1929

COMMISSIONER OF INCOME-TAX v. THE BURMA CORPORATION, LTD.

RUTLEDGE, C.J., CHARI AND BROWN, JJ.

Our answer to the reference therefore is that the contributions of the Burma Corporation Limited to its Staff Provident Fund are not assessable to income-tax and super-tax, if the money had actually been paid to the Trustees and the Corporation has lost the control over and the use of, the money.

In these circumstances we make no order as to costs.

APPELLATE CIVIL.

Before Mr. Justice Baguley.

1929

July 22.

U AHDEIKSA

v.

MA SAN ME AND ANOTHER.*

Buddhist Ecclesiastical Law—Pongyi *in occupation of a* kyaung, *rights of*—*Donor whether entitled to evict the* pongyi—*Evidence Act* (*I of* 1892), *s.* 116—*Licensee how far estopped.*

The plaintiffs who represent the original founder and builder of a *kyaung* sued for eviction of the defendant *pongyi*, who they claimed had been placed in possession of the *kyaung* by them as a mere licensee.

Held, that a *kyaung* once offered to a *pongyi* becomes *extra commercium* and cannot be regarded like an ordinary piece of immoveable property which can be occupied by a layman, bought, sold, or otherwise treated like an ordinary commercial property.

Held, *further*, that whilst section 116 of the Evidence Act operates to estop a licensee from denying his licensor's title, it does not make the license revocable under all circumstances, and that the founder of a *kyaung* who put a *pongyi* in possession thereof must prove his right to evict the *pongyi*, proof of license not being in itself sufficient for such purpose.

Held, *further*, that layman cannot evict a presiding *pongyi* in an ordinary state of affairs ; and that a presumption of proper installation arises from a *pongyi* being placed by the founder of a *kyaung* in possession thereof.

A. C. Mukerjee for the appellant.

Day for the respondents.

* Special Civil Second Appeal No. 59 of 1929 (at Mandalay) from the judgment of the District Court of Sagaing in Civil Appeal No. 78 of 1928.

1929

U AHDEIKSA
v.
MA SAN ME.

BAGULEY, J.—This is an appeal by the defendant. The plaintiffs are mother and son; they sued for recovery of possession of a *kyaung* and its compound in which the defendant is now established.

Ma San Me is the daughter of the original founders of the *kyaung*, and it is alleged that the original *kyaung* built by her parents was pulled down and rebuilt by herself and her husband who is now dead. The second plaintiff is their only son. The plaint states that when the *kyaung* was built the plaintiffs asked one *Pongyi* U Zayanta to live in and look after it. When he became old he returned the *kyaung* to Ma San Me, and she and her husband took back the *kyaung* and handed it over to another *Pongyi*, U Maga, after U Zayanta had died, and that U Maga lived in the *kyaung* and looked after it for three years, after which he also returned the *kyaung*, and, finally, in 1282 the present defendant-appellant asked permission to live in the *kyaung* and look after it, and he was permitted to do so. The plaintiffs say that as he is now not living in accordance with the *Vinaya* they wish to recover possession of the *kyaung*.

It will be noted that the plaint suggests a rather striking state of affairs, namely, that the plaintiffs have a *kyaung*, which is their absolute outright property and occupied by a series of *pongyis* as caretakers. According to the plaint there was never any dedication of the *kyaung* either *poggalika* or *sanghika*; and in an annexure to the plaint, the plaintiffs specifically state that the transactions would not come under the Buddhist Ecclesiastical Law at all because the possession of the *pongyis* was never more than permissive.

The defence is that, originally U Zayanta had the *kyaung* dedicated to him in the ordinary way, and that after the death of U Zayanta and U Maga, the

kyaung was dedicated to the defendant. The written statement then goes on to argue that the case should be tried by the Ecclesiastical authorities and to state that there have been other disputes between the other parties.

The trial Court framed six issues after examining the parties. It found that when the defendant came to occupy the *kyaung* it was in the possession of Ma San Me and her husband now deceased; that they got possession of the *kyaung* by the previous *pongyi* returning it to them; that the defendant had the *kyaung* offered to him in a regular way, the roof being *sanghika* and the under portion *poggalika*, and that the defendant was not liable to give up possession to the plaintiffs.

On appeal to the District Court, the learned District Judge viewed the matter from a totally different angle. He found that as the defendant on his own showing came into occupation by the invitation of the plaintiffs that was an admission in itself that the plaintiffs were the owners of the *kyaung*. He further found that the defendant failed to prove the dedication of the *kyaung* to himself; that the burden of proving this dedication lay upon him, and as he had failed to prove dedication to himself the suit must be decreed.

The defendant *pongyi* now comes in second appeal to this Court.

The appeal was argued at considerable length, and at one time it appeared to me that it would be necessary to come to a decision on the as yet undecided point of whether the original donor of a *poggalika* gift has any right remaining to him in the property given, *vide* May Oung's Buddhist Law, page 177; but on further consideration it appears to me that the point does not really arise.

1929

U AHDFIKSA v. MA SAN ME.

BAGULEY, J.

Mr. Day for the respondents argued that the appeal should be dismissed on a short point under section 116, Evidence Act. He claimed that the appellant having come into occupation of the *kyaung* by license of the plaintiffs, could not be permitted to deny that the plaintiffs had a title to the *kyaung* at the time that they gave it to him. This argument appears to me to be fallacious. The property now in suit is not ordinary property : it is of an ecclesiastical nature and, therefore, *pro tanto* Buddhist Ecclesiastical Law must be taken into consideration with regard to it. The defendant may have come into occupation of the *kyaung* by license of the plaintiffs, but that does not imply that he must therefore return the *kyaung* to them whenever they ask for it. Section 116, Evidence Act, merely states that the licensee is not permitted to deny that the person who gave him the license "had a title to such possession at the time that that license was given." It does not state that every license is revocable at the whim of the licensor ; and the fact that the provisions of the Evidence Act might prevent the appellant from denying the respondents' title to possession of the *kyaung* at the time that he entered into possession under their license would not prevent him from asserting that the respondents have power now to turn him out.

As I have stated, the plaint asserts a most extraordinary state of affairs, namely, that the *kyaung* was built by laymen and had a series of *pongyis* put in as watchmen in succession.

The suit was managed entirely by the second plaintiff, and he endeavoured to prevent his mother from appearing in Court. However, the trial Judge insisted on her appearance, and when she was put into the witness-box she stated that the *kyaung*

1929

U AHDEIKSA
v.
MA SAN ME.

BAGULEY, J.

was built as an offering to the *sanghas* She also stated that the defendant had been in the suit *kyaung* for about 18 years, as opposed to the eight years mentioned in the plaint. The plaintiff Tun Aung states that the defendant was made a *rahan* at the instance of his (plaintiff's) father; and therefore, assuming that the defendant entered the *kyaung* at the instance of the plaintiffs, we have the following state of affairs. The plaintiffs represent the original founder and builder of the *kyaung*. At their invitation the defendant came into occupation of it, and he has been in occupation of it, for some period varying between eight years, as stated in the plaint, and 18 years as stated by the first plaintiff herself on oath. In any case the defendant has been in possession for a very long time indeed. He is a *pongyi* whose entry into the priesthood was made at the instance of the husband of the first plaintiff who was the father of the second plaintiff. Ordinarily speaking, a *pongyi* placed in a *kyaung* by the representatives of a founder of the *kyaung* would be regarded as having been properly installed and would not be liable to be evicted at the whim and pleasure of those who placed him in the *kyaung*. A *kyaung* cannot be regarded like an ordinary piece of immoveable property which can be occupied by a layman, bought, sold, or otherwise treated like an ordinary commercial property. Once a *kyaung* has been built and offered to a *pongyi* it becomes *extra commercium*; and I hold that the lower appellate Court has erred in regarding it as an ordinary piece of immoveable property. If occupation of ordinary immoveable property is to be regarded as *prima facie* evidence of ownership to such an extent that any person who wishes to recover possession from a man in possession has got to prove his right to do so, still more would it be incumbent on any layman who

1929

U ANDEINSA v. MA SAN ME.

BAGULEY, J.

wish to turn a *pongyi* out of a *kyaung* in which he was living to prove that he was entitled to do so. The plaintiff Tun Aung, as I have said, speaks to this somewhat strange position of the defendant being put in as a caretaker liable to be evicted at any time. He says, however, in cross-examination with regard to the defendant, "Defendant *pongyi* was staying in a *kyaung* to the east. He was not a presiding *pongyi* there. He became presiding *pongyi*—I should call him our tenant—when he came to stay in this *kyaung*. It will be seen therefore that the second plaintiff, the one who is strongly against the defendant, admits that the defendant became a presiding *pongyi* when he entered this *kyaung*. This would certainly show that a very heavy burden lay upon the plaintiffs. A layman cannot evict a presiding *pongyi* in an ordinary state of affairs.

The first witness called by the plaintiff is U Kumara. He states definitely, "I do not know on what understanding the defendant came to stay in this *kyaung*." The next witness for the plaintiffs is Lu Min. He says that defendant *pongyi* went to Ma San Me and asked to be allowed to stay in the *kyaung* in suit and look after it and Ma San Me agreed. This witness is a most casual witness, living in another village, indebted to the plaintiffs, and he admits that he does not know if anything further was said when the defendant came to stay in the *kyaung*, and he does not know what celebration was done on that occasion. The next witness for the plaintiffs is Aung Ya. He refers to a conversation between Ma San Me and the defendant, but he does not know whether it was as a result of that conversation that the defendant entered the *kyaung*, and he admits that he does not know what actually occurred when

the defendant come to stay in the *kyaung*. The next witness for the plaintiffs is Maung So Mya. He gives the history of the *kyaung*, and winds up by saying "defendant *pongyi* came to stay here after U Maga but I do not know how." This is the whole of the plaintiffs' case. It seems to me quite impossible to hold on this evidence that the plaintiffs have shown their right to turn the defendant out of the *kyaung*. As I have said before, this case cannot be regarded as though it referred to a house or an ordinary piece of immoveable property. When a *pongyi* is installed in a *kyaung* and he is shown to have remained in that *kyaung* for a period of many years, any layman who claims the right to turn him out had got to prove that right very strictly. A *kyaungtaga*, when he places a *pongyi* in charge of a *kyaung* and refers to him as the presiding *pongyi* of that *kyaung*, in the vast majority of cases would have dedicated the *kyaung* to that *pongyi*, and any *kyaungtaga* who asserts the contrary has got to prove it, and has got to prove that the *pongyi* was merely his watchman or caretaker. This, as I have shown, the plaintiffs in the present suit have entirely failed to do, and the defendant *pongyi* is entitled to the benefits that follow from his possession of the *kyaung* in the same way that any other occupier of immoveable property is entitled to the presumptions that will accrue to him because of his occupation, and this the more because *kyaungs* are normally occupied by *pongyis* and not by laymen once they have been made over to the priesthood in one form or another.

The case was argued at length on the point of Buddhist law with regard to the reversion of *sanghika* gifts. On examination of the evidence, however, as I have shown, it does not appear to me that this point would arise, and I therefore, have not thought

1929

U AHDEIKSA v. MA SAN ME.

BAGULEY, J.

it necessary to deal with the many cases and authorities cited in argument.

For these reasons I set aside the judgment and decree of the lower Appellate Court, and restore that of the trial Court dismissing the suit. The respondents will bear the appellant's costs throughout.

PRIVY COUNCIL.

J.C.*

1929

July 25.

MA PWA MAY AND ANOTHER *v.* S.R.M.M.A. CHETTYAR FIRM.

(On Appeal from the High Court at Rangoon.)

Transfer of Property Act (IV of 1882), s. 53—Transfer to defeat creditors—Mortgage preferring one creditor over others—Registration of document not duly stamped—Error of procedure—Good faith—Validity of registration—Indian Stamp Act (II of 1899), ss. 35, 37—Indian Registration Act (XVI of 1908), s. 87.

A mortgage executed for adequate consideration, being partly the discharge of a genuine debt, no benefit being retained by the mortgagor, is not invalid under s. 53 of the Transfer of Property Act, 1882, as being made to defeat or delay creditors, even though the mortgagor, who is heavily indebted, thereby prefers the mortgagee over other creditors, one of whom has instituted a suit, and before registration of the mortgage has obtained an order before decree attaching the mortgagor's property.

Musahar Sahu v. *Hakim Lal*, (1915) I.L.R. 43 Cal. 521 ; L.R. 43 I.A. 104—*followed.*

Registration of an instrument not duly stamped, contrary to s. 35 of the Indian Stamp Act, 1899, is an error of procedure, not an act done without jurisdiction, consequently if it is done in good faith the registration is valid under s. 87 of the Indian Registration Act, 1908 ; and upon payment of the duty and penalty the instrument is admissible in evidence.

Mujibunnissa v. *Abdul Rahim*, (1900) I.L.R. 23 All. 233 ; L.R. 28 I.A. 15 *distinguished.*

Sah Mukhun Lall Panday v. *Sah Kundun Lall*, (1875) L.R. 2 I.A. 210—*applied.*

Sarada Nath Bhattacharya v. *Gobinda Chandra Das*, (1919) 23 C.W.N. 534—*approved.*

Where an instrument bears a stamp which is of sufficient amount but is surcharged as a court-fees stamp, the stamp is " of improper description " within

* PRESENT.—LORD ATKIN, SIR JOHN WALLIS, SIR GEORGE LOWNDES AND SIR BINOD MITTER.