

APPELLATE CRIMINAL.

Before Mr. Justice Carr.

KING-EMPEROR

v.

NGA PO SEIN GYI *alias* ISLAM.*1929
Feb. 7.

*Expulsion of Offenders Act (Burma Act I of 1926)—“Offender,” meaning of—
Restriction under Burma Habitual Offenders Restriction Act (Burma Act
11 of 1919) not sufficient.*

In 1926 respondent was convicted of theft and imprisoned for six months. In 1928 an order of restriction was passed against him under s. 7 of the Burma Habitual Offenders Restriction Act. The present proceedings were commenced to expel him under s. 3 of the Expulsion of Offenders Act, 1926.

Held, that although persons restricted under the Habitual Offenders Restriction Act are “offenders” within the meaning of that term as used in sections 2 and 3 of the Expulsion of Offenders Act, yet if expulsion is sought solely on the ground of such restriction and not by reason of a conviction for an offence then there is no machinery to expel them and therefore neither the District Magistrate nor the High Court has any jurisdiction to deal with the matter.

Gaunt (Assistant Government Advocate) for the Crown.

CARR, J.—This is a reference made by the District Magistrate of Bassein under section 4 (4) of the Burma Expulsion of Offenders Act, 1926.

The respondent is a Bengali Mohammedan by birth and has apparently lived in Burma for some 13 to 15 years. He has married a wife, who, on the mother's side, is partly of Burmese blood, and has apparently several children by her. Thus, by birth, he is a non-Burman, but it may be that he has acquired a domicile in Burma; and, if that is so, he would not be a non-Burman within the definition in section 2 (A) of the Act referred to.

* Criminal Reference No. 131 of 1928 by the District Magistrate of Bassein.

Before the District Magistrate the respondent admitted that he was a non-Burman, and the District Magistrate seems to have acted on this. But I am not prepared to accept such an admission as conclusive in a case of this kind. Being a non-Burman by birth, an ignorant person, such as the respondent, might very well admit that he was a non-Burman without knowing that any question of domicile is involved.

—On this question, therefore, I should have been obliged to return the proceedings for further enquiry, but for certain other considerations with which I will now deal.

The respondent, in 1926, was convicted of an offence of theft under section 379 of the Indian Penal Code, and was imprisoned for six months. But, for the purposes of the present case, that conviction is immaterial. He has not since been convicted of any offence, but, on the 11th of October, 1928, an order of restriction was passed against him under section 7 of the Burma Habitual Offenders Restriction Act, and it is this order which is the basis of the present proceedings and of the District Magistrate's recommendation that the respondent be expelled from Burma.

Section 2 (B) of the Expulsion of Offenders Act contains the definition of an "offender" for the purposes of that Act. Clauses (i) and (ii) of that sub-section deal with certain convictions of offences. Clause (B) (iii) deals with orders under sections 118 and 110 of the Code of Criminal Procedure and under analogous laws. Clause (iv) deals with an order of restriction under the Burma Habitual Offenders Act, and it is under this last clause that the respondent becomes an "offender" as defined in the Act.

1929

KING-
EMPEROR.

V.

NGA PO SEAN

GYI alias

ISLAM.

CARR, J.

1929
 KING-
 EMPEROR
 v.
 NGA PO SEIN
 GYI *alias*
 ISLAM.
 CARR, J.

Section 3 of the Act provides that any non-Burman who is an offender under the definition in section 2 shall be liable to be expelled from Burma. Section 4 then proceeds to set out the manner in which an offender may be expelled; but sub-section (1) of section 4 is somewhat curiously worded. It reads:—

“When an offender becomes liable *by reason of his conviction of an offence* to be expelled from Burma under the preceding section, the District Magistrate of the district in which such offence was committed may call upon him to show cause why he should not be expelled.”

The remaining sub-sections of this section deal with subsequent procedure.

Now, in sub-section (1) the insertion of the words “becomes liable by reason of his conviction of an offence” is of considerable importance. Referring back to the definition of an “offender”, we find that it is only under section 2(B) (i) and (ii), that a person becomes an “offender” by reason of a conviction of an offence. Under clauses (iii) and (iv) of that section, a person may become an offender not by reason of conviction of an offence, for it is well recognized law that orders under section 118 of the Criminal Procedure Code, or under section 7 of the Burma Habitual Offenders Restriction Act, are not convictions of offences.

The result is that the insertion of the words above-quoted in section 4 (1) restricts the application of this section to persons who are offenders under section 2 (B), clauses (i) and (ii), and that this section can have no application to a person who is an offender under clauses (iii) and (iv) of section 2 (B).

The result is that, although such offenders as the present respondent are liable under section 3 of the Act to be expelled from Burma, the Act, in fact, provides no machinery for the enforcement of that liability.

In my view, therefore, neither the District Magistrate, nor this Court, has any jurisdiction to deal with the matter under section 4 of the Act. It is impossible, therefore, for me deal with a reference under sub-section (4) of section 4.

The proceedings may be returned to the District Magistrate with a copy of this order.

1929
 KING-
 EMPEROR
 2,
 NGA PO SEIN
 alias GYI
 ISLAM.
 CARR, J.

APPELLATE CIVIL.

Before Mr. Justice Otter and Mr. Justice Brown.

MAUNG TUN LIN AND ANOTHER

v.

MAUNG TUN WIN.*

1929
 Feb. 12.

Civil Procedure Code, Sch. II, para. 16—Decree in conformity with the award—No appeal, exceptions to the rule of—Arbitrators with wide powers calling in others to assist—Award made with such assistance, valid.

A decree in consequence of an award to which para. 16 of Sch. II to the Civil Procedure Code applies, is not appealable.

Champsey Bhara & Company v. Jivraj Balloo Spinning and Weaving Company, Limited, 47 Bom. 576 (P.C.)—referred to.

An exception to the rule is where an award is not an award at all.

Ibrahim Ali v. Mohsin Ali, 18 All. 422—distinguished.

Where arbitrators having wide powers call in other persons to assist them, their award, signed by them alone, cannot be said to be no award at all.

Leong for the appellants.

OTTER and BROWN, JJ.—We think no appeal lies in this case. The judgment and decree were passed according to an award made in arbitration proceedings to which paragraph 16 of Schedule II to the Civil Procedure Code apply. The wording of the two sub-paragraphs of this paragraph is plain, and as was pointed

* Civil Miscellaneous Appeal No. 166 of 1928 from the order of the District Court of Pyapôn in Civil Regular No. 27 of 1927.