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Containing cases determined by the High Court at Rangoon and by the Judicial Committee of the Privy Council on appeal from that Court.

Reported by

PRIVY COUNCIL ... C. SIDNEY SMITH (*Gray's Inn*).

HIGH COURT, RANGOON { J. C. BILIMORIA (*Lincoln's Inn*), EDITOR.
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APPELLATE CIVIL.

Before Mr. Justice Mya Bu and Mr. Justice Sharpe.

MAUNG THAUNG SAING *v.* MA SEIN TIN.*

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May 27.

Declaratory Suit—Parties, Burman Buddhists—Relationship of parent and child—Maintenance order refused by magistrate—Suit to establish relationship by child—No right in parent's property—Legal character—Specific Relief Act, s. 42.

No suit lies under s. 42 of the Specific Relief Act, where the parties are Burman Buddhists, for a bare declaration that the defendant is the father of the plaintiff, after a magistrate has declined to order the defendant to make a monthly allowance for the maintenance of the plaintiff. Mere relationship of parent and child, which gives no right to the child in the property of the parents, is not such legal character as is capable of being established by means of a suit under s. 42 of the Act.

Mahomed Akbar Khan v. *Farman Ali*, A.I.R. (1930) Lah. 795 ; *Mahmud Shah* v. *Pir Shah*, A.I.R. (1930) Lah. 858 ; *Maung Aung Thein* v. *Maung Ba Maung*, [1940] Ran. 54 ; *Tha Mya* v. *Ma Kin Pu*, [1940] Ran. 807 ; *U Arzeinda* v. *Ma Kyin Shwe*, [1940] Ran. 668, referred to.

Darwood for the appellant.

No appearance for the respondent.

MYA BU, J.—This is an appeal under Order 43, rule 1 (*u*), of the Civil Procedure Code against an order of the District Court of Amherst remanding the case to the Court of first instance. In the Court of first instance the respondent Ma Sein Tin, a minor, sued through her mother Ma Aye May as her next friend the appellant Maung Thaung Saing for a declaration that he, the appellant, was the father of Ma Sein Tin. What prompted the institution of the suit was the fact that

* Civil First Appeal No. 16 of 1941 from the order of the District Court of Amherst in Civil Appeal No. 80 of 1940.

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Ma Aye May had applied for an order under section 488 of the Code of Criminal Procedure against Maung Thaung Saing for the maintenance of the child but her application was dismissed apparently on the ground that she failed to prove that Maung Thaung Saing was the father of the child. The Court of first instance dismissed the suit on the ground that such a suit did not lie. The appellate Court, however, reversed that finding and made the order of remand which is appealed against.

The question that falls for determination is whether the suit is maintainable under section 42 of the Specific Relief Act. That section provides that,

> " Any person entitled to any legal character, or to any right as to any property may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled."

Whether the respondent is entitled to any legal character or not is not a question which requires much discussion because the appellate Court has not based its judgment upon the footing that the plaintiff was claiming to be entitled to any legal character, and it seems fairly clear to my mind that mere relationship of parent and child, which gives no right whatever to the child in the property of the parents, is not such legal character as is capable of being established by means of a suit under section 42 of the Specific Relief Act.

A single Judge case of the Lahore High Court, *Mahomed Akbar Khan* v. *Farman Ali and others* (1), followed by a Bench of the same High Court, *Mahmud Shah* v. *Pir Shah* (2), furnish support to this view. In the latter case the learned Judges duly kept in view the

(1) A.I.R. (1930) Lah. 795. (2) A.I.R. (1936) Lah. 858.

difference between the structure of the family among the Hindus and that among other communities, such as the Mussulmans, due to the Hindu joint family system under which a child born or adopted acquires a vested right in the family property. Among Burman Buddhists, the birth or adoption of a child does not affect the rights of its parents to their property for the child obtains no vested interest whatever in such property. The parties in this case are Burman Buddhists and, therefore, the respondent, even though she were a child of the appellant, could not have obtained any vested interest or right in his property.

In *Maung Aung Thein* v. *Maung Ba Maung* (1) it was held that

> "a Burman Buddhist who has no subsisting interest in the property of his parents in their life-time, but would succeed as one of the heirs after their death cannot sue for a declaration under s. 42 that a certain individual is not the adopted son of his parents and that a deed of gift in favour of that individual by the parents is null and void as against him and the other heirs."

In the course of the judgment it was observed that the only legal character that the plaintiff might be entitled to claim in the case was in the form of a *spes successionis* upon the death of his parents of their estate which legal character neither the parent nor anyone else had denied. Whether there had been a denial of the legal character or not was, however, not a matter upon which the main decision in that case turned.

The learned District Judge pointed out that under section 488 of the Code of Criminal Procedure a father who has sufficient means is bound to maintain his child who is under the age of majority and went on to observe that that liability on the part of the father

(1) [1940] Ran. 54.

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"connotes the right in such a child to be maintained by the father." The liability of the father to maintain his child who is unable to maintain itself is a statutory liability imposed by the Criminal Procedure Code and, so far as the Burman Buddhists are concerned, such liability is not imposed upon him by the civil law and consequently among Burman Buddhists a child cannot sue its parents for maintenance ; see *Dr. Tha Mya* v. *Ma Kin Pu* (1), which controverts the proposition advanced by the learned District Judge in support of his order of remand.

U Arzeinda v. *Ma Kyin Shwe* (2) is a case which permits of a man against whom an order for maintenance had been obtained in a criminal Court in respect of a child alleged to be his instituting a suit under section 42 of the Specific Relief Act for a declaration that he is not the father of the child. It was manifest that in those circumstances a declaration would affect the plaintiff's liability to pay the amount of maintenance in question which was property within the meaning of s. 42 of the Specific Relief Act. It will therefore be erroneous to apply the converse of that case to the present one where the criminal Court having refused to make an order for the maintenance of the respondent, to which the respondent had no right under the personal law of the parties, the respondent is not in a position to contend that she has a right to obtain an order for maintenance. Inasmuch as the plaintiff is not entitled to any legal character or to any right as to any property her suit is not maintainable. The appeal is therefore allowed, the order of remand made by the District Court is set aside and the decree of the Court of first instance confirmed with costs in both the lower Courts. The

(1) [1940] Ran. 807. (2) [1940] Ran. 658.

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learned advocate for the appellant does not ask for costs of this appeal. We therefore make no order for the costs of this appeal.

SHARPE, J.—In my opinion, also, no suit lies under section 42 of the Specific Relief Act for a bare declaration that the defendant is the father of the plaintiff, after a Magistrate has declined to order the defendant to make a monthly allowance for the maintenance of the plaintiff. The mere fact that "A" is the child of "B" does not in my judgment invest "A" with any legal character within the meaning of section 42 of the Specific Relief Act, and the plaint in the present case did not contain any allegation—and, indeed, the facts and circumstances of the present case are such that the plaintiff could not have alleged—that the plaintiff was entitled to any right to any property. Neither of the only two bases upon which a suit under section 42 of the Specific Relief Act may be founded was available to the plaintiff in the present case. The present suit was therefore bound to fail.

It appears to me that where the learned District Judge went wrong, if I may say so, was in thinking that a child has to use his own words, a statutory right under section 488 (1) of the Criminal Procedure Code to be maintained by his or her able-bodied father. A child has no such right, as was pointed out in *Tha Mya* v. *Ma Kin Pu* (1).

I agree that this appeal must therefore be allowed with such costs as my Lord has indicated, and the decree of the trial Court dismissing the suit with costs should be restored.

(1) [1940] Ran. 807.

APPELLATE CIVIL.

Before Sir Ernest Goodman Roberts, Chief Justice, and Mr. Justice Dunkley.

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June 10.

U THU DAW *v.* U MYO NYUN.*

State-land—Disputes between private persons—Jurisdiction of civil Courts—Lease by Government—Right to win petroleum—Surface rights reserved by Government—Invasion of lessee's rights—Suit for declaration and injunction—No prayer for possession—Upper Burma Land and Revenue Regulation, s. 53 (2) (ii)—Specific Relief Act, ss. 42, 54—Mineral Concession Rules—Prospecting license obtained for principal by agent under power of attorney—Agent not possessing certificate of approval—Mining lease obtained in name of principal—Agent's contention principal his benamidar in respect of lease—Allegation, fraud on Government—Evidence in support of such contention inadmissible—Financing of operations by agent—Suit for account—Evidence Act, s. 92.

S. 53 (2) (ii) of the Upper Burma Land and Revenue Regulation does not bar the jurisdiction of the civil Courts in respect of disputes between private persons regarding the possession of State land, or rents, profits or produce thereof.

Burma Oil Co., Ltd. v. *Baijnath Singh*, (1917-20) 3 U.B.R. 212; *In re Maung Naw* v. *Ma Shwe Hmut*, 8 L.B.R. 227 (F.B.) ; *Maung Thaung* v. *Gani*, [1938] Ran. 603, referred to.

Where by the terms of a lease Government grants to a person a certain area of land to win petroleum therefrom, but no exclusive possession of the land is given to the lessee and the surface rights are reserved by Government, the lessee may file a declaratory suit and ask for an injunction restraining the person who had invaded his rights from interfering with them. He cannot file a suit for possession.

Durga Prasad v. *Bose*, I.L.R. 34 Cal. 753 (P.C.) ; *Kumar Jagat Mohan* v. *Pratab Deo*, I.L.R. 10 Pat. 877 (P.C.) ; *Nageshwar Bux* v. *Bengal Coal Co., Ltd.*, I.L.R. 10 Pat. 407 (P.C.) ; *Raja of Pittapur* v. *Secretary of State for India*, I.L.R. 52 Mad. 538 (P.C.) ; *Singh* v. *Singh*, I.L.R. 58 Cal. 1187 (P.C.), mentioned.

Where a person holds a power-of-attorney from his principal and has consistently dealt with Government as agent of his principal in respect of a prospecting licence issued to his principal, he cannot be heard to say, in a dispute between himself and the principal, that there was no agreement of agency and that the principal was a bare trustee for him in respect of the licence. Moreover, if the agent contends that, not having a certificate of approval himself and so being unable to get a prospecting licence or a mining lease, he merely pretended to be the grantee's agent in order to obtain the

* Civil First Appeal No. 117 of 1940 from the judgment of the District Court of Pakôkku in Civil Regular Suit No. 2 of 1937.

lease in the name of his principal, he thereby pleads a fraud on the revenue authorities, and evidence in support of such an alleged conspiracy to defraud cannot be admitted. If he has financed all the operations in connection with the licence he may have a right of suit for an account, but he cannot challenge the title of his principal under the lease.

Balkishen Das v. *Legge*, 27 I.A. 58 ; *Maung Kyin* v. *Ma Shwe Hla*, 44 I.A. 236, referred to.

Foucar for the appellant.

Ba Han for the respondent.

ROBERTS, C.J.—The plaintiff-appellant brought a suit in the District Court of Pakôkku praying for a declaration that he was " the sole grantee to win and work for natural petroleum in the area granted by the Instrument of Lease filed with the plaint ", and asked for a perpetual injunction under section 54 of the Specific Relief Act " restraining the defendant, his agents, workmen, labourers, artisans and every one connected with him in the working and winning of the natural petroleum over the said area from entering upon the said land for the purpose of winning working and carrying out natural petroleum. "

The instrument of lease which he filed with his plaint is Exhibit A. It is made between the Secretary of State in Council and the plaintiff. It is dated the 17th day of September 1936 and is a demise of " all those the wells, collections, deposits or reservoirs containing or supposed to contain natural petroleum . . . situate lying and being in or under the lands which are referred to in part I of the Schedule " for the term of thirty years from the 1st day of October 1931. It was not a demise of the surface area, as may plainly be seen from the terms of the lease itself ; under part IV, paragraph 5 (to give but one illustration) the Secretary of State reserved to himself the right to demise surface rights over any portion of the lands not in use or likely to be required by the lessee for the

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purposes of his grant to any person for cultivation, erection of buildings or for any other purpose. A suit for a declaration was therefore maintainable under Section 42 of the Specific Relief Act. See *Nageshwar Bux Roy* v. *Bengal Coal Co., Ltd.* (1), *Kumar Jagat Mohan Nath Sah Deo* v. *Pratab Udai Nath Sah Deo* (2), *Durga Prasad Singh* v. *Braja Nath Bose* (3), *Gobindanarayan Singh* v. *Shyamlal Singh* (4), *Raja of Pittapur* v. *Secretary of State for India in Council* (5). In none of these cases, all of which were decided by their Lordships of the Privy Council, was the point taken that a suit for possession was the proper remedy and that consequently a suit for a bare declaration was not maintainable. In the first named authority Lord Macmillan's judgment points out that it is not possible to take actual physical possession of a whole mineral field ; the nature of the subject and the possession of which it is susceptible must be borne in mind. Although a contention to the contrary found a place in the arguments addressed to us in the present appeal no authority was cited in support of it. By the terms of the lease the lessee has no right to eject persons from the surface area ; his liberties and powers are contained in Part II of the annexed Schedule and do not connote possession of the land.

Dr. Ba Han for the defendant-respondent also urged upon us that it was the duty of the Collector to eject from State land any person who occupied it without his permission. He referred us to section 53 of Regulation III of 1889 (the Upper Burma Land and Revenue Regulation). It was however held by the

(1) (1930) I.L.R. 10 Pat. 407 (P.C.).
(2) (1931) I.L.R. 10 Pat. 877 (P.C.).
(3) (1907) I.L.R. 34 Cal. 753 ; (1912) I.L.R 39 Cal. 696 (P.C.).
(4) (1931) I.L.R. 58 Cal. 1187 (P.C.).
(5) (1927) I.L.R. 52 Mad. 536 (P.C.).

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Judicial Commissioner in *Burma Oil Co.* v. *Baijnath Singh and another* (1) that the jurisdiction of the civil Courts is not barred by that section in respect of disputes between private persons regarding the ownership or possession of State Land or any lien upon or other interest in such land or the rent profits or produce thereof ; and I am, with respect, content to follow and adopt the reasoning of Mr. Justice Heald (as he afterwards became) and am in agreement with the conclusions at which he arrived. This judgment has been consistently followed and numerous cases in which reference has been made to it have been since decided in the Courts in Burma.

Some reference was also made to Rule 30 (ix) contained in the Burma Mineral Concessions Manual, but this appears to me to involve a confusion between disputes arising over a prospecting license and those which may arise between a lessee under Government of the right to win and work mineral oil and someone who is not a party to the lease. This regulation is therefore not in point at all.

Having disposed of these two preliminary matters it is necessary to examine the remaining contention of the defendant, namely that the plaintiff was a mere benamidar for him, and that there was a resulting trust in favour of the defendant. This is the substantial matter in issue in this appeal.

The history of the case, put briefly, is that the parties heard of the existence of certain oil-bearing lands in the Pakôkku district in 1927, and it is admitted that on April 23rd of that year the plaintiff granted to the defendant a power-of-attorney to act as his agent in the enterprise of winning and working the mineral oil. As such agent the defendant applied to

(1) (1917-20) 3 U.B.R. 212.

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the Deputy Commissioner for a prospecting license and it was granted to him on November 30th 1927 as the authorized agent of the plaintiff (Exhibit 2-H). It must be noticed that by virtue of section 7 of the Rules for the Grant by Local Governments of Licenses to prospect for minerals and of mining leases "No prospecting license or mining lease shall be granted except to a person holding a certificate of approval from the Local Government within whose jurisdiction the land lies for which the license or lease is asked." The defendant-respondent had never at any material time any such certificate of approval.

When the prospecting license came to be renewed at the expiry of two years it was granted to U Thu Daw and no reference was made to the defendant-respondent (Exhibit Z). However the latter was still acting as the agent of the appellant, and he applied on November 25th 1930 for a mining lease as the appellant's "authorized agent" (Exhibit 31). On February 18th 1932 he wrote to the Deputy Commissioner a letter (Exhibit 36) with reference to the matter again describing himself as the appellant's authorized agent.

During that year a dispute began between the parties, and on October 12th the appellant terminated the relationship of principal and agent which had existed between them (Exhibit 2-L). On October 17th he made a formal application for a mining lease over 640 acres in Suwin village (Exhibit 9).

Subsequently on November 28th the respondent wrote to the Deputy Commissioner (Exhibit N) describing himself as a "virtual lessee" and complaining that he had been "dispossessed" of the mines and asking for an inquiry. It is therefore clear that Government had notice of the disputes between the parties. Exhibit 38 is a letter couched in somewhat similar language, and from Exhibit O, dated May 12th 1934, it appears that

an explanation was asked from the appellant and he was told that the explanation furnished would probably have a bearing on whether or not a lease would ultimately be granted. On May 25th the explanation of the appellant was sent. He stated that he had formally revoked the power-of-attorney given to the respondent on January 16th 1933; the respondent had been simply acting as his agent and had no interest in the lease; and he followed his explanations with an application for a lease on June 1st 1934 (Exhibit 2-M) desiring to relinquish a small portion of the area previously demarcated. However he subsequently expressed his willingness not to relinquish this area and after some discussion the lease in respect of which he now seeks a declaration was granted to him. The lands referred to therein amount to 625 acres only.

[His Lordship commented on the inordinate delay of the trial by the acting District Judge owing to frequent and unnecessary adjournments and the admission of inadmissible evidence.]

On June 4th, 1940, the case came before a fresh acting District Judge and he was able to dispose of it entirely and to deliver judgment on July 1st. From the point of view of expedition this was commendable; but unfortunately, as he himself remarked, by the time he had control of the proceedings they had become overloaded with irrelevant as well as relevant matter.

The learned Judge has omitted to notice that the acts done by the defendant were done by him in the capacity of agent. He has found that there never was any relationship of principal and agent between the parties although there was a power-of-attorney and the defendant had all along acted before the Revenue authorities as if he were the agent of the plaintiff.

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The actual document was not produced but it was proved that the existence of a power-of-attorney had been registered : and the defendant was allowed to give secondary evidence of its contents. He said :

" We then executed a power-of-attorney by which U Thu Daw appointed me his agent. I have lost the original of the power-of-attorney. (Defendant now files a copy of the power-of-attorney ; it is admitted Exhibit 1.) By that power-of-attorney I was authorized to work the area with a view to apply for a prospecting license. I do not now remember the value of the imprest stamp on that document ; I cannot say either whether it was a general or a special power-of-attorney. U Thu Daw did not know the particular area that I intended to work, and it was not described in that power-of-attorney. It only empowered me to work as his agent land that would produce petroleum. Although by that document I was described as his agent, in point of fact I went to work that area for my own benefit and as principal. I did not personally apply for a certificate of approval, as on the north and south of the area which I was going to work there were other people working for petroleum and I was apprehensive that they should discover and claim my area."

The trial then proceeded upon the astonishing footing that the defendant was entitled to prove that the power-of-attorney was a mere sham ; that his representations to the Revenue authorities that he was the authorized agent of the appellant were a pretence ; but that though he had no certificate of approval and was plainly acting as the agent of the plaintiff until the power was revoked, the plaintiff had obtained from the Secretary of State nearly three years later, and when Government had full knowledge of the disputes between the parties, a lease as a mere benamidar for the defendant.

The learned Judge considered as relevant the fact that the plaintiff, although stating that he had provided the defendant with funds for the purpose of acting as

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his agent, " was unable to prove that he ever invested anything "; he also observed that it was " proved beyond all doubt that the defendant never at any time submitted accounts to the plaintiff "; and that there was no reason to discredit a witness who mentioned that the plaintiff declared to him that he had not spent any money on the work in question. This would be a most unlikely observation for the plaintiff to have made, but in any event it would carry the case no further. Another error was to regard the evidence of revenue clerks to the effect that defendant personally paid certain Government dues to them as supporting the defendant's story that he was not doing so as the agent of the plaintiff. The effect of the admissions as to the existence of the power-of-attorney has been overlooked. The defendant was wrongly allowed to set up, not the existence of a separate oral agreement as to some matter on which the power was silent, but a case which was absolutely inconsistent with the existence of a power-of-attorney at all. More than that, he was wrongly permitted to set up as his substantive case facts which if proved would show that he was a party to a fraud upon the Revenue authorities. His whole contention is that, not having a certificate of approval himself and being unable to get a lease, he was merely pretending to be the appellant's agent, and that in pursuance of that fraud he obtained the beneficial interest in a lease granted by the Government to the appellant. It appears in evidence that he is a member of the House of Representatives and it is a matter of some public interest, though perhaps not one for judicial comment, that such a defence should be attempted to be set up on his behalf.

It is evident that, having been the agent of the plaintiff till (at the beginning of 1933) his power-of-attorney was revoked as a result of bitter disputes

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between the parties, the plaintiff was not his benamidar in September 1936. The judgment and decree of the learned District Judge must therefore be set aside and this appeal must be allowed. There must be a declaration and perpetual injunction as prayed for in the plaint and the defendant must pay the costs calculated on the *ad valorem* scale both here and in the Court below.

DUNKLEY, J.—I am in entire agreement with my Lord the Chief Justice.

Two points have been raised on behalf of the defendant-respondent in bar of the suit. First, it is said that, by reason of the provisions of section 53 (2) (ii) of the Upper Burma Land and Revenue Regulation, the jurisdiction of the civil Courts is barred in regard to the subject-matter of this suit, because it relates to the possession of State land and to the rents, profits and produce thereof. This question was finally settled in 1920 by Heald J., who was then the Judicial Commissioner of Upper Burma, in the case of *The Burma Oil Co., Ltd.* v. *Baijnath Singh and one* (1), in which, following the Full Bench decision of the Chief Court of Lower Burma, *In re Maung Naw* v. *Ma Shwe Hmut and Maung Pein* (2), he held that section 53 (2) (ii) of the Upper Burma Land and Revenue Regulation does not bar the jurisdiction of the civil Courts in respect of disputes between private persons regarding the possession of State land or the rents, profits or produce thereof. The Lower Burma case concerned the construction of section 56 of the Lower Burma Land and Revenue Act, which enacts similar provisions in regard to the occupation of waste land in Lower Burma as section 53 (2) (ii) of the Regulation does in regard to the possession of State land in Upper Burma,

(1) (1917-20) 3 U.B.R. 212. (2) (1915-16) 8 L.B.R. 227.

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and it was decided by the Full Bench that section 56 of the Lower Burma Land and Revenue Act does not oust the jurisdiction of the civil Courts in disputes between private individuals regarding the right to possession of waste land in Lower Burma. *Maung Naw*'s case (1) was decided in 1915. Prior to the decision of these two cases in Upper and Lower Burma respectively, there had been conflicting decisions both of the Judicial Commissioner's Court and of the Chief Court of Lower Burma on this point; but since those dates it has been settled law that civil Courts have jurisdiction in disputes between private individuals regarding State land in Upper Burma or waste land in Lower Burma, and very many cases have been decided by the civil Courts in accordance with the law as laid down in these two cases. It would therefore require strong reasons indeed to persuade us now to dissent from a view of the law which has been consistently followed for over twenty years. The Lower Burma decision in *Maung Naw*'s case (1) has been recently affirmed by this Court in *Maung Thaung* v. *Shaik Abdul Gani* (2). As regards the Upper Burma Land and Revenue Regulation, I respectfully endorse the view expressed by Heald J. in *The Burma Oil Co., Ltd.* v. *Baijnath Singh* (3). As Heald J. said, section 53 (2) (ii) of the Regulation must be construed with reference to section 24 (2) thereof, and the word "claims" used in section 24 must clearly be restricted to claims against Government, and that being so the word must have the same meaning in section 53 (2) (ii). This view is shown to be correct by a reference to section 30 of the Regulation, where a contest between private individuals is referred to as "a dispute" and not as "a claim." There is, in fact, a clear distinction in the Regulation between "a

(1) (1915-16) 8 L.B.R. 227. (2) [1938] Ran. 603.
(3) (1917-20) 3 U.B.R. 212.

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claim", which means a claim against Government, and "a dispute", which means a dispute between private individuals. With the greatest respect, I have no doubt that *The Burma Oil Co., Ltd.* v. *Baijnath Singh* (1) was correctly decided.

Secondly, it is urged that the suit is not maintainable because the plaintiff-appellant is out of possession of the area in dispute and therefore he cannot sue for a declaration of his right or title, under section 42 of the Specific Relief Act, without adding thereto a prayer for further relief by delivery of possession. As my Lord has said, this contention at once falls to the ground when the terms of the lease granted to the plaintiff-appellant by Government, on which he bases his claim, are examined, for they plainly show that the lease does not give the appellant the right to exclusive possession of the lands demised, but only the "liberty and power at all times during the term hereby demised to enter upon the said lands." Consequently, it was not open to the appellant to sue for the relief of possession. On the other hand, his right to or enjoyment of the lands demised has been invaded by the defendant-respondent, and the invasion is plainly such that pecuniary compensation would not afford adequate relief to the appellant, and hence he has correctly added in his plaint, to the prayer for a declaration of his right, a prayer for a perpetual injunction under section 54 of the Specific Relief Act.

On the facts the defendant-respondent had no defence to this action. The plaintiff-appellant based his cause of action on the lease of the 16th September, 1936, and the defendant-respondent's only defence was that this lease had been granted in continuance of a prospecting license granted on the 30th November, 1927, and that the appellant was a mere benamidar, or

(1) (1917-20) 3 U.B.R. 212.

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bare trustee, for the respondent in respect of this prospecting license. In fact, the respondent has set up that he and the appellant entered into an agreement to commit a fraud on the Government, because the respondent did not hold in 1927, and has not held at any material time, a certificate of approval under the Mineral Concessions Rules, and consequently could not obtain a prospecting license in his own name. The respondent has therefore had to admit that the prospecting license was issued, not to him, but to the appellant, and although the first prospecting license of 1927 was carelessly worded by the revenue authorities of the Pakôkku District, in that it was headed, " U Myo Nyun, authorized agent of U Thu Daw," the second prospecting license issued in 1930, in continuation of the one of 1927, was issued in the name of U Thu Daw alone. It is plain that what the revenue authorities intended to indicate in the first license was that the license was issued to U Thu Daw for whom U Myo Nyun was the authorized agent; they could not have intended anything else, because they were well aware that the respondent did not possess a certificate of approval.

The respondent has admitted that in 1927 he received from the appellant a power-of-attorney in writing appointing him to be the appellant's agent for the purpose of obtaining this propecting licence and subsequently prospecting the area included in the licence and winning oil therefrom. Unfortunately, the original document has not been produced, but the respondent has given secondary evidence of its contents to that extent: he has now been permitted in the District Court to call a large number of witnesses to establish that it was never the intention of himself and the appellant that he should act as the agent of the appellant in regard to this prospecting licence, but

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that he was the principal and the appellant had merely lent his name to him so that, by a fraud on the Government, he could obtain a prospecting licence, which he was not entitled to obtain in his own name. Such evidence was inadmissible under the provisions of section 92 of the Evidence Act, for the power-of-attorney was a reduction to writing of the agreement of agency between the parties, that is, of the terms on which the appellant appointed the respondent to be his agent in respect of this prospecting licence and the work to be done thereunder. No doubt, the respondent could have led evidence to show that there was never any intention of the parties that this agreement should be acted upon, that is, to show that they never entered into any such agreement of agency at all, and that the document was not the record of the terms of any such agreement of agency ; but that is not the case which the respondent sets up. This power-of-attorney was cancelled by the appellant in February, 1933, and up to that time the respondent consistently acted, in all his dealings with the revenue authorities of Government, as agent under the power-of-attorney of the appellant in respect of the prospecting license. He therefore cannot now be heard to say that there was no such agreement of agency at all. What he is now setting up is a variation, or contradiction, of the terms contained in the document, namely that, although he was ostensibly an agent, the appellant was a mere bare trustee for him, he being the real owner ; and he has tried to prove this by evidence relating to the acts and conduct of the appellant and himself. Such evidence was inadmissible. See *Balkishen Das and others* v. *Legge* (1) and *Maung Kyin* v. *Ma Shwe Hla and others* (2). The judgment of the Judicial Committee in the latter case was delivered by Lord Shaw, and in

(1) (1899) 27 I.A. 58. (2) (1917) 44 I.A. 236 ; 9 L.B.R. 114.

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the course of the judgment his Lordship said that the question arose as to whether evidence "relating to the acts and conduct of the parties as distinguished from oral evidence and conversations constituting in themselves some agreement between them" was admissible, and on this point he said (at page 244) :

"That question has now been settled by their Lordships adversely to the reception of the evidence."

Hence the respondent could not be permitted to prove by such evidence that in respect of the original prospecting licence and the renewals thereof he was not an agent of the appellant.

The written statement disclosed no defence to the appellant's suit for a declaration of his right to the area included within the prospecting license and, subsequently, within the lease of 1936. If, as the respondent states, he financed all the operations in connection with the prospecting licence, he may have had a right of suit for an account against the appellant; but it does not give him a right to challenge the title of the appellant under the lease.

Moreover I cannot see what connection the lease of 1936 has with the prospecting license, in which the respondent alleges that he had an interest as beneficial owner. Even supposing that he had such a beneficial interest, the prospecting license and the renewals thereof expired in 1931 ; but the lease was not granted until 1936. In the meantime Government had become aware of the dispute between the appellant and the respondent, and between 1934 and the grant of the lease a full inquiry was held by the revenue authorities regarding the allegations of the respondent that he was not the agent of the appellant, but was in fact the principal, and that the appellant had merely lent his name to him (the respondent) because he did not hold

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a certificate of approval. After this inquiry had been concluded, and only after it had been concluded, a lease was issued to the appellant, and the respondent's objections to the issue of a lease to the appellant were overruled. Hence, even if the whole of the respondent's case be true, it is quite plain that the facts which he has set up could not give him any interest in the lease of 1936.

It is extremely unfortunate that this suit, which could have been readily disposed of on a consideration of the documentary evidence alone, should have been pending for three years owing to the procrastinating methods and misconceptions of law of the predecessor of the present District Judge.

APPELLATE CIVIL.

Before Sir Ernest Goodman Roberts, Chief Justice, and Mr. Justice Dunkley.

U DAW NA AND ANOTHER

v.

U MYAT SAN AND OTHERS.*

1941

June 17.

Arbitration—Minor, a party to submission—Award not binding on minor—Major parties to submission—Award binding on majors.

An award is not binding on a minor though he has signed the agreement to refer to arbitration and though he has attained majority at the time the award is sought to be enforced in Court. The major parties to the submission are bound to one another by their lawful agreement and cannot evade their submission or defeat the award on the ground that the minor was not bound thereby.

Jones v. *Powell*, 49 R.R. 728 ; *Kirkwood* v. *Ma Thein*, I.L.R. 5 Ran. 186 (P.C.) ; *Ma Pwa Kywe* v. *Maung Hmat Gyi*, [1938] Ran. 667 ; *Mohori Bibee* v. *Ghose*, I.L.R. 30 Cal. 539 (P.C.), referred to.

Chan Htoon for the appellants.

E Maung for the respondents.

ROBERTS, C.J. AND DUNKLEY, J.—This appeal arises out of a suit to file an arbitration award made without the intervention of the Court, which suit was brought under the provisions of paragraph 20 of the second Schedule to the Code of Civil Procedure. The parties to the suit and to this appeal are the heirs, or supposed heirs, of one U Po Than, and by an agreement in writing they agreed to refer the question of the division of U Po Than's estate between them to the decision of two arbitrators, who pronounced an award. Six persons, who were said to be interested in the award, then applied to the District Court of Myingyan under paragraph 20 of the second Schedule for the award to be filed in Court, and for a decree to be made

* Civil Misc. Appeal No. 2 of 1941 from the order of the District Court of Myingyan in Civil Regular Suit No. 3 of 1939.

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accordingly under the provisions of paragraph 21. Five other persons, who were also said to be interested in the award, were made defendants.

The suit was badly conducted in the District Court and that has resulted in an unfortunate muddle.

Several of the persons who were joined as parties are not heirs of U Po Than, although all of them except one were parties to the submission to arbitration and executed the agreement to refer. This one, Maung E Ko, is a minor. He is the son of Ma Thet Swe, a grand-daughter of U Po Than, and her husband Maung Shein, who is the fifth respondent. Although Ma Thet Swe died before this suit was instituted, she survived U Po Than and therefore became entitled to a share in his estate, and her husband Maung Shein succeeded to her rights on her death. Their son Maung E Ko has never had any interest in U Po Than's estate and is not an heir. He was not represented before the arbitrators and, as we have said, he was not a party to the submission to arbitration or to the award. Consequently, although he was named as a plaintiff in the original suit and as a respondent in this appeal, he was not a proper party, and his name ought to have been struck off the record. We are therefore now bound to exercise the powers conferred upon us by Order XLI, rule 33, of the Code of Civil Procedure, and to direct that his name shall be struck off the record of the suit and this appeal and out of the decree of the District Court.

The application to file the award was opposed by one only of the heirs, Ma Hnin Yi, and her husband Maung Daw Na. They are the appellants in the present appeal. They set up several objections to the filing of the award, but their objections were overruled by the learned District Judge and a decree was passed in accordance with the award.

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In this appeal only one point has been taken on behalf of the appellants, and that arises out of the ninth issue framed in the suit, which was as follows :

"Is the agreement to refer to arbitration invalid because it was signed by one Maung Tha Dun E who was a minor at the time when he signed it?"

Maung Tha Dun E attained his majority before the suit was filed, and was the fifth defendant in the suit and is the ninth respondent in this appeal. He did not oppose the filing of the award, and even now supports it, but it is admitted by all parties that he was a minor at the time of the submission to arbitration. It is also admitted that he executed the agreement to refer, although he was a minor, but his signature on the agreement is not apparent. There is a signature "Mg. E" in English on the document, and this is presumably Maung Tha Dun E's signature, but the learned District Judge ought to have seen that this point was cleared up by evidence.

Now, in dealing with the ninth issue the learned District Judge enunciated the astonishing proposition of law that "it does not necessarily follow that all contracts entered into by a minor are void." Were it not for this observation of the learned District Judge, we should have thought that if there was one principle of law which was in India and Burma finally and absolutely settled, then that was the principle that the contracts of a minor are absolutely void. The learned District Judge has brushed aside the clear statement of this principle by their Lordships of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (1) because he thinks that the decision of a single Judge of this Court in *Sharfath Ali* v. *Noor Mahomed* (2) lays down that the contracts of a

(1) (1902) I.L.R. 30 Cal. 539 (P.C.). (2) (1923) I.L.R. 2 Ran. 1.

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minor are not always void. This latter case does not lay down any such proposition; what it really decided was that there is a right of action for the recovery of money lent independent of contract. He declined to follow the decision in *Ma Pwa Kywe* v. *Maung Hmat Gyi* (1) on the ground that it is applicable only to the case of a contract to marry, whereas the judgment makes it clear that it is a statement of the general law of contract. Further, the learned District Judge quoted a passage from an annotated work on the Code of Civil Procedure as authority for the proposition that "when one of the parties to a reference is a minor and an application is made to a Court by another party to file the award, the Court, before filing the award, should decide definitely whether the reference was for the benefit of the minor so as to be binding on him." If he had looked at the footnote in which are mentioned the two cases relied on by the author as authority for this statement, he would have seen that they are decisions based on Hindu Law and refer to the special position of the *karta* in a joint Hindu family. These cases, to the reports of which we have referred, do not lay down any proposition of general application, and they have no application to the present case.

It is most unfortunate that the case of *Kirkwood*, alias *Ma Thein and another* v. *Maung Sin and another* (2) was not cited to the learned District Judge. If he had read the judgment of their Lordships of the Privy Council in that case, his difficulty so far as the minor Tha Dun E was concerned would have been resolved. In that case there was an arbitration award to which certain minors were parties, and both the learned District Judge who tried the original suit and the Chief Court of Lower Burma on appeal therefrom held that

(1) [1938] Ran. 667. (2) (1925) I.L.R. 5 Ran. 186 (P.C.).

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the award was void so far as the minors were concerned. This view was upheld by the Judicial Committee. The learned District Judge in that case further held that because the award was void as regards some of the parties it must be set aside in its entirety, but the Chief Court on appeal differed from this view and held that the award was valid and binding as regards the major parties thereto. On this point their Lordships of the Privy Council found it unnecessary to express any opinion. Learned counsel for the respondents does not attempt to contend that in the present case the award is not void so far as Maung Tha Dun E is concerned. The suit against him therefore ought to have been dismissed, and, although he has not appealed, we must again exercise our powers under Order XLI, rule 33, and direct that the judgment and decree of the District Court shall be altered by dismissing the suit against Maung Tha Dun E, and the decree of the District Court will be amended accordingly.

The real question which we have to decide in this appeal is whether, as contended by the appellants, the award is absolutely void, or whether, as contended by the respondents, it is valid and binding on all parties except Maung Tha Dun E.

In the course of their judgment in *Kirkwood's* case (1) their Lordships of the Privy Council quoted a passage from the judgment of Robinson C.J., Chief Judge of the Chief Court of Lower Burma, which reads as follows:

"As regards plaintiffs Nos. 1 and 3 therefore, who were minors and not properly represented before the arbitrator, there must be a decree declaring that the award is not binding on them. As to whether the decree should go further and declare that the award is not binding on any of the parties to it I am of opinion that in

(1) (1925) I.L.R. 5 Ran. 186 (P.C.).

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this case there is no ground for passing such a decree. The major parties to the reference in the award acted with their eyes open and with full knowledge of what they were doing. Whatever may have been the immediate object they had in view and whether they were acting under the idea that they were protecting the interests of the minors against their mother after her second marriage or were seeking to protect themselves as well as the minors, there is no ground for holding that they should be relieved of the result of their considered action and their binding agreement to refer. It is no argument to say that the result of remitting the minors to their original rights will have the effect of creating great complications."

We are in complete agreement with the view of the learned Chief Judge expressed in this passage of his judgment, and his remarks are peculiarly apposite to the present case. The minor Tha Dun E was not represented at all before the arbitrators, and although he was not competent to enter into any agreement, he personally signed the agreement to refer. Consequently the award is void as regards him ; but that does not entitle the major parties to the submission, who are bound to one another by their lawful agreement, to evade their submission or defeat the award on the ground that the minor is not bound thereby. The case of *Jones* v. *Powell* (1) is clear authority for this proposition.

Hence the appellants are bound by the award, and, save for the directions given in this judgment regarding the two minors Maung E Ko and Tha Dun E, this appeal fails and is dismissed with costs, advocate's fee ten gold mohurs.

(1) (1838) 6 Dowl. 483 ; 49 R.R. 728.

APPELLATE CIVIL.

Before Sir Ernest Goodman Roberts, Chief Justice, and Mr. Justice Dunkley.

THE HANTHAWADDY DISTRICT COUNCIL

1941
Aug. 5.

v.

U BA TIN.*

Limitation—Suit against District or Municipal Councillors—Loss, waste or misapplication of moneys or property—Position of Councillor that of trustee—Limitation Act, ss. 36, 120—Burma Municipal Act, s. 43—Rural Self-Government Act, s. 76.

Article 36 of the Limitation Act does not apply to suits under s. 76 of the Rural Self-Government Act or under s. 43 of the Municipal Act, for compensation for the loss, waste or misapplication of any money or other property belonging to a District Council, Circle Board or School Board or to a Municipal Committee, instituted by such District Council or School Board or by such Municipal Committee, against any person of whose neglect or misconduct while a member of such Council or Board, or of such Committee, such loss, waste or misapplication is a direct consequence. The position of municipal or of district councillors in regard to the municipal or district council funds is in law that of trustees and the article applicable is 120.

A.N.C.T. Subbiah v. *N. Mudaliar*, [1938] Mad. 586 (F.B.), followed.

U Win Su v. *Secretary of State for Burma*, [1940] Ran. 172, approved.

Tavoy Municipal Committee v. *U Khoo Zun Nee*, Civ. 2nd Ap. No. 232 of 1935, H.C., Ran., overruled *pro tanto*.

A reference for the decision of a Bench was made in the following terms by—

1940
July 1.

SHARPE, J.—The point in this appeal is a short one and the material facts themselves lie in a very small compass.

On the 14th May 1940 the appellants, the Hanthawaddy District Council, instituted a suit in the Township Court of Kayan against the former Chairman of the Mekkathan Circle Board, which Circle is within the Hanthawaddy District; the suit was one for compensation for the loss of money belonging to the Circle Board, and clearly it was brought under section 76 of the

* Reference arising from Civil 2nd Appeal No. 64 of 1941 from the judgment of the District Court of Hanthawaddy in Civil Appeal No. 19 of 1940.

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Rural Self-Government Act, 1921, although that Act is not specifically mentioned in the plaint. It was alleged in the plaint that the loss was a direct consequence of the defendant's neglect while Chairman of the above-mentioned Circle Board. It is immaterial for the present purpose for me to detail the neglect alleged. It will suffice to say that, to put it in a single sentence, it is alleged in the present suit that the defendant did not sufficiently check and supervise the accounts of the Bazaar-*gaung* of Kayan, as a result of which the latter was enabled to commit criminal breach of trust in respect of the monthly stall-rents and fees collected and received by him, which were accordingly lost by the Board. The date of the alleged neglect on the part of the defendant is not expressly stated in the plaint, but by a reference to the documents presented with the plaint it appears that the date is in or about the month of February 1937. The learned advocate for the appellants has stated to me that that is the date upon which he relies and the matter was decided in both the lower Courts on the basis of such a date, that is to say, on the basis of a date which is a little more than three years before the institution of the present suit.

The defendant pleaded in his written statement that the suit was barred by limitation, a preliminary issue was framed on that plea, and the only point now to be decided is whether the suit was so barred.

In my judgment the position of the defendant in this case, as Chairman of the Circle Board, was, in regard to any money belonging to the Board, in law that of a trustee, and his liability must accordingly be determined upon that footing. Dunkley J. has recently so held, as regards the position of a municipal councillor in regard to municipal funds—see *U Win Su* v. *The Secretary of State for Burma* (1)—following the Bench decision of the Bombay High Court in *Manilal Gangadas* v. *Secretary of State for India* (2). The material words of section 43 of the Municipal Act, 1898 [which is the Act under which *U Win Su*'s case (1) fell to be decided] are identical with the words of section 76 of the Rural Self-Government Act, which governs the present case. I myself have no doubt—and my own opinion is reinforced by the judgment of my learned brother Dunkley in *U Win Su*'s case (1) *supra*—that a member of a Circle Board is in the position of a

(1) [1940] Ran. 172. (2) (1915) I.L.R. 40 Bom. 166.

trustee as regards any money belonging to the Board. The question whether the rents and fees collected by the Bazaar-*gaung* in this particular case were or were not " money belonging to " the Circle Board may have to be decided hereafter if the suit, not being time-barred, proceeds. It appears to me that at the present stage of the proceedings it must be assumed that that question will be answered in the affirmative, for, if it is not so answered, the suit is not maintainable under section 76 of the Rural Self-Government Act. The question which I have just mentioned is one which, if there is a dispute about it, can only be answered after evidence has been taken in regard to it, whereas the present preliminary issue as to limitation falls to be decided entirely upon the pleadings.

If the decision in *U Win Su*'s case (1) *supra* is correct—and in my opinion it is correct—then it appears to me that the question now to be decided is what period of limitation applies in the case of a claim against a trustee in respect of the loss of trust property. In the case of *The Official Trustee* v. *Raeburn* (2) it was said by a Bench of this Court (at the bottom of page 302) that :

> " Section 3 " (of the Limitation Act) " lays down that every suit instituted after the period of limitation prescribed therefor by the first schedule shall be dismissed, with a saving clause in regard to the provisions of the succeeding sections of the Act. Hence the normal periods of limitation are those prescribed by the first schedule, and sections 4 to 27 provide exceptions to or qualifications of the ordinary provisions of the law. Consequently it is necessary, first, to decide what article of the first schedule of the Limitation Act is applicable to these suits and to apply it, and then to see whether sections 4 to 25 of the Act contain any exception or qualification which modifies the ordinary law in its application to these cases."

Therefore the first question to be decided in the present case is what article of the first schedule to the Limitation Act is applicable to this suit. No article specifically provides for the case of a suit against trustees ; therefore Article 120 applies to such a case. In *Subbiah Thevar* v. *Samiappa Mudaliar* (3) it was held by

(1) [1940] Ran. 172, (2) [1940] Ran. 273, 302.
(3) [1938] Mad. 586.

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a Full Bench of the Madras High Court that it is Article 120 which applies to a suit filed against a trustee to make good the loss sustained by the trust by reason of his omission to collect moneys due to the trust ; see also *Official Trustee* v. *Raeburn* (1). As the present suit was filed within the period mentioned in Article 120, it is unnecessary to consider, in this particular case, whether the exception to the ordinary law wich is provided by section 10 of the Limitation Act applies.

As it appears to me that Article 120 applies to the present suit, it is accordingly, in my judgment, not barred by limitation. But there is a decision of this Court, again of Dunkley J., sitting alone (upholding a decision of the District Judge, Mr. Spargo, as he then was) to the effect that Article 36 applies to a suit brought by a Municipal Committee against one of its former Presidents for the recovery of money lost to the Committee through the negligence of the defendant when he was its President. I refer to the case of the *Tavoy Municipal Committee v. U Khoo Zun Nee* (2). With great respect both to Dunkley J. and to Mr. Spargo, I am unable to see that Article 36 applies to such cases. As Leach C.J. said in *Subbiah Thevar* v. *Samiappa Mudaliar* (3) at page 596 :

> " If Article 36 were to apply to an act of non-feasance on the part of the trustee, it would mean that if the trustee lived he would be free from all liability in two years, but if he died before the two years had elapsed, his estate would continue to be liable for another three years."

That, of course, is because of Article 98. The mere fact that the suit is brought in respect of some malfeasance, misfeasance, or non-feasance is not, to my mind, sufficient by itself to bring the case within the terms of Article 36. The words " independent of contract " which appear in that article must not be overlooked. My understanding of the wording of Article 36 is that it applies to such acts and omissions as are commonly known as torts, that is to say, wrongs independent of contract. [The cases of *In the matter of the Union Bank, Allahabad, Ltd.* (4) and *Govind Narayan* v. *Raugnath Gopal* (5) may be usefully referred to in this connection.] It does not seem to me possible to say that a trustee who has lost trust property is liable therefor in an action for tort.

(1) [1940] Ran. 273. 302.
(2) 164 I.C. 410.
(3) [1938] Mad. 586.
(4) (1925) I.L.R. 47 All. 669, 693/4.
(5) (1929) I.L.R. 54 Bom. 226, 245/6.

I respectfully agree with what Leach C.J. said in the above-mentioned case and with the decision of the Full Bench in that case, which, as I have already indicated, was to the effect that Article 120 applies to an act of non-feasance on the part of a trustee.

I also entirely agree with the decision of Dunkley J. that a member of a Municipal Committee is in the position of a trustee, but I am unable to agree with him that Article 36 applies to a suit brought against such a person for compensation for loss of money belonging to the Committee. The earlier decision of Dunkley J., in the *Tavoy Municipal Committee* case (1), appears to me to be inconsistent with his own later decision in *U Win Su*'s case (2).

At one stage of the present proceedings it was apparently suggested, but only tentatively that Article 90 applies to suits such as the present one. If that Article were the appropriate one, the present suit would, as a matter of fact, be barred just as effectively as if Article 36 were the one applicable. But I do not think it at all possible to say that the present case is governed by Article 90. Although that Article relates to suits for "neglect or misconduct", which are the same words as are used both in section 76 of the Rural Self-Government Act and also in section 43 of the Municipal Act, the important words of Article 90 are "suits by principals against agents." I find it impossible to say that the defendant in the present case was in the position of an agent; in my opinion, he was, as I have already said, in the position of a trustee. Article 90 does not, therefore, apply to the present suit, in which the real question is, in my judgment, whether it is Article 36 or Article 120 which governs the case. I have also mentioned Article 90 because it appears that on at least one occasion the Assistant District Judge of Hanthawaddy has held that a suit similar to the present one (and brought, incidentally, by the same plaintiffs) was governed by Article 90; see *Hanthawaddy District Council* v. *U Po Sin* (3).

For the reasons hereinbefore appearing I think that I ought to refer a question of law to a Bench; an additional reason for my doing so is that I have not had the benefit of hearing any argument on behalf of the respondent.

The question of law which I propose to refer is this:

> Does Article 36 of the Limitation Act apply to suits under section 76 of the Rural Self-Government Act

(1) 164 I.C. 410. (2) [1940] Ran. 172.

(3) Civ. Ap. 44 of 1939 of the Asst. Dist. Court of Hanthawaddy.

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and under section 43 of the Municipal Act, for compensation for the loss, waste or misapplication of any money or other property belonging to a District Council, Circle Board or School Board, or to a Municipal Committee, instituted by such District Council or School Board, or by such Municipal Committee, against any person of whose neglect or misconduct while a member of such Council or Board, or of such Committee, such loss, waste or misapplication is a direct consequence ?

I now refer that question, under Rule 24 of the Appellate Side Rules (Civil) of this Court, for the decision of a Bench of two Judges or of a Full Bench, as the Chief Justice may direct. It will be seen that I have framed the question in such a way as to cover cases under both Acts, although the present suit is, of course, only under one of them, namely, the Rural Self-Government Act. I have included both Acts in the question referred as the position in this regard is exactly the same under both Acts and as the *Tavoy Municipal Committee* case (1), the decision in which really gives rise to this reference, was decided under the other Act.

E Maung (Government Advocate) for the appellant. The appellant's suit under s. 76 of the Rural Self-Government Act has been dismissed on the ground that art. 36 of the Limitation Act applies and the suit is barred by limitation. The lower Courts in so holding relied on an unreported decision of this Court in *Tavoy Municipal Committee* v. *U Khoo Zun Nee* (1), but that part of the judgment as to the application of art. 36 in that case was *obiter*, and the Madras case on which it relied, namely *Srinivasa Ayyangar* v. *Municipal Council of Karur* (2), has now been overruled by a Full Bench of the same Court in *A.N.C.T. Subbiah Thevar* v. *N.R.S. Mudaliar* (3).

The decision in the *Tavoy Municipal Committee*'s case is also inconsistent with the decision in *U Win Su* v. *The Secretary of State for Burma* (4). In the latter

(1) 164 I.C. 410.
(2) I.L.R. 22 Mad. 342.
(3) I L.R. (1938) Mad. 586.
(4) [1940] Ran. 172.

case, it was held that the position of a municipal Councillor is that of a trustee and that decision is applicable to this case because section 76 of the Rural Self-Government Act and s. 43 of the Municipal Act are similar. In this view the correct article applicable is article 120 of the Limitation Act. See *Chokshi* v. *Pestonji Vakil* (1); *Official Trustee* v. *Raeburn* (2); *In the matter of the Union Bank, Allahabad, Ltd.* (3); *C. Mandelli* v. *John Kenoy* (4); *J. Subba Rao* v. *J. Rama Rao* (5).

No appearance for the respondent.

DUNKLEY, J.—The question which has been propounded for our decision is as follows :

" Does Article 36 of the Limitation Act apply to suits under section 76 of the Rural Self-Government Act and under section 43 of the Municipal Act, for compensation for the loss, waste or misapplication of any money or other property belonging to a District Council, Circle Board or School Board, or to a Municipal Committee, instituted by such District Council or School Board, or by such Municipal Committee, against any person of whose neglect or misconduct while a member of such Council or Board, or of such Committee, such loss, waste or misapplication is a direct consequence ? "

The answer to this question must be in the negative, and it may be added that the appropriate article of the Limitation Act applicable to such a suit is Article 120.

The reference has been occasioned by some *obiter dicta* which I made in Special Civil Second Appeal No. 232 of 1935 (*The Tavoy Municipal Committee* v. *U Khoo Zun Nee*). That was a case brought by the Municipal Committee of Tavoy against its late president, and on second appeal I held that non-feasance by the late president had not been proved and that therefore

(1) 37 Bom. L.R. 946.
(2) [1940] Ran. 273.
(3) I.L.R. 47 All. 669.
(4) I.L.R. 62 Cal. 120.
(5) I.L.R. 40 Mad. 291.

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DUNKLEY, J.

no suit under section 43 of the Municipal Committee lay against him. Most regrettably, I went on to consider the question of limitation because the learned District Judge on first appeal had based his decision on this question, and I came to the conclusion that Article 36 of the Limitation Act was applicable, relying on the case of *Srinivasa Ayyangar* v. *Municipal Council of Karur* (1). As I had already decided the appeal against the Municipal Committee on another ground, what I said on the question of limitation was purely *obiter*, and the Madras case on which I relied is no longer good law in view of the decision of a Full Bench of the same High Court, in *A.N.C.T. Subbiah Thevar* v. *N. R. Samiappa Mudaliar* (2), where it was held that Article 120 of the First Schedule of the Indian Limitation Act, 1908, applies to a suit filed against a trustee or co-trustee to make good the loss sustained by the trust by reason of his omission to collect moneys due to the trust. It is most unfortunate that my unreported decision in Special Civil Second Appeal No. 232 of 1935 and that part of it which was purely *obiter* should have been followed, when in the case of *U Win Su* v. *The Secretary of State for Burma* (3) I held that the position of municipal councillors, and consequently also of district councillors, in regard to the municipal or district council funds is in law that of trustees. This is a reported decision, and when this decision is applied in conjunction with the law as laid down by the Full Bench of the Madras High Court, it is clear that the article which is applicable to a suit of this nature is Article 120 and not Article 36. So far as this point is concerned my judgment in Second Appeal No. 232 of 1935 must be held to be wrong.

(1) (1899) I.L.R. 22 Mad. 342. (2) [1938] Mad. 586 (F.B.).
(3) [1940] Ran. 172.

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The proceedings will, therefore, be returned to the learned Judge who is hearing the appeal with the answer to the question propounded in the negative.

Costs of this reference, five gold mohurs, to be costs in the second appeal.

ROBERTS, C.J.—I am quite clearly of the opinion that the answer to the question propounded must be in the negative and that Article 36 applies to wrongs independent of contract, *i.e.*, torts, but not to breaches of trust by trustees.

There was, as has been pointed out, reported authority to that effect, and I regret to hear that an *obiter dictum* in an unreported case of 1935 has been so construed by some persons as to whittle down the effect of a reported decision directly in point by the same learned Judge, which is to the effect that municipal councillors and district councillors are in the same position as trustees.

I agree with the order proposed as to costs.

APPELLATE CIVIL.

Before Sir Ernest Goodman Roberts, Chief Justice, and Mr. Justice Dunkley.

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Aug. 13.

A.K.M.L. CHETTYAR

v.

M.P.R.V.R. FIRM AND ANOTHER.*

Insolvency—Date of act of insolvency—Execution of fraudulent transfer, date of—Date of registration—Transfer made when property conveyed—Registration Act, s. 47—Burma Insolvency Act, ss. 6 (a) (b) (c), 9 (1) (c), 54.

When the act of insolvency on which the petition is grounded falls under either clause (*a*), (*b*) or (*c*) of s. 6 of the Burma Insolvency Act, for the purpose of s. 9 (*1*) (*c*) of the Act the date of the act of insolvency is the date of execution of the deed of transfer and not the date of registration thereof. There is no distinction between the language of s. 54 and the language of s. 9 (*1*) (*c*) of the Act when read with s. 6 of the Act. The transfer is made when the property is conveyed and s. 47 of the Registration Act makes it operative from the date the document is executed.

Re U On Maung v. *Maung Shwe Hpaung*, [1938] Ran. 375 (F.B.), followed.

K. Pillai v. *Mooppanar*, I.L.R. 50 Mad. 193 (P.C.); *Rama Nanda Pal* v. *P. K. Ghosh*, [1938] 2 Cal. 275, referred to.

P. K. Basu for the appellant.

P. B. Sen for the 2nd respondent.

ROBERTS, C.J.—The appellant firm petitioned the District Court of Myaungmya on June 12, 1940, to adjudicate the M.P.R.V.R. Firm insolvent; two partners were respondents to the petition, one of whom, M.P.R.V.R. Alagarsawmy Velar, died before adjudication. Accordingly there was an amended petition in which his legal representative was brought upon the record, and this was filed on December 17, 1940.

In the amended petition a new act of insolvency was sought to be set up in that a fraudulent transfer was made by the respondents on June 24, 1940; this

* Civil Misc. Appeal No. 13 of 1941 from the order of the District Court of Myaungmya in Insolvency case No. 1 of 1940.

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transfer was not registered until October 23, 1940, and the appellants now seek to say that the act of insolvency took place on that day.

By section 9 (*1*) (*c*) of the Burma Insolvency Act a creditor shall not be entitled to present an insolvency petition against a debtor unless the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition. Section 6 indicates when an act of insolvency is committed, and the relevant sub-sections, here (*a*) and (*b*), use the phrase "if he makes a transfer of his property" of a certain specified kind.

The learned District Judge rightly held that the principles laid down in *Re U On Maung* v. *Maung Shwe Hpaung and another* (1) by a Full Bench of this Court were applicable to the present case. It was there held that the period of three months referred to in section 54 of the Act began to run from the date of execution of the transfer of property and not from the date of registration. Baguley J. certainly added that the decision dealt with section 54 only and that he would like to reserve his opinion as to whether the same considerations would necessarily apply in considering limitation with regard to section 9 (*1*) (*c*). And we have listened to an interesting argument from Mr. Basu who has pointed out that in section 54 the language used is

> "every transfer of property, every payment made . . . . in favour of any creditor with a view of giving that creditor a preference over the other creditors shall (etc.) be deemed fraudulent"

whereas section 6 describes an act of insolvency as committed when the debtor "makes" a transfer. And

(1) [1938] Ran. 375.

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he points to section 54 of the Transfer of Property Act where . is laid down that a sale transfer can be " made " only by a registered instrument.

" Transfer of property " is defined in section 5 of the same Act, and the Full Bench decision to which I have referred shows that an unregistered transfer is merely inchoate until registered and not that nothing has been done. Section 47 of the Registration Act expressly deals with this point in providing that a registered document shall not operate from the date of registration but from the time from which it would have commenced to operate if no registration thereof had been required and made.

In *Rama Nanda Pal* v. *Pankaj Kumar Ghosh* (1) a Bench of the Calcutta High Court independently arrived at the same conclusion as that reached by the Full Bench here. Mr. Basu has not shown that there is any difference between sections 6 and 9 and section 54 which would make these decisions inapplicable to the former sections. As Baguley J. remarked, both in the High Courts of Madras and Lahore it has not been apprehended that different considerations apply; and whilst he was careful not to commit himself to any view as to the effect of section 9 I am satisfied that the principle involved here is in no way different from that laid down in the authorities to which I have referred.

Accordingly this appeal must be dismissed with costs, advocates' fee five gold mohurs.

DUNKLEY, J.—I agree.

The contention on behalf of the appellant is that when the act of insolvency on which the petition is grounded falls under either clause (*a*), (*b*) or (*c*) of

(1) [1938] 2 Cal. 275.

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section 6 of the Burma Insolvency Act, for the purpose of section 9 (*1*) (*c*) of the Act the date of the act of insolvency is the date of registration of the deed of transfer and not the date of execution thereof.

Mr. Basu, for the appellant, has cited two cases in support of this proposition, *Sarvathada Iswarayya* v. *Kuruba Subbanna and another* (1) and *Lakhmi Chand* v. *Kesho Ram* (2). Both these judgments are based on the conclusion of the learned Judges that for this purpose there is no distinction between the language of section 54 of the Provincial Insolvency Act and the language of section 9 (*1*) (*c*) when read with the appropriate clause of section 6, and consequently these cases are of no assistance to the appellant, because a Full Bench of this Court has held in *In re U On Maung* v. *Maung Shwe Hpaung and another* (3) that the period of three months referred to in section 54 of the Provincial Insolvency Act begins to run from the date of execution of the transfer of property and not from the date on which it is registered, and that ruling is binding on us.

So Mr. Basu has been obliged to contend that there is a distinction between the language of section 54 and the language of section 9 (*1*) (*c*) when read with section 6. In my opinion, there is no distinction between these provisions. Section 54 (*1*), so far as it is relevant, reads as follows :

"Every transfer of property * * * shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent, etc., etc., * * *"

Section 6, clause (*a*), or (*b*), or (*c*), refers to the making of a transfer of property, and each clause sets out that it is an act of insolvency if the debtor makes a transfer of

(1) (1934) I.L.R. 58 Mad. 166. (2) (1935) I.L.R. 16 Lah. (F.B.) 735.
(3) [1937] Ran. 375.

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property under certain circumstances ; section 9 (*1*) (*c*) enacts that a creditor shall not be entitled to present an insolvency petition against a debtor unless the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition ; so that, when these two provisions are read together, section 9 (*1*) (*c*) may be paraphrased in this form : " * * the making of the transfer of property on which the petition is grounded has occurred within three months before the presentation of the petition." When put in that way it seems clear, to my mind, that there is no distinction between the provisions of section 9 (*1*) (*c*) and the provisions of section 54.

Mr. Basu has argued that " a transfer " and " makes a transfer " are two entirely different things and that a transfer is not made until it is completed with all the formality required by law. This appears to me to be contrary to the definition of " transfer of property " contained in section 5 of the Transfer of Property Act, which reads as follows :

> " In the following sections ' transfer of property ' means an act by which a living person conveys property, in present or in future, to one or more other living persons * * * ."

Hence the transfer is the conveyance and the transfer is made when the property is conveyed ; and section 47 of the Registration Act makes it quite clear that the conveyance is complete when the document is executed.

The judgment of their Lordships of the Privy Council in *Kalyanasundaram Pillai* v. *Karuppa Mooppanar and others* (1) is to this effect. In that case there was a contest between two registered deeds of which the one which was first executed was not

(1) (1926) I.L.R. 50 Mad. 193 (P.C.).

registered until after the second had been executed and registered ; but their Lordships held that the deed which was first executed had priority over the other.

In my opinion a transfer of property is made when the document evidencing the transfer is executed and not when it is subsequently registered. Hence I agree with my Lord the Chief Justice that this appeal fails and must be dismissed with costs.

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A.K.M.L. CHETTYAR v. M.P.R.V.R. FIRM.

DUNKLEY, J.

INCOME-TAX ACT REFERENCE.

Before Sir Ernest Goodman Roberts, Chief Justice,
Mr. Justice Dunkley and Mr. Justice Shaw.

1941
Aug. 21.

IN RE THE COMMISSIONER OF INCOME-TAX, BURMA
v.
RAI BAHADUR BAGLA.*

Income-tax—Remittance to Burma by foreign branch to business in Burma—Presumption that remittance is out of profits—Goods consigned from Burma—Remittance less than cost of production—Remittance only repayment of capital—No profits.

When a remittance is made to Burma by the foreign branch of a business here, the presumption is that such remittance is from out of the profits of the foreign business. Where, however, the raw material has been extracted or purchased in Burma, converted into a saleable article in Burma and then exported for sale, and the remittance by the foreign branch of the business is less than the cost of production of the commodity, the remittance is one of working capital and not of profits. What the business in Burma has obtained is a payment in cash towards replenishment of the depleted stock in trade, as it were, of the business in Burma and is in the nature of a repayment of capital.

Chettyar Firm, V.P.R.PL. v. *Commissioner of Income-tax, Burma*; I.L.R. 11 Ran. 397; *Scottish Provident Institution* v. *Allan*, 4 T.C. 591, referred to.

Tun Byu (Government Advocate) for the Crown.

Clark for the assessee.

ROBERTS, C.J.—The question referred to us is as follows:

"Whether there was any material or evidence upon which it could be found that the sum of Rs. 1,09,723 was profits or income earned by the assessee and remitted during the year of account to Burma."

The respondents are a Hindu undivided family resident in Burma. Broadly speaking they have saw mills and a buying organization in Burma: they extract

* Civil Reference No. 10 of 1941.

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ROBERTS, C.J.

timber in this country and export it to India for sale. Nobody can say what profits they earn till the timber is sold in India. In the accounting year they sent timber valued at Rs. 11,09,512 to India for sale and the excess over that figure at which it might be sold would be a profit. Hence the respondents computed the commission they would receive upon sales and reached a notional figure which was accepted by the Commissioner. After allowing for losses in connection with the business in Rangoon as opposed to profits in Moulmein, and for depreciation, the sum of Rs. 10,150 was arrived at. The question is whether in addition to this sum they received other profits from British India. What they received from British India was a sum of Rs. 10,02,450.

It is perfectly true that profits were made in India from the sale of timber. The sum so realized amounted to Rs. 1,09,723.

Now in computing what profit there would be from the sale of the timber in India it was valued at Rs. 11,09,512. The Commissioner does not question this figure. No profit was made by the firm in Burma until it got back the value of this commodity. If any sum in excess of this sum were remitted from British India to British Burma there would be material on which it might well be held that the remittance of such an excess was a remittance of profits. But the Burma business has not got any profit from this source and indeed has sustained a loss. The Commissioner has stated in his order dated 29th October 1940 Annexure B :

" It is argued by the applicants that the remittances were payment of the price of the goods shipped. It is not apparent in what way this argument supports the applicant's case. But whether it does or not it is misconceived. There can be no question of a trader paying himself the cost of his own goods

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He purchases or manufactures at a certain cost to himself ; when he sells what he receives is the sale proceeds of those goods which if more than his cost gives him a profit and if less involves him in a loss."

The last sentence is of course correct. But in his earlier remarks the Commissioner appears to have confused profit with turnover. Though the respondents may have made a profit in India they have not received it in British Burma: what they have received in British Burma is less than their cost. The business in Burma no longer has the timber nor has it received the full value of the timber much less any profits connected with its sale. The Commissioner appears to recognize in paragraph 7 of Annexure B that the remittances do not cover the value of the timber exported and that there is no apparent reason why profits arising from other sources should be brought to Burma.

In *Scottish Provident Institution* v. *Allan* (1) Lord Chancellor Halsbury said

"This is a large amount of profit which has been made, a large amount which, out of profits, has been remitted to this country. If that is true, then Income Tax is payable upon it. If that is not the exact amount, but the parties would be able to show that some part of it ought to be appropriated to capital, and if they could make it apparent that the thing which was received in this country was not only profit, or was not at all profit, but was simply a repayment of capital, I think it is for them to show that."

It seems to me that this is what the respondents have done here: they have sent to Burma a sum less than the value of the timber received. Consequently what the business in Burma has obtained was a payment in cash towards replenishment of what I may term the depleted stock in trade of the business here, namely

(1) 4 Tax Cases 591.

timber. And this was in the nature of a repayment of capital.

As Page C.J. pointed out in *V.P.R.P.L. Firm* v. *Commissioner of Income-tax, Burma* (1) the only question of law that can arise upon such a case is whether there was any material before the income-tax authorities on which they could find that a sum remitted during the year of assessment to Burma was profits or income earned by the assessees. Where it is shown that a sum of money remitted in return for a commodity exported is less than the cost price of that commodity the sum remitted cannot be a profit on the sale thereof. This seems to me to dispose of the whole matter.

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Annexure C is devoted to a series of summaries or head notes of cases relating to money remittances in money lending businesses and these do not assist us in the present matter. The timber exporters in Burma did not get any profits from India ; they received some part of the turnover which was less than the value of the timber and before there could be a remittance of some part of the profits the amount remitted would have to exceed the admitted price of the commodity sold. This question must therefore be answered in the negative. The Commissioner must pay the costs of this reference advocate's fee fifteen gold mohurs ; and the respondent is entitled to the refund of his deposit.

DUNKLEY, J.—I agree.

At the end of paragraph 6 of his order in revision, from which this reference arises, the Commissioner of Income-tax said in regard to the present case :

" There is no question of drawing any inference from facts, much less of entering the domain of presumption, in determining the character or the purpose of the remittances."

(1) (1933) I.L.R. 11 Ran. 397.

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DUNKLEY, J.

That is undoubtedly correct; but in coming to the conclusion that part of these remittances was a remittance of profits the Commissioner really acted on the presumption that when a remittance is made by a foreign business the remittance is a remittance from out of the profits of the foreign business. That presumtion is rebuttable [*V.P.R.P.L. Firm* v. *The Commissioner of Income-tax, Burma* (1)], and the facts show that in this case the remittances were remittances of working capital. The raw material was extracted or purchased in Burma; it was converted into a saleable commodity in Burma, and was then consigned to India to be sold. Clearly, up to the stage when the timber reached the sale depôt in India all expenditure incurred was capital expenditure, incurred by the Burma business. The Burma business had to be reimbursed to this extent, otherwise it would come to a standstill. Hence, to the extent of the cost of production of the timber consigned to India, all remittances from India were remittances of working capital and not remittances of profits at all. Now, for the purpose of maintaining the accounts of the Burma business and of the India business, a value was placed on the timber consigned to India. In the Burma accounts this value was shown as the sale value of the timber to the branches in India, and in the India accounts it was shown as the purchase value from Burma. It represented the cost of production in Burma of the saleable article. These figures might have been challenged by the Income-tax authorities, and the assessee might have been called upon to prove the actual cost of production, but he was not; and the assessee's figures were accepted by the Income-tax authorities. Hence the value of the timber consigned to India, as shown in the assessee's books of

(1) (1933) I.L.R. 11 Ran. 397.

account, represented the cost of production of that timber in Burma. Up to that amount all remittances from India were therefore remittances of working capital. Since the total remittances were less than that amount, there was no remittance of profits, and the question referred must be answered in the negative.

SHAW, J.—I agree and have nothing further to add.

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DUNKLEY, J.

INCOME-TAX ACT REFERENCE.

Before Sir Ernest Goodman Roberts, Chief Justice,
Mr. Justice Dunkley and Mr. Justice Shaw.

1941
Aug. 21.

IN RE THE COMMISSIONER OF INCOME-TAX, BURMA
v.
S.P.K.A.R.M. FAMILY.*

Income-tax—Residence, meaning of—Hindu undivided family—Major son residing in Burma for education—No part in family business—Business managed by agent—Family residence not in Burma—Income Tax Act, s. 4.

Where the major son belonging to an undivided Hindu family resides in Burma for educational reasons in quarters of his own and has nothing to do with the family business, which was in the hands of a fully empowered agent in a separate place, the family cannot be said to be residing in Burma.

Commissioner of Income-tax, Madras v. *V.S.K.S. Chettyar*, I.L.R. 55 Made 885, distinguished.

Tun Byu (Government Advocate) for the Crown.

Foucar for the assessee.

ROBERTS, C.J.—The two questions referred to us are as follows :

" (1) Whether there was material upon which the Assistant Commissioner of Income-tax could come to the conclusion that the family of the S.P.K.A.R.M. was resident in Burma during the account period relevant to the 1939-40 assessment ?

(2) Whether there was material to hold that unrealized outstandings of Rs. 8,979 was a capital loss or otherwise disallowable under the Burma Income-tax Act ? "

As stated in the reference,—

"During the account period, a major son of the family, which consists of three members, the father, Ramanathan Chettyar, and two sons, Annamalai, a major, and Subramanian, a minor, resided in Burma for educational reasons. During the period of his residence, he had nothing to do with the family's business, which was in the hands of a fully empowered agent. He neither messed nor lived at the family shop but in quarters of his own and no provision was made at the shop for residence or cooking for

* Civil Reference No. 9 of 1941.

members of the family, the business being conducted in a room common to several other Chettyar firms and the agent and employees messing in a hotel."

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The Commissioner has relied on *The Commissioner of Income-tax, Madras* v. *V.S.K.S. Somasundaram Chettyar, Madura* (1), in which the facts were very different. The case is also reported as *V.S.K.S. Somasundaram Chettyar* v. *The Commissioner of Income-tax, Madras* (2), and it appears from the case stated, as there set out, that the Hindu undivided family consisted of the manager of the family and his son whose permanent home was in Pudukottah and this son was a student permanently residing in Madura. This latter fact was not alluded to at all in the judgment, and was not even mentioned in the official report, and formed no part of the grounds for deciding that there was material upon which the Commissioner could find that the Hindu undivided family was resident in Madura. The reference to it in the head-note in the report, *V.S.K.S. Somasundaram Chettyar* v. *The Commissioner of Income-tax, Madras* (2), is therefore misleading. The relevant facts were set out in the concluding passages of the judgment of Ramesam J. as follows :

"In this case it cannot be said that there is no evidence on which the Commissioner can come to a conclusion as to the place of residence. There is some evidence which is set out by the Commissioner as follows: 'The manager visits these places periodically for the purpose of supervising the business. During such visits he stays at Madura for varying periods as will be seen from the sworn statement given by the petitioner. Whenever the manager comes to Madura he resides in the business premises which are provided with a kitchen and other conveniences of a residential house.' These circumstances are certainly some evidence and the question as to whether there is enough evidence is not a matter for us but for the Commissioner."

(1) (1932) I.L.R. 55 Mad. 885. (2) 6 I.T.C. 96.

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It was not necessary for the Full Bench in Madras to proceed further, but there is an *obiter dictum* in the judgment to the effect that "in the case of a Hindu joint family, the family should be said to reside in all those places where members of the family live." With the greatest respect I think that this is capable of misapprehension ; the fact that one member of a Hindu undivided family eats, drinks and sleeps at a particular place is not necessarily any evidence that the family resides there. The amended Act of 1939 in India states in section 4A(*b*), "a Hindu undivided family, firm or other association of persons is resident in British India unless the control or management of its affairs is situated wholly outside British India" and under that section the Madras case would have been rightly decided although the *obiter dictum* would be incorrect. And in my judgment the Indian Legislature did no more than clarify the existing position by pointing out that the residence of individual members of a Hindu undivided family could not be material from which it could be inferred that the family resided there if such residence were fortuitous and divorced from control and management of the business.

I do not understand why it is remarked in the case stated that Mr. Annamalai Chettyar was a major son of the family, when it is admitted that he took no part in the business and was in Burma for educational reasons only and lived in quarters of his own, and I am not prepared to extend the decision in the Madras case so as to cover circumstances which would clearly not amount to residence in British India. During the course of the argument I inquired in what premises it was contended that the Hindu undivided family resided. It could not be contended that the business premises were used as a residence and the only answer which could be given was that the "quarters of his own" in

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which Mr. Annamalai Chettyar ate, drank and slept were such premises. I would hold that there was no evidence that these quarters were or could be the residence of the family. Moreover if the Commissioner of Income-tax were right, it seems to me that if a child of eight or ten years of age were sent to a boarding school a hundred miles away from the business premises but still in British Burma it would be possible to say on that ground alone that the Hindu undivided family of which he was a member resided there and that appears to me to lead to an absurd conclusion. Very different materials were available to the Commissioner in the case stated to the Full Bench in Madras : on the present facts I would answer the first question in the negative.

As to the second question the respondents' advocate has not pursued the point raised. The respondents took over some book-debts at the dissolution of the S.P.K.A.A.M. Firm and these turned out to be irrecoverable. It is enough to say that the loss sustained by the respondents was not one incurred as a trading loss in the year under assessment, but was a capital loss. The determination of this matter is, however, entirely a point of law once the facts have been ascertained and the proper question to have asked was whether in the circumstances of the case the sum of Rs. 8,979 was a capital loss or not, and not whether there was material upon which the Commissioner could so determine. The answer to this question is in the affirmative.

Each side must pay its own costs, but the respondent is entitled to a refund of his deposit.

DUNKLEY, J.—I agree.

SHAW, J.—I agree.

G.B.C.P.O.—No. 60, H.C.R., 3-2-42—1,650—III.

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