1929

M.R.R.Y SOMASUNDARAM CHETTYAR v. THE COMMISSIONER OF INCOME-TAX.

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

non-resident firm should be assessed. We can find no authority in the Act for varying the plain meaning of the wording of section 22 (4), or for limiting the power given to the Income-tax Officer by that clause. We are therefore of opinion that the Income-tax Officer had the power to call for the account books in question. We answer the first part of the question referred in the affirmative. The second part of the question referred does not therefore arise.

The Chettyar firm will pay the costs of this reference, advocate's fee five gold mohurs.

APPELLATE CIVIL.

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

1929

June 4.

U THWE

v.

A. KIM FEE AND OTHERS.*

Arrest, what is an, under civil process—Advocate's exemption from arrest whilst attending Court—Civil Procedure Code (Act V of 1908), s. 135—Damages for arrest in Court—Malice and absence of reasonable and probable cause essential for damages.

A person can be said to be arrested when he is actually touched or confined by a police officer or other person, unless there is a submission to the custody by word or action.

Where a process-server shows to the judgment-debtor the warrant of arrest and the judgment-debtor thereupon pays up, he cannot be said to be arrested.

An advocate can claim exemption from arrest and get himself released if at the time of arrest he is attending a Court in connection with a matter pending before it. But he cannot claim damages for such arrest unless the arrest was procured maliciously and without reasonable and probable cause.

Raj Chunder v. *Shama Sundari*, 4 Cal. 583; *Williams* v. *Taylor*, 6 Bing. 186—*referred to.*

---

* Civil First Appeal No. 107 of 1929 from the judgment of the District Court of Hanthawaddy in Civil Regular No. 42 of 1928.

Ba Thein (2) for the appellant.

1929

U THWE
v.
A. KIM FEE.

HEALD and MAUNG BA, JJ.—This is an appeal by U Thwe, Advocate of Kyauktan, from a judgment and decree of the District Court of Hanthawaddy, dismissing his suit with costs which amount to a little over Rs. 1,000.

The suit was against (1) A. Kim Fee, Rice-mill owner, Kyungale; (2) the Secretary of State for India in Council and (3) U Ba Tun, *Barrister-at-Law*, Rangoon, for the recovery of Rs. 6,000 as damages for illegal arrest.

In Civil Execution No. 26 of 1928 of the Sub-divisional Court of Kyauktan, U Ba Tun as Kim Fee's advocate filed an application for the execution of a decree against U Thwe for the recovery of Rs. 158-4-0 by his arrest and imprisonment. In due course a warrant was issued for his arrest. U Thwe alleged that on the 20th of April 1928, while he was engaged in his professional capacity in the Township Court of Kyauktan, the process server arrested him in open Court and that he paid the decretal amount under protest then and there. He further alleged that on account of such illegal arrest he was considerably disgraced and humiliated.

The learned District Judge held that there had been no arrest. He further held that, even if arrest could be considered to have been effected, the Secretary of State was not responsible as the arrest was an act of State and that U Ba Tun also could not be held liable so long as he kept himself within the four corners of the power-of-attorney and did not act from ulterior motives of his own. As regards the decree-holder, Kim Fee, he observed that U Thwe had suffered no damages whatever and that

1929

U THWE
v.
A. KIM FEE.

HEALD AND MAUNG BA, JJ.

if damages were due, he would assess at the figure of one pie. But in view of his finding that there had been no arrest, he dismissed the suit awarding separate costs for each defendant.

Mr. Ba Thein (2) urged that the lower Court committed an error in coming to the finding that there was no arrest at law. The Code of Civil Procedure does not lay down how an arrest is to be made; but the Code of Criminal Procedure has laid down in section 46 how an arrest is to be made. There it is laid down that in making an arrest the police-officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action. This seems to be the mode of arrest recognised in English law. In Stroud's Judicial Dictionary, it is thus stated: "An arrest of a person by a duly authorised officer is accomplished if the officer lawfully touch him; the power of effecting actual capture is not essential" (*Sandon* v. *Jervis*, 6 W.R. 690).

Process-server, Maung U, who executed the warrant in question, has deposed: "The Judge was sitting on the Bench. Plaintiff was sitting on a chair in front of him. I walked up with the warrant behind the plaintiff's chair and put the warrant in front of him and showed it to him saying "This is for you. You are arrested." The process-server further said that he did not lay hold of U Thwe nor did he lay hands on him. U Thwe himself has given evidence. He stated "The process-server came from behind me and said that as there was a warrant against me he had come to arrest me. He put the warrant on the table in front of me. He then said he had arrested me. He whispered this to me. He then did something, either touched my person or

touched the chair. I paid the money at once." The warrant itself may be usefully referred to in this connection. It contains these words: "These are to command you to arrest the said defendant and unless the said defendant shall pay to you the said sum of Rupees . . . . . to bring the said defendant before the said Court with all convenient speed." In his report endorsed on the warrant, the process-server stated that he arrested the judgment-debtor but as the judgment-debtor paid the decretal amount he did not bring the judgment-debtor to Court. So far as U Thwe and the process-server are concerned, both are under the impression that U Thwe was arrested; but strictly speaking the arrest could not be held to have been effected in the absence of clear proof that U Thwe's person was actually touched. The process-server was positive that he never touched U Thwe and the latter could not positively state that he was touched by the process-server. It could not also be held that there had been a submission to the custody by word or action on the part of U Thwe. We are therefore inclined to accept the finding of the lower Court that there had been no arrest.

We might even go further and say that there was no cause of action. It is true that under section 135 of the Code of Civil Procedure U Thwe was exempted from arrest under civil process while attending a Court in connection with any matter pending before it. Even if he were arrested, he could claim exemption and get himself released; but that arrest would not entitle him to claim damages for a tort. To claim damages it is essential that the arrest was procured maliciously and without reasonable and probable cause. U Thwe himself in his cross-examination had to admit this "I knew I

1929

U THWE
v.
A. KIM FEE.

HEALD AND MAUNG BA, JJ.

would have to pay the money some time, so I paid it because it was legally due by me."

In *Williams* v. *Taylor* (1), it was held "If a person has a reasonable and probable cause for asserting a legal right, he cannot be sued for setting the law in motion to enforce that right, however vindictive may be his feelings against his adversary." This was quoted by a Bench of the Calcutta High Court in *Raj Chunder Roy* v. *Shama Soondari Debi* (2). In that case in execution of an *ex parte* decree the plaintiff was arrested. Subsequently the plaintiff succeeded in getting that decree set aside on the ground that the claim was false. The plaintiff claimed Rs. 5,000 as damages. She obtained a decree in the trial Court and the decree was confirmed by the Appellate Court; but on second appeal the High Court reversed the decree holding that the plaintiff had failed to prove absence of reasonable and probable cause.

For the above reasons the appeal is dismissed under Order 41, rule 11.

(1) 6 Bingham 186.

(2) (1879) 4 Cal. 583.