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KO PO YEE AND BROTHERS AND FIVE OTHERS v. THE CORPORATION OF RANGOON.

RUTLEDGE, C.J., AND DUCKWORTH, J.

that the Assessor was under any obligation to enquire what their profits, in fact, were. And, in view of the difficulty which an Assessor would obviously be faced in trying to discover the true facts, we do not consider that it is incumbent upon him to make any enquiries on the subject of profits.

Another test of ascertaining what the hypothetical tenant would give as rent for the premises from year to year would have been to call some representative and reliable owner or manager of rice mills and examine him as to what would be the reasonable rent.

In the result we consider that the appeals fail and must be dismissed. In the circumstances, each party will bear their own costs.

APPELLATE CIVIL.

Before Mr. Justice Doyle.

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Jan. 17.

MAUNG KO GYI

v.

U KYAW.*

Evidence Act (I of 1872), section 92—Oral evidence to show that one of the executants of a monetary bond signed only as surety, whether admissible.

Held, that oral evidence to show that one of the executants of a monetary bond to the knowledge of the money-lender signed it only as a surety is not admissible.

Harek Chand Babu and others v. *Bishun Chandra Banerjee*, 8 C.W.N. 101; *Nga Saing and one* v. *Nga Lu Aung and others*, (1905) 2 U.B.R. 13—*followed.*

Mulchand v. *Madho Ram*, 10 All. 421 (dictum at p. 423)—*dissented from.*

Leong—for Appellant.

Tun Aung—for Respondent.

DOYLE, J.—The plaintiff-appellant, Maung Ko Gyi, sued U Kyaw and two others for the recovery Rs. 2,540,

* Civil Second Appeal No. 125 of 1926.

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due on a bond. U Kyaw contended that he had only signed as a surety, and that another document was also executed on which he was to be given two-thirds of the amount in excess of Rs. 2,000, if the price of jaggery exceeded Rs. 2,000. Maung Ko Gyi, at the very end of his evidence, was examined by the Court of first instance as to whether U Kyaw had signed the bond as a surety, and admitted that U Kyaw had signed as a surety. As it was clear from the evidence that Maung Ko Gyi had not taken proper steps to protect the security, both the lower Courts held that U Kyaw was discharged as a surety under the provisions of section 141 of the Indian Contract Act.

In this Court it is argued that the Court of first instance was wrong in questioning Maung Ko Gyi as to the capacity in which U Kyaw signed the document, since the document itself was an unequivocal admission of liability as a principal.

I am of opinion that this contention must prevail. It is true that in *Mulchand and another* v. *Madho Ram* (i), a Bench of the Allahabad High Court has *obiter* expressed the opinion that one of the obligors of a bond or bill of exchange may plead that he was only a surety in a case where a money-lender has made advances on the security of a joint and separate note, being well aware at the time that one of the makers was a surety only. The learned Judges there remarked that such a case would fall probably under proviso (1) to section 92. It is difficult to see under what part of proviso (1) to section 92 oral evidence to prove that a signatory signed as a surety and not as a principal could be admitted. There is no allegation of fraud in the present case, and the only other argument which might be urged would be that failure to note the fact that a signature was only written

(i) (1883) 10 All. 421.

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in the capacity of a surety was a mistake of law and of fact. An argument of this nature, if admissible, would destroy the whole effect of section 92. The quotation of Taylor on Evidence suggests that the learned Judges were influenced by English Law.

In *Harek Chand Babu and others* v. *Bishun Chandra Banerjee and another* (ii), a Bench of the Calcutta High Court, as far back as 1903, decided that oral evidence to show that one of the executants of a note of hand signed it only as a surety was not admissible. This view was concurred in, in 1906, by Shaw, Judicial Commissioner, in *Nga Saing and one* v. *Nga Lu Aung and others* (iii).

I am unable to discover any good ground for differing with these opinions. The contention, therefore, of U Kyaw that he is absolved from liability cannot prevail. According to the document, which was executed on the same day as the bond, U Kyaw was entitled to one-third of the proceeds of all jaggery in excess of 700 boxes jaggery supplied to Ko Gyi. Ko Gyi actually admits that 820 boxes were received by him, the average price being Rs. 10 per box. Ko Gyi is, therefore, entitled to set off one-third of the value of the 120 boxes, representing Rs. 400 for which, according to Ko Gyi, he has received Rs. 100.

The judgment and decree of the lower Courts dismissing the suit as against Maung Kyaw are set aside. There will be judgment and decree as against Maung Kyaw and Maung Pu Rs. for 2,240.

As the law point was only raised in this Court, there will be no order as to costs, in this Court.

(ii) (1903) 8 C.W.N. 101. (iii) (1906) 2 U.B.R. 13.