APPELLATE CIVIL.

Before Mr. Justice Lentaigne, and Mr. Justice Carr.

MA MYA SHWE AND TWO
v.
MAUNG MAUNG.*

1924
Mar. 21.

Defamation—The Criminal Law and the Civil Law of Defamation—Statement made by parties in the course of a judicial proceeding—Absolute privilege—Burden of proof on occasions of qualified privilege—Evidence Act (I of 1872), section 105.

The defendants, in a petition filed by them in the course of a criminal prosecution in which they were the accused, applied for a transfer of the case to another Magistrate, and made in the petition certain defamatory statements against the plaintiff who was the Magistrate of the trial Court.

Held, that at Civil Law the defendants were entitled to absolute privilege for such statements.

Held, that in a civil suit for damages, the question of the burden to prove express malice for defamation on occasions of absolute privilege would not arise because such an action would fail in any event under the rule of absolute privilege.

Semble : In cases of qualified privilege the preponderance of opinon in India appears to be in favour of the English rule that the burden of proof lies on the defendant in a civil action to prove that the occasion was a privileged occasion and that then the burden of proof would lie on the plaintiff in the civil action to prove express malice.

Held, also, that the provisions of section 105 of the Indian Evidence Act apply only to criminal prosecutions for defamation.

Semble : In criminal prosecutions for defamation, whether a statement was made on an occasion of privilege or not is to be decided with reference to the provisions of section 105 of the Indian Evidence Act and section 499 of the Indian Penal Code.

Golap Jan v. *Bholanath Khettry*, 38 Cal., 880 ; *Satis Chandra Chakravati* v. *Ram Dayal De*, 47 Cal., 388 ; *Woolfun Bibi* v. *Jesrat Shaik*, 27 Cal., 262—*referred to.*

Baboo Ganesh Dutt Singh v. *Mugneeram*, 11 Ben. L.R., 321 ; *Chunni Lall* v. *Narsingh Das*, 40 All., 341 ; *Dawkins* v. *Lord Rokeby*, L.R. 7 H.L. 744—*followed.*

Abdul Hakim v. *Tej Chander Mukerji*, 3 All., 815 ; *Augada Ram Shaha* v. *Nemai Chand Shaha*, 23 Cal., 867 ; *Crowdy* v. *O'Reilly*, 17 C.W.N., 554—*dissented from.*

* Civil First Appeal No. 38 of 1923 against the decree of the District Court of Thatôn in Civil Regular No. 13 of 1922.

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The facts necessary for the purpose of this report appear in the judgment of Carr, J., reported below.

Ormiston—for the Appellants.

Villa—for the Respondent.

CARR, J.—The plaintiff is a Myoôk and was in 1921 an Additional Magistrate at Thatôn. On the 22nd July 1921, one Maung Kyaw Din, a schoolmaster, filed a complaint charging the three defendants with trespassing in his school and assaulting one of his teachers, Ma Ngwe Thon. After examining the complainant the plaintiff ordered the issue of summons to the defendants under section 451, Indian Penal Code for the 3rd of August. On that date none of them appeared, though the 3rd defendant had been served and a pleader appeared, apparently for all three. The plaintiff thereupon directed the issue of bailable warrants of arrest.

That evening the first defendant, having heard of the issue of the warrants, spoke to U Po Sa, a retired District Judge about the matter, and U Po Sa with U Po Yeik went and spoke to the plaintiff, with a view to avoiding the arrest of the defendants. The plaintiff told them that if the defendants surrendered and gave bail he would withdraw the warrants. Accordingly on the 4th of August the defendants surrendered in Court and executed bonds.

The case was then fixed for hearing on the 13th August. But in the meantime Ma Ngwe Thon had filed an independent complaint on the same facts before the Subdivisional Magistrate, who had fixed the case for the 9th August. On that date the Subdivisional Magistrate was informed of the case pending before the plaintiff and accordingly transferred his own case to the plaintiff, sending the parties and witnesses

along with it. The two cases were amalgamated and all the prosecution witnesses were examined on that day. On the 10th August the accused (defendants) were examined and charges were framed. The 19th August was fixed for hearing the defence. On that date the trial was concluded and the 23rd August was fixed for judgment. On the 23rd the plaintiff postponed judgment to the 29th on the ground that he was indisposed. He was not so indisposed as not to be able to attend Court and try some other cases, but says that after trying those cases he did not feel equal to writing this judgment and so postponed it. He explains that it is his practice to write his judgments in Court on the day fixed for their delivery. This is not a very satisfactory practice. One obvious disadvantage is that it necessitates parties waiting in Court while the judgment is written, whereas if the judgment had been prepared beforehand it could be delivered at once at the opening of the sitting. This, however, is not of importance in the case.

On the 27th August defendants applied to the District Magistrate for a transfer of the case from the plaintiff's Court, making in their petition serious allegations against the plaintiff. The District Magistrate stayed proceedings and as it happened the plaintiff on that same day received orders of transfer. The result was that he had no more to do with the case and the transfer application was dropped. But the District Magistrate afterwards held a departmental enquiry into the allegations with the result that the plaintiff was exonerated and was given permission to proceed against the defendants. He filed this suit against them for Rs. 10,000 for defamation. He has obtained a decree for Rs. 4,000 and the defendants now appeal.

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The above facts are admitted and it is also admitted by the first defendant, Ma Mya Shwe, who is the only one of any importance, that there was nothing in the conduct of the case in Court to lead her to suppose that the plaintiff was other than impartial. The parties were not previously acquainted with one another. Ma Mya Shwe is a wealthy mill owner of Yinnyein who had recently regilded a pagoda at Thatôn at a cost, she says, of some Rs. 30,000.

The allegations in the petition were :—

That about the 6th or 7th August Ma Mya Shwe and one Ma Thein Yin called on the plaintiff's wife and at her suggestion gave her Rs. 50. That about ten days later Ma Thein Yin informed Ma Mya Shwe that plaintiff's wife had asked for "one." Taking this to mean Rs. 100 on the 22nd August Ma Mya Shwe sent Tun Lin and San Nyun with a Rs. 100 note. They came back and told her that they had seen the plaintiff, who had refused the Rs. 100 and asked for Rs. 1,000 saying that if they did not bring that sum they need not come again. On the 23rd judgment in the case was postponed to the 29th.

The plaintiff does not say that there is no substratum of fact in the allegations in the petition. His story is that on the 1st August Ma Mya Shwe and Ma Thein Yin visited his wife and wanted to talk about the case, but were not allowed to do so. On the evening of the 3rd after U Po Sa and U Po Yeik had spoken to him in English about the warrants his wife asked him what they had come about and on his telling her she told him about this incident. He told her not to let the women come to the house again. His wife of course denies that any money was given to her. On the morning of the 10th August—the day on which charges were framed—Gi Ya, a Chinaman with whom he is acquainted, came to him with

an offer of Rs. 100 from Tun Lin. He refused to entertain this offer and warned Gi Ya not to come to him again about cases. A little later Tun Lin himself came and wanted to speak about the case but he turned him out of the house without allowing him to say anything. He said nothing about Rs. 1,000. On evening of the 22nd August Ma The Nu and Ma Nyun, friends of his and wife and daughter of a retired Superintendent of Land Records, came to him on behalf of Ma Mya Shwe, whom they said they had left weeping at their house. He told them he would act according to law and that they must not talk to him about cases if they wished to remain his friends.

On the evidence on the record there can be no doubt that Ma Mya Shwe has failed to prove her allegations. There are very numerous contradictions between her statements and those of her witnesses before the District Magistrate and their depositions before the Court. Many of these could perhaps be accounted for by the interval of time and the severity of the examination. Perhaps all of them could be accounted for by the fact that it is immediately obvious that the story told to the District Magistrate was not true.

This appears most strikingly on the statement of Ma Mya Shwe herself. She resiled to a considerable extent from the statements in her petition. She alleged that she went with Ma Thein Yin to the plaintiff's wife on a mere casual visit. She had never seen plaintiff's wife before but fell in love with her at first sight and on her remarking that it was hard to make both ends meet gave her Rs. 50 at once out of sheer kindness of heart. And she sent the Rs. 100 for the same reason. She had no idea that the recipient was the wife of the Magistrate who was trying

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her case until she received Tun Lin's report. Clearly this story is unbelieveable. The motive for it is equally clear. She wished to make out that she herself had not been guilty of bribery but had acted quite innocently. In view of this, while it is not possible to accept her present story as the truth, it becomes rather difficult to say positively that it is false.

The evidence of her three witnesses Ma Thein Yin, Tun Lin and San Nyun is worse even than her own. They still keep up the pretence that they did not know what the money was being given for. San Nyun, it may be noted, is the husband of the 2nd defendant, Ma Mya Me, sister of Ma Mya Shwe. It is clear that no reliance whatever can be placed on any of these three. But here again it is somewhat difficult to say affirmatively that their story is entirely false.

The subsidiary witnesses for the defence seem to me of no importance. Two were not examined before the District Magistrate though it seems to me that their evidence was as relevant then as it is now. The other, Kyan Hmaw, says finally that Ma Mya Shwe asked him to pay her Rs. 1,000 due for rice because she wanted it for the Myoôk, while on Ma Mya Shwe's own story it would seem that she never thought of paying a sum so outrageous in relation to the nature of the case against her.

It is obviously difficult for the plaintiff to prove affirmatively that the allegations were false and his witnesses do not fully prove this. Gi Ya's evidence is well enough but is not a class to command implicit belief unless corroborated. Ma Chit, who was present on the occasion of Ma Mya Shwe's visit to the house, was weaving at the time and did not pay attention to what passed. The strongest item in

his case seems to me to be the evidence of Ma The Nu, who says that Ma Mya Shwe came on the evening of the 22nd and asked her to intercede. If this is true, and I see no reason to disbelieve it, it is highly probable that Ma Mya Shwe would have mentioned the demand of that morning, had there been such a demand. The only importance, I can see in U Po Gaung's evidence is that he contradicts Ma Mya Shwe's denial that she had ever been to Ma The Nu's house since *waso*.

On the evidence as a whole I am of opinion that the defendants have not proved their allegations and that those allegations were probably false. But I am unable to find affirmatively that they were false.

This case was argued on the contention that the occasion was one of qualified privilege only, but that even so the burden was on the plaintiff to prove express malice and that he had failed to discharge that burden. I have so far dealt with the case on this basis and I had come to the conclusion that the burden would be on the plaintiff as contended and that he must fail.

But my learned brother Lentaigne has gone into the question of privilege and has come to the conclusion that the English rule must be applied, that there is absolute privilege and that no suit will lie for damages for defamation when the defamatory statements have been made in judicial proceedings. I have gone through the authorities cited by him and I agree with his conclusion. I wish only to make it clear that this refers only to a civil suit for damages. The question in a criminal prosecution must be decided with reference to section 499 of the Penal Code and section 105 of the Evidence Act.

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I agree that the appeal should be allowed and that the plaintiff's suit should be dismissed but that each party should bear his own costs throughout.

LENTAIGNE, J.—The two legal points for determination in this case relate to the extent of the privilege which the defendants-appellants are entitled to claim for defamatory statements made by them in a petition filed by them in the course of a criminal prosecution in which they were the accused, and were applying in such petition for a transfer of the case to another Magistrate. Is the privilege which they are entitled to an absolute privilege, or only a qualified privilege? And, if it is only a qualified privilege, on whom does the onus of proof lie as regards the questions of good faith and malice?

The law on the question of the extent of the privilege to be accorded to litigants and witnesses for statements made in the course of judicial proceedings in India has been the subject of considerable diversity of opinion, and it is now recognized in the decisions of some of the High Courts that the law is different when the question arises for decision in a civil suit for damages for such defamation, from what it would be if the question arose for decision in a criminal prosecution for such defamation under the provisions of the Indian Penal Code. As the statutory provisions of the Indian Penal Code are the cause of that diversity of opinion, it is obvious that any discussion of the question must involve a consideration of the different law applicable in both classes of cases.

There is a very full discussion of the question as arising in the course of a criminal prosecution for defamation in the full bench decision of the Calcutta High Court in the case of *Satis Chandra Chakravarti* v. *Ram Dayal De* (1), where about 80

(1) (1920 47 Cal., 388 ; 24 C.W.N., 982.

previous decisions were discussed and it was held that the liability of the accused to conviction in a criminal prosecution must be determined by reference to the provisions of section 499 of the Indian Penal Code, and that, consequently, a person in that position is entitled only to the qualified privilege mentioned in the Exceptions 7 to 9 of that section. The full bench dissented from the decision in *Woolfun Bibi* v. *Jasarat Shaik* (2), which was described as based on a consideration of a decision of a Civil Court as to the application in Civil Courts of the absolute privilege allowed under the English Common Law, and it was pointed out that in such previous decision the attention of the Court was not drawn to certain earlier decisions in criminal prosecutions; and such decision was also referred to as being probably the solitary exception of such a rule being adopted by the Calcutta High Court in a criminal prosecution. It was also pointed out that the decisions of the Allahabad High Court and of the Punjab Courts in criminal prosecutions followed the same line as the Calcutta decisions. On the other hand, it was pointed out that the Madras High Court in certain decisions, even in criminal prosecutions, appeared to have adopted an additional exception to section 499, and to have held that the statements of advocates, litigants or witnesses in judicial proceedings were absolutely privileged; and that there were also two decisions of the Bombay High Court favouring the rule of absolute privilege, even in criminal prosecutions, though there was one other decision of that High Court which was to a different effect and placed the onus on the prosecution of proving the absence of good faith.

(2) (1899) 27 Cal., 262

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If the question of the extent of the privilege arises in the case of a claim for damages for defamation made in a suit instituted in a Civil Court, it was pointed out as an *obiter* in the same full bench decision of *Satis Chandra Chakravarti* v. *Ram Dayal De* (1), that different considerations arise, because there are no special statutory rules applicable to the subject, and the liability of the defendant in respect of a defamatory statement made previously as a witness or litigant in a judicial proceeding must be determined with reference to principles of justice, equity and good conscience; and that there is a large preponderance of judicial opinion in favour of the view that the principles of justice, equity and good conscience applicable in such circumstances should be identical with the corresponding relevant rules of the Common Law in England; but that a small minority of judicial opinion favour the view that the principles of justice, equity and good conscience should be identical with the rules embodied in section 499 of the Indian Penal Code.

I assume that the Judges constituting such full bench must have regarded themselves as holding the opinion which they describe as that of the "large preponderance of judicial opinion" and they did not regard themselves as being the small minority of judicial opinion. Consequently, the *obiter* expression of opinion appears to indicate that these Judges favour the application to India of rules identical with the corresponding relevant rules of the English Common Law, or, in other words, that they favour the rule of absolute privilege in the class of cases now under discussion, and that in such expression of opinion they agree with the High Courts of Bombay and Madras. On that construction of this *obiter* expression of opinion, these Judges of the Calcutta High Court were in

effect dissenting from certain previous decisions of the Calcutta High Court, and were possibly assuming that the Judges of the High Court of Allahabad were still adhering to the old decision in *Abdul Hakim* v. *Tej Chandar Mukerji* (3), which had been cited with approval in various Calcutta decisions so being dissented from. This last remark, however, refers to possible oversight in that Calcutta Full Bench decision which contains no reference to the comparatively recent full bench decision of the Allahabad High Court in the case of *Chunni Lal* v. *Narsingh Das* (4), in which the Allahabad Court overruled the old decisions and adopted in clear terms the English rule of absolute privilege as the rule applicable to the question when arising in a suit instituted in a Civil Court for damages for defamatory statements made in judicial proceedings. If I am correct in my construction of that Calcutta Full Bench decision, there is now the unanimous opinion of the four more ancient High Courts that the rule of absolute privilege is the rule applicable in such cases in a Civil Court.

In English law the rule of absolute privilege, in effect, means that no action lies for a defamatory statement made on an occasion which is absolutely privileged, and the fact that the statement was made maliciously does not affect the defence. The decision of the House of Lords in *Dawkins* v *Lord Rokeby* (5), is the English decision most commonly cited in this connetion. I find that the Privy Council has also taken the same view as regards defamatory statements made by witnesses who are afterwards sued for defamation in a Civil Court, and in the case of *Baboo Ganesh Dutt Singh* v *Mugneeram* (6),

(3) (1881) 3 All., 815.
(4) (1917) 40 All., 341.
(5) (1875) L.R., 7 H.L. 744.
(6) (1872) 11 Ben. L.R., 321; 17 W.R., 283.

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their Lordships stated :— "It concerns the public and the administration of justice that witnesses giving evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by suit for damages ; but the only penalty which they should incur, if they have given their evidence falsely, should be an indictment for perjury." Their Lordships did not in that case discuss the different question of the liability to prosecution for defamation under sections 499 and 500 of the Indian Penal Code ; but the above remarks indicate clearly that a suit for damages in a Civil Court would not lie. That decision of the Privy Council was referred to by the Calcutta High Court in the case of *Augada Ram Shaha* v. *Nemai Chand Shaha* (7), where it was considered that the Privy Council decision should be treated as only applying to the case of witnesses, and it was held that a defamatory statement made in pleadings is not absolutely privileged on the trial of a subsequent claim for damages for defamation made in a civil suit. This latter decision was followed by some later Calcutta decisions which were summarised and cited with approval in the Judgment of Beachcroft, J., in the case of *Crowdy* v. *O'Reilly* (8), though in that case Mukerji, J., expressed his opinion in favour of the rule of absolute privilege. The summary of Beachcroft, J., did not contain any reference to the case of *Golap Jan* v. *Bholanath Khettry* (9), which had been recently decided and was an action for malicious prosecution, in which Jenkins, C.J., of the Calcutta Court had made certain *obiter* remarks recognizing the right of absolute privilege for allegations made in a complaint in a criminal court so far as concerns

(7) (1896) 23 Cal., 867. (8) (1912) 17 C.W.N., 554.
(9) (1911) 38 Cal., 880.

a subsequent suit for damages. In many of these Calcutta decisions reliance was placed on the dicta of the High Court of Allahabad in the case of *Abdul Hakim* v. *Tej Chander Mukerji* (3); but that decision was expressly overruled and the decision of the Calcutta High Court in *Augada Ram Shaha* v. *Nemai Chand Shaha* (7), was dissented from by the full bench decision of the Allahabad High Court in *Chunni Lal* v. *Narsingh Das* (4), where it was definitely laid down in clear terms that the rule of absolute privilege should be adopted in favour of a bar against suits for damages in a Civil Court for defamatory statements made in a criminal complaint. The *ratio decidendi* of that decision would apply equally to pleadings in a civil suit and to statements and applications made by a party in any civil suit or criminal prosecution. Though the previous Calcutta decisions dissented from in this decision have not as yet been expressly overruled, I have pointed out above that the judgment in *Satis Chandra Chakravarti* v. *Ram Dayal De* (1), contains *obiter dicta* which appear to indicate that such former decisions are not approved and that the Judges of the Calcutta Full Bench in that case took a different view and one which appears to be similar to that enunciated by the Allahabad High Court in *Chunni Lal* v. *Narsingh Das* (4).

There is no decision of any bench in this province on the question now before us, and as I agree with the principles enunciated in and the reasoning in *Chunni Lal* v. *Narain Das* (4), I would hold that defamatory passages in a petition such as that now before me filed by an accused in a criminal prosecution and applying for a transfer of the case cannot be made the basis of a claim for damages in a suit instituted in a Civil Court because such a suit is

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barred on the ground of absolute privilege. I will show below that a consideration of the second question and of certain other points suggests additional points in support of this conclusion.

On this finding any discussion of the second question as to the party on whom would lie the onus of proof as regards the questions of good faith or malice would relate only to the other class of cases in which the English Law allows only a qualified privilege. It is clear that the provision in section 105 of the Indian Evidence Act, 1872, applies only to criminal prosecutions, and that it does not apply to civil suits. Consequently, there would be good ground for holding that the questions of onus of proof in a civil suit should be decided in accordance with the principles of the English Common Law applicable to questions of qualified privilege where such questions arise. In cases of qualified privilege, the preponderance of opinion in India appears to be in favour of the English rule that the onus lies on the defendant to prove that the occasion was a privileged occasion and that then the onus of proof would lie on the plaintiff to prove express malice. But, as I have held above, an occasion like that now in question would, under the English Common Law, be absolutely privileged, and on that basis there could be no question of onus of proof as to malice, because the action would fail in any event under the rule as to absolute privilege.

As the Court is bound in accordance with the rule laid down by the Privy Council to regard the rule of justice, equity and good conscience as in effect incorporating the relevant corresponding principles of English Common Law, the adoption of a rule of qualified privilege (on the supposition that the Common Law was in part abrogated by reason of some

indirect effect of the Penal Code) would not in any event, prevent the application in a different form of the underlying strength of the considerations which from the actual nature of the subject gave rise to the English rule of absolute privilege, and it would, therefore, be extremely rare for any Court in India to grant a decree even under the claimed rule of qualified privilege in any case which in England would come within the rule of absolute privilege. This aspect of the question shows that the underlying questions of public policy must equally arise in India, and it suggests the further question whether it would be consistent with public policy that litigation of that kind should be encouraged when there is only such a remote chance of success, in a few exceptional cases. The advocates of the rule of qualified privilege apparently contend that the statutory rule applicable to criminal cases is an indication of an intention of the Legislature, but the answer is that a statute should not be extended to cases to which it does not apply, and that the position of the question in a civil action is very different from the position in a criminal prosecution. In a criminal prosecution it is the duty of the Magistrate before whom the complaint is filed to examine the complainant and consider the question whether the case is one in which he should issue process against the accused. This procedure would save the person so accused of the offence of defamation from being harassed by a prosecution except in those cases where the Magistrate thought that there was some good ground for investigation. In a civil action the position is very different and no matter how frivolous and vexatious the action may be, it is never safe for the defendant to omit to obtain legal advice and to file a written statement defending the action. Consequently, the opportunities for harrassing by

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civil action are not so restricted as the opportunity in a criminal prosecution under the Penal Code, because the safeguard of the Magisterial discretion before the issue of process does not exist in the civil action. Moreover, even in a case where there is a conviction in a Criminal Court, the aggrieved party (if he also has a right to sue on the tort) would also be technically entitled to sue for damages in a subsequent civil action, because the criminal prosecution and the conviction and penalty are not intended to be a satisfaction of a civil right to damages for a tort. A consideration of these points should be sufficient to convince Judges that there is no reasonable ground why the statutory penal provision should be extended in the manner formerly contended for, so as to make it expressly or impliedly contemplate a double remedy and in effect authorise a double penalty and for that purpose to repeal, the relevant rule of the Common Law applicable to that civil suit.

The Privy Council has held that the English rule of absolute privilege applies in the case of a witness and I can see no reason why other Courts should take it on themselves to declare that the statute shall have a different operation and be extended in the other cases of litigants though they realise that the Privy Council has not permitted the similar extension of the statute in the case of witnesses. Regarded in this light, the old contention, which is possibly now obsolete, was in effect an attempt to disregard the ruling of the Privy Council in an analogous case. A consideration of these aspects of the question strongly confirms the view to which I had come above in agreement with the decision of *Chunni Lal* v. *Narsingh Das* (4).

I would therefore allow the appeal and set aside the decree of the District Court and direct that the suit be dismissed.

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In my opinion it is therefore immaterial what findings we should come to on the facts except in so far as it affects the question of costs. For the latter purpose I may say that I agree with the findings of fact come to by my brother Carr.

The defendants failed to take the point of law as to absolute privilege in the District Court, but instead allowed the case to go to a lengthy trial on the facts; and it is obvious that on the facts the case arose from the hasty action of the defendants, who have made allegations which they have failed to establish, besides making most contradictory statements in the different proceedings. It was only on this appeal that the appellant urged the law points on which the appeal has been decided. Under the circumstances I would direct each party to bear his or her costs in both Courts.

APPELLATE CIVIL.

Before Mr. Justice Lentaigne, and Mr. Justice Carr.

HOE MOE
v.
I. M. SEEDAT.*

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Mar. 24.

Set-off, valuation of—Set-off and plea of payment—Pecuniary jurisdiction—Rangoon Small Cause Court—Suits Valuation Act (VII of 1887), section 8—Rangoon Small Cause Court Act, 1920, section 13—Civil Procedure Code (V of 1908), Order 8, rule 6 (1)—Promissory-note and receipt, burden of proof of payment of consideration.

The plaintiff sued the defendant in the Rangoon Small Cause Court for work done and materials supplied to the defendant's house for which Rs. 3,567-1 had become due to him and towards which he had received payments aggregating to Rs. 1,600. The defendant admitted that Rs. 3,567-1 had been due; but pleaded that he had made four payments totalling Rs. 3,000 and also that he

* Special Civil First Appeal No. 36 of 1923 from the decree of the Small Cause Court of Rangoon in Civil Regular No. 7226 of 1922.