APPELLATE CIVIL.

Before Mr. Justice Lentaigne.

MAUNG PEIN
v.
MA THE NGWE.*

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July 24.

Evidence Act (I of 1872), section 106—Tenancy or relationship of master and servant, the burden of proof of—Finding of a Criminal Court between different parties not evidence in a Civil action—Liability for damage by fire, when started by a servant.

The plaintiff's rubber plantation was damaged by a fire which was started by the 2nd defendant on the 1st defendant's paddy land, during the 1st defendant's absence, by burning the undergrowth on the land in question. There was some evidence that the 2nd defendant was a servant of the 1st defendant, though it was alleged (but not proved) by the 1st defendant that the relationship between them was one of landlord and tenant and not that of master and servant.

Held, that the relationship between the 1st and the 2nd defendants being especially within the knowledge of the 1st defendant, an unfavourable presumption may be drawn against the 1st defendant under the provisions of section 106 of the Evidence Act if he had failed to give the fullest information as regards their relationship.

Held, also, that a lighting of a fire on open bush land being an operation necessarily attended with great danger, a person authorising another to execute for him such an operation, is bound not only to stipulate that all reasonable precautions shall be taken to prevent the fire extending to his neighbour's property but also to see that such precautions are observed, otherwise he will be responsible for the consequences.

Held, also, that the 2nd defendant and the 1st defendant's son having been sent up for trial under section 435 of the Indian Penal Code and both having been acquitted on the ground that the fire was accidental, the finding of the Criminal Court could not be treated as evidence in the present Civil action which was between a different set of parties.

Black v. *The Christchurch Finance Company, Limited*, (1894) A.C., 48; *Hughes* v. *Percival*, (1883) 8 A.C.,443—*followed*.

G. W. Davies—for the Petitioner.

Kyaw Din—for the Respondent.

LENTAIGNE, J.—The plaintiff-respondent instituted the suit now under revision against the applicant,

* Civil Revision No. 161 of 1923 against the decree of the District Court of Mergui passed in its Civil Appeal No. 5 of 1923.

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Maung Pein, and his minor son, Maung Ba Thein, and against one Maung Zon, alleged to be the cooly or servant of Maung Pein, claiming Rs. 500 as compensation for damage and loss caused to the plaintiff's rubber plantation by a fire, which originated on the paddy land belonging to Maung Pein, where the son and servant of Maung Pein were alleged to have started the fire by order of Maung Pein.

The Township Judge granted the plaintiff a decree against Maung Zon, who failed to defend the suit, but he dismissed the suit against Maung Pein, who was absent at the time of the fire, holding that Maung Pein would not be responsible for the foolish action of Maung Zon, even if Maung Zon were his servant, because he would not know that Maung Zon would burn the undergrowth in his absence without his instruction. He also dismissed the suit against the minor son, Maung Ba Thein, who admitted that he had been present when Maung Zon first set fire to the undergrowth, but did not remain and did not himself take part in the burning of the undergrowth.

The plaintiff appealed against that decision, and the learned District Judge states in the beginning of his judgment that the only issue necessary to be decided is whether the 2nd defendant, Maung Zon, was the servant or whether he was the tenant of Maung Pein. He sums up the evidence by stating that the evidence is to the effect that Maung Zon was working at clearing Maung Pein's land at the time the fire occurred, and that he was living in Maung Pein's house, and that, in the last dry weather, he used to work here and there, that is, as a cooly; that Maung Pein admitted that he had not reported to the Revenue Surveyor that he had let

out his land to Maung Zon; and that, although Maung Pein had given evidence, he did not say whether he had let out his land to Maung Zon as a cooly or on what conditions, or on what rent, or for what period, or whether Maung Zon was working the land as garden land or wet paddy land or *taungya* land. He then expressed the view that the relations between Maung Pein and Maung Zon were specially within the knowledge of Maung Pein, and that, therefore, under section 106 of the Indian Evidence Act, the burden of proving that Maung Zon was a tenant and not a servant lay on Maung Pein. He then held that, as Maung Pein had produced no evidence to prove this, he found that Maung Zon was Maung Pein's servant; and he granted a decree for Rs. 500, against Maung Pein as well as against Maung Zon with costs, and a direction that Maung Pein pay the costs of the appeal.

This Court is now requested to revise that judgment and decree on two grounds; firstly, that the District Judge erred in law in holding that, under section 106 of the Evidence Act, the burden of proving that Maung Zon was a tenant and not a servant lies with Maung Pein, and that there was no evidence produced by the plaintiff proving misconduct on the part of Maung Pein, but that there was evidence that Maung Zon was Maung Pein's tenant. Secondly, that Ba Thein and Maung Zon were sent up for trial under section 435, Indian Penal Code, and both acquitted on the ground that the fire was accidental.

As regards the second ground, I must hold that the finding of a Criminal Court cannot be treated as evidence in a Civil action between different parties, and it is unnecessary to discuss the question whether the allegation is a correct description of the contents of the judgment in the criminal prosecution.

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As regards the first ground for revision, I must hold that the applicant, Maung Pein, is not entitled to obtain the interference by this Court unless he can establish that the learned District Judge in granting that decree has acted illegally, or with material irregularity, so as to bring the case within the provisions of section 115 of the Code of Civil Procedure.

No question has been raised before me as to whether there was sufficient evidence of negligence or otherwise against the person who lit the fire. The law on this point has been summarized by their Lordships of the Privy Council in the following passage in the case of *Black* v. *The Christchurch Finance Company, Limited* (1), where Lord Shand states :—" The lighting of a fire on open bush land, where it may readily spread to adjoining property and cause serious damage, is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precautions to prevent the fire extending to his neighbour's property (*sic utere tuo ut alienum non laedas*). And if he authorises another to act for him, is bound, not only to stipulate that such precautions shall be taken, but also to see that these are observed, otherwise he will be responsible for the consequences. See *Hughes* v. *Percival* (2) and authorities there cited."

I may here note that the case of *Hughes* v. *Percival* (2), was a case where one of two adjoining house-owners employed a builder to pull down his house and rebuild it and, in the course of re-erection, some holes were made in a party wall between that and the adjoining house for the purpose

(1) (1894) Appeal Cases, 48. (2) (1883) VIII Appeal Cases, 443.

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of erecting a staircase, with the result that the party wall fell and injured the adjoining house. The house-owner, who had employed the builder, was held liable for such damage, although he had not authorized the cutting into the party wall. It was held by the House of Lords that the house-owner, who had employed such builder, could not get rid of responsibility by delegating the performance to a third person, and was, therefore, liable for the injury to the adjoining house.

In the case now before me, the learned District Judge has correctly pointed out that it was admitted by the son of Maung Pein that Maung Zon was living in Maung Pein's house at the time of the fire, and I notice that the admission was also to the effect that Maung Zon lived in their house, saying that he would clear the jungle on their land after he had cleared the jungle on his land. The District Judge is also correct in holding that there was evidence that Maung Zon, when living in Maung Pein's house, was working here and there as a cooly. Although Maung Pein stated that Maung Zon cleared his land in order to work the land, paying revenue ; he added in the following sentence that Maung Zon was ordered not to clear the land adjoining to plaintiff's estate and had been warned that the rubber estate would catch fire and be burnt down. Having regard to these points, I think that the learned District Judge was clearly justified in holding that there was evidence that Maung Zon was a servant of Maung Pein. One admission of Maung Pein was specially significant, because it shows that Maung Pein anticipated the danger of a fire, and, in fact, gave directions to Maung Zon to avoid the more dangerous class of fire in the shape of a fire near the rubber plantation.

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likewise do not think that the learned District Judge was in any way in error in drawing persumptions under section 106 of the Indian Evidence Act, 1872, unfavourable to Maung Pein, because he had not given the fullest information as to his relations with Maung Zon. He had not reported the alleged tenancy to the Revenue Surveyor, and the exact nature of such relations could only be known to Maung Pein and Maung Zon. Even if there was some sort of relation, such as that of paying revenue, as well as clearing jungle in return for being allowed to work other land, it would not necessarily mean that Maung Zon was not also a servant, having regard to the fact that he lived in the house of Maung Pein.

For these reasons I must hold that Maung Pein has failed to show any ground under section 115 of the Code of Civil Procedure why this Court should exercise its revisional powers. I, therefore, dismiss the application with costs.