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MAUNG SAN DA v. MAUNG CHAN THA.

CHARI, J.

I, therefore, confirm the judgment and decree of the lower appellate Court though not for the reasons actually stated by the learned Judge.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir Benjamin Heald, Kt., Officiating Chief Justice, & Mr. Justice Chari.

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Aug. 26.

SULAIMAN

v.

TAN HWI YA.*

Amendment of Pleadings—Court's discretion—New issue of fact and of law—Civil Procedure Code (Act V of 1908) O. 6, r. 17.—Stifling a criminal prosecution, what is—Agreement resulting in withdrawal of a criminal prosecution, not necessarily void—Agreement to pay debt due without knowledge of pending criminal prosecution.—Contract Act (IX of 1872) s. 23.

Under the provisions of Order 6, r. 17 of the Civil Procedure Code leave to amend pleadings is a matter in the discretion of the Court. It would ordinarily refuse to allow a party to raise new issues of fact long after the other party has called all his evidence and has closed his case. But if on the evidence a new issue of law arises, that can be raised.

Where a criminal prosecution for a non-compoundable offence has been withdrawn as a result of an agreement it does not necessarily follow that the agreement itself is void under s. 23 of the Contract Act. Where a person guaranteed the payment of a debt that was due without any knowledge that a criminal prosecution was pending in respect of it between the creditor and the debtor and which was thereafter withdrawn, the guarantor was bound by his contract.

Dwijendra v. *Gopiram*, 53 Cal. 51; *Harjas* v. *Tek Chand*, A.I.R. 1927 Lah. 465; *Nagappa Chetty* v. *Ma U*, 3 L.B.R. 42; *Shanti* v. *Lal Chand* A.I.R. 1927. Lah. 539—*referred to.*

Kya Gaing for the appellant.

Ba Maw for the respondent.

HEALD, OFFG. C.J.—Respondent sued appellant, as one of the three signatories of a mortgage bond

* Civil First Appeal No. 30 of 1929 from the judgment of the District Court of Pegu in Civil Regular Suit No. 47 of 1926.

for Rs. 4,000, to recover Rs. 6,100, which he alleged to be due on the bond for principal and interest, by the sale of the mortgaged property, and he claimed a personal decree for any amount which might remain outstanding after sale of the property against appellant as well as against the other two signatories of the bond. Appellant's name did not appear in the body of the bond, and respondent said in his plaint that appellant signed the bond as surety for the repayment of the amount for which the bond was given with interest thereon.

The other two signatories of the bond, who were appellant's brother, Thein Maung and Thein Maung's wife, did not contest the suit and are not parties to this appeal.

Appellant denied that he signed the bond or stood surety for the debt and said that if he did sign the bond he would not be liable on it because his name did not appear in the body of the document. He also filed a later written statement in which he pleaded that the bond was void for material alteration by the addition of his name to it.

The lower Court accepted the view that the bond was void as against appellant for material alteration and dismissed the suit as against him.

Respondent appealed and a Bench of this Court set aside the dismissal of the suit as against appellant and remanded the case for disposal on the issue whether or not appellant guaranteed the payment of the debt due on the bond.

After the remand and after respondent had examined all his witnesses on the issue which then arose and had closed his case, appellant applied for leave to file still another written statement in which he desired to raise a new defence that the bond was executed under coercion, undue influence, and pressure

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of criminal prosecution, and that the main consideration of the bond was the abandonment of the criminal prosecution. That application was made nearly two years after appellant had filed his earlier written statement.

The learned Judge said that he could not allow the new written statement to be filed at a stage when respondent had closed his case, but he went on to say that as the matter was a question of law he must decide it if necessary, and in his judgment he said that the defence which appellant desired to raise was a mere afterthought.

On the evidence the Judge found that appellant signed the bond as guarantor, and gave respondent a preliminary mortgage decree for sale in the usual form with a right to a personal decree against appellant as well as against the other defendants for any amount which might remain outstanding after the sale of the mortgaged property.

Appellant appeals on grounds that he did not sign the bond, that if he did sign it his signing it would not make him liable on it, that he did not guarantee repayment of the debt, and that the object of the bond was to secure the dropping of a criminal prosecution.

On the evidence there is no room for doubt that appellant signed the bond as guarantor, and the only ground of appeal which has been pressed is that the object of the bond was the stifling of a criminal prosecution and that because the bond was void under section 23 of the Contract Act, appellant was under no obligation in respect of it as guarantor

The case seems to me to raise the following questions :—

(1) Whether after respondent had called his evidence and closed his case on the

issues which arose on the pleadings, those issues being issues of fact, appellant ought to be allowed to amend his written statement so as to raise a new defence involving (*a*) issues of fact or (*b*) issues of law.

(2) Whether appellant would be free from liability under his agreement to guarantee payment of the debt for which the bond was given if the bond was in fact void under section 23 of the Contract Act.

Appellant clearly could not plead at the same time that he did not guarantee the debt and that he guaranteed it with the object of stifling a criminal prosecution, and as a matter of fact there is no evidence that he had any knowledge of the criminal prosecution at the time when he agreed to guarantee the debt. He said himself that he had no personal knowledge of the criminal prosecution. It must be taken therefore that his agreement to guarantee the debt was not void under section 23 of the contract Act, even if the bond itself was void under that section.

The admitted facts of the case are as follows. Respondent advanced Rs. 6,000 to appellant's elder brother Thein Maung for him to purchase paddy to be supplied to respondent. Thein Maung failed to supply the paddy and respondent prosecuted him. Thein Maung then asked the elders of the village to intercede with respondent on his behalf, and by reason of the intervention of the elders respondent agreed to accept from Thein Maung and his wife a mortgage bond for Rs. 4,000 provided that payment of the money was guaranteed by a surety, and to drop the criminal prosecution. The bond was executed by Thein Maung and his wife, and then

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appellant was sent for, and agreed to guarantee the payment. Thereafter the prosecution was dropped. The charge brought by respondent against Thein Maung is said to have been one of "criminal breach of trust," but Burmans do not distinguish between "criminal breach of trust" and "criminal misappropriation," the two offences being ordinarily called by the same name in Burmese, so that the fact that that name has been translated in the record as "criminal breach of trust' does not prove that the charge was in fact one under section 406 of the Indian Penal Code, while the fact that the charge was allowed to be withdrawn suggests strongly that it was a charge under section 403 and not under 406 of the Code. If it was a charge under section 403 it was compoundable with the permission of the Court and no question of the application of section 23 of the Contract Act would arise. For this reason alone it would appear that appellant failed to establish his defence, and that his appeal must fail.

But in the circumstances of the case it may be desirable that we should consider the questions of law which arise in the lower Court's record as it stands.

The first question is as to appellant's claim to be entitled to raise a new defence after the respondent had called his evidence and closed his case. Under Order 6, rule 17, leave to amend pleadings is a matter in the discretion of the Court and in my opinion the Court would ordinarily be justified in refusing to allow a defendant to amend his written statement so as to raise new issues of fact when nearly two years had elapsed since the filing of his original written statements and when the plaintiff had called all his evidence on the issues of fact raised by those written statements and had closed

his case. But if on the facts appearing in the plaintiff's evidence a new defence of law arises, I see no reason why it should not be taken, even after the plaintiff has closed his case on the facts, and therefore, although I would refuse to allow appellant to plead in this case that the bond was executed under coercion or undue influence, or to offer evidence that it was executed under pressure of a criminal prosecution, I would allow him to raise the defence based on the provisions of section 23 of the Contract Act in so far as that defence arose out of the evidence given by respondent or his witnesses.

As for the second question I have already said that I am not satisfied that any question of the application of section 23 of the Contract Act arises because I do not regard it as proved that the prosecution was one for a non-compoundable offence, and I may add that even if the offence was non-compoundable it would appear from the case of *Dwijendra* v. *Gopiram* (1) to say nothing of the cases of *Harjas* v. *Tek Chand* (2) and *Shanti* v. *Lal Chand* (3) which seem not to have been officially reported that it does not necessarily follow that because a criminal prosecution for a non-compoundable offence has in fact been withdrawn as a result of an agreement, the object of that agreement was opposed to public policy and the agreement was void under section 23 of the Contract Act. If those cases were rightly decided they seem to cast doubt on the correctness of the decision of a learned Judge of the late Chief Court of Lower Burma in the case of *Nagappa Chetty* v. *Ma U* (4).

But even if the bond was void as between respondent and the principal debtors, I do not think

(1) (1925) 53 Cal. 51.
(2) (1927) A.I.R. Lahore, 465.
(3) (1927) A.I.R. Lahore, 530.
(4) (1905) 3 L.B.R. 42.

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that appellant would be relieved of liability under his separate agreement to pay the debt, since that agreement was not void under section 23 of the Contract Act. There was certainly a debt due by Thein Maung and his wife to respondent, and I see no reason why appellant should be relieved from the liability, which he undertook, to pay so much of that debt as was covered by the bond.

I would therefore hold that the personal decree against appellant was properly given and I would dismiss his appeal with costs.

CHARI, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Chari.

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Aug. 28.

DAW YWET

v.

KO THA HTUT.*

Partnership Debt—Surviving partner's right to sue without joining legal representative of deceased partner—Contract Act (IX of 1872) s. 45—Buddhist couple, analogous position to that of partnership—Buddhist widow's right to sue without obtaining Letters of Administration.

Notwithstanding the provisions of s. 45 of the Indian Contract Act, the surviving partner can file a suit in respect of a debt due to the partnership without joining the legal representatives of the deceased partner.

K.V.P.L. Perianen Chetty v. *Armuga Pather*, 4 L.B.R. 99—*referred to.*
U Gana v. *U Kyaw Gaung*, 2 U.B.R. (1892-96) 204—*dissented from.*

The position of a Buddhist couple being analogous to that of a partnership, a Burmese Buddhist wife can maintain a suit in respect of a partnership asset in her capacity as surviving partner without any reference to her succession to the interest of her deceased husband in the asset or debt due to them jointly. It is therefore not necessary for her to get a succession certificate or Letters of Administration in respect of such asset or debt.

Ma Paing v. *Maung Shwe Hpaw*, 5 Ran. 296—*referred to.*

* Civil Revision No. 231 of 1929 from the judgment of the Small Cause Court of Rangoon in Civil Regular No. 3471 of 1929.