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before whom the case came could deal with in a perfectly impartial manner. In the present case where there is no erroneous recording or shutting out of evidence, should I direct a re-trial, it would be for all practical purposes the same thing as sending the case to a Magistrate with directions to convict and this I do not see my way to do.

The applicant has still got plenty of time to move the Local Government to file an appeal against the acquittal if she thinks fit, and this in my opinion is the proper remedy if she is dissatisfied with the acquittal.

I dismiss this application for revision.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Otter.

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May 14.

U SEIN PO

v.

U PHYU AND OTHERS.*

Company law—Association of over twenty persons without registration illegal—No suit lies for an account of its dealings and profits—Suit for return of subscriptions lies—Distinction between enforcement of illegal contract and prevention of continuance of illegality—Reduction of members does not make illegal association legal—Suit falls under Sch. I, Art. 120 of Limitation Act (IX of 1908).

An association consisting of more than twenty persons and formed for the purpose of carrying on business must be registered as a company. Otherwise it is an illegal company and its subscribers cannot sue for an account of its dealings and transactions and of its profits. But they have a right to sue for the return of their subscriptions, and if these have been converted into land or other things for the purpose of the company, they can be reconverted into money for payment of the debts and liabilities of the concern and then for repayment of the subscribers. In such cases no illegal contract is sought to be enforced and only the continuance of what is illegal is sought to be prevented.

Butt v. *Montcaux*, 1 K. & J. 97 ; *Sheppard* v. *Oxenford*, 1 K. & J. 489—*referred to.*

* Civil First Appeal No. 84 of 1928 from the judgment of the District Court of Prome in Civil Regular No. 11 of 1926.

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An association once illegal in form retains its illegal character until registration or dissolution, and does not become legal merely by a reduction of its number of members.

Moneys received by the promoter from the subscribers in such a case are not received by him for the subscribers' use ; hence a suit to recover them does not fall under Art. 60, but is governed by Art. 120 of the Limitation Act.

J. Subba Rao v. *J. Rama Rao*, 40 Mad. 291 ; *Rama Seshayya* v. *Sri T. Colloa Press*, 49 Mad. 408—*referred to.*

Paget for the appellants.

Thein Maung for the respondents.

OTTER, J.—This is an appeal against a judgment of the Additional District Judge of Prome, in an action by three members of an association formed for carrying on a rice-business, claiming a decree (i) declaring the respective shares of the subscribers to that association and (ii) directing that the plaintiffs be repaid their shares after reconverting the property of the association into cash and after payment of all debts and liabilities ; and praying also for the appointment of a Receiver.

The learned Judge of the lower Court granted the decree asked for, directed that the assets shown in Annexure A to his judgment should be sold, and ordered that the debts shown in Annexure B to his judgment should be paid out of the sale proceeds. He further ordered that the plaintiffs should receive their shares *pro rata* out of the balance arrived at.

The short facts are that all the parties to this appeal, with the exception of respondent No. 20, were members of the association I have referred to. The appellant occupied the position of promoter of the association, and its members subscribed varying sums amounting in all to some Rs. 55,000. Twenty-seven persons subscribed to the association, and their subscription moneys were paid during the year 1922. In April and May 1922 certain lands and a godown were

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purchased, and, later, a fully equipped rice-mill was built upon the land.

A lease of the property was granted to the appellant on the 10th of December 1924, and this expired on the 10th of December 1925. A further lease for three years is said to have been granted by certain of the subscribers but without the consent of the remainder.

It is unnecessary to deal in detail with the history of this association, for it was agreed that the only questions for consideration by this Court are questions of law.

The substantial contention put forward on behalf of the appellant is that the respondents have no cause of action, upon the ground that as the association was formed of more than twenty persons, money paid by way of subscription to the association is not recoverable.

It is conceded by the respondents that the association was at its formation an illegal association by reason of sub-section (2) of section 4 of the Indian Companies Act, for, as we have seen, it consisted of twenty-seven members.

The material portion of the section in question is as follows :—

> "No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the company, association or partnership . . . . Unless it is registered . . . . "

The association was never registered, and as has been indicated, a certain amount of business was done.

It may be observed here, that owing to transfers of shares, the number of subscribers subsequently became reduced to a figure below twenty. It will be necessary to refer to this point at a later stage.

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The argument of Mr. Paget who appears for the appellant, shortly, was that, although money paid for an illegal purpose is *primâ facie* recoverable from the payee, yet when once the purpose for which the money was paid has been carried out no action will lie for its recovery. In other words, he says that as the association in the present case, though admittedly illegal in its formation, has in fact carried out a part of the business for which it was formed, this Court cannot interfere on behalf of members of the association who ask for the return of money paid by them to the association.

Mr. Thein Maung for the respondents argued that the fact that the association, though illegal in its inception, has done business and that money of the subscribers has been employed for the purpose of the business makes no difference, and that as a matter of law the judgment of the lower Court was correct.

Mr. Paget referred to a number of authorities, and it will be necessary to examine certain of these. Three cases he relied upon may be referred to at once, *viz.*, *Cousins* v. *Smith* (1), *Sykes* v. *Beadon* (2), *Kearley* v. *Thomson* (3).

It is sufficient to say that in the first of these cases it was decided that a Court of equity would not assist a combination of firms formed for an illegal purpose by making an order for discovery.

It is hardly necessary to point out that the purpose of the association in the present case was not illegal.

The second was a similar case, and the effect of the judgment of Jassel, M.R. was that no Court of law or equity will lend its assistance towards carrying

(1) 13 Ves. Jun. 542 and 33 Eng. Law Reports 397.

(2) [1879] 11 Ch. Div. 170.

(3) [1890] 24 Q.B.D. 742.

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on an illegal contract, and that therefore such a contract cannot be enforced by one party against the other.

Thus the action was for the enforcement of an illegal contract; whereas the respondents in the present case do not rely upon an illegal contract at all.

In the third case the facts were that money was received by the defendants as consideration for their non-appearance at a public examination of a bankrupt and for not opposing his order of discharge. The defendants did not appear at the public examination, and before an application for discharge had been made plaintiff sought to recover his money.

Here again the action was upon an illegal contract, and thus this case is not on all fours with the present suit.

The old case of *Knowles* v. *Haughton* (1) is also relied upon, and the headnote is as follows :—

"The profits of a partnership in underwriting, illegal by statute cannot be the subject of account in equity."

It seems to me that this case does not assist the appellant, for the purpose of the partnership in that case was illegal.

In *Harvey* v. *Collett* (2), the plaintiff, on the ground that he had bought shares in a company upon the face of statements which were fraudulent, claimed cancellation of an agreement said to have been made between one of the directors and the other directors. The Court (for reasons to which it is unnecessary to refer) held that he was entitled only to the amount he had paid for the shares or their value.

This case, therefore, at least does not appear to assist the appellant.

(1) 11 Ves. Jun. 167 and 32 E.R. 1052.
(2) 13 Sim. 331 & 60 E.R. 646.

Butt v. *Monteaux* (1) was also quoted by Mr. Paget, and we would observe that passages in the judgment are also relied upon by Mr. Thein Maung for the respondents.

The facts were similar to those in the present case. The plaintiff claimed an account of moneys received by certain defendants who held the position of directors of a company, upon the ground that the purposes of the company were other than those disclosed in the prospectus. It was said that the company was illegal for want of registration and that an account ought to be refused.

As this case seems to afford considerable assistance in deciding the present suit, it will be convenient here to set out certain passages from the judgment of the Vice-Chancellor. At page 390 of the English Reports he said,

"Supposing the Company had been one which could and ought to have been registered, I confess I should have felt very little difficulty on the point mainly urged, namely, that a company, constituted like this of persons who have advanced their money, would be precluded from filing its bill, and having its money replaced and secured, because the promoters, whose duty it was to register, had neglected to register. I apprehend the whole scope and frame of the Act is clearly to protect the public against all kinds of fraudulent schemes, which parties were in the habit of issuing forth, in order to circulate them in the share-market. Everything in the Act is levelled against promoters . . . . And, if a case of that kind occurred, it would be very difficult to persuade me that the members of such an association, although they could not do more, or stir a step further without registration, were not sufficiently qualified to be called a company, to have back their money, not merely on the ground of the speculation being a bubble . . . . but to have back their money and the land and other things acquired with that money, and to have an account from the promoters whose duty it was to register, on the footing as between them and the promoters of its being in truth a

(1) 1 K. & J. 97 and 69 E.R. 385.

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company, and upon the principle that a man could not aver any wrong or omission of his own as an answer to a bill seeking such relief."

It is true that in that case the Court held that the company could not be treated as a company capable of being registered as an English Company, but the expression of opinion by the Court appears to throw considerable light on the rights of the respondents.

In re South Wales Atlantic Steamship Company (1), was a suit on an agreement made by an unregistered company. It can therefore be distinguished from the present case.

In re Padstaw Total Loss and Collision Assurance Association (2), was a case where an order to wind up an unregistered association of more than twenty persons was asked for. This was refused upon the ground that the Court cannot recognise such an association as having a legal existence. I need only point out that the present case is not and could not be an application to wind up an association but is a regular suit *inter alia* for the return of subscriptions paid.

Barclay v. *Pearson* (3) was a case where money was paid to a defendant for an illegal purpose, and it was held "that so far as money in the hands of the defendant was impressed with any trust, it was one which had arisen out of an illegal transaction, and the Court would not render any assistance in its administration, "and *semble*" that notwithstanding the illegality of the competition the competitors had a legal right . . . . to the return of their contributions, at all events, provided that they

(1) [1875] 2 Ch.D. 763. (2) [1881-82] 20 Ch.D. 137.
(3) [1893] 2 Ch.D. 154.

gave notice of their claim before the money had been distributed by the defendant."

The latter part of the headnote was relied upon by Mr. Paget, and it is a similar case to *Kearley* v. *Thomson and another* (1) already referred to. There the money was to be applied by the defendant for an illegal purpose. In the present case, as has already been pointed out, the purpose was not illegal.

Thus it will be seen that a careful examination of the cases relied upon on behalf of the appellant discloses no real support for the contention relied on his behalf.

On behalf of the respondent Mr. Thein Maung referred to an important passage in the 9th Edition of "Lindley on Partnership" at page 145, which would appear to be directly in point. It should be observed that in the preceding passage the learned authors referred to and commented upon the two cases I have just mentioned above, and they go on to say,

"Although, therefore, the subscribers to an illegal company have not the right to an account of the dealings and transactions of the company and of the profits made thereby, they have a right to have their subscriptions returned; and even though the moneys subscribed have been laid out in the purchase of land and other things for the purpose of the company, the subscribers are entitled to have that land and those things reconverted into money, and to have it applied as far as it will go in payment of the debts and liabilities of the concern, and then in repayment of the subscriptions. In such cases no illegal contract is sought to be enforced; on the contrary the continuance of what is illegal is sought to be prevented."

As authority for this proposition the cases, *inter alia*, of *Sheppard* v. *Oxenford* (2) and *Butt* v. *Monteaux* (3) already referred to, are cited.

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(1) [1890] 24 Q.B.D. 742.

(2) 1 K. & J 489 and 69 E.R. 552. (3) 1 K. & J. 97 and 69 E.R. 345.

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In Sheppard v. *Oxenford* (1), the plaintiff filed a bill against an illegal association for an account of all the moneys received and paid by the directors and the debts and liabilities of the association, and for sale . . . . and for a division of the properties of the association among the shareholders. "The Court did not think it necessary to do more than preserve the property and only granted an injunction against the defendant and appointed a receiver. No demurrer upon the ground that the association was illegal was put in, but later, a demurrer was entered apparently upon this ground and was subsequently overruled. It is clear from the report of this case however, that although the plaintiff did not obtain the return of his money no suggestion that he was not so entitled in law would have been entertained by the Court. The expression of opinion occurring in the case of *Bull* v. *Monteaux* (2) appears to be directly in point.

One further case was referred to, *viz.*, *Greenberg* v. *Cooperstein* (3). The material portion of the headnote is as follows :—

"Held (1) That the association was rendered illegal by the Companies (Consolidated) Act, 1908, section 1, sub-section 2, as being an unregistered association of more than twenty persons carrying on a business having for its object the acquisition of gain; (2) That, notwithstanding this, the Court was not debarred from affording relief to the members asking for the return of money paid into the hands of agents for application for an illegal purpose by granting an account."

At the close of his judgment Tomlin, J. (as he then was) said

"I am happy to think that the law is not so feeble that it cannot protect the subscribers by ordering an account; but in saying this, I am expressing no opinion as to what will take place after

(1) 1 K. & J. 489 and 69 E.R. 552. (2) 1 K. & J. 97 and 69 E.R. 385.
(3) L.R. [1926] Ch.D. 657.

the account has been taken and by what means if any the defendants may discharge themselves of the money they have received. I prefer to leave this entirely for discussion hereafter."

The decision in the case therefore does not assist either party to this appeal, but Mr. Paget was inclined to suggest that the learned Judge from his concluding words quoted above was doubtful whether he would order a return of moneys paid to the shareholders. This is by no means clear, and as the case appears to have been settled out of Court, it is impossible to say what course was taken when the action was finally decided.

Reviewing the authorities as a whole it would appear that there is no decided case exactly on all fours with the present suit. The passage appearing in *Butt* v. *Monteaux* (1) (above referred to), however appears to be sufficient authority in favour of the respondents. It is perfectly clear that what they ask is not an enforcement of an illegal contract, nor do they sue upon such a contract. If their prayer be given effect to the result will be that an illegal association is brought to an end.

I have no real doubt therefore that the suit as framed is maintainable, and that the decision of the lower Court on that point is correct.

Two further points must be referred to. It was said by Mr. Thein Maung that as the number of subscribers is now reduced to a number less than twenty, the association is no longer illegal, and that in any event the respondents are entitled to the order they ask. In view of my decision upon the main question in the suit, it is not necessary to decide this matter. I am of opinion however that although it may be said that subsequent registration of an illegal association would cure the previous

(1) 1 K. & J. 97 and 69 E.R. 385.

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omission to register, I can see no reason for holding that a subsequent reduction in numbers would have the same effect. What is aimed at by the statute is the *formation* of an illegal association, and it seems to me (though no authority was quoted by either party upon the point) that an association once illegal in form must retain its illegal character until registration or dissolution.

The only other question raised by Mr. Paget was the question of limitation. According to him the present suit must fail upon the ground that as the suit was instituted in April 1926 (*viz.*, more than three years after the payment of the subscriptions) it is out of time. It was argued that as this is a suit for money paid by the respondents to the appellant for the use of the former, Article 62 of the Limitation Act must apply.

This point appears to be a new point raised for the first time in this Court. Moreover, it is not covered by the memorandum of appeal. I am of opinion however that it is without substance. Article 62 of the Limitation Act applies to suits falling under the category well known in English law as "Suits for money had and received." Such suits arise where money paid into the hands of the defendant is payable forthwith to the plaintiff. See as to this *J. Subba Rao* v. *J. Rama Rao* (1).

In the present case, the money was paid for a certain purpose, *viz.*, to be expended in the purchase of a rice-mill for the benefit of the members of the association and other purposes, and after re-conversion the subscribers will clearly not be entitled to the return of the whole of their subscriptions. The suit, though not in form, in substance

(1) (1916) 40 Mad. 291.

therefore must be for an account, and it is only after such an account has been taken that the amounts due to the respective subscribers can be ascertained.

It has been well settled that Article 120 of the Limitation Act applies to such suits, and as this article provides for a limitation of six years from the time when the right to sue accrues, the action is well within time.

The only questions arising before this Court are the questions of law I have dealt with, and for the reasons given above I am of opinion that the decision of the lower Court is correct and must be upheld. The appeal is therefore dismissed, and in the circumstances the appellant must pay the respondents' cost both here and below.

HEALD, J.—On the 28th of December 1921, a number of persons decided to form a partnership to do a rice milling business. The capital of the partnership was to be Rs. 50,000 divided into 500 shares of Rs. 100 each. Rs. 25 was to be paid in respect of each share forthwith and the balance within ten days of notice to pay. Sixteen of those present, including a number of the parties to the present suit at once applied for shares amounting to 401 out of the 500 shares.

A meeting of the partners was held on the 7th of January 1922, at which it was recorded that 15 persons had paid up Rs. 25 for each share in respect of 358 shares, and the appellant Sein Po was appointed manager of the partnership business.

On the 14th of January 1922, it was recorded that four other persons had paid Rs. 25 for each share in respect of 52 more shares and the manager

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Sein Po and another of the shareholders were authorised to buy the equipment of the mill.

On the 7th of March 1922, it was recorded that five other persons had joined the partnership, taking 17 further shares, and a resolution was passed that the partnership should be registered as a Company under the name of the "Mingala Bazaar Rice Milling Company." Certain partners were authorised to buy the land and timber for the mill, and the manager, Sein Po, was authorised to buy the engine and to engage an engine-driver. The partnership was in fact never registered as a Company, and therefore was an illegal association.

On the 2nd of July 1922, shareholders were asked to take further shares and it was decided to issue notices for payment of the balance due in respect of shares already taken.

On the 2nd of October 1922, it was recorded that certain of the original subscribers had taken further shares and some new subscribers also seem to have taken shares.

The partnership is said to have consisted of 27 partners until February 1926, when one Tha Hla purchased the shares of Po Han and Kyi Byu, Kyaw Zan Hla, who was already a shareholder, purchased the shares of Le Le and Po Chit, Maung Pyu, who was already a shareholder, purchased the shares of Aung Nyun, Yan Byan purchased the shares of Maung Pyo and Pan I, who was already a shareholder, purchased the shares of Po Tha and Tha Hnin. These transfers are said to have reduced the number of shareholders to 19, and they were doubtless effected with a view to the filing of the suit, which was instituted in April 1926.

The partnership bought land, built and equipped a rice-mill with the usual appurtenant out-buildings,

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and on the 10th of December 1924, gave Sein Po a year's lease of the premises. Sein Po, according to the plaintiffs, failed either to pay the rent in full or to give up possession of the premises, but instead, with the concurrence of two of the shareholders, gave a lease of the mill to one Po Lon for three years. That lease has now expired and the premises have presumably reverted to the possession of the shareholders.

While the premises were still in the possession of Po Lon, three of the shareholders Maung Pyu, Po Kin, and Po Hla filed the present suit to recover from Sein Po, whom they described as the "promoter" of the partnership, and who, as they alleged, was manager of the business from the time when the partnership was instituted to the time when the partnership premises were leased to him, the shares which they contributed to the partnership, or so much as they might be entitled to recover in respect of those shares after converting the assets of the partnership into money and paying the debts incurred by the partnership.

Sein Po in his written statement said that he was Managing Director of the partnership throughout its existence, and did not deny that he was the "promoter". He admitted the formation of the partnership and its acquisition of the premises alleged, and he also admitted the receipt of Rs. 10,000 from Po Lon as rent of the premises. He pleaded however that by reason of the provisions of section 4 (2), of the Indian Companies Act the plaintiffs were not entitled to recover the money which they had put into the partnership and were not entitled to recover possession of the premises from him.

The lower Court found that the plaintiffs were entitled to recover the amounts, which they had paid,

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to the extent that their money or property representing that money was still in the possession of Sein Po, or of the partnership, subject to the payment of debts incurred by Sein Po on behalf of the partnership, and it recorded findings as to the assets which were available, the liabilities which were outstanding, and the amount paid by the partners as their shares of the capital. It directed that the assets should be sold, that the liabilities should be paid out of the sale proceeds, and that the plaintiffs should receive their shares *pro rata* out of the balance. It also directed that the costs should be borne by the defendants.

Only Sein Po appeals and the grounds of his appeal are that the suit was not maintainable by reason of the provisions of section 4 (2) of the Companies Act, that the plaint did not disclose a cause of action and that the suit was bad for misjoinder of parties and causes of action.

At the hearing in this Court a point of limitation which was not taken either in the trial Court or in the grounds of appeal was raised.

We have heard the learned advocates on both sides and I have had the advantage of reading my learned brother's judgment. I have no hesitation in agreeing with him that, subject to the law of limitation, plaintiffs are entitled to recover out of the assets of the partnership which remain after paying the liabilities, such amount as represents *pro rata* their shares of the money which they contributed to the partnership. I agree with him also that the reduction of the number of shareholders, which was effected shortly before the suit was filed, and was clearly effected for the purposes of the suit, did not avoid the objection that the partnership was illegal. At all times material to the suit it was illegal, and in my opinion we are

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bound to deal with it on the footing that it was an illegal association.

The question of limitation seems to me to be more difficult, but it was pointed out by a Full Bench of the High Court of Madras in the case of *Rama Seshayya* v. *Sri Tripurasundari Cotton Press* (1), that there is in the first schedule to the Limitation Act "No article which provides *simpliciter* for a debt due, such a debt as would have been the subject of the old common law action for debt" and that "all we can do is to fall back on the omnibus Article 120", and as I am satisfied that Article 62 cannot be applied because the money when it was received by Sein Po or his representative U Myaing was not received by him for the plaintiffs' use but was received for other specific purposes, and became payable to the plaintiffs, to the extent to which it is payable, only by reason of the happening of subsequent events, namely, the failure to register the partnership as a company, I agree that Article 120 applies and that the suit was not barred by limitation.

I accordingly concur in my learned brother's judgment dismissing the appeal with costs in this Court and his order that the appellant Sein Po should bear all the costs in the trial Court.

(1) (1925) 49 Mad. 468.