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 U PYINNYA  
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 ORMISTON, J.

I would answer the first question in the negative. The second question does not arise and, in my opinion, should not be answered.

The decisions of the Court of the Judicial Commissioner, Upper Burma, in *U Tilaroka v. Nga Shwe Kan* (1) that a Buddhist monk is prohibited by his personal law from engaging in any monetary transaction and of this Court in *U Tesa v. Ma E Gywe* (2), that a purchase of property by a Buddhist monk is contrary to his personal law and is immoral within the meaning of section 23 of the Indian Contract Act, should, in my view, be overruled.

The respondents will pay the costs of the reference, advocates' fees ten gold mohurs.

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## APPELLATE CIVIL.

*Before Mr. Justice Heald and Mr. Justice Maung Ba.*

MA MON THA AND OTHERS

v.

MA SAN AND OTHERS.\*

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 May 17.

*Palm trees, whether immoveable property—"Standing timber"—General Clauses Act (X of 1897), s. 3 (25), Burma General Clauses Act (Burma Act I of 1898), s. 2 (29)—Provincial Small Cause Courts Act (IX of 1887), Article 8, Second Schedule—Suit for possession of toddy-palm trees not a suit cognisable by Courts of Small Causes.*

Growing toddy-palm trees are ordinarily immoveable property under the Transfer of Property Act and the Registration Act. They are immoveable property within the definition of the General Clauses Acts and are therefore "immoveable property" for the purposes of the Civil Procedure Code, the Burma Courts Act and for the purposes of the Small Cause Courts Acts. A suit therefore for the possession of a toddy-palm grove is not a suit of the nature cognisable by Courts of Small Causes.

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(1) 2 U.B.R. (1914-16) 61.

(2) (1927) 5 Ran. 626.

\* Civi Revision No. 316 of 1928 arising out of Civil Appeal No. 39 of 1928 of the District Court of Myingyan.

"Standing timber" which are excluded from the definition of immovable property are trees which are fit to be used for building, furniture, and such like purposes.

*Bodha Gandheri v. Ashloke Singh*, 5 Pat. 765, *Krishnarao v. Babaji*, 24 Bom. 31; *Lalji Singh v. Nawab Chowdhary*, 7 Pat. 646; *Sakharam v. Visitram*, 19 Bom. 207; *Shanti v. Vepa*, 3 Mad. H.C.R. 237—*referred to*.

*Natesa v. Tangavelu*, 38 Mad. 881—*distinguished*.

*Maung Kywe v. Maung Kala*, 4 Ran. 503—*dissented from*.

*Ganguli* for the appellants.

*Basu* for the first respondent.

HEALD, J.—The parties to this litigation are descendants of a common ancestor, Shwe Pan, applicants being the widow and children of Maung Tun, a son of Shwe Pan's son Tha Dun Aung, while respondents are Tha Dun Aung's half-brothers and sisters, being children of Shwe Pan by a wife other than Tha Dun Aung's mother. They are litigating about a toddy-palm grove valued at Rs. 300. Applicants are in possession of the grove and they allege that it belonged to Tha Dun Aung who gave it to his son Maung Tun, from whom they inherited it. Respondents on the other hand say that they received it as their share of the estate of Shwe Pan as a result of arbitration proceedings between them and Tha Dun Aung's widow Ma Pyu, and that applicants are merely tenants of Ma Pyu.

It is to be noted that the litigation relates only to the growing trees and not to the land on which they stand, the separate ownership of growing palm-trees and the land on which they stand, being recognised in this Province where such trees and the land are separately assessed to revenue.

The trial Court dismissed respondents' suit but the District Court on appeal gave them a decree for possession of the trees.

Applicants have now filed an application in revision against the decision of the District Court, but under

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section 115 of the Code no revision lies if the decree is appealable.

The decree is appealable under section 100 of the Code if the suit is not a suit of the nature cognisable by Courts of Small Causes, and it is appealable under section 11 of the Burma Courts Act if it is not a suit of the nature cognisable by a Court of Small Causes under the Provincial Small Cause Courts Act but is a suit relating to immoveable property or to any right or interest in immoveable property, or is a suit in which it is necessary to decide any question relating to succession or inheritance.

So far as both the Code and the Act are concerned, the question whether the suit is one of the nature cognisable by Courts of Small Causes arises, and so far as the Act is concerned the further question might arise as to whether or not it is a suit in which it is necessary to decide a question relating to succession or inheritance.

It is not suggested that that further question arises in this case, but it has been assumed that the suit is one of the nature cognisable by Courts of Small Causes on the ground that growing palm-trees are not immoveable property and therefore a suit for possession of them is not within the purview of Article 4 of the second Schedule to the Provincial Small Cause Courts Act.

In Upper Burma suits for the possession of palm groves or growing palm-trees have for many years been regarded as suits for immoveable property, probably on strength of the ruling in the case of *Po Thin v. Maung Te* (1) where it was held that growing palm-trees are not "standing timber" within the meaning of those words in section 3 of the Upper Burma Registration Regulations so as to be excluded from the definition of

(1) 11 U.B.R. (1902-03) U.B. Registration Reg., p. 1.

“immoveable property” for the purposes of that regulation.

But in the case of *Maung Kywe v. Maung Kala* (1) a learned Judge of this Court, following the case of *Natesa v. Tangavelu* (2), held that a lease of growing palm-trees was not a lease of immoveable property within the definition of immoveable property given in the Transfer of Property Act and that the rent reserved by such a lease did not fall within the definition of “rent” given in that Act, and that therefore a suit for such rent was not a suit for rent within the meaning of Article 8 of the Second Schedule to the Provincial Small Cause Courts Act but was a suit of the nature cognisable by Courts of Small Causes.

In support of the view that growing trees are not necessarily moveable property the following cases have been cited, namely, *Krishnarao v. Babaji* (3), *Muhammed Sadiq v. Laute Ram* (4), *Bodha Gandheri v. Ashloke Singh* (5) and *Lalji Singh v. Nawab Chowdhary* (6).

On the other side, besides the Rangoon case, only the case of *Natesa v. Tangavelu*, mentioned therein, has been cited.

The decision in *Krishnarao v. Babaji* related to the question whether the growing mango tree was immoveable property for the purposes of section 3 of the Registration Act of 1866 which, like the present Registration Act, excluded “standing timber” from the definition of immoveable property, and the learned Judges said that “timber” meant properly such trees only as are fit to be used in building and repairing houses and that a mango tree, which is primarily a fruit tree might not always come within the term. They decided however on the strength of the statement

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(1) (1926) 4 Ran. 503.

(2) (1915) 38 Mad. 881.

(3) (1915) 24 Bom. 31.

(4) (1901) 23 All. 291.

(5) (1926) 5 Pat. 765.

(6) (1928) 7 Pat. 646.

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of the Judge in the trial Court that "the mango tree, though a fruit bearing one, may be classed as a timber tree especially in this part of the country (Ratnagiri) where its wood is often used for building houses", that the tree in that case should be regarded as moveable property for the purposes of the Registration Act.

The case of *Muhammed Sadiq v. Laute Ram* did not really raise or decide the question whether or not growing trees are immoveable property. The question raised in that case was whether on a partition by a Revenue Court, which had statutory jurisdiction to partition "land", the trees growing on the land passed by such partition, and it was held that they did pass as being part of the land.

The case of *Bodha Gandheri v. Ashloke Singh* was a suit for possession of a growing mango tree which was alleged to have been transferred by an unregistered deed of gift. The question was raised whether growing mango trees were "standing timber" within the meaning of section 3 of the present Transfer of Property Act which like the Registration Act excludes "standing timber" from the definition of immoveable property. The learned Judges expressed an opinion that in the peculiar circumstances of that case and having regard to the fact that the tree in suit was not intended to be used as timber but ~~was~~ intended and was in fact used for the purpose of enjoying the fruits from it, the tree must be regarded as immoveable property and not moveable property for the purposes of the Transfer of Property Act.

The case of *Lalji Singh v. Nawab Chowdhary* related to the definition of "immoveable property" in the Registration Act, and the following passage occurs in the judgment: "The question therefore is whether fruit trees such as mango trees are to be

regarded as standing timber or not. In my opinion they clearly are not standing timber, they are not intended for use as timber at all, they are in the ordinary course used merely as fruit trees, that is to say, they are there for the purpose of yielding fruit and not for the purpose of being cut down in order to be converted into furniture or parts of houses or for any other purpose for which timber is ordinarily used. It may be that occasionally mango wood is used for the same purpose as ordinary timber, but if so it must be very exceptional. The wood of the mango tree is not in my experience of such a nature that it can be said to be used generally as timber." In the result the learned Judges held that for the purposes of the Registration Act growing mango trees are not "standing timber" and are therefore "immoveable property."

In the case of *Natesa v. Tangavelu* a written lease of certain palm-trees had been given and the question arose whether that lease needed to be registered. The learned Judges found that the interest conveyed by the document, which was the right to take toddy and fruit from the trees for two years, was not for the purposes of the Registration Act an interest in immoveable property, but their finding did not necessarily involve a finding that the trees themselves were not immoveable property since it proceeded to some extent on a consideration of the fact that fruit upon and juice in trees are moveable property.

It will have been noticed that all these cases, in so far as they dealt with the question whether or not growing trees are to be regarded as immoveable property dealt with that question in relation to either the Transfer of Property Act or the Registration Act.

But the definitions of "immoveable property" given in those Acts do not apply to the Code or to the

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Burma Courts Act or to the Provincial Small Cause Courts Act.

The definition of "immoveable property" which applies to the Code is that given in the General Clauses Act, 1897, which says that in all Acts of the Governor-General in Council and Regulations made after the commencement of that Act unless there is anything repugnant in the subject or context "immoveable property" shall include land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth, but so far as the Code is concerned that definition is modified by the statement in the Code itself that moveable property includes growing crops.

The definition which applies to the Burma Courts Act is that given in the Burma General Clauses Act, which is the same as that given in the General Clauses Act of 1897.

There is no definition of "immoveable property" which by law applies to the Provincial Small Cause Courts Act, because that Act was passed before the General Clauses Act of 1897, came into force and the earlier General Clauses Acts contained no definition of "immoveable property", but I think that in the absence of anything repugnant in the subject or context, the definition given in the General Clauses Act of 1897 may reasonably be applied to the Provincial Small Cause Courts Act, and the definition given in the Burma General Clauses Act, which is the same as that given in the General Clauses Act of 1897, certainly applies to the Rangoon Small Cause Courts Act.

There seems to be little case law on the subject of the meaning of immoveable property in the Code, but in the case of *Sakharam v. Vishram* (1) the High

(1) (1895) 19 Bom. 207.

Court of Bombay held that a suit for possession of a growing jack-fruit tree was a suit for immoveable property.

As for the Small Cause Courts Act the High Court of Madras in the case of *Shanti v. Vepa* (1), which does not seem to have been officially reported, said that a Small Cause Court cannot entertain a suit for possession of a growing jack-fruit tree "which is certainly immoveable property."

If growing palms or fruit trees are immoveable property for the purposes of the Transfer of Property Act and the Registration Acts, which exclude "standing timber" from the definition of "immoveable property" then *a fortiori* they would be immoveable property for the purposes of the General Clauses Acts which say that immoveable property includes things "attached to the earth," the words "attached to the earth" having already been defined in the Transfer of Property Act as meaning among other things "rooted in the earth as in the case of trees and shrubs." In the Upper Burma case already cited reference was made to the definitions of "timber" given in Wharton's Law Lexicon and Stroud's Judicial Dictionary, and it may be useful to refer to the definition given in the New English Dictionary. There "timber" is said to be building material generally, wood used for the building of houses, ships, etc. or for the use of the carpenter, joiner or other artisan, wood in general as a material especially after it has been suitably trimmed and squared into logs or further adapted to constructive uses. The word is said to be applied to the wood of growing trees capable of being used for structural purposes and hence collectively to the trees themselves, "standing timber," and in English law to embrace generally the oak, ash and elm of the age of 20 years or more and

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(1) 3 Mad. H.C.R. 237.



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in particular districts by local custom including other trees, such as birch in the county of York and beech in the county of Buckingham. The Dictionary cites Blackstone as saying that oak, ash and elm are timber in all places, and in some particular countries by local custom *where other trees are generally used for building* they are thereupon considered as timber. It is probable that the framers of the Transfer of Property Act and the Registration Act were familiar with the meaning of the word "timber" in English law and used this word instead of the word "trees" intending to include only trees ordinarily used as material for buildings, ships, furniture and the like, and to exclude trees not so used. The view that "standing timber" in the Registration Act means trees "intended for early conversion into timber" has been adopted by the Government of Burma in Direction 24 of the Burma Registration of Deeds Directions, and it is clear that there is judicial authority for that view. I think therefore that growing toddy-palm trees are ordinarily immoveable property under the Transfer of Property Act and the Registration Act and that they are certainly immoveable property within the definition of the General Clauses Acts and are therefore "immoveable property" for the purposes of the Code and the Burma Courts Act, and I see no reason to believe that they are not immoveable property for the purposes of the Small Cause Courts Acts.

I would therefore hold that the present suit, being a suit for the possession of immoveable property, is not a suit of the nature cognisable by Courts of Small Causes, and that therefore a second appeal lies and that the application for revision is incompetent.

MAUNG BA, J.—I concur.