Thaung he conveyed the order that in order to recommence work on Pyinmana-Tatkon section the coils are to be tested, jointed, recoiled and then issued for works, and that the work was to continue

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till completed. He also informed him that the Superintendent of Telecoms Stores, Rangoon, would despatch sufficient amount of B.J. Coils to accomplish necessary jointings. He also added that he would issue, on receipt of indent, solder and resin to the Subdivisional Officer, Telecoms Toungoo, and that the additional funds for such unforeseen works should be debited to the work concerned.

The Bureau of Special Investigation then came upon the scene and took up the matter. They first arrested U Sein Ban, the Stores Superintendent and sent him up for trial under section 4 (*1*)(*d*) of the Suppression of Corruption Act. The trial ended with his conviction. U Sein Ban's appeal has since been dismissed by the High Court. Whereas, the present appellant was singled out and put on trial and, as stated above, he was charged under section 4 (*1*)(*d*) of the Suppression of Corruption Act, but at the time when the judgment was delivered the charge was altered to one under section 4 (*1*)(*c*) of the Suppression of Corruption Act. He was found guilty thereunder and convicted and sentenced as aforesaid.

Now, in the appeal the learned Government Advocate U Tin Maung, appearing for the respondent urged that even if on the facts and circumstances available in the case, the conviction of the appellant under section 4 (*1*)(*c*) of the Suppression of Corruption Act was incorrect, yet this appellate Court is competent under section 423 (*1*)(*b*) of the Criminal Procedure Code to alter the finding of the trial Court and maintain the conviction by holding that the facts established by the prosecution clearly made out a case under section 4 (*1*)(*d*) of the Suppression of Corruption Act. No doubt, under the aforesaid section this Appellate Court has ample

power to alter the finding of the trial Court while maintaining the sentence; but that does not in the least detract the primary responsibility of the prosecution establishing a case beyond reasonable doubt as against the accused person, so that even if the conviction had been under one section of the penal law a conviction can be maintained under another. The question then is whether the prosecution has established a case as against the appellant beyond reasonable doubt, within the ambit of section 4 (*1*)(*d*) of the Suppression of Corruption Act, 1948. In Criminal Reference No. 16 of 1956 in the case of *The Union of Burma* v. *U Nyo* I had occasion, as a member of the Bench, to point out what ingredients are necessary to bring home an offence under section 4 (*1*)(*d*) of the Suppression of Corruption Act. The offence contemplated in that section is misconduct in the nature of (1), fraud to the detriment of public interest or (2), misconduct in respect of public property entrusted to the accused which may be either (*a*) an act of misappropriation or (*b*) misconduct as set out in the explanation added thereto, *i.e.*, an act of mismanagement or for doing something which ought not to have been done, or for not doing something which ought to have been done under the given circumstances. The learned Government Advocate contends that the prosecution has fully established as against the appellant a case under section 4 (*1*)(*d*) of the Suppression of Corruption Act in that the appellant has committed fraud to the detriment of public interest. What constitutes fraud is not defined in the Suppression of Corruption Act. We may, therefore, have to examine whether the four sub-headings of misconduct set out in the charge framed by the first trial Judge have been proved against the appellant or in other words,

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whether those commissions or omissions, if any, constitute misconduct or fraud to the detriment of public interest within the purview of that section.

The learned Counsel, appearing for the appellant, has strenously contended that the prosecution has completely failed to establish a case beyond reasonable doubt that the appellant had committed fraud which constitutes misconduct in relation to the alleged acts of commission or omission enumerated in the charge. The first act of misconduct alleged against the appellant as could be gathered from the charge sheet reads:

> "(1) No tenders were called for or that you failed to point out to the Director of Telecommunications that tenders should be called for in purchasing the wires in question, in view of the warning given by the Controller of Posts and Telecoms, Accounts, in his letter Ex. (๏) and the express verbal order of U Ba Cho (PW 2)."

So, under this sub-head of the charge the acts or omissions for which the appellant is held responsible are (1), that he failed to point out to the Director of Telecommunications that tenders should be called for in the purchase of the copper weld wire in question and (2), that he ignored the warning given by the Controller of Posts and Telecoms, Accounts, in his letter Exhibit (๏) and also the express verbal order of U Ba Cho (PW 2). The implication here is that the appellant had been given previous warnings against purchase of commodities other than by calling for tenders by the Controller of Posts and Telecoms, Accounts, letter Exhibit (๏) and by the express verbal order of U Ba Cho (PW 2).

Now, when I examine Exhibit (๏) letter which is dated the *19th March 1953*, I find that the letter relates to purchase of stores for the year *1950-51*, and it has nothing to do with the purchase of copper weld

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wire in question. The subject of the letter clearly shows that it was with reference to purchase of stores from local firms, and I am, therefore, really at a loss how to connect the warning given in this letter with the purchase of properties, namely, the copper weld wires for which the appellant has been made responsible. According to the evidence borne out by the documents, the sanction to purchase copper weld wires was received on the *20th March 1953* and the purchase from the Oceanic Trading Co. was completed, at least for some 150 tons on the *28th March 1953*, inasmuch as a letter had already been addressed to the Oceanic Trading Co.—*vide* Exhibit (၀-၁၄), placing the order for the supply of that commodity. Therefore, it is beyond my comprehension how this letter Exhibit (၀) has any relevancy in the purchase of the copper weld wire with which the appellant is said to have been concerned. What that letter really requires from the Director of Telecommunications is an information whether the system of calling for tenders is adhered to in the purchase of stores from local agents, and a certificate to that effect was asked to be furnished for purchase of stores when accepted. The purchase of copper weld wire, as shown above, was made on the 28th March 1953. It is not understood how this letter Exhibit (၀) can be said to be a warning against further purchase of copper weld wires in question. If this document can at all be called a warning against the purchase of the wires in question other than by tenders, then U Ba Cho can also be held responsible; because he himself has initialled on the said letter containing the warning. There is also the alleged verbal warning said to have been given by U Ba Cho. Here again, it is a matter of oath against oath. Can we accept U Ba Cho's

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evidence without any hesitation? He is the head of that Department and the evidence shows that several very important documents produced by the prosecution bear U Ba Cho's initials or signatures—See Exhibits (၀-၁), (၀-၀), (၀-၆), (၀-၁၀-၈၁), (၀-၁၂), (၀-၀၀), (၀-၂၀), (၀-၂၆) and (၀-၃၅). From all these documents, it is made abundantly clear that U Ba Cho is not so innocent as he tries to make out in the trial Court. In a matter which involves the purchase of several lakhs worth of goods, it is extremely unlikely—nay it is impossible—that he was in complete darkness as to what was taking place in his office unless he had deliberately chosen that position for some reasons or the other. In fact, from his initials borne on relevant important documents, the inference that he was fully aware of what were taking place in his Department in connection with the purchase of the wires in question is irresistible, and that his suggestions to the contrary is a piece of falsehood. I can place no reliance on U Ba Cho's evidence and I must, therefore, say that he himself was fully aware that the purchase of the copper weld wire was not by tenders but by calling quotations. I cannot therefore attach any significance to appellant's having purchased the copper weld wires in question not by calling for tenders but by quotations. In that connection, my attention has been drawn to paragraphs 418 to 440 of the Posts and Telegraphs Manual, Volume II, regarding "Contracts". It appears that only when the purchase relates to purchase of stores to meet the annual requirements, the Controller of Telegraphs, Stores, is enjoined to make such purchases by calling for tenders. In fact, paragraph 418 makes specific exclusion of all these purchases of materials or stores or what in other words described as *ad hoc* purchase.

Paragraph 418 makes a specific exclusion of ordinary purchases in following terms :—

"The term 'Contract' as used in this Manual does not include agreements for the execution of work by piece-work, nor does it include mere ordinary purchases of materials or stores."

Thus, what the Telegraphs Manual lays down in connection with the contract work, relates to contract work such as *purchase of annual stores* or *contract works described in paragraph 431*. Here, the tender system is to be followed, and not what is generally called the quotation system. I therefore see no meaning in this charge whatsoever. The misconduct alleged here is, to say the least, vague and nothing can be imputed against the appellant for failure to call for tenders. Nor, can any criminal intention be attributed to him for failing to observe the warning given by the Controller of Posts and Telecoms, Accounts, a warning which bears no relation to the purchase of the copper weld wire in question. U Ba Cho himself is fully aware of the different stages of the transaction in question and the appellant cannot be held to have ignored U Ba Cho's orders because U Ba Cho himself can be said to have contravened the instructions contained in the Posts and Telegraphs Manual concerning contract purchases. Therefore, I must hold that the appellant cannot be held responsible for the act or omission set out in above sub-head of the charge.

The second sub-head of the charge reads :

"(2) Yet you stated, in your letter (၀-၁၆ and ၈၀) in reply to the letters exhibits (၀-၁၅ and ၆) issued by the Controller of Posts and Telecoms, Accounts, that tenders were called for."

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This act or omission alleged is more or less linked up with those alleged in sub-head (1). If we examine Exhibit (ဝ-၁၆) it will be found that it is a reply to the Controller of Posts and Telecoms, Accounts' letter Exhibit (ဝ-၁၅). It will also be seen that the information wanted by the Controller relates to the purchase of 100 tons Copper Weld Wires from M/s Oceanic Co. and his letter asked four questions despite the fact that a copy of the Government sanction to purchase the same had been forwarded to him as could be seen from paragraph 3 of Government's sanction Exhibit (c). He wanted to know whether tenders were called for for the supply of the said materials. The appellant was alleged to have answered that letter without the knowledge of the Director to the effect that tenders were called for for the purchase of the said property. Now, the term " tender " has obviously been used loosely not only in the Telecommunications Department but also in other Departments. This is amply borne out by several documentary evidence filed in the proceedings. Besides the Telecommunications Department, the Railways, Port Commissioners and other Departments called such *ad hoc* purchase as calling for quotations. The Telecommunications Department itself after U Ba Cho's vacation of his office, and when he was succeeded by Mr. Bartlet (DW 7), could not strictly adhere to what is called the tender system for certain contract works.

Mr. Bartlet has to admit that the Department has since suspended the tender system and reverted to what is called the quotation system, that is, making purchase by calling for quotations from the duly registered firms. He also has to concede that he found, when he took over the office of Telecommunications from U Ba Cho, that there were a lot of audit

objections. Previously, there was nothing to guide them how tenders should be called for. Though a certain form for tenders, namely, Exhibit 42, has been suggested for approval of the Ministry concerned yet the Ministry has not given their approval. It was found that the form Exhibit 42 itself was obsolete. He also stated that he found that the Telecommunications Department had all along followed quotation system rather than tenders. According to him, the office of the Director of Telecommunications was hardly aware of the difference between quotations and tenders. Therefore, I really do not see how in the state of affairs prevailing in the Telecommunications Department, as it then was, can the appellant be imputed with the offence of misconduct in answering to the query in Controller of Posts and Telecoms, Accounts' letter Exhibit (ဝ-၁၅) that tenders were called for in the purchase of the copper weld wire in question. It has been conceded, and there is abundance of evidence to that effect that the words "quotation" and "tender" are loosely used with no real significance so far as the *ad hoc* purchases are concerned. Several Departments of Government are shown to have used the word "quotation" instead of tenders. The Posts and Telegraphs Manual, Volume II, speaks about tenders for contract works of the description given in paragraph 431, and also in connection with annual purchases of stores as contained in paragraph 440. I could find nowhere that *ad hoc* purchases were to be made by calling for tenders. The appellant, therefore, cannot be said to have infringed the Office Manual nor the Posts and Telegraphs Manual which makes no provision for purchases or contract works other than those set out in paragraph 431, and annual stores set out in paragraph 440. Furthermore, U Ba Cho himself

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when he addressed to the Government asking for sanction—*vide* Exhibit (၀-၂၇) stated very clearly that the copper weld wires in question were being purchased by tender system—see the last line of Exhibit (၀-၂၇). When the Director of the Department himself said that the purchase was by tender system, I really do not see how the appellant could be imputed with any criminal or dishonest motive in answering to the audit objection in the way he has done, that is, that the purchase was by tenders, whereas it was in fact by quotation.

The third alleged act of misconduct reads :

> " You refused or you failed to point out to the Director of Telecommunications to accept the lowest quotations of Bawa and Company or of N. L. Muhury and Company, without sufficient cause *vide* Exhibit (၀-၂၀)."

Here again, the act of misconduct if it all amounts to misconduct cannot be imputed to the appellant alone. Nor does it by itself constitute misconduct. The evidence clearly shows that in the rejection of Bawa & Co. and Muhury & Co., U Ba Cho was fully aware of the terms of offer made by them, inasmuch as the synopsis of the quotations given by several companies was prepared not by the appellant but by U Myo Thaw during the appellant's absence on leave in India. In fact, it was U Ba Cho who wrote against the Oceanic Trading Co. the word " speak " *vide* Exhibit 2. U Myo Thaw, in his own handwriting prepared Exhibit 2, and against N. L. Muhury & Co. he wrote " Unknown origin. Del. 5 wks to 6 months." and as against Bawa Trading Co. he wrote " Austrian origin. Del. 3/4 wks to 6 months." No doubt, the prices quoted by them per ton was lower than Oceanic Trading Co.; but U Ba Cho was aware when Exhibit 2 was submitted to him that

preference should be given to tenders of ex stock holders, and U Myo Thaw gave reasons in Exhibit 2 why preference should be given to ex stock holders. The ex stock holders were two, Oceanic Trading Co. and U Chit Oo & Co. Of these two, the quotation of Oceanic Trading Co. was found to be K 150 less than U Chit Oo & Co. Now, if the Oceanic Trading Co. was preferred to the other two companies, namely, Bawa Trading Co. and Muhury & Co. it is abundantly clear that it was based upon Exhibit 2 synopsis prepared by U Myo Thaw and the appellant had no hand in it as he was then away in India. In these circumstances, how can the appellant be asked to meet a charge for what he has not done ? How can it be said that the appellant refused or failed to point out to the Director of Telecommunications to accept the lowest quotations of Bawa Trading Co. or N. L. Muhury & Co. ? Surely, this alleged act of misconduct, if at all a misconduct, cannot be imputed to the appellant. There is, thus, no substance in this sub-head of the charge either.

Now, the 4th sub-head reads :

"(*4*). You also made a false statement in Exhibit (ဝ-၂၀) that the wires supplied by the Oceanic Company, the Exhibits in this case, conformed to the specifications in spite of the fact that they were in torn bits of short lengths. In consequence of your misconduct, as stated above, the Superintendent of Stores, Telecoms Department had or was able to accept such torn bits of wire, entailing a loss about K 3,28,447.90 to the Union Government of Burma and thereby you have committed an offence of criminal misconduct, punishable under s. (4) (*1*) (*d*) read with s. 4 (*2*) of the Suppression of Corruption Act."

Exhibit (ဝ-၂၀) is a reply under the signature of the appellant to the Controller's (Posts and Telecoms, Accounts) query containing in letter dated 7th May 1953, Exhibit (ဝ-၁၇). Here again, the answer given by the appellant, even if it can be said that it

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was without the knowledge of the Director, is one concerning audit objections. The answer given by him reads :

" Messrs. Oceanic whose quotation was the third lowest, produced the stock for inspection which not only conform to our specification but was urgently required to be purchased."

The appellant has been accused of making a false statement in this letter to the Controller of Posts and Telecoms, Accounts, in that he has answered that the wire purchased not only conformed to the specification but was urgently required to be purchased. This necessarily leads me to consider what was the specification appellant was referring to. So far as the Telecommunications Department is concerned, the wire called copper weld 12 S.W.G. has a special technical connotation. In addressing to the Government, seeking sanction, it is significant that the specification of the copper weld wire required by the Department was set out as "*Copper Weld Wire No. 12 gauge*". The inspection team comprising U Maung Maung, U Sein Ban and the appellant examined the copper weld wire proposed to be purchased and made a report on their inspection. The Director himself read this report and it was only after submission of the report did U Ba Cho instruct his office to draft a letter asking for sanction from the Government. The letter was duly drafted ; he approved of it and he signed it. In that letter, it is clearly expressed that the specification was " 12 gauge copper weld wire " and that it was a purchase by tender. The sellers, Messrs. Oceanic Trading Co., at the time of inspection by the inspection team must have shown the wires of that specification. The wires were in two lots, some were brand new and some were slightly tarnished. The inspection

team cannot be said to have been aware that wires shown to it in bundles had torn bits. It was not until the receipt of the complaints from the out-stations was the Department made aware of the torn bits. The appellant, as a member of the inspection team, reported along with others that they were found to be good. Instruction was next given to the Stores Superintendent to accept the copper weld wires which answered the description found by the inspection team. So far as the appellant was concerned he was satisfied at the time of inspection that the copper weld wire conformed to the specification required by the Department. How can he and he alone be made responsible for the torn bits or short lengths that were discovered later ? For all we know, the sellers Messrs. Oceanic Trading Co. might have shown to the inspection team the copper weld wire which answered to the specification. Later, when actual delivery was made, they might have substituted torn bits and cut ones. Can the appellant be made to answer for possible misdeeds of others ? In fact the delivery was made not to him but to a different officer, namely, the Superintendent of Stores U Sein Ban, who had been found guilty of misconduct and convicted in a separate trial.

U Soe Paing (PW 3), the Controller of Posts and Telecoms. Accounts, Burma, figured as a prosecution witness No. 3. When questioned about what his objection was in the purchase of the copper weld wire in question, he makes reference to Chapter IX, paragraphs 419 (1) and 425 of the Posts and Telegraphs Manual, Volume II. But it appears to me that he is clearly under a misconception as to what the requirements of the Manual are in that regard. If he carefully reads the relevant paragraphs of the Manual, he will find that the general principles to

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be observed in execution of works by tenders are to be found in paragraph 418, while forms prescribed for contract works are to be found in paragraph 431. But so far as I can see the Manual makes no provision concerning agreements for the execution of work by piece-work or works concerning mere ordinary purchase of materials or stores of annual nature as contemplated in paragraph 440. Now in the purchase of the copper weld wire in question, it is conceded that it is not an annual purchase, nor a contract work which involves day to day or year to year performance on a long drawn out basis. It was clearly an *ad hoc* purchase. Therefore, I do not see what the audit objection was really about when U Soe Paing inquired from the Telecommunications Department whether in the purchase of the copper weld wire tenders had been called for or contracts executed as contemplated in paragraph 419 (1) (6) of the Manual. There is thus a complete misconception of the real requirements of the Manual, and I do not see how dishonest motive or criminal liability could be attributed to the appellant for alleged non-compliance of certain provisions of the Manual which have no application to the purchase in question.

Therefore, after a careful review of the entire facts and circumstances obtaining in the case and also from the evidence adduced by the prosecution, it is open to grave doubt whether a case of misconduct as contemplated in section 4 (*1*) (*d*) of the Suppression of Corruption Act has been established against the appellant. It is extremely unlikely in the position the appellant found himself at the relevent time, namely, as the Personal Assistant to the Director of Telecommunications, that he was solely responsible for the purchase of this enormous quantity of wire,

and that the Director U Ba Cho was not aware of what was taking place in his Department. There is also an admitted fact that the appellant was on leave for nearly a month in the early part of the year 1953, when the synopsis of quotations was prepared containing the recommendation for purchase from the Oceanic Trading Co. in preference to other firms. Can it be therefore said that he was a party to such transaction while he was away in India ? There is not a shred of evidence adduced against him that he either actually participated in the misdeed or acted as a conspirator thereto. Before the copper wires were purchased from the Oceanic Trading Co., U Ba Cho was made aware of the existence of such wires at certain places. Some officers of the Department were directed by him to inspect the wires and report on it. This clearly suggests that there was a prior contact between U Ba Cho and the prospective sellers long before the other departmental officers were made aware of the existence of the wires in question. From a series of events that followed after the inspection of the wires in question which I have set out in earlier part of my judgment, it is unthinkable that the appellant could be said to be solely responsible for their purchase contrary to the rules of the Manual and also against audit objections. At every stage of the transaction I find that U Ba Cho, the head of the Department, was in the know. Even when the reports poured in from several out-stations that the wires supplied were found to be in torn bits, yet he did not look into the matter with all seriousness, as a responsible head of the Department would have done, but merely issued instructions that the wires should be jointed and used, the extra expenditure incurred in that connection to be debited to the work concerned—*vide* Exhibit (2-ω).

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Therefore, I am not at all satisfied that the prosecution has established its case beyond all reasonable doubt against the appellant. Several responsible officers are concerned in the transaction for the purchase of the copper weld wires which involved several lakhs of public money. The appellant was only a Personal Assistant to the Director of Telecommunications. He has been put on trial for nearly three years and was sentenced to undergo one year's rigorous imprisonment. He has already served his term and is already out of jail while preferring this appeal. His trial before the trial Court was a protracted one. But his conviction, if it stands, will ever be a stigma and also prevent him the right of earning a pension from the Government. I must hold that no case of misconduct has been made out against him either under section 4 (*1*) (*d*) or 4 (*1*) (*c*) of the Suppression of Corruption Act, and I therefore set aside the conviction and sentence of the trial Court and acquit him so far as this case is concerned.